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Systemic Racial Bias and RICO's Application to Criminal Street and Prison Gangs

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SYSTEMIC RACIAL BIAS AND RICO'S APPLICATION TO CRIMINAL STREET AND PRISON GANGS

Jordan Blair Woods*

This Article presents an empirical study of race and the application of the federal Racketeer Influenced and Corrupt Organizations Act (RICO) to criminal street and prison gangs. A strong majority (approximately 86%) of the prosecutions in the study involved gangs that were affiliated with one or more racial minority groups. All but one of the prosecuted White-affiliated gangs fell into three categories: international organized crime groups, outlaw motorcycle gangs, and White supremacist prison gangs. Some scholars and practitioners would explain these findings by contending that most criminal street gangs are comprised of racial minorities. This Article challenges and problematizes this factual assumption by critically examining the processes by which the government may come to label certain criminal groups as gangs for RICO purposes. Based on the study findings, the Article argues that this labeling may be driven by systemic racial biases that marginalize entire racial minority groups and privilege mainstream nonimmigrant White communities. These systemic biases are characterized by converging constructions of race and crime, which fuse perceptions of gang-related crime with images of racial minorities. Conflating racial minorities with criminal activity enables the government to rely upon denigrating racial stereotypes in order to engage in invidious practices of racial profiling and to conduct sweeping arrests of racial minorities under RICO. This conflation also shields groups of nonimmigrant White criminal offenders from being conceptualized as gangs and shields nonimmigrant White neighborhoods from the stigma of having gang problems. In practice, this may harm communities that have White gang problems by preventing the government from executing gang-specific interventions within those communities.

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INTRODUCTION

In 1970, Congress enacted the Racketeer Influenced and Corrupt Organizations Act (RICO)¹ to dismantle the Mafia and other bodies of organized crime with great economic influence.² The U.S. government expanded the scope of RICO to include gangs in the 1980s.³ Since many states do not have laws specifically designed to dismantle gangs,⁴ RICO provides a federal avenue to target gangs within any jurisdiction of the United States.⁵

1. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 941-48 (codified as amended at 18 U.S.C. §§ 1961-68 (2006)). A majority of states have also enacted RICO statutes, which cover a wide spectrum of civil and criminal activities. Some states have used state RICO statutes to target criminal street and prison gangs. See, e.g., Erin Hoover, *Oregon Uses Racketeering Law on Gangs*, THE OREGONIAN, Nov. 14, 1994, at A01, available at NewsBank, Record No. 9411140217. For a discussion of the differences between federal RICO and state RICO statutes, see JOHN E. FLOYD, RICO STATE BY STATE: A GUIDE TO LITIGATION UNDER THE STATE RACKETEERING STATUTES 1-4 (1998).

2. Organized Crime Control Act of 1970, § 1 ("It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.").

3. NATALIE Y. MOORE & LANCE WILLIAMS, THE ALMIGHTY BLACK P STONE NATION: THE RISE, FALL, AND RESURGENCE OF AN AMERICAN GANG 169 (2001) ("Congress had enacted RICO in 1970 to fight organized crime and the mob. Officials realized that they could use the law beyond that scope, and in the 1980s street gangs increasingly saw RICO charges leveled against members.").

4. The National Gang Center has compiled a database of all gang-related legislation in the United States. Only thirteen states are listed as having specific laws to prosecute gangs: Arizona, Arkansas, California, Colorado, Georgia, Illinois, Kentucky, New Jersey, North Carolina, South Dakota, Texas, Virginia, and Washington. See *Gang Prosecution*, NATIONAL GANG CENTER, <http://www.nationalgangcenter.gov/Legislation/Prosecution> (last visited Apr. 1, 2012).

5. In addition to RICO, prosecutors can also charge gang members under RICO's corollary statute, Violent Crimes in Aid of Racketeering Activity (VICAR). 18 U.S.C. § 1959 (2006). VICAR establishes a federal offense for violent crimes committed in furtherance of a RICO organization, including murder, assault, kidnapping, and threats made in

From a prosecutor's perspective, RICO's focus on the criminal activity of group enterprises, as opposed to the criminal activity of individuals, provides major advantages over other criminal laws to combat gangs.⁶ RICO's reliance upon enterprise theory enables prosecutors to introduce all aspects of a gang's history and criminal conduct into evidence.⁷ The scope of admissible evidence is thus not limited to the conduct of specific defendants. Punishment for participating in a RICO enterprise is also more severe than the penalties for the underlying predicate crimes.⁸ Sentences for the most serious RICO convictions are especially harsh and can result in mandatory life terms.⁹ For these reasons, some prosecutors praise RICO as the preferred weapon for dismantling gangs.¹⁰

Recently, legal scholars have focused on RICO's application to criminal street gangs specifically, questioning whether this application is justified. As a matter of statutory interpretation, some scholars posit that Congress intended for RICO to apply exclusively to highly organized enterprises that infiltrate legitimate businesses, and that criminal street gangs do not fit this description.¹¹ Other scholars contend that criminal

connection with a racketeering enterprise. *Id.* From a prosecutorial perspective, one advantage of the VICAR statute over RICO is that it requires only one criminal act be proven, provided that the act is violent and committed to obtain payment from, to gain entrance to, or to maintain or increase an offender's position in a gang. *Id.* Charges were brought under both RICO and VICAR in many of the indictments within the sample of the empirical study presented in this Article.

6. Marc Agnifilo et al., *Investigating and Prosecuting Gangs Using the Enterprise Theory*, U.S. ATTORNEYS' BULL., May 2006, at 15, 22. ("Enterprise theory prosecutions target criminals in their collective groups, rather than focusing on isolated episodes of their criminal conduct.")

7. *Id.* at 16 ("Every aspect of the gang and its history—including how it acquired its territory; how it makes and disposes of its money; how it uses coded language, hand signals, and graffiti; and who it has killed and why—can be offered in one coherent story.")

8. Michael C. Cernovich, *Gangs*, in ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES, Vol. 1 1334, 1335 (Paul Finkelman ed., 2006) ("One criticism of RICO is that a RICO defendant faces greater punishment than if he or she had been convicted only of the underlying predicate acts. That is, a RICO defendant who is alleged to have committed two counts of wire fraud faces greater punishment than if he or she had been prosecuted under the wire fraud statutes."); Agnifilo et al., *supra* note 6, at 22 ("An enterprise theory case provides a full picture of a street gang's criminal activities and the resulting punishment and deterrence can prove more extensive and effective than stand-alone cases.")

9. John Gibeaut, *Gang Busters*, 84 A.B.A.J. 64, 65 (1998). For a list and description of criminal charges under the federal RICO statute, see Ross Bagley et al., *Racketeer Influenced and Corrupt Organizations*, 44 AM. CRIM. L. REV. 901, 933-40 (2007).

10. Gibeaut, *supra* note 9, at 65 (claiming that prosecutors praise RICO as "the preferred weapon[] for removing gang leaders from the streets").

11. See Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 680 (1987) ("[N]owhere in the legislative history is there even a glimmer of an indication that RICO or any of its predecessors was intended to impose additional criminal sanctions on racketeering acts that did not involve infiltration into legitimate

street gangs do not substantially affect interstate commerce, and thus the government does not have the constitutional authority under the commerce clause¹² to apply RICO to criminal street gangs.¹³

Although these criticisms raise questions concerning the legality of applying RICO to criminal street gangs, none focus on the troublesome consequences that RICO's application to gangs may have in terms of race. This Article brings some of these consequences to light through an empirical study of RICO gang prosecutions. The breadth of the federal statutory definitions of RICO "enterprise"¹⁴ and "criminal street gang"¹⁵ subject a variety of criminal groups with members of any race to prosecution under RICO as criminal street gangs.¹⁶ But in the study, a strong

business."); Note, *Constitutional Law—Commerce Clause—First Circuit Upholds Application of RICO to Criminal Gang Not Engaged in Economic Activity*, 121 HARV. L. REV. 1961, 1968 (2008) ("RICO's legislative findings demonstrate that Congress was particularly concerned with the infiltration of legitimate businesses that would necessarily be engaged in economic activities [C]ourts must . . . hesitate before they expand the reach of federal power beyond the bounds deemed prudent or constitutional by the legislature."). Social scientists have also argued that many criminal street gangs are not sufficiently structured to qualify as an organized crime groups. See James C. Howell, *Menacing or Mimicking? Realities of Youth Gangs*, 2 JUV. & FAM. CT. J. 39, 41 (2007); MALCOLM W. KLEIN, *THE AMERICAN STREET GANG: ITS NATURE, PREVALENCE, AND CONTROL* 61 (1995).

12. U.S. CONST. art. I, §8, cl. 3. In *United States v. Lopez*, the Supreme Court held that the federal government can only regulate activities if they involve instrumentalities of interstate commerce, channels of interstate commerce, or activities that substantially affect interstate commerce. 514 U.S. 549 (1995).

13. See Kristina A. Miller, Note, *After Gonzales v. Raich: Can RICO be Used to Prosecute Intrastate Noneconomic Street Gang Violence*, 16 WIDENER L. REV. 197 (2010); Robert Heberle, Comment, *RICO After Raich: The Commerce Clause after Federal Prosecution of Street Gangs*, 27 YALE L. & POL'Y REV. 499 (2009); Brian Nisbet, *What Can RICO Not Do?: RICO and the Non-Economic Intrastate Enterprise that Perpetuates Only Non-Economic Racketeering Activity*, 99 J. CRIM. L. & CRIMINOLOGY 509, 539 (2009); Matthew Hardwick Blumerstein, Note, *RICO Overreach: How the Federal Government's Escalating Offensive Act Against Gangs has Run Afoul of the Constitution*, 62 VAND. L. REV. 211, 236 (2009); Frank D'Angelo, *Turf Wars: Street Gangs and the Outer Limits of RICO's "Affecting Commerce" Requirement*, 76 FORDHAM L. REV. 2075 (2008); Note, *supra* note 11. But see Lesley Suzanne Bonney, Comment, *The Prosecution of Sophisticated Urban Street Gangs: A Proper Application of RICO*, 42 CATH. U.L. REV. 579 (1993).

14. Under federal law, a RICO "enterprise" is "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961 (2006).

15. Although not defined under RICO, "criminal street gang" is defined under federal law. See 18 U.S.C. § 521 (2002) ("'Criminal street gang' means an ongoing group, club, organization, or association of 5 or more persons (A) that has as 1 of its primary purposes the commission of 1 or more of the criminal offenses described in subsection (c); (B) the members of which engage, or have engaged within the past 5 years, in a continuing series of offenses described in subsection (c); and (C) the activities of which affect interstate or foreign commerce.").

16. See Brian Slocum, *RICO and the Legislative Supremacy Approach to Federal Criminal Lawmaking*, 31 LOY. U. CHI. L.J. 639, 643 (2000) ("Because RICO, as drafted, is such a

majority (approximately 86%) of the prosecuted gangs was affiliated with one or more racial minority groups (Black, Latino, or Asian).¹⁷ A similarly large percent (approximately 83%) of the prosecuted individuals were tied to gangs affiliated with one or more racial minority groups.

Some scholars and practitioners would argue that these findings substantiate the idea that gangs are comprised mostly of racial and ethnic minorities.¹⁸ This Article challenges and problematizes this factual assumption by examining the social processes that underlie the labeling of certain groups as “gangs” for RICO purposes. This Article maintains that this labeling may be driven by systemic racial biases that marginalize entire racial minority groups and privilege nonimmigrant White communities.¹⁹ These systemic biases are characterized by converging constructions of race and crime that fuse perceptions of gang-related crime with images of racial minorities. Conflating gang activity with racial minorities enables the government to rely upon denigrating racial stereotypes in order to engage in racial profiling and conduct sweeping arrests of racial minorities under RICO. Moreover, nonimmigrant White criminal offenders are shielded from being conceptualized as gang members or affiliates for RICO purposes, and mainstream White communities are protected from the stigma of having gang problems.²⁰

broad and abstract statute, it is capable of extending to a number of different types of conduct in a wide range of circumstances.”).

17. See *infra* Part III.B.

18. See, e.g., Klein, *supra* note 11, at 29 (“Most gangs—not all—are composed of homogenous racial and ethnic minorities. Principally they are Hispanic or black, with an increase recently in Asian and other groups.”); A.J. Reiss & J.A. Roth, *Perspectives on Violence*, in *CRIME: CRITICAL CONCEPTS IN SOCIOLOGY* 173, 182 (Philip Bean ed., 2003) (“Most youth gangs are found in inner cities, in areas of poverty, physical deterioration, and institutional breakdown. Because racial and ethnic minorities tend to be concentrated in such areas, many—but not all—gangs are comprised of minority youths.”).

19. C.f. MICHAEL PICKERING, *STEREOTYPING: THE POLITICS OF REPRESENTATION* 73 (2001) (“[T]hose who are ‘othered’ are unequally posited in relation to those who do the ‘othering.’ The latter occupy a privileged space in which they can define themselves in contrast to the Others who are so designated as different, with this designation reinforcing and prolonging the inequalities involved by seeming to confirm and prove them.”).

20. See MALCOLM W. KLEIN: *THE AMERICAN STREET GANG* 87 (1995) (“The advent of street gangs to a community is not a happy occurrence. It suggests that the community has failed in its task of socializing some portions of its youth Social agencies, schools, and the justice system appear impotent and thus face a public relations problem on top of their gang problem.”); Linda M. Schmidt, *Gangs as a Social Structure: What Law Enforcers Need to Understand*, in *GANGS AND LAW ENFORCEMENT* 21, 27 (Linda M. Schmidt & James T. O’Reilly eds., 2007) (stating that the stigma of having gangs in cities influences many cities to ignore that they have gang problems); Marjorie S. Zatz & Edwardo L. Portillos, *Voices from the Barrio: Chicano/a Gangs, Families, and Communities*, 38 *CRIMINOLOGY* 369, 381 (2000) (stating that gang problems bear a stigma that make communities less attractive to businesses, which exacerbates the lack of economic opportunities in communities suffering from gang violence).

Some criminologists have argued that the descriptive records of, and the empirical research conducted by, law enforcement often underestimate and sometimes ignore White involvement in gangs.²¹ Criminologists have further contended that empirical research on gangs suffers from sampling biases caused by the exclusion of White gang members as subjects and the exclusive recruitment of subjects from racial minority gangs and neighborhoods.²² A 1998 multisite study by Finn-agge Esbensen and L. Thomas Winfree supports the legitimacy of these arguments.²³ Esbensen and Winfree conducted a survey of 5,935 eighth-grade students in forty-two schools in eleven cities across the United States. The researchers found that, contrary to popular perception, one in four gang members identified as White.²⁴ This percentage excluded an additional 15% of subjects that society would likely perceive as White, but were categorized as “Other” for having self-identified as American, Italian, German, Portuguese, and other ethnicities.²⁵ From this finding, other criminologists have inferred that the racial composition of gangs varies considerably by geographic locality: they posit that gang members are mostly White in predominantly White communities, and mostly racial minorities in neighborhoods with predominant minority populations.²⁶

These critiques put forth by criminologists illustrate that bias can produce racially skewed depictions of gang phenomena. Based on this view, this Article’s analysis focuses on two related systemic racial biases that may drive the high representation of racial minorities in RICO gang prosecutions. First, cultural stereotypes have created a very narrow conception of the term “gang” that is fused with violent images of racial minorities.²⁷ Gang stereotypes disadvantage racial minorities by bringing specific criminal groups tied to racial minorities, such as the Bloods, the Crips, MS-13, and the Mexican Mafia, to the forefront of law enforcement and prosecutors’ gang radars. Gang stereotypes also make law enforcement, prosecutors, and members of society more prone to assume that crimes committed by groups of racial minorities—especially Blacks, Latinos, and Asians in urban neighborhoods—are gang related, whereas crimes committed by groups of nonimmigrant White individuals are not gang related. The Article will show that language within some of the

21. See Finn-agge Esbensen & L. Thomas Winfree, *Race and Gender Differences Between Gang and Nongang Youths: Results from a Multisite Survey*, 15 *JUR. Q.* 505, 510 (1998).

22. *Id.*

23. *Id.* at 516.

24. *Id.* at 517.

25. *Id.*

26. Howell, *supra* note 11, at 42-43.

27. See Howell, *supra* note 11, at 42 (“The myth, mainly a product of broadcast media, alleges that youth gang members are typically comprised of black inner-city males.”); Esbensen & Winfree, *supra* note 21, at 505 (stating that the stereotypical image of a gang member is an African-American or Hispanic male).

RICO indictments suggests that the government has targeted relatively small and local groups of racial minority offenders, provided names for the groups, and labelled the groups as gangs even though the suspects disagreed with "gang" labels.²⁸ These cases illustrate that racial stereotypes can shape the ways in which the government constructs gang phenomena.

The way that RICO is being applied to White-affiliated gangs casts further doubt on whether the statute's application (and thus the prosecution of gangs) is a racially unbiased process. The empirical study indicates that a specific categorization scheme governed the smaller percentage (approximately 13%) of White-affiliated criminal groups in the sample that were conceptualized as gangs and prosecuted under RICO.²⁹ All but one of the White-affiliated gangs fell into three categories: international organized crime groups, motorcycle outlaw gangs, and White supremacist prison gangs. As the analysis will argue, despite being White-affiliated, these criminal groups have been ostracized in ways that distance them from other nonimmigrant White offenders and law-abiding citizens.³⁰ The government may therefore implicitly or explicitly rely upon this categorization scheme in order to shield nonimmigrant White offenders, such as groups of White youth in rural or suburban areas, from being conceptualized as gangs for RICO purposes. In practice, this reliance can harm communities with White gang problems by preventing the government from intervening to curb gang-related crime within those communities.

Second, new fears of criminality involving migrants and immigrants from Mexico, Central America, and South America have spawned a new term: the "transnational gang."³¹ These increasing concerns over transnational gangs have inspired partnerships between local, state, and federal law enforcement agencies and Immigration and Customs Enforcement (ICE).³² Created in February 2005, Operation Community Shield (OCS)

28. See *infra* Part IV.A.

29. See *infra* Part III.B.

30. This argument is developed in more detail. See *infra* Part IV.A.

31. See ELANA ZILBERG, *SPACE OF DETENTION: THE MAKING OF A TRANSNATIONAL GANG CRISIS BETWEEN LOS ANGELES AND SAN SALVADOR* 55 (2011) (arguing that "the primary threat to national security is no longer encoded in communism but rather in the intersection of criminality and immigration" and that "the convergence of immigration and criminal law is 'central to the production of the transnational gang crisis.'") Various definitions have been put forth for the term "transnational gang." Transnational gangs tend to have one or more of the following characteristics: (1) the gangs are active in more than one country; (2) the crimes committed by gang members in one country are planned by gang leaders in another country; (3) gang members move from place to place and adapt to new localities; (4) the crimes transcend national borders. See, e.g. CELINDA FRANCO, CONGRESSIONAL RESEARCH SERVICE, *THE MS-13 AND 18TH STREET GANGS: EMERGING TRANSNATIONAL GANG THREATS?* 2 (2008), available at <http://www.au.af.mil/au/awc/awcgate/crs/r134233.pdf>.

32. See *Gangs and Crime in Latin America, Hearing Before the Subcomm. on the W. Hemisphere of the H. Comm. on Int'l Relations*, 109th Cong. 22-25 (2005) [hereinafter *Gangs and*

combines the resources of ICE and federal, state, and local law enforcement agencies in order to combat transnational gang violence and illegal immigration.³³ RICO is one tool that law and immigration enforcement can use during OCS operations in order to conduct sweeping arrests of alleged gang members and gang affiliates.

Due to its structure, OCS operations overwhelmingly target racial minorities from Mexico, Central America, South America, and the Caribbean. As the Article will argue, law and immigration enforcement officers are using vague and subjective standards during OCS operations to distinguish gang members/affiliates from offenders who are not affiliated with gangs, and gang members/affiliates from innocent people.³⁴ Complaints are surfacing of immigration and police officers entering predominantly Latino neighborhoods and stopping, questioning, searching, detaining, and arresting Latinos with no reasonable basis to believe that these individuals are criminal offenders, illegal immigrants, or gang members/affiliates. The convergence between immigration and gang enforcement is therefore enabling law enforcement to use concerns regarding transnational gangs as a pretext to engage in illegitimate practices of racial profiling and to conduct sweeping arrests of racial minorities under RICO.

The points above articulate the damaging consequences of gang stereotyping in the context of RICO prosecutions for all races, especially for Latinos, Blacks, and Asians. But as the analysis of this Article will show, racial stereotyping is not a new feature of RICO's history.³⁵ RICO's legislative history suggests that racial stereotyping was a key factor motivating RICO's enactment.³⁶ The federal statute was enacted to facilitate sweeping indictments against members of La Cosa Nostra ("the Mafia"), a criminal cartel comprised mostly of individuals of Italian and Sicilian de-

Crime in Latin America] (testimony of John P. Torres, Deputy Assistant Director, Human Smuggling and Public Safety Division, U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security) (describing Operation Community Shield, one such partnership, as a response to problems concerning "alien gang crime" in the United States). See *id.* at 26 (prepared of John P. Torres, Deputy Assistant Director, Human Smuggling and Public Safety Division, U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security) (stating that "[At ICE] we recognize that no single law enforcement agency can win the fight against transnational street gangs. ICE is working closely with a number of agencies and organizations under Operation Community Shield. Such cooperation is critical to the success of the initiative.").

33. See *Operation Community Shield/Transnational Gangs*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <http://www.ice.gov/community-shield/> (last visited Apr. 1, 2012).

34. See *infra* Part IV.B.

35. A historical analysis of RICO's enactment will be provided *infra* Part II.

36. See *infra* Part II.

scent. Due to hostility against new immigrant populations,³⁷ Italians and Sicilians were considered neither White nor American.³⁸

Some scholars may explain RICO's enactment in terms of the broad expansion of federal criminal laws during the second half of the twentieth century.³⁹ But the included historical analysis makes it difficult to deny the connection between RICO, racial subordination, and the protection of mainstream White America. The urgent need for a federal statute to protect American society from criminal groups like the Mafia (Italian and Sicilian "outsiders") has transformed into an urgent need for a federal statute to protect American society from criminal groups like the Bloods, Crips, and MS-13 (Black and Latino "outsiders").

Before proceeding, I want to recognize at the outset that it may be impossible to prove to some readers' satisfaction that RICO gang prosecutions disproportionately target racial minorities. As the methodology section will discuss, this type of claim is incredibly difficult to prove given the severe limitations of available data on RICO gang prosecutions.⁴⁰ The Department of Justice (DOJ) neither compiles nor releases the names or racial affiliations of the gangs prosecuted under RICO. Moreover, the DOJ does not release data on the number of criminal groups that it chooses not to conceptualize as gangs or to prosecute under RICO, even though these groups may qualify as gangs and be eligible for RICO prosecution.⁴¹ For these reasons, the presented empirical data does not definitively prove that RICO gang prosecutions are driven by systemic racial bias. Rather, in making particular observations about patterns in the data, I am merely suggesting that the study findings cast considerable doubt over whether the current application of RICO to prosecute gangs is a racially unbiased process.

Part I of this Article provides background on the elements of a RICO claim as applied to criminal street and prison gangs. Part II offers a historical analysis of the role of racial stereotyping during RICO's enactment. Part

37. See *infra* notes 94–95.

38. MARCELLA BENCIVENNI, *ITALIAN IMMIGRANT RADICAL CULTURE: THE IDEALISM OF THE SOVVERSIVI IN THE UNITED STATES, 1890-1940* 8 (2011) ("To Anglo-Saxon Americans, the looks, habits, and cultural traditions of the new immigrants appeared backward, primitive, and ultimately inferior. Italians were seen as not only of a lower stock, but also frequently not as 'white.'"). For an analysis of race issues and new Italian Immigrants of the late Nineteenth and early Twentieth Centuries, see generally, DAVID R. ROEDIGER, *WORKING TOWARD WHITENESS: HOW AMERICA'S IMMIGRANTS BECAME WHITE. THE STRANGE JOURNEY FROM ELLIS ISLAND TO THE SUBURBS* (2006).

39. For an analysis of the expansion of the U.S. federal criminal law, see DOUGLAS N. HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2008).

40. These limitations will be discussed *infra* Part III.A.

41. During the study, these points were confirmed by contacts with representatives in the Federal Bureau of Investigation (FBI) Violent Gang Task Forces and DOJ's Organized Crime and Gang Section. For ethical reasons, the names of those contacts remain anonymous.

III presents the methods and the results of the empirical study on RICO gang prosecutions. Part IV discusses these results in terms of systemic racial biases that may underlie RICO's application to criminal street and prison gangs. The conclusion recommends that the government (especially law enforcement and prosecutors) be more transparent about the process by which it labels group criminality as gang-related, and calls for new enforcement strategies that prevent RICO from operating as an instrument of racial subordination in gang prosecution contexts.

I. ELEMENTS OF A FEDERAL RICO CLAIM AS APPLIED TO CRIMINAL STREET AND PRISON GANGS

Since its enactment, RICO has been a controversial law.⁴² The federal statute has been used to prosecute a broad range of activities, including government corruption, white-collar crime, violence, and drug crimes.⁴³ RICO's elements and prohibited activities are included under 18 U.S.C. § 1962.⁴⁴ In short, there are three elements that the government must establish in order to prosecute an alleged gang member or gang affiliate under RICO: (1) the defendant must be directly or indirectly employed by or associated with an enterprise; (2) the defendant must have engaged in a pattern of racketeering activity; and (3) the crimes committed by the defendant must have affected interstate or foreign commerce.⁴⁵ As the analysis below shows, the government's burden of proof to establish each of these elements is fairly low.

42. See Slocum, *supra* note 16, at 643.

43. See JAY S. ALBANESE, *ORGANIZED CRIME IN AMERICA* 197 (3d ed. 1996) ("Although this statute was designed to combat organized crime infiltration of legitimate business, it has since been employed to prosecute criminal activities by a county sheriff's department, the Philadelphia traffic court, abortion protesters, a state tax bureau, the Tennessee governor's office, and the Louisiana Department of Agriculture. Clearly, the use of RICO has been extended to encompass all forms of organized and white-collar crime."); D'Angelo, *supra* note 13, at 2084 ("The first wave of expansion extended RICO into the areas of government and corporate corruption."); MICHAEL D. LYMAN & GARY W. POTTER, *ORGANIZED CRIME* 437 (3d ed. 2004) (describing RICO as "an invaluable tool in the fight against organized crime in the drug trade").

44. 18 U.S.C. § 1962 (2006) is divided into subsections (a) through (d). In general, §§ 1962(a) and (b) have not been applied to prosecute criminal street gangs. Section 1962(c) prohibits "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." Section 1962(d) prohibits any person from conspiring to violate the activities listed in Section 1962(a) through (c).

45. 18 U.S.C. §§ 1962(c) (2006).

A. Existing Criminal Enterprise, Element One

RICO defines an enterprise as “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.”⁴⁶ This statutory definition is incredibly broad. In 1981, the Supreme Court attempted to clarify the meaning of a RICO enterprise in *United States v. Turkette* by defining it as “a group of persons associated together for a common purpose of engaging in a course of conduct.”⁴⁷ In the Court’s view, an enterprise was demonstrated “by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.”⁴⁸ The Court, however, did not specify the level of organization or structure that was necessary for a criminal group to be considered a RICO enterprise.⁴⁹ This lack of specificity engendered conflicting standards among federal courts of appeals.⁵⁰ The majority of circuit courts required a RICO enterprise to have an organizational structure distinct from its pattern of racketeering activity.⁵¹ Conversely, the Second,

46. 18 U.S.C. § 1961(4) (2006).

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

48. *Id.*

49. Corey P. Argust, Douglas E. Litvack & Brant W. Martin, *Racketeer Influence and Corrupt Organizations*, 47 AM. CRIM. L. REV. 961, 976 (2010).

50. *See id.* (“[T]he circuits have taken differing positions on the degree of proof necessary to establish the existence of an enterprise that is sufficiently distinct and separate from the underlying pattern of racketeering.”).

51. Michael Morrissey, *Structural Strength: Resolving a Circuit Split in Boyle v. United States with a Pragmatic Proof Requirement for RICO Associated-in-Fact Enterprises*, 77 FORDHAM L. REV. 1939, 1967 (2009) (“The majority of circuits have adopted a proof requirement that the ascertainable structure in an ‘associated-in-fact’ enterprise must be separate and distinct from the pattern of racketeering to guard against the dangers of an overly broad interpretation.”). *See also* *United States v. Riccobene*, 709 F.2d 214, 224 (3d Cir. 1983) (requiring a showing of “an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses”); *United States v. Tillett*, 763 F.2d 628, 631 (4th Cir. 1985) (inferring the existence of a RICO enterprise based on the “continuity of structure and personality within the organization”); *Calcasieu Marine Nat’l Bank v. Grant*, 943 F.2d 1453, 1461 (5th Cir. 1991) (requiring that the members of the enterprise “function as a continuing unit as shown by a hierarchical or consensual decision making structure”); *United States v. Johnson*, 440 F.3d 832, 840 (6th Cir. 2006) (agreeing that “*Turkette* requires the government to prove both the existence of an ‘enterprise’ and a ‘pattern of racketeering activity.’”); *United States v. Rogers*, 89 F.3d 1326, 1337 (7th Cir. 1996) (quoting *Jennings v. Emry*, 910 F.2d 1434, 1440 (7th Cir. 1990)) (holding that a RICO “enterprise” is “an ongoing ‘structure’ of persons associated through time, joined in purpose, and organized in a manner amenable to the hierarchical or consensual decision-making”); *United States v. Kragness*, 830 F.2d 842, 855 (8th Cir. 1987) (holding that “there must be an ascertainable structure distinct from that inherent in the conduct of a pattern of racketeering activity”); *United States v. Smith*, 413 F.3d 1253, 1267 (10th Cir. 2005) (requiring a RICO enterprise to have an “existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses”).

Ninth, and Eleventh Circuits permitted the government to establish an existing RICO enterprise based solely on evidence of the predicate crimes.⁵²

Recently, in *Boyle v. United States*,⁵³ the Court seemed to resolve this circuit split in favor of the minority circuits.⁵⁴ The Petitioner in the case was convicted under RICO for robbing several banks in multiple states with a group of other people.⁵⁵ The trial court permitted the jury to infer an existing RICO enterprise from the bank robberies themselves, without finding a distinct organizational structure.⁵⁶ The Petitioner appealed his conviction after the trial court refused his request for a jury instruction requiring the government to prove an existing RICO enterprise through an organizational structure distinct from the underlying predicate acts.⁵⁷ In upholding the trial court's jury instructions, the Court held that a RICO enterprise must have an ascertainable structure, but the government need not prove an organizational structure beyond that inherent in the pattern of racketeering activity.⁵⁸ The Court upheld its position in *Turkette* that a RICO enterprise is a continuing unit that functions with a common purpose,⁵⁹ but concluded that the unit need not have a hierarchical structure and its members need not have fixed roles.⁶⁰ Rather, the unit's "decisions may be made on an ad hoc basis and by any number of methods."⁶¹

In the context of criminal street gang prosecutions, the breadth of the *Boyle* decision is further compounded by the ambiguity of the federal statutory definition of "criminal street gang" and the general lack of con-

52. *Odom v. Microsoft Corp.*, 486 F.3d 541, 551 (9th Cir. 2007) ("RICO does not require any particular organizational structure, separate or otherwise."); *United States v. Daidone*, 471 F.3d 371, 376 (2d Cir. 2006) (holding that proof of predicate acts may be sufficient to prove an existing RICO enterprise); *United States v. Goldin Indus., Inc.*, 219 F.3d 1271, 1275 (11th Cir. 2000) ("[A] RICO enterprise need not possess an 'ascertainable structure' distinct from the associations necessary to conduct the pattern of racketeering activity.").

53. 129 S.Ct. 2237 (2009).

54. Sean M. Douglass & Tyler Layne, *Racketeer Influenced and Corrupt Organizations*, 48 AM. CRIM. L. REV. 1075, 1092 (2011) ("The Supreme Court's recent ruling in *Boyle*, addressing *Turkette*, seems to indicate an accord with these latter circuits' [Second, Ninth, and Eleventh] less demanding approach to establishing association-in-fact enterprises, as separate proof of structure is not always necessary to prove an enterprise.").

55. *Boyle*, 129 S.Ct. at 2241-42.

56. *Id.* at 2242.

57. *Id.*

58. *Id.* at 2245.

59. *Id.* at 2242. See also *Turkette*, 482 U.S. 580, 583 (1981).

60. *Boyle*, 129 S.Ct. at 2245.

61. *Id.*

sensus among policymakers, scholars, and practitioners over the definition of the term.⁶² Federal law defines a criminal street gang as:

An ongoing group, club, organization, or association of 5 or more persons—

(A) that has as 1 of its primary purposes the commission of 1 or more of the criminal offenses described in subsection (c);

(B) the members of which engage, or have engaged within the past 5 years, in a continuing series of offenses described in subsection (c); and

(C) the activities of which affect interstate or foreign commerce.⁶³

The crimes enumerated under this federal gang statute are conspiracy to commit or the commission of (1) felonies involving a controlled substance, and (2) felonies of violence that require the use or attempted use of physical force against a person.⁶⁴

The combination of the broad statutory definitions of RICO “enterprise” and “criminal street gang” permit a variety of criminal groups with members of any race to be conceptualized as criminal street gangs. On the face of the statute, race is not mentioned explicitly. But as the empirical study will later show, the criminal groups that the government has prosecuted as gangs under RICO are primarily affiliated with one or more racial minority groups.

B. *Pattern of Racketeering Activity, Element Two*

In order to establish a “pattern of racketeering activity,” the government must implicate the defendant in at least two predicate acts of

62. There is no universal definition of “criminal street gang.” Although federal law provides a statutory definition, law enforcement agencies often adopt varying definitions of the term in practice. See, e.g. Donald Lyddane, *Understanding Gangs and Gang Mentality: Acquiring Evidence of the Gang Conspiracy*, U.S. ATTORNEYS’ BULL., May 2006, at 2. See also MALCOLM W. KLEIN, *THE AMERICAN STREET GANG: ITS NATURE, PREVALENCE, AND CONTROL* 20 (1995) (noting the “present state of uncertainty” over gang definitions); ARNOLD P. GOLDSTEIN, *DELINQUENT GANGS: A PSYCHOLOGICAL PERSPECTIVE* 3-7 (1991) (providing a list of different gang definitions that were advanced in the twentieth century); GEORGE W. KNOX, *AN INTRODUCTION TO GANGS* 11 (1993) (“Clearly, there have been many loose definitions of what constitutes a gang in the literature. More precision is needed.”).

63. 18 U.S.C. § 521(a) (2002). Although the statute requires activities to affect interstate or foreign commerce, this requirement has been relaxed significantly by many courts. See *infra* Part I.C.

64. 18 U.S.C. § 521(c) (2002).

racketeering.⁶⁵ RICO provides an exhaustive list of predicate acts, which include both state and federal crimes involving violence, fraud, counterfeiting, drugs, and immigration.⁶⁶ The defendants need not be convicted of the underlying predicate acts; offenses of which the defendant has been acquitted may serve as the basis of a RICO offense.⁶⁷ In the empirical study, the government almost always established this element through multiple allegations of violent, drug, and immigration crimes.⁶⁸

C. Interstate or Foreign Commerce, Element Three

A pattern of racketeering activity under RICO must affect interstate or foreign commerce.⁶⁹ After Congress enacted RICO, some courts held that the enterprise itself, rather than the predicate crimes, must affect interstate or foreign commerce.⁷⁰ Many courts now apply a much less stringent standard that merely requires an enterprise's predicate acts to have a *de minimis* impact on interstate or foreign commerce.⁷¹ This low

65. 18 U.S.C. § 1961(5) (2006).

66. See § 1961(1) (2006).

67. See Douglass & Layne, *supra* note 54, at 1081.

68. For example, in May 2011, a federal grand jury indicted nineteen members of Four Block Gang in Schenectady, New York under RICO for predicate acts of attempted murder, weapons possession, and narcotics distribution. Press Release, U.S. Dept. of Justice, Indictments Unsealed Charging Four Block Gang Members and Others with Racketeering and Narcotics Conspiracies (May 26, 2011), available at <http://www.justice.gov/usao/nyn/news/1369-2689-929423744.pdf>. In April 2011, a federal grand jury in Chicago, Illinois convicted four members of the Latin Kings on RICO charges for multiple predicate acts of drug trafficking, murder, extortion, and other acts of violence. Press Release, U.S. Dept. of Justice, Latin Kings' Nationwide Leader, Augustin Zambrano, and Three Other High-Ranking Gang Members Convicted of RICO Conspiracy and Related Crimes in Federal Trial (Apr. 7, 2011), available at http://www.justice.gov/usao/iln/pr/chicago/2011/pr0407_01.pdf. In October 2009, a federal grand jury indicted twenty-three defendants of the Original Gangsta Killers on RICO charges for multiple predicate acts of drug trafficking, robbery, and attempted murder. Press Release, U.S. Dept. of Justice, Indictment Charges 25 Gang Members and Associates with RICO Conspiracy, Drug Conspiracy, and Street Gang Enhancement (Oct. 29, 2009), available at <http://www.atf.gov/press/releases/2009/10/102909-ny-25-gang-members-indicted.html>.

69. 18 U.S.C. § 1962 (2006).

70. See *United States v. Nerone*, 563 F.2d 836, 853-4 (7th Cir. 1977) (holding that to bring a RICO claim, the government must show that an enterprise affects interstate commerce). See also Argust, Litvack & Martin, *supra* note 49, at 979.

71. See *United States v. Shryock*, 342 F.3d 948, 984 (9th Cir. 2003) (holding that the district court "correctly instructed the jury that a *de minimis* affect on interstate commerce was sufficient to establish jurisdiction under RICO"); *United States v. Marino*, 277 F.3d 11, 35 (1st Cir. 2002) (holding that "the government does not need to show that the RICO enterprise's effect on interstate commerce is substantial"); *United States v. Riddle*, 249 F.3d 529, 537 (6th Cir. 2001) (holding that "a *de minimis* connection suffices for a RICO enterprise that 'affects' interstate commerce"); *United States v. Miller*, 116 F.3d 641,

threshold allows the government to satisfy the interstate and foreign commerce element of RICO quite easily in cases that involve criminal street gangs.

Some courts have raised concerns about whether applying this less stringent standard to organizations that are predominantly noneconomic in nature, such as criminal street gangs, exceeds the bounds of the commerce clause of the U.S. Constitution.⁷² In *Waucaush v. United States*, the Sixth Circuit held that a prosecutor could not press RICO charges against members of a criminal street gang that engaged in violent, but noneconomic, activity.⁷³ The court held that RICO could only be used within the bounds of the commerce clause to target a noneconomic organization when its activities substantially affected interstate commerce.⁷⁴

Not all courts, however, have shared these concerns. In *United States v. Nascimento*, the First Circuit explicitly rejected the Sixth Circuit's reasoning in *Waucaush* and upheld the *de minimis* standard as applied to criminal street gangs that engage in violent noneconomic activity.⁷⁵ The court reasoned that the Sixth Circuit did not apply the canons of statutory construction appropriately when it interpreted the term "affect" as requiring a substantial effect on interstate or foreign commerce in cases involving noneconomic enterprises.⁷⁶ Due to this circuit split, the issue of whether the government must show that the racketeering activities of a noneconomic enterprise substantially affect interstate commerce remains unresolved.⁷⁷

II. THE CENTRALITY OF RACE AND ETHNICITY IN RICO'S ENACTMENT

During the first half of the twentieth century, a highly secretive and organized criminal cartel—comprised mostly of members of Italian and Sicilian descent—gained tremendous influence over the American

674 (2d Cir. 1997) (holding "the government need only prove that the individual subject transaction has a *de minimis* effect on interstate commerce" to satisfy § 1962(c)).

72. U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power "[t]o regulate Commerce . . . among the several States."). Some legal commentators have also raised similar concerns about the constitutionality of prosecuting noneconomic organizations under RICO. See *supra* note 13.

73. 380 F.3d 251, 255–56 (6th Cir. 2004).

74. *Id.* at 256.

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

76. *Id.* at 38 ("[T]he *Waucaush* court did not employ any of the usual tools of statutory construction. The absence of anything in the reasoning of that court that explains how it is possible, consistent with sound canons of statutory construction, to read the word 'affect' as possessing two different meanings depending upon additional facts not mentioned in the statute itself, makes the decision suspect.")

77. See, e.g., Thane Rehn, Note, *RICO and the Commerce Clause: A Reconsideration of the Scope of Federal Criminal Law*, 108 COLUM. L. REV. 1991, 2006–09 (2008). See also Nisbet, *supra* note 13, at 519–20; Blumerstein, *supra* note 13, at 228.

economy.⁷⁸ The cartel, also known as “La Cosa Nostra” or “the Mafia,” profited by managing illegal gambling enterprises, selling and distributing narcotics, and running prostitution rings.⁷⁹ It also infiltrated legitimate businesses by buying them out and conducting underground, black-market transactions to eliminate competitors.⁸⁰

The invisibility and secretiveness of the Mafia created an allure that captivated American society. In response to the increasing economic influence of the Mafia, Congress held an eight-day hearing on organized crime in 1951.⁸¹ Most hearings were untelevised at the time, but three major television networks interrupted regular programming in order to broadcast the organized crime hearings.⁸² During the hearings, Senator Estes Kefauver, the chair of Congress’s Special Committee to Investigate Organized Crime in Interstate Commerce (also known as the “Kefauver Committee” after Kefauver himself),⁸³ explained the severity of organized crime to the American public and warned that the Mafia already had tremendous influence in many U.S. cities.⁸⁴ The hearings spawned two decades of congressional deliberation and research on organized crime, which ultimately led to RICO’s enactment in 1970.⁸⁵

Organized crime was considered a relatively new and salient social problem when Congress passed RICO, but widespread organized violence had existed for decades before the statute’s enactment. African Americans were common targets of organized violence for almost one

78. THOMAS A. REPPETTO, *AMERICAN MAFIA* ix-xi (2004).

79. MORRIS PLOSCOWE, *The Significance of Recent Investigations for the Criminal Law and Administration of Criminal Justice*, 100 U. PA. L. REV. 805, 806 (1952) (“The Mafia is an organization of Sicilian origin which specializes in the sale and distribution of narcotics and in gambling, prostitution, and other rackets based on extortion and violence.”).

80. THIRD INTERIM REP. OF THE SPEC. COMM. TO INVESTIGATE ORGANIZED CRIME IN INTERSTATE COMMERCE, S. REP. NO. 82-307, at 170 (1951). For a history of La Cosa Nostra’s activities and federal prosecutors’ attempts to dismantle the organization, see JAMES B. JACOBS & LAURYN P. GOULDIN, *Cosa Nostra: The Final Chapter?*, 25 CRIME & JUST. 129 (1999).

81. REPPETTO, *supra* note 78, at ix.

82. *Id.*

83. The Special Committee to Investigate Organized Crime in Interstate Commerce met in the years 1950-1951. See WILLIAM HOWARD MOORE, *THE KEFAUVER COMMITTEE AND THE POLITICS OF CRIME* x (1974).

84. THIRD INTERIM REP. OF THE SPEC. COMM. TO INVESTIGATE ORGANIZED CRIME IN INTERSTATE COMMERCE, *supra* note 80, at 1 (“Organized criminal gangs operating in interstate commerce are firmly entrenched in our large cities in the operation of many different gambling enterprises such as bookmaking, policy, slot machines, as well as in other rackets such as the sale and distribution of narcotics and commercialized prostitution.”).

85. See Lesley Suzanne Bonney, Comment, *The Prosecution of Sophisticated Urban Street Gangs: A Proper Application of RICO*, 42 CATH. U. L. REV. 579, 587 (1993) (“Although a full-scale federal investigation of the Mafia began in the early 1950s, the government struggled for two decades to define an effective means to combat this criminal organization.”).

hundred years after the Civil War. Many of these violent crimes were committed by small groups of White individuals, White mobs, and organized White supremacist groups.⁸⁶ One study found that approximately 2,500 African Americans were victims of White lynch mobs between 1882 and 1930 in ten Southern states: almost every week, a Black man, woman, or child was murdered.⁸⁷ This violence continued through the civil rights movement in the 1960s, when mob violence was used as a way to suppress and deter African Americans from exercising their civil rights.⁸⁸

RICO's legislative history suggests that Congress was specifically concerned about the ability of Mafia members to infiltrate legitimate business practices and obtain economic and political power.⁸⁹ But the KKK had similar extraordinary influence within the economic and political spheres.⁹⁰ Many politicians and business leaders, both national and local, were affiliated with the Klan. Like the Mafia, KKK members often conducted clandestine operations and hid their affiliations with the organization from the public.⁹¹ Despite these parallels between the KKK and the Mafia, Congress never felt compelled to pass federal legislation to address mob violence against African Americans.⁹² Organized violence against African Americans was not considered "organized crime" in the way that we think of the term today.⁹³

86. See generally, THE SOUTHERN POVERTY LAW CENTER, *KU KLUX KLAN: A HISTORY OF RACISM AND VIOLENCE* (5th ed. 1997).

87. STEWART EMORY TOLNAY & E.M. BECK, *A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882-1930* ix (1995).

88. S. REP. NO. 90-721, at 2 (1967), reprinted in 1968 U.S.C.C.A.N. 1837, 1839 ("The great majority of Americans have either welcomed or peacefully accepted the movement of Negroes toward full employment of equal rights. Unfortunately, however, a small minority of lawbreakers has resorted to violence in an effort to bar Negroes from exercising their lawful rights . . . Acts of racial terrorism have sometimes gone unpunished and have too often deterred the free exercise of constitutional and statutory rights.").

89. S. REP. NO. 82-307, *supra* note 80, at 170.

90. MICHAEL WOODIWISS, *ORGANIZED CRIME AND AMERICAN POWER* 73 (2001) ("Klan dens tended to be headed by the Southern elite. Planters, former generals, lawyers, merchants, shopkeepers, schoolteachers, and even ministers of churches gave respectability and legitimacy to a movement that appealed to all levels of Southern White society.").

91. *Id.* ("[KKK] membership required absolute secrecy and a strange dress code.").

92. See Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 *YALE J.L. & FEMINISM* 31, 77 (1996) ("Lynching was an open, notorious crime that the states allowed to continue unchecked by any agents of law enforcement. This wholesale failure of the states to protect the lives of their Black citizens cried out for federal action. But throughout most of the history of lynching, the national government stood idly by."); Mark Tushnet, Essay, *Principles, Politics, and Constitutional Law*, 88 *MICH. L. REV.* 49, 69-70 (1989) ("[D]uring the long and unsuccessful effort in the 1920s and 1930s to enact a federal anti-lynching law, several Southern senators and representatives openly stated their opposition to such laws in racist terms.").

93. WOODIWISS, *supra* note 90, at 68 ("Logic and evidence would suggest that this organized crime, which kept Southern States in grip for almost a century, was more

If organized crime plagued the United States for decades before RICO's enactment, then what was so different about the Mafia that motivated Congress to enact RICO? One significant difference was the perceived non-White ethnicities of Mafia members.

Members of La Cosa Nostra were of Italian and Sicilian descent. For decades prior to RICO's enactment, Italian and Sicilian Americans had been victims of anti-immigrant racism and violence within the United States.⁹⁴ New Italian and Sicilian immigrants were ostracized and stereotyped as poor and racially inferior.⁹⁵ Anti-immigrant sentiment enabled the U.S. government to frame organized crime as a problem of alien conspiracy.⁹⁶ Converging constructions of ethnicity and criminality placed the blame for organized crime on new immigrants,⁹⁷ and fostered the belief that organized crime was perpetuated mostly by members of immigrant populations.⁹⁸ Ironically, most of the individuals who were prosecuted for organized crime under existing racketeering laws from 1953 to 1959, a few years after the Kefauver hearings, were neither Italian nor Sicilian.⁹⁹

Evidence of anti-immigrant sentiment and alien conspiracy beliefs is found in RICO's legislative history. RICO's congressional proponents did

directly pernicious than any other contemporary variety of illegal activity; yet the South does not appear in the literature on organized crime, except as an entrance point for the Mafia.”).

94. *Id.* at 97 (“From the 1880s Italians were the largest ethnic group to arrive in the United States and they received the most violent and abusive welcome of any of the European newcomers. Reports of beatings, shootings, and lynchings came in from all parts of the country.”).

95. See DAVID A. J. RICHARDS, *ITALIAN AMERICAN* 3 (1999); REPPETTO, *supra* note 78, at ix (“[N]ewspapers used such phrases as ‘cruel, treacherous, vindictive, and violent’ to describe Italians.”). See also Elizabeth G. Messina, *Psychological Perspectives on the Stigmatization of Italian Americans in the American Media*, 13 *THE PSYCHOTHERAPY PATIENT* 87 (2004).

96. See Alan A. Block, *The Organized Crime Control Act, 1970: Historical Issues and Public Policy*, 2 *THE PUBLIC HISTORIAN* 39, 41 (1980); Dwight C. Smith, Jr., *Mafia: The Prototypical Alien Conspiracy*, 423 *THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE* 75, 86–87 (Jan. 1976); WOODIWISS, *supra* note 90, at 94–95 (“Complaints about the criminal tendencies of foreigners increased in intensity during the nineteenth century and many political speeches, official reports, and magazine articles suggested that conspiracies among immigrants constituted a threat to the nation.”).

97. WOODIWISS, *supra* note 90, at 94 (“Scapegoat explanations for the problems of the United States have long been widely accepted by a large proportion of the population, particularly explanations that pinned the blame on those at the bottom of society, especially newly arrived migrants and immigrants.”).

98. MICHAEL D. LYMAN & GARY W. POTTER, *ORGANIZED CRIME* 65 (3d ed. 2004) (“The alien conspiracy theory posits that organized crime (the Mafia) gained prominence during the 1860s in Sicily and that Sicilian immigrants are responsible for the foundations of American organized crime which is made up of twenty-five or so Italian-dominated crime families.”).

99. Block, *supra* note 96, at 42. In 1959, the U.S. Department of Justice released “A Summary of Successful Racket Prosecutions, 1953–1959.” Block’s analysis of the report found that approximately 15% of the individuals convicted under existing racketeering laws were of Italian and Sicilian descent. *Id.*

not hide their disdain for La Cosa Nostra.¹⁰⁰ During the Congressional debates, policymakers equated defeating organized crime with defeating La Cosa Nostra.¹⁰¹ In 1965, five years before RICO's enactment, then-President Lyndon B. Johnson established the President's Commission on Law Enforcement and Administration of Justice.¹⁰² The Commission explicitly connected organized crime with Italian-American criminal groups:

Today the core of organized crime in the United States consists of 24 groups operating as criminal cartels in large cities across the Nation. Their membership is exclusively men of Italian descent, they are in frequent communication with each other, and their smooth functioning is insured by a national body of overseers FBI [Federal Bureau of Investigation] intelligence indicates that the organization as a whole has changed its name from the Mafia to La Cosa Nostra.¹⁰³

G. Robert Blakey, who drafted the RICO statute as a congressional staffer, commented in 1990 that the statute "was sort of like George Keenan's containment policy of the Soviet Union We tried it and, by God, it worked."¹⁰⁴ The explicit comparison between RICO and policies of Soviet containment illustrates that RICO was just as much of an attempt to

100. For instance, Attorney General John Mitchell gave the following statement in favor of federal legislation targeting organized crime before the Committee of the Judiciary of the House of Representatives:

Over the last four decades, a criminal minority has put together in the United States an organization which is both an illicit cartel and a nationwide confederation, operating with comparative immunity from our criminal laws, and in derogation of our traditional concepts of free enterprise. This confederation, formerly known as the Mafia, but more recently identified as La Cosa Nostra, owns or controls many illicit businesses in the United States, and is rapidly increasing its substantial interests in legitimate commerce and industry.

Hearing on S. 30 and Related Bills Before Subcomm. No. 5 of the Comm. on the Judiciary, 91st Cong. 151-57 (1970) (statement of John N. Mitchell, Attorney Gen. of the U.S.).

101. Block, *supra* note 96, at 40.

102. Gerard E. Lynch, *RICO: The Crime of Being A Criminal, Parts I & II*, COLUM. L. REV. 661, 664 (1987) ("The legislative history of RICO begins with the report of the President's Commission on Law Enforcement and Administration of Justice (the Katzenbach Commission) in 1967").

103. THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME 6-10 (1967).

104. Selwyn Raab, *A Battered and Ailing Mafia is Losing its Grip on America*, NY TIMES, Oct. 22, 1990, at A1, available at <http://www.nytimes.com/1990/10/22/us/a-battered-and-ailing-mafia-is-losing-its-grip-on-america.html?pagewanted=all&src=pm>.

protect the United States from perceived ethnic “outsiders”¹⁰⁵ as it was a dedication to fight organized crime.¹⁰⁶

In concluding this historical analysis, it is important to acknowledge that RICO is still used by the federal government today to combat Mafia-related crime.¹⁰⁷ These prosecutions, however, were excluded from the empirical study that follows on RICO gang prosecutions because the government did not use “gang-specific” language in its anti-Mafia efforts, even though prosecutors considered Mafia-related crime to be “organized crime.”¹⁰⁸ The empirical study only included RICO prosecution cases in which the government used “gang” language or terminology. Although outside of the bounds of the empirical study, the reasons for this exclusion may further suggest the complex ways in which “gang” crime has come to be socially constructed as a phenomenon involving select racial minority groups, especially Blacks, Latinos, and Asians.

III. RACE AND RICO’S APPLICATION TO CRIMINAL STREET AND PRISON GANGS: AN EMPIRICAL STUDY

The findings of the following empirical study suggest that RICO’s history of constructing racial and ethnic minorities as outsiders is repeating itself in the statute’s recent application to criminal street and prison

105. LYMAN & POTTER, *supra* note 98, at 65 (“Ethnicity is a key to the alien conspiracy theory of the organized crime phenomenon.”).

106. See, e.g., Carlo Morselli & Lila Kazemian, *Scrutinizing Rico*, 12 CRITICAL CRIMINOLOGY 351 (2004); W.R. Geary, *The Creation of RICO: Law as a Knowledge Diffusion Process*, CRIME, LAW, AND SOCIAL CHANGE 329 (2000).

107. See e.g., Press Release, U.S. Dep’t of Just., Genovese Organized Crime Family Soldier and Associates Indicted on Racketeering Charges, Including Extortion of International Longshorsemen’s Association Members (Jan. 20, 2011), available at http://media.nj.com/ledgerupdates_impact/other/Depiro,%20Stephen%20et%20al.%20Arrest,%20Indictment%20PR.pdf (announcing a recent RICO indictment against members of the Genovese Crime Family of La Cosa Nostra).

108. To illustrate this point more clearly, consider the following two examples. In February 2010, the government unsealed a RICO indictment involving the Genovese Organized Crime Family of La Cosa Nostra. The government never used the term “gang” to describe La Cosa Nostra itself or subsets of individuals who were affiliated with La Cosa Nostra. Rather, it used terms such as “crews” and “regimes” to describe collectivities of individual members of the organized crime unit. The government also used the term “boss,” not “gang leader,” to describe the organization’s leadership. *United States v. Nigro*, Indictment No: S1 09 Cr. 1239, S.D.N.Y., at *2-4, available at http://media.masslive.com/breakingnews/other/arillotta_indictment.pdf. In January 2011, the government unsealed another RICO indictment involving La Cosa Nostra. Again, the indictment does not employ “gang” terminology, but rather uses terms such as “crime family,” “boss,” “crews,” and “regimes,” and “decinas” when describing the organizational structure. *United States v. Balzano*, Indictment No: 11 0032 (SCT) (RCM) E.D.N.Y., at *3-4, available at <http://www.justice.gov/opa/documents/1-20-2011-balzano.pdf>.

gangs. Subpart A details the methods and limitations of the study. Subpart B presents the study findings.

In short, there were five main findings of the study. First, a strong majority (approximately 86%) of the prosecutions involved gangs that were affiliated with at least one racial minority group, and a similarly strong majority (approximately 83%) of prosecutions involved individuals who were allegedly in racial-minority gangs. Second, all but one of the prosecuted White-affiliated gangs fell into three categories: (1) international organized crime groups, (2) outlaw motorcycle gangs, and (3) White supremacist prison gangs. Third, there was a higher frequency of separately named gangs¹⁰⁹ that were affiliated with one or more racial minority groups than separately named White-affiliated gangs. Fourth, there was a higher frequency of small and local gangs that were affiliated with at least one racial minority group than were White-affiliated. Fifth, only five gangs in the sample were subjected to more than three prosecutions under RICO, all of which were Latino- and Black-Affiliated groups labeled as “more prominent” gangs by the Department of Justice. The implications of these findings with regard to systemic racial bias will be discussed in Part IV.

A. Methods and Study Limitations

There are very few empirical studies on RICO prosecutions. The lack of empirical research in this area is mainly due to the fact that the DOJ does not regularly release detailed statistics on RICO arrests or prosecutions.¹¹⁰ Due to the lack of available data, criminologists have had to create their own data sets in order to study RICO's application.

To date, three criminological studies on RICO's application in criminal contexts have been published. None of these studies specifically examines RICO's application to gang prosecutions. In one study, the researchers conducted interviews with twenty-three practitioners

109. I define a “separately named gang” as a gang that has its own name. The names comprising the data were determined by the names that the government used within the indictments or press releases. It is important to note that having a distinct name does not mean that a gang is completely independent or excluded from a broader network of gangs. For instance, one of the indicted gangs in the sample, the Rollin' 60 Neighborhood Crips (see Appendix) is a street gang based in Los Angeles, California. The gang initially formed as a faction of the original Crip gang in 1972 and has grown since. Although the gang can be tied to a broader national network of Crip gangs, the Rollin' 60s Neighborhood Crip gang is very much its own entity.

110. See Blumenstein, *supra* note 13, at 217 (noting that “aggregate statistics are not available regarding the frequency with which the Justice Department brings RICO charges—let alone RICO charges against gangs in particular”). During the study, these points were confirmed by contacts with representatives in the Federal Bureau of Investigation (FBI) Violent Gang Task Forces and the Department of Justice's (DOJ) Organized Crime and Gang Section. For ethical reasons, the names of those contacts remain anonymous.

(prosecutors, defense attorneys, and judges) who handled RICO cases in order to determine the utility and practical effects of the statute.¹¹¹ In the other two studies, the researchers scrutinized RICO's application through a subset of federal circuit and district court cases that were available on Westlaw and LexisNexis.¹¹²

It would have been impossible to quantify on a broad scale the racial affiliations of the gangs prosecuted under RICO from the methods used in these existing studies. Making generalizations about the racial affiliations of gangs prosecuted under RICO from a limited subset of prosecutor interviews might have produced inaccurate and skewed racial representations. Moreover, it would have been problematic to rely strictly upon the cases that are available on Westlaw and LexisNexis because defendants often accept plea bargains in RICO cases, and thus the cases do not result in published trial or appellate court opinions.¹¹³

The Federal Bureau of Investigation (FBI) has provided some statistics on RICO operations against gangs, reporting a total of 595 RICO indictments returned against "violent gangs" between the years 2001 to 2010.¹¹⁴ It is unclear, however, whether this quantity includes superseding indictments¹¹⁵ against the same defendants in specific cases.¹¹⁶ The FBI also

111. Martin G. Urbina & Sara Kreitzer, *The Practical Utility and Ramifications of RICO: Thirty-Two Years After Its Implementation*, 15 CRIM. J. POL. REV. 294, 294 (2004).

112. John Dombrink & James W. Meeker, *Racketeering Prosecution: The Use and Abuse of Rico*, 16 RUTGERS L. J. 633, 642-44 (1985) (using the subset of eighty federal appellate cases to reach conclusions about applying RICO in criminal cases). The scholars who performed this empirical study justified their methodology by arguing that: (1) all of the opinions are published, which permits easy access to data, (2) other litigation studies also rely upon federal appellate review; (3) appellate courts address problematic issues that arise in doctrine, and thus serve as a reliable source to examine whether a statute is being used creatively or abused. *Id.* at 643-44. Carlo Morselli & Lila Kazemian, *Scrutinizing Rico*, 12 CRITICAL CRIMINOLOGY 351, 359 (2004). The researchers in this study created a random sample of 166 cases across three decades (1970-2000). *Id.* The researchers intended to include an equal number of federal trial and appellate court cases. *Id.* Due to the lack of district court transcripts on Westlaw, however, the final subset of cases was comprised primarily of appellate cases (152 cases or 92%). *Id.*

113. Donald Crump, *Criminals Don't Pay: Using Tax Fraud to Prohibit Organized Crime*, 9 HOUS. BUS. TAX. L. J. 386, 391 (2009) ("Because RICO charges are easy for the prosecution to prove, defendants will often choose a plea bargain.").

114. *Violent Gang Initiatives*, FEDERAL BUREAU OF INVESTIGATION (Aug. 2011), <http://www.fbi.gov/about-us/ten-years-after-the-fbi-since-9-11/just-the-facts-1/violent-gang-initiatives> (last visited Apr. 1, 2012).

115. A superseding indictment is an indictment that is filed after an original indictment in a case. It is usually based upon events that occur after the indictment has been filed, which change the original nature of the indictment.

116. A superseding indictment is often used in federal court to drop charges or parties, or to make minor corrections to the original indictment that leave the original charges intact. See *United States v. Rojas-Contreras*, 474 U.S. 231, 240 (1985). I excluded superseding indictments from the sample if they involved the same defendants. It was not uncommon for two or three indictments to be returned against the same defendants over

did not specify which criminal groups it considered to be "violent gangs." More importantly, it was impossible to make inferences about race from this data because the FBI did not release the names or the primary racial affiliations of the prosecuted violent gangs.

Given these limitations, it was necessary to use other methods in order to investigate race in the context of RICO gang prosecutions. I used four sources to gather information on RICO gang prosecutions. First, using Westlaw, I collected all of the articles published in major local and national American newspapers between January 1, 2001, and January 1, 2011, containing the terms *RICO*, *gang*, and *indict* (along with any derivatives of these terms such as *racketeering*, *gangs* and *indicted*). Second, I used Westlaw case searches to find any RICO gang prosecutions between 2001 and 2011 that were not reported in the news sources available on Westlaw. Third, I used Google to conduct targeted searches within yearly ranges (January 1, 2001–January 1, 2002; January 1, 2002–January 1, 2003, etc.) to find any gang prosecutions that I did not retrieve on Westlaw. Fourth, I used the DOJ website to gather reports of gang prosecutions that I did not retrieve from any of the other sources. I listed all of the gathered cases in a separate database.

From this list, I used Google and the Public Access to Court Electronic Records (PACER) to obtain electronic copies of the RICO gang indictments. To avoid counting a particular gang prosecution more than once, the sample excluded superseding indictments involving the same defendants in a particular case. I coded each indictment in a separate Excel database based on (1) the year of the indictment, (2) the state of the indictment, (3) the name of the gang, (4) the primary racial affiliation of the gang, and (5) the number of the indicted gang members and affiliates under RICO.¹¹⁷ I used the following categories to code race: Black, Latino, Asian, White, Mixed, and Other. I included Black, Latino, Asian, and White as racial categories because the racial and ethnic compositions of most prosecuted gangs seemed to fit within these categories.¹¹⁸ I included a Mixed category for gangs that were affiliated with more than one racial group, and an Other category to capture the racial affiliations of gangs that did not fit within the other categories.

the course of a few years in a single case. If the FBI's reported numbers included superseding indictments, then this statistic would be higher than if such indictments had been excluded. From the available data, it is unclear how much higher. However, one could surmise from the frequency of superseding indictments that the difference would be considerable.

117. Many indictments brought forth charges under RICO and other federal criminal laws. Therefore, an indictment could have included both indictees charged under RICO and indictees not charged under RICO. In the sample, I excluded named individuals who were indicted for violating other federal criminal laws, but not RICO.

118. See IRVING A. SPERGEL, *THE YOUTH GANG PROBLEM: A COMMUNITY APPROACH* 61-69 (Oxford University Press, Inc., 1995) (dividing gang subcultures into Black, Hispanic, Asian and Pacific Island, and White gang subcultures).

I relied upon four indicators to make inferences about the racial affiliations of the gangs. First, I inferred race from the name of the gang; the Mexican Mafia, for instance, is a Latino-affiliated gang. Second, I made racial inferences from the surnames of the indicted gang members. If an indictment included gang members who each had Latino surnames (e.g., Lopez, Alvarez, Vasquez, Ortiz), then I inferred that the gang was Latino-affiliated. Third, I made inferences of race from the ideologies of the gangs. For instance, I inferred that White supremacist prison gangs were White-affiliated from their professed beliefs. Fourth, I made inferences of race from publicly available pictures and videos of indicted gang members: if, for example, released mugshots of prosecuted gang members/affiliates from a case depicted all Black individuals, then I inferred that the gang was Black-affiliated.

I was confident about my inferences of race in most cases, but relying upon these indicators to make such inferences was not a foolproof process. The role of personal judgment in making those inferences created an unavoidable potential for error. In order to increase the accuracy of my inferences, I relied upon more than one indicator for each case whenever possible.

It is important to underscore that I did not use these indicators to make inferences about the racial *identities* of the indicted gang members/affiliates. Gangs that are predominantly affiliated with one racial group may have members who identify as multiracial or identify with a different race from the primary racial affiliation of their gangs. Based on the available data, I was not confident inferring racial identities at the individual level: the risk of imposing inaccurate racial identities upon individual subjects was too high. An individual with a Latino surname, for instance, may identify as multiracial if he or she has parents of different races. From the limited information in the indictment, I would have erroneously assumed that the individual identified as Latino. Therefore, the data pertaining to individual indictees in the empirical study are centered on the primary racial affiliation of their gangs, not their individual racial identities. Put another way, a value of “25-Latino” in a case would reflect twenty-five indictees who were tied to a Latino-affiliated gang, not that twenty-five Latino gang members and affiliates were indicted.

Since the study presents numerical data, some readers may wonder whether the findings are “statistically significant.” Tests of statistical significance enable researchers to determine whether they would have received similar results if the entire population, as opposed to a sample of the population, had been included in the study.¹¹⁹ Significance tests assume that the researcher has selected a random sample of cases.¹²⁰ One limita-

119. MICHAEL K. LE ROY, *RESEARCH METHODS IN POLITICAL SCIENCE: AN INTRODUCTION USING MICROCASE 182* (7th ed. 2009).

120. *Id.*

tion of the empirical study is that the sample of RICO gang prosecutions is not random. Since I relied upon search engines and websites to gather all of the available RICO gang indictments, the sample excluded RICO gang prosecutions that were not publicly available. Given the lack of available statistics on RICO gang prosecutions, it is unclear how many prosecutions remain outside of the public realm and are thus excluded from the study. Because of this limitation, I could not guarantee the representativeness of the sample. In order to refrain from overstating the accuracy of my results, I did not perform significance tests with the numerical data. The study's findings should be therefore viewed with caution. Also, the findings should not be applied to support generalizations involving the application of RICO in other contexts or the application of different federal statutes to criminal street and prison gangs.

Although the study findings do not provide definitive statistical proof of racial bias, I argue that they raise considerable doubt as to whether the application of RICO to prosecute gangs is a racially unbiased process. However, readers should take into consideration that since the study sample only included publicly released RICO gang prosecutions, it is possible that this disturbing trend may not apply to unpublicized cases or prosecutions supported by sealed indictments. One finding that undercuts this possibility is that the media reported some of the cases originally supported by sealed indictments once the government unsealed them. For instance, on August 8, 2005, the Associated Press reported that fourteen Latino gang members of Sureños-13 (SUR-13) were arrested in Georgia.¹²¹ A federal grand jury had returned a sealed indictment on July 12, 2005, and it was not unsealed until a few days prior to the news report in order to allow law enforcement authorities to coordinate arrests.¹²² The multi-year time span of the empirical study (2001–2011) increased the likelihood that the study would capture RICO prosecutions that were originally supported by sealed indictments.

There were two additional potential biases that the empirical study could not avoid due to its reliance upon publicly available indictments. For the reasons discussed below, the strength of these potential biases is unclear. First, law enforcement and prosecutors may have resisted publicizing crackdowns against White-affiliated gangs in order to shield White neighborhoods and communities from the stigma of having gang problems.¹²³ One could surmise, however, that if law enforcement and prosecutors were so concerned with shielding White communities from being tied to gang violence, then they would have avoided labeling White criminal groups as street gangs altogether. Second, media sources may be

121. See Associated Press, *Atlanta Gang Members Arrested on Racketeering Charges*, ACCESSNORTHGA.COM (Aug. 8, 2005, 3:45 AM), <http://12.162.160.186/detail.php?n=141514>.

122. *Id.*

123. See Klein, *supra* note 20; Schmidt, *supra* note 20; Zatz & Portillos, *supra* note 20.

more prone to cover RICO prosecutions against racial minority gangs because of consumer demands for stories of sensationalized racial gang violence.¹²⁴ Even if this is the case, if the government does not conceptualize White-affiliated criminal groups as gangs for RICO purposes, then these consumer demands would not change the racial affiliations of the prosecuted gangs.

Despite limitations, the employed methods were the best fit for the empirical study given the shortcomings of the alternative methods and the lack of available data on RICO gang prosecutions. There were also advantages in using these methods. Newspaper articles often reported the exact number of alleged street gang members who were indicted under RICO, which I was then able to crosscheck with the number of gang members listed in the electronic copies of the indictments. Moreover, the prosecutions were likely to receive media coverage because of the seriousness of gang violence and the large-scale nature of RICO operations. Thus, even though the study does not provide statistically significant findings, its conclusions were based on a robust sample constructed from multiple reliable sources.

B. Results

The study sample consisted of 160 prosecutions¹²⁵ brought against 115 separately named¹²⁶ criminal street and prison gangs and 2,915 alleged

124. Lyddane, *supra* note 62, at 2 (“The news media and entertainment industry have sensationalized gang crimes and the gang lifestyle to the point that it has become part of mainstream America.”).

125. In determining whether a prosecution qualified as a separate case for the study, I considered factors including, but not limited to, (1) whether the prosecution involved a distinct subset of a particular gang; (2) whether the prosecution included new defendants from other RICO prosecutions; (3) whether the prosecution was supported by its own law enforcement investigation; (4) whether the RICO prosecution had its own place on the judicial docket, and was thus not part of another already existing RICO gang prosecution. Based on these factors, it was possible for a single gang to be represented in more than one case within the study if the prosecutions involved different subsets of the same gang. For instance, Case 4 of the empirical study involved six members of MS-13 who were indicted under RICO in 2011 by federal authorities in the District of Columbia. See Appendix. Case 13 of the study involved 7 members of MS-13 who were indicted under RICO that same year by federal authorities in Texas. See Appendix. Both cases involved the same gang, MS-13. But the cases qualified as different “prosecution cases” because the prosecutions involved different subsets of the same gang. They prosecutions were also supported by independent law enforcement investigations and separate indictments that involved different defendants. Moreover, the cases were to be tried in different federal district courts.

126. I define a “separately named gang” as a gang that has its own name. The names comprising the data were determined by the names that the government used within the indictments or press releases. Having a distinct name does not mean that a gang is completely independent or excluded from a broader network of gangs. See *supra* note 109.

gang members/affiliates. The Appendix contains a list of the gang prosecution cases and coded variables. The main findings of the study are presented below. Before presenting these findings, I want to emphasize that this Part of the Article does not put forth any normative claims or offer any potential explanations of the data. The analysis of this Part is merely descriptive. The implications of the data, in addition to any arguments or counterarguments that arise from the data, will be discussed separately *infra* Part IV.

Finding 1: A strong majority of the prosecution cases involved gangs that were affiliated with at least one racial minority group, and a similarly strong majority of prosecutions involved gang members/affiliates that were connected to gangs that were affiliated with one or more racial minority groups.

In the sample, most (approximately 86%) of the prosecution cases involved gangs that were affiliated with at least one racial minority group (See Table 1). Most of these cases involved gangs that were affiliated with one specific group, as opposed to mixed-race gangs. A smaller percentage (approximately 14%) of the prosecutions involved predominantly White-affiliated gangs.

TABLE 1
RICO GANG PROSECUTION CASES BASED ON THE PRIMARY RACIAL
AFFILIATIONS OF THE PROSECUTED GANGS, 2001–2011¹²⁷

Race	Frequency ¹²⁸	Percentage
Asian	6	3.75
Black	60	37.50
Latino	65	40.62
Mixed	7	4.38
Other	0	0.00
White	22	13.75
Total	160	100.00

The study yielded somewhat similar results in terms of the number of prosecuted gang members and affiliates. A similarly strong majority (approximately 83%) of these individuals were connected to gangs that were primarily affiliated with at least one racial minority group (see Table

127. A breakdown of gang prosecution cases based on the predominant racial affiliations of the prosecuted gangs is available on request from the author.

128. To remind readers, given the definition of "prosecution cases," it was possible for a major gang to generate more than one frequency in the sample. See *infra* note 125. For instance, the Aryan Brotherhood generated a frequency of 3 for White-affiliated gang prosecution cases because three separate prosecutions (one in Texas, two in California) involving different gang members were brought against factions of the major prison gang. See cases 42, 145, 158 in Appendix.

2). Most of these cases also involved individuals who were tied to gangs that were primarily affiliated with one specific racial minority group, as opposed to mixed-race gangs. A smaller percentage (approximately 17%) of the prosecutions involved individuals connected to White-affiliated gangs.

TABLE 2
NUMBER OF GANG MEMBERS/AFFILIATES PROSECUTED UNDER RICO
BASED ON THE PRIMARY RACIAL AFFILIATIONS OF
THEIR GANGS, 2001–2011¹²⁹

Race	Frequency	Percentage
Asian	60	2.06
Black	816	27.99
Latino	1,341	46.00
Mixed	197	6.76
Other	0	0
White	501	17.19
Total	2,915	100.00

These figures are not conclusive evidence of systemic racial bias, but they do indicate a high representation of racial minorities in terms of the prosecuted groups and individuals associated with those groups in the sample.¹³⁰

Finding 2: The prosecuted White-affiliated gangs generally fell into three categories: (1) international organized crime groups, (2) outlaw motorcycle gangs, and (3) White supremacist prison gangs.

The sample included twenty-two White-affiliated gangs, which comprised 13.75% of the total prosecuted gangs in the sample (see Table 1). The data revealed that a specific categorization scheme applied to these White-affiliated gangs. All but one of the twenty-two White-affiliated gangs fell into three categories: (1) international organized crime groups, (2) outlaw motorcycle gangs, and (3) White supremacist prison gangs (see Table 3). A strong majority of those prosecutions (approximately 82%) involved the first two categories: outlaw motorcycle gangs and White supremacist prison gangs.

129. A breakdown of the number of gang members/affiliates prosecuted under RICO based on the primary racial affiliations of their gangs is available upon request from the author.

130. Again, I want to emphasize that at this point of the Article, I am not making any normative claims or putting forth any interpretations of this data. I acknowledge that some readers would explain these numbers by arguing that there are more racial minority gangs than white gangs, and more racial minority gang members than white gang members. I will address these points *infra* Part IV.

TABLE 3
RICO GANG PROSECUTIONS INVOLVING WHITE-AFFILIATED
GANGS,¹³¹ 2001–2011

Gang Type	Frequency of Prosecution Cases	Percentage of White-Affiliated Gangs	Percentage of Total Gangs
International Organized Crime Group	3	13.63	1.87
Other	1	4.55	0.62
Outlaw Motorcycle Gang	11	50.00	6.88
White Supremacist Prison Gang	7	31.82	4.38
Total	22	100.00	13.75

Finding 3: There was a higher frequency of separately named gangs that were affiliated with one or more racial minority groups than separately named White-affiliated gangs.

The prosecutions in the sample involved 115 separately named gangs.¹³² A strong majority (approximately 89%) of the separately named gangs were affiliated with at least one racial minority group (see Table 4). There were also just over four times as many separately named Black-affiliated gangs, and just under three times as many Latino-affiliated gangs, as White-affiliated gangs (see Table 4).

131. The names of the prosecuted White-affiliated gangs in the sample by category included: *International Organized Crime Groups*: Armenian Power, Chicago Outfit, Unnamed Russian Gang; *Other*: The Guardians; *Outlaw Motorcycle Gangs*: Hells Angeles (4 cases) Highwaymen Motorcycle Club, Outlaws (3 cases), Pagan's (3 cases); *White Supremacist Prison Gangs*: Aryan Brotherhood (3 cases), Aryan Warriors, Dead Man Incorporated, Soldiers of the Aryan Culture, Nazi Low Riders.

132. Again, I define a "separately named gang" as a gang that has its own name. The names comprising the data were determined by the names that the government used within the indictments or press releases. Having a distinct name does not mean that a gang is completely independent or excluded from a broader network of gangs. See *supra* note 126.

TABLE 4
SEPARATELY NAMED GANGS PROSECUTED UNDER RICO
BASED ON RACIAL AFFILIATION OF THE GANGS, 2001–2011

Primary Racial Affiliation of Gang	Frequency	Percentage
Asian ¹³³	6	5.22
Black ¹³⁴	53	46.09
Latino ¹³⁵	36	31.30
Mixed ¹³⁶	7	6.09
Other	0	0.00
White ¹³⁷	13	11.30
Total	115	100.00

Finding 4: There was a higher frequency of small and local prosecuted gangs that were affiliated with at least one racial minority group than were White-affiliated.

Almost one-third (approximately 31%) of the prosecution cases in the sample involved small or local criminal street gangs (see Table 5). A strong majority of those cases (approximately 86%) involved gangs that were primarily affiliated with Blacks, Latinos, or Asians specifically. Black-

133. The six separately named Asian gangs included: Dragon Family, Lim Organization, Tiny Oriental Posse, Tongan Crips, Wang Organization, Yi Ging Organization.

134. The fifty-three separately named Black gangs included: 110 Gang, 662 Boss Piru, Almighty Vice Lord Nation, Black Guerrilla Family, Bloods, Boot Camp Gang, Bounty Hunter Bloods/Nine Tech Gangsters, Bricktown Gang, Brighton Brigade, Brighton Place/Northview Heights Crips, Bugout Boyz/Nine-Trey Gangsters, Carman Brothers Crew, Cash Money Brothers, Chain Gang/Wolf Pack, Courtlandt Avenue Crew, Crips, Double II, Down Below Gang, Dump Squad, Elk Block Gang, Esmond Street Crew, Four Block Gang, Fruit Town/Brick City Brims, Fulton Hill Hustlers, Gangster Disciples, Harlem Boys, Hoover Crips, Josephine Dog Pound, Jungle Junkies, King Mafia Disciples, Lex Mob, LSP Gang, McGriff Enterprise, Murder Unit, Neighborhood Piru Bloods, Newburgh Bloods, Newburgh Crew, Original Gangsta Killers (OGK), Page Street Mob, Pasadena Denver Lane (PDL) Bloods, Patio Crew, Pitch Dark Family, Playboy Bloods, Pueblo Bishop Bloods, Rollin' 60s Crips, Six Tre Outlaw Gangsta Disciples Folk Nation, Southside Brims Bloods, Squad Up, Stapleton Crew, Stonehurst Gang, Tree Top Piru (TTP), West Coast Crips, Woodbine Crew.

135. The thirty-six separately named Latino gangs included: 18th Street Gang, 38th Street Gang, Almighty Latin King and Queen Nation (ALKQN), Azusa 13, Barrio Azteca, Black Angels, Bronx Trinitarios Gang (BTG), Brown Magic Clica, Brownside Locos, Cisneros Organization, Columbia Lil' Cycos, Drew Street Gang, Eastside Gang, Florencia 13, Forming Kaos, Freeman Street Robbery Organization, Imperial Gangsters, Killing Every Spot, Lennox 13, Malditos-13, Mexican Mafia, MS-13, Nuestra Familia, Ojeda Organization, Pachuco-21, Puente 13, Raza Unida, Riverside Locos, Sur-13, Texas Mexican Mafia, Texas Syndicate, The Avenues, Varrio Hawaiian Gardens Gang, Vatos Locos, Vineland Boyz, West Myrtle Street Gang.

136. The seven separately named Mixed gangs included: 10th Street Gang, Bandidos Biker Gang, Insane Deuces, Mello Organization, Mongols, Unnamed Gang, Wheels of Soul.

137. The thirteen separately named White gangs are listed *supra* note 131.

and Latino-affiliated gangs were especially represented in this finding. Just under one in four (approximately 24%) of the total cases in the sample involved a small or local criminal street gang that was primarily Black- or Latino-affiliated. These frequencies were much lower than the prosecuted small/local criminal street gangs that were White-affiliated. Only four of the small/local gangs were White-affiliated, and three of those gangs were considered international organized crime groups.

TABLE 5
SMALL OR LOCAL GANGS PROSECUTED UNDER RICO
BASED ON PRIMARY RACIAL AFFILIATION
OF THE GANGS, 2001–2011

Race	Frequency of Cases Involving Small or Local Gangs	Percentage of Cases Involving Gangs with Similar Racial Affiliation	Percentage of Total Cases
Asian	4 ¹³⁸	66.67	2.50
Black	26 ¹³⁹	43.33	16.25
Latino	12 ¹⁴⁰	18.46	7.50
Mixed	3 ¹⁴¹	42.86	1.88
Other	0	0.00	0.00
White	4 ¹⁴²	18.18	2.50
Total	49	–	30.63

Finding 5: Only five gangs in the sample were subjected to more than three prosecutions under RICO, and all of those gangs involved Latino- and Black-Affiliated gangs labeled as “more prominent” gangs by the Department of Justice.

In the sample, there were only five gangs that were involved in more than three prosecution cases (see Table 6). Three of these gangs were

138. The four cases involving small and local Asian-affiliated gangs included: Dragon Family, Lim Organization, Wang Organization, and Yi Ging Organization

139. The twenty-six cases involving small and local Black-affiliated gangs included: Boot Camp Gang, Bricktown Gang, Brighton Brigade, Carman Brothers Crew, Cash Money Brothers, Chain Gang/Wolf Pack, Courtlandt Avenue Crew, Down Below Gang, Elk Block Gang, Esmond Street Crew, Four Block Gang, Fulton Hill Hustlers, Harlem Boys, Josephine Dog Pound, Jungle Junkies, Lex Mob, LSP Gang, McGriff Enterprise, Murder Unit, Original Gangsta Killers (OGK), Page Street Mob, Patio Crew, Pitch Dark Family, Squad Up, Stonehurst Gang, and Woodbine Crew.

140. The twelve cases involving small and local Latino-affiliated gangs included: Bronx Trinitarios Gang (BTG), Brown Magic Clica, Brownside Locos, Cisneros Organization, Drew Street Gang, Eastside Gang, Freeman Street Robbery Organization, Killing Every Spot, Ojeda Organization, Riverside Locos, Vineland Boyz, and West Myrtle Street Gang.

141. The three cases involving small and local mixed-race-affiliated gangs included 10th Street Gang, Insane Deuces, and an unnamed gang.

142. The four cases involving small and local White-affiliated gangs included: The Guardians, Armenian Power, Chicago Outfit, and an Unnamed Russian Gang.

Latino-affiliated (Almighty Latin King and Queen Nation [ALKQN], MS-13, and Texas Syndicate) and two of these gangs were Black-affiliated (Bloods and Crips).¹⁴³ Each of these gangs is identified as a “more prominent” street or prison gang by the Department of Justice.¹⁴⁴

TABLE 6
GANGS PROSECUTED MORE THAN THREE TIMES UNDER RICO, 2001-2011

Primary Racial Affiliation of Gang	Major Gang Name	Number of Prosecution Cases	Percentage of Cases Involving Gangs With Similar Racial Affiliation	Percentage of Total Cases
<i>Latino</i>				
			N = 65	
	Almighty Latin King and Queen Nation	8	12.31	5.00
	MS-13	12	18.46	7.50
	Texas Syndicate	6	9.23	3.75
	<i>Subtotal</i>	26	40.00	16.25
<i>Black</i>				
			N = 60	
	Bloods ¹⁴⁵	19	31.67	11.88
	Crips ¹⁴⁶	8	13.33	5.00
	<i>Subtotal</i>	27	45.00	16.88

Prosecutions against ALKQN, MS-13, and Texas Syndicate comprised approximately 40% of all cases involving Latino-affiliated gangs (see

143. It is important to clarify that the prosecuted subsets of these three major Latino-affiliated gangs did not have their own distinct names. Conversely, many of the cases involving the Bloods and the Crips involved subsets of those gangs with distinct names (e.g. “Pueblo Bishop Bloods” and “Hoover Crips”). In some cases, the subsets did not have a name that tied them directly to the Bloods or the Crips; rather, the federal government tied the gang subset to the Bloods or the Crips in the prosecution indictment (e.g., “Double II” of the Bloods).

144. *Street Gangs*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/criminal/ocgs/gangs/street.html> (last visited Apr. 1, 2012) (identifying Almighty Latin King and Queen Nation, Bloods, Crips, and MS-13 as “more prominent” criminal street gangs that operate in the United States); *Prison Gangs*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/criminal/ocgs/gangs/prison.html> (last visited Apr. 1, 2012) (identifying Texas Syndicate as a one of the “largest” prison gangs that operates in the United States).

145. The subsets of Bloods in the sample included: 662 Boss Piru, Bloods (three cases), Bounty Hunter Bloods/Nine Tech Gangsters (two cases), Bugout Boyz/Nine-Trey Gangsters, Double II, Dump Squad, Fruit Town/Brick City Brims, Neighborhood Piru Bloods, Newburgh Bloods, Newburgh Crew, Pasadena Denver Lane (PDL) Bloods, Play-boy Bloods, Pueblo Bishop Bloods, Southside Brims Bloods, Stapelton Crew, Tree Top Piru (TTP).

146. The subsets of Crips in the sample included: Brighton Place/Northview Heights Crips, Crips (four cases), Hoover Crips, Rollin’ 60s Crips, and West Coast Crips.

Table 6). Moreover, prosecutions involving subsets of the Bloods and the Crips comprised approximately 45% of all prosecution cases involving Black-affiliated gangs. The prosecution cases from these five major Latino- and Black-affiliated gangs comprised almost one-third (approximately 33%) of the total prosecutions.

IV. SYSTEMIC RACIAL BIASES UNDERLYING RICO'S APPLICATION TO CRIMINAL STREET AND PRISON GANGS

The data regarding race and RICO gang prosecutions suggest a situation that calls for explanation: a facially neutral law (RICO) and a facially neutral concept ("criminal street gang") are being applied to prosecute criminal groups that are predominantly affiliated with racial minorities.

Some scholars would explain the racial disparity in the data by contending that gangs are comprised mostly of racial minorities. For decades, criminologists have studied gang subcultures and suggested that gang development is a function of social isolation and lack of economic opportunity.¹⁴⁷ Race is related to these factors because persistent racial discrimination in certain spheres of society, such as employment and housing, has facilitated the creation of isolated neighborhoods of racial minority populations with severely limited economic opportunities.¹⁴⁸ Gangs provide pathways to achieve respect and financial success within these communities that are marginalized from mainstream society.¹⁴⁹

Although the roles of social and economic marginalization in gang formation should not be disregarded, accepting these factors at face value to explain the high representation of racial minorities in the data is dangerous and potentially misleading. Social and economic marginalization may explain the conditions under which gangs are more likely to form, but they do not explain the social processes by which law enforcement and prosecutors may come to label particular groups as criminal street or prison gangs. Strictly resorting to factors of social and economic

147. See FREDERIC THRASHER, *THE GANG* (1927); ALBERT K. COHEN, *DELINQUENT BOYS: THE CULTURE OF THE GANG* (1955); RICHARD A. CLOWARD & LLOYD E. OHLIN, *DELINQUENCY AND OPPORTUNITY* (1961); Walter B. Miller, *Lower Class Culture as a Generating Milieu of Gang Delinquency*, 14 J. SOC. ISSUES, 5-20 (1958). See also, JOHN M. HAGEDORN & MIKE DAVIS, *A WORLD OF GANGS: ARMED YOUNG MEN AND GANGSTA CULTURE* (2008); IRVING A. SPERTEL, *THE YOUTH GANG PROBLEM: A COMMUNITY APPROACH* 161 (1995).

148. See JOHN M. HAGEDORN & MIKE DAVIS, *A WORLD OF GANGS: ARMED YOUNG MEN AND GANGSTA CULTURE* (2008); IRVING A. SPERTEL, *THE YOUTH GANG PROBLEM: A COMMUNITY APPROACH* 161 (1995); JAMES DIEGO VIGIL, *A RAINBOW OF GANGS: STREET CULTURES IN THE MEGA-CITY* 7 (2002).

149. See HAGEDORN & DAVIS, *supra* note 148; SPERTEL, *supra* note 148; VIGIL, *supra* note 148.

marginalization in order to explain the racial disparity in the data risks neglecting potential illegitimate racial biases that may drive this disparity.

Although not evidence of racial stereotyping per se, there is a clear connection between race and the groups that the DOJ views as the “more prominent criminal street gangs” that operate in the United States.¹⁵⁰ On its website, the DOJ lists seventeen such gangs,¹⁵¹ all of which are predominantly affiliated with a single racial minority group: Black, Latino, or Asian.¹⁵² The only White gangs that appear on the DOJ website are motorcycle outlaw gangs and White supremacist prison gangs.¹⁵³

The analysis below discusses two potential systemic biases that may drive the high representation of racial minorities in RICO gang prosecutions. First, as discussed in Subpart A, cultural stereotypes have created racially slanted conceptions of the term “gang,” which are fused with violent images of racial minorities. These stereotypes make law enforcement officers and prosecutors more prone to assume that crimes committed by groups of racial minorities are gang-related, whereas crimes committed by groups of nonimmigrant White individuals are not gang related. Second, as discussed in Subpart B, recent partnerships between immigration and antigang law enforcement units have resulted in RICO gang crackdowns that target racial minority groups exclusively. These practices not only shield nonimmigrant White populations from suspicion of gang involvement, they also jeopardize the constitutional rights of racial minorities. These points question whether the labeling of criminal street and prison gangs for RICO purposes is a racially unbiased process.

A. Racial Stereotypes and Gang Conceptualizations

Cultural stereotypes influence how society constructs crime and perceives criminal offenders. The word “mafia,” for instance, engenders particular images of Italian Americans that are perpetuated by the media.¹⁵⁴ The well-known television show *The Sopranos* and popular movies

150. *Street Gangs*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/criminal/ocgs/gangs/street.html> (last visited Apr. 1, 2012).

151. *Id.*

152. *Id.* These seventeen gangs are the 18th Street Gang, Almighty Latin King and Queen Nation, Asian Boyz, Black Peace Stone Nation, Bloods, Crips, Florencia 13, Fresno Bulldogs, Gangster Disciples, Latin Counts, Latin Disciples, Mara Salvatrucha (MS-13), Surenos and Nortenos, Tango Blast, Tiny Rascal Gangsters, United Blood Nation, and Vince Lord Nation.

153. *About Violent Gangs*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/criminal/ocgs/gangs/> (last visited Apr. 17, 2012).

154. JERRIE MANGIONE & BEN MORREALE, *LA STORIA* xvii (1993) (“The story of Italians and their American offspring must of course include the relatively few (nearly all of them American-born) whose criminality encouraged Hollywood, ambitious politicians, and the national media to exploit the dramatic nuances of the term “mafia,” engendering a

like *The Godfather* feed off of these cultural stereotypes that equate Italian Americans with mobsters, buffoons, and hotheads.¹⁵⁵

Similarly, American culture and media have disseminated damaging stereotypes of racial minorities as gang members to such an extent that perceptions of gangs and gang activity cannot be disassociated from these racial stereotypes.¹⁵⁶ Latinos, for instance, have been consistently represented within American popular culture as “foreigners, outsiders, or immigrants.”¹⁵⁷ Perhaps the most common representation of Latino youth in popular culture today is as a gang member.¹⁵⁸ Media and film coverage of gangsta rap in the late 1980s and early 1990s also gave rise to the association between gang violence and racial minorities.¹⁵⁹ Gangsta rap was an important outlet for young artists to communicate their daily struggles with racism and poverty.¹⁶⁰ However, the explicit lyrics of gangsta rap and the consumer demand for sensationalized racial violence¹⁶¹ have popularized stereotypes of racial minorities—especially young Black males—as violent gangsters.¹⁶²

stereotype that slanders the great majority of Italian Americans. This, too, is a feature of Americanization.”).

155. See, e.g., *id.*

156. See Howell, *supra* note 11, at 42.

157. Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, in CRITICAL RACE THEORY: THE CUTTING EDGE 204, 207 (Richard Delgado & Jean Stefancic eds., 2d ed. 2007).

158. Mary Romero, *State Violence and the Social and Legal Construction of Latino Criminality: From El Bandido to Gang Member*, 78 DENV. U. L. REV. 1081, 1095 (2001). See also 1 ENCYCLOPEDIA OF LATINO POPULAR CULTURE 298 (Cordelia Candelaria et al. eds., 2004) (“One of the most common stereotypes of Latino youth in contemporary twenty-first-century popular culture is that of gang members. Along with the conventional stereotypes of the Latin lover from the early decades of motion pictures and of the Mexican maid from the closing decades of the twentieth century, the sinister image of the gang member in baggy pants, knotted head scarf, and tattoos has appeared regularly in movies and television programming and contributed to general public perceptions of Latinos.”); Lee, *supra* note 157, at 207 (“The Latino-as-criminal stereotype often affects young male Latinos who are assumed to be gang members, particularly if they live in a low-income high-crime neighborhood and wear baggy pants and T-shirts.”).

159. See GREG DIMITRIADIS, PERFORMING IDENTITY/PERFORMING CULTURE 99 (2009) (discussing the representations of African American youth as “nihilistic” in media and film spawned from the rise of gangsta rap).

160. See JOHN HAGEDORN, A WORLD OF GANGS: ARMED YOUNG MEN AND GANGSTA CULTURE 97 (2008).

161. Lyddane, *supra* note 62, at 2 (“The news media and entertainment industry have sensationalized gang crimes and the gang lifestyle to the point that it has become part of mainstream America.”).

162. See ANTHONY KWAME HARRISON, HIP HOP UNDERGROUND: THE INTEGRITY AND ETHICS OF RACIAL IDENTIFICATION 29 (2009) (“Music Industry rap flourished through the proliferation of sensationalized images of black violent criminality, unbridled sexual potency, and conspicuous consumption, in both content and style”); TORRIANO BERRY & VENISE T. BERRY, THE 50 MOST INFLUENTIAL BLACK FILMS: A CELEBRATION OF AFRICAN-AMERICAN TALENT, DETERMINATION, AND CREATIVITY 214 (2001) (“Rap music and the hip-hop culture

Cultural stereotypes not only shape how the general public views crime, but may also influence the perceptions and behaviors of police officers and prosecutors. Gang stereotypes within the police and prosecutorial realms can have especially damaging consequences for racial minorities. The harmful process begins at the level of law enforcement, where racially slanted gang stereotypes can shape how police departments perceive and report crimes.¹⁶³ Gang stereotypes may drive some officers to categorize crimes committed by groups of racial minorities as gang crimes, even if the suspects have no ties to gangs or gang members. One could hypothesize that police officers are more prone to make these erroneous assumptions when responding to crime within neighborhoods that have predominantly racial minority populations and reputations of gang activity. The harmful process may then continue to the prosecution stage, where racial stereotypes of gang crime may shape prosecutors' decisions to categorize certain groups of offenders as gangs and bring gang-related charges, including RICO charges.¹⁶⁴

The data suggest that gang stereotypes may disadvantage racial minorities in two ways. First, gang stereotypes can reify the specific criminal groups that law enforcement and prosecutors perceive as gangs.¹⁶⁵ Put another way, racially slanted gang stereotypes may bring specific gangs that are commonly associated with racial minorities to the forefront of police and prosecutors' radars. Within the sample, factions of the Bloods, the Crips, MS-13, Latin Kings, and the Mexican Mafia were strongly represented.¹⁶⁶ These gangs are comprised of racial minorities and operate mostly in neighborhoods with high racial minority populations.

raised concerns over violent and negative images of black men and women, as gangsta' and gang-banger music videos filled the screens."); Bell Hooks, *Misogyny, Gangsta Rap, and the Piano*, Z MAGAZINE (March 4, 1994, 7:50 AM), <http://race.eserver.org/misogyny.html> (last visited Apr. 1, 2012) ("[A] central motivation for highlighting gangsta rap continues to be the sensationalist drama of demonizing Black youth culture in general and the contributions of young Black men in particular."). Scholars have debated whether these images perpetuated by rap music reflect the true lives of African Americans in poor urban neighborhoods. See generally TRICIA ROSE, *THE HIP HOP WARS: WHAT WE TALK ABOUT WHEN WE TALK ABOUT HIP HOP AND WHY IT MATTERS* (2000) (outlining the contending positions over whether rap music portrays negative images of African Americans and accurately reflects life in poor black urban neighborhoods).

163. ALBERT R. ROBERTS, *CRITICAL ISSUES IN CRIME AND JUSTICE* 35 (2nd ed. 2003) ("Unfortunately, the response of law enforcement officers (LEOs) to gang activity has not been carefully planned. Rather, it has been for the most part dictated by economic needs, media coverage, and the prevailing political atmosphere.").

164. Some scholars have criticized prosecutorial discretion as a factor underlying the biased application of RICO. See Dombrink & Meeker, *supra* note 112, at 638-39.

165. Cf. PICKERING, *supra* note 19, at 47 (stating that stereotypes can "operate as a means of evaluatively placing, and attempting to fix in place, other people or cultures from a particular and privileged perspective").

166. See "Finding 4," *supra* Part III.B.

One possible interpretation of this finding is that subsets of these major gangs comprise a large proportion of gangs nationwide. This interpretation would undermine the role of systemic racial bias in RICO gang prosecutions. The dearth of reliable statistics on the quantity of gangs and wide regional variability in gang activity make it impossible to determine whether this is interpretation is correct. Another potential explanation is that law enforcement and prosecutors may focus antigang efforts on these notorious gangs as a consequence of the gang reification process described in the previous paragraph. Public fear spawned by popularized images of these major gangs by the media, such as in the television show *Gangland*, creates an incentive for law enforcement to focus antigang efforts on these major gangs in order to sustain or to improve law enforcement's public image. As racial stereotypes drive the enforcement practices of law enforcement and prosecutors, White criminal groups and neighborhoods with predominantly nonimmigrant White populations are shielded from being subjected to antigang operations.

Second, racially slanted gang stereotypes can disadvantage racial minorities in RICO prosecution contexts by making police and prosecutors more prone to assume that crimes committed by relatively small, unstructured groups of racial minorities are gang related. To demonstrate this point more concretely, consider the following three cases:

On March 9, 2011, police officers arrested five White adults at a North Carolina residence for running a methamphetamine lab.¹⁶⁷ The officers found a .38 caliber revolver and drug paraphernalia at the residence. The five offenders were charged with various felonies, but not labelled as a "gang" or charged under RICO for participating in the meth ring.

In March 2010, officers arrested twelve White men who were involved in an interstate theft and drug ring.¹⁶⁸ For months, the men stole vehicles and prescription drugs from Florida and later sold stolen goods in Alabama. The men were charged with multiple felonies for fraud and narcotics offenses, but they were not labeled as a gang or charged under RICO for running a gang enterprise.¹⁶⁹

In July 2002, five Black men from Dorchester, Massachusetts, were indicted under RICO and charged with various felonies for violence and narcotics.¹⁷⁰ The indictment alleged that the suspects were part of a criminal

167. Alison Hill, *5 Arrested in "Shake and Bake" Meth Lab*, WBTV.COM (Mar. 9, 2011, 11:54 AM), <http://www.wbtv.com/story/14217641/5-arrested?redirected=true>.

168. Lisa A. Davis, *12 Indicted in Interstate Theft, Drug Ring*, THE PASCO TRIBUNE (Apr. 1, 2010), <http://www2.tbo.com/content/2010/apr/01/12-indicted-interstate-theft-drug-ring/>.

169. See generally Indictment, *United States v. Godwin* (M.D. Fl. 2011) (No. 3:10-cr-00276-MMH-TEM) (copy of indictment on file with author).

170. Maria Cramer & Brian R. Ballou, *Suspect in 4 Killings was Acquitted on Racketeering Charges*, BOSTON GLOBE, December 9, 2010, at 1.

street gang called the Esmond Street Crew, which aimed to sell crack cocaine and marijuana. The indictment also alleged that the suspects engaged in violent disputes with a rival neighboring gang.

All of the criminal groups in the cases above qualify as RICO enterprises and meet the federal statutory definition of criminal street gang.¹⁷¹ But the only group that was deemed a criminal street gang and charged under RICO was the sole group comprised of racial minorities. In that case, there was strong disagreement over whether a criminal street gang existed, which cast doubt on the appropriateness of the RICO charge. The defendants alleged that there was no criminal enterprise and that the government “inappropriately strung a series of acts committed at different times, by different persons, for different motives, all to the detriment of the defendants.”¹⁷² One defendant’s attorney stated that “[n]obody ever called them Esmond Street Crew until the federal government decided that would be a nice thing to call them.”¹⁷³ The lack of an existing criminal enterprise was supported by prior findings by a trial judge in *United States v. Modlin*, in which three of the same five defendants were charged for conspiracy to distribute cocaine.¹⁷⁴ In the sentencing hearing, the judge concluded that the Esmond Street Crew was not a criminal enterprise, but rather a group of people in the same locality who associated with one another and dealt drugs independently.¹⁷⁵

Another RICO case in the sample demonstrates how easy it is for the government to construct particular groups of racial minorities who are involved in criminality as criminal street gangs for RICO purposes. In 2003, a federal grand jury returned RICO charges against nine men who were part of an alleged gang called Pitch Dark Family (“PDF”) in Vallejo,

171. In the cases, the prosecution could have argued that each defendant was affiliated with or a member of a criminal group, that each defendant engaged in a pattern of racketeering activity through multiple acts of violence or drug crimes, and that each predicate crime had a de minimis affect on interstate commerce. See 18 U.S.C. § 1962 (2006). Moreover, in the cases above, the prosecution could have argued that each group was comprised of five or more members, that each group had the commission of criminal offenses as one of its primary purposes, that those offenses were committed within the past five years, and that each of those activities affect interstate or foreign commerce. See 18 U.S.C. § 521(a) (2002).

172. See Memorandum and Order Re: Severance/Bifurcation of Guilt and Punishment at 2-3, *United States v. Green*, No. 02-10301-NG (D. Mass. July 7, 2004) (copy of memorandum on file with author).

173. David S. Bernstein, *Fedz in the Hood*, June 25 – July 1, 2004 THE PORTLAND PHOENIX 2 (2004), available at http://www.portlandphoenix.com/features/other_stories/multi2/documents/03938891.asp (quoting Benjamin Entine).

174. Judgment, *United States v. Modlin*, CR01-10314 (D. Mass. May 21, 2003) (copy of judgment on file with author).

175. Clerk’s Notes, *United States v. Heinrich* (D. Mass 2003) (copy of notes for sentencing hearing on file with author).

California.¹⁷⁶ Members of the group also wrote and performed rap music under the same name.¹⁷⁷ One of the most contested issues at trial was whether PDF was a criminal enterprise or a rap group that happened to contain some members involved in criminality.¹⁷⁸

The government used two sources to establish that PDF was a street gang. First, it relied upon the testimony of a number of witnesses, each of whom had criminal histories and were testifying in return for leniency in a pending case.¹⁷⁹ Second, the government relied upon expert testimony from a previous gang intelligence officer of the Vallejo Police Department. The former officer testified that PDF was a street gang based on "street knowledge" that he purportedly gained from working the graveyard shift for multiple years.¹⁸⁰ The former officer did not write down a single piece of information prior to trial and could not remember the name of a single source from which he gained his street knowledge.¹⁸¹ He defined a street gang as "three or more people who were bound together by some social need and who were involved in committing criminal acts that generally put safety of the citizenry at risk."¹⁸² The former officer testified that the Pitch Dark Family met this definition based on his street knowledge and from a few articles of clothing with PDF logos, a piece of graffiti that displayed the nicknames of PDF members, and a letter that referred to the PDF as an entity.¹⁸³

The defense argued unsuccessfully that PDF was not a criminal street gang, but rather a group of rappers who were close friends and grew up together.¹⁸⁴ The defense conceded that some of the members sold drugs for profit, but maintained that these criminal acts had nothing to do with the group itself.¹⁸⁵ The defense called attention to the fact that the government's own witnesses admitted that each defendant who sold drugs kept his own profits and did not contribute any of those profits to the PDF as an organization.¹⁸⁶ There was no evidence of existing organizational rules or a defined structure.¹⁸⁷ Moreover, the gang was not listed within the California gang database and police officers did not refer to

176. Charlie Goodyear, *9 Arrested on Gang Charges; 8 Suspected in Vallejo Slayings*, SAN FRANCISCO CHRONICLE, Feb. 22, 2003, at A15 (copy of indictment on file with author).

177. Brief of Appellants, *United States v. Walker*, Nos. 06-10643, 06-10653 (Ninth Cir. July 7, 2008), 2008 WL 3285593, at *2.

178. *Id.*

179. *See, e.g., id.* at *13 n.3.

180. *Id.* at *49. *See also id.* at *6-*9.

181. *Id.* at *8-*9.

182. *Id.* at *7.

183. *Id.* at *9-*10.

184. *Id.* at *34.

185. *Id.*

186. *See id.* at *14.

187. *See id.*

the criminal group as “Pitch Dark Family” or “PDF” within any of the recorded documentation after arresting the defendants.¹⁸⁸

Another case from the sample that shows how easy it is for the government to construct groups of racial minority offenders as gangs for RICO purposes involves the alleged gang called “Chain Gang” or “Wolf Pack.” In that case, twenty-four members of the alleged criminal street gang were indicted under RICO for a variety of crimes in the Rochester area, including violence and the sale of crack cocaine.¹⁸⁹ The defendants argued that there was no such organization called the Chain Gang or the Wolf Pack.¹⁹⁰ After the defendants were arrested on RICO charges, local community activists held a neighborhood meeting to garner support for the arrestees and challenge the basis of the racketeering charges.¹⁹¹ One of the arrestees, who worked as a cook for the University of Rochester, did not deny her criminal transgressions, but stated: “We are not an organization, we did not organize anything. We are friends who have known each other for years.”¹⁹² The arrestee’s mother, Gwendolyn, told the media that the name “Wolf Pack” was a “pet-name” that she had given to a group of neighborhood kids that she used to cook for because they were going hungry.¹⁹³ One day, Gwendolyn’s son said to her, “Momma, those kids are hanging around like a pack of wolves, waiting to eat.”¹⁹⁴ When Gwendolyn finished cooking, she said to her son, “Call in the wolf pack.”¹⁹⁵ From that day on, a relationship grew between her family and the neighborhood youth, and she continued to fondly call them the “Wolf Pack.”¹⁹⁶

In addition to the Esmond Street Crew, the Pitch Dark Family, and the Chain Gang/Wolf Pack cases, there were thirty-nine other cases¹⁹⁷ in the sample involving relatively small and local criminal groups that the government chose to prosecute as criminal street gangs. One interpretation of this finding is that the term “gang” has taken on a racialized meaning, independent of its formal definition under the law, which increases the likelihood that crimes committed by small groups of racial minorities will be labeled as gang-related crimes. In fairness, the government is not the

188. *Id.* at *3-4.

189. See Press Release, U.S. Dep’t of Justice, Authorities Target City Gang Under Federal RICO Statute (Apr. 28, 2009), available at <http://www.atf.gov/press/releases/2009/04/042809-ny-authorities-target-city-gang.html>.

190. Dave McCleary, *Members of the So-Called “Wolf Pack” Gang Proclaiming Innocence*, MINORITY REPORTER (Jun 5, 2009), <http://www.minorityreporter.net/fullstory.php?id=234>.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. See Table 5, *supra* Part III.B.

only player involved in this labeling process: in some cases, racial minorities may internalize gang stereotypes and identify as gang members when they are involved in criminal groups that are comprised mostly of racial minorities.¹⁹⁸ Regardless, the Esmond Street Crew, the Pitch Dark Family, and the Chain Gang/Wolf Pack cases show that law enforcement and prosecutors are sometimes the primary players in this labeling process, and that racial stereotypes enable these players to use race as a proxy in order to construct crime, perhaps erroneously, as gang-related. The low burden of proof that the government must meet to establish a RICO criminal enterprise facilitates these racially biased constructions of group criminality. The incredible difficulty of raising a successful selective prosecution claim under the U.S. Constitution makes it even more difficult to challenge these racially biased constructions of gang crime.¹⁹⁹

The study findings involving the way in which RICO is being applied to White-affiliated gangs further supports the notion that racially slanted assumptions guide the government's construction of gang phenomena. As stated previously in Part III.B, the sample of RICO prosecutions against White-affiliated gangs generally fell into three categories: motorcycle outlaw gangs, White supremacist prison gangs, and international organized crime groups. Only one case in the sample, which will be discussed later, fell outside of these categories.²⁰⁰

198. In making this argument, I am utilizing concepts from "labeling theory" developed by Howard Becker in his popular work *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* (1963). Becker viewed deviance as a social creation, not an objective phenomenon. *Id.* at 8. In his view, people suffered a drastic change in their public identities as a consequence of being labeled as deviant. People assumed a "master status" of the deviant, emanating that deviancy became the main feature of their identities. *Id.* at 32. Becker contended that because people's self-conceptions depend on the recognition of others, individuals who were labeled as deviant begin to identify and act in accordance with their master status. *Id.* at 34. As individuals became marginalized from conventional society, they increased their involvement in organized groups comprised of others who were similarly labeled as deviant. *Id.* at 37-38. Deviant subcultures affirmed the identities of deviant members, and rationalized and justified the activities of their members. *Id.* at 39.

199. See Bonita R. Gardner, *Separate and Unequal: Federal Tough-On-Guns Program Targets Minority Communities for Selective Enforcement*, 12 MICH. J. RACE & L. 305, 319 (2007) ("Selective prosecution claims are very difficult to prove, as there is rarely proof that a prosecutor sought prosecution because of a defendant's race. Moreover, the tests for proving discriminatory impact and purpose are applied under a strenuous standard of review. Prosecutors have broad discretion in making charging decisions and those decisions are rarely disturbed."). In making this point, I am not discounting the possibility of raising a federal equal protection violation. In fact, scholars have argued that state RICO laws violate state equal protection guarantees. See Janice A. Petrella, *Equal Protection – What is in a Name? Sign? Symbol? Gang Members and RICO Considered*, 34 RUTGERS L.J. 1237 (2003).

200. See Indictment, *United States v. Godwin*, *supra* note 169. In *Godwin*, six individuals were indicted for allegedly being part of a criminal street gang called "the Guardians." *Id.* at ¶ 1. The alleged gang committed violent home invasions, armed bank robberies, and dealt cocaine and prescription drugs. *Id.* at ¶ 2. See also Dana Treen, *Feds: Jacksonville Gang Traded in Violence, Intimidation, Drugs*, FLORIDA TIMES-UNION (Apr. 11, 2011, 5:12 PM),

One important feature of this categorization scheme is that it includes White-affiliated criminal groups that are isolated and marginalized from mainstream nonimmigrant White communities. This characteristic differs fundamentally from the prosecuted racial minority gangs, which often have strong central presences in neighborhoods populated predominantly by racial minorities. For instance, members of motorcycle outlaw gangs and White supremacist prison gangs fit visual prototypes that distinguish them from mainstream White communities. Motorcycle outlaw gang members often ride motorcycles, wear vests adorned with club-specific patches, and have club tattoos.²⁰¹ White supremacist prison gang members are often tattooed heavily with symbols (such as swastikas and lightning bolts) that signify White racial superiority.²⁰² These criminal groups are also distanced from nonimmigrant White communities based on their ideologies. Motorcycle outlaw gangs were initially ostracized from mainstream motorcycle cultures, and later deliberately assumed identities as social outcasts.²⁰³ American society has marginalized White supremacist views as “extreme” and “radical,” which could be interpreted as an attempt for American society to distance itself from its history of institutionalized racial subordination through slavery and segregation.²⁰⁴

<http://jacksonville.com/news/crime/2011-04-20/story/feds-jacksonville-gang-traded-violence-intimidation-drugs>.

201. LYMAN & POTTER, *supra* note 98, at 282-83 (“Outlaw motorcycle gangs have become easily identifiable because of their colors or membership jacket. . . . In addition . . . his motorcycle is a great source of pride and significance.”); PATRICK MORLEY, REPORT WRITING FOR CRIMINAL JUSTICE PROFESSIONALS 196 (2008) (“A motorcycle gang member will not attempt to hide his club membership There will be obvious gang or club markings, club symbols and patches, belt buckles, as well as a club tattoo, if he has been in the club or gang for a period of time.”).

202. See T.J. LEYDEN & M. BRIDGET COOK, *SKINHEAD CONFESSIONS: FROM HATE TO HOPE* 47-48 (2008) (describing the swastika and lightning bolt tattoos as common symbols of white power and racism). For a database of extremist symbols and their meanings, see *A Visual Database of Extremist Symbols, Logos, and Tattoos*, AMERICAN DEFAMATION LEAGUE (2005), http://www.adl.org/hate_symbols/default_graphics.asp (last visited Apr. 1, 2012).

203. MARSHALL B. CLINARD & ROBERT F. MEIER, *SOCIOLOGY OF DEVIANT BEHAVIOR* 14 (14th ed. 2011) (“These bikers live hedonistic lives and often reinforce their image of themselves as social outcasts by engaging in outrageous behavior for the benefit of onlookers.”); STEPHEN SCHNEIDER, *ICED: THE STORY OF ORGANIZED CRIME IN CANADA* 379-80 (2009) (“Reveling in their image as social outcasts, rebel bikers adopted the ‘one-percenter’ moniker to distinguish themselves from the majority of motorcycle riders and, eventually, the rest of society. This label would signal the start of a concerted effort by ‘outlaw bikers’ to cultivate a lifestyle and image that would give rise to a subculture dedicated to challenging the accepted norms and values of mainstream American society.”).

204. Charles W. Mills, *White Supremacy*, in 269 *A COMPANION TO AFRICAN-AMERICAN PHILOSOPHY* (Tommy L. Lott & John P. Pittman eds., 2006) (“Since official segregation and political exclusion of this sort no longer exist in the United States, the term [“White supremacy”] has now disappeared from mainstream white American discourse, except to refer to the unhappy past or, in the purely ideological sense, to the beliefs of radical white separatist groups (e.g., the Ku Klux Klan, Aryan Nations).”).

White supremacist prison gangs are further separated from mainstream society because they operate mostly inside the prison walls.²⁰⁵

Language from some of the RICO indictments in the sample illustrates how the government is using concepts of ethnicity in order to distance the third category of White-affiliated gangs—international organized crime groups—from nonimmigrant White communities. In 2010, for instance, a federal grand jury indicted seventy members of Armenian Power, a Los Angeles gang comprised mostly of individuals of Armenian descent. Since the beginning of the Twentieth Century, U.S. courts have treated Armenians as “White” under the law.²⁰⁶ Despite this fact, the RICO indictment does not once describe Armenian Power or its members as White. Conversely, the indictment labels the gang as an ethnic street gang.²⁰⁷ The indictment emphasizes the gang’s non-American ties, describing it as an “international organized crime group”²⁰⁸ consisting “primarily of individuals of Armenian descent, as well as of other countries within the former Soviet bloc.”²⁰⁹ The gang members’ preferences for speaking in Russian and Armenian are discussed which, it is stated, further distances the gang from mainstream English-speaking society.²¹⁰ These statements indicate that the government did not view Armenian Power as a group of criminally involved White Americans.

The study findings therefore suggest that the White-affiliated gangs being prosecuted under RICO fit a very narrow prototype that does not apply to many criminal groups comprised of nonimmigrant White offenders. This categorization scheme privileges mainstream nonimmigrant White criminal offenders from being stigmatized as gang members by reifying already marginalized White-affiliated groups (outlaw motorcycle gangs, White supremacist prison gangs, and international organized crime groups) as “gangs.” Furthermore, the government may rely upon this categorization

205. *A Life of Service: An Interview with Mia Yamamoto*, 13 ASIAN PAC. AM. L.J. 1, 8 (2007) (“[A] prison gang and prison gangs are organized, in many ways, around the same societal dynamic that creates minority groups on the outside, which is their exclusion from the mainstream of, in that case, prison society . . .”).

206. See e.g., *In re Halladjian*, 174 F.834 (C.C.D. Mass. 1909) (describing an Armenian born in Asiatic Turkey as a “free white-person” within the meaning of federal law and thus eligible for naturalization).

207. Grand Jury Indictment at 11, *United States v. Darbinyan*, No. CR-11-0072 (C.D. Cal. Jan. 26, 2011) (“Armenian Power was formed in the East Hollywood district of Los Angeles as a street gang whose membership consisted primarily of individuals of Armenian descent, as well as of other countries within the former Soviet bloc, in response to other ethnic street gangs in the area.”).

208. *Id.* at 10.

209. *Id.* at 11.

210. *Id.* at 15 (“Particularly through its leadership, Armenian Power maintains ties to Russia and Armenia, to which most members and associates generally retain strong ethnic and cultural ties. Indeed, although most are fluent in English, Armenian Power members and associates generally prefer to discuss their criminal activities in the Armenian and Russian languages in order to conceal their discussions to the extent possible.”).

scheme to generate statistics that create a perception that the government recognizes and takes the problem of White gang crime seriously. This perception may be distorted, and even false, if the government does not label White criminal groups as gangs simply because those groups fall outside of this narrow prototype.

The privilege provided by this categorization scheme to mainstream nonimmigrant White communities is not necessarily beneficial; it may even be harmful. The single case that fell outside of the categorization scheme demonstrates that White gang problems can pose serious dangers to communities, including nonimmigrant White neighborhoods. The case involved a group of six males that called themselves “The Guardians.”²¹¹ Prior to being indicted under RICO, the gang committed a number of violent crimes in Florida, including brutal home invasions and armed bank robberies, and also dealt prescription drugs, steroids, and cocaine.²¹² The gang targeted “high dollar” homes to steal jewelry, firearms, and credit cards.²¹³ In committing these crimes, gang members pistol-whipped and tied up their victims. One victim was so severely injured that he suffered a skull fracture and spent several days on life support.²¹⁴ If the government had not conceptualized the group as a gang, then the government would have been unable to execute gang-specific interventions to curb the criminal group’s violent activity.

Criminological research suggests that the RICO white-gang prototype is underinclusive of White gang phenomena. As explained previously, Esbensen and Winfree’s comprehensive multisite study found that contrary to popular perception, one in four gang members identified as White.²¹⁵ The subjects of the study were eighth-grade students. Since motorcycle gangs have adult members, one can infer that the White gang members in the study were not part of motorcycle gangs. Moreover, Esbensen and Winfree deliberately categorized the ethnicity of gang members as “Other” if they identified as Italian, German, Portuguese, etc.²¹⁶ As a result, the gang members that were categorized as White were not part of international organized crime groups. The only category left is White supremacist prison gangs. Since the students were not incarcerated, they also do not fit this prototype. There is no mention by the investigators that all of the White gang members in the study were part of White supremacist gangs. One could surmise, however, that the investigators would have explicitly mentioned such a strong finding if this were the case. Thus,

211. Dana Treen, *Feds: Jacksonville Gang Traded in Violence, Intimidation, Drugs*, JACKSONVILLE.COM (Apr. 20, 2011), <http://m.jacksonville.com/news/crime/2011-04-20/story/feds-jacksonville-gang-traded-violence-intimidation-drugs>.

212. *Id.*

213. *Id.*

214. *Id.*

215. Esbensen & Winfree, *supra* note 21, at 517.

216. *Id.*

in reifying "White gang problems" as involving international organized crime groups, motorcycle outlaw gangs, and White supremacist prison gangs, the categorization scheme provides a framework to rationalize governmental neglect of White gang problems, especially in nonimmigrant White communities. In facilitating this neglect, the limited prototype prevents law enforcement and community advocacy groups from executing interventions to combat White gang crime.

B. The Convergence of Immigration and Gang Enforcement

As argued previously, the motivation to dismantle the Mafia through RICO was at least partially rooted in discriminatory conceptions of migrant criminality involving Italian and Sicilian immigrants. History seems to be repeating itself in the context of RICO's application to street and prison gangs. Although immigrant-based gangs are not a new phenomenon,²¹⁷ recent perceptions of criminality involving migrants and immigrants from Mexico, Central America, and South America have spawned a new term: the "transnational gang."²¹⁸ Based on stereotypes that label migrants and immigrants as criminals, these concerns are influenced by a strong wave of anti-immigrant sentiment over the past two decades.²¹⁹

New fears of migrant criminality have inspired a troublesome partnership between federal, state, and local law enforcement agencies and Immigration and Customs Enforcement (ICE) called Operation Community Shield (OCS).²²⁰ Created in February, 2005, OCS combines the resources of ICE and law enforcement agencies in order to combat

217. JESSICA M. VAUGHAN & JOHN D. FEERE, CENTER OF IMMIGRATION STUDIES, TAKING BACK THE STREETS: ICE AND LOCAL LAW ENFORCEMENT TARGET IMMIGRANT GANGS 3 (2008), available at <http://www.cis.org/articles/2008/back1208.pdf>. See also, NATIONAL DRUG INTELLIGENCE CENTER, ATTORNEY GEN'S REPORT TO CONGRESS ON THE GROWTH OF VIOLENT STREET GANGS IN SUBURBAN AREAS (April 2008), available at <http://www.justice.gov/ndic/pubs27/27612/dept.htm> (quoting that the Department of Justice "has significantly expanded efforts to attack the links that connect transnational gang members across the region, especially in Mexico and Central America").

218. See *supra* note 31.

219. See Jennifer M. Chacon, *Whose Community Shield? Examining the Removal of the "Criminal Street Gang" Member*, 2007 U. CHI. LEGAL F. 317, 321 (2007) [hereinafter Chacon, *Whose Community Shield?*] ("Almost two decades ago, Congress made important changes to federal immigration law by expanding the number of offenses that would render a noncitizen eligible for removal."); *id.* at 324 ("With the rapidly increasing size of the immigrant population—which coincided with the increasing criminalization of that population—came a public outcry against the perceived dangers of 'criminal aliens.'").

220. See *Gangs and Crime in Latin America*, *supra* note 32, at 3 (statement of Rep. Dan Burton, Chairman, Subcomm. W. Hemisphere).

criminal street gang violence and illegal immigration.²²¹ OCS was originally designed to target members and affiliates of Mara Salvatrucha (MS-13), which is comprised mostly of individuals of El Salvadorian descent.²²² Three months after OCS began, ICE expanded the program's scope to include all alleged transnational street gang members and their affiliates.²²³

Since its inception, OCS has been used to conduct sweeping arrests of alleged street gang members. In March 2011, for instance, OCS arrested 678 alleged gang members and affiliates from 133 Mexican-affiliated gangs during a single initiative called Project Southern Tempest.²²⁴ OCS operations have already resulted in almost 24,000 arrests for crimes and immigration violations.²²⁵ Based on available evidence, one can infer that most of the operations involved individuals from Mexico, Central and South America, and the Caribbean.²²⁶ RICO is one tool that empowers law and immigration enforcement to conduct sweeping arrests of alleged gang members and affiliates during OCS operations. On October 16, 2008, for example, an ICE-led investigation resulted in a fifty-one-count indictment against thirty-one members of MS-13, of which nineteen faced charges under federal RICO for violent crimes.²²⁷

Since illegal immigration in the United States is a phenomenon that is closely associated with racial minorities (especially Latinos), non-White

221. See News Release, U.S. Immigration and Customs Enforcement, 321 Arrested in ICE-Led Multi-Agency Operation Targeting Gang Members (Aug. 7, 2008), available at <http://www.ice.gov/news/releases/0808/080807miami.htm>.

222. HERBERT C. COVEY, STREET GANGS THROUGHOUT THE WORLD 64 (2010) ("Predominantly El Salvadorian, the MS-13 early membership is reported to be from Salvadorian soldiers escaping the civil war who brought combat experience with them to Los Angeles"). Chacon argues that MS-13 formed after El Salvadorian soldiers brought back U.S. gang culture to El Salvador after being deported from the United States. Chacon, *Whose Community Shield?*, *supra* note 219, at 327-29. In her view, "MS-13 is more a U.S. phenomenon than a Central American Import." *Id.* at 329.

223. See *Operation Community Shield/Transnational Gangs*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <http://www.ice.gov/community-shield/> (last visited Apr. 1, 2012).

224. See News Release, U.S. Immigration and Customs Enforcement, 679 Gang members and Associates Arrested During Project Southern Tempest: ICE Makes Arrest of 20,000th Gang Member (Mar. 1, 2011), available at <http://www.ice.gov/news/releases/1103/110301washingtondc.htm>.

225. See *supra* note 174. According to ICE, 12,100 of these arrests involved crimes and 11,700 of these arrests involved administrative immigration offenses. *Id.*

226. Vaughan and Feere, for instance, compiled data of the nationality of OCS arrestees between 2005 and 2007. The data comprised 6,559 arrests from fifty-three different nationalities. Of the arrestees, 59% were from Mexico, 17% El Salvador, 9% United States, 5% Honduras, 3% Guatemala, 1% Jamaica, 2% Unknown, and 4% Other. See VAUGHAN & FEERE, *supra* note 217, at 3.

227. See *Priorities Enforcing Immigration Law: Hearing Before the H. Appropriations Comm., Subcomm. on Homeland Sec.*, 111th Cong. 11 (2009) (statement of Marcy M. Foreman, Dir., Office of Investigations, U.S. Immigration and Customs Enforcement), available at www.ice.gov/doclib/news/library/speeches/forman_04_02_09.doc.

populations are overwhelmingly targeted by OCS operations.²²⁸ The practice of combining immigration and antigang law enforcement resources into partnerships such as OCS shields gangs without transnational ties, such as White gangs in nonimmigrant White neighborhoods, from being targeted by those partnerships. Consequently, when RICO is used as a tool to prosecute the targets of OCS operations, it is highly likely that the federal statute will be applied to prosecute racial minorities.

Another very disturbing aspect of OCS operations is that law and immigration enforcement officers are using vague and subjective standards during these operations to distinguish gang members/affiliates from criminals who are not affiliated with gangs, and gang members/affiliates from innocent people.²²⁹ The dangers that these lax standards pose to racial minorities are exacerbated by the recent merging of the civil and criminal immigration frameworks within the United States.²³⁰ Federal criminal procedure affords a variety of protections to citizen defendants that are not available to non-citizens.²³¹ Since ICE is permitted to use racial identity as a proxy in order to distinguish between noncitizens and citizens (a distinction that is not entirely clear itself),²³² OCS enables law enforcement to circumvent criminal procedural protections by relying upon state and local officials to use their discretion to investigate alleged gang members and affiliates.²³³ The discretion of state and local officials is not constrained by the substantive protections of the criminal law.²³⁴ As a result, law enforcement and ICE may target non-criminally involved racial minorities for immigration violations under the pretext that these individuals are

228. See *supra* note 226.

229. See Nina Bernstein, *Immigrant Workers Caught in a Net Cast for Gangs*, N.Y. TIMES, Nov. 25, 2007, at 41 ("The [Operation Community Shield] crackdown relies heavily on local police forces to identify suspects, often based on loosely defined or subjective criteria."); Jennifer M. Chacon, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1593 (2010) [hereinafter Chacon, *A Diversion*] ("One of the biggest ambiguities about the operation [Operation Community Shield] is that it provides no legal definitions for 'criminal street gangs' or 'associates,' the targets of that operation.").

230. See generally, Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281 (2010) (discussing the increasing intertation of civil and criminal immigration enforcement).

231. Devon W. Carbado & Cheryl I. Harris, *Undocumented Immigration*, 58 UCLA L. REV. 1543, 1545 (2011) (noting that "citizenship affords a set of procedural and constitutional protections in immigration and criminal law enforcement contexts that are unavailable to noncitizens").

232. See *id.* at 1545-46 ("In the context of contemporary immigration enforcement, with respect to Latinos, this proxy function of race blurs the boundary between citizen and noncitizen and further conflates noncitizenship and undocumented status.").

233. Chacon, *Whose Community Shield?*, *supra* note 219, at 332.

234. *Id.*

alleged transnational gang members or affiliates.²³⁵ This risk seems to be borne out in reality, given that a majority of the deportations resulting from OCS operations have been based on immigration violations rather than criminal charges.²³⁶

Cases have already surfaced that illustrate how these partnerships between law and immigration enforcement are operating as legitimized forms of racial profiling. In September 2007, an operation under OCS in Greenport, New York, resulted in the arrests of eleven alleged gang members.²³⁷ Only one of the arrested men had any suspected gang ties.²³⁸ The other ten men, while accused of immigration violations, had no criminal history and were not gang members.²³⁹ Many of those men had reputations within their communities as family men and good workers.²⁴⁰ The mayor denounced the operation, characterizing the “gang issue [as a means of keeping] the White majority scared about the Latino population . . . [allowing ICE] to come in and bust as many people as they want.”²⁴¹

Another lawsuit brought recently against the County of Sonoma, California, further illustrates how law and immigration enforcement partnerships are enabling officers to use gangs as a pretext to target racial minorities.²⁴² The lawsuit challenged the constitutionality of a joint operation between ICE and the Sonoma County sheriff’s antigang unit on the grounds that the operation was racially discriminatory.²⁴³ The plaintiffs argued that law enforcement officers entered neighborhoods with high Latino populations with the alleged goal of targeting undocumented alien gang members.²⁴⁴ The plaintiffs alleged that they were contacted,

235. Chacon, *A Diversion*, *supra* note 229, at 1593-94 (“The lack of legal standards governing the identification of gang members creates a risk of increased racial profiling in law enforcement.”); Abby Sullivan, Note, *On Thin Ice: Cracking Down on the Racial Profiling of Immigrants and Implementing a Compassionate Enforcement Policy*, 6 HASTINGS RACE & POVERTY L.J. 101, 120-21 (2009) (“Because immigration agents are permitted to consider race more liberally than typical law enforcement officers, this blurring of the line between crime control and immigration law enforcement has created an immigration enforcement policy under which the permissibility of the use of race is increasingly vague.”).

236. Sullivan, *supra* note 235, at 121 (“Operation Community Shield creates a loophole under which local law enforcement effectively targets immigrants who have no criminal history and pose no threat to the community [T]he government has deported seventy percent of those removed under Operation Community Shield based on immigration violations alone, without bringing criminal charges.”).

237. *Id.* at 122.

238. Bernstein, *supra* note 229, at 41.

239. *Id.*

240. *Id.*

241. *Id.* (brackets in original).

242. Complaint for Declaratory and Injunctive Relief and Damages, Comm. for Immigrant Rights of Sonoma County v. County of Sonoma (N.D. Cal. 2008) (No. 08-4220) (copy of Complaint on file with author).

243. *Id.* at 6.

244. *Id.*

questioned, searched, detained, and arrested, even though there was no reasonable suspicion that they were illegal immigrants or gang members or were engaging in criminal activity.

One plaintiff, for instance, was pulled over while riding in a car with other Latino occupants.²⁴⁵ The car displayed a "For Sale" sign in the back window.²⁴⁶ The driver was not cited for a traffic infraction, yet the police interrogated him about his gang affiliations.²⁴⁷ The officer then asked the plaintiff whether he was on probation and whether he had any gang affiliations.²⁴⁸ The plaintiff admitted that he was on probation. Although the police had no reasonable suspicion of civil or criminal violations, the plaintiff was forced out of the car, interrogated about his gang affiliations, searched, arrested, and detained solely for his "suspected immigration status."²⁴⁹

Another plaintiff and his fiancée were entering a bakery to purchase a cake when they were stopped by two sheriffs, supposedly because of a crack in the car's windshield.²⁵⁰ The sheriffs then questioned the plaintiff about his immigration status, his tattoos, and whether he was a gang member.²⁵¹ The sheriffs also unlawfully searched his wallet.²⁵² The plaintiff responded that he was not a gang member, but he refused to answer questions about his immigration status.²⁵³ The following month, officers arrested the plaintiff at his job based on his suspected immigration status.²⁵⁴ The sheriffs had no reasonable suspicion that the plaintiff was a noncitizen without authorization to be in the United States.²⁵⁵ The plaintiff had no prior police record other than for driving without a license, and he had never been a gang member.²⁵⁶

The case against the County of Sonoma was eventually settled, so the constitutionality of the joint operation was not litigated.²⁵⁷ The plaintiffs' allegations, however, suggest that race is being used as an illegitimate proxy for criminality and that transnational gang membership is being used as a pretext to target innocent racial minorities, especially Latinos. In legitimizing the use of racial profiling, these operations jeopardize the

245. *Id.* at 10.

246. *Id.* at 10-11.

247. *Id.* at 11.

248. *Id.*

249. *Id.*

250. *Id.* at 12.

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. Settlement Agreement and General Release of Claims, *County of Sonoma* (N.D. Cal. 2008) (copy of Settlement Agreement on file with author).

individual rights and procedural protections of racial minorities and put them at risk of being presumed undocumented noncitizens and/or criminals.

CONCLUSION

In summary, this Article's presentation of new empirical data casts doubt over whether the application of RICO to prosecute gangs is a racially unbiased process. The limitations of the study method indicate a serious need for government agencies, especially the FBI and the Department of Justice, to distribute annual data on the racial demographics of the gangs prosecuted under RICO. In articulating potential biases that may drive RICO gang prosecutions, I recommend for law enforcement and prosecutors to be more transparent when deciding to label (and not to label) particular criminal groups as gangs. I further urge law enforcement and prosecutors to think more critically, reflectively, and carefully about the terms by which they construct crime as gang-related. As the Article has illustrated, the illegitimate use of race as a proxy to construct, and then to prosecute, gang-related crime has destructive consequences for all races, but especially for racial minorities. Clear and enforceable standards must be put into place in order to inhibit the government from using gang prevention as a pretext to engage in invidious practices of racial profiling that erroneously label innocent racial minorities, and racial minority criminal offenders without gang ties, as gang members. Given the harsh consequences of RICO convictions, these new strategies are essential to prevent RICO from operating as a state instrument of racial subordination.

APPENDIX

Appendix Key:

Primary Racial Affiliation of Gang

- A = Asian
- B = Black
- L = Latino
- M = Mixed
- O = Other
- W = White

Category of White-Affiliated Gang

- (IO) = International Organized Crime Group
- (OMG) = Outlaw Motorcycle Gang
- (WSPG) = White Supremacist Prison Gang

RICO GANG PROSECUTIONS 2001–2011

No.	Year	State	Gang Name	Primary Racial Affiliation of Gang	No. Indicted Under RICO RICO
1	2011	NY	Bronx Trinitarios Gang (BTG)	L	41
2	2011	TX	Texas Syndicate	L	17
3	2011	MD	Dead Man Incorporated	W (WSPG)	22
4	2011	DC	MS-13	L	6
5	2011	IN	Imperial Gangsters	L	11
6	2011	IN	Almighty Latin King and Queen Nation (ALKQN)	L	18
7	2011	TX	Texas Mexican Mafia	L	15
8	2011	NC	Almighty Latin King and Queen Nation (ALKQN)	L	13
9	2011	TX	Texas Syndicate	L	11
10	2011	MD	Southside Brims Bloods	B	27
11	2011	NY	Newburgh Bloods	B	15
12	2011	NY	Courtlandt Avenue Crew	B	9
13	2011	TX	MS-13	L	7
14	2011	MO	Wheels of Soul	M (OMG)	18
15	2011	CA	Forming Kaos	L	17
16	2011	CA	Mexican Mafia	L	28
17	2011	GA	Vatos Locos	L	6
18	2011	TX	Barrio Azteca	L	5
19	2011	NY	10th Street Gang	M (B & L)	29
20	2011	NY	Four Block Gang	B	19
21	2011	FL	The Guardians	W	6
22	2011	CA	Crips	B	38
23	2011	NY	Bricktown Gang	B	13

No.	Year	State	Gang Name	Primary Racial Affiliation of Gang	No. Indicted Under RICO RICO
24	2011	VA	Bounty Hunter Bloods/Nine Tech Gangsters	B	8
25	2011	ID	Brown Magic Clica	L	11
26	2011	TX	Barrio Azteca	L	35
27	2011	OH	LSP Gang	B	23
28	2011	CA	Azusa 13	L	27
29	2011	DC	MS-13	L	11
30	2011	NY	Almighty Latin King and Queen Nation (ALKQN)	L	17
31	2011	CA	38th Street Gang	L	50
32	2011	TN	Bloods	B	6
33	2011	CA	Lennox 13	L	6
34	2011	NJ	Fruit Town/Brick City Brims	B	15
35	2010	TX	Raza Unida	L	13
36	2010	MD	18th Street Gang	L	7
37	2010	NY	Pagan's	W (OMG)	13
38	2010	PA	Harlem Boys	B	14
39	2010	NY	Bugout Boyz/Nine-Trey Gangsters	B	12
40	2010	LA	Josephine Dog Pound	B	8
41	2010	TX	Bounty Hunter Bloods/Nine Tech Gangsters	B	6
42	2010	TX	Aryan Brotherhood	W (WSPG)	3
43	2010	VA	Outlaws	W (OMG)	27
44	2010	CA	Armenian Power	W (IO)	70
45	2010	MD	Black Guerrilla Family	B	14
46	2010	UT	Tongan Crips	A	9
47	2010	PA	Almighty Latin King and Queen Nation (ALKQN)	L	12
48	2010	GA	MS-13	L	26
49	2010	CA	Puente 13	L	16
50	2010	CA	Pueblo Bishop Bloods	B	41
51	2010	PA	Brighton Place/Northview Heights Crips	B	26
52	2010	VA	Outlaws	W (OMG)	23
53	2009	MD	Almighty Latin King and Queen Nation (ALKQN)	L	19
54	2009	CA	The Avenues	L	88
55	2009	CA	Eastside Gang	L	19
56	2009	CA	Black Angels	L	37
57	2009	NY	Original Gangsta Killers (OGK)	B	23
58	2009	TN	Almighty Vice Lord Nation	B	9
59	2009	WV	Pagan's	W (OMG)	5
60	2009	TX	Texas Mexican Mafia	L	12
61	2009	NY	110 Gang	B	12

No.	Year	State	Gang Name	Primary Racial Affiliation of Gang	No. Indicted Under RICO RICO
62	2009	MI	Highwaymen Motorcycle Club	W (OMG)	74
63	2009	CA	Varrio Hawaiian Gardens Gang	L	57
64	2009	CA	MS-13	L	24
65	2009	MD	Pasadena Denver Lane (PDL) Bloods	B	23
66	2009	MD	Black Guerrilla Family	B	14
67	2009	VA	Dump Squad	B	10
68	2009	NY	Newburgh Crew	B	4
69	2008	CA	Mongols	M (OMG)	79
70	2008	CA	MS-13	L	22
71	2008	NV	Playboy Bloods	B	10
72	2008	IL	Almighty Latin King and Queen Nation (ALKQN)	L	15
73	2008	NY	MS-13	L	8
74	2008	DC	662 Boss Piru	B	8
75	2008	NC	MS-13	L	26
76	2008	NV	Aryan Warriors	W (WSPG)	13
77	2008	TN	Tree Top Piru (TTP)	B	26
78	2008	NY	Chain Gang/Wolf Pack	B	24
79	2008	CA	Drew Street Gang	L	51
80	2008	TX	Texas Mexican Mafia	L	23
81	2008	FL	Neighborhood Piru Bloods	B	14
82	2007	CA	Florencia 13	L	104
83	2008	NV	Squad Up	B	3
84	2007	TX	Texas Syndicate	L	17
85	2007	KS	Crips	B	20
86	2007	KS	Crips	B	8
87	2007	KS	Crips	B	13
88	2007	MI	Outlaws	W (OMG)	16
89	2007	CA	Columbia Lil' Cynos	L	27
90	2007	MD	MS-13	L	16
91	2007	TX	Texas Syndicate	L	12
92	2007	TN	MS-13	L	14
93	2007	TX	Texas Syndicate	L	14
94	2006	NY	Pagan's	W (OMG)	55
95	2006	NY	Jungle Junkies	B	25
96	2006	CA	18th Street Gang	L	11
97	2006	NY	Brighton Brigade	B	14
98	2006	CA	Mexican Mafia	L	22
99	2006	UT	Tiny Oriental Posse	A	14
100	2006	WA	Hells Angels	W (OMG)	5
101	2005	WI	Almighty Latin King and Queen Nation (ALKQN)	L	49
102	2005	GA	Unnamed	M (B&L)	27

No.	Year	State	Gang Name	Primary Racial Affiliation of Gang	No. Indicted Under RICO RICO
103	2005	MD	MS-13	L	19
104	2005	GA	Sur-13	L	13
105	2005	NY	Elk Block Gang	B	16
106	2005	NY	Cash Money Brothers	B	13
107	2005	CA	West Myrtle Street Gang	L	11
108	2005	CA	Ojeda Organization	L	16
109	2005	CA	Down Below Gang	B	5
110	2005	OK	Hoover Crips	B	13
111	2005	CA	Page Street Mob	B	5
112	2005	NY	Yi Ging Organization	A	18
113	2005	NY	Six Tre Outlaw Gangsta Disciples Folk Nation	B	7
114	2005	IL	Chicago Outfit	W (IO)	14
115	2005	IL	Insane Deuces	M (B&L)	16
116	2005	NY	Freeman Street Robbery Organization	L	11
117	2005	NY	McGriff Enterprise	B	9
118	2004	NY	Stapleton Crew	B	5
119	2004	NY	Lim Organization	A	8
120	2004	NY	Wang Organization	A	8
121	2004	NJ	Double II	B	14
122	2004	GA	Killing Every Spot	L	13
123	2005	WA	The Bandidos Biker Gang	M (W&L)	22
124	2004	CA	Vineland Boyz	L	33
125	2004	NY	MS-13	L	13
126	2004	NY	Bloods	B	14
127	2003	UT	Soldiers of the Aryan Culture (SAC)	W (WSPG)	12
128	2003	NV	Hells Angels	W (OMG)	42
129	2003	AZ	Hells Angels	W (OMG)	16
130	2003	MA	Stonehurst Gang	B	13
131	2003	NV	Rollin' 60s Crips	B	20
132	2003	NY	Murder Unit	B	3
133	2003	CA	Hells Angels	W (OMG)	17
134	2003	NY	Unnamed Russian Gang	W (IO)	8
135	2003	NY	Boot Camp Gang	B	26
136	2003	NY	Woodbine Crew	B	3
137	2003	TX	Texas Syndicate	L	19
138	2003	CA	Pitch Dark Family	B	9
139	2002	GA	Brownside Locos	L	51
140	2002	GA	Almighty Latin King and Queen Nation (ALKQN)	L	
141	2002	GA	Malditos-13	L	-
142	2002	GA	Pachuco-21	L	-
143	2002	GA	Riverside Locos	L	-

No.	Year	State	Gang Name	Primary Racial Affiliation of Gang	No. Indicted Under RICO RICO
144	2002	IL	Carman Brothers Crew	B	7
145	2002	CA	Aryan Brotherhood	W (WSPG)	40
146	2002	MA	Mello Organization	M	6
147	2002	NM	Cisneros Organization	L	9
148	2002	MA	Esmond Street Crew	B	5
149	2002	UT	King Mafia Disciples	B	10
150	2002	NJ	Lex Mob	B	27
151	2002	CA	West Coast Crips	B	4
152	2002	CA	Nazi Low Riders (NLR)	W (WSPG)	12
153	2001	VA	Dragon Family	A	3
154	2001	TX	Mexican Mafia	L	7
155	2001	NY	Patio Crew	B	2
156	2001	VA	Fulton Hill Hustlers	B	12
157	2001	WI	Gangster Disciples	B	13
158	2001	CA	Aryan Brotherhood	W (WSPG)	8
159	2001	NY	Bloods	B	7
160	2001	CA	Nuestra Familia	L	13

