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The Vexing Case of Venue for Violent Crimes in Aid of Racketeering

Melvin Otey

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ABSTRACT

The right of accused persons to have their guilt adjudicated in the locations where their alleged crimes occurred is intrinsic to American conceptions of ordered liberty and fundamental fairness. It is so important that it is codified in, among other places, two constitutional provisions. Yet, dramatic technological advances have made affixing venue for some modern crimes increasingly difficult. Violations of 18 U.S.C. § 1959, which proscribes violent crimes in aid of racketeering, exemplify the complexity. Courts have used different methods to venue these prosecutions, but the approaches are largely inconsistent with traditional venue determinations, potentially impinge on defendants' constitutional rights, and easily burden defendants' vital interests. Consequently, a new approach is sorely needed. This Article proposes a standard that respects both the need for effective prosecution of violent crimes in aid of racketeering and defendants' compelling interests in answering charges only where alleged offenses occur.

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* Associate Professor of Law, Jones School of Law, Faulkner University; B.S.B.A. 1997, St. Louis University. Trial Attorney, U.S. Department of Justice, Organized Crime and Racketeering Section, 2000–2003. Trial Attorney, U.S. Department of Justice, Organized Crime and Gang Section, 2007–2014. E-mail: MOtey@faulkner.edu. The Author expresses his gratitude to colleagues with the John Mercer Langston Writing Workshop for their helpful input during the developmental stages of this Article; Professor Sheldon A. Evans and David J. Stander, Esq. for their constructive critiques as it neared completion; Gigi Panagotacos, Assistant Director for Collection Development and Research Librarian, and Jacob Jackson for their excellent research assistance; and, as always, his wife, Jania, and his sons, Caleb and Christian, for their continuing love and support.

INTRODUCTION

In response to an affront against one of their fellows, several members of a street gang met in an apartment to discuss and plan their retaliation. Shortly after the conspirators left the apartment to carry out the attack, but before they reached their target, local authorities intervened and arrested the gang members. The meeting—where all of the planning was done—was held in the city where the attack was to occur.[1] In most cases, determining the venue for any ensuing federal prosecutions would seem to be a relatively straightforward undertaking. One would logically expect the cases to proceed in the district where the meeting took place because the criminal agreement and all steps taken to consummate the retaliatory acts of violence occurred there. However, in some instances, the determination is far more complicated than one might initially suspect. What if the gang was "headquartered" in a different judicial district? What if the gang was so large and influential that its members resided in and committed various crimes in judicial districts throughout the United States? Should the location and activities

1. This brief scenario is drawn from the facts of United States v. Saavedra, 223 F.3d 85 (2d Cir. 2000), discussed in greater detail *infra* Section IV.A.1.

of members who were not involved in the retaliatory plot affect the venue for prosecution of those who were involved? If so, how?

A criminal defendant's right to be tried in the venue where his crime occurred is among the most fundamental and enduring elements of the American conceptions of justice and fairness. Yet, the proper method of affixing venue for alleged violations of one of the nation's most powerful and punitive statutes is unclear. Title 18, United States Code, Section 1959, entitled "Violent Crimes in Aid of Racketeering Activity" ("Section 1959" or "VICAR"),[2] was enacted in 1984 as a complement to the notorious Racketeer Influenced and Corrupt Organizations Act ("RICO").[3] While RICO addresses a wide swath of offenses, including violent crimes, narcotics offenses, immigration violations, and financial crimes, VICAR supplements it by allowing the federal government to prosecute offenders for certain serious violent crimes when they are committed in aid of racketeering.[4] Consistent with its complementary design, VICAR is often used in tandem with its more robust predecessor,[5] but it is also charged separately to redress acts of violence

2. Some courts refer to violations of Section 1959 as "VCAR" offenses. *See, e.g.*, United States v. Delgado, 972 F.3d 63, 66–67 (2d Cir. 2020); United States v. Khalil, 279 F.3d 358, 367 (6th Cir. 2002); Wood v. United States, No. 02-CR-0624-2-L, 2018 U.S. Dist. LEXIS 87969, at *2 (S.D. Cal. May 24, 2018); United States v. Tisdale, 07-10142-05-JTM, 2009 U.S. Dist. LEXIS 44052, at *1 (D. Kan. May 20, 2009); Alexander v. United States, 1:01CV2378, 2002 U.S. Dist. LEXIS 29606, at *2 (N.D. Ohio Mar. 15, 2002); United States v. Garcia, 68 F. Supp. 2d 802, 809 (E.D. Mich. 1999). However, most courts refer to them as "VICAR" offenses. *See, e.g.*, United States v. Bingham, 653 F.3d 983, 996 (9th Cir. 2011); United States v. Mahdi, 598 F.3d 883, 887–89 (D.C. Cir. 2010); United States v. Ayala, 601 F.3d 256, 260–61 (4th Cir. 2010); United States v. Marino, 277 F.3d 11, 39 (1st Cir. 2002); United States v. Merlino, 310 F.3d 137, 140 (3d Cir. 2002); United States v. Erbo, No. 97 Cr. 1105 (LAP), 2020 U.S. Dist. LEXIS 216787, at *7 (S.D.N.Y. Nov. 19, 2020); United States v. Morales, 881 F. Supp. 769, 770 (D. Conn. 1995). "VICAR" is also the preferred acronym within the Organized Crime and Gang Section, the section within the U.S. Department of Justice tasked with oversight of prosecutions under Sections 1962 (RICO) and 1959 (VICAR). *See* 18 U.S.C. § 1959 (2018).

3. 18 U.S.C. §§ 1961–1968 (2018); *see also* United States v. Banks, 514 F.3d 959, 967 (9th Cir. 2008); United States v. Mapp, 170 F.3d 328, 335 (2d Cir. 1999); United States v. Rogers, 89 F.3d 1326, 1335 (7th Cir. 1996); United States v. Norwood, No. 12-CR-20287, 2015 U.S. Dist. LEXIS 62540, at *22 (E.D. Mich. May 13, 2015).

4. *See* United States v. Jones, 566 F.3d 353, 361 (3d Cir. 2009); *Rogers*, 89 F.3d at 1335; United States v. Concepcion, 983 F.2d 369, 381 (2d Cir. 1992) ("Thus, § 1959 complements RICO by allowing the government not only to prosecute under RICO for conduct that constitutes a pattern of racketeering activity in connection with an enterprise, but also to prosecute under § 1959 for violent crimes intended, *inter alia*, to permit the defendant to maintain or increase his position in a RICO enterprise.").

5. *See* U.S. DEP'T OF JUSTICE, VIOLENT CRIMES IN AID OF RACKETEERING 18 U.S.C. § 1959: A MANUAL FOR FEDERAL PROSECUTORS 5 n.3 (2006) [hereinafter VICAR MANUAL] ("Frequently, RICO and Section 1959 charges are brought in the same indictment regarding the same or overlapping conduct."); *see also* United States v. Sorrell, No. 18-1462, 2020 U.S. App. LEXIS 14402, at *3–4 (6th Cir. May 5, 2020);

committed by members and associates of gangs and organized crime groups.

Given the close kinship between the two statutes and their joint deployment in prosecutions for nearly four decades, the lack of attention given to VICAR is somewhat surprising. For instance, while RICO-related scholarship abounds, there have been few scholarly articles directly addressing Section 1959 heretofore.[6] Moreover, while there are several Supreme Court decisions interpreting RICO and outlining its boundaries,[7] the Court has never directly ruled on the contours of its powerful complement. In this relative vacuum, certain vital issues particular to VICAR prosecutions have escaped careful scrutiny, including the lower courts' disagreement about the proper method for affixing venue for alleged VICAR offenses.

Determining venue is often more complicated today than it was in the past because of advances in technology, travel, and telecommunications;[8] and the task is even more complex for certain federal offenses, like those involving expansive criminal organizations.[9] Yet, the fundamental interests protected by constitutional and statutory venue provisions do not dissipate as society becomes more mobile and interconnected.[10] This Article discusses the current approaches to venuing VICAR prosecutions promulgated by the Second and Fourth Circuit Courts of Appeals, each of which is deeply flawed and potentially

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United States v. Bergrin, 682 F.3d 261, 265 n.5 (3d Cir. 2012); United States v. Orena, 32 F.3d 704, 707 (2d Cir. 1994).

6. There may be only one previous article directly addressing the statute. *See generally* Christopher C. Kendall, *Rape as a Violent Crime in Aid of Racketeering Activity*, 34 L. & PSYCHOL. REV. 91 (2010).

7. For Supreme Court decisions interpreting RICO and its boundaries, see generally Boyle v. United States, 556 U.S. 938 (2009); Nat'l Org. for Women v. Scheidler, 510 U.S. 249 (1994); Reves v. Ernst & Young, 507 U.S. 170 (1993); H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229 (1989); Sedima v. Imrex, 473 U.S. 479 (1985).

8. *See Saavedra*, 223 F.3d at 86 ("[I]n today's wired world of telecommunication and technology, it is often difficult to determine exactly where a crime was committed, since different elements may be widely scattered in both time and space, and those elements may not coincide with the accused's actual presence.").

9. *See* Norman Abrams, *Conspiracy and Multi-Venue in Federal Criminal Prosecutions: The Crime Committed Formula*, 9 UCLA L. REV. 751, 752 (1962) ("Because of a variety of factors—including improvements in long-distance communication and transportation facilities, the commercial and industrial development of the nation, the growth of criminal groups organized nationwide and the nature of crimes now covered by federal criminal laws—the incidence of federal prosecutions involving crimes with some type of multi-district contacts is today very large. Accordingly, the problem of determining proper venue in such cases is today a recurring one.").

10. *See* United States v. Passodelis, 615 F.2d 975, 977 (3d Cir. 1980) ("Though our nation has changed in ways which it is difficult to imagine that the Framers of the Constitution could have foreseen, the rights of criminal defendants which they sought to protect in the venue provisions of the Constitution are neither outdated nor outmoded.").

produces unconstitutional results.[11] It then proposes an approach that will lead to determinations that are more harmonious with the relevant constitutional, statutory, and policy considerations. While no court has expressly adopted this proposed approach, the seeds for it have been sown by decisions in the Seventh and Ninth Circuits.[12] Here, the implications of those decisions are developed, made explicit, and offered as a better standard.

Part I describes the importance of venue in the American conceptions of justice and fairness. Part II explains the verb test and the effects test, which are typically used to affix venue in one or more federal districts. Part III introduces 18 U.S.C. § 1959 and its relevant features. Part IV evaluates the two approaches federal courts currently use in determining venue for VICAR prosecutions. Finally, Part V proposes an alternative that better respects the structure of Section 1959 and is more consonant with traditional venue determinations.

I. THE IMPORTANCE OF VENUE

Venue refers to the scene or setting where legal grievances or charges may be adjudicated, and the Founders of the United States were keenly aware of its significance in criminal prosecutions. In the Declaration of Independence, the colonists' list of allegedly tyrannical "injuries and usurpations" by King George III of Great Britain included "transporting us beyond Seas to be tried for pretended offences."[13] The Founders, then, were sensitive to perceived abuses by the British crown and sought to prevent similar abuses—like hauling defendants across the continent unjustifiably—within the new republic.[14] Their experiences are the genesis of the fundamental ethic that accused persons are entitled to adjudication of criminal charges at the *locus delicti*, the scene of the crime,[15] and the tenet is now indigenous to the American concept of fairness.[16]

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11. United States v. Saavedra, 223 F.3d 85, 91 (2d Cir. 2000) and United States v. Umaña, 750 F.3d 320, 329 (4th Cir. 2014) are discussed in greater detail *infra* Part IV.

12. United States v. Leija-Sanchez, 602 F.3d 797, 800 (7th Cir. 2010) and United States v. Stinson, 647 F.3d 1196, 1203 (9th Cir. 2011) are discussed in greater detail *infra* Part V.

13. THE DECLARATION OF INDEPENDENCE para. 2, 21 (U.S. 1776); *see also* United States v. Auernheimer, 748 F.3d 525, 532 (3d Cir. 2014) ("The proper place of colonial trials was so important to the founding generation that it was listed as a grievance in the Declaration of Independence.").

14. *See* United States v. Cabrales, 524 U.S. 1, 6 (1998); Drew L. Kershen, *Vicinage*, 29 OKLA. L. REV. 801, 808 (1976).

15. *See* United States v. Spivey, 956 F.3d 212, 215 (4th Cir. 2020); United States v. Brennan, 452 F. Supp. 3d 225, 234 (E.D. Pa. 2020).

16. *See Auernheimer*, 748 F.3d at 532 (stating that venue "has been fundamental since our country's founding"). For discussion of the colonial experience, see William

A. Constitutional and Statutory Provisions

The venue requirement is codified in two provisions of the Constitution of the United States. First, Article III Section 2 includes a basic *locus delicti* provision. It states, in part, that, "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed."[17] The Sixth Amendment then requires the adjudication of charges "by an impartial jury of the state and district wherein the crime shall have been committed."[18] The latter is, strictly speaking, a vicinage provision rather than a venue provision since it pertains to the location from which jurors may be drawn rather than the *situs* of the crime, but the practical consequence constrains the geographic location of a criminal trial.[19] In light of the travel and technological limitations that existed when the provisions were written, each seemingly presumes that crimes are "committed" in a single judicial district.

These constitutional protections have been incorporated into the Federal Rules of Criminal Procedure and clarified in the United States Code.[20] Federal Rule of Criminal Procedure 18 allows courts discretion in fixing a place for trial within a given district, provided that, "[u]nless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed."[21] Of course, in some respects, this requirement merely begs the question of where the offense was actually "committed," so certain federal statutes define the term for the offenses they proscribe. For example, Title 18 U.S.C. § 659 provides that, "[t]he offense [of embezzlement or theft] shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said money, baggage, goods, or chattels."[22]

Wirt Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 MICH. L. REV. 59, 63–66 (1944); Kershen, *supra* note 14, at 805–07.

17. U.S. CONST. art. III, § 2.

18. U.S. CONST. amend. VI.

19. *See* United States v. Passodelis, 615 F.2d 975, 977 n.3 (3d Cir. 1980) ("Literally, the provision in Article III is a venue provision since it specifies the place of trial, whereas the provision in the Sixth Amendment is a vicinage provision since it specifies the place from which the jurors are to be selected. This distinction, however, has never been given any weight, perhaps because it is unlikely that jurors from one district would be asked to serve at a trial in another district, or perhaps, more importantly, because the requirement that the jury be chosen from the state and district where the crime was committed presupposes that the jury will sit where it is chosen.").

20. *See Auernheimer*, 748 F.3d at 532; United States v. Oceanpro Indus., Ltd., 674 F.3d 323, 328 (4th Cir. 2012); United States v. Salinas, 373 F.3d 161, 164 (1st Cir. 2004) ("This rule echoes the constitutional commands." (quoting United States v. Cabrales, 524 U.S. 1, 6 (1998))).

21. FED. R. CRIM. P. 18.

22. 18 U.S.C. § 659 (2018).

Similarly, Title 18 U.S.C. § 3236 states: "In all cases of murder or manslaughter, the offense shall be deemed to have been committed at the place where the injury was inflicted, or the poison administered or other means employed which caused the death, without regard to the place where the death occurs."[23]

Affixing proper venue is not a mere procedural technicality.[24] Federal courts, including the Supreme Court, have consistently recognized the importance of these determinations.[25] They "raise deep issues of public policy" and "touch closely the fair administration of criminal justice and public confidence in it, on which it ultimately rests."[26] According to William Grayson, one of the first two U.S. senators for the Commonwealth of Virginia, "[W]here the governing power possesses an unlimited control over the venue, no man's life is in safety."[27] Thus, federal venue provisions are intended to create "a safety net" that protects accused persons from "the prosecutor's whim" and "promote[s] both fairness and public confidence in the criminal justice system."[28] In each criminal case, the government has to prove that venue is appropriate by a preponderance of the evidence.[29]

B. Defendants' Interests

While "the Supreme Court has yet to articulate a coherent definition of the underlying policies,"[30] defendants have the most obvious and substantial interests in the venues for their trials. In explaining the importance of venue in criminal prosecutions, the Supreme Court noted, "The provision for trial in the vicinity of the crime is a safeguard against the unfairness and hardship involved when an accused is prosecuted in a

23. 18 U.S.C. § 3236 (2018).

24. *See* United States v. Johnson, 323 U.S. 273, 276 (1944) ("Questions of venue in criminal cases, therefore, are not merely matters of formal legal procedure."); United States v. Root, 585 F.3d 145, 155 (3d Cir. 2009) ("Proper venue in criminal trials is more than just a procedural requirement.").

25. *See Auernheimer*, 748 F.3d at 540 ("The Supreme Court has repeatedly made clear that the constitutional limitations on venue are extraordinarily important."); *see, e.g.*, United States v. Billups, 692 F.2d 320, 332 (4th Cir. 1982), *corrected*, (4th Cir. Oct. 15, 1982) ("Venue in a federal criminal case is an issue of constitutional dimension."); United States v. Passodelis, 615 F.2d 975, 977 (3d Cir. 1980).

26. *Johnson*, 323 U.S. at 276.

27. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 568 (Jonathan Elliot ed., 1836) [hereinafter DEBATES].

28. United States v. Salinas, 373 F.3d 161, 164 (1st Cir. 2004).

29. *See Auernheimer*, 748 F.3d at 533; United States v. Ramirez, 420 F.3d 134, 139 (2d Cir. 2005); United States v. Griley, 814 F.2d 967, 973 (4th Cir. 1987); United States v. White, 611 F.2d 531, 535 (5th Cir. 1980).

30. United States v. Reed, 773 F.2d 477, 480 (2d Cir. 1985).

remote place."[31]Among other hardships, a defendant called upon to face charges in a remote location that has no substantial nexus with his crime is far more likely to proceed without the support and encouragement of his friends and neighbors.[32] Also, the jury of his ostensible peers is more likely to be comprised of "mere strangers, who may feel no common sympathy, or who may even cherish animosities or prejudices against him."[33] In some instances, the racial, ethnic, social, economic, and religious demographics of the jury pool might be radically different from one federal district to the next, and these differences can influence jurors' attitudes, perceptions, and judgments in criminal cases in ways that disadvantage the accused.[34]

Moreover, the financial burden of a remote trial can be oppressive.[35] As an initial matter, a long trial in a far-flung district can jeopardize a defendant's livelihood.[36] Furthermore, the costs of obtaining private counsel will likely skyrocket if travel and lodging expenses for one or more lawyers are added to more traditional costs. In fact, the financial and logistical hardships might be so significant that employment of one's preferred counsel becomes impractical.[37] Even if one secures the attorney of his choice, the draconian effects of the financial burden will only be exacerbated if additional expenses are required for key witnesses. "If [a defendant] is poor, and relies upon many witnesses for his exculpation, this will almost of necessity put it out of his power to make a complete defence; if he is a man of moderate means the defence may ruin him."[38] Even if an accused person is not destitute, having to defend against criminal charges in a venue other than one in which the alleged crime actually occurred can make it more difficult to maintain employment,

31. United States v. Cores, 356 U.S. 405, 407 (1958).

32. *See* Kershen, *supra* note 14, at 808–09.

33. State v. Robinson, 14 Minn. 447, 454–55 (1869); *see also* State v. Kindig, 39 P. 1028 (Kan. 1895) ("Undoubtedly the provision securing to the accused a public trial, within the county or district in which the offense is committed, is of the highest importance. It prevents the possibility of sending him for trial to a remote district, at a distance from friends, among strangers, and perhaps parties animated by prejudices of a personal or partisan character.").

34. *See* Jeannine Bell & Mona Lynch, *Cross-Sectional Challenges: Gender, Race, and Six-Person Juries*, 46 SETON HALL L. REV. 419, 436–41 (2016); *see also* Barbara O'Brien et al., *Ask and What Shall Ye Receive? A Guide for Using and Interpreting What Jurors Tell Us*, 14 U. PA. J.L. & SOC. CHANGE 201, 218–26 (2011).

35. *See Robinson*, 14 Minn. at 454–55.

36. *See* United States v. Radley, 558 F. Supp. 2d 865, 881 (N.D. Ill. 2008); United States v. Ringer, 651 F. Supp. 636, 638 (N.D. Ill. 1986).

37. *See* United States v. Johnson, 323 U.S. 273, 279 (1944) ("The inconvenience, expense and loss of time involved in transplanting these witnesses to testify in trials far removed from their homes are often too great to warrant their use."); Kershen, *supra* note 14, at 809.

38. Swart v. Kimball, 5 N.W. 635, 639 (Mich. 1880).

marshal exculpatory evidence and key witnesses, and mount an effective defense.[39]

C. Community Interests

While federal venue provisions are primarily intended to protect defendants, the federal government and the communities it represents have substantial interests as well, so "fairness to defendants cannot be the sole grounds for determining venue."[40] The communities immediately impacted by the alleged criminality must be considered.[41] For instance, if venue is fixed in a location where witnesses and physical evidence are not readily available, the prosecution's case could be undermined and the government's expenses could swell. More importantly, though, a jury of the vicinage nearest the *locus delicti* is presumably best able to determine the facts and render a decision reflecting the conscience of the community.[42]

In light of these interests, "a defendant who travels to a remote location to commit a crime cannot invoke the Constitution's venue protections to preclude trial there."[43] One cannot escape criminal liability by committing a crime that spans two or more jurisdictions, even if the crime is not wholly accomplished in either. Further, a defendant does not necessarily need to be present in the district where the crime was consummated in order to implicate a given community's vital interests. While some societal concerns are rather obvious and compelling, certain government interests are less legitimate, but no less real and substantial. For instance, prosecutors might seek to try the accused in venues where they anticipate that, for any number of reasons, juries will be less sympathetic to particular defendants, a specific circuit's laws are more favorable given the facts of their cases and state of their evidence, or judges will tend to favor the government rather than the defendant.[44] If

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39. *See* Watt v. People, 18 N.E. 340, 343 (Ill. 1888) ("Undoubtedly the right to a trial by a jury of the county in which the crime charged was committed is ordinarily a substantial and important legal right. It secures to the accused a trial among his neighbors and acquaintances, and at a place where, if innocent, he can most readily make that fact to appear."); *Robinson*, 14 Minn. at 454–55.

40. United States v. Reed, 773 F.2d 477, 480 (2d Cir. 1985).

41. *See* United States v. Cabrales, 524 U.S. 1, 9 (1998) ("[T]he Government further maintains that its convenience, and the interests of the community victimized by drug dealers, merit consideration.").

42. *See id.* at 9–10; *see also* Kershen, *supra* note 14, at 843.

43. *See* Robert L. Ullmann, *One Hundred Years After Hyde: Time to Expand Venue Safeguards in Federal Criminal Conspiracy Cases?*, 52 SANTA CLARA L. REV. 1003, 1009 (2012).

44. *See* David Spears, *Venue in Federal Criminal Cases: A Strange Duck*, CHAMPION, Jan./Feb. 2019, at 24, 25; *see also* United States v. Salinas, 373 F.3d 161, 169 (1st Cir. 2004) ("Over time, one of the primary concerns motivating the limitation of

federal prosecutors are given *carte blanche* in selecting the proper venue for criminal cases, they can more easily secure convictions and punishments simply by having a jury that suits their purposes.[45]

The specter of trampling over a defendant's rights and interests is particularly high for federal statutes like Section 1959. VICAR is a unique statute—unlike the kinds initially contemplated by the Framers—in that, as applied to large-scale criminal organizations with members and associates operating throughout the country, some of its constituent elements almost perpetually exist across a multiplicity of judicial districts. Consequently, a question naturally arises regarding where VICAR charges can potentially be prosecuted. Must they be prosecuted where the predicate criminal act was committed, in whole or in part, or may they be prosecuted in any district where the sprawling enterprise happens to exist and operate through its various members and associates?

II. DETERMINING VENUE

A complicated combination of constitutional provisions, statutes, and rules interact to determine venue in federal criminal cases.[46] While the right of the accused to proper venue in a criminal prosecution is deeply ingrained in the American ethics of justice and fairness and codified in, among other places, two constitutional provisions, the Constitution does not actually provide criteria for determining the *locus delicti* of crimes.[47] Rather, it "fixes some undefined outer limits."[48] In the absence of constitutional guidance, federal courts recognize that Congress establishes the elements of federal crimes and may also prescribe the attendant venue requirements.[49] Thus, where a federal statute explicitly affixes the appropriate venue for prosecution, or the criteria for affixing venue, that prescription is determinative.[50]

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venue has been the danger of allowing the government to choose its forum free from any external constraints." (citing Travis v. United States, 364 U.S. 631, 634 (1961))).

45. *See* DEBATES, *supra* note 27, at 569.

46. *See* United States v. Rasheed, 983 F.3d 187, 192–93 (2d Cir. 2020) ("[V]enue in federal criminal cases is controlled by a complicated interplay of constitutional provisions, statutes, and rules." (quoting United States v. Rowe, 414 F.3d 271, 277 (2d Cir. 2005))).

47. *See* United States v. Kibler, 667 F.2d 452, 454 (4th Cir. 1982).

48. Abrams, *supra* note 9, at 816.

49. *See* United States v. Root, 585 F.3d 145, 156 (3d Cir. 2009) ("Congress has the power to lay out the elements of a crime to permit prosecution in one or any of the districts in which the crucial elements are performed." (citing United States v. Perez, 280 F.3d 318, 328–29 (3d Cir. 2002))); *see also* United States v. Pendleton, 658 F.3d 299, 303 (3d Cir. 2011) ("Congress may fix jurisdiction in any district where a 'crucial element' of the crime is performed." (citing *Perez*, 280 F.3d at 329)).

50. *See* Abrams, *supra* note 9, at 816 ("It appears that Congress, by its definition of the elements of offenses, by its formulation of the general venue provision, and by

In many cases, even where a statute does not explicitly establish venue, the appropriate venue for a criminal prosecution is implicit and readily discernible. "When a crime consists of a single, non-continuing act, the proper venue is clear: The crime is committed in the district where the act is performed."[51] Common law violent crimes, in particular, are somewhat unremarkable in that they typically occur within 1 of the 50 states or 1 of the 94 federal judicial districts. In such cases, most, if not all, of the relevant evidence and material witnesses are physically proximate to the *situs* of the event, just as the Framers anticipated.

Of course, not all crimes are so discrete and contained. "The commission of some crimes can span several districts."[52] Conspiracies, for example, can include many coconspirators committing a wide range of overt acts over an extended period of time across an expansive geographic area. Moreover, certain federal crimes, like those requiring interstate transportation as a jurisdictional prerequisite, necessarily involve multiple districts.[53] Other crimes involve distinct parts that might be accomplished in different locations. With modern advances in technology, particularly in travel and communication, and the growth of interstate and national crime groups, it is increasingly common for offenses to involve more than one district;[54] a defendant who commits a crime, in whole or in part, in a remote district is not shielded from prosecution there.[55]

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enactment of specific venue provisions attached to particular offenses exercises an almost plenary power over venue.").

51. United States v. Ramirez, 420 F.3d 134, 139 (2d Cir. 2005) (quoting United States v. Beech-Nut Nutrition Corp., 871 F.2d 1181, 1188 (2d Cir. 1989)); *see also* United States v. Reed, 773 F.2d 477, 481 (2d Cir. 1985) ("Virtually all the caselaw designates the site of the defendant's acts as a proper venue.").

52. United States v. Rommy, 506 F.3d 108, 119 (2d Cir. 2007).

53. *See Reed*, 773 F.2d at 481.

54. *See* United States v. Tang Yuk, 885 F.3d 57, 69 (2d Cir. 2018) ("As far-reaching communications and travel are now easy and common, the 'acts constituting the offense' can, unsurprisingly, span a geographic range that extends far beyond the physical borders of a defendant's district of residence."); *see also* Abrams, *supra* note 9, at 752 ("Because of a variety of factors—including improvements in long-distance communication and transportation facilities, the commercial and industrial development of the nation, the growth of criminal groups organized nationwide and the nature of crimes now covered by federal criminal laws—the incidence of federal prosecutions involving crimes with some type of multi-district contacts is today very large. Accordingly, the problem of determining proper venue in such cases is today a recurring one.").

55. *See Tang Yuk*, 885 F.3d at 69 ("Constitutional and procedural restrictions on criminal venue, accordingly, do not protect defendants from prosecution in a district far from their homes if they commit a crime in a remote district.").

A. 18 U.S.C. § 3237

In order to guide the courts in affixing venue for, among other things, continuing crimes whose statutes do not contain an explicit venue provision, Congress promulgated Title 18 U.S.C. § 3237 ("Section 3237"),[56] which specifies that an "offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed." Under this statute, a crime that occurs in more than one district may be prosecuted in either because venue is proper in any district where a distinct part of a crime is committed or into which a continuing crime moves.[57] Courts have construed this provision "as broadening, not reducing, the venue jurisdiction inherited from English law."[58]

While some federal statutes include specific venue provisions,[59] most do not, so it is often incumbent on courts to determine the *situs* of a given crime using the principles provided in Section 3237. As the Supreme Court explained, where a "statute does not indicate where Congress considered the place of committing the crime to be . . . the *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it."[60] This broad and imprecise two-pronged approach requires courts to identify the conduct constituting

56. *See* Michael A. Schlesinger, *Venue in Constructive Contempt Prosecutions Under 18 U.S.C. § 1503: An Act-Oriented Approach*, 63 B.U. L. REV. 919, 926 (1983) ("To assist the venue inquiry in the absence of an explicit provision, Congress has enacted a multi-venue statute, 18 U.S.C. § 3237(a) . . . .").

57. *See* Travis v. United States, 364 U.S. 631, 636 (1961) ("Multiple venue in general requires crimes consisting of 'distinct parts' or involving 'a continuously moving act.'" (quoting United States v. Lombardo, 241 U.S. 73, 77 (1916), *superseded by statute*, Act of Aug. 16, 1954, ch. 736, 68A Stat. 895 (codified as amended at 26 U.S.C. § 7502))); *see also* United States v. Freeman, 239 U.S. 117, 119–20 (1915) (continuing offense).

58. United States v. Gillette, 189 F.2d 449, 452 (2d Cir. 1951).

59. *See, e.g.*, 18 U.S.C. § 659 (2018) ("The offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said money, baggage, goods, or chattels."); 18 U.S.C. § 1956 (2018) (money laundering) (providing that prosecution "may be brought in—(A) any district in which the financial or monetary transaction is conducted; or (B) any district where a prosecution for the underlying specified unlawful activity could be brought, if the defendant participated in the transfer of the proceeds of the specified unlawful activity from that district to the district where the financial or monetary transaction is conducted"); 18 U.S.C. § 3236 (2018) ("In all cases of murder or manslaughter, the offense shall be deemed to have been committed at the place where the injury was inflicted, or the poison administered or other means employed which caused the death, without regard to the place where the death occurs.").

60. United States v. Anderson, 328 U.S. 699, 703 (1946) (internal citations omitted) (citing United States v. Bowman, 260 U.S. 94, 97–98 (1922)).

the offense and then determine "the location of the commission of the criminal acts."[61]

Where a federal statute lacks an explicit venue provision and a court must rely upon Section 3237, venue is appropriate only where the identified criminal conduct actually occurs.[62] For conspiracies, this means that venue is appropriate in any district where the criminal agreement is made or an act in furtherance of the criminal agreement occurs, even if a particular conspirator is not physically present there.[63] For substantive offenses, conduct elements alone are the touchstone for determining venue even though other kinds of elements might be necessary for determining criminal liability. Therefore, mere circumstance elements[64] and steps that are merely preparatory to the crime are irrelevant.[65] Thus far, lower courts have used two tests, the "verb test" and the "effects test," in determining where venue for substantive statutory offenses implicitly lie pursuant to Section 3237.

B. The Verb Test

Federal courts commonly use the "verb test"—which relies on the verbs employed in the statute to define the offense—to determine where the criminal conduct "begun," was "completed," or was "committed"

61. United States v. Rodriguez-Moreno, 526 U.S. 275, 279 (1999); *see also* United States v. Sterling, 860 F.3d 233, 241 (4th Cir. 2017) ("Determining where proper venue lies is . . . a two-step process."); United States v. Davis, 689 F.3d 179, 185 (2d Cir. 2012) (employing the "two-step analysis" set forth in *Rodriguez-Moreno*); United States v. Pendleton, 658 F.3d 299, 303 (3d Cir. 2011) ("Where . . . Congress has not designated the venue in the relevant criminal statute, we employ the two-pronged approach set forth in *Rodriguez-Moreno*.).

62. *See* United States v. Villalobos-Macias, 280 F. Supp. 3d 1211, 1220 (D.N.M. 2017) ("Venue is proper in the district in which criminal conduct occurs, not where any element occurs." (citing *Rodriguez-Moreno*, 526 U.S. at 279)).

63. *See* United States v. Auernheimer, 748 F.3d 525, 533 (3d Cir. 2014); United States v. Caldwell, 16 F.3d 623, 624 (5th Cir. 1994); United States v. Rosa, 17 F.3d 1531, 1541 (2d Cir. 1994); United States v. Uribe, 890 F.2d 554, 558 (1st Cir. 1989).

64. *See Rodriguez-Moreno*, 526 U.S. at 280 n.4; *see also* United States v. Strain, 396 F.3d 689, 694 (5th Cir. 2005) (finding that the issuance of a warrant and knowledge of it are circumstance elements of 18 U.S.C. § 1071); United States v. Bowens, 224 F.3d 302, 310–11 (4th Cir. 2000) (finding that "issuance of a warrant for a person's arrest is merely a circumstance element" of the harboring offense under 18 U.S.C. § 1071).

65. *See Sterling*, 860 F.3d at 241 ("Acts which are merely 'preparatory' to the underlying offense and its essential conduct, however, cannot provide a basis for venue."); *see also Davis*, 689 F.3d at 186 ("Further, to support venue, what is begun or continued in a district must be a part of the actual charged crime, not merely steps preparatory to the crime."); United States v. Beech-Nut Nutrition Corp., 871 F.2d 1181, 1190 (2d Cir. 1989) ("Whether the crime be continuing or noncontinuing, venue is not proper in a district in which the only acts performed by the defendant were preparatory to the offense and not part of the offense.").

under Section 3237.[66] The Supreme Court discussed this test in *United States v. Rodriguez-Moreno*.[67] There, the Court was faced with determining the appropriate venue for use of a firearm during and in relation to a federal crime of violence, where a kidnapping offense persisted across districts but the firearm was used in only a single district.[68] The Third Circuit Court of Appeals had reversed the defendant's conviction for lack of venue, but the Supreme Court overruled.[69] Regarding the utility of the verb test, it explained:

> [W]e have never before held, and decline to do so here, that verbs are the sole consideration in identifying the conduct that constitutes an offense. While the "verb test" certainly has value as an interpretative tool, it cannot be applied rigidly, to the exclusion of other relevant statutory language. The test unduly limits the inquiry into the nature of the offense and thereby creates a danger that certain conduct prohibited by statute will be missed.[70]

While the federal statute's "crime of violence" element lies in a prepositional phrase rather than a verb clause, the Court concluded that the underlying "violent acts are essential conduct elements."[71] Consequently, the statute contained two conduct elements, and venue was proper in any district where either was satisfied.[72] Under the circumstances, a rigid application of the verb test to the statute would have missed an essential conduct element "not expressed in verbs."[73]

C. The Effects Test

While affirming the verb test, the Supreme Court indicated that it is not the only potentially valid method of affixing venue.[74] Certain federal

66. *See, e.g.*, United States v. Clark, 728 F.3d 622, 624 (7th Cir. 2013); United States v. Ramirez, 420 F.3d 134, 138–40 (2d Cir. 2005); United States v. Crawford, 115 F.3d 1397, 1403–07 (8th Cir. 1997) (applying the "active verb" or "key verb" test); United States v. Donahue, 885 F.2d 45, 50 (3d Cir. 1989) ("[I]t is often helpful to look at the statutory verb in the description of the offense in determining where an offense was committed."); United States v. Billups, 692 F.2d 320, 332 (4th Cir. 1982) ("The usual method for making this determination, one which we have consistently approved, is an examination of the verbs employed in the statute to define the offense, although this method is not exclusive." (internal citations omitted)); United States v. Tedesco, 635 F.2d 902, 905 (1st Cir. 1980).

67. *See* United States v. Rodriguez-Moreno, 526 U.S. 275, 276 (1999).

68. *See id.* Title 18 U.S.C. § 924(c)(1) prohibits the possession, carrying, or use of a firearm during and in relation to, or in furtherance of, a federal crime or violence or drug trafficking offense. *See id.*

69. *See id.* at 282.

70. *Id.* at 280.

71. *Id.*

72. *See id.* at 280–81.

73. *Id.* at 280.

74. *See id.* at 276.

statutes define essential conduct elements in terms of their impact, and lower courts have sometimes utilized the "effects test" to venue prosecutions for those offenses.[75] Under the effects test, "[w]hen Congress defines the essential conduct elements of a crime in terms of their particular effects, venue will be proper where those proscribed effects are felt."[76] For example, the Hobbs Act only punishes a robbery or extortion offense that "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce."[77] Consequently, extortive threats made in one district, followed by payment in second district, and affecting commerce in a third district might be prosecuted in any of the three.[78] Similarly, venue properly lies for inducing aliens to enter the United States in violation of 8 U.S.C. § 1324(a)(4) in the district where entry occurs even if the proscribed inducement is wholly extraterritorial.[79]

The Supreme Court declined to directly address the effects test in *Rodriguez-Moreno*,[80] but several Circuit Courts affirmed its continuing viability following the decision. For instance, the Fourth Circuit explained, "we do not understand the Supreme Court's recent decisions to have altered the well-established rule that Congress may, consistent with the venue clauses of Article III and the Sixth Amendment, define the essential conduct elements of a criminal offense in terms of their effects, thus providing venue where those effects are felt."[81] However, where the effects are not part of a statute's essential conduct elements,

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75. *See* United States v. Auernheimer, 748 F.3d 525, 537 (3d Cir. 2014) ("Undoubtedly there are some instances where the location in which a crime's effects are felt is relevant to determining whether venue is proper."); United States v. Reed, 773 F.2d 477, 482 (2d Cir. 1985) ("[P]laces that suffer the effects of a crime are entitled to consideration for venue purposes. Such districts have an obvious contact with the litigation in their interest in preventing such effects from occurring. To some extent this factor overlaps with the definition and nature of the crime . . . . Established caselaw thus allows prosecutions under many federal statutes to be brought in any district where the effects of the crime are felt.").

76. United States v. Bowens, 224 F.3d 302, 313 (4th Cir. 2000); *see also Auernheimer*, 748 F.3d at 537 (citing *Bowens*, 224 F.3d at 313).

77. 18 U.S.C. § 1951 (2018).

78. *See, e.g.*, United States v. Floyd, 228 F.2d 913 (7th Cir. 1956); *see also Auernheimer*, 748 F.3d at 537 ("[I]n a prosecution for Hobbs Act robbery, venue may be proper in any district where commerce is affected because the terms of the act themselves forbid affecting commerce."); United States v. Stephenson, 895 F.2d 867, 875 (2d Cir. 1990) ("Venue under the Hobbs Act is proper in any district where interstate commerce is affected or where the alleged acts took place.").

79. *See, e.g.*, United States v. Castillo-Felix, 539 F.2d 9, 13 (9th Cir. 1976).

80. *See* United States v. Rodriguez-Moreno, 526 U.S. 275, 279 n.2 (1999) (reserving on the issue of whether "venue also may permissibly be based upon the effects of a defendant's conduct in a district other than the one in which the defendant performs the acts constituting the offense").

81. *Bowens*, 224 F.3d at 312.

the effects alone do not provide a constitutional or statutory basis for affixing venue.[82]

As matters presently stand, then, there are two generally recognized approaches to determining venue for alleged violations of statutes that do not include their own venue provisions. Under the verb test—more properly, perhaps, the "conduct test"—a court considers the *situs* of the essential conduct proscribed by the statute. Under the effects test, where a statute specifically defines a crime in terms of its impact, the court considers the location(s) where the proscribed effects are felt. As discussed below, in light of VICAR's text and the absence of an element analogous to the effects requirements of statutes like the Hobbs Act, only the verb test is a potentially viable tool for determining venue for VICAR prosecutions.

III. INTRODUCTION TO VICAR (18 U.S.C. § 1959)

Title 18 U.S.C. § 1959 is one of the federal statutes significantly impacted by lower courts' inconsistencies in discerning the implied venue for offenses without express venue provisions. VICAR is "an offshoot of earlier RICO legislation."[83] To secure a conviction under Section 1959, the government must prove that a defendant, motivated either by pecuniary gain from an "enterprise" engaged in "racketeering activity" or because of his or her position in relation to such an enterprise, committed an enumerated crime of violence.[84] The elements

82. *See* United States v. Auernheimer, 748 F.3d 525, 537 (3d Cir. 2014) ("The Government has not cited, and we have not found, any case where the locus of the effects, standing by itself, was sufficient to confer constitutionally sound venue."); *Bowens*, 224 F.3d at 314 ("In summary, we hold that venue for a criminal prosecution must be determined solely in reference to the essential conduct elements of the charged offense. Venue will lie wherever those essential conduct elements have occurred. Venue will also lie where the effects of the defendant's conduct are felt, but only when Congress has defined the essential conduct elements in terms of those effects."); United States v. Brennan, 452 F. Supp. 3d 225, 234–35 (E.D. Pa. 2020) ("This 'effects-based' test asks two questions: (1) did Congress define a crime's essential conduct elements in terms of their effect; and (2) if so, did the district in question *actually feel* the effects of the proscribed conduct? The first question is purely legal and may be addressed at the motion-to-dismiss stage. The second question is factual and must be proven by a preponderance of the evidence at trial.").

83. United States v. Speed, No. 94-40222, 1995 U.S. App. LEXIS 44110, at *7 n.1 (5th Cir. Jan. 12, 1995).

84. *See* 18 U.S.C. § 1959(a) (2018); United States v. Nascimento, 491 F.3d 25, 31 (1st Cir. 2007) ("VICAR requires that a defendant have committed a crime of violence in return for something of pecuniary value from, or in order to advance or maintain his position within, an enterprise affecting interstate commerce that is engaging in a pattern of racketeering activity."); United States v. Fernandez, 388 F.3d 1199, 1232 (9th Cir. 2004) ("The statute clearly contemplates two alternative theories of motive for the commission of VICAR offenses: either the defendant received something of pecuniary value from the racketeering enterprise to commit the crime ('quid pro quo crime' or

of the offense, then, include: (1) the existence of an enterprise; (2) the enterprise's engagement in racketeering activity; (3) a predicate crime of violence; and (4) the defendant's pecuniary or positional motive.[85]

The first two elements—enterprise and engagement in racketeering—are concepts borrowed from RICO. Under Section 1959, an enterprise "includes any partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity, which is engaged in, or the activities of which affect, interstate or foreign commerce."[86] Upon comparing this definition to RICO's definition of enterprise, two differences are readily apparent. First, the definition in 18 U.S.C. § 1959(b)(2) is slightly narrower than the one in 18 U.S.C. § 1961(4).[87] Second, the definition in 18 U.S.C. § 1959(b)(2) requires engagement in or impact upon interstate or foreign commerce.[88] Despite these slight differences, courts typically hold that RICO and VICAR enterprises are effectively synonymous.[89]

Section 1959 expressly adopts RICO's definition of "racketeering activity."[90] Like "enterprise," this is an expansive term.[91] Among other

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'murder for hire'); or the crime was committed to achieve, maintain or increase the defendant's status in the enterprise ('status crime').").

85. *See* 18 U.S.C. § 1959; United States v. Velasquez, 881 F.3d 314, 332 (5th Cir. 2018); United States v. Kamahele, 748 F.3d 984, 1007 (10th Cir. 2014); United States v. Umaña, 750 F.3d 320, 334–35 (4th Cir. 2014); United States v. Jones, 566 F.3d 353, 363 (3d Cir. 2009); *Fernandez*, 388 F.3d at 1220; United States v. Concepcion, 983 F.2d 369, 381 (2d Cir. 1992); United States v. Rolett, 151 F.3d 787, 790 (8th Cir. 1998).

86. *See* 18 U.S.C. § 1959(b)(2).

87. *See* United States v. Baca, No. CR 16-1613 JB, 2020 U.S. Dist. LEXIS 48577, at *132 (D.N.M. Mar. 20, 2020) (describing RICO's definition as "slightly narrower"). *Compare* 18 U.S.C. § 1959(b)(2) *with* 18 U.S.C. § 1961(4) (2018) (stating that "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity").

88. *See* 18 U.S.C. § 1959(b)(2); *Concepcion*, 983 F.2d at 380 ("This definition differs from the RICO definition of enterprise only in that it includes the commerce requirement, whereas in RICO that requirement appears in each of the sections stating substantive prohibitions of activities with respect to enterprises, rather than in the definition of enterprise.").

89. *See, e.g.*, United States v. Rogers, 89 F.3d 1326, 1335 (7th Cir. 1996), *cert. denied*, 519 U.S. 999 (1996); *see also* United States v. York, No. 1:16-cr-00069-LJO-SKO-11, 2017 U.S. Dist. LEXIS 155627, at *7 n.2 (E.D. Cal. Sep. 22, 2017) ("Section 1959 incorporates the definition of an 'enterprise' and 'racketeering activity' found in the Racketeering Influenced and Corrupt Organizations Act ('RICO'), 18 U.S.C. §§ 1961–1968. Therefore, cases interpreting those terms in RICO apply equally to VICAR."); S. Rep. No. 98-225, at 307 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3486 ("The definition is very similar to that in 18 U.S.C. 1961, the Racketeer Influenced and Corrupt Organizations (RICO) statute, which has been held to include illegal organizations such as organized crime 'families' as well as legitimate business organizations. The Committee intends that the term enterprise here have the same scope.").

90. *See* 18 U.S.C. §§ 1959(b)(1), 1961(1); United States v. Pimentel, 346 F.3d 285, 296 (2d Cir. 2003); United States v. Mapp, 170 F.3d 328, 335 (2d Cir. 1999).

91. United States v. Jones, 566 F.3d 353, 365 (3d Cir. 2009).

things, it includes (1) state felonies involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, and dealing in a controlled substance; (2) roughly analogous federal crimes; and (3) a variety of financial, immigration, narcotics trafficking, and terrorism-related federal offenses.[92] Members and associates of the enterprise—but not necessarily the defendant—must be engaged in racketeering, and there is no requirement that the defendant even know of the enterprise's engagement.[93]

While the statute does not define "engaged in," courts have allowed the phrase its ordinary meaning.[94] It suggests something more than an isolated instance of wrongdoing and seems to require an ongoing threat that members of the enterprise would participate in racketeering activity both before and after the VICAR event.[95] At a minimum, this likely requires a showing of "racketeering activity during the time period relevant" to the predicate act of violence.[96] Because an enterprise acts through its members, associates, and employees,[97] the simplest way to demonstrate that an enterprise was "engaged in racketeering activity" is to prove that its members committed racketeering acts on its behalf both before and after the alleged VICAR offense. An enterprise that exists to perpetually commit racketeering activities would be perpetually

92. *See* 18 U.S.C. § 1961(1)(B)–(G).

93. *See* United States v. Odum, 878 F.3d 508, 518 (6th Cir. 2017) (observing that no court has ever found that "VICAR conviction requires that the government prove the defendant actually knew that the enterprise was engaged in racketeering activity—that is, an explicit knowledge-of-racketeering requirement").

94. *See* United States v. Garfinkle, 842 F. Supp. 1284, 1291 (D. Nev. 1993), *aff'd sub nom.*, United States v. Bracy, 67 F.3d 1421 (9th Cir. 1995); *cf.* Moskal v. United States, 498 U.S. 103, 108 (1990) ("'In determining the scope of a statute, we look first to its language,' giving the 'words used' their 'ordinary meaning.'") (internal citations omitted) (first quoting United States v. Turkette, 452 U.S. 576, 580 (1981); and then quoting Richards v. United States, 369 U.S. 1, 9 (1962)).

95. *See, e.g.*, *Bracy*, 67 F.3d at 1429 (noting that the government presented ample evidence that the enterprise was engaged in racketeering activity before and after the alleged kidnapping); United States v. Moran, No. 11-CR-6083CJS, 2013 U.S. Dist. LEXIS 169078, at *25 (W.D.N.Y. Nov. 26, 2013) (acknowledging that "evidence of ongoing racketeering activity occurring both before and after the VICAR assault is likely relevant to establish that the Hell's Angels were engaged in racketeering activity at the time of the alleged assault"); United States v. Lyttle, No. 2:09-cr-00222, 2010 U.S. Dist. LEXIS 132943, at *14 (S.D. W. Va. Dec. 15, 2010) ("The Government must prove the following to establish VICAR's 'enterprise engaged in racketeering activity' element: (1) that there was a present and ongoing threat that the enterprise would commit racketeering acts through its members; (2) that the threat arose from one or more racketeering acts committed by a member of the enterprise on behalf of the enterprise; and (3) that the threat was existent at the time the predicate crime of violence was committed or threatened.").

96. *Lyttle*, 2010 U.S. Dist. LEXIS 132943, at *25.

97. *See* United States v. Feliciano, 223 F.3d 102, 116–17 (2d Cir. 2000); United States v. Cutolo, 861 F. Supp. 1142, 1146 (E.D.N.Y. 1994).

"engaged in" racketeering activities.[98] However, even a single act can theoretically create an inference that an enterprise is "engaged in" racketeering activity, at least for a short time.[99] A national criminal organization with members acting in several states, then, might be simultaneously and perpetually engaged in racketeering in multiple states or districts.

VICAR's third and fourth elements require that a defendant commit a prohibited act of violence for a prohibited reason. The narrow set of predicate crimes are murder, kidnapping, maiming, assaults either with a dangerous weapon or resulting in serious bodily injury, attempts or conspiracies to commit any of the foregoing offenses, and threatening to commit a crime of violence.[100] A person who commits one of these predicate acts for pecuniary gain or to gain entrance to or maintain membership in an enterprise engaged in racketeering activity violates Section 1959.[101]

IV. EVALUATING THE CURRENT APPROACHES

Section 1959, like RICO and most federal statutes, does not contain an explicit venue provision.[102] Consequently, courts must rely on Section 3237 in determining the appropriate district(s) for prosecutions under VICAR. As one scholar explained:

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98. *See* H. J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 242–43 (1989) ("[T]he threat of continuity may be established by showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business. Thus, the threat of continuity is sufficiently established where the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes . . . . The continuity requirement is likewise satisfied where it is shown that the predicates are a regular way of conducting defendant's ongoing legitimate business (in the sense that it is not a business that exists for criminal purposes), or of conducting or participating in an ongoing and legitimate RICO 'enterprise.'"); *Garfinkle*, 842 F. Supp. at 1292.

99. *See Garfinkle*, 842 F. Supp. at 1292 ("There is no requirement that an enterprise commit any specific number of racketeering acts."); *see also* United States v. Soler, No. 94 Cr. 533 TPG, 1996 WL 734894, at *1 (S.D.N.Y. Dec. 24, 1996) (rejecting the argument that "18 U.S.C. § 1959 requires the jury to find the commission of 'predicate acts'—that the enterprise committed two or more acts of racketeering activity"); *cf.* United States v. Pimentel, 346 F.3d 285, 297 (2d Cir. 2003) (explaining that, "we must affirm the convictions in the event that we find sufficient evidence to establish that the Netas committed at least one of the charged racketeering activities"). *But see Cutolo*, 861 F. Supp. at 1146 ("Presumably § 1959 does not apply where [an enterprise's members, associates, or employees] committed only a single crime. The word 'engaged' implies more than that. But this court need not decide how extensive the criminal activity must be before the enterprise may be said to 'engage' in racketeering.").

100. *See* 18 U.S.C. § 1959(a) (2018).

101. *See id.*

102. While RICO does not contain a venue provision for criminal prosecutions, 18 U.S.C. § 1965(a) contains a venue provision for civil RICO suits. *See id.* § 1965(a) (2018).

> Unlike the simple criminal offenses of the Framers' era, today's crimes tend to be intricate and often transcend fixed geographic boundaries. Consequently, defendants today can commit crimes in districts where they have never been physically present. This anomaly has led to judicial inconsistency when construing criminal statutes.[103]

Because racketeering crimes are precisely the kind of modern offenses that exacerbate such difficulties for courts, and in light of Section 3237's breadth and Section 1959's complexities, courts struggle to dependably venue VICAR prosecutions.

Given VICAR's close and complementary relationship with RICO, courts tend to approach venue questions under the statutes in a similar fashion.[104] While there is obvious merit to interpreting Section 1959's key terms based on RICO precedents, the statutes are, in fact, distinct. A fundamental difference in the nature of VICAR crimes demands a more conservative approach to venue questions than is required under RICO. In short, RICO substantive and conspiracy offenses are quintessentially continuing offenses because a RICO offense necessarily involves multiple parts and is not complete until a second predicate crime is committed.[105] Similarly, VICAR conspiracies are quintessentially continuing crimes. However, unlike RICO, substantive VICAR offenses only require commission of one predicate crime that may or may not be continuing in nature. Consequently, a categorical approach to venuing Section 1959 prosecutions is fundamentally different and demands a more nuanced approach.

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103. Schlesinger, *supra* note 56, at 929.

104. *See* United States v. Jones, No. 7:16-cr-30026, 2017 U.S. Dist. LEXIS 94709, at *19 n.9 (W.D. Va. June 20, 2017) ("Many courts have rejected defendants' challenges to venue for § 1959(a) offenses by focusing on the close relationship between § 1959(a) and RICO under § 1962."); *see, e.g.*, United States v. Umana, No. 3:08CR134-RJC, 2010 U.S. Dist. LEXIS 25817, at *11 (W.D.N.C. Mar. 18, 2010) ("Where the government actually charges a defendant with a RICO conspiracy under 18 U.S.C. § 1962(d), it is without question proper to charge related § 1959 offenses in the same venue.").

105. *See* United States v. Yashar, 166 F.3d 873, 879 (7th Cir. 1999) (observing that RICO is a continuing offense because "[i]t criminalizes a 'pattern' of activity that can include predicate acts separated in time by as much as ten years. Therefore, the nature of the offense is such that Congress must have intended it to be a continuing one, and thus an exception to the normal start of the limitations period," and discussing straddle offenses in the context of statutes of limitations); United States v. Wong, 40 F.3d 1347, 1366–67 (2d Cir. 1994); United States v. Moscony, 927 F.2d 742, 754 (3d Cir. 1991) (agreeing that "RICO is a continuing offense 'directly analogous to the crime of conspiracy,'" and discussing straddle offenses for application of the United States Sentencing Guidelines); United States v. Tackett, No. 11-15-ART, 2011 U.S. Dist. LEXIS 101244, at *14 (E.D. Ky. Sep. 8, 2011) (stating that "RICO is a continuing offense . . . because its statute criminalizes patterns of activity that can include predicate acts separated in time by as many as ten years," and discussing straddle offenses in the context of statutes of limitations).

Thus far, two variations of the verb test—the "operation of the enterprise" and "physical manifestation of purpose" approaches—have been utilized to determine whether non-conspiratorial VICAR events occurred in one or more districts. However, each fails to adequately account for the more limited nature of Section 1959's proscriptions. The approaches are described and evaluated below.

A. The "Operation of the Enterprise" Approach

The "operation of the enterprise" approach to the verb test was first articulated by the Second Circuit Court of Appeals the year after the Supreme Court decided *Rodriguez-Moreno*, and it has been embraced by other courts considering the limits of venue for VICAR crimes. The Second Circuit's approach begins by classifying Section 1959 violations as categorically continuing crimes because of its enterprise requirement.

1. *Saavedra* and the "Operation of the Enterprise" Approach

In *United States v. Saavedra*, Marcelino Saavedra and Luis Rodriguez, both members of the Latin Kings street gang, gathered with others at the apartment of Nephtali DeJesus, a fellow member, and discussed plans to jointly retaliate against the brother of DeJesus's then-pregnant common-law wife for beating her and threatening him.[106] With the assistance of a government informant, the police thwarted the attack by locating and arresting the conspirators shortly after they left DeJesus's apartment.[107]

The Latin Kings gang was headquartered in Manhattan, located in the Southern District of New York; but Brooklyn, which is located in the Eastern District of New York, was the *situs* for the meeting, planning, and potential assault.[108] The defendants were charged in the Southern District of New York with separate counts of conspiring and attempting to commit assault in aid of racketeering in violation of 18 U.S.C. § 1959(a)(6). They contended, among other things, that venue was inappropriate in the Southern District.[109]

In affirming that venue was appropriate, the Second Circuit reasoned that VICAR offenses are continuing crimes because the motive element is "a critical conduct element of the offense."[110] The court reached this conclusion by emphasizing the statute's complementary relationship with RICO.[111] Both statutes target criminal conduct

106. *See* United States v. Saavedra, 223 F.3d 85, 86–87 (2d Cir. 2000).
107. *See id.* at 87.
108. *See id.* at 86–87.
109. *See id.* at 86–88.
110. *Id.* at 91.
111. *See id.*

connected to enterprises engaged in racketeering activity, and crimes that might otherwise seem to be isolated acts of violence outside of the racketeering context are not single acts when they "occur as part of the activities of the criminal enterprise."[112]

In this case, the motive element "serve[d] as a continuing thread between Manhattan, the epicenter of the Latin Kings racketeering operations, and Brooklyn," where the conspiratorial agreement was made and where the attack ostensibly would have occurred.[113] Consequently, the crimes either began, continued, or were completed in the Southern District, and venue was permissible under Section 3237(a). The court then determined that, although no conduct specifically related to the conspiracy and attempted assault occurred in the Southern District, venue there was not unfair or prejudicial to the defendants because the Latin Kings enterprise had "substantial contacts" with the district since the group was headquartered in Manhattan and members held monthly meetings there.[114]

According to the Second Circuit, venue is appropriate in the district where the enterprise is principally located, even if no conduct relating to the predicate violent crime occurs in that district.[115] In anticipation of criticisms that its decision could "open the floodgates" for VICAR charges in any federal district where members of the Latin Kings might have operated, the court explained,

> Although the racketeering enterprise might have conducted some operations in [other districts] as a formal matter, the "elements and nature of the crime" under § 1959 would not create "substantial contacts" to that district because the "essential" quality of the racketeering element in § 1959 derives from the inextricability of the defendants' acts and their position in the racketeering enterprise.[116]

As part of its substantial-contacts analysis,[117] the court asserted that the repercussions of the crime would be felt strongly in the Southern

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112. *Id.*

113. *Id.* at 92.

114. *See Saavedra*, 223 F.3d at 93.

115. *See id.* at 94.

116. *Id.*

117. The Second Circuit Court of Appeals, among other circuit courts, supplements its venue analysis with the "substantial contacts" test—a tool for determining the *fairness* of venuing a prosecution in one district among multiple constitutional or statutory options. *See, e.g.*, United States v. Auernheimer, 748 F.3d 525, 537 (3d Cir. 2014) ("This test thus serves to limit venue in instances where the *locus delicti* constitutionally allows for a given venue, but trying the case there is somehow prejudicial or unfair to the defendant."); United States v. Williams, 788 F.2d 1213, 1215 (6th Cir. 1986). The test is, strictly speaking, a method of restricting otherwise-lawful venue options rather than determining the outer limits. "If a defendant argues that the chosen venue is constitutionally infirm but that it did not result in any hardship to him, the court only

District but did not actually explain why this was so.[118] Also, while the court noted that venue for a criminal conspiracy properly lies in any district where coconspirators acted, the court did not identify any actions taken in the Southern District by a defendant or coconspirator in furtherance of the alleged VICAR conspiracy and attempted assault.[119] On the contrary, the government conceded that all acts or acts in furtherance of the conspiracy occurred in the Eastern District.[120]

2. *Saavedra*'s Aftermath

Consistent with the ruling in *Saavedra*, the government sometimes argues that venue is appropriate in districts where neither the defendant nor a confederate for whom the defendant is criminally responsible acted in furtherance of the alleged predicate crime because venue is appropriate wherever the enterprise conducts its affairs.[121] While few courts have ruled on the question of whether VICAR offenses are categorically continuing crimes, some have clearly accepted this argument and indicated that they concur with the Second Circuit's reasoning.[122] For example, in *United States v. Owens*, a member of the Aryan Brotherhood of Mississippi ("ABM") objected to being charged in the Northern District of Mississippi with murder in aid of racketeering.[123]

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determines the *locus delicti* and does not then analyze whether there were 'substantial contacts.'" *Auernheimer*, 748 F.3d at 537; *see also* United States v. Coplan, 703 F.3d 46, 80 (2d Cir. 2012); United States v. Magassouba, 619 F.3d 202, 205 n.2 (2d Cir. 2010). Consequently, while the substantial-contacts analysis is sometimes prominent in courts' reasoning—as it is in *Saavedra*—it is secondary to, and does not bear directly upon, the question under consideration in this Article, i.e., the constitutional and statutory limits of venue for VICAR crimes.

118. *See Saavedra*, 223 F.3d at 94.

119. *See id.*

120. *See id.* at 89.

121. *See* United States v. McIntosh, No. CR 02-938(A) VAP, 2007 WL 9676741, at *1 (C.D. Cal. Nov. 27, 2007); *see also* United States v. Owens, No. 4:14-cr-00141-GHD-SAA-1-15, 2016 U.S. Dist. LEXIS 139970, at *54–55 (N.D. Miss. Oct. 6, 2016).

122. *See* United States v. Odum, No. 15-2280/2503, 2017 U.S. App. LEXIS 24231, at *15 (6th Cir. Nov. 30, 2017) (noting that venue for assault with a dangerous weapon in aid of racketeering was appropriate in the Eastern District of Michigan, where the enterprise was headquartered, even though the shooting occurred in Ohio); *McIntosh*, 2007 WL 9676741, at *1–2 ("The racketeering element of VICAR makes it a 'continuing offense' because it involves ongoing conduct.") (citing *Saavedra*, 223 F.3d at 91–92); United States v. McElhiney, No. CR 02-938-GHK, 2007 WL 9676539, at *2 (C.D. Cal. Feb. 22, 2007) (citing *Saavedra*, 223 F.3d at 91–92); *see also Owens*, 2016 U.S. Dist. LEXIS 139970, at *60–61 (citing *Saavedra*, 223 F.3d at 91–92); Owens v. United States, No. 4: 13CV2561 CDP, 2015 U.S. Dist. LEXIS 88376, at *7–9 (E.D. Mo. July 8, 2015) (determining that VICAR murders in Illinois and Ohio were continuing offenses and determining that venue was appropriate in Missouri where the enterprise engaged in criminal activity unrelated to the murders) (citing *Saavedra*, 223 F.3d at 91–92); United States v. Aiken, 76 F. Supp. 2d 1346, 1349–51 (S.D. Fla. 1999).

123. *See* United States v. Owens, 724 F. App'x 289, 296 (5th Cir. 2018).

The government countered that trial was properly venued in the Northern District, even if the defendant did not commit an overt act there, because he purposed to increase or maintain his position in the ABM, an enterprise that operated throughout the entire State of Mississippi.[124] Without finding that the defendant either committed or agreed to commit crimes or overt acts in the Northern District, the Fifth Circuit held that venue was proper because the murder occurred on behalf of a state-wide organization whose members operated in the district in unrelated matters.[125]

3. Evaluation of the "Operation of the Enterprise" Approach

The lone dissenting judge in *Saavedra* articulated several fallacies in the majority's opinion. First, the mere existence of the Latin Kings gang in the Southern District was not part of the "conduct" proscribed under 18 U.S.C. § 1959.[126] Second, the court's conspiracy analogy failed because no acts in furtherance of the conspiracy occurred in the Southern District, "and there is no authority whatsoever for the proposition that the acts of one member of a racketeering organization may be imputed to other members of the same organization."[127] Third, the dissent warned that the "holding may . . . permit prosecution for § 1959(a) offenses in any district in which the racketeering enterprise has operated at any point in time—no matter how tenuous the connection, if any, between the underlying acts of the defendant and these operations."[128] While the majority attempted to foreclose such extremes, the government "candidly acknowledged at oral argument that this was the logical consequence of its theory of the case."[129]

Indeed, the Second Circuit's reasoning that the existence of an enterprise under Section 1959 is a conduct element is unpersuasive. Congress clearly articulated traditional *mens rea* requirements—more precisely, motive requirements—in Section 1959. The existence of an enterprise is an essential element of a VICAR crime, but its existence does not necessarily involve any action by the defendant. As one court explained, "if Congress made it a crime to jaywalk at 2:00 p.m., the 'conduct element' would be 'jaywalking,' while the 'circumstance element' would be the time-of-day requirement."[130] The mere existence of a racketeering enterprise under Section 1959 is analogous to the time-

124. *See id.* at 295–96.
125. *See id.*
126. *See Saavedra*, 223 F.3d at 95–96 (Cabranes, J., dissenting).
127. *Id.*
128. *Id.* at 99.
129. *Id.*
130. *See* United States v. Brennan, 452 F. Supp. 3d 225, 234 (E.D. Pa. 2020).

of-day requirement; it is a circumstance element, and consequently should have no bearing on the venue analysis.

The dissent in *Saavedra* discussed the fallacy of analogizing VICAR to conspiracy for venue purposes, but the majority's effort to analogize it to RICO also fails since RICO's classification as a continuing offense is not contingent on the existence of an enterprise. Instead, RICO is a continuing offense specifically because it requires that a defendant commit at least two predicate crimes over a period of time.[131] Section 1959, however, is distinct in that violations require only one criminal act.[132] Unless the one criminal act is itself a continuing crime—like conspiracy or kidnapping—or occurs in parts over a period of time, VICAR offenses are not continuing.

B. The "Physical Manifestation of Purpose" Approach

Apparently unpersuaded by the Second Circuit's reasoning in *Saavedra*, the Fourth Circuit Court of Appeals took a decidedly different approach to determining the appropriateness of venue for VICAR crimes. Rather than confer venue based on the existence of the alleged enterprise within the relevant district, the Fourth Circuit's method reads a conduct requirement into Section 1959's *mens rea* element and potentially affixes venue based on this requirement.

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131. *See* United States v. Yashar, 166 F.3d 873, 879 (7th Cir. 1999) (observing that RICO is a continuing offense because "[i]t criminalizes a 'pattern' of activity that can include predicate acts separated in time by as much as ten years. Therefore, the nature of the offense is such that Congress must have intended it to be a continuing one, and thus an exception to the normal start of the limitations period"); United States v. Wong, 40 F.3d 1347, 1366–67 (2d Cir. 1994); United States v. Moscony, 927 F.2d 742, 754 (3d Cir. 1991) (agreeing that "RICO is a continuing offense 'directly analogous to the crime of conspiracy'"); United States v. Tackett, No. 11-15-ART, 2011 U.S. Dist. LEXIS 101244, at *14 (E.D. Ky. Sep. 8, 2011) ("RICO is a continuing offense . . . because its statute criminalizes patterns of activity that can include predicate acts separated in time by as many as ten years.").

132. *See* Tse v. United States, 290 F.3d 462, 465 (1st Cir. 2002) (observing that 18 U.S.C. § 1959 "contains no requirement that the government establish a pattern of racketeering activity"); United States v. Fiel, 35 F.3d 997, 1005 (4th Cir. 1994), *cert. denied*, 513 U.S. 1177 (1995) ("Section 1959 contains no required 'pattern' of racketeering activity."); United States v. York, No. 00069-LJO-SKO-11, 2017 U.S. Dist. LEXIS 155627, at *7 n.2 (E.D. Cal. Sep. 22, 2017) ("The major difference between the two statutes, aside from the fact that VICAR deals explicitly with violent crimes, is that although the government must prove the existence of an 'enterprise engaged in racketeering activity' under Section 1959, it need not prove that there was a 'pattern' of racketeering activity as required in a RICO charge under Section 1962.").

1. *Umaña* and the "Physical Manifestation of Purpose" Approach

In *United States v. Umaña*, Alejandro Enrique Ramirez Umaña, a member of the notorious Mara Salvatrucha street gang, commonly known as MS-13, was convicted of, *inter alia*, two VICAR murders for killing a pair of brothers in a Greensboro, North Carolina, restaurant following perceived slights to his gang.[133] MS-13 is "a transnational organization, with groups, or 'cliques,' across the United States, in Canada, and in Central America."[134]

In 2007, Umaña, an experienced and reputed member of the gang, was dispatched by a leader in New York to take control of an underperforming clique in Charlotte, North Carolina.[135] Upon arriving in Charlotte, a city located in the Western District of North Carolina, Umaña convened meetings, directed the local groups, and instructed them in MS-13 protocols over a period of months.[136] In December of the same year, he and fellow gang members encountered the eventual victims inside a restaurant in Greensboro, North Carolina, a city located in the Middle District of North Carolina.[137] At some point, the brothers, who were unaffiliated with gangs, engaged in an argument with members of Umaña's group, and one of the brothers insulted the gang.[138] Umaña shot and killed both men before exiting the establishment,[139] and he subsequently explained to fellow members that he killed the young men because "they insulted the MS-13" and "he was doing it because of us, too."[140] He was arrested in Charlotte a few days after the murders and charged in the Western District.[141]

Umaña was convicted at trial but objected pre-trial that venue for the murders was proper only in the Middle District because the lone *actus reus* requirement for murder in aid of racketeering is "murder."[142] He contended that VICAR's purpose requirement is a *mens rea* element that does not rightly factor into an analysis of where the underlying violent crime occurred.[143] Consistent with its argument in other VICAR cases, the government asserted that MS-13's racketeering activities in the Western District were an essential conduct element of 18 U.S.C.

133. *See* United States v. Umaña, 750 F.3d 320, 329 (4th Cir. 2014).
134. *Id.* at 330.
135. *See id.* at 331.
136. *See id.*
137. *See id.*
138. *See id.*
139. *See id.* at 331–32.
140. *Id.* at 332.
141. *See id.*
142. *See id.* at 332–35.
143. *See* United States v. Umaña, 750 F.3d 320, 334–35 (4th Cir. 2014).

§ 1959(a)(1) and made venue appropriate there as well as the Middle District.[144]

The Fourth Circuit rejected Umaña's argument and, in so doing, adopted a rationale that seemingly had not been advocated by either party. According to the court, VICAR's purpose clause "defines a motive element that includes a requirement that the defendant have interacted with the enterprise with respect to his purpose of bolstering his position in that enterprise."[145] To satisfy this requirement, the court explained that a mafia boss might order a member to commit a murder or, after the murder occurs, a member might return to other members of the group "to boast about his exploits with a mind toward advancement."[146] The Fourth Circuit ultimately held that venue was appropriate in the Western District of North Carolina because Umaña objectively manifested his positional purpose in Charlotte both before and after the killings.[147] More specifically, he discussed maintaining respect with MS-13 members in the months prior to the Greensboro homicides, and he returned to Charlotte and boasted thereafter.[148]

Rather than focus on the activities of the enterprise, even activities wholly unrelated to the charged acts of violence, to interpret Section 1959 as a continuing offense, the Fourth Circuit essentially averred that the statute's *mens rea* element necessarily includes a distinct *actus reus* element and that this embedded "conduct element" can be used for affixing venue. It offered two justifications for this interpretation. First, "a physical manifestation of purpose is necessary to ensure that the act is actually carried out to further the enterprise's goals" rather than, for instance, "with a secret intent to join a gang where the murderer has absolutely no prior connection with the gang itself."[149] Second, the statutory context suggests that, like its pecuniary-value-motive alternative, VICAR's positional purpose *mens rea* requirement necessitates a *quid pro quo*.[150]

2. *Umaña*'s Aftermath

While the Fourth Circuit did not explicitly announce that Section 1959 creates continuing offenses, such a conclusion is the necessary consequence of its holding, and that is how other courts have interpreted the decision. Perhaps sensing the weaknesses in the Fourth Circuit's

144. *See id.* at 334.
145. *Id.* at 335.
146. *Id.*
147. *See id.* at 335–36.
148. *See id.* at 335.
149. *Id.*
150. *See id.*

reasoning, the United States District Court for the Western District of Virginia subsequently attempted to rationalize it under the effects test. In *United States v. Jones*, the court stated that VICAR inherently references the effects of the conduct the Fourth Circuit read into the statute's purpose element.[151] There, two Mad Stone Bloods gang members were charged with two counts of assault in aid of racketeering stemming from their participation in robberies in Norfolk, Virginia, located in the Eastern District of Virginia.[152] The defendants objected to being tried in the Western District, while the government argued that venue was proper because the gang's leaders resided and operated in the Western District.[153]

According to the district court, VICAR's purpose element "inherently references the effects of the proscribed conduct," and the specific effect under consideration was the decision-making of the enterprise's leaders.[154] In articulating the kind of evidence that would have satisfied this motive-related conduct element, the district court noted that: (1) neither defendants nor any other member of the enterprise engaged in related conduct in the Western District of Virginia; (2) there was no evidence that the violent crimes were ordered or approved by leaders in the Western District; and (3) there was no evidence that the perpetrators communicated about their crimes with enterprise leaders in the Western District.[155] Because the government's proof established none of these things, the VICAR assault charges were dismissed without prejudice for improper venue.[156]

While the reasoning in *Jones* was constrained by the Fourth Circuit's decision in *Umaña*, the court's explanation reimagines what it means to aid and abet a crime in violation of 18 U.S.C. § 2.[157] Under the verb test, venue would have been proper in the Western District under Section 3237 had the government proven any of the scenarios described by the district court because a defendant or someone for whom the defendant was legally responsible would have acted in the Western

151. *See* United States v. Jones, 302 F. Supp. 3d 752, 759 (W.D. Va. 2017).

152. *See id.* at 755.

153. *See id.*

154. *Id.* at 759 (quoting United States v. Oceanpro Indus., 674 F.3d 323,329 (4th Cir. 2012)); *see id.* ("Thus, proving the § 1959(a) offenses in this case necessarily requires evidence of the effects of [the defendants'] conduct on the decisions of [Mad Stone Bloods] leaders who grant membership to and promotions within the gang.").

155. *See id.* at 760.

156. *See id.* at 762–63.

157. *See* 18 U.S.C. § 2 (2018) (detailing the entitled "Principals" section as, "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal; (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal").

District in furtherance of the crime of violence. The only apparent reason for contorting the nature of VICAR's motive requirement or the proof necessary to establish its existence was the district court's obligation to conform to the Fourth Circuit's precedent in *Umaña*.

3. Evaluation of the "Physical Manifestation of Purpose" Approach

The Fourth Circuit's opinion is striking, in the first instance, in that it does not even mention *Saavedra*. The court clearly intended to take a wholly different approach but seemingly wanted to avoid explicitly disavowing the precedent in its sister circuit. On a positive note, the *Umaña* decision does not attempt to stretch the notions of venue to improperly include districts where the alleged enterprise merely exists. Rather, it rightly attempts to limit the *locus delicti* according to either the defendants' behavior—or at least directly relevant behaviors of defendants' confederates—and the predicate crimes.

Still, the Fourth Circuit made an egregious mistake. While the court attempted to tie venue to the defendant's own conduct, or potentially the conduct of persons who actually participated in the predicate violent crime, its reasoning is deeply flawed. First, Section 1959's motive requirement simply does not have an embedded *actus reus* requirement. Despite the fact that 18 U.S.C. § 1959 was enacted 30 years before *Umaña* was decided, both of the court's arguments in support of its interpretation—(1) that physical manifestation of purpose is necessary to confirm the defendant's purpose and (2) VICAR's positional purpose requirement requires a *quid pro quo*—are without precedent, and the Fourth Circuit did not cite any cases affirming its logic. In fact, the weight of legal authority is decidedly in the other direction.

VICAR has a traditional motive element in that it only refers to the defendant's purpose and does not include an inherent conduct requirement, and the *Umaña* decision is patently inconsistent with the Fourth Circuit's own precedents. Shortly before *Umaña* was decided, the Fourth Circuit observed that, "[t]he *actus reus* is the 'guilty act' required for the imposition of criminal sanctions, and is distinguishable from the *mens rea*, i.e., the guilty mind."[158] Moreover, it concluded that, "the *mens rea* requirement under Section 1001 was a circumstance element that does not contribute to determining the *locus delicti* of the crime."[159] *Actus reus* and *mens rea* elements are clearly distinct, and under the Fourth Circuit's formulation, transforming an obvious *mens rea* element into a conduct element expands the government's already broad

158. United States v. Jefferson, 674 F.3d 332, 367 n.46 (4th Cir. 2012).
159. United States v. Oceanpro Indus., Ltd., 674 F.3d 323, 329 (4th Cir. 2012).

discretion in enforcing Section 1959 beyond constitutional and statutory limits.

The requirement that VICAR motive be objectively manifested compounds the initial mistake of reading a second conduct element into the statute. It is well-established that *mens rea* can be, and often is, proven circumstantially and without any necessary overt acts.[160] Reading an objective physical act requirement into the statute without either textual support or obvious proof of legislative intent involves a tortured exercise in eisegesis and should be untenable to both defendants and the government. The brunt of that expansion obviously falls on defendants, but the requirement improperly adds an *actus reus* requirement to the government's burden of proof that raises substantial questions about when VICAR offenses are even complete.

A plain reading of the statue does not require proof that the defendant or a confederate act in a way that proves the defendant's motive and neither does its legislative history. Moreover, the United States Department of Justice clearly identifies Section 1959's purpose element as a simple *mens rea* requirement.[161] If the statute includes a second conduct element involving an objective manifestation of motive, the requisite proof would be required to establish guilt in addition to establishing venue. Of course, no court has ever concluded that guilt under Section 1959 is contingent on such proof. The government may not always object strenuously, however, because the additional burden of proof is practically negligible in many instances, and the return for meeting it—expanded venue options—can be great.

The Fourth Circuit's contention that VICAR's alternative purpose elements necessarily involve conduct on the part of a defendant or a

160. *See* United States v. Idriss, 436 F.3d 946, 950 (8th Cir. 2006) ("The government need not prove intent directly and can often prove intent by circumstantial evidence."); United States v. Bucher, 375 F.3d 929, 934 (9th Cir. 2004) (observing that specific intent "can be inferred from the defendant's conduct and from the surrounding circumstances" (quoting United States v. Hernandez-Franco, 189 F.3d 1151, 1155 (9th Cir. 1999))); State v. Foster, 921 N.W.2d 454, 460 (N.D. 2019) ("[C]ircumstantial evidence is often the only way to prove criminal intent." (quoting State v. Sabo, 742 N.W.2d 812, 817 (N.D. 2007))); State v. Belleville, 88 A.3d 918, 921 (N.H. 2014) ("Because persons rarely explain to others the inner workings of their minds or mental processes, a culpable mental state must, in most cases[,] be proven by circumstantial evidence." (alteration in original) (quoting State v. Tayag, 977 A.2d 510, 513 (N.H. 2009))).

161. *See* VICAR MANUAL, *supra* note 5, at 9 ("The mens rea element of Section 1959 is commonly referred to as the purpose element; that is, that the Section 1959 predicate crime was committed for the purpose of **either** the receipt of, or as consideration for a promise or an agreement to pay, anything of pecuniary value, **or** 'for the purpose of gaining entrance to or maintaining or increasing position in an enterprise.' The defendant must also act with the intent required by the Section 1959 predicate offense.").

confederate is erroneous and unprecedented. If Congress had intended to require an objective manifestation of a defendant's motive, it certainly could have written the statute that way. Yet, there is absolutely no indication in the statutory language or the legislative history supporting such an intention. In this instance, the novelty of the court's interpretation fatally undermines its credibility. Plainly stated, prior to *Umaña*, no court, including the Fourth Circuit, had ever reached such a conclusion.

V. THE PROPOSED "ACT IN FURTHERANCE OF THE PREDICATE CRIME" APPROACH

The verb test has been approved by the Supreme Court and is appropriate for determining venue under Section 1959.[162] The effects test, while viable for statutes that explicitly proscribe producing certain effects, is inapposite for VICAR because the statute contains no material effects language.[163] Rather than reimagining VICAR's elements in order to expand the government's forum-shopping power, courts should recognize that the various interests inherent in the venue determination are best served by allowing the statute's terms their plain meaning and applying 18 U.S.C. § 3237 in a traditional way.

The Second and Fourth Circuits rightly employ variations of the verb test, but neither the Second Circuit's "operation of the enterprise" approach nor the Fourth Circuit's "physical manifestation of purpose" approach is compatible with constitutional limitations, the dictates of Section 3237, or Supreme Court precedent. Each potentially venues criminal cases in districts where absolutely no conduct, even accessorial conduct, pertaining to the predicate crime of violence occurred. This is because each test treats a non-conduct element as though it were, in fact, a conduct element for purposes of conferring venue. The "operation of the enterprise" standard does so by focusing on the existence of the enterprise—a circumstance element under Section 1959—and the "physical manifestation of purpose" approach does so by improperly transforming a motive element into a second *actus reus* requirement.

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162. *See* United States v. Rodriguez-Moreno, 526 U.S. 275, 276 (1999).

163. *See* United States v. Auernheimer, 748 F.3d 525, 537 (3d Cir. 2014) ("The Government has not cited, and we have not found, any case where the locus of the effects, standing by itself, was sufficient to confer constitutionally sound venue."); United States v. Bowens, 224 F.3d 302, 314 (4th Cir. 2000) ("In summary, we hold that venue for a criminal prosecution must be determined solely in reference to the essential conduct elements of the charged offense. Venue will lie wherever those essential conduct elements have occurred. Venue will also lie where the effects of the defendant's conduct are felt, but only when Congress has defined the essential conduct elements in terms of those effects."); United States v. Brennan, 452 F. Supp. 3d 225, 234–35 (E.D. Pa. 2020).

These approaches err in a similar way and share a common foundational flaw—they fail to recognize that the VICAR statute creates a series of distinct offenses that cannot be treated categorically for venue purposes. Quite simply, some VICAR offenses are continuing crimes, and some are not. For example, conspiracies to commit substantive violent crimes in violation of 18 U.S.C. § 1959(a)(5) and (6) are categorically continuing offenses because conspiracy is a quintessential continuing offense.[164] Determining proper venue for VICAR conspiracies, then, is relatively straightforward. Venue is appropriate in any district where a conspirator either agreed to commit or actually committed an overt act in furtherance of the conspiratorial agreement.[165] Similarly, kidnapping offenses in violation of 18 U.S.C. § 1959(a)(1) continue until the victim is released or rescued, and venue would constitutionally lie in any district where the victim was taken, held, or transported in the course of the kidnapping or in any district where someone performed an act in furtherance of the same.[166]

For non-conspiracy VICAR crimes, though, whether inchoate or complete, venue properly lies in the district(s) where the proscribed conduct occurred. While it is possible that various acts involving a given murder, aggravated assault, or threat could be committed by various perpetrators and accessories over a period of time and in various districts, this is not required, given the nature of the crimes. Indeed, such circumstances would be exceptional in many criminal organizations. In the vast majority of cases, punctiliar crimes like murder or assault begin and end within a relatively short span in a confined geographic area. In such an instance, the VICAR crime would no more be a continuing offense than its underlying predicate because Section 1959 does not require any additional conduct beyond the conduct required for the predicate. Violent crimes in aid of racketeering, then, may be continuing

164. *See* United States v. Yashar, 166 F.3d 873, 875 (7th Cir. 1999) ("The classic example of a continuing offense is a conspiracy, but other offenses such as escape or kidnapping also may fall within those definitions."); United States v. McGoff, 831 F.2d 1071, 1078 (D.C. Cir. 1987) ("The classic example of a continuing offense is conspiracy.").

165. *See* Hyde & Schneider v. United States, 225 U.S. 347, 363 (1912) ("We have held that a conspiracy is not necessarily the conception and purpose of the moment, but may be continuing. If so in time, it may be in place—carrying to the whole area of its operations the guilt of its conception and that which follows guilt, trial and punishment."); United States v. Rosenberg, 888 F.2d 1406, 1415 (D.C. Cir. 1989).

166. *See Rodriguez-Moreno*, 526 U.S. at 281 ("A kidnaping, once begun, does not end until the victim is free."); United States v. Garcia, 854 F.2d 340, 343–44 (9th Cir. 1988) (kidnapping is a continuing offense because it involves detention and continues throughout the duration of the detention); United States v. McQuarrie, No. 16-cr-20499, 2018 U.S. Dist. LEXIS 58872, at *9 (E.D. Mich. Apr. 6, 2018) ("Thus, kidnapping is a continuing offense because the injury to the victim is inflicted anew each day.").

but are not *necessarily* continuing, and a viable approach to affixing their venue must account for this nuance.

The Second and Fourth Circuits have employed liberal approaches that allow for more expansive venue options with VICAR offenses than Section 3237 authorizes, but the Supreme Court has indicated that a cautious interpretive approach is "more consonant with the considerations of historic experience and policy which underlie [the venue] safeguards in the Constitution."[167] Because some substantive violent crimes in aid of racketeering are necessarily continuing while others are potentially continuing and still others simply are not, venue for each alleged VICAR crime must be evaluated separately.

This evaluation should be fairly simple in most instances. To the extent that a predicate violent crime is wholly conceived and completed in one district, venue is only appropriate in the district where it was conceived and completed. Such a conclusion is consistent with traditional venue determinations as contemplated by the Framers and guaranteed by the U.S. Constitution.[168] However, venue could also rightly lie in multiple districts if the underlying crime of violence moves into more than one district. For example, if the violent crime was ordered by parties in one district and carried out in a second district with remote assistance from a member in a third district, then venue would appropriately lie in any of the three districts.

Venue for violent crimes is always appropriate where the harm is ultimately inflicted, but it is also appropriate in any district where a participant aided and abetted in inflicting the harm. Under the verb test, VICAR's conduct elements—commission of one or more of the predicate crimes—ostensibly extend to accessorial acts. The Supreme Court has long recognized that, though a person is located in one district, he might be constructively present while helping to bring a crime to fruition in another district.[169] Title 18 U.S.C. § 2 defines a principal as "one who aids and abets the commission of a crime is not only *punishable as* a principal but *is* a principal."[170] Consequently, venue would be proper both in districts where accessorial acts are committed

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167. United States v. Johnson, 323 U.S. 273, 275 (1944).

168. *See* U.S. CONST. art. III, § 2; *see also* U.S. CONST. amend. VI.

169. *See, e.g.*, Hyde v. United States, 225 U.S. 347, 362 (1912) (discussing conspiracy).

170. United States v. Oates, 560 F.2d 45, 55 (2d Cir. 1977). 18 U.S.C. § 2 provides the following:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 2 (2018).

and in the district where the crime is consummated.[171] This conclusion is wholly consistent with the expanded conception of venue authorized under Section 3237.

While no circuit court has adopted this more conservative approach for VICAR crimes, at least two circuit courts have reasoned in ways that are in harmony with it. First, in *United States v. Leija-Sanchez*, the Seventh Circuit considered the propriety of trying a murder in the Northern District of Illinois.[172] There, Julio Leija-Sanchez led an enterprise that fraudulently produced identification documents for aliens illegally residing in the United States.[173] Leija-Sanchez was charged with murder in aid of racketeering for arranging the murder in Mexico of a former enterprise employee who went into competition with him.[174] The Seventh Circuit affirmed the appropriateness of prosecuting Leija-Sanchez in Illinois because, among other things, he arranged for the killing and attendant payment from within the state.[175]

Similarly, the Ninth Circuit determined venue for VICAR murder based on the defendant's alleged actions relating to the murder rather than the *situs* of the enterprise or any actions manifesting VICAR *mens rea*. In *United States v. Stinson*, John Stinson was a member of the ruling commission for the Aryan Brotherhood, a prison gang for white inmates that operates throughout California and federal prisons.[176] He was charged with RICO conspiracy and two murders in aid of racketeering, and he moved to dismiss the VICAR counts for improper venue in the Central District of California since the alleged murders occurred in the Northern District of California.[177]

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171. *See* United States v. Lange, 834 F.3d 58, 69 (2d Cir. 2016) ("Where guilt of a substantive offense is premised on aiding and abetting, '[v]enue is proper where the defendant's accessorial acts were committed *or* where the underlying crime occurred' because '18 U.S.C. § 2 alters the common law rule to provide an *additional* venue where . . . the principal[] acted.'" (quoting United States v. Smith, 198 F.3d 377, 383 (2d Cir. 1999))); United States v. Thomas, 690 F.3d 358, 370 (5th Cir. 2012) ("We have held that venue is proper in a district where the defendant did not act when the defendant has aided and abetted the commission of the substantive offense that occurred in the district. An individual charged with 'aiding and abetting may be tried in the district where the principal committed the substantive crimes.'" (quoting United States v. Carreon-Palacio, 267 F.3d 381, 393 (5th Cir. 2001))); United States v. Kilpatrick, 458 F.2d 864, 868 (7th Cir. 1972) ("Congress has declared that an aider and abettor may be punished as a principal, and it follows that he may be punished in the same district as the principal."); *see also* United States v. Cabrales, 524 U.S. 1, 7 (1998) (finding that venue was not appropriate in Missouri and noting that the defendant, resident in Florida, was not charged with aiding or abetting drug trafficking in Missouri).

172. *See* United States v. Leija-Sanchez, 602 F.3d 797, 798 (7th Cir. 2010).

173. *See id.* at 798.

174. *See id.*

175. *See id.* at 800.

176. *See* United States v. Stinson, 647 F.3d 1196, 1203 (9th Cir. 2011).

177. *See id.*

The Ninth Circuit concluded that venue was appropriate because the indictment alleged that Stinson aided and abetted the alleged murders at a prison in the Northern District from the Southern District.[178] Consequently, the alleged VICAR murders were continuing offenses "in this case."[179] While the court did not offer a comprehensive answer to when VICAR offenses can be continuing, it seemingly signaled an intention to make the decision on a case-by-case basis, rather than a categorical basis, and "[c]ourts applying *Stinson* have found venue proper in VICAR cases where the indictment charged [essential conduct elements, including] aiding and abetting language within the district of prosecution."[180]

CONCLUSION

The constitutional venue provisions, located in Article III Section 2 and the Sixth Amendment, "cannot be nullified by any statute of the United States."[181] The text of 18 U.S.C. § 1959 does not threaten to obviate these protections but, in some instances, the government advocates and the courts allow extensions of venue in VICAR prosecutions that exceed the constitutional limits. They seemingly do so in the name of convenience for the government and the judiciary.[182] Along the way, however, they discount or overlook defendants' fundamental and compelling interests. Rather than strain to shoehorn VICAR prosecutions into venues where they do not rightly belong, the government and the courts should recognize that VICAR is a more limited statute than RICO and thus rely on traditional venue analyses. Some predicate crimes, like conspiracy and kidnapping, are necessarily continuing offenses, but others, like murder and assault, are not. Given the elements of this powerful statute, which includes only one *actus reus* requirement, federal prosecutors should be allowed to bring charges in any district where either the predicate crime of violence was committed or a confederate committed an accessorial act. Whatever exceeds these limits violates the U.S. Constitution and 18 U.S.C. § 3237 and potentially imposes untenable burdens on defendants.

178. *See id.* at 1204.

179. *Id.*

180. United States v. Willie, No. 3:19-CR-65-10, 2020 WL 2225355, at *3 (N.D. Miss. May 7, 2020); *see also* United States v. Garcia, No. 11-cr-68-EJL, 2012 WL 6623984, at *16 (D. Idaho Dec. 19, 2012) (following *Stinson*).

181. *In re* Palliser, 136 U.S. 257, 262 (1890).

182. *Cf.* United States v. Aiken, 76 F. Supp. 2d 1346, 1350–51 (S.D. Fla. 1999).

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