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Empowering American Victims of International Organized Crime: Proposing an Amendment to Clarify RICO's Extraterritorial Application

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EMPOWERING AMERICAN VICTIMS OF INTERNATIONAL ORGANIZED CRIME: *PROPOSING AN AMENDMENT TO CLARIFY RICO'S EXTRATERRITORIAL APPLICATION*

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INTRODUCTION

The twenty-five year old Ms. Valerie Candy worked hard to earn her academic success, her spot on numerous honor societies, and her successful career.[1] She was ready to take a breath, relax, and revel in the life she created for herself. [2] As she boarded Pan Am flight 103 to visit her parents for the holidays she was filled with excitement, anticipating their reaction to the news that she and her fiancé were to marry over Christmas.[3] Unfortunately for Ms. Candy and 199 other Americans, December 21st of 1988 marked the last day they would ever talk to their loved ones.[4] Minutes into the flight, as Pan Am 103 crossed over Lockerbie, Scotland, a bomb exploded, and sent the passengers' plummeting to the ground.[5] This horrific incident occurred two years after an attack by the same association of Libyan terrorists on a UTA flight that killed several Americans, including the wife of a U.S. Ambassador.[6]

Despite the grave harm organized crime inflicts upon U.S. citizens extraterritorially,[7] the Racketeer Influenced and Corrupt Organizations Act (RICO)[8] is no longer available as a tool for individuals to combat these injustices. RICO is a U.S. federal law that provides criminal penalties and civil causes of action for crimes performed as part of an ongoing criminal organization.[9] The application of this powerful statute to extraterritorial crime is a source of great controversy. Before 2010, courts applied RICO extraterritorially whenever there was a substantial connection between the criminal activity and U.S. territory.[10] This liberal application of RICO abroad changed drastically after the famous *Morrison* Supreme Court opinion in 2010, which announced a presumption that a statute is restricted domestically in the absence of a "clear indication" that it applies beyond U.S. borders.[11]

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1 *See* MATTHEW COZ & TOM FOSTER, THEIR DARKEST DAY: THE TRAGEDY OF PAN AM 103 AND ITS LEGACY OF HOPE, 67 (Grove Press, 1992).

2 *See id.*

3 *Id.*

4 *Id.*

5 *Id.*

6 Kimberly Kindy, *Families of Americans Killed in 1989 Bombing See Victory Over Libya Nullified,* WASHINGTON POST (Dec. 23, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/12/22/AR2008122202050.html.

7 Meaning wholly outside the boundaries of United States jurisdiction.

8 18 UNITED STATES CODE (U.S.C.) §§ 1961–1968 was enacted on October 15, 1970, as Title IX of the Organized Crime Control Act of 1970.

9 *Id.* Although largely directed at crimes economic in nature, these "acts" include most crimes classified as felonies, such as acts of terrorism. *See id.* § 1961.

10 This was called the "conducts and effects" test. *See, infra* Section II.B.1

11 *See* Morrison v. National Australia Bank, 130 S. Ct. 2869 (2010).

Courts have dismissed almost every civil extraterritorial RICO claim since *Morrison*, claiming that no such "clear indication" exists within the RICO statute.[12] Conversely, the criminal provisions of this same RICO statute escape the domestic limitations of *Morrison* altogether. Courts extend the narrow *Bowman* Supreme Court opinion, which affords prosecutors extraterritorial latitude in cases involving national security, to immunize criminal RICO from the *Morrison* presumption.[13] The bright-line *Morrison* rule and porous *Bowman* standard are incoherent when they collide in the context of a statute like RICO, which imposes both criminal and civil liability.[14] The asymmetry that courts currently tolerate confuses case law and erodes the power of U.S victims of organized crime.

To clarify the inconsistency and confusion plaguing case law on RICO's extraterritorial application, this Article proposes an amendment to the RICO statute that clarifies the scope of RICO's extraterritorial reach.[15] This proposed amendment comports with Supreme Court precedent and RICO's legislative intent, and protects U.S. citizens from victimization of crimes abroad by optimizing the deterrent value of RICO. Section II overviews the RICO statute and the case law grappling with RICO's extraterritorial application, Section III highlights the shortcomings of the current RICO framework and proposes an amendment to rectify these shortcomings, and Section IV briefly concludes.

I. BACKGROUND

RICO's reputation as one of the most powerful federal tools to combat organized crime[16] is currently at risk. The domestic limitations courts impose on RICO's civil provisions and the inconsistencies that plague the case law grappling with RICO's extraterritorial application, drastically curtail the once powerful reach of this statute. RICO, which is part of the 1970 Organized Crime and Control Act, was Congress' attempt to prevent organized criminal enterprises from continuing to drain billions of dollars from the U.S. economy every year.[17] Specifically, RICO permits suits against individuals that conduct the affairs of a criminal enterprise through a "pattern of racketeering

[12] *See e.g.*, Cedeño v. Intech Grp., Inc., 733 F. Supp. 2d 471, 474 (S.D.N.Y. 2010); Norex Petroleum Ltd. v. Access Indus., Inc., 631 F.3d 29, 33 (2d Cir. 2010).

[13] *See* United States v. Bowman, 260 U.S. 94 (1922).

[14] S. Nathan Williams, *The Sometimes "Craven Watchdog": The Disparate Criminal-Civil Application Of The Presumption Against Extraterritoriality*, 63 DUKE L. J. 1381, 1384 (2014).

[15] *See, infra* Section III.B.1.

[16] *See* Thomas P. Ott, *Responding to the Threat of International Organized Crime: A Primer on Programs, Profiles, and Practice Points*, 60 U.S. ATTYS' BULLETIN 1, 14 (2012).

[17] *Id.*

activity."[18] To foster the background necessary to understand the value in the proposed amendment, Section A defines core RICO terms and highlights the differences between civil and criminal RICO, and Section B discusses the case law grappling with RICO's extraterritorial application.

A. UNDERSTANDING RICO: A POWERFUL TOOL TO COMBAT ORGANIZED CRIMINAL ACTIVITY

RICO provides a statutory cause of action against individuals that are involved in a criminal enterprise—or association—that engaged in two or more related "racketeering" crimes within a certain time period. A violation of the RICO statute, regardless of whether the action is criminal or civil, requires (1) proof of the existence of an enterprise, (2) proof of racketeering activity (3) proof of a *pattern* between these racketeering acts; and (4) proof that the enterprise engaged in or affected interstate or foreign commerce.[19] 18 U.S.C. § 1961 defines several key terms, such as "racketeering activity," "enterprise" and "pattern."[20] An "enterprise" includes any individual, partnership, corporation, association or other legal entity, and any group of individuals associated in fact although not a legal entity.[21] "Racketeering activity" includes any of the enumerated crimes under 18 U.S.C. § 1961(1), such as murder, gambling, arson, robbery, drug smuggling, human trafficking, and terrorism.[22] A "pattern of racketeering activity" requires at least two racketeering acts within a statutorily prescribed time period[23] that are related and pose a threat of continued criminal activity.[24]

Although the RICO statute contains both civil and criminal provisions, scholars cite the expansive remedies and flexible evidentiary barriers under civil RICO as a more effective means of disrupting the activities of a criminal enterprise than criminal RICO.[25] RICO's criminal provisions generally only provide for fines and imprisonment,[26] whereas

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[18] 18 U.S.C. § 1962(c) (2012).

[19] *See id.*

[20] *Id.* § 1961.

[21] *See id.* §§ 1961(4), (5).

[22] As of 2001, racketeering activity specifically includes acts of terrorism. *Id.* § 2332(b).

[23] Usually five or ten years depending on the crime. *See id.* § 1961(5).

[24] See *id.* § 1961. There must be "something to a RICO pattern beyond simply the number of predicate acts involved." *See* H.J. Inc. v. NW Bell Tel. Co., 492 U.S. 229 (1989). "[T]o prove a pattern of racketeering activity a ... prosecutor must show that the racketeering predicates... amount to or pose a threat of continued criminal activity." *Id.* at 239.

[25] Daniel Hoppe, *Racketeering After* Morrison*: Extraterritorial Application Of Civil Rico*, 107 NORTHWESTERN UNIV. L. REV. 1375, 1382 (2013).

[26] Up to twenty years in prison and fines of up to $25,000. *See* 18 U.S.C. § 1963. Criminal prosecutions require prior approval from the Department of Justice's Organized Crime and Gang Section (OCGS). *See* DEP'T OF JUSTICE, U.S. ATT'Y MANUAL § 9-110.101–9-110.900 (2012).

the civil provisions entitle private citizens to compensatory and treble damages, and civil sanctions such as forcing the violator to divest all assets in the enterprise or forcing the dissolution of the enterprise itself.[27] In addition to having a greater range of sanctions under civil –as opposed to criminal – RICO, there are also fewer barriers to overcome when bringing a civil RICO suit.[28] For example, the government's bureaucratic approval process and limited resources significantly limit the number of criminal RICO suits that can be brought, whereas private RICO suits suffer no such limitations.[29] Furthermore, civil RICO plaintiffs enjoy a more liberal discovery process and a lower burden of proof than government prosecutors in criminal RICO suits.[30] Thus, the true source of RICO's power to disrupt the activities of criminal enterprises rests on the statute's civil provisions.

B. THE HISTORY AND CURRENT JUDICIAL FRAMEWORK ON RICO'S EXTRATERRITORIAL APPLICATION

Although organized crime transcends national borders, and although Congress has never expressly limited RICO's territorial scope, courts currently restrict the civil provisions of the statute to the territorial boundaries of the United States.[31] The doctrine of extraterritoriality, which concerns the application of domestic law to foreign conduct, is highly controversial and increasingly important as international trade and investment continues to rise, and multinational enterprises continue to multiply.[32] Two significant Supreme Court precedents caused a wide discrepancy in the extraterritorial applicability of RICO depending on whether the civil or criminal provisions gave rise to the claim. Courts interpret the famous *Morrison* decision of 2010 as restricting civil RICO domestically, while courts consistently extend the 1922 *Bowman* decision to support liberally applying criminal RICO abroad.[33] Section 1 overviews the application of RICO extraterritorially before and after the *Morrison* decision, Section 2 discusses the liberal application of criminal RICO extraterritorially, and Section 3 highlights

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[27] *See* 18 U.S.C. § 1964; *Organized Crime Control: Hearings on S.30, and Related Proposals, Relating to the Control of Organized Crime in the United States*, BEFORE SUBCOMM. NO. 5 OF THE H. COMM. ON THE JUDICIARY, 91ST CONG. 106.–07 (1970) (discussing the need for a broad range of flexible remedies).

[28] Hoppe, *supra* note 25, at 1382.

[29] *See id.* at 1380; Gerard E. Lynch, *How Useful Is Civil RICO in the Enforcement of Criminal Law* 35 VILLANOVA L. REV. 929, 937 (1990).

[30] Civil plaintiffs must only prove guilt by a preponderance of the evidence, whereas in criminal RICO cases, government must prove guilt beyond a reasonable doubt, and obtain warrants for evidence collection. *See* Hoppe, *supra* note 25, at 1382.

[31] *See id.* at 1383.

[32] *See* David H. Small, *Managing Extraterritorial Jurisdiction Problems: The United States Government Approach*, 50 L. & CONTEMP. PROBS. 283 (1988).

[33] *See infra* Section II.B.1 and B.2.

specific language within RICO that evidences Congress' intent to apply RICO extraterritorially.

1. THE STRICT DOMESTIC RESTRICTIONS ON CIVIL RICO

The jurisprudence on extraterritorial civil RICO has been anything but consistent, with courts liberally applying civil RICO extraterritorially before 2010, and then completely restricting RICO domestically after the Supreme Court's 2010 *Morrison* opinion. The judicial establishment of a "conducts and effects" test to determine when RICO applied abroad in the 1990s ended decades of confusion about RICO's extraterritorial application. The Second Circuit prompted the creation of this test when it first noted in 1991 that "the mere fact that the corporate defendants are foreign entities does not immunize them from the reach of RICO."[34] This conducts and effects test warranted RICO's extraterritorial application "if conduct material to the completion of the racketeering occur[ed] in the United States, or if significant effects of the racketeering [we] re felt here."[35] The test was not limitless, however, as it required that "the conduct occurring in, or directed at, the United States . . . was not an insubstantial or preparatory part of the overall looting scheme, but the actual means of its consummation."[36] This test was widely adopted amongst U.S. federal courts from the 1990s through 2010,[37] and scholars credited this test with affording RICO the teeth necessary to ward of foreign criminal activity that impacted the United States significantly.[38] Moreover, scholars commended the test as a tool that ensured courts based their RICO jurisdiction determinations off nuanced analyses of each extraterritorial crime's effect on the United States—as opposed to the arbitrary civil versus criminal bright-line jurisdictional rules imposed in the post-*Morrison* framework.[39]

Despite the culminating and widespread acceptance of the conducts and effects test to determine when RICO applied abroad, civil RICO's application has been limited to domestic conduct since the 2010 *Morrison* opinion. In *Morrison,* which dealt exclusively with securities laws, foreign investors purchased shares of a foreign company on a foreign exchange and later brought a securities fraud

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[34] Alfadda v. Fenn, 935 F.2d 475, 478 (2d. Cir. 1991).

[35] *See* Liquidation Comm'n of Banco Intercontinental SA v. Renta, 540 F.3d 1339 (11th Cir. 2008).

[36] *See Liquidation Comm'n*, 540 F.3d at 1352.

[37] *See e.g., id.* at 1339; S.A. v. Alvarez Renta, 530 F.3d 1339, 1351-52 (11th Cir. 2008) (adopting the "widely accepted view ... that RICO may apply extraterritorially if conduct material to the completion of the racketeering occurs in the United States, or if significant effects of the racketeering are felt here"); Poulos v. Caesars World, Inc., 379 F.3d 654, 663-64 (9th Cir. 2004) (listing several cases that have applied the conducts and effects test).

[38] *See infra,* page 7.

[39] *See id.*

claim in a U.S. court under section 10(b) of the Securities Exchange Act of 1934.[40] Before *Morrison* reached the Supreme Court, the District Court dismissed the claims for lack of subject-matter jurisdiction and the Second Circuit affirmed, applying the conducts and effects test to conclude that the tie between the United States and the alleged fraud was too attenuated for 10(b) to apply.[41] The Supreme Court affirmed the decision but rejected the "conducts and effects" test, arguing instead that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."[42] The Court then applied this presumption against extraterritorial application to the Securities Exchange Act, finding no "affirmative indication" in the statute that Congress intended Section 10(b) to apply extraterritorially.[43] Specifically, the Court found that Congress's primary concern in passing the statute was "not upon the place where the deception originated, but upon purchases and sales of securities in the United States."[44]

The *Morrison* presumption, although raised in the securities law context, instantly shook up the jurisprudence on the extraterritorial application of RICO. Lower courts view *Morrison* as a rule requiring courts to presume that a statute only applies within the United States absent a "clear indication of an extraterritorial application."[45] Because Congress did not expressly state that RICO applies extraterritorially, almost every court to entertain an extraterritorial civil RICO claim since *Morrison* has dismissed the suit.[46] Just two months after *Morrison*, a federal district court applied the presumption to deny RICO jurisdiction over a foreign enterprise, citing the absence of specific statutory mention of "foreign enterprises" as the reason.[47] Soon afterwards, the Second Circuit applied *Morrison* to dismiss allegations of corruption and bribery against Russian government officials, and found that "simply alleging that some domestic conduct occurred cannot support a claim of domestic application," and that the "slim contacts with the United States" were "insufficient to support extraterritorial application" of RICO.[48] Several more courts applied *Morrison* to dismiss extraterritorial civil RICO claims shortly afterwards.[49] Moreover, in 2013 the Supreme

[40] *See* Morrison v. National Australia Bank, 130 S. Ct. 2869 (2010).
[41] *Id.* at 2875-76.
[42] *Id.* at 2877.
[43] *Id.* at 2883.
[44] *Id.* at 2884.
[45] *Id.* at 2878.
[46] *See e.g., Cedeño,* 733 F. Supp. 2d at 474; *Norex,* 631 F.3d at 33.
[47] *Cedeño,* 733 F. Supp. 2d at 473.
[48] *Norex,* 631 F.3d at 33 (emphasis added).
[49] *See e.g.,* European Cmty. v. RJR Nabisco, Inc., 2011 WL 843957, at *4 (E.D.N.Y Mar. 8, 2011) (holding that extraterritorial application of RICO is prohibited).

Court relied on *Morrison* to specifically reinforce the presumption against extraterritoriality in the context of the Alien Tort Statute, which further indicates the Supreme Court's unwavering commitment to continue to restrict statutes domestically.[50]

2. THE LIBERAL EXTRATERRITORIAL APPLICATION OF CRIMINAL RICO

Contrary to the domestic restrictions placed on civil RICO, when a criminal RICO claim is brought against extraterritorial conduct, the government can almost always cite the 1922 *Bowman* Supreme Court opinion to obtain extraterritorial jurisdiction. The *Bowman* opinion permitted courts to apply criminal statutes extraterritorially in certain limited cases, even if the statute itself did not appear to apply extraterritorially.[51] Today, *Bowman* casts some doubt as to whether the *Morrison* presumption ought to apply in criminal cases.[52] *Morrison* neither overruled *Bowman* nor even mentioned it,[53] so courts generally treat *Bowman* as an exception to the *Morrison* rule.[54] Some government attorneys even argue that there is a presumption *in favor* of extraterritorial application when it concerns criminal defendants.[55]

Although the *Bowman* opinion was limited to situations where the government was a victim of the extraterritorial criminal conduct,[56] courts consistently cite *Bowman* to exempt criminal cases as a whole from domestic restrictions.[57] The reason for this extension of *Bowman*

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[50] *See* Kiobel v. Royal Dutch Petroleum, 133 S. Ct. 1659 (2013) (relying on *Morrison* to hold that the Alien Tort Statute does not permit federal courts to recognize a cause of action for torts committed by aliens abroad).

[51] United States v. Bowman, 260 U.S. 94, 98 (1922).

[52] The Second Circuit asserted in two post-*Morrison* cases that the presumption does not apply to criminal matters. *See* United States v. Siddiqui, 699 F.3d 690, 700 (2d Cir. 2012)); United States v. Al Kassar, 660 F.3d 108, 118 (2d Cir. 2011).

[53] United States v. Carson, No. SACR 09-00077-JVS, 2011 WL 7416975, at *7 (C.D. Cal. Sept. 20, 2011).

[54] *See, e.g.*, United States v. Weingarten, 632 F.3d 60, 66 (2d Cir. 2011) (disregarding *Morrison* in favor of the reasoning in *Bowman*); United States v. Singhal, 876 F. Supp. 2d 82, 97 (D.D.C. 2012) (declining to extend *Morrison* beyond § 10(b), instead applying *Bowman* to allegations of mail fraud); United States v. Campbell, 798 F. Supp. 2d 293, 303 (D.D.C. 2011) ("Despite the emphasis of *Morrison* that the presumption against extraterritoriality applies 'in all cases,' recent jurisprudence has developed with nary a mention of *Bowman*.").

[55] *See Brief of the United States as Amicus Curiae in Support of Limited Rehearing En Banc* at 3, Norex Petrol. Ltd. v. Access Indus., Inc., 631 F.3d 29 (2d Cir. 2010) (No. 07-ˇ4553-ˇcv) 63.

[56] *See* United States v. Gatlin, 216 F.3d 207, 211 n.5 (2d Cir. 2000); United States v. Philip Morris USA, Inc., 783 F. Supp. 2d 23, 28 n.6 (D.D.C. 2011); United States v. Martinelli, 62 M.J. 52, 58 (C.A.A.F. 2005); Ellen S. Podgor & Daniel M. Filler, *International Criminal Jurisdiction in the Twenty-First Century: Rediscovering* United States v. Bowman, 44 SAN DIEGO L. REV. 585, 595 (2007).

[57] *See, e.g.*, Siddiqui, 699 F.3d at 700 (2d Cir. 2012) ("The ordinary presumption that laws do not apply extraterritorially has no application to criminal statutes."); Al Kassar, 660 F.3d at 118 ("The presumption that ordinary acts of Congress do not apply extraterritorially, does not apply to criminal statutes."); United States v. Yousef, 327 F.3d 56 at 87 (2d Cir. 2003)("Congress is presumed to intend extraterritorial application of criminal statutes" that comply with *Bowman's* test").

in the criminal RICO context is inconsistent among courts. Some courts infer that Congress intended to provide for extraterritorial jurisdiction over foreign criminal offenses that cause domestic harm.[58] Other courts stretch *Bowman* further, finding criminal RICO has extraterritorial application whenever enterprises affect foreign commerce,[59] and a few courts find no domestic presumption "where the legislation implicates concerns that are not inherently domestic."[60] Furthermore, judges within the same court differ in their interpretations of *Bowman*.[61] Regardless of which interpretation of *Bowman* courts use, instances where courts decline to apply criminal statutes extraterritorially are now the exception rather than the rule.[62] The liberal interpretation of *Bowman* and the restrictive interpretation of *Morrison* together cause the significant discrepancy in the extraterritorial applicability of civil and criminal RICO today.[63]

3. CONGRESS INTENDED TO APPLY RICO EXTRATERRITORIALLY

Despite the aforementioned confusion courts face in determining whether RICO applies abroad, RICO's legislative history indicates that Congress designed the entire statute to have extraterritorial application.[64] Congress enacted RICO with the focus of alleviating the *effects* of organized crime on the United States, but nowhere in the statute did Congress restrict RICO to the territorial boundaries of the United States.[65] Congress was careful to avoid limiting language throughout RICO, which the imbedded statutory instruction that RICO is "to be liberally construed to effectuate its remedial purposes" clearly demonstrates.[66] Furthermore, the Supreme Court and lower

[58] *See* United States v. MacAllister, 160 F.3d 1304, 1308 (11th Cir. 1998); United States v. Plummer, 221 F.3d 1298, 1304-05 (11th Cir. 2000); United States v. Baker, 609 F.2d 134, 136-38 (5th Cir. 1980).

[59] *See* Leija-Sanchez, 602 F.3d at 800; Carson, 2011 WL 7416975, at *8.

[60] United States v. Corey, 232 F.3d 1166, 1170 (9th Cir. 2000).

[61] *Compare* United States v. al Kassar, 660 F.3d 108, 118 (2d Cir. 2011) ("The presumption that ordinary acts of Congress do not apply extraterritorially does not apply to criminal statutes.") *with* Kollias v. D & G Marine Maint., 29 F.3d 67, 71 (2d Cir. 1994) (holding that *Bowman* "should be read narrowly" such that "only criminal statutes…relating to the government's power to prosecute wrongs committed against it, are exempt from the presumption [against extraterritoriality]").

[62] David Keenan & Sabrina P. Shroff, *Taking the Presumption Against Extraterritoriality Seriously*, 45 LOYOLA UNIV. CHICAGO L. J. 72, 84 (2013).

[63] Although the discrepancy is still real, recent decisions indicate a re-evaluation amongst courts of the applicability of the *Morrison* presumption to criminal RICO. *See, e.g.*, United States v. Chao Fan Xu, 706 F.3d 965, 974-5 (9th Cir. 2013) ("we begin the present analysis with a presumption that RICO does not apply extraterritorially in a civil or criminal context.").

[64] *See* Russell Squire & Susannah Ostlund, *Racketeer Influenced and Corrupt Organizations*, 49 AM. CRIM. L. REV. 1157, 1158 (2012).

[65] *See* United States v. Bowman, 260 U.S. 94, 99 (1922) (that the "probable place" for the commission of an offense lies outside the United States indicates that Congress intended to apply that offense extraterritorially); *accord* United States v. Delgado-Garcia, 374 F.3d 1337, 1345 (D.C. Cir. 2004); United States v. Plummer, 221 F.3d 1298, 1305 (11th Cir. 2000).

[66] Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947.

federal courts frequently note that Congress intended for RICO to apply broadly.[67]

Furthermore, the text of RICO does not impose a domestic injury requirement and broadly permits recovery by "[a]ny person injured in his business or property."[68] Similarly, RICO's text does not impose a domestic enterprise limitation, as RICO's unequivocal language covers "any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."[69] The express reference to *foreign* commerce within RICO is also indicative of Congress' intent to apply RICO extraterritorially.[70] Congress also recognized the international nature of organized crime by including an enumerated list of predicate acts in RICO's definition of "racketeering activity" that have an inherently international aspect.[71] Lastly, RICO's legislative history confirms that Congress was concerned with the harmful impact international organized crime has on the United States and its people.[72] In the Senate Committee Hearings, Congress consistently referenced the activities of the Cosa Nostra and the Sicilian Mafia as examples of what RICO was aimed at combating.[73] Absent extraterritorial application, RICO could not combat the very criminal activity Congress was most worried about.

II. ANALYSIS

The result of the domestic restriction on civil RICO and the discrepancy between civil and criminal RICO's applicability extraterritorially is a significant and unsupported weakening of RICO's power to combat organized crime. Section A details why the current judicial framework for determining RICO's extraterritorial application is unsupported and harmful. Section B then proposes an amendment to RICO that will clarify decades of confusing RICO jurisprudence, while upholding the legislative intent behind RICO and returning statutory power to U.S. victims of international organized crime.

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[67] *See, e.g.*, Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 660 (2008) ("We have repeatedly refused to adopt narrowing constructions of RICO to make it conform to a preconceived notion of what Congress intended to proscribe.")

[68] 18 U.S.C. § 1964(c).

[69] 18 U.S.C. § 1962(a)-(c).

[70] *See* Pasquantino v. United States, 544 U.S. 349, 371-72 (2005) (noting that a statute that "punishes frauds executed 'in interstate or foreign commerce,'... is surely not [one] in which Congress had only 'domestic concerns in mind.").

[71] Such as drug smuggling, sex trafficking, money laundering, and various immigration crimes. *See* 18 U.S.C. § 1961(1).

[72] *See* Pub. L. No. 91-452, § 904(a), 84 Stat. 947.

[73] *See* 1970 Crime and Control Act Hearings, *supra* note 27, at 152, 157 (statement of John N. Mitchell, Att'y Gen. of the United States).

A. CRITIQUE OF THE CURRENT FRAMEWORK COURTS USE TO APPLY RICO EXTRATERRITORIALLY

Supreme Court precedent, prudence, and Congress' intent in enacting RICO does not support courts' disparate extraterritorial application of RICO's civil and criminal provisions.[74] Courts should not arbitrarily dissect the extraterritorial application of statutes along civil and criminal lines.[75] Courts should rather determine whether the statute in its entirety applies extraterritorially.[76] The First Circuit used this exact reasoning to conclude that civil and criminal antitrust cases should be treated equally with regard to extraterritoriality, explaining that "it is a fundamental interpretive principle that identical words or terms used in different parts of the same act are intended to have the same meaning."[77] Civil and criminal RICO are premised on the same substantive conduct and are grounded in the same statutory language of the same Act, and therefore should have equal extraterritorial application.

Even if a disparate treatment of civil and criminal RICO were supportable, the Supreme Court's *Morrison* and *Bowman* opinions should not be the cited support.[78] The limited "fundamental principle" of jurisdiction that the *Bowman* court employed only permitted extraterritorial jurisdiction over criminal conduct that targeted the U.S. government.[79] Citing *Bowman* to permit the extraterritorial application of all criminal RICO cases is therefore a significant divergence from the *Bowman* court's original intention. Moreover, *Morrison* does not support the domestic restriction of civil RICO. *Morrison* does not bar extraterritorial application of U.S. statutes, but merely imparts a presumption against extraterritoriality that can be rebutted by a "clear indication" that the statute extends beyond the domestic sphere.[80] The combination of Congress' broad language,[81] preoccupation with the Sicilian Mafia during RICO's enactment, and emphasis on foreign commerce "clearly indicates" Congress' intent to apply the statute extraterritorially.[82] Thus, *Morrison* does *not* preclude the application of

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[74] *See, supra* Section II.B. (discussing the current disparate treatment of civil and criminal RICO).
[75] *See* Keenan & Shroff, *supra* note 62, at 86.
[76] *See* United States v. Nippon Paper Industries Co., 109 F.3d 1, 7 (1997).
[77] *Id. at 4.*
[78] *See id.*
[79] *See* Podgor & Filler, *supra* note 56, at 595.
[80] *See* Morrison v. National Australia Bank, 130 S. Ct. 2869, 2878 (2010).
[81] Specifically, the congressional instruction to "liberally construe" RICO provisions to effectuate the statute's remedial purpose. *See, supra* Section II.B.3.
[82] *See, id.* (highlighting the word choice Congress used in RICO that indicate the statutes applicability to extraterritorial criminal activity); Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970)

civil RICO to extraterritorial conduct and *Bowman* does not support the automatic application of criminal RICO to extraterritorial conduct.

In addition to being unsupported, the domestic restriction of civil RICO severely diminishes the effectiveness of RICO in combating organized crime that affects the United States and its people. Because courts restrict RICO's extraterritorial application to the statute's criminal provisions, only the government may currently bring such extraterritorial suits—not private citizens.[83] Resource restrictions and multi-layered bureaucratic processes significantly limit the number of extraterritorial RICO suits the government can bring, which can result in many RICO violations slipping away unpunished.[84] Additionally, when the government prosecutes under criminal RICO the significant rights afforded to criminal defendants considerably lowers the chances of a successful conviction.[85] Furthermore, because investigations of conduct that occurred abroad are often time consuming and expensive, the high standards of proof in criminal trials render a successful extraterritorial criminal RICO claim even more challenging.[86]

The domestic restrictions on civil RICO also deny U.S. victims of extraterritorial organized crime the ability to individually seek justice or compensation through RICO.[87] In a case like Pan Am 103, where, although no level of monetary relief could fix the pain the loss of their beloved family members caused them, private RICO suits could at least provide a sense of individual power in bringing these criminals to justice.[88] Under the current framework these U.S. victims, whose lives were forever changed on the fatal day that Pan Am went down, have no such recourse. Thus, the current framework courts use to determine whether to entertain an extraterritorial RICO claim is unsupported by case law and detrimental to the effectiveness of the statute.

B. PROPOSAL: AN AMENDMENT THAT CLARIFIES RICO'S APPLICABILITY TO EXTRATERRITORIAL CONDUCT

The harm that the disparate extraterritorial application of civil and criminal RICO causes, paired with the lack of statutory or judicial support for that discrepancy, necessitates a more effective and supportable framework for determining when both civil and criminal RICO apply

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[83] *See, supra* Section II.A (discussing the civil and criminal provisions of RICO).

[84] *See id.*

[85] Because of the significant disparity in evidentiary standards and discovery rules. *See, supra* Section II.A.

[86] *See id.*

[87] *See* Lynch, *supra* note 29, at 937.

[88] *See, supra* Section I.

extraterritorially. This Paper proposes an amendment to RICO that clarifies the extent that RICO as a whole applies extraterritorially, and clarifies the parallel treatment of civil and criminal RICO's applicability to extraterritorial conduct. Section 1 details the proposed amendment, Section 2 discusses the advantages of the amendment, and Section 3 considers potential concerns that the amendment may give rise to.

1. THE LANGUAGE OF THE PROPOSED AMENDMENT

The proposed RICO amendment would (1) express that the statute as a whole applies extraterritorially, (2) detail the limits of that extraterritorial application, and (3) delineate that RICO's civil and criminal provisions are equally applicable to extraterritorial conduct. The amendment uses a slightly modified version of the logic-based "conducts and effects" test[89] to determine when RICO as a whole applies extraterritorially. The original conducts and effects test permitted the extraterritorial application of RICO suits against criminal activity that was substantially planned on U.S. soil, or that had a substantial impact within the United States.[90] The proposed amendment expands the second element of the test to include conduct that substantially impacts lawful residents of the United States, even if the harm occurs abroad. The language of the proposed amendment is as follows:

18 U.S. Code § 1969 – Extraterritorial Application

(a) The jurisdiction of this statute extends to conduct outside the territory of the United States in the following two situations:
   (1) the enterprise substantially conducts the preparation of at least one of its racketeering acts within the territorial jurisdiction of the United States; or
   (2) at least one of the racketeering acts has a substantial effect on a lawful resident of the United States, regardless of whether they are located abroad or at home at the time.

(b) The civil and criminal provisions of this statute shall have equal extraterritorial application in the situations delineated in subsections (a)(1)-(2).

2. ADVANTAGES OF THE PROPOSED AMENDMENT

The proposed amendment eradicates the core concerns that plague the current framework courts use to determine when RICO

[89] *See, supra* Section II.B.1 (discussing the widespread support of the conducts and effects test prior to 2010).

[90] *See id.;* Liquidation Comm'n of Banco Intercontinental SA v. Renta, 540 F.3d 1339, 1339 (11th Cir. 2008).

applies extraterritorially, and the amendment comports with Supreme Court precedent, congressional intent, and international law.[91] By clearly expressing RICO's applicability to extraterritorial conduct, the proposed amendment removes RICO from the *Morrison* discussion altogether and avoids the presumption against extraterritoriality.[92] The proposed amendment also comports with the *Bowman* court's "protective principle"[93] of jurisdiction because Section (a)(2)[94] permits RICO prosecutions whenever the crime substantially impacts the United States or its residents, even if it occurs wholly extraterritorially. By bypassing the *Morrison* presumption altogether and comporting with the limited interpretation of *Bowman*, the proposed amendment engenders a nuanced framework that avoids this arbitrary bright-line distinction between civil and criminal RICO that the current framework contains.[95]

The extraterritorial extension of RICO contained in the proposed amendment also finds support in customary international law, which permits a nation to exercise extraterritorial jurisdiction over crimes that affect that nation's own people, even if the crime occurs outside the territorial jurisdiction of the nation.[96] Moreover, by extending power to individuals to file RICO suits against organized crime that affects them abroad, the proposed amendment significantly bolsters RICO's power and flexibility to combat the constant threat that international criminal enterprises pose.[97] This extraterritorial extension of civil RICO in turn bolsters the deterrence value of the RICO statute because members of international criminal enterprises will become aware that they are subject to individual suits from every U.S. resident that their crimes substantially impact.[98] Relatedly, permitting civil plaintiffs to file extraterritorial RICO suits as they arise will counteract the RICO

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[91] *See, supra* Section III.A (discussing how the current framework decreases the effectiveness of RICO and strips U.S. victims of international organized crime of their power under RICO).

[92] *Morrison* only applies in situations where Congress did not clearly indicate that a statute applies extraterritorially. *See* Morrison v. National Australia Bank, 130 S. Ct. 2869, 3878 (2010).

[93] The protective principle requires the extraterritorial application of domestic criminal statutes whenever the case concerns threats to our nation. *See* United States v. Bowman, 260 U.S. 94, 99 (1922).

[94] *See, supra* Section III.B.1.

[95] Courts currently apply erroneous extensions of *Morrison* and *Bowman* to instill bright-line rules between the extraterritorially application of civil and criminal RICO. *See, supra* Section II.B.1 and B.2.

[96] *See, supra* Section III.B.1 (proposed amendment Section (a)(1)); John McCarthy, *The Passive Personality Principle and Its Use in Combatting International Terrorism*, 13 FORDHAM INTL L. J. 298 (1989).

[97] See U.S. Dep't of Justice, Overview of the Law Enforcement Strategy to Combat International Organized Crime (2008), *available at* http://www.justice.gov/ag/speeches/2008/ioc-strategy-public-overview.pdf.

[98] *See, supra* Section II.A; Hoppe, *supra* note 25 at 138.

violations that slip by unpunished as a result of the government's limited resources and procedural constraints.[99] Additionally, these civil extraterritorial RICO suits may result in more convictions than those that currently prevail under criminal RICO counterparts due to the lower burdens of proof and fewer procedural and evidentiary barriers applicable in civil trials.[100]

Lastly, the proposed amendment empowers U.S. victims of international organized crime to seek justice against, and compensation from, the perpetrators those crimes. In the context of economically motivated crime, the proposed amendment encourages individual U.S. residents to enter international business adventures, because these individuals can rely on RICO as a tool to protect themselves should any racketeering acts be directed at their companies outside U.S. borders. This climate of economic confidence was one of Congress' express goals in enacting RICO.[101] Overall, the proposed RICO amendment clarifies decades of confusing and inconsistent case law and engenders a nuanced and logical framework for determining when RICO applies extraterritorially that optimizes RICO's effectiveness.[102]

3. POTENTIAL CRITICISMS OF THE PROPOSED AMENDMENT

The jurisdictional extensions contained in the proposed amendment are controversial, and will likely raise three related criticisms. Critics may argue: (1) the nature of criminal provisions warrants their more liberal extraterritorial application than civil provisions; (2) the amendment poses a needless expansion of U.S. jurisdiction; and (3) this expansion could result in a flood of litigation.

Within the RICO context, the disparate treatment of the civil and criminal provisions is not warranted. In some contexts an expansive interpretation of criminal provisions and restrictive interpretation of civil provisions may be beneficial to increase the deterrent value of the statute while reducing fears of frivolous floods of litigation.[103] In the RICO context, however, this disparate interpretation of civil and criminal provisions is unwarranted. Racketeering acts are rarely violent in nature. Rather, the bulk of racketeering activity is economic in nature, and thus do not carry the same connotations that lead to

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[99] *See, supra* Section II.A; Hoppe, *supra* note 25 at 1380; Lynch, *supra* note 29, at 937.

[100] *See* Hoppe, *supra* note 25, at 1380 (explaining the difference between criminal and civil RICO).

[101] *See, supra* Section1.C.A (discussing Congress' motive for enacting RICO).

[102] *See, supra* Section II.B (highlighting the inconsistent treatment of RICO's extraterritorial application since 1970).

[103] *See* Frederick C. Boucher, *Closing the Rico Floodgates in the Aftermath of Sedima*, 31 N.Y.L. SCH. L. REV. 133 (1986).

the societal desire for the government to have greater flexibility in fighting for justice against criminal defendants.[104] Moreover, Congress wrote RICO with broad civil remedies specifically to allow victims of organized crime to protect themselves by individually enforcing the statute.[105]

The exercise of jurisdiction in the proposed amendment is also not unrestrained, because jurisdiction only extends to instances where the effects of the racketeering activity are *substantial*, meaning quantifiably large using some objective standard.[106] Losing a family member on a flight that organized terrorists bomb is an unequivocally significant effect, yet a small stockholder of a company that suffers from an alleged RICO violation that lowers the price of the company's shares is not such a clear cut argument of a *substantial* effect. Only time spent grappling with the amendment through specific case analyses will clarify and define the amendment's boundaries, but the desire for a bright-line rule is no reason to avoid this nuanced process.

Lastly, history does not reveal a correlation between extraterritorial application of RICO and floods of RICO litigation. Prior to *Morrison*, when the conducts and effects test permitted widespread extraterritorial application of civil RICO, there were no such "floods."[107] Critics of RICO's broad scope periodically claim that RICO's civil provisions result in excessive litigation domestically, but these criticisms do not focus on the extraterritorial reach of the statute, rather the criticisms focus on the relative ease with which RICO elements are met.[108] Nonetheless, courts dismiss many civil RICO lawsuits on Rule 12(b) motions, consequently minimizing the burden on federal courts that such suits present.[109] The extraterritorial application of civil RICO would therefore enjoy the benefit of such broad application—namely deterrence against foreign criminals, and empowerment of U.S. victims of international organized crime—without suffering the harm of excessive litigation.

III. CONCLUSION

The rapid expansion of transnational organized crime necessitates the availability of civil and criminal RICO to combat threats that

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[104] *See* 18 U.S. Code § 1961.

[105] *See, supra* Section II.B.3 (discussing RICO's legislative intent and language of the statute); Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947.

[106] *See, supra* Section III.B.1 (discussing the language of the proposed amendment).

[107] *See* Boucher, *supra* note 103.

[108] *See id.*

[109] *See id.* For example, of 145 civil RICO cases filed in the Southern District of New York from 2004 to 2007, all 36 cases that were resolved on the merits resulted in judgments against the plaintiffs. Thirty cases were dismissed on Rule 12(b)(6) motions. *Id.*

occur extraterritorially. Furthermore, Supreme Court precedent, prudence, international law, and RICO's legislative intent support the extraterritorial application of the RICO statute. The proposed RICO amendment achieves this objective by clearly stating that RICO applies extraterritorially, defining the limits of that extraterritorial application, and delineating that criminal and civil RICO apply equally to such extraterritorial conduct.

The amendment avoids the *Morrison* presumption altogether and the amendment comports with the protective principle of *Bowman* by ensuring that extraterritorial organized crime that targets the U.S. government may be prosecuted. Furthermore, international law supports the amendment's application of RICO to situations where our nation's residents are victims of crimes abroad. The amendment also finds support in the language of the RICO statute, as well as the original intent behind the enactment of RICO in 1970—to combat the Sicilian Mafia. Lastly and most importantly, the amendment reinforces Congress' desire to invest power in private citizens and victims of these crimes to individually protect the law, such as the hundreds of family members who lost their loved ones on Pan Am flight 103.