



Spring 2023

## Prosecuting the Mob: Using RICO to Create a Domestic Extremism Statute

Samuel D. Romano

Washington and Lee University School of Law, [romano.s23@law.wlu.edu](mailto:romano.s23@law.wlu.edu)

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Criminal Law Commons](#), [Criminal Procedure Commons](#), and the [Legislation Commons](#)

### Recommended Citation

Samuel D. Romano, *Prosecuting the Mob: Using RICO to Create a Domestic Extremism Statute*, 80 Wash. & Lee L. Rev. 967 ().

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol80/iss2/7>

This Note is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact [christensena@wlu.edu](mailto:christensena@wlu.edu).

# Prosecuting the Mob: Using RICO to Create a Domestic Extremism Statute

Samuel D. Romano\*

## *Abstract*

*In 2021, Secretary of Homeland Security Alejandro Mayorkas asserted that “[d]omestic violent extremism is the greatest terrorist-related threat” facing the United States. Although domestic extremism is often characterized as a lone wolf threat, it is frequently spurred on by white supremacist and neo-Nazi organizations that use the internet to radicalize their members and then avoid accountability by hiding behind constitutional protections—a strategy called “leaderless resistance.” This strategy results in devastating consequences. While the number of hate groups and hate crimes in the United States have risen to record highs, constitutional protections prevent domestic extremist organizations from being treated the same as foreign terrorist organizations. In turn, those who support domestic extremist organizations are also largely precluded from prosecution for providing material support.*

*Enter the Racketeer Influenced and Corrupt Organizations Act (RICO). Despite its roots in countering the mafia and other*

---

\* J.D. Candidate, Class of 2023, Washington and Lee University School of Law; B.A., Class of 2018, University of California, Berkeley. Thank you to the light of my life and my constant supporter, Pnina Olkha, and to my parents, Daniel Romano and Alice Garfield, who taught me what it means to be both an American and a Jew. This Note would not have been possible without Professor Alexandra Klein, whose open door and marked windows guided it to fruition, as well as Professor Will Barndt, whose mentorship forever impacted my academic career. I also want to thank Professors Jay Apperson and Thomas DiBiagio for their guidance throughout the writing process. Finally, thank you to my friends and peers for their unending encouragement. Sanka, you helped too.

*organized crime groups, RICO has become a catch-all statute to prosecute criminal organizations of all types. The statute allows the government to encapsulate and address decentralized organizations whose members commit criminal offenses without explicit agreement or instruction. In essence, RICO allows the government to constitutionally criminalize organizational membership and involvement.*

*The organizations that lead the “leaderless” resistance must be held accountable. This Note asserts that Congress can use RICO’s model of organizational accountability to create a domestic extremism statute that enables the government to undermine these organizations by: (1) designating domestic extremist organizations; and (2) prosecuting their support networks. This statute would provide the government with an effective and constitutional method to deter the greatest current extremist threat to the United States.*

### Table of Contents

INTRODUCTION .....	968
I. AMERICAN EXTREMISM.....	971
A. <i>Leaderless Resistance and Lone Wolves</i> .....	973
B. <i>The Internet as a Metastasizing Force</i> .....	976
C. <i>Stormfront</i> .....	981
II. ORGANIZATIONAL ACCOUNTABILITY .....	984
A. <i>Foreign Terrorist Organizations</i> .....	986
B. <i>RICO and the Criminal Enterprise</i> .....	991
III. CREATING A DOMESTIC EXTREMISM STATUTE.....	1002
A. <i>Proposed Statutory Framework</i> .....	1003
B. <i>Application</i> .....	1007
CONCLUSION.....	1011

### INTRODUCTION

In 2021, Secretary of Homeland Security Alejandro Mayorkas asserted that “[d]omestic violent extremism is the

greatest terrorist-related threat” facing the United States.<sup>1</sup> Although this contention may be detached from the foreign-terrorism centered, post-9/11 national security landscape,<sup>2</sup> domestic extremism<sup>3</sup> is deeply rooted in American history and regularly leads to violence and death in the United States. Extremism is frequently spurred on by hate groups that knowingly radicalize their decentralized members, largely over the internet, and then avoid organizational accountability by hiding behind constitutional rights.<sup>4</sup> These same rights lead critics to contend that domestic extremist organizations cannot be designated in the same manner as foreign terrorist organizations,<sup>5</sup> which in turn largely precludes prosecutions for providing material support.<sup>6</sup>

Enter the Racketeer Influenced and Corrupt Organizations Act (RICO).<sup>7</sup> In 1970, Congress enacted RICO to address the

1. Cammy Pedroja, *‘Domestic Extremism’ Is Greatest Terror Threat Facing US, Says DHS Secretary Mayorkas*, NEWSWEEK (Aug. 2, 2021), <https://perma.cc/6UZR-5YZM>.

2. Cf. Brian Katulis & Peter Juul, *The Lessons Learned for U.S. National Security Policy in the 20 Years Since 9/11*, CTR. FOR AM. PROGRESS (Sept. 10, 2021), <https://perma.cc/S7JL-XQVH>.

3. This Note will use the term “domestic extremism” to prevent confusion with statutory “domestic terrorism,” which requires specific intent. See 18 U.S.C. § 2331(5) (“[T]he term ‘domestic terrorism’ means activities that . . . appear to be intended—(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government . . . ; or (iii) to affect the conduct of a government . . .”). Nonetheless, the colloquial definition of domestic terrorism, which is frequently used by the public and accepted by law enforcement agencies, is far broader and often focuses on hate crimes. See *Terrorism*, FBI, <https://perma.cc/X6RS-5NDP> (“Domestic terrorism: Violent, criminal acts committed by individuals and/or groups to further ideological goals stemming from domestic influences, such as those of a political, religious, social, racial, or environmental nature.” (emphasis added)).

4. See James Verini, *The Domestic Terror Paradox*, N.Y. TIMES (Feb. 8, 2023), <https://perma.cc/PV2V-3GHA> (“By 2019 . . . F.B.I. counterterrorism officials would report to Congress that ‘individuals adhering to racially motivated violent extremism ideology have been responsible for the most lethal incidents among domestic terrorists in recent years.’”).

5. See, e.g., Francesca Laguardia, *Considering a Domestic Terrorism Statute and Its Alternatives*, 114 NW. U. L. REV. 1061, 1085 (2020) (“The ability of a government to designate domestic political organizations as terrorists has potentially chilling implications, especially if any and all association with the organization could be considered material support . . .”).

6. See 18 U.S.C. § 2339B(a)(1).

7. *Id.* §§ 1961–1968.

ongoing threat of organized crime. At its core, the statute criminalizes participation in an “enterprise engaged in . . . a pattern of racketeering activity.”<sup>8</sup> Despite the statute’s roots and ostensible purpose, RICO became a catch-all to prosecute criminal organizations of all types.<sup>9</sup> In essence, RICO allows the government to constitutionally criminalize organizational membership and involvement.

This Note examines how Congress can use RICO’s model of organizational accountability to create a successful domestic extremism statute that avoids First Amendment issues and enables the government to undermine domestic extremist organizations by prosecuting their support networks. Part I outlines the mischaracterization of domestic extremism as a lone wolf threat and asserts that this mischaracterization is the result of an intentional strategy by domestic extremist organizations to obfuscate their role in perpetuating extremist acts. This Part also focuses on the internet’s role as a metastasizing force for this obfuscation and highlights one organization’s ability to avoid organizational accountability despite repeated ties to domestic extremism. Part II identifies potential options for organizational accountability, focusing on the foreign terrorism designation model and RICO, and explains why these models are insufficient to hold domestic extremist organizations accountable. Part III proposes a statutory framework that uses RICO’s organizational accountability model and statutory hate crimes to create a constitutional designation statute for domestic organizations. Part III further explains how designation can enable the government to prosecute domestic extremist organizations’ support networks and undermine their influence on extremist violence. Finally, Part III applies the proposed framework to the domestic extremist organization detailed in Part I. This Note provides a solution to the constitutional problems that jeopardize accountability for domestic extremist organizations,

---

8. *Id.* § 1962(c).

9. See Barry Tarlow, *RICO: The New Darling of the Prosecutor’s Nursery*, 49 *FORDHAM L. REV.* 165, 168–69 (1980) (“Although it punishes participation in an ‘enterprise’ through racketeering activity, the enterprise concept has been construed as little more than a person or group of persons involved in the commission of two crimes.” (citations omitted)).

strengthening the government's ability to counteract the greatest current extremist threat to the United States.

### I. AMERICAN EXTREMISM

The United States has a domestic extremism problem. Violence “to further ideological goals stemming from domestic influences, such as . . . religious, social, [and] racial”<sup>10</sup> biases permeates our history—including the Reconstruction<sup>11</sup> and Civil Rights eras<sup>12</sup>—and still frequently occurs today.<sup>13</sup> Indeed, in

10. *Terrorism*, *supra* note 3.

11. See ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, 119–123 (updated ed. 2002) (outlining the “wave of violence that raged almost unchecked in large parts of the postwar South”); Robert J. Kaczorowski, *To Begin the Nation Anew: Congress, Citizenship, and Civil Rights After the Civil War*, 92 AM. HIST. REV. 45, 51 (1987) (“White supremacists frequently met the attempts of freed blacks to assert their constitutionally guaranteed freedom with violent repression and economic intimidation.”); Eric Foner, *The New View of Reconstruction*, AM. HERITAGE, Oct.–Nov. 1983, at 3, <https://perma.cc/NGL2-ESU4>; *Southern Violence During the Reconstruction*, AM. EXPERIENCE, <https://perma.cc/5K4P-TPSL> (“[W]ith . . . Reconstruction, you get political violence[.] You get organized groups . . . whose purpose is to obstruct and destroy Reconstruction government, to assassinate or intimidate black and white Republican officials, to use violence to prevent people from voting. And this is quite widespread throughout the South.”); Alex Fox, *Nearly 2,000 Black Americans Were Lynched During Reconstruction*, SMITHSONIAN MAG. (June 18, 2020), <https://perma.cc/2EJF-7PBX>.

12. See *Responses Coming from the Civil Rights Movement*, AM. EXPERIENCE, <https://perma.cc/V7RW-PZGT>; see, e.g., Derrick Bryson Taylor, *Who Were the Freedom Riders?*, N.Y. TIMES (July 18, 2020), <https://perma.cc/3S4A-E5GU> (detailing responses to the 1961 Freedom Rides, including a bus’s “firebomb[ing] . . . while [a] mob held the door closed,” attacks by the Ku Klux Klan, and beatings “with baseball bats, iron pipes and bicycle chains”); Margalit Fox, *Jim Clark, Sheriff Who Enforced Segregation, Dies at 84*, N.Y. TIMES (June 7, 2007), <https://perma.cc/MM6G-GV6G> (“On [Sherriff of Dallas County, Alabama] Clark’s authority, protesters were routinely beaten and tear-gassed and on one occasion were led on a forced march. He was sometimes assisted in his work by . . . volunteers, armed with whips and clubs, who came to be known as ‘the sheriff’s posse.’”).

13. See ANTI-DEFAMATION LEAGUE, MURDER & EXTREMISM IN THE UNITED STATES 2021, 6 (2022), <https://perma.cc/HX4V-YQ63> (PDF) (“As in most years, lethal extremist violence in 2021 was heavily dominated by right-wing extremism. All but three of the 29 murders (90%) documented in this report had ties to forms of right-wing extremism . . . .”); *Hate Crime Statistics*, U.S. DEPT. OF JUST. (2020), <https://perma.cc/35LE-957C> (reporting that nearly 62% of federal hate crimes in 2020 were motivated by race, ethnicity, or ancestry,

2021, the President and the National Security Council recognized the danger and persistence of domestic extremism,<sup>14</sup> and introduced the “first government-wide national [s]trategy” to address the “resurgence of . . . [domestic extremist] threats in one horrific incident after another.”<sup>15</sup> Because the current domestic extremist threat is frequently framed as one consisting disproportionately of lone wolves<sup>16</sup> and small cells,<sup>17</sup> conventional wisdom may counsel that a strategy of individual investigation, indictment, and prosecution for hate crime attempts and acts will effectively combat domestic extremism.<sup>18</sup>

---

and that of the nearly seven thousand offenders, 55.1% were white); BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., HATE CRIME VICTIMIZATION, 2005–2019, 5, 9 (2021), <https://perma.cc/32VG-KNF6> (PDF) (detailing that from 2015 to 2019, nearly 60% of hate crimes were motivated by race, ethnicity, or national origin, and 45.3% of offenders were white); see, e.g., Rebecca Hersher, *Jury Finds Dylann Roof Guilty in S.C. Church Shooting*, NPR (Dec. 15, 2016), <https://perma.cc/CQ7B-AXDP>; Campbell Robertson et al., *11 Killed in Synagogue Massacre; Suspect Charged With 29 Counts*, N.Y. TIMES (Oct. 27, 2018), <https://perma.cc/AUY4-SU8R>; Jennifer Medina et al., *One Dead in Synagogue Shooting Near San Diego; Officials Call It Hate Crime*, N.Y. TIMES (Apr. 27, 2019), <https://perma.cc/TC6V-SALV>; Simon Romero et al., *Massacre at a Crowded Walmart in Texas Leaves 20 Dead*, N.Y. TIMES (Aug. 3, 2019), <https://perma.cc/SW9N-J5UT>; Jack Healy et al., *At Least 5 Dead and 25 Injured in Gunman’s Rampage at an L.G.B.T.Q. Club in Colorado*, N.Y. TIMES (Nov. 20, 2022), <https://perma.cc/J328-8GBQ>; Hurubie Meko & Dan Higgins, *Buffalo Gunman Pleads Guilty in Racist Attack That Left 10 Dead*, N.Y. TIMES (Nov. 28, 2022), <https://perma.cc/M9GB-9YHN>; Maya King & Amanda Holpuch, *Man Charged with Hate Crimes in Shootings Outside Synagogues in L.A.*, N.Y. TIMES (Feb. 17, 2023), <https://perma.cc/K44T-QUXS>.

14. See NAT’L SEC. COUNCIL, EXEC. OFF. OF THE PRESIDENT, NATIONAL STRATEGY FOR COUNTERING DOMESTIC TERRORISM 11 (2021), <https://perma.cc/WT68-55KR> (PDF).

15. *Id.* at 5–7.

16. There is not a settled definition of lone wolf extremism. In the context of this Note, lone wolf extremism is defined as extremist “actions carried out by lone individuals, as opposed to those carried out *on the part of* [extremist] organizations or state bodies.” MARK S. HAMM & RAMÓN SPAALJ, THE AGE OF LONE WOLF TERRORISM 5 (David Brotherton ed., 2017) (emphasis added).

17. NAT’L SEC. COUNCIL, *supra* note 14, at 10 (“[L]one offenders or small cells . . . are more likely to carry out violent attacks . . . than organizations that allegedly advocate a [violent domestic extremist] ideology.”).

18. See *id.* at 23 (describing a primary method to “disrupt and deter domestic terrorism activity” as enabling “appropriate enhanced investigation and prosecution of domestic terrorism crimes”); see, e.g., *Additional Charges Filed in Tree of Life Synagogue Shooting*, U.S. DEP’T OF JUST. (Jan. 29, 2019), <https://perma.cc/ES5R-S2QB>; *Federal Grand Jury in El Paso Returns*

This strategy, however, critically misunderstands the intersection of lone wolf extremism with the ideologies perpetuated by larger domestic extremist groups and communities. Lone wolf extremism is the result of an intentional strategy by extremist organizations to encourage individual acts of domestic extremism while deflecting accountability to those actors.

#### A. *Leaderless Resistance and Lone Wolves*

Although the lone wolf threat is undoubtedly the public face of domestic extremism, it is facile to conclude that the threat is anything but the result of an intentional strategy of “leaderless resistance” to avoid organizational accountability.<sup>19</sup> Louis Beam, a white supremacist, first publicized the concept of leaderless resistance in 1983 after realizing “that the American radical right was reaching a low point in terms of its popularity and strength.”<sup>20</sup> Beam described leaderless resistance as a system of organization “based upon the cell organization, but [without] any central control or direction,” and contrasted it to the traditional, top-down organizational structure that was “extremely dangerous for [its] participants when . . . utilized in a resistance movement.”<sup>21</sup> The express motivation behind popularizing leaderless resistance was to “transform the white supremacy movement” by ensuring the longevity of white supremacist organizations.<sup>22</sup> To do so, Beam advocated for a

---

*Superseding Indictment Against Patrick Crusius*, U.S. DEPT OF JUST. (July 9, 2020), <https://perma.cc/9BYP-SECU>; Herscher, *supra* note 13.

19. See Paul Joose, *Leaderless Resistance and Ideological Inclusion: The Case of the Earth Liberation Front*, 19 *TERRORISM & POL. VIOLENCE* 351, 352 (2007) (“[A]cademic literature pertaining to leaderless resistance has focused on its use as an effective strategy for avoiding detection, infiltration, and prosecution by a powerful state.” (citation omitted)).

20. *Id.*

21. Louis R. Beam, *Leaderless Resistance*, in *INTER-KLAN NEWSLETTER & SURVIVAL ALERT* 12–13 (Robert E. Miles et al. eds., 1983), <https://perma.cc/4BWS-MD9L> (PDF).

22. JEROME P. BJELOPERA, *CONG. RSCH. SERV.*, R44921, *DOMESTIC TERRORISM: AN OVERVIEW* 50 (2017), <https://perma.cc/Q7K3-XZC2> (PDF); *see id.* (“Beam described [leaderless resistance] as a means of avoiding law enforcement infiltration of white supremacist groups . . .”); Joose, *supra* note 19, at 351 (“Leaderless resistance is a strategy of opposition that allows for



two-tier system in which a public organization “propagandizes and disseminates ideology” in a manner protected by the First Amendment, while lone wolves “engage in movement-related activity without any centralized direction or control.”<sup>23</sup>

Beam hoped to create a system of domestic extremism perpetuated by lone wolf attackers without *any* organizational ties;<sup>24</sup> however, many current “lone wolves” fail to meet this heightened level of isolation.<sup>25</sup> The term “lone wolf” is therefore inaccurate.<sup>26</sup> Domestic extremists, and those who participate in leaderless resistance, are more appropriately categorized as a “decentralized threat.”<sup>27</sup> Lone wolves and larger extremist

and encourages individuals or small cells to engage in acts of political violence entirely independent of any hierarchy of leadership or network of support.”).

23. BJELOPERA, *supra* note 22, at 50–51.

24. See Louis Beam, *Leaderless Resistance*, THE SEDITIONIST, Feb. 1992, <https://perma.cc/529L-QTAU> (PDF) (“[T]he pyramid type of organization can be penetrated quite easily . . . in this country. . . . This understood, the question arises ‘What method is left for those resisting state tyranny?’ The answer [is] . . . [a] system of organization that . . . does not have any central control or direction . . .”).

25. See BJELOPERA, *supra* note 22, at 50 (“[I]ndependently acting domestic [extremism] suspects are not necessarily isolated, adrift, and cut off from any outside contact or influence.”); David C. Hoffman, *How “Alone” Are Lone-Actors? Exploring the Ideological, Signaling, and Support Networks of Lone-Actor Terrorists*, 43 STUD. CONFLICT & TERRORISM 657, 658 (2020) (“[I]n [a] qualitative analysis of the antecedent behavior of 119 cases of lone-[wolf] terrorists . . . more than half . . . linked their actions with some form of wider group or movement.” (citing Paul Gill et al., *Bombing Alone: Tracing the Motivations and Antecedent Behaviors of Lone-Actor Terrorists*, 59 J. FORENSIC SCIS. 425, 429–31 (2014))).

26. See Hoffman, *supra* note 25, at 673 (“Proceeding under the assumption that lone-actor terrorism is a solitary, hard-to-detect, and harder-to-interdict phenomenon is self-defeating. Recent empirical research . . . suggests that the moniker of “lone-[wolf]” is a misnomer, in the sense that most do not radicalize, plan, and execute their plans in social, ideological, or operational isolation.”); BJELOPERA, *supra* note 22, at 50 (“This dynamic—the interplay between above-ground groups or movements proffering extremist dogma or ideology (protected speech) that is then consumed and acted upon by independent underground groups or cells who commit crimes—is a critical feature of domestic terrorism.”).

27. BJELOPERA, *supra* note 22, at 50; see also Val Burris et al., *White Supremacist Networks on the Internet*, 33 SOCIO. FOCUS 215, 215 (2000) (“White supremacism appears to be a relatively decentralized movement with multiple centers of influence, but without sharper cleavages between factions.”); Editorial, *There Are No Lone Wolves*, N.Y. TIMES (Nov. 19, 2022), <https://perma.cc/XC9K-YS9V> (“[W]hile the majority of adherents to the white supremacist cause aren’t directly affiliated with . . . groups, they describe

organizations are not removed from one another—they are part and parcel of a regime to violently pursue white supremacy.

This regime increases the threat of domestic extremist groups by allowing them to conceal their impact on the proliferation of hate crimes. In 2019, the Southern Poverty Law Center (SPLC) reported that the number of hate groups in the United States reached a record high,<sup>28</sup> even after the number increased by 70% between 2000 and 2012.<sup>29</sup> Statistics also showed a concomitant growth in hate crimes.<sup>30</sup> Viewed through the lens of leaderless resistance, this parallel is not a coincidence. Studies on the organizational characteristics of extremist groups in the United States show that “organizations with a supremacist ideology . . . are more likely to use violence,”<sup>31</sup> and that among those organizations, “decentralized organizations with weaker leadership are more likely to use violence.”<sup>32</sup> Beam’s concept to transform the white supremacy movement seems to have been largely successful.<sup>33</sup> The number

---

themselves as part of a global movement of like-minded people, some of whom commit acts of leaderless violence in the hopes of winning more adherents and destabilizing society.”).

28. *Hate Groups Reach Record High*, S. POVERTY L. CTR. (Feb. 19, 2019), <https://perma.cc/JW38-YTFW>.

29. See Victor Asal et al., *Organizational-Level Characteristics in Right-Wing Extremist Groups in the United States Over Time*, 45 CRIM. JUST. REV. 250, 251 (2020).

30. See Katharina Buchholz, *U.S. Hate Crimes at New Decade High*, STATISTA (Aug. 31, 2021), <https://perma.cc/SF2H-R8JC> (“According to statistics released by the FBI, hate crimes have risen to their highest level in over a decade in the United States. Last year, there were 7,759 hate crime incidents, around 470 more than the total number reported in 2019 . . . .”); see also Alan Feuer, *White Supremacist Propaganda Soared Last Year, Report Finds*, N.Y. TIMES (Mar. 9, 2023), <https://perma.cc/2XTK-TFJ8>. But see Glenn Thrush, *F.B.I. Reports Drop in Hate Crimes, but Lack of Data Casts Doubt on Figures*, N.Y. TIMES (Dec. 12, 2022), <https://perma.cc/Y9KZ-U9U8>.

31. Asal et al., *supra* note 29, at 260; see also Jeff Gruenwald et al., *Distinguishing Loner Attacks from Other Domestic Extremist Attacks and from Other Domestic Extremist Violence: A Comparison of Far-Right Homicide Incident and Offender Characteristics*, 12 CRIMINOLOGY & PUB. POL’Y 65, 67 (2013) (citing four studies supporting that “most violent loner attacks [in the United States were] committed by far-rightists, and . . . such attacks are increasing”).

32. Asal et al., *supra* note 29, at 260.

33. See Gruenwald et al., *supra* note 31, at 67 (“In short, these results and offending patterns identified by the [United States Extremist Crime

of white supremacist groups continues to grow, more individuals commit domestic extremist acts than ever before, and yet individuals, rather than the organizations that “propagandize[] and disseminate[] ideology,” are targeted as the root of the problem.<sup>34</sup>

### B. *The Internet as a Metastasizing Force*

Beam envisioned a system of domestic extremism in which members could successfully pursue white supremacy in isolation. This system has not been wholly realized because extremists require initiation into white supremacy’s beliefs and goals—after all, “[w]ithout radicalization there would be no [extremism].”<sup>35</sup> According to Beam, it is “the responsibility of the individual to acquire the necessary skills and information as to what is to be done.”<sup>36</sup> Today, “lone wolves” frequently acquire the necessary skills and information by using the internet.<sup>37</sup> The internet allows domestic violent extremism to metastasize on a

---

Database] indicate that advocating for leaderless acts may have been successful.”).

34. BJELOPERA, *supra* note 22, at 51.

35. HAMM & SPAALJ, *supra* note 16, at 59; *see also id.* at 158–59 (listing “affinity with online sympathizers or extremist group[s]” as an integral part of their “Radicalization Model of Lone Wolf Terrorism”).

36. Beam, *supra* note 24.

37. *See* HAMM & SPAALJ, *supra* note 16, at 8 (“In cases of lone wolf [extremism], an aggrieved individual typically becomes radicalized within his or her own attainable means, such as . . . online sermons and political screeds . . .”); Cherie L. Deogracias, *Race, Reconstruction, and the RICO Act: Using the Racketeer Influenced and Corrupt Organizations Act in Prosecutions Against White Supremacist Organizations in America*, 20 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 306, 330–31 (2020) (“Hundreds of white supremacist websites operate on the World Wide Web to distribute information and propaganda, recruit new members, and drive traffic onto other white supremacy groups’ websites by featuring linked URLs to their websites.” (citing Burris et al., *supra* note 27, at 216)); *see, e.g., There Are No Lone Wolves*, *supra* note 27

Seeing the video and the manifesto “started my real research into the problems with immigration and foreigners in our white lands—without his livestream I would likely have no idea about the real problems the West is facing,” [Payton] Gendron wrote in his . . . manifesto, posted on the internet shortly before . . . he drove to a Tops grocery store in Buffalo and carried out a massacre of his own that left 10 Black people dead.

previously unimaginable scale.<sup>38</sup> According to one study, although “only one lone wolf of the pre-9/11 era was radicalized over the Internet[,] [a]fter 9/11 the figure rose from 3 percent to 26 percent.”<sup>39</sup> This increase was particularly prevalent among white supremacists.<sup>40</sup> Beyond providing a forum for domestic extremists to radicalize, the internet is also the perfect medium to breed a leaderless resistance.

A successful leaderless resistance relies on a constitutionally-protected organization that publicizes extremist views to decentralized actors who can carry out attacks without being legally tied to the radicalizing organization. Online radicalization enhances this legal separation. By not inciting illegal activity or explicitly agreeing to commit a criminal offense, extremist organizations can encourage “lone wolves”<sup>41</sup> but avoid criminal liability.<sup>42</sup> As Mark

---

38. See *Stormfront*, S. POVERTY L. CTR., <https://perma.cc/3HST-2YKH> (“[T]he majority of the radical right continues to use the Internet as its primary means of activism.”); ANTI-DEFAMATION LEAGUE, *THE CONSEQUENCES OF RIGHT WING EXTREMISM ON THE INTERNET 1* (2013), <https://perma.cc/9QLW-HYDS> (PDF) (“The Internet has provided the far-right fringe with formerly inconceivable opportunities. Online, racists, anti-Semites, and anti-government extremists can reach a much larger audience than ever before and can more easily portray themselves as legitimate.”); KATRINA MULLIGAN ET AL., CTR. FOR AM. PROGRESS, *A NATIONAL POLICY BLUEPRINT TO END WHITE SUPREMACIST VIOLENCE 6* (2021) <https://perma.cc/LXZ5-Q4NX> (PDF) (“White supremacists use internet-based platforms, websites, and social spaces to propagate their narratives, reach new members, organize, and fundraise. They use both mainstream online platforms, which reach a wider audience, and smaller, more niche platforms that allow for more overtly violent content and discussion.” (citation omitted)).

39. HAMM & SPAALJ, *supra* note 16, at 63.

40. See *id.*

41. See HAMM & SPAALJ, *supra* note 16, at 158 (“The Internet and social media make it possible for an individual to become radicalized in the solitude of his or her bedroom through . . . exchanging militant propaganda, and even acquiring technical know-how for committing acts of [extremism] . . .”); Gruenwald et al., *supra* note 31, at 86 (“The use of the Internet by loners and other extremists may be increasing as a tool used for recruitment, sharing of tactics, and attack planning.”).

42. The lack of an explicit agreement precludes accomplice liability in the form of criminal conspiracy. See CHARLES DOYLE, CONG. RSCH. SERV., *R41223, FEDERAL CONSPIRACY LAW: A BRIEF OVERVIEW 6* (2020), <https://perma.cc/3WV8-CBUC> (PDF) (“[P]roximity does not constitute agreement; mere association, standing alone, is inadequate; an individual does not become a member of a conspiracy merely [by] associating with conspirators known to be involved in crime.” (internal quotations omitted)). A larger issue

S. Hamm and Ramón Spaaij explain in their seminal study on lone wolf terrorism, “The shift from affinity with extremist *groups* to an affinity with anonymous *online sympathizers* is one of the most important transformations in the history of lone wolf terrorism because it has expanded the base of support for leaderless resistance.”<sup>43</sup>

The nexus between the internet and white supremacist domestic extremism is well documented. One of the first recognized domestic extremist attacks motivated by the internet occurred in 1999, after Richard Baumhammers was radicalized online by organizations including the White Aryan Resistance (“WAR”).<sup>44</sup> WAR’s website promoted Beam’s leaderless resistance model and provided Baumhammers with white supremacist propaganda and access to internet communities espousing similar beliefs.<sup>45</sup> Baumhammers also joined a mailing list for a skinhead band and “registered as a user at the neo-Nazi

---

in the context of leaderless resistance is the concept of “incitement.” In *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the Supreme Court addressed a case where a Ku Klux Klan leader was criminally charged under an Ohio law for advocating for “revengeance” because of the suppression of the “white, Caucasian race” in favor of Jews and Black Americans. *Id.* at 446. In a landmark opinion, the Court held that: “[T]he constitutional guarantees of free speech and free press do not permit a State to forbid . . . advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing *imminent lawless action* and is likely to incite or produce such action.” *Id.* at 447 (emphasis added). Leaderless resistance necessarily includes a separation between advocacy and action that is rarely imminent, and many therefore assert that the organizations that encourage hate crimes cannot be held accountable for subsequent action. See *Stormfront Standing Strong as Hate Sites Expand*, S. POVERTY L. CTR. (Mar. 15, 1999), <https://perma.cc/782Y-6HDL> (“Just as a Klansman has an absolute right under the First Amendment to rally and express views judged hateful by most people, Net propagandists are protected in pushing their extremist views. Generally speaking, such rhetoric has been protected unless it calls for ‘imminent lawless action.’”). This Note contends that a statute modeled on RICO would avoid these constitutional issues.

43. HAMM & SPAAIJ, *supra* note 16, at 74 (emphasis in original); see also *id.* at 157–58 (“Online sympathizers are important to the lone wolf [extremist] because they provide personal and ideological support to individuals while simultaneously allowing them to operate anonymously within their chosen community.”); Gruenwald et al., *supra* note 31, at 68 (“Hate groups often attempt to connect with other extremists via social media and other Internet sources for various reasons, including the recruitment of new members.”).

44. See HAMM & SPAAIJ, *supra* note 16, at 76.

45. See *id.*

web server Stormfront” to which he “made more than a thousand visits.”<sup>46</sup> And, as Beam hoped when he first popularized leaderless resistance, Baumhammers eventually learned “the necessary skills and information as to what is to be done.”<sup>47</sup>

On April 28, 2000, Baumhammers committed an abhorrent extremist attack in his neighborhood, targeting those who drew the ire of his white supremacist communities.<sup>48</sup> As Hamm and Spaaij detail:

Baumhammers walked to the home of his next door neighbor, a sixty-three-year-old Jewish woman . . . and fatally shot her six times with his Smith & Wesson before setting fire to the house. Baumhammers then drove . . . to the Beth El congregation and fired into the synagogue windows. Exiting his vehicle, he spray-painted two red swastikas and “Jew” on the building. From there, Baumhammers drove to an Indian grocery store where he shot and killed an Indian customer and then shot the Indian store manager in the neck, paralyzing him. Baumhammers next drove to the Ahavath Achim Congregation where he scattered gunfire against the synagogue windows. Then he drove to a Chinese restaurant where he shot and killed the Chinese manager and a Vietnamese cook. From there, Baumhammers drove to a Korean karate school, where he shot and killed an African American man before fleeing.<sup>49</sup>

In the aftermath of the attack and his arrest, Baumhammers’ online communities—the same communities that “openly advocated random lone wolf [extremist] attacks against minorities as a form of leaderless resistance”—publicly praised his actions.<sup>50</sup>

Baumhammers was charged with multiple counts of murder and hate crime acts in Pennsylvania state court, and

---

46. *Id.*

47. Beam, *supra* note 24.

48. HAMM & SPAAIJ, *supra* note 16, at 76.

49. *Id.* at 76–77.

50. *Id.* at 76; *see id.* at 77 (“Two days after Baumhammers was charged in the shootings, [WAR] hailed the killings. ‘Mr. Richard Baumhammers, a white man from . . . Pennsylvania, recently decided to deliver Aryan justice in a down home way[.]’”).

found guilty on all counts.<sup>51</sup> Despite recognizing during sentencing that Baumhammers was “coaxed and coached by the mongers of venom and violence,” the trial judge nonetheless characterized Baumhammers’ attack as a “lone wolf attack against minorities.”<sup>52</sup> Neither WAR nor Stormfront were held legally accountable for inspiring the attack,<sup>53</sup> particularly because the organizations did not engage in, or criminally incite, the violent activity.<sup>54</sup>

For this reason, long after Baumhammers’ attack, organizations continue to inspire white supremacist attacks with minimal consequences.<sup>55</sup> No organization better exemplifies the ability to consistently inspire domestic extremist attacks without legal accountability than Stormfront, the leading white supremacist website.

---

51. See *Commonwealth v. Baumhammers*, 960 A.2d 59, 67 (Pa. 2008).

52. HAMM & SPAALJ, *supra* note 16, at 77 (internal quotations omitted).

53. WAR eventually faced crippling civil consequences for its founder’s role in a separate racially motivated murder. See *Tom Metzger*, S. POVERTY L. CTR., <https://perma.cc/4Y8E-7KGP>.

54. See *supra* note 42.

55. See, e.g., *Frequently Asked Questions About Hate Groups*, S. POVERTY L. CTR. (Feb. 16, 2022), <https://perma.cc/YY49-H6KP> (“[Dylann] Roof was not a member of any hate group, but his act was inspired by . . . the white nationalist group Council of Conservative Citizens (CCC), among other hate group[s].”); HEIDI BEIRICH, S. POVERTY L. CTR., *WHITE HOMICIDE WORLDWIDE 5* (2014), <https://perma.cc/3NDK-9UXN> (PDF) (“[O]n Aug. 5, 2012, Wade Michael Page shot and killed six people at a Sikh temple [in Wisconsin], . . . and wounded four others before killing himself during a shootout with police. Page . . . had been a registered user on Stormfront, under various user names, for more than 10 years.”); *Neo-Nazi Leader Sentenced to Five Years in Federal Prison for Explosives Charges*, U.S. DEP’T OF JUST. (Jan. 9, 2018), <https://perma.cc/HY9Y-ZMQY>; Michael E. Miller, *Hunting Black Men to Start a ‘Race War’*, WASH. POST (Dec. 27, 2019), <https://perma.cc/VVD7-F3MS> (“In the three months before his [intentional stabbing of a Black man], [James Harris] Jackson visited websites related to white supremacy on 415 occasions—an average of nearly five times a day . . . Like Roof, he frequented the Daily Stormer, where he read incendiary articles about black crime.”); Katie Mettler, *Sean Urbanski Sentenced to Life in Killing of Black Army Lt. Richard Collins III*, WASH. POST (Jan. 14, 2021), <https://perma.cc/M43C-ZK57> (“[A]uthorities discovered that [Sean Urbanski] belonged to a white-supremacist Facebook group called ‘Alt-Reich: Nation’ and had racist memes stored on his phone.”).

C. *Stormfront*

Stormfront is an online white supremacist and neo-Nazi forum that was created in 1995 by Don Black, a former member of the Ku Klux Klan.<sup>56</sup> Stormfront acts as something of a community center for those who support its bigotry, and members are able to “post articles, engage in discussions, and share news of upcoming racist events.”<sup>57</sup> Stormfront is noteworthy in this regard—unlike other websites that promote white supremacy, the forum encourages participation and requires membership to do so.<sup>58</sup> The website’s home page states that “[y]ou are welcome to browse any of our thirteen million posts, but you must register before you can post anywhere except the Open Forums.”<sup>59</sup> This associational requirement has hardly deterred Stormfront’s supporters: it “claim[ed] more than 300,000 registered members as of May 2015,” and is described by SPLC as the “Western world’s most popular forum for [white supremacists].”<sup>60</sup> Stormfront is also funded by these members. In 2008, a section titled “sustaining members” was added to the website for “those who have supported the site financially,” and serves as a private message board for “Stormfront’s most influential users.”<sup>61</sup>

More than acting solely as a forum for open discussion, multiple discussion threads include titles that encourage, but do not instruct, Stormfront members to act.<sup>62</sup> These threads sport titles like “What do you want done with the Jews?” and “Aryan

---

56. *Stormfront*, supra note 38.

57. *Id.*

58. *See id.* (“Whereas typical hate sites function as one-way transfers of information—rather like a brochure that can be read but not responded to—Stormfront has always been organized as a message board. Members can post opinions, listen to others respond, then post more feedback for all to read.”).

59. *Welcome to Stormfront*, STORMFRONT, <https://perma.cc/529B-D7WK>.

60. *Stormfront*, supra note 38.

61. *Id.*

62. *See* Lorraine Bowman-Grieve, *Exploring “Stormfront”: A Virtual Community of the Radical Right*, 32 *STUD. CONFLICT & TERRORISM* 989, 1003 (2009) (“The actions and activities promoted on the board are predominantly nonviolent in nature . . . because promoting violent or illegal activities is against the board rules. Board members predominantly respect this rule, realizing that to break it, to explicitly promote or incite violence, would lead . . . to . . . the dissolution of their community.”); *see also supra* note 42.



storm Rising,” and many bemoan the various societal ills allegedly caused by Black Americans, immigrants, and Jews.<sup>63</sup> Stormfront’s results speak for themselves. Richard Baumhammers was an early member, but his extremist acts are hardly an isolated occurrence for the website’s members. Just eight months before Baumhammers’ attack, Buford O’Neil Furrow, another member, traveled from Washington to California and shot six people in and around a Jewish day care center, killing one.<sup>64</sup> In 2002, another member murdered his own brother because of his sibling’s perceived sexuality.<sup>65</sup> In fact, after conducting a two-year study, SPLC concluded that registered members of Stormfront have committed “nearly 100 bias-related homicides” since 2009.<sup>66</sup>

Despite its members’ repeated links to acts of domestic extremism, Stormfront continues to evade organizational accountability.<sup>67</sup> After extremist attacks by its members, the website’s founder quickly minimizes the member’s activity on Stormfront and emphasizes potential compounding factors that allegedly inspired the act.<sup>68</sup> Nonetheless, as a direct result of these attacks, support for Stormfront soars. After Baumhammers’ killing spree, Black stated that media coverage of the killing spree “had more than doubled the number of ‘hits’ to his website.”<sup>69</sup> Similarly, after another member’s attack in Wisconsin led to the deaths of six people, Stormfront’s web traffic rose to its “highest and most significant spike[] of the year.”<sup>70</sup> This effect—where a Stormfront member’s attack

---

63. *Stormfront*, *supra* note 38.

64. *See* BEIRICH, *supra* note 55, at 2.

65. *See id.* (“On April 19, 2002, Ian Andrew Bishop, a 14-year-old so-called ‘Stormfront Youth’ killed his brother by striking him repeatedly in the head with a claw hammer, allegedly because he thought [his brother] was gay.”).

66. *Id.* at 6.

67. *See id.* at 2 (“Investigators find that most offenders openly advocated their ideology online for lengthy periods while sucking up the hatred around them. Yet Stormfront’s founder . . . shrugs off responsibility . . .”).

68. *See, e.g., id.* (“[Black] claimed Baumhammers ‘had been previously diagnosed as something worse than schizophrenic.’”); *id.* (“Black denied any responsibility in the Bishop case, claiming ‘Bishop killed his older brother because he thought his parents liked him better.’”); *id.* at 5.

69. *Id.* at 2.

70. *Id.* at 5.

inspires support for the website—is not relegated solely to web traffic. After the same attack in Wisconsin, “[m]onthly donations to the site rose from \$6,545 [in one month] . . . to \$8,028 in [the next] to \$10,032 [in the next month] of that year.”<sup>71</sup>

An alarming pattern emerges: Stormfront members commit hate crimes, which then inspire financial and ideological support for the website. In turn, the organization is able to radicalize new members and encourage domestic extremism, while only individual members are held accountable. As of this Note’s publication, Stormfront remains online.<sup>72</sup>

Stormfront provides organizational support for extremism by inspiring individuals to carry out “lone wolf” attacks<sup>73</sup> and then successfully deflects responsibility to the attackers.<sup>74</sup> Stormfront, and other organizations that act in a similar manner,<sup>75</sup> are essentially Beam’s leaderless resistance theory

71. *Id.*

72. *See Welcome to Stormfront*, *supra* note 59 (last visited May 3, 2023).

73. *See* Bowman-Grieve, *supra* note 62, at 999 (“[Stormfront] has developed a network of support for themselves and others that gives them legitimacy and allows them to further justify their ideological beliefs and actions both on an individual and group level.”); BEIRICH, *supra* note 55, at 2 (“Over the past two decades, the largest hate site in the world, Stormfront.org, has been a magnet and breeding ground for the deadly and the deranged.”); *cf.* Paul Gill et al., *Bombing Alone: Tracing the Motivations and Antecedent Behaviors of Lone-Actor Terrorists*, 59 J. FORENSIC SCI. 425, 434 (2014) (finding that lone wolves’ radicalization process frequently “includes . . . adopting an extremist ideology” and that, in their study, “68% of the cases [displayed] evidence to suggest that the individual read or consumed literature or propaganda associated with a wider movement”); Josh Adams & Vincent J. Roscigno, *White Supremacists, Oppositional Culture and the World Wide Web*, 84 SOC. F. 759, 771–72 (2005) (describing the appeal to individual or lone wolf action on neo-Nazi websites as “grounded in the view that participants are not alone, but are acting for the collective good of their race and surrounded by clandestine sympathizers”).

74. *See supra* notes 63–71 and accompanying text.

75. Another domestic extremist organization that follows this mold is Iron March, an influential neo-Nazi forum whose slogan was “Gas The Kikes! Race War Now! 1488! Boots on the ground!” *Atomwaffen Division*, S. POVERTY L. CTR., <https://perma.cc/S9DW-GXLD>. Iron March operated from 2011 to 2017, and its members were responsible for multiple acts of violence. *See* James Poulter, *The Obscure Neo-Nazi Forum Linked to a Wave of Terror*, VICE (Mar. 12, 2018), <https://perma.cc/LY6H-449Y> (“Users of Ironmarch.org have attempted a mall shooting; murdered two young men; attempted to hack a Sikh dentist to death with a machete; and have been found to be in possession of illegal weapons and materials to make bombs, among other crimes.”). Even after its shuttering, Iron March continues to impact the current domestic

incarnate.<sup>76</sup> Investigating and prosecuting “lone wolves” while their encouragers continue without fault will not stop this cycle. The balance of this Note explores methods to hold these organizations accountable and to undermine their decentralized support networks.

## II. ORGANIZATIONAL ACCOUNTABILITY

The federal statutory scheme must be adapted to hold the organizations that continue to inspire domestic extremist attacks accountable. To decrease the difficulty of creating a new domestic extremism statute, this Note proposes a solution

---

extremism landscape through Atomwaffen Division. *See Atomwaffen Division, supra*; H.E. Upchurch, *The Iron March Forum and the Evolution of the “Skull Mask” Neo-Fascist Network*, CTC SENTINEL, Dec. 2021, at 32. Atomwaffen Division, like Stormfront and Iron March, promulgated materials encouraging hate crimes, and its members similarly committed violent action for which they were individually indicted. *See, e.g.*, A.C. Thompson & Jake Hanrahan, *Inside Atomwaffen as it Celebrates a Member for Allegedly Killing a Gay Jewish College Student*, PROPUBLICA (Feb. 23, 2018), <https://perma.cc/PDZ7-V4VY> (last updated Aug. 3, 2018). The recent arrest and prosecution of its leadership has upended Atomwaffen Division. *See Atomwaffen Division, supra*; *Leader of Neo-Nazi group ‘Atomwaffen’ Pleads Guilty to Hate Crime and Conspiracy Charges for Threatening Journalists and Advocates*, U.S. DEPT OF JUST. (Apr. 7, 2021), <https://perma.cc/F4GG-4AGN>. Nonetheless, because multiple members of the group shifted from Iron March after its closure, Atomwaffen Division’s unraveling does not indicate that its impact will cease. *See Upchurch, supra*, at 35 (“The survival . . . of the skull mask network, despite the loss of Iron March . . . , shows that takedowns of public, centralized, online organizing platforms are not necessarily enough to disrupt violent extremist networks if members have already formed strong social connections that can survive the migration to other communication services.”). The decentralized members of these groups remain dangerous domestic extremist threats, and their organization on multiple websites exposes them to the statutory scheme proposed by this Note. *See Alex Newhouse, The Threat Is the Network: The Multi-Node Structure of Neo-Fascist Accelerationism*, CTC SENTINEL, Jun. 2021, at 17.

76. *See* BJELOPERA, *supra* note 22, at 50–51

[Beam] suggested two levels of leaderless movement activity. First, on an operational level, militant, underground, ideologically motivated cells or individuals (lone wolves) engage in movement-related illegal activity . . . . Second, . . . the above-ground public face (the “political wing”) of the movement propagandizes and disseminates ideology—engaging in protected speech. In this system, underground cells or lone wolves would be responsible for their own actions, and the public face of the movement would not be held accountable.

rooted in existing organizational accountability models. The United States' wealth of law regarding foreign terrorist organizations is the logical starting point to counteract extremist organizations. Al-Qaeda's attack against the United States on September 11, 2001, exposed the United States' ineffective deterrence of another extremist threat.<sup>77</sup> The government subsequently utilized federal law to pursue foreign terrorist organizations and their supporters.<sup>78</sup> Specifically, federal law enforcement pursued a strategy of designating foreign terrorist organizations and prosecuting the organization's supporters.<sup>79</sup>

The foreign terrorism model's applicability to domestic extremist groups is tenuous, however, because the First Amendment's protections likely preclude executive designation of domestic extremist organizations.<sup>80</sup> Federal law nonetheless

---

77. See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT xv (2004), <https://perma.cc/EZ29-VYAF> (PDF) ("September 11, 2001, was a day of unprecedented shock and suffering in the history of the United States. The nation was unprepared. How did this happen, and how can we avoid such tragedy again?"); *id.* at 348 ("The road to 9/11 again illustrates how the large, unwieldy U.S. government tended to underestimate a threat that grew ever greater."). Beyond the government's underestimation of these extremist threats, foreign terrorism and domestic extremism share more in common than many Americans would like to admit. See Verini, *supra* note 4 ("[Domestic extremists] were susceptible to the same manipulative messages as aspiring jihadis: The world was going to hell, and America was leading it there; their lives would be meaningless until they took a stand.").

78. See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., *supra* note 77, at 330 ("In [a] meeting [on September 12, 2001], [President Bush] stressed that the United States was at war with a new and different kind of enemy. The President asked principals to go beyond their pre-9/11 work and develop a strategy to eliminate terrorists and punish those who support them.").

79. See Laguardia, *supra* note 5, at 1071 ("In the international terrorism context, the U.S. can and does rely heavily on 18 U.S.C. § 2339B, which prohibits material support of an organization if the organization has been designated [a foreign terrorist organization] by the Secretary of State." (citation omitted)).

80. See *id.* at 1085 ("The ability of a government to designate domestic political organizations as terrorists has potentially chilling implications . . ."); Courtney Kurz, *Closing the Gap: Eliminating the Distinction Between Domestic and International Terrorism Under Federal Law*, 93 TEMP. L. REV. 115, 141 (2020) ("This proposal does not suggest . . . creating a [designated terrorist] list to address domestic organizations. . . . The creation of such a list would likely face significant constitutional obstacles by intruding on individuals' right of association."); Shirin Sinnar, *Separate and Unequal: The Law of Domestic and International Terrorism*, 117 MICH. L. REV. 1333, 1399

provides a separate, constitutionally accepted, mechanism to prosecute organizations passively connected to other actors' criminal activity: RICO.<sup>81</sup> To determine whether either of these methods of organizational accountability can be adapted to prosecute domestic extremist groups, this Part first provides an overview of the statutory scheme used to hold foreign terrorist organizations accountable for their supporters' acts and explains why this model cannot be applied to domestic extremist organizations. Second, it describes RICO's different method of organizational accountability and explains why RICO avoids many of the constitutional concerns inherent to applying the foreign terrorism statutory scheme to domestic organizations. It concludes by explaining why RICO itself cannot be mobilized to hold domestic extremist organizations accountable, and why Congress should enact a unique domestic extremism statute.

#### A. *Foreign Terrorist Organizations*

Federal law includes a unique system for designating foreign terrorist organizations. Under 8 U.S.C. § 1189, “the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General”<sup>82</sup> has authority to designate which foreign organizations are considered terrorist organizations by the United States.<sup>83</sup> If the process laid out by § 1189 seems relatively simple, that's because it is. An organization must meet only three elements to be designated a foreign terrorist organization: it must (1) “be a foreign terrorism organization”; (2) “engage in or retain the capability and intent

---

(2019) (“[C]alls to ‘ratchet up’ terrorism law ignore the potential liberty and equality costs of doing so.”). *But see* Verini, *supra* note 4 (“Since Jan. 6, there have been constant calls for the Justice Department to treat domestic violent extremists and foreign terrorists with a ‘moral equivalence,’ . . . that is, to punish people for the violence of their ideas as much as, if not more than, the violence of their actions.”).

81. See G. Robert Blakey, *Materials on RICO: Criminal Overview*, in 1 TECHNIQUES IN THE INVESTIGATION AND PROSECUTION OF ORGANIZED CRIME: MATERIALS ON RICO 1, 15 (G. Robert Blakey ed., 1980), <https://perma.cc/XS33-58L2> (PDF) [hereinafter Blakey, *Criminal Overview*] (“[RICO] applies to any kind of enterprise criminality whether it has a syndicate relationship or not. Any group activity . . . where a pattern of criminal behavior is engaged in squarely falls within this statute.”).

82. 8 U.S.C. § 1189(d)(4).

83. See *id.* § 1189(a)(1).

to engage in terrorism”; and (3) “threaten the security of U.S. nationals or the national defense, foreign relations, or the economic interests of the United States.”<sup>84</sup> The initial designation process is conducted almost exclusively by the Department of State<sup>85</sup> at the direction of the Secretary of State.<sup>86</sup> Once this process is conducted, the Secretary of State must provide a classified “intent to designate” to congressional leaders that is not subject to their approval.<sup>87</sup> Indeed, notice is provided only seven days before designation and, once this designation occurs, it is published in the Federal Register and can only be revoked by the Secretary of State,<sup>88</sup> an Act of Congress,<sup>89</sup> or proof by the designated organization that it does not meet the required elements.<sup>90</sup> For such a simple process, however, the penalties are severe.

Once a foreign organization is designated as a terrorist organization, individuals and organizations can be prosecuted for providing “material support” to the organization.<sup>91</sup> This capability provides the most significant weapon against foreign terrorism in the federal statutory scheme. The material support provision in 18 U.S.C. § 2339B states that if one “knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, [they] shall be fined . . . or imprisoned not more than 20 years, or both, and, if . . . death . . . results, shall be imprisoned for any term of years or for life.”<sup>92</sup> Because of the ambiguity of this statute, the breadth of covered conduct,<sup>93</sup> and the potential penalties, “most

---

84. JOHN W. ROLLINS, CONG. RSCH. SERV., 7-5700, FOREIGN TERRORIST ORGANIZATION (FTO) 1 (2019), <https://perma.cc/E6NZ-Z23D> (PDF) (citing 8 U.S.C. § 1189(a)(1)).

85. *See id.* (“The State Department’s Bureau of Counterterrorism (CT) is responsible for identifying entities for designation as an FTO. Prior to doing so, the Department is obligated to demonstrate that the entity in question engages in ‘terrorist activity’ . . .”).

86. *See* 8 U.S.C. § 1189(d)(4).

87. *See id.* § 1189(a)(2)(A)(i).

88. *See* ROLLINS, *supra* note 84, at 1.

89. *See* 8 U.S.C. § 1189(a)(2)(B)(ii).

90. *See id.* § 1189(a)(4)(B).

91. 18 U.S.C. § 2339B.

92. *Id.* § 2339B(a)(1).

93. *See id.* § 2339A(b)(1) (defining material support as providing “any property, tangible or intangible, or service, including currency or monetary

‘terrorism prosecutions’ are material support prosecutions under § 2339B.”<sup>94</sup> Given the United States’ substantial use of designation and material support prosecutions to deter foreign extremism, it would seem that a domestic extremism statute modeled on this statutory scheme would be a useful weapon to combat similar domestic threats. Section 2339B’s material support provision is contingent, however, on the necessary condition of organizational designation by the Secretary of State. Without designation, the material support statute is inoperable.<sup>95</sup> But this method of designation—by an executive officer—also disqualifies the foreign terrorism statutory scheme as a template for designating domestic extremist organizations.

Unlike foreign terrorist organizations, domestic organizations benefit from the protections afforded by the United States Constitution,<sup>96</sup> particularly the freedoms of

---

instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel . . . , and transportation, except medicine or religious materials”).

94. Laguardia, *supra* note 5, at 1071; *see also* CTR. ON NAT’L SEC. AT FORDHAM L., THE AMERICAN EXCEPTION: TERRORISM PROSECUTIONS IN THE UNITED STATES—THE ISIS CASES 27–28 (Karen J. Greenberg ed., 2017), <https://perma.cc/QF5V-NL8K> (PDF) (finding that out of 135 federal cases related to ISIS, over ninety were charged under 18 U.S.C. § 2339B); Verini, *supra* note 4 (“[M]aterial support statutes . . . have been the backbone of the Justice Department’s campaign against groups such as Al Qaeda and ISIS.”).

95. *See* 18 U.S.C. § 2339B(g)(6). There is a separate material support statute, 18 U.S.C. § 2339A, which can be used against domestic individuals, including those who intend to commit acts of domestic extremism, without organizational designation. *See, e.g., Three Men Plead Guilty to Conspiring to Provide Material Support to a Plot to Attack Power Grids in the United States*, U.S. DEP’T OF JUST. (Feb. 23, 2022), <https://perma.cc/RL4Z-AW9A>. Section 2339A criminalizes material support in furtherance of one of the statute’s designated criminal offenses, rather than material support to a designated organization. *See* 18 U.S.C. § 2339A(a). Since a critical aspect of this Note is organizational accountability prior to invoking a material support statute, this Note focuses on Section 2339B’s designation model.

96. *See* *Holder v. Humanitarian L. Project*, 561 U.S. 1, 39 (2010) (“We . . . do not suggest that Congress could extend the same prohibition on material support . . . to domestic organizations. We simply hold that, in prohibiting the particular forms of support that plaintiffs seek to provide to foreign terrorist groups, § 2339B does not violate the freedom of speech.” (emphasis added)); *see also* Laguardia, *supra* note 5, at 1086–87 (“While *Holder v. Humanitarian Law Project* allowed § 2339B to interfere with political speech in the international context, the Court expressly limited its holding to association with foreign organizations.” (citation omitted)); Kurz,

speech<sup>97</sup> and association.<sup>98</sup> These constitutional protections substantially affect the ability to designate domestic extremist groups in the mold of foreign terrorist designations.<sup>99</sup> The First Amendment would almost certainly preclude a statute that enables the government, via an executive officer, to formally designate domestic organizations as terrorists and subsequently prosecute their supporters.<sup>100</sup> Such a statute could have a chilling effect on free speech<sup>101</sup> and could also fall prey to allegations of vagueness and overbreadth.<sup>102</sup> An executive officer's leadership role in designating organizations could also subject domestic designation to dangerous political disputes about which groups are truly extremist and which merely garner the disdain of the political party in power.<sup>103</sup>

---

*supra* note 80, at 141 (“[T]he creation of [a domestic extremism] list would likely face significant constitutional obstacles by intruding on individuals’ right of association. . . . [This] same issue[] do[es] not apply to foreign organizations who do not enjoy First Amendment protections.” (citation omitted)).

97. See U.S. CONST. amend. I.

98. See *NAACP v. Alabama*, 357 U.S. 449, 460 (1958).

99. See *Sinnar*, *supra* note 80, at 1400 (“[C]oncerns over free speech and privacy, government accountability, anticipatory prosecution, and harsh punishment weigh against subjecting more people to the international terrorism paradigm.”).

100. See *Laguardia*, *supra* note 5, at 1085 (“Of course, there are reasons that no domestic terrorist organization list exists. . . . First Amendment conflicts jump to mind most quickly as a problem with designation of domestic organizations . . .”).

101. See *id.* (“The ability of a government to designate domestic political organizations as terrorists has potentially chilling implications, especially if any and all association with the organization could be considered material support, with no necessity that defendants intend to support illegal or violent efforts to obtain political change . . .”); *Sinnar*, *supra* note 80, at 1400 (“Many observe that material support prosecutions risk punishing thought crimes without action and chilling political speech.” (citation omitted)). *But see* MARY ANNE FRANKS, *THE CULT OF THE CONSTITUTION* 111 (2019) (“Freedom for the thought we hate [and] the danger of chilling effects . . . are all settled tenets of First Amendment orthodoxy. As such, their validity is frequently assumed rather than demonstrated. Under close examination, however, these articles of faith do not prove to be deserving of such confidence.”).

102. See *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (explaining that a statute is vague when “it subjects the exercise of the right of assembly to an unascertainable standard” and overbroad when it “authorizes the punishment of constitutionally protected conduct”).

103. See *Laguardia*, *supra* note 5, at 1087–88 (“If we allow the government to determine when an organization is sufficiently dangerous, especially when



Of course, the First Amendment's protections are not absolute, and notably exclude acts of incitement.<sup>104</sup> In *Brandenburg v. Ohio*,<sup>105</sup> the Supreme Court characterized incitement as “preparing a group for violent action and steeling it to such action,” and juxtaposed this type of action with “teaching . . . the moral propriety or even moral necessity for a resort to force and violence.”<sup>106</sup> Leaderless resistance, however, is *built upon* a separation between those who inspire a “resort to force and violence” and those who actually commit this violence.<sup>107</sup> Incitement's exception therefore cannot redeem the constitutional issues inherent to a domestic extremism statute that is modeled on the foreign terrorism statutory scheme.<sup>108</sup> This statute would likely be dead on arrival.

The foreign terrorism model, however, is not the only statutory scheme for holding organizations accountable. For

---

that organization has not itself claimed to be intent on the use of terrorism or violence to achieve its political goals, that power to designate organizations may be abused quickly and easily.”); Kurz, *supra* note 80, at 141 (“The government and those in power could use a domestic [extremism] list as a tool to target opposition groups.” (citation omitted)); *see, e.g.*, Kaelan Deese, *Giuliani Says Black Lives Matter Is ‘Domestic Terrorist’ Group*, THE HILL (Aug. 6, 2020), <https://perma.cc/J3NY-A5S8>; Maggie Haberman & Charlie Savage, *Trump, Lacking Clear Authority, Says U.S. Will Declare Antifa a Terrorist Group*, N.Y. TIMES (May 31, 2020), <https://perma.cc/8T7Q-DMJ7> (last updated June 10, 2020); Mark Follman, *How Trump Unleashed a Domestic Terrorism Movement—And What Experts Say Must Be Done to Defeat It*, MOTHER JONES (2021), <https://perma.cc/FLU7-R3HG> (“Reckoning with the domestic terrorism cultivated by Trump requires accountability for him and other leaders who abetted his incitement. But that is just the start. [T]he monetization of far-right rage by Fox News and its upstart competitors . . . must be confronted.”).

104. *See supra* note 42.

105. 395 U.S. 444 (1969).

106. *Id.* at 448 (citations omitted); *see also id.* at 447 (“[T]he constitutional guarantees of free speech and free press do not permit a State to forbid . . . advocacy of the use of force or of law violation *except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.*” (emphasis added)).

107. *See supra* note 42.

108. *But see* *Stewart v. McCoy*, 537 U.S. 993, 995 (2002) (Stevens, J., statement respecting denial of certiorari) (“Long range planning of criminal enterprises—which may include oral advice, training exercises, and perhaps the preparation of written materials—involves speech that should not be glibly characterized as mere ‘advocacy’ and certainly may create significant public danger.”).

decades, federal prosecutors have used RICO to challenge wide-reaching criminal enterprises whose conduct falls short of traditional criminal liability schemes.<sup>109</sup> Unlike a statute modeled on the foreign terrorism statutory scheme, one modeled on RICO could more easily survive criticism on constitutional grounds because RICO does not criminalize association outright or include a temporal requirement as direct as “imminence” to create liability. Instead, RICO relies on a pattern of existing, independent criminal acts—frequently referred to as “predicate offenses”—to establish organizational accountability.<sup>110</sup>

### B. RICO and the Criminal Enterprise

In 1970, in an effort to “eradicat[e] . . . organized crime in the United States . . . by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime,” Congress enacted RICO.<sup>111</sup> RICO is an expansive statute<sup>112</sup> whose jurisprudence spans over fifty years and thousands of cases.<sup>113</sup> Although its complex statutory scheme addresses a variety of activities,<sup>114</sup> one part of RICO is

---

109. See *United States v. Elliott*, 571 F.2d 880, 900 (5th Cir. 1978) (“RICO has displaced many of the legal precepts traditionally applied to concerted criminal activity. Its effect . . . is to free the government from the strictures of the multiple conspiracy doctrine and to allow the joint trial of many persons accused of diversified crimes.”); *id.* at 902 (“[Federal conspiracy law] inhibited mass [organized crime] prosecutions because a single agreement or ‘common objective’ cannot be inferred from the commission of highly diverse crimes by apparently unrelated individuals. RICO helps to eliminate this problem by creating a substantive offense which ties together these diverse parties and crimes.”).

110. See G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1021 n.71 (1980).

111. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970) (codified at 18 U.S.C. § 1961).

112. See Blakey & Gettings, *supra* note 110, at 1014 (describing RICO as “one of the most sophisticated statutes ever enacted by Congress”).

113. At the time of this Note’s publication, Westlaw displayed 21,971 cases citing 18 U.S.C. § 1962, the section of RICO most relevant to this Note. WESTLAW, 18 U.S.C. § 1962: CITING REFERENCES (last visited May 3, 2023).

114. See Blakey & Gettings, *supra* note 110, at 1011–12 (“RICO is used not just in organized crime prosecutions, but in white-collar crime prosecutions (most prominently political corruption cases) as well as in a large variety of violent offenses.” (citations omitted)).

especially relevant to holding domestic extremist organizations accountable: Clause (c) of § 1962. This clause is “the heart of [RICO],”<sup>115</sup> and makes it unlawful “for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity.”<sup>116</sup> To understand how a constitutional<sup>117</sup> domestic extremism designation statute can be modeled on RICO, it is necessary to explain Clause (c)’s fundamental concepts, specifically those of an enterprise and a pattern of racketeering activity.

Clause (c)’s core tenet is the criminal enterprise. RICO defines a criminal enterprise as “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.”<sup>118</sup> An enterprise need not be criminal—the statute “include[s] both legitimate and illegitimate enterprises within its scope.”<sup>119</sup> Although RICO was originally aimed at curtailing illegal acts related to economic activity,<sup>120</sup> it has since been applied to a broad scope of non-economic organized criminal conduct.<sup>121</sup> The result is a broad judicial view of criminal

---

115. Blakey, *Criminal Overview*, *supra* note 81, at 26.

116. 18 U.S.C. § 1962(c).

117. See Blakey & Gettings, *supra* note 110, at 1023 n.81 (“The concept of ‘enterprise’ is not unconstitutionally vague.” (citing *United States v. Aleman*, 609 F.2d 298, 305 (7th Cir. 1979); *United States v. Hawes*, 529 F.2d 472, 478–79 (5th Cir. 1976)); *id.* at 1021 n.71 (“RICO has been sustained against constitutional objection under the double jeopardy clause . . . and for alleged multiplicity.” (citing *United States v. Aleman*, 609 F.2d 298, 300 (7th Cir. 1979) (double jeopardy); *id.* at 306–07 (multiplicity); *United States v. Boylan*, 609 F.2d 359, 361 (2d Cir. 1980) (multiplicity))).

118. 18 U.S.C. § 1961(4).

119. *United States v. Turkette*, 452 U.S. 576, 580 (1981); see also Blakey & Gettings, *supra* note 110, at 1027 n.91 (“RICO does not draw the line between innocent and criminal conduct, since it requires the violation of two or more independent criminal statutes before it is violated.”).

120. See *Turkette*, 452 U.S. at 591.

121. See *Nat’l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 262 (1994) (“We hold only that RICO contains no economic motive requirement.”); see also JULIE R. O’SULLIVAN, *FEDERAL WHITE COLLAR CRIME: CASES AND MATERIALS* 641 (7th ed. 2019) (“Criminal RICO . . . has regularly been applied to conduct which in no way resembles the traditional organized crime ‘racketeering’ that it was intended to address.”).

enterprises.<sup>122</sup> The Supreme Court has stated as recently as 2009 that enterprises only require “three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise’s purpose.”<sup>123</sup> The Court also explained that groups “need not have a hierarchical structure or a ‘chain of command’” and that “decisions may be made on an ad hoc basis and by any number of methods.”<sup>124</sup> In essence, RICO can be “directed at *[any] group[] of individuals informally organized for a common purpose.*”<sup>125</sup> Neither an agreement between individuals nor the necessity to “incit[e] or produc[e] imminent lawless action”<sup>126</sup> is required for liability to attach to the *entirety* of the organization. Instead, RICO’s enterprise liability allows the government to constitutionally criminalize entire organizations based on individual members’ criminal acts.<sup>127</sup>

The amalgamation of these individual acts into a “pattern of racketeering activity” is another integral aspect of RICO’s organizational liability.<sup>128</sup> To enable a RICO prosecution, members of the enterprise must commit two acts of “racketeering activity” within ten years,<sup>129</sup> which can include a wide range of criminal activity such as murder, drug offenses,

---

122. See O’SULLIVAN, *supra* note 121, at 649 (“The facts of [Boyle v. United States, 556 U.S. 938 (2009)] demonstrate that the evidentiary bar of proving an association-in-fact [enterprise] is low.”).

123. Boyle v. United States, 556 U.S. 938, 946 (2009) (emphasis added).

124. *Id.* at 948.

125. Blakey & Gettings, *supra* note 110, at 1025.

126. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); *see also supra* note 42.

127. See *id.* at 1026 n.91 (“[T]he concept of ‘enterprise’ focuses on a group of people; it asks, did an entity engage in the crime?”); Douglas Kash, *You Can Run But You Can’t Hide: Using RICO to Fight Terrorism*, 69 POLICE J. 249, 249 (1996) (“The key to this statute is that it addresses the criminal activities of entire organizations . . .”).

128. See 18 U.S.C. § 1962(c) (“It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity . . .”).

129. See *id.* § 1961(5).

fraud, and many, many other federal<sup>130</sup> and state crimes.<sup>131</sup> These acts must be both related and continuous.<sup>132</sup> The statute's temporal requirements seek to guarantee that RICO prosecutions are not used to encompass unrelated and sporadic activity, although the Court's concept of a continuous relationship is "fairly flexible."<sup>133</sup> As a result, the Department of Justice's current guidance dictates that predicate "racketeering" offenses must be related, but that this relationship can be proven using a wide variety of evidence, such as "similar purposes, results, participants, victims, or methods of commission," as well as "distinguishing characteristics" that implicate non-isolated events.<sup>134</sup> Continuity is also defined broadly<sup>135</sup> and can be established by conduct that occurs repeatedly over a lengthy period of time ("close-ended" continuity),<sup>136</sup> or by a showing of current conduct that threatens to continue in the future ("open-ended" continuity).<sup>137</sup>

The pattern-of-racketeering-activity requirements ensure that RICO satisfies its original goal of addressing "long-term criminal conduct,"<sup>138</sup> and, more importantly, are the reason RICO's organizational accountability model is constitutional. As G. Robert Blakey, a leading scholar on RICO and a drafter of the statute, explains: "RICO is not a criminal statute; it does not

130. See *id.* § 1961(1) (listing over fifty federal criminal statutes that qualify as racketeering activity under RICO).

131. See *id.* ("[R]acketeering activity' means . . . any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical . . . which is chargeable under State law . . .").

132. See *H.J., Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239 (1989).

133. *Id.*

134. U.S. Dep't of Just., Just. Manual § 109 (2020) (quoting *H.J., Inc.*, 492 U.S. at 239–40).

135. See *H.J., Inc.*, 492 U.S. at 241.

136. See *id.* at 242.

137. See *id.* ("A RICO pattern may surely be established if the related predicates themselves involve a distinct threat of long-term racketeering activity, either implicit or explicit."); U.S. Dep't of Just., *supra* note 134 ("[A] threat of continued . . . activity [can be proved if] . . . the acts are part of a long-term association that exists for criminal purposes, or . . . they are a regular way of conducting the defendant's ongoing legitimate business, or . . . participating in an ongoing . . . legitimate enterprise." (citing *H.J., Inc.*, 492 U.S. at 242–43)).

138. *H.J., Inc.*, 492 U.S. at 242.

make criminal conduct that before its enactment was not already prohibited, since its application depends on the existence of ‘racketeering activity’ that violates an independent criminal statute.”<sup>139</sup> In contrast to statutes that criminalize acts based solely on association, such as the prohibition against providing material support to foreign terrorist organizations,<sup>140</sup> RICO’s model of criminal organizational liability can only be satisfied if members of an organization repeatedly commit *existing* criminal acts *related to* their organizational membership.<sup>141</sup> This distinction allows RICO to establish organizational accountability through its members’ actions while also avoiding First Amendment issues.

Beyond its constitutional criminalization of organizational membership, RICO is an ideal starting point to successfully address domestic extremism’s threat because it succeeded in disrupting organized crime in the United States.<sup>142</sup> At the time of its enactment, criminal organizations were a dire public safety and economic threat<sup>143</sup> that capitalized on weaknesses in

139. Blakey & Gettings, *supra* note 110, at 1021 n.71.

140. 18 U.S.C. § 2339B.

141. See Deogracias, *supra* note 37, at 336 (“[B]ecause RICO does not use associational status or belief to prosecute, and instead uses prerequisite crimes committed by a racketeering organization involved in interstate commerce, *it would not infringe on constitutionally protected First Amendment issues.*” (emphasis added) (citations omitted)); *United States v. Rubio*, 727 F.2d 786, 792 (9th Cir. 1983) (“Congress has made association with an enterprise one element of the RICO offense. . . . That element has withstood the attack that it unconstitutionally punishes associational status, the courts recognizing that RICO’s ‘proscriptions are directed against conduct, not status.’” (quoting *United States v. Martino*, 648 F.2d 367, 380 (5th Cir. 1981))); *United States v. Yarbrough*, 852 F.2d 1522, 1540–41 (9th Cir. 1988) (“[RICO enterprise liability] does not unconstitutionally punish associational status.”).

142. See G. Robert Blakey, *RICO: The Genesis of an Idea*, 9 TRENDS ORGANIZED CRIME 8, 21 (2006) (“[RICO’s] impact on organized crime . . . is unparalleled in the history of criminal law enforcement.” (citation omitted)); Paul E. Coffey, *The Selection, Analysis, and Approval of Federal RICO Prosecutions*, 65 NOTRE DAME L. REV. 1035, 1039 (1990) (“RICO is an essential component of the government’s strategy of attacking organized crime.”).

143. See Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970) (codified at 18 U.S.C. § 1961) (“[O]rganized crime activities in the United States weaken the stability of the Nation’s economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens.”).

the federal criminal code.<sup>144</sup> RICO was used to dismantle these organizations, including La Cosa Nostra, once described as “the largest, most extensive, and most influential crime group in this country.”<sup>145</sup> La Cosa Nostra was the government’s umbrella name for the Five Families of the Italian-American Mafia, who were collectively responsible for widespread and violent organized criminal activity in the 1970s and 1980s.<sup>146</sup> Stopping this criminal activity was RICO’s *raison d’être*,<sup>147</sup> and its use against La Cosa Nostra overwhelmingly succeeded. By 1986, sixteen years after RICO was enacted, the United States was able to prosecute over two-thirds of La Cosa Nostra’s familial leadership and thousands of its members.<sup>148</sup> It credited RICO for this outcome.<sup>149</sup>

Prosecutors have frequently used RICO to prosecute non-Mafia organizations,<sup>150</sup> including white supremacist hate

---

144. *See id.* (“[O]rganized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions . . . and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.”).

145. PRESIDENT’S COMM’N ON ORGANIZED CRIME, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL—THE IMPACT: ORGANIZED CRIME TODAY 35 (1986), <https://perma.cc/5U7C-Q3H4> (PDF).

146. *See id.* at 45 (“Even a partial recounting of La Cosa Nostra’s criminal activities is a virtual catalogue of organized crime: drug trafficking, illegal gambling, extortion, theft, fraud, prostitution, loansharking, labor racketeering, embezzlement, money laundering, bribery, bombing, highjacking, kidnapping, auto theft, arson, bribery, kickbacks, burglary, smuggling, forgery are all common.” (citations omitted)).

147. *See Coffey, supra* note 142, at 1039.

148. *See* PRESIDENT’S COMM’N ON ORGANIZED CRIME, *supra* note 145, at 47 (“In the last four years, the leadership in 17 of 24 La Cosa Nostra families has been indicted or convicted. In 1984 organized crime indictments [totalled] 2,194, involving predominately La Cosa Nostra members and associates.” (citations omitted)).

149. *See id.* at 47 (“One of the most valuable tools for prosecutors has been the Racketeer-Influenced Corrupt Organizations Act (RICO), signed into law in 1970, which recognizes the true institutional nature of organized crime . . . .” (citations omitted)).

150. *See* O’SULLIVAN, *supra* note 121, at 641 (“[T]he two provisions most pertinent to [organized crime organizations] . . . are the provisions least frequently invoked.” (citing *Thirty-Third Annual Survey of White Collar Crime, RICO*, 55 AM. CRIM. L. REV. 1619, 1639–40 (2018))).

groups like The Order.<sup>151</sup> Robert Matthews founded The Order in 1983 to “overthrow[] the United States government that he perceived to be dominated by Jews.”<sup>152</sup> Over the next year, its membership continued to grow as members of other white supremacist organizations joined its corps.<sup>153</sup> Like any other organization, The Order required funds to continue operating, and between October 1983 and July 1984, its members robbed multiple businesses, armored cars, and banks.<sup>154</sup> During this time, The Order also committed two murders, one explicitly motivated by the enterprise’s extremist views.<sup>155</sup> Following the group’s nearly yearlong crime spree, federal and state law enforcement began to actively pursue The Order’s members, and by 1985, the entire group was in custody.<sup>156</sup> Instead of merely charging the members with multiple counts of robbery and related federal offenses, the government used these crimes as predicate offenses and incorporated them into an overarching RICO indictment for which The Order’s members were convicted.<sup>157</sup> Some have argued that this case exemplifies how RICO can be used to mitigate domestic extremism.<sup>158</sup> For legal and policy reasons, however, RICO cannot adequately deter domestic extremist organizations.

---

151. See Wayne King, *11 in Neo-Nazi ‘Order’ on Trial Today*, N.Y. TIMES (Sept. 9, 1985), <https://perma.cc/8Y8C-GJPW> (“Twenty-three members of an anti-Semitic group calling itself the Silent Brotherhood, or the Order, were charged in a Federal indictment . . . under a 1970 Federal statute that provides penalties . . . for operating a criminal enterprise, which is defined in the statute as a racketeer influenced and corrupt organization.”).

152. *United States v. Yarbrough*, 852 F.2d 1522, 1526 (9th Cir. 1988).

153. See *id.* at 1526–27 (“[Matthews] gathered together a group of like-minded individuals to establish the organization. . . . Each member had previously associated himself with various right-wing radical organizations such as the Ku Klux Klan, the National Alliance (a neo-Nazi organization), and the ‘Christian Identity’ movement (a ‘Christian’ group with extreme racist and anti-Semitic views).”).

154. See *id.* at 1527.

155. See *id.* (“The Order decided that [Alan Berg, a radio host] should be killed for his criticism of the groups and to make a ‘statement’ by killing a prominent Jewish person. Berg was machine-gunned . . . when stepping from his car to his driveway in front of his Denver home.”).

156. See *id.*

157. See *id.* at 1526–27.

158. See, e.g., Deogracias, *supra* note 37, at 309.



A threshold issue with using RICO to prevent domestic extremism is that the statute does not include federal hate crimes<sup>159</sup> as predicate offenses.<sup>160</sup> Admittedly, as The Order's prosecution demonstrated, domestic extremist organizations can be dismantled with RICO for committing other predicate offenses. This approach, however, would undermine the goals of countering domestic extremism<sup>161</sup> by excluding prosecutions predicated on the very crimes the prosecutions aim to prevent.<sup>162</sup> An alternative approach might be to add federal hate crimes to the list of predicate offenses, particularly because new federal offenses have been added to the list to counter emerging threats. The USA PATRIOT Act of 2001,<sup>163</sup> for example, added various predicate offenses, including international terrorism acts.<sup>164</sup> Even if Congress amended RICO to include hate crimes as predicate offenses, however, federal law enforcement would remain without a crucial tool to counteract domestic extremist organizations: a material support provision.

Although RICO addresses an incredibly wide range of criminal conduct, its reach falls short of encompassing the conduct criminalized by the material support statute.<sup>165</sup> Section

---

159. See 18 U.S.C. § 249 (criminalizing hate crimes against individuals “because of [their] actual or perceived race, color, religion, or national origin”).

160. See *id.* § 1961(1); *cf.* Deogracias, *supra* note 37, at 331 (explaining that white supremacist organizations can be charged with RICO for “illegal activity . . . that could serve as [a] predicate offense[]” other than federal hate crimes).

161. See NAT'L SEC. COUNCIL, *supra* note 14, at 13 (describing a primary purpose of America's National Strategy for Countering Domestic Terrorism as “disrupt[ing] and deter[ing] those who use violence to intimidate racial or religious minorities, who have so often been the victims of hateful extremists”).

162. See, e.g., *United States v. Yarbrough*, 852 F.2d 1522, 1526–27 (9th Cir. 1988) (detailing how members of The Order murdered an individual because of his religion but were charged under RICO with predicate offenses such as “armed robbery of armored cars and banks, . . . transporting stolen property across state lines, . . . harboring fugitives, . . . and various federal firearms offenses,” rather than federal hate crime acts).

163. Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered titles of the United States Code).

164. See *id.* at 382.

165. See Laguardia, *supra* note 5, at 1094 (asserting that adding RICO to the federal terrorism statutory scheme would allow domestic extremist groups prosecuted under RICO to be labeled as terrorists, but would not provide “as broad a reach as would designating domestic organizations as [foreign terrorist organizations]”).

2339B's breadth is an integral part of its role in the United States' counterterrorism regime expressly because it allows the government to hold individuals who do not actively participate in terrorist operations accountable for their *enabling conduct*. Because of its distinct goal, the material support provision is unique to the counterterrorism statutory scheme. Attaching a material support provision to RICO, however, would be paradoxical. If an individual supported a RICO enterprise by providing "monetary instruments . . . , financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, [or] explosives,"<sup>166</sup> they would not be prosecuted for providing material support to a RICO enterprise—they would be prosecuted for being part of the enterprise. Moreover, if the government attempted to prosecute individuals for material support *before* an active RICO prosecution tied the support to an enterprise's pattern of criminal activity, criminal liability would likely be precluded by the First Amendment. RICO therefore lacks § 2339B's ability to prevent a decentralized network from assisting an organization that is not actively being prosecuted. Because the material support statute cannot be attached to RICO, Congress must develop an alternative. Otherwise, federal law enforcement will be unable to adequately address the decentralized networks that are essential to domestic extremism.

Beyond the legal difficulties associated with using RICO to address domestic extremist organizations, there are associated policy issues. A primary goal of these organizations, particularly white supremacist organizations, is to terrorize others because of their race, religion, or ethnicity.<sup>167</sup> Even if the government could effectively galvanize RICO to address domestic extremism, the prosecutions and associated penalties would remain under the umbrella of a statute not explicitly developed to address and deter domestic extremism.<sup>168</sup> Using RICO would therefore fail to accomplish social and penological goals of acknowledgment and deterrence.

---

166. 18 U.S.C. § 2339A.

167. See Deogracias, *supra* note 37, at 329.

168. See *supra* notes 111–114 and accompanying text.

Acknowledging the current state of domestic extremism and its roots in America's history of racism is nearly as important to counteracting its threat as an effective legal regime. Explicit recognition of this history is a cornerstone of many prominent hypotheses for countering racism's role in American social issues.<sup>169</sup> The same premise undergirds the need for a distinct domestic extremism designation statute. Yes, RICO could be used more effectively against domestic extremist organizations.<sup>170</sup> RICO is a hammer that stamps out a wide range of criminal activity, and advocates have supported its use against nearly the entire range of organized criminal activity.<sup>171</sup> But the United States overwhelmingly does not use RICO, or any of the individual criminal statutes that could encompass terrorist activity, to address international terrorism—it uses a unique statutory scheme. This uniqueness is the result of a necessity, as President George W. Bush stated when signing the USA PATRIOT Act, to “deal[] with terrorists who operate by highly sophisticated methods and technologies, some of which were not even available when our existing laws were written” and to “take[] account of the new realities and dangers posed by modern terrorists.”<sup>172</sup> The same impetus—to specifically acknowledge a unique threat not sufficiently addressed by

---

169. See, e.g., Ezra Klein, *Bryan Stevenson on How America Can Heal*, VOX (July 20, 2020), <https://perma.cc/68JN-B6CV> (“We have committed ourselves in this country to [silence, ignorance, and denial] about our history . . . . And that’s the first part of this relationship that has to be repaired. We’ve got to be willing now to talk honestly about who we are and how we got here.”); Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 67 UCLA L. REV. 1108, 1124 (2020) (“To move toward a future where respect for human rights and a pluralistic society is possible, America must directly grapple with the roots of modern policing in the institution of slavery.” (citation omitted)); Mitch Landrieu, *The Price We Have Paid for Not Confronting Racism*, N.Y. TIMES (June 3, 2020), <https://perma.cc/BHM3-K282>.

170. See Deogracias, *supra* note 37, at 338 (“[T]he RICO Act can provide United States Attorneys and law enforcement officers a way of investigating and prosecuting white supremacist organizations, while respecting First Amendment rights, by allowing [them] to hold anyone that takes part in the criminal enterprise responsible for its actions.” (citation omitted)).

171. See, e.g., Zvi Joseph, *The Application of RICO to International Terrorism*, 58 FORDHAM L. REV. 1071, 1072 (1990) (“Through RICO, the United States can strike at the organizations that support international terrorism.”).

172. Press Release, White House, Remarks by the President at Signing of the Patriot Act, Anti-Terrorism Legislation (Oct. 26, 2001), <https://perma.cc/M8EG-4Z66>.

existing statutes—should motivate the creation of a dedicated domestic extremism statute.<sup>173</sup>

Merely using RICO to address domestic extremism would also not satisfy the utilitarian penological goals of our justice system. A utilitarian perspective of justice contends that punishment for crimes is morally justified because it results in beneficial consequences, including general deterrence.<sup>174</sup> General deterrence refers to the concept that punishment for a crime will impress on society a broad impetus against committing that crime and “reduc[e] future violations.”<sup>175</sup> Although domestic extremist organizations can be prosecuted under RICO, this rarely occurs;<sup>176</sup> and, when it does, the organizations are prosecuted for violating generic federal offenses unrelated to domestic extremism.<sup>177</sup> A RICO prosecution, even against a domestic extremist organization, does not impress on society the same level of culpability for the organization’s extremist actions, particularly because RICO is

---

173. See Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement*, 80 B.U. L. Rev. 1227, 1254–55 (2000) (“One of the most important arguments in support of . . . the creation of [a] new federal hate crime has been the need to ‘send a message.’” (citation omitted)); cf. Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1567 (2000) (“To condemn meaningfully requires not a mere utterance, . . . but a practice of punishment socially understood to express condemnation effectively.”). The Supreme Court understood the unique challenges related to domestic extremism as early as 1972, when, in the context of surveillance, it “recognize[d] that domestic security surveillance may involve different policy and practical considerations from the surveillance of ‘ordinary crime,’” and that “Congress may [therefore] wish to consider protective standards for the latter which differ from those already prescribed for specified crimes in Title III.” *United States v. U.S. Dist. Ct. (Keith)*, 407 U.S. 297, 322 (1972).

174. See Kent Greenawalt, *Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343, 351 (1983).

175. *Id.*

176. See Deogracias, *supra* note 37, at 335–37 (detailing two instances, separated by over three decades, of domestic extremist organizations being prosecuted under RICO).

177. See, e.g., *United States v. Yarbrough*, 852 F.2d 1522, 1526 (9th Cir. 1988); *Multiple White Supremacist Gang Members Among 54 Defendants Charged in RICO Indictment*, U.S. DEP’T OF JUST. (Feb. 12, 2019), <https://perma.cc/D5KB-PRVU> (“The indictment alleges that the New Aryan Empire (NAE) is a racketeering enterprise, which committed violent acts—attempted murder, kidnapping, and maiming—in support of its organization and its wide-ranging drug-trafficking operation.”).

popularly considered an “anti-Mafia” statute. General deterrence is contingent on deterring a “particular crime.”<sup>178</sup> If the government hopes to deter the domestic extremism that permeates the United States, it must be emphatic about the particular crime for which extremists are being punished.<sup>179</sup>

In sum, legal and policy considerations counsel against using RICO to address domestic extremism in the United States. The statute, although broad, is insufficient to capture the decentralized nature of domestic extremism. Further, its use would prevent the United States from explicitly acknowledging and deterring the threat of domestic extremism. Instead, the best aspects of RICO and the foreign terrorism model should be combined to create a new domestic extremism statute that holds these organizations accountable.

### III. CREATING A DOMESTIC EXTREMISM STATUTE

Although the foreign terrorism model and RICO cannot directly counteract the United States’ domestic extremism problem, their methods of organizational accountability provide a foundation on which a domestic extremism statute can be built. This Part proposes a statutory framework that incorporates the best parts of RICO and the foreign terrorism model to constitutionally hold domestic extremist organizations accountable. The framework uses RICO’s “pattern of racketeering activity” concept to aggregate hate crimes committed by an extremist organization’s decentralized members. This aggregation allows the government to establish a “pattern of hate crime activity” tied to a domestic extremist “enterprise.” After establishing the existence of an enterprise whose members are engaging in a pattern of hate crime activity, a civil process would judicially designate the enterprise as a domestic extremist organization (in line with the foreign terrorism statutory scheme). If designated by this process, § 2339B’s material support provision would be triggered to allow

---

178. Greenawalt, *supra* note 174, at 351.

179. Cf. Joel Feinberg, *The Expressive Function of Punishment*, 49 *MONIST* 397, 400 (1965) (“Punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, either on the part of the punishing authority himself or of those ‘in whose name’ the punishment is inflicted.”).

the government to criminally prosecute the extremist organization's enablers. This Part concludes by applying the framework to a domestic extremist organization to demonstrate how the statute would work in practice.

#### A. Proposed Statutory Framework

Following RICO's example, the first step in crafting an effective domestic extremism statute must be tying multiple supposedly distinct acts to a domestic extremist organization.<sup>180</sup> Using RICO's definition of a "pattern of racketeering activity,"<sup>181</sup> law enforcement would have to establish that separate acts of domestic extremism—in this case, federal hate crime acts criminalized under 18 U.S.C. § 249<sup>182</sup> and state hate crime acts

---

180. Blakey's description of RICO's ability to encapsulate a decentralized criminal enterprise is especially relevant in this regard. As he describes RICO's approach in comparison to traditional criminal law:

The trouble is that [organized crime usually involves more than] a simple confrontation. *It's not what happened on a particular day, but the relationship between what happened on that day and something that happened ten days ago.* Organized crime . . . is really about relationship, and [RICO gives you] the opportunity to present to the jury the significance of what happened, and not simply what happened. . . . The focus of the traditional criminal law was on a single event on a single day, and it didn't want you to get into collateral matters because it was thought to be confusing, if not prejudicial. In fact, in sophisticated crime . . . the relationship between what happens in front of you and something else is what *is* significant, and it is not collateral.

Blakey, *Criminal Overview*, *supra* note 81, at 18 (alterations added and in original) (emphasis added and in original).

181. 18 U.S.C. § 1961(5).

182. *See id.* § 249 (criminalizing attempting to cause, or causing, bodily injury "through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device" because of an individual's "actual or perceived race, color, religion, or national origin," or their "gender, sexual orientation, gender identity, or disability"). There are three other federal hate crime statutes: 18 U.S.C. § 245 (prohibiting interference with specified constitutional rights based on an individual's "race, color, religion or national origin"); 18 U.S.C. § 247 (damage to religious property); and 42 U.S.C. § 3631 (interference with housing rights). *See Statutes Enforced by the Criminal Section*, U.S. DEP'T OF JUST., <https://perma.cc/X33X-D6PY>. These statutes are not explicitly addressed by this Note because of its focus on violent crime, but they could similarly be incorporated as predicate offenses for a RICO-modeled domestic extremism statute.

aimed at the same protected classes<sup>183</sup>—were each committed by individuals *related to the same organization*.<sup>184</sup> As with RICO, these individuals need not be part of a formal organization that provides direction, but rather can be any “group[] of individuals informally organized for a common purpose,”<sup>185</sup> and whose criminal acts are committed “on an ad hoc basis.”<sup>186</sup> A threat of continued criminal activity would also be required and, per RICO’s standards, would require a “fairly flexible”<sup>187</sup> showing demonstrated by either close- or open-ended activity.<sup>188</sup> Following evidence of relatedness and continuity, law enforcement could aggregate allegedly “unrelated” lone wolf acts to show a connected “pattern of hate crime activity” through a decentralized network.<sup>189</sup>

After establishing a pattern of hate crime activity, the next step would be to associate this activity with an enterprise. The enterprise need not be a criminal organization<sup>190</sup> like The Order. Instead, the only requirements would be those of a RICO

---

183. RICO allows a wide range of state criminal offenses to be used as predicate offenses, regardless of their ties to federal criminal offenses. *See* 18 U.S.C. § 1961(1). With a topic as sensitive to political overreach as domestic extremism, cabining the predicate offenses to hate crime acts against classes protected under 18 U.S.C. § 249 will help prevent statutory abuse should states expand hate crime victims to include classes not traditionally protected. *See, e.g.*, Craig Wall, *IL Lawmakers Push to Make Assaults on Police Officers a Hate Crime with Enhanced Penalties*, ABC 7 CHI. (Nov. 18, 2021), <https://perma.cc/6K92-XSFC>.

184. *See* U.S. Dep’t of Just., *supra* note 134 (“[P]redicate[] [offenses] are related if they have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.” (citing *H.J., Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 240 (1989); *Ticor Title Ins. Co. v. Florida*, 937 F.2d 447, 450 (9th Cir. 1991))); *see also supra* notes 133–134 and accompanying text.

185. Blakey & Gettings, *supra* note 110, at 1025.

186. *Boyle v. United States*, 556 U.S. 938, 948 (2009).

187. *H.J., Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239 (1989).

188. *See supra* notes 135–137 and accompanying text.

189. *See United States v. Turkette*, 452 U.S. 576, 583 (1981); *supra* notes 128–137 and accompanying text.

190. *See Turkette*, 452 U.S. at 580–81 (“There is no restriction upon the associations embraced by [RICO]: an enterprise includes any union or group of individuals associated in fact. On its face, the definition appears to include both legitimate and illegitimate enterprises within its scope; it no more excludes criminal enterprises than it does legitimate ones.”).

enterprise, or “three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise’s purpose.”<sup>191</sup> The Supreme Court has emphasized that, although the presence of a RICO enterprise is a showing distinct from evidence of a pattern of racketeering activity, proof of these elements will likely overlap.<sup>192</sup> Evidence of the pattern of hate crime activity could therefore satisfy the relationship and longevity requirements,<sup>193</sup> while the common purpose prong could be satisfied by showing the domestic extremist organization’s rhetoric against groups protected by 18 U.S.C. § 249 and its radicalized members’ hate crime acts against those same groups.<sup>194</sup>

Once an enterprise is demonstrated, its establishment, in conjunction with a pattern of hate crime activity, would meet the requirements for a RICO prosecution. Critically, because this method of organizational accountability uses an aggregated pattern of *existing* criminal activity that is related to an

---

191. *Boyle*, 556 U.S. at 946. Excluded from this statutory framework is the essentially *per se* rule that a legal entity will always satisfy the requirements for a RICO enterprise. See *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 364 (3d Cir. 2010) (“[W]hen the enterprise asserted is a legal [entity], such as a legitimate business or organization . . . , the need to allege and prove the existence of enterprise structure can be met without great difficulty, since all aspects of the enterprise element . . . are satisfied by the mere proof that the entity does in fact have legal existence.” (internal quotation omitted)); James Morrison Mecone et al., *Racketeer Influenced and Corrupt Organizations*, 43 AM. CRIM. L. REV. 869, 881 (2006). In the context of domestic extremism, this situation would constitute a deeply unusual circumstance—it’s unlikely that the White Aryan Resistance is registered in Delaware.

192. See *Turkette*, 452 U.S. at 583 (“While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. The ‘enterprise’ is not the ‘pattern of racketeering activity’; it is an entity separate and apart from the pattern of activity in which it engages.”).

193. See *supra* notes 180–189 and accompanying text.

194. See *Boyle*, 556 U.S. at 946 (describing “a ‘venture,’ ‘undertaking,’ or ‘project’” as elements that relate to an enterprise’s purpose.”); U.S. DEPT OF JUST., CRIMINAL RICO: 18 U.S.C. §§ 1961–1968: A MANUAL FOR FEDERAL PROSECUTORS 80 (2016), <https://perma.cc/3FND-CHF2> (PDF) (“[A] common purpose may be proven by . . . direct and circumstantial evidence [of] . . . inferences from the members’ commission of similar racketeering acts in furtherance of a shared objective, financial ties, coordination of activities, community of interests and objectives, interlocking nature of the schemes, and overlapping nature of the wrongful conduct.” (citation omitted)).



organization's *overarching purpose*, it would be able to "withst[and] the attack that it unconstitutionally punishes associational status." In line with RICO, the "proscriptions [would be] directed against conduct, not status."<sup>195</sup> Domestic extremist groups could therefore be exposed to constitutional organizational accountability. By connecting the components of the leaderless resistance, this statute would essentially make the groups inspiring extremist attacks the mafia bosses, and the "lone wolves" the foot soldiers.

At this point, the statute would depart from RICO and move toward a statutory scheme inspired by the foreign terrorism designation model. Rather than precisely following RICO's model and pursuing a prosecution against the enterprise and its members,<sup>196</sup> evidence of the enterprise's pattern of activity would be used to designate the enterprise as a domestic extremist organization. Importantly, designation would not be unilaterally conducted by an executive officer, but instead would occur through a civil process in which the government would present evidence of the organization's "RICO" liability. Admittedly, the lead-up to this designation process is based on the criminal RICO model; however, using this model only provides an extra layer of insulation from constitutional and political abuse by requiring a threshold showing otherwise reserved for a criminal statute.<sup>197</sup>

A civil process would also benefit the government and the alleged domestic extremist organization. On the one hand, due to its civil nature, the government would have to satisfy a lower burden of proof to designate the organization.<sup>198</sup> On the other

---

195. *United States v. Rubio*, 727 F.2d 786, 792 (9th Cir. 1983) (quoting *United States v. Martino*, 648 F.2d 367, 380 (5th Cir. 1981)).

196. There are practical issues with using this model against domestic extremist organizations, particularly because a single criminal prosecution would not properly address organizations' decentralized networks and may invoke double jeopardy issues if the perpetrators of predicate hate crimes were previously tried in state or federal court for those offenses.

197. Additionally, the motivation behind creating this domestic extremism statute is *not* to criminalize the organizations themselves (and expose the statute to an onslaught of First Amendment challenges)—it is to address a statutory hole that prevents law enforcement from effectively acknowledging domestic extremist organizations and addressing their decentralized support networks.

198. Civil designation would likely require proof by clear and convincing evidence (rather than the typical civil standard of a preponderance of the

hand, in contrast to the foreign terrorism designation model, the domestic organization at issue would be provided its constitutional due process rights of notice and an opportunity to be heard prior to designation.<sup>199</sup>

In the event that the organization is formally designated, various civil penalties could be exacted against the organization.<sup>200</sup> Regardless of those penalties, designation would accomplish the ultimate goal of this statute: the material support provisions would immediately attach to the designated domestic extremist organization and any support provided to that organization—no matter how decentralized<sup>201</sup>—would constitute a federal criminal offense.

### B. Application

Applying this framework to a domestic extremist organization demonstrates how valuable the statute could be to countering domestic extremism. Return to Stormfront, for example.<sup>202</sup> Its activity, taken alone, consists only of constitutionally protected speech. Nonetheless, consistent with research regarding acts of “lone wolf” extremism, individuals who visit Stormfront are inspired by its messages and are repeatedly tied to hate crimes against individuals protected

---

evidence) because “the individual interests at stake . . . are both ‘particularly important’ and ‘more substantial than mere loss of money.’” *Santosky v. Kramer*, 455 U.S. 745, 756 (1982) (citation omitted).

199. See *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976).

200. RICO provides significant civil remedies which could be incorporated into the model statute. See O’SULLIVAN, *supra* note 121, at 642 (“RICO provides for civil remedies such as divestiture, corporate dissolution, and reorganization. Notably, these civil remedies give prosecutors a means to secure pre-trial and even pre-indictment ‘injunctions that bar a defendant from using available [tainted] assets to obtain legal representation or prepare a defense.’” (quoting Tarlow, *supra* note 9, at 170)).

201. See 18 U.S.C. § 2339A(b)(1) (“[M]aterial support . . . means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel . . . , and transportation . . . .”); see also *Holder v. Humanitarian L. Project*, 561 U.S. 1, 40 (2010) (holding that material support statutes do not require “the Government to prove that plaintiffs ha[ve] a specific intent to further the unlawful ends of those organizations”).

202. See Part I.C.

under 18 U.S.C. § 249.<sup>203</sup> After these hate crimes are committed, Stormfront's funding increases and the website continues to inspire future extremists. Under the current statutory scheme, the individual attackers would be open to prosecution; yet, even if members of the executive<sup>204</sup> and judicial<sup>205</sup> branches understood Stormfront's role in inspiring these attacks, the website would continue to be protected and flourish because of protections enabled by a leaderless resistance strategy.

Enter the new RICO-inspired domestic extremism statute. Under RICO's "pattern of racketeering activity" standards, federal law enforcement would be able to establish that at least two hate crime acts were committed within ten years<sup>206</sup> by individuals sufficiently related<sup>207</sup> to Stormfront. Concomitantly, law enforcement would affirm that Stormfront, and individuals related to the website, represented a close- or open-ended threat of continuing criminal activity.<sup>208</sup> After meeting these threshold inquiries, law enforcement would have evidence of a pattern of hate crime activity.

Once a pattern of hate crime activity is established, federal law enforcement would determine this activity's relationship to an organization that qualifies as an enterprise under RICO. Based on the prior steps of the investigation, two requisite features will have already been confirmed: "relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose."<sup>209</sup> Because Stormfront advocates for action against protected classes under 18 U.S.C. § 249, such as "do[ing] [something] with the Jews,"<sup>210</sup> and its members commit hate crimes against

---

203. See *supra* notes 62–66 and accompanying text.

204. See *supra* notes 14–15 and accompanying text.

205. See *supra* notes 51–52 and accompanying text.

206. See 18 U.S.C. § 1961(5); *supra* notes 62–66 and accompanying text.

207. See *supra* notes 184–186 and accompanying text.

208. See *supra* notes 187–188 and accompanying text. Based on the amount of hate crimes committed by individuals related to Stormfront, this activity would likely be considered close-ended; however, it is worth noting that the RICO standard is only two criminal acts, and therefore an open-ended continuity standard would help federal law enforcement prevent burgeoning hate groups from proliferating.

209. *Boyle v. United States*, 556 U.S. 938, 946 (2009).

210. *Stormfront*, *supra* note 38.

Jews<sup>211</sup> and other religious minorities,<sup>212</sup> investigators would be able to establish a common purpose.<sup>213</sup> Based on this common purpose, the “three structural features” required to establish a RICO enterprise would be satisfied,<sup>214</sup> and Stormfront could be considered an enterprise whose members have committed a pattern of criminal activity—the RICO standard for organizational accountability.

Having satisfied these investigatory inquiries, the Department of Justice would then file a civil action to designate Stormfront as a domestic extremism organization. Unlike a foreign terrorist organization, but like any civil defendant, Stormfront would be afforded the opportunity to defend itself before an impartial adjudicator. If the government is able to show by clear and convincing evidence that Stormfront is an enterprise whose members are committing a pattern of hate crime activity, the organization would be formally designated as a domestic extremist organization. More importantly, following designation, if an individual—no matter how decentralized their relation to the organization—supports Stormfront’s radicalizing activity by providing “any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel . . . , [or] transportation,”<sup>215</sup> the government could proactively and constitutionally<sup>216</sup> prosecute these individuals for providing material support to a domestic extremist organization.

This example details a bold step to combat domestic extremism, and hesitation is reasonable. Prosecutorial discretion is notoriously broad and presents a real danger when coupled with statutes that limit organizations whose message is

---

211. See, e.g., *supra* note 49 and accompanying text.

212. See, e.g., BEIRICH, *supra* note 55, at 5 (“[O]n Aug. 5, 2012, Wade Michael Page shot and killed six people at a Sikh temple [in Wisconsin], . . . and wounded four others before killing himself during a shootout with police.”).

213. See *supra* note 194.

214. *Boyle*, 556 U.S. at 946.

215. 18 U.S.C. § 2339A(b)(1).

216. See *supra* notes 138–141 and accompanying text.

societally detested.<sup>217</sup> The tangible benefits of this statute nonetheless outweigh this danger. If the foreign terrorism model and RICO are any indication of this statute's potential abilities, designation and prosecution could drastically undercut domestic extremist organizations' operating ability and be a substantial tool in the fight against the networks that inspire and radicalize "lone wolves."<sup>218</sup> The value of a statute that enables law enforcement to counter such a substantial domestic threat<sup>219</sup> is underscored by the axiom that the freedoms of speech and association are not absolute, and are infringed upon regularly in service to the public good.<sup>220</sup> Critiques of this statutory

---

217. See Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC'Y 18, 19 (1940)

It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.

218. See Newhouse, *supra* note 75, at 23 (“[T]he [domestic extremism] network does not depend on the survival of any one leader, group, or ‘brand,’ but rather relies on its own decentralization and fluidity for resilience.”); *id.* (“[T]he biggest risk that counter[-extremism] authorities face is that a network of recruitment, radicalization, and organization is already established, and a focus on specific groups may not be tackling the root of the issue.”).

219. See *supra* Part I; *Holder v. Humanitarian L. Project*, 561 U.S. 1, 28 (2010) (“Everyone agrees that the Government’s interest in combating terrorism is an urgent objective of the highest order.”).

220. See, e.g., *United States v. O’Brien*, 391 U.S. 367, 377 (1968) (“[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important . . . governmental interest [which] is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential . . . .”); *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981) (“It is . . . common ground . . . that the First Amendment does not guarantee the right to communicate one’s views at all times and places or in any manner that may be desired.” (citations omitted)); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (permitting criminalization of free speech “where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”); *Holder*, 561 U.S. at 39–40 (holding that Section 2339B’s material support provision does not violate an individual’s freedom of speech or association); *Miller v. California*, 413 U.S. 15, 36 (1973) (“[O]bscene material is not protected by the First Amendment . . . .”); see also Verini, *supra* note 4

framework can also be tempered by the substantial protections domestic organizations will be provided before being designated, including due process rights and a rigorous investigatory process rooted in a criminal statute with decades of precedent. Most importantly, should these organizations be designated, and their enablers prosecuted, the country will explicitly address “the greatest terrorist-related threat . . . fac[ing] [the United States]”<sup>221</sup> by decrying perpetrators of domestic extremism.

### CONCLUSION

The United States’ statutory scheme fails to encompass the current nature and threat of domestic extremism. Using the internet, domestic extremist organizations have seized upon Louis Beam’s leaderless resistance model to create vast decentralized networks that inspire “lone wolves” to commit acts of violence and shield the organizations that inspire them from accountability. Although the government acknowledges the threat of domestic extremism and the role these organizations play in inspiring violence,<sup>222</sup> it has precluded the use of material support prosecutions—a primary method to subvert foreign terrorist organizations—because of constitutional issues associated with formally designating domestic organizations and subsequently prosecuting their supporters.<sup>223</sup>

RICO’s method of organizational accountability, which relies on a pattern of predicate criminal offenses tied to an organization, should be used as a model to avoid these constitutional issues and to create a dedicated domestic extremism statute. Although RICO is a wide-ranging statute used to address various criminal organizations—including extremist organizations—it is legally insufficient to address the

---

How much are we willing to impede the civil liberties, particularly the free-speech rights, of American citizens whose plots are domestic? And if we are willing to impede those rights, and if the public does expect the government to stop people . . . before they act, what do we expect it to use against them if not their words?

221. Pedroja, *supra* note 1.

222. See NAT’L SEC. COUNCIL, *supra* note 14, at 9 (acknowledging that “lone wolf” attackers “often consume material deliberately disseminated to recruit individuals to [domestic extremist] causes”).

223. See *supra* Part II.A.

decentralized support inherent to domestic extremist groups.<sup>224</sup> Its mobilization for this use would also fail to address policy goals of acknowledgment and deterrence.<sup>225</sup>

This Note addresses these legal and policy shortcomings by proposing a domestic extremism statute that would allow the government to present a pattern of aggregated hate crime activity, link it to a related domestic enterprise, and use this enterprise's pattern of criminal activity to designate domestic extremist organizations.<sup>226</sup> This model would provide due process protections to domestic organizations and substantial protections from government abuse.<sup>227</sup> Nonetheless, after formal designation, criminal sanctions used to attack foreign terrorists' support networks would attach to these domestic organizations, and would enable the United States to undermine the decentralized support networks that allow leaderless resistances to flourish.<sup>228</sup> Combatting the growing threat of domestic extremism requires innovative solutions to address an innovative threat. Drawing from multiple areas of American criminal law, this Note's proposed statutory framework allows the United States to subvert organizations that appropriate constitutional protections to shield their role in attacks against the diverse framework of our country.

---

224. *See supra* Part II.B.

225. *See supra* Part II.B.

226. *See supra* Part III.A.

227. *See supra* Part III.A.

228. *See supra* Parts I, III.