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Cameron Chuback

Algorithms and Omertà: A Discussion of Compatibility Between Seemingly Disparate Legal Spheres

CAMERON CHUBACK*

This Note assesses the viability of federal prosecutors' use of the Racketeer Influenced and Corrupt Organizations Act ("RICO") to prosecute spoofing, a market manipulating trading practice characterized by the cancellation of large orders meant to artificially alter market prices. Traditional spoofing convictions have been difficult to secure because of spoofing's complicated and esoteric nature and difficult-to-prove elements. Now, for the first time, prosecutors in United States v. Smith *have indicted alleged spoofers under RICO, which Congress designed with the intent to overcome evidentiary difficulties in organized crime prosecutions, particularly prosecutions of the American Mafia. However, the disparity between spoofing and the Mafia's traditional street rackets raises the questions of whether federal prosecutors may viably use RICO to prosecute spoofing and whether doing so will produce significant implications.*

This Note compares the legal contexts of spoofing and RICO to form the foundation of the discussion of whether prosecutors may viably use RICO to prosecute spoofing. This Note supports the use of RICO in spoofing cases, acknowledging RICO's easier-to-prove elements and spoofing's possible qualification as a number of RICO's prohibited racketeering activities, and recommends that RICO's use be complemented by effective use of cooperating witnesses. However, this Note also warns of potential negative

* Eleventh Circuit Editor, *University of Miami Law Review*, Volume 75; J.D. Candidate, University of Miami School of Law, 2022; MBA Candidate, Miami Herbert Business School, 2021; B.A., New York University, 2018.

side effects from using RICO to prosecute spoofing, such as the government incidentally overlooking solo spoofers due to excess concentration on groups of spoofers.

INTRODUCTION

"*It is far harder to kill a phantom than a reality.*"[1]

An illegal trading practice known as "spoofing" has recently gained more attention in legal news headlines.[2] In basic terms, spoofing is a deceptive trading practice in which traders, or "spoofers," place orders for either commodities or securities that the traders cancel before they are filled.[3] Such orders typically are meant to manipulate markets toward prices that favor the spoofers.[4] A widespread practice[5] that has historically proven difficult to defeat,[6] spoofing is carried out by the likes of those ranging from traders at renowned international investment banks[7] to no-names scaring the daylights out of the globe's most major markets from the comfort and secrecy of their homes.[8] A crime that can have such devastating

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[1] VIRGINIA WOOLF, *Professions for Women*, *in* THE DEATH OF THE MOTH AND OTHER ESSAYS 235, 238 (1970) (emphasis added).

[2] *See* Jody Godoy & Jon Hill, *Fed's Spoofing Case Against JPMorgan Traders Turns Heads*, LAW360 (Sept. 17, 2019, 9:17 PM), https://www.law360.com/articles/1199949/feds-spoofing-case-against-jpmorgan-traders-turns-heads [hereinafter *Fed's Spoofing Case*].

[3] *See* John I. Sanders, Comment, *Spoofing: A Proposal for Normalizing Divergent Securities and Commodities Futures Regimes*, 51 WAKE FOREST L. REV. 517, 518–19 (2016).

[4] *See* Meric Sar, Note, *Dodd-Frank and the* Spoofing *Prohibition in Commodities Markets*, 22 FORDHAM J. CORP. & FIN. L. 383, 384 (2017).

[5] *See* Sanders, *supra* note 3, at 519.

[6] *See Fed's Spoofing Case*, *supra* note 2 (suggesting that prosecutors opted for a RICO indictment against spoofers because proving intent in a traditional spoofing case is "not easy"); Sar, *supra* note 4, at 385 ("[S]poofing activity was in the past too elusive to prosecute under the general anti-manipulation authority of the Commodity Exchange Act [].").

[7] *See* Jody Godoy, *3 JPMorgan Traders Accused of 8-Year Spoofing Racket*, LAW360 (Sept. 16, 2019, 8:34 AM), https://www.law360.com/articles/1198568/3-jpmorgan-traders-accused-of-8-year-spoofing-racket [hereinafter *3 JPMorgan Traders Accused*] (reporting that public records show that alleged spoofers worked at JPMorgan); Jon Hill, *Ex-UBS Trader Acquitted of Spoofing Scheme*, LAW360 (Apr. 25, 2018, 11:13 AM), https://www.law360.com/articles/1037130/ex-ubs-trader-acquitted-of-spoofing-scheme [hereinafter *Ex-UBS Trader Acquitted*] (reporting that alleged spoofer worked for UBS AG, a major Switzerland-based international investment bank).

[8] *See* Aruna Viswanatha, *'Flash Crash' Trader Navinder Sarao Pleads Guilty to Spoofing*, WALL ST. J., https://www.wsj.com/articles/flash-crash-trader-navinder-sarao-pleads-guilty-to-spoofing-1478733934 (Nov. 10, 2016, 10:26

economic consequences, especially in an age where cybercrime is growing and expanding to new technologies faster than the world can prevent them,[9] should be highly concerning to traders, the government, and the public alike.

However, U.S. prosecutors are availing themselves of a law previously unused in spoofing cases to arm themselves against elusive spoofers and the evidentiary bulwark that has surrounded them for years. This law is the Racketeer Influenced and Corrupt Organizations Act ("RICO"),[10] which has been a prosecutorial "nuclear bomb"[11] on organized crime for the last forty years.[12] While this law may prove to be the legal weapon that finally derails spoofing, backfiring consequences may arise, and the U.S. government and its prosecutors need to be aware of this possibility to most effectively administer their battle against spoofing.

This Note begins with an introduction to spoofing and its related legislation and caselaw to familiarize the reader with the esoteric trading practice, and it ends with a description of *United States v. Smith*, the first spoofing case in which federal prosecutors brought a RICO claim.[13] A comprehensive explanation of RICO and its historical context follows, which includes discussions about RICO's use in the street crime and white-collar crime contexts. Lastly, this

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AM); Press Release, CFTC, CFTC Charges U.K. Resident Navinder Singh Sarao and His Company Nav Sarao Futures Limited PLC with Price Manipulation and Spoofing (Apr. 21, 2015), https://cftc.gov/PressRoom/PressReleases/7156-15 [hereinafter CFTC Sarao Press Release] (explaining how spoofer's activity "contributed to market conditions that led to the Flash Crash.").

[9] *See* Jack Foster, *21 Terrifying Cyber Crime Statistics*, VPN GEEKS, https://www.vpngeeks.com/21-terrifying-cyber-crime-statistics-in-2018/ (July 21, 2020).

[10] Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–1968; *see 3 JPMorgan Traders Accused*, *supra* note 7.

[11] William L. Anderson & Candice E. Jackson, *It's the Economy, Stupid: Rudy Giuliani, the Wall Street Prosecutions, and the Recession of 1990–91*, J. LIBERTARIAN STUD., Fall 2005, at 23 [hereinafter *It's the Economy, Stupid*] (quoting Daniel R. Fischel, Lee and Brena Freeman Professor Emeritus of Law and Business and former Dean at the University of Chicago Law School).

[12] *See Origins of the Mafia*, HIST., https://www.history.com/topics/crime/origins-of-the-mafia (May 28, 2019) (explaining that, since the 1980s, "hundreds of high-profile arrests" using "tough anti-racketeering laws" have weakened Mafia).

[13] PRAC. L. FIN., "SPOOFING": US LAW AND ENFORCEMENT, Note W-020-9748, https://www.westlaw.com/w-020-9748?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0 [hereinafter Spoofing Practical Law].

Note analyzes the pros and cons of applying RICO in spoofing cases, ultimately recommending a course of action that emphasizes working with cooperating witnesses.

I. SPOOFING

A. *What Is Spoofing?*

While many aspects of spoofing have been debated for years,[14] and different federal agencies have defined spoofing differently,[15] spoofing can be generally explained by the following succinct description:

> Spoofing is a scheme that involves a trader, or a "spoofer," placing large trades in hopes of inducing others to act in response to those trades; the "spoofer" then cancels his initial trades in order to capture a profit on trading positions he holds on the opposite side of the market.[16]

Spoofing is typically a high-frequency trading practice that uses algorithm-based[17] computer software "to execute, at very high speed, large volumes of trades."[18] Spoofing is distinct from

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[14] *See* Sar, *supra* note 4, at 384, 387 ("[T]here is great confusion in the trading industry regarding the spoofing prohibition . . . .") ("For a long time the illegality of *spoofing* has been a point of contention among lawyers and economists."); *see also* Abram Olchyk, Comment, *A Spoof of Justice: Double Jeopardy Implications for Convictions of Both Spoofing and Commodities Fraud for the Same Transaction*, 65 AM. U. L. REV. 239, 261 (2015) (citing Commodities Futures Trading Commission, Staff Roundtable on Disruptive Trading Practices (Dec. 2, 2010), https://www.cftc.gov/sites/default/files/idc/groups/public/@swaps/documents/dfsubmission/dfsubmission24_120210-transcri.pdf.) ("Spoofing has a murky and controversial definition within the commodities trading industry.").

[15] *See* Sanders, *supra* note 3, at 523 (citing John Sanders & Andrew Verstein, *Legal Confusion as to Spoofing*, HUFFPOST (May 12, 2015, 3:44 PM), https://www.huffpost.com/entry/legal-confusion-as-to-spo_b_7268518.).

[16] Sanders, *supra* note 3, at 518–19.

[17] *See id.* at 519. *But cf.* CFTC Sarao Press Release, *supra* note 8 (explaining that a spoofer used "manual spoofing techniques" in addition to algorithm-based spoofing).

[18] United States v. Coscia, 866 F.3d 782, 786 (7th Cir. 2017).

legitimate high-frequency trading practices,[19] which "take advantage of the minor discrepancies in the price of a security or commodity that often emerge across national exchanges,"[20] a process known as arbitrage,[21] because spoofing "can be employed to *artificially move* the market price of a stock or commodity up and down, instead of taking advantage of natural market events."[22] This artificial movement is what makes spoofing illegal. Spoofing is a form of market manipulation[23] and undermines "[t]he fair and efficient functioning of the markets" because it does not "reflect genuine supply and demand."[24]

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[19] *See, e.g.*, *id.* at 795 (listing examples of "legal trades" that are similar to illegal spoofing, such as "stop-loss orders" and "fill-or-kill orders"); *see also* MICHAEL LEWIS, FLASH BOYS: A WALL STREET REVOLT 173 (2015) ("[I]t wasn't high-frequency trading in itself that was pernicious; it was its predations."). Michael Lewis's *Flash Boys* provides interesting context regarding high-frequency trading that demonstrates how important speed started becoming in financial markets in the mid- to late 2000s and how high-frequency traders took advantage.

[20] *Coscia*, 866 F.3d at 786.

[21] *See id. See generally* LEWIS, *supra* note 19, at 8–15, 171–73 (stating that "much money could be made trading futures contracts in Chicago against the present prices of the individual stocks trading in New York and New Jersey[,]" but "[t]o capture the profits, you had to be fast to both markets at once"; explaining how high-frequency trading firms had technological capabilities to achieve arbitrage in a financial world where speed was measured in milliseconds; and noting that using a cable, which cost "$10.6 million for five years," that most directly connected the Chicago Mercantile Exchange in Chicago and the Nasdaq's stock exchange in New Jersey could procure a firm "profits of $20 billion a year").

[22] *Coscia*, 866 F.3d at 787 (emphasis in original).

[23] *Spoofing*, CORP. FIN. INST., https://corporatefinanceinstitute.com/resources/knowledge/trading-investing/spoofing/ (last visited Nov. 18, 2020) ("Since spoofing is considered a form of market manipulation, the practice is considered illegal."); *Market Manipulation*, INVESTOR.GOV, https://www.investor.gov/introduction-investing/investing-basics/glossary/market-manipulation (last visited Nov. 18, 2020) ("Market manipulation is when someone artificially affects the supply or demand for a security (for example, causing stock prices to rise or to fall dramatically).").

[24] *See* Press Release, SEC, SEC Charges Owner of N.J.-Based Brokerage Firm with Manipulative Trading (Apr. 4, 2014), https://www.sec.gov/news/press-release/2014-67 ("Traders who pervert these natural forces [of supply and demand] by engaging in layering or some other form of manipulative trading invite close scrutiny from the SEC."); United States v. Flotron, No. 3:17-CR-00220, 2018 WL 1401986, at *3 (D. Conn. Mar. 20, 2018) ("Because the indictment alleges that this market-altering conduct was engaged in with an intent to defraud and by means of conduct that created a false picture about demand in the market,

Spoofing is esoteric[25] and warrants a thorough, clear explanation. Below is a step-by-step illustration of a typical spoofing scheme that will help show how spoofing works. It begins with the artificial movement in asset market prices resulting from large trades placed by the spoofer:

> This artificial movement is accomplished . . . most simply . . . by placing *large* and *small* orders on opposite sides of the market. The *small* order is placed at a *desired price*, which is either *above or below* the current market price, depending on whether the trader wants to buy or sell. If the trader wants to buy, the price on the small batch will be lower than the market price; if the trader wants to sell, the price on the small batch will be higher. *Large orders* are then placed on the opposite side of the market *at prices* [between the current price and the desired price] *designed to shift the market toward the price at which the small order was listed*.[26]

After the spoofer achieves the artificial price movement through his placement of large orders, the principles of supply and demand begin operating.[27] Market participants, who see the large orders in the market and now believe that prices for the asset are changing in the direction of the spoofer's desired price, begin buying or selling

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the indictment adequately alleges facts that constitute a crime within the scope of the commodities fraud statute."). *See generally* L. Robert Kohls, *The Values Americans Live by*, https://careercenter.lehigh.edu/sites/careercenter.lehigh.edu/files/AmericanValues.pdf (last visited Nov. 18, 2020) (discussing Americans' embrace of a "highly competitive economy" and free enterprise); Eugene F. Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 J. FIN. 383 (1970) (explaining that an efficient market exists when "prices always 'fully reflect' available information").

[25] *See* Sanders *supra* note 3, at 519 ("Although spoofing received little attention before the Flash Crash, it appears to be a widespread practice."). *See generally* LEWIS, *supra* note 19, at 110, 211 (suggesting that "[s]ecrecy might have been the signature trait of" many high-frequency trading firms and stating that, in general, high-frequency trading is "an opaque industry").

[26] *Coscia*, 866 F.3d at 787 (emphasis added).

[27] *See id.*

the asset at prices approaching the spoofer's desired price.[28] Once the spoofer's desired price has been reached through the market participants' transactions, the spoofer cancels his large orders before they are filled.[29] Mere milliseconds go by between the change in market price due to the spoofer's price illusion and the cancelation of the large spoofed orders.[30] Once the spoofer cancels his large orders, his small orders are immediately filled at the new, artificially achieved price before the market can readjust to the asset's genuine price.[31]

An example further clarifies how spoofing works. Imagine a spoofer wants to sell corn futures contracts[32] (or corn "futures") at $3.50, but the current market price is $3.25. Wishing to instantly move the market price up to $3.50 so that he can sell at $3.50, the spoofer first places small sell orders of corn futures at $3.50, and then places large buy orders at various prices ascending[33] from $3.25 to $3.50. These large orders indicate to market participants that the market price for corn futures appears to be increasing. Consequently, the market participants begin buying at the higher prices. Once the market price of corn futures reaches $3.50 as a result of the trading frenzy, the spoofer cancels his large buy orders before they are filled, avoiding the costly purchase.[34] Right after this

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[28] *See id.*

[29] *See id.*

[30] *See id.*

[31] *See* Sanders, *supra* note 3, at 519 (providing an example in which a trader wants to sell a stock at a higher price, so he places large spoof orders on buy side of market to raise stock's price, cancels his large orders, and then sells small orders he placed at new, higher price).

[32] *See generally* James Chen, *Futures Contract*, INVESTOPEDIA, https://www.investopedia.com/terms/f/futurescontract.asp (Feb. 4, 2020) (explaining what a futures contract is and how it works).

[33] *See Coscia*, 866 F.3d at 788 ("The large orders were generally placed in increments that quickly approached the price of the small orders.").

[34] *But cf.* Indictment at 11, United States v. Smith, No. 1:19-CR-00669 (N.D. Ill. Aug. 22, 2019) [hereinafter *Smith* Indictment] ("Sometimes . . . [defendants] were unable to cancel quickly enough, and had to accept unintended (and unwanted) executions of their Deceptive Orders."); United States v. Flotron, No. 3:17-CR-00220, 2018 WL 1401986, at *3 (D. Conn. Mar. 20, 2018) (acknowledging that alleged spoof orders could have technically been "filled before [defendant] could cancel them," calling filling of these orders "an inconvenient cost of doing (fraudulent) business," noting that "the possibility that any of the alleged 'trick' orders might have been accepted or executed upon by someone else in the

cancellation, the spoofer's small sell orders of corn futures are filled at $3.50. The spoofer has earned $0.25 more on each corn future than he would have earned at the original, non-manipulated market price of $3.25.[35]

B. *Mechanisms of Enforcement Action Against Spoofing*

There are four authorities that can bring enforcement action against spoofing in the United States: the Commodities and Futures Trading Commission ("CFTC"), the U.S. Securities and Exchange Commission ("SEC"), the Financial Industry Regulatory Authority ("FINRA"), and the United States Department of Justice ("DOJ").[36] Two of these authorities are federal agencies that regulate and bring civil enforcement action against spoofing: the CFTC, which regulates the commodities futures market,[37] and the SEC, which regulates the securities market.[38] These two agencies consider different statutory language in establishing and defining spoofing.[39] FINRA is a self-regulatory organization[40] authorized by Congress that

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market does not legitimate the conduct as a matter of law," and highlighting that "[f]raudulent schemes often involve acts that seem innocuously innocent when viewed in isolation but that are part-and-parcel of a scheme to defraud when viewed in their broader context."); *Coscia*, 866 F.3d at 794 (stating that Coscia's conduct was still prohibited even though his large spoof orders "risked actually being filled.").

[35] There are other sources that provide clear, helpful examples of spoofing schemes. *See, e.g.*, *Coscia*, 866 F.3d at 787; Sanders, *supra* note 3, at 519.

[36] *See* Spoofing Practical Law, *supra* note 13.

[37] *See* Sanders, *supra* note 3, at 523. *See generally Securities vs. Commodities*, FINDLAW, https://consumer.findlaw.com/securities-law/securities-vs-commodities.html (June 20, 2016) [hereinafter *Securities vs. Commodities*] (providing "an overview of the difference between securities and commodities," giving examples of commodities, and describing the main features of investing in commodities).

[38] *See What We Do*, SEC, https://www.sec.gov/Article/whatwedo.html (June 10, 2013). *See generally Securities vs. Commodities*, *supra* note 37.

[39] *See* Sar, *supra* note 4, at 395, 412 (showing that the CFTC considers the language of federal commodities laws such as CEA § 4c(a), and the SEC considers the language of federal securities laws such as § 9(a)(2) of the Securities Exchange Act).

[40] *Self-Regulatory Organization (SRO)*, CORP. FIN. INST., https://corporatefinanceinstitute.com/resources/knowledge/other/self-regulatory-organization-sro/ (last visited Nov. 18, 2020) (showcasing FINRA as an example of an SRO).

"oversees U.S. broker-dealers"[41] and the U.S. equities markets,[42] and can bring civil enforcement action for violation of its rules.[43] The Department of Justice ("DOJ") is "an executive department of the government of the United States"[44] that can prosecute spoofers under criminal, commodities, and securities statutes.[45]

Regarding commodities spoofing, spoofing claims before 2010 were brought as "claims of price manipulation or false reporting under the [Commodities and Exchange Act ("CEA")]."[46] To prove spoofing in a price manipulation claim, the CEA required a showing of "specific intent to manipulate the market price";[47] nevertheless, spoofing remained "too elusive to prosecute under the general anti-manipulation authority of the [CEA]."[48] But, in 2010, the "spoofing provision"[49] of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") amended section 4(c) of the CEA, overriding previous law related to commodities spoofing and adding the following provision to the CEA:

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[41] *About FINRA*, FINRA, https://www.finra.org/about (last visited Nov. 18, 2020).

[42] *Technology*, FINRA, https://www.finra.org/about/technology (last visited Nov. 18, 2020) [hereinafter *Technology*, FINRA].

[43] *See* Spoofing Practical Law, *supra* note 13.

[44] *About DOJ*, DOJ, https://www.justice.gov/about (last visited Nov. 18, 2020) (quoting Act to Establish the Department of Justice, ch. 150, 16 Stat. 162 (1870)).

[45] *See* Spoofing Practical Law, *supra* note 13 ("The DOJ can prosecute spoofing under the CEA, or instead, under the mail, wire, and commodities fraud statutes. (7 U.S.C. § 13(a)(2); CEA § 9(a)(2); 18 U.S.C. §§ 1341, 1343, and 1348.)"); THE SECURITIES ENFORCEMENT MANUAL 393 (Michael J. Missal & Richard M. Phillips eds., 2nd ed., 2007) (listing federal securities laws under which criminal prosecutions may be brought); *see also id.* ("An individual or a company subject to federal criminal prosecution for substantive violations of the federal securities laws also may be subject to prosecution for violations of mail and wire fraud statutes and other federal crimes."); *Smith* Indictment, *supra* note 34, at 7, 31 (charging defendants under RICO, 18 U.S.C. § 1962(d), for their alleged spoofing).

[46] *See* Sar, *supra* note 4, at 389 (footnotes omitted).

[47] *See id.* at 395–96.

[48] *Id.* at 385.

[49] *See id.* (referring to the "statutory prohibition on spoofing" contained in the Dodd-Frank Wall Street Reform and Consumer Protection Act as the "spoofing provision").

> It shall be unlawful for any person to engage in any trading, practice, or conduct on or subject to the rules of a registered entity that . . . is of the character of, or is commonly known to the trade as, "spoofing" (bidding or offering with the intent to cancel the bid or offer before execution).[50]

This was the first time that a federal law expressly prohibited spoofing.[51] An important feature of the CEA's express prohibition of spoofing is the definition given in parentheses at the end of the provision. This definition does not require the pre-Dodd-Frank showing of an intent to manipulate prices; it requires only a showing of intent to cancel the bid or offer before execution,[52] which in practice can be proven with circumstantial evidence[53] derived from trade data, specifically the trade cancellation rate.[54] In effect, the new post-Dodd-Frank definition of spoofing establishes a less burdensome pleading standard for commodities spoofing claims and can be seen

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[50] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 747, 124 Stat. 1376, 1739 (2010) [hereinafter Dodd-Frank]; *see also* 7 U.S.C. § 6c(a)(5)(C).

[51] *See* Sar, *supra* note 4, at 389, 396, 416 (stating that "[t]he explicit illegality of spoofing under the CEA is new") ("[A]s of yet, there is no explicit statutory prohibition in securities laws against spoofing.") (stating that in "[t]he current state of the law . . . a stand-alone *spoofing* prohibition exists only as applicable to commodities markets").

[52] *Compare id.* at 390–91 *with* Dodd-Frank, *supra* note 50, at 1739 (amending the CEA to require only an intent to cancel the bid or offer execution) *and* 7 U.S.C. § 6c(a)(5)(C) (reflecting the amendment prescribed by Dodd-Frank).

[53] Sanders, *supra* note 3, at 530–31. *See generally Direct & Circumstantial Evidence: What's the Difference?*, BIXON LAW (Apr. 13, 2019), https://bixonlaw.com/direct-circumstantial-evidence-whats-the-difference/ (distinguishing between direct evidence and circumstantial evidence) ("Circumstantial evidence requires the jury to make an inference connecting the evidence to a conclusion of fact.").

[54] *See* Sanders, *supra* note 3, at 530–31, 534 ("In Sarao's case, he was cancelling ninety-nine percent of the orders he placed.") ("In its complaint against Khara and Salim, the CFTC argued that intent was clearly evidenced by the fact that the traders cancelled 100% of their 212 sell orders."). *But cf.* United States v. Coscia, 866 F.3d 782, 793 (7th Cir. 2017) (stating that Coscia "notes that high-frequency traders cancel 98% of orders before execution").

"as an attempt to simplify the already complex inquiries that usually arise in price manipulation claims."[55]

Securities laws prohibit spoofing, too, but they do not expressly prohibit spoofing or provide a specific, express definition of spoofing like the CEA now does.[56] Nevertheless, the SEC has found spoofing to be sufficiently similar to the kinds of fraud and market manipulation that various federal securities laws prohibit.[57] The SEC has taken action against spoofing[58] for violations of sections 17(a)(1)[59] and 17(a)(2)[60] of the Securities Act of 1933, sections 9(a)(2)[61] and 10(b)[62] of the Securities Exchange Act of 1934, and SEC Rule 10b-5.[63] The federal securities law whose prohibited activity perhaps most resembles spoofing is section 9(a)(2) of the Securities Exchange Act of 1934, which prohibits "[m]anipulation of security prices."[64] Section 9(a)(2) states:

> It shall be unlawful . . . [t]o effect, alone or with [one] or more other persons, a series of transactions in any security . . . creating actual or apparent active

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[55] Sar, *supra* note 4, at 414.

[56] *See* Gideon Mark, *Spoofing and Layering*, 45 J. CORP. L. 399, 429 (2020).

[57] *Id.;* Spoofing Practical Law, *supra* note 13; *e.g.*, Afshar, Securities Act Release No. 9983, Exchange Act Release No. 76,546, Investment Company Act Release No. 31,926, 2015 WL 7770262, at *15 (Dec. 3, 2015) (stating that spoofers' actions resulted in "violations of Sections 17(a)(1) and 17(a)(3) of the Securities Act as well as Sections 9(a)(2) and 10(b) of the Exchange Act and Rules 10b-5(a) and 10b-5(c)."); Briargate Trading, LLC, Securities Act Release No. 9959, Exchange Act Release No. 76,104, 2015 WL 5868196 (Oct. 8, 2015).

[58] *See* Mark, *supra* note 56, at 429; Spoofing Practical Law, *supra* note 13; *e.g.*, Afshar, Securities Act Release No. 9983, Exchange Act Release No. 76,546, Investment Company Act Release No. 31,926, 2015 WL 7770262, at *15 (Dec. 3, 2015); Briargate Trading, LLC, Securities Act Release No. 9959, Exchange Act Release No. 76,104, 2015 WL 5868196 (Oct. 8, 2015).

[59] 15 U.S.C. § 77q(a)(1).

[60] *Id*. at (a)(2).

[61] 15 U.S.C. § 78i(a)(2).

[62] 15 U.S.C. § 78j(b).

[63] 17 C.F.R. § 240.10b–5 (2020).

[64] 15 U.S.C. § 78i; *see* Sanders, *supra* note 3, at 524 (highlighting that § 9(a)(2) "fits the practice of spoofing most directly" and distinguishing the other laws that have been used to prohibit spoofing as "catch-all provisions that capture activities as far afield from spoofing as insider trading."); *see also* Sar, *supra* note 4, at 412 (citing numerous cease-and-desist orders directed at spoofers that state that the spoofers' actions violated Section 9(a)(2)).

> trading in such security, or raising or depressing the price of such security, for the *purpose* of inducing the purchase or sale of such security by others.[65]

Designating spoofing as a form of market manipulation requires a showing that the trader intended to manipulate the market price of an asset through spoofing, which is more difficult than the showing required in a commodities spoofing case "because an intent to manipulate market prices is not as obvious as looking at the raw trade and order data."[66] Indeed, in a securities spoofing case, "a simple showing of spoofing activity may not be sufficient."[67]

C. *Post-Dodd-Frank Cases Against Spoofing*

1. *UNITED STATES. V. COSCIA*

The first case in which the U.S. government brought a spoofing prosecution under the post-Dodd-Frank anti-spoofing provision of the CEA was *United States v. Coscia*.[68] Michael Coscia ("Coscia") was "the manager and owner of Panther Energy, LLC, a high-frequency trading company based in New Jersey."[69] Coscia was charged and convicted of spoofing and commodities fraud and "later sentenced to thirty-six months' imprisonment."[70] The government alleged that, for about ten weeks, Coscia engaged in spoofing by way of "preprogrammed algorithms to execute commodities trades in high frequency trading."[71] Coscia executed spoof trades that earned him a profit "in approximately two-thirds of a second, and was repeated tens of thousands of times, resulting in over 450,000 large orders, and earning Mr. Coscia $1.4 million."[72] Unfortunately,

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65 15 U.S.C. § 78i(a)(2) (emphasis added).

66 Sanders, *supra* note 3, at 535.

67 Sar, *supra* note 4, at 412.

68 United States v. Coscia, 866 F.3d 782 (7th Cir. 2017); *see First Federal Spoofing Prosecution: Trader Sentenced in Case Involving Manipulation of Market Prices*, FBI, (Aug. 12, 2016), https://www.fbi.gov/news/stories/trader-sentenced-in-spoofing-case-involving-market-manipulation [hereinafter *First Federal Spoofing Prosecution: FBI*]; Viswanatha, *supra* note 8 (explaining that Navinder Sarao was second trader convicted of spoofing behind Michael Coscia).

69 *First Federal Spoofing Prosecution: FBI*, *supra* note 68.

70 *Coscia*, 866 F.3d at 785.

71 *Id.* at 786.

72 *Id.* at 788.

with each one of those trades, Coscia caused other traders to suffer losses.[73]

Coscia demonstrates the effective use of circumstantial evidence to successfully prosecute a spoofer.[74] In making its case, the government relied on two types of evidence: trade data and witness testimony.[75] An illustration of the trade data demonstrates Coscia's intent to cancel the large orders that he placed:

> Mr. Coscia placed 24,814 large orders between August and October 2011, although he only traded on 0.5% of those orders. During this same period he placed 6,782 small orders on the Intercontinental Exchange and approximately 52% of those orders were filled . . . . Mr. Coscia[] trad[ed] on the Chicago Mercantile Exchange, where 35.61% of his small orders were filled, whereas only 0.08% of his large orders were filled.[76]

One of the government's witnesses, John Redman, a director of compliance for Intercontinental Exchange, Inc., testified that the trade data was "highly unusual," stating that Coscia's fill rate was 100 times greater for small orders than for large orders.[77] What is more, the cancellation rate for large orders and small orders, respectively, is usually about the same.[78] Additionally, Redman noted that Coscia's order-to-fill ratio was about 1,600% as compared to the average of 91% to 264%.[79]

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[73] *Id.* at 790, 801 (providing testimony from other traders detailing negative effect of Mr. Coscia's trading on their business and noting that "Mr. Coscia made money by artificially inflating and deflating prices. Every time he did so, he inflicted a loss.").

[74] *See generally* Sanders, *supra* note 3, at 530–31 (explaining that while a "smoking-gun email" is unlikely to be presented to evidence an intent to cancel, circumstantial evidence derived from trade data and patterns can suffice to evidence intent).

[75] *See Coscia*, 866 F.3d at 788–90 (stating that a review of "Coscia's specific activity in trading copper futures helps" explain his spoofing endeavors) ("A great deal of testimony was presented at trial . . . .").

[76] *Id.* at 789, 798 (footnotes omitted).

[77] *Id.* at 789.

[78] *Id.*

[79] *Id.*

Another key witness in the case was Jeremiah Park, the designer of "the two programs that Mr. Coscia had commissioned to facilitate his trading scheme: Flash Trader and Quote Trader."[80] The court's opinion provides a summary of Park's testimony:

> Park[] testified that Mr. Coscia asked that the programs act "[l]ike a decoy," which would be "[u]sed to pump [the] market." Park interpreted this direction as a desire to "get a reaction from the other algorithms." In particular, he noted that the large-volume orders were designed specifically to avoid being filled and accordingly would be canceled in three particular circumstances: (1) based on the passage of time (usually measured in milliseconds); (2) the partial filling of the large orders; or (3) complete filling of the small orders.[81]

In addition to affirming Coscia's spoofing conviction,[82] the Seventh Circuit Court of Appeals made several noteworthy holdings related to spoofing that were in direct response to contentions made by Coscia. The court held that the anti-spoofing provision of the CEA was not unconstitutionally vague because (1) the definition of spoofing provided in the anti-spoofing provision of the CEA was sufficient on its own, (2) notice was given of spoofing's prohibition because of the clear definition, and (3) legislative history and industry definition were irrelevant in determining the vagueness of the statute because the definition of spoofing as written in the statute was sufficient.[83] The court also held that the anti-spoofing provision of the CEA does not encourage arbitrary enforcement because the phrase "the intent to cancel the bid or offer before execution . . . imposes clear restrictions on whom a prosecutor can charge with spoofing[:] . . . the pool of traders who exhibit the requisite criminal intent."[84] This holding is critical because it emphasizes that intent to

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[80] *See id.*

[81] *Id.* (alteration partially to the original and partially in the original) (footnotes omitted).

[82] *Id.* at 803.

[83] *See id.* at 791–95.

[84] *See id.* at 794.

cancel an order is the keystone of proving a commodities spoofing claim.[85]

The court also affirmed Coscia's commodities fraud conviction.[86] The elements of commodities fraud are "(1) fraudulent intent, (2) a scheme or artifice to defraud, and (3) a nexus with a security."[87] Essentially, the same evidence that was used to convict Coscia of spoofing was used to convict him of commodities fraud: the operational parameters of Coscia's computer program and Coscia's trade data itself evidenced a "fraudulent intent" to use the placement of large orders to "create the *illusion* of market movement . . . as a means of shifting the market equilibrium toward his desired price, while avoiding the actual completion of those large transactions."[88] This holding demonstrates that spoofing can also manifest a deceptive element that transforms spoofing into a form of fraud. As this Note will discuss later in further detail, spoofing's fraudulent potential renders it amenable to RICO,[89] which could have serious implications for the alleged perpetrators and even the public as a whole.

2. *UNITED STATES V. FLOTRON*

Unlike *Coscia*, which presented the first spoofing conviction, *United States v. Flotron* presented the first spoofing acquittal.[90] On April 25, 2018, Andre Flotron, a precious metals trader who used to work for UBS AG, "one of the world's largest banking and financial services companies,"[91] was acquitted by a federal jury in the United States District Court for the District of Connecticut[92] on the government's count of "conspiracy to commit commodities fraud for allegedly plotting with others to enrich themselves and UBS AG through

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[85] *See supra* Part I(B).

[86] *See Coscia*, 866 F.3d at 803 (affirming that Coscia's "trading . . . constituted commodities fraud").

[87] *Id.* at 796.

[88] *Id.* at 797–98.

[89] *See infra* Part IV(A)(1).

[90] *Ex-UBS Trader Acquitted*, *supra* note 7; *see* Judgment of Acquittal, United States v. Flotron, No. 3:17-CR-00220 (D. Conn. Apr. 25, 2018), ECF No. 218 [hereinafter Flotron Judgment of Acquittal].

[91] United States v. Flotron, No. 3:17-CR-00220, 2018 WL 1401986, at *1 (D. Conn. Mar. 20, 2018).

[92] Flotron Judgment of Acquittal, *supra* note 90.

a roughly five-year spoofing scheme starting in 2008"[93] that comprised "hundreds of Trick Orders [(or spoof orders)] for precious metals futures contracts."[94]

Flotron's defense included a denial that he was part of a commodities fraud conspiracy, citing the "hypercompetitive and individually oriented" trading desk environment at UBS that would have prevented him from "agreeing to take part" in such a conspiracy.[95] Furthermore, Flotron's defense was notable in that his lawyers attacked the trade data analysis used to indict Flotron as "cherry-picking a few hundred trades out of more than 300,000 that Flotron did and presenting them without full, proper context."[96] To emphasize this point, one of Flotron's lawyers made a statement that undermines the use of trade data as evidence: "We don't convict people with charts and graphs."[97]

Notwithstanding the jury acquittal, prior to trial, Judge Meyer of District of Connecticut denied Flotron's motion to dismiss the superseding indictment of conspiracy to engage in commodities fraud.[98] Judge Meyer's opinion is worth reviewing because it underscores key factors that could support a commodities fraud prosecution,[99] which could render spoofing activities amenable to RICO.[100]

In supporting his motion to dismiss, Flotron claimed he did not commit the crime of commodities fraud because every buy or sell order he placed "was a *bona fide* order that was available to be traded upon by any market participant until later cancelled before

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93 *Ex-UBS Trader Acquitted*, *supra* note 7.

94 *Flotron*, 2018 WL 1401986, at *2.

95 *Ex-UBS Trader Acquitted*, *supra* note 7.

96 *Id.*

97 *Id.*

98 *Flotron*, 2018 WL 1401986, at *1, *5.

99 *See generally id.* at *1–5 (describing how the indictment adequately alleges that Flotron's activities constituted commodities fraud).

100 *See id.* at *1 n.1 (demonstrating how spoofing activities can trigger statutes related to commodities fraud, such as 18 U.S.C. §§ 1348–1349); United States v. Coscia, 866 F.3d 782, 796–97, 803 (7th Cir. 2017); *Smith* Indictment, *supra* note 34, at 7–8 (demonstrating how spoofing can be construed as "wire fraud affecting a financial institution" and "bank fraud," which can make spoofing amenable to RICO). A superseding indictment exists for *Smith*, but the changes made to it from the original indictment are insignificant for the purposes of this Note. *See generally* Superseding Indictment, United States v. Smith, No. 19-CR-00669 (N.D. Ill. Nov. 14, 2019), ECF No. 52.

execution," and he thereby "made no false or fraudulent representation to any market participant."[101] However, the court pointed out that "[f]raudulent schemes often involve acts that seem innocuously innocent when viewed in isolation but that are part-and-parcel of a scheme to defraud when viewed in their broader context."[102] In other words, while certain conduct itself may not be an express misrepresentation, in context it can still amount to fraud because it gives another person a false impression. The court applied this principle to the case and determined that, even though any trader could have accepted Flotron's large orders, the indictment still adequately alleged that Flotron's orders intended "to create a false impression in the market and to shift prices in [his] favor."[103] Therefore, the indictment was sufficient in alleging facts that constitute commodities fraud, and the court could not dismiss it.[104]

3. *UNITED STATES V. SMITH*

Thus far, this Note has discussed spoofing's cogent amenability to laws that pertain specifically to markets and trading. However, in the ongoing case *United States v. Smith*, federal prosecutors indicted alleged spoofers using a statute unprecedented in the spoofing legal sphere.[105] The indictment made charges under the typical commodities and criminal statutes mentioned earlier in this Note (such as the anti-spoofing provision of the CEA as well as the securities and commodities fraud statute)[106] but also made an anomalous

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101 *See Flotron*, 2018 WL 1401986, at *2.

102 *Id.* at *3.

103 *Id.*

104 *Id.* at *1.

105 *See generally Smith* Indictment, *supra* note 34 (indicting alleged spoofers using, among other laws, 18 U.S.C. § 1962(d)). The trial date for *Smith* is April 5, 2021, at 8:30 a.m. Notification of Docket Entry, United States v. Smith, No. 1:19-CR-00669 (N.D. Ill. Mar. 3, 2020), ECF No. 118. The CFTC brought a corresponding civil lawsuit against the same spoofers. *See generally* Complaint, CFTC v. Nowak, No. 1:19-CV-06163 (N.D. Ill. Sept. 16, 2019) (bringing a civil complaint against alleged spoofers); *3 JPMorgan Traders Accused*, *supra* note 7 (discussing the CFTC's investigation and listing the civil case information). As this Note is primarily focused on criminal RICO, this Note will not discuss *Nowak*.

106 18 U.S.C. § 1348; *see also* United States v. Coscia, 866 F.3d 782, 785 (7th Cir. 2017) (stating that Coscia was charged with commodities fraud under 18 U.S.C. § 1348(1)).

conspiracy charge under section 1962(d) of RICO.[107] This is an interesting prosecutorial play because, while RICO has been used in the white-collar context before (although rarely),[108] it is best known for prosecuting the Mafia,[109] a notorious organized crime group[110] historically involved in "street crimes."[111]

The *Smith* indictment alleged that, "between May 2008 and August 2016," various individuals at the precious metals desk of Bank A,[112] which can be identified as JPMorgan "from publicly available information about its traders' employment history,"[113] engaged in "thousands of trading sequences" in which they "placed one or more orders that they intended to cancel before execution ('Deceptive Orders') on the opposite side of the market from [orders that they intended to execute ('Genuine Orders').]"[114] These Deceptive Orders were meant to "fraudulently and artificially move the price of a given precious metals futures contract . . . allowing the Defendants and their co-conspirators to generate trading profits and avoid losses for themselves and other members of the Precious Metals Desk at [JPMorgan], the Precious Metals Desk itself, and ultimately, [JPMorgan]."[115]

Using these factual allegations, the government charged the defendants with operating as co-conspirators who, through a pattern of

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[107] *Smith* Indictment, *supra* note 34, at 1, 7–8, 31.

[108] *See infra* Part III; *see also 3 JPMorgan Traders Accused*, *supra* note 7.

[109] *See 3 JPMorgan Traders Accused*, *supra* note 7; U.S. Dep't of Just., Criminal RICO: 18 U.S.C. §§ 1961–1968, A Manual for Federal Prosecutors 4 (2016) [hereinafter Criminal RICO Manual].

[110] *See Origins of the Mafia*, *supra* note 12.

[111] David Kocieniewski, *Decline and Fall of an Empire*, N.Y. TIMES (Jan. 17, 1999), https://www.nytimes.com/1999/01/17/nyregion/decline-and-fall-of-an-empire.html. Part of the *Smith* defendants' argument in their motion to dismiss the indictment is that spoofing is too dissimilar to "the traditional organized crime syndicates that prompted Congress to enact RICO"; thus, a RICO conspiracy charge in this case in inappropriate and extended "far beyond the statute's intended reach." *See* Defendants' Memorandum of Law in Support of Joint Motion to Dismiss the Indictment and to Strike Surplusage at 45–46, United States v. Smith, No. 19-CR-00669 (N.D. Ill. Feb. 28, 2020), ECF No. 144 [hereinafter *Smith* Motion to Dismiss Indictment]. Part IV of this Note will analyze this issue further.

[112] *Smith* Indictment, *supra* note 34, at 7.

[113] *See 3 JPMorgan Traders Accused*, *supra* note 7.

[114] *Smith* Indictment, *supra* note 34, at 7, 9.

[115] *Id.* at 11.

racketeering activity, participated in the affairs of an "enterprise" that affected interstate and foreign commerce.[116] The government claimed that the defendants' spoofing activities amounted to wire fraud affecting a financial institution and bank fraud, two racketeering activities that RICO prohibits.[117] In the event of conviction, the government states that the defendants

> shall forfeit to the United States any and all right, title, and interest they have in any property, real and personal, which the Defendants have acquired or maintained in violation of Title 18, United States Code, Section 1962, or which constitutes, or is derived from, any proceeds obtained, directly or indirectly, from racketeering activity in violation of Title 18, United States Code, Section 1962.[118]

For a multitude of reasons that this Note will later discuss, the outcome of this case and the success of using RICO against alleged spoofers has critical implications going forward for traders, prosecutors, and the public.[119]

II. RICO AND THE MAFIA

A. *RICO's Historical Context and Legislative Purpose*

The Racketeer Influenced and Corrupt Organizations Act,[120] colloquially known as RICO, "was enacted October 15, 1970, as Title IX of the Organized Crime Control Act of 1970."[121] RICO provides for both criminal penalties and civil remedies[122] and was

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116 *See id.* at 7–8.

117 *See id.*

118 *Id.* at 43.

119 *See Fed's Spoofing Case*, *supra* note 2 (quoting Peter Henning, "a Wayne State University Law School professor who has worked in the DOJ's Fraud Section and the enforcement section of the [SEC].") ("If [the use of RICO] works here, then this could be [prosecutors'] template for other spoofing cases.").

120 18 U.S.C. §§ 1961–1968.

121 Criminal RICO Manual, *supra* note 109, at 1.

122 *Id.*

primarily intended to "more effectively" thwart and prevent organized crime in the United States.[123]

RICO's legislative intent derives from Congress's concern in the 1960s with organized crime,[124] specifically La Cosa Nostra ("Our Thing" in Italian),[125] another name for the Mafia.[126] The Mafia is a "network of organized-crime groups based in Italy and America."[127] The American Mafia's insurgence began in the 1920s as a result of the demise of other prominent organized crime groups such as the Five Points Gang in New York and Al Capone's Syndicate in Chicago,[128] and the "boom[]" of Italian-American neighborhood gangs in the bootleg liquor business.[129] By the 1960s, the Mafia had grown to become "the preeminent organized-crime network in the United States," engaging "in a range of underworld activities, from loansharking to prostitution, while also infiltrating labor unions and legitimate industries such as construction and New York's garment industry."[130] For example, in New Jersey during the 1950s and 1960s, the Mafia "wielded almost unchecked power over the state's business and political affairs."[131] Businesses such as ship unloading, trucking, and construction were dominated by the Mafia.[132] State and local officials were paid off to overlook the "street crimes" of the Mafia.[133] Indeed, the Mafia had become so widespread that it "was accepted as a fixture of daily life."[134]

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123 William L. Anderson & Candice E. Jackson, *Law as a Weapon: How RICO Subverts Liberty and the True Purpose of Law*, INDEP. REV., Summer 2004, at 85, 86 [hereinafter *Law as a Weapon*].

124 Craig M. Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837, 840 (1980).

125 Criminal RICO Manual, *supra* note 109, at 4; *Origins of the Mafia*, *supra* note 12.

126 SELWYN RAAB, FIVE FAMILIES xi (2005).

127 *Origins of the Mafia*, *supra* note 12.

128 *Id.*; *History of La Cosa Nostra*, FBI, https://www.fbi.gov/investigate/organized-crime/history-of-la-cosa-nostra#:~:text=Giuseppe%20Esposito%20was%20the%20first,province%20and%2011%20wealthy%20landowners (last visited Nov. 18, 2020).

129 *Origins of the Mafia*, *supra* note 12.

130 *Id.*

131 Kocieniewski, *supra* note 111.

132 *See id.*

133 *Id.*

134 *Id.*

In a 1969 Senate report, Congress expounded on organized crime, namely the Mafia, which "had extensively infiltrated and exercised corrupt influence over numerous legitimate businesses and labor unions throughout the United States, and hence posed a 'new threat to the American economic system.'"[135] Later elaborating on this threat, Congress stated that organized crime was "highly sophisticated, diversified, and widespread . . . [and] annually drain[ed] billions of dollars from America's economy."[136] Moreover, Congress stated that this drainage of money was caused by "such illegal endeavors as syndicated gambling, loan sharking, [and] . . . the importation and distribution of narcotics and other dangerous drugs."[137] The money and power obtained from this illegal activity was then used to infiltrate and corrupt legitimate businesses and labor unions in the United States, which "subvert[ed] and corrupt[ed] [the United States's] democratic processes."[138] As a result, organized crime activities "weaken[ed] the stability of the Nation's economic system, harm[ed] innocent investors and competing organizations, interfere[d] with free competition, seriously burden[ed] interstate and foreign commerce, threaten[ed] the domestic security, and undermine[d] the general welfare of the Nation and its citizens."[139]

Congress's concern was magnified by a major problem: the government faced grave difficulties in effectively attacking the Mafia's economic base, which comprised "its primary sources of revenue and power—illegal gambling, loan sharking and illicit drug distribution."[140] The destruction of the Mafia's economic base would mean the end of the Mafia's successful infiltration of legitimate businesses and, therefore, the end of the Mafia's subversion of American freedom, legitimate competition, and democracy.[141] To meaningfully attack the Mafia's economic base, the government

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135 Criminal RICO Manual, *supra* note 109, at 4 (quoting S. REP NO. 91-617, at 76–78 (1969)).

136 Organized Crime Control Act of 1970, Pub. L. No. 91-452, Statement of Findings and Purpose, 84 Stat. 922, 922 (1970) [hereinafter Statement of Findings and Purpose].

137 *Id.* at 923.

138 *Id.*

139 *Id.*

140 *See* United States v. Turkette, 452 U.S. 576, 591–92 (1981) (quoting S. REP. No. 91-617, at 79).

141 *See id.*

needed to trounce the individuals who were in charge of and orchestrating the Mafia's operations; these individuals were the Mafia leaders such as the "bosses, underbosses, consiglieri, and capos."[142] However, before RICO, it was almost impossible to take down top-ranking Mafiosi (a term used to describe members of the Mafia),[143] primarily because of the weakness of then-existing federal and state conspiracy statutes.[144] To wit, the government blamed "*defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary* to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime."[145] The evidentiary loophole that Mafia leaders exploited was that "they *gave orders* [to commit crimes] but *never personally committed* crimes."[146] Indeed, it was usually the underlings of Mafia families who got "picked up," and their convictions proved insignificant in stopping the Mafia.[147]

In addition to the legal loopholes protecting Mafia leaders, the unwavering immutability of "omertà" strengthened their protection.[148] Omertà (meaning "manliness")[149] is the Mafia's sacred oath of loyalty that consists of steadfast secrecy of Mafia operations and relentless refusal to "cooperate with authorities investigating any wrongdoing [by the Mafia]."[150] Certainly, this strong belief in

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142 *See* RAAB, *supra* note 126, at 177–78.

143 *Id.* at 14–15 (explaining that "the appellation *mafioso*" denotes "a Mafia member" and using word "mafiosi" to suggestively denote the plural version of "mafioso").

144 *Id.* at 177 ("Proving in court that these leaders were implicated in acts carried out by their underlings was virtually impossible under existing federal and state conspiracy statutes.").

145 *See* Statement of Findings and Purpose, *supra* note 136, at 923 (emphasis added).

146 RAAB, *supra* note 126, at 177 (emphasis added).

147 *See id.* at 178 (insinuating that "concentrating on low-level strays picked up on relatively minor charges" was insignificant in bringing down Mafia).

148 *See id.* at 177.

149 *Id.* at 14–15.

150 *Origins of the Mafia*, *supra* note 12 ("Of chief importance to the clans was omert[à] . . . ."); *see also* Stephanie Clifford, *Trial of Vincent Asaro Highlights Loss of Mafia's Code of Silence*, N.Y. TIMES (Nov. 9, 2015), https://www.nytimes.com/2015/11/10/nyregion/trial-of-vincent-asaro-highlights-loss-of-mafias-code-of-silence.html (explaining one of the "rules" was to not cooperate with the government, i.e., omertà).

omertà made it very difficult to "stop[] the Mafia during the first part of the 20th century."[151]

In response to the Mafia's evident invincibility and its dangerous impact on the American economic and political systems, Congress sought to "simplify the task" of successfully prosecuting Mafia leaders.[152] To do so, Congress passed RICO to "eradicat[e] organized crime in the United States by *strengthening the legal tools in the evidence-gathering process*, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."[153] Unlike previous laws, RICO permitted the government to indict Mafia members by showing merely that they were "linked to"[154] an enterprise that affected interstate or foreign commerce and that they "conduct[ed]," "participate[d]," or conspired to conduct or participate in the affairs of the enterprise through a pattern of racketeering activity.[155] Now, prosecutors could "dismantle the hierarchy of a [Mafia] family [including its leaders] with one sweeping indictment, instead of concentrating on low-level strays picked up on relatively minor charges."[156] This was crucial in the fight against the Mafia because courts now could convict top-ranking Mafia members—the ringleaders of the sources of economic power—provided that prosecutors could show that these members were connected to the enterprise committing the crimes.[157]

B. *Noteworthy RICO Provisions and Caselaw*

It is important to review the significant provisions of RICO and relevant caselaw to acquire a better understanding of how RICO is used to derail organized crime.

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151 *See Origins of the Mafia*, *supra* note 12.

152 RAAB, *supra* note 126, at 177.

153 *See* Statement of Findings and Purpose, *supra* note 136, at 923 (emphasis added). RICO's legislative purpose demonstrates the protection of the paramount American values, such as competition and free enterprise. For a discussion on American values, see generally Kohls, *supra* note 24.

154 RAAB, *supra* note 126, at 178.

155 *See* 18 U.S.C. §§ 1962(c)–(d); JAMES B. JACOBS ET AL., BUSTING THE MOB 90 (1994).

156 RAAB, *supra* note 126, at 178.

157 *See id.*; JACOBS ET AL., *supra* note 155, at 90.

RICO begins in section 1961 by setting out definitions,[158] which are indispensable to understanding, interpreting, and utilizing RICO.[159] Some of the key definitions are "racketeering activity," "enterprise," "person," and "pattern of racketeering activity."[160]

Section 1961(1) defines "racketeering activity" via a list of myriad crimes and conspiracies that can constitute racketeering, such as "murder, kidnapping, drug trafficking, robbery, loan-sharking, gambling, bribery, extortion, embezzlement from union funds, fraud, arson, and counterfeiting."[161] Additionally, this section includes as racketeering numerous activities that are criminal under other statutes, such as "fraud in the sale of securities," "wire fraud," "financial institution fraud," and "mail fraud."[162]

Section 1961(4) defines an "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[163] The U.S. Supreme Court in *United States v. Turkette* provided clarity as to the expanse of the enterprise definition: (1) an "enterprise" for the purpose of RICO "encompasses both legitimate and illegitimate enterprises";[164] (2) a pattern of racketeering activity does not constitute an enterprise, and "the Government must prove both the existence of an 'enterprise' and the connected 'pattern of racketeering activity'";[165] and (3) an association-in-fact enterprise is "proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit."[166] The Court in *Boyle v. United States* agreed with its holding in *Turkette* regarding association-in-fact enterprises, and it elaborated that "an association-in-fact enterprise must have at least 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."[167]

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158 *See* 18 U.S.C. § 1961.
159 Bradley, *supra* note 124, at 845.
160 *See* 18 U.S.C. § 1961.
161 RAAB, *supra* note 126, at 178; *see* 18 U.S.C. § 1961(1).
162 *See* 18 U.S.C. § 1961(1).
163 18 U.S.C. § 1961(4).
164 United States v. Turkette, 452 U.S. 576, 578–81, 587 (1981).
165 *Id.* at 583.
166 *Id.*
167 Boyle v. United States, 556 U.S. 938, 946 (2009).

Section 1961(5) defines "pattern of racketeering activity" as "at least two acts of racketeering activity, one of which occurred after the effective date of [RICO] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity."[168] The U.S. Supreme Court elaborated in *H.J. Inc. v. Northwestern Bell Telephone Co.* that "to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity";[169] this showing is referred to as "continuity plus relationship."[170]

Section 1962 establishes prohibited activities.[171] In essence, section 1962 prohibits three categories of activities:

> (1) subsection 1962(a) makes it unlawful to invest funds derived from a pattern of racketeering activity as defined in subsections 1961(1) and (5), or derived from the collection of an unlawful debt as defined in subsection 1961(6), in any enterprise engaged in interstate or foreign commerce; (2) subsection 1962(b) prohibits acquisition or maintenance of an enterprise through the proscribed pattern of racketeering activity or collection of an unlawful debt; (3) subsection 1962(c) prohibits the conduct of the enterprise through the prohibited pattern of activity or collection of debt . . . . *Thus, the three substantive sections prohibit, in essence, the investment of "dirty" money by racketeers, the takeover or control of an interstate business through racketeering, and the operation of such a business through racketeering.*[172]

In addition to sections 1962(a)–(c), section 1962(d) makes it "unlawful for any person to *conspire* to violate any of the provisions of subsection (a), (b), or (c) of [section 1962]."[173] Therefore, section

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168 18 U.S.C. § 1961(5).

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

170 *Id.* (quoting S. REP NO. 91-617, at 158) (emphasis removed).

171 18 U.S.C. § 1962.

172 Bradley, *supra* note 124, at 844–45 (emphasis added).

173 18 U.S.C. § 1962(d) (emphasis added); *see also* United States v. Salerno, 631 F. Supp. 1364, 1366 (S.D.N.Y. 1986).

1962(d) has allowed prosecutors to indict and convict Mafia leaders of racketeering on the sole grounds that they conspired to commit the racketeering-related violations prohibited in sections 1962(a)–(c).[174] Section 1962's easier-to-prove elements allowed prosecutors to overcome legal limitations they faced in previous Mafia cases and finally secure convictions of Mafia leaders.[175]

Section 1963 lists criminal penalties resulting from a conviction for violating any of RICO's provisions.[176] These penalties include fines, imprisonment of up to twenty years, and forfeiture of any interest or property derived directly or indirectly from any enterprise or racketeering activity in violation of section 1962.[177] The forfeiture element of section 1963 was new in RICO, and was intended to "remove the leaders of organized crime from the sources of their economic power" so that these "channels of commerce can be freed of racketeering influence."[178] Hence, the forfeiture element of section 1963 was vital in realizing Congress's intent to destroy the Mafia's economic power and base.[179]

Section 1964 describes civil remedies, which are available to the government or a private claimant.[180] Like the forfeiture element of section 1963, the civil remedies of section 1964 were provided to aid in "destroy[ing] the Mob's economic foundations."[181] Equitable relief may be attained via section 1964 if two elements are met:

> (1) [a showing that] a defendant committed or intended to commit a RICO violation by establishing the same elements as in a criminal RICO case, except

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[174] *See Salerno*, 631 F. Supp. at 1366. *See generally* 18 U.S.C. § 1962 (setting out prohibited activities under RICO, including the conspiracy to violate §§ 1962(a)–(c)).

[175] *See* RAAB, *supra* note 126, at 177–78. *See generally, e.g.*, *Salerno*, 631 F. Supp. at 1366 ("The defendants are charged both with conspiracy to participate in the above racketeering enterprise and actual participation in the enterprise in violation of 18 U.S.C. section 1962.").

[176] 18 U.S.C. § 1963.

[177] *Id.*

[178] Bradley, *supra* note 124, at 888–89.

[179] *See generally* S. REP NO. 91-617, at 79 (explaining that, to stop organized crime, "an attack" must be made on "economic base[s]" of organized crime groups).

[180] *See* 18 U.S.C. §§ 1964(a)–(c).

[181] *See* RAAB, *supra* note 126, at 178.

> that criminal intent is not required; and (2) that there is a reasonable likelihood that the defendant will commit a violation in the future.[182]

Once these elements are met, section 1964(a)

> authorizes potentially intrusive remedies, including injunctive relief, reasonable restrictions on defendants' future activities, disgorgement of unlawful proceeds, divestiture, dissolution, reorganization, removal from positions in an entity, and appointment of court officers to administer and supervise the affairs and operations of defendants' entities and to assist courts in monitoring compliance with courts' orders and in imposing sanctions for violations of courts' orders.[183]

The government recognizes the power and intrusiveness of RICO's civil remedies, and the Civil RICO Manual for Federal Attorneys entreats prosecutors to bring a civil RICO lawsuit "only when the totality of the circumstances clearly justify imposition of such remedies."[184] The government also explains that civil RICO lawsuits are typically brought against "collective entities such as corporations and labor unions, and hence such suits may affect innocent third parties such as union members and corporate shareholders."[185] Therefore, in deciding whether to bring a civil RICO lawsuit, "the Government should consider the adverse effects, if any . . . upon innocent third parties."[186] Courts in criminal cases, too, have stated that "[t]he responsible use of prosecutorial discretion is particularly important . . . given the extremely severe penalties authorized by RICO's criminal provisions."[187]

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[182] U.S. Dep't of Just., Staff of Organized Crime & Racketeering Section, Civil RICO: 18 U.S.C. §§ 1961–1968, A Manual for Federal Attorneys 2 (2007) [hereinafter Civil RICO Manual].

[183] *Id.* at 3.

[184] *Id.* at 3–4.

[185] *Id.* at 4.

[186] *Id.*

[187] *See* United States v. Palumbo Bros., 145 F.3d 850, 865 n.9 (7th Cir. 1998).

C. *Success in Emasculating the Mafia*

Along with numerous critical RICO convictions,[188] other factors have greatly diminished the Mafia's power and influence: "FBI raids in the late 1970s and [19]80s," the disappearance of Italian neighborhoods as hotbeds for Mafia recruits,[189] and in recent times, the rise of "crime syndicates from Japan, Russia, Mexico, and Eastern Europe."[190] As a result of the foregoing factors, the classic rackets that the Mafia used to perpetrate, such as extortion and gambling, have started to become things of the past.[191] To survive, the Mafia has recently tried relocating to white-collar crimes, such as Wall Street stock swindles, credit-card fraud, and even a "fraudulent health maintenance organization that served more than a million people."[192]

However, many of the FBI raids and successful prosecutions that have emasculated the Mafia would not have been possible without a major, previously unthinkable cultural shift in the Mafia that occurred in the 1980s and 1990s: the breaking of omertà.[193] To complement the enactment of RICO, the federal government developed a witness-protection program[194] that offered "leniency" to Mafiosi

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188 *See* Kocieniewski, *supra* note 111.

189 Jonathan Wolfe, *New York Today: The Modern Mob*, N.Y. TIMES (Aug. 8, 2016), https://www.nytimes.com/2016/08/08/nyregion/new-york-today-the-modern-mob.html.

190 Clifford, *supra* note 150; *see also* Kocieniewski, *supra* note 111 (mentioning growing presence of Albanian and Dominican drug gangs).

191 *See* Clifford, *supra* note 150 (describing the New York Mafia at the turn of the twenty-first century as "enfeebled"); Kocieniewski, *supra* note 111 ("It felt . . . like the end of an era.").

192 Kocieniewski, *supra* note 111; Selwyn Raab, *Officials Say Mob Is Shifting Crimes to New Industries*, N.Y. TIMES (Feb. 10, 1997), https://www.nytimes.com/1997/02/10/nyregion/officials-say-mob-is-shifting-crimes-to-new-industries.html; Seth Ferranti, *What the Latest Mafia Bust Says About Organized Crime*, VICE (Aug. 8, 2016, 8:00 PM), https://www.vice.com/en_us/article/bn3np4/mafia-bust-cosa-nostra-east-coast-new-york-philadelphia-jersey (suggesting that reason why Mafia is moving to white-collar crimes is because white-collar crimes have more favorable prison sentences than "traditional rackets").

193 *See* Kocieniewski, *supra* note 111; Clifford, *supra* note 150 ("But the trial made it clear. Omertà was no more.").

194 RAAB, *supra* note 126, at 179.

in exchange for their cooperation in bringing down other Mafiosi,[195] as well as "safeguarding them and their close relatives and helping them start new lives, far from their old environment."[196] This leniency has come in the form of evasion of prosecution, diminishment in sentence,[197] and even sparing a Mafioso's wife from prosecution and allowing her to keep the family's home.[198]

Two notable examples demonstrate how the breaking of omertà and cooperation with the government have proven valuable in prosecuting members of the Mafia. First, in 2015, Vincent Asaro, a member of the Bonanno crime family, was arrested and charged with racketeering conspiracy related to robbery, murder, and extortion.[199] Asaro's cousin, Gaspare Valenti, agreed to cooperate with the government and provide the testimony regarding crimes in which he and Asaro were involved that made Asaro's indictment possible.[200] Second, in 2004, Joseph Massino, former boss of the Bonanno crime family, agreed to cooperate with the government to aid a prosecution against Vincent "Vinny Gorgeous" Basciano, who had served as one of his captains.[201] Massino provided testimony about Mafia activities and agreed to wear a wire while in prison with Basciano, which served to reveal Basciano's admission that "he ordered a hit on an associate who ran afoul of the . . . Bonannos."[202] Massino agreed to cooperate with the government because "his cooperation spared his wife from prosecution, allowed her to keep their home and gave him a shot at a reduced sentence."[203]

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195 *See id.*; Kocieniewski, *supra* note 111; *see e.g.*, *Mafia Boss Breaks 'Omerta' to Give Evidence Against New York Crime Family*, TELEGRAPH (Apr. 12, 2011), https://www.telegraph.co.uk/news/worldnews/northamerica/usa/8447519/Mafia-boss-breaks-omerta-to-give-evidence-against-New-York-crime-family.html [hereinafter Massino Cooperation] (stating that Massino, a "former Bonnano boss," agreed to cooperate with government after his conviction to be given leniency).

196 RAAB, *supra* note 126, at 179.

197 *See id.*; Massino Cooperation, *supra* note 195.

198 *See* Massino Cooperation, *supra* note 195.

199 Clifford, *supra* note 150.

200 *Id.*

201 Massino Cooperation, *supra* note 195.

202 *Id.*

203 *Id.*

D. *The Mafia Commission Trial*

United States v. Salerno,[204] also known as the Mafia Commission Trial,[205] was the case that trailblazed the federal government's debilitation of the Mafia.[206] Salerno, whose indictment was produced by then-U.S. Attorney for the Southern District of New York, Rudolph Giuliani,[207] achieved national attention and comprised "a dramatic 10-week racketeering trial" in which top Mafiosi were convicted of operating a "commission that ruled the Mafia throughout the United States."[208] Importantly, in spite of Mafiosi previously purporting that the Mafia was a "fictional construction of media and government," for the first time the Mafia Commission Trial proved the existence of the Mafia.[209] The convicted defendants included some of the notorious crime bosses of the Five Families (the euphemism for the five most powerful Mafia gangs)[210]: Anthony Salerno of the Genovese group, Anthony "Tony Ducks" Corallo of the Lucchese group, and Carmine "Junior" Persico of the Colombo group.[211] The jury verdict convicted the defendants of "conduct[ing] the affairs of 'the commission of La Cosa Nostra' in a racketeering pattern that included murders, loan-sharking, labor payoffs and extensive extortion in the concrete industry in New York City."[212] With this verdict, *Salerno* became "[one of] the most successful[] of

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204 United States v. Salerno, 631 F. Supp. 1364 (S.D.N.Y. 1986).

205 *See* RAAB, *supra* note 126, at 274–75 (referring to *United States v. Salerno* as the "Commission trial" and the "Commission case" seemingly interchangeably); JACOBS ET AL., *supra* note 155, at 79 (referring to *United States v. Salerno* and the "Commission case" seemingly interchangeably).

206 *See* Arnold H. Lubasch, *U.S. Jury Convicts Eight as Members of Mob Commission*, N.Y. TIMES (Nov. 20, 1986), https://www.nytimes.com/1986/11/20/nyregion/us-jury-convicts-eight-as-members-of-mob-commission.html (reporting that convictions of Mafia leaders "would make it easier to fight racketeering" going forward).

207 *See* RAAB, *supra* note 126, at 268 (describing how Giuliani reviewed the final draft of the indictment, which a grand jury then approved "in February 1985 at the Federal District Court in Manhattan.").

208 Lubasch, *supra* note 206.

209 *See* JACOBS ET AL., *supra* note 155, at 89.

210 RAAB, *supra* note 126, at xi.

211 Lubasch, *supra* note 206.

212 *Id.*

the hundreds of federal Cosa Nostra prosecutions during the 1980s."[213]

Salerno's facts provide noteworthy examples of evidence that were sufficient to secure RICO convictions.[214] One of the indictments in the case was conspiracy to murder in violation of RICO section 1962(d).[215] The facts show that an individual named James Fratianno testified that he and others including Salerno attended a Genovese family meeting in which the present members jointly decided to murder "John Spencer Ullo, a person engaged in loansharking for the Genovese Family."[216] A vote was taken in which everyone voted to "hit" (kill) Ullo, and this decision was described as a "contract."[217] Another government witness, Angelo Lonardo, testified that Salerno and other members of the Genovese family "issued a 'contract' in 1980 to kill John Simone who was also known as Johnny Keyes."[218] Furthermore, one of the most major pieces of evidence was a secretly taped conversation in which Salerno said, "Tell him the commission from New York—tell him he's dealing with the big boys now."[219] The defendants in the Mafia Commission Trial were convicted on all counts, and the case broke open the door that "ma[de] it easier to fight racketeering."[220]

III. MILKEN AND THE USE OF RICO TO PROSECUTE WHITE-COLLAR CRIMES

Thus far, this Note has discussed RICO as a legal tool used to prosecute gang-type organized crimes, such as those that the Mafia perpetrated. The Mafia has historically carried out street crimes, such as loan-sharking, murder, and narcotics trafficking.[221] However, RICO also has been used successfully in non-Mafia-related

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213 *See* JACOBS ET AL., *supra* note 155, at 90.

214 *See generally* United States v. Salerno, 631 F. Supp. 1364, 1367–70 (S.D.N.Y. 1986) (providing examples of recorded conversations and witness testimony used as evidence of RICO violations).

215 *See id.* at 1366–67.

216 *See id.* at 1367.

217 *Id.*

218 *Id.*

219 Lubasch, *supra* note 206.

220 *Id.*

221 *See supra* Part II.

white-collar cases, most notably in the case against the infamous junk bond trader of the 1980s, Michael Milken.[222]

In 1989, Michael Milken was a forty-two-year-old executive at the Wall Street investment banking firm, Drexel Burnham Lambert, Inc.[223] By then, he had built a billion-dollar junk bond empire that provided financing for hundreds of corporations.[224] However, a three-year investigation of Milken "uncovered substantial fraud" in his operations.[225] This resulted in a ninety-eight-count indictment against Milken, claiming that from 1984 to 1986, Milken "violated laws on securities and mail fraud, insider trading, making false statements to the Government and racketeering. The criminal racketeering charges represent[ed] the broadest use yet of [RICO] on Wall Street."[226] The indictment was largely based on testimony provided by Ivan F. Boesky, an arbitrager who had worked with Milken and Drexel Burnham Lambert on "substantial investments in several of . . . Boesky's companies."[227] At the time of Milken's indictment, Boesky was "serving a three-year sentence for filing false information with the Securities and Exchange Commission" and "agreed to cooperate with Federal authorities."[228] The indictment led to Milken pleading guilty to six felony charges.[229]

Then-U.S. Attorney for the Southern District of New York, Rudolph Giuliani, who indicted the Mafia Commission under RICO just a few years earlier,[230] brought the indictment against Milken

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222 *See Law as a Weapon*, *supra* note 123, at 94.

223 *See* Stephen Labaton, *'Junk Bond' Leader Is Indicted by U.S. in Criminal Action*, N.Y. TIMES (Mar. 30, 1989), https://www.nytimes.com/1989/03/30/business/junk-bond-leader-is-indicted-by-us-in-criminal-action.html.

224 *Id.*; *see, e.g.*, *Drexel: Prosecution and Fall*, WALL ST. J., Feb. 15, 1990, at A14, ProQuest Global Newsstream, Document ID 398156576 [hereinafter *Drexel: Prosecution and Fall*] (providing a sample of approximately 1,000 originally non-investment grade companies that were clients of Michael Milken for whom Milken raised capital).

225 Labaton, *supra* note 223 (quoting Benito Romano, Acting United States Attorney in Manhattan).

226 *Id.*

227 *Id.*

228 *Id.*

229 *It's the Economy, Stupid*, *supra* note 11, at 20.

230 *See* RAAB, *supra* note 126, at 268 (describing how Giuliani reviewed final draft of indictment, which a grand jury then approved "in February 1985 at the Federal District Court in Manhattan.").

"ostensibly to bolster 'confidence' in the 'fairness' of [financial] markets."[231] Some considered this ironic in light of Giuliani's critique of the prosecutorial focus during the Carter Administration on white-collar crimes in lieu of "organized crime, drug dealers, and other hard-core criminals."[232] Nevertheless, prior to the Milken case, Giuliani first used RICO to convict members of the securities firm Princeton/Newport Trading Partners; notably, he used RICO to "freeze the company's assets upon indictment and, essentially, put the firm out of business."[233] According to Daniel R. Fischel, Lee and Brena Freeman Professor Emeritus of Law and Business and former Dean at the University of Chicago Law School, "Giuliani saw RICO's amorphous language as a potent weapon to rubberhose and coerce guilty pleas and punish those who refused to cooperate. . . . Giuliani was able to drop the equivalent of a nuclear bomb on any target . . . ."[234]

In spite of the success of Giuliani's RICO prosecutions against Wall Street figures, it has been argued that these prosecutions led to the prolonged recovery of the economic recession in the United States that lasted from the summer of 1990 until March 1991.[235] While some explain the recession by standard notions of the business cycle,[236] some argue that there was a "Giuliani effect" that stymied the recession's recovery.[237] The Giuliani effect suggests that Congress "unwisely reacted" to Giuliani's Wall Street prosecutions by enacting the legislation known as the Financial Institutions Reform, Recovery and Enforcement Act in 1989, which demanded savings and loans associations to divest their junk bonds.[238] The Giuliani effect suggests that this legislatively compelled junk bond

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231 *It's the Economy, Stupid*, *supra* note 11, at 20–21. *See generally* Kohls, *supra* note 24 (discussing American's embrace of a "highly competitive economy" and free enterprise); Fama, *supra* note 24, at 383 (explaining that an efficient market exists when "prices always 'fully reflect' available information").

232 *It's the Economy, Stupid*, *supra* note 11, at 21 (quoting Daniel R. Fischel, Lee and Brena Freeman Professor Emeritus of Law and Business and former Dean at the University of Chicago Law School).

233 *Id.* at 22–23.

234 *Id.* at 23.

235 *Id.* at 20–21.

236 *Id.* at 29.

237 *Id.* at 31.

238 *Id.* at 31, 33–34.

"dump" resulted in "a steep drop in the prices of high-yield bonds, as [savings and loans associations] sought to unload them into the market."[239] Fischel explains that "[t]he government's attempted purge of the high-yield debt market created a 'credit crunch'—the inability of borrowers to obtain financing for profitable investments—which contributed to the length and severity of th[e] recession."[240] Alan Greenspan, the Federal Reserve Chairman at the time, agreed that a faulty "statutory framework" was partially to blame for the credit crunch.[241]

IV. THE VIABILITY OF USING RICO TO PROSECUTE SPOOFING

A. *Pros of Using RICO in Spoofing Cases*

1. EASIER PROSECUTION OF SPOOFERS

It is clear that prosecutors have historically had difficulty in successfully prosecuting spoofing, and the changes to and different uses of legislation demonstrate the government's attempts to invigorate spoofing's prosecution. In 2010, Dodd-Frank simplified the elements needed to establish spoofing in a commodities spoofing case by promulgating a stand-alone spoofing provision containing a concise definition of spoofing that was relatively easy to prove compared to the pre-Dodd-Frank or current securities law standard that requires the more difficult showing of price manipulation.[242] Nevertheless, *United States v. Flotron* demonstrates that conventional spoofing prosecutorial tools, including the stand-alone anti-spoofing provision of the CEA and the securities and commodities fraud statute, are not indomitable in securing convictions.[243]

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239 *Id.* at 33–34.

240 *Id.* at 34.

241 *Id.*

242 *See* Sar, *supra* note 4, at 412 (stating that price manipulation pleading standard with respect to spoofing is "more onerous" than that established by stand-alone anti-spoofing provision of CEA).

243 *See* United States v. Flotron, No. 3:17-CR-00220, 2018 WL 1401986, at *1, *5 (D. Conn. Mar. 20, 2018) (denying motion to dismiss indictment because indictment adequately alleged facts to establish commodities fraud via spoofing); *Ex-UBS Trader Acquitted*, *supra* note 7 (reporting that alleged spoofer was acquitted of conspiracy to commit commodities fraud).

However, some have argued that RICO, unlike the spoofing-related commodities laws and securities laws, does not require a showing of intent,[244] an element that frequently seems to be the crutch in prosecutors' attacks on spoofers.[245] While it may be contentious to assert that RICO claims do not require intent,[246] RICO in fact was specifically designed to simplify prosecutions on the evidentiary front[247] by requiring easier-to-prove elements,[248] such as a pattern of racketeering activity (only two racketeering acts within ten years of each other)[249] and an enterprise (a term with a broad definition and a broad reading by courts).[250] *United States v. Smith* exemplifies how prosecutors can take advantage of RICO's easier-to-prove elements in spoofing cases. By equating the *Smith* traders' alleged spoofing to racketeering activities prohibited under RICO section 1961(1), specifically wire fraud affecting a financial institution and bank fraud, prosecutors could effectually bring charges of section

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244 *Law as a Weapon*, *supra* note 123, at 88. *But see* Civil RICO Manual, *supra* note 182, at 2 (distinguishing civil RICO suits from criminal RICO suits in that, unlike in a criminal RICO suit, a civil RICO suit need not prove criminal intent).

245 *See* Sar, *supra* note 4, at 412, 414 (providing an in-depth discussion about the disparity between commodities laws and securities laws in the degree of intent required to prove spoofing) (stating that the anti-spoofing provision of the CEA does not solve the "evidentiary difficulties" associated with establishing intent); *Fed's Spoofing Case*, *supra* note 2 (quoting law professor Peter Henning, who states that a conviction in *Smith* could make it possible for prosecutors to not have to deal with the definition of spoofing, which includes intent).

246 *See General Intent Crimes vs. Specific Intent Crimes*, NOLO, https://www.nolo.com/legal-encyclopedia/general-vs-specific-intent.html (last visited Nov. 18, 2020) (explaining that "overwhelming majority of crimes" require intent); *see also* Civil RICO Manual, *supra* note 182, at 2 (distinguishing civil RICO suits from criminal RICO suits in that, unlike in a criminal RICO suit, a civil RICO suit need not prove criminal intent).

247 *See* Statement of Findings and Purpose, *supra* note 136, at 923 (stating how RICO "strengthen[ed] the legal tools in the evidence-gathering process" to "eradicat[e] . . . organized crime"); RAAB, *supra* note 126, at 177 (describing how RICO "simplif[ied] the task" of prosecuting the Mafia by requiring prosecutors to show easier elements such as a pattern of racketeering activity and an enterprise).

248 *See* RAAB, *supra* note 126, at 177 (describing how RICO "simplif[ied] the task" of prosecuting the Mafia by requiring prosecutors to show easier elements such as a pattern of racketeering activity and an enterprise).

249 *See* 18 U.S.C. §§ 1961–1962.

250 *See id.*; Criminal RICO Manual, *supra* note 109, at 70 (explaining how "RICO's [d]efinition of [e]nterprise [b]roadly [e]ncompasses [m]any [t]ypes of [e]nterprises").

1962 violations.[251] This move complies with the holdings of *United States v. Coscia* and *Flotron*, which establish that spoofing can qualify as fraud.[252] Therefore, a case like *Smith* demonstrates savvy prosecution of spoofing because the prosecutors, in bringing charges under RICO, availed themselves of the easiest-to-prove elements fathomably applicable to spoofing.

What is more, some argue that RICO prosecutions have a greater chance of success than conventional spoofing prosecutions because they are more "straightforward"[253] and digest[ible]"[254] to a lay jury.[255] RICO prosecutions involve more familiar, "intuitive" concepts such as "criminal enterprises" and racketeering acts that are "easier for a jury to understand."[256] This prosecutorial avenue is distinct from conventional spoofing prosecutions, which may involve complexities such as "expert opinions who use advanced market theory"[257] that not only may be incomprehensible to a lay jury, but also may "bor[e] the jury to death."[258]

In spite of concerns that prosecutors have wrongly wielded RICO in cases that are disparate from RICO's anti-Mafia, anti-organized crime legislative intent,[259] spoofing caselaw appears to

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[251] *Smith* Indictment, *supra* note 34, at 7–8.

[252] *See* United States v. Coscia, 866 F.3d 782, 803 (7th Cir. 2017) (affirming a jury conviction that Coscia's spoofing activities constituted commodities fraud as distinguishable from spoofing under stand-alone anti-spoofing provision of CEA); United States v. Flotron, No. 3:17-CR-00220, 2018 WL 1401986, at *1, *5 (D. Conn. Mar. 20, 2018) (denying a motion to dismiss indictment on grounds that indictment alleged facts sufficient to establish a claim of conspiracy to commit commodities fraud).

[253] *See Fed's Spoofing Case*, *supra* note 2.

[254] *See* Sar, *supra* note 4, at 414.

[255] *See id.*; *Fed's Spoofing Case*, *supra* note 2.

[256] *See Fed's Spoofing Case*, *supra* note 2.

[257] *See* Sar, *supra* note 4, at 414.

[258] *See Fed's Spoofing Case*, *supra* note 2 (quoting Gregory Kaufman, a partner at global law practice Eversheds Sutherland.

[259] *See* Bradley, *supra* note 124, at 838 ("The broad language of RICO and the judicial zeal in enforcing it have caused many individuals to be prosecuted whom Congress clearly had no intention of reaching."); *Law as a Weapon*, *supra* note 123, at 86 (stating that "RICO has metastasized from its original intent"); *Drexel: Prosecution and Fall*, *supra* note 224 (taking issue with using RICO to prosecute Michael Milken because it "morally equate[d] investment banking with loan sharking and murder."); *Smith* Motion to Dismiss Indictment, *supra* note 111, at 45–46 (explaining how the RICO conspiracy charge is inappropriate given that

portray spoofing as comporting with the kind of crime that the black-letter law of RICO seeks to stop.[260] RICO contextualizes its legislative purpose by providing some background information about Congress's concern with organized crime:

> The Congress finds that . . . organized crime in the United States is a *highly sophisticated* . . . and *widespread* activity that *annually drains billions of dollars* from America's economy . . . . [O]rganized crime activities in the United States *weaken the stability of the Nation's economic system, harm innocent investors and competing organization, interfere with free competition,* [and] *seriously burden interstate and foreign commerce* . . . . [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 or remedies to bear on the unlawful activities of those engaged in organized crime . . . .[261]

Correspondingly, spoofing is a highly sophisticated[262] and widespread[263] practice that circumvents and subverts free competition,[264]

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spoofing is too dissimilar from "the traditional organized crime syndicates that prompted Congress to enact RICO"). *But see* United States v. Turkette, 452 U.S. 576, 580, 593 (1981) ("If the statutory language is unambiguous, in the absence of a 'clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.' . . . [the statute's language is its] most reliable evidence of its intent"); Organized Crime Control Act of 1970 § 904(a), 84 Stat. at 947 (emphasis added) ("The provisions of this title shall be *liberally construed* to effectuate its remedial purposes.").

260 *See 3 JPMorgan Traders Accused*, *supra* note 7.

261 Statement of Findings and Purpose, *supra* note 136, at 922–23 (emphasis added).

262 *See* United States v. Coscia, 866 F.3d 782, 786–89 (7th Cir. 2017) (exhibiting the sophisticated nature of spoofing, which can include advanced, specifically designed computer software and hundreds of thousands of trades).

263 *See* Sanders, *supra* note 3, at 519.

264 *See Coscia*, 866 F.3d at 787–88, 797 (explaining that, unlike legitimate high-frequency trading that "tak[es] advantage of natural market events," spoofing acts to artificially move prices to create "an *illusion* of market movement.").

can inflict millions of dollars in losses,[265] and can even result in an economic meltdown, which this Note will later discuss.[266] Also, the threat of spoofing seems to persist due to "defects in the evidence-gathering process"[267] related to difficulties in proving intent and viably using trade data analysis as evidence.[268] Considering the overlap between spoofing's context and RICO's language, spoofing seems to constitute organized crime that RICO seeks to forbid.[269]

2. PREVENTION OF THE MAFIA'S MOVE TO WHITE-COLLAR CRIMES

United States v. Turkette states that "RICO [is] both *preventive* and remedial."[270] There is concern regarding RICO's application outside of its legislative intent of stopping organized crime like that carried out by the Mafia.[271] However, using RICO to prosecute spoofing—a crime that presumably is not usually carried out by Mafiosi and may not fit the stereotypical description of a Mafia crime —may actually act to prevent Mafia crime. With the downfall of the Mafia's street rackets, the Mafia has attempted to participate in white-collar crimes, such as stock swindles.[272] With this move toward white-collar crimes, spoofing may appeal to the Mafia, especially because it is difficult to track; the Mafia's operations

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[265] *See, e.g.*, *id.* at 788 (explaining that Coscia's spoofed trades earned him $1.4 million).

[266] *See infra* Part IV(B)(1).

[267] *See* Sar, *supra* note 4, at 414 (explaining evidentiary difficulties in proving intent in spoofing cases). *See generally* Statement of Findings and Purpose, *supra* note 136, at 923.

[268] *See Ex-UBS Trader Acquitted*, *supra* note 7 (reporting that Flotron's attorneys condemned government's "prosecution by statistics").

[269] *See 3 JPMorgan Traders Accused*, *supra* note 7 (quoting Brian Benczkowski, chief of the DOJ's Criminal Division) (asserting that the spoofing seen in *Smith* "is precisely the kind of conduct that the RICO statute is meant to punish").

[270] United States v. Turkette, 452 U.S. 576, 593 (1981) (emphasis added).

[271] *See Drexel: Prosecution and Fall*, *supra* note 224 (expressing displeasure toward Giuliani's use of RICO against Milken despite RICO's legislative intent contrasting with nature of Milken's crimes); *id.* ("It didn't matter that the RICO law was designed by Congress explicitly for the Mafia or that this would somehow equate investment banking with loan sharking and murder."); *Law as a Weapon*, *supra* note 123, at 86 ("RICO has metastasized from its original intent, which was to deal more effectively with the perceived problem of organized crime.").

[272] Kocieniewski, *supra* note 111.

historically were "clandestine" and usually did not leave a "paper trail[]."[273] However, because RICO has crippled the Mafia in the last forty years,[274] successful RICO prosecutions of spoofing may hit a sore spot and deter the Mafia from engaging in spoofing.

B. *Cons of Using RICO in Spoofing Cases*

1. LONE WOLVES

While RICO may be a powerful tool to overcome evidentiary difficulties against spoofers, it might not solve the problem altogether. A valid RICO indictment (specifically a RICO indictment pursuant to 18 U.S.C. § 1962(c)–(d), which are the sections to which a spoofing violation would be amenable)[275] must satisfy two important elements: (1) that there was an *enterprise*, which "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity";[276] and (2) that the defendant was a "*person* employed by or associated with [the] enterprise."[277] However, while an individual defendant can constitute an enterprise in himself,[278] the U.S. Supreme Court held in *Cedric Kushner Promotions, Ltd. v. King* that an individual defendant cannot simultaneously comprise the enterprise *and* the person who engaged with the enterprise; this holding illustrates the "distinctness principle."[279] Importantly, the

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[273] *See* RAAB, *supra* note 126, at xiii, xv ("[T]here were no clear paper trails incriminating mobsters in money skimming . . . . Accurate, documented data about the Mafia's clandestine activities usually is difficult to verify.").

[274] *Origins of the Mafia*, *supra* note 12 (explaining that since the 1980s, "hundreds of high-profile arrests" using "tough anti-racketeering laws" have weakened Mafia).

[275] *See Smith* Indictment, *supra* note 34, at 7, 31.

[276] *See* 18 U.S.C. §§ 1961(4), 1962.

[277] *See* 18 U.S.C. §§ 1961(3), 1962.

[278] *See* Salinas v. United States, 522 U.S. 52, 65 (1997).

[279] *See* Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 161–63 (2001).

This Note focuses mainly on criminal RICO and the actions of federal prosecutors. Therefore, it should be noted that *Cedric* is a civil RICO case. A civil RICO case's standard of proof—proof by a preponderance of the evidence—is lower than a criminal RICO case's standard of proof—proof beyond a reasonable doubt. *See* Spoofing Practical Law, *supra* note 13 (stating standard of proof for civil RICO cases and criminal RICO cases, respectively). Because of the difference in

distinctness principle would maintain that an "enterprise that is . . . simply the same person referred to by a different name" is not distinct from the "person," and a RICO conviction is thereby impossible.[280] However, if there is only one individual defendant and the enterprise is, for example, a corporation—"a legally different entity" from the "person"—then the "person" and "enterprise" are distinct, and a RICO conviction is thereby possible.[281]

This poses a twofold problem to the government in prosecuting spoofing. Firstly, the government cannot use RICO to prosecute individual spoofers acting singularly and who are not "employed by or associated with" a distinct, separate enterprise such as a

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standards of proof between civil and criminal RICO cases, one could argue that holdings from a civil RICO case could not be applied to a criminal RICO analysis, and vice versa. However, because RICO specifically provides for criminal penalties and civil remedies, and the holding from *Cedric* concerns only the establishment of elements—which criminal and civil RICO cases share (except for criminal intent, *see* Civil RICO Manual, *supra* note 182, at 2, 38)—it is likely that application of the *Cedric* holding to a criminal RICO analysis would be acceptable, and this Note does so here. Indeed, different jurisdictions have cited the *Cedric* holding in criminal RICO cases. *See, e.g.*, United States v. Bergrin, 650 F.3d 257, 266, 271 (3rd Cir. 2011) (applying *Cedric*'s distinctness principle holding in determining that "the indictment . . . alleged facts sufficient to charge [defendants] with RICO violations, [and] it should have survived a motion to dismiss" in a criminal case); United States v. Mongol Nation, 639 Fed. App'x 637, 638 (9th Cir. 2017) (applying *Cedric*'s distinctness principle holding to its own holding in a criminal case that district court erred in ruling that the defendant "person" and relevant enterprise were "not sufficiently distinct."); United States v. Knox, No. CR. 7:02CR00009, 2003 WL 22019046, at *2–3 (W.D. Va. Aug. 22, 2003) (applying *Cedric*'s distinctness principle holding to its own holding in a criminal case that the defendant was a person distinct from the enterprise); *cf. Smith* Motion to Dismiss Indictment, *supra* note 111, at 37–45 (citing a mix of civil and criminal RICO caselaw in arguing for the dismissal of the RICO conspiracy charge).

The reader of this Note may not agree that such a civil RICO holding may apply to a criminal RICO analysis; however, some jurisdictions have made essentially the same holding in criminal cases as the holding from *Cedric* without actually citing *Cedric*. *See, e.g.*, United States v. DiCaro, 772 F.2d 1314, 1319 (7th Cir. 1985); United States v. Benny, 786 F.2d 1410, 1415–16 (9th Cir. 1986). Nevertheless, regardless of how the reader views the issue presented in this footnote, there are at least some jurisdictions that hold that, for the purposes of RICO, the same entity cannot simultaneously comprise the "person" and the "enterprise".

[280] *See Cedric*, 533 U.S. at 161 (internal quotation marks omitted).

[281] *See id.* at 161, 163.

corporation because, for the purpose of RICO, a defendant cannot simultaneously comprise the "enterprise" and the "person" engaging with the enterprise.[282] Secondly, while it is possible that cases exist in which prosecutors claim an individual constitutes an enterprise, it is uncommon.[283] These two issues together potentially portend that the government will have a bias toward investigating and prosecuting only groups of spoofers, especially if one considers RICO's historical use of prosecuting the Mafia and high-profile traders and firms and the possibility that RICO becomes a successful weapon for spoofing prosecutions. As a result, the government may incidentally let spoofers acting solo, to whom this Note will refer as lone wolves, carry on their crimes right under its nose.[284]

Just because lone wolves do not necessarily operate syndicate-style at a big-name bank on the top floor of a skyscraper does not mean that the harm they can inflict is negligible. For example, the conditions that resulted in the "Flash Crash" of 2010, in which the Dow Jones Industrial Average "fell 1000 points in a matter of minutes," were caused in large part by a UK-based trader named Navinder Sarao.[285] Sarao was operating his "one-man trading firm"[286] *out of his home*,[287] placing spoofed E-Mini S&P near month futures contracts at "exceptionally" high frequency.[288] This case demonstrates how one singular spoofer working out of his home can

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[282] *See id.* at 161.

[283] *See Salinas*, 522 U.S. at 65; *cf.* United States v. Elliott, 571 F.2d 880, 898 n.18 (5th Cir. 1978) (explaining that, although the court treated a group of individual defendants as an enterprise in accordance with the government's "theory of the case," the facts of the case could have allowed the court to view one particular individual defendant as the enterprise "and the other defendants as persons merely 'employed by or associated with' the enterprise.").

[284] *See, e.g.*, Sar, *supra* note 4, at 415–16 (explaining how the difficulties of monitoring tremendous amounts of trade data may cause the government to bring actions "disproportionate[ly]" against high-volume traders).

[285] *See* Sanders, *supra* note 3, at 517, 521.

[286] *See id.* at 521.

[287] Viswanatha, *supra* note 8.

[288] CFTC Sarao Press Release, *supra* note 8 (Sarao's trading was "exceptionally active" on the day of the Flash Crash). It is important to note that Navinder Sarao was presumably spoofing through his company, Nav Sarao Futures Limited PLC. *See id.* Therefore, per *Cedric*'s holding, a RICO charge against Sarao would likely be adequate with respect to satisfying the distinctness principle. *See id.*; Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 161, 163 (2001).

have an extreme impact on markets. To serve the concerns of Congress in enacting RICO, the government should not focus solely on traders working at banks or in groups à la syndicate and instead dedicate sufficient resources to lone wolves like Sarao.

2. ADAPTATION

With the success of RICO spoofing prosecutions, spoofers will likely innovate and find ways to avoid RICO indictment.[289] Spoofers may intuit that working alone may improve their chances of avoiding indictment, as discussed earlier.[290] Spoofers working in groups may try to discover and develop new ways of coordinating their spoofing activities that the government cannot currently detect. Compare this plan of action with that of the spoofers in *Smith*. The spoofers working *at the same bank* corresponded about their spoofing activities over "electronic chat,"[291] which evidently was detrimentally conspicuous considering prosecutors secured and presented it in their indictment.[292] Indeed, spoofers will adjust to the errors of defendants prosecuted under RICO and adapt their activities to avoid detection. This adaptation may include working with co-conspirators at separate banks,[293] corresponding over private VPNs that would "enable[] [spoofers] to encrypt data [they] send[] over the network and protect the identity of [their] . . . [IP] address[es]"[294] while operating on the Internet, corresponding in code,

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[289] *Cf.* Mark, *supra* note 56, at 455 (suggesting that that an alleged lower detection of spoofing has occurred possibly because spoofers "have become more careful about concealment."); Sar, *supra* note 4, at 415 (explaining how the CEA's stand-alone spoofing prohibition may force traders to change their algorithms to avoid legal trouble); Lucy Ren, *High Profile 'Spoofing' Cases Put Traders on Edge*, MEDILL REPS. CHI. (May 22, 2015), https://news.medill.northwestern.edu/chicago/high-profile-spoofing-cases-put-traders-on-edge/ ("Traders are on notice and looking for ways to avoid even the appearance of being market manipulators as prosecutors and regulators crack down on spoofing").

[290] *See supra* Part IV(B)(1).

[291] *Smith* Indictment, *supra* note 34, at 29–30.

[292] *See id.*

[293] *Cf. id* (showing alleged spoofers who worked at same bank communicating over electronic chat).

[294] Larry Greenemeier, *Seeking Address: Why Cyber Attacks Are So Difficult to Trace Back to Hackers*, SCI. AM. (June 11, 2011), https://www.scientificamerican.com/article/tracking-cyber-hackers/.

and even developing unprecedented spoofing or algorithmic strategies that are less detectable.

C. *Recommendation*

Some have advocated greater and more sophisticated use of trade data in making cases against spoofers[295] in light of prior difficulties in tracking and analyzing tremendous amounts of trade data.[296] Steps to achieve this goal have been taken. The SEC's Market Abuse Unit developed a platform for trade data analysis that was a "technological breakthrough" in "uncover[ing] and detect[ing] patterns of suspicious activity."[297] FINRA also has developed data tools that have strengthened the SEC's efforts in tracking and analyzing trade data.[298] However, as sophisticated as it is becoming,[299] trade data analysis alone may not suffice to solve the problem of spoofing. FINRA only assists the SEC,[300] leaving the CFTC, which oversees a commodities market that is undeniably vulnerable to

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295 *See 3 JPMorgan Traders Accused*, *supra* note 7 (noting a "push for prosecutors to use big data to make [spoofing] cases"); *Ex-UBS Trader Acquitted*, *supra* note 7 (explaining a defense attorney's critique of using trade data analysis to engage in "prosecution by statistics").

296 *See* Sar, *supra* note 4, at 415–16.

297 *See* Todd Ehret, *SEC's Advanced Data Analytics Helps Detect Even the Smallest Illicit Market Activity*, REUTERS (June 30, 2017, 1:11 PM), https://www.reuters.com/article/bc-finreg-data-analytics/secs-advanced-data-analytics-helps-detect-even-the-smallest-illicit-market-activity-idUSKBN19L28C.

298 *See id.* ("Like the SEC's [Market Abuse Unit], FINRA's data-driven surveillance includes sophisticated analysis of trading activity across U.S. equity and options markets surrounding material news announcements for evidence of potential insider trading."); Sanders, *supra* note 3, at 528.

299 *Technology*, FINRA, *supra* note 42.

300 *See id.* (explaining that FINRA's technology helps "accurately monitor the U.S. equities markets") (failing to make any reference to the CFTC or commodities); Sanders, *supra* note 3, at 528 (explaining how FINRA's "data tools . . . have enabled the SEC to track orders and trading activity" to catch spoofers) (failing to make any reference to the CFTC or commodities).

spoofing,[301] presumably inferiorly equipped to catch spoofers,[302] although software developed by third-parties helps detect commodities spoofing.[303] Juries have acquitted alleged spoofers despite sufficient evidence for an adequate commodities fraud indictment,[304] and members of the legal community have condemned the use of trade data evidence as "prosecution by statistics."[305]

Where the trade data analysis is not enough, informants (colloquially known as "stool pigeons")[306] and cooperating witnesses

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[301] *See generally* United States v. Coscia, 866 F.3d 782, 790, 802 (7th Cir. 2017) (demonstrating how Coscia's spoofs caused substantial losses to other traders); United States v. Flotron, No. 3:17-CR-00220, 2018 WL 1401986, at *1–2 (D. Conn. Mar. 20, 2018) (describing allegations of conspiracy to commit commodities fraud via spoofing); *Smith* Indictment, *supra* note 34 (alleging RICO conspiracy via spoofing in precious metals market); Viswanatha, *supra* note 8 (stating that convicted commodities trader played significant role in causing the Flash Crash).

[302] *See* Mark, *supra* note 56, at 451 (stating that the CFTC is "technologically challenged."). Similar to how the SEC works with the self-regulatory organization FINRA, the CFTC works with the self-regulatory organization National Futures Association ("NFA"). *See About NFA*, NFA, https://www.nfa.futures.org/about/index.html (last visited Nov. 18, 2020). While the NFA "has provided regulatory services to designated contract markets . . . [and] surveillance activities with the majority of the [swap executions facilities] registered with the CFTC," *see* Edward Dasso, III, *Market Regulation: Designed Contract Markets and Swap Execution Facilities*, NFA, https://www.nfa.futures.org/market-regulation/index.html (last visited Nov. 18, 2020), the research for this Note has not come across any source that indicates NFA employs FINRA-like technological sophistication in detecting illegal commodities trading practices.

[303] Mark, *supra* note 56, at 450.

[304] *See Ex-UBS Trader Acquitted*, *supra* note 7 (reporting that alleged spoofer was acquitted of conspiracy to commit commodities fraud); Flotron Judgment of Acquittal, *supra* note 90; *Flotron*, 2018 WL 1401986, at *1, *5 (denying a motion to dismiss indictment on grounds that indictment alleged facts sufficient to establish a claim of conspiracy to commit commodities fraud).

[305] *See Ex-UBS Trader Acquitted*, *supra* note 7 (reporting that Flotron's attorney condemned government's "prosecution by statistics").

[306] Kara Kovalchik, *Why Is an Informant Called a "Stool Pigeon"?*, MENTAL FLOSS (Aug. 26, 2016), https://www.mentalfloss.com/article/83619/why-informant-called-stool-pigeon (describing term "stool pigeon" as a "decoy . . . who would infiltrate a criminal enterprise and then report back to law enforcement personnel with their findings just to curry favor with the local cops."). *But see* Jon Shazar, *Racketeering Apparently Easier to Prove than Spoofing*, DEALBREAKER (Oct. 25, 2019), https://dealbreaker.com/2019/10/jpmorgan-metals-spoofing (referring to cooperating witnesses in *Smith* as "stool pigeons"). It appears that the

(formally known as "cooperators") could play a significant role in RICO prosecutions against spoofing.[307] In many of the major moments in RICO's history, cooperating witnesses in particular were critical to convicting the individuals charged. In the Mafia cases, including the Mafia Commission Trial, cooperating witnesses provided incriminating testimony as to activities of the accused, such as Joe Massino against Vinny Basciano[308] or Gaspare Valenti against Vincent Asaro.[309] Cooperating witnesses have played roles in white-collar RICO prosecutions, too. In the case of Michael Milken, Ivan Boesky's testimony was a critical factor in achieving conviction.[310] Indeed, the prosecutors in the pioneering *Smith* case appear to agree cooperating witnesses could play a crucial role in spoofing cases. The *Smith* prosecutors have secured the cooperation of two former JPMorgan precious metals traders, John Edmonds and Christian Trunz, whose testimony will "help explain how the

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previous citation's source misused the term "stool pigeons" to refer to cooperating witnesses. An informant and a cooperating witness are functionally different, *see* Daniel Richman, *Informants and Cooperators*, *in* 2 REFORMING CRIMINAL JUSTICE 279, 281, 286 (Erik Luna ed., 2017), and "stool pigeon" is meant to refer specifically to an informant.

[307] *See generally* Richman, *supra* note 306, at 279–99 (distinguishing and defining "informants" and "cooperators," explaining how informants typically work with police by aiding in investigations and cooperators typically work with prosecutors by testifying in trials, and stating that "there is considerable overlap in these categories . . . . [M]any informants formaliz[e] their deals and becom[e] cooperators"). *But cf.* LEWIS, *supra* note 19, at 244–59 (explaining that the prosecution's failure to bring a quality expert witness "who actually knew anything at all about computers or the high-frequency trading business" actually aided prosecution of Sergey Aleynikov, an ex-programmer for Goldman Sachs, presumably because jurors—unversed in computer programming and high-frequency trading—did not receive a proper explanation of Aleynikov's actions and their implications, which prevented them from having the understanding and knowledge necessary to acquit him).

[308] *See* Massino Cooperation, *supra* note 195 (calling Massino "the government's star witness" and explaining how Massino became a cooperating witness for the government after his 2004 conviction of numerous crimes).

[309] *See* Clifford, *supra* note 150 (explaining how Valenti committed crimes with Asaro and then began "cooperating with the government").

[310] *See* Labaton, *supra* note 223 (explaining that Boesky "agreed to cooperate with Federal authorities" while "serving a three-year sentence for filing false information with the Securities and Exchange Commission.").

reported spoofing was accomplished . . . [and] in framing the case for the jury as one involving deception and not just spoofing."[311]

Therefore, because of the value of cooperating witnesses in the RICO caselaw and their inclusion in the first-ever RICO spoofing case, it would likely be wise for prosecutors in future RICO spoofing cases to allocate some of their energy away from trade data analysis and toward finding and negotiating with cooperating witnesses. RICO's witness protection program offers significant incentives and protection to informants and cooperating witnesses,[312] and prosecutors should ensure that they use the program as a bargaining chip when negotiating with potential cooperating witnesses.[313] What is more, the CFTC and SEC have similar whistleblower programs that offer incentives and protection for information about spoofing,[314]

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[311] Peter J. Henning, *Racketeering Law Makes Its Return to Wall Street*, N.Y. TIMES (Oct. 24, 2019), https://www.nytimes.com/2019/10/24/business/dealbook/racketeering-wall-street.html; Dawn Giel & Dan Mangan, *Three J.P. Morgan Precious Metals Traders Charged as Criminal Probe Continues*, CNBC (Sept. 16, 2019, 12:41 PM), https://www.cnbc.com/2019/09/16/three-jp-morgan-precious-metals-traders-charged-in-criminal-probe.html (stating that John Edmonds and Christian Trunz were "former precious traders at J.P. Morgan"); Dawn Giel, *Another Ex-JP Morgan Precious Metals Trader Pleads Guilty to 'Spoofing,' Is Cooperating with Feds*, CNBC (Aug. 20, 2019, 3:56 PM), https://www.cnbc.com/2019/08/20/another-ex-jp-morgan-precious-metals-trader-pleads-guilty-to-spoofing.html.

[312] *See* RAAB, *supra* note 126, at 179.

[313] *See* Richman, *supra* note 306, at 281, 287 ("Cooperator testimony thus must be obtained through explicit (although sometimes implicit) negotiation.").

[314] *See* Sar, *supra* note 4, at 410–11; *Program Overview*, CFTC Whistleblower Program, https://www.whistleblower.gov/overview (last visited Nov. 18, 2020) (discussing how CFTC monetarily awards whistleblowers and how employers may not impede whistleblowers' reports nor retaliate against them for providing such reports); Christina Parajon Skinner, *Whistleblowers and Financial Innovation*, 94 N.C. L. REV. 874, 880–81 (2016) (describing the three incentives for participating in SEC whistleblower program: "cash bounty," "protection from workplace retaliation," and "confidentiality"); *Office of the Whistleblower*, SEC, https://www.sec.gov/whistleblower [hereinafter SEC Office of the Whistleblower] (June 4, 2020) (discussing value of whistleblowers' information and how monetary awards may be given); Jason Zuckerman & Matthew Stock, *Can I Submit Anonymous Tip to SEC Whistleblower Office? Chapter 2*, 7 NAT. L. REV., no. 170, June 19, 2017, https://www.natlawreview.com/article/can-i-submit-anonymous-tip-to-sec-whistleblower-office-chapter-2 ("[T]he SEC is committed to protecting whistleblowers' identities, to the fullest extent possible. . . . There are limits, however"); Jason Zuckerman & Matthew Stock, *What Employment*

for these agencies view whistleblowers as key to bringing enforcement actions against perpetrators of illegal trading practices.[315] Many in the trading community may be familiar with and thereby trusting of these agencies' whistleblower programs, a notion of which prosecutors should take advantage when discussing with potential cooperating witnesses the viability and worth of cooperating with RICO's witness protection program.

While witnesses in spoofing cases before *Smith* typically were not cooperating witnesses who exchanged testimony for leniency, they still provided great value in prosecutions. For example, in *Coscia*, the trade data alone may have been insufficient to secure Coscia's convictions had John Redman not interpreted the trade data and had Jeremiah Park not explained the design of Coscia's algorithmic trading programs.[316] Thus, by adding cooperating witnesses who possess vital information to the usual, already valuable set of witnesses, prosecutors could further increase their chances of success in RICO spoofing cases.

Protections Are Available for SEC Whistleblowers? Chapter 3, 7 NAT. L. REV., no. 177, June 26, 2017, https://www.natlawreview.com/article/what-employment-protections-are-available-sec-whistleblowers-chapter-3 (explaining that SEC Whistleblower Program protects whistleblowers from retaliation from their employers as a result of whistleblowers' notice to SEC "about a potential securities-law violation.").

315 *See* SEC Office of the Whistleblower, *supra* note 314 ("Assistance and information from a whistleblower . . . can be among the most powerful weapons in the law enforcement arsenal of the Securities and Exchange Commission."); Press Release, CFTC, CFTC Announces Approximately $7 Million Whistleblower Award (Sept. 27, 2019), https://www.cftc.gov/PressRoom/PressReleases/8022-19#:~:text=Washington%2C%20DC%20%E2%80%93%20The%20U.S.%20Commodity,Commodity%20Exchange%20Act%20(CEA) (quoting CFTC Director of Enforcement James McDonald) (stressing "how integral whistleblowers have become to [the CFTC's] enforcement efforts"). *See generally* Skinner, *supra* note 314, at 889–903 (describing benefits of whistleblower programs "[i]n the financial regulation context").

316 *See* United States v. Coscia, 866 F.3d 782, 788–89, 797–98 (7th Cir. 2017) (showing evidentiary importance of Jeremiah Park's and John Redman's testimonies in Michael Coscia's spoofing and commodities fraud convictions).

CONCLUSION

RICO may be the answer prosecutors have been searching for to achieve consistent justice over spoofing. While prosecutors should take advantage of the new technology that is facilitating trade data analysis to identify spoofing, they should also consider the methods that helped win RICO prosecutions in the days before spoofing, namely RICO's witness protection program and the breaking of omertà. If RICO successfully convicted Mafiosi hiding behind the code of omertà, there is no reason to believe that RICO will not successfully convict spoofers hiding behind the code of algorithms as long as prosecutors take the right measures and meaningfully consider all of the consequences.