Article

Examining the Present Security-Liberty Nexus: Civil RICO—Remedy to Procure Security or Threat to Civil Liberty?

Marvin L. Astrada 357

Notes

Excusing “Women of Circumstance”: Redefining Conspiracy Law to Hold Culpable Offenders Accountable

Amanda E. Smallhorn 409

“Cast Me Not Away!”: The Plight of Modern Day Romeo and Juliet

Kelsey Dumond 455
QUINNIPIAC UNIVERSITY SCHOOL OF LAW

FACULTY AND OFFICERS OF ADMINISTRATION
FOR THE ACADEMIC YEAR 2017–2018

OFFICERS AND ADMINISTRATION
John L. Lahey, B.A., M.A., University of Dayton; M.A., Columbia University; Ph.D., University of Miami; President, Quinnipiac University
Mark A. Thompson, B.S., Bentley College; M.B.A., Western New England College; Ph.D., Georgia State University; Executive Vice President and Provost, Quinnipiac University
Jennifer Gerarda Brown, A.B., Bryn Mawr College; J.D., University of Illinois; Dean, School of Law; Professor of Law
Jeffrey A. Cooper, A.B., Harvard University; J.D., Yale University; LL.M., New York University; Associate Dean for Faculty Research and Development; Professor of Law and Director of the Tax Concentration
Neal R. Feigenson, B.A., University of Maryland; J.D., Harvard University; Professor of Law and Associate Dean for Academic Affairs
Kathy A. Kuhar, B.S., Eastern Connecticut State University; J.D., Quinnipiac University School of Law; Associate Dean of Students
Shelley R. Sadin, B.A. Yale University; J.D., Georgetown University; Associate Dean of Professional and Career Development
Adam Barrett, B.A., University of New Hampshire; J.D., Ohio Northern University—Claude W. Pettit College of Law; Associate Vice-President and Dean of Law Admissions

FACULTY EMERITI
Melanie B. Abbott, B.A., Bates College; M.S., Syracuse University; J.D., University of Bridgeport; Professor Emeritus of Law
Frederick Tse-shyang Chen, J.D., University of Chicago; LL.B., Soochow University; LL.M., Yale University; Professor of Law Emeritus
Susan R. Dailey, B.A., M.A., Ph.D., Catholic University of America; Professor of Legal Writing Emeritus
Mary Ferrari, B.A., University of Notre Dame; J.D., Cornell University; LL.M., New York University; Professor of Law Emeritus
Charles A. Heckman, A.B., Brown University; J.D., University of Chicago; Professor of Law Emeritus
Joseph Hogan, A.B., St. Joseph’s University; J.D., Widener University School of Law; Associate Professor of Legal Skills Emeritus
Richard Litvin, A.B., Dickinson College; J.D., Temple University; LL.M., Yale University; Associate Professor of Law Emeritus
Martin B. Margulies, B.A., Columbia University; LL.B., Harvard University; LL.M., New York University; Professor of Law Emeritus
Elizabeth P. Marsh, A.B., Harvard University; J.D., New York University; Professor of Law and Co-Director of the Criminal Law and Advocacy Concentration
John T. Morgan, B.A., Southwest Missouri State University; J.D., Washington University; LL.M., Harvard University; Professor of Law
Toni Robinson, B.A., Sarah Lawrence College; J.D., Columbia University; LL.M., New York University; Professor Emeritus of Law and Co-Director of the Tax Concentration
Gail S. Stern, B.A., Boston University; M.A.L.S., Wesleyan University; J.D., University of Bridgeport; Associate Professor of Legal Skills Emeritus
Sheila Taub, B.A. Brandeis University; J.D., Harvard University; Professor of Law Emeritus
James Trowbridge, B.A., Fairfield University; LL.B., Georgetown University; Professor of Law Emeritus
Jamison Wilcox, A.B., Amherst College; J.D., Columbia University; Professor of Law Emeritus

FACULTY OF LAW
Kevin M. Barry, B.A., J.D., Boston College; LL.M., Georgetown University; Professor of Law
Dale L. Carlson, B.S., M.B.A., State University of New York at Buffalo; J.D., Syracuse University; LL.M., New York University; Distinguished Practitioner in Residence, Intellectual Property Law and Director, Intellectual Property Law Concentration
William V. Dunlap, B.A., The New School for Social Research; M. Phil., University of Cambridge; J.D., Yale University; Professor of Law
Leonard A. Dwarica, B.A., St. Peters College; M.S., New York University; J.D., Pace University School of Law; Distinguished Practitioner in Residence, Health Law; Director, Center for Health Law and Policy; Director, Health Law Concentration
Robert C. Farrell, B.A., Trinity College; J.D., Harvard University; Professor of Law and Director of the Trinity Summer Program
Marilyn J. Ford, B.A., Southern Illinois University; J.D., Rutgers University; Professor of Law
Sheila Hayre, B.A., M.A., Stanford University; J.D., Yale University; Visiting Professor of Law
Jennifer L. Herbst, A.B., Dartmouth College; M. Bioethics, J.D., University of Pennsylvania; LL.M., Temple University; Professor of Law
Carolyn Wilkes Kaas, B.A., Cornell University; J.D., University of Connecticut; Associate Professor of Law and Director of Clinical Programs and Director, Center on Dispute Resolution and Director, Family Law Concentration
Stanton D. Krauss, B.A., Yale University; J.D., University of Michigan; Professor of Law
Sandra Lax, B.A., Brooklyn College; M.L.S., Queens College; J.D., University of Bridgeport; Distinguished Practitioner in Residence, Family Law
William DeVane Logue, B.A., Brown University; J.D., University of Connecticut School of Law; Distinguished Practitioner in Residence and Dispute Resolution
Leonard J. Long, B.S., Illinois Institute of Technology; M.A., Ph.D., University of Illinois; J.D., University of Chicago; Professor of Law
Alexander M. Meiklejohn, A.B., Amherst College; J.D., University of Chicago; Professor of Law
Dwight Merriam, B.A., University of Massachusetts; M.R.P., University of North Carolina; J.D., Yale University; Distinguished Practitioner in Residence
Linda R. Meyer, B.A., University of Kansas; J.D., Ph.D., University of California, Berkeley; Professor of Law
Suzanne H. Nathanson, A.B., Harvard University; J.D., Case Western Reserve University; Assistant Professor of Legal Skills
Joseph Olivenbaum, B.A., New York University; J.D., Northeastern University; Assistant Professor of Legal Skills and Director of Academic Support Program
Charles A. Pillsbury, B.A., Yale University; M.A.R., Yale Divinity School; J.D., Boston University; Distinguished Practitioner in Residence, Dispute Resolution
Emanuel Psarakis, A.B., University of Connecticut; J.D., Boston University; LL.M., Columbia University; Distinguished Practitioner in Residence, Employment Law
Sarah French Russell, B.A., J.D., Yale University; Assistant Professor of Law and Director, Criminal Law and Advocacy Concentration
Brad Saxton, B.A., College of William & Mary; J.D., University of Virginia; Professor of Law and Dean Emeritus
Mark Schroeder, B.A., Williams College; J.D., University of Connecticut, Assistant Professor of Legal Skills
Sara V. Spodick, B.A., Southern Connecticut State University; J.D., Quinnipiac University School of Law; Director of Tax Clinic
W. John Thomas, B.A., J.D., University of Arizona; LL.M., M.P.H., Yale University; Professor of Law
Robert White, B.A., Tufts University; J.D., New York University; Distinguished Practitioner in Residence and Commercial Law

LYNNE L. PANTALENA LAW LIBRARY
Ann M. DeVeaux, B.A., J.D., University of Bridgeport; M.L.S., Southern Connecticut State University; Director of the Law Library
John Michael Hughes, B.A., Sacred Heart University; M.L.S., Southern Connecticut State University; M.A., University of New Haven; Associate Director of the Law Library
Christina DeLucia, B.A., Pennsylvania State University; M.S.L.I.S., Pratt Institute; Reader Services Librarian
Mary K. Tartaglia, B.S., M.L.S., Southern Connecticut State University; Reader/Technical Services Librarian
Mary Ellen Lomax-Bellare, A.A., B.A., M.A.T., University of Bridgeport; Serials Manager
Hepsie Leslie-Abbott, A.A. University of Bridgeport; B.A., B.S., M.A., Quinnipiac University; Serials Assistant
Erica M. Papa, B.S., M.A., Southern Connecticut State University; Administrative Services Coordinator
Margaret Y. Thomas, B.S., Duquesne University; Circulation/Reserve Manager
Article

EXAMINING THE PRESENT SECURITY-LIBERTY NEXUS: CIVIL RICO—REMEDY TO PROCURE SECURITY OR THREAT TO CIVIL LIBERTY?

Marvin L. Astrada, J.D., Ph.D.*

Thus do we poor humans attain our ends, striving through carnage and destruction to bring lasting peace and happiness upon the earth.1

–Jack London

I. INTRODUCTION ............................................................................. 358
II. PRIVATE CIVIL RICO: AN EXERCISE IN CONTINUITY ............. 362
   A. The Court & Civil RICO: An Exercise in Capacious Statutory Construction ................................................. 366
   B. Civil RICO: A Tool for Combatting Terroristic Violence or Threat to Liberty? ........................................... 368
III. SEDIMA, S.P.R.L. V. IMREX: THE COURT SPEAKS .................. 371
IV. POST-SEDIMA: REJECTING A CIRCUMSCRIBED APPROACH ...... 373
   A. Encroaching on the First Amendment: Critiquing Civil RICO ........................................................................ 377
   B. Civil RICO and First Amendment Freedoms: Mutually Exclusive or Reconcilable? ............................... 381
   C. Weathering the Storm: Civil RICO & NOW v. Scheidler ... 387
V. CIVIL RICO, ACTS OF VIOLENCE AND SUPPORT OF TERRORISM 394
   A. Developing a Framework for Distinguishing Speech and Association From Support and Conduct .................. 396
      1. United States v. Marzook: Protected and Unprotected

* Marvin L. Astrada (M.A., Ph.D., Florida International University; J.D., Rutgers University Law School; M.A., C.A.S., Wesleyan University) teaches in the Politics & History Department at New York University – Washington D.C.

1 JACK LONDON, THE IRON HEEL 2 (1908).
I. INTRODUCTION

The relationship between liberty, security, and public policy, generally speaking, is one fraught with tension. In the wake of recent terrorist attacks abroad and recent events that took place in the U.S. involving the right to free speech, violence, and counter-speech, it is timely to reexamine the liberty-security nexus. Security is broadly conceived as reflecting a state of affairs wherein an individual is emplaced within a societal order-arrangement (“Order”) that equivocates itself with the general and specific wellbeing, and with public safety. Security, conceptually, constitutes an “organic bond uniting hierarchized individuals.” To be secure in the world therefore involves generating mechanisms of control over internal and external “threats” to Order. Liberty encompasses, or rather, focuses on the freedom of the individual subject to define its own wellbeing. How the law interprets and addresses the competing values of speech and security embodied in the liberty-security nexus thus directly impacts speech as a civil liberty, public order, and public policy. This Article therefore examines civil RICO as an exemplar of public policy and the complexity that attaches to adjudicating cases and controversies rooted in a liberty-security nexus. Civil RICO may, as will be discussed below, provide an effective means to enhance security, which encompasses law, order, and societal stability, by combatting terroristic violence via civil suits granting treble damages against perpetrators who engage in terroristic violence, broadly defined. In utilizing civil RICO, concerns have been raised that it may have an adverse effect on First Amendment freedom of speech. The tension between security and liberty is immanent in efforts to combat terroristic violence, and in procuring security. This Article thus explores the notion that civil RICO and First Amendment liberty may not be mutually exclusive, and that courts may better balance the competing

---

values and interests embodied in the liberty-security nexus in the articulation of public policy.

When Congress enacted Title IX of the Organized Crime Control Act, i.e., the Racketeer Influenced and Corrupt Organizations Act (“RICO”), in 1970, the Act primarily focused on effectively combating organized crime operating in the U.S.\(^3\) RICO was an expression of public policy that privileged security, a law-and-order approach to criminal justice policy. With its implementation, RICO provided federal prosecutors with unprecedented statutory tools, like severe criminal penalties and public and private civil causes of action, to dismantle and severely punish the infiltration of organized crime into legitimate business enterprises operating within the stream of interstate commerce.\(^4\) Forty-six years after its passage, RICO has, generally speaking, effectively crippled organized crime in the U.S. by way of encompassing statutory language in tandem with a consistent judicial posture of liberally defining RICO’s language and mandate.\(^5\) When interpreting the substance and parameters of RICO’s powerful statutory tools—in particular, the award of treble damages in private civil actions for harm suffered by private parties from any enterprise that engages in a pattern of racketeering—the Court in particular has profoundly expanded the

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney’s fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962.

\(^4\) In addition to harsh criminal penalties, RICO also provides for civil causes of action that can result in very significant damages awards. “Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney’s fee.” 18 U.S.C. § 1964(c) (emphasis added).

\(^5\) See United States v. Turkette, 452 U.S. 576, 593 (1981), wherein the Court initially posited a liberal interpretation of RICO:
As a measure to deal with the infiltration of legitimate businesses by organized crime, RICO was both preventive and remedial. . . . If Congress had intended [a] more circumscribed approach . . . there would have been some positive sign that the law was not to reach organized criminal activities that give rise to the concerns about infiltration. The language of the statute, however—the most reliable evidence of its intent—reveals that Congress opted for a far broader definition of the word “enterprise,” and we are unconvinced by anything in the legislative history that this definition should be given less than its full effect.
circumference of RICO’s applicability.\(^6\) Expansive construction of RICO’s provisions include the imposition of severe criminal and civil sanctions, as well as forfeiture provisions and equitable relief in the form of injunctions.\(^7\)

RICO has a civil component, permitting a civil cause of action for recovery of treble damages and litigation costs, which provides relief to private citizens injured in conjunction with a RICO violation.\(^8\) The federal courts’ expansive interpretation of RICO has made some commentators anxious, viz., on First Amendment grounds.\(^9\) While there may be a potential conflict betwixt speech (liberty) and civil RICO (security, order) in expanding RICO’s criminal and civil scope, since its inception, RICO was never explicitly limited to the traditional notion of organized crime. Indeed, the federal courts—most importantly the U.S. Supreme Court—have expansively construed RICO, finding it to apply to variegated actors and contexts that qualify as “enterprises” engaged in “patterns” of racketeering.\(^10\) “Though initially aimed at curbing organized crime activities, RICO has been successfully implemented against securities firms, large corporations, and video dealers,” among other entities.\(^11\) RICO has also been successfully applied to social protest movements, unions, the health care and tobacco industries, and even systemic police misconduct.\(^12\)

Over the last 46 years RICO has substantively evolved, and the federal judiciary has endowed it with an expansive character, which has been applied in a variety of contexts that Congress never envisioned when it was enacted in 1970. In light of RICO’s evolving complex and encompassing nature—especially its applicability to a variety of civil liberties contexts, such as social protest movements and labor organizations—it is proper to address an important development in the law that the U.S. Supreme Court has alluded to, but has not explicitly

\(^6\) See id. at 585.
\(^7\) See id. at 585–86; John P. Barry, When Protesters Become “Racketeers,” RICO Runs Aftoul of the First Amendment, 64 St. John’s L. Rev. 899–900.
\(^8\) Barry, supra note 7, at 900.
\(^10\) Barry, supra note 7, at 902–03.
\(^11\) Id. at 900 (footnotes omitted).
answered in its RICO jurisprudence, which has a significant effect on liberty, security, and policy. In light of recent and ongoing terrorist attacks at home and abroad, revisiting the role that civil law can play in combating terrorist violence is timely. Efforts to bolster the campaign to effectively combat terrorist violence directly result from recent historical memory, e.g., the Oklahoma City bombing, the bombing of the World Trade Center (pre-9/11), the Unabomber, the 9/11 terrorist attack on the Twin Towers, and the bombing of abortion centers and killing of abortion providers. Civil RICO, as an exemplar of the security dimension of the liberty-security nexus, is a potentially significant tool to employ in combating terrorist violence. For example, “civil RICO suits can act as an additional means by which to thwart terrorist financing. They enable private plaintiffs, serving as private attorneys general, to aid in the disruption of terrorist financing.”

This Article explores the question—and analyzes the tension immanent in attempts to balance liberty and security—does civil RICO, when employed to combat terrorist violence, unconstitutionally intrude upon cherished notions of First Amendment freedoms of speech and association? More specifically, can a plaintiff employ civil RICO in its private manifestation when it directly or indirectly impinges First Amendment freedoms of speech and association? Does the Court’s RICO jurisprudence attenuate such freedoms? Or does it allow for the reconciliation of RICO’s mandate, scope, meaning, and purpose vis-à-vis First Amendment freedoms? As a matter of law, can civil RICO be employed if it chills speech and association? What role, if any, does (or should) civil RICO play in combatting terrorist violence?

To address the preceding questions, this Article will conduct a select discussion of RICO’s juridical development to establish a working context for fleshing out the relationship between civil RICO and the First Amendment. Next, the relationship between civil RICO and the First Amendment will be discussed via analysis of civil RICO’s

---

14 Adam B. Weiss, From the Bonannos to the Bin Ladens: The Reves Operation or Management Test and the Viability of Civil RICO Suits against Financial Supporters of Terrorism, 110 COLUM. L. REV. 1123, 1123 (2010).
encompassing character and evolving nature and application beyond the traditional notion of organized crime, such as its application to social protest movements that (arguably) engage in patterns of racketeering activity. A discussion of the federal courts’ application of civil RICO to speech and association in light of support of terrorism will be presented, and then analyzed in light of civil RICO and First Amendment freedoms. Throughout the discussion and analysis, this Article will keep the following structural query in mind; i.e., what type of speech and association does civil RICO apply to? More specifically, in the exercise of speech and association rights, can private civil RICO be employed when it has the potential effect of chilling First Amendment freedoms of entities that instigate, express, and/or provide “support” for acts of terrorist violence? Is curbing First Amendment freedoms permissible—is cabining speech and association in line with RICO’s stated purpose and goals as interpreted by the U.S. Supreme Court?

II. PRIVATE CIVIL RICO: AN EXERCISE IN CONTINUITY

Liberty need not be severely attenuated to procure security. Civil RICO and First Amendment freedoms may not be mutually exclusive. Indeed, in light of the Court’s RICO and First Amendment jurisprudence, it is possible for the federal courts to reconcile the competing values that underlie: (1) the (seemingly limitless) application of civil RICO with (2) the preservation of the integrity of fundamental freedoms of free speech and association. In light of RICO’s overarching stated purpose and First Amendment freedoms as interpreted by the U.S. Supreme Court, civil RICO’s application to speech and association that is “actually malicious”15 and poses an “imminent threat of harm,”16 e.g., materially supports acts of violence and (domestic) terrorism, appears to allay fears of RICO chilling speech and association. A selective analysis of the Court’s RICO and First Amendment jurisprudence supports this contention, and the remainder of this Article will develop the notion that civil RICO may indeed be reconciled with First Amendment freedoms if applied via a uniform, objective legal standard that enables the courts to test whether speech and association fall within the purlieus of civil RICO. The courts thus have the means at their disposal to fashion a legal standard to reconcile civil RICO, First Amendment freedoms, and what

types of “support” of terrorism are shielded from private civil RICO liability.\footnote{17}{See United States v. Freeman, 6 F.3d 586, 597–98 (9th Cir. 1993) (RICO’s application to state legislative bribery scheme did not chill First Amendment rights regarding solicitation of campaign contributions); United States v. Jenkins, 974 F.2d 32, 34–35 (5th Cir. 1992) (First Amendment freedoms were not violated by pre-trial restraining order prohibiting defendants from selling or transferring their assets, which order exempted defendants’ operation of any lawful business in a lawful manner, including the sale of allegedly obscene materials); United States v. Pryba, 900 F.2d 748, 755 (4th Cir. 1990) (RICO forfeiture of non-obscene expressive materials acquired in violation of RICO did not violate the First Amendment); United States v. Yarbrough, 852 F.2d 1522, 1540–41 (9th Cir. 1988) (wherein a white supremacist’s RICO conspiracy conviction did not violate his First Amendment rights of political advocacy and association).}

At the outset, it is important to note that, as a matter of fact and law, although § 1962(c) is a remedial provision providing aggrieved private parties with a private cause of action, the state action doctrine tinctures such suits with the color of law. This aspect of RICO comprises an interesting expression of how security and order manifest in public policy. Because civil RICO is a congressional grant of power to private parties, suits brought under § 1962(c) fall under the state action doctrine. This, in turn, gives rise to the sundry First Amendment issues analyzed in this Article. Most “rights secured by the Constitution are protected only against infringement by governments” rather than infringements by private actors.\footnote{18}{Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 156 (1978); see also Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349–50 (1974); The Civil Rights Cases, 109 U.S. 3, 17–19 (1883).} The Court, however, has utilized the state action doctrine to identify instances where private parties’ actions occur under color of law.

The state action issue is implicit in almost every claim that a plaintiff has been deprived of constitutionally protected rights. Theoretically, before a court may address the merits of such a constitutional claim, the court must first determine whether there is any governmental action that triggers the claimed constitutional protection.\footnote{19}{Richard L. Stone & Michael A. Perino, Not Just a Private Club: Self Regulatory Organizations as State Actors When Enforcing Federal Law, 1995 COLUM. BUS. L. REV. 453, 464 (1995) (footnote omitted).}

When ascertaining the basis for an actionable claim, “[i]nstead of a unitary principle applicable in all state action cases, the Court has essentially resorted to a case-by-case factual analysis.”\footnote{20}{Id. at 465–66.} The Court has stated that, “[o]nly by sifting [through] facts and weighing circumstances
can the nonobvious involvement of the State in private conduct be attributed its true significance.”

When determining if the state action doctrine applies, the Court has applied a two-part test: (1) “the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible,” and (2) “the party charged with the deprivation must be a person who may fairly be said to be a state actor.” Civil RICO, as a grant of congressional power that authorizes private parties to bring suit when negatively impacted by the activities of enterprises engaged in patterns of racketeering, clearly satisfies this two-part test. Thus, § 1962(c), as a remedial provision, complements § 1962(b) (which allows the government to file a civil suit against enterprises engaged in patterns of racketeering activities), and falls within the state action doctrine.

Whether one finds the development welcome or disagreeable, the types or class of entities and activities that fall within RICO’s encompassing language have been profoundly expanded since the Court expounded upon RICO’s scope, purpose, and meaning in the early 1980s, over a decade after RICO was enacted. Over the past 46 years, the Court has, with some exceptions, consistently reified its initial interpretation of congressional intent to construe RICO (civilly and criminally) quite broadly; indeed, the Court’s RICO jurisprudence has, for the most part, maintained that the federal courts adhere to a liberal, expansive construction of RICO’s text and legislative history. “One of the principal reasons for the unforeseen and unprecedented expansion of RICO, especially in civil cases, is the broad and ambiguous language of the statute. This has made it a powerful weapon against persons engaged in prohibited racketeering activities.”

---

24 In National Organization for Women v. Scheidler, the Court declared that the “fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.” Nat’l Org. for Women v. Scheidler, 510 U.S. 249, 262 (1994) (quoting Haroco, Inc. v. Am. Nat’l Bank & Tr. Co. of Chi., 747 F.2d 384, 398 (7th Cir. 1984)). This was not the first time the Court had endorsed this language, and had directed the lower courts to follow it. See Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 499 (1985).
26 Coppola & DeMarco, supra note 12, at 241–42 (footnote omitted).
significance of RICO’s evolution, it is necessary to examine key aspects of its juridical history and development. This Article begins with the Court’s opinion in *Sedima, S.P.R.L. v. Imrex Co., Inc.*[^7] which posits and develops the legal principles, framework, and operative history that the Court has utilized in constructing a foundation for its RICO jurisprudence and how it has interpreted the liberty-security nexus.

Overall, since RICO’s inception, Congress has sparingly modified RICO, substantively speaking, with the exception of explicitly expanding or restricting its circumference (e.g., acts of terrorism have been added and securities fraud has been removed from RICO predicate acts).[^28] Additionally, the Court has played an active and primary role in reading RICO’s encompassing language as permissibly expanding the scope of civil (and criminal) RICO by either remaining silent (as it did for over a decade after RICO’s enactment) or “repeatedly interpreting the statute in a liberal, far-reaching manner.”[^29] During the Court’s silence, use of civil RICO had already begun to eclipse the initial primary target of the Act, i.e., organized crime in the form of the Mafia.

By 1985, the Supreme Court . . . had found that of the “known civil RICO cases at the trial court level, 40% involved securities fraud, 37%, common law fraud in a commercial or business setting, and only 9% ‘allegations of criminal activity of a type generally associated with professional criminals.’” An American institute of certified public accountants study of 132 published decisions “found that 57 involved securities transactions and 38 commercial and contract disputes, while no other category made it into double figures.” Or, as Justice White put it for the majority of the Court[ in *Sedima*], “it is true that private civil actions under the statute are being brought almost solely against [non-traditional] defendants rather than against the archetypal intimidating

[^27]: *Sedima*, 473 U.S. 479.


mobster.”

The stage was thus being set for civil RICO’s expansive utilization and application over the course of the Court’s protracted silence, and the encompassing nature of RICO was posited and affirmed in Sedima.

A. The Court & Civil RICO: An Exercise in Capacious Statutory Construction

RICO establishes very broad authority for imposing equitable remedies under 18 U.S.C. § 1964, authorizing public and private civil causes of action. Under § 1964(a), the U.S. Attorney General is empowered to file a civil suit seeking remedies against RICO enterprises engaged in patterns racketeering activity to prevent and restrain RICO violations by:

- ordering any person to divest himself of any interest, direct or indirect, in any enterprise;
- imposing reasonable restrictions on the future activities or investments of any person . . . the activities of which affect interstate or foreign commerce; or
- ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

Such penalties were intended to provide federal prosecutors with “new weapons of unprecedented scope for an assault upon organized crime and its economic roots.” The application of this subsection has been construed liberally on a consistent basis. The Second Circuit, for instance, has “held that ordering a defendant to contribute to the cost of eliminating the vestiges of his racketeering activities in the enterprise he corrupted is a proper equitable remedy to prevent RICO violations.” In United States v. Sasso, the court emphasized “§ 1964(a)’s expansive language, its legislative history, and the traditional power of the district

---

31 18 U.S.C. §§ 1964(a), (b) (2006). See Richard v. Hoechst Celanese Chem. Grp., Inc., 355 F.3d 345, 354–55 (5th Cir. 2003) (finding that equitable remedies such as disgorgement are available under § 1964(a), but only to “prevent and restrain future conduct rather than to punish past conduct”) (emphasis added) (quoting United States v. Carson, 52 F.3d 1173, 1182 (2d Cir. 1995)).
courts to fashion equitable remedies. . . .”

Civil RICO also provides private parties with a separate cause of action for damages.

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue . . . and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney’s fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962.

The court in Bernath Plaintiff v. The American Legion notes that the four basic elements of civil RICO liability are: “(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. The phrase ‘racketeering activity’ is defined as including any act which is indictable under a lengthy list of criminal offenses, including the federal statutes prohibiting mail and wire fraud.” It is this section in particular that has given rise to fears of civil RICO’s encroachment upon First Amendment freedoms of speech and association. Indeed, “Civil RICO is an unusually potent weapon . . . .” Some commentators argue that the federal courts have gone too far in construing RICO in a hyper-expansive manner that threatens to chill First Amendment freedoms, and others have argued that, “[a]lthough RICO’s purpose as originally proposed was to combat the infiltration of legitimate business by organized crime, Congress purposefully worded the statute broadly enough so that it could extend to anyone who committed the crimes enumerated in the predicate acts, regardless of their motivation.”

36 Id.
39 See Anne Melley, The Stretching of Civil RICO: Pro-Life Demonstrators Are Racketeers?, 56 UMKC L. REV. 287, 310, 312 (1988). Melley notes that, “[i]n the hands of attorneys with their eyes fixed upon the treble damages provision, the statute has become a tool by which to federalize common law fraud, contract disputes and even trespass actions, and to impose penalties whose severity far outweighs the nature of the offenses.” Id. at 312; see also Antonio J. Califa, RICO Threatens Civil Liberties, 43 Vand. L. Rev. 805, 833–34 (1990).
B. Civil RICO: A Tool for Combatting Terroristic Violence or Threat to Liberty?

The liberty-security nexus can be observed in the interplay between § 1964(c)’s “support” of terroristic violence and First Amendment freedoms of speech and association.\(^{41}\) The public policy issue that emerges upon observation of civil RICO’s application, in light of how support of acts of terroristic violence are interpreted, is that if civil RICO continues “to be invoked against [expressive] organizations, a conflict could arise between the rights of citizens to express their views and the rights of other citizens to prohibit such expressive conduct through the threat of a RICO civil lawsuit.”\(^{42}\) The fundamental principles and rights implicated by speech and association in the context of expressive organizations (e.g., political, ideological, and religious organizations) can also be applied to organizations that, because of highly unpopular or controversial ideological messages and/or underpinnings, engage in speech and association that may be construed as directly supporting criminal acts of violence and terrorism. Although the Court has not directly addressed the issue, the lower courts have legal tools at their disposal to determine when there is civil RICO infringement on First Amendment rights of free speech and association vis-à-vis support of acts of terroristic violence.\(^{43}\) As will be discussed below, the Court’s First Amendment and RICO jurisprudence provides the lower courts with various tools and principles by which to adjudge when speech is shielded from civil RICO.

In emphasizing the security dimension of the liberty-security nexus, as a matter of public policy, the Court has relied heavily on congressional intent to construe RICO expansively. Namely, the Court has relied on the liberal construction clause Congress put forth when it initially enacted RICO. The clause states that the “provisions of [RICO] shall be liberally construed to effectuate its remedial purposes.”\(^{44}\)

\(^{41}\) The relationship between Civil RICO and terrorism has been examined in the literature. See, e.g., Irvin B. Nathan & Kenneth I. Juster, Law Enforcement Against International Terrorists: Use of the RICO Statute, 60 U. COLO. L. REV. 553, 570 (1989) (“RICO provides the United States government with . . . much broader and more effective [means of combating terrorism].”); Zvi Joseph, The Application of RICO to International Terrorism, 58 FORDHAM L. REV. 1071, 1073 (1990) (“RICO’s unique characteristics suggest that it should be used as a weapon against international terrorist organizations.”).

\(^{42}\) Barry, supra note 7, at 901.

\(^{43}\) See, e.g., id. at 901–02 (examining the use of civil RICO against social activists in contravention of the First Amendment).

Overall, Congress’ liberal construction clause has been actively applied to civil RICO, and the federal courts have interpreted RICO as

“grant[ing the] courts broad discretion and latitude in enjoining violators” of RICO from activities that may lead to future violations. In fashioning penalties, the court must make due provision for the rights of innocent parties. While the courts have recognized that certain injunctions may implicate a defendant’s First Amendment rights of association, the government’s significant interest in eradicating organized crime may override such concerns.45

Part of that interest stems from the courts finding that “RICO treatment is reserved for conduct ‘whose scope and persistence pose a special threat to social well-being.”46 The Court

has repeatedly reinforced Congress’s intent to construe civil RICO broadly by instructing the lower courts to heed the expansive language of the statute. . . . [For instance, in] National Organization for Women, Inc. v. Scheidler (NOW I) the Supreme Court rejected the Seventh Circuit’s restrictions on private civil RICO claims by holding that RICO does not require that the racketeering enterprise be accompanied by an underlying economic motive.47

As will be discussed below, by dispensing with the economic motive requirement, Scheidler has created the potential to subject ideological speech and association pertaining to expressive speech, through supporting entities that may be perceived to support/promote terrorism, to possible civil RICO liability.

Jettisoning the economic motive requirement has potentially serious implications for the exercise of First Amendment freedoms, especially when the purleus between pure speech and mere association and supporting acts of terroristic violence become blurred. Some courts have considered the question of civil RICO’s relationship to free speech and expressive support of terrorism that is alleged to encompass material


45 Douglass & Layne, supra note 33, at 1116 (footnotes omitted); see also United States v. Private Sanitation Indus. Ass’n, 995 F.2d 375, 377–78 (2d Cir. 1993) (permitting the curtailment of associational rights in furtherance of significant governmental interests); United States v. Local 560, 974 F.2d 315, 345 (3d Cir. 1992) (concluding that governmental interest in eliminating organized crime from unions justifies curtailment of associational rights).

46 GE Inv. Private Placement Partners II v. Parker, 247 F.3d 543, 551 (4th Cir. 2001) (quoting Menasco, Inc. v. Wasserman, 886 F.2d 681, 684 (4th Cir.1989)).

support for criminal acts of terrorism. Although this Article will explore additional rationales and available analytic tools to posit a uniform and coherent legal standard for reconciling civil RICO and the First Amendment, overall the courts’ rationales in speech and terrorism cases arguably help rather than detract from implementing a workable distinction between what types of speech and association are protected vis-à-vis civil RICO. The *In re Terrorist Attacks on September 11, 2001* court, for example, entertained and then rejected a number of claims alleging civil RICO violations.

One holding was that there was no liability under RICO since it was not alleged that the defendant participated in the operation or management of any enterprise as was required under 18 U.S.C.A. § 1962(c) when, after the al Qaeda leader Osama bin Laden declared war on Americans, a defendant allegedly arranged for the delivery of a battery for a satellite phone used by Osama bin Laden.

Another defendant was charged with financial support of terrorism. In dismissing the RICO counts based on financial contribution as material support of criminal acts of terrorism, the court relied on the Seventh Circuit’s reasoning that

> foreseeability is the cornerstone of proximate cause, and in tort law, a defendant will be held liable only for those injuries that might have reasonably been anticipated as a natural consequence of the defendant’s actions. . . . To hold the defendants liable for donating money without knowledge of the donee’s intended criminal use of the funds would impose strict liability. Nothing in the language of the statute or its structure or history supports that formulation.

The court’s rationale thus serves to clarify and mollify rather than

---

48 See, e.g., United States v. Al-Arian, 308 F. Supp. 2d 1322, 1341–49 (M.D. Fla. 2004); United States v. Arnaout, 236 F. Supp. 2d 916, 916–18 (N.D. Ill. 2003) (declining to dismiss the counts against Arnaout where they “sufficiently allege that Arnaout conspired to supply material support and benefits to [terrorist organizations] and others engaged in violent confrontations involving murder, kidnapping, maiming and injury . . . in violation of United States law,” despite his arguments that the alleged recipients of his material support were lawful combatants).


51 *In re Terrorist Attacks on September 11, 2001*, 392 F. Supp. 2d at 548.

52 Boim v. Quranic Literacy Inst., 291 F.3d 1000, 1012 (7th Cir. 2002).
obfuscate and agitate civil RICO’s relationship to fundamental freedoms of speech and association. The next section will provide a working context within which to begin to assess whether or not civil RICO is fundamentally at odds with First Amendment freedoms of speech and association.

III. **Sedima, S.P.R.L. v. IMREX: THE COURT SPEAKS**

Although criminal RICO “was greeted with open arms by prosecutors as soon as it was enacted in 1970,” civil RICO, on the other hand, “sat virtually unused on the library shelf for some ten years after its enactment.” Since then, civil RICO’s life . . . has been exhaustively chronicled and criticized by scholars as well as courts.” The Court’s opinion in *Sedima* decisively brought civil RICO out of a state of near-dormancy. *Sedima* explicitly laid out what the Court viewed as the most relevant principles and aspects of RICO’s legislative history that the lower courts should consider and employ in analyzing and determining when to apply civil RICO, and what the Court considered integral aspects of RICO’s language and the Act’s overall scope, meaning, and purpose. The Court, in interpreting RICO’s language in an expansive manner, clearly privileged the security component of the liberty-security nexus. The Court’s opinion in *Sedima* remains a definitive statement of the Court’s structural understanding of RICO’s breadth and depth, and continues to ground the Court’s RICO jurisprudence. Hence, it is necessary to consider *Sedima* because the logic underlying the decision is directly relevant when attempting to resolve the tensions between private civil RICO and First Amendment freedoms.

*Sedima* was part of the Court’s initial foray into interpreting “the purpose, scope, and meaning of RICO and its legislative history, particularly as far as its civil applications [were] concerned.” One of the reasons why *Sedima* remains relevant to present appraisals of civil RICO is that the Court articulated what can be essentially characterized as an “expansionist, plaintiff-favorable review of the statute and its

55 *Id.* at 486–90.
56 Coppola & DeMarco, supra note 12, at 248–49.
57 *Id.* (quoting PAUL A. BATISTA, CIVIL RICO PRACTICE MANUAL § 2.05 (3d ed. 2011)).
legislative history. The Court found that

the compensable injury necessarily is the harm caused by [RICO] predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise. [Such] acts are . . . “an activity which RICO was designed to deter.” Any recoverable damages occurring by reason of a violation of § 1962(c) will flow from the commission of the predicate acts.

It is important to note that, in laying the foundational schema for its RICO jurisprudence, the Court explicitly rejected a narrow interpretation of RICO’s purpose and scope. In doing so, public policy would thus reflect an emphasis on security, order, as opposed to placing the liberty interest at the forefront of interpretation and adjudication. The Court declared that

RICO is to be read broadly. This is the lesson not only of [its] self-consciously expansive language and overall approach, but also of its express admonition that RICO is to “be liberally construed to effectuate its remedial purposes.” The statute’s “remedial purposes” are nowhere more evident than in the provision of a private action for those injured by racketeering activity.

In explicitly endorsing an expansionist construction of RICO, the Court found that “RICO was an aggressive initiative to supplement old remedies and develop new methods for fighting crime.” “Crime,” as the Court employed, is a term of art, a state of affairs that implicates a non-restrictive construction of the Act. As one commentator notes,

under both its criminal and civil provisions, RICO proscribes infiltration of business by organized crime. Put another way, RICO does not proscribe organized crime; rather, it is aimed at organized criminal activity in all its multitudinous forms. Therefore, RICO’s statutory language is necessarily broad. To provide the courts with interpretive guidance, Congress also included a liberal construction clause with RICO.

“Crime” that is “organized” can thus be interpreted commodiously to

---

58 Id. at 249.
59 Sedima, 473 U.S. at 497.
60 Id. at 497–98.
61 Id. (emphasis added) (citations omitted).
62 Id. at 498.
63 Sedima, 473 U.S. at 498.
encompass enterprises and activity that surpass a restrictive notion relegated to a specific form of organized crime.

The Court’s exposition of RICO in *Sedima*, including the dissent, touched upon what would become a major critique of civil RICO, i.e., RICO should be narrowly construed because an overly broad interpretation of the Act’s sweeping language renders RICO even more ambiguous, protean, and thus more prone to government and private party abuse.\^65 The dissenting opinions, for instance, claimed that the Court’s interpretation of RICO—imbuing RICO with very high degrees of (unwarranted) elasticity—fundamentally and improperly altered the federal-state balance regarding civil remedies, and that the Act actually lent itself to a restrictive reading, i.e., RICO “should be read narrowly to confine its reach.”\^66 In explicitly rejecting this line of argument, the Court’s majority expounded upon the justification for interpreting RICO expansively, i.e., the “fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.”\^67 While the Court did acknowledge that RICO was perhaps “evolving into something quite different from the original conception of its enactors,”\^68 the majority nevertheless found that RICO’s encompassing language, based on its history, purpose, and scope “inherent in the statute as written, and [any] correction [to the contrary] must lie with Congress.”\^69

IV. POST-*SEDIMA*: REJECTING A CIRCUMSCRIBED APPROACH

Over the last three decades, civil RICO’s juridical construction has experienced sustained continuity as well as some degree of change. Until relatively recently, continuity has, for the most part, characterized civil RICO’s development. There are some notable exceptions. For example, in *Reves v. Ernst & Young*,\^70 the Court dialed back civil RICO’s expansiveness, yet still found that “the ‘provisions of [RICO] shall be liberally construed to effectuate its remedial purposes.’ This clause obviously seeks to ensure that Congress’ intent is not frustrated by an overly narrow reading of the statute, *but it is not an invitation to apply*...
RICO to new purposes that Congress never intended.” The Reves Court thus went against the general trend of the Court’s overall RICO jurisprudence and applied a restrictive interpretation, focusing on the word “conduct.” The Court found that the statute’s use of the term “conduct” as both noun and verb within the same sentence of § 1962(c) indicated Congressional intent that “conduct” requires “an element of direction.” Thus, one is not liable under § 1962(c) “unless one has participated in the operation or management of the enterprise itself.” The general trend of the Court’s RICO jurisprudence, however, has been to retain a relatively expansive interpretation of RICO’s scope, purpose, and meaning as posited in Sedima. This ongoing continuity has direct implications for how to address the relationship between civil RICO and First Amendment freedoms when it comes to chilling speech if it is viewed as supporting terrorist violence.

In a post-Sedima context, the Court has augmented the circumference of RICO’s applicability via an expansive interpretation of the Act’s language. For instance, four years after Sedima, the Court decided H. J. Inc. v. Northwestern Bell Telephone Co., upholding and further reinforcing Sedima’s “treatment of RICO’s legislative history and again reject[ing] the argument for a narrow construction.” In H. J. Inc., the Court stated:

To be sure, Congress focused on, and the examples used in the debates and reports to illustrate the Act’s operation concern, the predations of mobsters. Organized crime was without a doubt Congress’ major target. . . . [T]he legislative history shows[, however,] that Congress knew what it was doing when it adopted commodious language capable of extending beyond organized crime.

Sedima and H. J. Inc. are thus clear statements of the Court’s approach to RICO interpretation that are indicative, at least implicitly, of the Court’s privileging an expansive approach that is on par with other

---

72 Id. at 185.
73 Id. at 178.
74 Reves, 507 U.S. at 183.
75 Christopher D. McDemus, Reves v. Ernst & Young: The Supreme Court’s Recent Restrictive Standard Concerning § 1962(c) of the Civil RICO Statutes, 19 DEL. J. CORP. L. 1027, 1030–31 (1994).
77 Coppola & DeMarco, supra note 12, at 251.
potentially competing values, viz., First Amendment freedoms of speech and association. Arguably, the values embodied in RICO—preserving public safety, security—may be at odds with First Amendment freedoms. Yet, as will be discussed below, a commodious interpretation of crime does not necessarily involve casting First Amendment freedoms to the wayside.

In 1992, twenty two years after RICO was enacted, the Court restricted civil RICO in *Holmes v. Securities Investor Protection Corp.*\(^79\) In *Holmes*, the Court analyzed and reinterpreted § 1964(c), which had previously been “read to mean that a plaintiff is injured ‘by reason of’ a RICO violation,” and that a plaintiff may recover treble damages “simply on showing that the defendant violated § 1962, the plaintiff was injured, and the defendant’s violation was a ‘but for’ cause of plaintiff’s injury.”\(^80\) In *Holmes*, the Court restricted civil RICO by stating that proximate cause was, henceforth, required for a plaintiff to recover treble damages.\(^81\) The Court stated that

\[\text{[w]e may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used first in § 7 of the Sherman Act, and later in the Clayton Act’s § 4. It used the same words, and we can only assume it intended them to have the same meaning that courts had already given them. Proximate cause is thus required [when claiming treble damages under private civil RICO].}\(^82\)

The Court thus rejected the contention that a civil RICO violation need only be a “but for” cause of plaintiff’s injury: “This construction is hardly compelled, however, and the very unlikelihood that Congress meant to allow all factually injured plaintiffs to recover persuades [the Court] that RICO should not get such an expansive reading.”\(^83\)

It is interesting to note that *Holmes*, in conjunction with *Sedima* and *H. J. Inc.*, serves to better clarify the relationship between civil RICO and the First Amendment in the latter’s favor by providing a less expansive notion of causation. With proximate cause being requisite to recover treble damages, it actually becomes more difficult to chill freedom of speech and association. In *Anza v. Ideal Steel*, for instance, the Court applied *Holmes*, stating that “[w]hen a court evaluates a RICO


\(^80\) *Id.* at 265–66 (footnote omitted).

\(^81\) *Id.* at 268.

\(^82\) *Id.* (citations omitted).

\(^83\) *Holmes*, 503 U.S. at 266 (footnote omitted).

claim for proximate causation, the central question it must ask is *whether the alleged violation led directly to the plaintiff’s injuries.*

If an act(s) has to be the proximate cause of harm, then civil RICO lessens threats to protected speech and association because direct harm would involve more than just protected speech and expressive activity to trigger the treble damages provision. Plaintiffs have to prove how an organization’s or individual’s speech and association activities directly lead to injury, thus better insulating First Amendment freedoms from improper application of private civil RICO.

Whenever the Court expands civil RICO’s reach, it is not unreasonable for security and public safety concerns to surface, which can pose a menace to First Amendment freedoms. Being secure in one’s place, person, and effects, as famously enumerated in the U.S. Declaration of Independence and U.S. Constitution, is an overarching theme articulated in a security configuration such as civil RICO. Notions of security embedded in the liberty-security nexus significantly impact public policy. Liberty is a secondary interest, at best, in light of how the Court has interpreted RICO. Granted, the Court has imposed some restrictions on civil RICO; yet, the post-Sedima context, with notable exceptions, entails more continuity than change, arguably endowing civil RICO with the potential to chill First Amendment freedoms. The restrictions that have been instated, such as a re-interpretation of civil RICO to contain the requirement of proximate cause to recover treble damages, have not significantly altered the broader character of the Court’s RICO jurisprudence. Yet, it does not have to be the case that security and public safety trump liberty; each can coexist with the other in the same legal universe.

Within the working context discussed so far, the most relevant Court pronouncement on the relationship between private civil RICO

---

85 Id. at 458–60.
87 See U.S. CONST. amend. IV; THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
89 See, e.g., Reid, *supra* note 86, at 203 (arguing that civil RICO has begun to erode “vital constitutional rights”).
90 See, e.g., Melley, *supra* note 39, at 312 (calling for Congressional intervention to curtail the court’s continued broad reading of civil RICO).
and First Amendment freedoms comes from Justice Souter’s concurring opinion in National Organization for Women v. Scheidler.91 In Scheidler, the Court did not directly address the question of when does civil RICO impermissibly encroach upon constitutionally protected freedoms of speech and association.92 The decision, however, in conjunction with the Court’s First Amendment jurisprudence, does provide guidance as far as fleshing out the relationship between civil RICO and freedom of speech and association, how these freedoms apply to support of acts of violence and terrorism, and how civil RICO may or may not cabin such freedoms. Before addressing Scheidler and the post-Scheidler context vis-à-vis civil RICO, freedom of speech, and support of terrorist violence, a selective exposition of the Court’s First Amendment jurisprudence is presented, including cases that define protected and unprotected speech, as well as the alleged harms that civil RICO poses to First Amendment freedoms. This is necessary because RICO does not operate within a vacuum; the Court’s First Amendment jurisprudence provides a backdrop for ascertaining what types of speech and association are shielded from civil RICO liability.

A. Encroaching on the First Amendment: Critiquing Civil RICO

When analyzing liberty from a speech and association perspective, it is important to note that the Court has declared that, “[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.”93 The fear is that civil RICO encroaches upon liberty under the aegis of security. Such fears, however, while not unreasonable, are nonetheless attenuated in light of the Court’s First Amendment jurisprudence, which RICO must comply with given the superiority of the U.S. Constitution over congressional statutes.94

The Constitution protects peaceful assembly, even if members of the assembly commit crimes in

---

92 Id. at 262 n.6 (majority opinion).
94 See Califia, supra note 39, at 823 (“Indeed, the Court repeatedly has held that statutes which punish speech or conduct solely because it is offensive or unseemly are constitutionally overbroad.”).
other contexts. Assembly is an integral part of the freedoms guaranteed by the first amendment, [as is] association . . . .

Obnoxious and harassing speech is protected. Indeed, the Court repeatedly has held that statutes which punish speech or conduct solely because it is offensive or unseemly are constitutionally overbroad.95

The Court’s First Amendment jurisprudence is robust. The Court has endowed First Amendment freedoms with a high degree of protection.96 Thus, any potential chilling effect(s) that civil RICO may have must contend with the Court’s formidable protection of free speech and association. “The doctrine of chilling effect reflects the view that the harm caused by the chilling of free speech is comparatively greater than the harm resulting from the chilling of other activities.”97 In *Speiser v. Randall*, the Court, in applying the chilling effects doctrine, found that “the line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finely drawn. The separation of legitimate from illegitimate speech calls for more sensitive tools . . . .”98 Within the context of civil RICO, some commentators agree with Justice Marshall’s dissent in *Sedima* that civil RICO does in fact pose a serious threat to free speech and association because it lacks clear restraints in its language and how it has been interpreted by the Court.99 Justice Marshall notes that civil RICO

litigants, lured by the prospect of treble damages and attorney’s fees, have a strong incentive to invoke RICO’s provisions whenever they can allege in good faith two instances of mail or wire fraud.

. . . . Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit . . . . [C]ivil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat.100

---

95 Id. (footnotes omitted); see also *Street v. New York*, 394 U.S. 576, 592 (1969) (“It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.”); see also *Houston v. Hill*, 482 U.S. 451, 472 (1987) (“[T]he First Amendment recognizes, wisely we think, that a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive.”).

96 *Califa*, supra note 39, at 832.

97 Id. at 833.


99 See *Califa*, supra note 39, at 833–34.

Justice Marshall’s reasoning has provided a basis for critics alleging that civil RICO’s treble damages and attorney’s fees provisions may have a chilling effect on First Amendment freedoms, especially because it has the potential of deterring noneconomically motivated organizations and grossly overdeterring borderline activity. . . . The self-censorship that will likely occur as a result of the threat of RICO’s civil penalties will certainly deter otherwise protected First Amendment activity. . . . [T]he imposition of treble damages, costs, and attorney’s fees significantly chill free speech. . . .

In light of the highly unpopular and controversial nature of speech and association that can be construed as support of terroristic violence, it is not implausible to suggest that, because of the close relationship between pure speech and expressive speech related to and/or that traverses protected speech via material support, i.e., conduct, civil RICO could have serious implications for First Amendment freedoms related to ideological (as opposed to material) support of acts of violence and terrorism.

The line between protected and unprotected protest activity is not easy to draw. At one end of the spectrum of activity, [subjects] are engaged in pure political speech to which RICO [clearly] cannot apply. Criminal conduct lies at the opposite end of the spectrum and it is clear that the First Amendment is not a refuge for violence or law-breakers. Somewhere in between, however, lies a category of mixed speech and conduct that includes both protected and unprotected expression.

According to some critics, within this nebulous area of hybrid activity, composed of both protected and unprotected activity, lurks the potential for the abrogation of protected freedoms in the course of trying to chill and punish unprotected speech-as-conduct.

When the tool of prosecution is RICO . . . the stakes are at their highest . . . [those] engaging in protected activity risk losing their protected status when later they or others with whom they are associated engage in unprotected acts, since the line between protected and unprotected activities is fuzzy. The effect

---

102 *Id.* at 718–19.
is a chilling of free speech.\textsuperscript{103}

The transected dimension, it is alleged, is most vulnerable to civil RICO’s chilling effect. This fear, however, can be allayed by the rich and robust protections that the Court has accorded liberty in the form of freedom of speech and association. “Civil RICO plaintiffs must sufficiently plead both racketeering activity \textit{and} that the activity caused them some injury.”\textsuperscript{104} Critics of civil RICO’s expansive construction claim that “[i]t is clear that RICO was intentionally written broadly to encompass the myriad of businesses infiltrated by organized crime. However, . . . [i]t is important to note that serious constitutional issues are raised when RICO is extended into areas for which it was not intended,” i.e., application of civil RICO to fundamental First Amendment freedoms of speech and association.\textsuperscript{105} Critics argue that private civil RICO has no inherent restraints, as does criminal RICO, and thus is prone to abuse.\textsuperscript{106} This is the case because security becomes the controlling framework in policy formulations based on public safety at the forefront of competing values. While it is certainly the case that it is profoundly difficult to draw a bright line between protected and unprotected speech, especially in light of the highly controversial issue of speech that is linked to support of violence or acts of terrorism, it seems that application of civil RICO does not necessarily have to inevitably traverse the line between protected and unprotected speech. As will be discussed below, using the federal court cases of \textit{United States v. Marzook},\textsuperscript{107} \textit{United States v. Warsame},\textsuperscript{108} and \textit{Savage v. Council on American-Islamic Relations, Inc.},\textsuperscript{109} the courts do have tools at their disposal to construct and follow a relatively uniform legal standard to determine whether civil RICO does or does not apply vis-à-vis First Amendment considerations, quelling fears that civil RICO may displace First Amendment freedoms.\textsuperscript{110}

\textsuperscript{104} Ray v. Spirit Airlines, Inc., 836 F.3d 1340, 1351 (11th Cir. 2016).
\textsuperscript{105} Barry, \textit{supra} note 7, at 909 (footnote omitted).
\textsuperscript{106} See Weiss, \textit{supra} note 14, at 1158.
\textsuperscript{107} United States v. Marzook, No. 03 CR 0978, 2005 WL 3095543 (N.D. Ill. E.D., Nov. 17, 2005).
\textsuperscript{110} Reid, \textit{supra} note 86, at 203, 219–20 (noting that, because “free expression remains a fundamental right, the [government] must carefully tailor its regulations to achieve its ends
Civil RICO certainly has the potential for chilling First Amendment freedoms. In addition to Justice Marshall’s admonition that the sheer cost of defending private civil suits presents a serious issue as to civil RICO’s reach, its significant sanctions—treble damages, costs, and reasonable attorneys’ fees—in conjunction with the possible “stigmatic label of ‘racketeer’ affix[ing] to anyone against whom a RICO claim is brought—even if that person’s First Amendment rights are ultimately vindicated,” create profound disincentives to exercise free speech and association that is unpopular. Critics allege that entities sued under civil RICO might well have to bear the enormous costs of litigation (the detailed discovery—necessary in most types of civil litigation—would impose crushing costs . . .) . . . [making RICO] a formidable weapon in its expanded form. The threat of RICO . . . necessarily chills constitutionally protected free speech.

B. Civil RICO and First Amendment Freedoms: Mutually Exclusive or Reconcilable?

Although some may feel that civil RICO’s application beyond traditionally defined organized criminal enterprises is incompatible with First Amendment freedoms of speech and association, is it necessarily the case that one must choose one to the exclusion of the other? RICO, criminal and civil, was never explicitly intended to combat terrorism. Yet the Court has endowed RICO with expansiveness. Civil RICO has become, for some commentators, a logical addendum to civil remedies available to combat terroristic violence. The answer is not clear cut. As Harold Koh, notes, regarding legal responses to terrorism, civil remedies are far and away the least

without unduly restricting speech,” protecting one who “vigorously advanc[es] his political, social, or religious views, [and] causes incidental harm, to a business concern”.

See, e.g., N.Y. Times Co. v. Sullivan, 376 U.S. 254, 277–78 (1964) (discussing the potential for a lawsuit to chill protected speech); Eugene Volokh, Crime-Facilitating Speech, 57 STAN. L. REV. 1095, 1192 (2005) (“Speakers who are genuinely not intending to facilitate crime might nonetheless be deterred by the reasonable fear that a jury will find the contrary.”); see also Ana Maria Marin, RICO’s Forfeiture Provision: A First Amendment Restraint on Adult Bookstores, 43 U. MIAMI L. REV. 419, 446–47 (1988) (arguing that use of RICO to regulate obscenity presents constitutional problems).

Id. at 744, 747.

See Weiss, supra note 14, at 1124 (remarking that RICO’s expansive reading may help to combat terrorist organizations).
understood. . . . Broadly construed, the term “civil remedies” encompasses all nonforcible [sic], noncriminal means of sanctioning terrorists and states who support terrorists. Unlike direct action, civil responses to terrorism raise questions that are quintessentially legal, not political and logistical. . . . Moreover, unlike criminal remedies, which look solely toward punishment and deterrence, civil remedies additionally contemplate making terrorists “pay up”—that is, directly or indirectly compensating the victims of terrorist crimes by affording victims or their governments an economic recovery from terrorists or their state supporters.115

In light of the nature and character of civil RICO as a remedy, does civil RICO’s mandate to provide injured plaintiffs with treble damages explicitly and inevitably chill freedom of speech and association? Treble damages, within the greater scheme of RICO, aids in punishing and dismantling criminal enterprises that engage in racketeering activity. In the context of terrorism, however, does making terrorists “pay up” for speech acts that may be construed as supporting terrorism have the unintended yet serious consequence of attenuating freedom of speech? Indeed, the Court has alluded to, but has not directly addressed the general question, and has not answered the specific question of civil RICO regarding what exactly constitutes support of terror. It is the case that “[t]hroughout this nation’s history, the civil litigation system has frequently served as a regulatory check on both private and public actors; there is no reason why it could not supplement—to the extent practical, possible, and desirable—America’s arsenal in the war on terror.”116 Furthermore, the Court’s articulated standards in its First Amendment and civil RICO jurisprudence (and the lower courts’ interpretation of the Court’s case law) provide an adequate basis for distinguishing which types of speech and association are and are not protected when such freedoms concern support for acts of violence and terrorism. The courts’ inquiry can begin with adoption of a standard of review based on whether speech is “actually malicious” and poses an “imminent threat of harm” to provide clarity as to what types of speech are exempt from civil RICO application.

The tension between security, broadly defined, and civil liberties is palpable, and requires the courts’ careful deliberation. Indeed, “every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities.”117 Yet the courts’ First Amendment

116 Weiss, supra note 14, at 1144.
Jurisprudence provides a workable and effective bulwark against overreach of civil RICO. The First Amendment prohibits criminal liability based on an individual’s mere association with a group.\textsuperscript{118} Yet it is the case that “violence has no sanctuary in the First Amendment... under the guise of ‘advocacy.’”\textsuperscript{119} The courts have found that it is well-settled that “true threats” of violence are not protected by the First Amendment. True threats, in contrast to mere “political hyperbole,” have been characterized by the Supreme Court as statements made by a speaker who “means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group.”\textsuperscript{120}

The “actually malicious” and “imminent threat of harm” standard (hereinafter, AMITH) on its face does an effective job of balancing the competing dimensions of the liberty-security nexus, adhering to the Court’s declaration that because a “dim and uncertain line” separates protected speech from unprotected speech, “freedoms of expression must be ringed about with adequate bulwarks.”\textsuperscript{121} Even courts that are skeptical of civil RICO\textsuperscript{122} may be less hostile to its employment if the “dim and uncertain line” can be made a little less of each. Reconciling liberty and security is not beyond the ken of the courts. That is, the overarching need for government to protect the U.S.’s citizenry and integrity against terrorist violence does not have to ride rough shod over First Amendment freedoms, nor does the government’s goal need to be completely frustrated by the First Amendment. The remaining sections will build upon the previous discussion and demonstrate how civil RICO is not at odds with the various standards that the federal courts (and the Supreme Court in particular) have articulated regarding First Amendment freedoms and one’s right to voice support for groups and causes that advocate for and carry out acts of violence and terrorism.

\textsuperscript{118}See, e.g., NAACP v. Claiborne Hardware Co., 458 U.S. 886, 918–19 (1982) (noting that although states have broad power to regulate economic activities, they cannot prohibit peaceful advocacy of a politically-motivated boycott).
\textsuperscript{122}See, e.g., Schmidt v. Fleet Bank, 16 F. Supp. 2d 340, 346 (S.D.N.Y. 1998) (“[C]ourts must always be on the lookout for the putative RICO case that is really ‘nothing more than an ordinary fraud case clothed in the Emperor’s trendy garb.’”) (quoting In re Integrated Res. Real Estate, 850 F. Supp. 1105, 1148 (S.D.N.Y. 1993)).
as part of their ideological program.

In *Brandenburg v. Ohio*, the Court found the following:

[freedom of speech] do[es] not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. . . . “the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.” A statute which fails to draw this distinction impermissibly intrudes upon the . . . First . . . Amendment[].”

Thus, the Court has found that “mere advocacy” of the use of force or violence does not in and of itself preclude speech and association from First Amendment protection. Civil RICO is precluded from punishing mere speech and association that advocates, as a general principle, support of violence and terrorism in conjunction with religious and ideological mantras. Under the *Brandenburg* framework, the AMITH standard provides the courts with a feasible and objective legal standard to apply when assessing whether civil RICO would unconstitutionally intrude on First Amendment freedoms. “Under *Brandenburg*, the [S]tate must prove that (1) the speaker subjectively intended incitement; (2) in context, the words used were likely to produce imminent, lawless action; and (3) the words used by the speaker objectively encouraged and urged incitement.” Although civil RICO’s language is broad, the language fits into the AMITH standard while balancing liberty rights of speech and association because “support” as an expressive exercise loses protection when it morphs into material support equivalent to actual “conduct.” Conduct that falls within the AMITH standard is not mere espousal of views or affiliation. The courts could thus use this test to adhere to the letter and spirit of civil RICO while concomitantly respecting protected speech and association.

In *McMonagle v. Northeast Women’s Center, Inc.*, the Court denied certiorari of a Third Circuit decision “that allowed a civil RICO action to be brought against an anti-abortion group that had conducted protest activities against an abortion clinic.” Justice White dissented,

---

124 *Id.*
125 Larsen, *supra* note 101, at 734.
127 *Barry, supra* note 7, at 901.
opining that certiorari was necessary, but he did not directly address any First Amendment issues regarding speech and association. 128 Because the Court permitted the suit to stand—a suit that claimed a RICO violation based on what could be considered a relatively minimal amount of damage to property and business 129—the courts have, generally speaking, adhered to a “low threshold” of “wrongful” activity when assessing whether or not to permit a civil RICO suit to proceed. According to some commentators, McMonagle’s “low threshold” actually encourages chilling of speech because it is possible that individuals or groups opposed to an organization’s activities or policies may face potential civil RICO liability whenever it takes steps which can be considered “wrongful” in relation to a pattern of racketeering. 130 Ostensibly, “crime” is expansively defined under RICO, emphasizing the values encompassed within a security framework. The low threshold of “wrongful” activity allegedly creates a very real potential for the chilling of speech and association, because under a low threshold standard, it may be possible to chill speech through “the use or threat of a RICO suit.” 131

[This may be the case because] a plaintiff in a RICO suit does not have to show that the defendant’s actions actually constituted a violation of a criminal statute in order to prove that the conduct was “wrongful,” and that the defendant extorted his property through the “wrongful use of fear.” It is sufficient merely to demonstrate that the defendant acted without a lawful claim or right. Furthermore, the plaintiff is given the benefit of only having to prove the “wrongfulness” of the defendant’s conduct by a “mere preponderance” standard as opposed to the more stringent “beyond a reasonable doubt” standard as is required in criminal trials. 132

Critics of civil RICO are not limited to First Amendment lawyers and academics. Criticism of civil RICO also emanates from the bench. Some time ago, Judge Sentelle of the Court of Appeals for the District of Columbia articulated what he felt was the most troubling aspect of civil RICO when considering First Amendment freedoms of speech and association. In short, Judge Sentelle states that, “judicial hatred of RICO arises not only from its amorphous mass, but also from the fact that this amorphous mass is a voracious monster. RICO devours traditional and

128 See McMonagle, 493 U.S. at 901 (White, J., dissenting).
129 Id.
130 See Barry, supra note 7, at 907–08.
131 Id. at 907.
132 Id. at 908 (footnotes omitted).
basic concepts of American jurisprudence, including... First Amendment rights of free speech and association.” Judge Sentelle’s evaluation of the federal courts’ treatment of labor unions faced with private civil RICO suits leads him to “question the legitimacy of a statutory remedy that includes as an essential element First Amendment protected association, where the other elements are as vague, nebulous, and as easily subject to creative allegation as the elements of civil RICO.”

Judge Sentelle points to the application of civil RICO to union enterprises as an example of how RICO’s expansive application has a very high potential to chill First Amendment freedoms. Sentelle’s assertion combined with the Scheidler Court’s later finding that no economic motive is necessary for establishing the viability of RICO enterprises, serves to justify fears that civil RICO may in fact be used against a group’s political/ideological activities. Such application supposedly has serious implications for freedom of speech and association. Yet, a closer analysis of the contexts within which civil RICO was found applicable lends support to the contrary contention that civil RICO is being applied to conduct rather than to mere affiliation or espousal of views, which, as a matter of law, constitute protected speech and activity.

In United States v. Sasso, where union officials had committed RICO violations by threatening company representatives, whose employees were union members, as a means for obtaining cash payments, the court found that the lower court had the authority to order those officials to contribute to the costs of monitoring the union. In United States v. Carson, the court held that an order of disgorgement of “ill-gotten gains” against a union officer prosecuted for committing racketeering acts benefiting organized crime should be limited to sums intended solely to prevent and restrain future RICO violations. Although open-ended as to what future violations encompass, this penalty was found to be in accord with the letter and spirit of RICO. Perhaps the case of United States v. International Brotherhood of...
Teamsters, wherein the court upheld disciplinary actions against a union official for associating with an organized crime figure pursuant to consent decree reforming a union’s electoral and disciplinary processes after it was infiltrated by organized crime, may be held out as improperly punishing one for mere association. The association, however, was explicitly connected with organized crime—an illegal association nexus which criminal and civil RICO was initially established to address and abrogate in the first place. In Bayou Steel Corp. v. United Steel Workers of America, plaintiffs filed a civil RICO lawsuit against a group of unions for waging a “corporate campaign” of harassment and violence after failed labor negotiations. Interestingly, prior to the parties reaching a settlement agreement, the court had held that the plaintiff had sufficiently alleged proper facts for establishing a RICO claim, denying a motion to dismiss the complaint.

The foregoing cases suggest that a finding of factual sufficiency to sustain an action is not necessarily determinative, and that by allowing such actions to go forward, the relationship between civil RICO and First Amendment freedoms can be further fleshed out and better defined. Either way, it may be somewhat of an exaggeration to allege that civil RICO is poised to voraciously consume any speech and association that a plaintiff may find repugnant. The facts of a case must be taken into account, with the Court’s First Amendment jurisprudence as the backdrop for adjudging which type of speech the Constitution protects. In addition, speech and association alone are insufficient for sustaining a civil RICO action; the plaintiff must also prove actual harm.

C. Weathering the Storm: Civil RICO & NOW v. Scheidler

Generally speaking, civil RICO has successfully weathered First Amendment challenges to its application to contexts outside of organized crime. Regarding the question of whether providing support for acts of violence and terrorism falls within the purview of the
“shadow of the First Amendment,” the federal courts’ handling of civil RICO suggests that, if the Court were to directly address the issue, chilling speech and association may perhaps be justified (i.e. found constitutional). This is because “constitutional safeguards do not extend to an ‘association’ that is part of a plan to commit a crime.” The Court has stated that, the “First Amendment, which guarantees individuals freedom of conscience and prohibits governmental interference with religious beliefs, does not shield from government scrutiny practices which imperil public safety, peace or order.” It is important to note, however, that the government’s asserted interest when impinging upon First Amendment freedoms must be “substantial.” Although distinct, criminal RICO and civil RICO are part of the same statutory framework, and thus the Court’s pronouncements in one realm may be viewed as persuasive/applicable in the other. In light of the Court’s pronouncement and general First Amendment jurisprudence, there is limited precedent and measured policy support for civil RICO to restrict and/or cabin speech and association when such speech—as in the case of material support for acts of violence and terrorism—morphs into (or can be substantially considered) conduct, satisfying the AMITH standard of review.

The closest the Court has come to addressing the relationship between private civil RICO and the First Amendment occurred in National Organization for Women v. Scheidler. In that case, the Court briefly alluded to civil RICO’s First Amendment implications in Justice Souter’s concurrence. Justice Souter noted that certain types of speech and association are simply beyond the First Amendment’s protections, and as such, there exists speech and association that “we need not fear chilling.” In light of the Court dispensing with the economic motive requirement for sustaining a private civil RICO action, the concurrence noted that, “an economic-motive requirement would protect too much with respect to First Amendment interests, since it would keep RICO from reaching ideological entities whose members commit acts of

146 Bryan et al., supra note 12, at 1017.
151 Id. at 263–64 (Souter, J., concurring).
violence we need not fear chilling.” 152 Generally speaking, Scheidler has implications for the relationship between speech and association and for expanding the circumference of civil RICO’s applicability, because without economic motive being necessary, it allows for ideology to potentially be brought into the scope of civil RICO application. This development, however, does not necessarily produce the illimitable “voracious monster” Judge Sentelle described. 153

Granted, the Court significantly expanded private civil RICO’s application in Scheidler when it permitted a private civil RICO claim to stand against anti-abortion groups that were allegedly members of nationwide conspiracy to shut down abortion clinics through a pattern of racketeering activity. 154 In Scheidler, the Court unanimously held that, for purposes of 18 U.S.C. §§ 1961 and 1962(c), enterprises need not have an economic motive to be subject to RICO actions; “[n]owhere in either § 1962(c) or the RICO definitions in § 1961 is there any indication that an economic motive is required.” 155 The Court found that civil RICO is not constrained by economic motive; that is, economic motive is neither necessary nor sufficient for an entity to be subject to civil RICO. Lack of an economic motive, as the critics note, does create the possibility to restrict speech and association that is organized (i.e., an enterprise), political, and that slightly interferes with interstate commerce in any way. 156 Scheidler’s holding—while perhaps potentially opening the door, so to speak, to infringement of speech based on the ideological underpinnings of said speech—does not necessarily result in infringement when civil RICO is employed. When speech and/or association manifests itself as material support (i.e., conduct, as opposed to mere affiliation and espousal of beliefs), that is “actually malicious” and poses an “imminent threat of harm,” private civil RICO does not chill protected speech and association.

Scheidler involved private civil RICO’s application to anti-abortion groups engaged in alleged racketeering activity. 157 The Court did not address potential First Amendment constitutional challenges to RICO claims against ideological organizations because such issues had not

---

152 Id. (emphasis added).
153 Sentelle, supra note 30, at 161.
155 Id. at 257.
156 See, e.g., Larsen, supra note 101, at 735 (“RICO’s threat to the First Amendment is easily alleviated by lifting its applicability to noneconomic actors.”).
157 Scheidler, 510 U.S. at 252–53.
been explicitly raised in the courts below. Justice Souter noted in his concurrence that:

An economic motive requirement is unnecessary, because legitimate free-speech claims may be raised and addressed in individual RICO cases as they arise. Nothing in the Court’s opinion precludes a RICO defendant from raising the First Amendment in its defense. RICO predicate acts may turn out to be fully protected First Amendment activity. And even in a case where a RICO violation has been validly established, the First Amendment may limit the relief that can be granted against an organization otherwise engaging in protected expression.

Subsequently, when conduct has allegedly violated RICO, as opposed to the cause of action merely being speech and affiliation, private civil RICO claims have been upheld or allowed to proceed based on the Court’s abrogation of an economic motive requirement. For example, in Tompkins v. Cyr, the court found that plaintiffs had valid grounds for a civil RICO complaint against anti-abortion protestors who tried to stop doctors from performing abortions by harassing and threatening them and their families with violence. It is interesting to note that the court denied a motion on appeal to sanction the plaintiffs for filing a frivolous RICO claim. In Huntingdon Life Sciences, Inc. v. Rokke, the court upheld a civil RICO claim against the People for the Ethical Treatment of Animals ("PETA") organization where the defendant was alleged to be an undercover PETA operative who surreptitiously obtained employment to gain access to the plaintiff’s laboratory to investigate its animal testing practices. PETA employed the fraudulently obtained information to launch a public relations campaign against the plaintiff. In both Tompkins and Huntingdon, the defendants engaged in conduct beyond mere speech. Granted, the conduct intersected with speech and association, but the fact remains that the civil RICO suits were permitted to go forward based on conduct, not on speech grounds.

With the explicit repudiation of an economic motive, civil RICO

---

158 Id. at 262 n.6.
159 Id. at 264 (Souter, J., concurring); see also Mike Robinson, Racketeer Verdict Goes Against Abortion Foes, BOS. GLOBE, Apr. 21, 1998; Scheidler v. Nat’l Org. for Women, Inc., 537 U.S. 393, 404–05 (2003).
160 See Douglass & Layne, supra note 33, at 1122–23.
161 Tompkins v. Cyr, 202 F.3d 770, 775, 787–88 (5th Cir. 2000).
162 Id. at 787–88.
164 Id. at 985.
has been used to encompass other enterprises that are usually viewed as being shielded by the First Amendment’s protection of affiliation and espousal of views. Some courts have attempted to reconcile civil RICO with First Amendment freedoms by clearly distinguishing the substantive difference between mere affiliation and espousal of views and support of terrorism that is material and thus qualifies as actual conduct.\footnote{See, e.g., United States v. Al-Arian, 308 F. Supp. 2d 1322, 1336–39, 1341–43 (M.D. Fla. 2004).} Although a criminal RICO case, the court’s rationale in United States v. Beasley\footnote{United States v. Beasley, 72 F.3d 1518 (11th Cir. 1996).} can be applied to civil RICO when assessing the relationship between civil RICO and the First Amendment. In Beasley, the Eleventh Circuit found that a religious organization could indeed be subject to RICO liability.\footnote{Id. at 1525–27.} The court noted that

> [t]he evidence admitted was highly relevant to the jury’s understanding of the existence, motives, and objectives of the RICO conspiracy and the means by which it was conducted. . . . [R]eligion [was employed] as a means of exhorting followers to commit the racketeering acts, and appellants cannot hide behind . . . the First Amendment.\footnote{Id. at 1527 (emphasis added).}

In assessing protections from non-protected speech and association, the court found that

> affiliation with a religious group is properly admissible where probative . . . . The evidence regarding the religion was relevant, because religious teachings were used to justify, rationalize, and promote crime. . . . The First Amendment’s protection of beliefs and associations does not preclude such evidence where relevant to a trial issue.\footnote{Id.}

The rationale of Beasley is in line with and supports the application of civil RICO to enterprises that, though shielded by the First Amendment when it comes to affiliation and espousal of protected (unpopular) views (political, ideological, social, and/or religious), engage in conduct effectuating acts of violence and terrorism not entitled to the aegis of the First Amendment, because the conduct is part of expressive speech that “we need not fear chilling.” The court noted that RICO is thus legitimately triggered because for it “[t]o satisfy the interstate commerce requirement, only a slight effect on interstate commerce is enough.”
commerce is required."170

Granted, it is possible to construe the Beasley rationale as facilitating RICO’s capacity to impose “unconstitutional prior restraint on speech, rather than a permissible criminal punishment,”171 upon ideological enterprises that espouse highly unpopular views. It is also a valid contention, however, that speech and association that encompass (manifest) “force, threats of force, fear and violence”172 are unprotected and subject to civil RICO because such conduct results in damages to financial interests and property, and negatively affects interstate commerce. Support of terror that is subject to civil RICO can thus be distinguished from mere espousal of views and affiliation that support terror, in that actual conduct transected with or that goes beyond speech is not protected and thus is subject to civil RICO. Speech that provides tangible or material support for acts of terrorism equals conduct.173 Such conduct arguably falls under the purview of civil RICO. Civil RICO “does not punish protected acts of expression. Peaceful picketing, protesting, and other non-violent acts of expression protected under the First Amendment are not predicate acts under RICO, and will not subject individuals to RICO liability. RICO punishes only unlawful conduct such as murder, arson, robbery, extortion, and fraud.”174 As the Court noted in Alexander v. United States, RICO-based criminal and civil sanctions having some incidental effect on First Amendment activities are subject to First Amendment scrutiny “only where it was conduct with a significant expressive element that drew the legal remedy in the first place, . . . or where a statute based on a non-expressive activity has the inevitable effect of singling out those engaged in expressive activity . . . .”175

Intended conduct that facilitates, substantively and directly, and furthers the illegal goals of terrorist organizations is thus, at best, incidental to

170 Beasley, 72 F.3d at 1526.
172 Ne. Women’s Ctr., Inc. v. McMonagle, 868 F.2d 1342, 1350 (3d Cir. 1989).
175 Alexander, 509 U.S. at 2774–75.
expressive activity, and unprotected by the First Amendment. The Court’s rationale, in conjunction with the AMITH standard, further clarifies and distinguishes civil RICO from First Amendment freedoms, allowing each to function without unduly impinging on the other.\footnote{The court in \textit{Smithfield Foods, Inc. v United Food & Commercial Workers Int’l Union}, 585 F. Supp. 2d 789, 803 (E.D. Va. 2008) stated:}

In cases dealing with First Amendment challenges to RICO’s application, such as social protest as constitutionally protected exercises of free speech and association, the courts have found that significant government interests may, as a matter of law, curb such freedoms.\footnote{\textit{United States v. O’Brien}, 391 U.S. 367, 376–77 (1968).} This principle of restriction on First Amendment freedoms can be readily applied to civil RICO and its potential curbing of speech and association that manifests itself as actual conduct prohibited by law. For example, acts of terrorism, murder, extortion, and kidnapping extolled by, and facilitated through, religious-ideological enterprises are not protected speech, and thus are subject to civil RICO liability. Even when a terrorist organization’s agenda possesses legal and illegal components, and expressive activity is amalgamated with illegal aspects of an organization’s agenda, such as carrying out acts of violence and terrorism, material support of terrorism in the form of intended substantive conduct is expressive activity that “we need not fear chilling.” The courts have recognized that the application of certain laws may impact a “defendant’s First Amendment rights of association, [but] the government’s significant interest in eradicating organized crime may [as a matter of law] override such concerns.”\footnote{Douglass & Layne, \textit{supra} note 33, at 1116. The Second Circuit Court of Appeals has noted that “it is well established that an individual’s right to freedom of association may be curtailed to further significant governmental interests[, b]ecause the public has a compelling interest in eliminating the ‘public evils’ of ‘crime, corruption, and racketeering.’” United States v. Int’l Bhd. of Teamsters, 941 F.2d 1292, 1297 (2d Cir. 1991) (citations omitted).}


There can be no question that meetings, speeches, petitions, nonviolent picketing, and boycotts are all forms of speech and conduct that are entitled to protection under the First Amendment. “[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process, and citizens must be able to make their views known by collective effort, lest their voices be faint or lost.” Such speech may cajole others to boycott businesses without losing its protected character, and governmental abridgement of such discussion can only occur to prevent “clear danger of substantive evils.” Indeed, it is abundantly clear that “[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action.”

organizations can be viewed as organized criminal enterprises subject to
civil RICO liability.

V. CIVIL RICO, ACTS OF VIOLENCE AND SUPPORT OF TERRORISM

In light of the case law and principles discussed above, the courts can, as a matter of law, consistently distinguish between protected and unprotected speech and conduct regarding acts of violence and support of terrorism. This is a desirable devolvement if policy is to reflect a balance between liberty and security. Balance is desirable because security lends itself to being expansive in nature and application. Security can encompass a variety of dimensions that transcend a limited preoccupation with physical safety. Public safety can entail the political, economic, cultural, literary, agricultural, social, and media aspects of a polity, which are all potential fodder for securitization. Thus, a robust First Amendment jurisprudence helps cabin civil RICO.

In Scales v. United States, the Court held unconstitutional a statute making it unlawful to be a knowing member in any organization that advocated the violent overthrow of the U.S.179 The Court held that:

In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity (here advocacy of violent overthrow), that relationship must be sufficiently substantial to satisfy the concept of personal guilt . . . . Membership, without more, in an organization engaged in illegal advocacy, it is now said, has not heretofore been recognized by this Court to be such a relationship.180

Thus, an individual cannot be punished for merely belonging to, or espousing sympathies with, a political organization, even if said organization has legal as well as illegal goals. The Court has held that a “blanket prohibition of association with a group having both legal and illegal aims . . . [would pose] a real danger that legitimate political expression or association would be impaired.”181 Association and advocacy are protected by the First Amendment. To impose liability on an individual for association with a group, it is necessary to establish that the group possessed unlawful goals and that the individual held a

180 Id.
181 Id. at 229. See also United States v. Hammoud, 381 F.3d 316, 328 (4th Cir. 2004) (“[I]t is a violation of the First Amendment to punish an individual for mere membership in an organization that has legal and illegal goals.”).
specific intent to further those illegal aims.\textsuperscript{182}

The lower federal courts have entertained suits filed under civil RICO regarding support of terrorism. Specifically, the courts have considered whether or not private civil RICO’s severe penalties can be applied to support of terrorism.\textsuperscript{183} Although different statutory contexts and rationales are involved, the general notion that emerges from the case law is that conduct in support of terrorism does not fall within the purview of First Amendment protection.\textsuperscript{184} The law can criminalize—i.e., chill—speech and association that fall outside of the First Amendment. Civil RICO targets conduct. Material support of terrorism is conduct, not speech;\textsuperscript{185} therefore, conduct that poses an immediate threat of harm to public safety enjoys no protection from the aegis of the First Amendment and is subject to civil RICO liability.

Enterprises that facilitate or carry out acts of violence and terrorism are thus potentially subject to private civil RICO liability because, as the Court found in \textit{Scheidler}, “[a]n enterprise surely can have a detrimental influence on interstate or foreign commerce without having . . . profit-seeking motives.”\textsuperscript{186} The remainder of this Article will focus on how the courts can develop a more consistent and uniform modality of determining when speech and association are protected from private civil RICO liability. The rationales of three specific lower court decisions dealing with RICO and support of terrorism in light of First Amendment protections will be explored in order to accomplish this

\begin{footnotes}
\footnote{182}{Boim \textit{v.} Quranic Literacy Inst., 291 F.3d 1000, 1022 (7th Cir. 2002).}
\footnote{183}{\textit{See}, e.g., In re Terrorist Attacks on September 11, 2001, 392 F. Supp. 2d 539, 546, 575–76 (S.D. N.Y. 2005) (rejecting a number of claims under RICO against financial supporters of charities who funneled money to terrorist organizations); In re Terrorist Attacks on September 11, 2001, 464 F. Supp. 2d 335, 340–41 (S.D.N.Y. 2006) (rejecting as speculative RICO claims that the defendants should have known that charitable investments were being used to support terrorist activities); In re Terrorist Attacks on September 11, 2001, 349 F. Supp. 2d 765, 826–28 (S.D.N.Y. 2005) (dismissing RICO claim for failure to show that injury was result of the defendants’ alleged investment of racketeering income and failure to show that defendants were actively participating in the conduct of the enterprise); United States \textit{v.} Bagaric, 706 F.2d 42, 54 (2d Cir. 1983); United States \textit{v.} Marzook, 426 F. Supp. 2d 820, 826 (N.D. Ill. 2006); United States \textit{v.} Al-Arian, 308 F. Supp. 2d 1322, 1348–50 (M.D. Fla. 2004); Burnett \textit{v.} Al Baraka Inv. & Dev. Corp., 274 F. Supp. 2d 86, 91, 100–02 (D.D.C. 2003) (dismissing RICO claims because of failure to show injuries to business or property); Doe I \textit{v.} State of Israel, 400 F. Supp. 2d 86, 117–18 (D.D.C. 2005) (finding that plaintiff must demonstrate that the defendant had intent to further the terrorist acts, for allowing a more expansive interpretation of RICO would “constitute an omnipresent blanket of liability that could chill a wide range of economic and First Amendment activity”).}
\footnote{184}{\textit{See}, e.g., Marzook, 426 F. Supp. 2d at 826; \textit{Al-Arian}, 308 F. Supp. 2d at 1341–43.}
\footnote{185}{\textit{See} Holder \textit{v.} Humanitarian Law Project, 561 U.S. 1, 25–26 (2015).}
\footnote{186}{Nat’l Org. for Women \textit{v.} Scheidler, 510 U.S. 249, 258 (1994).}
\end{footnotes}
aim. The courts’ rationales, in conjunction with application of the AMITH standard, provides the courts with an effective, clear, and legitimate means of determining when First Amendment freedoms are exempt from private civil RICO actions.

A. Developing a Framework for Distinguishing Speech and Association From Support and Conduct

1. United States v. Marzook: Protected and Unprotected Speech

The court’s analysis in United States v. Marzook provides a basis and starting point for developing a framework for assessing when support of terrorism is subject to civil RICO liability. The Marzook court specifically addressed the question of RICO’s application to, and possible “criminalization” of, mere ideological affiliation vis-à-vis First Amendment freedoms of speech and association. Although conducted in a criminal context, the court’s analysis is quite helpful in establishing a clear framework for adjudging when First Amendment freedoms are protected from civil RICO. The court’s analysis provides a working basis from which to analyze private civil RICO’s implications to speech and association. In particular, the court’s analysis helps distinguish between mere espousal of views and affiliation that supports terrorism, i.e., protected speech, and material support of terrorism that is equivalent to conduct, i.e., unprotected speech subject to private civil RICO liability.

In Marzook, the defendant,

[a]s part of his role as a Hamas administrator and in furtherance of the RICO conspiracy, . . . participated in a number of phone conversations related to Hamas activity both in the United States and abroad. . . . in furtherance of Hamas’s goals . . . including . . . control and minimization of damage to Hamas from the arrest and loss of members involved in terrorist actions.

In addition, in furtherance of the RICO conspiracy, the defendant also provided the following types of support of terrorism (as opposed to mere espousal of political views) in the form of disseminating documents

---

188 Id. at *4.
189 Id. at * 5–7.
190 Id. at *2 (emphasis added).
relating to the following activities: “Hamas terrorist attacks; [ ] security training and directives, including counter-surveillance techniques, secrecy protocols, and interrogation issues; . . . The movement of money for Hamas activities; . . . [and] Policies and activities of various terrorist organizations or anti-Israeli groups . . . .” 191

The court explicitly rejected the defendant’s claim that “the Indictment impinges on his First Amendment rights of freedom of speech and association.” 192 Defendant claimed that the RICO charge criminalized his social and political views and affiliation in violation of the First Amendment. 193 The court, however, rejected the defendant’s argument. 194 The court found that the RICO indictment, in light of the defendant’s conduct, which included supporting “a group that used terrorism to further its goals, . . . did not violate the defendant’s First Amendment rights . . . .” 195 The First Amendment recognizes that an individual cannot be punished for mere membership in an organization, even if that organization has legal as well as illegal goals, unless there was a showing that the defendant specifically intended to further the organization’s unlawful goals. 195 Mere espousal of views in the form of support for groups that advocate terrorism is not sufficient for RICO liability; conduct—material support as distinct from mere support—that goes beyond mere association or advocacy is sufficient to subject one’s expressive activity to civil RICO liability. 196

The court’s analysis was based on clearly distinguishing mere speech and affiliation from actual conduct in support of terrorism. 197 This crucial distinction provides courts with an initial point of inquiry when determining which type of speech and association are either directly protected or which reside somewhere within the “shadow of the First Amendment.” 198 In United States v. Dellinger, the court noted why it is important to begin with a clear distinction between protected and unprotected speech; stating its necessity

[w]hen the group activity out of which [an] offense develops [may] be described as a bifarious undertaking, involving both legal and illegal purposes

191 Marzook, 2005 WL 3095543, at *2.
192 Id. at *4.
193 Id.
194 Id. at *5.
195 Zitter, supra note 50; see Marzook, 2005 WL 3095543, at *4.
196 Marzook, 2005 WL 3095543, at *5.
197 Id.
and conduct, and [thus may be] within the shadow of the first amendment . . . This is . . . to avoid punishing one who participates in such an undertaking and is in sympathy with its legitimate aims, but does not intend to accomplish them by unlawful means.199

The Dellinger formulation thus points to the efficacy of employing the AMITH legal standard in conjunction with an actual conduct versus mere espousal of views/affiliation test, because the test is sensitive to First Amendment freedoms while allowing private civil RICO to operate as Congress intended—to aid in dismantling and punishing enterprises engaged in patterns of racketeering activity. Speech and association that involve the provision of material support for terrorist groups, causes, movements, etc., go beyond protected speech, and do not lie either directly within, or in the shadow of, the First Amendment. Rather, material support of terrorism constitutes conduct—active conduct that seeks to intentionally and substantively facilitate the goals of enterprises that operate and implement their agendas illegally through acts of violence and terrorism, which are thus subject to private civil RICO.

Private civil RICO does not criminalize mere membership, association, and/or advocacy on behalf of a group that embraces illegal violence and acts of terror to implement a particular religious and/or politico-ideological agenda. As mentioned above, the Court has explicitly held that the First Amendment prohibits criminal liability based on an individual’s mere association with a group.200 An individual’s mere association with a group that advocates violence and acts of terrorism does not constitute support of terror for the purposes of First Amendment protection.201 The Marzook court, therefore, found that association with organizations that engage in legal as well as illegal acts requires that a defendant not only associate with, but also specifically intend to support the illegal activities and goals of a particular organization.202 As mentioned previously, “in order to impose liability on an individual for association with a group, it is necessary to establish that the group possessed unlawful goals and that the individual held a specific intent to further those illegal aims.”203

199 Id.
201 See United States v. Hammoud, 381 F.3d 316, 328–29 (4th Cir. 2004) (“[I]t is a violation of the First Amendment to punish an individual for mere membership in an organization that has legal and illegal goals.”).
203 Boim v. Quranic Literacy Inst., 291 F.3d 1000, 1022 (7th Cir. 2002).
Ascertaining what constitutes support of terrorism thus involves distinguishing between speech and conduct and the manifestation of specific intent to actually further those organizations’ goals of illegally perpetuating and engaging in acts of terrorism, which converts protected speech into unprotected speech subject to civil RICO. When subject to civil RICO liability, it should be clear that a defendant’s speech and affiliation with groups that are engaged in or support terrorism is not being criminalized; rather, conduct that specifically intends to further and facilitate the carrying out of terrorism is what is being punished.\textsuperscript{204} Chilling of First Amendment freedoms thus occurs in “situations where the government seeks to impose liability on the basis of association alone, i.e., on the basis of membership alone or because a person espouses the views of an organization that engages in illegal activities.”\textsuperscript{205} This is not the case in the application of civil RICO to material support of terrorism. Speech and association that materially supports terrorism via active conduct is not mere membership, but active participation that is actually malicious and poses an imminent threat of immediate harm.

Conduct is the key. Taking the step of providing actual material support for acts of violence and terrorism constitutes conduct, and that is what civil RICO punishes. Additionally, an agreement to intentionally carry out illegal conduct within protected speech activity, to hide illegal conduct within legitimate protected speech activity, is covered in the conspiracy provision of RICO.\textsuperscript{206} RICO’s conspiracy provision is informative for this discussion because it bases liability on an agreement to engage in conduct as opposed to mere espousal of views and/or affiliation.\textsuperscript{207} As noted by the court in \textit{United States v. Glecier},

Section 1962(c), the familiar “substantive” RICO provision, criminalizes the participation in the affairs of an enterprise affecting interstate commerce through a pattern of racketeering activity. Section 1962(d), like all conspiracy provisions, has as its target the act of agreement—here, the agreement to engage in activity[, i.e., conduct,] that implicates section 1962(c).\textsuperscript{208} Affiliation and espousal of politico-ideological views that support terrorism is protected speech and association, conduct that acts upon

\textsuperscript{204} See Marzook, 2005 WL 3095543, at *4–7.
\textsuperscript{205} Boim, 291 F.3d at 1026.
\textsuperscript{208} United States v. Glecier, 923 F.2d 496, 500 (7th Cir. 1991).
such views is not. Under the AMITH standard, courts can identify which category of analysis applies.

2. United States v. Warsame: Refining the Notion of Material Support

The court’s analysis in United States v. Warsame\(^{209}\) provides additional clarity for developing a framework to determine when speech and association are protected from private civil RICO liability. As in the case of Marzook, the Warsame court also analyzed when mere espousal of views and affiliation become material support and thus conduct facilitating the illegal goals of terrorist organizations.\(^{210}\) The court’s analysis of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”\(^{211}\)) provides a viable and clear basis, within the context of civil RICO, to determine when speech and association morph into material support of terrorism, i.e., conduct facilitating terrorism.\(^{212}\)

Under AEDPA, “material support or resources” is defined as:

\[
\text{any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.}\(^{213}\)
\]

The AEDPA definition, when applied to material support of terrorism, is useful for fleshing out a framework for adjudging whether or not speech is subject to private civil RICO, because it builds upon the dichotomy of protected speech/association is not equivalent to unprotected support/conduct. While the AEDPA definition does not need to be applied as is, the definition, at a minimum, does provide an exemplar of a standard that adheres to the distinction between speech and conduct, in that material support is viewed as involving one having specific intent to facilitate and further a terrorist enterprise’s illegal goals through conduct.


\(^{210}\) Id. at 1014.


\(^{212}\) Warsame, 537 F. Supp. 2d at 1010.

The *Warsame* court’s analysis of 18 U.S.C. § 2339(B)(a)(1)214 also aids in further clarifying a framework for analyzing and adjudging whether speech and association are exempt from civil RICO liability. In particular, the court addresses the issues of potential criminalization (chilling) of First Amendment freedoms vis-à-vis association and expressiveness via financial contributions to organizations (i.e., the equivalent of RICO enterprises) that engage in legal advocacy and implementation of illegal acts of violence and terrorism to obtain religious and/or politico-ideological goals.215 The Court’s First Amendment jurisprudence has consistently held that “the critical line for First Amendment purposes must be drawn between advocacy, which is entitled to full protection, and action, which is not.”216 Civil RICO is not an exception. Civil RICO does not chill—does not criminalize—speech and association. Indeed, it would be far-fetched to claim that Congress intended civil RICO to chill First Amendment freedoms. It is plausible, however, to contend that Congress intended to punish criminal behavior (conduct) and compensate victims of illegal conduct under § 1962(c). This being the case, mere expression, espousal of views, affiliation, and advocacy can be carried out on behalf of terrorist groups; private civil RICO does not chill First Amendment freedoms to associate with and advocate on behalf of terrorist organizations—free speech and association allow membership in terrorist groups or groups that advocate terrorism as part of a politico-ideological program, and allows espousal of or sympathizing with the views of such organizations, however unpopular the views might be. Material support of terrorism, however, is equivalent to conduct, and thus “does not implicate associational or speech rights.”217

As far as financial contribution being an expressive component of speech and association, the *Warsame* court found that support of terrorism in the form of action (conduct) is not entitled to protection.218 This rationale also supports the contention that civil RICO can be reconciled with First Amendment freedoms. Financial contributions to political organizations generally receive heightened First Amendment

---

214 A person “must have knowledge that the organization is a designated terrorist organization . . . , that the organization has engaged or engages in terrorist activity . . . , or that the organization has engaged or engages in terrorism.” *Warsame*, 537 F. Supp.2d at 1010–11 (quoting 18 U.S.C. § 2339B(a)(1)).
215 *Id.* at 1013–15.
217 Boim v. Quranic Literacy Inst., 291 F.3d 1000, 1026 (7th Cir. 2002).
218 *Warsame*, 537 F. Supp.2d at 1015.
protection because, as the Warsame court notes, “they have an expressive component and demonstrate the donor’s association with the candidate or organization.”\textsuperscript{219} There is, however, a qualification; i.e., contributions are deemed protected speech only when made to an organization “whose overwhelming function [is] political advocacy.”\textsuperscript{220} Arguably, financial support of terrorist groups—even those with a political component—are not to be considered advocacy groups with an “overwhelming” (legal) political function in that acts of violence and terrorism are patently illegal, criminal, and thus not entitled to protection like legitimate speech.\textsuperscript{221} The Warsame court’s rationale that financial contributions to terrorist organizations that openly and actively advocate and carry out acts of violence and terrorism is not protected speech, but rather conduct that invokes the intermediate scrutiny standard articulated in \textit{United States v. O’Brien}.\textsuperscript{222} Thus, in the case of permitting civil RICO to potentially negatively impact First Amendment freedoms, speech and association should be subject to civil RICO when: (1) the government’s interest in preventing the spread of terrorism is substantial, and (2) the government’s interest in preventing terrorism does not directly relate to, or target, free speech and association, with the caveat that “any incidental restrictions on . . . freedom of expression [should thus be] no greater than necessary to further the government’s substantial interest” in combating terrorism.\textsuperscript{223}

The Court’s reasoning in \textit{Dennis v. United States}, which addressed the issue of conspiracy in light of the First Amendment, further bolsters the Warsame court’s reasoning.\textsuperscript{224} In Dennis, the concurrence noted that:

\begin{quote}
The defense of freedom of speech . . . has often been raised . . . because . . .
\end{quote}


\textsuperscript{220} Humanitarian Law Project v. Reno, 205 F.3d 1130, 1134–35 (9th Cir. 2000).

\textsuperscript{221} See, e.g., United States v. Hammoud, 381 F.3d 316, 328 n.3 (4th Cir. 2004) (rejecting the argument that financial contributions to Hizballah are protected as political speech because Hizballah is not a political advocacy group, but rather a criminal terrorist organization).

\textsuperscript{222} \textit{Warsame}, 537 F. Supp. 2d at 1015. As the Warsame court noted, under the Court’s \textit{O’Brien} standard of review, a statute is valid if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

\textsuperscript{223} \textit{Warsame}, 537 F. Supp. 2d at 1016.

it usually consists of words written or spoken . . . . Communication is the essence of every conspiracy, for only by it can common purpose and concert of action be brought about or be proved . . . “. . . But it has never been deemed an abridgement of freedom of speech . . . merely because the conduct was in part initiated, evidenced, or carried out by means of language . . . . Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against . . . conspiracies deemed injurious to society.”

Material support of terrorism, as in the case of conspiracies to commit crimes, is not only actually malicious, but also poses an imminent threat of harm, and is thus quite “injurious to society.” Furthermore, the courts have not allowed claims of freedom of speech to insulate entities from the criminal (and civil) implications and consequences that stem from speech and association being converted into material support, i.e., conduct, that facilitates acts of violence and terrorism.

3. **Savage v. Council on American-Islamic Relations**: Balancing Competing Interests

The last case to be analyzed is *Savage v. Council on American-Islamic Relations, Inc.* The *Savage* court’s logic goes furthest in substantively addressing critics’ concerns about the potential voracity of civil RICO and First Amendment freedoms. While the *Marzook* and *Warsame* courts addressed the chilling of such freedoms within a criminal context, providing insight into constructing a framework for identifying what type of speech is or is not subject to private civil RICO liability, the court in *Savage* directly addresses the issue within a civil RICO context. In *Savage*, the court was confronted with the issue of sustaining a private civil RICO suit. At the outset of its opinion, the court noted the very serious First Amendment implications of the private civil RICO suit. The court found that nearly all of defendants’ activities implicated in the RICO charge—in particular, public use and critique of the plaintiff’s public radio commentary (which accused defendant of being a terrorist organization) to counter the charges levied by plaintiff—“are related to speech and thus may have First Amendment protection. . . . the gravamen of

---

225 *Id.* (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949)).
227 *Id.* at *2.
228 *Id.* at *10.
plaintiff’s dispute is with the ideas that defendants may or may not espouse. As plaintiff should no doubt be aware, this is fertile First Amendment territory...”229 The court followed Justice Souter’s admonition in Scheidler, with the result being that private civil RICO was found not to apply to protected speech.230

The Savage court was sensitive to, and took into account, the First Amendment issues that the initiation of a civil RICO suit implicated.231 By engaging in an initial First Amendment analysis, the court was able to immediately identify and quash the misuse of civil RICO to impinge First Amendment freedoms of speech. Upon a careful analysis of the facts, the court was acutely aware that the plaintiff was employing civil RICO in such a way as to chill protected speech. Application of the AMITH standard, in conjunction with determining whether speech is formally protected (mere speech/affiliation) or is not protected (actual material support/conduct) further bolsters an operative framework by which the courts can reconcile civil RICO and First Amendment freedoms. In Savage, defendant’s speech was deemed not actually malicious and not posing an imminent threat of harm to plaintiff or the public.232 The court’s rationale and subsequent dismissal of the suit supports the contention that private civil RICO and the First Amendment can be reconciled. Savage directly addresses and dispenses with fears of civil RICO as a voracious monster with illimitable application.

In Savage, the court found that the suit at bar presented the following First Amendment issue; i.e., the issue of Noerr-Pennington protection vis-à-vis freedom of speech.233 The court found that “[a]lthough the Supreme Court has not extended the Noerr-Pennington doctrine to speech-related activities other than petitioning, the doctrine

---

229 Id. at *10 (emphasis added).
230 Id. at *12.
231 Id. at *10.
232 Id. at *12.
233 As the Savage court noted:

“The Supreme Court has long recognized that for the Petition Clause [of the First Amendment] to be a meaningful protection of the democratic process, citizens must be immune from some forms of liability for their efforts to persuade government officials to adopt policy or perform their functions in a certain way.” This doctrine is referred to as the Noerr-Pennington doctrine, which has its origins in the Supreme Court’s decision that a party could be immune from liability under the Sherman Act for efforts to influence the legislative or executive branches of government.

demonstrates that defendants may use the First Amendment as a shield to defend against claims alleging antitrust and civil RICO violations.\footnote{234} The First Amendment may be used as a “shield” to protect parties engaged in “petitioning” via civil lawsuits and pre-litigation demand letters.\footnote{235} In \textit{Savage}, the court found that applying civil RICO would indeed chill the defendant’s freedom to respond to the plaintiff’s initial allegations of it being a terrorist organization by filing lawsuits.\footnote{236} “To the extent the actions complained of involve defendants’ filing of lawsuits . . . defendants are entitled to \textit{Noerr-Pennington} protection . . . [a] RICO claim may not be sustained on the basis of [defendant filing] lawsuits and pre-litigation demand letters.”\footnote{237}

Like the \textit{Marzook} and \textit{Warsame} courts, the \textit{Savage} court, to some degree, addressed issues of free speech and association by distinguishing protected speech from unprotected conduct, and then determining whether that conduct took place while furthering a terrorist organization’s illegal goals. Furthermore, the \textit{Savage} court also found that the injury complained of was based entirely on protected speech, and thus the plaintiff’s suit was dismissed.\footnote{238} The court’s rationale thus directly addresses the critics’ allegations that civil RICO should be severely restricted due to the threat it poses to First Amendment freedoms.

\textbf{Plaintiff’s injury is entirely founded upon defendants’ speech-related activities.}

It appears beyond dispute that plaintiff is a public figure and that plaintiff was discussing matters of public concern when he discussed the role of Islam in the United States and whether those of Islamic faith should be permitted to emigrate here.\footnote{239}

\textbf{If the AMITH standard of review is added to the courts’ analysis pertaining to First Amendment freedoms and private civil RICO, a framework begins to emerge that reconciles the purpose, scope, and meaning of RICO with the protection of First Amendment freedoms from being chilled.}

Lastly, it is also important to note that civil RICO, despite any attempts to construe it as such, is not a punitive measure. The courts

\footnotesize{\begin{itemize}
    \item \footnote{234}{\textit{Savage}, 2008 WL 2951281, at *12.}
    \item \footnote{235}{\textit{Id.} at *11.}
    \item \footnote{236}{\textit{Id.} at *11–12.}
    \item \footnote{237}{\textit{Id.} at *11.}
    \item \footnote{238}{\textit{Savage}, 2008 WL 2951281, at *12.}
    \item \footnote{239}{\textit{Id.}}
\end{itemize}}
have found that part of civil RICO’s purpose—which, along with First Amendment freedoms, is fundamental to American law—is to compensate parties that have suffered harm because of the defendant’s illegal conduct.

Although the treble damages provisions of a civil RICO suit may suggest a punitive element, the overriding purpose of RICO is to provide a remedy to persons injured as a result of racketeering activity. . . . [C]ivil RICO recovery runs to a private individual, and the mere inclusion of treble damages within a statutory scheme does not operate to make it punitive.240

The Court, citing hearings held in the House of Representatives, has explicitly stated that the “legislative history of § 1964(c) reveals [an] emphasis on the remedial role of the treble-damages provision . . . ‘those who have been wronged by organized crime should at least be given access to a legal remedy.’ The policing function of § 1964(c), although important, was a secondary concern.”241

The remedial nature of private civil RICO, although tinctured with a degree of “prosecutorial” power, is nevertheless non-punitive in nature, and thus poses much less of a threat to First Amendment freedoms of speech and association as critics allege. In enacting RICO, the Court has found that Congress intended to augment and enhance the government’s capacity to dismantle enterprises that engage in racketeering activity via civil RICO by vesting prosecutorial power in private parties victimized by racketeering enterprises. This is the case because civil RICO meets Congress’

objective of encouraging civil litigation to supplement Government efforts to deter . . . prohibited practices. The object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors, “private attorneys general,” dedicated to eliminating racketeering activity. . . . [T]reble damages is accordingly justified by the expected benefit of suppressing racketeering activity . . . .242

VI. CONCLUSION

When examining the liberty-security nexus, each dimension is

revealed to be part and parcel immanent in Order. Each is premised on opposing, but fundamental, aspects of a democratic society. Law is an instrumentality that enables freedom and order to coexist in the same space. Civil RICO values security, order, and public safety. Additionally, civil RICO illustrates the law’s ability to reconcile competing societal values. In light of the Court’s initial construction of RICO, subsequent RICO jurisprudence, and its overall First Amendment jurisprudence, civil RICO can coexist and be reconciled with First Amendment freedoms of speech and association. In sum, conduct that supports terrorism is unprotected, and is distinct from mere espousal of views and affiliation, which is protected speech. When one gives up on speech and adopts violence as a primary means of “expressing” an ideology, political position, and/or worldview, then any protections afforded speech and expression are forfeited. The courts (and the Court in particular) have interpreted the First Amendment as protecting lawful speech. Lawful speech, generally speaking, has been defined and characterized as encompassing non-violent conduct. Such speech does not fall within the purview of civil RICO. Violent conduct committed in the name of speech, expression, do not fall within the protective zone of First Amendment freedom of speech and expression.

Civil RICO thus applies to conduct in support of terrorism, and thus does not pose a prima facie threat to First Amendment freedoms. Speech has to be actually malicious and must pose an imminent threat of harm; i.e., speech must manifest itself into conduct to be subject to civil RICO. Deterring and punishing the material support of terrorism is in line with the scope, meaning, and purpose of private civil RICO. With acts of terrorism being made part of criminal RICO predicate acts, the courts have an incentive to reconcile private civil RICO with the First Amendment in a uniform, clear, efficient, and constitutionally acceptable manner. As noted in United States v. Al-Arian, the Court has declared that protecting society is “of great importance,” and that “other courts have concluded that the government’s interest in stopping the spread of . . . terrorism is ‘paramount’ or ‘substantial’ . . . stopping the spread of terrorism is not just a sufficiently important governmental


244 See Alexander v. United States, 509 U.S. 544, 555 (1993) (stating that RICO does not prohibit speech that is constitutionally protected).

interest, but is a compelling governmental interest. 246 Liberty need not be adversely affected by security. Thus, as in the case of criminalization, subjecting facilitators of terrorism to civil liability enhances and reifies RICO’s overall efficacy regarding the goal of dismantling enterprises that pose a profound threat of harm to public safety and in compensating the victims of illegal acts of terrorism.

Notes

EXCUSING “WOMEN OF CIRCUMSTANCE”: REDEFINING CONSPIRACY LAW TO HOLD CULPABLE OFFENDERS ACCOUNTABLE

Amanda E. Smallhorn*

I. THE IMPACT OF “WOMEN-ONLY” EXCUSES ON CRIMINAL CULPABILITY OF WOMEN ............................................................. 421
   A. Coercion by Husband ................................................................. 421
   B. Battered Women’s Syndrome ...................................................... 424

II. WHO THE WOMEN OF CIRCUMSTANCE ARE AND WHY THEY SHOULD BE EXCUSED ................................................................... 427
   A. Kemba Smith ....................................................................... 429
   B. Danielle Metz ..................................................................... 430
   C. Teresa Griffin ..................................................................... 430

III. AN INTERSECTIONAL ANALYSIS OF “WOMEN-ONLY” EXCUSES IS NECESSARY ............................................................... 431

IV. POTENTIAL INTERSECTIONAL SOLUTIONS TO EXCUSE WOMEN OF CIRCUMSTANCE ........................................... 436
   A. Proposed Substantive Changes to Criminal Law ..................... 436
      1. Legally Excusing Women of Circumstance From Conspiracy Charges ...................................................... 437
      2. Adjusting the Standard to Meet a Duress Defense ............... 442
   B. Proposed Changes to Federal Mandatory Minimum Sentencing Practices .......................................................... 444
      1. Recalculating Drug Quantities Under the Current Definition of Conspiracy .................................................. 444
      2. Changing the Elements to Meet a Safety Valve ............... 447
      3. Creating a “Cooperation Under Duress” Departure ......... 450

V. CONCLUSION................................................................................. 453
There are a lot of women who are in prison because of their association with a man. We may not necessarily be involved with the crime, but knowing about it is what makes us guilty. . . . People should know that with conspiracy law, you don’t have to know anything to be brought in with those charges. You could be in a car with someone, you could stop by someone’s house, you could even make a phone call to someone. So don’t pass judgment on those who have been sentenced to serve prison time because of this law. Research it. Understand it fully. We’re not all guilty to the degree that we should be sentenced so seriously in the courts.1

Twenty-five year-old Ramona Brant met Donald Barber in 1989, soon after relocating from New York to North Carolina.2 When she moved in with him, she knew he dealt drugs, but had no idea he ran an interstate drug ring.3 One month into their relationship, Barber began violently beating Ramona when he was angry, a pattern that continued for years.4 On the various occasions when Ramona left or tried to leave, Barber threatened to harm her or her loved ones and promised to change, so she returned.5 Ramona and Barber had two sons together; once while

3 Id.
4 Id. For example, in January 1990, while pregnant with their first son, Dwight, Barber allegedly smacked Ramona in the face and she left him. Id. In October 1990, while ten weeks pregnant with their second son, DaJon, Barber allegedly hit Ramona in the head with a telephone receiver so hard that she had to get stitches. Tolan, supra note 2; see also Transcript of Re-sentencing of Ramona Brant at 131, United States v. Brant, No. 3:93CR124–09 (W.D.N.C. July 15, 1998) [hereinafter Transcript of Re-sentencing] (on file with author) (“Q. Did you have to—did you have any injuries as a result of that assault? A. Yes, I did. I had an open wound on my forehead. It took 16 stitches to close.”).
5 See Tolan, supra note 2; see also RIP: Ramona Brant received clemency on 12/18/15, set FREE on 2/2/2016 and tragically passed 2/25/18, CANDoClemency,
she was trying to call for help from a gas station payphone, Barber punched Ramona so hard that she miscarried their third child.\textsuperscript{6}

In May 1993, the police pulled over one of Barber’s associates, Christopher Durante, for speeding, and found two guns and 21 grams of crack cocaine in his car.\textsuperscript{7} Durante implicated Barber as his source for the drugs, which led to Barber’s arrest several months later.\textsuperscript{8} The eventual charges alleged that Barber and his drug ring conspirators were responsible for 183 kilograms of powder and 97 kilograms of crack cocaine.\textsuperscript{9}

The government did not indict Ramona as a conspirator until June 1994.\textsuperscript{10} When the police questioned Ramona, she said that Barber made her carry a gun\textsuperscript{11} and physically forced her to accompany him when he traveled to Florida or New York to pick up cocaine or to meet clients.\textsuperscript{12} She admitted making phone calls and delivering messages for Barber, but insisted that she did not personally direct his drug trade.\textsuperscript{13} Barber forced her to be present at drug deals to manipulate her, saying that if she “was present during some of the activities, she couldn’t rat on him, she didn’t have any power anymore over him with regard to that.”\textsuperscript{14}

Unfortunately for Ramona, her minimal involvement was no defense to the charges: conspiracy law says that “[a] member of a conspiracy is liable for all the foreseeable acts of co-conspirators in furtherance of the agreement. . . . If the defendant is in for a penny, [s]he

\textsuperscript{6} Tolan, supra note 2.
\textsuperscript{7} Id.
\textsuperscript{8} Id.
\textsuperscript{9} Id.
\textsuperscript{11} Transcript of Re-sentencing, supra note 4, at 151 (“[Barber] would hand me a gun and say, here, carry this. . . . There were times that he would give me the gun and when I’d give it back, he said, stupid, you didn’t even take the safety off. What’s a safety?”).
\textsuperscript{12} Id. at 149, 179 (“There were times [Barber] would call me and tell me, pack a bag, we are going on a trip. . . . Plenty of times I went with him on trips, and by the time I reached my destination I would have black eyes or bruises.”).
\textsuperscript{13} Id. at 185, 187 (“[Barber] had the money. He controlled anything and everything that happened. If you check to see, I had no bank account, I had no car, I had no money, I had no credit cards.”).
\textsuperscript{14} Id. at 36.
is in for a pound.”¹⁵ The Supreme Court held in Pinkerton v. United
States that conspiracy liability makes all criminal conduct admissible
against, and attributable to, each member of a conspiracy, regardless of
whether the individual had actual knowledge of the entire conspiracy.¹⁶
Under federal law, Ramona was legally responsible for the entirety of
the drugs sold by any member of the conspiracy, anywhere, anytime,
whether she helped with, or even knew of, the sales or not. She could be
charged with the very same crimes as Barber, the actual leader and
mastermind of the drug ring.¹⁷

The War on Drugs¹⁸ and Congress’s subsequent creation of
mandatory minimum sentences triggered by the type and quantity of
drugs charged¹⁹ make it nearly impossible for a federal drug conspirator

¹⁵ Wesley M. Oliver, Limiting Criminal Law’s “In for a Penny, In for a Pound”
Doctrine, 103 GEO. L.J. ONLINE 8, 8–9 (2013) (footnote omitted).
¹⁶ Pinkerton v. United States, 328 U.S. 640, 647 (1946).

In virtually every jurisdiction in the United States, a conspirator can be held
responsible for crimes committed by her co-conspirators as long as such crimes
were in furtherance of the agreement and were reasonably foreseeable. The crimes
themselves do not have to have been agreed upon, intended or even discussed.
Liability is based upon a simple negligence standard, reasonable foreseeability.
This rule of liability was established by the Supreme Court in 1946 in
Pinkerton v. United States, and is applied in an enormous number of prosecutions . . . . 
"The Pinkerton doctrine permits the government to hold a defendant criminally
responsible for all reasonably foreseeable acts of co-conspirators regardless of
actual knowledge, intent, or participation. Thus, if the government cannot prove a
defendant’s guilt or various substantive charges, it need only convince the jury of
the defendant’s guilt of conspiracy to secure convictions on the otherwise
unsupportable substantive charges.

¹⁷ See Shana Knizhnik, Failed Snitches and Sentencing Stitches: Substantial Assistance
and the Cooperator’s Dilemma, 90 N.Y.U. L. REV. 1722, 1733 (2015) (“As long as an
treeprise as a whole is responsible for the statutorily requisite quantity of drugs, each
individual defendant can be held liable at sentencing for that entire amount.”).
¹⁸ Holly Jeanine Boux and Courtenay W. Daum, Stuck Between a Rock and a Meth
Cooking Husband: What Breaking Bad’s Skyler White Teaches Us About How the War on
Drugs and Public Antipathy Constrain Women of Circumstance’s Choices, 45 N.M. L. REV.
567, 573 (2015) (“As long as an enterprise as a whole is responsible for the statutorily requisite
quantity of drugs, each individual defendant can be held liable at sentencing for that entire
amount.”).

¹⁹ See U.S. SENTENCING COMM’N, AN OVERVIEW OF MANDATORY MINIMUM
PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 11 (2017), https://www.ussc.gov/research/research-reports/2017-overview-mandatory-minimum-penalties-federal-criminal-justice-system (depicting the two-tiered triggering thresholds used for determining mandatory
like Ramona to receive less than the mandatory minimum sentence.20 In mandatory minimum drug cases, sentences can range from a low of five years to a high of lifetime imprisonment.21 There are two ways to avoid the mandatory minimum for drug conspiracy.22 One way is to provide the government with “substantial assistance,” which it can subsequently use in cases against other conspiracy members, 23 essentially creating a “rat race” between conspirators to see who can give the government the most useful information first.24 The other way is to meet a statutory safety valve’s strict requirements, which rewards low-level drug-trafficking offenders who have no prior criminal history, but only if they also have no aggravating factors, such as the use of a firearm during the offense.25 In a case like this one, with a high quantity of drugs and various aggravating factors, including the use of a firearm, Ramona’s role as a conspirator meant that she was facing a potential life sentence, unless she could successfully “snitch” on Barber.

Sure enough, the government offered Ramona a plea deal in exchange for information on Barber,26 and agreed to reserve her the right

20 See Boux & Daum, supra note 18, at 581 (“Federal law specifies that individuals conspiring to sell drugs shall be subject to mandatory minimum sentencing policies, not just mandatory prison time. . . . While mandatory minimum sentencing laws apply to an array of criminal offenses, drug offenders have comprised the greatest portion of those sentenced under these guidelines.”) (footnote omitted).


22 U.S. SENTENCING COMM’N, supra note 19, at 18 (“Under the current system, a sentencing court can impose a sentence below an otherwise applicable statutory mandatory minimum penalty if: (1) the prosecution files a motion based on the defendant’s ‘substantial assistance’ to authorities in the investigation or prosecution of another person; or (2) in certain drug trafficking cases, the defendant qualifies for the statutory ‘safety valve’ contained in 18 U.S.C. § 3553(f).”) (footnote omitted).

23 Phyllis Goldfarb, Counting the Drug War’s Female Casualties, 6 J. GENDER RACE & JUST. 277, 294 (2002) (“The primary mechanism for sentencing flexibility in the current scheme derives from substantial assistance motions filed by the prosecution. If a prosecutor certifies that a defendant has provided important information to law enforcement that can be used in cases against other offenders, then the defendant may receive a significant reduction in sentence, perhaps salvaging years of freedom. Yet this is precisely the sort of benefit that is available to those who have major involvement in the drug trade and unavailable to those who have peripheral involvement.”) (footnote omitted).

24 Knizhnik, supra note 17, at 1741 (“In crimes involving multiple defendants, it is in each defendant’s interest to cooperate as quickly as possible, since ‘[t]he longer a defendant waists to cooperate, the less likely he is to have information that is still useful to the government.’ This results in a ‘race to the station house’ among co-conspirators, each wanting to provide the most beneficial (new) information.”) (alteration in original) (footnote omitted).


to allocate on the basis of duress or coercion at sentencing.\textsuperscript{27} Ramona signed the plea agreement on August 11, 1994,\textsuperscript{28} despite having very little useful information to offer,\textsuperscript{29} because she was advised that the plea would result in probation and she could remain home with her infant children.\textsuperscript{30} But she refused to plead guilty at her September 11, 1994, hearing\textsuperscript{31} after she was told that the plea would result in jail time.\textsuperscript{32} She decided that going to trial and asserting a duress defense to her minimal involvement was a better option.\textsuperscript{33}

At trial, however, several of Barber’s associates, including Durante, testified that Ramona was extensively involved in Barber’s drug trade.\textsuperscript{34}

\begin{itemize}
\item\textsuperscript{27} Transcript of Re-sentencing, \textit{supra} note 4, at 215.
\item\textsuperscript{28} \textit{Brant}, 1997 U.S. App. LEXIS 9876, at *7.
\item\textsuperscript{29} Telephone Interview with Ramona Brant (Feb. 28, 2017). See also Transcript of Re-sentencing, \textit{supra} note 4, at 186, stating:
\begin{quote}
A. . . And when [Mr. Tadeo] got finished with the interview, he told me—he turned to my attorney and he said, she knows less than Durante and Chris did, she really wasn’t no help, and he knew I was no help. But because you have a job to do, y’all came down and indicted me anyway.
\end{quote}
\item\textsuperscript{30} Telephone Interview with Ramona Brant (Feb. 28, 2017). See also Transcript of Re-sentencing, \textit{supra} note 4, at 167–68 stating:
\begin{quote}
Q. And why did you not—why did you withdraw your guilty plea?
A. I had been listening to [Barber]. He was insisting on going to trial. And when I spoke to Mr. Tadeo, he said that he would guarantee me straight probation, I believe three years straight probation with no jail time. When I got in there that day, he told me that I was going to have to do jail time.
\end{quote}
\item\textsuperscript{31} \textit{Brant}, 1997 U.S. App. LEXIS 9876, at *7.
\item\textsuperscript{32} Telephone Interview with Ramona Brant (Feb. 28, 2017); Transcript of Re-sentencing, \textit{supra} note 4, 168.
\item\textsuperscript{33} Telephone Interview with Ramona Brant (Feb. 28, 2017). See \textit{infra} Part IV(A)(2) for more discussion of the current duress defense.
\item\textsuperscript{34} During their testimony, Barber’s associates revealed the following:
\begin{itemize}
\item Q. Have you ever been to the residence of Donald Ray Barber and received the powder from Ms. Brant at that time?
A. Yes, I have.
\item Q. How many times would you estimate?
A. Probably three times.
\item Q. And state who led the New York connection, was it Donald Ray Barber or Ramona Brant?
A. It was Ramona Brant.
\item Q. And how do you know that?
A. Because not only did she tell me, I know that she is originally from New York, the New York area.
\item Q. What kind of gun did [Ramona] have?
A. It looked like an uzi.
\item Q. What did she ask you?
\end{itemize}
Despite her shock at this testimony, Ramona was confident that proof of Barber’s constant physical abuse toward her would support an affirmative defense to her alleged involvement. But Ramona’s public defender never presented the numerous police reports that documented the abuse she suffered, nor did he ask Ramona’s family members to testify about their knowledge of the abusive relationship. After a two-day trial, the jury found Ramona guilty of conspiracy to possess with intent to distribute a quantity of cocaine and cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 846.

At the sentencing hearing, the judge barred Ramona’s lawyer from introducing the police reports about her abuse or admitting an expert to testify about Battered Women’s Syndrome to support a duress departure. With no other grounds for a departure, Ramona faced a

---

A. She asked if when you first cooked the first ounce up or why didn’t you just cook a little of it up and when it lost, then just bring it back then?

Transcript of Trial of Ramona Brant at 45, 53–54, 152–53, United States v. Barber, No. 3:93CR124-MU (W.D.N.C. Oct. 12, 13, 1994) [hereinafter Transcript of Trial] (on file with author). See also Tolan, supra note 2 (“Police said [Barber and Ramona] had introduced cocaine to Charlotte and sold $37 million worth of the drug in the last five years, based on the records they recovered. (Officers never found any drugs on Barber or [Ramona], however.’’); Brant, 1997 U.S. App. LEXIS 9876, at *11–12 (finding that hearsay testimony from a co-conspirator alleging that Ramona, while inside her home, held an Uzi and scolded the co-conspirator for cooking an entire batch of cocaine without test cooking a small quantity first was sufficient to show that Ramona was the link to a drug supplier in New York); but see Telephone Interview with Ramona Brant (Feb. 28, 2017) (“I didn’t even know what an ‘uzi’ was! They were lying about that interaction, it never happened. They also held me responsible for all of the drugs for the entire length of the conspiracy, but I didn’t know Barber before 1989.”); Transcript of Re-sentencing, supra note 4, at 182 (“The things that was going on, I really did not honestly have knowledge of, what was this, what was that. And an Uzi, my God, I don’t even know what kind of guns that [Barber] had in the home.”).

35 Tolan, supra note 2.

36 See Transcript of Trial, supra note 34, at 225–31 (covering the extent of the testimony given by Anna Brant, Ramona’s mother, which does not mention her knowledge of the abusive relationship); Tolan, supra note 2; Brant, 1997 U.S. App. LEXIS 9876, at *12 (“Brant presented no evidence of duress or abuse, and her lawyer elicited no testimony from any of the witnesses on cross-examination that they saw evidence of abuse.”).

37 Transcript of Sentencing, supra note 10, at 51.

38 Id. at 3 (“And for the record, let me say that your request for the witnesses to speak to the coercion battered wife syndrome phase of the case was denied by the Court because that defense was not raised at the trial stage.”); see also Tolan, supra note 2; Brant, 1997 U.S. App. LEXIS 9876, at *12–13.

Before sentencing Brant filed a motion requesting the issuance of subpoenas to witnesses whom Brant says would have helped establish duress and coercion for sentencing purposes. Brant also submitted medical records and police reports to support the claim at sentencing. U.S.S.G. § 5K2.12 allows a court to decrease the sentence below the applicable guideline range if the defendant committed the offense because of serious coercion, blackmail or duress, even if the circumstances
maximum sentence of life in prison without the possibility of parole for her first time, nonviolent drug conviction. The statute and sentencing guidelines mandated how many years Ramona should receive based on the quantity of drugs in the charge and other aggravating factors, not based on her individual culpability. The trial judge stated that he “hope[d] that the Government can find some basis for filing a motion for sentence for you to serve that’s less than what the guidelines mandated, because . . . it would be counterproductive for society to keep you in prison for the rest of your life . . . .” Unfortunately, the government did not make a motion and Ramona received an LWOP sentence. When she appealed, the appellate court ruled that evidence of the abuse should have been taken into account at sentencing, and remanded for resentencing.

**Id.** But because Brant did not present a defense of coercion or duress at trial, the court held that it would be inappropriate to allow her to present evidence of the defense at her sentencing hearing. **Id.**

Prior to United States v. Booker, 543 U.S. 220 (2005), district courts were mandated to apply the guidelines in every situation; post-Booker, the guidelines became advisory. Further discussion about the guidelines will take place infra Part IV.

**Id.** Transcript of Sentencing, supra note 10, at 53–54.

“...” The police never actually found drugs on Ramona during the course of their investigation and all accusations against her were hearsay statements from third parties, who received significantly less prison time than Ramona. **Id.**”
Hopeful for justice, Ramona returned to court and presented the evidence of her abuse and an expert testified about Battered Women’s Syndrome, but the judge felt the evidence did not satisfy the standard for a duress departure. The judge again stated, “I thought the sentence that I originally imposed on you was entirely too harsh, but it was mandated by the sentencing guidelines.” The judge then “confirm[ed] the sentence as it exists, even though I absolutely am shocked at the severity of the sentence. And I wish right now that the government would make a motion that would permit me to downward depart from it.” The government did not make a motion, so Ramona was sent back to prison for life.

Over the last thirty years, the female inmate population in the United States has grown by over 800 percent, with the majority of female inmates convicted for low-level, nonviolent drug or property offenses. According to Families Against Mandatory Minimums (“FAMM”), about fifty-six percent of women are in jail due to the drug war or over property crimes, which carry mandatory minimum sentences appropriate in the case of duress that does not qualify as a complete legal defense. In such a case, the defendant might make the decision to forego asserting duress at trial to avoid admitting the commission of a criminal act. Section 5K2.12 of the sentencing guidelines does not punish such a decision because it allows departure even if the evidence is insufficient to establish a complete defense.

Id. (citation omitted).

44 Transcript of Re-Sentencing, supra note 4, at 9–49. Ramona presented an expert to testify about the abuse she endured. The expert stated, for example:

[A]t the point where she had made an effort to escape that relationship and in essence was met with the reality that she couldn’t protect her mother from Mr. Barbour’s [sic] threats to kill her, and therefore, she essentially in my view was in pretty much of a catch 22, she was in a situation where although she personally could flee, she couldn’t protect her mother against the threats from him, she went back to him.

Id. at 32; see also Tolan, supra note 2.

45 Transcript of Re-Sentencing, supra note 4, at 219–20.

46 Id. at 219.

47 Id. at 221.

48 Tolan, supra note 2. On December 18, 2015, President Barack Obama granted clemency to 94 federal inmates, including Ramona Brant. Ramona served twenty-one years before she was officially released from prison on February 2, 2016. See id. Most women in Ramona’s situation are not so lucky. Ramona’s clemency resulted from the work of Amy Povah and other activists, who assist prisoners with executive clemency petitions and raising awareness about unfair sentencing practices. See Ramona, CANDOCLEMENCY, supra note 5.

with no ability for the judge to consider mitigating circumstances. Sociological studies indicate that men represent the vast majority of upper-level drug traffickers, which drug conspiracy laws were intended to target, but national news and prisoners’ rights advocacy agencies have highlighted the widespread phenomenon of harsh sentencing of unintended targets: wives and girlfriends who had minimal involvement in the underlying crime.

The inequity in sentencing outcomes for women like Ramona Brant demonstrates how the law “presumes that males and females are equally situated in the drug economy” and therefore equally deserving of punishment. Mandatory sentencing reforms resulting from the 1980s War on Drugs made sentencing gender-neutral, but also switched the power of discretion in sentencing from judges to prosecutors. While facially neutral, these reforms resulted in the imposition of harsh sentences for conspiracy on women like Ramona, who were merely “dating, trusting, acquiescing, or submitting to the dominance of a boyfriend or husband who engages in the drug trade. . . .”

50 Id.
51 See, e.g., Frederick Desroches, Research on Upper Level Drug Trafficking: A Review, 37 J. DRUG ISSUES 827, 840 (2007); see also Goldfarb, supra note 23, at 291 (“By and large, women do not hold income-generating positions in the drug trade. We know the words ‘druglords’ and ‘kingpins’, not ‘drugladies’ and ‘queenpins.’”) (footnotes omitted).
53 Boux & Daum, supra note 18, at 584.
54 Kathleen Daly, Gender and Sentencing: What We Know and Don’t Know From Empirical Research, 8 FED. SENT’G REP. 163, 165 (1995); Myrna S. Raeder, Gender Issues in the Federal Sentencing Guidelines and Mandatory Minimum Sentences, 8 CRIM. JUST. 20, 21 (1993). Raeder’s research on gender-neutrality in sentencing laws highlights how the attempt to even the playing field just brought in the female players without adjusting the rules: Even though all defendants receive longer sentences under the guidelines than previously, women’s sentences have increased more than those of men because formerly they received probation and/or shorter sentences more often than did men. . . . The result of gender neutrality was simply to add women to the mix without evaluating whether this was fair.

Id. at 23.
55 Haneefah A. Jackson, Note, When Love is a Crime: Why the Drug Prosecutions and
But the inequity in sentencing is not just gendered, it is also raced and classed—the female population in prison is “disproportionately people of color, overwhelmingly poor and low-income, survivors of violence and trauma, and have high rates of physical and mental illness and substance use.” 56 Wives and girlfriends of drug dealers are often involved in drug activities solely because their partner uses or sells drugs, 57 but “tend to have less extensive criminal histories than their male counterparts.” 58 Scholars refer to this less culpable subset of women as “women in relationship” 59 or “women of circumstance.” 60

Punishments of Female Non-Conspirators Cannot Be Justified By Retributive Principles, 46 HOW. L.J. 517, 521 (2003); see also Transcript of Re-sentencing, supra note 4, at 218. Ramona testified:

Certainly a life sentence I don’t believe that’s fair or can justify my role as far as being what I thought was Donald Barbour’s [sic] mate. That’s what it started out to be, a relationship. I never thought that it would turn into a conspiracy charge. I never knew that Donald Barbour [sic] was indulging in some type of drug enterprise.

Id. at 218.

56 ELIZABETH SWAVOLA ET AL., OVERLOOKED: WOMEN AND JAILS IN AN ERA OF REFORM 7 (2016).

57 Eda Katharine Tinto, The Role of Gender and Relationship in Reforming the Rockefeller Drug Laws, 76 N.Y.U. L. REV. 906, 908 (2001). One of Daly’s studies looked at felony offenders in New Haven, Connecticut, and found “that men and women who were accused and convicted of statutorily similar crimes did not commit crimes of similar seriousness.” Daly, supra note 54, at 165. Daly’s analysis of presentence reports for these individuals showed that more often for the women, there were “‘blurred boundaries’ between victimization and criminalization,” which “rendered some women’s crimes less blameworthy.” Id. Daly defines “blameworthy” as linking the defendant’s social history and prior record to the offense to see how a defendant’s social history imposes meaning on a crime. Id. at 165 n.18. This blameworthiness should be taken into account to determine appropriate sentencing.

58 SWAVOLA ET AL., supra note 56, at 7.

59 Tinto, supra note 57, at 909. Tinto uses the term “women in relationship” to explain that “a woman’s intimate relationship is often interconnected with the drug offense she commits and demonstrates how, under the Laws, the failure to consider this underlying context results in a criminal charge and sentence that are likely to be unjust.” Id.


the wives, mothers, sisters, daughters, girlfriends, and nieces, who become involved in crime because of their financial dependence on, fear of, or romantic attachment to a male drug trafficker. These “women of circumstance” find themselves incarcerated and subject to draconian sentences because the men in their lives persuade, force, or trick them into carrying drugs.

Id. at 1533; see also Boux & Daum, supra note 18, at 583. A situation where a woman may find herself being a “woman of circumstance” is when she “lives with a male drug operative [and] may be charged with possession and sentenced to a mandatory jail sentence if there are drugs in their shared residence.” Id. A “woman of circumstance”
None of these scholars claim that every woman involved in drug activities is a woman of circumstance. They do agree, however, that it is often difficult to tease out the main reason why women participate in drug crimes with their husbands or boyfriends, making it a challenge to determine if a particular woman is a less culpable woman of circumstance. Coercion and duress get women of circumstance involved in drug conspiracies, but our current non-intersectional legal doctrines offer limited means for these minimally involved women to raise a defense to get out of the mandatory minimum sentences that entail.

This Note aims to discuss the harsh mandatory federal sentences imposed on peripherally involved wives and girlfriends of drug dealers, like Ramona Brant, and better ways to hold these less culpable offenders accountable. Part I of this Note explores the history of two “women-only” excuses and the impact they have had on current views of criminal culpability of women in the United States. Part II describes who some of the women of circumstance are and how these women find themselves uniquely involved in the criminal justice system because of drug conspiracy laws. Part III demonstrates how an intersectional analysis of “women-only” excuses is necessary to ensure that women of circumstance have equal access to justice when charged under drug conspiracy laws. Part IV proposes changes to conspiracy law in general and ways of sentencing women of circumstance specifically to better serve the purposes of deterrence and retribution. Part IV(A) proposes substantive changes by (1) legally excusing women of circumstance from conspiracy charges and (2) adjusting the standard to meet a duress defense. Part IV(B) proposes ways to move out of the federal mandatory

may also be “a woman who drives a male intimate in her vehicle . . . if he is delivering drugs.” Id. This Note will use Gaskins’ term “women of circumstance” when referring to the wives and girlfriends of drug dealers hereinafter.

61 See Tinto, supra note 57, at 916 n.45.
62 Boux & Daum, supra note 18, at 568–69.
Combined with the tactics employed by police and prosecutors in the War on Drugs, these women are forced to try and reconcile a long list of conflicting concerns. They must balance (1) how the legal system uses them as scapegoats and pawns, (2) their intimate relationships with dangerous drug operatives, (3) the physical, financial and emotional wellbeing of their children and families, and (4) societal expectations about “good” women and female subservience. The combined effect of these intersecting forces has led to the entrapment, marginalization and incarceration of tens of thousands of women of circumstance.

Id. (footnote omitted).

minimum sentencing regime by (1) recalculating drug quantities under the current definition of conspiracy, (2) changing the elements to meet a safety valve, and (3) creating a “cooperation under duress” departure. Ultimately, our goal should be to hold the culpable offenders accountable—women of circumstance do not rise to the level of culpability warranting LWOP or other mandatory minimum sentences.

I. THE IMPACT OF “WOMEN-ONLY” EXCUSES ON CRIMINAL CULPABILITY OF WOMEN

Women’s rights in America have come a long way, especially in establishing autonomy between husband and wife. With increased autonomy came the corresponding recognition of independent culpability: if a wife had legal independence then she no longer needed an excuse if her husband forced her to participate in criminal conduct. The logic makes sense when looking at the general population of women. But it does not make sense when looking at the subpopulation of women of circumstance who, despite having legal independence, are still coerced, battered, or manipulated into criminal conduct by their husbands or boyfriends. The “women-only” excuses of coercion by husband and Battered Women’s Syndrome show the tension between embracing legal autonomy for the majority of women and the need for “women-only” excuses to address the reality of coercion for marginalized women of circumstance.

A. Coercion by Husband

Historically, under the doctrine of coverture, a single woman’s property came under control of her husband upon marriage and women themselves became the legal property of their husbands. The common law fiction of legal unity between a husband and wife made it so that a wife was merely the servant of her husband and acted only by his will.

64 See Anne M. Coughlin, Excusing Women, 82 CALIF. L. REV. 1, 32–33 (1994).
66 Coughlin, supra note 64, at 36 (“Upon marriage the woman’s personal property was vested absolutely in her husband, any earnings she might secure in the future were his, his interest in her real property ‘were almost as extensive’ as his rights in her personality, and divorce was difficult, costly, and, in many cases, impossible, to secure.”) (footnotes omitted).
The rebuttable presumption of “coercion by husband” 68 fit into the doctrine of coverture because, if a wife committed a crime in the presence of her husband, it was reasonable to assume that he had forced her and she was an unwilling, coerced participant in the crime. 69 As legal head-of-household, the husband was always in control of everything under his roof, 70 so the presumption was valid even if he was not actually present or within the home when his wife committed the crime. 71 There were reasonable limits on the presumption, so that a wife could not rely on it if, for example, she had participated in a homicide. 72

Individual states started phasing out their reliance on coverture rules in the 1830s, and a wave of married women’s property reforms swept the country over the next half century, eliminating the old doctrine of coverture. 73 The presumption of coercion by husband to excuse women’s criminal conduct fell out of legal favor starting in the 1930s 74 coinciding with women’s suffrage, 75 and completely disappeared from
American case law by the 1970s. Colorful opinions authored during this period of change denounced the law’s former presumption that a wife needed a legal excuse to get out from under her husband’s control and society’s acquiescence of such legal treatment.

Although perceived as a win for women’s autonomy and equality, the dismissal of the presumption has arguably made it harder for women of circumstance to claim that their involvement in a drug crime was indeed a result of their husbands’ coercion. This is evidenced in Commonwealth v. Santiago. In this case, Sheila Santiago looked out the window when she heard police officers knocking on her door to serve a search warrant on her husband. Sheila called out to her husband, he also looked out the window, and when neither of them came down to open the front door, the officers forcibly entered. The officers allegedly saw Sheila attempting to throw a bundle of heroin out of an open window.

At trial, Sheila was not permitted to use the coercion by husband defense to excuse her conduct. The court determined that the view of wives as subordinate to husbands was akin to the “Middle Ages” and the excuse was no longer available. The court found that the officers’ testimony accusing Sheila of throwing heroin out of the window, combined with Sheila being the first to respond to the officers’ knock on the door, was sufficient to rebut the presumption, probably because of the judicial conclusion that women are now less likely to be under their husband’s control.”

76 Coughlin, supra note 64, at 20.
77 See, for example, United States v. Dege, 364 U.S. 51, 54–55 (1960), holding:

For this Court now to act on Hawkins’s formulation of the medieval view that husband and wife “are esteemed but as one Person in Law, and are presumed to have but one Will” would indeed be “blind imitation of the past.” It would require us to disregard the vast changes in the status of woman—the extension of her rights and correlative duties—whereby a wife’s legal submission to her husband has been wholly wiped out, not only in the English-speaking world generally but emphatically so in this country. . . . Suffice it to say that we cannot infuse into the conspiracy statute a fictitious attribution to Congress of regard for the medieval notion of woman’s submissiveness to the benevolent coercive powers of a husband in order to relieve her of her obligation of obedience to an unqualifiedly expressed Act of Congress by regarding her as a person whose legal personality is merged in that of her husband making the two one.

79 Id. at 442; see also George L. Blum, Annotation, Defense of necessity, duress, or coercion in prosecution for violation of state narcotics laws, 1 A.L.R.5th 938, § 5[b] (1992).
80 Santiago, 340 A.2d at 442.
81 Id.
82 Id. at 445.
83 Id.
the door, were sufficient circumstances to show that she acted on her own volition. 84 Since no evidence was presented to demonstrate that a third party inspired Sheila’s acts, the court ruled that “hiding behind the marital bond” of coercion was not in service of policy and would only permit unjustifiable avoidance of punishment. 85 No subsequent American cases have attempted to make the standalone coercion by husband argument to excuse a wife’s criminal conduct.

B. Battered Women’s Syndrome

Legal scholars have theorized that when the coercion by husband excuse disappeared from the American legal system in the 1970s, it was replaced by another patriarchal excuse 86 which continued to demean women in much the same way as the former—Battered Women’s Syndrome (“BWS”). 87 Dr. Lenore Walker is credited with stating the theory that a battered woman’s actions may be reasonable, and therefore excusable, due to her psychological state. 88 BWS is not a standalone defense, but is often asserted to explain a claim of self-defense if a battered woman kills her abusive partner rather than leaving him. 89 Since the traditional doctrine of self-defense (and all criminal laws and their corresponding defenses) is based on the experience of men as the norm, 90 BWS was created to show that a battered woman’s experience of self-defense, which deviates from the traditional norm, is still a justified and reasonable response. 91

Lawyers then began to use BWS to explain a claim of duress if a battered woman “commit[ted] crimes against someone other than their

84 Santiago, 340 A.2d at 446.
85 Id.
87 Coughlin, supra note 64, at 29, 48–49; see also Cornia, supra note 86, at 105 (“The premise behind the Marital Coercion Doctrine, that women were incapable of rational consideration, was historically used in a larger context to deprive women of many of the rights we take for granted today.”).
88 See Cornia, supra note 86, at 101–02.
89 Id. at 101.
90 See Raeder, supra note 54, at 21 (noting that gender neutral criminal law policies “shoehorn” women into a policy originally contoured to males).
91 Id. at 57 (“[T]he court may reduce the sentence if the victim’s wrongful conduct contributed significantly to provoking the defendant’s behavior.”); see also Cornia, supra note 86, at 101–02.
In comparing evidence to support a self-defense theory of BWS with evidence to support a duress theory of BWS, evidence of past abuse and the impact it has on the battered woman “relates directly to the reasonableness of the defendant’s choice between being beaten and committing the criminal activity.” Courts have recognized that battered women can be coerced into “deal[ing], carry[ing], or purchas[ing] drugs” and that this coercion supports a duress defense.

Ramona Brant’s lawyer raised a BWS excuse at her resentencing hearing. Ramona’s expert, Dr. Dutton, testified that the abuse Ramona suffered was “pretty severely violent,” “involve[d] weapons,” and resulted in “actual physical injury.” She further testified that Ramona used a range of strategies including compliance with Barber’s commands, physically resisting, and actually leaving him, but that those strategies only worked in the short term. Dr. Dutton highlighted that Ramona’s attempt to leave Barber in August of 1991 resulted in Barber physically attacking Ramona’s brother and threatening to kill her mother. Dr. Dutton also testified that “[a]s to the drugs . . . he would then simply involve her, so that essentially, if she knew information, had information, was present during some of the activities, she couldn’t rat on him . . . [by] report[ing] him to the police.” The judge found that “there were a lot of threats” but concluded that “it in no way impacted the forming of or carrying out of the conspiracy” and that “it is impossible for me to make the factual findings that would justify a downward departure.”

Despite the potential benefit of the BWS excuse for women of circumstance like Ramona, critics say the benefits are outweighed by the harms of disempowering women in the eye of the law. BWS “defines the woman as a collection of mental symptoms, motivational deficits, and behavioral abnormalities; indeed, the fundamental premise of the defense is that women lack the psychological capacity to choose lawful means to extricate themselves from abusive mates.” Critics argue that

---

92 Cornia, supra note 86, at 107.
95 Transcript of Resentencing, supra note 4, at 22.
96 Id. at 23–24.
97 Id. at 35–36.
98 Id. at 36–37.
99 Transcript of Resentencing, supra note 4, at 219–20.
100 Coughlin, supra note 64, at 7.
BWS adheres to the same principles of servitude and obedience that undergirded the earlier excuse of coercion by husband: after identifying the conduct as unreasonable, BWS excuses the woman “if she can prove that she was a passive, obedient wife whose choices were determined, not by her own exercise of will, but by the superior will of her husband.”

Critics also worry that the strategic choice to use a BWS excuse at trial could cause collateral damage. The term “battered women’s exceptionalism” describes the “attempt to treat battered women as special legal persons requiring consideration denied to others.” The negative impact of this exceptionalism is that battered women, because they allegedly could not prevent the battering from happening or chose not to leave their batterer, are deemed less qualified to take care of their own children and dependents. Even though lawyers will argue that the inferiority implied by asserting the defense is “a small sacrifice to impugn a client’s reputation in order to save her from a sentence of life in prison or the death penalty,” these greater implications may outweigh the “small sacrifice” if she risks losing her children.

Consequences of the BWS label can go beyond the risk of losing custody of children. Other real consequences include being perceived “as suffering from a permanent condition which causes [a woman] to be untruthful (on the witness stand), . . . dangerous (to children or other vulnerable persons in [her] care), unreliable (in protecting the interests of legal clients), and beyond hope of rehabilitation.” So while the BWS excuse is still raised in court today, many feminist scholars

---

101 Id. at 50.

Dressed up as a duress claim, the battered woman syndrome defense resembles almost perfectly the marital coercion doctrine. In both cases, the demanding “duress” standard, which the criminal law insists that responsible actors must satisfy, is adjusted downward to accommodate women’s predisposition for obedience to men. Indeed, the new defense is, if anything, more misogynist than its predecessor. By proving that women suffer from special psychological deficits that make them incapable of resisting illegal pressures exerted by men, it explicitly locates the source of women’s subjugation, not within legal or cultural convention, but within women themselves.

102 Id. at 57.

103 Catania, supra note 86, at 122.

104 Id. at 106.

105 See id. at 116–17 (providing an example of when a BWS defense led to a woman losing her parental rights).

106 Id. at 122.
consider it demeaning, demoralizing, and an affront to women’s autonomy. As evidenced by Ramona’s case, even if a woman of circumstance suffers from BWS, it is still incredibly difficult to use evidence of BWS to meet the high standard for a duress defense to conspiracy.

II. WHO THE WOMEN OF CIRCUMSTANCE ARE AND WHY THEY SHOULD BE EXCUSED

While the policy argument against “women-only” excuses—to prevent guilty women from unjustifiably avoiding punishment—is a valid one, more information is necessary to determine if a violation exists in every situation. It is true that some women of circumstance participate in drug dealing for their own benefit and may therefore deserve prison time for their culpable actions. It is not the aim of this Note to deny the logic behind holding culpable offenders accountable.

But what about the women who are truly coerced and questionably culpable? Was Sheila Santiago a willing participant in her husband’s heroin operation, or did her husband bring heroin into their jointly-owned home despite her protests against it? Why would Sheila’s attempt to throw drugs out of the window automatically implicate her as a culpable participant in her husband’s drug operation, rather than being seen as a kneejerk reaction to the police forcibly entering her home? Was Ramona really a culpable member of the drug conspiracy if she was forced to be present at drug deals by her abusive boyfriend who attacked and threatened to harm her and her family if she left him? If Sheila or Ramona, or the countless other women in similar circumstances, had reported their husband’s or boyfriend’s drug activities before the police came with a warrant, would they have been worse off than if they had just kept their mouths shut? Should these real life factors matter when determining the severity of punishment for women of circumstance under drug conspiracy laws?

108 For an overview of how the criminal justice system “protects women who obey the violent men in their lives but . . . does not protect women who challenge those men,” see Cornia, supra note 86, at 110–11.
109 In fact, Ramona said that Barber threatened to take away her children if she told the police that he was the one abusing her. See Transcript of Re-sentencing, supra note 4, at 31–32 (“And he said, I guess you are going to have to get some help. He said, you better not tell, you better not tell I did it, if you tell I did it, you won’t see Dwight again.”).
110 See Jackson, supra note 55, at 518.
By ignoring the context of the domestic relationship during sentencing, the legal system ignores the possibility that a particular woman of circumstance had limited options and was only acting out of fear for her own safety, or the safety of her family. Often times, a woman of circumstance has drug and alcohol addiction problems of her own, has endured physical and sexual abuse, and is dependent upon her abuser, but her overarching need to keep the family together above all else outweighs her own safety concerns. Most are “desperate, unsuspecting or coerced women who often have no prior criminal history.” Cooperation with the authorities is seen as “the ultimate form of betrayal in a relationship,” so some women risk incarceration rather than disrupting the cohesiveness of the family unit. “The girlfriend problem” describes the dilemma of choosing between a reduced sentence in exchange for offering information or remaining silent and getting the maximum sentence. The dilemma is exacerbated when drugs are being dealt from within the home because the woman of circumstance must be willing to physically leave her own home, her romantic partner, and the father of her children in order to be risk-free. The following three stories further illustrate how the current legal system fails to excuse, or even acknowledge, the role that coercion and duress play when determining culpability and appropriate punishment of

111 Boux & Daum, supra note 18, at 589. Ramona’s BWS expert testified that:

I think that another very strong motivator, especially after the attempt
[Ramona] made to leave in August of ‘91 was simply fear, that she had learned that
in spite of a quite, I think, valiant effort to leave this man and to leave this state
and to escape, that she was unable to do that in a way that she could assure the safety
not only of herself, but of her mother and her family. In fact, her brother was the
victim of Mr. Barbour [sic] and/or his cohorts, and her mother was quite severely
threatened, that is, threatened to be killed. And so I think once that happened and
once he found her and came back, she came back, the option of leaving, the option
of just trying that again, she knew what had already
happened. She didn’t have to guess, gee, what would happen if I tried to leave. She
knew; it happened before. And so I think fear was a particularly powerful motivator
about why she didn’t just leave after August of ‘91.

Transcript of Re-sentencing, supra note 4, at 35–36.

112 Gaskins, supra note 60, at 1535; see generally Julian Abele Cook, Jr., Gender and

113 Boux & Daum, supra note 18, at 604. This betrayal is especially poignant when the
male is involved in drug-related activity and the woman’s choice to stay might not match up
with what mainstream society sees as a normal decision. Id.

114 Nekima Levy-Pounds, Beaten by the System and Down for the Count: Why Poor
Women of Color and Children Don’t Stand a Chance Against U.S. Drug-Sentencing Policy, 3

115 Id.
women of circumstance involved in drug conspiracies.

A. Kemba Smith

Twenty-four year-old Kemba Smith was seven months pregnant when she was sentenced to serve twenty-four and one-half years in prison for participating in her drug kingpin boyfriend’s activities. Before his death, Peter Hall recruited mostly female students, like Kemba, from Hampton University, to serve as drug couriers in his drug ring. During their relationship, Hall violently abused Kemba to the point where she feared for her life. Kemba had no prior criminal record and never handled the drugs that Hall ran through his interstate business, but she was found fully culpable for his entire drug enterprise after he was murdered.

At sentencing, Kemba’s lawyers presented evidence that Kemba suffered from BWS to support a duress defense. They called lay witnesses who went to college with Kemba, introduced medical and other documents showing the violent abuse Kemba suffered, and had expert witnesses testify on her behalf. But the trial court rejected Kemba’s duress defense, saying that it “could not accept such a defense when [Kemba] had dated Hall for such a long time and had witnessed Hall’s violent nature.” In the Court’s view, [Kemba] understood and appreciated the criminality of Hall’s actions and was therefore fully

---

118 See Margulis, supra note 102, at 175–76; Gaskins, supra note 60, at 1534 (stating that Kemba was fearful of Hall, “who eventually killed his best friend for informing on him”).
119 Gaskins, supra note 60, at 1534.
121 See Smith, 113 F. Supp. 2d at 895.
122 Id. (“All the witnesses concurred that Smith’s relationship with Hall was marked by episodes of brutal rage. According to the witnesses’ testimony, Hall slapped, beat, or choked Smith on many instances, and he would often yell and scream at her.”).
123 Id. at 896. But see United States v. Smith, 966 F. Supp. 408, 410 (E.D. Va. 1997). The district court judge who dismissed Kemba’s motion to vacate her sentence did so begrudgingly, again showing the struggle between the desires of the legislature and the lack of discretion in the judiciary for mandatory drug sentencing schemes.

The undersigned occasionally thinks that particular applications of law are unfair. For example, the sentences routinely imposed for drug offenses are excessively stiff; the penalties for crack cocaine involvement are staggeringly exorbitant. For example, applying the Sentencing Guidelines in this case generated
culpable for her behavior.\footnote{See Stories: Kemba Smith, supra note 116. Kemba’s parents raised her infant son for the six and one-half years that she served until she was granted clemency in 2000. Id. Kemba now shares her traumatic story and experience with the criminal justice system to advocate for reform in sentencing. See About Kemba, KEMBA SMITH, http://www.kembasmith.com/bio/ (last visited Feb. 17, 2018).}

\section*{B. Danielle Metz}

Danielle Metz was the wife of an abusive cocaine dealer and mother of two children; she had no job skills other than cutting hair, no bank account in her name, no Social Security number, and no independent source of income.\footnote{AM. CIV. LIBERTIES UNION FOUND, A LIVING DEATH: LIFE WITHOUT PAROLE FOR NONVIOLENT OFFENSES 44–45 (2013) [hereinafter LIVING DEATH].} Her husband moved her and the children across the country away from Danielle’s family, and he forced Danielle to transport money and drugs across state lines, which she did fewer than five times.\footnote{Id. at 45.} When Danielle could not take any more of the mental and physical abuse, she moved her children back across the country to be with her family.\footnote{Id.} Two months later, Danielle was arrested and indicted for participating in her husband’s drug conspiracy.\footnote{Id.} At twenty-six years-old, Danielle was sentenced to serve three LWOP sentences plus twenty years for her first time, nonviolent drug conviction.\footnote{Id.}

\section*{C. Teresa Griffin}

Teresa Griffin was twenty-one years-old and pregnant when her abusive boyfriend forced her to quit her job, withdraw from college, and follow him to a new state.\footnote{LIVING DEATH, supra note 125, at 45. Danielle was granted clemency on August 30, 2016, after serving twenty-three years. See Danielle Metz—Serving Life—Received Clemency on 8/30/2016, CANDOCLEMENCY, http://www.candoclemency.com/danielle-metz/ (last visited Apr. 3, 2018).} When Teresa tried to leave, her boyfriend
hit her and threatened to not only kill her, but also take her children from a previous relationship out of the country.\(^\text{131}\) After their baby was born, he forced Teresa to buy him a car, rent him an apartment, and work for him as a drug mule, transporting drugs by bus so that he could fly to the final destination to deal the drugs himself.\(^\text{132}\) She tried to leave again, and he again threatened to take her children out of the country.\(^\text{133}\) Teresa was seven months pregnant with her second child by her boyfriend when she was apprehended by police and arrested.\(^\text{134}\) Teresa was convicted of conspiracy, among other charges, and was sentenced to serve LWOP in addition to two concurrent 280-month sentences and a 60-month sentence for her first time, nonviolent drug conviction.\(^\text{135}\)

Women like Ramona, Kemba, Danielle, and Teresa should be excused from the mandatory minimums tied to drug conspiracy laws because they are the unintended targets of the laws. Congress’s Anti-Drug Abuse Act of 1986 aimed to punish kingpin drug dealers by tying mandatory minimum sentences to drug type and quantity.\(^\text{136}\) The enactment of the Anti-Drug Abuse Act of 1988 then added “conspiracy to commit a drug offense” to the list of crimes subject to a mandatory minimum to hold conspirators to the same level of punishment as kingpin dealers, regardless of individual culpability.\(^\text{137}\) The American Civil Liberties Union has said that this addition “pulled many girlfriends and wives of drug dealers into the justice system” because “every participant in a conspiracy can be held liable for the crime of every other participant.”\(^\text{138}\) It is therefore not surprising that “non-violent, drug-related offenses account for the largest source of the total growth of female inmates” incarcerated in both federal and state prisons.\(^\text{139}\)

\(^{131}\) *Id.*

\(^{132}\) *Id.*

\(^{133}\) *Id.*

\(^{134}\) *LIVING DEATH,* supra note 125, at 52–53.

\(^{135}\) *Id.* at 53. Teresa was granted clemency on June 3, 2016, after serving twenty-six years. See *Teresa Mechell Griffin Received Clemency on June 3, Serving Life Sentence, CANDOCLEMENCY,* http://www.candoclemency.com/teresa-mechell-griffin/ (last visited Apr. 3, 2018).


\(^{138}\) Glazer, *supra* note 40, at 204.

III. AN INTERSECTIONAL ANALYSIS OF “WOMEN-ONLY” EXCUSES IS NECESSARY

So why have “women-only” excuses gone by the wayside? It would seem that a “women-only” excuse would perfectly address the unique situations that many women of circumstance find themselves in and allow them to have a fighting chance when trying to raise an affirmative defense against male-defined conspiracy law. As illustrated by the stories of Ramona, Kemba, Danielle, and Teresa, the typical woman of circumstance has no prior criminal record before meeting her drug-dealing boyfriend. She then gets pregnant, endures violent abuse, and becomes financially dependent upon her abuser, locking her into the role of a conspirator with no easy way out. Surely a “women-only” excuse is appropriate to allow this small subset of less culpable women to escape from the draconian mandatory minimum sentences for drug crimes.

But it is the very fact that women of circumstance are a small subset of (primarily) poor women of color that creates the problem. Often women of circumstance are members of a group (racial, ethnic, immigrant, religious) that has been systemically abused, coerced, and overly incarcerated throughout American history for one reason or another. Most of the predominate drivers of the feminist movement

---

140 As a white, middle-class woman, I acknowledge that my understanding of intersectionality is limited by what I can read and study, as opposed to lived experience, and I am mindful of disclaimers from black feminists like Hillary Potter about not tokenizing intersectionality or using it to promote colorblind legal analyses. See HILLARY POTTER, INTERSECTIONALITY AND CRIMINOLOGY: DISRUPTING AND REVOLUTIONIZING STUDIES OF CRIME 40–81 (2015) (describing the evolution of feminism and birth of intersectionality). My purpose in bringing up intersectionality is to combat the belief that all women would reject a “women-only” excuse, because this ignores the voices of women of color, or poor women, who are often women of circumstance.

141 See Gaskins, supra note 40, at 1535.
142 See id. at 1533; see also infra Part IV(A)(1).
143 See Boux & Daum, supra note 18, at 573–74 n.17 for data demonstrating that women, especially women of color, are uniquely caught up in the War on Drugs and the policies that resulted in ways that white women are not.
144 See, for example, Brenda V. Smith, Uncomfortable Places, Close Spaces: Female Correctional Workers’ Sexual Interactions With Men and Boys in Custody, 59 UCLA L. REV. 1690, 1701 (2012), for an illustrative picture of this concept as it relates specifically to black women.

As early as the late nineteenth century, black women were more likely to be arrested and imprisoned than white women because they were perceived as less feminine, less worthy, and less salvageable than white women. New York, which led the nation in early penal reform for both male and female inmates, has long had
for women’s equality are members of the white majority; therefore, “women-only” excuses are usually viewed through the lens of an independent, middle-class, white woman, which does not represent the experience of all women. Consequently, if an excuse jeopardizes the autonomy of women (like coercion by husband) or implies inferiority between women and men (like BWS), then the feminist majority will almost certainly oppose it. The voice of the many drowns out the voice of the few.

This idea of a universal woman as representative of all women’s experience “that can be described independent of other facets of experience like race, class, and sexual orientation” is called “gender essentialism.” In looking at the exclusion of homeless women from the group of women that is traditionally welcomed by the philosophy of battered women’s shelters, Lisa R. Green refers to the following definition of “essentialism” and its impact on homeless battered women seeking shelter:

Essentialism refers to the “tendency in dominant Western feminist thought to posit an essential ‘womanness’ that all women have and share in common despite the racial, class, religious, ethnic, and cultural differences among us.” This tendency toward homogeneity results in a feminist movement that is often meaningless for women whose experiences differ from the paradigmatic woman at the center of the philosophy. The phenomenon of essentialism is disproportionate numbers of black women in its correctional institutions, including the Auburn Prison for Women, established in 1893, and the Bedford Hills Reformatory for juveniles, established in 1901. Although blacks never composed more than 5 percent of the population of the state during the relevant time period, Auburn’s records from 1893 to 1933 show a total of 1674 inmates, of which 536 were black women. Relying on eugenic theories of criminality, black women were cast as sexually loose and aggressive in their behavior, and unfeminine and animal-like in their appearance. These misperceptions made African American women exceptionally vulnerable to arrest for prostitution, vagrancy, and disorderly conduct. Of course, these misperceptions did not consider black women’s vulnerability to abuse because of their past histories as slaves and descendants of slaves, nor their independence and physical strength as a direct result of having had to make their own paths in the world.

Id. (footnotes omitted).

145 Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 STAN. L. REV. 581, 588 (1990). Unfortunately, feminist legal theory often claims to speak for all women, but really speaks on behalf of the majority who are “white, straight, and socioeconomically privileged.” Id.; see also Buel, supra note 94, at 237 (“Women of color are often silenced by the discourse centered on white females. This results in the omission of their unique experiences and perspectives from traditional feminist jurisprudence and certainly from other analytical legal constructs.”).

146 See Harris, supra note 145, at 588.
demonstrated when battered women’s shelters do not accept homeless women because these women do not conform to the prototypical battered woman whom the institution is designed to accommodate.

Although homeless women do maintain intimate relationships and are subject to abuse by their husbands, boyfriends, and lovers, the staff at battered women’s shelters discount the issue of male violence when it is directed at women in the lowest socio-economic class in our country.147

Green’s analysis of the essentialism problem for homeless battered women can be transposed almost word-for-word to describe the problem faced by marginalized women of circumstance under the mandatory federal sentencing regime for peripheral involvement in drug crimes. The goal of seeking homogeneity in sentencing between (white) women and (white) men resulted in a feminist movement that was arguably meaningless for non-white or poor white women, whose experiences differed dramatically from the middle-class white women at the center of the philosophy.148 When the federal sentencing guidelines promote equal treatment toward both men and women regardless of gender,149 they ignore the reality that many women of circumstance do not conform to the prototypical criminal woman whom the institution is designed to punish. Finally, although women of circumstance can share evidence of the abuse and coercion they suffered, the law ignores the evidence unless it meets the exact statutory definition for a duress defense.150 The standard is incredibly difficult to meet, and because a mandatory minimum sentence is tied to the charged drug quantity and type, the only way out is if the prosecutor changed the charge to a crime without a mandatory minimum, giving the discretion back to the judge.151 Thus, the experiences of women of circumstance are discounted in these situations, possibly because they, like homeless battered women, are in

148 Id. at 170.
149 See, for example, U.S. SENTENCING COMM’N, FEDERAL SENTENCING GUIDELINES MANUAL § 5H1.10 (2016), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2016/GLMFull.pdf [hereinafter U.S.S.G.], entitled Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status (Policy Statement), with the following explanation: “These factors are not relevant in the determination of a sentence.” The Introductory Commentary to Part H, which defines specific offender characteristics, highlights that “the [Sentencing Reform] Act directs the Commission to ensure that the guidelines and policy statements ‘are entirely neutral’ as to five characteristics—race, sex, national origin, creed, and socioeconomic status.” Id. § 5H, at 473.
150 See Cook, supra note 112, at 146–47.
the class with the lowest priority of rights in our country.\footnote{Lenox, supra note 139, at 285.}

According to Kimberlé Crenshaw, feminism needs to be intersectional and “account for multiple grounds of identity when considering how the social world is constructed.”\footnote{Kimberlé Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 STAN. L. REV. 1241, 1245 (1991).} Without applying an intersectional lens to an analysis of the mandatory sentencing of women peripherally involved in drug crimes, the very identity of women of circumstance is arguably erased.\footnote{See Jarune Uwujaren & Jamie Ut, Why Our Feminism Must Be Intersectional (And 3 Ways to Practice It), EVERYDAY FEMINISM (Jan. 11, 2015), http://everydayfeminism.com/2015/01/why-our-feminism-must-be-intersectional/.} A common misconception about embracing intersectionality in the feminist movement is that it encourages division and exclusion, but this harkens back to the original problem of the one-size-fits-all feminism that centered around middle-class, white women.\footnote{Id.} Focusing “only on the common ground between women is erasing rather than inclusive. . . . One-size-fits-all feminism is to intersectional feminism what #AllLivesMatter is to #BlackLivesMatter. The former’s attempt at inclusiveness can actually erase the latter’s acknowledgment of a unique issue that disproportionately affects a specific group of people.”\footnote{Id.}

Ramona, Kemba, Danielle, and Teresa were considerably lucky; they all received executive clemency that recognized their punishment did not fit the crime. The executive branch should not have to overstep the judiciary in granting justice to women of circumstance, but without changes to mandatory minimum drug sentencing laws, there really is no other choice. This means that the only legal recourse for a woman of circumstance is to go through the criminal justice system, lose custody of her children, and give up her freedom for an unknown number of years while hoping for a convincing clemency petition and a president sympathetic to her situation.

The legislature can make changes to divert this specific subset of

\footnotesize

152 Lenox, supra note 139, at 285.

While female criminality has long been attributed to the intersection of poverty and drugs, recent data indicate that drugs play a more critical role than previously recognized. Most female inmates were convicted of nonviolent and/or economically motivated drug offenses, leading scholars to conclude that such illegal behavior is “decidedly gendered.” Academics agree that selling drugs is a “survival crime[]” that women commit to earn money, support an addiction, or escape domestic violence and horrific social conditions.

Id. (footnotes omitted).


155 Id.

156 Id.
women out of the criminal justice system; saving precious judicial resources and precious lives. The process of change must start by recognizing that our system of laws is patriarchal; therefore, every woman facing the legal system is already at a disadvantage in trying to match up to the normative man. But proposing a normative woman standard does not go far enough, because there is no such thing as a universal woman; issues such as race and class also contribute to the varying types of “normative” women. So what can we do to ensure that marginalized women of circumstance have equal access to justice and a law that recognizes their unique situations?

IV. POTENTIAL INTERSECTIONAL SOLUTIONS TO EXCUSE WOMEN OF CIRCUMSTANCE

Significant intersectional work is needed to combat the unintended gendered, raced, and classed consequences of the legal response to the War on Drugs. Women of circumstance are just one of the many casualties of this war, but little attention is paid to their unique status as low-level, first time offenders with unequal bargaining power as compared to their male counterparts. Federal conspiracy law is deliberately broad and all-encompassing, making it easy to get involved in a conspiracy and much more difficult to get out. Additionally, despite being violently coerced into participation, women of circumstance find themselves facing mandatory minimum sentences because they have no useful information to offer the government. Furthermore, once charged and tried as a conspirator, individual culpability arguments are moot because each conspirator is responsible for all drugs charged to the conspiracy. The following proposed solutions take this reality into consideration and formulate ways to increase the ability for women of circumstance to advocate for fair treatment under the law, while allowing the criminal justice system to hold the culpable drug offenders accountable for their actions.

A. Proposed Substantive Changes to Criminal Law

The most drastic and cure-all solution to the unfair sentencing of women of circumstance is to change substantive conspiracy law. When domestic partners are charged as co-conspirators in a larger conspiracy involving third parties, the jury should be required to find that the woman of circumstance was actively initiating and encouraging the criminal scheme as a conspirator and not merely aiding and abetting
under coercion from her husband or boyfriend. If the jury does not make this finding, then the woman of circumstance should be excused from the penalties of the overall conspiracy. Sentencing women for their actual culpability in a conspiracy serves legitimate purposes of deterrence and retribution. Sentencing women of circumstance to strict mandatory minimum sentences when they lack culpability, however, serves no legitimate purpose because it unfairly equates being trapped in an abusive or controlling relationship with voluntary acquiescence in a conspiracy.

In the alternative, Congress should alter the definition of the affirmative defense of duress at trial. The current standard, requiring an imminent threat to kill or cause grievous bodily injury,\(^\text{157}\) discounts the harm of ongoing physical threats or an imminent threat of non-physical injury that creates the same fear as a physical threat. Furthermore, this practice rewards abusers whose chosen method of power and control is verbal or emotional rather than physical, allowing abusers to manipulate women of circumstance in ways that are ineligible to meet the defense. The law should not remove a woman’s access to a deserved duress defense based on the uncontrollable actions of her abuser.

1. Legally Excusing Women of Circumstance From Conspiracy Charges

Common law defines the specific intent crime of general criminal conspiracy as an agreement between two or more persons formed for the purpose of committing a crime.\(^\text{158}\) To convict for a drug conspiracy, “the Government must prove the following beyond a reasonable doubt: (1) the existence of an agreement between two or more individuals to distribute [the substance]; (2) the defendant’s knowledge of the agreement; and (3) [the defendant’s] voluntary participation in the conspiracy.”\(^\text{159}\) There is no requirement to prove an overt act in furtherance of the conspiracy.\(^\text{160}\) Once labeled a conspirator, federal courts follow \textit{Pinkerton v. United States}, and hold that conspirators are liable for all the “reasonably foreseeable” substantive crimes committed

\(^{157}\) See United States v. Willis, 38 F.3d 170, 175 (5th Cir. 1994).

\(^{158}\) See, e.g., Pinkerton v. United States, 328 U.S. 640, 647 (1946); United States v. Childress, 58 F.3d 693, 707 (D.C. Cir. 1995).

\(^{159}\) United States v. Kiekow, 872 F.3d 236, 245 (5th Cir. 2017) (quoting United States v. Olguin, 643 F.3d 384, 393 (5th Cir. 2011)).

\(^{160}\) United States v. Dumes, 313 F.3d 372, 382 (7th Cir. 2002).
by their co-conspirators in furtherance of the agreement.\textsuperscript{161} The Anti-Drug Abuse Act of 1988 codified this premise specifically for drug conspiracies, stating that drug conspirators could receive mandatory minimum sentences for the full amount of drugs charged in the conspiracy, regardless of their individual culpability.\textsuperscript{162}

A conspiracy charge carries a very low burden of proof. Under 21 U.S.C. § 846, “[a]ny person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.”\textsuperscript{163} Under 21 U.S.C. § 841, a person will receive the same punishment as the principal actor if they conspired either “(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.”\textsuperscript{164} The government does not have to meet a tangible evidence standard to charge an individual for conspiracy—just being a party to the conspiracy is enough to receive the punishment equal to that of the person who “knowingly or intentionally” manufactured, possessed, or distributed the drugs.\textsuperscript{165} There is also no requirement that the government prove the conspirator knew the quantity or type of drugs involved in the conspiracy, nor is there an occasion for the alleged conspirator to challenge the assertion at trial.\textsuperscript{166}

Scholarship on conspiracy law repeats two main justifications for punishing conspirators equal to the primary offender. The first is that conspiracy is an inchoate crime, allowing law enforcement to intervene and apprehend individuals before they can complete the entire planned bad act.\textsuperscript{167} The second is that conspiracies in general present more of a danger to society as an “independent societal ill,”\textsuperscript{168} because group

\textsuperscript{161} See Pinkerton, 328 U.S. at 647–48.


\textsuperscript{165} See, e.g., United States v. Dixon, 547 F.2d 1079, 1081 (9th Cir. 1976) (noting that neither failed narcotic transaction nor failure to recover bag containing heroin precluded conspiracy conviction).


\textsuperscript{167} See, e.g., R. Michael Cassidy & Gregory I. Massing, The Model Penal Code’s Wrong Turn: Renunciation as a Defense to Criminal Conspiracy, 64 FLA. L. REV. 353, 357 (2012).

actors are more likely to succeed in their bad acts than an individual actor. But critics of conspiracy law argue that holding individual conspirators accountable for the “reasonably foreseeable” actions of others creates a “culpability gap”—a gap between the greater level of moral culpability contemplated by Congress and the lesser level manifested in the action of the offender.”

This culpability gap is prevalent among women of circumstance caught in their domestic partner’s drug conspiracy. The legitimate purposes for charging all conspirators equally are irrelevant when applied to a woman of circumstance because even if she knew about the conspiracy agreement and participated in some way, the voluntariness of her actions is questionable. For example, it is hard to argue that Ramona voluntarily became part of Barber’s drug conspiracy when, after moving in with him and after he started beating her, she found out he was a large-scale drug dealer. Even if Ramona had left soon after, she could still conceivably be charged as a conspirator for doing something as small as answering the phone on Barber’s behalf or using the money from his drug sales to buy food for her children while they lived together. Unlike the other co-conspirators who did not live with Barber or have a romantic relationship with him, Ramona was stuck. Barber was not only the father of her two children and her sole financial supporter, but also physically abused her and attacked her family when she tried to leave him. He routinely dragged Ramona to drug deals against her will so that she could not turn him in without implicating herself. There is nothing voluntary or intentional about why Ramona stayed in the house or complied when forced to accompany Barber on drug deals—she was trapped by fear, dependence, and love.

An example of a current defense to conspiracy that precludes most women of circumstance is the doctrine of withdrawal. Withdrawal protects an actor from being liable for a coconspirator’s subsequent actions or statements when the actor affirmatively terminates his membership in the conspiracy. For the defense to be valid, the actor must cease participating in activities and also either give notice of abandonment to coconspirators or report the conspiracy to the authorities. The withdrawal starts the clock on the statute of limitations as to previous actions, removes liability for subsequent

169 Cassidy & Massing, supra note 167, at 357.
171 Day, supra note 168, at 422.
172 Cassidy & Massing, supra note 167, at 373.
offenses that active conspirators commit, and keeps later declarations from being admissible against the actor who withdraws.\textsuperscript{173}

Membership in the conspiracy for the entirety of the crime is a rebuttable presumption in which only affirmative proof of a defendant’s withdrawal can overcome it.\textsuperscript{174} Yet it is unlikely that a woman of circumstance will even be able to accomplish the first requirement of ceasing to participate in the activity if her husband or boyfriend is using her home to carry out the drug business. As previously mentioned, the overwhelming majority of women of circumstance rely upon their domestic partner financially, so cutting ties and leaving the home is not a valid option if she wishes to keep a roof over her head. Therefore, even if she were to announce her abandonment to the group or inform the authorities of the activities, she would still be liable as a conspirator for not ceasing to participate.

When domestic partners are charged as co-conspirators in a larger conspiracy involving third parties, the jury should be required to find that the less-involved domestic partner was actively initiating and encouraging the criminal scheme, not just acquiescing in isolated acts of aiding and abetting under the influence of the more-involved domestic partner.\textsuperscript{175} This does not preclude a woman of circumstance from liability for her personally commissioning other crimes, but would excuse the actions of a truly innocent woman of circumstance who merely shared a home with a drug dealing husband or boyfriend, but took no part in the drug business. It would give a peripherally involved woman like Ramona the opportunity to raise a legal defense against allegations that she was actively initiating and encouraging the conspiracy—often asserted by desperate co-conspirators under pressure to appease the government to earn their own sentence reductions.\textsuperscript{176}

\textsuperscript{173} Day, \textit{supra} note 168, at 422–23.
\textsuperscript{174} Id. at 424–25.
\textsuperscript{175} Current jury instructions ask juries to do the exact opposite. For example, the Eleventh Circuit’s pattern jury instructions for conspiracy under 21 U.S.C. § 846 state: “If the Defendant played only a minor part in the plan but had a general understanding of the unlawful purpose of the plan—and willfully joined in the plan on at least one occasion—that’s sufficient for you to find the Defendant guilty.” \textsc{Eleventh Circuit Judicial Council, Eleventh Circuit Pattern Jury Instructions (Criminal) 2016}, at O100 (2016), http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormCriminalPatternJuryInstructions2016Rev.pdf.
\textsuperscript{176} See Telephone Interview with Amy Povah (Mar. 28, 2017). The following analogy shows how convoluted the conspiracy charge can be and how the low burden of proof works in the government’s favor (a version of this story was presented in Amy’s trial):

Suppose the government made picnics illegal. A car shows up at a local park.
Albert gets out and has a platter of chicken, Billy has a blanket, Charlie has a
Creating space for a woman of circumstance to challenge the voluntariness of her involvement in the conspiracy addresses the prejudicial stereotype that the wife or girlfriend of a drug dealer is always complicit and fully culpable in her partner’s crimes.

Excusing a woman of circumstance from the mandatory minimums tied to conspiracy means that the government can only try her for the actual crimes she is alleged to have committed rather than saddling her with the punishments of the entire conspiracy. Spending a lifetime in prison as punishment for being in an abusive relationship serves no legitimate purpose; the streets are no safer with a nonviolent, peripherally involved woman of circumstance behind bars. Requiring a higher burden of proof for a crime currently known as “[the] darling of the modern prosecutor’s nursery” would be a drastic change in the law and would upset the traditional method of relying upon co-conspirator hearsay testimony to establish conspiracy convictions. But as shown in the next section, the current legal defense of duress does not sufficiently allow women of circumstance to defend themselves against the intangible evidence of hearsay testimony in the high-stakes sentencing regime that ignores their peripheral involvement.

pitcher of kool-aid, and David has a volleyball net. Just by looking at them one would think they have just engaged in an illegal act—a conspiracy to have a picnic. In fact, Albert, Billy, and Charlie were conspiring to have a picnic, but David just got a ride from them to the park and had no intention to take part in the picnic. David should have reported the picnic right away (as should every wife or girlfriend whose partner deals drugs) but he did not. As a result, when all four of them are arrested, Albert, Billy, and Charlie are each happy to make a deal (because they are truly guilty), but in order to get a sentence reduction they must incriminate someone else. David refuses to make a deal because he is truly innocent and does not know anything that would be helpful to the prosecution to earn him a sentence reduction. Albert, Billy, and Charlie all testify against David in exchange for a two-year sentence but David gets the mandatory minimum of ten years because he has no evidence to refute the hearsay testimony against him.

177 In addition to not keeping the streets any safer, the over-incarceration of women of circumstance negatively impacts their children because, like Ramona’s children, they now have no mother or father to take care of them. For more information on the specific impact on children, see, for example, Chieko M. Clarke, Comment, Maternal Justice Restored: Redressing the Ramifications of Mandatory Sentencing Minimums on Women and Their Children, 50 HOW. L.J. 263, 266 (2006), noting the correlation between incarcerated mothers and the increased likelihood that their children will abuse drugs or alcohol, become homeless, or exhibit suicidal behaviors.

178 Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925). Judge Learned Hand’s famous quote about conspiracy charges has been heavily referenced since he penned it in 1925, showing that the prosecutor today is just as “modern” as the prosecutor of Judge Learned Hand’s time. See, e.g., Marcus, supra note 16, at 1.
2. Adjusting the Standard to Meet a Duress Defense

The affirmative defense of duress as currently written is insufficient to excuse women of circumstance who are coerced into participation in a drug conspiracy. The existing standard to meet a duress defense should be adjusted so that a woman of circumstance is allowed to provide evidence of her individual experience of duress to obtain an acquittal, or at least a reduced sentence. The defense as currently written states:

the defendant must show that: (1) she acted under an immediate threat of serious bodily injury; (2) she had a well-grounded belief that the threat would be carried out; and (3) she had no reasonable opportunity to avoid violating the law and the threatened harm.

Kemba Smith’s case is a textbook example of how difficult the current duress standard is to meet for a woman of circumstance who experienced violent physical abuse. Despite ample evidence from both expert and lay witnesses testifying to the extent of the violent and deadly abuse Kemba suffered at the hands of her boyfriend, the court denied her duress defense, reasoning that Kemba’s “generalized fear of serious bodily harm if she did not commit certain offenses” was insufficient to meet the high standard. According to the court, it was just as easy for Kemba to “discontinue her criminal activity and avoid the feared injury” as it was for her to remain in the abusive relationship and be subject to the conspiracy statute. This is the classic case of victim-blaming and discounting the non-normative experiences of women of circumstance in favor of the essential woman standard: a reasonable woman would have left if the abuse was so bad, so a woman who stayed must be intentionally participating in the criminal activity.

If evidence of a “generalized fear of serious bodily harm” is insufficient to meet the current duress standard, then most women of circumstance will never succeed on duress claims. Although physical abuse is prevalent, non-deadly threats of force—such as mental and emotional intimidation, withholding financial support, or threatening to kidnap children or call child protective services—are even more

---

179 Arguably, courts have refused to lower the standard, and precedent shows that a high standard is favored in duress claims. While tradition is important, the law is ever-changing and it may be time to re-evaluate the reasoning behind the firm stance against leniency.


181 \textit{Id.} at 909.

182 \textit{Id.}
frequent, and are equally valid reasons why women of circumstance do not leave and are coerced into participation.

A woman of circumstance should be allowed to raise a duress defense if she can demonstrate that, for example, she would have lost her home, her job, or custody of her children because of her dependence upon the principal drug dealer. These facts should create a presumption against a finding of voluntary agreement or intent to conspire, excusing women of circumstance from the punishment under conspiracy law. Allowing her to raise this defense gives her more power in the initial plea bargaining process and puts the discretion back into the hands of the trier of fact, especially if, as is usually the case, her knowledge of the conspiracy is too limited to qualify for a prosecutorial substantial assistance departure. If the duress defense is granted, it would keep a woman of circumstance from being charged with the full quantity of drugs involved in the conspiracy that she had nothing to do with and ensure that a mandatory minimum sentence, if warranted, reflects her actual participation in the crime.

It is important to highlight and immediately dismiss a potential criticism from feminists who strongly oppose the BWS theory of duress. Adjusting the standard to meet a duress defense is not singling out women as the inferior sex or implying that women are incapable of separating from abusive partners. Unlike the BWS theory of duress, an adjusted standard for the duress defense that allows proof of non-physical threats does not define a woman as a collection of mental symptoms; it merely recognizes the multiple layers of harm involved in the particular relationship. This is not an attempt to create a “women of circumstance exceptionalism” with negative implications; it is taking an existing defense, which does not carry a lifelong label of shame and stigma, and applying it to circumstances in which poverty and marginalization create and magnify different kinds of threats.

There are some drawbacks to proposing an adjusted standard for the duress defense. Realistically, the act of determining which women qualify for the lower standard of a duress defense will necessarily leave some deserving women, or other afflicted household members, out of consideration. The opposite is also possible; that undeserving women will qualify for the adjusted standard and receive reduced sentences when they were actually culpable. These concerns are worth investigating further to determine how many people might realistically

---

183 See infra Part IV(B)(3).
fall into these categories and the likelihood that they would attempt to assert the duress defense if it was adjusted as proposed.184

If conspiracy law is not redefined to excuse women of circumstance from the charge, the duress defense should at least be adjusted to provide an opportunity for women to present evidence of any kind of abuse they endured, to help mitigate the resulting sentence.

B. Proposed Changes to Federal Mandatory Minimum Sentencing Practices

Mandatory minimum sentences were the answer to society’s question of how to clean up the streets from rampant drug crime. The impact of a mandatory minimum is that, unless a defendant meets very specific exceptions, they will never receive less than the statutorily defined minimum term of years. These narrow exceptions keep women of circumstance who had little or no involvement in the drug conspiracy itself from getting below the mandatory minimum.

The focus of this section is finding ways to get out from under the mandatory minimum sentencing regime so that judges are able to use their discretion in sentencing. One way is to recalculate the drug quantities imputed to women of circumstance so that they do not rise to the level that triggers the mandatory minimum. Another way is to create a new safety valve provision for low-level offenders that is easier to meet than the current provision, which in principle avoids triggering the mandatory minimum. Finally, creating a “cooperation under duress” departure, which can be raised by the defendant rather than the government, puts bargaining power back into the hands of the woman of circumstance and allows her to present evidence of her willingness to cooperate for mitigation purposes.

1. Recalculating Drug Quantities Under the Current Definition of Conspiracy

The quantity-driven rather than culpability-driven sentencing scheme for drug offenses is illustrated by the way that the statutes and sentencing guidelines pinpoint levels of punishment based on drug

---

184 See, e.g., Neil P. Cohen et al., The Prevalence and Use of Criminal Defenses: A Preliminary Study, 60 TENN. L. REV. 957, 965 (1993) (reporting prevalence of defenses, including duress, in criminal trials in Tennessee from questionnaires sent to judges, prosecutors, and defense lawyers, and finding that the duress defense was seldom used).
quantity, regardless of actual knowledge. To demonstrate the problem with using overall drug conspiracy quantity to derive sentences, this section explores the levels of punishment for Ramona Brant’s conviction as a first-time, nonviolent narcotics offender charged under 21 U.S.C. § 841(b)(1)(A) with 183 kilograms of powder cocaine. Despite the fact that police found no drugs on Ramona during the investigation, she was held responsible for the full amount charged under the law of conspiracy, and was sentenced as such.

The quantity of a particular drug triggers a specific mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(A). For example, a first-time conviction for anyone who knowingly or intentionally manufactures, distributes, dispenses, or possesses

5 kilograms or more of a mixture or substance containing a detectable amount of . . . cocaine . . . [results in] a term of imprisonment which may not be less than 10 years or more than life . . . [and requires] supervised release of at least five years in addition to such term of imprisonment . . . [and] the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph.

Under the statute and my hypothetical drug amount of 183 kilograms of powder cocaine, Ramona’s mandatory minimum sentence is ten years with at least five years of supervised release and no probation. Therefore, under the statute, the only way to get a sentence lower than ten years is if the entire amount of cocaine found in the conspiracy was less than 5 kilograms.

But the same drug quantity can result in a different sentence under the sentencing guidelines. The statute of conviction, here 21 U.S.C. § 841(b)(1)(A), directs a judge to make an assessment under U.S.S.G. § 2D1.1 as to offense type and the base offense level. Ramona, as a first-time offender, would have a criminal history category level of one and a base offense level of at least 36, because she was charged with having “at least 150 KG but less than 450 KG of Cocaine.” Ignoring

---

186 The charge in Ramona’s actual case was for 183 kilograms of powder cocaine and 97 kilograms of crack cocaine, with enhancements for use of a firearm and being a leader in the organization. See supra note 42. For ease of explanation, I am only using the charge of 183 kilograms of powder cocaine in this example.
188 See Froyd, supra note 136, at 1480.
189 U.S.S.G. § 2D1.1. Just for reference, the trial court found Ramona’s base offense level to be 38.
the aggravating factors found in the actual case, the base offense level of 36 corresponds to a term of 188–235 months on the sentencing table, or roughly 15 to 20 years.\textsuperscript{190} While this is higher than the statutory minimum, Ramona might have qualified for some mitigating factors, such as the four level “minimal participant” reduction in § 3B1.2(a) and the corresponding two level reduction for § 2D1.1(b)(16), bringing her overall offense level in this hypothetical scenario down to 30 and a range of 97 to 121 months, or roughly 8 to 10 years.\textsuperscript{191}

The current mandatory minimum statutes prevent a judge from sentencing someone like Ramona below the ten-year mandatory minimum, despite the fact that the sentencing guidelines might allow for a lower sentence.\textsuperscript{192} If Congress is unwilling to amend the definition of conspiracy to allow for women of circumstance to raise a defense against voluntary participation, then it should amend the drug calculations tied to mandatory minimums. The trier of fact should have discretion to determine the quantity of drugs that an individual was actually responsible for, rather than allowing the government to impute the full amount of drugs in the conspiracy to each conspirator, and being forced to abide by the corresponding mandatory minimums. The trial judge in Ramona’s case practically begged the government to make a motion for him to downward depart on Ramona’s sentence, because he did not feel she deserved life in prison for what the evidence alleged she had done.\textsuperscript{193} If a judge states on the record that he or she disagrees with the sentence being imposed because the punishment does not fit the crime, this statement should not continue to go unaddressed.\textsuperscript{194}

\textsuperscript{190} See id. ch. 5, pt. A, Sentencing Table. During the sentencing phase of a trial, the judge refers to the guidelines that were in effect at the time of sentencing. For ease of explanation, I am using the most current edition of the guidelines.

\textsuperscript{191} See id.

\textsuperscript{192} See U.S.S.G. § 5G1.1(c), stating that “the sentence may be imposed at any point within the applicable guideline range, provided that the sentence—(1) is not greater than the statutorily authorized maximum sentence, and (2) is not less than any statutorily required minimum sentence.”

\textsuperscript{193} See Transcript of Re-sentencing, supra note 4, at 221.

\textsuperscript{194} Judges across the country have voiced their disagreement and have actually stepped down from the bench in their outrage over mandatory minimum sentences and the havoc it wreaks on the lives of nonviolent drug offenders. See, e.g., Another Federal Judge is Speaking Out Against Mandatory Minimum Sentences, MEDIUM (Apr. 19, 2017), https://medium.com/@civilrightsorg/another-federal-judge-is-speaking-out-against-mandatory-minimum-sentences-e30301ad2211.
2. Changing the Elements to Meet a Safety Valve

The current safety valve provision under 18 U.S.C. § 3553(f) provides an exception to mandatory minimum sentences specifically for drug charges regardless of drug quantity.195 Because it is not a departure, it does not require a government motion, and it therefore places the burden into the hands of the defendant to present evidence of their eligibility196 and allows judges to “impose a sentence without regard to the statutory mandatory minimum penalty for the covered offenses.”197 But the scope of the current safety valve is too narrow to allow women of circumstance the benefit of its coverage. The safety valve language reads:

(f) Limitation on Applicability of Statutory Minimums in Certain Cases . . . . [T]he court shall impose a sentence pursuant to guidelines . . . without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;
(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
(3) the offense did not result in death or serious bodily injury to any person;
(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act [21 U.S.C. § 848]; and
(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.198

196 See Froyd, *supra* note 136, at 1497.
Ramona is a perfect example of someone who should have qualified for the safety valve. Ramona was a first-time offender, and therefore “[did] not have more than 1 criminal history point” on her record.199 Ramona’s involvement in the conspiracy “did not result in death or serious bodily injury to any person.”200 Most importantly, for someone so peripherally involved as Ramona “the fact that [she] ha[d] no relevant or useful other information to provide . . . shall not preclude a determination by the court that [she] has complied with this requirement.”201

What made Ramona ineligible, however, were the government’s allegations that she “possess[ed] a firearm . . . in connection with the offense” and that she was “an organizer, leader, manager, or supervisor of others in the offense.”202 These allegations were founded on the hearsay testimony of co-conspirators who themselves received substantial assistance departures from the government in exchange for testifying against Ramona and her boyfriend.203 But for allegations that one of the guns found in the house belonged to Ramona and that she directed the drug sales from New York, making her an organizer, Ramona would have qualified for the safety valve exception as currently written.204

The safety valve exception as exists now is unworkable. Factors (1), (3), and (5) could remain as currently written because they clearly support a finding that the individual charged is a low-level, nonviolent, first time offender. They are objective in nature and cannot be manipulated by the government: (1) the individual either does or does not have more than one criminal history point; (3) the crime either did or did not result in death or serious bodily injury; and (5) the individual either spoke or did not speak to the government before the sentencing hearing. Factors (2) and (4) are problematic because they are subjective in nature and can be proven solely through hearsay testimony, but they are also important indicators of violence and levels of culpability. For example, a bright-line rule like the one in (2) ensures that any possession of a gun or inducing another participant to possess a gun in connection to the offense disqualifies the individual from the safety valve. Problematically, there is no room for explanation in a case like

199 See id. § 3553(f)(1).
200 Id. § 3553(f)(3).
201 Id. § 3553(f)(5).
203 See, e.g., Transcript of Trial, supra note 34, at 82–83.
204 See id. at 45, 53–54, 152–53.
Ramona’s where her abuser forced her to carry a gun, which is very different from a conspirator who willingly obtains a gun to facilitate drug activities. This element can also be satisfied if any member of the conspiracy possessed a firearm, under *Pinkerton* vicarious liability. As currently written, the law does not distinguish, for example, between the less culpable Ramona, who was forced to carry a gun, but was not arrested with a gun in her possession, and the fully culpable Durante, who was arrested with both guns and drugs in his car. Nor could it, and still be called a safety valve rather than a floodgate.

To avoid the difficulty of the current safety valve provision, one proposal calls for using the sentencing guidelines regime if a defendant falls within a statutory definition of a low-level drug offender. The proposal identifies a non-exhaustive list of factors that a court may consider when determining whether a defendant is a low-level participant. If a judge finds that the defendant met a sufficient number of factors, the safety valve provision would apply, and the judge would sentence under the guidelines rather than following the mandatory minimum. The judge would still take factors like use of a firearm or cooperation with the government into consideration as an aggravating or mitigating adjustment, but not until after the mandatory minimums were off the table. This “solves the problem of sentence disparity between high-level and low-level offenders and remedies the disparate impact felt

---

205 Froyd, *supra* note 136, at 1500.
206 See *id.* at 1501, enumerating the following factors:
   (1) The Defendant received a small, flat fee payment for a drug delivery (rather than a percentage of the profits after the drugs were sold);
   (2) The Defendant only delivered drugs one way, and did not deliver the money in return;
   (3) The Defendant received a pre-packaged bag;
   (4) The Defendant delivered to an individual not previously known to the Defendant;
   (5) The Defendant did not sell or negotiate the terms of the sale of the drugs;
   (6) The Defendant had no ownership of any portion of the drugs;
   (7) The Defendant did not finance any aspect of the criminal activity;
   (8) The Defendant lacked knowledge as to the type, quantity, or value of the drugs the Defendant was carrying;
   (9) The Defendant lacked knowledge or understanding of the scope and structure of the conspiracy;
   (10) The Defendant lacked knowledge regarding the activities of others involved in the conspiracy;
   (11) The Defendant did not supervise others; or
   (12) The Defendant was closely supervised by the supplier or distributor.
207 *Id.*
208 *Id.* at 1505.
by women drug offenders."\(^{209}\)

3. Creating a “Cooperation Under Duress” Departure

The United States Attorney’s Manual permits federal prosecutors to offer a substantial assistance recommendation on behalf of a defendant who “has provided substantial assistance in the investigation or prosecution of others, or has otherwise provided substantial assistance to the government.”\(^{210}\) The process is codified and states, “[u]pon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense.”\(^{211}\) Per the sentencing guidelines, only “upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.”\(^{212}\) This option gives the prosecutor “a power, not a duty, to file a motion when a defendant has substantially assisted.”\(^{213}\)

There is no definition for “substantial assistance” and therefore prosecutors are free to make a determination of what qualifies as “substantial” on a case-by-case basis.\(^{214}\) The guidelines state,

---

\(^{209}\) Froyd, supra note 136, at 1507.


\(^{212}\) U.S.S.G. § 5K1.1 (emphasis added). The court may consider the appropriate reduction based on the following facts:
   (1) the court’s evaluation of the significance and usefulness of the defendant’s assistance, taking into consideration the government’s evaluation of the assistance rendered; (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant; (3) the nature and extent of the defendant’s assistance; (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance; (5) the timeliness of the defendant’s assistance.

\(^{213}\) Id.


As one judge interviewed for the project stated: U.S. Attorneys don’t agree on the definition of substantial assistance. Some define it as anything that helps them solve the case or leads to charges against new individuals or strengthens the case against previously indicted defendants. Some will not make the motion unless the defendant actually testified before the grand jury. For others, truthful debriefing is
“[s]ubstantial weight should be given to the government’s evaluation of the extent of the defendant’s assistance, particularly where the extent and value of the assistance are difficult to ascertain.” Unsurprisingly, this means that many low-level offenders are not offered a substantial assistance recommendation because they do not know enough useful information. Although Congress’s intention in creating mandatory minimums was to punish drug kingpins, ironically, those who are most deeply involved in the crime are the ones who have a greater chance of receiving the most lenient sentences because of how helpful they can be to the prosecution of others.

When looking at the barriers a woman of circumstance must face, it seems cruel that she is unable to qualify for a substantial assistance recommendation—the only recommendation that a prosecutor can make on her behalf at sentencing—because her information is either nonexistent or not useful enough to implicate other participants. Rather than simply having no impact on the sentencing process, the current system actually punishes wives and girlfriends for not being good enough “snitches,” while rewarding husbands and boyfriends for being deeply entrenched in crime. Although men and women involved in drug conspiracies are equally subjected to mandatory minimums, the results are gendered with women receiving disproportionately lengthy sentences for their limited roles.

One dramatic solution to this problem would be to eliminate the

---

Id. 215 U.S.S.G. § 5K1.1 cmt. 3.
Id. 216 Froyd, supra note 136, at 1493.
Id. 217 Ja.
Id. 218 Raeder, supra note 54, at 21; Jackson, supra note 55, at 518 n.5 (“Women who associate with male drug dealers find themselves in uniquely difficult situations when faced with the rigidity of the sentencing guidelines because their low-level or nonexistent roles in the alleged conspiracies often render them unable to provide prosecutors with the substantial assistance required for sentence level reductions.”).
Id. 219 Levy-Pounds, supra note 114, at 471–72.

The primary purpose of holding all alleged co-conspirators equally liable in a drug-trafficking ring is to force co-defendants to “snitch” on each other and cooperate with prosecutors in exchange for a sentence reduction. This stealth weapon placed by the legislature into prosecutors’ hands arguably results in more women becoming casualties in the “war on drugs,” as they are often sentenced to lengthy prison terms that are grossly disproportionate to their level of involvement in a drug-related crime.

Id. (footnotes omitted).
Id. 220 Glazer, supra note 40, at 199.
Id. 221 Lenox, supra note 139, at 288–89; Froyd, supra note 136, at 1495.
substantial assistance departure altogether. Data shows that prosecutors are inconsistent in their application of the departure, and a strict reading of Congress’s intention to remove disparities in sentencing would indicate that substantial assistance departures go against that objective. If high-level offenders are receiving unfairly low sentences, then the scale may weigh in favor of eliminating the departure altogether, rather than continuing to leave it up to prosecutorial discretion.

A more tempered solution might be to create a “cooperation under duress” carve-out to the substantial assistance departure requirements. Currently, women of circumstance are penalized for not having useful information about other actors, even if they are willing to admit their own guilt. Rather than relying on the prosecutor to make a recommendation at sentencing (for assistance that these women are likely unable to provide), women of circumstance should be allowed to move on their own behalf to receive a sentence below the mandatory minimum by showing they wanted to cooperate, but lacked any useful information due to duress. It would give the judge discretion to hear evidence in support of the motion without relying upon the prosecutor to make the first move. The level of departure would not be as significant as a substantial assistance departure, but it would recognize the effort and not penalize a woman of circumstance for having the misfortune of knowing too little information to be of use. Importantly, the standard of “cooperation under duress” would be left undefined “just as the government’s standard for ‘substantial assistance’ is not defined.”

This open definition levels the playing field so that the judge is the one

---

222 See generally Spohn & Fornango, supra note 214 (analyzing research on jurisdictional variations in the use of substantial assistance departures, and the corresponding likelihood that a person will receive that departure, to determine that such departures are affected by race, ethnicity, and gender).

223 See, e.g., Knizhnik, supra note 17, at 1727. Knizhnik’s suggested “good faith cooperation” departure would be as follows:

Notwithstanding any other provision of law, the court shall have the authority, upon motion from the defendant, to depart from the Guidelines or impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant’s good faith cooperation with the Government, if the defendant:

(a) qualifies for a decrease under Section 3E1.1(a) for acceptance of responsibility, and

(b) demonstrates having engaged in cooperation with the Government in good faith, in order to provide assistance in the investigation or prosecution of a person who has committed an offense.

Id. at 1755.

224 Id. at 1757.
deeming the sufficiency of the evidence, rather than the prosecutor.

V. CONCLUSION

It has now been thirty years since the mandatory sentencing guidelines were put into practice. It is high time for our legislature to take a serious look at the gendered and racialized results of these sentencing laws, especially in the drug conspiracy context, and ask why women of circumstance are being locked up at a greater rate than their male counterparts. What began as a well-intentioned legislative goal of making sentencing for drug crimes more equal by being gender-neutral, has resulted in a disproportionate number of women of circumstance being subjected to harsh sentences designed to deter and punish the most culpable leaders and organizers of drug conspiracies. It is hard to believe that this was the outcome Congress envisioned.

To be fair, it does not make sense to go back in time and revive the old, outdated “women-only” legal excuses that protected married women who acted at the will of their husbands. Arguably, it may even be time to discard the BWS theory of duress and self-defense because of its own pitfalls in painting women as inferior creatures who cannot make rational decisions and stigmatizing them as having a mental illness. But the proposed solutions for women of circumstance in this Note cannot be equated to the misogynistic doctrines of the past. These solutions are only necessary because of the havoc that mandatory minimums have created when unintended targets are caught in the expansive web of drug conspiracy laws. Changes, either to substantive law or to the mandatory minimums themselves, can ensure fair sentencing by holding the culpable offenders accountable for their actions.
I. INTRODUCTION

“O Romeo, Romeo, wherefore art thou Romeo?” It is a safe assumption that most people would be able to identify this quotation as belonging to William Shakespeare’s famous play,  Romeo and Juliet. In addition, most of those individuals likely know the story of Romeo and Juliet: a tale of star-crossed lovers, two teenagers whose families are enemies, prompting the couple to navigate considerable obstacles in their pursuit of love. In the play, the two main characters’ family feud is the central issue. If this were a modern day problem, however, Romeo, and possibly Juliet, could potentially face criminal charges due to their

1 WILLIAM SHAKESPEARE, ROMEO AND JULIET act 3, sc. 5.
2 Id. at act 2, sc. 2.
3 See generally id.; see also Steve James, Romeo and Juliet Were Sex Offenders: An Analysis of the Age of Consent and a Call for Reform, 78 UMKC L. REV. 241, 241 (2009).
4 See generally SHAKESPEARE, supra note 1; see also James, supra note 3, at 241.
ages; Juliet is thirteen while Romeo is an older teen.\textsuperscript{5} Applying that contemporary filter to this beloved classic puts into perspective the ugly truth and substantial consequences teenagers are faced with today.

In an attempt to soften the strict lines defining statutory rape, many states have passed Romeo and Juliet laws, which essentially serve as an exception to the crime.\textsuperscript{6} The Romeo and Juliet laws were implemented to “afford[ ] protection to minors who willingly, voluntarily, and intentionally engage in sexual intercourse . . . [and] to decriminalize the penalty for minors in statutory rape cases.”\textsuperscript{7} The purpose of this Note is to analyze statutory rape laws and Romeo and Juliet exceptions, how they are lacking, and draw attention to the irrevocable consequences that result from sex offender registration.

This analysis focuses on distinguishing those who are a real threat to the community and the innocence of our children from young adults and adolescents who made an innocent mistake in exploring amorous relationships. There are two prime examples of the former: Roman Polanski\textsuperscript{8} and Megan Mahoney.\textsuperscript{9} Polanski is a famous, Academy Award-winning filmmaker who is also well-known for being a child rapist.\textsuperscript{10} At forty-three-years-old, Polanski performed oral, vaginal, and anal sex on a thirteen-year-old aspiring model despite her protests.\textsuperscript{11} He was arrested and indicted on six felony counts, served forty-two days in jail, and then fled to France on the day of his sentencing, where he has lived ever since.\textsuperscript{12} Megan Mahoney, twenty-four-year-old high school gym teacher and assistant women’s basketball coach, was arrested for having regular sexual contact with a sixteen-year-old male student over

\textsuperscript{5} James, supra note 3, at 241.


\textsuperscript{10} Fitzpatrick, supra note 8.

\textsuperscript{11} Id.

\textsuperscript{12} Id.
the course of about two months.\textsuperscript{13} There is no denying that Polanski and Mahoney’s sexual acts were predicated on a position of power and authority, and such acts should overwhelmingly be deterred and punished. On the other hand, there are adolescents who engage in consensual sexual relationships and are not a threat to the community. For instance, take Kaitlyn Hunt.\textsuperscript{14} At age eighteen, Kaitlyn engaged in a sexual relationship with her fourteen-year-old girlfriend, both of whom attended the same high school.\textsuperscript{15} When the younger girl’s parents found out, Kaitlyn was removed from the school, weeks before graduation, and charges were filed.\textsuperscript{16} Not only did the two go to the same high school, but the relationship was consensual; it was the girlfriend’s parents who took extreme measures, resulting in imprisonment and probation for Kaitlyn, in addition to house arrest and a significantly negative impact on her career, and future as a whole.\textsuperscript{17} These cases are not as open and shut as the law makes them out to be, and young adults like Kaitlyn are victims of the current legislation.

The following section examines the foundation of statutory rape laws in the United States and explores its progression through the reformist era, both in terms of what is static and what has changed. Section III dives into the biological and psychological side of growing up, and how useful this data can be when examining cases such as Kaitlyn’s. Sections IV, V, and VI offer a threefold examination of the Romeo and Juliet laws: the benefits; the downsides of applying such laws in Connecticut and other states, comparatively; and the terrible consequences that occur when an actor falls just outside the exception’s boundary lines. Furthermore, Section VII presents devastating real life tales, which serve as just a small glimpse into the hell that becomes a person’s life following a conviction for an innocent engagement. The final portion of this Note examines the changes to the sex offender registration system that have recently been proposed by the Connecticut Sentencing Commission, and proposes additional changes that the Connecticut Legislature, as a whole, should take into consideration.

\textsuperscript{13} Jauregui, supra note 9.


\textsuperscript{15} Jauregui, supra note 14.

\textsuperscript{16} Id.

\textsuperscript{17} Id.; see also Ganim, supra note 14.
II. STATUTORY RAPE: THEN AND NOW

Under most criminal codes, Romeo and Juliet’s sexual relationship is considered statutory rape, which is based on the assumption that a person is legally incapable of consenting to sexual intercourse until he/she reaches a certain age as dictated by the respective state. 18 Originally, such laws were incorporated and applied to our legal system through English common law, which deemed it “illegal to ravish,” with or without her consent, a ‘maiden’ under the age of 12.” 19 Moreover, these laws were made to preserve a female’s virginity against a deceitful older man’s seduction, who was not willing to pay for such a gift with his hand in marriage. 20 Now, over seven hundred years later, the age of consent has gradually changed, ranging from fifteen to eighteen, depending on the state. 21 Most states have also dictated the acceptable age range between the two parties to mitigate or eliminate a statutory rape charge, 22 some have specified classifications that dictate the level of criminal behavior, 23 and others have explicitly stated what is, or is not, a tolerable defense to such a crime. Some states recognized the defense that a man or woman believed the adolescent party to be older than the minority age, and in others, a man could defend himself against statutory rape charges by proving that the minor female was already sexually experienced and, therefore, he did not corrupt the female. 24 Provisions outlining the boundaries of such sexual relationships are known as “Romeo and Juliet” laws, which are further discussed in the following section.

19 Id.
22 Id.
23 See Catherine L. Carpenter, On Statutory Rape, Strict Liability, and the Public Welfare Offense Model, 53 AM. U. L. REV. 313, 339 n.148 (2003) (“Under CONN. GEN. STAT. § 53a–70(a)(2) [(2017)], sexual assault of one under thirteen is a potential Class A or B felony. Under § 53a–71(a)(1), the sexual assault of someone between thirteen and sixteen years of age is described as a Class B or C felony. The provision for sexual assault in the fourth degree, § 53a–73a, prohibits sexual contact of someone under fifteen and is either a Class A misdemeanor or Class D felony.”).
24 Donovan, supra note 18, at 2.
Most often, the assumption in these cases is that the “perpetrator” is a male and the “victim” is a younger female.25 This notion reflects the traditional view that only young girls and young women are susceptible and defenseless, not boys or young men, and girls therefore require exclusive safeguards like the statutory rape law.26 The feminist reforms of the 1970s, however, targeted this concept as one of their goals: “include young males as a part of the protected class and enable females to be charged as perpetrators.”27 Liberal feminist participants argued about the inequality of rights assigned to men and women in society:

If sex is viewed as a privilege, for a state to say that a girl of a certain age is neither legally nor factually capable of consenting to that act while boys are able to consent to sex at any age with any women, that girl has been deprived of a right that her male counterpart has been allowed to engage in.28

The reformists were eventually successful in their endeavor, causing lawmakers and law enforcers in the late 1970s to recognize that not only could an older or younger male initiate sexual acts, but also an older or younger female.29 In essence, the statutory rape laws have gradually become both more stringent (raising the age of consent) and more accepting (eliminating gender biases), reflecting modern society’s values. Given that statutory rape is largely a strict liability offense,30 however, it seems that our institution is unconsciously, or perhaps consciously, still of the view that a younger, female “victim” cannot also be the sexual instigator, with the exception of a minority of states, such as California.31

25 Id.
26 Id.
28 Id. (quoting Luisa A. Fuentes, The 14th Amendment and Sexual Consent: Statutory Rape and Judiciary Progeny, 16 WOMEN’S RIGHTS L. REP. 139, 151 (1994)).
29 Id.
30 Owens v. State, 724 A.2d 43, 48–49 (Md. 1999) (“An overwhelming majority of courts confronted with a constitutional challenge to statutory rape laws have held that denying a defendant a mistake-of-age defense in a statutory rape case does not deprive him of his due process rights. We are aware of only one court which has held that due process mandates a mistake-of-age defense to statutory rape, and that holding appears to be based on state, and not federal, constitutional analysis. We decline to deviate from the majority rule and uphold the legislature’s intent, as determined in Garnett, to make statutory rape a strict liability crimes.”) (footnote omitted) (citation omitted).
It is apparent that both law and society define “adult,” or even “maturity,” in very different ways, with science’s interpretation hanging like a pendulum between the two. For instance, Connecticut law defines the age of majority at eighteen-years-old, whereas it is illegal to drink alcohol under twenty-one years of age. The law essentially segregates minors from adults, the former described as “vulnerable and incompetent” while the latter “autonomous and responsible.” On the other hand, science views adolescence as existing between childhood and adulthood. During this stage, the brain’s cognitive functions are being continuously “rewired” until roughly twenty-five years old. Specifically, the prefrontal cortex controls memory retrieval, emotions, weighing outcomes, and judgment. Oftentimes, society will dismiss adolescent behavior as a product of developmental hormones, their home life, and the like. While these factors do influence behavior, there is one paramount influence: an incompletely developed pre-frontal cortex that inhibits the ability to make mature, independent decisions. Therefore, prior to having a fully formed pre-frontal cortex as a mid-twenty-something-year-old, the task of judging future consequences, such as engaging in a sexual relationship with someone a few years younger, is quite difficult. Even though the United States Supreme Court ruled in Roper v. Simmons that adolescents are less criminally responsible than adults due to their “immature judgment, susceptibility to negative peer influences, and transitory personality development,” the law continues...
to treat seventeen-, eighteen-, nineteen-, and twenty-year-olds as adults in the criminal justice system when it comes to crimes like statutory rape, regardless of the fact that this criminality is more of a gradual, developmental process as opposed to a “deficient, anti-social ‘character.’”

Additionally, research has provided information demonstrating why girls mature faster than boys, perhaps answering the question: why is it older boys, rather than older girls, who are often labeled the sex offender/aggressor in statutory rape situations? It all comes down to the brain pruning neural connections. This process starts around the ages of ten to twelve for girls, but fifteen to twenty for boys. As a female teen’s brain emerges, hormones dramatically reorganize her brain circuitry, driving the way she thinks, feels, acts and even obsesses over her looks. Studies show that these surges of estrogen can trigger teen girls’ need to become sexually desirable to boys. Thus, girls are going through this stage at a much younger age than their male counterparts. At this age, a boy’s pre-frontal cortex, the operator of judgment making, is not developed yet. When considering this information in a scientific light, it is not so absurd for a girl going through this process around 15 and a boy doing so around 19 to act impulsively on their sexual desires, despite the consequences. Boys, on the other hand, are up to speed when it comes to sex: “the male amygdala, which also controls sexual thought, is twice as large as that of females. Fueled by testosterone, it triggers the typical teenage male brain to think about sex every 52 seconds, compared to a few times a day for teen girls.”

Viewing this scientific data, it is reasonable that an adolescent would improperly gauge the risk of being prosecuted for engaging in oral sex, when seventy percent of males and seventy-two percent of females aged eighteen to nineteen have engaged in oral sex. Given the

---

41 Herbert, supra note 34.
43 Id.
45 Id. (“It may not be until late adolescence or their early 20s that boys’ brains catch up to their girl peers.”).
46 Id.
developmental status, fixation, and high school environment, for example, sexual experimentation is common at this time, yet young men and women are being punished for it, even though this categorical group is notorious for feeling invincible and acting impulsively.\(^48\) Thus, it is easy to see the correlation between these statutes and an increase in sex offenders and victims, as well as why the prosecution of statutory law offenses is described as “the low-hanging fruit for prosecutors.”\(^49\)

The foundational issue of the statutory rape laws derives from its legislative beginnings. In 1996, President Bill Clinton signed the Welfare Reform Act, which found statutory rape laws to be a matter of public health concern, stating:

> The negative consequences of an out-of-wedlock birth on the mother, the child, the family, and society are well documented as follows: (A) Young women 17 and under who give birth outside of marriage are more likely to go on public assistance and to spend more years on welfare once enrolled. These combined effects of “younger and longer” increase total AFDC costs per household by 25 percent to 30 percent for 17-year-olds.\(^50\)

Thus, the theoretical backbone of these statutes actually has nothing to do with the level and variations of teenage maturity, but economic frugality. The reason the government wanted to regulate sexual activity in the criminal sphere was to dissuade adolescents from getting pregnant, thus sparing government resources and distributing it across the social spectrum.\(^51\) Not only is it a problem that the law refuses to acknowledge the scientific data supporting gradual teenage development, but in addition, when there is poorly conceived legislation, such as this, many “victims” of statutory rape do not view themselves as victims when they feel they participated in a consensual act. As a result, the true victims are overshadowed by the purported victims of this poorly crafted legislation.

### IV. ROMEO AND JULIET PROVISIONS: THE GOOD

As mentioned above, the Romeo and Juliet laws were implemented to “afford[ ] protection to minors who willingly, voluntarily, and

\(^48\) Id.
\(^49\) Id. (quoting Michele Goodwin, Law’s Limit: Regulating Statutory Rape Law, 2013 WIS. L. REV. 481, 509 (2013)).
\(^51\) Rankin, supra note 47.
intentionally engage in sexual intercourse . . . [and] to decriminalize the penalty for minors in statutory rape cases.” These provisions largely come into play when the “perpetrator” is eighteen or nineteen years old and the “victim” is fifteen or sixteen years of age, for example. These laws, however, usually do not extend to adults in a position of authority over the minor involved, such as a teacher-student relationship, a coach-athlete relationship, or a parent-child relationship, for instance. Moreover, these provisions do not apply to those accused of sexual acts involving the threat of violence, or violence itself.

Historically, Romeo and Juliet laws were applied solely to heterosexual parties. In some jurisdictions, if the victim was a minor and both the victim and the perpetrator were of the same sex, the exception would not apply to them, resulting in much tougher consequences, such as hefty fines, felony convictions, and mandatory sex offender registration. Kansas was one such jurisdiction. In 2004, Matthew Limon, a developmentally disabled eighteen-year-old, engaged in consensual oral sex with a fourteen-year-old boy. Had the minor “victim” been a girl, Limon would have been sentenced to thirteen to fifteen months’ imprisonment under the 1999 Kansas Romeo and Juliet law. Instead, Limon was sentenced to seventeen years in prison for this consensual homosexual act. Fortunately this law was successfully challenged under the Equal Protection Clause, with the court citing *Lawrence v. Texas* and *Romer v. Evans*. The court held the Kansas law unconstitutional under both the United States Constitution and the Kansas Constitution, eliminated the phrase “and are members of the

---

52 Minor, *supra* note 7, at 321.
55 Romeo and Juliet provisions apply to *consensual sexual activity*, therefore, it is inherent that any nonconsensual sexual activity, i.e., rape born out of force, violence, or coercion, would ultimately fall out of the purview of such provisions.
58 *Id.* at 243 (Pierron, J., dissenting).
59 *Id.* (“Since he was the same sex as [the fourteen-year-old], the sentence range was 206 to 228 months. The court imposed a sentence of 206 months—17 years and 2 months.”).
opposite sex” from the statute, and further held that Limon’s conviction and sentence violated his rights.61

A Romeo and Juliet provision can also prevent an individual from having to register as a sex offender.62 Alternatively, such a provision can reduce the time a convict must remain on the sex offender registry.63 For example, someone convicted of statutory rape can petition the appropriate court to remove his/her name from the sex offender registry once a Romeo and Juliet provision is enacted.64 Although this will be explored in greater depth in subsequent sections, there may be an advantage to removing listed offenders such as Kaitlyn from the registry: by reevaluating the list, state officials can better determine which qualifying individuals should be more heavily monitored, and which individuals are not actually threats to the community.

In addition, these provisions can reduce a criminal charge from a felony to a misdemeanor.65 Thus, the defendant would serve a less severe jail sentence. Therefore, it is extremely beneficial to make such provisions available to individuals involved in consensual relations with another young person close in age.

---

61 Id. at 40–41.
63 In fact, in most states, those who fall within the Romeo and Juliet’s purview do not have to register as a sex offender at all. See, e.g., FLA. STAT. § 943.04354(1)(c) (2017) (permitting the removal of the requirement to register when the “sexual predator” is within four years of age from the victim, who is between the ages of thirteen and eighteen); see also Patrick McGreevy, Criminal Justice Leaders Seek to End Lifetime Registry for Low-risk Sex Offenders in California, L.A. TIMES (June 18, 2017), http://www.latimes.com/politics/la-pol-ca-sex-offender-registry-20170618-story.html (noting that lawmakers in California are seeking to reduce the number of years low-level, nonviolent sex offenders would have to register, including teenagers who are usually only a few years apart when engaging in sexual activity).
64 See, e.g., FLA. STAT. § 943.04354 (stipulating that a person may be considered for removal from the sex offender registry); Katie Wedell, Overhaul Could Drop Thousands From Sex Offender Registry, DAYTON DAILY NEWS (July 14, 2017), https://www.mydaytondailynews.com/news/state--regional-govt--politics/overhaul-could-drop-thousands-from-sex-offender-registry/Vx8yW4iYePGAdLqTqPvxxJ/ (discussing changes to Ohio’s sex offender registry law in which low-level sex offenders would be able to petition to be taken off the registry).
65 Higdon, supra note 62, at 965.
V. ROMEO AND JULIET IN CONNECTICUT: THE BAD

A. Connecticut Law

In Connecticut, the age of consent—the minimum age an individual can legally consent to engage in sexual acts—is sixteen.\(^66\) Therefore, any individual, male or female, fifteen years or younger, is not legally capable of acquiescing to sexual activities with someone eighteen years of age or older. Thus, if someone does engage in these acts with another person fifteen years of age or younger, they can be prosecuted for statutory rape.\(^67\) There are exceptions, however, to this age of consent. One such exception is more stringent: if the perpetrator is a guardian of the victim (i.e., coach, parent, teacher, instructor, etc.), and they are over the age of twenty, then the age of consent becomes eighteen years old.\(^68\)

Another exception is the close-in-age exemption, or Connecticut’s Romeo and Juliet law. This safe harbor was created for the same purpose as other Romeo and Juliet provisions: to prevent the prosecution of couples that participate in a consensual, sexual relationship when one or both of the parties is below the age of consent (sixteen).\(^69\) In Connecticut, the consenting parties must be within three years of age.\(^70\)

Since the term “statutory rape” is not used in the Connecticut statutes, the legislature uses equivalent terms to describe such acts, which vary depending on the specific circumstances of the charges. These charges may range from Aggravated Sexual Assault in the first degree (a Class A or B felony) to Sexual Assault in the third degree (a Class C or D felony), for instance.\(^71\) For our purposes, one of the more relevant statutes is § 53a–71 of the Connecticut General Statutes, entitled, “Sexual assault in the second degree: Class C or B felony,” which states that:

(a) A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and: (1) Such other person is


\(^{67}\) CONN. GEN. STAT. § 53a–71(a).

\(^{68}\) Id.

\(^{69}\) See id.

\(^{70}\) Id.

\(^{71}\) CHRISTOPHER REINHART, 2008–R–0619, CRIMES WITH MANDATORY MINIMUM PRISON SENTENCES tbl.1 (2008); CONN. GEN. STAT. § 53a–70a (2015); CONN. GEN. STAT. § 53a–72a (2007).
thirteen years of age or older but under sixteen years of age and the actor is more than three years older than such other person . . . .

(b) Sexual assault in the second degree is a class C felony or, if the victim of the offense is under sixteen years of age, a class B felony, and any person found guilty under this section shall be sentenced to a term of imprisonment of which nine months of the sentence imposed may not be suspended or reduced by the court. 72

Upon analysis of this statute, it is evident that the legislature intended for a sexual act to be considered statutory rape if the “victim” was three years and one day younger than the perpetrator. Considering that the Romeo and Juliet provision only offers its protection when the parties’ ages are within three years of each other, an offender who is not protected by the provision faces exposure to a minimum penalty of nine months’ imprisonment. Absent this safe harbor, however, an offender can face upwards of twenty years in prison, depending on the circumstances. 73

In addition to the above, an offender may also be confronted with C.G.S. § 53–21, “Injury or risk of injury to, or impairing morals of, children. Sale of children,” stating, in relevant part:

(a) Any person who (1) willfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired, or does any act likely to impair the health or morals of any such child, or (2) has contact with the intimate parts, as defined in section 53a–65 74, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . shall be guilty of (A) a class C felony for a violation of subdivision (1) . . . and (B) a class B felony for a violation of subdivision (2) of this subsection, except that, if the violation is of subdivision (2) of this subsection and the victim of the offense is under thirteen years of age, such person shall be sentenced to a term of imprisonment of which five years of the sentence imposed may not be suspended or reduced by the court. 75

74 The Connecticut Legislature defines “intimate parts” as “the genital area or any substance emitted therefrom, groin, anus or any substance emitted therefrom, inner thighs, buttocks or breasts.” CONN. GEN. STAT. § 53a–65 (2013).
75 CONN. GEN. STAT. § 53–21 (2015).
The above statute carries the same penalty as C.G.S. § 53a–71, which means that if charged with both, an offender’s minimum and maximum exposure may be doubled.76

B. Contrasting Connecticut with Other States

It is important to note that Romeo and Juliet provisions vary widely throughout the country, though the age of consent only ranges from sixteen to eighteen years of age, depending on the state. For example, in Texas, an individual commits statutory rape when consensually, sexually involved with another person who is younger than seventeen years old.77 Although there is no close-in-age exemption at all in Texas, a defendant may assert an affirmative defense that he or she was no more than three years older than the alleged victim and the victim was fourteen or older.78 Somewhat similarly, Colorado’s age of consent is also seventeen, however, it does have a Romeo and Juliet law.79 In Colorado, if two individuals are eighteen or younger and are within four years of one another, they are allowed to engage in such sexual activities without fear of potential prosecution.80 Although Florida’s age of consent is eighteen81 (two years older than Connecticut’s), its Romeo and Juliet law is seemingly more lenient. As long as the victim is no younger than fourteen and no older than seventeen, Florida permits individuals to file for removal from the registered sex offender list and provides an exemption from sex offender registration if there is no more than a four year age gap between the perpetrator and the victim of certain consensual acts.82 Moreover, an accompanying statute includes an age-gap provision that allows a sixteen or seventeen year old to engage in consensual conduct with a person who is sixteen to twenty-three years of age.83 Finally, in California, there is a Romeo and Juliet exception for

76 See CONN. GEN. STAT. § 53a–71 (2013) (classifying sexual assault in the second degree as a class C or class B felony).
78 TEX. PENAL CODE § 22.011(e) (2016); Texas Age of Consent Laws 2018, supra note 77.
80 COLO. REV. STAT. § 18–3–402(d).
81 FLA. STAT. § 794.05(1) (2017); COMMITTEE ON CRIM. JUST., EXAMINE FLORIDA’S “ROMEO AND JULIET” LAW 4 (2011), http://www.flsenate.gov/PublishedContent/Session/2012/InterimReports/2012-214c.pdf.
82 FLA. STAT. § 943.04354 (2017).
83 FLA. STAT. § 794.05.
consensual sexual relations between minors who have no more than a three year age difference. Unlike many other states, however, this neither exempts nor provides a defense for those involved; it merely reduces the charge from a felony to a misdemeanor.

As seen here, statutory rape laws and their corresponding Romeo and Juliet provisions vary widely across the United States, as close-in-age exemptions do not exist in all locations. Since these legislative acts concern a purely developmental issue—the average mental age an individual can rationally decide to consent to sex—they were designed to offer a compromise between those who support and those who oppose statutory rape laws. Yet it is evident through an analysis of various state laws that there is no magical age that effectively determines when a young person is mature enough to consent to sex in every instance. As a result, the issue is still divisive on each side of the law; some may contend that the provisions do not successfully address the age of consent issue, while others may argue that the Romeo and Juliet laws are still falling short of achieving justice for teenagers. The only way to tackle the issues is to illuminate the inconsistencies within the legislation and propose a more reasonable, justifiable solution. While it may not be feasible to take on every Romeo and Juliet provision in the country, one small change can prevent legions of lives from being ruined by an undeserved sex-offender designation, while also protecting those who have been truly victimized. The impetus for this small change should start in Connecticut.

VI. THE REPERCUSSIONS: THE UGLY

A. The Regulations

In Connecticut, a defendant who is prosecuted and convicted of sexual assault in the second degree for allegations of statutory rape may

---

84 CAL. PENAL CODE § 261.5(b) (2013).
85 Id.
86 See, e.g., Elizabeth Nevins-Saunders, Incomprehensible Crimes: Defendants with Mental Retardation Charged with Statutory Rape, 85 N.Y.U. L. REV. 1067, 1073 (2010) (noting that there is no consensus on what is an appropriate age of consent amongst jurisdictions, which stems from disagreement over when one is mentally able to consent to sex).
87 See, e.g., Carissa Byrne Hessick & Judith M. Stinson, Juveniles, Sex Offenses, and the Scope of Substantive Law, 46 TEX. TECH L. REV. 5, 8 (2013) (arguing that Romeo and Juliet laws do not go far enough). But see infra note 170, and accompanying text, for a contrary view.
be required to publicly register as a sex offender, as sex offender registration is maintained at the local level. In this state, the Department of Emergency Services and Public Protection ("DESPP") maintains a website that provides information about sex offenders living in Connecticut. Supposedly, "[t]he main purpose of providing this data on the Internet is to make the information more easily available and accessible, not to warn about any specific individual." This justification, however, is likely a pretext as revealed by the way local media and law enforcement routinely use these registration systems to keep track of individual offenders. Consider Patch, a network of local-news specific sites across the nation, or more specifically, an article posted in the Berlin, Connecticut Patch subsection titled, “Sex Offender Addresses: Berlin Homes to be Aware of This Halloween,” listing all registered sex offenders residing in that town. There are additional articles that detail the same information in other towns, such as Oxford and Enfield, Connecticut. Although websites like Patch might include the disclaimer Connecticut law mandates for public access to the sex offender registry to avoid using such information to injure or harass anyone listed, based on headlines such as the one above and the ease in which the information can be accessed, the likelihood that the data is used solely for informative purposes and not prejudicial purposes is very

91 Id.
96 See CONN. GEN. STAT. § 54–258a (“Any agency of the state or any political subdivision thereof that provides public access to information contained in the registry shall post a warning that states: ‘Any person who uses information in this registry to injure, harass or commit a criminal act against any person included in the registry or any other person is subject to criminal prosecution.’ Such warning shall be in a suitable size and location to ensure that it will be seen by any person accessing registry information.”); see also Connecticut Sex Offender Registry, supra note 90 (including the same disclaimer).
low. Moreover, the public can also access this information on a national scale through the National Sex Offender Public Registry Website (“NSOPW”),\(^\text{97}\) which works much like a search engine: “jurisdictions that have their own public sex offender registry websites connect to NSOPW by way of a web service or automated upload to enable NSOPW to conduct queries against the jurisdiction’s websites.”\(^\text{98}\) In fact, with modern technological advancement, there is now an iPhone app that will tell you if any registered sex offenders are nearby, allowing users to access this information with heightened convenience.\(^\text{99}\)

Although the localities maintain sex offender registration, over the past twenty years, Congress has legalized numerous versions of “minimum standards” to be implemented for registration and/or notification purposes.\(^\text{100}\) In 1994, the “Wetterling Act,” which required states to affect a sex offender and crimes against children registry, was enacted.\(^\text{101}\) This Act called for an incentive-based system, where penalties, such as the loss of federal grant funds, would be imposed on noncompliant States.\(^\text{102}\) In 1996, “Megan’s Law” was passed to regulate the minimum standards for community notification—also an incentive-based system.\(^\text{103}\) Ten years later, the most recent federal minimum standards for both systems was enacted, called the Sex Offender Registration and Notification Act (“SORNA”),\(^\text{104}\) a division of the Adam Walsh Act (“AWA”).\(^\text{105}\) Through SORNA, jurisdictions are required to submit information about registered sex offenders to The National Sex


\(^\text{100}\) U.S. DEP’T. OF JUSTICE, supra note 89, at 1–2.


\(^\text{102}\) U.S. DEP’T. OF JUSTICE, supra note 89, at 19 n.6.


Offender Registry (“NSOR”), which law enforcement utilizes across the nation, and ensure that the offender’s fingerprints have been submitted to the Next Generation Identification (“NGI”), the official fingerprint database at the Federal Bureau of Investigation (“FBI”), as well as palm prints to the National Palm Print System (“NPPS”) and DNA profiles with the Combined DNA Index System (“CODIS”), both of which are also officially administered by the FBI. Given the lingering federal presence in this area, a sex offender essentially has double registration requirements: if a person is required to register pursuant to federal law, that person is required to register in that state, as well. Most jurisdictions even provide “catch-all” provisions, which essentially require anyone convicted of an offense that is “by its nature a sex offense” to register. In Connecticut, an offender is registered as a sex offender for either ten years, “when he is released into the community after being convicted or found not guilty by reason of mental disease or defect of (1) 4th degree sexual assault or (2) a criminal offense against a minor,” or for life, when he was “convicted or found not guilty by reason of mental disease or defect of a sexually violent offense,” or if he was convicted of either, “(1) one of the crimes requiring 10-year registration and he has a prior conviction for one of those offenses or (2) the portion of 1st degree sexual assault involving having sexual intercourse with someone under age 13 when the actor is more than two years older than the victim.”

Furthermore, as the above sex offender registration systems were administered, the issue arose as to whether or not an offender who was convicted antecedent to the law’s passage would be required to register. SORNA requires that jurisdictions register offenders whose “predicate convictions predate the enactment of SORNA or the jurisdiction’s...
implementation of the SORNA standards” when:

[1] They are incarcerated or under supervision, either for the predicate sex offense or for some other crime;
[2] They are already registered or subject to a pre-existing sex offender registration requirement under the jurisdiction’s law; or
[3] They hereafter reenter the jurisdiction’s justice system because of conviction for some other crime (whether or not a sex offense).\textsuperscript{110}

This hotly debated issue seemed to be put to rest in 2003 under Smith v. Doe, where the United States Supreme Court decided retroactive registration requirements did not violate the Ex Post Facto clause of the Constitution,\textsuperscript{111} and were, therefore, legal.\textsuperscript{112} Yet, many jurisdictions have continued to litigate cases challenging the constitutionality of retroactively imposed registration requirements. Some state courts have held that retroactive registration does violate their respective state constitutions,\textsuperscript{113} while others have struggled to stay consistent with their rulings,\textsuperscript{114} and still some other courts have continued to stand by Smith.\textsuperscript{115} In the fifteen years since Smith, the Supreme Court has avoided revisiting any Ex Post Facto implications raised by the additional requirements targeting registered sex offenders.\textsuperscript{116}

\textsuperscript{111} U.S. CONST. art. I, § 10, cl. 1.
\textsuperscript{112} Smith v. Doe, 538 U.S. 84, 105–06 (2003). In this case, the Alaska Sex Offender Registration Act was at issue. Id. at 89. The Act stated that any sex offender or child kidnapper incarcerated in Alaska must register with the Department of Corrections or local authorities, which maintains a central registry of sex offenders. Id. at 90. This registry holds publicly accessed information such as the identity of the offender, including a picture and physical description. Id. Two defendants (John Doe I and John Doe II) were convicted of aggravated sex offenses prior to the enactment of this Act. Smith, 538 U.S. at 91. Their claim was that the Act was void in application to them under the Ex Post Facto Clause of Article I Section 10 of the Constitution. Id. Ultimately, the majority opinion by Justice Kennedy held that “[t]he [Alaska Sex Offender Registration] Act is non-punitive, and its retroactive application does not violate the Ex Post Facto Clause.” Id. at 105–06.
\textsuperscript{113} See Doe v. State, 189 P.3d 999, 1019 (Alaska 2008); Wallace v. State, 905 N.E.2d 371, 384 (Ind. 2009); State v. Letalien, 985 A.2d 4, 26 (Me. 2009).
\textsuperscript{114} See Doe v. Thompson, 373 P.3d 750, 771 (Kan. 2016) (holding that registration system violates Ex Post Facto Clause because it is punitive); but see State v. Petersen-Beard, 377 P.3d 1127, 1141 (2016) (holding registration system does not violate the Ex Post Facto clause).
\textsuperscript{115} See Shaw v. Patton, 823 F.3d 556, 562, 577 (10th Cir. 2016) (using Smith’s five factor analysis in its decision to rule that the sex offender registry was non-punitive and thus valid); Doe v. Cuomo, 755 F.3d 105, 110–12 (2d Cir. 2014).
\textsuperscript{116} See U.S. DEP’T. OF JUSTICE, supra note 89, at 9, 25 n.76 (citing United States v. Kebodeaux, 133 S.Ct. 2496, 2500 (2013) (assuming, without deciding, that Congress did not
In addition to creating SORNA, the AWA created three categories of sexual offenders. A Tier I sex offender is a residual class that includes all sex offenders not classified in Tier II or III, and registration is obligatory for fifteen years.\(^{117}\) Categorization as a Tier II offender would require being incarcerated for more than a year for offenses involving the use of minors in prostitution, the sexual contact of minors, the use of a minor in a sexual performance, and the production or distribution of child pornography.\(^{118}\) Additionally, if a person is previously convicted of a Tier I sex offense and is subsequently convicted for a felony sex offense, that individual will become a Tier II sex offender, which requires registration for twenty-five years.\(^{119}\) A Tier III classification requires registration for life, the renewal of which is mandatory every three months, and is imposed when the offender committed a sex offense punishable by imprisonment exceeding one year and comparable to:

\[
\begin{align*}
[1] & \text{engaging in a sexual act with another by force or threat;} \\
[2] & \text{engaging in a sex act with another who has been rendered unconscious or involuntarily drugged, or who is otherwise incapable of appraising the nature of the conduct or declining to participate; or} \\
[3] & \text{engaging in a sexual act with a child under the age of 12.} \\
\ldots & \\
[4] & \text{Kidnapping of a minor (unless committed by a parent or guardian).}^{120}
\end{align*}
\]

The government offers a very bleak silver lining to this daunting catalogue: “If a Tier I offender maintains a clean record for 10 years, the registration period is reduced by five years. If a Tier III offender maintains a clean record for 25 years, the registration period is reduced by 25 years. There is no such provision for Tier II offenders.”\(^{121}\) To qualify for a “clean record,” the offender must not be convicted of a sex offense punishable by more than one year’s imprisonment; must not be convicted of any sex offense—even if the maximum punishment is less
than one year in prison; must successfully (without revocation) complete a period of supervised release, probation, or parole; and must successfully complete an appropriate certified sex offender treatment program.122

B. The Burden

One of the most pressing issues that registered sex offenders face is the registration itself. Nearly all jurisdictions employ a criminal penalty for failing to register, in addition to the federal government set standard. Under 18 U.S.C. § 2250, anyone required to register as a “sex offender,” or who “knowingly fails to register or update a registration as required by [SORNA] . . . shall be fined . . . or imprisoned not more than 10 years, or both.”123 Connecticut is a jurisdiction which demands that a sex offender verify their address every 90 days, with a ten-day return period to the Sex Offender Registry, or else face a Class D felony charge.124 In Connecticut, a Class D felony is punishable by up to five years in prison and a maximum fine of $5,000.125

Additionally, the convicted defendant would most likely undergo sex offender probation, which is considered the most arduous and restrictive type of probation in the state.126 This probation requires an evaluation of each sex offender who is assigned a risk level, as well as a treatment program (this may include counseling sessions, drug and alcohol testing, and urinalysis).127 A probation officer may seek a violation of probation arrest warrant if the sex offender does not complete treatment.128 Furthermore, this strict policy includes supervision of the following matters: “(1) personal contacts, (2) treatment service referrals, (3) contacts with treatment providers and the

124 CONN. GEN. STAT. § 54–257(c) (2017); CONN. GEN. STAT. § 54–251(e) (2017); Chris Ayotte, State’s Sex Offenders Fail to Register, NBC CONN. (Jan. 20, 2011) http://www.nbcconnecticut.com/news/local/States-Sex-Offenders-Fail-to-Register-114287899.html.
127 Id.
128 Id.
probationer’s family and associates, (4) home and employment field contacts and visits, (5) response to noncompliance, and (6) graduated sanctions.”129 Convicted sex offenders may also be subjected to electronic monitoring and/or polygraph testing (“lie detectors”).130 Moreover, any registered sex offender must have their address and place of employment approved by a probation officer, re-register his or her address every 90 days, and the offender may not sleep overnight at any address other than his or her home address without approval of the probation officer.131 Further probation conditions include, but are not limited to: no contact with the victim or his or her family in any way; must notify the probation officer of any new or existing romantic or sexual relationship; must take any medication instructed through the treatment program; may not intake any drugs or alcohol unless prescribed by a physician; may not be in the presence of any minor without probation officer approval; must keep and update a driving or activity log; and the offender is not allowed to possess a camera, camera phone, or any such device that is capable of recording and playing back any images without probation officer approval.132

129 Id.
130 COPPOLO, supra note 126.
131 Id.
132 Id. The entire list for sex offender probation conditions in Connecticut is provided at this source, stating:

1. you will participate in and complete any sex offender evaluation and recommended treatment as directed by a probation officer (You may be financially responsible for all or part of the costs of such evaluation and treatment.);
2. you will participate in polygraph examinations administered by a CSSD-approved, specially trained polygraph examiner for treatment purposes and to determine level of supervision;
3. you will have no contact with the victim or victim’s family by letter, telephone call, tape, video, email, text message, or third party contact unless approved by a probation officer. (Contact with the victim or victim’s family must be reported immediately to a probation officer.);
4. you will notify your probation officer of any new or existing romantic or sexual relationship;
5. your place of residence must be approved by a probation officer;
6. you will not move from your place of residence or sleep elsewhere overnight without a probation officer’s prior knowledge and permission;
7. you will allow any probation officer entry into your residence and notify any occupant of your residence that a probation officer may enter where you live;
8. all employment must be pre-approved by a probation officer;
9. you will provide financial and telephone records upon a probation officer’s request;
10. you will abide by any curfew imposed by a probation officer;
11. you will not possess or subscribe to any sexually explicit or sexually stimulating material deemed inappropriate by a probation officer or patronize any
Although the Romeo and Juliet provisions were created as a compromise and have helped many teenagers who find themselves in a consensual relationship with a minor, there is still plenty of room for improvement. Again, Connecticut law states that a person can be convicted of second-degree sexual assault if he or she has sexual intercourse with an individual between thirteen and sixteen years of age and that person is more than three years younger than him or her. For instance, in the case of an eighteen-year-old high school senior, who engages in a consensual relationship with a fifteen-year-old high school sophomore, that senior would be seen as a perpetrator, a statutory rapist,
and the sophomore as the victim. Furthermore, if there were a fourteen-
year-old high school freshman born on August 5th who dates and is in a
consensual sexual relationship with a seventeen-year-old high school
junior, born on August 6th, the older student could be prosecuted for
statutory rape. The state would prosecute this individual, who may be a
straight-A student, an athlete, and family-oriented person, solely because
he or she is three years and one day older than his or her younger
counterpart. This demonstrates the harsh cut and dry nature of the
existing law.

Moreover, many teenagers find themselves standing in front of a
judge, restrained in handcuffs, being read his or her sentence because the
law is so heavy handed. For instance, two teenagers, one below the age
of consent and one above, could be in a consensual sexual relationship
condoned by the parents of the younger individual, and the older teen
still may still be subject to prosecution if another party, such as a
teacher, medical professional, public employee, or a clergy member, 134
chooses to report it, as such reporting requirements are often
mandatory.135 Unfortunately, statutory rape is largely a strict liability
crime, meaning there is automatic responsibility for a crime without
having to prove the applicable mens rea, or the “guilty mind.”136
Therefore, because the statute purposely omits the intent element of the
crime, mens rea does not need to be proven; just a voluntary act.137

Additionally, the statute creates the potential that a scholar athlete,
with not a speck on his or her “permanent record,” is sent to prison for
ten to twenty years for past consensual sexual relations with someone
below the age of consent, purely because the younger individual wanted
revenge for a breakup, or because he or she was jealous, and so on.
Although there is no such thing as a flawless law, and there are always
exceptional cases where a defendant is unfairly targeted, statutory rape
laws are over-inclusive and too frequently harshly penalize individuals
who are not criminals, thus going beyond a few exceptional cases.138

134 See CONN. GEN. STAT. § 17a–101(b) (2017).
135 The statutes that require mandatory reporting, and outline penalties for failure to
report, are: CONN. GEN. STAT. § 17a–101(b) and CONN. GEN. STAT. § 17b–451 (2017).
Furthermore, the Connecticut Department of Children & Families website elaborates on the
duty to report and provides a “Model Policy for Reporting of Child Abuse and Neglect.” See
Model Policy for Reporting Child Abuse and Neglect, DEP’T. OF CHILDREN & FAMILIES,
137 Mens rea, BLACK’S LAW DICTIONARY (10th ed. 2014).
138 See James, supra note 3, at 246–47 (arguing that statutory rape law are over inclusive).
In many areas of the country, in the eyes of the law, there is little distinction between Romeo and Juliet’s mutual decision to engage in a consensual relationship and a child molester’s abusive actions. As discussed, a slightly older teenager who has sex with his or her younger significant other can be arrested, prosecuted, and convicted for the act. Unfortunately, the many teenagers outside of the Connecticut Romeo and Juliet provision’s boundaries are faced with an exposure of a mandatory minimum of nine months’ imprisonment to upwards of ten to twenty years in prison. Moreover, the defendant may also be liable for a fine ranging from ten to fifteen thousand dollars. Regrettably, this is not the end of the defendant’s punishment.

Furthermore, courts have largely held that an offender’s belief that the victim was above the age of consent, or an offender’s claim that he or she was misled by the victim’s appearance or misrepresentations, are not a valid defenses. Since the 1964 People v. Hernandez California Supreme Court ruling, some states have adopted the mistake-as-to-age defense, where the defendant can argue that he or she reasonably believed that the victim was the age of consent, which therefore negated any criminal intent. Although that ruling has inspired a number of other jurisdictions to adopt a similar policy, Connecticut still has not employed the mistake-of-age defense. Therefore, a teenage defendant from High School X, who engages in sexual conduct with another individual from High School Y at a party, may have reasonably believed the other person was above the age of consent, but the only relevant fact the judge considers is the younger person’s actual age. Under this strict liability standard, this teenager now faces prison time, amongst a plethora of other potential consequences, as discussed above.

140 Id.
141 See supra text accompanying notes 72–73.
142 CONN. GEN. STAT. § 53a–41.
144 Id.; see People v. Hernandez, 393 P.2d 673 (Cal. 1964).
145 FURBISH, supra note 143.
VII. NOTHING CHANGES, IF NOTHING CHANGES

A. Reality Check

With all this discussion focusing on scientific data as well as federal and state legislative requirements and penalties, it is easy to forget that many adolescents, teenagers, young adults, or whatever one may call them, have their lives hanging in the balance. Their dreams of being a police officer, an NBA all-star, a school teacher, or even a social worker have gone up in smoke. Their chances of continuing to live in their childhood home are slim to none. They face a life of harsh judgment with continuing difficulty in finding and keeping a job, a new home, and making new friends. Starting over is not an option because neither the law nor the stigma will allow it.

Meet Josh Strader of Beavercreek, Ohio, who innocently passed a note to his now-wife, Jennah, in church asking if she would go out with him, with both of their parents’ knowledge and support.\footnote{Katie Wedell, Proposal would lessen penalties for some sex offenders, CONN. FOR ONE STANDARD OF JUST. (Nov. 27, 2016), http://www.ctosj.org/2016/12/20/proposal-would lessen-penalties-for-some-sex-offenders/.} Both being in their first serious relationship, they had sex for the first time, and Jennah became pregnant.\footnote{Id.} Unfortunately, Josh had just turned nineteen and Jennah had not yet turned fifteen, requiring a counselor to notify law enforcement.\footnote{Id.} Not only was Josh blessed with his first child from their union, but he was also cursed with the label of a Tier II sex offender.\footnote{Id.} Jennah described the negative impact this consequence has had on their lives, saying that Josh cannot go to the school to pick up his daughter if she is not feeling well, he has had difficulty finding a job, and that “[i]t’s almost like being a single mother sometimes.”\footnote{Wedell, supra note 146.} Now twenty-eight, Josh must continue to register as a sex offender every year until 2033, when his daughter will be twenty five.\footnote{Id.} Jennah and their family have encountered many stereotypical reactions and shared the substance of those confrontations:

“Even after hearing the story of what happened, they can’t wrap their mind around somebody who’s on the registry who never hurt anybody, who never sexually assaulted anybody,” Jennah Strader said. “They just automatically go...”
to ‘he’s a child molester, he’s a rapist.’ They don’t think we were young kids and we made a bad decision and now we’re paying for it.”

Although she does not regret a moment of her time with Josh, she hopes for reformation of the law, pleading, “We want [to be] productive people of society and when you do this you take away that . . . .”

A reporter for the Dallas News, Diane Jennings, further explored the impact registration has on the offender’s family. The wife of the unnamed-offender disclosed that she had to quit her job as an educator because, “[m]arrying (him) made his offense mine, because while he may be the one with his picture on the internet, I am the one the public sees regularly . . . . I had gone from ‘child advocate’ to perceived ‘child abuser’ simply through marriage.” This negative brand also affects the children, who are innocent of any past misunderstanding. For instance, when the father in this situation was still on probation, he could not attend any of his children’s plays, games, meet the teacher nights, or graduation. Further, one daughter came home crying after she was told, “[m]y daddy says your daddy is bad.” Neighbors tend to walk the other way or cross the street to avoid the family when they are outside in the yard.

An online blog titled, Tales from the Registry, featured a post from a user named “desperatemom.” In it, she shared her aggravation and despondency with her son’s experience. Her son found himself in the same situation others have, an eighteen-year-and-nine-months-old college freshman who was pursued by a fourteen-year-old online. Two encounters of oral sex later, a detective began investigating him, a lawyer was hired, he began counseling, and was met with inquiries by schoolmates about his predator status. Despite being in the thick of plea deals and sentencing hearings, her son is certainly going to be labeled a Tier II sex offender, requiring him to register for the next
twenty-five years, all because he was pursued by and engaged in sexual relations with a girl who was four months below the misdemeanor line.162

Sadly, this situation is not all that unique; in fact, the above dire circumstances have recurred continuously over these past ten years, and have not changed despite the new technology and norms society utilizes today. Take Zachery Anderson, for example.163 A nineteen-year-old boy in the Midwest who studied computer science at his local community college, came from a close-knit family, and was today’s typical American teenager, flirting with and meeting girls through the Internet and social media applications.164 Again, like many teenagers do, he met a seventeen-year-old girl on a dating app, known as “Hot or Not,” from Michigan (not far from his home in Indiana), and they engaged in consensual sex.165 The girl, who was actually fourteen-years-old, had a worried mother at home concerned about the girl’s whereabouts, prompting a call to the police that eventually led to Zachery’s arrest a few weeks later.166

Many citizens are in uproar over Zachery’s situation, claiming it is “a parable of the digital age: the collision of the temporary relationships that young people develop on the Internet and the increasing criminalization of sexual activity through the expansion of online sex offender registries.”167 Among his supporters is William Buhl, a former Michigan judge, stating, “The whole registry is a horrible mistake . . . I think it’s utterly ridiculous to take teenage sex and make it a felony. This guy is obviously not a pedophile.”168 Moreover, the girl he was involved with and her justifiably concerned mother do not want to see Zachery punished.169 The sentencing judge, however, has refused to accept

162 Id.
164 Id.
165 Id.
166 Id.
167 Bosman, supra note 163.
168 Id.
169 Id.

[T]he girl, who is now 15, and her mother . . . have also defended Mr. Anderson, appearing in a District Court in Michigan this spring to ask a judge for leniency. “I don’t want him to be a sex offender, because he really is not,” the mother said, according to court transcripts. Her daughter told the judge that she felt “nothing should happen to Zach,” adding, “If you feel like something should, I feel like the lowest thing possible.”
today’s dating rituals and held it against Zachery, stating, “You went online, to use a fisherman’s expression, trolling for women, to meet and have sex with . . . . That seems to be part of our culture now. Meet, hook up, have sex, sayonara. Totally inappropriate behavior. There is no excuse for this whatsoever.”\(^\text{170}\) It is apparent that the judge, like some people, support extremely narrow Romeo and Juliet statutes, and seem to harbor disapproval of teenage sexual relations altogether, and resent common features of modern relationships, such as the use of the Internet to make amorous connections.

By the same token, the government refuses to acknowledge the fact that the girl purposely misrepresented her age to Zachery, arguing that his punishment is appropriate for failing to accurately determine her true age.\(^\text{171}\) In addition to his ninety days in jail and sex offender registration, Zachery’s probation includes a ban from internet use for five years—effectively preventing him from continuing his college education in computer science, finding a job that includes using a computer, and even maintaining a personal email address.\(^\text{172}\)

Public outcry has occurred from hearing Zachery’s story. The Executive Director of Reform Sex Offender Laws, Inc., has described this situation as “a conviction on steroids,” and elaborated on the difficulty of maintaining a job when on the registry, stating, “[b]eing on a registry becomes a liability for employers, no matter how minor the offense was. Other people will say: ‘I saw your employee on the Internet. He’s a sex offender, and I will not come to your establishment.’”\(^\text{173}\) One University of California, Irvine law professor, Michele Goodwin, wrote to the New York Times in response to Zachery’s story, calling attention to the lack of a “coherent framework. . . offered by politicians that responds to the contemporary realities of adolescent sexuality, which involve immature but rarely criminal conduct. Neither federal nor state legislatures offer coherent approaches to protect against the harshest criminal punishments

\(\text{id.}\)

\(\text{id.}\)

\(\text{Bosman, supra note 163.}\)

\(\text{id.}\)

\(\text{See also Our History: From RSOL to NARSOL, NAT’L ASS’N FOR RATIONAL SEXUAL OFFENSE LAWS, http://nationalrsol.org (last visited Feb. 25, 2018). Formed in 2007, Reform Sex Offender Laws, Inc., is a non-profit organization that advocates for civil rights and argues that sex offender registries across the nation has exponentially widened its reach to include petty offenses, like teen sexting and consensual sexual relationships among young adults.}\)
demanded by statutory rape provisions.” She elaborated on the upsetting notion that these laws are often selectively enforced against those in poor and working-class families, as well as those involved in interracial sexual engagements. Goodwin closed her letter to the editor with a sentence that embodies the very crux of this issue: “These prosecutions represent the overuse of criminal law to address issues often better left to parents.”

B. Room for Improvement

Not only was Zachery’s family scrambling to find a new place to live, other registered sex offenders have found themselves homeless, sleeping in cars, trailer parks and motels, if welcome, because of the restrictive bans placed on available residences upon reentry into society. Professor of Justice Administration at the University of Louisville, Richard Tewksbury, presented evidence that, “although [registered sex offenders] are found in all varieties of neighborhoods, they are particularly likely to reside in areas characterized by economic disadvantage, lack of physical resources, relatively little social capital, and high levels of social disorganization.” In Connecticut, probation officers must pre-approve offender’s residences and possible relocations. The factors taken into account include:

1. the location’s potential access to the offender’s target population;
2. his or her prior sexual assault convictions;
3. other people living in the residence;
4. the location’s accessibility to family members, friends, or other supportive services;
5. whether the residence or location is of a type the offender’s treatment plan has assessed as being a potential trigger for reoffending; and
6. whether a permanent or stable residence is available that might reduce the

---

175 Id.
176 Id.
177 Bosman, supra note 163.
likelihood of the offender becoming transient.\textsuperscript{181}

Noncompliance with the requirements can lead to stricter probation, extended probation periods, prosecution, and probation revocation resulting in imprisonment.\textsuperscript{182} Furthermore, registered sex offenders are restricted “from living in a nearby radius of places that ‘children congregate.’ These places can include playgrounds, schools, churches, bus stops, community centers, and more.”\textsuperscript{183} In addition to the housing restrictions, finding a job is incredibly difficult, due to the issue of “checking the box,” where, on many job applications, there is a question that explicitly asks whether or not the applicant has ever been convicted or charged with a crime.\textsuperscript{184} The stigma that attaches to sex offender registration is extravagant, because “having a record . . . has a negative impact on educational, employment, and housing opportunities.”\textsuperscript{185} The worst is assumed and often these registered offenders are left homeless and jobless, a real victim of legislation. As Zachery’s mother expressed, “A young person, they make one mistake and all of a sudden they’re classified as a loser for the rest of their life.”\textsuperscript{186}

The Connecticut Sentencing Commission (“CSC”) was created in 2011 to examine Connecticut criminal justice and sentencing laws, and propose changes to the Governor, the General Assembly, and other criminal justice agencies.\textsuperscript{187} In August of 2015, the CSC began studying the sex offender registration system, such as the sentencing laws, management of offenders and the registry, victims’ needs, and consequences of such management practices.\textsuperscript{188} The CSC most recently met on January 25, 2017, and submitted a formal study on November 3, 2017.\textsuperscript{189} Some lawmakers wanted to broaden the definition of a sex

\textsuperscript{181} Id. at 3–4.
\textsuperscript{182} Id.; see also CONN. GEN. STAT. § 53a–32 (2017).
\textsuperscript{183} Rankin, supra note 47.
\textsuperscript{184} A few states, including Connecticut, prohibit government employers from asking if an applicant has been convicted of a crime, but these laws do not extend to private employers. David J. Norman, Note, \textit{Stymied by the Stigma of a Criminal Conviction: Connecticut and the Struggle to Relieve Collateral Consequences}, 31 QUINNIPIAC L. REV. 985, 1002 (2013).
\textsuperscript{185} Victoria Simpson Beck & Stephanie Boys, \textit{Romeo & Juliet: Star-Crossed Lovers or Sex Offenders?}, CRIM. JUST. POL’Y. REV. 655, 656 (2012).
\textsuperscript{186} Bosman, supra note 163.
\textsuperscript{187} Michael Agogliati et al., \textit{Lawmakers are looking to tighten regulations for sex offenders}, WFSB (Jan. 25, 2017), http://www.wfsb.com/story/34340569/lawmakers-are-looking-to-tighten-regulations-for-sex-offenders.
\textsuperscript{188} Id.
\textsuperscript{189} Id.; CONN. SENTENCING COMM’N, \textit{A STUDY OF THE SEX OFFENDER SENTENCING, REGISTRATION, AND MANAGEMENT SYSTEM} (2017), http://www.ct.gov/ctsc/lib/ctsc/Sex_Off
offender while others focused on the poor regulation of released offenders, stating, “Most people on registries represent people at minimal risk and tax dollars are better spent elsewhere.”

The CSC attempted to strike a balance in its recent report: proposing amendments to shift from an offense-based sex registry to a risk assessment-based registry. While registration remains a requirement under this proposed change, “the length of time on the registry and whether it is a public registry or a law enforcement-only registry will be determined by evaluating the registrant’s risk of reoffending.” The report states:

Under the new system, some registrants will be on the registry for shorter periods than under the current system, and others will be on for longer periods. However, that determination will be based on the registrant’s risk to the community. The registrants will have an opportunity to lower their risk profile by participating in programming for behavioral health, vocational training, and other services designed to enhance community reintegration and by avoiding rearrest for any new criminal activity.

The prospective changes include implementing procedures by which registered offenders can petition to reduce their sentences. Those with a low-risk of reoffending, determined by actuarial risk assessment, would only be placed on a law enforcement registry for ten years. Moderate-risk offenders would be placed on either the public or law enforcement registry based on a Board decision and high-risk offenders would be presumptively placed on the public registry for life. This proposal is a good start to changing Connecticut’s laws regarding sex offender registration. The implementation of an independent Sex Offender Registration Board to evaluate cases could result in fewer young people from having to publicly register for consensual sexual encounters. It could provide people like Zachery, who is at very little risk for reoffending, the opportunity to lead a normal life, without the public’s knowledge of his past misfortune. More, however, can be done to rectify the current law.

---

190 Agogliati et al., supra note 187.
191 CONN. SENTENCING COMM’N, supra note 189, at 9.
192 Id.
193 Id.
194 Id. at 11.
195 CONN. SENTENCING COMM’N, supra note 189, at 11.
196 Id.
As evidenced by the foregoing arguments and factual data, sex offender registration legislation needs to be amended, in more than one way. First, the strict liability component should be rescinded; there is a surplus of factors that need to be considered, including the relationship of the parties, parental consent, relationship status (were allegations made as a consequence of heartbreak, as revenge?), whether the actor knew the victim’s real age, etc. The strict liability standard for statutory rape removes the “force” element from a rape charge, which leaves only intercourse and age as factors, and creates the presumption that the force element is established, “without the prosecutor’s having to prove it and without the defense even having the option of affirmatively disproving it.”

Second, the stigma of sex offender registration is far too harsh, thanks to the strict and overprotective policies and restrictions enacted by the government. Many registered sex offenders find themselves without a permanent address, a stable support system, or a job, when they engaged in a relationship with a fellow high school student, or someone who lied about their age, for instance. In 2015, the California Supreme Court declared restrictions imposed on paroled sex offenders in San Diego County unconstitutional, therefore causing California to cease enforcement of its blanket rule requiring offenders to stay 2,000 feet away from schools and parks, which made 97% of rental housing in the area unavailable to offenders. After enforcing the rules on a case-by-case basis, only one third of the 5,901 offenders actually needed the restrictions, thereby lowering the number of transient sex offenders without a permanent address by 20%. Connecticut, in turn, should institute a similar policy. In order to combat the homeless and jobless populations in the state, as well as more effectively determine the real sex offender threats, the state should re-evaluate the registry based on the above factors, perhaps removing qualifying offenders from the list altogether, and enforce the restrictions on a case by case, totality of the circumstances basis—similar to the recent proposal by the CSC. By labeling eighteen-, nineteen-, twenty-, or even twenty-one-year-olds a


198 See In re William Taylor et al. on Habeas Corpus, 184 Cal. Rptr. 3d 682, 700 (Cal. 2015); Jen Fifield, Once out of prison, few places for sex offenders to live, CORRECTIONSONE (May 14, 2016), https://www.correctionsone.com/re-entry-and-recidivism/articles/180714187-Once-out-of-prison-few-places-for-sex-offenders-to-live/.

199 Id.
“sex offender” for the rest of their life, dooming just about any hope for a successful, happy life with that one title, due to an innocent mistake, is true injustice.

VIII. ACT 5, SCENE 3

Often, people have this sense of invincibility and think, “this will never happen to me.” And though that may be true, they never anticipate that their neighbors, friends, and even family members are potentially one misunderstanding away from explanations made in vain, one knock of the judge’s gavel away from looking at the world through cold, metal bars, and one registration away from living a life full of anxiety, loneliness, and rejection. Age of consent laws serve an important purpose: they protect the innocence of children from unwarranted sexual advances. The true victim, however, may not be the boy or girl of sixteen (or younger); too often the victim is actually the Kaitlyn, Josh, or Zachery of the story: the girl who lives down the street, the class president, the scholar athlete, or even the boy hopelessly in love with his slightly younger girlfriend, who he intends to marry one day. Admittedly, teenage sex can be problematic, but the law should not criminalize consensual sex among teenagers the way it does pedophiles or rapists.

Although Romeo was speaking to Apothecary about his status of a poor, starving man, it foreshadows the dark, lonely existence that today’s Romeo is thrust into: “The world is not thy friend nor the world’s law.”200

---

200 SHAKESPEARE, supra note 1, act 5, sc. 1.