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COMMENT

In *Wakefield's* Wake: Rescuing New York's Enterprise Corruption Jurisprudence

INTRODUCTION

For many years, New York State's enterprise corruption law was grounded in a legal error. Recently, the New York Court of Appeals has sought to correct some of the doctrinal consequences of this mistake. Unfortunately, the court's solution has left the law unmoored from its original purpose, perpetuated issues of notice and legality, and heightened the risk of overcriminalization. This Comment reconstructs and analyzes these developments. It then turns to the practice of a lone (and heretofore ignored) New York State trial court judge as a potential solution to the legal and policy problems created by the current state of the law.

The argument proceeds in six parts. Part I demonstrates how the federal Racketeer Influenced and Corrupt Organizations Act (RICO) – the inspiration for New York State's enterprise corruption law – was designed to respond to the special problems that the Mafia posed for traditional law enforcement. Part II explains how New York legislators, concerned about the way the federal law threatened fair trial principles, sought to limit the reach of their state analog, the Organized Crime Control Act (OCCA). Part III shows how New York State courts eliminated many of those limits as a result of an error of statutory interpretation, creating bad doctrine. Part IV examines the way the Court of Appeals has recently tried to fix this flawed jurisprudence. Part V details some of the problems with the court's solution. Part VI proposes the use of section 210.40(2) motions under the New York Criminal Procedure Law as an alternative by which the judiciary can correct its long-standing error. Finally, a short conclusion suggests the broader implications of this possible reform.

I. RICO: A NEW CRIME FOR AN OLD CRIMINAL

The crime of enterprise corruption owes its origins to the Mafia crisis of the mid-twentieth century. Following World War II, the Mob was powerful and hard to prosecute,¹ operating through lucrative schemes, of which only some components were obviously criminal. For example, the Lucchese crime family ran a protection racket in the Long Island sanitation industry, skimming \$200,000 to \$400,000 a year off of garbage collection fees.² The scheme relied on some recognizable crimes like bid rigging and intimidation. However, at its center was an apparently legitimate trade association, which the Mob used to control prices and collect payments.³

Schemes like the Lucchese's posed three related problems for law enforcement officials. First, they insulated higher-ups from serious criminal charges by distancing them from easy-to-prove crimes.⁴ Second, and counter-intuitively, they provided law enforcement with plenty of other criminals to prosecute besides the scheme's orchestrators, creating the illusion of enforcement authority without the ability to reach the real underlying crime.⁵ These difficulties can both be understood as manifestations of a third, deeper problem: the organization of the Mob made it resistant to traditional criminal prosecution. Traditionally, law enforcement sought to pin individual crimes on individual criminals.⁶ But most individuals in a complex criminal organization like the Mafia were interchangeable. If one low-level Mafioso were jailed, another would simply take his place. The core crime family—and with it, the criminal scheme—remained out of reach.

To address these problems, in 1970, Congress enacted an innovative new statute, RICO, criminalizing the use of thuggery and illicit schemes to infiltrate

1. See SELWYN RAAB, *FIVE FAMILIES: THE RISE, DECLINE, AND RESURGENCE OF AMERICA'S MOST POWERFUL MAFIA EMPIRES* 156-57, 167 (2005). By the mid-1960s, the Department of Justice estimated that "organized crime's profits were equal [to] those of the [United States'] ten largest industrial corporations combined." *Id.* at 156 (emphasis omitted). Following Raab's own practice, this Comment uses the terms "Mafia" and "Mob" interchangeably to refer to traditional La Cosa Nostra crime families. See *id.* at xi; cf. *Organized Crime*, FED. BUREAU INVESTIGATION, <http://www2.fbi.gov/hq/cid/orgcrime/lcnindex.htm> [<http://perma.cc/8G3N-FANG>] (distinguishing precisely between different branches of the American Mafia).

2. RAAB, *supra* note 1, at 239.

3. *Id.* at 238-39.

4. *Id.* at 177.

5. See *id.* at 181-82.

6. *Id.* at 174.

legitimate businesses.⁷ This new law allowed prosecutors to go after the Mob not in spite of its complex organization, but through it.⁸ Focusing on how the Mafia made its money allowed prosecutors to pursue not only the low-level street enforcers who committed traditional crimes, but also the captains who planned them and the bosses who indirectly profited.

However, the very features of the law that made it useful against organized crime also raised serious concerns about the violation of defendants' basic rights. Controversially, RICO appeared to criminalize "being a criminal"—a status instead of an act.⁹ Although this seemed less problematic when the targets were dangerous crime families, federal prosecutors soon used RICO to pursue a variety of non-Mafia defendants.¹⁰ Some feared prosecutorial overreach.¹¹

II. OCCA: NEW YORK'S "BABY RICO"

The Mafia had long been a significant presence in New York,¹² and by the 1980s the state was grappling with an epidemic of organized crime.¹³ When legislators finally created a state counterpart to RICO in 1986,¹⁴ they attempted

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7. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901(a), 84 Stat. 941 (codified at 18 U.S.C. §§ 1961-1968 (2012)).
 8. 18 U.S.C. § 1962(a)-(d) (2012).
 9. Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 661-62, 692-695 (1987).
 10. G. Robert Blakey & Thomas A. Perry, *An Analysis of the Myths that Bolster Efforts To Rewrite RICO and the Various Proposals for Reform: "Mother of God—Is This the End of RICO?"* 43 VAND. L. REV. 851, 855 & n.12 (1990).
 11. See, e.g., Barry Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 FORDHAM L. REV. 165, 169-71 (1980).
 12. See generally VIRGIL W. PETERSON, *THE MOB: 200 YEARS OF ORGANIZED CRIME IN NEW YORK* (1983) (recounting the history of the Mafia in New York).
 13. See, e.g., Memorandum from Robert Abrams, N.Y. Attorney Gen., to Mario Cuomo, N.Y. Governor 1 (July 19, 1986) [hereinafter Abrams Memorandum] (on file with author) (highlighting "the staggering dimensions and broad tentacles" that "organized crime as it functions in New York State" had developed); Letter from Edward I. Koch, N.Y.C. Mayor, to Mario Cuomo, N.Y. Governor (July 28, 1986) (on file with author) (urging the enactment of OCCA to help "alleviate the desperate situation" in which New York found itself unable to adequately address its Mafia threat).
 14. See Memorandum Filed with Assembly Bill Number 11726 from Mario Cuomo, N.Y. Governor 2 (July 24, 1986) [hereinafter Cuomo Memorandum] (on file with author) (noting that, in the absence of a New York law on enterprise corruption, state investigators were forced "to turn over their evidence to federal prosecutors"). See generally Jason D. Reichelt, Note, *Stalking the Enterprise Criminal: State RICO and the Liberal Interpretation of the Enterprise Ele-*

to correct for two of the federal law's perceived deficiencies. First, state legislators worried that RICO undermined the guarantee to a fair trial because it severed criminality from the commission of criminal acts.¹⁵ Second, and more profoundly, legislators feared that RICO was overly broad and potentially applicable to defendants undeserving of its heightened sanctions.¹⁶

The crime they invented, called "enterprise corruption" in the Organized Crime Control Act of 1986 (OCCA),¹⁷ was designed to provide an avenue for prosecuting the Mob while responding to these concerns.¹⁸ The legislature intended enterprise corruption to apply to a narrower range of cases than RICO¹⁹ and to offer defendants greater protections.²⁰

OCCA's most significant innovation, a radical departure from RICO, was the way it defined the crime.²¹ Both RICO and OCCA sought to reach Mafiosi through their involvement with an enterprise.²² OCCA, however, additionally required that alleged criminals specifically participate in a *criminal* enterprise,²³ defined as "a group of persons sharing a common purpose of engaging in criminal conduct, associated in an ascertainable structure distinct from a pattern of

ment, 81 CORNELL L. REV. 224, 230-33 (1995) (discussing the enactment of state RICO laws in the 1980s).

15. See, e.g., Letter from Daniel L. Feldman, N.Y. State Assembly Member, to Evan A. Davis, Counsel to the Governor 1 (July 18, 1986) (on file with author) ("It has taken those four years [of drafting] to refine [OCCA] to the point at which it achieves its purposes without raising some of the problems of fair trial for which the federal law (RICO) has been criticized."). Daniel Feldman was one of the Act's sponsors. *Id.*
16. See, e.g., Letter from Melvin H. Miller, Chairman, N.Y. State Assembly Comm. on Codes, to Evan A. Davis, Counsel to the Governor 2-3 (July 16, 1986) [hereinafter Letter from Miller]; see also *infra* notes 29-34 and accompanying text.
17. 1986 N.Y. Laws 2507.
18. See, e.g., Abrams Memorandum, *supra* note 13, at 2 (describing how OCCA seeks to "overcome flaws and eliminate potential abuses alleged to exist in the federal RICO statute," in particular "the concern that the new powers given to prosecutors might be inappropriately used").
19. See generally N.Y. PENAL LAW § 460.00 (McKinney 2016) (noting that "[b]ecause of its more rigorous definitions, [OCCA] will not apply to some situations encompassed within comparable statutes in other jurisdictions").
20. See, e.g., Letter from Miller, *supra* note 16, at 2-3 (discussing how OCCA seeks to protect defendants from the "prejudicial joinder" they may face under RICO).
21. Accord Steven L. Kessler, *And a Little Child Shall Lead Them: New York's Organized Crime Control Act of 1986*, 64 ST. JOHN'S L. REV. 797, 810 (1990) (noting that "OCCA's requirement that each defendant be associated with a criminal enterprise is probably the most fundamental distinction between OCCA and other RICO-type statutes").
22. 18 U.S.C. § 1962 (2012); PENAL § 460.20.
23. PENAL § 460.20(1).

criminal activity, and with a continuity of existence, structure and criminal purpose beyond the scope of individual criminal incidents.”²⁴ In practice, the “criminal purpose” element of the law has not had much bite,²⁵ leaving two prongs for courts to grapple with: an “ascertainable structure” and a “continuity of existence.”²⁶

Defining the crime this way responded to both of the legislature’s concerns about RICO. It protected defendants by requiring prosecutors to affirmatively establish that the defendants had participated in or sought to advance the affairs of a criminal enterprise.²⁷ This restored the nexus between wrongful action and punishment. It also limited the law’s reach by restricting the application of OCCA to defendants who were explicitly participating in such enterprises. This narrowed the law by preventing it from potentially reaching anyone engaged in a pattern of criminal activity.

These were not the only changes OCCA’s drafters inserted into their “baby RICO.”²⁸ They further cabined the law by incorporating detailed legislative findings about the Act’s purpose into the text of the statute, along with provisions requiring that it only be used in line with those findings.²⁹ Further, whereas the federal law required proof of two predicate criminal acts to constitute a pattern of criminal activity, OCCA required three.³⁰ Finally, legislators incorporated a host of changes to the New York State Criminal Procedure Law to tweak the way OCCA prosecutions unfold and offer defendants additional protections.³¹

24. *Id.* § 460.10(3).

25. Even a very general purpose, such as “[r]ealizing an economic benefit,” has been found to qualify “as a common purpose under the enterprise corruption statute.” *People v. Joseph Stevens & Co.*, No. 2394/2009, 2011 WL 1757051, *29 (N.Y. Sup. Ct. May 2, 2011) (unreported disposition) (quoting *People v. Pustilnik*, No. 2759/2005, 2007 WL 674116, at *4 (N.Y. Sup. Ct. Mar. 1, 2007)). The Court of Appeals has also allowed a criminal purpose to be inferred from the actions of defendants. See *People v. Kancharla*, 23 N.Y.3d 294, 305 (2014).

26. PENAL § 460.10(3).

27. *Id.* § 460.20(2).

28. Kessler, *supra* note 21, at 797-98 (“OCCA [was] also known as ‘Baby RICO’ or ‘Little RICO.’”).

29. PENAL § 460.00. For further discussion, see *infra* Parts V, VI.

30. Compare 18 U.S.C. § 1961(5) (2012) (defining “pattern of racketeering activity” to require “at least two acts of racketeering activity”), with PENAL § 460.10(4) (defining “pattern of criminal activity” to mean conduct requiring “three or more criminal acts”).

31. See, e.g., N.Y. CRIM. PROC. LAW §§ 200.40(1)(d), 200.65, 210.40(2), 300.10(6), 310.50(4) (McKinney 2016); see also *infra* Part VI. One such procedural check requires the explicit consent of the district attorney for any prosecution under OCCA. PENAL § 460.60(2); CRIM.

Underlying these decisions was a felt need to restrict OCCA to criminals who posed the same kinds of enforcement problems for traditional law enforcement as the Mafia. As Assemblyman Melvin Miller, one of the bill's sponsors, put it, in what has become the most influential statement of legislative intent underlying the Act: "[T]he extraordinary sanctions allowed under [OCCA] should be reserved for those who not only commit crimes but do so as part of an organized criminal enterprise. Present law [without OCCA] is adequate to punish ordinary white-collar crime . . ."³² And although OCCA's drafters always understood that organized criminal enterprises might include more than just Italian crime families,³³ the Mafia was their main target.³⁴

The application of the law initially stayed within these bounds, and where prosecutors overreached, the judiciary disciplined them. For example, when the Manhattan district attorney charged a pair of union officials under OCCA for passing bribes,³⁵ the court threw the indictment out with a forceful condemnation: there was "no question" that the defendants met the criteria for prosecution under the federal law, but "OCCA was designed to target certain criminal activities more precisely defined and with less sweep than RICO."³⁶

PROC. § 200.65. Courts do not appear to have worried overly much about this provision, articulating a presumption in favor of the prosecutor even where the required attestation giving consent was not timely filed, and suggesting that there may be no remedy to improper filing at all. *See* *People v. Thomas*, 866 N.Y.S.2d 22, 24 (App. Div. 2008) (relying in part on the "presumption of regularity" to find the required consent for an enterprise corruption prosecution); 6 RICHARD A. GREENBERG ET AL., *NEW YORK PRACTICE SERIES: NEW YORK CRIMINAL LAW* § 36:8, n.11 (3d ed. 2014) (discussing *People v. Marquez*, N.Y. L.J., July 22, 1996, at 25 (N.Y. Sup. Ct.)).

32. Letter from Miller, *supra* note 16, at 2. For this letter's influence in the courts, see, for example, *People v. Yarmy*, 651 N.Y.S.2d 840, 843 (Sup. Ct. 1996), which quotes Miller's letter to establish the limits of the statute's "target group [as] envisioned by the legislature." *See also* *People v. Moscatiello*, 566 N.Y.S.2d 823, 824-25 (Sup. Ct. 1990) (quoting Miller's letter to show that the legislature intended the "criminal enterprise" requirement to limit the statute's application).
33. *See* PENAL § 460.00 (clarifying that "the concept of criminal enterprise should not be limited to traditional criminal syndicates or crime families").
34. *See, e.g.*, Abrams Memorandum, *supra* note 13, at 3 (calling OCCA "a major achievement for [New York State] in its efforts to attack organized crime," including "Mob infiltration of, and influence in, legitimate industries"); Cuomo Memorandum, *supra* note 14, at 2-3 (noting RICO's success at targeting "traditional organized crime families" and anticipating that OCCA would be similarly successful).
35. *Moscatiello*, 566 N.Y.S.2d at 823.
36. *Id.* at 823, 825.

III. THE LAW SLIPS ITS BINDS

Over the next twenty-five years, however, New York State courts expanded the definition of “criminal enterprise,” ignoring OCCA’s original text and purpose. This divergence originated with *People v. Wakefield Financial Corp.*³⁷ In *Wakefield*, a number of traders at separate firms had been indicted under OCCA for collaborating to fraudulently set stock prices. No Mafia connections were alleged, nor were participants directed by bosses otherwise beyond the reach of the law. Indeed, all of the participants faced not only enterprise corruption charges but also many other criminal counts, including multiple counts of falsifying business records and grand larceny.³⁸ Nevertheless, the court declined to dismiss the enterprise corruption charge.³⁹ Reasoning that OCCA should apply “where it is alleged that a structure is established to engage in continuing . . . criminal activity,”⁴⁰ the court sought to satisfy the law’s narrow, multi-pronged definition of “criminal enterprise” with a more flexible and unitary “system of authority” test drawn from federal RICO trials.⁴¹ Under the court’s new “system of authority” standard, borrowed from federal law, the government no longer needed to show, distinctly, that an alleged criminal enterprise had an ascertainable structure and a continuity of existence.⁴² Rather, the state could focus on showing that a group of criminals were bound together by a system of authority. The system of authority would speak to both the criminal enterprise’s structure and its continuity.⁴³

The *Wakefield* decision is problematic on three counts. First, as a technical matter, it rests on an error of statutory interpretation. The *Wakefield* court relied on the fact that OCCA had been heavily influenced by RICO⁴⁴ and that its

37. 590 N.Y.S.2d 382 (Sup. Ct. 1992).

38. *Id.* at 384.

39. *Id.* at 388-89.

40. *Id.* at 390.

41. *Id.* at 389 (citing prior federal rulings in *United States v. Kragness*, 830 F.2d 842 (8th Cir. 1987); *United States v. Lemm*, 680 F.2d 1193 (8th Cir. 1982); *United States v. Bledsoe*, 674 F.2d 647 (8th Cir. 1982)).

42. *See, e.g.*, *People v. Moscattello*, 566 N.Y.S.2d 823, 825 (Sup. Ct. 1990) (dismissing an enterprise corruption indictment because, “having reviewed the Grand Jury minutes,” the court found that the defendants “were associated in no structure and certainly not one with a scope of existence beyond their criminal acts”).

43. *Wakefield*, 590 N.Y.S.2d at 389 (drawing on proof of a “system of authority” to establish “an ascertainable structure” and the existence of a “continuing enterprise”).

44. *Id.* at 388 (noting that, in designing OCCA, “the experience of the federal courts with RICO was examined closely by the legislature”); *see also* Ethan Brett Gerber, Note, “A RICO You

drafters had apparently borrowed the law's concept of criminal enterprise⁴⁵ and even some of its definitional language from federal RICO cases.⁴⁶ Ordinarily, under the so-called *Lorillard* rule, when a legislature borrows statutory language from another jurisdiction, it is also understood to borrow extant interpretations of that language by the other jurisdiction's courts.⁴⁷ This seems to be

Can't Refuse": *New York's Organized Crime Control Act*, 53 BROOK. L. REV. 979, 995 (1988) ("New York's definition of criminal enterprise has been greatly influenced by judicial interpretations of RICO").

45. Compare N.Y. PENAL LAW § 460.10(3) (McKinney 2016) (requiring that a "criminal enterprise" under OCCA be "distinct from a pattern of criminal activity"), with *United States v. Turkette*, 452 U.S. 576, 583 (1981) ("[U]nder RICO, the Government must prove both the existence of an 'enterprise' and the connected 'pattern of racketeering activity.' . . . The 'enterprise' is not the 'pattern of racketeering activity'; it is separate and apart from the pattern of activity in which it engages.").
46. Compare PENAL § 460.10(3) (defining a "criminal enterprise" under OCCA as "a group of persons sharing a common purpose of engaging in criminal conduct, associated in an ascertainable structure distinct from a pattern of criminal activity, and with a continuity of existence, structure and criminal purpose beyond the scope of individual criminal incidents"), with *Lemm*, 680 F.2d at 1198 (holding that an "enterprise" under RICO is a group of persons with "(1) [a] common or shared purpose; (2) some continuity of structure and personnel; and (3) an ascertainable structure distinct from that inherent in the conduct of a pattern of racketeering").
47. See *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) ("[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."). See generally WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION, STATUTES AND THE CREATION OF PUBLIC POLICY* 858-66 (5th ed. 2014) (discussing *Lorillard*); 2B NORMAN SINGER & SHAMBIE SINGER, *SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION* § 52:2 (7th ed. 2015) (describing the presumption that "[w]hen a state legislature adopts a statute which is identical or similar to one in another [jurisdiction], courts of the adopting state usually adopt the original jurisdiction's construction"); William N. Eskridge, *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 79 (1989) (discussing the *Lorillard* rule).

To be clear, OCCA borrowed from federal case law *interpreting* RICO and not the language of the underlying statute. This might make the *Wakefield* court's adoption of federal law seem more understandable. After all, if the statutes' drafters used the federal court's own language, surely they must have intended it to mean what the federal courts themselves meant. However compelling this argument in the abstract, it is inapposite here. OCCA's drafters were familiar not only with the text of RICO, but the interpretation it had been given by federal courts. See Kessler, *supra* note 21, at 799 (noting that "New York legislators . . . sift[ed] through more than fifteen years of RICO history" to draft their bill). They nevertheless explicitly rejected the reach and formulation of federal law. See *supra* text accompanying notes 15-36. And New York State courts understood this. See, e.g., *Moscatiello*, 566 N.Y.S.2d at 825 (rejecting an indictment under OCCA that, the court asserted, would have been appropriate under RICO). Given these circumstances, the *Wakefield* court's decision was arguably *less* defensible. Since the underlying language of OCCA differed so greatly

how the *Wakefield* court read OCCA's provisions on criminal enterprise⁴⁸: since New York borrowed language from a federal case, the meaning of that language must be the same as that found in federal law. However, it is well established that the *Lorillard* rule should not apply where there are manifest and substantial differences in public policy between the two jurisdictions.⁴⁹ That exception should have controlled here. Although New York legislators adapted federal language, their purpose was fundamentally different. As they repeatedly articulated, and as OCCA's text makes explicit, OCCA was meant to have a less expansive reach than RICO and to demand more of prosecutors.⁵⁰ The *Wakefield* court was therefore wrong to import the federal standard into New York law.

Second, and largely as a result of this mistake, the court stripped away the protections the narrow definition of "criminal enterprise" had offered. As interpreted by the *Wakefield* court, OCCA could reach any criminal operation involving a system of authority.⁵¹ Most criminal schemes with more than a single actor, however, involve some system of authority. But OCCA was not intended to reach all cases of group criminality. As its text and drafters made clear, and as its legislative history shows, it was supposed to reach criminals who resisted traditional prosecution in the same way as the Mafia.⁵² Under *Wakefield*, OCCA

and explicitly from the language of RICO, the federal interpretation the *Wakefield* court adopted was groundless: it took as the gloss of one statute (OCCA) the interpretation of a completely different statute (RICO).

In any case, the logic of the public policy exception to *Lorillard* applies with equal force to borrowings of statutory and judicial language. *See infra* note 49.

48. *See Wakefield*, 590 N.Y.S.2d at 389 (reaching its decision by "[d]rawing an analogy from the federal RICO statute" and relying on citations to federal cases from the Third, Fifth, and Eighth Circuits).
49. *See*, canonically, *Zerbe v. State*, 583 P.2d 845, 847 (Alaska 1978), which discusses some of the many limits on the rule of borrowed statutes, noting that, even in its strongest form, the *Lorillard* rule should be "a presumption" that is "in any event, not conclusive." *See also* *Zerbe v. State*, 578 P.2d 597, 599-601 (Alaska 1978), *overruled on other grounds by* *Kinegak v. State Dep't Corr.*, 129 P.3d 887 (Alaska 2006) (rejecting various federal court interpretations of legislative language adopted by the state of Alaska because those interpretations were not persuasive and against the state's own public policy); WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION, STATUTES AND THE CREATION OF PUBLIC POLICY* 1077-80 (4th ed. 2007) (discussing *Zerbe*); SINGER & SINGER, *supra* note 47, § 52:2 n.30 (summarizing case law across jurisdictions that qualifies when original jurisdiction interpretations should be adopted).
50. *See supra* text accompanying notes 15-36.
51. *See supra* text accompanying notes 40-43.
52. *See supra* text accompanying note 32.

could be used expansively, despite the fact that the statute's terms demanded it be used restrictively.

Third, this deviation led to confused jurisprudence in the lower New York courts. OCCA had set up exacting standards for determining what kind of conduct it covered. But the *Wakefield* court's mushy RICO-based test drew alternative, unclear lines. For applying the law to concrete cases, it proved plainly inadequate.⁵³

IV. FROM WAKEFIELD TO KESCHNER: ENTERPRISE CORRUPTION LAW TODAY

In response to this confusion, the New York judiciary has recently sought to redefine the meaning of "criminal enterprise." In a series of opinions over the past four years—culminating in a decision issued in the summer of 2015—the New York Court of Appeals has articulated a new standard to replace *Wakefield*'s "system of authority" test: "excess capacity."⁵⁴ The new test acknowledges that "[t]he days of traditional organized crime families," with their hierarchies of godfathers, capos, and soldiers, "seem to be fading."⁵⁵ The legislature's real concern, the court correctly noted, was with "[t]hose enterprises [that] were understood to present a distinct evil by reason of their unique capacity to plan and carry out sophisticated crimes on an ongoing basis while insulating their leadership from detection and prosecution."⁵⁶ Such organizations could theoretically take many forms.⁵⁷ What made them dangerous was not their form but their capacities—their crime-committing ability.⁵⁸ The new standard thus

53. Consider the muddled saga of *People v. Western Express*, 19 N.Y.3d 652 (2012). The case involved a ring of credit card thieves associated with an otherwise legitimate website. *Id.* at 654-55. The trial court dismissed the government's enterprise corruption charge, noting that the criminals used the website as a market and were not organized in any *Wakefield*-like system of authority. *Id.* at 656. The Appellate Division reversed, pointing out that, however useful the *Wakefield* court's system of authority standard might be, it was not actually required by the text of the statute, and the website did provide a kind of structure. *Id.* at 657. A divided Court of Appeals reversed again, declining to endorse either the *Wakefield* test or the Appellate Division's disavowal, noting only that whatever organization the thieves had, it was not robust enough to count as a clear structure. *Id.* at 660.

54. *People v. Kancharla*, 23 N.Y.3d 294, 304 (2014).

55. *Western Express*, 19 N.Y.3d at 660 (Pigott, J., dissenting).

56. *Id.* at 657 (majority opinion).

57. *Id.* at 659-60.

58. See *People v. Keschner*, 37 N.E.3d 690, 702-03 (N.Y. 2015) (Lippman, C.J., dissenting in part) ("If a structured criminal entity, as constituted, is designed to continue to engage in

seeks to replace *Wakefield's* flabby formalism with a more principled, functional approach.

Reconciling the new standard with OCCA's first prong—the need for an “ascertainable structure”—was relatively straightforward. For example, in one case involving a materials testing company that appeared to be systematically faking results,⁵⁹ the question before the court was whether the individuals who perpetrated the crimes constituted a criminal enterprise with an ascertainable structure even though their only relation to each other was within a legitimate corporation.⁶⁰ The court decided they did. It was not necessary, the court explained, for an alleged criminal enterprise to have a separate hierarchical organization in addition to that of the legitimate corporation. Rather, it would be enough if it were “an association possessing a . . . constancy and capacity exceeding the individual crimes committed under [its] auspices.”⁶¹ True, a hierarchical organization could provide evidence of excess capacity.⁶² But the key factor was the capacity, not the chain of command.

The second prong, “continuity,” has given the court more trouble. In the previous twenty years, some New York State courts had turned the *Wakefield* “system of authority” standard into a complete “removability test,” inspired by one of *Wakefield's* progeny, *People v. Yarmy*.⁶³ In that case, a New York supreme court justice dismissed enterprise corruption charges against a pair of criminals who sold guns illegally.⁶⁴ Their two-man scheme hardly resembled an organized crime syndicate, but they may have met the “system of authority” test for ascertainable structure, since their operation relied on Richard Yarmy's personal federal firearms license.⁶⁵ Perhaps looking for an alternative ground to dismiss the count, the trial court found that the alleged criminal enterprise lacked continuity.⁶⁶ In dismissing the OCCA charge, the court opined that “one im-

orchestrated criminal conduct over a sustained period, and not just to commit one or a few discrete crimes, it falls within the statute's description and, indeed, its intentment.”).

59. *Kancharla*, 23 N.Y.3d at 299-302.

60. *Id.* at 302.

61. *Id.* at 304 (quoting *Western Express*, 19 N.Y.3d at 658).

62. *Id.* at 305-06.

63. 651 N.Y.S.2d 840 (Sup. Ct. 1996), *abrogated by Keschner*, 37 N.E.3d 690.

64. *Id.* at 844.

65. *See id.* at 845. The *Yarmy* court held that the two-man team did not have an “ascertainable structure” as it lacked “any semblance of a hierarchical organization” and such a hierarchical “organizational structure is critical to establishing an enterprise.” But the *Yarmy* court, too, erroneously relied on federal RICO prosecutions to reach this conclusion. *Id.* at 844. OCCA, of course, makes no mention of a hierarchical organizational structure.

66. *Id.* at 845.

portant factor in determining continuity is whether the organization could exist after the removal—by arrest or otherwise—of any of the participating member(s),⁶⁷ which the gun-selling operation decidedly could not. Although this removability test never achieved universal adoption,⁶⁸ it did prove influential.⁶⁹

The removability test, however, was not good law. It was a far cry from the language of the statute. And it seemed to suggest that a criminal enterprise that ended with the arrest of its members might not be a criminal enterprise at all. At the very least, it created perverse incentives for criminal groups. If a criminal enterprise simply concentrated all its responsibilities in the hands of a single individual, would it then no longer count as a criminal enterprise, because that individual would be irreplaceable?⁷⁰

The issue came to a head last summer, when the Court of Appeals was asked to resolve a split among the state intermediate appellate courts.⁷¹ In *People v. Keschner*, decided in June 2015, the court struck down the removability test and applied the excess capacity standard to OCCA's continuity prong. The

67. *Id.*

68. See, e.g., *People v. Guardino*, 880 N.Y.S.2d 244, 247 (App. Div. 2009) (ruling that a criminal enterprise showed the necessary continuity of existence even though it ended upon the arrest of its members).

69. See, e.g., *People v. Conigliaro*, 737 N.Y.S.2d 96, 97 (App. Div. 2002) (explaining that “the People [in *People v. Nappo*, 690 N.Y.S.2d 649 (App. Div. 1999), *rev'd on other grounds*, 729 N.E.2d 698 (N.Y. 2000), had] failed to establish . . . any continuity of existence wherein the said entity was capable of continuing without the participation [of the defendants],” citing to *Yarmy*); *People v. Nappo*, 690 N.Y.S.2d 649 (App. Div. 1999) (dismissing a charge of enterprise corruption, citing to *Yarmy*), *rev'd on other grounds*, 729 N.E.2d 698 (N.Y. 2000); *People v. Pustilnik*, 2007 WL 674116, at *8 (Sup. Ct. Mar. 1, 2007) (unreported disposition) (noting that OCCA's continuity prong was satisfied for a given criminal enterprise since “[s]ufficient evidence in the Grand Jury demonstrated the continuity of the criminal enterprise even if a different member were to have replaced one of the defendants,” citing to *Yarmy*).

70. Cf. Transcript of Oral Argument at 8, *People v. Keschner*, 37 N.E.3d 690 (N.Y. 2015), <http://www.nycourts.gov/ctapps/arguments/2015/Jun15/Transcripts/060115-15-16-Oral-Argument-Transcript.pdf> [<http://perma.cc/9MWE-MZHH>] (reporting Judge Stein asking defendant-appellant's counsel whether “all an organization . . . has to do to exempt itself from criminal enterprise liability is to put one guy at the top and [] have him or her control the whole thing”).

71. Compare *People v. Keschner*, 973 N.Y.S.2d 7, 11 (App. Div. 2013) (departing from the Second Department of the Appellate Division in *Conigliaro* insofar as that decision had endorsed *Yarmy* by “holding that the involvement of one or more irreplaceable participants removes an organization from the statutory definition of ‘criminal enterprise’”), with *Conigliaro*, 737 N.Y.S.2d at 97 (arguably endorsing *Yarmy* by construing a prior dismissal of an enterprise corruption charge as having rested, in part, on the People's failure to establish that the alleged criminal enterprise could have continued to exist without the participation of two key members).

case concerned a medical clinic, which was organized to systematically generate fraudulent billings.⁷² Although many different members of the clinic participated in the criminal scheme, a quirk of New York State law made one of the doctors indispensable.⁷³ The court held that this did not bar finding the clinic to be a criminal enterprise. To establish continuity, it concluded, it would not be necessary to show that a criminal enterprise could “survive[] the removal of a key participant.”⁷⁴ Instead,

the requirement is . . . that [the group] continues to exist beyond individual criminal incidents. A team of people who unite to carry out a single crime or a brief series of crimes may lack structure and criminal purpose beyond the criminal actions they carry out; such an ad hoc group is not a criminal enterprise. If a group persists, however, in the form of a structured, purposeful criminal organization beyond the time required to commit individual crimes, the continuity element of criminal enterprise is met.⁷⁵

Taken together, these cases have revised the meaning of OCCA’s two criminal enterprise prongs. To satisfy them now, prosecutors need not worry about establishing authoritative reporting lines or stepladders of criminal advancement. Rather, they must prove only that a group of people could have committed more crimes than they did, and that they continued to exist as a distinct group with a shared goal even when they were not in the act of committing those crimes.

V. THE COURT OF APPEALS’ SOLUTION CREATES NEW PROBLEMS FOR THE DOCTRINE

The new excess capacity standard is an improvement. It gives New York courts greater guidance than they had from *Wakefield*, moves away from improper reliance on federal law, and is more responsive to OCCA’s text and purpose. However, this jurisprudential correction remains incomplete. As it stands, the Court of Appeals’ enterprise corruption jurisprudence still suffers from two problems: it continues to sanction prosecutions that the statute bars, though to a lesser degree than *Wakefield*, and it undermines principles of notice

72. *Keschner*, 37 N.E.3d at 691-93.

73. Medical clinics in New York State can only be owned by a licensed M.D. *Id.* at 692.

74. *Id.* at 691.

75. *Id.* at 699 (internal quotation marks and citations omitted).

and legality. OCCA's sponsors made clear that it was meant neither to criminalize behavior otherwise appropriately covered by the New York State Penal Law, nor to attach to most traditional white-collar criminal schemes.⁷⁶ This intention was not only reported in the legislative history but was also incorporated into the actual text of the law.⁷⁷ These limitations had been operationalized largely through the narrow definition of a criminal enterprise.⁷⁸ However, the *Wakefield* court dismantled those protections, and the Court of Appeals' recent decisions have not fully restored them. As interpreted by the court, OCCA still does not do what its own text calls for.

This risks over-criminalization. Although less broad than *Wakefield*, even the new, more functional standard covers whole categories of cases that do not pose the special problems for law enforcement that OCCA targeted. This has both philosophical and practical effects. On the philosophical level, it means that we are punishing defendants for conduct that we do not actually believe to be criminal. Where criminals collaborate to commit several crimes, for instance, to punish them for enterprise corruption instead of simply the underlying predicate acts is to make a judgment that the association itself represents a special kind of additional harm worth punishing. But the new standard, on its own, does not guarantee that the law will only be used to punish such associations. For example, in many bribery-related public corruption situations, the actors are repeat players—such as lobbyists and contractors—who continue to exist as a recognizable group because of their professional identities, even when they are not in the act of committing crimes. Furthermore, public officials will always have “excess capacity” by virtue of their office. Consequently, they are likely to always meet the requirements for a charge of enterprise corruption under this new standard. However, not every bribe-taking public official has done a wrong beyond that already punished under traditional public corruption crimes.⁷⁹ If they have not, they should not be indictable under OCCA. The new standard, however, seems to allow it.

76. See, e.g., Letter from Miller, *supra* note 16, at 2.

77. N.Y. PENAL LAW § 460.00 (McKinney 2016) (legislative findings); accord *People v. Morris*, No. 0025/09, 2010 N.Y. Misc. LEXIS 3484, at *78 (Sup. Ct. July 29, 2010) (unreported disposition) (noting that a given provision of OCCA was “both a legislative finding and an enacted portion of the Penal Law and therefore bind[ing on] this Court as any other relevant Penal Law provision”).

78. See *supra* notes 21–24 and accompanying text.

79. These include larceny, scheming to defraud, defrauding the government, filing false instruments, official misconduct, giving and receiving bribes, giving and receiving rewards for official misconduct, giving and receiving unlawful gratuities, giving and receiving bribes for a public office, impairing the integrity of a government licensing exam, corrupt use of a po-

On a practical level, then, this may transform OCCA from a tool for targeting otherwise hard-to-reach forms of criminality into a mechanism for enhancing penalties and easing prosecutors' work. OCCA gives prosecutors another powerful weapon with which to compel plea bargains from certain defendants: the threat of indictment for an additional class B felony. A corrupt public official from the earlier example could find herself risking twenty-five years in jail where, in OCCA's absence, she would have faced only minimal jail time for the less serious underlying offenses.⁸⁰ This can create a powerful incentive to plead to one or several of the predicate acts, and one that can be easily abused.⁸¹ While bribe-taking public officials are not "natural objects of moral or political sympathy,"⁸² this is no reason to subject them to heightened penalties at the whim of a prosecutor or to ease the state's burden in proving its case.

More troublingly, the new standard has put the doctrine into tension with two fundamental principles of criminal law: notice and legality. Defendants are

sition of authority, and the crime of corrupting the government, which is a crime of its own and an aggravating factor. *See generally* PENAL §§ 155, 175, 190, 195, 200, 496.

This is not to say that New York's anti-corruption laws are adequate. *See* Kathleen Rice et al., *Preliminary Report*, COMMISSION TO INVESTIGATE PUB. CORRUPTION 85-97 (Dec. 2, 2013), http://publiccorruption.moreland.ny.gov/sites/default/files/moreland_report_final.pdf [<http://perma.cc/TD9E-SEZC>] (detailing problems with New York State's current anti-corruption penal laws and recommending substantial reforms). But the inadequacies in New York's public corruption laws documented by the Moreland Commission may not be the kind easily reached by enterprise corruption prosecutions.

80. *Compare* PENAL § 460.20 (noting that "enterprise corruption is a class B felony"), *with id.* § 460.10.1 (listing predicate criminal acts, including some nonviolent class D and E felonies).
81. Upsettingly, this effect of OCCA would largely escape public accountability, since it would keep cases out of court and would not show up in the plea deal or charging instruments. Only a study of prosecutors' archives or careful comparisons of the sentences that followed after plea deals or trials for similarly situated defendants would let us know whether—and to what extent—this was happening. For studies along these lines, see, for example, Jamie Fellner, *An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants To Plead Guilty*, HUM. RTS. WATCH (Dec. 5, 2013), http://www.hrw.org/sites/default/files/reports/us1213_ForUpload_o_o_o.pdf [<http://perma.cc/F85H-EJ3N>], which uses detailed reporting to explore the power of plea deals and the penalty defendants pay for going to trial; and Kyle Graham, *Crimes, Widgets, and Plea Bargaining: An Analysis of Charge Content, Pleas, and Trials*, 100 CALIF. L. REV. 1573 (2012), which uses United States Department of Justice datasets to look at the relationship between the charge sheet, the underlying crimes, plea deals, and actual sentences.
82. With apologies to Daniel Markovits, see *Will the "New Aristocrats" Broker the Deal?*, NEW HAVEN INDEP. (May 25, 2015), http://www.newhavenindependent.org/index.php/archives/entry/yale_law_commement/ [<http://perma.cc/3ZER-WNGJ>] (quoting Daniel Markovits, *Address at the Yale Law School Commencement: A New Aristocracy* (May 18, 2015)).

at risk of OCCA's penalty enhancements with only minimal notice because the application of OCCA to their conduct is not the result of any statutory enactment, nor reflected anywhere in New York's codified Penal Law. State case law applying OCCA remains confused, and, as the only possible source of notice here, does not give clear guidance either.⁸³

This presents two different legality issues. First, if OCCA is used to enhance penalties for certain crimes for which the legislature has not specified penalty enhancements, one law (OCCA) would be used to undercut others. Prosecutors and courts would be, in effect, encroaching on the legislature's authority to define the severity of crimes by using OCCA to prescribe stricter punishments for certain crimes than what the legislature had prescribed. This raises the specter of serious separation-of-powers concerns.

Second, and more concretely, OCCA's text limits it to a narrower range of circumstances than those in which it may now be used. As judicially elaborated, the law applies in prosecutions that are beyond the reach of its text. This risks violating the basic principle of legality, according to which no behavior should be punished if it is not criminalized. OCCA explicitly limits the reach of enterprise corruption to acts in conformity with the legislative findings. But the legislative findings limit OCCA to a smaller set of cases than those covered by the court's new excess capacity standard. Through an interpretation of a statute, then, the court risks extending enterprise corruption to conduct that the legislature pointedly refused to include within its reach.

VI. AN ALTERNATIVE: REIGNING IN OCCA THROUGH SECTION 210.40(2) MOTIONS

Luckily, the judiciary already has the tools at its disposal to cabin OCCA. As part of its initial enactment, OCCA empowered judges to dismiss enterprise corruption charges "where prosecution of that count [would be] inconsistent with the stated legislative findings" through a special motion under section

83. For example, even as the Court of Appeals has moved away from the *Wakefield* approach, *Wakefield* continues to be cited in trial court orders, *see, e.g.*, *People v. Foster*, No. 063422009, 2011 WL 12842248 (N.Y. Sup. Ct. Feb. 15, 2011) (relying in part on *Wakefield* to construe enterprise corruption), and appellate court briefs, *see, e.g.*, Reply Brief for Defendant-Appellant-Respondent, *People v. Barone*, 14 N.E.3d 354 (N.Y. 2014) (No. APL-2013-00013), 2014 WL 2117928 (also relying on *Wakefield* to construe enterprise corruption). As Stephen Skowronek and Karen Orren have noted in a different context, succeeding institutions, such as legal tests, do not usually displace one another in neat succession, but rather coexist uneasily, in tension and partial contradiction, in a phenomenon they call "intercurrence." KAREN ORREN & STEPHEN SKOWRONEK, *THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT* 108-19 (2004) (describing intercurrence).

210.40(2) of the New York Criminal Procedure Law.⁸⁴ This device, however, has seldom been used. One New York supreme court has opined that it should be limited to “shield[ing] a minor cog in the criminal machinery, such as a low level operative, or one who was involved only in a small portion of the criminal activities, from the strong penalties” of an enterprise corruption conviction,⁸⁵ drastically and unjustifiably limiting section 210.40(2) motions’ scope. Courts have been reluctant to grant such motions at all;⁸⁶ the Court of Appeals has never issued one.⁸⁷

Reviving this mechanism could fix some of the problems with the new jurisprudence of the Court of Appeals by restoring protections for defendants and giving courts a tool to limit OCCA’s overbreadth. The Court of Appeals should encourage New York courts to deploy section 210.40(2) motions to ensure that prosecutors are using OCCA in line with the law’s intention. This, after all, is what OCCA requires, and is, according to the text of the New York Criminal Procedure Law, the purpose section 210.40(2) motions serve.⁸⁸ Those intentions include preventing enterprise corruption charges from attaching to low-level operatives, as the New York supreme court noted. But they also include limiting the law’s reach to criminal enterprises whose leaders might not otherwise face prosecution for the full extent of their crimes. This doubtless covers many criminal schemes without Mafia connections,⁸⁹ but it should not reach ordinary white-collar crimes, particularly run-of-the-mill political corruption.

84. N.Y. CRIM. PROC. LAW § 210.40(2) (McKinney 2016).

85. *People v. Morris*, No. 0025/09, 2010 N.Y. Misc. LEXIS 3484, at *78 (Sup. Ct. July 29, 2010) (unreported disposition).

86. *See, e.g., People v. Basbus*, 889 N.Y.S.2d 578 (App. Div. 2009); *People v. Joseph Stevens & Co.*, No. 2394/2009, 2011 N.Y. Misc. LEXIS 2152 (Sup. Ct. May 2, 2011) (unreported disposition). For an important exception, see *infra* note 91 and accompanying text.

87. At least none that I could find. The practice guides reach the same conclusion. *See, e.g., GREENBERG ET AL., supra* note 31, § 36:8 (noting that it “remains to be seen . . . whether [New York] appellate courts will develop their own jurisprudence” around section 210.40(2) motions).

88. *See* N.Y. PENAL LAW § 460.00 (McKinney 2016) (stating legislative findings); CRIM. PROC. § 210.40(2) (“[A] count alleging enterprise corruption in violation of article four hundred sixty of the penal law may be dismissed in the interest of justice where prosecution of that count is inconsistent with the stated legislative findings in said article.”).

89. For a contemporary, appropriate, non-Mafia white-collar example, see the recent enterprise corruption indictments of Narco Freedom, Inc. *A.G. Schneiderman Announces Indictment of Nonprofit Narco Freedom and Its Top Executives for Participating in an Organized Crime Ring*, N.Y. ST. ATT’Y GEN. (Mar. 18, 2015), <http://www.ag.ny.gov/press-release/ag-schneiderman-announces-indictment-nonprofit-narco-freedom-and-its-top-executives> [<http://perma.cc/4EST-GVQB>].

The advantages to this judicial solution are many. It would allow for a timely fix to the law without relying on the often-dysfunctional New York State Assembly. And it would keep courts and lawmakers from getting bogged down in defining new categorical tests, replacing a sterile exercise in line drawing with an act of judicial evaluation. Most beneficially, it would create an opportunity for courts to consider the real question underlying the use of OCCA: whether a given non-Mafia criminal enterprise is nevertheless similar to an organized crime syndicate in the way that it resists traditional prosecution. If it is, then the use of an enterprise corruption charge is in keeping with OCCA's aims, and so within the statute. If not, then other criminal laws should already be adequate to punish the conduct.

The practicability of this solution is apparent from the unique practice of New York Supreme Court Justice Bernard Fried. Apparently alone among New York State trial court judges, Justice Fried has used section 210.40(2) motions to dismiss enterprise corruption counts where, in his judgment, the indictment was not in keeping with the purposes of the statute.⁹⁰ In particular, he has argued for dismissing enterprise corruption counts where there are otherwise "adequate sanctions and remedies available to punish and deal with the conduct involved," as those are the cases to which the legislative findings sought to limit OCCA's "enhanced sanctions."⁹¹ Since the Criminal Procedure Law makes it clear that a New York State court can grant section 210.40(2) motions *sua sponte* if necessary,⁹² nothing prevents trial courts from following Justice Fried's lead—though this practice could be encouraged by guidance from the Court of Appeals.⁹³

It might be objected that greater use of section 210.40(2) motions would simply perpetuate doctrinal confusion, by allowing judges to make ad hoc decisions based on their own discretion. This is an understandable fear. However, it ignores the extent to which the legislative findings incorporated into OCCA

90. See, e.g., *People v. D.H. Blair & Co.*, No. 3282/2000, 2002 WL 766119, at *15 (N.Y. Sup. Ct. Jan. 29, 2002) (Fried, J.) (citing *People v. Andreadakis, Ind.*, No. 9691/93 (N.Y. Sup. Ct. 1995)).

91. *People v. Demenus*, N.Y. L.J., Apr. 13, 1995, at 29, col. 1 (N.Y. Sup. Ct.) (internal quotation marks omitted); see also *D.H. Blair & Co.*, 2002 WL 766119, at *15 (discussing Justice Fried's use of section 210.40(2) motions in earlier decisions).

92. See CRIM. PROC. § 210.40(3).

93. Accord GREENBERG ET AL., *supra* note 31, § 36:8 ("It remains to be seen whether meaningful standards will be developed for determining when dismissal of an enterprise corruption charge in the interest of justice is warranted, and whether the appellate courts will develop their own jurisprudence for deciding when dismissing (or refusing to dismiss) an enterprise corruption charge on this ground constitutes an abuse of discretion.").

already give judges concrete guidance. Whether a given factual situation fits within OCCA's purposes is too complicated a question to be answered by a simple bright-line test. But it is not beyond judicial cognizance—not in the estimation of the legislature, which assigned that task to the courts when it created section 210.40(2) motions as part of its enactment of OCCA; nor is it beyond the competence of the judiciary in the judgment of the courts themselves, which regularly evaluate whether to dismiss indictments “in the interest of justice” in other cases.⁹⁴ As an added protection, section 210.40(2) motions are presumptively reviewable for abuse of discretion by appellate courts,⁹⁵ enabling the New York judiciary to create and maintain uniform standards. By endorsing Justice Fried's approach, encouraging other New York Supreme Court Justices to follow suit, and, over time, articulating standards for the use of section 210.40(2) motions, the Court of Appeals could make sure that its recent decisions ultimately enhance OCCA, rather than explode it.

CONCLUSION

As this Comment has shown, OCCA sought to strike a balance between prosecuting exceptional dangers and respecting defendants' rights. In the decades after its enactment, New York courts expanded the law's reach, upsetting its equipoise. As a result, and despite the recent efforts of the New York Court of Appeals, OCCA remains out of balance. It no longer fulfills the intentions of its drafters. Its application is in tension with its own statutory text. And it raises fundamental issues of notice and legality while courting overcriminalization. Fortunately, New York courts have the resources at their disposal to address these concerns. By following the practice of the heretofore-overlooked Justice Fried and reinvigorating section 210.40(2) motions, they could set the law aright.

This readjustment may have significance beyond New York. Many states have their own “baby RICO” statutes, and commentators have long worried about possible overreach under those laws as well.⁹⁶ Justice Fried's practice could provide a way for judges in states with statutes like New York's to curb

94. See, e.g., CRIM. PROC. § 210.40(1) and accompanying notes of decision.

95. 34 GLENDA K. HARNAD & TAMMY E. HINSHAW, CARMODY-WAIT NEW YORK PRACTICE WITH FORMS § 189:165 (2d ed. 2016) (noting that the Court of Appeals may review an order dismissing an indictment in the interest of justice for abuse of discretion as a matter of law).

96. See 8 JEROLD S. SOLOVY ET AL., BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 96:98 (3d ed. 2015) (listing state RICO statutes); Reichelt, *supra* note 14, at 266-70 (discussing arguments for limiting state RICO).

the law without relying on prosecutorial discretion or new legislation.⁹⁷ On a more abstract level, this approach offers a model for how courts can work collaboratively with legislatures to actualize legislative intent where those legislators have explicitly enshrined their intent in statute. This avoids troublesome debates about “purposivism” and “textualism” to bring courts back to one of their core functions: opening a space in which to figure out how to properly apply the law to facts. As OCCA’s drafters themselves recognized, categorical lines would not properly bound those circumstances deserving of OCCA’s heightened penalties.⁹⁸ In any given use of the enterprise corruption statute, there will be a question about whether the defendants were engaged in the kind of activity that the law sought to reach. That is a question that deserves real briefing. Through the use of section 210.40(2) motions, the New York judiciary could make sure it, too, gets its day in court.

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97. Cf. Reichelt, *supra* note 14, at 270-72 (proposing prosecutorial discretion and new legislative enactments to curb state RICO laws).

98. See N.Y. PENAL LAW § 460.00 (McKinney 2016) (“The balance intended to be struck by this act cannot readily be codified in the form of restrictive definitions or a categorical list of exceptions.”).

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