

Iowa's State RICO Statute: Wreaking Havoc on Iowa's Criminal Justice System

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ABSTRACT: Iowa's Ongoing Criminal Conduct Act ("IOCCA") was patterned after the federal Racketeer Influenced and Corrupt Organizations Act ("RICO") and the Model Ongoing Criminal Conduct Act ("Model Act"). Yet, it exceeds the reach and intent of these acts, especially by excluding key provisions of the Model Act's definition of "specified unlawful activity," which limited its application to racketeering offenses or offenses characteristic of organized crime. This variation broadens the scope of people who can be charged under the IOCCA—a Class B felony with a 25-year sentence—thereby creating a prosecution tool to over-charge and intimidate defendants into taking plea deals. The ability to charge virtually any individual who commits two felonies in succession with an additional Class B felony for ongoing criminal conduct undermines the intent of the federal RICO statute and the Model Act to protect legitimate commerce from organized crime. It is also contrary to the principles of fairness and justice that society expects of the criminal justice system. This Note advocates that the Iowa Legislature constrict the reach of the IOCCA so that it only criminalizes what it was truly meant to combat: racketeering and organized crime. In doing so, this Note examines the problems and inefficiencies of the IOCCA, as well as the RICO statutes of other states, to determine the most effective approach to protect legitimate commerce from organized crime.

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I. INTRODUCTION

Critics of the United States' criminal justice system increasingly call for reform, with scholars and laymen alike highlighting the lengthy sentences for non-violent crimes,¹ racial disparities in conviction and sentencing,² police violence,³ and the ineffectiveness of jury trials.⁴ As Judge Kozinski of the Ninth Circuit wrote in his article, *Criminal Law 2.0*, "there are enough doubts on a broad range of subjects touching intimately on the integrity of the system that we should be concerned."⁵ Among the frequent concerns affecting the integrity of the criminal justice system is the power of prosecutors in America. Because most criminal cases are resolved through plea bargains, prosecutors have immense power.⁶ Prosecutors often have more power to decide a

1. See Shima Baradaran, *Drugs and Violence*, 88 S. CAL. L. REV. 227, 259 (2015) (detailing the problems with drug sentencing guidelines, stating, "[d]ue to the assumption that drug crime is violent crime . . . a defendant convicted of murder may have a lower sentence than a nonviolent drug dealer"); Douglas Ray Dunkins Jr., Opinion, *I Have a Life Sentence for a Nonviolent Drug Crime. Clemency Is My Only Hope*, GUARDIAN (July 16, 2015, 11:45 AM), <http://www.theguardian.com/commentisfree/2015/jul/16/life-sentence-nonviolent-drug-clemency>.

2. In male prisons, non-Hispanic blacks "comprised the largest portion of male inmates under state or federal jurisdiction in 2013" at 37%, while non-Hispanic whites accounted for 32% of the prison population and Hispanics made up 22% of the population. E. ANN CARSON, U.S. DEP'T OF JUSTICE, PRISONERS IN 2013 1 (2014), <http://www.bjs.gov/content/pub/pdf/p13.pdf>. Similarly, the imprisonment rate for black females was double that of white females. *Id.* As Marc Mauer, the executive director of The Sentencing Project stated, "[t]hese [disparities] also contribute to eroding trust in the justice system in communities of color—an outcome that is clearly counterproductive to public safety goals. It is long past time for the nation to commit itself to a comprehensive assessment of the causes and remedies for addressing these issues." Marc Mauer, *Justice for All? Challenging Racial Disparities in the Criminal Justice System*, 37 HUM. RTS. 14, 16 (2010).

3. See, e.g., Kevin Johnson, *Lack of Training, Standards Mean Big Problems for Small Police Departments*, USA TODAY (June 23, 2015, 4:39 PM), <http://www.usatoday.com/story/news/nation/2015/06/23/small-police-departments-standards-training/28823849> (describing the problems facing small police departments, but also discussing the "unprecedented scrutiny" of policing in America); Justin Worland, *U.N. Panel Sharply Criticizes Police Brutality in U.S.*, TIME (Nov. 28, 2014), <http://time.com/3609811/police-brutality-united-states-un-ferguson-torture> (discussing incidents of police violence in America and the United Nations' "critici[sm of] the United States for police brutality, military interrogations and excessive use of force by law enforcement").

4. Judge Kozinski of the Ninth Circuit described his experience debriefing jurors on their verdicts by saying, "[s]ome of the comments seem entirely rational, but much of what jurors describe looks like a fun-house mirror reflection of *Twelve Angry Men*." Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, xix (2015); see also Julius H. Miner, *The Jury Problem*, 37 J. CRIM. L. & CRIMINOLOGY 1, 2 (1946) ("The woeful lack of intellectual endowment on the part of a juror is no doubt a most serious difficulty of common occurrence. Such lack of endowment is, to the defense lawyer in a criminal case, the very highest qualification any juror can possess. If a prospective juror discloses intelligence and competency he is promptly excused by the defense.").

5. Kozinski, *supra* note 4, at xiii.

6. "While there are no exact estimates of the proportion of cases that are resolved through plea bargaining, scholars estimate that about 90 to 95 percent of both federal and state court cases are resolved through this process." LINDSEY DEVERS, BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY 1 (2011), <http://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf>.

defendant's fate than jurors, as they have the ability to stack charges to increase the risks a defendant faces by going to trial.⁷

Of course, prosecutors are supposed to seek fairness and justice. As the Supreme Court noted in *Berger v. United States*:

[A prosecutor] is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.⁸

In an effort to ensure that prosecutors act with fairness and justice, the American Bar Association imposes standards on prosecutors to prevent them from overcharging defendants.⁹ However, these standards do not prevent prosecutors from pursuing the most severe charges supported by the evidence, even if a jury conviction is unlikely.¹⁰ Likewise, prosecutors often make charging decisions in private with little or no oversight to hold

7. Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 408 (2001) (“In federal and state jurisdictions governed by sentencing guidelines, these [charging] decisions often predetermine the outcome of a case since the sentencing judge has little, if any, discretion in determining the length, nature, or severity of the sentence.”); Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 45 (“The prosecutor in the typical case possesses such a gross disparity of bargaining power that the process of determining what charges the defendant will plead to is more an administrative determination than a true negotiation. . . . The prosecutor, who resembles a powerful, unregulated monopoly, establishes ‘the going rate’ for any particular category of crime and can change ‘the going rate’ or deviate from previous policy at will.”); Kozinski, *supra* note 4, at xxii; *see also infra* Part III.B.2.

8. *Berger v. United States*, 295 U.S. 78, 88 (1935).

9. See AM. BAR ASS'N., CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION 3-4.3(a)–(b) (4th ed. 2015), http://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition.html (“A prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice. . . . After criminal charges are filed, a prosecutor should maintain them only if the prosecutor continues to reasonably believe that probable cause exists and that admissible evidence will be sufficient to support conviction beyond a reasonable doubt.”); *see also* MODEL RULES OF PROF'L CONDUCT r. 3.8(a) (AM. BAR ASS'N 1983) (“The prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause. . . .”); NAT'L PROSECUTION STANDARDS THIRD EDITION § 4-1.3 (NAT'L DIST. ATTORNEYS ASS'N 2009) (“Prosecutors should screen potential charges to eliminate from the criminal justice system those cases where prosecution is not justified or not in the public interest.”).

10. Davis, *supra* note 7, at 413 (discussing how prosecutors often charge more offenses than they can prove); *see also* Gifford, *supra* note 7, at 48 (“[O]vercharging merely refers to the prosecutor filing the most serious crimes that the evidence will support, even when conviction on the charged offense is questionable. . . . Overcharging is one more tool the prosecutor has to induce defendants to plead guilty.” (footnote omitted)).

them accountable for charging more than they believe they can prove beyond a reasonable doubt.¹¹ This charging strategy places the defendants in a “Catch-22”: they can either risk being convicted of all or some of the charges, or they can accept plea deals that offer reduced charges in exchange for guilty pleas to one or some of the nominal offenses they committed in the hopes of receiving mercy in sentencing.¹² This bargain for mercy benefits prosecutors far more than it benefits defendants, as prosecutors are able to obtain guilty pleas in cases where convictions are unlikely for all charges while defendants accepting plea deals are frequently sentenced on the basis of the offenses committed rather than the charges to which they plead.¹³

The Iowa Ongoing Criminal Conduct Act (“IOCCA”), Iowa Code section 706A, currently provides prosecutors with an excellent tool to overcharge defendants who are facing charges on two or more offenses committed in succession. The IOCCA is essentially Iowa’s version of the federal Racketeer Influenced and Corrupt Organizations Act (“RICO”) statute.¹⁴ However, the IOCCA extends much further than federal RICO or the Model Ongoing Criminal Conduct Act (“Model Act”) that the Iowa statute was originally modeled after. Specifically, the IOCCA’s definition of “specified unlawful activity” removes the Model Act’s limitations on the applicable criminal conduct it punishes. The Model Act’s drafters only intended for it to apply to racketeering or acts characteristic of organized crime.¹⁵ The exclusion of the Model Act’s limitations on “specified unlawful activity” has prompted a number of challenges before the Iowa Court of Appeals and Iowa Supreme Court to appeal convictions of Iowa Code section 706A.2(4), the statutory provision criminalizing ongoing criminal conduct through acts of “specified unlawful activity.”

Despite the many challenges to the IOCCA, the Iowa Supreme Court has begrudgingly upheld the constitutionality of the statute, as is appropriate under a plain language interpretation of the IOCCA. However, in doing so, the court asserted that it did not believe the Iowa Legislature intended for the statute to reach more crimes than the Model Act, but that it had no other choice but to interpret the statute based on plain language, rather than any probable intent of the Iowa Legislature.¹⁶ The broad reach of the IOCCA has

11. See Davis, *supra* note 7, at 435 (describing the lack of accountability for prosecutors in their charging decisions and the level of deference courts give to prosecutors, which frequently prevents defendants from challenging charging decisions).

12. *Id.* at 408–09.

13. See Gifford, *supra* note 7, at 56.

14. State v. Reed, 618 N.W.2d 327, 334–35 (Iowa 2000) (applying the Supreme Court’s interpretation of federal RICO to interpret the “continuing basis” time period requirement in Iowa Code § 706A).

15. See IOWA CODE § 706A.1(5) (2015); State v. Olsen, 618 N.W.2d 346, 349 (Iowa 2000).

16. Olsen, 618 N.W.2d at 351.

created two problems. First, it has created a tool that allows prosecutors to intimidate defendants into taking plea deals by attaching a 25-year sentence for ongoing criminal conduct to the sentence of their predicate offenses. Rather than risk these additional sentences, defendants may be intimidated into taking plea deals for lesser charges. Second, the statute's broad construction allows the state to prosecute individuals who commit almost any two criminal acts in succession, as the court has liberally interpreted the requirement that these acts be committed for "financial gain."¹⁷

This Note argues that the Iowa Legislature should constrict the broad reach of the IOCCA and create a statute similar to that of the Model Act or other state RICO statutes. Part II begins by summarizing the history of federal RICO, its effect on the IOCCA, and the Iowa Supreme Court's consequential interpretations of the statute's definition of "specified unlawful activity" under the IOCCA. Part III examines the ineffectiveness of the IOCCA and the problems associated with its use since it was enacted almost 20 years ago. Part IV argues that the Iowa Legislature should restrict the definition of "specified unlawful activity" in the IOCCA by proposing ways to reform the statute.

II. BACKGROUND

In order to effectively identify and solve the problems with the IOCCA, this Part reviews the historical underpinnings necessary to give context to the analysis. First, Part II.A addresses the origins of RICO, the Model Act, and the roles that these statutes played in the creation of the IOCCA, Iowa's RICO statute. Second, Part II.B discusses the IOCCA more in depth, specifically focusing on the section of the statute defining "specified unlawful activity." Finally, Part II.C discusses some Iowa Supreme Court decisions interpreting the IOCCA, specifically those cases that deal with the IOCCA's definition of "specified unlawful activity."

A. FEDERAL RICO, THE MODEL ACT, AND THE RISE OF IOWA'S STATE RICO STATUTE

In 1970, Congress passed the Racketeer Influenced and Corrupt Organizations Act ("RICO") in response to the drain on America's economy stemming from organized crime.¹⁸ Racketeering is "[a] system of organized crime" or "[a] pattern of illegal activity . . . carried out as part of an enterprise."¹⁹ RICO seeks to eradicate "organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in

17. *Reed*, 618 N.W.2d at 333.

18. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 941-48 (codified as amended at 18 U.S.C. §§ 1961-1968 (2012)).

19. *Racketeering*, BLACK'S LAW DICTIONARY (10th ed. 2014).

organized crime.”²⁰ RICO provides prosecutors with evidentiary and administrative advantages over other laws used to prosecute multiple defendants in a single trial. All four of the prohibited activities under RICO involve interstate or foreign commerce.²¹ Under RICO, it is unlawful for any person to: (1) use or invest income derived from a “pattern of racketeering activity”²² to acquire, establish, or operate an enterprise;²³ (2) “to acquire or maintain . . . any interest in or control of any enterprise” through a pattern of racketeering activity;²⁴ (3) to be employed by or associated with an enterprise if that person engages in the enterprise’s pattern of racketeering activity;²⁵ and (4) to conspire to commit any of the first three prohibited activities.²⁶

After the federal RICO statute was enacted, most states passed their own RICO statutes based on the concepts set forth in the federal RICO statute.²⁷ Many of these statutes have different names that reference “organized crime,”²⁸ “ongoing criminal conduct,”²⁹ or “criminally influenced organizations.”³⁰ These state statutes often mirror federal RICO, criminalizing individual participation in an enterprise through a pattern of racketeering activity.³¹ Iowa, however, is unique, because its version of the federal RICO statute is the only state statute modeled after the Model Ongoing Criminal

20. Organized Crime Control Act of 1970, 84 Stat. at 923.

21. 18 U.S.C. § 1962(a)–(d) (2012).

22. To convict under federal RICO, a prosecutor must show a “pattern of racketeering activity,” which consists of predicate offenses, and the defendant must have committed “at least two acts of racketeering activity,” with one having occurred in the past “ten years . . . after the commission of a prior act of racketeering activity.” *Id.* § 1961(5).

23. *Id.* § 1962(a).

24. *Id.* § 1962(b).

25. *Id.* § 1962(c).

26. *Id.* § 1962(d).

27. SECTION OF ANTITRUST LAW, AM. BAR ASS’N, RICO STATE BY STATE: A GUIDE TO LITIGATION UNDER THE STATE RACKETEERING STATUTES 1 (John E. Floyd ed., 2d ed. 2011). Many commentators have referred to state RICO statutes as “Baby RICO” or “Little RICO” statutes. See Jason D. Reichelt, Note, *Stalking the Enterprise Criminal: State RICO and the Liberal Interpretation of the Enterprise Element*, 81 CORNELL L. REV. 224, 225 n.2, 232 (1995) (“[S]tate RICO statutes often provide state prosecutors administrative and evidentiary advantages. In a state RICO prosecution, even though the predicate acts themselves might have been committed in many counties, the case can be consolidated and tried in a single county, eliminating most venue problems. Furthermore, RICO prosecutions often make it easier for juries to see the entire picture of the criminal organization rather than a confusing morass of individual, and seemingly unrelated, criminal acts committed over a long period of time.”).

28. See, e.g., COLO. REV. STAT. § 18-17-101 (2015); N.Y. PENAL LAW § 460.20 (McKinney 2008); WIS. STAT. § 946.80 (2013–2014).

29. IOWA CODE § 706A (2015).

30. UTAH CODE ANN. § 76-10-1603 (LexisNexis 2012).

31. Reichelt, *supra* note 27, at 225. Federal RICO defines “enterprise” as “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.” 18 U.S.C. § 1961(4) (2012). Most state RICO statutes deviate only slightly from the federal definition of “enterprise.” Reichelt, *supra* note 27, at 225.

Conduct Act (“Model Act”),³² which was created by the President’s Commission on Model State Drug Laws in 1993.³³

Much like the federal RICO statute, the main purpose of the Model Act was to protect legitimate commerce from criminal networks and alleviate the economic effects of criminal activity.³⁴ To accomplish this objective, the Model Act established five categories of violations, including “acts of specified unlawful activity,”³⁵ which is defined as “any act, including any preparatory or completed offense, committed for financial gain, that is punishable [as a felony] [by confinement for more than one year] under the laws of this state.”³⁶ It further limited the predicate of these acts to the following types: (1) homicide, obstruction of justice, extortion, extortionate extensions of credit, robbery, or trafficking in controlled substances, explosives, weapons, or stolen property; (2) any offense that is a first degree misdemeanor or higher; and (3) predicate offenses to racketeering or criminal profiteering, including illegal control of, investment in, or conduct of an enterprise, or “offenses related to the provision of illicit goods and services such as drugs, fraud, theft, gambling, [and] prostitution.”³⁷ Despite adopting the Model Act, the Iowa Legislature deviated from the Model Act’s definition and categories of “specified unlawful activity” in a consequential way. The next two Parts of this Note explain the IOCCA and explore the IOCCA’s deviations from the federal RICO statute and the Model Act in greater depth.

B. THE IOCCA: A REFLECTION OF THE MODEL ACT, IF ONLY IN A BROKEN MIRROR

While the IOCCA is meant to mirror the Model Act, the IOCCA’s deviations from its model have created a distorted and abusive version of the Model Act. The IOCCA, Iowa’s state RICO statute, criminalizes the same types

32. *State v. Olsen*, 618 N.W.2d 346, 348 n.1 (Iowa 2000) (“Iowa is the only state in the nation to enact an ongoing criminal conduct statute. Although some states have enacted money laundering and racketeering acts with definitions similar to those found in the model act, no other state has enacted the comprehensive substantive provisions of the model act as a separate ongoing criminal conduct statute.”).

33. *Id.* at 348.

34. MODEL ONGOING CRIMINAL CONDUCT ACT § 3 (PRESIDENT’S COMM’N ON MODEL STATE DRUG LAWS 1993) (“The purposes of this [Act] are: (a) to defend legitimate commerce from criminal activity; (b) to provide economic disincentives for criminal activity; (c) to remedy the economic effects of criminal activity; and (d) to lessen the economic and political power of criminal networks in this state by providing to the people and to the victims of criminal activity new preventive measures through criminal sanctions and civil remedies.”); *see also id.* § 2(b) (“Individuals and groups associated together to conduct criminal activity pose an additional threat to the integrity of legitimate commerce by obtaining control of legitimate enterprises through criminal means, by force or fraud, and by manipulating those enterprises for criminal purposes.”).

35. *Id.* § 5. The four other categories of violations, in addition to specified unlawful activity, include facilitation of a criminal network, money laundering, acts of specified unlawful activity influenced enterprises, and negligent empowerment of specified unlawful activity. *Id.*

36. *Id.* § 4(e).

37. *Id.* § 4(e)(1)–(3), cmt.4.

of ongoing criminal conduct as the Model Act, largely replicating the categories of violations found in federal RICO and the Model Act.³⁸ However, a closer inquiry into the IOCCA's definition of "acts of specified unlawful activity" reveals a deviation in the IOCCA from the Model Act. This deviation creates a pernicious and unconducive law in conflict with the purposes of the federal RICO statute, the Model Act, and the IOCCA itself.

Although it adopted the Model Act, the Iowa Legislature altered the IOCCA's definition of "specified unlawful activity" in a consequential way.³⁹ Section 706A.1(5) of the IOCCA defines "[s]pecified unlawful activity" as "any act, including any preparatory or completed offense, committed for financial gain on a continuing basis, that is punishable as an indictable offense under the laws of the state in which it occurred and under the laws of this state."⁴⁰ This definition eliminates the Model Act's requirement that the crime involve racketeering and organized crime in its definition of "specified unlawful activity," thereby eliminating the Model Act's targeted approach to organized crime.⁴¹ Consequently, the IOCCA essentially allows prosecutors to charge any person with ongoing criminal conduct who: (1) has committed any two felonies (2) for financial gain (3) on a continuing basis.⁴² Ongoing criminal conduct is a Class B felony.⁴³ It carries a 25-year sentence and it is constitutional for the sentence to run consecutive to the underlying predicate offense's sentence.⁴⁴ Therefore, a conviction under the IOCCA adds substantial time to the sentence for a defendant's predicate offense.

38. The IOCCA makes it unlawful to: (1) knowingly participate in "[s]pecified unlawful activity influenced enterprises"; (2) knowingly facilitate a criminal network; (3) launder money; (4) commit "[a]cts of specified unlawful activity"; and (5) negligently empower "specified unlawful activity." IOWA CODE § 706A.2 (2015); *see also infra* Part II.A.

39. Iowa Ongoing Criminal Conduct Act, 1996 Iowa Acts 316 (codified as amended at IOWA CODE § 706A).

40. IOWA CODE § 706A.1(5).

41. *State v. Olsen*, 618 N.W.2d 346, 350 (Iowa 2000) ("Unlike the model code, the definition [of 'specified unlawful activity'] does not include any further limitation to racketeering offenses or offenses that represent the key components of ongoing criminal networks. Instead, the phrase 'specified unlawful activity' applies to any indictable offense, limited only to those offenses 'committed for financial gain on a continuing basis.'") (quoting IOWA CODE § 706A.1(5)).

42. *Id.* at 351 (finding that people can be charged with ongoing criminal conduct even though their activities are unrelated to the traditional concept of racketeering).

43. IOWA CODE § 706A.4.

44. *State v. Russell*, 216 N.W.2d 355, 356 (Iowa 1974).

C. STATE V. REED AND STATE V. OLSEN: A DYNAMIC DUO OF IOWA SUPREME COURT DECISIONS WITH DYNAMIC EFFECTS ON THE SCOPE OF IOWA'S ONGOING CRIMINAL CONDUCT ACT

On October 11, 2000, the Iowa Supreme Court decided *State v. Reed*⁴⁵ and *State v. Olsen*,⁴⁶ two momentous cases upholding and interpreting the IOCCA. In both cases, the court relied on the plain language of the IOCCA to uphold the broad reach of the statute. While these interpretations of the IOCCA are textually correct, the court implicitly noted that the IOCCA needed reform, commenting that the statute exceeded the reach and intent of the federal RICO statute and the Model Act.⁴⁷ First, in *State v. Reed*, the court upheld the defendant's conviction of "specified unlawful activity" under the IOCCA despite the fact that the statute does not list predicate offenses.⁴⁸ The conviction added 25 years to the district court's sentence of a term not to exceed 75 years for the defendant's predicate offense of intent to deliver.⁴⁹ In *Reed*, the defendant was convicted of multiple drug-related offenses, which served as the predicate offense for the charge of ongoing criminal conduct.⁵⁰ On appeal, the defendant argued that the failure of IOCCA section 706A.1(5)—the definition of "specified unlawful activity"—to list inclusive predicate offenses as the Model Act does made the Iowa statute unconstitutionally overbroad and vague.⁵¹ However, the court rejected this argument, stating that "the preparatory or completed offenses in section 706A.1(5) are still limited to those offenses committed for financial gain on a continuing basis and that are punishable as an indictable offense."⁵²

Additionally, the *Reed* court expressly adopted the federal interpretation of the "continuing basis" requirement in section 706A.1(5) of the IOCCA.⁵³

45. See generally *State v. Reed*, 618 N.W.2d 327 (Iowa 2000).

46. *Olsen*, 618 N.W.2d at 346.

47. *Id.* at 350 ("Although we use a model act for guidance in interpreting our statutes which are patterned after such an act, when our legislature has varied our statute from portions of a model act, the statute cannot be interpreted consistently with the model act in its entirety."); *Reed*, 618 N.W.2d at 333 ("It is true that the Model Act limits the 'preparatory or completed offenses'.... It is also true that section 706A.1(5) does not similarly limit 'preparatory or completed offenses.' We view this omission as legislative intent to make our statute more inclusive." (internal citation omitted)).

48. *Reed*, 618 N.W.2d at 332–35. Without a limitation on the types of predicate offenses that may be charged coextensively with the IOCCA, individuals may be charged under the IOCCA for criminal conduct that is wholly unrelated to racketeering or organized crime. See *infra* Part II.

49. *Reed*, 618 N.W.2d at 331.

50. *Id.* at 330–31.

51. *Id.* at 331.

52. *Id.* at 333.

53. *Id.* at 334–35. The Iowa Supreme Court adopted the United States Supreme Court's interpretation of federal RICO statute's "pattern of racketeering activity" phrase in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 239 (1989). *See Reed*, 618 N.W.2d at 335 ("Given the similarity between the underlying purposes of RICO and Iowa Code chapter 706A, we think the interpretation given to 'pattern of racketeering activity' by the United States Supreme Court in

Under this standard, there must be a relationship between at least two of the defendant's predicate acts and "the threat of continuing activity" that "combines to produce a pattern" to charge a defendant with a violation of the IOCCA.⁵⁴ Nevertheless, the time frame prosecutors must show to prove that predicate offenses are committed on a "continuing basis" is, like the code's definition of "specified unlawful activity," interpreted broadly.⁵⁵ The relationship between the predicate offenses can occur over a "closed-ended" or "open-ended" period of time.⁵⁶ A "closed-ended" time period is when several related predicate acts occur over a substantial time period.⁵⁷ An "open-ended" time period is demonstrated by "past conduct that by its nature projects into the future with a threat of repetition" so long as the activities occur within ten years of one another, thereby providing prosecutors with greater discretion in charging defendants with ongoing criminal conduct.⁵⁸

Second, in *State v. Olsen*, the Iowa Supreme Court acknowledged that a defendant does not have to be engaged in a criminal enterprise to be convicted of committing a "specified unlawful activity."⁵⁹ In *Olsen*, the court upheld the ongoing criminal conduct conviction of a defendant based on the predicate offense of theft by deception.⁶⁰ In doing so, the court rejected the defendant's argument that the IOCCA "was intended to apply to racketeering crimes only and there was no evidence presented by the State to show he was part of a criminal network or engaged in an illegal enterprise for financial gain within the contemplation of the statute."⁶¹

The *Olsen* court implicitly acknowledged the flaws of the IOCCA's definition of "specified unlawful activity,"⁶² stating the IOCCA's purpose is undoubtedly, "like the model act, to combat criminal networks and enterprises," based on the statute's framework and the fact that two of the three categories of violations within the statute targeted criminal networks and enterprises.⁶³ Nevertheless, the textually-bound court found that the lack

H.J. is a reasonable one for 'continuing basis' in section 706A.1(5). Applying that interpretation here, we conclude Reed's conduct falls squarely within the conduct targeted by the Iowa legislature.").

54. *Id.* at 334 (quoting *H.J. Inc.*, 492 U.S. at 239).

55. *Id.* at 333–34.

56. *Id.* at 333–35; *see also* 18 U.S.C. § 1961(1)–(5) (2012).

57. *Reed*, 618 N.W.2d at 333–35; *see also* 18 U.S.C. § 1961(1)–(5).

58. *Reed*, 618 N.W.2d at 333–35 (quoting *Midwest Heritage Bank, FSB v. Northway*, 576 N.W.2d 588, 591 (Iowa 1998)); *see also* 18 U.S.C. § 1961(1)–(5).

59. *State v. Olsen*, 618 N.W.2d 346, 351 (Iowa 2000) ("[T]he ongoing criminal conduct statute includes crimes committed 'for financial gain on a continuing basis' that are unrelated to the general notion of racketeering activity. This is derived from the clear language of the statute and it is not for us to search for a meaning more compatible with portions of the model act which the legislature did not adopt.").

60. *See generally id.*

61. *Id.*

62. *Id.*

63. *Id.* at 350.

of legislative findings or purpose,⁶⁴ in combination with the failure of the statute's plain language to limit "specified unlawful activity" violations to persons engaged in a criminal network or enterprise, required the court to interpret the statute with the broad reach created by its language.⁶⁵

Although the court's intent in *Reed* and *Olsen* was only to accurately interpret the IOCCA according to its plain language, the court's decisions to uphold the broad scope of the statute concomitantly established it as a dangerously useful charging tool for prosecutors at the defendant's expense.⁶⁶ Since the court's decisions in *Reed* and *Olsen*, prosecutors have been able to simultaneously charge defendants with ongoing criminal conduct through specified unlawful activity for a wide variety of acts typically not associated with racketeering or organized crime, such as the theft of two cars,⁶⁷ three burglaries in one morning,⁶⁸ or money laundering and theft from two of a defendant's insurance clients.⁶⁹ While the defendant who committed three burglaries in one morning had his conviction for ongoing criminal conduct reversed on appeal,⁷⁰ the Iowa Court of Appeals and Iowa Supreme Court typically uphold challenges to charges of ongoing criminal conduct based on "specific unlawful activity."⁷¹

64. *Id.* at 349 ("Our Iowa statute was enacted without the benefit of any stated legislative findings or purpose."); *see also id.* at 349 n.2 ("We recognize that the preamble to this act indicates Iowa's ongoing criminal conduct statute was enacted for the purpose of 'establishing economic and other penalties for certain criminal activity.'" (quoting 1996 Iowa Acts ch. 1133 (codified as amended at IOWA CODE § 706A (1997)))). Unlike Iowa, at least half of the states with their own RICO statutes have included some form of legislative purpose in their statutes, and many of these purpose statements are modeled after the *Statement of Findings and Purpose* found in the Organized Crime Control Act where RICO is located. SECTION OF ANTITRUST LAW, *supra* note 27, at 1–2.

65. *Olsen*, 618 N.W.2d at 351 ("We are obligated to ascertain the intent behind criminal statutes by examining what the legislature said, without speculation as to the probable intent beyond the words used in the statute.").

66. Throughout *Olsen*, the Iowa Supreme Court frequently reiterates its position that it is only to interpret the plain language of the statute, regardless of any other motives the Iowa Legislature had when it enacted the statute because it will not undermine policy decisions. *Id.* at 350–51; *see also State v. Reed*, 618 N.W.2d 327, 333 (Iowa 2000) (holding that the Iowa Legislature's omission of categories included in the Model Act demonstrates legislative intent to make Iowa's Ongoing Criminal Conduct Act more inclusive).

67. *Day v. State*, No. 12-1790, 2013 WL 2373264, at *2 (Iowa Ct. App. May 30, 2013).

68. *State v. Harrington*, No. 08-2030, 2010 WL 2925696, at *1 (Iowa Ct. App. July 28, 2010).

69. *State v. Frey*, No. 05-0287, 2006 WL 2872492, at *2 (Iowa Ct. App. Oct. 11, 2006).

70. *Harrington*, 2010 WL 2925696, at *3 (holding that there was insufficient evidence to show that the defendant's acts were committed on a continuing basis as required to convict him of ongoing criminal conduct).

71. *See, e.g., Day*, 2013 WL 2373264, at *2; *Frey*, 2006 WL 2872492, at *2; *State v. Davis*, No. 04-1976, 2005 WL 3115842, at *3 (Iowa Ct. App. Nov. 23, 2005) (upholding the ongoing criminal conduct conviction for a county treasurer convicted of forgery, felonious misconduct, and tampering with public records); *see also State v. Agee*, No. 02-0967, 2003 WL 22087479, at *2 (Iowa Ct. App. Sept. 10, 2003) (upholding a conviction for ongoing criminal conduct where the predicate offenses were five counts of forgery).

Many defendants have challenged convictions for ongoing criminal conduct under the IOCCA during its almost 20 years of existence. The Iowa Supreme Court has also recognized in *Olsen* and *Reed* that the statute's definition of "specified unlawful activity" is broader than that of the Model Act that it was meant to mirror.⁷² Despite the numerous challenges to the statute in its relatively short period of existence and the Iowa Supreme Court's disapproval of the statute because of its harsh penalties, the Iowa Legislature has yet to reform the statute's language to remedy the growing problems associated with its definition of "specified unlawful activity."⁷³ Until the Iowa Legislature constricts the scope of "specified unlawful activity" defined in the IOCCA, defendants will continue to suffer the harsh consequences of convictions under this statute, and Iowa courts will continue to encounter appeals challenging convictions of ongoing criminal conduct under the statute.

III. MORE CRIMINAL ACTS FOR FINANCIAL GAIN, MORE PROBLEMS

By expanding the definition of "specified unlawful activity" to include virtually any two felonies committed in succession so long as they are committed for "financial gain," the Iowa Legislature has provided Iowa prosecutors with a problematic charging tool. This charging tool results in a significant increase in plea deals, as defendants may look at the lengthy sentence increase associated with a conviction under the IOCCA and choose to plead guilty to lesser charges out of fear that the alternative is a conviction on all charges.⁷⁴ This Part explores the problems associated with the IOCCA. Part II.A presents statistics on the number of people convicted of ongoing criminal conduct in Iowa for each of the IOCCA's categorical violations. Part II.B examines the effectiveness of the statute in combating organized crime—the purpose of the Model Act, federal RICO legislation, and the IOCCA—by analyzing whether the Iowa cases on record charging a violation of "specified unlawful activity" under the statute have dealt with defendants whose predicate offenses were related to the general notion of racketeering.

72. *State v. Olsen*, 618 N.W.2d 346, 349 (Iowa 2000); *State v. Reed*, 618 N.W.2d 327, 333 (Iowa 2000).

73. *Olsen*, 618 N.W.2d at 351 ("We also realize harsh criminal penalties are associated with violations of the statute, which can be much more severe than the penalties associated with the underlying predicate offense. Yet, '[o]nce the legislature has spoken, [our] role is to give effect to the law as written,' not to rewrite it to reflect a policy different from that language." (footnote omitted)).

74. Gifford, *supra* note 7, at 48–49 ("Even if conviction on all charges is unlikely, the defendant who perceives some risk of conviction on all charges, and a virtual certainty of conviction on at least some charges, is unlikely to contest guilt. . . . [D]efendants often believe the cases against them are 'dead-bang' and are induced to plead by the overcharging."); *see also* Davis, *supra* note 7, at 408–09 ("The defendant certainly has the option of exercising her right to trial and leaving her fate in the hands of the jury or judge, but often she is not willing to run the risk of additional and more serious convictions and more prison time.").

A. A STATISTICAL ANALYSIS OF IOWA'S ONGOING CRIMINAL CONDUCT ACT

The number of convictions for “specified unlawful activity” per year exceeds the number of convictions for acts associated with enterprises and criminal networks on any given reported year, indicating that the statute is being abused rather than stopping crime. “Convictions include guilty pleas and verdicts, deferred judgements and deferred sentences.”⁷⁵ According to Iowa Department of Human Rights statistics, there are substantial differences between convictions for “specified unlawful activity” compared to convictions for facilitating a criminal network or participating in an enterprise. Convictions for facilitating a criminal network and participating in an enterprise have remained steady from January of 2004 through July of 2015, as demonstrated by Figure 1.

Figure 1. Annual Convictions of Ongoing Criminal Conduct for Enterprise Participation, Facilitation of a Criminal Network, and Specified Unlawful Activity from January 2004–July 2015.⁷⁶

| Year | 706A.2(1) Enterprise | 706A.2(2) Criminal Network | 706A.2(4) Specified Unlawful Activity |
|----------------|-------------------------|----------------------------------|---|
| 2004 | 3 | 1 | 11 |
| 2005 | 3 | 2 | 18 |
| 2006 | 5 | 0 | 18 |
| 2007 | 6 | 0 | 16 |
| 2008 | 3 | 1 | 25 |
| 2009 | 0 | 1 | 21 |
| 2010 | 1 | 2 | 15 |
| 2011 | 2 | 5 | 33 |
| 2012 | 3 | 6 | 20 |
| 2013 | 4 | 6 | 24 |
| 2014 | 1 | 2 | 25 |
| Jan.–July 2015 | 2 | 5 | 22 |

Despite the IOCCA’s purpose to combat organized crime,⁷⁷ there are fewer annual convictions stemming from participation in an enterprise or a criminal network than the convictions for ongoing criminal conduct for “specified unlawful activity”—the broad category of ongoing criminal conduct, under which almost any crime can be a predicate offense. The disproportionately high number of convictions for “specified unlawful

75. *Criminal Justice Data*, IOWA DEP’T HUM. RTS., <https://humanrights.iowa.gov/cjjp/justice-data-warehouse/criminal-justice-data> (last visited Oct. 23, 2016).

76. See *id.*; see also JUSTICE DATA WAREHOUSE, FY2013–FY2015 706A CONVICTIONS, <https://drive.google.com/file/d/oB34fbvq4t7s3eDYxaDF3OXRZNUU/view> (last visited Oct. 23, 2016).

77. *Olsen*, 618 N.W.2d at 350.

activity” compared to influence enterprises or criminal networks seemingly contradicts the purpose of the IOCCA to prevent and punish racketeering and organized crime. Punishing individual criminal conduct that is wholly unrelated to any form of group or organized crime—even if the individual’s crimes are ongoing—does nothing to hamper racketeering or organized crime.

The statistics reported by the Justice Data Warehouse on the charging differentials for the various categories of ongoing criminal conduct do not discuss whether individuals charged with ongoing criminal conduct for “specified unlawful activity” under the IOCCA were participating in racketeering or some form of organized crime. Consequently, some of the differential between the number of people charged under the “specified unlawful activity” category in comparison to the other categories may stem from prosecutors choosing to charge people associated with organized crime under the “specified unlawful activity” category because it is easier to simply show that a person committed at least two acts in succession for financial gain than it is to show that he was acting as part of a network or enterprise.⁷⁸ However, the cases in the next Part of this Note demonstrate that prosecutors have abused the “specified unlawful activity” category of the IOCCA to charge individuals whose crimes were unconnected to any form of racketeering or organized crime.

B. COMBATING ORGANIZED CRIME OR ABUSING THE “SPECIFIED UNLAWFUL ACTIVITY” CATEGORY OF THE IOCCA FOR PROSECUTORIAL GAIN?

An examination of cases involving convictions for ongoing criminal conduct of “specified unlawful activity” under the IOCCA, along with the statute’s conviction statistics as a whole, support the theory that the “specified unlawful activity” category is being abused. Throughout the IOCCA’s 20-year history, Iowa’s appellate courts have examined a number of cases in which a defendant technically met the requirements of ongoing criminal conduct for “specified unlawful activity,” yet had no actual connection to organized crime or a criminal network.⁷⁹ Even so, these charges have almost always been upheld due to the IOCCA’s lack of purpose statement or limitations on the types of crimes constituting “specified unlawful activity” that would narrow the IOCCA’s reach to racketeering and organized crime.⁸⁰

78. When reaching charging decisions, prosecutors may consider a number of factors, including whether the elements of the crime have been met and how strong the evidence is to support a conviction. *See* Davis, *supra* note 7, at 408–09.

79. *See* discussion *infra* Part III.B.1.

80. *See supra* Part II.B.

1. The Technical Fouls of the IOCCA's Broad Reach

Not only is *State v. Olsen* a momentous case in terms of interpreting the IOCCA's definition of "specified unlawful activity," but *Olsen* is also a prime example of a case in which the defendant technically met the statutory requirements of ongoing criminal conduct for "specified unlawful activity," yet was acting only for personal gain rather than as part of a criminal network⁸¹ or enterprise.⁸² In *Olsen*, the defendant and his girlfriend committed theft by deception by conning an elderly woman into paying the couple for home improvement work that they never performed.⁸³ The defendant argued that Iowa Code section 706A.2(4), which prohibits ongoing criminal conduct for "specified unlawful activity," is inapplicable to "financial gain that is merely personal to the offender, but applies only to financial gain which facilitates a criminal network" because another Iowa Code section already punishes offenders for ongoing theft against the same victim.⁸⁴ The Iowa Supreme Court rejected this argument and refused to consider the legislative intent—that the statute should apply only to criminal networks or enterprises—when this intention was not explicitly in the plain language of the statute.⁸⁵

Like in *Olsen*, the defendant in *Day v. State* was charged with ongoing criminal conduct for "specified unlawful activity" under the IOCCA after committing criminal acts for personal gain.⁸⁶ In *Day*, the defendant's predicate acts of ongoing criminal conduct were two charges of second-degree theft.⁸⁷ Charges were later filed against the defendant for assaulting a

81. A "criminal network" is defined as "any combination of persons engaging, for financial gain on a continuing basis, in conduct which is an indictable offense under the laws of this state regardless of whether such conduct is charged or indicted." IOWA CODE § 706A.1(1) (2015). A combination occurs under the statute when persons work together to further a network's activities or purposes, regardless of whether the persons "know each other's identity, membership in the network changes from time to time, or one or more members of the network stand in a wholesaler-retailer, service provider, or other arm's length relationship with others as to conduct in the furtherance of the financial goals of the network." *Id.*

82. An "enterprise" is defined as "any sole proprietorship, partnership, corporation, trust, or other legal entity, or any uncharted union, association, or group of persons associated in fact although not a legal entity, and includes unlawful as well as lawful enterprises." *Id.* § 706A.1(2). Nevertheless, "the enterprise must be an entity separate from the named defendant who . . . allegedly engag[ed] in [the] unlawful activity." *Midwest Heritage Bank, FSB v. Northway*, 576 N.W.2d 588, 590 (Iowa 1998) (quoting *Libertad v. Welch*, 53 F.3d 428, 442 (1st Cir. 1995)). While the Iowa Supreme Court in *Midwest Heritage* was interpreting federal RICO's definition of "enterprise," the Iowa Supreme Court acknowledged in *Reed* that the similarities between federal RICO's purpose and section 706A of the Iowa Code allowed the court to apply the federal interpretation of RICO definitions to section 706A of the Iowa Code's definitions. *State v. Reed*, 618 N.W.2d 327, 334–35 (Iowa 2000).

83. *State v. Olsen*, 618 N.W.2d 346, 347–48 (Iowa 2000).

84. *Id.* at 351.

85. *Id.* at 351–52.

86. *Day v. State*, No. 12-1790, 2013 WL 2373264, at *1 (Iowa Ct. App. May 30, 2013).

87. *Id.*

police officer, first-degree harassment, and fifth-degree criminal mischief, but the defendant entered into a plea deal in which he pleaded guilty to assaulting a police officer and ongoing criminal conduct for “specified unlawful activity.”⁸⁸

On appeal, the defendant argued he did not commit his crimes for “financial gain,” as required for ongoing criminal conduct, because he did not sell or piece out the parts of the first vehicle—he destroyed it after driving around in it.⁸⁹ The Iowa Court of Appeals rejected this argument and sustained his plea deal, holding that the first vehicle theft was for financial gain because “golf clubs worth \$4000, [an] iPod worth \$149, a bag of clothes, and a wallet with an ATM card” were never recovered from the vehicle.⁹⁰ The defendant acted alone in committing each of these crimes.⁹¹ This charge of ongoing criminal conduct contradicts the purpose of RICO and the Model Act—the IOCCA’s guiding acts—to combat racketeering, organized crime, and acts characteristic of a criminal network. Similarly, it violates the maxim that “a person cannot associate with one’s self” to constitute a criminal enterprise or network.⁹²

In yet another case involving theft, the Iowa Court of Appeals upheld a conviction of ongoing criminal conduct for “specified unlawful activity” in *State v. Frey*, in which the individual defendant—an insurance agent and financial consultant—laundered and stole money from two elderly clients.⁹³ In its decision, the Iowa Court of Appeals found that misappropriating money from two different people on a continuing basis for financial gain was enough to constitute ongoing criminal conduct for “specified unlawful activity,” even though the defendant only committed the predicate acts for personal gain, rather than to benefit a criminal enterprise or network.⁹⁴

While *Olsen*, *Day*, and *Frey* represent the normative standard in Iowa appellate court holdings on the issue of ongoing criminal conduct for “specified unlawful activity,” the Iowa Court of Appeals’ holding in *State v. Harrington* represents a unique, optimistic decision on the issue, as it overturned a defendant’s conviction of ongoing criminal conduct for

88. *Id.* at *1 & n.1.

89. *Id.* at *2. The defendant conceded his second act of theft was for financial gain. *Id.* However, even if the second act was for financial gain, the Iowa Code defines “specified unlawful activity” as acts to be “committed for financial gain on a continuing basis.” IOWA CODE § 706A.1(5) (2015). Thus, both acts must have been committed for financial gain in order for the defendant to be charged with ongoing criminal conduct. *Id.* Although the defendant pled guilty, his case was on appeal because he argued “his trial counsel was ineffective for failing to challenge the adequacy of his ongoing criminal conduct guilty plea in a motion in arrest of judgment.” *Day*, 2013 WL 2373264, at *1.

90. *Id.* at *2.

91. *Id.* at *1.

92. Midwest Heritage Bank, FSB. v. Northway, 576 N.W.2d 588, 590 (Iowa 1998).

93. *State v. Frey*, No. 05-0287, 2006 WL 2872492, at *2 (Iowa Ct. App. Oct. 11, 2006).

94. *Id.*

“specified unlawful activity.” In *Harrington*, the defendant was convicted of ongoing criminal conduct after he burglarized three homes in the same morning.⁹⁵ He argued on appeal that these acts did not amount to the requisite continuing basis of ongoing criminal conduct since they did not occur over an extended time period.⁹⁶ Meanwhile, the State argued that the defendant’s spurt of activity and background as a habitual offender with no form of employment made his activity a continual threat of ongoing criminal conduct.⁹⁷ The Iowa Court of Appeals held that “without more,” the evidence did not show that the defendant’s acts represented a continued threat of ongoing criminal conduct, so it reversed his conviction of ongoing criminal conduct.⁹⁸ However, it reversed the conviction because the predicate activity occurred over a short period of time, not because the defendant’s acts were not furthering a criminal network or enterprise based on the statute’s broad reach.⁹⁹

Because the purpose of RICO and the Model Act, which the IOCCA is meant to mirror, is to impede organized crime,

[i]t is a virtually universal maxim in state RICO case law that a defendant charged with associating with an enterprise to conduct or participate in a pattern of racketeering activity cannot constitute both the defendant and the enterprise. . . . [T]he state cannot prosecute a person under RICO for associating with himself.¹⁰⁰

However, that is essentially what the state of Iowa does when it prosecutes many of the individuals charged under the IOCCA for ongoing criminal conduct for “specified unlawful activity.” Overall, these cases depict how prosecutors can use and have used the IOCCA to reach a more expansive scope of criminal conduct than either the federal RICO or the Model Act, which the IOCCA was meant to mirror. However, these cases only represent part of the problem. Charges of ongoing criminal conduct for “specified unlawful activity” also can be instrumental in the plea bargaining process.

2. Plea Considerations on Ongoing Criminal Conduct for “Specified Unlawful Activity”

Prosecutorial “overcharging sets the stage for coercive pleas”¹⁰¹ by creating the potential for severe sentencing if the defendant is convicted at

95. State v. Harrington, No. 08-2030, 2010 WL 2925696, at *1 (Iowa Ct. App. July 28, 2010).

96. *Id.* at *2.

97. *Id.* at *3.

98. *Id.*

99. *Id.*

100. Reichelt, *supra* note 27, at 247.

101. H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 84 (2011).

trial. Defendants frequently feel that they have little power or choice but to accept a plea deal, regardless of their guilt.¹⁰² While the Iowa Court of Appeals overturned the defendant's conviction in *State v. Harrington*, Iowa appellate courts continue to uphold many challenges to convictions for ongoing criminal conduct for "specified unlawful activity."¹⁰³ Further, many charges of ongoing criminal conduct for "specified unlawful activity" under the IOCCA are likely never challenged because they may be stacked on to other charges, thereby resulting in a plea deal which precludes defendants from challenging the sentence or plea deal on appeal. Prosecutors' ability to add a Class B Felony charge—which carries a 25-year sentence—onto a wide array of criminal acts to induce a plea deal illustrates additional problems with the broad reach of the IOCCA's definition of "specified unlawful activity."

Often, the sentencing differential between a plea deal involving ongoing criminal conduct and the sentence that could be imposed on a defendant convicted at trial is so significant that few defendants risk going to trial, leaving many cases to be resolved at the plea deal stage.¹⁰⁴ As the United States Supreme Court observed in *Missouri v. Frye*, "[t]o a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it is the criminal justice system."¹⁰⁵ As a result of the dominant role of plea bargaining in the criminal justice system, the *Frye* Court noted:

[Defendants] who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes. This often results in individuals who accept a plea bargain receiving shorter sentences than other individuals who are less morally culpable but take a chance and go to trial.¹⁰⁶

In general, the greater the potential sentence, the riskier it is for defendants to agree to a trial because they face harsher punishments.¹⁰⁷ Thus, prosecutors have greater bargaining power to get defendants to accept guilty pleas when the defendants are facing lengthy sentences by going to trial,

102. See *id.*

103. See *supra* Part III.B.1.

104. See Gifford, *supra* note 7, at 60; see also John L. Kane, *Plea Bargaining and the Innocent: It's Up to Judges to Restore Balance*, MARSHALL PROJECT (Dec. 26, 2014, 1:05 PM), <http://www.themarshallproject.org/2014/12/26/plea-bargaining-and-the-innocent#.FbbSEvt1> ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the results of guilty pleas.").

105. Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)).

106. *Id.* (quoting Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1034 (2006)).

107. Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 728 (2005).

which may be why “prosecutors lobby for harsher sentences to enhance their position during plea negotiations.”¹⁰⁸ In fact, the Department of Justice has lobbied for harsher sentencing laws in a number of legislative acts to help prosecutors more easily obtain convictions, including the Child Abduction Prevention Act and the Child Obscenity and Pornography Protection Act of 2003, the federal cocaine sentencing policy, penalties for white collar crime, and drug mandatory minimums.¹⁰⁹ Helping prosecutors obtain their goals typically furthers legislators’ interests because elected legislators—like prosecutors—are concerned with the public’s interest in their outcomes, specifically the public’s interest in seeing criminal offenders punished for their crimes.¹¹⁰ Therefore, legislators may be willing to define crimes broadly because “[b]roadening criminal liability and raising nominal sentences make[s] prosecution cheaper,” “enhance[s] prosecutors’ ability to induce guilty pleas,” provides “a useful counter to prosecutors’ tendency to prosecute too little,” and gives the public the notion that prosecutors and legislators are working to prevent and punish crime.¹¹¹ In turn, the sentences for pleading guilty after being charged with violating a broad statute and being found guilty after a trial for violating that same broad statute may differ to the detriment of criminal defendants.

The contrast between the sentences in *State v. Harrington* and *Day v. State* provides one example of Iowa cases where the sentencing differential between a plea deal involving the IOCCA and the potential sentence that could result in trial is of substantial difference. When the defendant in *State v. Harrington* was convicted at trial for “eluding, theft in the first degree, theft in the second degree, and three counts of burglary in the second degree”—all as a habitual

108. *Id.* at 728.

109. *Id.* at 728 n.25 (“For example, the congressional record is full of examples of the Department of Justice requesting more stringent sentencing laws because it makes prosecutors’ jobs easier.” (citations omitted)); *see also, e.g., Child Abduction Prevention Act and the Child Obscenity and Pornography Protection Act of 2003: Hearings Before the Subcomm. on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary*, 108th Cong. 16–17 (2003) (statement of Daniel P. Collins, Associate Deputy Att’y Gen., Department of Justice) (requesting legislation that would limit downward departures); *Federal Cocaine Sentencing Policy: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 107th Cong. 16–33 (2002) (statement of Roscoe C. Howard, U.S. Attorney for the District of Columbia) (arguing against a reduction in the penalties for crack cocaine, in part because it would reduce incentives for defendants to cooperate with prosecutors); *Penalties for White Collar Crime: Hearings Before the Subcomm. on Crime and Drugs of the Senate Comm. on the Judiciary*, 107th Cong. 102 (2002) (statement of James B. Comey, Jr., U.S. Attorney, Southern District of New York) (asking for tougher white collar crime penalties); *Drug Mandatory Minimums: Are They Working?: Hearing Before the Subcomm. on Criminal Justice, Drug Policy, and Human Resources of the H. Comm. on Government Reform*, 106th Cong. 62 (2000) (statement of John Roth, Chief, Narcotic and Dangerous Drug Section, Criminal Division, Department of Justice) (arguing in favor of mandatory minimum drug laws because they “provide an indispensable tool for prosecutors” by creating an incentive for defendants to cooperate).

110. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 551–52 (2001).

111. *Id.*

offender—and ongoing criminal conduct, he was sentenced to a term of 115 consecutive years.¹¹² Meanwhile, the defendant in *Day v. State*, who was charged with two counts of second-degree theft, “assault on a police officer, first-degree harassment, and fifth-degree criminal mischief,”¹¹³ took a plea deal not to exceed 25 years imprisonment—a sentence of at least 90 fewer years than in *Harrington* for similar charges.¹¹⁴ Thus, in addition to the possible use of the IOCCA to prosecute cases in which an individual acts only for personal gain—as opposed to acting in an enterprise or criminal network—the statute also “provides a powerful plea bargaining weapon that may be subject to abuse.”¹¹⁵

The IOCCA is subject to abusive plea bargaining by prosecutors because the checks on this type of abuse through the grand jury and democratic systems are inadequate.¹¹⁶ First, “[i]f the technical requirements of a [state] RICO violation are met, the jury is not likely to consider whether a conviction falls within the underlying purpose of the statute.”¹¹⁷ Rather, grand juries typically decide in line with the prosecutor’s charging decisions, and the probable cause requirements for grand jury approval are so slight that the grand jury only throws out the weakest cases.¹¹⁸ Second, the myth that plea deals let guilty people off easy for their crimes and the “tough on crime” stance many in America take regarding criminals coincide, with little concern for fairness in the processes of prosecutorial charging and plea deal due

112. *State v. Harrington*, No. 08-2030, 2010 WL 2925696, at *1 (Iowa Ct. App. July 28, 2010).

113. *Day v. State*, No. 12-1790, 2013 WL 2373264, at *1 n.1 (Iowa Ct. App. May 30, 2013).

114. *Id.* at *1. While the defendants in *Harrington* and *Day* faced some different charges, the pervasive sentencing differential between a defendant who went to trial and received a 25-year sentence just for his conviction of ongoing criminal conduct—in addition to the 90-year sentence he received for his other crimes—and a defendant who pled guilty to ongoing criminal conduct and assaulting an officer in exchange for a total of 25 years imprisonment provides insight into the motivation for defendants to enter plea deals. Unfortunately, the sentencing differential is often most substantial between guilty pleas and trial sentences in cases with a high probability of acquittal. *See Gifford, supra* note 7, at 60. Consequently, “[p]rosecutors who desire convictions in cases where the evidence is weak will offer substantial bargaining concessions, making such offers difficult for defendants to refuse.” *Id.*

115. *See Russell D. Leblang, Controlling Prosecutorial Discretion Under State RICO*, 24 SUFFOLK U. L. REV. 79, 86–87 (1990) (“The major problem with adopting RICO at the state level is that it provides the prosecutor with extensive but unchecked discretion to seek potentially severe penalties and to label someone a racketeer in cases where the defendant is not part of any kind of organized crime.”).

116. In addition to the lack of accountability through the grand jury and the democratic process, judges have little influence on prosecutorial decisions. *See Gifford, supra* note 7, at 39–40 (“Except in extreme cases, courts review neither the types of pressures that the prosecutor brings upon the defendant to encourage him to plead guilty nor the substance of the plea bargain.” (footnotes omitted)).

117. *Leblang, supra* note 115, at 99.

118. *Gifford, supra* note 7, at 48.

process, since the victims of this misconduct are considered undesirable criminals in need of punishment.¹¹⁹

Finally, because there are few rules and checks governing charging decisions, stacking on a charge of ongoing criminal conduct to a defendant's other charges furthers the prosecutor's interests, whether the defendant accepts a plea deal or contests the charges in court.¹²⁰ Even if the defendant is not convicted of ongoing criminal conduct, the jury may still convict him of lesser offenses at trial.¹²¹ Consequently, the defendant has to consider the risk of being convicted of any or all of the offenses he is charged with before going to trial, which may induce him into signing a guilty plea to a lesser charge or predicate act.¹²² In the end, “[t]he right to reject the proposed plea bargain is largely chimerical. Fear of heavier sentence after trial . . . might lead defendants to accept virtually all plea agreements, thereby impairing, at least in a pragmatic sense, the voluntariness of the guilty plea.”¹²³ The problems examined in this Part can largely be rectified if the Iowa Legislature reforms the IOCCA to narrow the statute's broad reach, thereby diminishing the current level of prosecutorial discretion granted by the code that allows prosecutors to charge virtually any two criminal acts committed by a person within a pattern of time as ongoing criminal conduct for “specified unlawful activity.”

IV. THE IOWA LEGISLATURE SHOULD ADOPT A NEW STATE RICO STATUTE

The Iowa Legislature should adopt a new, narrower state RICO statute that criminalizes racketeering and organized crime—the criminal activity the IOCCA was originally meant to combat. Although the Iowa Legislature could

119. *Id.* at 41; see also Davis, *supra* note 7, at 464. While some believe that plea deals let criminals off easy by giving them the power to “choose” a potentially more lenient sentence offered in a plea deal, there really is frequently very little choice for defendants when deciding to take a plea deal. See *supra* Part II.B. Rather, plea deals only give the illusion that defendants are in control of their decisions to accept plea deals. On the popular Netflix original series *Orange Is the New Black*, a prison guard character referred to the fictional Litchfield Penitentiary’s implementation of a Women’s Advisory Council composed of prisoners to make them feel empowered and in control, stating that “[t]his isn’t about giving them power. This is about your mother telling you, you could take a bath before dinner or after. You were still gonna get wet but you thought you had a choice.” *Orange is the New Black: WAC Pack* (Tilted Productions & Lionsgate Television Broadcast July 11, 2013). Likewise, offering a plea deal after stacking the charges only makes defendants feel in control—either way, they are likely still going to be sentenced for at least one of the multiple crimes they are charged with, but they think they have a choice in their sentencing.

120. Gifford, *supra* note 7, at 48.

121. For example, the defendant in *Harrington* risked being convicted of six other charges in addition to his charge of ongoing criminal conduct for “specified unlawful activity” by going to trial. *State v. Harrington*, No. 08-2030, 2010 WL 2925696, at *1 (Iowa Ct. App. July 28, 2010).

122. See Gifford, *supra* note 7, at 48; see also Kozinski, *supra* note 4, at xi-xii.

123. Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 HARV. L. REV. 564, 579 (1977) (footnote omitted).

simply amend the IOCCA and adopt the Model Act's definition of "specified unlawful activity" to limit the statute's reach to acts of racketeering or acts characteristic of organized crime, the best way to reform the IOCCA is to select the most effective safeguards and narrow the statute's reach to its purpose of combating criminal networks and enterprises. This Part proposes steps to reform Iowa's state RICO statute and evaluates the potential effectiveness of these proposals.

A. STEP ONE: PROVIDE A STATEMENT OF PURPOSE

As the Iowa Supreme Court's opinions in *Reed* and *Olsen* demonstrate, including a statement of purpose or intent helps ensure that the court interprets the statute in line with this purpose, as opposed to the plain language of the statute as the Iowa Supreme Court was forced to do—especially when this plain language does not adequately reflect the statute's purpose.¹²⁴ Consequently, the first step the Iowa Legislature should take to reform the IOCCA is to include a statement of purpose. This statement should mention the legislative findings that motivated the Iowa Legislature to enact the statute in the first place so that the purpose for enacting the IOCCA can be found within the statute's plain language.¹²⁵ The statement need not be an in-depth report of legislative findings, so long as the findings at least provide the basic intent of the law. To illustrate, Wisconsin's state RICO statute provides legislative findings that state, "[t]he legislature finds that a severe problem is posed in this state by the increasing organization among certain criminal elements and the increasing extent to which criminal activities and funds acquired as a result of criminal activity are being directed to and against the legitimate economy of the state."¹²⁶ Iowa should incorporate a similar brief statement into its own state RICO statute, in addition to a statement explicitly providing that the intent of the statute is to target organized crime and remedy its effects rather than to prosecute an individual for isolated incidents of ongoing crime.¹²⁷

Including a statement of purpose would deter Iowa prosecutors from charging individuals like the defendant in *Olsen*—who committed theft by deception by conning one person into paying for home improvement work

^{124.} See *supra* Part II.C (describing the Iowa Legislature's lack of legislative purpose or findings in Iowa Code Section 706A that required the Iowa Supreme Court to interpret the statute according to plain language even though this language was likely broader than the Legislature intended).

^{125.} For example, Wisconsin's state RICO statute includes a statement of intent specifically indicating that the statute's purpose is to punish "organized criminal elements," as well as the legislature's findings enacting the statute. WIS. STAT. § 946.81 (2013–2014).

^{126.} *Id.*

^{127.} Wisconsin's RICO statute would serve as a good model for the new Iowa RICO statute. Wisconsin's statement of intent provides, "[i]t is not the intent of the legislature that isolated incidents of misdemeanor conduct be prosecuted under this act, but only an interrelated pattern of criminal activity[,] the motive or effect of which is to derive pecuniary gain." *Id.*

he never performed—with ongoing criminal conduct for “specified unlawful activity” when they have only committed crimes for personal financial gain rather than for the benefit of a criminal network or enterprise.¹²⁸ Additionally, such a statement would guide prosecutors on how to properly charge individuals with a violation of Iowa’s Ongoing Criminal Conduct Act. Similarly, it would guide the courts in making decisions involving the IOCCA. After all, the reason why the Iowa Supreme Court interpreted the IOCCA’s definition of “specified unlawful activity” so broadly in the first place was in part because the Iowa Legislature neglected to provide a statement of purpose for the court to examine in making its decision.¹²⁹

B. STEP TWO: REFORM THE DEFINITION OF “SPECIFIED UNLAWFUL ACTIVITY” TO EXPRESSLY STATE WHICH CRIMES OR CATEGORIES OF CRIMES CONSTITUTE ONGOING CRIMINAL CONDUCT FOR “SPECIFIED UNLAWFUL ACTIVITY”

The Iowa Legislature should narrow its definition of “specified unlawful activity” to activities that are typically associated with racketeering and organized crime. Currently, the only real limit on “specified unlawful activity” in the IOCCA is that the predicate “act[s], including any preparatory or completed offense, [be] committed for financial gain on a continuing basis.”¹³⁰ The Legislature can narrow the IOCCA’s definition of “specified unlawful activity” by specifically listing all crimes or categories of crimes that are typically associated with organized crime in its definition of “specified unlawful activity.”¹³¹

Limiting the definition of “specified unlawful activity” will not hinder the prosecution’s ability to prosecute individuals for crimes that should fall under the IOCCA, as these lists still provide prosecutors with enough flexibility to charge people for a variety of acts under the statute because they are fairly exhaustive. For example, Connecticut provides a list of 19 crimes or categories of crimes in its definition of “racketeering activity.”¹³² Similarly, Utah’s definition of “unlawful activity” includes 90 different crimes or categories of crimes.¹³³ While listing 90 different crimes in the definition of “unlawful activity” may seem like an invitation to abuse the statute, the Utah Pattern of

128. See *supra* Part II.B (discussing “specified unlawful activity” in the IOCCA).

129. See *supra* Part II.B.

130. IOWA CODE § 706A.1(5) (2015).

131. See, e.g., CONN. GEN. STAT. § 53-394(a)(1)-(19) (2015); UTAH CODE ANN. § 76-10-1602(4)(a)-(jjj) (LexisNexis 2012); WIS. STAT. § 946.82(4) (2013-2014).

132. CONN. GEN. STAT. § 53-394(a)(1)-(19). “Racketeering activity” means to commit, to attempt to commit, to conspire to commit, or to intentionally aid, solicit, coerce or intimidate another person to commit any crime which, at the time of its commission, was a felony chargeable by indictment or information under” the statutory provisions of various crimes, including homicide, extortion, assault, prostitution, burglary, larceny, forgery, firearms violations, coercion, bomb manufacturing, hazardous waste, money laundering, human trafficking, and drug crimes. *Id.*

133. UTAH CODE ANN. § 76-10-1602(4).

Unlawful Activity Act also limits each of its categorical violations to predicate acts that are associated with enterprise activity.¹³⁴ These limits allow law enforcement officers and prosecutors to focus more narrowly on using the state RICO statute to target organized crime.

Ultimately, the biggest flaw in the IOCCA is its definition of “specified unlawful activity” that allows prosecutors to charge individuals for acts that are not associated with organized crime.¹³⁵ Limiting the definition of “specified unlawful activity” would prevent prosecutors from charging people like the joy-riding defendant in *Day*, who committed theft and stole a car with valuable possessions in it, or the defendant in *Frey*, who laundered and stole money from two different people, from being charged with ongoing criminal conduct despite the lack of connection between their acts and organized crime.¹³⁶ Thus, narrowing this definition of “specified unlawful activity” by setting a range of crimes or categories of crimes would help limit prosecutors from abusing the statute and charging individuals for crimes committed solely for personal gain.¹³⁷

C. STEP THREE: REQUIRE PROSECUTORS TO ALLEGE AT LEAST TWO INTERRELATED ACTS OF “SPECIFIED UNLAWFUL ACTIVITY” ASSOCIATED WITH RACKETEERING OR ORGANIZED CRIME IN THEIR CHARGING INFORMATION

To alleviate concerns that listing crimes or categories of crimes that fall under “specified unlawful activity” does not go far enough to prevent prosecutors from abusing the IOCCA, the Iowa Legislature should insert a statutory provision requiring prosecutors to provide specific facts showing a pattern of racketeering or involvement with a criminal enterprise or network.¹³⁸ Because Iowa currently requires the predicate acts for ongoing criminal conduct to be committed on a “continuing basis,” prosecutors should be required to allege at least two interrelated incidents of such acts in order to charge an individual for ongoing criminal conduct for “specified unlawful activity.”¹³⁹

Overall, requiring prosecutors to allege a pattern of unlawful activity in their trial information, in combination with this Note’s other proposals

^{134.} *Id.* § 76-10-1603.

^{135.} See *supra* Parts II.B, III.B.2.

^{136.} See *supra* Part III.B.1.

^{137.} See Reichelt, *supra* note 27, at 265 (“The most effective method of restricting RICO’s scope while maintaining fidelity to the goals of the statute is to limit the types of criminal activity that count as predicate acts for the purpose of proving the pattern of racketeering activity requirement.” (footnote omitted)).

^{138.} Iowa should look to Connecticut’s Corrupt Organizations and Racketeering Activity Act for guidance on this, which requires, “[i]n any information charging a violation of this chapter, the state shall allege the existence of a pattern of racketeering activity based upon at least two incidents of racketeering activity, which shall be specified in such information.” CONN. GEN. STAT. § 53-396(a) (2015).

^{139.} IOWA CODE § 706A.1(5) (2015).

implementing a statement of purpose and a specific list of crimes or categories of crimes that constitute “specified unlawful activity,” will provide much needed safeguards on the use of the IOCCA. These proposals will narrow the inherent broadness of the IOCCA by explicitly limiting its reach to its original purpose, which was recognizably, “like the model act, to combat criminal networks and enterprises.”¹⁴⁰

V. CONCLUSION

The Iowa Supreme Court’s decisions in *Reed* and *Olsen*, as well as numerous other cases, demonstrate the troubling abuse of the IOCCA, Iowa’s state RICO statute proscribing ongoing criminal conduct. Due to the statute’s broad reach and the Iowa Supreme Court’s broad interpretation of the statute, prosecutors can charge an individual with ongoing criminal conduct—a Class B felony carrying a lengthy 25-year sentence—for virtually any two criminal acts committed in succession. Additionally, the IOCCA provides prosecutors with a powerful tool for coercing defendants into plea deals in order to avoid the intimidating, ongoing criminal conduct sentences.

Punishing individuals for criminal acts that are utterly unconnected to racketeering and organized crime serves no purpose in deterring systematic organized crime, thereby diminishing the effectiveness of the IOCCA in achieving its true purpose. Unfortunately, these problems will persist unless the Iowa Legislature reforms the IOCCA to constrict its broad reach. Therefore, the Iowa Legislature should adopt this Note’s proposals by providing a statement of purpose, listing the categories of crimes that constitute “specified unlawful activity” within the statute, and requiring prosecutors to provide specific information alleging at least two acts associated with racketeering or organized crime in their charging information.

¹⁴⁰ State v. Olsen, 618 N.W.2d 346, 350 (Iowa 2000).