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## DOES MOTIVE ALSO FOLLOW THE BULLET? TRANSFERRED INTENT AND VIOLENT CRIMES IN AID OF RACKETEERING

Melvin L. Otey

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# DOES MOTIVE ALSO FOLLOW THE BULLET? TRANSFERRED INTENT AND VIOLENT CRIMES IN AID OF RACKETEERING

MELVIN L. OTEY\*

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## INTRODUCTION

In order to further the aims of an organization dedicated to a campaign of urban terrorism on American soil, a gunman publicly assassinated a prominent spokesman whose rhetoric was decidedly antagonistic to his group's ideology. While fleeing, the gunman shot a bystander who tried to prevent him from leaving the hotel where the

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killing occurred, as well as a police officer who subsequently encountered him outside.<sup>1</sup> One does not have to complete the first year of law school to know that the shooter is potentially culpable for murdering the spokesman and attempting to murder both the bystander and the police officer because he shot the three victims and seemingly had the same intent—to kill—with respect to each one. But what of his motive? Can it rightly be said that he had the same motive in shooting each victim? The murder was impelled by a desire to advance or protect his organization's goals, but the assassin shot the bystander because he "got in the way" and the officer in order to avoid being taken into custody. Does it matter that he may have shot each victim for a different reason? In most cases, it does not matter at all, but sometimes it matters a great deal.

While some statutes prescribe enhanced sentences for violent actors who attack others for specific reasons,<sup>2</sup> the actor's motive does not define most crimes.<sup>3</sup> Although motive is an element of some common law crimes, like burglary,<sup>4</sup> and certain defenses, like self-defense and defense of others,<sup>5</sup> it has not been a primary concern of criminal law. Consequently, in most circumstances, the aforementioned gunman would be culpable for "murder" and "attempted murder," notwithstanding his particular reasons for acting, if he did not have a legal justification or excuse for the shootings. However, motive is an element of certain modern variations of quintessentially common law offenses, including statutes that outlaw violence committed for specific reasons like preventing witnesses from testifying at trial<sup>6</sup> or in exchange for payment.<sup>7</sup>

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1. This brief synopsis partially describes the murder of Rabbi Meir Kahane, a founder of the Jewish Defense League, at the Marriot East Side Hotel in New York on November 5, 1990. *See United States v. Rahman*, 189 F.3d 88, 104–05 (2d Cir. 1999).

2. *See, e.g.*, ALA. CODE § 13A-5-13 (2021) (concerning crimes motivated by victim's race, color, religion, national origin, ethnicity, or physical or mental disability); DEL. CODE ANN. tit. 11, § 1304 (West 2021) (concerning hate crimes); 720 ILL. COMP. STAT. 5/12-7.1 (West 2022) (same).

3. *See Hernandez v. McDowell*, No. CV 16-09578-VBF (JDE), 2017 U.S. Dist. LEXIS 213354, at \*25 (C.D. Cal. Nov. 17, 2017) (citing *People v. Maurer*, 38 Cal. Rptr. 2d 335, 337 (Ct. App. 1995)) ("In general, motive is not an element of a crime.").

4. *See, e.g.*, ALA. CODE § 13A-7-5 (2021) (concerning burglary).

5. *See, e.g.*, ALA. CODE § 13A-3-23 (2021) (concerning self-defense and defense of others).

6. *See, e.g.*, 18 U.S.C. § 1512 (2018) (concerning tampering with a witness, victim, or an informant); N.Y. PENAL LAW § 215.13 (Consol. 2022) (concerning tampering with a witness in the first degree); *see also* COLO. REV. STAT. ANN. § 18-9-121 (West 2021) (concerning bias-motivated crimes).

7. *See, e.g.*, CONN. GEN. STAT. ANN. § 53a-54b (West 2021) (concerning murder with special circumstances).

Prosecuting modern motive-based violent crimes can be relatively straightforward if the actor successfully attacks his intended target. A question arises, however, about the propriety of punishing an actor for violations of these motive-based statutes where the actor operating with a forbidden motive harms an unintended bystander. What if a woman tries to strike a man specifically because of his religion and accidentally strikes a woman whose religion is the same as her own? Would this battery qualify as a “hate crime” even though she did not strike the woman because of her religion?

The common law typically used variations of the transferred intent doctrine to ensure punishment of perpetrators who intended to harm specific people but unintentionally harmed others instead.<sup>8</sup> It did not transfer the perpetrator’s reasons for acting—as opposed to his basic intention to act—because the common law did not emphasize motive when defining crimes.<sup>9</sup> Judges and juries did not need to concern themselves with defendants’ motivating impulses for engaging in criminality. Does the common law doctrine of transferred intent, then, truly fill all of the gaps needed to justify punishing perpetrators who harm bystanders when attempting to commit modern crimes that require a specific motive?

While some might reflexively dismiss the notion that a bad actor who harms another might escape punishment under certain statutes, prosecuting and punishing wrongdoers the right way and for the right reasons is essential to American conceptions of justice and ordered liberty. Improper application of the transferred intent doctrine potentially reduces the government’s burden of proof for crimes that include an express motive element,<sup>10</sup> and this implicates the right of accused persons to due process of law under the Fifth and Fourteenth Amendments.<sup>11</sup> In some instances, there may be a substantial question about whether an accused person may be convicted and punished at all, but, in most cases, the appropriate question is whether transferred intent is the proper legal theory to employ in arriving at a decision to convict and punish.

This Article evaluates the propriety of transferring motive in the context of 18 U.S.C. § 1959, the “Violent Crimes in Aid of Racketeering

8. See *Poe v. State*, 671 A.2d 501, 503–04 (Md. 1996).

9. See *id.*

10. See, e.g., *Gov’t of V.I. v. Davis*, 561 F.3d 159, 169 (3d Cir. 2009) (“The transferred intent instruction here relieved the Government of its burden of proving beyond a reasonable doubt that [the defendant] had the specific intent to commit murder against each individual on whom the assault was committed.”).

11. *In re Winship*, 397 U.S. 357, 364 (1970) (“[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”).

Activity” statute (hereinafter “Section 1959” or “VICAR”).<sup>12</sup> It concludes that transferring motive is either unnecessary or untenable given the scope of the transferred intent doctrine. Section 1959 is a good context for examining the appropriateness of extending the traditional doctrine to envelop an actor’s animating drives in order to punish him specifically for motive-based crimes. VICAR convictions, particularly murder convictions, carry substantial sentences. In fact, the only sentencing options for VICAR murder are life imprisonment and death.<sup>13</sup> While violent crimes in aid of racketeering are serious offenses—and often merit substantial prison terms—the ramifications of this evaluation are far broader than the statute itself. All motive-based crimes, including those defined by recently enacted hate crime statutes, are necessarily implicated.

Part I of this Article demonstrates that the transferred intent legal fiction does not include transferring motive. Part II explains VICAR’s two *mens rea* requirements—one adopted from the predicate crime of violence and the other providing the nexus for federal jurisdiction. Part III evaluates the employment of the transferred motive in real and hypothetical scenarios. Finally, Part IV argues its inappropriateness for motive-based statutes like VICAR.

## I. THE TRANSFERRED INTENT LEGAL FICTION

Even though the mental element is a basic component of most criminal offenses,<sup>14</sup> the United States Supreme Court has

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12. Some courts refer to violations of Section 1959 as “VCAR” offenses. *See, e.g.*, *United States v. Delgado*, 972 F.3d 63, 66–67 (2d Cir. 2020); *United States v. Khalil*, 279 F.3d 358, 367 (6th Cir. 2002); *Wood v. United States*, No. 02-CR-0624-2-L; 02-CR-0625-2-L, 2018 U.S. Dist. LEXIS 87969, at \*2 (S.D. Cal. May 24, 2018); *United States v. Tisdale*, No. 07-10142-05-JTM, 2009 U.S. Dist. LEXIS 44052, at \*1 (D. Kan. May 20, 2009); *Alexander v. United States*, No. 1:01CV2378; (4:99CR0203), 2002 U.S. Dist. LEXIS 29606, at \*1 (N.D. Ohio Mar. 15, 2002); *United States v. Garcia*, 68 F. Supp. 2d 802, 805 (E.D. Mich. 1999). However, most courts refer to them as “VICAR” offenses. *See, e.g.*, *United States v. Bingham*, 653 F.3d 983, 986 (9th Cir. 2011); *United States v. Mahdi*, 598 F.3d 883, 887 (D.C. Cir. 2010); *United States v. Ayala*, 601 F.3d 256, 260–61 (4th Cir. 2010); *United States v. Marino*, 277 F.3d 11, 18 (1st Cir. 2002); *United States v. Merlino*, 310 F.3d 137, 140 (3d Cir. 2002); *United States v. Erbo*, No. 97 Cr. 1105 (LAP); No. 08 Civ. 2881 (LAP), 2020 U.S. Dist. LEXIS 216787, at \*2 (S.D.N.Y. Nov. 19, 2020); *United States v. Morales*, 881 F. Supp. 769, 770 (D. Conn. 1995). “VICAR” has historically been the preferred acronym within the Organized Crime and Gang Section, the section within the US Department of Justice tasked with oversight of prosecutions under Sections 1962 (RICO) and 1959 (VICAR).

13. 18 U.S.C. § 1959(a)(1) (2018).

14. *See Morissette v. United States*, 342 U.S. 246 (1952).

The contention that an injury can amount to a crime only when

acknowledged that “[f]ew areas of criminal law pose more difficulty than the proper definition of the *mens rea* required for any particular crime.”<sup>15</sup> While some aspects of the inquiries have become settled and routine over time, a relatively new application of the old transferred intent doctrine to modern statutes that proscribe specific motives illustrates the continuing complexities of defining *mens rea*.

### A. Transferred Intent Generally

Transferred intent is the age-old concept that, in order to avoid the dubious result of allowing a bumbling wrongdoer to go unpunished or under-punished,<sup>16</sup> it is permissible under certain circumstances to marry his *mens rea* for one crime or toward one victim with his *actus reus* for another crime or toward another victim and condemn him for the unintended harm or results as though they were intended.<sup>17</sup> The doctrine, broadly conceived, is principally invoked in two basic scenarios—(1) where an actor intends to physically harm one person, but fails to do so and accidentally harms another, or (2) where an actor has no intention of physically harming anyone but accidentally does so while engaging in some other criminal conduct. The first situation, “the classic case,”<sup>18</sup> is often referred to as the “bad aim” scenario.<sup>19</sup> In this circumstance, “when A aims at and shoots toward B but accidentally misses and hits C (an innocent bystander), A is just as guilty as if his aim had been precise.”<sup>20</sup> The actor’s basic criminal

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inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

*Id.* at 250.

15. United States v. Bailey, 444 U.S. 394, 403 (1980).

16. People v. Fernandez, 673 N.E.2d 910, 913 (N.Y. 1996); State v. Fennell, 531 S.E.2d 512, 517 (S.C. 2000); see also Peter Westen, *The Significance of Transferred Intent*, 7 CRIM. L. & PHIL. 321, 326 (2013).

17. See People v. Bland, 48 P.3d 1107, 1126 n.11 (Cal. 2002) (“English courts have applied the transferred intent doctrine to murder for over four centuries.”); Ford v. State, 625 A.2d 984, 998 (Md. 1993) (“Thus, transferred intent makes a whole crime out of two halves by joining the intent as to one victim with the harm caused to another victim.”); *disapproved of on other grounds*, Henry v. State, 19 A.3d 944 (Md. 2011).

18. Fennell, 531 S.E.2d at 515.

19. See, e.g., People v. Jackson, 472 P.3d 553, 559 (Colo. 2020) (“Traditionally, application of the transferred intent doctrine has been limited to bad-aim cases.”).

20. Jackson, 472 P.3d at 558; see also Voisine v. United States, 136 S. Ct. 2272, 2286 (2016) (Thomas, J., dissenting) (describing the transferred intent doctrine as an example “where a person acts in a violent and patently unjustified manner, the law will often impute that the actor intended to cause the injury resulting from his conduct,

objective—to kill a human being—remains the same, but the contemplated harm is inflicted upon an unintended victim.

The second scenario involves accidental homicides committed during the course of other crimes. While these events are typically labeled “felony murder” or “misdemeanor manslaughter,” criminal culpability under such circumstances is based on the same legal fiction as the first scenario.<sup>21</sup> As Wayne R. LaFave explains these theories,

Under the felony-murder rule, one may be guilty of murder if he causes the death of another in the course of committing a felony (or, at least, one of certain dangerous felonies); and, under the misdemeanor-

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even if he actually intended to direct his use of force elsewhere”); MODEL PENAL CODE § 2.03(2) (AM. L. INST. 2021).

21. See *Miller v. Alabama*, 567 U.S. 460, 491 (2012) (Breyer, J., concurring) (citations omitted)

The felony-murder doctrine traditionally attributes death caused in the course of a felony to all participants who intended to commit the felony, regardless of whether they killed or intended to kill. This rule has been based on the idea of ‘transferred intent’; the defendant’s intent to commit the felony satisfies the intent to kill required for murder.

*Id.*; *State v. Harrison*, 914 N.W.2d 178, 217 (Iowa 2018) (Appel, J., dissenting) (“The felony-murder rule has been justified under a theory of ‘transferred intent,’ namely, that the mens rea required for murder is provided by imputing the mens rea from the defendant’s felonious act.”); *State v. Robinson*, 883 P.2d 764, 767–68 (Kan. 1994) (“Felony murder in Kansas depends upon transferred intent to supply the malice, deliberation, and premeditation elements.”); *People v. Hernandez*, 624 N.E.2d 661, 665 (N.Y. 1993)

The basic tenet of felony murder liability is that the *mens rea* of the underlying felony is imputed to the participant responsible for the killing. By operation of that legal fiction, the transferred intent allows the law to characterize a homicide, though unintended and not in the common design of the felons, as an intentional killing.

*Id.*; Nancy Ehrenreich, *Attempt, Merger, and Transferred Intent*, 82 BROOK. L. REV. 49, 60–61 (2016) (arguing that transferring intent, whether between crimes or between victims, conflicts with modern *mens rea* principles); Gerald S. Reamey, *The Growing Role of Fortuity in Texas Criminal Law*, 47 S. TEX. L. REV. 59, 71 (2005) (“Transferred intent, as applied to felony-murder, would borrow the general intent to commit the felony and use it to supply the intent required for murder.”). *But see* 2 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 6.3(d) (3d ed. 2021) (averring without explication that felony murder and misdemeanor manslaughter “are not based upon notions of ‘transferred intent,’ but rather stem from certain peculiarities in the law of homicide”).

manslaughter rule, one may be guilty of involuntary manslaughter if he causes the death of another while committing a *malum in se* type of misdemeanor.<sup>22</sup>

In these instances, instead of imputing the actor's aim of harming one person to another, the design to commit a dangerous crime is exchanged for a design to commit a criminal homicide.<sup>23</sup> Courts and scholars generally use the term "transferred intent" when the requisite mental state toward one victim is imputed to another for the same contemplated harm,<sup>24</sup> and they usually utilize the terms "felony murder" or "misdemeanor manslaughter" when the requisite transfer is from non-homicide crime to a homicide crime.

While the transferred intent doctrine is often applied in cases involving homicides, it "is not limited to homicide cases."<sup>25</sup> Consequently, a defendant who intentionally sets fire to the weeds on a vacant lot is criminally liable for malicious damage to property when the fire accidentally spreads to and damages a nearby apartment

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22. LAFAVE, *supra* note 21.

23. See *State v. Seba*, 380 P.3d 209, 219 (Kan. 2016) ("Felony murder . . . transfers the intent to commit an inherently dangerous felony to an unintended death that occurs during the commission of the underlying felony. It is felonious intent; rather than homicidal intent, that provides the malice and intent required for a first-degree felony-murder conviction."); *Commonwealth v. Matchett*, 436 N.E.2d 400, 407 (Mass. 1982)

To make out a case of murder, the prosecutor need only establish that the defendant committed a homicide while engaged in the commission of a felony. The effect of the felony-murder rule is to substitute the intent to commit the underlying felony for the malice aforethought required for murder. Thus, the rule is one of "constructive malice."

*Id.* (quoting *Commonwealth v. Watkins*, 379 N.E.2d 1040 (1978)); 2 JENS DAVID OHLIN, *WHARTON'S CRIMINAL LAW* § 21:9 (16th ed. 2021)

In the typical case of felony-murder, there is no malice in "fact" with respect to the homicide; the malice is supplied by the "law." There is an intended felony and an unintended homicide. The malice which plays a part in the commission of the felony is transferred by the law to the homicide. As a result of the fictional transfer, the homicide is deemed committed with malice; and a homicide with malice is, by definition, common-law murder.

*Id.*

24. LAFAVE, *supra* note 21 ("[W]hat has sometimes been referred to as 'transferred intent' is applicable only within the limits of the same crime . . .").

25. *State v. Doe*, 172 P.3d 1094, 1096 (Idaho 2007).



complex.<sup>26</sup> Whatever the particular context, assigning criminal liability based on this “artificially constructed kind of intent”<sup>27</sup> involves an obvious legal fiction<sup>28</sup>—it inherently acknowledges that, as a matter of fact, an actor’s *mens rea* and *actus reus* do not concur as is traditionally and typically required to establish criminal liability.<sup>29</sup>

While transferred intent has deep roots and its continuing vitality is generally justifiable on policy grounds,<sup>30</sup> it is important to remember that the doctrine is a legal fiction and, even within its traditional scope, has drawn considerable criticism from courts and legal scholars.<sup>31</sup> Consequently, courts should be wary of expanding its

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26. *See id.*

27. *Miller v. Alabama*, 567 U.S. 460, 491 (2012) (Breyer, J., concurring).

28. *See People v. Jackson*, 472 P.3d 553, 558 (Colo. 2020) (“The disciples of the transferred intent doctrine are nevertheless willing to pretend otherwise under the purely fictional notion that A’s intent to kill may somehow magically be transferred from B to C.”); Douglas N. Husak, *Transferred Intent*, 10 NOTRE DAME J.L. ETHICS & PUB. POL’Y 65, 86 (1996) (“Thus I reach the same conclusion that many commentators have taken for granted without argument: the doctrine of transferred intent is indeed a legal fiction.”).

29. *Morissette v. United States*, 342 U.S. 246, 251–52 (1952) (observing that, under English common law, “[c]rime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil”); *State v. Trombley*, 807 A.2d 400, 403 (Vt. 2002) (“Criminal liability is normally based upon the concurrence of two factors: ‘an evil-meaning mind’ and ‘an evil-doing hand.’” (quoting *Morissette*, 342 U.S. at 251)); *People v. Torres*, 848 P.2d 911, 914 (Colo. 1993) (en banc) (“Generally, in order to subject a person to criminal liability, there must be a concurrence of the *actus reus*, an unlawful act, and the *mens rea*, a culpable mental state.”); *Garnett v. State*, 632 A.2d 797, 800 (Md. 1993) (“At common law, a crime occurred only upon the concurrence of an individual’s act and his guilty state of mind.”); Elaine T. Devoe, *Criminal Law—The Use of Transferred Intent in Attempted Murder, a Specific Intent Crime*: *State v. Gillette*, 17 N.M. L. REV. 189, 194 (1987) (arguing that the court’s application of transferred intent to attempted murder of unintended victims was an admission that the defendant lacked the specific intent to kill them).

30. *See People v. Scott*, 927 P.2d 288, 291 (Cal. 1996) (“[T]he accused is deemed as culpable, and society is harmed as much, as if the defendant had accomplished what he had initially intended, and justice is achieved by punishing the defendant for a crime of the same seriousness as the one he tried to commit against his intended victim.”); *State v. Fennell*, 531 S.E.2d 512, 517 (S.C. 2000) (“When a defendant contemplates or designs the death of another, the purpose of deterrence is better served by holding that defendant responsible for the knowing or purposeful murder of the unintended as well as the intended victim.” (quoting *State v. Worlock*, 569 A.2d 1314, 1325 (N.J. 1990))).

31. One court has noted:

The rule has been severely criticized over the years due to the harsh

application beyond traditional limits. One relatively recent expansion involves imputing an actor's motive to commit a crime along with his basic intention to do so.

### *B. Distinguishing Intent and Motive*

The doctrine of transferred intent is often summarized with the phrase "intent follows the bullet."<sup>32</sup> This does not necessarily mean that motive also follows the bullet. While intent and motive are closely related, and the terms are sometimes used interchangeably, they are not, strictly speaking, coterminous.<sup>33</sup> While many scholars have sought to elucidate the distinction at great length, it is, at first glance at least, simple enough. As Professor Walter Harrison Hitchler explained,

In reality, motive is a species of intent. A wrongful act is seldom desired for its own sake. The wrongdoer has in view some ulterior object which he desires to attain

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outcome that results from employing the legal fiction of constructive malice, instead of proof of one of the other mental states normally required for a conviction of murder in the first degree, regardless of whether a death occurring during the commission of the felony was intentional, unintentional, or accidental.

Commonwealth v. Gunter, 692 N.E.2d 515, 525 (Mass. 1998).

And one scholar has commented that:

The doctrine of transferred intent—or "transferred malice" in England—perplexes commentators and courts alike. Commentators uniformly disparage it as a legal fiction, deriding it as "theoretically incoherent," "overly harsh," "arbitrarily abstract," an "unexplained mystery," "an historical aberration," "an arbitrary exception to normal principles" having "no place in criminal law," an "arrant, bare-faced fiction of the kind dear to the heart of the medieval pleader," and "something of a freak."

Westen, *supra* note 16, at 322; *see also, e.g.*, David J. Karp, *Causation in the Model Penal Code*, 78 COLUM. L. REV. 1249, 1267–72 (1978) (arguing that the transferred-intent doctrine should "be a rebuttable presumption of aggravated recklessness with respect to the death of the actual victim if it occurs while the offender is attempting to murder someone else").

32. OHLIN, *supra* note 23, § 21:8; *see, e.g.*, State v. Seba, 380 P.3d 209, 217 (Kan. 2016); Carpio v. State, 199 P. 1012, 1013 (N.M. 1921); State v. Wynn, 180 S.E.2d 135, 139 (N.C. 1971).

33. *See* People v. Cash, 50 P.3d 332, 353 (Cal. 2002) (stating that "motive is the 'reason a person chooses to commit a crime,' but it is not equivalent to the 'mental state such as intent' required to commit the crime" (quoting People v. Hillhouse, 40 P.3d 754, 777 (Cal. 2002))).

by means of it . . . His *intent*, therefore, is twofold, and is divisible into two distinct portions, which we may distinguish as his *immediate* and his *ulterior intent*. The former relates to the wrongful act itself; the latter is that which passes beyond the wrongful act, and relates to the object or series of objects for the sake of which the act is done. The *ulterior intent* is called the *motive of the act*.<sup>34</sup>

Intent, then, involves a person's mental state relative to his action, while *motive*—sometimes referred to as *ulterior intent*—relates to the purpose that impels the action.<sup>35</sup>

Potential confusion between the degree of intersection between intent and motive is exacerbated by the broad usage of the word "intent" under the common law, which distinguished between general and specific intent. The former refers to one's mental state in committing a volitional act, while the latter refers to one's mental state in seeking to bring about a result beyond the volitional act. The distinction between general and specific intent can be ambiguous and confusing,<sup>36</sup> and *motive* is a particular species of the latter category. For instance, a person might intentionally participate in an illegal poker game with the motive to secure evidence against the operation's organizers and other participants.<sup>37</sup> Similarly, a premeditated killing might be intentional murder, but "[t]he motive to murder might be to rid the community of a bad man . . ."<sup>38</sup> Intent and motive, then, are related terms, but they are not synonymous—*motive* is a narrower concept.

Most criminal offenses have an intent element, but a few also

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34. Walter Harrison Hitchler, *Motive as an Essential Element of Crime*, 35 DICK. L. REV. 105, 108 (1931).

35. Carissa Byrne Hessick, *Motive's Role in Criminal Punishment*, 80 S. CAL. L. REV. 89, 94–95 (2006) ("In its most basic legal form, an intention is an actor's state of mind toward her illegal action: whether she performed the act purposefully, knowingly, or recklessly. These states of mind are commonly referred to as *mens rea*. By contrast, a defendant's motives are her *reasons for acting*."); Jeffrey G. Sherman, *Mercy Killing and the Right to Inherit*, 61 U. CIN. L. REV. 803, 815 n.52 (1993) ("Perhaps the most appealing qualitative formulation of the difference between intent and motive is that intent is a purpose to commit an act, while motive is the actor's purpose in committing it.")

36. See, e.g., *United States v. Bailey*, 444 U.S. 394, 403 (1980) ("At common law, crimes generally were classified as requiring either 'general intent' or 'specific intent.' This venerable distinction, however, has been the source of a good deal of confusion."); *United States v. Hall*, 281 F. App'x 809, 814 (10th Cir. 2008) (observing that "the terms *specific intent* and *general intent* are ambiguous and their use is often confusing").

37. *State v. Torphy*, 78 Mo. App. 206, 209 (1899) (Ellison, J., dissenting).

38. *Id.*

include motive as an essential element. For instance, “[a]t common law, burglary was confined to unlawful breaking and entering a dwelling at night *with the intent to commit a felony*.”<sup>39</sup> The crime had two essential *mens rea* requirements. First, the perpetrator had to generally intend to break and enter the dwelling; the manner and fact of entry had to be volitional and not accidental. Second, he had to specifically intend to commit a felony inside the dwelling. The latter requirement is, more precisely, a motive requirement. If the breaking and entry are not impelled by the actor’s desire to commit a felony inside the dwelling, then the actor, while potentially culpable for a crime like trespassing or breaking and entering, has not satisfied the common law elements of burglary. Today, certain statutory crimes—like racially motivated violence in violation of 18 U.S.C. § 245(b)(2)(B) and violent crimes in aid of racketeering in violation of 18 U.S.C. § 1959—are similar to burglary in that they prescribe punishment only where a specific nefarious motive provokes a person’s intentional act.

In light of the distinction between intent and motive, it is important to note that the traditional transferred intent legal fiction imputes an actor’s intention to act rather than his motive for doing so. For instance, attempt crimes are contingent upon their animating motives.<sup>40</sup> As Hitchler explains, “Every attempt is an act done with *intent to commit a particular act*. The existence of this ulterior intent or motive is the essence of the attempt.”<sup>41</sup> It is notable, then, that most jurisdictions embrace transferred intent theories for murder, but “[a] number of jurisdictions have rejected the doctrine of transferred intent in relation to the crime of attempted murder of the unintended victim.”<sup>42</sup> In jurisdictions declining to extend the doctrine to attempts, the immediate intent to apply force or a toxic substance is transferable from the target to unintended victims, but the motive—which Hitchler calls the ulterior intent—is not.<sup>43</sup>

Properly understood, then, transferred intent typically involves assigning the immediate intent to harm one person to another in order to complete the legal fiction of merging a *mens rea* with a non-concurring *actus reus*. In the case of felony murder or misdemeanor manslaughter, it involves making one whole crime by marrying two half-crimes—the death of an unintended victim with the intention to commit a non-homicide offense. Transferring motive, though,

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39. *Quarles v. United States*, 139 S. Ct. 1872, 1876 (2019) (emphasis added).

40. Hitchler, *supra* note 34, at 113.

41. *Id.*

42. *Bell v. State*, 768 So. 2d 22, 28 (Fla. Dist. Ct. App. 2000) (collecting cases rejecting “the doctrine of transferred intent in relation to the crime of attempted murder of the unintended victim”); *see, e.g.*, *People v. Bland*, 48 P.3d 1107, 1116 (Cal. 2002) (stating that “transferred intent does not apply to attempted murder”).

43. *See Bell*, 768 So. 2d at 28.

compounds the legal fiction and amplifies the frictions inherent in the traditional doctrine by pretending that the actor possesses two things, rather than only one, that she does not actually possess—(1) the intent to bring about a harm or result to the actual victim, and (2) a particular motive for causing the harm or result.

## II. VICAR'S ALTERNATIVE MOTIVES ELEMENT

Section 1959, a companion to the well-known “RICO” statute,<sup>44</sup> is a violent crime statute that includes a motive requirement. Whereas RICO is “a veritable broad sword,”<sup>45</sup> capable of cutting down members and associates of criminal organizations at all levels and for a wide swath of offenses, Section 1959 is a rapier intended only for those who commit specified violent crimes—murder, kidnapping, maiming, assaults with a dangerous weapon, assaults resulting in serious bodily injury, attempts or conspiracies to do any of the foregoing, and threats to commit a crime of violence—on behalf of such enterprises.<sup>46</sup> The underlying crimes must be “in violation of the laws of any State or the United States,”<sup>47</sup> so the *mens rea* requirements for these predicate crimes, along with their other elements, are incorporated into the corresponding VICAR offenses.<sup>48</sup>

In VICAR prosecutions with state crime predicates, in particular, federal charges potentially transform quintessentially local crimes into federal racketeering offenses.<sup>49</sup> Federal jurisdiction and

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44. “RICO” is the common acronym for the Racketeer Influenced and Corrupt Organizations Act. 18 U.S.C. §§ 1961–1968 (1982 & Supp. IV 1986).

45. Melvin L. Otey, *Why RICO's Extraterritorial Reach Is Properly Coextensive with the Reach of Its Predicates*, 14 J. INT'L BUS. & L. 33, 34 (2015).

46. 18 U.S.C. § 1959(a) (2018).

47. *Id.*

48. See *United States v. Deleon*, No. CR 15-4268 JB, 2020 U.S. Dist. LEXIS 9688, at \*454 (D.N.M. Jan. 21, 2020) (“Although an indictment need allege only that the defendant’s conduct violates a generic definition of a violent crime under federal or state law, the United States must, at trial, prove all elements of the violent crime under federal or state law.”). A second federal district court makes a similar point:

[A] plain reading of [Section 1959] indicates that an element of a substantive VICAR offense, when the predicate crime of violence is identified as a state-law offense, is that the defendant committed the violent act in violation of the laws of that State. Put differently, if the alleged crime of violence did not violate the elements of a state law, it cannot form the basis for a VICAR charge.

*United States v. Barbeito*, No. 2:09-cr-00222, 2010 U.S. Dist. LEXIS 55688, at \*73 (S.D. W. Va. June 3, 2010).

49. *Cf. United States v. Toki*, 822 F. App’x 848, 851 (10th Cir. 2020) (“Petitioners

prosecution are only justified, then, by a violent act's nexus to an "enterprise"—a legal entity or association of individuals engaged in or affecting interstate commerce.<sup>50</sup> One's associations do not necessarily compound harms or justify federal prosecution.<sup>51</sup> However, this nexus alone prevents Section 1959 from effectively creating status offenses where some actors are subject to the rigors of federal enforcement and punishment because of unpopular or unsavory associations while others are exempted.<sup>52</sup>

The enterprise nexus—the relationship justifying federal intervention for otherwise intrastate crimes—is satisfied by VICAR's second *mens rea* element, which is an explicit motive requirement.<sup>53</sup>

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were charged under VICAR, which makes it a federal crime to commit certain state crimes in aid of racketeering."); *United States v. Jones*, 566 F.3d 353, 363 (3d Cir. 2009) ("[T]he statutory language of VICAR is broad, in that it covers violent crimes that might otherwise be prosecuted by local authorities.").

50. 18 U.S.C. § 1959. The Second Circuit elaborated:

Section 1959 incorporates a jurisdictional element requiring a nexus between the offense in question and interstate commerce. Specifically, § 1959 prohibits the commission of a violent crime "as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity," and defines "enterprise" as an entity which is "engaged in, or the activities of which affect, interstate or foreign commerce."

*United States v. Torres*, 129 F.3d 710, 717 (2d Cir. 1997) (quoting 18 U.S.C. § 1959(a)-(b)(1)); *see also United States v. Vasquez*, 267 F.3d 79, 87 (2d Cir. 2001) ("Effect on interstate or foreign commerce is the jurisdictional element of a [VICAR] offense; therefore, the government is required to provide evidence of such an effect.").

51. *See United States v. Saavedra*, 223 F.3d 85, 92 (2d Cir. 2000) ("Section 1959 does not proscribe *being* a member of the Latin Kings; it proscribes criminal conduct committed *in furtherance* of that position."); *United States v. Roye*, No. 3:15cr29 (JBA), 2017 U.S. Dist. LEXIS 137241, at \*9 (D. Conn. Aug. 25, 2017).

52. *See United States v. Banks*, 514 F.3d 959, 968 (9th Cir. 2008); *see also United States v. Ledbetter*, 929 F.3d 338, 358 (6th Cir. 2019) ("It is not enough that [defendant] committed a violent crime while a member of a violent gang."); *United States v. Hackett*, 762 F.3d 493, 500 (6th Cir. 2014) (quoting *Banks*, 514 F.3d at 968) ("VICAR does not extend to any violent behavior by a gang member under the presumption that such individuals are always motivated, at least in part, by their desire to maintain their status within the gang[.] Otherwise, in gang cases, the purpose element would be nearly a tautology." (alteration in original)).

53. *See United States v. Umaña*, 750 F.3d 320, 336 (4th Cir. 2014) (concluding that "Congress could rationally have concluded that intrastate acts of violence, such as murder, committed for the purpose of maintaining or increasing one's status in an interstate racketeering enterprise, would substantially affect the interstate activities of that enterprise"). The *Banks* court determined that:

The statute provides two alternative theories for establishing the requisite connection. The alleged violent crimes must be committed either (1) as consideration for the actual receipt of a promise to pay or an "agreement to pay[] anything of pecuniary value from an enterprise engaged in racketeering activity," or (2) "for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity."<sup>54</sup> The former category essentially describes violence perpetrated for hire on behalf of a racketeering enterprise, and the latter has to do with protecting and promoting membership in such an organization. "Thus, on its face, [S]ection 1959 encompasses violent crimes intended to *preserve* the defendant's position in the enterprise *or to enhance* his reputation and wealth within that enterprise."<sup>55</sup> Violent actors may be official members of the group, and oftentimes they are, but formal membership is not required; these theories potentially encompass independent contractors and other enterprise associates.<sup>56</sup>

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Murder *while* a gang member is not necessarily a murder *for the purpose* of maintaining or increasing position in a gang, even if it would have the effect of maintaining or increasing position in a gang. By limiting the statute's scope to those cases in which the jury finds that one of the defendant's general purposes or dominant purposes was to enhance his status or that the violent act was committed 'as an integral aspect' of gang membership, we ensure that the statute is given its full scope, without allowing it to be used to turn every criminal act by a gang member into a federal crime.

*Banks*, 514 F.3d at 969–70; *United States v. Santiago*, 207 F. Supp. 2d 129, 142 (S.D.N.Y. 2002) ("Section 1959 makes it a federal crime for a person to commit violent crimes in aid of racketeering, and the statute contains a motive requirement.").

54. 18 U.S.C. § 1959(a). As the Ninth Circuit determined:

The [VICAR] statute clearly contemplates two alternative theories of motive for the commission of VICAR offenses: either the defendant received something of pecuniary value from the racketeering enterprise to commit the crime ("quid pro quo crime" or "murder for hire"); or the crime was committed to achieve, maintain[,] or increase the defendant's status in the enterprise ("status crime").

*United States v. Fernandez*, 388 F.3d 1199, 1232 (9th Cir. 2004).

55. *United States v. Dhinsa*, 243 F.3d 635, 671 (2d Cir. 2001).

56. See *Ledbetter*, 929 F.3d at 360 ("Section 1959(a) is not limited to enterprise members. On the contrary, the pecuniary-gain prong paradigmatically covers actions by so-called independent contractors who perform violent crimes for or alongside an enterprise for profit."); *United States v. Rolett*, 151 F.3d 787, 790 (8th Cir. 1998); *United States v. Concepcion*, 983 F.2d 369, 384 (2d Cir. 1992) (observing that "§ 1959 as a whole is sufficiently inclusive to encompass the actions of a so-called independent

### A. VICAR's Pecuniary Motive Alternative

First, Section 1959 proscribes criminal acts of violence committed “as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity.”<sup>57</sup> This is an obvious motive requirement rather than a basic intent element like those associated with murder and assault.<sup>58</sup> A defendant must be impelled by payment or the prospect of payment from an enterprise engaged in racketeering activity.<sup>59</sup> The two “as consideration for” clauses have the traditional sense of a bargained-for exchange.<sup>60</sup> They contemplate a *quid pro quo* agreement between the hiring and hired parties akin to the arrangement in a contract killing.<sup>61</sup> The first clause involves prepayment for an ensuing act of violence, and the second contemplates a future payment.<sup>62</sup> In either case, “there must be evidence that the hitmen clearly understood they would receive something of pecuniary value in exchange for performing the solicited murderous [or otherwise proscribed violent] act.”<sup>63</sup>

According to the Second Circuit Court of Appeals, “[t]he scope of a pecuniary motive is fairly self-explanatory.”<sup>64</sup> The language in VICAR parallels the *mens rea* provision in 18 U.S.C. § 1958—the federal

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contractor”); S. REP. NO. 98-225, at 306–07 (1983), as reprinted in 1984 U.S.C.C.A.N. 3182, 3486.

57. 18 U.S.C. § 1959(a).

58. *United States v. Baca*, 333 F.R.D. 208, 210 (D.N.M. 2019) (referring to the pecuniary value requirement as “VICAR’s motive requirement”); see also *People v. Hamilton*, 774 P.2d 730, 751 (Cal. 1989) (“Carried out ‘for’ financial gain implies motive.”).

59. See 18 U.S.C. § 1959(a).

60. See *United States v. Washington*, 318 F.3d 845, 854 (8th Cir. 2003) (discussing 18 U.S.C. § 1958); *United States v. Richeson*, 338 F.3d 653, 659 (7th Cir. 2003) (same); *United States v. Wicklund*, 114 F.3d 151, 153–54 (10th Cir. 1997) (same).

61. See *United States v. Acierno*, 579 F.3d 694, 701 (6th Cir. 2009) (discussing 18 U.S.C. § 1958 and stating “[w]e agree with our sister circuits and hold that the consideration element of the statute requires a *quid pro quo* between the parties of something of pecuniary value”); *United States v. Fernandez*, 388 F.3d 1199, 1232 (9th Cir. 2004) (discussing 18 U.S.C. § 1959); *United States v. Hernandez*, 141 F.3d 1042, 1057 (11th Cir. 1998) (discussing 18 U.S.C. § 1958); *Washington*, 318 F.3d at 854 (same); S. REP. NO. 98-225, at 306 (“Section [1959] proscribes contract murders and other violent crimes by organized crime figures.”). Compare 18 U.S.C. § 1958(a) (requiring as consideration “anything of pecuniary value”), with 18 U.S.C. § 1959(a) (same).

62. *Wicklund*, 114 F.3d at 154 (stating that, together, the clauses “describe separate situations and impose criminal liability regardless of whether the payment has occurred or is to occur later”).

63. *United States v. Chong*, 419 F.3d 1076, 1082 (9th Cir. 2005); see also *United States v. Ferguson*, 246 F.3d 129, 136–37 (2d Cir. 2001).

64. *Ferguson*, 246 F.3d at 134.



murder-for-hire statute.<sup>65</sup> In each statute, the phrase “anything of pecuniary value” means anything of value in the form of money, a negotiable instrument, a commercial interest, or anything else the primary significance of which is economic advantage.<sup>66</sup> Since any “money or other valuable consideration” potentially suffices,<sup>67</sup> the payment or prospective payment could take the form of cash,<sup>68</sup> sale-level quantities of drugs,<sup>69</sup> a combination of cash and goods,<sup>70</sup>

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65. 18 U.S.C. § 1958(a) (2018) reads as follows:

Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility of interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so, shall be fined under this title or imprisoned for not more than ten years, or both; and if personal injury results, shall be fined under this title or imprisoned for not more than twenty years, or both; and if death results, shall be punished by death or life imprisonment, or shall be fined not more than \$250,000, or both.

*Id.*

66. *Id.* § 1958(b)(1).

67. S. REP. NO. 98-225, at 304 (1983), as reprinted in 1984 U.S.C.C.A.N. 3182, 3483.

68. See, e.g., *United States v. Moonda*, 347 F. App'x 192, 198–99 (6th Cir. 2009) (finding promise to pay one-half of whatever the victim's estate was worth was sufficient to support conviction under 18 U.S.C. § 1958); *United States v. Acierno*, 579 F.3d 694, 700–02 (6th Cir. 2009) (finding “the payment of a mere \$100, even if it were offered as having been related only to the ‘expenses’ of the receiving party” was sufficient to support conviction under 18 U.S.C. § 1958); *United States v. Scott*, 145 F.3d 878, 884 (7th Cir. 1998) (finding cash payments of \$75,000 sufficient to support conviction under 18 U.S.C. § 1958).

69. See, e.g., *United States v. Washington*, 318 F.3d 845, 854 (8th Cir. 2003) (finding two and one-half ounces of heroin worth approximately \$2,500 was sufficient to meet requirements of 18 U.S.C. § 1958(b)).

70. See, e.g., *United States v. Richeson*, 338 F.3d 653, 657–59 (7th Cir. 2003) (finding a promised payment of money and guns sufficient to support conviction under 18 U.S.C. § 1958); *United States v. Concepcion*, 983 F.2d 369, 384 (2d Cir. 1992) (finding payment of a diamond Rolex watch and \$10,000 sufficient to support conviction under 18 U.S.C. § 1959).

insurance proceeds,<sup>71</sup> vehicles,<sup>72</sup> jewelry,<sup>73</sup> real estate,<sup>74</sup> or guns.<sup>75</sup> However, the primary significance of the consideration likely is not an economic advantage for something like a small amount of marijuana tendered for personal consumption,<sup>76</sup> reimbursement solely for incidental crime-related expenses,<sup>77</sup> or a generic “favor.”<sup>78</sup>

In *United States v. Frampton*, a case involving prosecution under both 18 U.S.C. §§ 1958 and 1959, the Second Circuit Court of Appeals affirmed the trial court’s entry of a judgment of acquittal for murder-for-hire in violation of 18 U.S.C. § 1958 where the triggerman attempted to kill someone in exchange for an unspecified “favor.”<sup>79</sup> Two drug dealers, Marion Frampton and Reggie Cooley, enlisted Latique Johnson’s help to kill one of their co-conspirators in order to seize control of the trafficking operation.<sup>80</sup> The government presented evidence at trial that arguably demonstrated that Johnson was a professional contract killer and had received compensation for prior murders.<sup>81</sup> However, the only evidence regarding potential compensation for the charged killing consisted of testimony by Cooley that, “[i]f [Johnson] needed a favor from me, he’d get a favor.”<sup>82</sup> When asked what this meant, he stated, “Anything. Anything he need [sic].”<sup>83</sup> While the government argued that a favor from Cooley, who was well-respected in the crack cocaine trade, could potentially confer a significant economic benefit on Johnson, the court concluded that, in the absence of evidence suggesting an understanding as to the form this favor would take, the evidence was insufficient to demonstrate that its “primary significance” was in “economic advantage,” as

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71. See, e.g., *United States v. Hernandez*, 141 F.3d 1042, 1057–59 (11th Cir. 1998) (finding promise to profit from insurance proceeds sufficient to support conviction under 18 U.S.C. § 1958).

72. See, e.g., *United States v. Rolett*, 151 F.3d 787, 792 (8th Cir. 1998) (finding promise of a truck as payment for murder was sufficient to support murder conspiracy conviction under 18 U.S.C. § 1959).

73. *Concepcion*, 983 F.2d at 384.

74. *Richeson*, 338 F.3d at 657.

75. *Id.* at 657–59.

76. See *United States v. Johnson*, No. 3:06cr160(JBA), 2013 U.S. Dist. LEXIS 94382, at \*26–28 (D. Conn. July 8, 2013).

77. See *United States v. Chong*, 419 F.3d 1076, 1083 (9th Cir. 2005). *But see* *United States v. Acierno*, 579 F.3d 694, 700–02 (6th Cir. 2009) (distinguishing *Chong* and disagreeing with its contention “that payment for expenses to a murder contract cannot constitute ‘consideration’ under 18 U.S.C. § 1958”).

78. See *United States v. Frampton*, 382 F.3d 213, 216–19 (2d Cir. 2004).

79. *Id.* at 217.

80. *Id.* at 216–17.

81. *Id.* at 218.

82. *Id.*

83. *Id.*

VICAR requires.<sup>84</sup>

Even if Johnson had anticipated financial remuneration, the evidence did not prove a shared expectation. The concept of consideration requires a mutual understanding,<sup>85</sup> so a crime committed in unilateral expectation of pecuniary gain is insufficient.<sup>86</sup> As one lower court explained, “it is not sufficient to have one hand clapping.”<sup>87</sup> There would have to be evidence that the perpetrator and solicitor both anticipated payment of something of principally pecuniary value at the time the agreement for the violent act was formed.<sup>88</sup> This is true even where monies were actually paid after the crime was completed if the agreement to pay did not precede the crime.<sup>89</sup> Under the pecuniary value theory, the government must prove beyond a reasonable doubt that a defendant had the requisite intent for the predicate crime and was specifically motivated to commit the underlying offense by payment or promise of payment from the enterprise.

### B. VICAR's Positional Motive Alternative

The second, more commonly charged method of meeting Section 1959's jurisdictional *mens rea* requirement can itself be satisfied in various ways—proving either that a defendant committed a proscribed violent act “for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity.”<sup>90</sup> This is also a motive requirement rather than a basic intent requirement like those required for VICAR's predicates.<sup>91</sup>

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84. *Id.* at 218–19 (“[T]he mere fact that the consideration offered by one (the solicitor) in exchange for another’s (the murderer’s) agreement to commit a murder could inure to the economic benefit of the latter is insufficient.”).

85. See *United States v. Wicklund*, 114 F.3d 151, 154 (10th Cir. 1997); *United States v. Davis*, 103 F. Supp. 3d 396, 404 (S.D.N.Y. 2015).

86. *Wicklund*, 114 F.3d at 153–54 (discussing 18 U.S.C. § 1958); *Davis*, 103 F. Supp. 3d at 404 (same).

87. *Davis*, 103 F. Supp. 3d at 404.

88. *Frampton*, 382 F.3d at 219; *United States v. Johnson*, No. 3:06cr160(JBA), 2013 U.S. Dist. LEXIS 94382, at \*26–27 (D. Conn. July 8, 2013) (granting a judgment of acquittal on VICAR murder charges because of insufficient motive evidence).

89. See, e.g., *United States v. Chong*, 419 F.3d 1076, 1082–84 (9th Cir. 2005) (reversing convictions under 18 U.S.C. § 1958 for murder-for-hire and conspiracy to commit murder-for-hire); *Davis*, 103 F. Supp. 3d at 404–05; see also *United States v. Ferguson*, 246 F.3d 129, 136–37 (2d Cir. 2001).

90. 18 U.S.C. § 1959(a) (2018).

91. See *United States v. Umaña*, 750 F.3d 320, 335 (4th Cir. 2014) (referring to the “requirement that the defendant have interacted with the enterprise with respect

### 1. Gaining Entrance to an Enterprise

First, the positional motive “reaches defendants associated with racketeering enterprises who may not be members but who participate in the organization’s activities with the aspiration of becoming members.”<sup>92</sup> It also applies to former members seeking readmission to criminal organizations.<sup>93</sup> For example, in *United States v. Candelario-Santana*, Alexis Candelario-Santana, the former undisputed head of a drug-trafficking organization, lost control of his operation when he fled and was subsequently convicted and imprisoned for participating in a dozen murders.<sup>94</sup> Initially, the people he tasked with overseeing the day-to-day operations shared the trafficking proceeds with him, but they stopped doing so at some point after he was incarcerated.<sup>95</sup> After Candelario-Santana was released from prison, he and David Oquendo-Rivas participated in a mass shooting at a bar run by one of his successors in the drug operation; nine people were killed, and more than a dozen others were injured.<sup>96</sup> Candelario and Oquendo were subsequently convicted at trial on more than fifty counts, including a number of VICAR offenses.<sup>97</sup> On appeal, Oquendo argued that the evidence was insufficient to support his VICAR convictions, but the First Circuit Court of Appeals affirmed because (1) the evidence supported findings that Candelario’s motive was to reassert his role in the enterprise, and (2) Oquendo shared his motive and participated in the attack “for the purpose of gaining entrance to the enterprise.”<sup>98</sup>

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to his purpose of bolstering his position in that enterprise” as part of VICAR’s motive element); *United States v. Concepcion*, 983 F.2d 369, 381 (2d Cir. 1992) (“The phrase ‘for the purpose of . . . maintaining or increasing position in’ the enterprise, accorded its ordinary meaning, appears to refer to a defendant who holds a position in a RICO enterprise and who committed an underlying crime of violence with a motive of retaining or enhancing that position.” (alteration in original)).

92. *Ferguson*, 246 F.3d 129, 134 (2d Cir. 2001); see also 18 U.S.C. § 1959(a); *United States v. Polanco*, 145 F.3d 536, 540 n.2 (2d Cir. 1998); *United States v. Santiago*, 207 F. Supp. 2d 129, 142 (S.D.N.Y. 2002) (“Section 1959 also reaches defendants who, although they may not be members, are somehow associated with a racketeering enterprise and participate in the organization’s activities with the aspiration of becoming members.”).

93. See, e.g., *United States v. Desena*, 260 F.3d 150, 156–57 (2d Cir. 2001).

94. 834 F.3d 8, 15–16 (1st Cir. 2016).

95. *Id.*

96. *Id.* at 16.

97. *Id.* at 15.

98. *Id.* at 16, 28–29.

## 2. Maintaining or Increasing Position in an Enterprise

The second positional motive theory is far broader and more commonly alleged than the first. It reaches members who commit violent crimes for the purpose of maintaining or increasing position in a racketeering enterprise if either (1) they know violence is expected as a condition of membership, or (2) they commit the crime in furtherance of their membership.<sup>99</sup> This motive can be evinced in several ways, and the burden of doing so is practically slight.<sup>100</sup> This is particularly true in cases involving associations—like traditional organized crime groups and most street gangs, prison gangs, outlaw motorcycle gangs, and drug trafficking organizations—for whom violence is an inherent element of their existence and operations. The broad scope of this motive permits the exercise of federal jurisdiction for most acts of violence committed by members and associates of such groups.

In many instances, enterprise members are expected to attack members of rival groups. For example, in *United States v. Fiel*, members of the Fates Assembly Motorcycle Club were told at meetings that all club members would be involved in a war against the rival Pagans Motorcycle Club after a Pagan killed a Fates member.<sup>101</sup> Among other things, members were told that all who had an opportunity to kill a Pagan and get away with it were expected to do so, and those who did not want to participate should leave the club.<sup>102</sup> Thereafter, the defendants procured explosives, conducted surveillance, stored and delivered explosives, and drove a getaway car in an ambush attempt.<sup>103</sup> In light of this evidence, “[a] rational jury

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99. See, e.g., *United States v. Bostick*, 791 F.3d 127, 138 (D.C. Cir. 2015); *United States v. Heilman*, 377 F. App'x 157, 205 (3d Cir. 2010); *United States v. Diaz*, 176 F.3d 52, 95–96 (2d Cir. 1999); *United States v. Fiel*, 35 F.3d 997, 1004 (4th Cir. 1994); *United States v. Concepcion*, 983 F.2d 369, 381 (2d Cir. 1992); *United States v. Mills*, 378 F. Supp. 3d 563, 576 (E.D. Mich. 2019).

100. Cf. However, one federal district court has determined that:

[W]hile mere membership in a gang cannot alone provide a basis for establishing a defendant's motivation to maintain his or her position in a gang, evidence of membership in addition to other evidence connecting the crime to the gang's activities, whether direct or circumstantial, could suffice for a jury to infer the requisite motivation.

*United States v. Roye*, No. 3:15cr29 (JBA), 2017 U.S. Dist. LEXIS 137241, at \*9 (D. Conn. Aug. 25, 2017).

101. 35 F.3d at 1001–02.

102. *Id.* at 1002.

103. *Id.*

could conclude that defendants believed that participation in the war against the Pagans was expected of them by reason of their membership in the Fates[.]” and this was sufficient to satisfy VICAR’s motive element.<sup>104</sup>

A defendant would also have the requisite positional motive if he committed a prohibited violent act because it was expected of him specifically because of his position in the enterprise.<sup>105</sup> In *United States v. Gooch*, the District of Columbia Circuit Court of Appeals affirmed, *inter alia*, the VICAR conviction of Larry Gooch, a member of the “M Street Crew” gang.<sup>106</sup> Gooch served as the gang’s “muscle” by enforcing its “rules, engaging in violence, and punishing disloyalty . . . .”<sup>107</sup> Because he was well known as an enforcer, the court found that the jury was free to decide that he murdered two people rumored to have stolen drugs from the gang and to have cooperated with the authorities because, by virtue of his position, he was expected to retaliate against those who posed threats to the gang and violated its code.<sup>108</sup>

The government can satisfy VICAR’s motive requirement by showing that a defendant ordered an act of violence to quell a threat to the enterprise and protect its operations.<sup>109</sup> For instance, in *United States v. Tse*, the First Circuit Court of Appeals affirmed Stephen

104. *Id.* at 1005.

105. *See, e.g.*, *United States v. Bostick*, 791 F.3d 127, 142 (D.C. Cir. 2015); *United States v. DeSilva*, 505 F.3d 711, 715–16 (7th Cir. 2007); *United States v. Carson*, 455 F.3d 336, 370 (D.C. Cir. 2006) (“The jury also could have determined that Carson shot English to maintain or increase his own reputation as an enforcer in the enterprise.”); *United States v. Dhinsa*, 243 F.3d 635, 671 (2d Cir. 2001); *United States v. Wilson*, 116 F.3d 1066, 1078 (5th Cir. 1997); *United States v. Castro*, 669 F. Supp. 2d 288, 292 (E.D.N.Y. 2009), *aff’d*, 411 F. App’x 415 (2d Cir. 2011).

106. 665 F.3d 1318, 1321 (D.C. Cir. 2012).

107. *Id.* at 1322.

108. *Id.* at 1338.

109. The court in *Dhinsa* noted:

[W]e have affirmed convictions under section 1959(a) for violent crimes committed or sanctioned by high ranking leaders of the enterprise for the purpose of protecting the enterprise’s operations and furthering its objectives or where the defendant, as a leader within the enterprise, was expected to act based on the threat posed to the enterprise and that failure to do so would have undermined his position within that enterprise.

*Dhinsa*, 243 F.3d at 671–72; *see also, e.g., Bostick*, 791 F.3d at 138–39; *United States v. Diaz*, 176 F.3d 52, 95–96 (2d Cir. 1999) (affirming conviction of a leader of the Latin Kings street gang who authorized two of his subordinates to kill another member of the gang); *United States v. Reyes*, 157 F.3d 949, 955 (2d Cir. 1998) (affirming conviction of the head of a large drug distribution organization who ordered the murder of a rival who was encroaching on his drug business).

Tse's conviction under 18 U.S.C. § 1959(a)(5) for attempted murder and conspiracy to murder two men.<sup>110</sup> Tse was the leader of Ping On, a powerful crime organization in Boston with ties to criminal groups in Hong Kong, and the intended victims were members of a rival gang.<sup>111</sup> Tse was upset that competitors were impinging on Ping On's territory and that the targeted victims were demanding money from Ping On members.<sup>112</sup> Tse interpreted these aggressions as "attacks on the preeminence of his organization and on him," so he ordered others to kill the two rivals.<sup>113</sup> The court found these facts sufficient to prove that Tse ordered the murders because competitors "threatened the security and supremacy of his leadership and of his enterprise[.]" which satisfied VICAR's positional motive alternative.<sup>114</sup>

Defendants also have the requisite motive if members were expected to respond violently to those who disrespected the enterprise or its members and would lose the respect of fellow members for failing to do so.<sup>115</sup> In *United States v. Olson*, a member of the Latin Kings street gang was convicted of participating in a woman's murder in order to maintain his position.<sup>116</sup> The defendant believed the victim had facilitated the murder of a Latin Kings associate, so he helped to kill her in revenge.<sup>117</sup> He argued that the government's evidence did not prove he killed with VICAR's positional motive.<sup>118</sup> However, cooperating gang members testified at trial "that when someone 'disrespected' the Latin Kings, members were obliged to respond with violence ranging from beatings to shootings."<sup>119</sup> If they did not

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110. 135 F.3d 200, 203, 210 (1st Cir. 1998).

111. *Id.* at 203.

112. *Id.* at 203-04.

113. *Id.*

114. *Id.* at 206.

115. *See, e.g., United States v. Nicholson*, 716 F. App'x 400, 410 (6th Cir. 2017) (concluding that evidence was sufficient to support a finding of requisite motive where a "plot to murder [rivals] was hatched in retaliation for the murder of a[n enterprise] member, and [defendant] acknowledged that [enterprise members] were expected to retaliate against anyone who disrespected them"); *United States v. Gills*, 702 F. App'x 367, 376 (6th Cir. 2017) (observing that a gang "expected its members to retaliate violently when someone disrespected or threatened a fellow member" and were viewed as "soft" or "weak" if they failed to do so); *United States v. Hackett*, 762 F.3d 493, 500-01 (6th Cir. 2014); *United States v. Smith*, 413 F.3d 1253, 1278 (10th Cir. 2005); *United States v. Tipton*, 90 F.3d 861, 891 (4th Cir. 1996) (finding purpose element for VICAR offense satisfied where defendant acted, in part, "in furtherance of the [drug trafficking] enterprise's policy of treating affronts to any of its members as affronts to all, of reacting violently to them and of thereby furthering the reputation for violence essential to maintenance of the enterprise's place in the drug-trafficking business").

116. 450 F.3d 655, 662-63 (7th Cir. 2006).

117. *Id.* at 672.

118. *Id.*

119. *Id.* at 671.

“respond to signs of disrespect with whatever violent means they had available at the time, they faced punishment ranging from fines to beatings at the next Latin Kings meeting.”<sup>120</sup> According to the Seventh Circuit Court of Appeals, this was sufficient proof.<sup>121</sup>

Similarly, perpetrators of violence would have the required positional motive if the enterprise operated on principles of violence and members’ standing could be enhanced by committing acts of violence or diminished by failing to do so.<sup>122</sup> For example, in *United States v. Robertson*, the Eleventh Circuit Court of Appeals affirmed a conviction for two murders in aid of racketeering where the defendant was a member of Tampa Blood and Honour, a skinhead white supremacist group.<sup>123</sup> The group “consider[ed] non-white persons to be subhuman enemies” and believed homeless people were “degenerate and worthless to society.”<sup>124</sup> Among other things, members exchanged stories about their violent exploits, thrived on proving themselves to each other by attacking rivals and enemies, and

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120. *Id.*

121. The Seventh Circuit noted:

Latin Kings were obliged by their code of conduct to take violent action whenever someone disrespected the Latin Kings. A reasonable jury could find that this is exactly what Mendez did. The evidence is thus sufficient to prove that the murder was related to the conduct of the Latin Kings enterprise, and that Mendez committed the murder in order to maintain his position in the Latin Kings.

*Id.* at 673.

122. See, e.g., *United States v. Bostick*, 791 F.3d 127, 142 (D.C. Cir. 2015); *United States v. Wilson*, 579 F. App’x 338, 343 (6th Cir. 2014); *United States v. Crenshaw*, 359 F.3d 977, 996 (8th Cir. 2004). The Seventh Circuit detailed the principles of the Dawg Life gang:

There was testimony that the Dawg Life gang was an ongoing enterprise involved in the sale of illegal drugs. The gang operated on principles of violence and that violence was a prerequisite for rewarding and promoting members. There was also testimony that acts of violence were a part of the Dawg Life culture and violence was the expected behavior in order to maintain one’s status within the gang.

*United States v. Phillips*, 239 F.3d 829, 845–46 (7th Cir. 2001); see also *United States v. Boyd*, 792 F. Supp. 1083, 1102 (N.D. Ill. 1992) (finding that purpose element was satisfied when the government presented evidence that committing violent acts was one way to move up within the notorious El Rukn street gang’s hierarchy and that aversion to such acts would “invite trouble”).

123. 736 F.3d 1317, 1321 n.4, 1331 (11th Cir. 2013).

124. *Id.* at 1322.



wore steel-toed boots to cause greater injuries and pain during their fights.<sup>125</sup> When a Tampa Blood and Honour member led his comrades in beating and kicking three homeless men over the course of two evenings, killing two of them, and subsequently bragged to the group's leader, these facts were sufficient to prove his positional motive.<sup>126</sup>

These examples are not exhaustive. No specific indicia of the positional motive are required, but in addition to those described above, others are common. These include lower-level members following orders from higher-level members,<sup>127</sup> acting in concert with fellow members,<sup>128</sup> displaying enterprise allegiance during the attack by flashing signs or using slogans,<sup>129</sup> acting brazenly and openly so

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125. *Id.*

126. *Id.* at 1322–23, 1330.

127. *See, e.g.*, *United States v. Garcia*, 754 F.3d 460, 472 (7th Cir. 2014) (finding that evidence supported conviction for VICAR assault where order to attack erring members went through chain of command and was implemented by subordinates); *United States v. Whitten*, 610 F.3d 168, 180–81 (2d Cir. 2010) (noting the existence of sufficient evidence to support finding that defendant's general purpose in murdering two detectives was to maintain or increase his position within the Stapleton Crew gang where there was testimony that violent acts by members of the gang enhanced their status within the group and that the murders were contemplated and implicitly authorized by the group's leaders); *United States v. Crenshaw*, 359 F.3d 977, 995–96 (8th Cir. 2004) (finding evidence sufficient to support position-related motive where gang members were expected to avenge injuries to fellows, leader had ordered reprisals on site, and defendants reported to leaders following the shooting).

128. *See, e.g.*, *United States v. Gills*, 702 F. App'x 367, 376–77 (6th Cir. 2017) (finding that evidence was sufficient to establish gang-related purpose for shooting where defendant brought along a fellow gang member as a witness); *United States v. Odum*, 878 F.3d 508, 519 (6th Cir. 2017), *vacated sub nom. Frazier v. United States*, 139 S. Ct. 319 (2018) (noting that defendant joined a fight after seeing a fellow member get knocked down and then immediately reported his actions to enterprise leadership); *United States v. White*, 621 F. App'x 889, 894 (9th Cir. 2015) (affirming VICAR murder conspiracy conviction where defendant participated in a drive-by shooting with fellow gang members in retaliation for the killing of another member); *United States v. Kamahale*, 748 F.3d 984, 1008 (10th Cir. 2014) (concluding that defendants acting with fellow gang members to retaliate supported the jury's conclusion that the shooting was to further or maintain the defendants' positions in his gang); *Garcia*, 754 F.3d at 472 (finding that evidence supported conviction for VICAR assault where order to attack erring members was implemented by a group of subordinates); *Crenshaw*, 359 F.3d at 995–96 (finding evidence sufficient to support position-related motive where defendants hunted for rivals together).

129. *See, e.g.*, *Kamahale*, 748 F.3d at 1008 (displaying gang insignia during the shooting supported the jury's conclusion that the shooting was to further or maintain the defendants' positions in their gang).

that others might see,<sup>130</sup> and boasting afterwards.<sup>131</sup> Moreover, it is immaterial whether or not the predicate crime actually maintains or improves a perpetrator's status.<sup>132</sup> For instance, one could theoretically be culpable if his purpose in attempting to murder someone was to protect or enhance his position, but the group's leader was unimpressed or even disapproved of the action. The sheer breadth of the positional motive theory allows for expansive federal jurisdiction that reaches almost any proscribed act of violence even tangentially related to an enterprise affecting interstate commerce.

### C. Mixed Motives

Federal courts can exercise jurisdiction over traditionally local offenses under Section 1959 even if neither of the statute's motive options is the actor's chief impulse because there is no indication in the legislative history that Congress intended the VICAR motive be a defendant's sole, or even primary, concern.<sup>133</sup> Rather, Congress was

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130. See, e.g., *Gills*, 702 F. App'x at 376–77 (finding that evidence was sufficient to establish gang-related purpose for shooting where defendant carried out the shooting in “broad daylight”); *Kamahele*, 748 F.3d at 1008 (finding that carrying out the shooting in broad daylight and the shooters' desire for the family and others to know that the gang was responsible supported the jury's conclusion that the shooting was to further or maintain the defendants' positions in his gang).

131. See, e.g., *Gills*, 702 F. App'x at 376–77 (finding that evidence was sufficient to establish gang-related purpose for shooting where defendant subsequently bragged about the shooting to other members); *Whitten*, 610 F.3d at 180–81 (evidence was sufficient to support finding that defendant's general purpose in murdering two detectives was to maintain or increase his position within the Stapleton Crew gang where there was testimony that violent acts by members of the gang enhanced their status within the group and defendant's actions after the murders suggested that he was proud of the crimes and wanted others to be made aware of them); *United States v. Farmer*, 583 F.3d 131, 142 (2d Cir. 2009) (finding position-related motive satisfied where gang members “deemed an attack against one . . . to be an attack against all,” members could rise within the gang by acting violently toward rivals, and defendant bragged about murdering a person he believed had attacked his fellow gang members).

132. See *Whitten*, 610 F.3d at 181; *Farmer*, 583 F.3d at 142 (“However, the question is not whether [the defendant's] position in the Bloods was advanced in fact by the murder he committed, but whether his purpose in committing the murder was to benefit his position.”).

133. *United States v. Heilman*, 377 F. App'x 157, 204 (3d Cir. 2010) (“Notably, the statute makes no reference to a sole, exclusive, or primary purpose.”); *Hitchler*, *supra* note 34, at 115–16 (“[A]s a general rule, the motive required to make an act criminal need not be a sole or principal or determining motive.”); see, e.g., *Kamahele*, 748 F.3d at 1008; *United States v. Hackett*, 762 F.3d 493, 500 (6th Cir. 2014); *Farmer*, 583 F.3d at 143–44 (“The government was not required to prove that [the defendant's] ‘sole or principal motive’ was ‘maintaining or increasing his position,’ so long as it proved that enhancement of status was among his purposes.” (quoting *United States v. Dhinsa*,

concerned about violent crimes committed “as an integral aspect of membership” in enterprises.<sup>134</sup> The “general rule” that a “combination of two or more motives in one conative impulse is exceedingly common”<sup>135</sup> applies to VICAR crimes.<sup>136</sup> Consequently, courts have concluded that the positional motive is satisfied as long as one of the statute’s alternative motives was the “general,”<sup>137</sup> “animating,”<sup>138</sup> or “substantial purpose”<sup>139</sup> of the defendant’s action. Hence, a defendant’s mixed motive can support a VICAR conviction so long as there is evidence that the use of violence, under the circumstances, tends to increase or maintain the defendant’s position, and the defendant was partially motivated by that.<sup>140</sup>

In *United States v. Tipton*, the evidence showed that an attack was prompted by a “purely personal grievance” against the victim for “messing” with the girlfriend of one of the defendants.<sup>141</sup> The other defendant argued that he had “no more than a private purpose to

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243 F.3d 635, 671 (2d Cir. 2001)); *United States v. Carson*, 455 F.3d 336, 371 (D.C. Cir. 2006) (observing that “[i]t makes no difference . . . whether [defendant’s] interest in maintaining his position was his sole motivation”); *United States v. Concepcion*, 983 F.2d 369, 381 (2d Cir. 1992); *United States v. Jones*, 291 F. Supp. 2d 78, 89 (D. Conn. 2003).

134. *Kamahale*, 748 F.3d at 1008 (noting that “the Government need only establish that the predicate violent crime was committed as an ‘integral aspect of membership’ in the [criminal] enterprise”); *United States v. Fiel*, 35 F.3d 997, 1004 (4th Cir. 1994) (“The legislative history indicates that the phrase was added to proscribe murder and other violent crimes committed ‘as an integral aspect of membership’ in such enterprises.”); S. REP. NO. 98-225, at 304 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3483.

135. *Hitchler*, *supra* note 34, at 115.

136. *See United States v. Smith*, 489 F. Supp. 3d 167, 173–74 (E.D.N.Y. 2020) (“It is, of course, not uncommon that violent crimes, including acts chargeable under § 1959, can have multiple motives.”).

137. *Whitten*, 610 F.3d at 179–81 (noting that evidence was sufficient to support finding the defendant’s general purpose in murdering two detectives was to maintain or increase his position within the Stapleton Crew gang where there was testimony that violent acts by members of the gang enhanced their status within the group, that the murders were contemplated and implicitly authorized by the group’s leaders, and that the defendant’s actions after the murders suggested that he was proud of the crimes and wanted others to be made aware of them); *United States v. Banks*, 514 F.3d 959, 968–70 (9th Cir. 2008); *Fiel*, 35 F.3d at 1003; *United States v. Thai*, 29 F.3d 785, 817 (2d Cir. 1994).

138. *United States v. Tisdale*, 980 F.3d 1089, 1095 (6th Cir. 2020); *United States v. Nicholson*, 716 F. App’x 400, 410 (6th Cir. 2017); *Hackett*, 762 F.3d at 500.

139. *Banks*, 514 F.3d at 969.

140. *United States v. Stanley*, 808 F. App’x 25, 30 (2d Cir. 2020) (affirming VICAR murder conviction where evidence supported a finding that maintaining or improving position in the enterprise was defendant’s “secondary motivation”).

141. 90 F.3d 861, 891 (4th Cir. 1996).

assist a friend in avenging an affront.”<sup>142</sup> Still, the Fourth Circuit Court of Appeals found the evidence sufficient to support jury findings that the shooting was motivated “in part at least in furtherance of the enterprise’s policy of treating affronts to any of its members as affronts to all, of reacting violently to them and of thereby furthering the reputation for violence essential to maintenance of the enterprise’s place in the drug-trafficking business.”<sup>143</sup> Moreover, the evidence supported findings that participation in group retaliation was critical to maintaining one’s position in the enterprise.<sup>144</sup>

While neither the pecuniary nor positional motives must be primary, VICAR’s motive requirement is not satisfied where a defendant’s position within the alleged enterprise is “merely incidental” to the violent act.<sup>145</sup> For instance, in *United States v. Banks*, a defendant challenged the jury instructions regarding his VICAR charge.<sup>146</sup> At trial, “[t]he district court instructed the jury that the purpose element could be satisfied if ‘at least one of the defendant’s purposes in committing [the violent crime] was to gain entrance or maintain or increase his position in the enterprise, the Rolling 60s Crips.’”<sup>147</sup> Further, it instructed that the element was met “if the Defendant committed the charged violent crime *at least in part* because he knew it was expected of him by reason of his membership in the enterprise or that he committed it in furtherance of that membership.”<sup>148</sup> The defendant “object[ed] that these instructions misstate[d] the law because they permitted the jury to convict him of a VICAR violation even if his primary motive was personal revenge and he was only incidentally motivated by a desire to regain the respect of fellow gang members.”<sup>149</sup>

Ultimately, the Ninth Circuit Court of Appeals determined that “an examination of the text, context, and purpose of the VICAR statute leaves no reasonable doubt that the purpose element is satisfied ‘whether [the defendant’s gang-related purpose] be primary

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142. *Id.*

143. *Id.*

144. *Id.*

145. *United States v. Hackett*, 762 F.3d 493, 500 (6th Cir. 2014); *United States v. Heilman*, 377 F. App’x 157, 204–05 (3d Cir. 2010) (“Nevertheless, VICAR requires more than an incidental purpose. Thus, self-promotion need only be a general purpose for committing a violent crime.”); *see, e.g., United States v. Ledbetter*, 929 F.3d 338, 358 (6th Cir. 2019) (overturning VICAR murder conviction where evidence did not demonstrate “that members were expected or encouraged to unilaterally rob and murder low-level drug users who otherwise supported the gang by purchasing its drugs”).

146. 514 F.3d 959, 962 (9th Cir. 2008).

147. *Id.* at 964–65 (alteration in original).

148. *Id.* at 965.

149. *Id.*

or secondary,” and Congress did not intend “for courts to busy themselves with ‘rank[ing] the reasons that a defendant had for committing the offense.’”<sup>150</sup> The court did, however, squarely address the dangers of accepting evidence of only an incidental status motive in support of VICAR prosecutions:

We do not mean to say, however, that a defendant falls within the scope of VICAR if his desire to enhance or maintain his status in the organization had any role, no matter how incidental, in his decision to commit a violent act. To adopt such a broad interpretation would risk extending VICAR to any violent behavior by a gang member under the presumption that such individuals are always motivated, at least in part, by their desire to maintain their status within the gang; if the reach of this element were not cabined in some way, prosecutors might attempt to turn every spontaneous act or threat of violence by a gang member into a VICAR offense. The VICAR statute itself contains no indication that Congress intended it to make gang membership a status offense such that mere membership plus proof of a criminal act would be sufficient to prove a VICAR violation. Otherwise, every traffic altercation or act of domestic violence, when committed by a gang member, could be prosecuted under VICAR as well.<sup>151</sup>

Section 1959 is a powerful statute that can federalize otherwise local criminal acts. The sometimes slender thread that justifies federal intervention is the perpetrator’s subjective motive either to be paid by the enterprise or to gain, maintain, or increase his position within it. However, the motive requirement, particularly the positional motive alternative, is easily met. While a perpetrator must be animated, at least in some part, by a connection with a

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150. The Ninth Circuit continued:

Because the text of the statute is clear and conforms with both its context and purpose, we join our sister circuits and hold that the purpose element does not require the Government to show that the defendant was solely, exclusively, or even primarily motivated by a desire to gain entry into, or maintain or increase his status within, the criminal organization.

*Id.* at 967–68 (alterations in original).

151. *Id.* at 968.

racketeering enterprise, that purpose might conceivably be tertiary, quarternary, or even quinary. As a practical matter, then, the line separating VICAR crimes from prototypical state offenses is a thin one, and there is no compelling need for interpretive gymnastics to make it even thinner. Given this context, the next section questions the propriety of transferring pecuniary or positional motives in order to assign culpability under Section 1959.

### III. TRANSFERRED MOTIVE IN VARIOUS VICAR CONTEXTS

For various reasons, unintended harm to non-target victims is a hazard of doing business in the oft-violent realm of organized crime. In some instances, violence erupts suddenly in populated areas. At times, members are unable or unwilling to pursue their targets under circumstances that minimize the risk of harm to others. Moreover, the presence of innocents is sometimes preferred since brazen acts of violence can enhance the reputation of a member or even a whole group.<sup>152</sup>

In order to ensure that harm to unintended victims does not go unpunished, federal courts that have directly addressed the matter generally agree that “transferred intent applies to VICAR crimes.”<sup>153</sup> In some cases, though, a more profound legal fiction than is inherent in the traditional doctrine when applied to the predicate crimes themselves is involved—fictitiously imputing a motive to bring about a harm or result rather than a simple intention to act.<sup>154</sup> While serious acts of violence, whether committed intentionally or accidentally, should be prosecuted and punished in order to protect society and deter future harms, this justification alone does not always warrant federal intervention.

In assessing the propriety of transferring motive in establishing guilt for VICAR crimes rather than merely transferring intent for the underlying predicate crime, it is necessary to consider the various contexts for its application. There are at least four scenarios in which courts have affirmed, or potentially will affirm, its use. The transferred motive theory has been applied to intentional attacks involving either

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152. See, e.g., *United States v. Farmer*, 583 F.3d 131, 137 (2d Cir. 2009) (noting that a conspirator suggested shooting up a house even though the desired target was unlikely to be present in order to increase respect for the gang).

153. *United States v. Savage*, 970 F.3d 217, 275 (3d Cir. 2020) (citing *United States v. Concepcion*, 983 F.2d 369, 381–82 (2d Cir. 1992)); cf. *Jefferson v. United States*, No. 97-276 (4) (MJD/JGL), 2002 U.S. Dist. LEXIS 25382, at \*6–7 (D. Minn. Dec. 2, 2002) (finding that defense attorney’s failure to object to transferred intent instruction in a prosecution under Section 1959 was not unreasonable or prejudicial).

154. See *United States v. Rahman*, 189 F.3d 88, 141 (2d Cir. 1999) (stating that “the transferred intent doctrine is applicable to transferred motive”).

incidental victims or cases of mistaken identity, and it has been—or will be—applied to accidental victims of either bad aim or a variety of felony murder. However, in some instances, resorting to the legal fiction is unnecessary in establishing the crimes' elements. In at least one scenario—"bad aim" killings—it simply does not work.

### A. Harms to Intended Victims

Courts sometimes discuss intentional acts of violence committed in aid of racketeering—like the killing of an incidental, or secondary, victim or cases involving mistaken identity—as involving a transfer of VICAR motive. In most instances, though, the facts do not mandate resorting to the transferred intent doctrine because proof of actual motive is readily available. To the extent that culpability would depend on transferring motive, application in this context goes beyond the traditional limits of the doctrine and, potentially, due process.

#### 1. Transferred Motive in Incidental Victim Contexts

In *United States v. Concepcion*, the Second Circuit's "seminal case construing this statute,"<sup>155</sup> the court first affirmed the use of transferred motive for VICAR crimes.<sup>156</sup> There, Manuel Concepcion, a leader in a violent drug trafficking organization, accompanied by three armed subordinates, confronted rival drug dealers who were disputing control of a retail drug location.<sup>157</sup> As they approached the rivals, a bystander tried to stop Concepcion, and Concepcion shot and killed him.<sup>158</sup> At trial, Concepcion argued that VICAR requires proof of specific intent and "that the actual victim of the violence was the intended victim, not an incidental victim."<sup>159</sup> The court, however, affirmed his VICAR murder conviction and held that his motive to maintain or increase his position in the drug trafficking enterprise by killing rivals could be said to transfer since he killed a non-rival who "got in his way" as he was attempting to settle the territorial dispute.<sup>160</sup>

In *Concepcion*, the Second Circuit used the term "transferred intent" but it actually relied on "transferred motive."<sup>161</sup> Using this

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155. *United States v. Jones*, 291 F. Supp. 2d 78, 86 (D. Conn. 2003).

156. *Concepcion*, 983 F.2d at 381–82.

157. *Id.* at 375.

158. *Id.*

159. *Id.* at 381.

160. *Id.* at 381–82, 393. The murder of this non-rival victim is analogous to the previously discussed murder of the bystander. *See supra* Introduction.

161. *Concepcion*, 983 F.2d at 381; *see United States v. Rahman*, 189 F.3d 88, 141

same approach, the court subsequently affirmed other convictions involving incidental, or secondary, victims.<sup>162</sup> In one instance, the court upheld an accessory after-the-fact to VICAR murder conviction based on positional motive where, under the circumstances, a rational jury could conclude that the shooter killed someone who was not “an initially intended victim” partly because the shooter feared the victim might impede his effort to kill the original target.<sup>163</sup> In another case, the court affirmed convictions on two VICAR attempted murder counts where the defendant shot people who tried to prevent his escape after he killed his intended target.<sup>164</sup>

One who intentionally assaults or kills another without legal justification or excuse is culpable and properly subject to prosecution. However, this observation is distinct from the question whether transferred motive is an appropriate theory justifying federal enforcement and punishment under Section 1959 because the approach is not within the traditional scope of the transferred intent doctrine. Perhaps more importantly, the legal fiction is unnecessary when a perpetrator intentionally assaults or kills someone as a means to accomplishing a further objective. If the actor has the requisite positional or pecuniary motive and acts to accomplish a violent crime prohibited by Section 1959, he can—as a matter of fact and not fiction—be said to have the same motive for intentionally harming people in direct pursuit of that further purpose. This argument is even stronger where the evidence shows that members and associates are expected to achieve their criminal objectives despite intervention or opposition and their standing within an enterprise rises and falls with their willingness and ability to do so.<sup>165</sup>

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(2d Cir. 1999) (“*Concepcion* has already established for this Circuit that the transferred intent doctrine is applicable to transferred motive.”).

162. See, e.g., *Rahman*, 189 F.3d at 104–05, 160; *United States v. Malpeso*, 115 F.3d 155, 158, 164 (2d Cir. 1997).

163. *Malpeso*, 115 F.3d at 158, 164.

164. *Rahman*, 189 F.3d at 104–05, 160.

165. See, e.g., *Betancourt v. Hedgpeth*, No. ED CV 08-01076, 2010 WL 3447499, at \*10 (C.D. Cal. July 13, 2010) (finding that the jury could reasonably have found that gang members answering interference in gang activities with brutal violence was intended to enhance the gang’s reputation for ruthlessness, intimidate community members, and make it less likely that community members would report the gang’s crimes), *report and recommendation adopted*, No. ED CV 08-01076 DOC (RZ), 2010 WL 3447495 (C.D. Cal. Aug. 27, 2010); *People v. Garcia*, No. B266328, 2019 WL 2295779, at \*3 (Cal. Ct. App. May 30, 2019) (“The People’s gang expert testified that a gang member who is ‘disrespected’ by someone who gets in his way is ‘expected . . . not to back down’ and instead to ‘commit an act of violence’ in response to such defiance.” (alteration in original)). The evidence in cases involving gang-related violence, for instance, often demonstrates that members and associates are expected to respond



For instance, if an enterprise member is threatened with expulsion if he does not participate in a fistfight with a rival, his motive to maintain his position would perdure if he killed the rival's parent who either tried to prevent the fight from occurring or tried to thwart the attacker's flight thereafter. In circumstances like this—which are analogous to the facts in *Concepcion* and other cases where the Second Circuit has transferred motive—the perpetrator actually has VICAR's jurisdictional motive, and there is no need to resort to a legal fiction.<sup>166</sup>

## 2. Transferred Motive in Mistaken Identity Contexts

While relying on the reasoning in *Concepcion*, the Second Circuit also affirmed the use of the transferred motive theory to crimes of violence involving misidentified persons.<sup>167</sup> In *United States v. Farmer*, a Bloods gang member, Laval Farmer, targeted and killed a fourteen-year-old boy whom he mistook for a rival gang member in retaliation for an attack on two of his fellows.<sup>168</sup> Thereafter, before discovering that he killed an innocent, Farmer bragged to other Bloods that he had avenged the gang by killing a rival.<sup>169</sup> The court concluded that there was ample evidence that the defendant intended to kill a rival and part of his purpose in doing so was to raise his status in his own gang.<sup>170</sup>

Like intentional attacks on incidental victims, there is no need to resort to transferred intent or motive theories for intentional attacks on misidentified victims.<sup>171</sup> Despite Farmer's mistake, he actually

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violently to bystanders who potentially interfere with their criminal objectives. See, e.g., *People v. Kennedy*, No. B264661, 2020 WL 218756, at \*5 (Cal. Ct. App. Jan. 15, 2020) (discussing gang expert testimony that “a gang member who shoots innocent bystanders creates a more fearsome reputation for the gang beyond that of a gang member who merely kills other gang members”).

166. See *Rahman*, 189 F.3d at 141; *Concepcion*, 983 F.2d at 381–82.

167. *United States v. Farmer*, 583 F.3d 131, 142–43 (2d Cir. 2009).

168. *Id.* at 136–37, 143.

169. *Id.* at 137.

170. *Id.* at 142–43; cf. *United States v. Stanley*, No. 3:15-cr-00198 (JAM), 2019 U.S. Dist. LEXIS 1208, at \*23–25 (D. Conn. Jan. 3, 2019) (denying motion for judgment of acquittal for murder in aid of racketeering where evidence showed that defendant killed a bystander in a retaliatory shooting).

171. See LAFAVE, *supra* note 21, § 6.4(d) (asserting that a mistake of identity does not negate an intention to kill); Jeremy M. Miller, *Mens Rea Quagmire: The Conscience or Consciousness of the Criminal Law?*, 29 W. ST. U. L. REV. 21, 38 (2001) (“Where a crime is perpetrated on a victim through mistaken identity, transferred intent, though not necessary, is applicable. This is the case because the defendant, quite simply, desired to kill the person whom he or she killed.”).

intended to kill the victim, and he had the required motive.<sup>172</sup> He may have been wrong about the efficacy of achieving his goal since he misidentified the victim, but he had the positional motive, and his reason for having it was immaterial.<sup>173</sup>

Alternatively, the Ninth Circuit Court of Appeals affirmed VICAR murder convictions of mistakenly identified victims without transferring motive.<sup>174</sup> In *United States v. Vasquez-Velasco*, the defendant, a member of the Guadalajara Narcotics Cartel, was charged with killing two American tourists in Mexico for the purpose of maintaining and increasing his position in the cartel's drug trafficking activities.<sup>175</sup> Among other things, the cartel was responsible for distributing large amounts of cocaine in the United States and produced massive amounts of marijuana in Mexico.<sup>176</sup> DEA investigations and enforcement activities in the United States and Mexico cost the organization billions of dollars and prompted retaliation against DEA agents.<sup>177</sup> When the unsuspecting victims wandered into a restaurant frequented by drug traffickers, the defendant and others mistook them for DEA agents and killed them.<sup>178</sup> Under the circumstances, the court affirmed the convictions and extraterritorial application of Section 1959.<sup>179</sup>

Whether the victims are incidental in that they are unplanned secondary targets or mistakenly identified, the transferred intent theory does not apply to intentional killings,<sup>180</sup> and the transferred motive derivative of the theory is inapposite for VICAR crimes. First, transferring motive is not part of the traditional transferred intent doctrine. Second, the approach requires unnecessarily convoluted reasoning because, under these scenarios, perpetrators have the necessary motive toward intended victims when they attack. This is true even if they have other motives like removing an impediment to assaulting or killing someone else.

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172. *Farmer*, 583 F.3d at 142–43.

173. *Id.*

174. *United States v. Vasquez-Velasco*, 15 F.3d 833, 843 (9th Cir. 1994).

175. *Id.* at 837–38, 842–43.

176. *Id.* at 842.

177. *Id.*

178. *Id.* at 842–43.

179. *Id.* at 848.

180. See *State v. Williams*, 829 S.E.2d 702, 707 n.9 (S.C. 2019) (finding the doctrine of transferred intent unnecessary in mistaken identity cases); *Martinez v. State*, 844 S.W.2d 279, 282 (Tex. Ct. App. 1992) (observing that “the law of transferred intent does not apply” in mistaken identity cases).

### B. Harms to Unintended Victims

The Second Circuit Court of Appeals has plainly stated that it “do[es] not believe that section 1959 reaches only murders that were committed intentionally.”<sup>181</sup> In its estimation, VICAR convictions are potentially viable in cases involving “bad aim” and felony murder. The court’s rationale for “bad aim” situations applies, at a minimum, to assaults as well.<sup>182</sup> However, utilizing the transferred motive fiction in either case involves a substantial and unnecessary expansion of the traditional transferred intent doctrine that potentially offends due process.<sup>183</sup>

#### 1. Transferred Motive in “Bad Aim” Contexts

Reliance on transferred motive is unnecessary for intentional killings, but it is possible that certain unintentional killings, like those resulting from a shooter’s bad aim, could not be effectively prosecuted under Section 1959 without transferring motive in some instances.

Bad-aim cases and mistaken-identity cases are alike in that the unintended victim harmed is a surprise to the actor. But they differ in that the surprise originates in a different deficit on the actor’s part. In the bad-aim situation, the actor harms another “by accident, that is, by lack of physical control over the direction [his] threatened harm[] will take” as it leaves his hands. In the mistaken-identity situation, the actor harms another “by mistake, namely, by failing fully to realize who [his] . . . target [is].”<sup>184</sup>

This “different deficit on the actor’s part”<sup>185</sup> accounts for an additional hurdle to proving an actor had the requisite motive for VICAR culpability in bad aim cases.

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181. *United States v. Mapp*, 170 F.3d 328, 335 (2d Cir. 1999).

182. *See id.* (“Instead, it is sufficient for the government to prove that the defendant committed murder . . . and that he engaged in the *conduct* that resulted in the murder . . .”).

183. *See, e.g., State v. Harrison*, 914 N.W.2d 178, 216–17 (Iowa 2018) (Appel, J., dissenting) (“The notion that the felony-murder rule embraces a theory of transferred intent may be attacked on the ground that it violates due process and constitutes cruel and unusual punishment.”).

184. *People v. Jackson*, 472 P.3d 553, 559 (Colo. 2020) (alterations in original) (citations omitted) (quoting Westen, *supra* note 16, at 333).

185. *Jackson*, 472 P.3d at 559 (citing Westen, *supra* note 16, at 333).

Consider the following scenario: a gunman hired by a criminal organization fires a single shot at his intended victim, misses the target, and kills a small child instead. It cannot be credibly maintained that he either intended to kill the child or that he was actually motivated to do so for pecuniary gain from the enterprise. Yet, both would be required for a VICAR murder conviction. Securing a conviction under these circumstances would necessitate a transfer of intention to kill the actual target and a transfer of his pecuniary motive for doing so. The first transfer is the essence of the transferred intent doctrine, but the second is not and entails compounding the traditional legal fiction.

Under some situations, there may be a viable argument that the hypothetical gunman intended to kill the child and others in close proximity to the primary target. Rather than twist the transferred intent doctrine to reach victims that fall outside its traditional scope, there is precedent in some jurisdictions for the proposition that a perpetrator who creates a zone of danger around a target—for instance, by firing a hail of bullets or using an explosive device—can be said to have a concurrent intent to kill others in the target's immediate vicinity.<sup>186</sup> Prosecutors could argue and juries could find that violent actors concurrently intended to kill bystanders as well as the primary target, as “[a] defendant can be convicted of multiple specific intent crimes from one act when it can be inferred that he intended to cause harm to more than one victim.”<sup>187</sup> This approach obviates the perceived need, at least in certain cases, for ignoring the typical bounds of transferred intent in order to ascribe VICAR culpability.

Even without a feasible theory that a perpetrator actually intended to assault or kill bystanders, concerns that murderers or other violent actors might go unpunished or underpunished—the animating concerns behind the transferred intent doctrine—without deployment of the transferred motive fiction are misplaced. No compelling state or federal interests would go unredressed if the transferred intent doctrine were not stretched beyond its traditional limits to reach this scenario. The hypothetical shooter can and should be punished under an array of state and federal statutes because he is potentially culpable for murdering the child—using the traditional

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186. See, e.g., *United States v. Garibay*, 675 F. App'x 752, 752 (9th Cir. 2017) (discussing California's “kill zone” theory of concurrent intent to kill); *People v. Canizales*, 442 P.3d 686, 693–98 (Cal. 2019) (discussing the parameters of the “kill zone” theory); *Harrison v. State*, 855 A.2d 1220, 1231 (Md. 2004) (observing that “courts have permitted an inference that the defendant created a kill zone when a defendant . . . fired multiple bullets at an intended target”).

187. *Ford v. State*, 625 A.2d 984, 996 (Md. 1993), *disapproved of on other grounds*, *Henry v. State*, 19 A.3d 944 (Md. 2011).

transferred intent doctrine—in violation of applicable state laws, attempting to murder his target in violation of Section 1959 and state law, using interstate commerce facilities in the commission of murder-for-hire in violation of 18 U.S.C. § 1958, and a host of other state and federal crimes.<sup>188</sup>

## 2. Transferred Motive in Felony Murder Contexts

The Second Circuit has affirmed a VICAR murder conviction where the underlying state law predicate rested on a felony murder theory without relying on transferred motive.<sup>189</sup> In *United States v. Mapp*, one of the defendants shot and killed a robbery victim but claimed the shooting was accidental,<sup>190</sup> and he challenged his conviction while arguing that the government failed to prove the required motive under Section 1959.<sup>191</sup> He contended that the statute “should be interpreted as punishing only intentional murders” because “one cannot have a motivation or purpose for committing an unintentional act . . . .”<sup>192</sup> The court rejected this argument and held, based on the statute’s text and purpose, that “it is sufficient for the government to prove that the defendant committed murder—however that crime is defined by the underlying state or federal law—and that he engaged in the *conduct* that resulted in murder, however defined, with the purpose or motivation prescribed in the statute.”<sup>193</sup> The defendant, then, was properly culpable for VICAR murder if he participated in the robbery with either of Section 1959’s alternative motives.<sup>194</sup> Other courts have also accepted the felony murder theory

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188. See, e.g., *Lopez v. Keyser*, No. 19-CV-2655 (ARR), 2020 U.S. Dist. LEXIS 219311, at \*1–2, \*5–6 (E.D.N.Y. Nov. 23, 2020) (denying petition for a writ of habeas corpus where a gang member was convicted of one count of intentional murder in the second degree on a theory of transferred intent and two counts of assault in the first degree under New York state law for killing one bystander and injuring two others while attempting to shoot rivals from a rooftop).

189. See, e.g., *United States v. Lee*, 660 F. App’x 8, 16, 22 (2d Cir. 2016) (“Where, as here, the murder in aid of racketeering is a felony murder, the element of purpose or motivation need only be shown with respect to the underlying felony—in this case, the robbery.”).

190. 170 F.3d 328, 332 (2d Cir. 1999).

191. *Id.* at 335.

192. *Id.*

193. *Id.*

194. *Id.* at 335–36; see also *United States v. Palacios*, Nos. 98-1458, 98-1459, 1999 U.S. App. LEXIS 5206, at \*8 (2d Cir. Mar. 24, 1999) (concluding that “the defendants committed the robbery to maintain or increase their position within the Latin Kings, and, since [the victim] was killed ‘in the course of and in furtherance of the robbery, the defendants committed felony murder to maintain or increase their position within the Latin Kings’ (quoting N.Y. PENAL LAW § 63 (Consol. 2022)).

in finding or affirming VICAR convictions.<sup>195</sup>

It is noteworthy that the Second Circuit did not explicitly rely on transferred motive in *Mapp*.<sup>196</sup> While RICO and VICAR are related statutes, applying the felony murder theory to RICO predicates is fundamentally different than applying it to VICAR predicates because the required nexus to the enterprise is different for the two statutes.<sup>197</sup> RICO merely requires that the predicate crime be committed as part of conducting the affairs of the enterprise, but VICAR requires that the predicate crime is specifically motivated by the requisite positional or pecuniary aims.<sup>198</sup>

Felony murder involves imputing the malice from participation in a non-homicide offense to the unintended homicide. Compounding one fiction with another to create culpability for VICAR murder would lead to defendants being convicted of federal crimes where they neither intend the prohibited harm nor have the motive necessary to justify federal prosecution in bringing that specific harm to pass. Because the only sentencing options for murder under Section 1959 are life in prison and death,<sup>199</sup> imposing the most severe sentences possible under such circumstances potentially violates due process.<sup>200</sup>

Instead of resorting to transferred motive in *Mapp*, the Second Circuit interpreted VICAR's motive requirement to apply to the conduct that resulted in the murder rather than the murder itself.<sup>201</sup> Consequently, it affirmed the defendant's guilt because he participated in a robbery—which is not a predicate offense under Section 1959—in order to maintain his position in the enterprise, and murder under state law resulted from his participation.<sup>202</sup> This interpretation of VICAR's second *mens rea* requirement is novel and few, if any, other courts have adopted it. Even if this reading is not compelled by the text of the statute or its legislative history, it is straightforward and avoids contorting the transferred intent doctrine.

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195. See, e.g., *Prudente v. United States*, No. 1:05-CR-0324-CAP-JFK-1, 2011 WL 13300057, at \*4–5 (N.D. Ga. Apr. 18, 2011).

196. *United States v. Mapp*, 170 F.3d 328, 335–36 (2d Cir. 1999).

197. See 18 U.S.C. §§ 1959, 1962 (2018).

198. See *id.*

199. *Id.* § 1959(a)(1).

200. See *State v. Harrison*, 914 N.W.2d 178, 216–17 (Iowa 2018) (Appel, J., dissenting) (“The notion that the felony-murder rule embraces a theory of transferred intent may be attacked on the ground that it violates due process and constitutes cruel and unusual punishment.”); see also, e.g., Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 460–91 (1985).

201. *Mapp*, 170 F.3d at 335–36.

202. *Id.*

#### IV. THE IMPROPRIETY OF TRANSFERRING MOTIVE IN VICAR CONTEXTS

As a matter of long and generally accepted legal fiction, intent is said to “follow the bullet,” but an additional leap of the legal imagination is required to conclude that motive follows as well. There are, and must be, limits to application of the transferred intent doctrine.<sup>203</sup> While it is helpful in bringing wrongdoers to justice, it is best to restrict transferred intent to its traditional contours rather than compound one fiction with another in order to assign culpability for motive-based offenses like hate crimes and violent crimes in aid of racketeering.

Section 1959, in particular, creates a low bar to federal jurisdiction based on the perpetrator’s motive. When its jurisdictional motive requirement is only satisfied based on variations of transferred intent, then prosecutors do not have to prove beyond a reasonable doubt that accused persons committed the underlying crimes with the required motive. Yet, courts have generally accepted and applied the doctrine to sustain convictions without critically analyzing the propriety of doing so.

A crime is only a violent crime in aid of racketeering in violation of Section 1959 when the defendant has the *mens rea* required for both the underlying offense and either the pecuniary or positional motive tying the criminal act to a racketeering enterprise.<sup>204</sup> Using the

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203. See, e.g., *Miller v. Alabama*, 567 U.S. 460, 491 (2012) (Breyer, J., concurring) (opining that the deployment of “transferred intent” in some circumstances should not be “sufficient to satisfy the intent to murder that could subject a juvenile to a sentence of life without parole”); *Gov’t of V.I. v. Davis*, 561 F.3d 159, 168–69 (3d Cir. 2009) (concluding “that the doctrine of transferred intent does not apply to first-degree assault as defined under Virgin Islands statutory law” because the statute required that defendants specifically intend to commit certain enumerated crimes during the perpetration of the assault); *Ramsey v. State*, 56 P.3d 675, 681–82 (Alaska Ct. App. 2002) (concluding that the defendant could not be guilty of attempted murder based on transferred intent because “carried to its logical extension, [the State’s argument] would allow [the State] to convict [the defendant] of the attempted murder of everyone in the building”); *Commonwealth v. Gunter*, 692 N.E.2d 515, 525 (Mass. 1998) (“Having been abolished in some jurisdictions the felony-murder rule has been limited in application in many jurisdictions where it has been retained, including our own.”); Ehrenreich, *supra* note 21, at 57 (“Several doctrinal issues within transferred-intent law raise questions about the wisdom of broadening the doctrine . . .”). Compare *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (reversing the imposition of the death penalty for felony murder on a defendant who participated in a robbery but did not participate when his co-conspirators killed a victim of the robbery), with *Tison v. Arizona*, 481 U.S. 135, 158 (1987) (“[M]ajor participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement.”).

204. 18 U.S.C. § 1959.

transferred intent doctrine to meet both of these requirements creates serious and unnecessary due process concerns.<sup>205</sup> A defendant might be substantially prejudiced, for example, if a murder in violation of state law improperly morphed into a federal murder in aid of racketeering because the federal conviction would carry a mandatory minimum sentence of life in prison without the possibility of parole, notwithstanding one's criminal history or role in the offense.<sup>206</sup>

Frankly, there are better ways to prosecute and adjudicate motive-based offenses. First, in the VICAR context, there is no need to employ a fiction to transfer an actor's motive when his or her act of violence is intentional and impelled by either past or future payment from a racketeering enterprise or aspirations of gaining entrance to or maintaining membership in it. This is true whether the victims are incidental or misidentified targets. If a person has the prohibited motive and proceeds to accomplish the violent act, or attempts to accomplish it, and intentionally assaults or kills someone in the process, then the person was motivated to commit the assault or homicide for one of VICAR's two alternative purposes.

Secondly, with truly accidental victims, there are some circumstances where successful VICAR prosecution will be available without the transferred motive fiction. Rather than overtax the transferred intent doctrine in those instances, defendants should simply be prosecuted under other federal statutes or applicable state laws. Particularly exaggerated "bad aim" cases involving large scale or prolonged attacks that endanger bystanders in close proximity to primary targets could arguably be prosecuted as concurrently intentional attacks, but this approach would admittedly only redress a fraction of prosecutions currently or prospectively being pursued under VICAR. The remainder, though, along with felony murder prosecutions relying on both transfer of intent for the predicate crime and transfer of motive to establish VICAR culpability, should not be maintained.

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205. Compare the Court's approach in *Francis v. Franklin* to due process concerns:

[Mandatory] presumptions violate the Due Process Clause if they relieve the State of the burden of persuasion on an element of an offense . . . . A permissive inference does not relieve the State of its burden of persuasion because it still requires the State to convince the jury that the suggested conclusion should be inferred based on the predicate facts proved . . . . A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury.

*Francis v. Franklin*, 471 U.S. 307, 314–15 (1985).

206. 18 U.S.C. § 1959(a)(1).



VICAR is a powerful statute, and it certainly has its place in the federal government's arsenal for tamping down organized crime. Recognizing the limitations of the transferred intent doctrine in the VICAR context is not a matter of being "soft on crime," as some might reflexively suppose. Neither is it a matter of allowing bad actors to go free. It is a matter of respecting fundamental fairness. Rather, it is a simple acknowledgement that breaking one law is not necessarily the same as breaking another, and it is important to the American conceptions of justice and fairness that even the worst actors are entitled to due process of law. The web of state and federal criminal laws is more than adequate to redress the various harms that are not encompassed under Section 1959 without overworking the notion of transferred intent. After all, VICAR predicates are, first and foremost, violations of either state law or another federal statute and can be prosecuted accordingly.

#### CONCLUSION

Under the traditional approach, transferred intent allows a factfinder at trial to impute an actor's intention to shoot and kill one person to a bystander who was accidentally killed instead. Transferring motive would involve the additional fiction of assigning the actor the intention of assaulting or killing the unintended victim for a specific reason, like preventing the victim from testifying in a court proceeding or because the victim was a law enforcement officer. This would expand the reach of statutes that create motive-based crimes and involve combining legal fictions to punish people who have not actually brought about the proscribed harms for the proscribed reasons.

The intention here has not been to argue that motive-based statutes are unconstitutional or even undesirable. On the contrary, this Article assumes that they are a permissible exercise of legislators' lawmaking function and can be important tools for deterring and redressing significant societal threats. There is good reason for punishing violent actors more severely when they attack others to keep them from participating in legal proceedings, to prevent them from exercising their constitutional rights, because of their immutable characteristics, or as part and parcel of some larger nefarious criminal undertaking. Yet, as the Ninth Circuit Court of Appeals observed regarding VICAR's motive requirement, the reach of motive elements must be "cabined in some way" lest local crimes be improperly transformed into federal offenses or traditional crimes unnecessarily morphed into aggravated offenses with higher penalties and

additional social stigmas.<sup>207</sup>

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207. *United States v. Banks*, 514 F.3d 959, 968 (9th Cir. 2008).

