

BIG BOX CARCERALISM

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ABSTRACT

If you believe major retailers, the United States is in the midst of a national shoplifting crime wave. Violent gangs rob big box stores, mom-and-pop stores, and pharmacies alike, and in the process, pilfer millions of dollars' worth of merchandise, resell it through online marketplaces, and use their illicit proceeds to fund international terrorist organizations and transnational gangs. The harms, retailers argue, are substantial—because this is not just typical shoplifting. Yet these groups are getting away with it all—because existing criminal statutes are too weak and soft-on-crime prosecutors will not bring cases.

This narrative has been hugely influential. National and local media outlets breathlessly cover “smash-and-grab” robberies and credulously report retailers' own statistics about the extent of organized retail crime. And since 2003, federal lawmakers have unsuccessfully pushed for the creation of a federal “organized retail crime” offense, an unprecedented expansion of federal criminal jurisdiction that would empower U.S. Attorneys' offices to bring low-level thefts into federal court. But though these efforts have stalled nationally, in the last two decades, nearly forty states have adopted “organized retail crime” statutes, which create new offenses for repeated thefts done by organized gangs.

Yet this narrative, while clearly powerful, is wrong. Retail groups have misrepresented the extent of organized retail crime in the United States—and, under increased scrutiny, were forced to walk back their characterizations and correct their flawed data. And federal and state prosecutors both have ample tools at their disposal for charging organized retail crime. Virtually all conduct undertaken by shoplifting enterprises would easily trigger liability—as well as substantial punishments—under existing criminal statutes, and “organized retail crime” statutes would add comparatively little muscle to these laws for most defendants.

So far, little scholarly attention has been focused on organized retail crime statutes. This deficiency is stunning at a time when a majority of states now have versions of these statutes in place and Congress is actively considering legislation that would dramatically expand the scope of federal jurisdiction.

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Accordingly, this Article makes two distinct contributions to existing criminal scholarship. First, I assemble a comprehensive survey of the history, content, and impact of organized retail crime statutes. Second, based on that survey, I argue that retail groups are pulling a bait-and-switch. Organized retail crime statutes will likely be ineffective against their ostensible targets, the groups involved in multi-million-dollar crime rings, yet highly effective against their likely intended targets—low-level shoplifters and reform-minded prosecutors.

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INTRODUCTION

Transnational crime syndicates are ravaging American retail stores. Low-level boosters steal high-demand products, like baby formula, over-the-counter medication, and cosmetics, and then deliver them to fencers, who resell them for huge profits. These proceeds are laundered to support the operations of transnational armed groups, like Hamas and MS-13; cost retailers billions in lost inventory; and contribute to a shoplifting epidemic that has swept the country.

At least, that is the narrative that major retailers and trade groups have repeatedly pushed. Beginning in the early 2000s, the country’s largest retail companies

sounded the alarm about increased shoplifting and called on Congress to act by passing legislation to create a new federal crime: “organized retail theft.”¹ Though early action from Congress seemed promising—most notably, the introduction of the industry-backed Organized Retail Theft Act of 2003²—it only culminated in the creation of a federal task force and information-sharing database.³ Congress’s failure to act instead turned retailers’ attention to the states, where the American Legislative Exchange Council (ALEC) drafted and then helped push state-level analogs of organized retail crime statutes.⁴ As the narrative of organized retail crime has repeatedly resurfaced over the last two decades, industry pressure has produced myriad proposals to combat the epidemic. Though more than half of states today have some form of organized retail crime statute,⁵ Congress still has not acted.⁶

But there are good reasons to doubt the accuracy of the retailers’ narrative. “Organized retail crime” is a broad term without a universally accepted definition.⁷ As such, it could be used to describe both transnational gangs and small groups of shoplifters who boost and fence stolen products within a single state—and each group realizes radically different profits from its activities. The term also applies to a spectrum of conduct, ranging from nonviolent thefts at retail establishments to hijacking and stealing cargo trucks. These definitional problems are interrelated with a statistical problem: namely, that there is no official data on the frequency or impact of organized retail crime.⁸ This information deficit causes real problems.

1. See, e.g., CHARLES I. MILLER, FOOD MKTG. INST., A REPORT ON ORGANIZED RETAIL THEFT 14–15 (2003).

2. Organized Retail Theft Act of 2003, S. 1553, 108th Cong. (2003). See generally *Organized Retail Theft: Conduit of Money Laundering: Hearing Before the Subcomm. on Crim. Just., Drug Pol’y & Hum. Res. of the H. Comm. on Gov’t Reform*, 108th Cong. (2003) [hereinafter 2003 House Government Reform Hearing] (hearing on organized retail theft).

3. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 1105, 119 Stat. 2960, 3092 (codified at 34 U.S.C. § 41505).

4. In July 2011, an ALEC whistleblower leaked “800 resolutions and model bills to the Center for Media and Democracy and *The Nation*. Prior to this leak, these bills were only available to ALEC-affiliated legislators and corporate members.” Rebecca Cooper, Caroline Heldman, Alissa R. Ackerman & Victoria A. Farrar-Meyers, *Hidden Corporate Profits in the U.S. Prison System: The Unorthodox Policy-Making of the American Legislative Exchange Council*, 19 CONTEMP. JUST. REV. 380, 384 (2016). One such example was a model “Organized Retail Theft Act.” *Organized Retail Theft Act Exposed*, CTR. FOR MEDIA & DEMOCRACY (Feb. 9, 2017) [hereinafter ALEC Model Organized Retail Theft Act Exposed], https://www.alecexposed.org/wiki/Organized_Retail_Theft_Act_Exposed [<https://perma.cc/KA37-XM3M>].

5. *Infra* Part II.B.

6. *Infra* Part I.C.

7. KRISTIN M. FINKLEA, CONG. RSCH. SERV., R41118, ORGANIZED RETAIL CRIME 2 (2012) (“There is a lack of consensus . . . on the specific activities—particularly of boosters—that constitute ORC.”); MD. GOVERNOR’S OFF. OF CRIME CONTROL & PREVENTION, REPORT ON ORGANIZED RETAIL THEFT 1 (2016) (noting that “there is no uniform definition of ‘Organized Retail Crime’”); see also DONALD E. DEKIEFFER, UNDERGROUND ECONOMIES AND ILLEGAL IMPORTS: BUSINESS AND LEGAL STRATEGIES TO ADDRESS ILLEGITIMATE COMMERCE 60 (2010) (“It is easier to describe [organized retail theft] than to define it.”).

8. E.g., Ernesto Lopez, Robert Boxerman & Kelsey Cundiff, *Shoplifting Trends: What You Need to Know*, COUNCIL ON CRIM. JUST. (Nov. 2023), <https://counciloncj.org/shoplifting-trends-what-you-need-to-know/> [<https://perma.cc/9DT3-KABN>] (“[C]rime incident data is not suited to measure organizational retail theft. Organized retail theft is an investigative determination – rather than a reported offense type in official sources –

While individual, high-profile instances of shoplifting—especially violent “smash-and-grab” robberies—can go viral and are deeply impactful for the store employees and bystanders who experience them,⁹ these instances are clearly no more than anecdotal.¹⁰ Moreover, because most data on organized retail crime is privately compiled, it is prone to significant error and misinterpretation, even by its own compilers. From 2021 to 2023, the Coalition for Law Enforcement and Retail (CLEAR) and the National Retail Federation (NRF) misinterpreted, and then relied on, each other’s data, playing a game of telephone that suggested that organized retail crime was far more prevalent than their own data *actually* showed.¹¹

Moreover, even if the narrative itself is accurate, it seems unlikely that the retailers’ proposed solution—creating the crime of “organized retail theft”—would do anything to solve the problem. Organized retail crime laws do little more than repackage existing prohibitions on theft, conspiracy, and racketeering.¹² While the details differ from jurisdiction to jurisdiction, most of the proposed and enacted statutes simply allow prosecutors to add together multiple theft crimes into a single prosecution and charge everyone involved in the enterprise. Not only can prosecutors *already* do that under most state laws,¹³ but such a theory of liability would also be roughly analogous to a similarly structured prosecution for conspiracy to commit theft or for racketeering under the Racketeer Influenced and Corrupt Organizations Act (RICO) based on a constellation of thefts and frauds.

In any event, it seems unlikely that simply making it slightly easier for prosecutors to aggregate and charge theft crimes is a desperately needed tool—much less a useful one at all—for combatting transnational crime syndicates. Suppose that it is true that a nontrivial share of overall retail theft is attributable to highly organized, structurally intricate transnational crime rings. Suppose further that, in the aggregate, these rings steal billions of dollars’ worth of merchandise, causing significant pain to retailers and the U.S. economy, and then launder the proceeds to support their criminal operations. If so, why are trumped-up aggregated theft prosecutions

and therefore it cannot be reliably extracted from crime data.”); Ames Grawert & Ram Subramanian, *Myth vs. Reality: Trends in Retail Theft*, BRENNAN CTR. FOR JUST. (Mar. 7, 2024), <https://www.brennancenter.org/our-work/research-reports/myth-vs-reality-trends-retail-theft> [<https://perma.cc/G24Y-FZ3P>].

9. Abha Bhattarai & Gerrit De Vynck, ‘Flash Mob’ Robberies Roiling U.S. Retailers, *Traumatizing Workers*, WASH. POST (Dec. 3, 2021), <https://www.washingtonpost.com/business/2021/12/03/retail-theft-organized-crime/> [<https://perma.cc/79UT-5A4Q>].

10. Lopez et al., *supra* note 8 (“Widely circulated footage of large crowds of people running from stores with armfuls of goods has raised questions about whether such ‘mob’ shoplifting events are on the rise. A lack of available data makes a definitive answer impossible, but the information available does show that the vast majority of shoplifting is not committed by groups.”).

11. See, e.g., Daphne Howland, *Retailers Have a Crime Problem. It’s in the Numbers.*, RETAIL DIVE (Nov. 29, 2023), <https://www.retaildive.com/news/retailers-crime-problem-numbers/699107/> [<https://perma.cc/9KWY-T8EK>]; Sam Dean, *Retailers Say Thefts Are at Crisis Level. The Numbers Say Otherwise*, L.A. TIMES (Dec. 15, 2021), <https://www.latimes.com/business/story/2021-12-15/organized-retail-theft-crime-rate> [<https://perma.cc/3GTT-4GAQ>].

12. *Infra* Part III.B.

13. *Id.*

a better way to deal with these criminal enterprises than, say, conspiracy, money laundering, or RICO prosecutions? If targeting transnational crime syndicates is the real goal, then organized retail crime statutes seem like using a pea shooter to stop a missile.

But perhaps these syndicates are not the *real* targets of organized crime statutes. After all, federal and state prosecutions against highly organized retail theft operations are seemingly able to proceed without much difficulty using existing criminal statutes. Criminal liability under federal and state conspiracy statutes and RICO, as well as state-level anti-gang laws, is sprawling.¹⁴ For decades, commentators have criticized the overreach of organizational liability under these laws.¹⁵ Instead, it seems possible that the real targets of these statutes may actually be low-level shoplifters working in small groups—and the “progressive” prosecutors who would rather pursue diversion than incarceration.¹⁶

After all, a theft ring consisting of just a few people, whose profits are in the hundreds or thousands, not *millions*, would likely never rise to the attention of federal prosecutors. An intricate state-level prosecution based on RICO or money-laundering charges seems equally unlikely given the aggregate total of the theft, and prosecutors may have little capacity to make connections to related crimes in other jurisdictions. Instead, any prosecution would likely be predicated on simple theft charges. When the theft takes place in a jurisdiction with a progressive prosecutor, the office might opt for an alternative to incarceration, like diversion or probation. However, the inflated panic behind organized retail theft can help prime voters into supporting harsher penalties, either by supporting legislators pushing for change, or as part of direct democracy, as the passage of California’s Proposition 36 in 2024 demonstrated.¹⁷ Then, once enacted, the organized retail crime statutes toughen up sentences, loosen venue requirements, and allow more prosecutors’ offices to exercise jurisdiction over the offense—potentially displacing the prosecutors who would seek noncarceral alternatives.

In this Article, I argue that organized retail crime statutes are not able to accomplish their stated aims and that their only possible outcome is to make it easier for prosecutors to charge low-level shoplifters. In doing so, I analyze the universe of organized retail crime statutes for the first time, and develop a unique taxonomy for categorizing and understanding these statutes.

14. *Infra* Part III.

15. See, e.g., Andrew Ingram, *Conspiracy, Really?*, 110 IOWA L. REV. 1203, 1214–24 (2025).

16. See, e.g., Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. REV. 164, 178–82 (2022); Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1419–28 (2021); Angela J. Davis, *Reimagining Prosecution: In Search of the True Progressive*, 3 UCLA CRIM. JUST. L. REV. 1, 22 (2019).

17. Nigel Duara & Joe Garcia, *Why Californians Got Tougher on Crime: Bleak Downtowns and Attention-Getting Retail Thefts*, CALMATTERS (Nov. 6, 2024), <https://calmatters.org/justice/2024/11/retail-theft-proposition-36-election/> [https://perma.cc/LXU4-QT33].

I begin in Part I by outlining the multi-decade pressure campaign to adopt organized retail crime statutes. I explain the narrative of organized retail crime as it is presented by retailers—and how this narrative drives media reporting on shoplifting. Then, I discuss the earliest national efforts to create, for the first time, an “organized retail crime” offense. The necessity for a new offense was predicated on claimed deficiencies in both federal and state criminal statutes, a paucity of law enforcement and prosecutorial resources, the need for greater facilitation among public and private actors, and an alleged (but largely unsubstantiated) link to terrorism.

In Part II, I turn to the states. I begin by outlining the largely successful effort by national retail groups, including through ALEC, to adopt organized retail crime laws in the states. I catalog the diverse approaches taken by states in creating such offenses themselves.¹⁸ While some significant differences exist among different statutes, most accomplish the same things. They criminalize joint criminal activity in the specific context of shoplifting, aggregate individual acts of shoplifting into a single (and weightier) charge, expand the geographic venues in which charges can be brought, increase punishments, and (sometimes) centralize prosecutorial authority in a state actor.

Then, in Part III, I argue that organized retail crime, even in the absence of one of the statutes described in Parts I or II, could be charged under federal or state law. I walk through several different possibilities for criminal liability, including principles of organizational liability, like conspiracy, RICO, and anti-gang statutes, as well as theories that are applicable to individual action.

Finally, in Part IV, I argue that, when the details of the organized retail crime statutes are matched up against the threat that they ostensibly respond to, they are wholly inadequate—and, as such, a series of ulterior motives may instead be behind them. The argument for their necessity—that existing federal and state criminal laws are insufficient—reflects either stunning ignorance or deception about the underlying legal regime. The changes advocated for by retailers would seemingly do nothing to meaningfully combat organized retail crime. Put simply, it is naive to argue that merely repackaging simple theft crimes would help combat the activities of transnational gangs.

Beyond the expressive effect of passing organized retail crime statutes, there are, however, several discrete effects of adopting them. While setting harsher sentences for shoplifting is unlikely to meaningfully disrupt organized criminal activity, it will allow prosecutors to throw the book at low-level shoplifters, regardless of whether they are really participants in “organized crime” or not. These laws will likely result in more prosecutions of shoplifting offenses and greater incarceration—and there is good reason to believe that these effects will be most acutely felt by communities of color.

18. Unless otherwise noted, the statutory analysis is as of January 1, 2026.

Moreover, organized retail crime statutes increase the salience of shoplifting as a threat to the average American and to the domestic economy. Establishing shoplifting as a serious, ever-present threat achieves an important political goal, not least because the available data does not seem to bear out the melodrama of the retailers' claims about how prolific and extensive shoplifting is. As shoplifting increases in salience, it can be used as a cudgel against the diversion programs favored by reform-minded prosecutors—as well as the prosecutors themselves. Expanding venue for organized retail crime offenses will allow tough-on-crime prosecutors to sidestep reform prosecutors who are less inclined to pursue carceral solutions to low-level shoplifting offenses.

I. THE CAMPAIGN FOR A FEDERAL ORGANIZED RETAIL CRIME STATUTE

“Organized retail crime” is an ambiguous term. It is unclear what it means, how often it occurs, and how serious of a problem it really is. But despite its ambiguities, it clearly invokes fear—either of organized crime or violent “smash-and-grab” robberies that endanger the public—and is a useful term in justifying some sort of response from policymakers. While concerns over shoplifting are quite old,¹⁹ for the last two decades, big-box stores and retailers' associations have loudly complained that shoplifting is out of control, that transnational criminal enterprises are to blame, and that existing criminal statutes cannot stop them. Accordingly, they have demanded that law enforcement officials direct their attention to shoplifting and that federal and state legislators create new offenses for organized retail crime.

In this Part, I describe the campaign to adopt a separate “organized retail crime” offense under federal law. I begin in Section A by contextualizing the rise of the organized retail crime narrative. While “organized retail crime” itself lacks a consistent definition, I unpack it by exploring the spectrum of possible meanings, the operation of organized criminal gangs that commit serial shoplifting offenses, and the uncertainty over the extent of organized retail crime itself.

Then, in Section B, I describe the public relations strategy that has been used to justify a federal organized retail crime statute. Pulling from arguments made to the media, in trade publications, and in congressional hearings, I outline the arguments that retailers' associations have made in support of this legislative agenda.

In Section C, I break down the organized retail crime bills that have been proposed—so far, unsuccessfully—by members of Congress. I discuss the changes to existing statutes that these bills would have accomplished and how these proposed changes fit into the operation of existing statutory schemes.

19. See generally KERRY SEGRAVE, *SHOPLIFTING: A SOCIAL HISTORY* (2001) (examining the history of shoplifting since the Civil War); RACHEL SHTEIR, *THE STEAL: A CULTURAL HISTORY OF SHOPLIFTING* (2011) (examining the cultural significance of shoplifting from 16th-century England through the present day).

A. Unpacking “Organized Retail Crime”

Theft, from merchants and residences alike, has been a concern for centuries. But modern innovations—the growth of department stores in the late 1800s and early 1900s, the creation of shopping malls in the mid-1900s, and the establishment of online marketplaces in the 1990s and 2000s—have created new opportunities for thieves.²⁰ Technological change has frequently been followed by changes in state penal codes to more clearly define theft crimes. Though virtually all shoplifting offenses could be charged under preexisting state prohibitions of larceny or theft,²¹ many states established separate crimes of “shoplifting” to either provide for greater punishments or summary prosecutions.²² As Universal Product Codes were used to ring up merchandise, some states passed laws to prohibit the manipulation of such codes.²³ Likewise, the use of anti-theft devices meant to trigger alarms when an item was in the process of being stolen was followed by state laws that outlawed manipulating the devices or shielding them from detectors.²⁴ Many of the current trends in theft—like “porch piracy”²⁵ and the rising theft of catalytic converters²⁶—have also precipitated specific prohibitions in state criminal law.²⁷

Retailers argue that “organized retail crime” is somewhat different than other types of theft, however. Its precise origin is difficult to pinpoint, but according to retail trade groups, criminal enterprises began undertaking large-scale shoplifting in the late 1980s and 1990s.²⁸ Regardless of when it began, the *campaign* against

20. See SEGRAVE, *supra* note 19, at 18–19; SHTEIR, *supra* note 19, at 97–98, 105.

21. WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* §§ 19.2(i), 19.3(b) n. 22 & 24 (3d ed. 2023).

22. MODEL PENAL CODE & COMMENTARIES § 223.1 cmt. 3 at 188–89 n. 24 (1985). The Commentaries state:

About half of the states superimposed on their ordinary grading schemes [for theft] special legislation dealing with ‘shoplifting,’ *i.e.*, taking goods from a store without paying or concealing merchandise with intent to avoid payment. These statutes commonly provided maximum penalties of 30 days or less without regard to amounts involved. The purpose of the legislation was to facilitate summary prosecution.

23. See *infra* notes 316–317 and accompanying text.

24. See *infra* notes 318–319 and accompanying text.

25. Drew McKay, Comment, *The Porch Pirate Problem*, 59 HOUS. L. REV. 455, 458–59 (2021); Paul Frew & Gene Petrino, *2025 Package Theft Report and Statistics*, SECURITY.ORG (Nov. 6, 2025), <https://www.security.org/package-theft/annual-report/> [https://perma.cc/UB2A-BBYW] (“Package thieves stole \$8.2 billion worth of online orders over the past year.”).

26. BENJAMIN F. STICKLE, *METAL SCRAPPERS AND THIEVES: SCAVENGING FOR SURVIVAL AND PROFIT* 12 (2017); Izzie Ramirez, *Catalytic Converters Are Being Stolen in Record Numbers. Here’s Why.*, VOX (May 20, 2023), <https://www.vox.com/2023/5/20/23728557/catalytic-converter-theft-scrap-price-replacement-toyota-prius-cars-insurance-protection> [https://perma.cc/4RMA-U7DH].

27. See, e.g., GA. CODE ANN. § 16-8-25 (West 2025) (criminalizing porch piracy); McKay, *supra* note 25, at 460–64 (summarizing legislative responses to porch piracy); ARK. CODE ANN. § 5-36-126 (West 2025) (criminalizing theft of catalytic converter); LA. STAT. ANN. § 14:67.12 (2025) (same); see also Press Release, Josh Gottheimer, Member, House of Representatives, RELEASE: Bipartisan “Porch Pirates” Bill Introduced During Holiday Season to Combat Package Theft (Dec. 23, 2025), <https://gottheimer.house.gov/posts/release-bipartisan-porch-pirates-bill-introduced-during-holiday-season-to-combat-package-theft> [https://perma.cc/W5DD-BQA6].

28. See MILLER, *supra* note 1, at 3.

organized retail crime really began in the early 2000s, when the terms “organized retail crime” and “organized retail theft” first entered common parlance.²⁹

The difference between simple shoplifting and organized retail crime can be slight. Shoplifting occurs for a variety of reasons—many people take items that they need, like food, out of necessity—but “organized retail crime” is generally understood to refer to repeated acts of shoplifting undertaken as part of a coordinated criminal effort to steal specific items and resell them.³⁰ However, the term could also refer to violently hijacking cargo trucks, colluding with employees to embezzle money or products, or falsifying receipts to receive fraudulent refunds.³¹

Law enforcement and retail groups have developed a typology of the people involved in organized retail crime. “Boosters” are the foot soldiers who steal from brick-and-mortar stores and deliver the products to fences.³² Depending on the scope of the operation, fences might clean and repackage the products before selling them to wholesalers on the grey market or selling them through legitimate outlets, like online marketplaces or flea markets.³³ Several recent criminal cases illustrate how different types of these groups work:

- A 2024 California state court indictment charged nine defendants with stealing \$8 million worth of cosmetics from stores like Ulta Beauty and Sephora. The ringleader “recruited many young women to enter makeup stores and commit bulk thefts of specific high-demand makeup products,” which she then resold on her Amazon storefront.³⁴

29. GOOGLE BOOKS NGRAM VIEWER, “Organized Retail Crime”, https://books.google.com/ngrams/graph?content=organized+retail+crime&year_start=1800&year_end=2022&corpus=en&smoothing=3 [https://perma.cc/8253-PFCT] (displaying data from 1800 to 2022) (last accessed Jan. 21, 2026).

30. One definition comes from the National Retail Federation, which defines “organized retail crime” as “the systematic largescale theft of retail goods from manufacturers, logistics and transportation providers, distributors, or retailers, and the subsequent resale of stolen goods for financial gain to wholesalers, retailers, or individual consumers, usually for a fraction of the retail cost.” NAT’L RETAIL FED’N & K2 INTEGRITY, ORGANIZED RETAIL CRIME: AN ASSESSMENT OF A PERSISTENT AND GROWING THREAT 30 (2023), [hereinafter NRF 2023 REPORT] <https://nrf.com/research/organized-retail-crime-assessment-persistent-and-growing-threat> [https://perma.cc/W9H4-SMDM].

31. READ HAYES, LOSS PREVENTION RSCH. COUNCIL, ORGANIZED RETAIL CRIME: DESCRIBING A MAJOR PROBLEM 16–18 (2005); WALTER E. PALMER & CHRIS RICHARDSON, ASIS FOUND., ORGANIZED RETAIL CRIME: ASSESSING THE RISK AND DEVELOPING EFFECTIVE STRATEGIES 4 (2009) [hereinafter CRISP REPORT], <https://popcenter.asu.edu/sites/default/files/library/crisp/organized-retail-crime.pdf> [https://perma.cc/9QDJ-F3W8].

32. ASS’N OF CERTIFIED ANTI-MONEY LAUNDERING SPECIALISTS & U.S. IMMIGR. & CUSTOMS ENF’T, DETECTING AND REPORTING THE ILLICIT FINANCIAL FLOWS TIED TO ORGANIZED THEFT GROUPS (OTG) AND ORGANIZED RETAIL CRIME (ORC) 13–16 (2022) [hereinafter ACAMS REPORT], <https://live-acams-new.pantheon.io/sites/default/files/2025-11/Organized%20Theft%20Groups%20and%20Organized%20Retail%20Crime%20-%20White%20Paper.pdf> [https://perma.cc/VJZ5-KXTK]; FINKLEA, *supra* note 7, at 4; MILLER, *supra* note 1, at 3; HAYES, *supra* note 31, at 13–16.

33. NRF 2023 REPORT, *supra* note 30, at 8–9; see Jack A. Cofer, Note, *The Grey Market’s Ability to Be Black and White: Regulating for Fraud in Online Marketplaces Beyond the INFORM Consumers Act*, 59 GA. L. REV. 699, 710–15 (2025).

34. Felony Complaint at 2–34, *People v. Mack*, No. CA302211 (Cal. Super. Ct. Feb. 16, 2024), [https://oag.ca.gov/system/files/attachments/press-docs/\[Redacted\]Conformed%20Felony%20Complaint%20-%20People%20v.%20Mack%2C%20et%20al.%20Case%20No.%20CD302211.pdf](https://oag.ca.gov/system/files/attachments/press-docs/[Redacted]Conformed%20Felony%20Complaint%20-%20People%20v.%20Mack%2C%20et%20al.%20Case%20No.%20CD302211.pdf) [https://perma.cc/C2LW-D9DP]; Press Release, Cal. Att’y Gen, Attorney General Bonta Announces Charges Against an Organized Retail Crime Ringleader for Scheme Spanning 21

- A 2023 Colorado state court indictment involved two defendants who stole just shy of 200 items with an aggregate value of about \$40,000 from Home Depot locations in northern Colorado in the course of a little less than a year. Upon leaving the stores with the stolen merchandise, they would resell it to local pawn shops.³⁵
- A 2021 federal indictment in the Northern District of Oklahoma involved twenty-three defendants who stole about \$10 million worth of products from big-box retailers, most commonly over-the-counter medication. Boosters stole the products from stores in northern Oklahoma and neighboring states and then delivered them to the ringleader, who then resold the items through her Amazon and eBay accounts.³⁶
- A 2018 federal indictment in the Southern District of Texas involved five defendants who stole about \$30 million worth of over-the-counter medicine and hygiene products from pharmacies and retail stores around the country. Thieves stole the products from stores and shipped them back to their operations base in Houston, where they operated a wholesale company. They cleaned the goods, repackaged them, and shipped them to distributors in New Jersey and New York.³⁷

Some of the groups involved in organized retail theft are allegedly much larger and are claimed to have connections to violent, transnational gangs and internationally recognized terrorist organizations. However, though allegations abound that groups like Hamas, Hezbollah, and MS-13 play a meaningful role in organized retail crime operations,³⁸ these allegations appear to be largely unsubstantiated outside of a handful of potentially isolated incidents.³⁹ There are some indications that

Counties and Nearly \$8 million in Losses (Feb. 16, 2024), <https://oag.ca.gov/news/press-releases/attorney-general-bonta-announces-charges-against-organized-retail-crime> [<https://perma.cc/M9BH-NUXJ>].

35. Colorado State Grand Jury Indictment at 3–4, *People v. Hehr*, No. 22CR0001 (Colo. Dist. Ct. Feb. 16, 2023), https://coag.gov/app/uploads/2023/03/CO-State-Grand-Jury-Indictment_VanLife.pdf [<https://perma.cc/9R9B-TGC8>].

36. Indictment at 4–17, *United States v. Abel*, No. 4:21-cr-00493-GKF (N.D. Okla. Nov. 3, 2021); Press Release, U.S. Att’y for the N.D. Okla., *Woman Pleads Guilty for Leading a Retail Theft Organization That Netted \$4.5 Million* (July 14, 2022), <https://www.justice.gov/usao-ndok/pr/woman-pleads-guilty-leading-retail-theft-organization-netted-45-million> [<https://perma.cc/F3A4-J8D6>].

37. Indictment at 3–14, *United States v. Ouwad*, No. 4:18-cr-00171 (S.D. Tex. Mar. 18, 2018); Press Release, U.S. Immigr. & Customs Enf’t, *2 Brothers Sentenced for Roles in Large-Scale Organized Retail Theft Ring Following HSI Houston, Federal Partner Investigation* (Nov. 16, 2023), <https://www.ice.gov/news/releases/2-brothers-sentenced-roles-large-scale-organized-retail-theft-ring-following-hsi> [<https://perma.cc/CBJ2-FBG3>]; Press Release, U.S. Att’y Off. for the S.D. Tex., *Fences Indicted in Multi-Million Dollar, Multi-State Criminal Theft Operations* (Apr. 4, 2018), <https://www.justice.gov/usao-sdtx/pr/fences-indicted-multi-million-dollar-multi-state-criminal-theft-operations> [<https://perma.cc/D2T4-CTCQ>].

38. *See, e.g.*, HITHA PRABHAKAR, *BLACK MARKET BILLIONS: HOW ORGANIZED RETAIL CRIME FUNDS GLOBAL TERRORISTS* 11–12 (2012); Matthew Levitt, *Hezbollah’s Criminal Networks: Useful Idiots, Henchmen, and Organized Crime Facilitators*, in *BEYOND CONVERGENCE: WORLD WITHOUT ORDER* 155, 159–60 (Hilary Matfess & Michael Miklaucic eds., 2016).

39. *See, e.g.*, FINKLEA, *supra* note 7, at 5–6; *Combating Organized Retail Crime—The Role of Federal Law Enforcement: Hearing Before the Subcomm. on Crime, Terrorism and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 12 (2009) [hereinafter 2009 House Judiciary Committee Hearing] (statement of David J. Johnson, Section Chief, Violent Crime Section, Criminal Investigative Division, Federal Bureau of

highly organized groups are behind some efforts to scam and defraud large retailers, but the frequency of these events is unclear. For example, industry representatives frequently speak at meetings of the Michigan Organized Retail Crime Advisory Board and share details about what acts of theft and fraud they face. Many of the in-person thefts involve impersonation of third-party shoppers or the creation of false online shopping receipts,⁴⁰ and stores experience attempted fraud through Bitcoin and Western Union money-order scams—including targeting individual employees by name.⁴¹

However, the true reach of organized retail crime is unclear—and almost assuredly exaggerated. A popular claim that organized retail crime represents a “\$100 billion problem” is pervasive⁴² but untrue. The claim’s origin is rooted in the inherent methodological difficulty of actually measuring “organized retail crime” as opposed to more straightforward shoplifting, and has been compounded by confusion *within* retailers’ groups as to what their own data shows, which is then communicated inaccurately to the public.

Every year, retailers suffer inventory loss from a variety of sources, including “employee theft, shoplifting, administrative error, and vendor fraud,” which are collectively referred to as “inventory shrinkage” or “shrink.”⁴³ In 2023, the National Retail Federation (NRF) reported that the industry’s overall shrink rate in 2022 was \$112.1 billion.⁴⁴ Though the NRF noted that shrink was “up from \$93.9 billion in 2021,”⁴⁵ inflation in the early 2020s increased the overall price of

Investigation); Rich Connell & Robert J. Lopez, *Ties Between Gang, Fences Probed*, L.A. TIMES (Dec. 23, 2005), <https://www.latimes.com/local/la-me-gang23dec23-story.html> [https://perma.cc/L6E6-YUAR].

40. MICH. ORG. RETAIL CRIME ADVISORY BD., DECEMBER 21, 2023 MEETING MINUTES, (2023), https://www.michigan.gov/msp/-/media/Project/Websites/msp/sid/2023_Dec_ORC_Meeting_Minutes.pdf?rev=cf124e5ac3bb40e8942ead284a1d8d17&hash=31E93479D743B574A1A6A1EF889EF217 [https://perma.cc/H72J-Y5N5] (“They will have falsified images on their phone, show the associates, and leave.”).

41. MICH. ORG. RETAIL CRIME ADVISORY BD., September 21, 2023 Meeting Minutes, (2023), https://www.michigan.gov/msp/-/media/Project/Websites/msp/sid/2023_Sept_ORC_Meeting_Minutes.pdf?rev=53a9d8dc98684ad69d92f3a4de682a14&hash=4C66FBDA29949D64557CDD0632A47F7A [https://perma.cc/4UPJ-TE7N] (“They’ve also seen an uptick with fuel stations and phone scams and BITCOIN scams. [The store] or the associate may be the victim in these cases, and they are trying to train and communicate to team members, but scammers are doing good with names and gaining familiarity of the associate.”).

42. *See, e.g.*, Kayla Bailey, *How Organized Retail Crime Became a \$100 Billion Problem That Is Growing ‘Dramatically’*, FOX BUSINESS (Oct. 20, 2022), <https://www.foxbusiness.com/retail/organized-retail-crime-100-billion-problem-growing-dramatically-matt-shay> [https://perma.cc/7626-AHVD]; Charles “Cully” Stimson & Zack Smith, *Organized Shoplifting Is a \$100-Billion Problem. Here’s Why We’re All Screwed*, HERITAGE FOUND. (Sept. 12, 2023), <https://www.heritage.org/crime-and-justice/commentary/organized-shoplifting-100-billion-problem-heres-why-were-all-screwed> [https://perma.cc/V3QQ-75A9].

43. RICHARD C. HOLLINGER & JASON L. DAVIS, 2002 NATIONAL RETAIL SECURITY SURVEY: FINAL REPORT 3 (Univ. of Fla., 2002).

44. NAT’L RETAIL FED’N & LOSS PREVENTION RSCH. COUNCIL, 2023 RETAIL SECURITY SURVEY: THE STATE OF NATIONAL RETAIL SECURITY AND ORGANIZED RETAIL CRIME 1 (2023) [hereinafter 2023 RETAIL SECURITY SURVEY], <https://nrf.com/research/national-retail-security-survey-2023> [https://perma.cc/4X43-EV9F].

45. *Id.*

merchandise, so this increase might be statistically insignificant.⁴⁶ In any event, based on numbers that were self-reported by retailers, the NRF calculated that theft accounted for 65% of overall shrink in 2022, with internal theft by employees accounting for 29% and external theft accounting for 36%.⁴⁷ “Process, control failures and errors”⁴⁸ represented 27% of shrink, and “unknown” and “other” combined for 7%.⁴⁹

However, while the “external theft” category “include[d] [organized retail crime]-related events,” the contribution of organized retail crime to the overall numbers was unclear.⁵⁰ Observers and media outlets—as well as representatives of the retail industry themselves—routinely conflate shrink with theft,⁵¹ and theft with “organized retail crime.”⁵² For example, in 2021, Brendan Dugan, the Director of Organized Retail Crime and Corporate Investigations for CVS, who also served as the President of the National Coalition of Law Enforcement and Retail (CLEAR), testified before the U.S. Senate Judiciary Committee. He alleged that “organized retail crime accounts for \$45 billion in annual losses for retailers.”⁵³ But this was not true. Dugan had misinterpreted NRF data from 2016, which estimated the *shrink rate* to be \$45.2 billion,⁵⁴ and then incorrectly represented it as the overall loss caused by organized retail crime.

Nonetheless, Dugan’s claim proliferated. Media outlets credulously reported the claim and politicians incorporated it into their messaging, despite the fact that extrapolating the data produced bizarre, highly improbable conclusions.⁵⁵ The

46. Lisa Jack, *Understanding the Retail Loss Problem in the New Era of High Inflation*, ECR RETAIL LOSS GRP. (June 2023), <https://www.ecrloss.com/research/does-inflation-create-shrink?from=/research> [<https://perma.cc/QV86-C55A>].

47. 2023 RETAIL SECURITY SURVEY, *supra* note 44, at 6.

48. These, the NRF explained, are “[l]osses that occurred through normal business operations and may be due to cashier errors, inaccurate system pricing, accidental loss or damages and other operational or systemic errors.” *Id.* at 20.

49. *Id.* at 6.

50. *See id.* (emphasis added).

51. *See* Daphne Howland, *The Biggest Culprit in Shrink is in the Store—But It’s Probably Not a Criminal*, RETAILDIVE (July 28, 2025), <https://www.retaildive.com/news/the-biggest-culprit-in-shrink-is-in-the-store-but-its-probably-not-a-cri/753755/> [<https://perma.cc/VM7B-MUTG>].

52. Dean, *supra* note 11.

53. *Cleaning Up Online Marketplaces: Protecting Against Stolen, Counterfeit, and Unsafe Goods: Hearing Before the S. Comm. on the Judiciary*, 117th Cong. 3 (2021) (testimony of Brendan P. Dugan, Dir. of Organized Retail Crime & Corp. Investigations, CVS Health), <https://www.judiciary.senate.gov/imo/media/doc/Dugan%20testimony.pdf> [<https://perma.cc/9PG9-BUEQ>].

54. *See* Howland, *supra* note 11 (“In an email to Retail Dive, Dugan confirmed that he was citing NRF’s 2016 report on total retail shrink as CLEAR’s ORC estimate.”); *see also* NAT’L RETAIL FED’N & UNIV. OF FLA., THE 2016 NATIONAL RETAIL SECURITY SURVEY 7 (June 2016), https://cdn.nrf.com/sites/default/files/2018-10/NRF_2016_NRSS_restricted-rev.pdf [<https://perma.cc/RQ28-DTBS>] (“The impact of shrinkage on the retail industry continues to be sizeable. With an average shrink rate of 1.38%, this costs the overall U.S. retail economy \$45.2 billion in 2015.”).

55. *See* Dean, *supra* note 11 (“Rachel Michelin, president of the California Retailers Assn., told the San Jose Mercury News that in San Francisco and Oakland alone, businesses lose \$3.6 billion to organized retail crime each year. That would mean retail gangs steal nearly 25% of total sales in San Francisco and Oakland combined,

coup de grâce, however, was when the NRF then incorporated into one of its reports Dugan’s misrepresentation of its own data. In the original version of its 2023 report on organized retail crime, the NRF claimed that “nearly half of [shrink in 2021] was attributable to [organized retail crime], according to NRF survey data and research by the National Coalition of Law Enforcement.”⁵⁶ But all the NRF did was take the misrepresented number cited by Dugan—\$45 billion—and compare it to the 2021 shrink rate. In other words, the 2016 shrink rate, which Dugan misrepresented as the rate of “organized retail crime,” was used as the numerator, and the 2021 shrink rate was used as the denominator.

Amid a flurry of criticism, the NRF retracted its claim months later.⁵⁷ In a defiant press release, the NRF denied that “the retail industry distorts retail theft data to drive public policy goals” and implored critics to “stop dwelling on flawed, flashy inferences and focus on the facts.”⁵⁸ CLEAR put out its own statement “stand[ing] behind” its “estimate that organized retail crime (ORC) causes \$45 billion dollars in inventory losses,”⁵⁹ and the next year, the NRF announced that it would no longer be conducting an annual report on retail shrink—to instead focus on “the landscape of retail theft and violence.”⁶⁰

But, contrary to the NRF’s denial, the misrepresentation *did* drive public policy goals. While the falsehood in the 2023 report certainly was not the only cause—observers continue to conflate shrink with theft—the claim in the report was used to justify the creation of “organized retail crime” offenses under federal and state law and to ramp up punishments for shoplifting as part of a “moral panic.”⁶¹ Many retailers also cited the effect of organized retail crime in their decision to close stores or restrict public access to products.⁶² What’s more, while data on the extent of organized retail crime is not ironclad, the best available estimates suggest that it is just a fraction of overall theft—and that the flashy, attention-grabbing, and *violent* smash-and-grab robberies are highly unrepresentative of typical shoplifting episodes.

which amounted to around \$15.5 billion in 2019, according to the state agency that tracks sales tax. Can that be right? In a word: no.”)

56. Howland, *supra* note 11.

57. Anne D’Innocenzio, *Retail Group Pulls Back on Claim Organized Retail Crime Accounts for Nearly Half of Inventory Loss*, ASSOC. PRESS (Dec. 7, 2023), <https://apnews.com/article/national-retail-federation-organized-retail-crime-data-fa38e4e3d7e9d2b7b4e8dd7e6fed81e1> [<https://perma.cc/YBN8-W2RV>].

58. David Johnston, *Addressing the Elephant in the Room on Organized Retail Crime*, NAT’L RETAIL FED’N (Feb. 8, 2024), <https://nrf.com/blog/addressing-elephant-room-organized-retail-crime> [<https://perma.cc/DG3Z-92WF>].

59. Press Release, Coal. of L. Enf’t & Retail, CLEAR ORC Loss Data (Dec. 7, 2023), <https://www.clearusa.org/post/press-release-clear-orc-loss-data> [<https://perma.cc/VJ4U-WHDY>].

60. Daphne Howland, *After More Than 3 Decades, NRF Won’t Publish Its Annual Shrink Report This Year*, RETAILDIVE (Oct. 7, 2024), <https://www.retaildive.com/news/no-nrf-annual-retail-shrink-report-2024/729009/> [<https://perma.cc/8UKN-HBQH>].

61. See Sandeep Singh Dhaliwal, *The Criminal System Under Racial Capitalism*, 58 U.C. DAVIS L. REV. 1589, 1654–60 (2025).

62. F.T. Green, *How Corporations Enable Property Crime—And Use It to Fuel a Self-Serving Panic*, THE APPEAL (May 2, 2024), <https://theappeal.org/corporations-property-crime-theft-shoplifting-panic/> [<https://perma.cc/975Z-QQ45>].

The Computer and Communications Industry Association estimates, for example, that organized retail crime “accounted for about 4.5% of total retail inventory shrink in 2019 and 2020,” which produced an estimated “\$4 billion in total” losses.⁶³ The Council on Criminal Justice noted that, based on available crime statistics, “95% of shoplifting incidents in 2019, 2020, and 2021 that were committed by a known number of individuals involved one or two people,” and that just “0.1% of shoplifting incidents involved more than six people during these three years.”⁶⁴

Market analysts, including those at S&P Global Ratings and William Blair & Company, suggested that retailers were purposely overestimating their losses from organized retail theft.⁶⁵ Many retailers announced store closures in the early 2020s and blamed their decisions to do so on losses from organized retail crime.⁶⁶ But S&P observed that “some retail companies could be overstating the contribution of theft,”⁶⁷ and William Blair suggested that “companies like Target could indeed be using the current narrative around shrink to take broader action in lagging parts of their business,” and that “potentially ulterior, more opportunistic motives” could be at play.⁶⁸ To that end, there’s some evidence that corporations might be feeling a backlash from overplaying their hand. As the chief financial officer of Walgreens acknowledged in an earnings call in January 2023, “maybe we cried too much last year” about retail theft and “probably we put in too much” additional spending on store security.⁶⁹

63. Letter from Trevor Wagener, Chief Economist and Dir. of the Rsch. Ctr., Comput. & Comm’n Indus. Ass’n, to U.S. H. Comm. On the Judiciary, Subcomm. On Crime & Fed. Gov’t Surveillance at 6–7 (June 9, 2023), <https://www.congress.gov/118/meeting/house/116093/documents/HHRG-118-JU08-20230613-SD004.pdf> [<https://perma.cc/5DW7-PG6V>].

64. Lopez, Boxerman & Cundiff, *supra* note 8.

65. Howland, *supra* note 11.

66. Nathaniel Meyersohn, *America’s Stores Are Winning the War on Shoplifting*, CNN (Sept. 13, 2024, at 6:00 AM EDT), <https://www.cnn.com/2024/09/13/business/theft-retail-shrink-stores/index.html> [<https://perma.cc/4422-A976>]; Jaclyn Peiser, *Is There a Shoplifting Crisis? What You Need to Know About Retail Crime*, WASH. POST (Oct. 3, 2023), <https://www.washingtonpost.com/business/2023/10/03/shoplifting-organized-retail-crime-theft/> [<https://perma.cc/R33W-Y53Z>]; Press Release, Target Corp., Target Closes Select Stores to Prioritize Team Member and Guest Safety (Sept. 26, 2023), <https://corporate.target.com/press/statement/2023/09/target-closes-select-stores-to-prioritize-team-member-and-guest-safety> [<https://perma.cc/A6TW-R3WQ>]; Gabrielle Fonrouge, *Rising Thefts at Walmart Could Lead to Price Jumps, Store Closures, CEO Says*, CNBC NEWS (Dec. 6, 2022, at 2:04 PM EST), <https://www.cnbc.com/2022/12/06/walmart-ceo-says-shoplifting-could-lead-to-price-jumps-store-closures.html> [<https://perma.cc/Q8MJ-C432>].

67. Diya G. Iyer, *Crime, No Punishment: Theft Poses Risk to U.S. Retailers This Holiday Season*, S&P GLOBAL RATINGS (Sept. 13, 2023, at 12:25 EDT), <https://www.spglobal.com/ratings/en/research/articles/230913-crime-no-punishment-theft-poses-risk-to-u-s-retailers-this-holiday-season-12850024> [<https://perma.cc/Y9RL-HN5D>].

68. Irina Ivanova, *The Alleged Crime Epidemic in Places Like San Francisco Causing Stores to Flee May Actually Just Be Bad Management, Investment Bank Suggests*, FORTUNE MAG. (Nov. 1, 2023, at 6:56 PM EDT), <https://fortune.com/2023/11/01/retail-crime-store-closures-target-walgreens-bad-management-william-james/> [<https://perma.cc/AZR8-5PX5>].

69. *Walgreens Boots Alliance (WBA) Q1 2023 Earnings Call Transcript*, MOTLEY FOOL (Jan. 5, 2023, at 8:30 AM ET), <https://www.fool.com/earnings/call-transcripts/2023/01/05/walgreens-boots-alliance-wba-q1-2023-earnings-call/> [<https://perma.cc/TS9T-V6Z7>] (quoting Chief Financial Officer James Kehoe).

B. *The Campaign to Legislate Against “Organized Retail Crime”*

“Organized retail crime” entered the public lexicon in the early 2000s as the retail industry launched a campaign to toughen penalties against serial shoplifters who were part of “organized crime.” The industry “lobb[ie]d Congress to make organized retail theft a felony under federal law[,]”⁷⁰ and pursued similar legislative changes at the state level.⁷¹ How did retailers justify this different approach? The underlying offense—shoplifting—is certainly not new. But retail groups have pointed to some key differences, like the intent (to resell, rather than to appropriate to one’s own use⁷²), the organizational involvement (almost always done in concert with others⁷³), and the object of the enterprise (cosmetics, over-the-counter medicines, and clothes⁷⁴), all of which are a bit different than classic shoplifting. The growth of new mediums, and specifically, online marketplaces, has allowed individual people to break into the market for retail goods, lowering the barriers for shoplifters to sell their stolen goods.⁷⁵

Retailers have tapped into the apparent differences between organized retail crime and ordinary shoplifting to justify distinct legislative treatment of the offenses themselves and have raised three main arguments in support of distinct treatment of organized retail crime.

First, retail groups have also alleged that there are coordination problems between federal and state governments, between the public and private sectors, and within the private sector itself, all of which complicate the identification, investigation, prosecution, and prevention of organized crime.⁷⁶ Given the distribution of organized crime activity across multiple counties, states, and even countries, local prosecutors may have difficulty in ascertaining whether a shoplifting incident in their jurisdiction is part of a greater pattern.⁷⁷ And while federal

70. David Cho, *A New Formula for Fraud*, WASH. POST (Aug. 3, 2001), <https://www.washingtonpost.com/archive/politics/2001/08/04/a-new-formula-for-fraud/49b2be77-b93d-4fee-b29f-eca0f0c16c01/> [https://perma.cc/7QXA-9FY9].

71. *Infra* Part II.

72. CRISP REPORT, *supra* note 31, at 4; NRF 2023 REPORT, *supra* note 30, at 1.

73. ACAMS REPORT, *supra* note 32, at 9; NRF 2023 REPORT, *supra* note 30, at 1.

74. NRF 2023 REPORT, *supra* note 30, at 11.

75. INT’L COUNCIL OF SHOPPING CTRS., ICSC ORGANIZED RETAIL CRIME BRIEF 13 (2023), https://www.icsc.com/uploads/default/ICSC_ORC_Brief_Fall_2023.pdf [https://perma.cc/3EU4-BFVE].

76. E.g., *E-Fencing Enforcement Act of 2008, the Organized Retail Crime Act of 2008, and the Combating Organized Retail Crime Act of 2008: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 48 (2008) [hereinafter 2008 U.S. House Judiciary Committee Hearing] (testimony of Joseph LaRocca, Vice President for Loss Prevention at the National Retail Federation) (“One of the biggest obstacles in investigating and apprehending the thieves who steal and resell through online marketplaces is the lack of resources available to local, state, and even federal law enforcement to investigate these crimes . . .”).

77. E.g., *Responding to Organized Crimes Against Manufacturers and Retailers: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 21 (2005) [hereinafter 2005 House Judiciary Committee Hearing] (testimony of Paul D. Fox, Director of Global External Relations at the Gillette Company, Chair of the Coalition Against Counterfeiting and Privacy); 2008 U.S. House Judiciary Committee Hearing, *supra* note 76, at 37 (testimony of Joseph LaRocca).

officials are better suited to investigate and prosecute high-level organized retail crime, especially involving transnational syndicates, retail theft has usually not been a priority for the FBI.⁷⁸ Brick-and-mortar retailers have also argued that online marketplaces like eBay and Amazon are insufficiently responsive to the retailers' requests for assistance in theft investigations and that they should assume a greater responsibility in proactively monitoring for potentially fraudulent transactions.⁷⁹

Second, retailers argued that the effects of organized retail crime pose different societal harms than low-level thefts because of what is being stolen and who is financially benefiting from the organizations. The theft and redistribution of over-the-counter medicine and specialty food products like baby formula can result in the adulteration of the products themselves, posing a public health risk.⁸⁰ Much of this early rhetoric seemed to position organized retail crime as a unique threat to the nuclear family.⁸¹ Industry advocates divorced *organized* retail crime from individual acts of shoplifting that were economically necessary and from thefts of higher-end, luxury-coded goods. Retailers specifically pointed to seemingly mundane items, like baby formula, as the “unlikely target[s]” of retail theft,⁸² and noted that “[t]hese organized crime rings are going in and methodically targeting certain stores, certain products . . . everything from baby formula to batteries to razors.”⁸³ Other than vague allusions to “international crime organizations” or “organized crime”—“I’m not saying . . . the Mafia,” one retailers’ association leader conjectured—there were little specifics about the exact nature of the threat.⁸⁴

After the terrorist attacks on September 11, however, the retailers’ rhetoric changed,⁸⁵ and leaned more heavily on alleged connections between organized retail crime and overseas terrorist organizations. These allegations have relied

78. *Oversight of the Federal Bureau of Investigation: Hearing Before the H. Comm. on the Judiciary*, 112th Cong. 29 (2012) [hereinafter 2012 FBI Oversight House Judiciary Committee Hearing] (testimony of Robert Mueller, Director of the Federal Bureau of Investigation).

79. 2008 U.S. House Judiciary Committee Hearing, *supra* note 76, at 37 (testimony of Joseph LaRocca).

80. 2003 House Government Reform Hearing, *supra* note 2 (testimony of Frank Borden, Assistant Director of the Manufactured Food Division, Bureau of Food and Drug Safety, Texas Department of Health); *see also* Karen Everstine, John Spink & Shaun Kennedy, *Economically Motivated Adulteration (EMA) of Food: Common Characteristics of EMA Incidents*, 76 J. OF FOOD PROT. 723, 728–29 (2013).

81. *See* Cho, *supra* note 70 (reporting that baby formula stolen by organized retail theft rings “ends up back on grocery shelves mislabeled, putting babies at risk”); Paul Grimaldi, *Retail Stores Battle ‘Shrinkage’*, S.F. CHRON. (Oct. 7, 2005), [https://www.newspapers.com/image/1246736999/\[https://perma.cc/5WBY-9C9P\]](https://www.newspapers.com/image/1246736999/[https://perma.cc/5WBY-9C9P]) (“Retailers are losing billions of dollars each year to organized retail crime, but beyond the financial losses, we are seeing this form of crime become increasingly violent,” said Joseph LaRocca, vice president of loss prevention for the National Retail Federation.”); *see also* Maurice BP-Weeks & Brendan McQuade, *Shoplifting: Corporate Copaganda 5–8* (2023), <https://static1.squarespace.com/static/5ee39ec764dbd7179cf1243c/t/65021e9cdb97b53598a171f1/1694637727578/Shoplifting++Corporate+Copaganda.pdf> [https://perma.cc/E2FX-6CML] (noting the “scary, sensationalist shoplifting stories”).

82. Cho, *supra* note 70.

83. *Shoplifters Running Rings Around Malls*, CONCORD MONITOR (June 15, 2001), <https://www.newspapers.com/image/836261375/> [https://perma.cc/5EYP-UGBY] (quoting Jon Hurst, President of the Retailers Association of Massachusetts).

84. *Id.*

85. *Cf.* ARRESTED DEVELOPMENT: *Best Man for the Gob* (20th Century Fox Television broadcast, aired Apr. 4, 2004) (“I don’t want to blame it all on 9/11, but it certainly didn’t help.”).

heavily on specious, highly speculative links that are frequently predicated on out-right xenophobia and Islamophobia. Though a 2003 report from the Food Marketing Institute (FMI) suggested that there were “strong indications that revenue from these criminal enterprises may be funneled to terrorist groups or to those here in America who support terrorist rings,” the extent of its own evidence was that “many people involved in organized retail crime rings ‘were foreign nationals, some with U.S. citizenships, and many who are illegal immigrants.’”⁸⁶

And though the Federal Bureau of Investigation was ostensibly worried that “old-fashioned mobsters [would] team up with Al Qaeda for the right price,”⁸⁷ there has never been terribly strong evidence—made public, anyway—of any link between shoplifting and terrorism. There is some documentation that domestic groups sent proceeds of their shoplifting abroad, including to countries in the Middle East,⁸⁸ and a handful of cases in which domestic groups sent funds to terrorist groups.⁸⁹ However, when presented with the opportunity to allege a more direct link, the FBI in 2006 noted that while it “has conducted numerous investigations of criminal activities having a possible nexus to terrorism[,] . . . the FBI does not have specific information linking Hamas or other Palestinian terrorist groups” to shoplifting schemes.⁹⁰

And third, retailers have argued that the existing laws that prohibit theft and the operation of criminal enterprises are inadequate tools for law enforcement because “no federal law specifically addresses organized retail crime and state laws are inadequate.”⁹¹ In particular, retail groups have bemoaned the unavailability of federal criminal jurisdiction for high-volume shoplifting events, such that “when professional thieves are apprehended for stealing large quantities of merchandise from a retail store, no Federal statute is readily available.”⁹² And in the absence of a federal penalty, “the case is likely to be handled under State shoplifting law and usually treats such crimes as petty theft and a misdemeanor.”⁹³ Accordingly, retailers argued for the creation of a specific “organized retail crime” offense and the addition of “organized retail theft” as a predicate offense under RICO.⁹⁴

86. MILLER, *supra* note 1, at 3.

87. Pat Milton, *FBI Fears Mob Will Link with Terrorists*, NEWS J. (Oct. 2, 2006), [https://www.newspapers.com/article/the-news-journal/190700536/\[https://perma.cc/2RSH-JRK6\]](https://www.newspapers.com/article/the-news-journal/190700536/[https://perma.cc/2RSH-JRK6]).

88. FINKLEA, *supra* note 7, at 12–13; FOOD INDUS. ASSOC., MEDIA REPORTS – MIDDLE EAST CONNECTION: ORGANIZED RETAIL CRIME, <https://www.fmi.org/docs/loss/ORCMiddleEast.pdf> [<https://perma.cc/SC9V-VSTG>] (last visited Jan. 23, 2026).

89. 2009 House Judiciary Committee Hearing, *supra* note 39, at 14–15 (testimony of Janice Ayala, Deputy Assistant Director, Office of Investigations, U.S. Immigration & Customs Enforcement); 2008 U.S. House Judiciary Committee Hearing, *supra* note 76, at 48 (LaRocca testimony).

90. *A Current Assessment of Money Laundering and Terrorist Financing Threats and Countermeasures: Hearing Before the S. Comm. on Banking, Hous., and Urb. Aff.*, 109th Cong. 73 (2006) (written response of Michael Morehart, the Chief of the Terrorist Financing Operations Section of the Counterterrorism Division of the FBI, to questions posed by U.S. Senator Jim Bunning).

91. 2005 House Judiciary Committee Hearing, *supra* note 77, at 42 (letter from Sandy Kennedy, President of the Retail Industry Leaders Association).

92. *Id.* at 16 (testimony of Chris Nelson, Director of Asset Protection, Target Corporation).

93. *Id.*; see also 2008 U.S. House Judiciary Committee Hearing, *supra* note 76, at 48 (LaRocca testimony).

94. 2005 House Judiciary Committee Hearing, *supra* note 77, at 42 (letter from Sandy Kennedy).

In the past decade, another argument has been raised in arguing for a stronger federal presence in investigating and prosecuting organized retail crime—that “progressive prosecutors” are not fulfilling their duty to enforce the law.⁹⁵ These claims are not restricted to far-right groups like the Trump-affiliated America First Policy Institute,⁹⁶ but have been advanced by members of Congress,⁹⁷ federal prosecutors,⁹⁸ and by retailers themselves.⁹⁹

San Francisco District Attorney Chesa Boudin attracted a significant amount of criticism amid a perceived increase in shoplifting in San Francisco in 2021 and 2022.¹⁰⁰ The President of the California Retailers Association blamed him for the crime spike, criticizing him for supporting diversion programs for some low-level property crimes instead of prosecution.¹⁰¹ Boudin faced a recall election in 2022, and much of the campaign was animated by debates over how his office handled crimes like shoplifting.¹⁰² When Boudin was recalled, the retailers’ group was triumphant, predicting that “the recall of San Francisco’s District Attorney will mark a turning point so retail customers and employees need not fear becoming the victims of crime.”¹⁰³ Yet while crime rates bear a loose relationship to the identity of the district attorney, it is worth noting that

95. See, e.g., Charles Stimson & Zack Smith, “Progressive” Prosecutors Sabotage the Rule of Law, Raise Crime Rates, and Ignore Victims, HERITAGE FOUND. (Oct. 29, 2020), <https://www.heritage.org/crime-and-justice/report/progressive-prosecutors-sabotage-the-rule-law-raise-crime-rates-and-ignore> [https://perma.cc/M99W-AWRQ].

96. See RACHEL WALLEN OGLESBY, SCOTT ERICKSON & MATTHEW LOBEL, PROTECTING AMERICA’S RETAILERS FROM THEFT (Am. First Pol’y Inst. 2024), <https://americafirstpolicy.com/issues/protecting-americas-retailers-from-theft> [https://perma.cc/YNF9-NPKE].

97. E.g., *The Rise in Organized Retail Crime and the Threat to Pub. Safety: Hearing Before the Subcomm. on Crime and Federal Surveillance of the H. Comm. on the Judiciary*, 118th Cong. 2 (2023) [hereinafter 2023 House Judiciary Committee Hearing]; Press Release, Chuck Grassley, Senator, Grassley: Reverse Anti-Law Enforcement Policies to Combat Rising Crime (Feb. 1, 2022), <https://www.grassley.senate.gov/news/remarks/grassley-reverse-anti-law-enforcement-policies-to-combat-rising-crime> [https://perma.cc/73EY-R57T].

98. 2023 House Judiciary Committee Hearing, *supra* note 97, at 27 (statement of John Milhiser, former U.S. Attorney for the Central District of Illinois).

99. See, e.g., Kayla Galloway, *CA Retailer’s Association President Calls out DA Chesa Boudin Amid SF’s Spike in Organized Crime*, ABC7 NEWS (July 8, 2021), <https://abc7news.com/chesa-boudin-san-francisco-crime-sf-organized-theft/10869696/> [https://perma.cc/QZ2Z-BX48].

100. E.g., Michael Barba, *Data Shows Chesa Boudin Prosecutes Fewer Shoplifters Than Predecessor*, S.F. EXAMINER (July 9, 2021), https://www.sfexaminer.com/archives/data-shows-chesa-boudin-prosecutes-fewer-shoplifters-than-predecessor/article_7dbc7d85-cde9-59d9-8f23-7b240ee6f26d.html [https://perma.cc/W2YE-JV65]; Thomas Fuller, *Voters in San Francisco Topple the City’s Progressive District Attorney, Chesa Boudin*, N.Y. TIMES (June 8, 2022), https://www.nytimes.com/2022/06/07/us/politics/chesa-boudin-recall-san-francisco.html?unlocked_article_code=1.KFA.VGgg.tA8U6lJOkNjd&smid=url-share [https://perma.cc/3XGF-JM2E].

101. Galloway, *supra* note 99; Eric Ting, *New Data Explores Chesa Boudin’s Handling of San Francisco Retail Theft Cases*, S.F. GATE (Mar. 17, 2022), <https://www.sfgate.com/politics/article/Chesa-Boudin-retail-theft-data-17005912.php> [https://perma.cc/X9RG-P4AH].

102. Carissa Byrne Hessick, *Pitfalls of Progressive Prosecution*, 50 *FORDHAM URB. L.J.* 973, 982, 985–86 (2023).

103. Press Release, Cal. Retailers Ass’n, California Retailers Association President and CEO Rachel Michelin Issues Statement on San Francisco District Attorney Recall Election, <https://calretailers.com/california-retailers-association-president-and-ceo-rachel-michelin-issues-statement-on-san-francisco-district-attorney-recall-election/> [https://perma.cc/XLZ8-YXE7] (last visited Jan. 29, 2026).

Boudin's successor, Brooke Jenkins, has adopted tough-on-crime policies and the rate of violent crime has *increased* in San Francisco.¹⁰⁴

C. Federal Organized Retail Crime Proposals

The U.S. Code does not *expressly* criminalize “organized retail crime”—depending on what is meant by the term, that is. It is true, as retail groups have pointed out, that a nonviolent incident in which shoplifters stole \$5,000 worth of merchandise from a single store, *without more*, would likely not trigger federal criminal charges.¹⁰⁵ However, depending on what the shoplifters do (or intend to do) with the merchandise or the proceeds, they could very easily incur criminal liability under federal law. Transporting stolen property valued at \$5,000 or more “in interstate or foreign commerce” would incur liability under 18 U.S.C. § 2314,¹⁰⁶ as would receiving or selling stolen property valued at \$5,000 or more that “crossed a State or United States boundary after being stolen” under section 2315.¹⁰⁷ But if no such transportation occurs, or if the value of the goods is under \$5,000, then the case for liability is more challenging.¹⁰⁸

During three separate periods of time—2003, 2008-2010, and 2022-present—members of Congress have introduced legislation to establish federal criminal liability for organized retail crime. Most of the efforts by members of Congress to expressly criminalize organized retail crime have sought to modify sections 2314 and 2315, but this is not where the first efforts to regulate organized retail crime began.

The first effort took place in 2003, when Republican Senator Larry Craig introduced the Organized Retail Theft Act of 2003.¹⁰⁹ The Act would have established a totally separate crime, designated in the U.S. Code as “organized retail theft,”

104. Joe Rivano Barros, *One Year After Recall, Violent Crime Is Up Under DA Brooke Jenkins*, MISSION LOCAL (June 9, 2023), <https://missionlocal.org/2023/06/one-year-after-recall-violent-crime-is-up-under-da-brooke-jenkins/> [<https://perma.cc/45RM-4EGJ>].

105. 2005 House Judiciary Committee Hearing, *supra* note 77, at 17 (testimony of Chris Nelson).

106. 18 U.S.C. § 2314.

Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud . . . [s]hall be fined under this title or imprisoned not more than ten years, or both.

Id.

107. *Id.* § 2315.

Whoever receives, possesses, conceals, stores, barter, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of \$5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of \$500 or more, which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken, knowing the same to have been stolen, unlawfully converted, or taken . . . [s]hall be fined under this title or imprisoned not more than ten years, or both.

Id.

108. *Infra* Part III.A.

109. Organized Retail Theft Act of 2003, S. 1553, 108th Cong. (2003).

which could have been committed either by stealing “any goods offered for retail sale” with a minimum “total value exceeding \$1,000” during a 180-day period or by receiving stolen goods.¹¹⁰ “Organized retail theft” would have been included in the definition of “racketeering offense,” thereby allowing its commission to qualify as a predicate act for RICO liability.¹¹¹ Finally, the Act would have prohibited the sale of “[b]aby food, infant formula, or similar products” manufactured for the consumption of children, or “[a]ny drug, food for special dietary use, cosmetic, or device” regulated under the Federal Food, Drug, and Cosmetic Act from being sold at a flea market.¹¹²

Though retail groups endorsed Craig’s bill,¹¹³ it ultimately failed to pass. Instead, in 2005, Craig worked with several other Republican members of Congress to add a proviso to the Violence Against Women Act reauthorization that required the Attorney General to establish an organized retail theft task force and establish a database for nationwide retail theft crimes.¹¹⁴

Little movement occurred on the issue until the late 2000s, when several competing bills were introduced by bipartisan legislators in both chambers of Congress. These bills did not follow Craig’s proposal. Instead, they largely sought to alter the existing prohibitions on interstate transportation and distribution of stolen property by lowering the \$5,000 threshold for interstate transportation of stolen property,¹¹⁵ allowing the aggregation of multiple offenses of interstate transportation,¹¹⁶ or broadening the reach of the statutes to include transactions on online marketplaces.¹¹⁷ Several of them did propose, as Craig did, to define “organized retail crime,”¹¹⁸ but only to broaden the reach of sections 2314 and

110. *Id.* § 2.

111. *Id.* § 3.

112. *Id.* § 4.

113. *See, e.g.*, Press Release, FMI The Food Industry Ass’n, FMI Applauds Introduction of Bill to Combat Organized Retail Theft – A \$34 Billion Retail Crime Challenge (Aug. 1, 2003), [https://www.fmi.org/newsroom/news-archive/view/2003/08/01/fmi-applauds-introduction-of-bill-to-combat-organized-retail-theft-a-\\$34-billion-retail-crime-challenge](https://www.fmi.org/newsroom/news-archive/view/2003/08/01/fmi-applauds-introduction-of-bill-to-combat-organized-retail-theft-a-$34-billion-retail-crime-challenge) [<https://perma.cc/YF5M-4R87>].

114. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 1105(a)(1), 119 Stat. 2960 (2005) (codified at 42 U.S.C. § 13701); Press Release, Food Indus. Ass’n, Congress Approves Organized Retail Theft Provisions (Dec. 20, 2005), <https://www.fmi.org/newsroom/news-archive/view/2005/12/20/coalition-against-organized-retail-theftcongress-approves-organized-retail-theft-provisions> [<https://perma.cc/E5AN-AH2U>].

115. Organized Retail Crime Prevention and Enforcement Act of 2009, H.R. 4011, 111th Cong. §§ 2–3 (2009) [hereinafter 2009 Smith Bill].

116. Combating Organized Retail Crime Act of 2008, S. 3434, 110th Cong. § 3(a)–(c) (2008) [hereinafter 2008 Durbin Bill]; Combating Organized Retail Crime Act of 2009, S. 470, 111th Cong. § 3(a)–(c) (2009) [hereinafter 2009 Durbin Bill].

117. 2008 Durbin Bill, *supra* note 116, § 4; 2009 Durbin Bill, *supra* note 116, § 4; 2009 Smith Bill, *supra* note 115, § 4.

118. *See, e.g.*, Organized Retail Crime Act of 2008, H.R. 6491, 110th Cong. § 3 (2008) [hereinafter 2008 Ellsworth–Jordan Bill]; Organized Retail Crime Act of 2009, H.R. 1173, 111th Cong. § 3 (2009) [hereinafter 2009 Ellsworth–Jordan Bill].

2315.¹¹⁹ Congress took no action on these bills, and no other organized crime proposals were introduced until 2022 and 2023, when similar groups of lawmakers proposed bills that were very similar to the bills introduced over a decade before, by proposing to amend 18 U.S.C. §§ 2314 and 2315 to allow prosecutions where \$5,000 in stolen goods is transported across state lines or sold in a 12-month period.¹²⁰ In January of 2026, the U.S. House Committee on the Judiciary reported the Combating Organized Retail Crime Act of 2025¹²¹ to the floor,¹²² but as of the time of publication, no further action had been taken.

Proposals by Congressmen Brad Ellsworth, a Democrat who had previously served as a county sheriff in Indiana, and Jim Jordan, a Republican from Ohio, went further, attempting to impose criminal liability on the operators of online marketplaces. Under their 2008 and 2009 bills, “facilitation” of organized retail crime “through the operation of an online marketplace for the sale of goods and services,” when the operator “know[s] or ha[s] reasonable cause to know that such organized retail crime is facilitated by such operation” would have been added as qualifying conduct under section 2315.¹²³ To that end, operators were required to: (1) “expeditiously investigate” possible criminal activity on their platforms “when credible evidence” that goods were “acquired through organized retail crime” came to their attention; (2) impose a requirement that sellers post “identifying information” about the source of certain merchandise; and (3) maintain seller information for three years.¹²⁴

The scope of criminal liability imposed on operators for failure to act was so expansive that even far-right Congressman Louie Gohmert expressed skepticism about it, suggesting instead that online marketplaces be held civilly liable.¹²⁵ Several other proposed laws imposed similar duties on online marketplaces, but instead allowed the U.S. Attorney General to pursue enforcement actions and

119. See, e.g., 2008 Ellsworth–Jordan Bill, *supra* note 118, § 3.

Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, or engages in organized retail crime involving the transporting, transmitting, or transferring in interstate or foreign commerce any goods, wares, or merchandise, knowing the same to have been stolen, converted or taken by fraud . . .”

(emphasis added to reflect proposed addition); 2009 Ellsworth–Jordan Bill, *supra* note 118, § 3 (same).

120. Combating Organized Retail Crime Act of 2022, S. 5046, 117th Cong. (2022); Combating Organized Retail Crime Act of 2022, H.R. 9177, 117th Cong. (2022); Combating Organized Retail Crime Act of 2023, S. 140, 118th Cong. (2023); Combating Organized Retail Crime Act of 2023, H.R. 895, 118th Cong. (2023).

121. Combating Organized Retail Crime Act, H.R. 2853, 119th Cong. (2025–26).

122. Press Release, Dave Joyce, Member, House of Representatives, Joyce Passes Organized Retail Crime Bill Through House Judiciary Committee (Jan. 14, 2026), <https://joyce.house.gov/posts/joyce-passes-organized-retail-crime-bill-through-house-judiciary-committee> [<https://perma.cc/U73C-LD68>].

123. 2008 Ellsworth–Jordan Bill, *supra* note 118 § 3; 2009 Ellsworth–Jordan Bill, *supra* note 118, at § 3.

124. 2008 Ellsworth–Jordan Bill, *supra* note 118, at § 3(e)(2); 2009 Ellsworth–Jordan Bill, *supra* note 118, at § 3(e)(2).

125. 2008 U.S. House Judiciary Committee Hearing, *supra* note 76, at 4–5 (remarks of Congressman Louie Gohmert).

exposed the marketplaces to civil liability in specific circumstances.¹²⁶ These efforts were ultimately successful. In 2023, President Biden signed into law the INFORM Consumers Act, which obligates online marketplaces to collect information from “high-volume third party seller[s].”¹²⁷ Many states have adopted similar laws,¹²⁸ though they are focused on civil, not criminal, liability.

Many of the laws have also proposed to expand the scope of liability for access device fraud under 18 U.S.C. § 1029. Section 1029 broadly prohibits the production or use of counterfeit or unauthorized “access device[s]” to obtain the property of another.¹²⁹ The term “access device” is defined broadly,¹³⁰ but with a set of terms that “primarily criminalize[] theft of credit and debit card information and related identity theft,” as well as “the theft of online access devices such as passwords and other online information.”¹³¹ However, the organized retail crime bills proposed to expand the definition to include “gift card[s],”¹³² “Universal Product Code label[s],”¹³³ and “radio frequency identification transponder[s],” along with other electronic product tags.¹³⁴ While there has been comparatively little litigation over the expansion of access device fraud to the shoplifting context, two separate federal district court cases in 2008 concluded that Universal Product Code labels were not “access devices”¹³⁵—which may have prompted the proposed legislative changes.

In total, the possible expansion of criminal liability under the proposed laws is somewhat unclear. While it is true, as noted previously, that a single nonviolent shoplifting incident, *without more*, would likely not have triggered federal liability under the U.S. Code as it stands now, the proposed legislative changes

126. 2008 Durbin Bill, *supra* note 116, at § 4; 2008 Ellsworth–Jordan Bill, *supra* note 118, at § 4; 2009 Durbin Bill, *supra* note 116, at § 4; 2009 Ellsworth–Jordan Bill, *supra* note 118, at § 4.

127. Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, 136 Stat. 4459, div. BB, tit. III, § 301 (codified at 15 U.S.C. § 45f(a)); *see also* Cofer, *supra* note 33, at 725–32 (critiquing the INFORM Consumers Act for its focus on high-volume marketplaces and failure to cover marketplaces that do not process payments).

128. *See* ALA. CODE §§ 8-41-1 to -7 (2025); ARK. CODE ANN. §§ 4-119-101 to -105 (West 2025); CAL. CIV. CODE §§ 1749.8.1–8.5 (West 2025); COLO. REV. STAT. ANN. §§ 6-1-1401 to -1404 (West 2025); GA. CODE ANN. §§ 10-1-940 to -945 (West 2025); 815 ILL. COMP. STAT. ANN. §§ 356/1-1 to -15 (West 2025); IOWA CODE ANN. §§ 554F.1–9 (West 2025); LA. STAT. ANN. §§ 51:3261–:3266 (West 2025); MICH. COMP. LAWS ANN. §§ 445.903n, 445.903o (West 2025); N.C. GEN. STAT. ANN. §§ 66-490 to -495 (West 2025); OHIO REV. CODE ANN. §§ 1349.65–69 (West 2025); OKLA. STAT. ANN. tit. 15, §§ 799A.1–.8 (West 2025); 73 PA. STAT. AND CONS. STAT. § 201-9.4 (West 2025).

129. 18 U.S.C. § 1029(a).

130. *Id.* § 1029(e)(1).

131. Charlotte Decker, Note, *Cyber Crime 2.0: An Argument to Update the United States Criminal Code to Reflect the Changing Nature of Cyber Crime*, 81 S. CAL. L. REV. 959, 988 (2008).

132. 2008 Ellsworth–Jordan Bill, *supra* note 118, at § 3(d)(1); 2009 Ellsworth–Jordan Bill, *supra* note 118, at § 3(d)(1); 2009 Durbin Bill, *supra* note 116, at § 3(c).

133. 2008 Durbin Bill, *supra* note 116, § 3(c); 2008 Ellsworth–Jordan Bill, *supra* note 118, § 3; 2009 Ellsworth–Jordan Bill, *supra* note 118, § 3(d)(2); 2009 Durbin Bill, *supra* note 116, § 3(c).

134. 2008 Ellsworth–Jordan Bill, *supra* note 118, § 3(d)(3); 2009 Ellsworth–Jordan Bill, *supra* note 118, § 3(d)(3); 2009 Durbin Bill, *supra* note 116, § 3(c).

135. *United States v. Bruce*, 531 F. Supp. 2d 983, 986–89 (N.D. Ill. 2008); *United States v. Lutz*, No. 3:06 CR 495, 2008 WL 4449082, at *1 (N.D. Ohio Sept. 30, 2008).

would likely not have provided for a different outcome. The modifications that they made to sections 2314 and 2315 may have altered the requisite *value* of stolen property that needed to be transported, but none of them abolished the interstate commerce requirement—the necessary jurisdictional hook for Congress’s ability to criminalize the conduct. However, as I argue in Part III, *infra*, triggering federal criminal liability under existing law would not have required much more at all.

But on the other hand, the proposed modifications to access device fraud under section 1029 would have had a much clearer impact—they would have given federal prosecutors jurisdiction over comparatively low-level thefts that would ordinarily fall under the ambit of state criminal law. Defining an “access device” as including a barcode, for example, would mean that manipulating barcodes to steal \$1,000 worth of property could trigger a conviction for access device fraud¹³⁶ and a prison term of up to ten years.¹³⁷

Finally, the organized retail crime proposals introduced from 2022 to the present have also sought to extend liability for money laundering under 18 U.S.C. § 1956 to include acts of organized retail crime. Broadly, section 1956 “outlaws financial transactions involving the proceeds of certain other crimes—predicate offenses referred to as ‘specified unlawful activities.’”¹³⁸ These bills would have added the interstate transportation of stolen property and the purchase of stolen property transported in interstate commerce, discussed earlier,¹³⁹ as qualifying “specified unlawful activities.”¹⁴⁰ This addition would be entirely redundant, however, because those crimes are *already* specified unlawful activities, just with a different label.¹⁴¹

In the end, however, despite a multi-decade lobbying campaign by retailers’ groups, Congress has not yet passed any law that expressly criminalizes

136. 18 U.S.C. § 1029(a)(2) (“[K]nowingly and with intent to defraud . . . uses one or more authorized access devices during any one-year period, and by such conduct obtains anything of value aggregating \$1,000 or more during that period[.]”). One small caveat to this conclusion, however, is that the conduct would still need to “affect[] interstate or foreign commerce[.]” *Id.* § 1029(a). Under the current definition of “access device,” this requirement is not terribly difficult to meet. *See, e.g.,* *United States v. Clayton*, 108 F.3d 1114, 1117 (9th Cir. 1997); *United States v. Rushdan*, 870 F.2d 1509, 1514 (9th Cir. 1989) (defendant’s illicit “possession of the numbers of out of state credit cards” affected interstate commerce).

137. 18 U.S.C. § 1029(c)(1)(A)(i).

138. CONG. RSCH. SERV., *MONEY LAUNDERING: AN OVERVIEW OF 18 U.S.C. § 1956 AND RELATED FEDERAL CRIMINAL LAW 2* (2017).

139. *Supra* notes 106–107 and accompanying text.

140. *E.g.,* Combating Organized Retail Crime Act, H. 2853, 119th Cong. § 3(2)(B) (2025); Combating Organized Retail Crime Act of 2023, S. 140, 118th Cong. § 3(2)(B) (2023). The 2022 and 2023 proposals are virtually identical to each other.

141. Admittedly, the path to getting there is somewhat windy. Section 1956(c)(7) defines “specified unlawful activity” as including “any act or activity constituting an offense listed in section 1961(1) of this title,” 18 U.S.C. § 1956(c)(7), which imports the definition of “racketeering activity” for the purposes of RICO liability, 18 U.S.C. § 1961(1). Sections 2314 and 2315, relating to the interstate transportation and sale of stolen property, are listed as types of “racketeering activity,” 18 U.S.C. § 1961(1), and thus qualify as “specified unlawful activity” for money laundering liability as well. *See* 18 U.S.C. § 1956(c)(7)(A).

“organized retail crime” or that has modified the threshold requirements for liability for interstate transportation or distribution of stolen property. Other than creating an organized retail theft task force as part of the 2005 reauthorization of the Violence Against Women Act and imposing disclosure requirements on online marketplaces under the INFORM Consumers Act, Congress has taken little action to amend federal statutes to respond to allegations of organized retail crime. However, as I argue later, this does not mean that federal prosecutors do not have adequate tools to prosecute acts of organized retail crime. To the contrary, they certainly do—and prosecutions do take place. Nonetheless, in the absence of federal action to expressly criminalize “organized retail crime,” retailers have simply turned to the states.

II. ORGANIZED RETAIL CRIME IN THE STATES

Efforts in the states to establish a separate offense, or theory of liability, for organized retail crime have played out very differently than at the federal level. For one, these efforts have been largely successful. As of the time of publication, more than half of the states in the country have statutes that could be described as “organized retail crime” statutes.¹⁴²

Second, penalizing theft has been traditionally handled by the states, not the federal government.¹⁴³ Because state legislatures do not have to worry about the same kind of constitutional constraints on their lawmaking powers as Congress does, they are freer to criminalize conduct and categorize it for different punishments. Accordingly, while the U.S. Code does not criminalize simple theft, every state penal code does. As such, establishing a separate criminal offense for “organized retail theft” does not require state legislatures to make unlawful any currently lawful activity, but instead to take *already* unlawful conduct and draw lines for when it reaches a new level of extremity, intensity, or frequency such that it should be treated as a different or more serious offense.¹⁴⁴

Third, while almost all of the proposed federal laws to criminalize organized retail crime have stuck to a similar formula, state efforts to do the same have been wildly inconsistent. Regardless of how retailers define the term, states define “organized retail crime” very differently from each other—and punish it differently, too.

In this Part, I discuss the successful efforts to persuade state legislatures to adopt new statutes that penalize organized retail crime.¹⁴⁵ I begin in Section A by

142. As I explain later, the differences between these statutes are significant, and as such, it is difficult to arrive at a single definition of the criminal offense of “organized retail crime” that both includes the relevant statutes and is precise enough to be useful. For now, it will suffice to note that my use of the term refers to a statute that expressly criminalizes repeated acts of shoplifting, done by oneself, with another, or one’s underlings.

143. See LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 261–65 (1993).

144. See STUART P. GREEN, *13 WAYS TO STEAL A BICYCLE: THEFT LAW IN THE INFORMATION AGE* 33–36 (2012) (describing the adoption of specific theft statutes).

145. I generally exclude unenacted state laws from this discussion unless specifically relevant.

outlining the legislative history, where available, of these changes, and how they fit into a broader effort by corporate groups to ratchet up the penalties for shoplifting crimes. Then, in Section B, I develop, for the first time, a survey of state-level organized retail crime statutes. Because states define “organized retail crime” differently, there is not a single definition of a criminal offense that captures all relevant provisions. Accordingly, I focused my search on provisions that established separate offenses, theories of liability,¹⁴⁶ or enhanced sentences for *repeated* thefts from retail establishments or in concert with another person. I discuss the results of the survey and develop a typology that organizes the statutes.

A. *The Campaign for State Criminal Reform*

After retail groups were unable to push the Organized Retail Theft Act of 2003, they turned their attention to the states. In 2005, the American Legislative Exchange Council (ALEC), a now-infamous group of conservative policy advocates and big businesses that pushes corporate-friendly policies, published a model Organized Retail Theft Act.¹⁴⁷ ALEC’s bill provided for criminal liability for two classes of possible defendants—the people who “are involved in theft of retail property from a retail establishment” with the intent to resell it (the organizer and the actual shoplifter) and the person who receives the stolen property with the intent to further distribute it (the fence).¹⁴⁸ Liability extended to the former only where the aggregate value of the property exceeded at least \$1,000, or “\$500 or more above the present state felony theft level,” during a “180-day period.”¹⁴⁹

Before ALEC’s proposal was published in 2005, only one state—Florida—had adopted any sort of organized retail crime statute, which it did in 2001 as part of a broad rewrite of the state’s property crime statute,¹⁵⁰ to extremely little attention.¹⁵¹ But after ALEC’s model bill was published and distributed to affiliated lawmakers around the country,¹⁵² it was quickly adopted, as Figure 1 shows.

146. By “theories of liability,” I mean that organized retail theft, as defined by the statute, might qualify as a predicate act for a state RICO offense, for example, as is the case in Kentucky, Mississippi, and Ohio. See KY. REV. STAT. ANN. § 120(1) (West 2025); MISS. CODE ANN. § 97-43-3.1 (West 2025); OHIO REV. CODE ANN. §§ 2923.31(I)(5)(a)(i), (Q) (West 2025).

147. ALEC Model Organized Retail Theft Act Exposed, *supra* note 4.

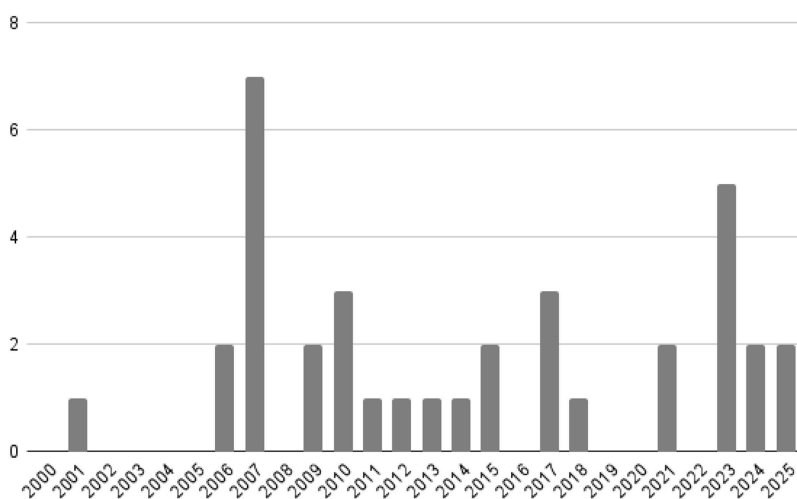
148. *Id.*

149. *Id.* While the felony theft threshold is generally outside the scope of this discussion, it is worth noting that many politicians, law enforcement officials, and retail groups have suggested that many organized retail theft rings send boosters to steal an aggregate value merchandise in a single shoplifting incident that falls *precisely* under a given state’s felony theft threshold. 2023 House Judiciary Committee Hearing, *supra* note 97, at 34 (testimony of Kris Kobach, Attorney General of Kansas); 2005 House Judiciary Committee Hearing, *supra* note 77, at 21 (testimony of Paul D. Fox).

150. An Act Relating to Property Crimes, ch. 115, sec. 3, § 3(8)(a)–(d), 2001 Fla. Laws 944.

151. *Bill: Shoplifters Could Lose License*, INDIAN RIVER PRESS J. (Vero Beach, Fla.) (May 3, 2001), [https://www.newspapers.com/image/783869332/\[https://perma.cc/36PR-5AH8\]](https://www.newspapers.com/image/783869332/[https://perma.cc/36PR-5AH8]).

152. See Cooper et al., *supra* note 4, at 384.

Figure 1. Organized Retail Crime Acts Adopted by Year

Within five years, fourteen states adopted versions of ALEC’s Organized Retail Theft Act. As noted in greater detail below, while most legislatures kept the broad strokes of ALEC’s model bill intact—insofar as liability was extended to organizers, shoplifters, and fences for merchandise thefts with a combined value that took place over a set period of time—they differed on the finer points.¹⁵³

The earliest organized retail crime legislation was adopted in the backdrop of a renewed effort by retail groups and law enforcement to raise the salience of shoplifting incidents. News stories about shoplifting routinely appeared in national publications and local newspapers alike, usually crediting retailers’ self-reported statistics with little skepticism.¹⁵⁴ Accordingly, the sponsors of the legislation were able to easily make reference to these reports and emphasize that their goal was to put a halt to surging shoplifting incidents, specifically, those conducted by groups of thieves, with harsher punishments.¹⁵⁵

153. *Infra* Part II.B.

154. See, e.g., Ann Zimmerman, *As Shoplifters Use High-Tech Scams, Retail Losses Rise*, WALL ST. J. (Oct. 25, 2006), <https://www.wsj.com/articles/SB116174264881702894>; <https://www.wsj.com/articles/SB116174264881702894> [<https://perma.cc/3255-HYFH>]; Maggie Shepard, *Retailers, Police Take on New Breed of Shoplifters*, ALBUQUERQUE TRIB., June 30, 2006; Dan Daly, *Local Stores, Police Battle Shoplifting, Fraud*, RAPID CITY J. (Dec. 3, 2006), <https://www.newspapers.com/image/528918697> [<https://perma.cc/B74X-BMJJ>].

155. See, e.g., Loresha Wilson, *Authorities Hope to Crack Down on Organized Retail Theft*, SHREVEPORT TIMES (Mar. 23, 2007), <https://www.newspapers.com/image/220318817/> [<https://perma.cc/FBZ5-LAJ8>]; Victoria Colliver, *Gangs of Thieves Hit Retailers Hard*, S.F. CHRON., Oct. 30, 2008, <https://www.newspapers.com/image/1248741785/> [<https://perma.cc/X79U-XW6Q>]; Megan Boehnke, *Bill Targets Organized Shoplifting*, ARIZ. REPUBLIC (Apr. 30, 2009), [https://www.newspapers.com/image/126658874/?match=1&terms=“organized%20retail%20theft”](https://www.newspapers.com/image/126658874/?match=1&terms=organized%20retail%20theft) [<https://perma.cc/YRM5-XJMB>].

Over the next decade, eleven more states adopted organized retail theft laws, but at a significantly slower pace. In these states, the criminal justice establishment frequently made adoption of the statutes a priority. In 2012, then-Michigan Governor Rick Snyder urged the state legislature to adopt a host of what he called “smart justice” reforms, including the specific criminalization of organized retail theft and the creation of an advisory board to review the law’s impact,¹⁵⁶ which the legislature agreed to.¹⁵⁷ The Task Force submitted its recommendations to the legislature—which included a recommendation to “[d]ifferentiate levels of property crime by,” among other things, “[e]stablishing a criminal enterprise law with enhanced penalties to deter organized retail theft.”¹⁵⁸ The next year, the legislature amended its RICO Act to specifically prohibit the operation of “an organized theft or fraud enterprise,” which included shoplifting offenses.¹⁵⁹ South Dakota Attorney General Marty Jackley recommended a series of statutory changes, including the creation of an organized retail crime statute, which he categorized as a “consumer protection law[]” that would “protect consumers and legitimate businesses.”¹⁶⁰ The legislature agreed.¹⁶¹ And in California and Tennessee, the state prosecutors’ associations supported efforts to establish organized retail theft crimes,¹⁶² which the legislature did in both states.¹⁶³

National concerns about a perceived rise in organized retail crime, which fueled a renewed interest by some members of Congress in a federal solution, also prompted more states to adopt their own statutes.¹⁶⁴ From 2021 to the present, eleven more states separately criminalized organized retail crime.¹⁶⁵ Supporters of

156. See Press Release, Rick Snyder, Governor of Mich., Governor Says ‘Smart Justice’ is Key to Safe Communities, Economic Growth (Mar. 7, 2012), <https://www.michigan.gov/formergovernors/recent/snyder/press-releases/2012/03/07/governor-says-smart-justice-is-key-to-safe-communities-economic-growth> [https://perma.cc/EY67-NY52].

157. Organized Retail Crime Act, H.B. 5843, Act No. 455, 96th Leg., Reg. Sess., 2012 Mich. Legis. Serv. 300 (West) (codified at MICH. COMP. LAWS ANN. §§ 752.1081–1087 (West 2025)).

158. MISS. CORR. & CRIM. JUST. TASK FORCE, FINAL REPORT 14 (Dec. 2013), https://www.mdoc.ms.gov/sites/default/files/2023-01/Dec%202013%20Final%20Report_Task%20Force.pdf [https://perma.cc/NC3H-YCNS].

159. H.B. 585, ch. 457, 2014 Reg. Sess., 2014 Miss. Legis. Serv. 1159 (West) (codified at MISS. CODE ANN. § 97-43-3.1. (West 2025)).

160. Press Release, S.D. Att’y Gen., Attorney General Jackley’s Proposed Legislation Addressing Human Trafficking, Meth and Strengthening Consumer Protection (Jan. 6, 2014), <https://atg.sd.gov/OurOffice/Media/pressreleasesdetail.aspx?id=1110#gsc.tab=0> [https://perma.cc/4452-796Z].

161. S.B. 23, ch. 191, 89th Leg., Reg. Sess., 2014 S.D. Sess. Laws 373 (codified at S.D. CODIFIED LAWS § 37-24-52 (2025)).

162. PROSECUTORS & POL. PROJECT, PROSECUTOR LOBBYING IN THE STATES, 2015–2018 42, 262 (2021), <https://law.unc.edu/wp-content/uploads/2021/06/Prosecutor-Lobbying-in-the-States-2015-2018.pdf> [https://perma.cc/4ERM-TDG6].

163. A.B. 1065, ch. 803, 2018 Reg. Sess., 2018 Cal. Legis. Serv. 5222, (West) (codified at CAL. PENAL CODE § 490.4 (West 2025)); Organized Retail Crime Prevention Act, ch. 472, 2017 Reg. Sess., 2017 Tenn. Legis. Serv. 1691 (West) (codified at TENN. CODE ANN. § 39-14-114. (West 2025)).

164. See Gabrielle Fonrouge, *Retailers Are Shaping a Wave of Laws to Crack Down on Organized Theft—Here’s How They Do It*, CNBC NEWS (Aug. 11, 2023), <https://www.cnbc.com/2023/08/11/organized-retail-crime-nine-states-pass-laws-to-crack-down-on-theft.html> [https://perma.cc/H428-75CC].

165. ALA. CODE § 13A-8-226 (2025); GA. CODE ANN. § 16-8-14.2 (West 2025); 720 ILL. COMP. STAT. ANN. § 5/16-25.1 (West 2025); IND. CODE § 35-43-4-2.2 (West 2025); MINN. STAT. ANN. § 609.522 (West 2025); VA. CODE ANN. § 18.2-103.1 (West 2025); N.M. STAT. ANN. § 30-16-20.1 (West 2025); IOWA CODE ANN. § 714.2B

the laws echoed much of the rhetoric used by members of Congress and retailers' associations—that organized retail crime was running rampant and existing criminal statutes were unable to respond to it.¹⁶⁶

In Alabama, which adopted its Retail Theft Crime Prevention Act in 2023,¹⁶⁷ the state District Attorneys Association included the state's organized retail crime bill in its "Crime Package," and falsely claimed that "Organized retail crime is a 100-billion-dollar criminal enterprise."¹⁶⁸ It further asserted that "Alabama has a giant neon sign welcoming organized crime into our state, because we do not have laws to address the specific aspects of organized crime. The leadership structure is all but immune and they know it."¹⁶⁹

The Alabama Retail Association not only supported the bill, but also worked hand-in-hand with the prosecutors' association to "educate" legislators about the topic. According to its own website, the Retail Association "briefed the state's district attorneys and law enforcement communities about the prevalence of organized retail theft in our state and the challenges in catching, arresting and prosecuting the people behind the crimes."¹⁷⁰ The final version of the bill also empowered retail associations—along with state officials and police associations—with "develop[ing] training for prosecutors and law enforcement agencies throughout the state to combat organized retail crime."¹⁷¹

B. State Organized Retail Crime Statutes

From 2001 to 2025, thirty-eight states adopted organized retail crime statutes.¹⁷² As noted earlier, there is no single description that will fully capture all of these

(West 2025); KAN. STAT. ANN. § 21-5841 (West 2025); MD. CODE ANN., CRIM. LAW § 7-104.13 (West 2025); NEB. REV. STAT. ANN. § 28-525 (West 2025).

166. See, e.g., Don Thompson, *DAs, Retailers Say California Needs Tougher Retail Theft Law*, ASSOCIATED PRESS (Dec. 3, 2021), <https://apnews.com/article/business-california-theft-8dec92007049f1fa41f9e280882bcef6> [https://perma.cc/4ENK-24HT]; Grace Kinnicutt, *Pritzker Signs Bill Aimed at Addressing Organized Retail Crime*, STATE J.-REG. (Springfield, Ill.) (May 14, 2022), <https://www.sj-r.com/story/news/state/2022/05/14/illinois-governor-signs-bill-targeting-organized-retail-crime/9775768002> [https://perma.cc/B2YK-FWAA]; Keith Schubert, *Proposed Bill Aims to Curb Organized Retail Crime in Minnesota*, MINNEAPOLIS/ST. PAUL BUS. J. (Mar. 27, 2023), <https://www.bizjournals.com/twincities/news/2023/03/27/proposed-bill-aims-to-curb-organized-retail-crime.html>.

167. Retail Theft Crime Prevention Act, ALA. CODE § 13A-8-226 (2025).

168. Press Release, Ala. Dist. Att'ys Ass'n, 2023 Crime Package: Alabama Fights Crime (2023), [hereinafter 2023 Alabama District Attorneys' Association Press Release] <https://alabamadistrictattorney.org/crimepackage/> [https://perma.cc/P6GL-7DKD].

169. *Id.*; see also Archie Snowden, *Alabama Lawmakers Put Forward a Bill Aimed at Retail Crime*, WHNT NEWS 19 (Oct. 4, 2023), <https://whnt.com/news/alabama-news/alabama-lawmakers-put-forward-a-bill-aimed-at-retail-crime/> [https://perma.cc/WXL2-CFCC] (describing the increased retail crime in the state and lack of laws to prevent this crime).

170. *As of Sept. 1, Retail Crime Prevention Act in Effect More Arrests Made Under 2023 Retail Crime Prevention Act*, [hereinafter *Retail Crime Prevention Act in Effect*] ALA. RETAIL ASS'N (Oct. 19, 2024), <https://alabamaretail.org/news/retail-theft-organized/> [https://perma.cc/D93B-7H69].

171. ALA. CODE § 13A-8-233 (2025).

172. Some national retailers' associations state a higher number, but these numbers count crimes that are *not* organized retail crimes or that provide sentencing enhancements for, but do not separately criminalize, organized retail crime.

laws. In surveying the universe of organized retail crime statutes, I identified laws that had at least one of two characteristics—they either required concerted action among more than one person *or* required multiple thefts, measured either by number of incidents or aggregate value of stolen property. Most statutes had both elements present, but not all did.

In this Section, I categorize the thirty-eight organized retail crime statutes based on seven different criteria: (1) what underlying conduct they punish; (2) the frequency or value thresholds for stolen merchandise to trigger liability; (3) the existence of a plurality requirement; (4) the parties who can be punished under the law; (5) punishments; (6) the venue for criminal prosecution; and (7) any expressly created role for state-level officials.

1. Conduct and Intent

Theft crimes—whether retail, organized, or neither—punish theft. But many organized retail theft crime statutes go beyond the familiar elements of common-law larceny or consolidated theft statutes, frequently bleeding over into receipt of stolen property, conspiracy, and *attempted* theft or burglary. At the same time, the underlying intent can be more specific than to permanently deprive the rightful owner of the property.

The underlying conduct that might be prohibited by organized retail theft crime provisions can usually be broken down into three separate buckets. First, these statutes specifically prohibit shoplifting merchandise with the intent to resell it, including by delivering it to a fence or selling it on an online marketplace.¹⁷³ The *actus reus* (taking from a *store*, as opposed to from any person or entity) and *mens rea* (taking with the intent to *resell*, rather than with the intent to permanently deprive the owner) are both more specific than under common-law larceny or most consolidated theft statutes.

Second, many statutes specifically criminalize coordinating or organizing efforts to shoplift merchandise.¹⁷⁴ Many of these prohibitions function similarly to

173. See, e.g., ARIZ. REV. STAT. ANN. § 13-1819(A)(1) (2025); CAL. PENAL CODE § 490.4(a)(1) (West 2025); IND. CODE ANN. § 35-43-4-2.2(b) (West 2025); IOWA CODE ANN. 714.2B(2)(c) (West 2025); KY. REV. STAT. ANN. §§ 506.120(1)(h), (i) (West 2025); LA. STAT. ANN. § 14:67.25(B) (2025); MASS. GEN. LAWS ANN. ch. 266, § 30D(b) (West 2025); MICH. COMP. LAWS ANN. § 752.1083(c) (West 2025); NEB. REV. STAT. ANN. § 28-525(2) (a) (West 2025); NEV. REV. STAT. ANN. § 205.08345(6)(c)(2) (West 2025); N.C. GEN. STAT. ANN. § 14-86.6(a)(1) (West 2025); OHIO REV. CODE ANN. §§ 2923.31(I)(5)(a)(i), (Q) (West 2025); 18 PA. STAT. AND CONS. STAT. § 3929.3(c) (West 2025); S.C. CODE ANN. § 16-13-135(B)(1) (2025); S.D. CODIFIED LAWS §§ 37-24-1(7A), 37-24-52 (2025); TENN. CODE ANN. § (c)(1)(A) (West 2025); VA. CODE ANN. § 18.2-103.1(B) (West 2025); W. VA. CODE ANN. § 61-3A-7(a) (2025); WIS. STAT. ANN. §§ 943.50(1m), (4m) (West 2025).

174. See, e.g., ALA. CODE § 13A-8-226(a)(1) (2025); CAL. PENAL CODE § 490.4(a)(4) (West 2025); FLA. STAT. ANN. § 812.015(8)(a) (West 2025); GA. CODE ANN. § 16-8-14.2(a) (West 2025); 720 ILL. COMP. STAT. ANN. § 5/16-25.1(b) (West 2025); MD. CODE ANN., CRIM LAW § 7-104.1(a)(2) (West 2025); MICH. COMP. LAWS ANN. § 752.1084(1)(b) (West 2025); MINN. STAT. ANN. § 609.522(1)(e) (West 2025); MISS. CODE ANN. § 97-43-3.1(1) (West 2025); N.H. REV. STAT. ANN. § 637:10-c; (2025); N.J. REV. STAT. § 2C:20-11.2 (West 2025); N.M. STAT. ANN. § 30-16-20.1(A)(4) (West 2025); N.C. GEN. STAT. ANN. § 14-86.6(a)(3) (West 2025); S.D. CODIFIED LAWS § 37-24-52(2) (2025); TEX. PENAL CODE 31.16(a) (West 2025).

conspiracy. To that end, most expressly use the word “conspire” to bring certain conduct under the purview of the statute,¹⁷⁵ but not all do. Consider, for example, New Mexico’s organized retail crime statute, which punishes a defendant who “recruits, coordinates, organizes, supervises, directs, manages or finances another to undertake.”¹⁷⁶ Such a statute certainly *describes* conspiracy-like conduct, yet does not expressly require an agreement.

Third, most organized retail crime statutes criminalize receiving or selling stolen property, but only if the person knows, or has reason to believe, that the property has been stolen.¹⁷⁷ In practice, this conduct functions almost identically to the classic definition of receipt of stolen property,¹⁷⁸ though some of the states require that the recipient specifically know—or reasonably believe—that the property was specifically stolen from a merchant.¹⁷⁹

Beyond these commonalities, there is a host of conduct constituting organized retail crime that is a bit more idiosyncratic and specific, none of which is a common feature of most or a significant number of these laws. For example, some states include disabling or tampering with anti-theft devices,¹⁸⁰ using another “device” or “container” to facilitate a theft,¹⁸¹ using a fire alarm to pull off a theft,¹⁸²

175. *See, e.g.*, ALA. CODE § 13A-8-226(a)(3) (2025) (“Attempts, solicits, or conspires”); FLA. STAT. ANN. §§ 812.015(8)(b), 9(c) (West 2025) (“Conspires with”); KY. REV. STAT. ANN. § 506.120(1)(h) (West 2025) (“conspire or attempt to commit”); MASS. GEN. LAWS ANN. ch. 266, § 30D(d) (West 2025) (“conspires with”); MICH. COMP. LAWS ANN. § 752.1084(1)(d) (West 2025) (“Conspires with”); N.H. REV. STAT. ANN. § 637:10-c (2025) (“conspires with”); N.J. STAT. ANN. § 2C:20-11.2 (West 2025) (“conspires with”); N.C. GEN. STAT. ANN. §§ 14-86.6(a)(1), (3) (West 2025) (“Conspires with”); S.C. CODE ANN. § 16-13-135(A)(1) (2025) (“conspiring to”); S.D. CODIFIED LAWS § 37-24-52(2) (2025) (“conspires”); VA. CODE ANN. § 18.2-103.1(B) (West 2025) (“[c]onspires or acts in concert with”).

176. N.M. STAT. ANN. 30-16-20.1(A)(4) (West 2025).

177. ALA. CODE § 13A-8-226(a)(4) (2025); CAL. PENAL CODE § 490.4(a)(2) (West 2025); CONN. GEN. STAT. ANN. § 53-142k(a)(3) (West 2025); FLA. STAT. ANN. §§ 812.015(8)(b), (9)(c) (West 2025); KAN. STAT. ANN. § 21-5841(a)(1)(A) (West 2025); KY. REV. STAT. ANN. § 506.120(1)(i) (West 2025); LA. STAT. ANN. § 14:67.25 (B) (2025); MICH. COMP. LAWS ANN. § 752.1084(1)(e) (West 2025); NEB. REV. STAT. ANN. § 28-526(5) (West 2025); N.M. STAT. ANN. § 30-16-20.1(A)(2) (West 2025); N.C. GEN. STAT. ANN. § 14-86.6(a)(2) (West 2025); TENN. CODE ANN. § 39-14-113(c)(2) (West 2025); TEX. PENAL CODE ANN. § 31.16(a) (West 2025); WASH. REV. CODE ANN. § 9A.56.350(1)(b) (West 2025); W. VA. CODE ANN. § 61-3A-7(c) (West 2025).

178. LAFAVE, *supra* note 21, at § 20.2 (“Receiving stolen property—a statutory crime separate from the crime involved in the stealing of the property—is defined in the typical statute as the receiving of stolen property knowing that it is stolen.”).

179. ALA. CODE § 13A-8-226(a)(4) (2025) (“stolen [] . . . from a retail merchant”); MICH. COMP. LAWS ANN. § 752.1084(1)(e) (West 2025) (“stolen from a retail merchant”); TENN. CODE ANN. § 39-14-113(c)(2) (West 2025) (knowing it was taken in violation of merchandise theft law, 39-14-146); W. VA. CODE ANN. § 61-3A-7(c) (West 2025) (knowing it was taken from retail merchant).

180. ALA. CODE § 13A-8-226(a)(2) (2025); ARK. CODE ANN. § 5-36-127(b)(1)(C) (West 2025); MICH. COMP. LAWS ANN. § 752.1084(1)(c) (West 2025); S.D. CODIFIED LAWS § 37-24-52(3) (2025); WIS. STAT. ANN. §§ 943.50(1m)(f)–(h) (West 2025).

181. ALA. CODE §§ 13A-8-226(a)(5), (7) (2025); ARIZ. REV. STAT. ANN. § 13-1819(A)(2) (2025); N.H. REV. STAT. ANN. § 637:3-a(II)(d) (2025).

182. MICH. COMP. LAWS ANN. § 752.1084(1)(g) (West 2025); S.D. CODIFIED LAWS § 37-24-52(4) (2025).

using a “communication device” during the course of a theft,¹⁸³ or engaging in receipt fraud.¹⁸⁴ Beyond these, there are some state-specific qualifying acts as well.¹⁸⁵

2. Frequency or Value Thresholds

Most state organized retail crime statutes place a threshold for liability on the frequency of thefts or value of stolen merchandise within a set period of time, though not all do,¹⁸⁶ and some only set a threshold for a steeper sentence.¹⁸⁷ However, other than noting that thresholds are common, there are few commonalities in how the thresholds are set. Most states opt to use the aggregated value of the thefts for liability, grading of the offense, or for calculating punishment,¹⁸⁸ but they vary significantly in the requisite value. In some states, the aggregate value of the thefts could trigger liability even if it is under \$1,000,¹⁸⁹ but in Georgia, the aggregate value must be \$25,000 or greater.¹⁹⁰ Others attach liability (or potentially

183. ALA. CODE § 13A-8-226(a)(7) (2025) (“Uses a wireless telecommunications device or other digital or electronic device to facilitate the theft of retail merchandise.”); ARK. CODE ANN. § 5-36-127(b)(1)(E) (West 2025) (“Uses a wireless telecommunication device or other digital or electronic device to facilitate the commission of theft of property[. . . .]”); WASH. REV. CODE ANN. § 9A.56.350(1)(d) (West 2025) (“makes or sends at least one electronic communication seeking participation in the theft in the course of planning or commission of the theft”).

184. N.H. REV. STAT. ANN. §§ 637:10-b, 637:10-c (2025); TENN. CODE ANN. § 39-14-113(c)(2) (West 2025).

185. See e.g., ALA. CODE §§ 13A-8-226(a)(6), (8) (2025); ARK. CODE ANN. § 5-36-127(b)(1)(F) (West 2025); FLA. STAT. ANN. §§ 812.015(8)(d), (e) (West 2025); MICH. COMP. LAWS ANN. § 752.1084(1)(h) (West 2025).

186. ARIZ. REV. STAT. § 13-1819 (2025); MICH. COMP. LAWS ANN. § 752.1084 (West 2025); MISS. CODE ANN. §§ 97-43-3.1(1)(a), (3)–(4) (West 2025); N.H. REV. STAT. ANN. § 637:10-c (2025); N.J. REV. STAT. § 2C:20-11.2 (West 2025).

187. CAL. PENAL CODE § 490.4(b)(1) (West 2025); IND. CODE ANN. § 35-43-4-2.2(c)(1) (West 2025); MINN. STAT. ANN. § 609.522(3) (West 2025); OKLA. STAT. ANN. tit. 21, §§ 1731(B), (C) (West 2025); S.D. CODIFIED LAWS § 37-24-52 (2025); WIS. STAT. ANN. § 943.50(4) (West 2025).

188. ALA. CODE § 13A-8-226(b) (2025); ARK. CODE ANN. § 5-36-127(c) (West 2025); CAL. PENAL CODE § 490.4(b)(1) (West 2025); CONN. GEN. STAT. ANN. § 53-142k(b) (West 2025); FLA. STAT. ANN. §§ 812.015(8) (a)–(e), (9)(b)–(c) (West 2025); GA. CODE ANN. § 16-8-14.2(a) (West 2025); 720 ILL. COMP. STAT. ANN. 5/16-25.1(b) (West 2025); IND. CODE ANN. § 35-43-4-2.2(c)(1) (West 2025); KAN. STAT. ANN. § 21-5841(a)(1) (West 2025); LA. STAT. ANN. § 14:67.25(D) (2025); MD. CODE ANN., CRIM. L. §§ 7-104.1(b), (c) (West 2025); MASS. GEN. LAWS ANN. ch. 266, §§ 30D(b)–(d) (West 2025); MINN. STAT. ANN. § 509.522(3) (West 2025); NEV. REV. STAT. ANN. § 205.08345(1) (West 2025); N.M. STAT. ANN. §§ 30-16-20.1(A)(1)–(3) (West 2025); N.C. GEN. STAT. ANN. § 14-86.6(a2) (West 2025); OHIO REV. CODE ANN. § 2923.32(B)(2)(a) (West 2025); OR. REV. STAT. ANN. § 164.098(1)(c) (West 2025); 18 PA. STAT. AND CONS. STAT. ANN. § 3929.3(b) (West 2025); S.C. CODE ANN. §§ 16-13-135(E)(1)–(2) (2025); S.D. CODIFIED LAWS § 37-24-52 (2025); TENN. CODE ANN. § 39-14-113(c) (1) (West 2025); VA. CODE ANN. § 18.2-103.1(B) (West 2025); WASH. REV. CODE ANN. §§ 9A.56.350(1), (4) (West 2025); W. VA. CODE ANN. § 61-3A-7 (West 2025); WIS. STAT. ANN. § 943.50(4) (West 2025).

189. ALA. CODE § 13A-8-226(b)(3) (2025) (\$500 in 30 days); CAL. PENAL CODE § 490.4(b)(1) (West 2025) (\$950 in 12 months increases punishment); FLA. STAT. ANN. §§ 812.015(8)(a)–(e) (West 2025) (\$750 in 30 days); 720 ILL. COMP. STAT. ANN. 5/16-25.1(b) (West 2025); WASH. REV. CODE ANN. § 9A.56.350(1) (West 2025).

190. GA. CODE ANN. § 16-8-14.2(a) (West 2025).

increase punishments) based on the number of thefts themselves or the quantity of merchandise stolen.¹⁹¹

3. Plurality Requirement

Unsurprisingly, most state retail crime statutes condition liability on plural action. Given the nature of the crime—in that it is described and understood as an “organized” offense—this makes sense. Just as it is impossible to conspire with oneself, it seems odd to refer to any “organized” activity that takes place with just one person’s actions. Accordingly, in most states, two actors are required to participate in the offense.¹⁹² Some variants of the offense require more than two participants, either to establish a basis for the offense¹⁹³ or to alter punishment for it.¹⁹⁴ Yet some states allow *organized* retail crime to be committed by just one person. Some states make the unilateral option explicit—for example, by stating, like

191. CAL. PENAL CODE § 490.4(b)(1) (West 2025) (“two or more separate occasions within a 12-month period”); DEL. CODE ANN. tit. 11, § 841B(a) (West 2025) (“quantities that would not normally be purchased for personal use or consumption”); FLA. STAT. ANN. § 812.015(8)(f) (West 2025) (“three or more retail thefts within a 120-day period and in committing such thefts obtains or uses 10 or more items of merchandise”); KY. REV. STAT. ANN. § 506.120(1)(h) (West 2025) (“more than one (1) theft of retail merchandise”); ME. REV. STAT. ANN. tit. 17-A, § 363(1) (West 2025) (“2 or more thefts of retail merchandise . . . from 2 or more retail stores”); MINN. STAT. ANN. §§ 509.522(1)(b) (West 2025) (“acts committed or directed by the defendant on at least two separate occasions”); *see also* N.H. REV. STAT. ANN. §§ 637:10-b, 10-c (2025) (five or more receipts if based on receipt fraud); *see also* IOWA CODE ANN. § 714.2B(1)(a) (West 2025) (penalizing someone who “has previously engaged in a pattern of retail theft,” which requires two incidents over six months, and who intentionally commits an act or directs another member of the retail theft enterprise “to commit an act involving retail merchandise”).

192. ALA. CODE § 13A-8-226(a) (2025) (“in association with one or more other persons”); CAL. PENAL CODE § 490.4(a)(1) (West 2025) (“in concert with one or more other persons”); CONN. GEN. STAT. ANN. § 53-142k(b) (West 2025) (“in conjunction with one or more other persons”); GA. CODE ANN. § 16-8-14.2(a) (West 2025) (with “one or more other persons”); 720 ILL. COMP. STAT. ANN. 5/16-25.1(a) (West 2025) (“in concert with another individual”); *id.* (b) (directing “any other individual or individuals”); IOWA CODE ANN. § 714.2B(1)(d) (West 2025) (“two or more individuals”); KAN. STAT. ANN. § 21-5841(a)(1) (West 2025) (“with one or more other persons”); KY. REV. STAT. ANN. § 506.120(3) (West 2025) (“two (2) or more persons”); ME. REV. STAT. ANN. tit. 17-A, § 363 (West 2025) (“2 or more persons”); MASS. GEN. LAWS ch. 266, § 30D(b) (West 2025) (“2 or more persons”); MINN. STAT. ANN. § 609.522(1)(e) (West 2025) (“two or more individuals”); MISS. CODE ANN. § 97-43-3.1(3) (West 2025) (“association of two (2) or more persons”); N.H. REV. STAT. ANN. § 637:10-c (2025) (“conspires with one or more persons”); N.J. REV. STAT. ANN. § 2C:20-11.2 (West 2025) (“conspires with others”); N.M. STAT. ANN. §§ 30-16-20.1(A)(1)–(2) (West 2025) (“acts in concert with one or more persons”); N.C. GEN. STAT. ANN. § 14-86.6(a)(1) (West 2025) (“conspires with another person”); OKLA. STAT. ANN. tit. 21, § 1731(C) (West 2025) (“in concert with at least one other individual”); OR. REV. STAT. ANN. § 164.098(1) (West 2025) (“with another person”); 18 PA. STAT. AND CONS. STAT. ANN. §§ 3929.3(a), (c) (West 2025) (“association”); S.C. CODE ANN. § 16-13-135(A)(1) (2025) (“two or more people”); TENN. CODE ANN. § 39-14-113(c)(1) (West 2025) (“in concert with one (1) or more individuals”); VA. CODE ANN. § 18.2-103.1(B) (West 2025) (“in concert with another person”); WASH. REV. CODE ANN. §§ 9A.56.35(1)(a)–(b) (West 2025) (“with an accomplice”); WIS. STAT. ANN. §§ 943.50(1m), (4m) (West 2025).

193. *See, e.g.*, CAL. PENAL CODE § 490.4(a)(2) (West 2025) (“in concert with two or more persons”); N.C. GEN. STAT. ANN. § 14-86.6(1)(3) (West 2025) (“with two or more other persons”); WASH. REV. CODE ANN. § 9A.56.350(1)(d) (West 2025) (“with no less than six accomplices”); W. VA. CODE ANN. § 61-3A-7(a) (2025) (“with two or more person”).

194. DEL. CODE ANN. tit. 11, § 841B(b) (West 2025) (allowing multiple theft crimes to be aggregated if involving more than one person); OKLA. STAT. ANN. tit. 21, § 1731(C) (West 2025) (same).

Arizona does, “A person commits organized retail theft if the person *acting alone or in conjunction with another person* does any of the following”¹⁹⁵—and other statutes do not speak to the question.¹⁹⁶

However, the fact that a statute does not expressly require plural action does not mean that a single person could necessarily run afoul of it. For example, receiving stolen property, which some statutes either require for liability or provide as an option for establishing a violation,¹⁹⁷ has usually required at least two actors.¹⁹⁸ Such a requirement may also be implicit in the statute itself.

In *Lang v. State*, the Texas Court of Criminal Appeals held that the state’s organized retail crime statute “does not apply to the conduct of an ordinary shoplifter acting alone.”¹⁹⁹ The language at issue provided, “[a] person commits an offense if the person intentionally conducts, promotes, or facilitates an activity in which the person receives, possesses, conceals, stores, barter[s], sells, or disposes of” actual or suspected “retail merchandise.”²⁰⁰ Noting that the language was ambiguous, the court then considered the legislative history, from which it concluded that “this statute was not intended to criminalize every act of ordinary shoplifting, but was instead intended to target professional crime rings involved in the large-scale theft and reselling of stolen retail merchandise.”²⁰¹ Accordingly, the court concluded that the “proper interpretation of the statutory phrase . . . requires proof of conducting, promoting, or facilitating some activity distinct from the mere activity inherent in the ordinary shoplifting of retail items by a single actor.”²⁰² In 2025, the Texas Legislature rewrote the section, and made clear that its provisions could be committed by a single person.²⁰³

While *Lang*’s reasoning has not been picked up by any other courts yet, the logic could apply to other statutes, too. For example, Louisiana’s organized retail crime

195. ARIZ. REV. STAT. § 13-1819(A) (2025) (emphasis added); FLA. STAT. ANN. § 812.015(8)(c) (West 2025) (“Individually, or in concert with one or more other persons”); MD. CODE ANN., CRIM. LAW § 7-104.1(a)(2) (West 2025) (“either alone or in concert with one or more other persons”); MICH. COMP. LAWS ANN. § 752.1084 (1) (West 2025) (“alone or in association with another person”); NEB. REV. STAT. ANN. § 28-526 (West 2025) (“acting alone or in association with another person”); NEV. REV. STAT. ANN. § 205.08345(6)(c) (West 2025) (“alone or with any other person or persons”); TEX. PENAL CODE § 31.16 (West 2025) (“A person commits an offense if the person . . . on two or more occasions within a 180-day period, unlawfully appropriates retail merchandise . . .”).

196. DEL. CODE ANN. tit. 11, § 841B(a) (West 2025); IND. CODE ANN. § 35-43-4-2.2 (West 2025); LA. STAT. ANN. § 14:67.25 (2025); OHIO REV. CODE ANN. § 2923.31 *et seq.* (West 2025); OKLA. STAT. ANN. tit. § 1731 (2025).

197. *Supra* Part II.B.1.

198. *See, e.g.*, *Guyer v. State*, 453 A.2d 462, 466 (Del. 1982); *see also* LAFAVE, *supra* note 21, at § 20.2(h) (distinguishing between the instigator or aider and the actual thief).

199. *Lang v. State*, 561 S.W.3d 174, 176 (Tex. Crim. App. 2018).

200. *Id.* at 180 (quoting the then-operative version of TEX. PENAL CODE ANN. § 31.16(b)(1)).

201. *Id.* at 181–83.

202. *Id.* at 183.

203. TEX. PENAL CODE ANN. § 31.16(a) (West 2025).

statute prohibits “the intentional procuring, receiving, or concealing of stolen retail property with the intent to sell, deliver, or distribute that property.”²⁰⁴ Like Texas’s statute, Louisiana’s uses verbs that read awkwardly if it applies to a single person. Given that Louisiana’s generic theft statute refers to “misappropriation” and “taking,”²⁰⁵ the use of “procuring, receiving, or concealing” could suggest a different action. And, like in Texas, the Louisiana Legislature was motivated to pass the law because of concerns about “organized crime.”²⁰⁶

4. Responsible Parties

Given that organized retail crime statutes have been justified based on the unique societal harms posed by the coordinated theft and reselling of retail merchandise, it is unsurprising that criminal liability extends to the thieves, organizers, and fences. However—again—different approaches abound. Virtually all statutes penalize the thief, more than half the organizer, and slightly fewer than half the fence.²⁰⁷

The three statutes under which mere shoplifters could not be charged—Georgia, Illinois, and Pennsylvania—focus criminal liability exclusively on the organizers. To violate Georgia’s Organized Retail Crime Prevention Act, a defendant must organize others to steal \$25,000 or more in retail merchandise over the course of a year for her own benefit, and then subsequently place the property in the hands of a fence.²⁰⁸ While this is a more intricate set of requirements than most states, the punishment is also harsher: up to twenty years in prison.²⁰⁹ Under Illinois’s statute, a *mere* shoplifter could not be charged, but one who commits assault, battery, or property damage while shoplifting could.²¹⁰ Otherwise, criminal liability extends to the organizer for being “a manager of the organized retail crime,”²¹¹ which is similar to Pennsylvania’s statute.²¹²

204. LA. STAT. ANN. § 14:67.25(B) (2025). *Cf. Lang*, 561 S.W.3d at 191 n.10 (Yeary, J., dissenting) (discussing Louisiana statute).

205. LA. STAT. ANN. § 14:67(A) (2025).

206. Wilson, *supra* note 155, at 4A.

207. *Infra* Figure 2.

208. GA. CODE ANN. § 16-8-14.2(a) (West 2024).

209. *Id.* § 16-8-14.2(d).

210. 720 ILL. COMP. STAT. ANN. § 5/16-25.1(a) (West 2024).

211. *Id.* § 5/16-25.1(b).

212. 18 PA. CONS. STAT. § 3929.3(a) (2004).

Figure 2. Liable Parties under State Organized Retail Crime Statutes

State	Shoplifter	Organizer	Fence	State	Shoplifter	Organizer	Fence
AL	X	X	X	MS	X		X
AZ	X			NE	X	X	X
AR	X	X		NV	X	X	
CA	X	X	X	NH	X	X	
CT	X		X	NJ		X	
DE	X		X	NM	X	X	X
FL	X	X	X	NC	X	X	X
GA		X		OH	X	X	
IL	X	X		OK	X		
IN	X			OR	X	X	
IA	X	X		PA		X	
KS	X	X	X	SC	X	X	X
KY	X		X	SD	X	X	
LA	X		X	TN	X	X	X
ME	X	X		TX	X	X	X
MD	X			VA	X	X	X
MA	X	X		WA	X	X	X
MI	X	X		WV	X	X	X
MN	X	X		WI	X		

5. Punishment

At their core, organized retail crime statutes essentially punish theft. Most conduct that would trigger criminal liability under one of these statutes would also trigger liability under a jurisdiction’s theft statute—or as attempted theft, conspiracy to commit theft, or solicitation of theft. Establishing “organized retail crime” as a separate criminal category might, therefore, suggest specific societal disapproval of *that* conduct.²¹³

Yet if societal disapproval explains legislative actions here, that explanation is inadequate for explaining how organized retail crime statutes punish what they criminalize. Comparing the range of theft sentences to organized retail crime sentences admittedly involves an apples-to-oranges comparison. Virtually all states stratify punishments for theft based on the aggregated value of the loss, but not all states do the same for organized retail crime. Of those that do, a sizable minority use *different* stratifications.

All of that said, comparing the punishments for theft with organized retail crime yields several key observations. First, some states use the exact same punishment matrices for both crimes. For example, in Connecticut, the state’s organized retail crime statute applies when the crime ring steals “retail property having an aggregate value exceeding two thousand dollars” within a single 180-day period.²¹⁴ Such an act constitutes a Class D felony, which is punishable by up to five years in

213. See GREEN, *supra* note 144, at 33–36.

214. CONN. GEN. STAT. § 53-142k(b) (2024).

prison.²¹⁵ However, if the aggregate value exceeds \$10,000, it is a Class C felony, punishable by one to ten years in prison.²¹⁶ Yet that punishment matrix is identical to how state law treats larceny—the same values trigger the same prison term,²¹⁷ and state law also allows the “[a]mounts included in thefts . . . to be aggregated in determining the grade of the offense” when they are “committed pursuant to one scheme or course of conduct . . .”²¹⁸ Several other states also treat organized retail crime and theft identically for purposes of punishment,²¹⁹ and *also* allow the aggregation of theft incidents when part of a common scheme.²²⁰ In these states, the separate criminalization of organized retail crime might only have an expressive purpose.

In most states, the punishment matrices for theft and for organized retail crime differ, and usually punish organized retail crime more harshly than theft. One of the most bizarre aspects of this different treatment is that most of the states that treat organized retail crime more harshly than theft are *regressive* in how they do so—such that *lower* levels of organized retail crime are punished disproportionately worse than *higher* levels are.

Consider how this would play out in Alabama, for example. “Organized retail crime” is punishable as a Class B felony, which carries a prison term of two to twenty years.²²¹ The offense punishes shoplifting that takes place by at least two people acting “in association with” each other, and can occur in one of three different ways: (i) \$500 or more in a thirty-day period; (ii) \$1,000 or more in a 180-day period; or (iii) \$2,500 or more in a one-year period.²²² “Theft of property” is a separate offense under Alabama law that is also classified as a Class B felony with the same prison term—but only when \$2,500 or more is taken.²²³ Stealing less than \$500 is a misdemeanor punishable by up to one year, \$500–1,499 is punishable by

215. *Id.* § 53-142k(e) (specifying felony level); *id.* § 53a-35a(8) (specifying punishment).

216. *Id.* § 53-142k(e) (specifying felony level); *id.* § 53a-35a(7) (specifying punishment).

217. Third-degree larceny, which is the theft of property between \$2,000 and \$10,000, is punishable as a Class D felony, *id.* § 53a-124, and second-degree larceny, which is the theft of property between \$10,001 and \$20,000, is punishable as a Class C felony, *id.* § 53a-123. However, the larceny statutes have an additional, higher than the organized retail crime statute does not—theft of property over \$20,000 is punishable as a Class B felony, *id.* § 53a-123, which carries a prison term of 1–20 years, *id.* § 53a-35a(6).

218. *Id.* § 53a-121(b).

219. DEL. CODE ANN. tit. 11, § 841(c) (West 2025); OKLA. STAT. ANN. tit. 21, §§ 1704–1706 (2025) (defining grand and petit larceny); *id.* §§ 1731(A), (C) (specifying punishment for shoplifting offenses when done “in concert with at least one other individual”); TENN. CODE ANN. § 39-14-105 (West 2025) (defining levels of theft); *id.* § 39-14-113(d)(1) (providing that organized retail crime “is punished as theft pursuant to § 39-14-105”); *id.* § 40-35-111 (specifying punishments); TEX. PENAL CODE § 31.03(e) (West 2025) (defining levels of theft); *id.* § 31.16(d) (defining levels of organized retail crime); *id.* §§ 12.21–23, 12.32–35 (specifying punishment).

220. DEL. CODE ANN. tit. 11, §§ 840, 855 (West 2025); OKLA. STAT. ANN. Tit. 21, §§ 1731(B), (C) (2025); TENN. CODE ANN. § 39-14-105(b) (West 2025); TEX. PENAL CODE § 31.09 (West 2025).

221. ALA. CODE § 13A-8-226(e) (2025) (identifying level of crime); *id.* § 13A-5-6(a)(2) (specifying term for Class B felony).

222. *Id.* § 13A-8-226(b).

223. *Id.* § 13A-8-3(a).

one to five years, and \$1,500–2,500 is punishable by one to ten years.²²⁴ Alabama, like virtually all states, allows the value of property to be aggregated for grading the offense when “committed pursuant to one scheme or course of conduct.”²²⁵ Accordingly, two people who together steal \$501 worth of merchandise within a thirty-day period could receive up to a twenty-year prison term, a punishment that would only be available to a person acting on their own when they stole \$2,501 worth of anything. If one of the participants committed the same \$501 theft on their own, their maximum prison term would only be five years.

Even accepting the unsupported arguments related to “group dangerousness” that justify greater criminal penalties for unlawful groupwork,²²⁶ doing so regressively makes little sense. Yet many states do exactly that, most commonly by setting no minimum level for liability under their organized retail crime statutes.²²⁷ In such states, it is possible that two people acting together, who steal small-value merchandise in even a loosely organized fashion, could face felony charges for doing so—but if they engaged in the same theft alone, the conduct would be chargeable, at most, as a misdemeanor²²⁸ or even an infraction.²²⁹ Moreover, several of the states that ostensibly allow for an individual defendant to commit an “organized” retail theft crime operate the same way, such that a low-level offense conducted in a retail establishment triggers the same punishment that a several-thousand-dollar theft would in most other instances.²³⁰

Admittedly, it is possible that the greater punishment could allow prosecutors some leverage over defendants who are involved in larger organized retail crime syndicates—which could be used to snag bigger fish in the group. Yet without better information and data sharing practices among jurisdictions, it may be practically impossible for prosecutors to know whether a defendant is a booster for a syndicate, a member of a much smaller group, or acting by themselves. As such, if

224. *Id.* §§ 13A-8-3 to -5 (defining level of crime); *id.* § 13A-5-6 to -7 (specifying term for felonies and misdemeanors).

225. *Id.* § 13A-8-1(15).

226. *See, e.g.,* Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 *IND. L.J.* 473, 493–97 (2006); Evan Bernick, *Conspiracy Abolition*, *VA. L. REV.* (forthcoming 2026) (manuscript at 51–52).

227. *E.g.,* *ARIZ. REV. STAT.* § 13-1819; *CAL. PENAL CODE* § 490.4(b); *IND. CODE ANN.* § 35-43-4-2.2; *ME. STAT. tit. 17-A*, § 363.

228. Felony thresholds for theft vary across the country. *How Do Thresholds Differ Across the Country?*, *RAISE THE THRESHOLD*, <https://raisethethreshold.org/home/> [<https://perma.cc/496A-K8KW>] (last accessed May 11, 2024).

229. *See, e.g.,* *N.J. STAT. ANN.* § 2C:20-2(b) (West 2025) (classifying theft of less than \$200 as a “disorderly persons offense”).

230. In Arizona, “organized retail theft” can be committed by a person “acting alone” who “[r]emoves merchandise from a retail establishment without paying the purchase price with the intent to resell or trade the merchandise for money or for other value.” *ARIZ. REV. STAT. ANN.* § 13-1819(A) (2025). It has no value threshold and is automatically punished as a Class 4 felony, *id.* (B), which carries a 1.5–3-year prison term, *id.* § 13-702(D), 707(A)(1). For any other type of theft, a defendant would need to steal at least \$3,000 worth of property. *Id.* § 13-1802(G).

the extent of loss that the prosecutor can prove is no greater than several thousand dollars, any such leverage might be illusory.

6. Venue

The U.S. Constitution's vicinage protections have not been incorporated to the states, leaving state constitutions and statutes generous leeway in defining the appropriate venue for criminal trials.²³¹ The appropriate venue for the prosecution of a criminal offense is usually the jurisdiction in which the offense occurred, but this basic rule becomes complicated when an offense—like conspiracy—may have unfolded in multiple jurisdictions.²³²

Organized retail crime presents an obvious example of a crime that might take place in multiple jurisdictions. In twelve states, the organized retail crime statutes include specific venue provisions allowing the crime to be charged in one of several different jurisdictions.²³³ The remaining states, however, do not contain express venue provisions.²³⁴ In these states, venue is nonetheless proper in any county in which “any part” of the crime took place²³⁵—but what does that mean?

Some of the constituent “parts” of organized retail crime are more obviously tied to specific locations than others. If a series of thefts took place in several jurisdictions, venue would surely be proper in any individual jurisdiction in which one of the thefts took place.²³⁶ Many states make that clear, either through specific provisions in their organized retail crime statutes²³⁷ or venue provisions specific to

231. Brian C. Kalt, *Crossing Eight Mile: Juries of the Vicinage and County-Line Criminal Buffer Statutes*, 80 WASH. L. REV. 271, 287–91 (2005).

232. LAFAYE, *supra* note 21, at § 12.2(b) n.66. *But see* Emma Kaufman, *Territoriality in American Criminal Law*, 121 MICH. L. REV. 353, 377 (2022) (“Asking where a conspiracy or an ongoing theft took place is a territorial question. But in modern criminal law, the answer to that question is often a legal fiction based on artificial extensions of time and concepts like constructive presence.”).

233. ALA. CODE § 13A-8-230 (2025); ARK. CODE ANN. § 5-36-127(d) (West 2025); GA. CODE ANN. § 16-8-14.2(c) (West 2025); 720 ILL. COMP. STAT. ANN. § 5/16-25.1(d) (West 2025); MASS. GEN. LAWS ANN. ch. 266, §§ 30D(b), (c) (West 2025); NEV. REV. STAT. ANN. § 205.08345(4) (West 2025); N.M. STAT. ANN. § 30-16-20.1(B) (West 2025); N.C. GEN. STAT. ANN. § 14-86.6(c) (West 2025); S.C. CODE ANN. § 16-13-135(C) (2025); VA. CODE ANN. § 18.2-103.1(E) (West 2025); WASH. REV. CODE ANN. § 9A.56.350(4) (West 2025); W. VA. CODE ANN. § 61-3A-7(g) (West 2025); *see also* N.Y. CRIM. PROC. 20.40(4)(n)(i) (McKinney 2025).

234. The organized retail crime statutes in Arizona, California, Connecticut, Delaware, Florida, Indiana, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, New Hampshire, New Jersey, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, and Wisconsin do not have any venue provisions specific to this crime.

235. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-109(B)(1) (2025); CAL. PENAL CODE § 781 (West 2025).

236. *See, e.g.*, ALA. CODE § 13A-8-3(c)(2) (2006); 720 ILL. COMP. STAT. 5/16-25(d) (2022); KY. REV. STAT. ANN. § 452.580 (West 1962).

237. *See, e.g.*, GA. CODE ANN. § 16-8-14.2(c) (West 2025) (“[T]he crime shall be considered to have been committed in any county in which an incident of organized retail theft occurred.”); MASS. GEN. LAWS ANN. ch. 266, § 30D(b)–(c) (West 2025) (“[A]ny county where a theft from a mercantile establishment occurred.”); NEV. REV. STAT. ANN. § 205.08345(4) (West 2025) (“[T]he violation shall be deemed to have been committed and may be prosecuted in any jurisdiction in this State in which any theft committed by any participant in the organized retail theft was committed”); N.M. STAT. ANN. § 30-16-20.1(B) (West 2025) (“[A]ny county in which merchandise is stolen.”); N.Y. CRIM. PROC. L. § 20.40(4)(n)(i) (McKinney 2025) (“[A]ny county in which

serial thefts.²³⁸ And if the stolen merchandise is transported, sold, or transferred to a fence for subsequent reselling, venue would usually be appropriate wherever any of those activities took place.²³⁹ To that end, in stolen property cases some states provide that venue is proper even in counties that the thieves *traveled through* while transporting the property.²⁴⁰ But where else? What about the jurisdiction in which a defendant facilitated or organized the commission of the crime? Given that organized retail crime is essentially a conspiracy to commit a series of thefts, the venue provisions with respect to conspiracy prosecutions might help define the universe of permissible jurisdictions. Most states allow conspiracy charges to be brought in any jurisdiction in which the defendant entered into the conspiracy or in which an overt act took place.²⁴¹ But organized retail crime statutes do not always require a defendant to agree to enter into a conspiracy²⁴²—and because the focus is frequently on the completed crime, not the agreement itself, there is no explicit overt act requirement. So even if the facilitation or organization is a constituent “part” of the crime, it is hard to know where, exactly, it would be charged.

California state law clarifies the confusion somewhat by providing that venue is proper in “the county where any act was done by the defendant in instigating, procuring, promoting, or aiding in” organized retail crime.²⁴³ Alabama law expands the list of permissible venues to include “the county of residence of the person who is the subject of the theft,”²⁴⁴ which queues up its own interpretative questions. Most statutes, however, lack any statements about venue. If organized retail crime prosecutions increase in states with more ambiguous venue provisions, state courts may have to interpret what this phrase means.

7. Role of State Officials

The multijurisdictional nature of many organized retail crimes has persuaded many states to establish statewide officials to monitor, investigate, and prosecute

such defendant committed at least one such organized retail theft crime; provided, however, that the county of prosecution is contiguous to another county in which one or more of such other organized retail theft crimes was committed.”); WASH. REV. CODE ANN. § 9A.56.350(4) (West 2025) (“Thefts committed by the same person in different counties that have been aggregated in one county may be prosecuted in any county in which any one of the thefts occurred.”).

238. See, e.g., MINN. STAT. § 609.52(3)(5) (West 2025); OHIO REV. CODE ANN. § 2091.12(H) (West 2025).

239. See, e.g., ARIZ. REV. STAT. ANN. § 13-109(B)(6) (2025); CAL. PENAL CODE § 786.5 (West 2025); IND. CODE ANN. § 35-32-2-2 (West 2025).

240. See, e.g., CAL. PENAL CODE § 786(a) (West 2025); KY. REV. STAT. ANN. § 452.580 (West 2025); see also KAN. STAT. ANN. § 21-5841(c) (West 2025) (“any county where at least \$1 in aggregate retail market value of merchandise is taken, received, sold or purchased”).

241. LAFAVE, *supra* note 21, § 12.2(b), at n.66 (noting that the “problem” of the overt act requirement “is rarely important except for purposes of . . . venue,” which “lies in any district where an overt act is committed or where the agreement is made”); see, e.g., DEL. CODE ANN. tit. 11, § 522(b)(1) (West 2025) (“No defendant shall be charged with a conspiracy in any county other than one in which the defendant entered into the conspiracy or one in which an overt act pursuant to the conspiracy was done . . .”).

242. *Supra* Part II.B.1.

243. CAL. PENAL CODE § 786.5 (West 2025).

244. ALA. CODE § 13A-8-230(b) (West 2025).

the offenses. Several states have established study groups or advisory boards to analyze the nature of organized retail crime.²⁴⁵ In other states, the attorneys general or state police forces have established task forces to focus on the crimes.²⁴⁶ The Delaware General Assembly created a unit focused on organized retail crime in the Attorney General's office in 2008.²⁴⁷

Lawmakers in California, Florida, Illinois, Nevada, and Pennsylvania opted to grant statewide officials some limited power to prosecute these cases.²⁴⁸ The Attorney General of California, assigned "direct supervision of every district attorney" by the state constitution,²⁴⁹ has historically had limited powers to independently initiate a prosecution.²⁵⁰ In 2012, the legislature expanded these powers to include "any matters in which there are two or more activities, in which fraud or theft is a material element, that have occurred in more than one county and were conducted either by a single defendant or multiple defendants acting in concert."²⁵¹ In 2022, after organized retail crime was established as a separate crime, the Attorney General was expressly given the power to prosecute it.²⁵²

In Florida, the Office of Statewide Prosecution has a role to play in organized retail theft. The Statewide Prosecutor was created by a 1986 constitutional amendment meant to make it easier to prosecute multijurisdictional organized crime, and the office exercises "concurrent jurisdiction" over crimes that occurred "in two or more judicial circuits as part of a related transaction . . ."²⁵³ As a result of a 2019

245. See, e.g., S.B. 1411, 56th Leg., 2d Reg. Sess., 2024 Ariz. Legis. Serv. 167 (West) (codified at ARIZ. REV. STAT. ANN. § 41-191.13 (2025)) (creating the "Organized retail theft task force"); H.B. 06-1380, 65th Gen. Assemb., 2d Reg. Sess., 2006 Colo. Legis. Serv. 277 (West) (creating the "Interagency task force on organized retail theft"); H.B. 5843, 96th Leg., Reg. Sess., 2012 Mich. Legis. Serv. 455 (West) (codified at MICH. COMP. LAWS SERV. § 752.1086 (West 2025)) (creating an "organized retail crime advisory board"); H.B. 1826, 88th Leg., Reg. Sess., 2023 Tex. Sess. Law Serv. 426 (West) (codified at TEX. GOV'T CODE ANN. § 403.0302 (West 2025)) (creating a "task force to study and make recommendations related to preventing organized retail theft"). Despite the fact that two of these boards were created over a decade ago and were ostensibly obligated to produce a report on their findings, I have been unable to identify any such report.

246. See, e.g., Press Release, Nat'l Ass'n of Att'y Gen., Bipartisan Coalition Urges Congress to Take Action Against Rise in Organized Retail Crime (Feb. 25, 2025), <https://www.naag.org/press-releases/bipartisan-coalition-urges-congress-to-take-action-against-rise-in-organized-retail-crime/> [<https://perma.cc/4SPG-UFX3>].

247. H.B. 458, 144th Gen. Assemb., 1st Sess. (Del. 2008); DEL. CODE ANN. tit. 30, § 2911 (West 2025).

248. See 720 ILL. COMP. STAT. ANN. § 5/16-25.1(c) (West 2025) ("A violation of organized retail crime may be investigated, indicted, and prosecuted pursuant to the Statewide Grand Jury Act."); 725 ILL. COMP. STAT. ANN. § 215/7 (West 2025) (authorizing the Attorney General to "prosecute any indictment returned by" the statewide grand jury); NEV. REV. STAT. ANN. § 205.08345(5) (West 2025) ("The Attorney General may investigate and prosecute a violation of this section and any other statute violated in the course of committing a violation of this section.")

249. CAL. CONST. art. V, § 13.

250. See CAL. PENAL CODE § 923 (West 2026).

251. S.B. 1474, ch. 568, 2012 Cal. Legis. Serv. 4999 (West), *codified at* CAL. PENAL CODE § 923(c) (West 2025).

252. A.B. 1613, ch. 949, 2022 Cal. Legis. Serv. 9179 (West), *codified at* CAL. PENAL CODE § 786.5 (West 2025).

253. FLA. CONST. art. IV, § 4(b).

statutory change, the Office now has the *duty* to prosecute any person who “commits retail theft in more than one judicial circuit within a 120-day period.”²⁵⁴

And in Pennsylvania, a 2023 change to the existing organized retail crime statute gave the Attorney General concurrent jurisdiction over organized retail theft crimes that involved more than one county within the state or crossed state lines.²⁵⁵ The law also created the Deputy Attorney General for Organized Retail Crime Theft—an office consisting of “five prosecuting attorneys to have geographically concurrent jurisdiction” with the county district attorneys.²⁵⁶

The Florida and Pennsylvania changes are difficult to disentangle from the recent disputes that have taken place between state leaders and local prosecutors. In Florida, then-Governor Rick Scott removed homicide cases from Aramis Ayala, the elected State Attorney in Orlando, in 2017 after Ayala announced that she would not seek the death penalty.²⁵⁷ Then, over the course of 2022 and 2023, Governor Ron DeSantis removed two separate elected prosecutors—Andrew Warren and Monique Worrell—from office over vague allegations that the offices were insufficiently prosecuting crime.²⁵⁸ Likewise, in Pennsylvania, Philadelphia District Attorney Larry Krasner has attracted the ire of the state legislature since his initial election in 2017. Several times in the last decade, statewide prosecutors in the Attorney General’s office have been given concurrent jurisdiction over crimes taking place in Philadelphia.²⁵⁹ After Republicans lost the Pennsylvania House of Representatives in the 2022 election, they impeached Krasner.²⁶⁰

To be clear, there are entirely defensible reasons why statewide officials are better positioned to prosecute organized retail crime than local prosecutors. The most concerning cases of organized retail crime involve multijurisdictional activity that may be difficult for local prosecutors with limited resources to connect as part of the same scheme.²⁶¹ Those logistical difficulties clearly justify the involvement of a statewide prosecutor. But we should certainly be wary that any creation or empowerment of such an official is motivated by a desire to displace disfavored local prosecutors.

254. H.B. 7125, ch. 167, § 37, 2019 Fla. Sess. Law Serv. 2093 (West), *codified at* FLA. STAT. ANN. § 812.015 (10) (West 2025).

255. 18 PA. CONS. STAT. AND CONS. STAT. ANN. § 3929.3(b.1)(2) (West 2025).

256. *Id.* § 3929.3(b.2)(1).

257. Carissa Byrne Hessick & Rick Su, *The (Local) Prosecutor*, 2023 WIS. L. REV. 1669, 1678–79 (2023).

258. *Id.*

259. *See, e.g.*, Brooks Holland & Steven Zeidman, *Progressive Prosecutors or Zealous Defenders, From Coast-to-Coast*, 60 AM. CRIM. L. REV. 1467, 1480 (2023).

260. Hessick & Su, *supra* note 257, at 1679. However, because the impeachment occurred in the twilight of the 2021–22 legislative session, the Pennsylvania Supreme Court subsequently held that the State Senate had no jurisdiction to conduct an impeachment trial. *Krasner v. Ward*, 323 A.3d 674, 704–06 (Pa. 2024).

261. *See supra* notes 76–77 and accompanying text.

III. CHARGING ORGANIZED RETAIL CRIME UNDER EXISTING LAWS

The legal landscape of theft is unsettled. Despite the fact that state theft crimes encompass virtually all possible ways of committing theft—and purposely so!—state legislatures continue to layer on new theft-related offenses.²⁶² At the same time, members of Congress routinely push for expansions of federal criminal jurisdiction that could make comparatively small thefts chargeable by U.S. Attorneys’ offices.²⁶³ All of these changes are being pushed by retail groups. All of them are also based on either a fundamental misunderstanding of—or strategic misrepresentations about—organizational criminal liability in the United States.

Yet the consistent messaging from legislators, law enforcement officials, retailers, and more than a few prosecutors is that the existing crimes in any prosecutor’s charging kit are not adaptable to the threat of organized retail crime. Therefore, more laws, and more detailed laws, are needed. But the idea that American prosecutors are somehow constrained in their ability to charge organized crime or theft is, frankly, absurd. The existing schemes of organizational criminal liability, whether conspiracy, RICO, or anti-gang laws, are sprawling in scope. The reach of laws that reach the underlying conduct, whether chargeable as simple theft, burglary, fraud, or money laundering, is likewise significant. And where property is stolen from a *merchant*, there is frequently a multiplier effect on how the property is classified and punished.

Moreover, these are not secret laws, unknown to the modern prosecutor. The sprawling reach of organizational liability is both widely known—conspiracy liability is included in most first-year criminal law classes²⁶⁴ and is tested on the Multistate Bar Examination²⁶⁵—and widely criticized by scholars and criminal justice reformers alike.²⁶⁶ True, the frequency of charges under these laws may differ from state to state, and there can be logistical challenges in local prosecutors’ practical ability to bring charges, but it is incorrect to claim that these tools are broken or poorly suited to the task at hand.

In this Part, I argue that the entire logic underpinning the need for specific “organized retail crime” laws is fatally flawed. Existing criminal statutes are more than adequate tools for law enforcement and prosecutors to use to combat organized retail crime rings. I divide my discussion here into criminal liability at the

262. GREEN, *supra* note 144, at 33–36.

263. *See supra* Part I.C.

264. *See, e.g.*, SANFORD H. KADISH, STEPHEN J. SCHULHOFER & RACHEL E. BARKOW, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 701–60 (11th ed. 2022); JOSHUA DRESSLER & STEPHEN P. GARVEY, CRIMINAL LAW: CASES AND MATERIALS 831–83 (9th ed. 2022); PAUL H. ROBINSON, SHIMA BARADARAN BAUGHMAN & MICHAEL T. CAHILL, CRIMINAL LAW: CASE STUDIES & CONTROVERSIES 323–59 (5th ed. 2021); CYNTHIA LEE & ANGELA P. HARRIS, CRIMINAL LAW: CASES AND MATERIALS 853–78 (4th ed. 2019).

265. NAT’L CONF. OF BAR EXAM’RS, MBE SUBJECT MATTER OUTLINE 3–4 (2020), https://www.ncbex.org/sites/default/files/2023-01/MBE_Subject_Matter_Outline.pdf [<https://perma.cc/7B4K-C5GD>].

266. *See* Ingram, *supra* note 15, at 1214–24 (summarizing criticisms of conspiracy doctrine and proposals for reform); Bernick, *supra* note 226, at 52.

federal level and at the state level. In Section A, I explain how federal prosecutors *already* have the ability to charge those involved in organized retail crime and have done so in several recent cases. Then, in Section B, I argue that state-level prosecutors have even more tools at their disposal.

A. *Organized Retail Crime Liability Under Federal Law*

In justifying the need for a new federal offense for organized retail crime, many retailers' groups argued that a significant amount of the conduct that falls into organized retail crime is not chargeable under federal law. In 2005, Target's Director of Asset Protection asserted to Congress that "when professional thieves are apprehended for stealing large quantities of merchandise from a retail store, no Federal statute is readily available."²⁶⁷ Indeed, as I noted earlier, where shoplifters steal several thousand dollars' worth of retail goods from a merchant in a nonviolent incident, that act, *without more*, would likely not form the basis for a federal criminal charge.²⁶⁸

But that is not the harm that the retailers have identified. According to them, *there is almost always more*, which is what makes organized retail crime so harmful. The most devious rings are not engaging in a single act of high-level theft. Instead, they are stealing from multiple stores, frequently in different jurisdictions, with the intent to sell the goods—commonly through online marketplaces like Amazon or eBay—and make a profit.²⁶⁹ Retailers can also point to even worse ways in which the shoplifting takes place, e.g., the violent "smash-and-grab" incidents that cause significant damage to the stores and may harm or kill employees and customers.²⁷⁰

Yet if those additional details are true, that forms the basis for federal jurisdiction. Many of the federal bills meant to criminalize "organized retail crime" proposed modifications to 18 U.S.C. § 2314 and § 2315, which prohibit the interstate transportation and reselling of stolen goods, respectively, but only when the property has "a value of \$5,000 or more . . ."²⁷¹ Retailers and lawmakers have expressed concern that the \$5,000 threshold could serve as an obstacle to federal prosecution where the value of property transported falls below that requirement.²⁷² Yet it is difficult to square this concern with what retailers allege is happening on the ground. If the concern of organized retail theft is that criminal syndicates are stealing and reselling *millions* of dollars' worth of merchandise, it is highly unlikely that they would not, at some point, hit the \$5,000 threshold. And

267. 2005 House Judiciary Committee Hearing, *supra* note 77, at 17 (testimony of Chris Nelson).

268. See *supra* Part I.C.

269. ACAMS REPORT, *supra* note 32, at 18–19; NRF 2023 REPORT, *supra* note 30, at 16–17.

270. NRF 2023 REPORT, *supra* note 30, at 4.

271. 18 U.S.C. §§ 2314, 2315. Note that this excludes any "veterans' memorial object" and "pre-retail medial product[s]," which have no minimum dollar value.

272. 2005 House Judiciary Committee Hearing, *supra* note 77, at 21 (testimony of Paul D. Fox); *id.* at 42 (letter from Sandy Kennedy).

though retailers allege that additional legislation is needed to clarify that the threshold can be met by aggregating the value of multiple thefts,²⁷³ the law already allows that to happen. The definition of “value” includes the “aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment.”²⁷⁴ In 1960, the U.S. Supreme Court confirmed that when the acts at issue “have enough relationship so that they may properly be charged as a single offense, their value may be aggregated.”²⁷⁵

Even where the threshold value has not yet been hit, or the property has not yet been transported in interstate commerce, the U.S. Code provides prosecutors with options. To prosecute a conspiracy or an attempt to commit an offense, prosecutors do not need to prove every element of the underlying offense,²⁷⁶ such that a conspiracy or an attempt to violate Sections 2314 or 2315 could exist even where the property itself had not yet been stolen,²⁷⁷ had not yet been transported,²⁷⁸ or did not (yet) have an aggregate value of \$5,000.²⁷⁹

But transporting or selling stolen property in interstate commerce is just one post-theft activity that could trigger federal liability. Depending on how it is done, the act of disposing of the merchandise can constitute a new federal offense. For example, where someone steals property and then fraudulently returns it to the retailer by the mail, claiming to have purchased it, to receive a refund,²⁸⁰ they have almost assuredly committed mail fraud.²⁸¹ A more straightforward example, and one routinely cited by retailers themselves, occurs when the crime ring attempts to sell the property through an online marketplace like Amazon or eBay. These resellers likely commit wire fraud almost automatically by impliedly representing that they have the right to sell the property.²⁸² Then, upon actually selling the merchandise, they will almost inevitably commit another federal crime immediately afterwards. By taking funds that have been derived from a criminal offense—like theft—and then depositing them into an account at a financial institution, they

273. Mike Duff, *Fight Against Organized Retail Crime Continues Amid Legislation, Increased Advocacy*, INT'L HOUSEWARES ASS'N: HOMEPAGE NEWS (May 9, 2023), <https://www.homepagenews.com/featured-news/fight-against-organized-retail-crime-continues-amid-legislation-increased-advocacy/> [<https://perma.cc/V2A3-55SP>].

274. *Id.*; 18 U.S.C. § 2311.

275. *Schaffer v. United States*, 362 U.S. 511, 517–18 (1960); *see United States v. Honey*, 542 F. Supp. 129, 133–34 (E.D. Ark. 1981).

276. *See Ocasio v. United States*, 578 U.S. 282, 287–89 (2016).

277. *See, e.g., United States v. Rose*, 590 F.2d 232, 235 (7th Cir. 1978); *United States v. Sarro*, 742 F.2d 1286, 1297 (11th Cir. 1984).

278. *See, e.g., United States v. Maddox*, 492 F.2d 104, 106 (5th Cir. 1974); *Sarro*, 742 F.2d at 1296.

279. *See, e.g., United States v. Waldron*, 590 F.2d 33, 33–34 (1st Cir. 1979).

280. NAT'L RETAIL FED'N, 2023 CONSUMER RETURNS IN THE RETAIL INDUSTRY 2 (Jan. 2024), <https://nrf.com/research/2023-consumer-returns-retail-industry> [<https://perma.cc/EQ9J-X6QA>]; *see Liz Young, Brick-Filled Boxes. Bogus Receipts. Retailers Battle Fraudulent Returns.*, WALL ST. J. (Jan. 10, 2024), <https://www.wsj.com/articles/brick-filled-boxes-bogus-receipts-retailers-battle-fraudulent-returns-9c819109> [<https://perma.cc/H48P-45U9>].

281. 18 U.S.C. § 1341; *see, e.g., United States v. McGauley*, 279 F.3d 62, 66–69 (1st Cir. 2002).

282. *See* 18 U.S.C. § 1343. For a recent example of a prosecution based on this theory, *see* Indictment at 2, *United States v. Vladimirov*, No. 2:20-cr-00054 (S.D.W. Va. Mar. 10, 2020).

have clearly committed money laundering.²⁸³ What is more, where these activities are done in a group, the defendants have likely also engaged in conspiracies to commit wire fraud, mail fraud, or money laundering.²⁸⁴ And where these activities are intended, but have not yet been completed, the prospective defendants could be charged with attempting the underlying crimes²⁸⁵—or, in federal court, possibly both.²⁸⁶

Depending on what property is stolen and how it is redistributed, possible defendants might incur additional charges. Many of the federal efforts to criminalize organized retail crime proposed modifying the definition of “access device” to include gift cards, such that stealing and reselling gift cards would constitute access device fraud under 18 U.S.C. § 1029.²⁸⁷ However, such a clarification may not be needed anyway, given that at least one court has already interpreted “access device” to include gift cards.²⁸⁸

Where the products stolen are food, drug, or cosmetic products, the act of stealing and reselling the product could result in charges brought under the Federal Food, Drug, and Cosmetic Act for mislabeling or misbranding a regulated product,²⁸⁹ or for trademark infringement.²⁹⁰ (Not to mention possible civil liability from the companies whose trademarks have been infringed.²⁹¹) The mere act of selling stolen products, where the products themselves have not been damaged or adulterated, or where they have not been put into new containers, will likely not result in charges.²⁹² However, when the products are taken from their original containers and put into new ones with new marks, when they have expired, or when they have been stored improperly and have degraded, charges might follow.²⁹³ While drug theft has been discussed most commonly in the context of prescription drugs or controlled substances,²⁹⁴ the redistribution of over-the-counter medication, especially diabetes test strips, and food products like baby formula is connected to organized retail theft activities.²⁹⁵

283. 18 U.S.C. § 1957(a). The *Vladimirov* case provides an example of this theory of criminal liability, too. For a greater discussion, see *United States v. Vladimirov*, 2021 WL 4491756, at *4–5 (S.D. W. Va. Sept. 30, 2021).

284. See *Vladimirov*, 2021 WL 4491756, *at 4–5.

285. Michael R. Fishman, Note, *Defining Attempts: Mandujano's Error*, 65 DUKE L.J. 345, 354 (2015).

286. While the Model Penal Code only allows a defendant to be convicted of one inchoate crime, a rule that many states also follow, LAFAVE, *supra* note 21, at § 11.5(c) n.144, defendants can frequently be convicted of more than one inchoate crime under the U.S. Code, Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 58–62 (1989).

287. See *supra* notes 129–135 and accompanying text.

288. *E.g.*, *United States v. Truong*, 587 F.3d 1049, 1051–52 (9th Cir. 2009).

289. 21 U.S.C. § 331.

290. 18 U.S.C. § 2320.

291. See, *e.g.*, *Warner-Lambert Co. v. Northside Dev. Corp.*, 86 F.3d 3, 5 (2d Cir. 1996).

292. See, *e.g.*, *United States v. Hanafy*, 302 F.3d 485, 489 (5th Cir. 2002).

293. See, *e.g.*, *Indictment, United States v. Pepin*, No. 2:09-cr-00400 (W.D. Wash. Nov. 19, 2009).

294. See, *e.g.*, Donald deKieffer, *Trojan Drugs: Counterfeit and Mislabeled Pharmaceuticals in the Legitimate Market*, 32 AM. J. L. & MED. 325, 338 (2006).

295. See, *e.g.*, ACAMS REPORT, *supra* note 32, at 9.

Finally, many of the crimes discussed above—as well as analogous state crimes—could form the basis for RICO²⁹⁶ or Hobbs Act liability. Both statutes extend the reach of federal criminal jurisdiction to conduct that has historically been prosecuted by state officials.²⁹⁷ Access device fraud, mail fraud, wire fraud, money laundering, interstate transportation or sale of stolen property, and trafficking in goods bearing counterfeit marks are all recognized as “racketeering acts” for RICO charges, as are more violent activities like cargo theft.²⁹⁸ It is true that a single shoplifting incident, without more, may not be a predicate act under RICO,²⁹⁹ which is one of the reasons that the proposed Organized Retail Theft Act of 2003 added “organized retail crime” to the definition of “racketeering activity,”³⁰⁰ with the full support of retail groups.³⁰¹ However, to the extent that a “smash-and-grab” incident could be charged as robbery under state law,³⁰² it would count as a predicate offense under RICO³⁰³ and would similarly trigger liability under the Hobbs Act.³⁰⁴

Not only *could* these charges be brought against organized retail crime syndicates, they already have been.³⁰⁵ When federal law enforcement officials and prosecutors have testified before Congress, they have emphasized that the existing federal statutes allow prosecutors to pursue charges against those involved in organized retail crime. “RICO has been very easy” for federal prosecutors to use, and the “[p]redicate acts that are included in RICO have been easy to work with

296. See Ryan Stai, Note, *Counteracting Theft and Fraud: The Application of RICO to Organized Retail Crime*, 88 MINN. L. REV. 1391, 1405–14 (2004) (concluding that organized retail theft could be prosecuted under RICO).

297. See Erin C. Blondel, *The Structure of Criminal Federalism*, 98 NOTRE DAME L. REV. 1037, 1071–73 (2023).

298. 18 U.S.C. § 1961(1).

299. *Id.* § 1961(5) (defining “pattern of racketeering activity” as “at least two acts of racketeering activity”) (emphasis added).

300. Organized Retail Theft Act of 2003, S. 1553, 108th Cong. § 3 (2003).

301. 2005 House Judiciary Committee Hearing, *supra* note 77, at 42 (letter from Sandy Kennedy).

302. A smash-and-grab incident taking place during a store’s normal operating hours would seem to be a classic case of a robbery, in that it is “a (1) trespassory (2) taking and (3) carrying away of the (4) personal property (5) of another (6) with intent to steal it,” (7) “the property [is] taken from the person or presence of the other,” and (8) “the taking [is] accomplished by means of force or putting in fear.” LAFAVE, *supra* note 21, at § 20.3; see also *id.* n.6 (noting that while “American statutes do not generally spell out the eight elements,” they nonetheless include these core requirements).

303. 18 U.S.C. § 1961(1) (identifying “robbery” as “racketeering activity”).

304. 18 U.S.C. § 1951(a) (“Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned . . .”). It is possible that even a shoplifting incident that only involved the use of physical force against *property*, as opposed to a *person*, could trigger liability under the Hobbs Act. See Connor Sunderman, *Violence Against Property: The Breaking Point of Federal Crime of Violence Classifications*, 122 COLUM. L. REV. 755, 780–81 (2022).

305. See FINKLEA, *supra* note 7, at 20; U.S. GOV’T ACCOUNTABILITY OFF., GAO-11-675, ORGANIZED RETAIL CRIME: PRIVATE SECTOR AND LAW ENFORCEMENT COLLABORATE TO DETER AND INVESTIGATE THEFT 18 (June 2011).

and pretty inclusive,” an FBI official told Congress in 2005.³⁰⁶ Another official reiterated in 2009 that “the existing laws on the books, whether it is Title 18, U.S. Code 2314 or 2315, or the conspiracy statutes, or the money laundering statutes, or even the RICO statute, do provide adequate criminal remedies to address” organized retail crime.³⁰⁷

B. Organized Retail Crime Liability Under State Law

State criminal codes offer prosecutors many of the same tools as federal prosecutors, but supplemented with common-law theft crimes. Most obviously, prosecutors can charge shoplifters with theft, larceny, or shoplifting, depending on how it is classified in each state. However, this option is unsatisfying to many retail associations, who argue that charging the participants in organized retail crime with mere *theft* is ineffective and a waste of time. They characterize the punishments for theft as too low³⁰⁸ and suggest that savvy shoplifters know how to avoid hitting the threshold for felony theft.³⁰⁹ And because many prosecutors do not charge low-level theft crimes, this means that frequent shoplifters are able to avoid punishment.³¹⁰

Yet many of these points misunderstand—or perhaps misrepresent—criminal law. When retailers characterize the punishments for theft as middling and suggest that shoplifters can avoid felony charges by not stealing *too much*, they ignore the fact that, in virtually every state in the country, separate theft incidents can be aggregated together. It is true that a *single* shoplifting incident may fall below the threshold for a felony.³¹¹ However, when someone commits multiple thefts as part of the same course of conduct, almost all states allow prosecutors to add the values of the individual incidents together to calculate the total loss.³¹² While state courts

306. 2005 House Judiciary Committee Hearing, *supra* note 77, at 28–29 (testimony of Chris Swecker, Assistant Director, Criminal Investigative Division, Federal Bureau of Investigation).

307. 2009 House Judiciary Committee Hearing, *supra* note 39, at 38 (testimony of David J. Johnson).

308. *E.g.*, Jason Straczewski, *Meeting the Challenge of Organized Retail Crime*, NAT’L RETAIL FED’N (Apr. 7, 2022), <https://web.archive.org/web/20220408150039/https://nrf.com/blog/meeting-the-challenge-organized-retail-crime> [<https://perma.cc/AKB5-2EP6>]. *But see* NRF 2023 REPORT, *supra* note 30, at 29 (conceding that “[f]urther research is necessary to corroborate anecdotal claims by some prosecutors, law enforcement officers, and retail loss specialists that higher state felony theft thresholds or bail reforms have caused an increase in ORC incidents”).

309. *See supra* note 147–149 and accompanying text.

310. *See id.*

311. *See id.* Of course, there are good reasons why such an incident *should not* be a felony. Felony convictions carry serious, often lifelong, collateral consequences and the overzealous prosecution of low-level crimes has contributed to the growth of the carceral state. For those (and similar) reasons, many criminal justice reformers have urged felony thresholds to be raised. *See e.g.*, JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM* 155–56 (2017).

312. *See, e.g.*, ALA. CODE § 13A-8-1(15) (2025); ARIZ. REV. STAT. ANN. § 13-1003 (2025); ARK. CODE ANN. § 5-36-102(d)(2) (West 2025); CAL. PENAL CODE § 487 (West 2025); COLO. REV. STAT. ANN. § 18-4-401(4) (West 2025); CONN. GEN. STAT. § 53a-121(b) (West 2025); DEL. CODE ANN. tit. 11, §§ 840, 855 (West 2025); FLA. STAT. ANN. § 812.012(10)(c) (West 2025); HAW. REV. STAT. ANN. § 708-801(6) (West 2025); IDAHO CODE ANN. §§ 18-2407(1)(b)(8)–(b)(9) (West 2025); 720 ILL. COMP. STAT. ANN. § 5/16-0.1 (West 2025); IOWA CODE

have interpreted these aggregation provisions differently, it is misleading to suggest that prosecutors *cannot* do it.

Moreover, state statutes contain a sizable number of different theft crimes.³¹³ Business-backed groups have largely succeeded in a multi-decade effort to add even more shoplifting-related criminal offenses into state statutes. ALEC has drafted far more model laws than just their organized retail crime proposal. In 2000, ALEC proposed the Bogus Receipts and Universal Product Codes Act, which specifically prohibited the possession or production of a receipt or barcode label, with higher penalties for anyone who possessed fifteen or more receipts or labels.³¹⁴ Today, nineteen states have since adopted nearly identical versions of the model act.³¹⁵ The same year, ALEC distributed the Unlawful Use of Theft Detection Shielding or Deactivation Devices Act, which criminalized the use or manufacture of any “laminated or coated bag or device” that was designed to “shield merchandise from detection by an electronic or magnetic theft detector.”³¹⁶ Over twenty states adopted it.³¹⁷ And in 2002, ALEC proposed the Theft Using

Ann. § 714.3 (West 2025); KAN. STAT. ANN. § 21-5801(b)(5) (West 2025); KY. REV. STAT. ANN. § 514.030(4) (West 2025); LA. STAT. ANN. § 14:67(C) (2025); ME. STAT. tit. 17A, § 352(5)(E) (2025); MD. CODE ANN., CRIM. LAW § 7-103(f) (West 2025); MICH. COMP. LAWS ANN. § 750.356a(4) (West 2025); MINN. STAT. ANN. § 609.522 (3)(5) (West 2025); MISS. CODE ANN. § 97-17-41 (West 2025); MO. ANN. STAT. § 570.030(11) (West 2025); MONT. CODE ANN. § 45-6-301(8) (West 2025); NEB. REV. STAT. ANN. § 28-518(8) (West 2025); NEV. REV. STAT. ANN. § 205.251(2) (West 2025); N.J. STAT. ANN. §§ 2C:20-2(b), 11(c) (West 2025); N.M. STAT. ANN. § 30-16-20.1(D) (West 2025); OHIO REV. CODE ANN. § 2913.61 (West 2025); OKLA. STAT. ANN. tit. 21, § 1731 (B) (West 2025); OR. REV. STAT. ANN. § 164.115(6) (West 2025); 18 PA. STAT. AND CONS. STAT. ANN. §§ 3903 (c)(3), 3929(b)(2) (West 2025); S.D. CODIFIED LAWS § 22-30A-18 (2025); TENN. CODE ANN. § 39-14-105(b) (West 2025); TEX. PENAL CODE ANN. § 31.09 (West 2025); WASH. REV. CODE ANN. § 9A.56.010(21)(c) (West 2025); *State v. Jerome*, 758 S.E.2d 576, 583 (W. Va. 2014).

313. For an interesting discussion of an interesting set of highly specific theft crimes, see Michael L. Smith, *Library Crime*, 71 *DRAKE L. REV.* 65, 72–82 (2024) (discussing specific state crime of library theft).

314. *Bogus Receipts and Universal Product Codes Act Exposed*, CTR. FOR MEDIA & DEMOCRACY, https://www.alecexposed.org/wiki/Bogus_Receipts_and_Universal_Product_Codes_Act_Exposed [<https://perma.cc/B2MA-U6A5>] (last updated Feb. 9, 2017).

315. ARIZ. REV. STAT. ANN. § 13-1817 (2025); ARK. CODE ANN. § 5-37-101(12) (West 2025); DEL. CODE ANN. tit. 11, §§ 840A (West 2025); FLA. STAT. ANN. § 812.012 (10)(a)(2) (West 2025); GA. CODE ANN. § 16-8-17 (West 2025); IND. CODE ANN. § 35-43-5-1 (West 2025); IOWA CODE ANN. § 714.8(18) (West 2025); KAN. STAT. ANN. § 21-5805 (West 2025); LA. STAT. ANN. § 14:68.7 (2025); MASS. GEN. LAWS ANN. ch. 266, § 30C (West 2025); MISS. CODE ANN. § 97-23-105 (West 2025); N.D. CENT. CODE ANN. § 12.1-31-09 (West 2025); N. H. REV. STAT. ANN. § 637:10-b (2025); N.J. STAT. ANN. §§ 2C:21-2.4 (West 2025); OR. REV. STAT. ANN. § 165.013(1)(b) (West 2025); TEX. PENAL CODE ANN. § 32.47(b) (West 2025); VT. STAT. ANN. tit. 13, § 2575(5) (West 2025); W. VA. CODE § 61-3-57 (West 2025).

316. *Unlawful Use of Theft Detection Shielding or Deactivation Devices Act Exposed*, CTR. FOR MEDIA & DEMOCRACY, https://www.alecexposed.org/wiki/Unlawful_Use_of_Theft_Detection_Shielding_or_Deactivation_Devices_Act_Exposed [<https://perma.cc/M7U3-8BPE>] (last updated Feb. 9, 2017).

317. ARIZ. REV. STAT. ANN. § 13-1816 (2025); ARK. CODE ANN. § 5-36-401 (West 2025); COLO. REV. STAT. ANN. § 18-4-417 (West 2025); 9 GUAM CODE ANN. § 43.95 (2024); IDAHO CODE ANN. § 18-2411 (West 2025); 720 ILL. COMP. STAT. ANN. § 5/16-6 (West 2025); KAN. STAT. ANN. § 21-5805 (West 2025); IOWA CODE ANN. § 714.7B (West 2025); MASS. GEN. LAWS ANN. ch. 266, § 30B (West 2025); MICH. COMP. LAWS ANN. § 750.360a (West 2025); MISS. CODE ANN. § 97-23-93.1 (West 2025); NEV. REV. STAT. ANN. § 205.970 (West 2025); N.H. REV. STAT. ANN. § 637:10-a (2025); N.D. CENT. CODE ANN. § 12.1-23-13 (West 2025); 18 PA. STAT. AND CONS. STAT. ANN. § 3929.2 (West 2025); 11 R.I. GEN. LAWS ANN. § 11-63-1 (West 2025); UTAH CODE ANN. § 76-6-

Emergency Exit to Avoid Apprehension or Detection Act, which established a higher-level theft offense for anyone who “commit[s] a theft by using a designated emergency exit.”³¹⁸ However, just a few states adopted it.³¹⁹ Many of these statutes can have the practical effect of “turn[ing] an overt act toward the commission of an attempted misdemeanor theft into a felony.”³²⁰

While a shoplifting incident would not traditionally count as “burglary”—certainly not under the common law—state legislatures have significantly expanded the definition of burglary such that many shoplifting incidents would now qualify.³²¹ As Ira Robbins has explained, the state law definitions of burglary (and subsequent judicial interpretations) have converted simple shoplifting incidents into burglary depending on the value of the item stolen, whether the defendant “enter[ed] a store with intent to shoplift,”³²² and whether the defendant unlawfully *remained* in the store.³²³

As was the case with the expansion of theft-related crimes, retailers have played a role in the widened interpretation of burglary. In *State v. Welch*, the defendant entered a Walmart and stole several items so that her associate could fraudulently return the items and receive a gift card.³²⁴ However, she had previously been issued a “trespass form” by that Walmart that “precluded the defendant from entering the store because of prior shoplifting episodes.”³²⁵ Accordingly, on the theory that the defendant had entered the store without the owner’s permission and committed a theft, the local prosecutor charged her with burglary.³²⁶ She was convicted, sentenced to just under seven years in prison, and appealed her conviction.³²⁷ The question of whether she had actually committed burglary under state law reached the Tennessee Supreme Court, which prompted a coalition of retail groups to submit an amicus brief to the court encouraging it to affirm the conviction,³²⁸ which it did.³²⁹

608 (2025); VT. STAT. ANN. tit. 13, § 2575 (West 2025); W. VA. CODE ANN. § 61-3A-4a (West 2025); WIS. STAT. ANN. § 943.50 (West 2025); WYO. STAT. ANN. § 6-3-411 (West 2025).

318. *Theft Using Emergency Exit to Avoid Apprehension or Detection Act Exposed*, CTR. FOR MEDIA & DEMOCRACY, https://aleceExposed.org/wiki/Theft_Using_Emergency_Exit_to_Avoid_Apprehension_or_Detection_Act_Exposed [<https://perma.cc/5N7Z-5DPJ>] (last updated Feb. 9, 2017, 7:25 PM).

319. 720 ILL. COMP. STAT. ANN. § 5/16-25(b) (West 2025); WASH. REV. CODE ANN. § 9A.56.360 (West 2025).

320. See *State v. Armstrong*, 80 P.3d 378, 384 (Kan. 2003) (discussing the possible implications of KAN. STAT. ANN. § 21-3764(d) (2002), which prohibited the unlawful removal of a theft detection device).

321. See Ira P. Robbins, *Deconstructing Burglary*, 57 U.C. DAVIS L. REV. 1489, 1516–19 (2024) (describing how states differentiate burglary from retail theft).

322. *Id.* at 1518.

323. *Id.* at 1540–42, 1555–56.

324. *State v. Welch*, 595 S.W.3d 615, 619–20 (Tenn. 2020).

325. *Id.* at 620.

326. *Id.*

327. *Id.*

328. Brief of Retail Litigation Center, Inc., National Association for Shoplifting Prevention, and Tennessee Retail Association as Amici Curiae Supporting Appellee at 7, *State v. Welch*, 595 S.W.3d 615 (Tenn. 2020) (No. E2018-00240-SC-R11-CD).

329. *Welch*, 595 S.W.3d at 631.

However, regardless of how the underlying conduct could be charged—theft, a related theft crime, burglary, or something else—where it involves multiple people, they could also be liable for conspiracy to commit the offense. Every state criminalizes conspiracy, and many of them have adopted the Model Penal Code’s definition of the offense,³³⁰ if not its full intended meaning.³³¹ While conspiracy may not be a commonly used tool in all jurisdictions,³³² prosecutors could certainly charge those involved in an organized retail crime ring with conspiracy to commit theft or, depending on the jurisdiction, burglary. Because most states recognize *Pinkerton*-type vicarious liability³³³—that is, for “reasonably foresee[able]” offenses “committed by one of the conspirators in furtherance of the unlawful project”³³⁴—those involved in the ring could have significant legal exposure.

The development of Alabama’s organized retail crime law, adopted in 2023, illustrates the profound dissonance at play. The Retail Theft Crime Prevention Act established new crimes—“retail theft,” which formally codified shoplifting as a separate offense,³³⁵ and “organized retail theft,” which separately criminalized attempted and successful shoplifting incidents done in groups³³⁶—and expressly allowed for the aggregation of multiple thefts within set timeframes.³³⁷ According to state legislators, prosecutors, and retailers, these changes were desperately needed. The President of the Alabama Retail Association claimed that “[r]etail thieves feared no jail time or even arrest” before the law.³³⁸ Barry Matson, the Executive Director of the Alabama District Attorneys Association (ADAA), agreed, concluding, “We did not have the ability in Alabama to charge.”³³⁹ In

330. See, e.g., Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1369 (2003) (noting that “the trend in state law . . . has moved in a different direction,” which was “prompted by the Model Penal Code’s rejection of extra punishment for conspiracy, its decision to permit merger, and its refusal to permit *Pinkerton* liability”).

331. See, e.g., *State v. Pacheco*, 882 P.2d 183, 189 (Wash. 1994) (Durham, J., dissenting) (criticizing the majority for requiring a bilateral conspiracy when the “Washington conspiracy statute tracks the Model Penal Code’s language rather than the ‘two or more persons’ language of the general federal conspiracy statute”).

332. Scholars have repeatedly reported—albeit sometimes anecdotally—that conspiracy cases are not brought as frequently in state court as they are in federal court. See, e.g., Paul Marcus, *Conspiracy: The Criminal Agreement, in Theory and in Practice*, 65 GEO. L.J. 925, 947–50 (1977); Shaun P. Martin, *Intracorporate Conspiracies*, 50 STAN. L. REV. 399, 403–05 (1998); Steven R. Morrison, *Requiring Proof of Conspiratorial Dangerousness*, 88 TUL. L. REV. 483, 511–13 (2014).

333. Neil Colman McCabe, *State Constitutions and Substantive Criminal Law*, 71 TEMP. L. REV. 521, 536 (1998) (noting that *Pinkerton* “has been followed by many state courts in recognizing the extended reach of vicarious liability in the area of conspiracy law”).

334. *Pinkerton v. United States*, 328 U.S. 640, 647–48 (1946).

335. ALA. CODE § 13A-8-222 (2025). See Ralph Chapoco, *Shoplifting in Alabama could land people in prison under ‘retail theft’ bill*, AL.COM (May 12, 2023), <https://www.al.com/news/2023/05/shoplifting-in-alabama-could-land-people-in-prison-under-retail-theft-bill.html> [<https://perma.cc/7ACH-PTX4>] (“Those crimes are prosecuted under the theft statute, and it doesn’t exactly fit,” said State Senator Clyde Chambliss, the sponsor of the 2023 Act).

336. ALA. CODE § 13A-8-226(a) (2025).

337. *Id.* § 13A-8-226(b).

338. *Retail Crime Prevention Act in Effect*, *supra* note 170.

339. Snowden, *supra* note 169.

backing the legislation, the ADAA colorfully illustrated the problem: “Alabama has a giant neon sign welcoming organized crime into our state.”³⁴⁰

Yet for nearly two decades, many of the things ostensibly accomplished by the 2023 act had already been codified. In 2006, the legislature modified the state’s theft statute to allow for aggregation of multiple theft offenses³⁴¹ in ways *exactly* mirrored by the 2023 act.³⁴² Virtually all of the conduct separately defined as “organized retail theft” could have easily triggered liability for conspiracy to commit theft in the first degree for any of the defendants involved.³⁴³ The characterization of the 2023 act as desperately needed, and of the existing law as woefully inadequate, simply does not square with how theft was criminalized at that point.

Beyond conspiracy, however, in many states criminal enterprises involved in retail theft could also face charges under state RICO laws. While not all states have adopted analogs of the federal RICO statute, most have.³⁴⁴ Many states “incorporate a broad range of activity in violation of their jurisdiction’s laws” that go beyond the listed predicate acts under federal RICO.³⁴⁵ Georgia’s RICO statute is one of the most widely used and well-known state analogs, and it has been deployed against teachers cheating on standardized tests, rapper Young Thug’s alleged street gang, former President Donald Trump, and protestors opposed to “Cop City” in Atlanta.³⁴⁶

The expansiveness of state RICO means that much of the underlying conduct that would not, without more, have triggered federal liability or formed a predicate offense under federal RICO might trigger analogous liability under state RICO statutes. Simple theft, for example, is not a predicate act under federal RICO,³⁴⁷ but usually is in state RICO statutes.³⁴⁸

Some states also have a type of law that the U.S. Code does not: anti-gang offenses.³⁴⁹ While federal law recognizes a “[c]ontinuing criminal enterprise” crime that has frequently been used against gangs, it is expressly limited to

340. 2023 Alabama District Attorneys’ Association Press Release, *supra* note 168.

341. H.B. 371, 2006 Gen. Assemb., Reg. Sess. (Ala. 2006) (codified at ALA. CODE § 13A-8-3 (2025)).

342. *Compare id.* (establishing “theft [by] common plan or scheme by one or more persons” where “[t]he aggregate value of the property stolen is at least one thousand dollars (\$1,000) within a 180-day period” as theft of property in the first degree), with ALA. CODE § 13A-8-226(b)(2) (2026) (“Theft of retail merchandise consisting of one or more items of retail merchandise during a 180-day period, the aggregate value of which is one thousand dollars (\$1,000) or more, constitutes organized retail theft.”).

343. ALA. CODE § 13A-8-226(a) (2026).

344. See generally JOHN E. FLOYD, RICO STATE BY STATE: A GUIDE TO LITIGATION UNDER THE STATE RACKETEERING STATUTES (2d ed. 2011) (surveying state RICO statutes).

345. *Id.*

346. Tamika Griffin Moses, *Georgia (RICO) on My Mind*, 105 B.U. L. REV. 247, 249, 262–69 (2025).

347. See generally 18 U.S.C. § 1961(1) (defining “racketeering activity”).

348. FLOYD, *supra* note 344.

349. Fareed Nassor Hayat, *Abolish Gang Statutes with the Power of the Thirteenth Amendment: Reparations for the People*, 70 UCLA L. REV. 1120, 1180–83 (2023) [hereinafter Hayat, *Abolish Gang Statutes*]; Fareed Nassor Hayat, *Two Bites at the Apple: Requiring Double Jeopardy Protection in Gang Cases*, 73 RUTGERS U. L. REV. 1463, 1502–04 (2021) [hereinafter Hayat, *Two Bites at the Apple*].

repeated violations of drug offenses,³⁵⁰ and the federal “criminal street gangs” statute is a sentence enhancement, not a substantive offense.³⁵¹ State anti-gang statutes do not usually contain a similar substantive limitation,³⁵² and though some treat the facilitation of gang activities as a sentencing enhancement, many others treat it as a separate offense.³⁵³ There is sometimes very little daylight between a violation of a state RICO law and violation of an anti-gang law. Some states have adopted a generic prohibition on criminal enterprises that might serve both purposes, while others have adopted separate statutes that have different elements.³⁵⁴ Many of the organized retail crime rings described by law enforcement and retail groups would fit the textual definition of “gang” in many state anti-gang laws,³⁵⁵ allowing prosecutors to bring charges on those grounds, too.

* * *

My purpose in laying out the different options for federal and state prosecutors in the preceding sections is not to *encourage* greater use of sprawling theories of organizational liability, but instead to emphasize that if the goal is sending shoplifting ringleaders to prison for a very long time, there are many ways to do so under existing criminal statutes. There may be good reasons for wanting to pursue serious charges against organized retail crime rings. Perhaps these rings are simply the next iteration of salient organized crime that has attracted public attention. After all, the nature of organized crime in the United States has shifted, and use of conspiracy and RICO along with it, from the mob and Mafia activity in American cities in the mid-twentieth century to the street gangs involved in drug trafficking and distribution in the 1980s and 1990s.³⁵⁶

Further, if we assume that the societal harms of *those* organized criminal activities were great enough to justify heavy criminal penalties, perhaps the same is true

350. 21 U.S.C. § 848(c).

351. 18 U.S.C. § 521(b).

352. *See, e.g.*, CAL. PENAL CODE § 186.22(e)(1) (West 2025) (defining “pattern of criminal gang activity” as including the commission of a variety of offenses); FLA. STAT. ANN. § 874.03 (West 2025) (defining “criminal gang” as “a formal or informal ongoing organization, association, or group that has as one of its primary activities the commission of criminal or delinquent acts”); GA. CODE ANN. § 16-15-3(1) (West 2025) (defining “criminal gang activity” as including the commission of a variety of offenses); IDAHO CODE ANN. § 18-8502(3) (West 2025) (defining “pattern of criminal gang activity” as including the commission of a variety of offenses).

353. Hayat, *Two Bites at the Apple*, *supra* note 349, at 1471–72 n.39 (surveying state gang statutes).

354. *Id.* (comparing and contrasting state anti-gang and RICO statutes).

355. For example, a group of three people who commit two acts of shoplifting would be classified as a “criminal gang” under Idaho law and, if convicted of the underlying thefts, would qualify for sentence enhancements for their “gang” involvement. *See* IDAHO CODE ANN. § 18-8502(1) (West 2024) (defining a “criminal gang” as an association of three or more people); *id.* § 18-8502(3) (providing that two or more acts of theft would constitute a “pattern of criminal gang activity”); *id.* § 18-8503 (providing for sentence enhancements). What’s more, anyone who “[k]nowingly solicit[ed], invit[ed], encourag[ed] or otherwise caus[ed] a person to actively participate” in the gang would commit a *separate* offense, “recruiting criminal gang members,” which would carry a ten-year prison term. *Id.* § 18-8504.

356. *See* Lucy Litt, *RICO: Rethinking Interpretations of Criminal Organizations*, 26 BERKELEY J. CRIM. L. 71, 132–38, 145–46 (2021).

of organized retail crime. *If* the participants are involved in financing terrorist groups or transnational gangs, as retailers have alleged, even in the absence of persuasive public evidence;³⁵⁷ *if* the rings are adulterating food, drug, or cosmetic products in a way that poses a public health risk;³⁵⁸ or *if* the commission of repeated thefts from retail stores causes physical harm to employees, customers, or other bystanders,³⁵⁹ perhaps there are good reasons to pursue these charges.

At the same time, there are good reasons to criticize the incredible scope of liability under conspiracy, RICO, or anti-gang statutes, as many scholars have done for decades. Identifying a particularly unsympathetic group of defendants and identifying novel ways to bring charges against them certainly will not stop with those prosecutions. In the face of clear evidence that the laws allowing for massive organizational liability for criminal enterprises, or vicarious liability for the criminal acts of another, are disproportionately wielded against defendants of color,³⁶⁰ we should be very skeptical of reaching too far.

IV. THE REAL EFFECTS OF ORGANIZED RETAIL CRIME STATUTES

If most organized retail crime activities trigger liability under federal and state law as they exist today, and prosecutors have tools available to severely punish those involved, what use are organized retail crime statutes? Consider state organized retail crime laws first. Perhaps, their possible redundancy notwithstanding, these laws make it easier for prosecutors to permanently disrupt the activities of organized retail crime rings. While adopting duplicative criminal statutes can have negative effects,³⁶¹ the benefits of greater specificity—clearer signaling to law enforcement, prosecutors, and possible offenders alike, as well as avoiding ambiguous applications that require judicial intervention—could justify the adoption of laws that are designed for this particular criminal activity.

Alternatively, perhaps organized retail crime statutes are not of any use at all. They may simply be products of political and societal pressure—part of the

357. *Supra* note 38–39 and accompanying text.

358. *Supra* note 81 and accompanying text.

359. *Supra* note 9 and accompanying text.

360. Perry Moriearty, Kat Albrecht & Caitlin Glass, *Race, Racial Bias, and Imputed Liability Murder*, 51 FORDHAM URB. L.J. 675, 712–14 (2024) (concluding, based on data from Minnesota, that “Black defendants were . . . 25 times more likely to be charged with imputed liability murder” than “White defendants,” suggesting that “the doctrines of imputed liability murder and direct liability murder function differently for Black and White defendants”); Jordan Blair Woods, *Systemic Racial Bias and RICO’s Application to Criminal Street and Prison Gangs*, 17 MICH. J. RACE & L. 303, 335–47 (2012) (discussing the relationship between racist depictions of criminal organizations and RICO prosecutions); Litt, *supra* note 356, at 128–32.

361. Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 261 (2007) (arguing that “[o]utdated, poorly conceived, and duplicative statutes . . . can generate doctrinal confusion on mens rea requirements, allow disparate treatment of similar offenders, and facilitate occasional vindictive prosecutions as well as muddy criminal law’s expressive and moral force”); *see also* Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 769 (2005) (arguing that “[t]he expanding overlap of federal and state law also increases the potential for duplicative prosecutions and penalties for the same conduct, which are not prohibited by the Double Jeopardy clause”).

“overcriminalization phenomenon.”³⁶² As concerns about shoplifting have reached new highs, elected politicians want to be seen as doing something, and adopt new, seemingly “tough” statutes that simply repackage existing liability for theft, conspiracy, and complicity with little practical effect.³⁶³

Yet neither of these explanations totally fits. While politicians are undoubtedly feeling pressure to respond to mounting public anxiety over a perceived increase in crime,³⁶⁴ dismissing organized retail theft laws as mere security theater is too simple. The laws *do* provide alternative, and likely easier, means of charging coordinated criminal activities.³⁶⁵ They also alter the institutional balance of power among prosecutors by expanding options for venue and empowering greater state involvement. But these changes do not seem to be drawn to the problem they claim to be fixing—halting organized crime.

In this final Part, I argue that the organized retail crime narrative contains a fundamental dissonance. While advocates of these laws point to highly organized criminal activities with massive societal consequences as the *reason* for these laws, almost nothing in the text of most organized retail crime statutes seems to address that problem. Instead, the laws seem calculated to address a different problem, and perhaps the retailers’ real goal—low-level shoplifters who might otherwise be placed into diversion programs or other noncarceral alternatives.

In Section A, I argue that organized retail crime statutes do not provide prosecutors with the tools to unravel crime rings’ activities. Conspiracy and RICO liability have been devastatingly effective against organized criminal activity because of how easy it is to ensnare high-level organizers under those theories of liability. Yet almost all of that is absent from organized retail crime statutes. Nothing in the laws expressly allows for vicarious liability or provides prosecutors with very much leverage to use against low-level boosters.

Then, in Section B I suggest that the real goal of organized retail crime statutes is to make it easier for tough-on-crime prosecutors to send low-level shoplifters to jail. The structure of the offenses created by these laws lowers the barriers for prosecutors to charge what effectively amounts to a conspiracy to commit theft—but without the same evidentiary requirements and logistical hurdles. Moreover, the

362. Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 716 (2005) (defining “the overcriminalization phenomenon” as “(1) untenable offenses; (2) superfluous statutes; (3) doctrines that overextend culpability; (4) crimes without jurisdictional authority; (5) grossly disproportionate punishments; and (6) excessive or pretextual enforcement of petty violations”).

363. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 530 (2001) (noting that “appealing to the median voter is more likely to mean some combination of two things: generating *outcomes* (not rules) the median voter wants, and taking *symbolic stands* the median voter finds attractive”).

364. Nick Reisman, *Democrats’ Next Crime Fight: Retail Theft*, POLITICO (Jan. 29, 2024), <https://www.politico.com/news/2024/01/29/democrats-next-crime-fight-retail-theft-00137953> [<https://perma.cc/8AWY-B36U>]; Anabel Sosa, *California Lawmakers Want to Curb Retail Theft, But Say It’s Not as Easy as It Sounds*, L.A. TIMES (Dec. 30, 2023), <https://www.latimes.com/california/story/2023-12-30/california-lawmakers-want-to-stop-retail-theft-but-a-lack-of-data-is-making-that-hard> [<https://perma.cc/XMS4-62TE>].

365. Stuntz, *supra* note 363, at 531 (“Legislatures *can* raise the odds of conviction—and lower the cost of getting one—by changing criminal liability rules, even for conduct long since criminalized.”).

offense's focus on a course of conduct means that it can be charged in multiple jurisdictions, just like conspiracy, potentially removing the ability of reformist prosecutors to redirect low-level offenders into diversion programs.

A. *A Poor Fit for the Apparent Target*

If the goal of organized retail crime statutes is to ensnare, and ultimately take down, crime syndicates that are stealing, reselling, and laundering millions of dollars' worth of merchandise, these laws will ultimately fall short. Neither the federal nor state laws seem to add much meat to existing criminal liability, and none appears to be drafted to impose broad organizational liability.

As outlined earlier, the conduct that falls into the category of "organized retail crime" is, of course, already criminal activity. While there are some circumstances in which the conduct might fall outside the scope of federal jurisdiction, those cases likely involve low-level shoplifting incidents—for which we might very seriously question whether federal jurisdiction is even appropriate at all. So, what do organized retail crime statutes add to the existing liability? Because the answer varies depending on whether the question is directed to the proposed federal laws or the enacted state laws, I address each separately.

1. Federal Legislation

The most recent iterations of federal organized retail crime bills—the Combating Organized Retail Crime Act, which has been introduced in the 117th, 118th, and 119th Congresses—follow the same basic pattern.³⁶⁶ All three simply allow prosecutors to aggregate, "during any 12-month period," the value of all stolen property transported in interstate commerce by a defendant.³⁶⁷ However, the Supreme Court has already allowed individual acts of interstate transportation of stolen property to be combined into a single count.³⁶⁸

Accordingly, the effect of this modification would be negligible—and, in some ways, these proposed laws are not really even "organized retail crime" bills. They *might* make it easier for prosecutors to pursue charges for violations of 18 U.S.C. §§ 2314 and 2315, but the courts have already broadly interpreted the power of federal prosecutors to aggregate under these sections.³⁶⁹ And while the organized retail crime bills that were proposed in 2008 and 2009 would have implemented bigger changes to the U.S. Code, most of them would not have conferred federal jurisdiction on acts that did not otherwise invoke it.³⁷⁰

366. *Supra* Part I.C.

367. Combating Organized Retail Crime Act, H.R. 9177, 117th Cong. § 3 (2022); Combating Organized Retail Crime Act, S. 5046, 117th Cong. § 3 (2022); Combating Organized Retail Crime Act, H.R. 895, 118th Cong. § 3 (2023); Combating Organized Retail Crime Act, S. 140, 118th Cong. § 3 (2023).

368. *Schaffer v. United States*, 362 U.S. 511, 517–18 (1960); *United States v. Smith*, 692 F.2d 658, 660 (10th Cir. 1982) (citing *Schaffer* to allow aggregation under section 2315).

369. *See Schaffer*, 362 U.S. at 517–18.

370. *Supra* Part I.C.

Accordingly, the ability of federal prosecutors to pursue organized retail crime rings would be marginally affected by the passage of these laws. It is easy enough to bring charges under §§ 2314 and 2315—for the completed act or conspiracy to commit it—and most of the activities in which these rings are involved would also constitute mail fraud, wire fraud, or money laundering, which would in turn form the basis for RICO liability.³⁷¹ If prosecutors *wanted* to bring charges for most shoplifting incidents, they certainly could.³⁷²

2. State Laws

A similar reality unfolds in the states, but with some important complications. The goal of state organized retail crime statutes—which either create a new crime or increase the punishments for existing crimes—is to treat repeated acts of shoplifting conducts by groups of people³⁷³ more harshly. While they do accomplish that goal, they provide prosecutors with comparatively few tools to unwind organized criminal activity.

It is difficult to imagine that amped-up theft charges will be a terribly powerful weapon against retail crime syndicates. Insofar as the low-level boosters are arrested and face these charges, the incentive to flip based on the punishment may not be *so much* greater than what the boosters would face if arrested for felony theft.³⁷⁴ Moreover, while one of the apparent appeals of these laws is that they allow prosecutors to aggregate multiple thefts for purposes of calculating overall loss, as I noted in Part III.B, virtually all states already allow that to happen.³⁷⁵ There are *some* logistical difficulties that prosecutors may face,³⁷⁶ so these laws may remove a small hurdle, but it is difficult to characterize the change as significant.

But a more fatal defect is that organized retail crime statutes do not operate like other statutes that are ostensibly designed to attack organized criminal activity. While “organized retail crime” functions similarly to conspiracy to commit theft,³⁷⁷ nothing in the text of the statutes confers any kind of vicarious criminal liability on those involved in the underlying conduct for related crimes committed by others. In other words, there is no apparent *Pinkerton* liability at play. Under *Pinkerton*, parties to

371. *Supra* Part III.A.

372. One of the likeliest reasons that more cases are not brought is that the loss amounts are likely too small for most U.S. Attorneys’ offices. In fiscal year 2023, for example, the loss amounts in economic crime cases “ranged from no loss (in 286 cases) to \$2.9 billion (in one case), with an average loss amount of \$3,321,161 but a median loss amount of \$109,900.” U.S. SENT’G COMM’N, 2023 ANNUAL REPORT 20 (2023), <https://www.uscc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2023/2023-Annual-Report.pdf> [<https://perma.cc/5YL7-5NF9>].

373. As I noted earlier, while this definition is *generally* correct, some state organized retail crime statutes can be violated by a single person or by a single act of shoplifting. *Supra* Part II.B.3.

374. *Supra* Part II.B.5.

375. *Supra* note 312 and accompanying discussion.

376. *Id.* For example, given that, under federal law and most state laws, aggregated thefts have to be part of the same course of conduct, *supra* note 311 and accompanying discussion, prosecutors have to prove that the thefts are connected.

377. *Supra* Part II.B.1.

a conspiracy can be held liable for crimes committed by their co-conspirators so long as they were in furtherance and within the scope of the conspiracy, and a reasonably foreseeable consequence of the agreement.³⁷⁸ Admittedly, there is much to criticize about the *Pinkerton* rule,³⁷⁹ but warts notwithstanding, it is a powerful tool for charging far-reaching conspiracies and unwinding organized criminal enterprises.³⁸⁰

Most organized retail crime statutes do not operate like mini-RICO statutes, either. While a few states have defined “organized retail crime” *only* for the purpose of adding it to their existing RICO statutes as predicate acts,³⁸¹ most have not—and the remaining states do not really emulate enterprise-based criminal liability in how they treat serial shoplifting. Again, because RICO liability is frequently sprawling,³⁸² it is a deadly weapon for prosecutors to deploy against organizations.³⁸³

Instead, most organized retail crime statutes impose comparatively little liability on organizers, especially compared to conspiracy or RICO liability.³⁸⁴ The few laws that *do* dramatically increase organizers’ liability, like those in Georgia, Illinois, and New Jersey, are a helpful point of comparison here.³⁸⁵ They focus their attention on the organizers, not the boosters, and levy hefty sentences on them. But that approach is, far and away, a minority approach. It is possible that the majority of these laws make it easier for prosecutors to criminally charge the boosters. After all, they would merely need to prove that the organizers facilitated or coordinated the activities without any need to prove an agreement or shared objective.³⁸⁶ But the payoff for doing so seems less significant, given that the evidence that prosecutors would obtain in pursuit of such a prosecution would undoubtedly implicate other people in the underlying criminal conduct.

378. *Pinkerton v. United States*, 328 U.S. 640, 646–48 (1946).

379. *E.g.*, Cynthia V. Ward, *Criminal Justice Reform and the Centrality of Intent*, 68 VILL. L. REV. 51, 79–82, 82 n.139 (2023); Kimberly Kessler Ferzan, *Conspiracy, Complicity, and the Scope of Contemplated Crime*, 53 ARIZ. ST. L.J. 453, 465–70 (2022); Andrew Ingram, *Pinkerton Short-Circuits the Model Penal Code*, 64 VILL. L. REV. 71, 80–82 (2019).

380. Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 398–99 (2003).

381. *E.g.*, MISS. CODE ANN. § 97-43-3.1(3) (West 2025); OHIO REV. CODE ANN. § 2923.31(Q) (West 2025).

382. G. Robert Blakey & Thomas A. Perry, *An Analysis of the Myths That Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: “Mother of God—Is This the End of Rico?”*, 43 VAND. L. REV. 851, 860–62 (1990); Benjamin Levin, *American Gangsters: RICO, Criminal Syndicates, and Conspiracy Law as Market Control*, 48 HARV. C.R.-C.L. L. REV. 105, 136 (2013); Pamela Bucy Pierson, *RICO, Corruption and White-Collar Crime*, 85 TEMP. L. REV. 523, 537–39 (2013); Jason D. Reichelt, Note, *Stalking the Enterprise Criminal: State RICO and the Liberal Interpretation of the Enterprise Element*, 81 CORNELL L. REV. 224, 240–44 (1995).

383. *See, e.g.*, Paul E. Coffey, *The Selection, Analysis, and Approval of Federal RICO Prosecutions*, 65 NOTRE DAME L. REV. 1035, 1039 (1990) (“RICO is an essential component of the government’s strategy of attacking organized crime.”).

384. *Stai*, *supra* note 296, at 1415–16.

385. *Supra* Part II.B.4.

386. Under the statutes, a conviction could be obtained of the ringleader by simply proving what *their* intent was—*e.g.*, to steal and resell stolen merchandise—and that they directed the underlying theft. GA. CODE ANN. § 16-8-14.2(a) (West 2025); 720 ILL. COMP. STAT. ANN. § 5/16-25.1(b) (West 2025); 18 PA. STAT. AND CONS. STAT. ANN. § 3929.3(a) (West 2025).

Of course, prosecutors could certainly charge *conspiracy* to commit organized retail theft—a possibility that many of the statutes expressly contemplate³⁸⁷—to widen the net and charge offenses undertaken in pursuit of the conspiracy itself. But that power exists already, given that prosecutors could charge conspiracy to commit theft. While it is possible that the continuous course of conduct required by organized retail crime statutes might expand what crimes are “reasonably foreseeable” for purposes of *Pinkerton* liability,³⁸⁸ that seems too uncertain of a conclusion.

Accordingly, it is hard to envision that these laws would serve much practical use in charging the retail crime syndicates about which retailers express the most anxiety. Making it easier to charge theft is a weak weapon against multi-million-dollar organized crime rings. These laws also ignore two universally shared problems of combatting organized retail crime: (1) that there are coordination difficulties between different levels of government, as well as the public and private sectors, in identifying possible cases, and (2) that there are easily available black and grey markets for reselling the stolen merchandise. While some of the organized retail crime statutes build some kind of infrastructure for coordinated action, few do.³⁸⁹ Separately, while some states have imposed duties on online marketplaces or flea markets to retain certain records, most have not.³⁹⁰

B. A Good Fit for the Actual Target

The middling effect of organized retail crime statutes on highly intricate organized criminal activity, and especially against its organizers, does not mean that these laws will be ineffective against *every* possible defendant, however. Quite the opposite. These laws seem to be designed to empower tough-on-crime prosecutors to aggressively pursue comparatively low-level shoplifters, both in terms of how they structure the offense itself and how they allow more prosecutors to have a bite at the apple.

First, at the state level, the offense clearly *can* be committed by small-time thieves. The value threshold for committing the offense is comparatively low. In some states, the crime could be committed with an aggregate haul under \$1,000, and in most states, below \$5,000³⁹¹—hardly the kind of economy-altering thefts that the retail industry trumpets³⁹² or that attract media coverage.³⁹³ In some states, it is possible to commit the offense without hitting *any* particular threshold for

387. See *supra* Part II.B.1.

388. *Pinkerton v. United States*, 328 U.S. 640, 647–48 (1946).

389. See *supra* Part II.B.7.

390. See *supra* note 128 and accompanying discussion.

391. *Supra* Part II.B.2.

392. ACAMS REPORT, *supra* note 32, at 23 (asserting that “Organized retail crime is believed to cost retailers US\$68,900,000,000.00 per year in losses or more”).

393. See, e.g., Dani Anguiano, *Leader of US Retail Theft Ring That Allegedly Stole \$8m in Cosmetics Caught*, GUARDIAN (Mar. 14, 2024), <https://www.theguardian.com/us-news/2024/mar/14/retail-theft-ring-leader-arrested-california> [<https://perma.cc/D868-3GBG>].

value.³⁹⁴ Most of these statutes would easily ensnare a sizable portion of repeat shoplifters.

It is also possible for a single defendant to commit “organized retail theft,” despite the absurdity of committing an *organized* crime on one’s own.³⁹⁵ While the Texas Court of Criminal Appeals interpreted Texas’s ambiguous statute to preclude such a possibility,³⁹⁶ other statutes *expressly* allow for the crime to be committed as a solitary activity³⁹⁷ or could be read to allow a prosecution for a single person’s conduct.³⁹⁸

The costs of these statutes will be “disproportionately borne by low-income women of color.”³⁹⁹ While additional studies of the effects of organized retail crime statutes are hopefully on the way, the most comprehensive study thus far suggests that defendants of color are likelier to be charged with organized retail theft—as opposed to an ordinary theft charge—than white defendants. A study of property theft and organized retail theft prosecutions in Texas from 2012 to 2015 determined there was a statistically significant racial disparity in which defendants faced harsher charges.⁴⁰⁰ The study concluded that “a typical agency will make about twice as many [organized retail theft] arrests of [B]lacks than whites, and about 20 percent more of Hispanics than whites,” with the effects greatest for female defendants.⁴⁰¹

Second, the proposed or created offenses allow for expansive venue, enabling some low-level theft crimes to be brought into federal court or tried in state-level jurisdictions with tough-on-crime prosecutors. While the changes to interstate transportation or resale of stolen property do not seem to extend federal jurisdiction very far, some of the older organized retail crime proposals would have accomplished bigger changes. The Organized Retail Crime Act, introduced in 2008 and 2009, allowed 18 U.S.C. § 2314 to be violated by “engag[ing] in organized retail crime” when the merchandise was transported in interstate commerce, and defined “organized retail crime” so broadly that it could be violated at almost any monetary threshold.⁴⁰² Likewise, the proposals in the same era would have expanded the application of access device fraud under 18 U.S.C. § 1029 to allow the use or production of bogus barcodes or radio frequency identifier tags to trigger federal

394. *Supra* Part II.B.2.

395. *Supra* Part II.B.3.

396. *Lang v. State*, 561 S.W.3d 174, 176 (Tex. Crim. App. 2018).

397. ARIZ. REV. STAT. ANN. § 13-1819(A) (2025); FLA. STAT. ANN. § 812.015(8)(c) (West 2025); MICH. COMP. LAWS ANN. § 752.1084(1) (West 2025); NEV. REV. STAT. ANN. § 205.08345(6)(c) (West 2025); OHIO REV. CODE ANN. §§ 2923.31, .36(C) (West 2025).

398. DEL. CODE ANN. tit. 11, § 841B(a) (West 2025); IND. CODE ANN. § 35-43-4-2.2 (West 2025); LA. STAT. ANN. § 14:67.25 (2025); OKLA. STAT. ANN. tit. 21, § 1731(B) (West 2025).

399. Kaaryn Gustafson, *Degradation Ceremonies and the Criminalization of Low-Income Women*, 3 U.C. IRVINE L. REV. 297, 335 (2013).

400. Michael Braun, Jeremy Rosenthal & Kyle Therrian, *Police Discretion and Racial Disparity in Organized Retail Theft Arrests: Evidence from Texas*, 15 J. EMPIRICAL LEGAL STUD. 916, 918–19 (2018).

401. *Id.*

402. H.R. 6491, 110th Cong. § 3 (2008); H.R. 1173, 111th Cong. § 3 (2009).

liability⁴⁰³—which would convert small-time, albeit somewhat sophisticated, thefts into federal offenses. While none of the recent proposals introduced in Congress are *quite* so expansive,⁴⁰⁴ the expansion of federal criminal jurisdiction under these laws would have been significant and largely without precedent.

The effects on venue in state legal systems that these laws have adopted are likely far more pernicious. Several statutes adopted specific venue provisions for the offenses that they created.⁴⁰⁵ These laws usually provided that venue was proper anywhere that any of the conduct—namely, the shoplifting incidents themselves, but also preparatory acts in many states—took place.⁴⁰⁶ The organized retail theft crime statutes in Alabama and Virginia extended further, establishing proper venue “in the county of residence of the person who is the subject of the theft,”⁴⁰⁷ and where “the person charged with the offense resided at the time of the offense,”⁴⁰⁸ respectively. However, these changes did not accomplish much by themselves. Virtually all states have long established, for continuous crimes, that venue is proper in any jurisdiction in which any part of the offense took place.⁴⁰⁹ Accordingly, whether the organized retail crime statute *expressly* established venue in such a jurisdiction, it would have been proper there anyway.⁴¹⁰ Some state laws regarding venue also provide that where more than one county has concurrent jurisdiction, the first county to initiate a prosecution establishes exclusive venue.⁴¹¹

Treating repeated, low-level thefts, including those conducted by single defendants, as continuous crimes allows venue to be proper in multiple jurisdictions. The same effect would occur if the crimes were charged as *conspiracy* to commit theft, but again, organized retail crime does not require the same elements as conspiracy⁴¹² and in some states can be committed by a single person.⁴¹³ Organized retail crime statutes in California, Florida, Illinois, Nevada, and Pennsylvania also expressly empower statewide prosecutors to pursue charges against organized

403. *Supra* notes 129–135 and accompanying text.

404. *See generally* Combating Organized Retail Crime Act, S. 5046, 117th Cong. (2022); Combating Organized Retail Crime Act, H.R. 9177, 117th Cong. (2022); Combating Organized Retail Crime Act, S. 140, 118th Cong. (2023); Combating Organized Retail Crime Act, H.R. 895 (2023).

405. *Supra* Part II.B.6.

406. ALA. CODE § 13A-8-230(b) (2025); GA. CODE ANN. § 16-8-14.2(c) (West 2025); 720 ILL. COMP. STAT. ANN. § 5/16-25.1(c) (West 2025); MASS. GEN. LAWS ANN. ch. 266, §§ 30D(b)–(c) (West 2025); NEV. REV. STAT. ANN. § 205.08345(4) (West 2025); N.M. STAT. ANN. § 30-16-20.1(B) (West 2025); N.Y. CRIM. PROC. LAW § 20.40(4)(n)(i) (McKinney 2025); N.C. GEN. STAT. ANN. § 14-86.6(c) (West 2025).

407. ALA. CODE § 13A-8-230 (2025).

408. VA. CODE ANN. § 18.2-103.1(E) (West 2025).

409. *See supra* Part II.B.6.

410. North Carolina’s organized retail crime law makes this explicit by establishing that “[e]ach county where a part of the charged offense occurs has concurrent venue as described in” § 15A-132, which itself establishes that “each county has concurrent venue” when “acts or omissions constituting part of the commission of the charged offense occurred in more than one county[.]” *See* N.C. GEN. STAT. ANN. § 14-86.6(c) (West 2025); *id.* § 15A-132(a).

411. *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 4.16.

412. *See supra* Part II.B.1.

413. *See supra* Part II.B.3.

retail theft groups.⁴¹⁴ There is some relationship between venue and the power of a statewide official to take the reins: in Florida, the Statewide Prosecutor's power is constitutionally limited to cases involving more than one judicial circuit;⁴¹⁵ those in California and Pennsylvania are statutorily limited to pursuing multi-county cases;⁴¹⁶ and the Nevada Attorney General faces no such limitation.⁴¹⁷ It is possible, then, to imagine that one of the goals of organized retail crime statutes is to empower tough-on-crime prosecutors to sidestep reform-minded prosecutors in nearby jurisdictions.

Admittedly, although there do not appear to be any explicit statements to this effect in the available legislative record or in news articles written about the laws, the anger of retail groups and law enforcement at “progressive prosecutors” who have pursued lower-level charges against shoplifters, or favored diversion programs for low-level property crimes over prison, is well documented.⁴¹⁸ It is not difficult to surmise that the retail groups pushing these laws, and the legislative sponsors who have carried them into law, may have intended to sidestep these prosecutors and the idea of noncarceral alternatives.

Consider an example that illustrates how this might play out in practice. Suppose that, in 2022, someone stole merchandise valued at \$375 from each of two convenience stores located in Davenport, Florida, for an aggregate value of \$750. Despite being just across the street from each other, the two stores are in different counties and judicial circuits—one of the locations is in Osceola County, located in the 9th Judicial Circuit,⁴¹⁹ and the other is in Polk County, located in the 10th Judicial Circuit.⁴²⁰

Because the value of the stolen property is \$750, the incident is classified as “grand theft of the third degree and a felony of the third degree” under Florida law.⁴²¹ However, depending on which prosecutor were to pursue charges, the outcome might be very different. The State Attorney in the 9th Judicial Circuit, Monique Worrell, redirected some of her office's resources away from smaller theft crimes,⁴²² but 10th Judicial Circuit State Attorney Brian Haas has never done

414. *See supra* Part II.B.7.

415. FLA. CONST. art. IV, § 4(b).

416. CAL. PENAL CODE § 923(c) (West 2025); 18 PA. STAT. AND CONS. STAT. ANN. § 3929.3(b.1)(2) (West 2025).

417. NEV. REV. STAT. ANN. § 205.08345(5) (West 2025).

418. Eliyahu Kamisher, *Walmart, Target Push for New Shoplifting Crackdown in California*, BLOOMBERG (Feb. 9, 2024), <https://www.bloomberg.com/news/articles/2024-02-09/walmart-target-push-for-new-shoplifting-crackdown-in-california> [<https://perma.cc/JT3D-3EGH>].

419. FLA. STAT. ANN. § 26.021(9) (West 2025) (“The ninth circuit is composed of Orange and Osceola Counties.”).

420. FLA. STAT. ANN. § 26.021(10) (West 2025) (“The tenth circuit is composed of Hardee, Highlands, and Polk Counties.”).

421. *Id.* § 812.014(c)(1) (West 2025).

422. *See, e.g.*, Brandon Hogan, *Orange-Osceola State Attorney Monique Worrell Launches Adult Civil Citation Program*, NEWS 6, <https://www.clickorlando.com/news/local/2022/04/01/orange-osceola-state-attorney-monique-worrell-launches-adult-civil-citation-program/> [<https://perma.cc/9JDU-VS88>] (last updated

the same.⁴²³ Depending on which office ultimately charged the defendant, the sentence sought by the prosecutor might have pushed up against the five-year maximum for the offense or, because there was no minimum, might have been much less.⁴²⁴ However, because the crime took place “in more than one judicial circuit,” state law would have mandated that “the person *must* be prosecuted by the Office of the Statewide Prosecutor.”⁴²⁵

While not all states allow for statewide officials to step in and prosecute these offenses, any state with an organized retail crime statute necessarily allows a tougher prosecutor’s office to step in and potentially displace a reform-minded prosecutor. Accordingly, if the *actual* goal of organized retail crime statutes is to convert lower-level shoplifting incidents into higher-level crimes, and to make prison sentences a likelier prospect, these laws are well-designed.

CONCLUSION

As far as narratives go, the organized retail crime narrative has been wildly successful. Retailers, law enforcement groups, and tough-on-crime politicians have mainstreamed fears that violent gangs with ties to terrorists are roaming the country and stealing basic necessities from commercial establishments—and that these events are common occurrences, rising in frequency and causing severe harm to the economy. Because the existing tools available to police and prosecutors are inadequate in combatting these harms, organized retail crime statutes are needed. Members of Congress have repeatedly responded by introducing federal legislation to carve out new space for criminal liability, and though these efforts have been unsuccessful, analogous state-level legislation has been adopted around the country.

Apr. 3, 2022); Samantha Schuyler, *Orlando Prosecutor Race Plays Out in the Shadow of Florida’s Retaliation Against Reform*, BOLTS (Aug. 7, 2020), <https://boltsmag.org/orlando-prosecutor-race-shadow-of-retaliation/> [<https://perma.cc/TYE4-Z5GR>] (describing Worrell’s 2020 campaign). In 2023, Governor Ron DeSantis suspended Worrell from office, concluding that “the administration of criminal justice in the Ninth Circuit has been so clearly and fundamentally derelict as to constitute both neglect of duty and incompetence[.]” Fla. Exec. Order No. 23-160 (Aug. 9, 2023). In response, the replacement that DeSantis appointed redirected the office’s resources, including by suspending Worrell’s diversion programs. Christopher Cann, *DeSantis-Appointed State Attorney Cancels Diversion Programs Following Worrell’s Ouster*, ORLANDO SENTINEL (Aug. 10, 2023), <https://www.orlandosentinel.com/2023/08/10/andrew-bain-monique-worrell-policy-changes/> [<https://perma.cc/5NKG-UQUG>]. Worrell was re-elected in 2024. Luis-Alfredo Garcia, *Ousted Orange-Osceola State Attorney Is Back in Office After Removal in 2023*, CENT. FLA. PUB. MEDIA (Jan. 7, 2025), <https://www.cfpublic.org/politics/2025-01-07/ousted-orange-osceola-state-attorney-monique-worrell-back-in-office> [<https://perma.cc/ZJ7P-TCLY>].

423. See, e.g., POLK SHERIFF, *Attorney General Moody News Conference*, Dec. 2, 2021, at 9:59 (YouTube, Dec. 2, 2021), <https://www.youtube.com/watch?v=mJde0rq6gsA> [<https://perma.cc/QN5M-LUP6>] (remarks of Polk County, Florida Sheriff Grady Judd) (“But in other states, when you have prosecutors stand up and go, ‘Well, if they arrest you tonight, I won’t file the charges tomorrow.’ I can tell you, Brian Haas, our state attorney, is not like that. He has our back.”).

424. FLA. STAT. ANN. § 812.014(2)(c)(1)–(3) (West 2025) (providing that, when stolen property is between \$750 and \$20,000, it is a “felony of the third degree”); *id.* § 775.082(3)(e) (providing that felonies of the third degree are punishable “by a term of imprisonment not exceeding 5 years”).

425. *Id.* § 812.015(10).

In this piece, I have argued that the entire narrative is predicated on misleading information. Though some shoplifting incidents fit this description, the overwhelming majority do not. And though shoplifting certainly costs retail groups billions of dollars in losses every year, organized retail crime is very likely a small percentage of that total.

The core lie of the narrative is that prosecutors are hamstrung in their ability to effectively prosecute shoplifting rings and that organized retail crime statutes give prosecutors tools that they do not currently have. But the targeted conduct is already illegal (because theft itself is illegal) and readily punishable under federal and state law. As I have laid out, the details that make organized retail crime so deadly in this narrative—the volume of the thefts, the danger of collective criminal action, and the risk of violence—are already used under existing laws as bases for additional liability or harsher sentences.

The real effects, then, of organized retail crime statutes lie elsewhere. Though they possess expressive qualities, they are not merely symbolic legislation. Instead, I have argued that they disproportionately enhance criminal liability for low-level shoplifters and likely help sideline reformist prosecutors who might seek noncarceral alternatives to deter recidivism. Where states increase punishment for organized retail crime as opposed to mere theft, the sentencing multipliers are highest where the total losses are lowest. Moreover, the expansion of venue and the move to empower statewide prosecutors extends concurrent jurisdiction over the underlying conduct and displaces the prosecutors who would be less inclined to pursue the harshest charges.

If these laws are going to be debated in the public square, policymakers and advocates deserve the full context in which they would operate. The prospect that organized retail crime statutes would be abused by police and prosecutors—abuse that would follow in the tradition of other forms of organizational liability, and that would be felt most acutely in communities of color—is far too serious not to feature prominently in this conversation.