

# CRIMINALIZING YAKUZA MEMBERSHIP: A COMPARATIVE STUDY OF THE ANTI-BORYOKUDAN LAW

## I. INTRODUCTION: THE YAKUZA'S PLACE IN MODERN JAPANESE SOCIETY

Originating in Japan and operating across the globe, the Yakuza are regarded as some of the most sophisticated and wealthiest criminal organizations.<sup>1</sup> Yakuza gangs operate a wide variety of illegal revenue-generating activities ranging from securities fraud to traditional extortion of civilians.<sup>2</sup> These hierarchical criminal organizations are classified under Japanese Law as *boryokudan* (violence groups).<sup>3</sup> As of 2010, the National Police Agency identified 22 boryokudan groups operating in Japan.<sup>4</sup>

In July 2011, the United States Department of State included the Yakuza on a list of four transnational criminal organizations that “facilitate and aggravate violent civil conflicts.”<sup>5</sup> Pursuant to this order, in 2012, the Treasury Department froze the U.S. assets of two members of the largest Yakuza syndicate, the *Yamaguchi-gumi*.<sup>6</sup> Despite these foreign designations, Japanese law does not criminalize active Yakuza membership.<sup>7</sup> While a direct prohibition on Yakuza membership would appear to be the most efficient method of eliminating the Yakuza, the Japanese legislature, the Diet, has refrained from enacting such legislation.<sup>8</sup> The Diet has instead opted for piecemeal legislation aimed at impeding Yakuza revenue-raising activities, increasing liability for criminal acts by Yakuza members, and empowering local citizens who

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1. Lt. Bruce A. Gragert, *Yakuza: The Warlords of Japanese Organized Crime*, 4 ANN. SURV. OF INT'L & COMP. L. 147, 148 (1997).

2. See generally *id.*; DAVID KAPLAN & ALEC DUBRO, *YAKUZA: JAPAN'S CRIMINAL UNDERWORLD* 163 (2012).

3. See 暴力団員による不当な行為の防止等に関する法律 (Botaiho) [Law Concerning Prevention of Unjust Acts by Organized Crime Groups], Law No. 115 of 2006 and Law No. 53 of 2012, available at <http://law.e-gov.go.jp/htmldata/H03/H03HO077.html>.

4. Nat'l Police Academy, *Crime in Japan in 2010*, 15 (2011) [hereinafter *Crime in Japan in 2010*].

5. Exec. Order No. 13,581, 3 C.F.R. 13581 (2011).

6. Press Release, U.S. Dept. Treas., Treasury Imposes Sanctions on Key Members of the Yakuza And Brothers' Circle Criminal Organizations (Feb. 23, 2012) (available at <http://www.treasury.gov/press-center/press-releases/Pages/tg1430.aspx>).

7. “Japan has no law which penalizes the unification of criminal organization[s].” Ko Shikata, *Yakuza—Organized Crime in Japan*, 9 J. OF MONEY LAUNDERING CONTROL 416, 419 (2006).

8. *Id.*

choose to challenge Yakuza groups.<sup>9</sup> Eighteen years after the Japanese legislature enacted its first regulations aimed at curbing Yakuza activities, the National Police Agency proudly proclaimed in 2010 that Yakuza membership nationwide had dropped back to 1992-levels.<sup>10</sup>

Part II of this Note will describe Yakuza's role in Japan. Part III will examine the Anti-Boryokudan law, its revisions, and implementation against the Yakuza. Part III will also describe the Yakuza's reactions and adaptations to the law.

Part IV will take a comparative look at the laws criminalizing organized crime membership in the United States and Italy. This examination includes an analysis of the relevant laws' language, legislative history, and evolution following implementation.

This Note will conclude with the following observations: The Anti-Boryokudan Law's primary effect has been to organize public opinion against the Yakuza. However, the legislation relies too heavily on individuals and communities to shoulder the burden in the battle against the Yakuza. Until legislation is enacted that provides prosecutors with the tools necessary to attach criminal liability to Yakuza membership, the Yakuza will remain an influential presence in Japanese society.

## II. THE YAKUZA AND JAPAN

Part of the debate about the Yakuza's role in Japanese society is encapsulated in the group's historical origins.<sup>11</sup> The modern Yakuza trace their lineage back to the *machi-yakko*, 17th century Robin Hood-type civil defense groups, who protected townspeople from gangs of rogue samurai.<sup>12</sup> However, the link to the heroic *machi-yakko* is merely a Yakuza

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9. See generally Andrew Rankin, *21st-Century Yakuza: Recent Trends in Organized Crime in Japan, Yakuza Part 1*, ASIA PAC. J.: JAPAN FOCUS (Feb. 13, 2012), <http://www.japanfocus.org/-Andrew-Rankin/3688> [hereinafter Rankin Part 1].

10. Jake Adelstein, *Yakuza Members in Japan Lowest Since 1992 Anti-Organized Laws Went in to Effect; National Police Agency Announces 2010 Figures* (Apr. 16, 2011), <http://www.japan-subculture.com/Yakuza-members-in-japan-lowest-since-1992-anti-organized-laws-went-in-to-effect-national-police-agency-announces-2010-figures/>.

11. See generally Eliza Fisher, *From Outcasts to Overlords: The Legitimation of the Yakuza in Japanese Society*, 3 UNDERGRADUATE J. OF SOC. STUD. 1, 4. (2012).

12. During the Tokugawa Shogunate's reign, Samurai were left unemployed. KAPLAN & DUBRO, *supra* note 2, at 14–18. Many of these unemployed Samurai, known as “ronin,” formed outlaw gangs called the *hatamoto-yakko* (servants of the town) that raided towns and terrorized citizens. *Id.* The *machi-yakko* were townspeople and other former ronin who formed groups to protect themselves from the *hatamoto-yakko*. *Id.* While the Yakuza identify themselves with the *machi-yakko*, a direct historical connection is hard to make. *Id.* Furthermore, while the *machi-yakko* are generally portrayed as protectors of the town, that description fails to take into account the fact that the *machi-yakko* were also involved in various criminal activities. *Id.*

brand narrative designed to posture the Yakuza as an essential and benevolent force in traditional Japanese society.<sup>13</sup> In fact, the Yakuza did not emerge until the 18th century and can be traced to two groups, *tekiya* and *bakuto*, marketplace managers and professional gamblers.<sup>14</sup> Regardless of its veracity, the National Police Agency has recognized that the Yakuza's association with concepts of traditional Japanese chivalry and nobility are an effective tactic in obtaining a degree of social tolerance for the Yakuza.<sup>15</sup>

Times of crisis have provided the Yakuza with high profile opportunities to promote their image as protector of the people.<sup>16</sup> Yakuza groups delivered aid to the victims of the Great Hanshin Earthquake in 1995 and again following the Great Tohoku Earthquake and Tsunami in 2011.<sup>17</sup> News stories in 1995 frequently emphasized—possibly at the Yakuza's urging—the Yakuza's ability to deliver aid (sometimes more quickly and efficiently than the national government).<sup>18</sup> Other reports portrayed the Yakuza operating as *de facto* police, patrolling the streets in

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13. *Id.* Interestingly, Yakuza rituals, political views, and showy appearance compare most closely with the *hamamoto-yakko* rather than the *machi-yakko*. Peter B.E. Hill, *The Japanese Mafia: Yakuza*, LAW & ST. 38 (2008).

14. *Tekiya* (street peddlers) established control over portable booths in market fairs held at temples and shrines. Gragert, *Yakuza supra* note 1, at 150–53. They were organized according to feudal status and would extort protection money from merchants in order to control the allocation of stalls as well as the availability of the goods to be sold. *Id.* *Tekiya* operations were mostly legal and received official recognition from feudal lords. *Id.* The shogunate granted the *tekiya* status that was roughly equivalent to that of the Samurai in order to reduce fraud and the possibility of turf wars among the gangs. *Id.* *Bakuto* (traditional gamblers) engaged in illegal gambling but were actually recruited by Tokugawa government officials. *Id.* at 153–54. The officials hired the *bakuto* to gamble with workers engaged in large government irrigation and construction projects as a scheme to earn back the salary paid to the workers. *Id.* Later, *bakuto* organized into disciplined groups and began operating throughout Japan. *Id.* The *bakuto* gave the Yakuza a number of its most famous traditions: finger cutting, tattooing, and strict adherence to secrecy, as well as their name. *Id.* *Yakuza* is a slang term for the worst possible hand in the traditional card game *hana fuda*: 8(ya), 9(ku), 3(za). *Id.* *Bakuto* were also given some measure of official sanction from the feudal lords. *Id.* See also KAPLAN & DUBRO, *supra* note 2, at 18–27. The *bakuto* also had a penchant for violence that led the Tokugawa shogunate to request their help in policing the realm and recruiting gang members to fight in the civil war surrounding the Meiji Restoration. EIKO MARUKO SINIAWER, RUFFIANS, YAKUZA, NATIONALIST: THE VIOLENT POLITICS OF MODERN JAPAN, 1860–1960, 25 (2008).

15. “It cannot be denied, however, that due to confusion noble sounding words such as *ninkyō* (Yakuza notion of chivalry) and *jingi* (Yakuza justice) there is a pernicious tendency in our society to tolerate the existence of these gangs, or to regard them as exciting and exotic.” Andrew Rankin, *Recent Trends in Organized Crime in Japan: Yakuza vs. the Police, & Foreign Crime Gangs, Part 2*, ASIA PAC. J.: JAPAN FOCUS (Feb. 20, 2012), <http://www.japanfocus.org/-Andrew-Rankin/3692> [hereinafter Rankin Part 2] (citing Nat’l Police Agency, *Heisei 19-nen kamihanki Boryokudan josei*) (The State of Organized Crime in the First Two Quarters of 2007).

16. See Rankin Part 2, *supra* note 15.

17. *Id.*

18. Jake Adelstein, *Yakuza to the Rescue*, THE DAILY BEAST (Mar. 18, 2011), <http://www.the-dailybeast.com/articles/2011/03/18/japanese-yakuza-aid-earthquake-relief-efforts.html>.

gangs to enforce order.<sup>19</sup> Yakuza groups arrived with trucks of food and necessities before other organizations were able to mobilize their relief efforts.<sup>20</sup> By contrast, Yakuza bosses appeared reluctant to publicize their relief efforts in 2011.<sup>21</sup> Their apparent modesty may be attributable to the backlash that occurred in 1995 following reports that Yakuza members had demanded letters of support from citizens in exchange for aid.<sup>22</sup>

The Yakuza also portray themselves as ultra-Japanese through associations with right-wing political groups.<sup>23</sup> The Yakuza have been connected with Japan's ultranationalist movement from the movement's inception.<sup>24</sup> The relationship has provided the Yakuza with political influence and has contributed to the portrayal of the Yakuza as protectors of Japanese traditions, untainted by Westernization.<sup>25</sup> In the early twentieth century, several Yakuza bosses served as Diet members, reinforcing the involvement of Yakuza groups in politics.<sup>26</sup> Yoshida Isokichi, a prominent boss from Kyushu, was held as an ideal parliamentarian in the 1900s and a mythically brave "man of chivalry."<sup>27</sup>

19. The Yamaguchi-gumi, the Sumiyoshi-kai, and the Inagawa-kai were reported to have "compiled squads to patrol the streets of their turf and keep an eye out to make sure looting and robbery doesn't occur." Christopher Beam, *Stop Thief! Thank You*, SLATE (Mar. 16, 2011), [http://www.slate.com/articles/news\\_and\\_politics/crime/2011/03/stop\\_thief\\_thank\\_you.html](http://www.slate.com/articles/news_and_politics/crime/2011/03/stop_thief_thank_you.html).

20. Adelstein, *supra* note 18.

21. *Id.*

22. *Id.*

23. Since the Yakuza's violent participation in combating the student strikes of 1960 and Japanese leftist movements culminating with the assassination of Inejiro Asanuma, head of the Japan Socialist Party (JSP), the Yakuza have shifted away from engaging in physical violence on behalf of the right-wing. SINIAWER, *supra* note 14, at 168–73. Instead the Yakuza have used economic tools, principally corruption, as their method of wielding influence. *Id.* at 173. The downfall of several prominent politicians since the 1990s, including Prime Ministers Noburo and Yoshiro, due to Yakuza connections highlights the need for the Yakuza to act covertly in their political machinations. *Id.*

24. *Id.* at 168–73.

25. In the mid-1800's Mitsuru Toyama founded the ultranationalist Dark Ocean Society which waged a "campaign of terror, blackmail and assassination to exert influence over military officials and government officials" in the rapidly-modernizing Japan. KAPLAN & DUBRO, *supra* note 2, at 33–34. In 1892, during Japan's first ever national elections, the Dark Ocean Society joined with over 300 Yakuza members and police officers to harass anti-government opponents and promote the election of conservative politicians. *Id.* The Dark Ocean Society was responsible for the assassination of the Queen of Korea and it was the members of this movement that later led Japan into World War II. *Id.* The Yakuza and the ultranationalist were easily allied because of shared ideologies: both resented foreigners and foreign ideals; were threatened by liberal and socialist movements; revered a romanticized past that deified the emperor; and organized themselves in similar *oyabun-kobun* (adopted parent-son) structures. *Id.*

26. SINIAWER, *supra* note 14, at 93.

27. "In Diet sessions, Yoshida was 'misleadingly' described as sitting like a golden Buddha in dignified silence." *Id.* at 92. One explanation for the acceptance of Yakuza bosses as Diet members was that during the 1920s elected representatives often turned to violence when speech was sufficient, and brawling was standard practice on the Diet floor. *Id.*

Incidents in 2013 have revealed that connections remain between the Yakuza and right-wing political groups in their attempts to exert influence in Japan's current political climate.<sup>28</sup> Territorial conflicts between Japan and its Asian neighbors have rekindled nationalist sentiment in Japan.<sup>29</sup> The combination of an ideological shift further towards the right and the severing of ties to Japan's geographic neighbors may provide an opportunity for the Yakuza to exert power and influence. However, there still remains a dispute among commentators as to whether the Japanese public accepts the perception of the Yakuza as ultra-Japanese or simply a group of criminals.<sup>30</sup>

There is great public interest in Yakuza exploits, as well as respect for their achievements, both domestically and abroad.<sup>31</sup> Weekly and daily Yakuza fan magazines, the "*de facto* trade publications" of organized crime in Japan, are available at newsstands, convenience stores, and public libraries.<sup>32</sup> Yakuza techniques and etiquette are also popular themes for self-help and management books aimed at businessmen.<sup>33</sup> Films, documentaries, and video games portraying the Yakuza as code-adhering gentlemen capable of ninja-like assassinations have also become a staple Japanese cultural export.<sup>34</sup>

The Yakuza's aggressive public relations efforts have not kept the issue of their utility in modern Japanese society from becoming the focus of

28. *Japan's Ultrationalists: Old Habits Die Hard*, THE ECONOMIST (May 17, 2007), <http://www.economist.com/node/9205495/print>; Jake Adelstein, *The Yakuza Lobby*, FOREIGN POL'Y (Dec. 13, 2012), [http://www.foreignpolicy.com/articles/2012/12/13/the\\_yakuza\\_lobby](http://www.foreignpolicy.com/articles/2012/12/13/the_yakuza_lobby); Anna Watanabe, *Japan: Severed Finger Sent to Politician by Right Wing Group*, ASIAN CORRESPONDENT (Mar. 13, 2012), <http://asiancorrespondent.com/78045/japan-severed-finger-sent-to-politician-by-right-wing-group/>.

29. *See generally* *Could Asia Really go to War Over These?*, THE ECONOMIST (Sept. 22, 2012), <http://www.economist.com/node/21563316>. *See also* *Fight Over Rocky Islets Opens Old Wounds Between South Korea and Japan*, N.Y. TIMES (Oct. 4, 2012), <http://www.nytimes.com/2012/10/05/world/asia/south-korea-and-japan-fight-over-rocky-islets.html>.

30. Rankin Part 2, *supra* note 15.

31. *Id.*

32. Prominent titles include *Jitsuwa Jidai*, *Jitsuwa Jiho*, *Jitsuwa Document*, and *Asahi Geino*. Jake Adelstein, *The Strange World of Yakuza Fan Magazines*, PUBLISHING PERSPECTIVES (Oct. 30 2009), <http://publishingperspectives.com/2009/10/the-strange-world-of-Yakuza-fan-magazines/>. Each magazine is closely affiliated with a specific Yakuza group. *Id.* The Yamaguchi-gumi, the largest syndicate, does not fully cooperate with the magazines. *Id.* Despite having a no-interview policy since 2005 they are often covered by *Jitsuwa Document*. *Id.*

33. Titles include "*Management Skills of the Yamaguchi-gumi* (2005), *Yakuza Techniques for Overcoming Business Hurdles through Successful Speaking and Listening* (2006), *Modern Yakuza Tips for Making Cash* (2008), the ominous-sounding *Yakuza Techniques for Dealing with Complaints* (2010), and, for romantic hopefuls, *Choosing your Man: Yakuza Tips for Telling a Winner from a Loser* (2008)." Rankin Part 2, *supra* note 15.

34. Rankin cites both the French documentary "Young Yakuza" (2007) as well as a 2009 CBS Report on the Yakuza. *Id.* *See also* OUTRAGE (Magnolia Pictures 2009).

public debate. Periods of intense violence during turf wars between gangs, widely reported acts of Yakuza vigilante justice, and the Yakuza's increasing connections to foreigners have fostered a resilient and vocal anti-Yakuza movement.<sup>35</sup> Even so, public sentiment has not entirely shifted, and some still argue that Japanese society is better off with the Yakuza than without them.<sup>36</sup> Supporters of the "necessary evil" argument contend that the Yakuza are a stabilizing force in what would otherwise be a chaotic criminal underworld.<sup>37</sup> Others, including Japanese talk show host Ogura Tomoaki, contend that there are problems uniquely suited to the dispute resolution techniques of the Yakuza.<sup>38</sup> In litigation-averse Japan, many Japanese voluntarily take their problems to the Yakuza rather than resolving them through judicial channels.<sup>39</sup> Ogura was censured for his comments, but his sentiment probably represents a "small but solid minority of Japanese who accept the role of the Yakuza as unofficial enforcers in Japanese society."<sup>40</sup> Ogura's contention may say more about the Japanese civil court systems than the Yakuza. The Yakuza continue to play a role in resolving minor disputes between non-Yakuza members even after the enactment of laws designed to curb Yakuza mediation.<sup>41</sup>

Support for the main legislation aimed at the Yakuza, the Anti-Boryokudan Law, came from three sources: international pressure, domestic politics, and the Yakuza themselves. Japanese politicians were under pressure from their U.S. counterparts for not pulling their weight in the "War on Drugs."<sup>42</sup> Relations between the two nations were already strained due to a bilateral trade imbalance.<sup>43</sup> Japanese politicians felt compelled to act after being criticized for being slow to comply with the

35. See *Fukuoka Starts New Anti-Gang Campaign*, THE TOKYO REPORTER (Aug. 5, 2012), <http://www.tokyoreporter.com/2012/08/05/fukuoka-starts-new-anti-gang-campaign/> (Describing how business leaders and law enforcement are mobilizing against gang activity).

36. Rankin Part 2, *supra* note 15.

37. *Id.*

38. Ogura may be referring to problems within the entertainment industry, where the Yakuza are known to retain substantial influence, or civil disputes, such as car accidents, where, in litigation-averse Japan, the Yakuza have become mediators. *Id.*

39. *Id.* In a practice called *mimbo*, one party will hire a Yakuza member who will visit the other party and "suggest" a settlement amount. Gragert, *supra* note 1, at 184–85. The other person generally pays regardless of his actual liability. *Id.*

40. Rankin Part 2, *supra* note 15.

41. JEFF KINGSTON, CONTEMPORARY JAPAN: HISTORY, POLITICS, AND SOCIAL CHANGE SINCE THE 1980S 252 (2012).

42. Peter Hill, *Heisei Yakuza: Burst Bubble and Bôtaihô*, 6 SOC. SCI. JAPAN J. 1, 14 (2003).

43. RICHARD H. FRIMAN, NARCODIPLOMACY: EXPORTING THE U.S. WAR ON DRUGS 64, 78–79 (1996).

1988 UN anti-drug trafficking convention.<sup>44</sup> Unlike the U.S. and European parties to the convention, “Japan lacked specific countermeasures against organized crime.”<sup>45</sup> In the mid-1980s, several high profile gang wars broke out across Japan.<sup>46</sup> These conflicts created a poor public image of the Yakuza.<sup>47</sup> Public tolerance of the Yakuza also waned as Yakuza participation in the legitimate economy increased during Japan’s real estate bubble.<sup>48</sup> The ruling Liberal Democratic Party (LDP) had been looking for an opportunity to clean up its image following a string of scandals, disgraced prime ministers, and electoral disasters.<sup>49</sup> Prime Minister Kaifu Toshiki took a hard line against the Yakuza and introduced the Anti-Boryokudan law in hopes of regaining public confidence.<sup>50</sup> The Anti-Boryokudan was thus introduced as a result of the confluence of domestic and international factors.

### III. THE ANTI-BORYOKUDAN LAW

#### A. *Boryokudan Designation*

The Anti-Boryokudan Law, enacted in 1991, was the first of Japan’s three major laws against organized crime.<sup>51</sup> The Anti-Boryokudan law is an executive law that prescribes regulations for the Yakuza.<sup>52</sup> The law has undergone a number of revisions since 1991, most notably in 2006 and

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44. Japanese policymakers at the time viewed cooperation on drug issues as a means to defuse broader bilateral relations. *Id.*

45. Hill, *supra* note 42, at 14.

46. These gang wars included: [A] conflict between the Yamaguchi-gumi and a breakaway faction, the Ichiwa-kai which resulted in 25 deaths and over 500 arrests; a war just outside of Tokyo between the Yamaguchi-gumi and the Tokyo-based Nibiki-kai; and an internal war between the Kokuryo-kai on Okinawa that resulted in the death of a high school student mistaken for a Yakuza member. *Id.* at 13.

47. *Id.*

48. Hill explains,

The economic conditions of the bubble allowed the Yakuza to borrow money from cash-flush banks. The Yakuza would then use this money in real-estate and stock market speculation. During these transactions, the Yakuza would use their organizational leverage to obtain more favorable terms; when the real estate or stock underperformed, the Yakuza would demand compensation from the sellers.

HILL, *supra* note 13, at 139.

49. Hill, *supra* note 42, at 13–14.

50. *Id.* at 14.

51. Shikata, *supra* note 7, at 419. The Anti-Boryokudan Law is alternatively referred to as the “Organized Crime Counter Measures Law.” MIYAZAKI MANUBU, TOPPAMONO 403 (2005). The Anti-Boryokudan Law passed unanimously with no criticism. Hill, *supra* note 13, at 158.

52. Shikata, *supra* note 7, at 419.

2012.<sup>53</sup> The original legislation allowed the Prefectural Public Safety Commissions to designate certain groups as “boryokudan” (violence groups).<sup>54</sup> Article 3 of the Act stipulates that in order for the Prefectural Public Safety Commission to designate a group as boryokudan: (1) regardless of the group’s purpose, it must allow members to take advantage of the gang’s influence in order to maintain their daily lives, accumulate wealth, or execute their business; (2) a certain percentage of the gang members must have criminal records; and (3) the gang must be hierarchically organized under the control of an individual representing the gang.<sup>55</sup>

The Anti-Boryokudan Law does not provide a specific formula or process for weighing the factors in determining the gang’s “real purpose.”<sup>56</sup> Similarly, the act doesn’t articulate the specific hierarchical structure or minimum membership thresholds required to fulfill the third factor.<sup>57</sup> Legislators do, however, offer a degree of clarity when articulating the exact crimes that satisfy the act’s criminal record provisions.<sup>58</sup> This clarity is confined to this specific portion of the second factor, as the subsequent text provides a multitude of formulas prefectural centers can utilize when calculating the group’s criminal membership percentage to determine if the group exceeds the legal threshold.<sup>59</sup> The threshold itself is determined by further ordinances and is not established in the Anti-Boryokudan Law.<sup>60</sup>

Even if all three criteria are met, the Public Safety Commission must hold a hearing on the matter in which group members can make statements on the group’s behalf.<sup>61</sup> The Public Safety Commission must also consider

53. *Supra* note 3.

54. *Id.* art. 3, para. 2

55. *Id.* art. 3, § 1-3.

56. *Id.* art. 3, § 1.

57. *Id.* art. 3 § 3.

58. Art. 3 Sections 2(a)-(f) list a number of criminal offenses that satisfy the criminal record requirement. *Id.* art 3 § 2. While the list is specific, its application covers nearly every offense under Japan’s Criminal Code. *Id.* The Act allows the Prefectural Public Safety Commission to calculate the criminal membership by comparing the percentage of criminal record holders to the leading members of the gang, or the percentage in the number of holders of criminal records as compared with the total number of members. *Id.* art 3 § 2.

59. *Id.*

60. The threshold percentage will then be compared to see if it “exceeds a percentage prescribed by a relevant government ordinance.” *Id.* art. 2 § 2(a)-(f).

61. According to Botaiho,

These hearings are to be held publicly but may be private in order to provide privacy when required. The gang must be given advance notice of the hearing and a representative of the gang is able to make statements on the gang’s behalf during the hearing. Should a

the opinions of a panel of witnesses, usually lawyers, before making a designation.<sup>62</sup> Designations are published and remain in effect for three years unless the boryokudan dissolves or fundamentally changes in a manner such that it no longer falls within the boryokudan criteria.<sup>63</sup>

### *B. The Initial Yakuza Reaction and Implementation of the Law*

The Yakuza's initial reaction to the implementation of the Anti-Boryokudan Law was to adapt internally while engaging in an aggressive public relations campaign against the law. The external actions came to a peak on the date of the Anti-Boryokudan Law's enactment; around 130 Yakuza members protested in Ginza, claiming that the new law would lead to human rights abuses by the police.<sup>64</sup> Internally, the metamorphosis required subtle changes in conduct and visibility. After the enactment of the Anti-Boryokudan Law, it was reported that Yakuza syndicates held a meeting where they distributed a manual entitled *How to Evade the New Law*.<sup>65</sup> In general, Yakuza groups reorganized. Additionally, they replaced the signs on their headquarters and restructured their organizations in an effort to appear more like legitimate organizations.<sup>66</sup>

The Yamaguchi-gumi, Aizu-Kotetsu, and Kusano-ikka eventually brought a lawsuit against the government challenging the constitutionality of the Anti-Boryokudan law.<sup>67</sup> The Yamaguchi-gumi pulled out of the lawsuit after the Great Hanshin Earthquake of 1995 greatly affected its

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representative for the gang not appear, the Commission may designate the gang as a boryokudan after thirty days.

*Id.* art. 5.

62. *Id.* art. 6.

63. *Id.* art. 7-8. Yakuza gangs' responses varied from east to west. Hill, *supra* note 13, at 201-02. During the designation hearings, Tokyo Yakuza groups protested their designation but ultimately accepted it. *Id.* Tanake Keizo, who represented the Inagawa-kai, stated at the hearing, "whatever they might be, the laws decided on by the state are humbly and solemnly accepted." *Id.* By contrast, the Yamaguchi-gumi protested on grounds similar to their eastern counterparts but did not accept their designation. *Id.* They, along with other groups from western Japan, filed lawsuits challenging the new law. *Id.*

64. Christopher J. Chipello & Yumiko Ono, *Japanese Police Given New Law In Fight Against Organized Crime*, ASIAN WALL ST. J., Mar. 2, 1992.

65. "The manual advises gangs to stop behaving like violent outfits and to pose as legitimate businesses, religious organizations, or political organizations." Gragert, *supra* note 1, at 199.

66. The Yamaguchi-gumi ordered local bosses of affiliated gangs to register as companies, become chairmen of those companies, and appoint their lieutenants as directors. *Id.* at 199-200. Some reorganization techniques were less drastic than others; for example, the Inagawa-kai replaced the plaque outside their Roppongi headquarters simply to read "Inagawa Industries." Chipello & Ono, *supra* note 64.

67. Manabu, *supra* note 51, at 425.

operations.<sup>68</sup> On September 29, 1995, the Kyoto District Court issued an opinion dismissing the Aizu-kotestsu's challenge.<sup>69</sup> The opinion conceded that the law would eventually lead to restrictions on the gangster's lives, but concluded that the purpose of the law was to allow the issuance of administrative orders preventing gangster organizations from engaging in unjust activities.<sup>70</sup> The court reasoned that Article 14 of the Japanese Constitution, which guarantees all citizens equality under the law,<sup>71</sup> did not guarantee absolute equality for citizens, and that selective application was rational in light of the nature of the activities the Anti-Boryokudan Law was intended to prevent.<sup>72</sup>

Significantly, the Anti-Boryokudan Law neither criminalized Yakuza membership, nor did it deal with the companies directly or indirectly owned by the Yakuza.<sup>73</sup> The law's effect on the day-to-day business of the Yakuza was minimal. The Anti-Boryokudan Law did expand police investigative powers over the Yakuza, allowing Prefectural Police to require Boryokudan groups within the Prefecture to submit reports in addition to subjecting those groups to on-the-spot police inspections.<sup>74</sup> Articles 11 and 12 embody the only enforcement element of the law.<sup>75</sup> Under Articles 11 and 12, the police can issue cease-and-desist orders to Yakuza members who have been reported for attempting to engage in extortion.<sup>76</sup> The original act limited the prefectural police to only issuing orders when a citizen reported that a Boryokudan member had attempted to extort money or had committed one of the other acts listed in Articles 11 and 12.<sup>77</sup> Punishment through the penal code is available once the Boryokudan member has violated the cease-and-desist order.<sup>78</sup> The limitation to issuing cease-and-desist orders is the fundamental significance of the Anti-Boryokudan Law being administrative law. Behavior violating an administrative law is only subject to an injunction directing the perpetrator to stop; criminal law, which doles out

68. *Id.*

69. *Id.* at 436.

70. *Id.*

71. JAPAN CONST. [KENPO], art. 14 available at <http://web-japan.org/factsheet/en/pdf/09Constitution.pdf>.

72. The Japanese Supreme Court confirmed the Kyoto District Court's ruling in 1997. *Id.* at 426–27.

73. Gragert, *supra* note 1, at 199.

74. Botaiho, Law No. 77 of 1991, art. 33 § 1-3.

75. *Id.* art. 11–12.

76. The duration of these orders are not to exceed one year. *Id.*; Chipello & Ono, *supra* note 64.

77. Botaiho, Law No. 77 of 1991, art. 11–12; Shikata, *supra* note 6, at 419.

78. Botaiho, Law No. 77 of 1991, art. 46–52.

punishment, only comes into effect when the perpetrator violates the injunction.<sup>79</sup>

Miyazaki Manubu, an acclaimed journalist and the son of a top Yakuza boss, succinctly expressed the main criticisms of the original Anti-Boryokudan Law. First, the ambiguous language of law made it difficult to interpret.<sup>80</sup> Manubu contends that such legislation would not survive a U.S.-type “void for vagueness” challenge.<sup>81</sup> Second, the law drew a clear distinction between citizens and Yakuza members.<sup>82</sup> According to Manubu, one lawyer commented that the law harkened back to the wartime concept of *hikokumin* (unpatriotic citizen) and infringed on their human rights.<sup>83</sup> However, human rights lawyers and the media were indifferent to what Manubu found to be human rights violations and rationalized such deprivations (“[yakuza] are bad, anyway[,]”)<sup>84</sup> as constitutional for fear of public backlash.<sup>85</sup>

The vagueness of Article 3, as well as the lack of any real punishments, could be attributed to the fear of some observers that the new law would push the Yakuza completely underground.<sup>86</sup> Many felt that an underground Yakuza would be even harder to control.<sup>87</sup> The openness of the original law, it was theorized, allowed police to keep better tabs on Yakuza activity.<sup>88</sup> Just two years after the original implementation of the law, many officials feared that even the relatively light provisions of the Anti-Boryokudan law had accomplished this very task.<sup>89</sup>

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79. Hill, *supra* note 13, at 166.

80. Manubu, *supra* note 51, at 405.

81. *Id.* Other commentators have also pointed out that the law rests feebly on the National Public Safety Commission’s (NPSC) subjective interpretations of the definitions of two key terms: “violent illegal activity” and “boryokudan”. Hill, *supra* note 13, at 170. A number of the NPSC’s illegal violent activities are not typical boryokudan activities, but rather measures that have traditionally been employed against left-wing groups. *Id.*

82. Manubu, *supra* note 51, at 405 (I need to double check page number from hard copy, I had a hard copy in Singapore but now am working off an electronic copy that does not have page numbers.

83. *Id.* at 426. Manubu is specifically concerned that anti-boryokudan legislation criminalizes a person’s affiliations as opposed to their actions. *Id.* He remarks that such laws defy Western fundamentals of freedom and criminal law. *Id.* at 426–27.

84. *Id.* at 404–7.

85. *Id.*

86. Chipello & Ono, *supra* note 64.

87. *Id.* Manubu fears that tightening anti-Yakuza laws will only push the Yakuza to become more secretive, American-style criminal organizations. Manubu, *supra* note 51, at 423.

88. “Until now, gangsters have been allowed to flaunt their affiliations openly, posting thick-lettered signboards outside their offices and sporting trademark lapel pins. The system sometimes seemed to foster a cozy relationship between gangsters and police. But it also enabled the authorities to keep close track of the groups, as the detailed membership statistics indicate.” *Id.*

89. “Many officials in Japan believe that the laws have also had an unwanted side effect, namely, driving the Yakuza underground and deeper into commercial business where they will continue to

While it may seem absurd to limit police action to situations where the individual being extorted reports the matter to police, providing citizens with the ability to exercise discretion could also be seen as a pragmatic solution. Japan lacks a comprehensive witness protection program, meaning a citizen threatened by the Yakuza might find paying the amount requested by the Yakuza more palatable than reporting the incident or testifying against a syndicate.<sup>90</sup>

Skeptics and Yakuza members view the vagueness of the regulations as a strategic move on behalf of the police force.<sup>91</sup> Unclear rules effectively require citizens and the Yakuza alike to rely on the police for clarity and final decisions.<sup>92</sup> The police and the Yakuza also share a symbiotic relationship<sup>93</sup> in the “protection market” or, as one Yakuza member noted, when the Yakuza move out “in comes the Sakuradaemon (referring to the Tokyo Metropolitan Police Department’s symbol) gang.”<sup>94</sup>

The Anti-Boryokudan Law also provides an avenue for corrupt members of the police force to impose a protection scheme on the Yakuza. Police members have been known to accept bribes from Yakuza members in exchange for overlooking shipments of illegal goods or providing alerts of impending police raids.<sup>95</sup> Police members are also often beneficiaries of

thrive and be even harder to detect.” Gragert, *supra* note 1, at 199.

90. Police will provide ad hoc protection, but there is no national program for relocating witnesses and their families. Rankin Part 2, *supra* note 15.

91. *Id.*

92. The National Police Agency (NPA) has set up online and telephone services for people seeking information about ordinance stipulations. Rankin Part 2, *supra* note 15. While the allegations seem thin based purely on this evidence, Rankin also notes that in 2011 the NPA announced the formation of “anti-Yakuza protection squads” that would be dispatched to guard individuals and businesses that each department’s director of protection determines are under threat of Yakuza violence. *Id.* The vagueness also allows the police to exercise a wide range of discretion in enforcement of the law. By controlling the law’s application, the police can “crack down on those who stand up to them and control those who follow with tails wagging.” MANUBU, *supra* note 51, at 412.

93. Rankin points to the pachinko industry as a good case study of the relationship between the Yakuza and the police. Rankin Part 2, *supra* note 15. The Yakuza infiltrated the pachinko industry in the 1970s. *Id.* The police eliminated the yYakuza presence in the 1980s. *Id.* The industry is now regulated by the Security Electronics and Communications Technology Association (SECTA). *Id.* SECTA is an immensely powerful organization; pachinko was a \$230 billion dollar industry in 2012. Christine Kassover, Kinbasha Flexes Brand in Fragmented \$230B Japanese Pachinko Industry, THE OTC INVESTOR (July 16, 2012), <http://theotcinvestor.com/kinbasha-flexes-brand-in-fragmented-230b-japanese-pachinko-industry-1499/>. Rankin notes that investigative journalists estimate that one-third of SECTA’s employees are ex-policemen, indicating that when the police closed down the yYakuza rackets, they secured comfortable retirement positions for themselves regulating the pachinko industry. Rankin Part 2, *supra* note 15.

94. Manubu also believes that one of the aims of the Anti-Boryokudan Law was to allow the police to replace the Yakuza as rulers of the adult-entertainment and pachinko industries. MANUBU, *supra* note 51, at 411.

95. *Id.*

free drinks at Yakuza-run bars and police have ignored some level of Yakuza violence in exchange for help from Yakuza in suppressing violence.<sup>96</sup> A purely statistical snapshot does not indicate collaboration between the police and the Yakuza: the police arrested over a third of all Yakuza members in 2010.<sup>97</sup> However, that number has not changed in over two decades,<sup>98</sup> and the outlook is even worse when one considers the falling prosecution rate of those arrested.<sup>99</sup>

### C. The 2007 Revision to the Anti-Boryokudan Law

In 2007, legislators attempted to strengthen the Anti-Boryokudan Law with revisions addressing Yakuza rituals and the hierarchal nature of Yakuza organizations.<sup>100</sup> In Articles 16–26, the revised law introduced new restrictions aimed at the Yakuza’s recruitment efforts.<sup>101</sup> Signature traditions such as ritual finger-cutting and coerced tattooing were prohibited.<sup>102</sup> The revisions also included Article 28, which called upon the Prefectural Public Safety Commissions to provide support to

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96. Gragert notes that police would leave the Yakuza alone provided they did not cross accepted boundaries; in exchange the Yakuza would act as an alternative police force by suppressing unorganized street crime. Gragert, *supra* note 1, at 201.

97. The official number of Yakuza arrests for 2010 is 25,681. Rankin Part 2, *supra* note 16. It should be noted that only 4 of those arrests were for violations of the Anti-Boryokudan law, down from 12 the previous year. Crime in Japan in 2010, *supra* note 4, at 71.

98. Rankin Part 2, *supra* note 15.

99. “[I]n 1991 prosecutors filed charges in 81% of cases; by 2010 that figure had dropped to 68.2%.” *Id.*

100. Botaiho, Law No. 115 of 2006, art. 15-28. Botaiho had also previously been revised in 1993 and in 1997. Kingston, *supra* note 41, at 240. In both cases the main purpose was to expand the scope of the law in response to the ways boryokudan had adapted their practices to avoid the provisions of the law. Hill, *supra* note 13, at 163.

101. Article 16 prohibits the coercing or inducing of minors or other individuals into affiliating with a Yakuza group. Botaiho, Law No. 115 of 2006, Art. 16-19. Article 16 also prohibits threats to an individual’s family made in attempt to recruit that person into the gang. *Id.* Article 17 then extends the prohibition to superior members, prohibiting them from ordering their subordinates to carry out these acts. *Id.* However, Articles 18 and 19 limit the measures police can implement to issue cease-and-desist orders to Yakuza members accused of violating the Act. *Id.*

102. Ritual finger-cutting (*yubitsume*) is a traditional method of discipline within Yakuza groups; in 1992 it was estimated that nearly 42% of Yakuza members had had a finger amputated. Gragert, *supra* note 1, at 171. Tattoos have been the traditional marking of Yakuza members since Japan’s feudal period when authorities tattooed criminals with a black ring around the arm for each criminal offense. *Id.* Tattooing became a symbol of resistance and the process evolved into a test of strength embraced by Yakuza members. *Id.* Articles 20–23 prohibit the practice of coerced finger-cutting, as well of the ordering of a subordinate by a superior to engage in that behavior, but prescribes a punishment limited to issuing a cease-and-desist order. Botaiho, Law No. 115 of 2006, art. 20–23. Articles 24–26 also limit police action to issuing cease-and-desist orders, but the scope of the crime is larger as even introducing a minor to a tattoo artist is prohibited under the act. Botaiho, Law No. 115 of 2006, art. 20–26.

individuals wanting to leave Yakuza groups.<sup>103</sup> At the same time, the revision left the penal provisions unchanged and offered no new criminal enforcement measures for the police to utilize.<sup>104</sup>

Despite the fact that the 2007 revision left the penal provisions unchanged and offered no new criminal enforcement measures, Article 15, Section 2 did introduce civil liability to the heads of the Yakuza gangs for damage caused by subordinate members using dangerous weapons.<sup>105</sup> Liability in civil compensation claims has had a dramatic impact on the structure and activities of the Yakuza.<sup>106</sup> The damage liability provision had originally been implemented in a 2004 version of the act, but the 2007 revision extended the provision to all damages incurred during turf wars or fundraising activities, including criminal acts, by underlings.<sup>107</sup> Between 2005 and 2008, the Yamaguchi-gumi underwent several major leadership changes; many theorize that this turmoil was a direct response to the expanding liability provisions.<sup>108</sup> Following the 2007 revisions, the Yamaguchi-gumi faced lawsuits from business owners who had either been personally harmed or had their businesses physically destroyed by subordinates inflicting Yakuza justice.<sup>109</sup> Japanese courts have interpreted

103. The section does not contain any specific provisions or guidelines for the national or local governments to follow. *Id.* art. 28. Instead, it largely defers to the prefectural centers with no specific requirements. *Id.*

104. *Id.*

105. Representatives of the designated gang are liable for the intrusion of the life, physical body or property of a third party when a rivalry develops between the gangs. *Id.* art. 15 §§ 2–3. In addition, the liability of gang representatives is generally based on the provisions of Japan’s Civil Code. *Id.*

106. Rankin Part 1, *supra* note 9.

107. *Id.* See also *Mob Crackdown Targets Bosses, Bidders*, JAPAN TIMES (Dec. 22, 2007), <http://www.japantimes.co.jp/news/2007/12/22/national/mob-crackdown-targets-bosses-bidders/#.UyOEX15dD3E>.

108. Adelstein discusses Tadama Goto’s departure from a Yamaguchi-gumi sect and his desire to avoid liability for a murder carried out by his subordinates during his reign. Jake Adelstein, *It’s Not Easy Being a Yakuza Boss*, THE WIRE (Sept. 28, 2012), <http://www.thewire.com/global/2012/09/its-not-easy-being-yakuza-boss/57384/>. The Yamaguchi-gumi’s head boss (*oyabun*) Yoshinori Wantanabe also resigned in 2005 amid mysterious circumstances. Eric Talmadge, *Japan’s Mob Organizes for the Future*, MILWAUKEE J. SENTINEL (Oct. 2, 2005) (*available at* <http://news.google.com/newspapers?nid=1683&dat=20051002&id=v1MvAAAIBAJ&sjid=OUUEAAAIBAJ&pg=6567,1991931>). Many have attributed Wantanabe’s departure to the revised Anti-Boryokudan law. Jake Adelstein, *The Death and Legacy of Yakuza Boss ‘Mr. Gorilla’*, THE DAILY BEAST (Dec. 12, 2012), <http://www.thedailybeast.com/articles/2012/12/03/the-death-and-legacy-of-yakuza-boss-mr-gorilla.html>.

109. The first landmark case involved a Thai bar owner who was running a gambling ring without paying the traditional dues to the Yamaguchi-gumi affiliate. Rankin Part 1, *supra* note 9. The gang assaulted staff members, stole cash from the register, and wrecked the bar. *Id.* The owner then sued the gang. *Id.* Despite the fact that Shinobu Tsukasa, the leader of the Yamaguchi-gumi was in jail at the time, and that the gang has over 40,000 members, the court ruled in favor of the bar owner and ordered Tsukasa to pay damages of 15 million yen. *Id.* This lawsuit seemed to open the floodgates. *Id.* Tsukasa was ordered to pay 4 million yen for a similar incident in Gifu; 42 million yen to a taxi firm in Hyogo,

the provision as retroactive, even applying it to acts that occurred prior to the 2007 revision.<sup>110</sup> The liability provisions have become a key source of the public's ability to check the power of large organized crime syndicates. Shortly after the enactment of the revisions, a popular story circulated about a Yakuza boss paying an underling's unpaid McDonald's bill [to avoid a civil lawsuit].<sup>111</sup>

Since 2008, Yakuza membership has been steadily changing.<sup>112</sup> Between 1991 and 2000, 1,971 gangs disbanded; however, the total Yakuza population only decreased by 7,400 indicating that many of these groups simply reorganized.<sup>113</sup> The Yamaguchi-gumi has dismissed, on average, 2,000 members a year.<sup>114</sup> However, many analysts feel that these numbers misrepresent the success of the law and remain skeptical of reports of a shrinking Yakuza.<sup>115</sup>

NPA data indicates that Yakuza gangs have reorganized their structure and attempted to improve their interactions with the public.<sup>116</sup> While this may be attributed in part to the liability provisions of the 2007 revision, the data reveals a trend of decreasing "regular" Yakuza membership prior to the revisions, while the number of "associate" members has remained

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the Yamaguchi-gumi's headquarters, that the gang had attempted to extort money from; as well as other legally ordered payments to individuals the gang has either assaulted or targeted for extortion. *Id.*

110. The court allowed the suit to proceed and Tsukasa eventually settled with the family of the victim, despite the fact that Tsukasa himself was in jail during the time of the murder and it had been undertaken by an affiliate group of the Yamaguchi-gumi. Adam Westlake, *Yakuza Boss Pays \$1.4 Million in Compensation to Family of Murder Victim*, THE JAPAN DAILY PRESS (Oct. 5, 2012), <http://japandailynews.com/yakuza-boss-pays-1-4-million-in-compensation-to-family-of-murder-victim-0514668/>. The Sumi-yoshi-kai, another one of Japan's three major Yakuza gangs, has also been subjected to liability suits. In 2007, the Tokyo District Court ordered Sumiyoshi-kai executives to pay 59 million yen to the family of an innocent South Korean student killed in a botched revenge shooting. Jun Hongo, *Mob Leaders Found Liable for Botched Hit*, THE JAPAN TIMES (Sept. 21, 2007), <http://www.highbeam.com/doc/1G1-168935033.html>.

111. The crux of the story involves a Yamaguchi-gumi member who placed a drive-thru order in Kyoto. Adelstein, *supra* note 108. The Yakuza member complained that his meal got wet and after arguing with the manager sped off without paying. *Id.* Several days later Yamaguchi-gumi headquarters in Kobe received a bill via mail which the organization paid. *Id.*

112. At the end of 2010 the NPA reported that the number of full and associate Yakuza members was 78,600. National Police Agency, White Paper on Crime: 2011, 28 (2012) [hereinafter White Paper 2011].

113. Hill, *supra* note 13, at 207.

114. Rankin Part 1, *supra* note 9.

115. When a Yakuza member is dismissed the gang sends a detailed report to the police and asks that the police treat the individual as a civilian. *Id.* However, neither the police nor the Yakuza have incentive to verify the report. *Id.* The police get to claim that the Yakuza is shirking on account of its enforcement measures and the Yakuza gain a shadow member who can act on behalf of the gang without incurring liability or being subjected to the measures of Botaiho. *Id.*

116. *Id.*

constant.<sup>117</sup> Yakuza groups have also made a concerted effort to blend into society, making their affiliations known only when it is advantageous to do so.<sup>118</sup> While a rise in the popularity of tattoos among civilians has helped the Yakuza blend in, groups have nearly eliminated some of the more conspicuous aspects of Yakuza culture in order to become less visible.<sup>119</sup> To that end, in 2009 the Yamaguchi-gumi issued a new code of conduct to its members requesting that affiliated gangs refrain from using the Yamaguchi-gumi's symbol, imprinting the crest on their business cards, or engaging in gang-like activity under the Yamaguchi-gumi name.<sup>120</sup> Furthermore, there are strong statistical and anecdotal indications that the Anti-Boryokudan Law has led to a decrease in inter-gang conflicts. In the 1990s, the number of conflicts fell by over half.<sup>121</sup> Interviews with Yakuza members also indicate that inter-gang conflicts are resolved more expeditiously than before.<sup>122</sup>

#### D. 2012 Revisions to the Anti-Boryokudan Law

The 2012 revision to the Anti-Boryokudan law sought to cure the defects of the previous version of the Act by eliminating the need for cease-and-desist orders before the police can make an arrest.<sup>123</sup> The revised Act allows the police to designate the gang's territory as a "caution zone" and arrest individuals engaged in making unjustifiable demands

117. Regular members are the members as reported by Yakuza groups themselves. National Police Academy, White Paper on Crime 2010, 101 (2011) [hereinafter White Paper 2010]. "Associated Members are those who are not necessarily members of a *Boryokudan*, but have a relationship with a *Boryokudan* and attempt unlawful and violent actions with the power of the *Boryokudan* behind them or those who cooperate with and support the activities of *Boryokudans* by supplying funds, weapons, etc. or are associated with *Boryokudans* or *Boryokudan* members." *Id.* In 2004, the Yakuza population consisted of 44,300 regular members and 43,000 associate members. *Id.* In 2009, the Yakuza population decreased to 38,600 regular members and 42,300 associate members. *Id.* In 2011, regular members fell further to 32,700 and associate members increased to 47,600. *NPA: Number of Yakuza Members Drops Sharply in 2011*, THE TOKYO REPORTER (Mar. 16, 2012), <http://www.tokyo-reporter.com/2012/03/16/npa-number-of-yakuza-members-drops-sharply-in-2011/>.

118. Rankin Part 1, *supra* note 9.

119. Head-shaving, fines, and expulsion have replaced ritual finger-cutting as the *de facto* forms of punishment in Yakuza culture today. *Id.*

120. Amy Takahashi, *Yakuza Group Succumbs to Revised Law, Encourages 'Code of Conduct'*, THE TOKYO REPORTER (Sept. 17, 2009), <http://www.tokyoreporter.com/2009/09/17/yakuza-group-succumbs-to-revised-law-encourages-code-of-conduct/>.

121. Hill, *supra* note 13, at 208.

122. Police data corroborates the Yakuza member's assertions. *Id.* Between 1983 and 1990, 75% of conflicts were resolved within a week; within the following ten years that number increased to 90%. *Id.*

123. Adam Westlake, *Japan Passes Law that Allows Instant Arrest of Yakuza Members*, THE JAPAN DAILY PRESS (July 31, 2012), <http://japandailynews.com/japan-passes-law-that-allows-instant-arrest-of-yakuza-members-317818/>.

without prior warning.<sup>124</sup> While the effectiveness of the Act is still largely dependent on civilian reporting, the modified enforcement measures provide a greater level of reassurance to individuals willing to report Yakuza activity.<sup>125</sup>

It is unclear whether citizens feel these measures are necessary or offer the requisite protection. The impact on Yakuza activity also remains unclear. The consistent increase in cease-and-desist orders from 1995 to 2004 is indicative of a public that is willing to take on the Yakuza, regardless of whether the police are able to arrest the Yakuza directly.<sup>126</sup> That said, there has been an increase in the number of reports issued according to National Police Agency statistics in 2010.<sup>127</sup> The decrease could either be the result of decreased Yakuza activity or of waning public confidence in the effectiveness of the orders.<sup>128</sup> While the impact of this legislation remains undetermined, recent arrests reinforce the revision's relevance and potential utility in Japan.<sup>129</sup>

#### *E. Issues in Criminalization of Yakuza Membership*

While revisions to the Anti-Boryokudan Law have placed increased restrictions on Yakuza members, the law still requires the Yakuza member to commit a criminal act before they are subjects to the law's provisions.<sup>130</sup> With continued Yakuza violence and turf wars twenty years after the implementation of the Anti-Boryokudan Law, it is reasonable to question the Japanese government's failure to completely outlaw Yakuza membership. Both the United States and Italy, two countries that have

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124. *Swifter Punishment for Yakuza Expected after Anti-Gangster Law Passed*, THE MAINICHI (July 26, 2012).

125. Westlake, *supra* note 123. A purely reactive police strategy is considered inappropriate when dealing with organized crime because a number of the victims will not report the crime, either because they are also operating within the criminal economy or because the crime between the parties was part of a consensual, illegal transaction. Hill, *supra* note 13, at 147.

126. In 1995, there were 1,321 discontinuance orders and 33 recurrence prevention orders issued. Shikata, *supra* note 7, at 419. Those numbers grew to 2,717 and 161 respectively by 2004. *Id.*

127. In 2010, 2,130 discontinuance orders and 85 recurrence prevention orders were issued; this represents a 31-order increase from the 2009 statistics. Crime in Japan in 2010, *supra* note 4, at 15 (2011).

128. Between 2000 and 2010 the percentage of Yakuza members arrested for extortion decreased by 45.3%. White Paper 2010, *supra* note 117, at 103. However, in 2010, there were only 4 arrests and 6 clearances for violations of the Anti-Boryokudan Law. Crime in Japan 2010, *supra* note 4, at 71.

129. Shortly after implementation of these measures, a Yamaguchi-gumi member was among four arrested for attempting to extort a restaurant owner. *Yamaguchi-gumi Member Among 4 Arrested for Extortion of Yamagata Restaurant*, THE TOKYO REPORTER, (Aug. 1, 2012), <http://www.tokyoreporter.com/2012/08/01/yamaguchi-gumi-member-among-4-arrested-for-extortion-of-yamagata-restaurant/>.

130. 改正暴力団対策法成立. Revisions to the Anti-Boryokudan law, Law 53 of 2012.

faced organized crime epidemics, passed legislation banning organized criminal organizations and crime membership altogether.<sup>131</sup> Examining the effects of these laws may provide answers as to whether Japan should take steps beyond the current revision, and, if they were to do so, what path they should take in enacting effective anti-Yakuza membership legislation.

#### IV. RICO AND 416-BIS

##### A. RICO: A Broad-Sweeping Measure

In the United States, the Racketeer Influenced and Corrupt Organizations Act (RICO) has become the primary legislative tool used against organized crime.<sup>132</sup> RICO allows for the prosecution of any individual that participates in or conspires with a criminal organization through racketeering activity.<sup>133</sup> Despite the effectiveness of RICO in combatting organized crime, the text of the statute contains no direct reference to organized crime.<sup>134</sup>

Currently, the United States has no statutory definition of organized crime.<sup>135</sup> Beginning in 1946, the Hobbs Act, prohibiting interference with or obstruction of interstate commerce, was the legislation most frequently invoked against organized crime.<sup>136</sup> During the 1950s and 1960s, Congress established the Kefauver Committee,<sup>137</sup> the McClellan Committee,<sup>138</sup> and the Presidential Task Force on Organized Crime<sup>139</sup> to investigate the growing organized crime problem and develop legislative countermeasures.<sup>140</sup>

131. The primary enforcement measure against criminal organization in the United States is the Racketeering Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. § 1961–1968 (2010). In 1982, Italy enacted the Italian Penal Code Act 416-bis, which outlaws membership in or association with Mafia-type associations. Codice Penal [C.P.] art. 416-bis (Italy) (1982).

132. See HOWARD ABADINSKY, ORGANIZED CRIME 181–87 (7th ed. 2003).

133. Jerome P. Bjelopera & Kristin M. Finklea, Cong. Research Serv., R41547, *Organized Crime: An Evolving Challenge for U.S. Law Enforcement*, 6, 34–35 (2012).

134. 18 U.S.C. § 1961-1968 (2010).

135. Bjelopera & Finklea, *supra* note 133, at 34.

136. Benjamin Scotti, *Rico vs. 416-bis: A Comparison of U.S. and Italian Anti-Organized Crime Legislation*, 25 LOY. L.A. INT'L & COMP L. REV. 143, 147 (2000); Hobbs Act, 18 U.S.C. § 1951 (2010).

137. S. Res 202, 81st Cong. (1950).

138. S. Rept. 395, 85th Cong. (1957).

139. DRUG ENFORCEMENT AGENCY, ORGANIZED CRIME AND DRUG ENFORCEMENT TASK FORCE, available at <http://www.justice.gov/dea/ops/ocdetf.shtml>.

140. The Kefauver Committee, established in 1951, examined how organized crime was structured and which laws it violated. Scotti, *supra* note 136, at 146–47. While the committee meetings created greater public awareness of organized crime, they did not result in significant legislative changes. *Id.* The McClellan Committee, during the Valachi hearings in 1963 and the Presidential Task

In 1966, Senator John L. McClellan introduced a bill that would have criminalized Mafia membership.<sup>141</sup> While the bill specifically referenced the Mafia, organizations that used any interstate commerce facility for the purpose of engaging in criminal activity were also targeted.<sup>142</sup> The bill attacked the organizational structure of the Mafia by targeting individuals who not only committed criminal acts on behalf of the organization but also those who provided financial assistance or refused to cooperate with law enforcement.<sup>143</sup> Though Congress rejected the proposal, the bill identified the need for legislation that extended beyond the low-level perpetrators of criminal acts to reach the bosses commanding their actions.<sup>144</sup>

RICO was enacted as part of the Organized Crime Control Act of 1970 to provide “new weapons of unprecedented scope for an assault on organized crime and its economic roots.”<sup>145</sup> Congress intended RICO to be used against organized crime groups that laundered profits gained through illegal activities in otherwise legal businesses.<sup>146</sup> RICO prosecutions focus on the entire history of an organization’s illegal acts, allowing evidence of multiple acts committed to be introduced in a single trial.<sup>147</sup> RICO extends additional criminal and civil consequences to specific state and federal

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Force on Organized Crime, gathered information and proposed legislation that would become the foundation of the Organized Crime Control Act of 1970, which included RICO. *Id.*

141. The proposed bill made designated Mafia membership, defined “Mafia” as a secret society whose members are pledged and dedicated to commit unlawful acts against the United States or any State thereof in furtherance of their objective to dominate organized crime and whose operations are conducted under a secret code of terror and reprisal not only for members who fail to abide by the edicts, decrees, decisions, principles, and instructions, a felony, and prescribed a 5-year minimum sentence. *See S. 2187, 89th Cong. § 2-3 (1966).*

142. *Id.*

143. § 2(b) prescribes that courts, when considering membership or participation, consider the individual’s (1) criminal convictions relating to the acts mentioned in § 2(a); (2) financial contributions to the organization; (3) loans or bail bonds given to other members of the organization; (4) any instructions given in relation to the organization to other individuals to commit crimes; (5) participation in meetings relating to criminal violations; or (6) refusal to cooperate with law enforcement. *Id.* § 2(b).

144. G. Robert Blakely & John Robert Blakely, *Civil and Criminal RICO: An Overview of the Statute and its Operation*, 64 DEF. COUNS. J., 36, 42 (1997); CYRILLE FIJNAUT & LETIZIA PAOLI, ORGANISED CRIME IN EUROPE: CONCEPTS, PATTERNS AND CONTROL POLICIES IN THE EUROPEAN UNION AND BEYOND 26 (2005).

145. Scotti, *supra* note 136, at 149 (quoting an analysis of the legislative intent behind RICO in *Russello v. U.S.*, 464 U.S. 16, 26 (1983)); Charles Doyle, Cong. Research Serv., 96-950, *RICO: A Brief Sketch*, 1 (2006).

146. Scotti, *supra* note 136, at 149.

147. *Id.* In *United States v. Castellano*, a RICO prosecution against a criminal organization, “twenty-four defendants were charged in a seventy-eight count indictment.” Lesley Suzanne Bonney, *The Prosecution of Urban Street Gangs: A Proper Application of RICO*, 42 CATH. U. L. REV. 579, 597 (1993) (citing *Castellano*, 610 F. Supp. 1359 (S.D.N.Y. 1985)).

crimes.<sup>148</sup> 18 U.S.C. § 1962, which targets individuals employed by, or associated with, offending organizations, is the substantive provision most frequently used to prosecute members of organized crime groups.<sup>149</sup>

United States Supreme Court decisions have strengthened RICO by clarifying certain terms contained in 18 U.S.C. § 1962(c).<sup>150</sup> In *Reves v. Ernst & Young*, the Court concluded that “conduct or participate” requires participation in the “operation or management” of the enterprise.<sup>151</sup> The “operation or management” test is broad enough to include all individuals associated with a criminal enterprise, allowing prosecutors to target members at every level of a criminal organization.<sup>152</sup>

RICO prosecutions require that the government establish that an individual participated in a “pattern of racketeering activity.”<sup>153</sup> Racketeering acts encompass nearly every serious federal felony and most state felonies.<sup>154</sup> The Supreme Court considered Congress’s intent in enacting RICO when it addressed the meaning of the term “pattern.”<sup>155</sup> In *Sedima S.P.R.L. v. Imrex Co.*, the Court held that prosecutors in RICO cases must establish that the alleged criminal acts have both “continuity” and a “relationship” with one another.<sup>156</sup> “Continuity” and “relationship” were further defined by the Supreme Court as describing criminal acts

148. *Id.* The list of federal and state crimes can be found in 18 U.S.C. § 1962. Congress regularly updates and adds offenses to this list. *Id.* at 1; 18 U.S.C. § 1962 (2010).

149. Subsection (c) states, “It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.” 18 U.S.C. § 1962(c) (2010).

150. Scotti, *supra* note 136, at 150.

151. *Reves v. Ernst & Young*, 507 U.S. 170, 179 (1993). *See also* *United States v. Swan*, 250 F.3d 495, 498 (7th Cir. 2001).

152. Scotti, *supra* note 136, at 151. The Court has reinforced their intention to extend liability beyond the upper management of an enterprise to individuals who exercise discretion in carrying out the instructions of upper management. *See* *United States v. Diaz*, 176 F.3d 52, 92 (2d Cir. 1999); *United States v. Owens*, 167 F.3d 739, 753–54 (1st Cir. 1999); *United States v. Urban*, 404 F.3d 754, 769–70 (3d Cir. 2005). [Would probably be more useful additional information if these cases had parenthetical descriptions].

153. “(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.” 18 U.S.C. § 1962(b) (2010).

154. Scotti, *supra* note 136, at 151. These acts include “any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical . . . which is chargeable under State law and punishable by imprisonment for more than one year.” 18 U.S.C. § 1961(1)(A) (2010).

155. The Supreme Court factored in Congress’s intention that Rico address the structure of criminal organizations and the problem as a whole rather than isolated acts. Scotti, *supra* note 136, at 152 (citing *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479).

156. *Id.*

which “amounted to, or threatened the likelihood of, continued criminal activity” and relate to each other, respectively.<sup>157</sup>

In the *United States v. Turkette*,<sup>158</sup> Turkette and twelve other defendants involved in a drug trafficking organization argued that “enterprise” in RICO referred only to legitimate enterprises.<sup>159</sup> The Supreme Court disagreed, holding that the fact that the word “legitimate” did not precede “enterprise” in the statute indicated that the scope of RICO encompasses both legitimate and illegitimate enterprises.<sup>160</sup> Excluding illegitimate enterprises from RICO’s scope would preclude RICO from fulfilling its fundamental purpose of combating criminal organizations.<sup>161</sup>

By broadly interpreting the statutory language, the Supreme Court has helped craft RICO into an effective weapon against organized crime in America.<sup>162</sup> RICO prosecutions have been instrumental in eradicating domestic organized crime, as well as entire Mafia families, despite never explicitly mentioning “organized crime” or the “Mafia.”<sup>163</sup>

#### *B. Italian Legislation Outlawing Mafia Membership: 416-bis*

One of the first Italian laws to address the Mafia operated in a manner similar to the original Anti-Boryokudan Law. Act Number 1435 (Act 1435), enacted in 1956, was a preventive measure that provided police officers with the power to warn individuals who were perceived as threats to public security and morals.<sup>164</sup> If the individuals failed to comply with the warnings, they could be subjected to surveillance, house arrest, or internal exile without trial.<sup>165</sup> Act 1435’s internal exile provision was counter-productive, as it ultimately contributed to Mafia expansion beyond Sicily, where the Mafia has its roots.<sup>166</sup> Mafia members were displaced

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157. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989). Prosecutions subsequent to *Northwestern Bell* treated proof of the existence of a criminal organization as “a useful component in establishing a connection between two predicate acts.” Scotti, *supra* note 136, at 152.

158. 452 U.S. 576 (1980).

159. *Id.* at 579–80. *Turkette* was the first case in which a RICO prosecution was brought against a wholly illegal enterprise. *Id.*

160. The Court stated: “Had Congress not intended to reach criminal associations, it could easily have narrowed the sweep of the definition by inserting a single word, ‘legitimate.’ But it did nothing to indicate that an enterprise consisting of a group of individuals was not covered by RICO if the purpose of the enterprise was exclusively criminal.” *Id.* at 581.

161. Scotti, *supra* note 136, at 153.

162. Bonney, *supra* note 147, at 597–99.

163. Scotti, *supra* note 136, at 153–54.

164. *Id.* at 157.

165. “Act 1435 provided only for administrative measures implemented by law enforcement and, as such, did not require the accused appear before a court.” *Id.*

166. *Id.*

into other areas of the country where they networked, made connections, and recruited new members in their new, government-assigned locales.<sup>167</sup> Act 1435's measures concentrated on individuals and were therefore limited in their ability to combat large criminal organizations.<sup>168</sup>

Article 416 was an early attempt by the Italian government to address organized crime by focusing on the structure of the criminal organization.<sup>169</sup> Although Article 416 first took effect when the current Italian Penal Code was promulgated in 1931, the provisions of the article addressing criminal groups are derived from ancient Roman law.<sup>170</sup> Article 416 prohibits the creation of a group for the purpose of committing crimes.<sup>171</sup> Article 416 applies to groups of at least three people in which the members join the organization voluntarily, agree to pursue shared criminal goals, and intend to engage in a continuous course of criminal conduct.<sup>172</sup>

In 1982, the Italian Government enacted the La Torre-Rognoni Act, formally codified as 416-bis, in response to a high-profile Mafia assassination.<sup>173</sup> Article 416-bis goes beyond Article 416 and specifically criminalizes "Mafia" membership.<sup>174</sup> The legislature hoped that 416-bis would allow law enforcement to prosecute individuals who belong to the Mafia, and whom the Mafia's organizational hierarchy had insulated from liability under earlier legislation.<sup>175</sup> Article 416-bis defines the Mafia as an association that is used by members to commit crimes and exert influence

167. *Id.*

168. *Id.*

169. *Id.* at 158.

170. During the Roman Republic and Empire, Roman law punished certain criminal groups considered to be a danger to the state. Alexander D. Tripp, Comment, *Margins of the Mob: A Comparison of Reves v. Ernst & Young with Criminal Association Laws in Italy and France*, 20 FORDHAM INT'L L.J. 263, 297 n.300 (1996).

171. C.P. Art. 416 (It.) (1982), available at [http://www.camera.it/\\_bicamerale/leg15/commbicanti/mafia/files/pdf/Art\\_416bis.pdf](http://www.camera.it/_bicamerale/leg15/commbicanti/mafia/files/pdf/Art_416bis.pdf). "When three or more people associate for the purpose of committing a number of crimes, those that promote, form or organize the association are punished, for this alone, by imprisonment for from three to ten years. For simply participating in the association, the punishment is imprisonment for from one to five years." Tripp, *supra* note 170, at 297 n.299 (translation of C.P. art. 416 (It.) by author of Tripp).

172. If the members agree only to conduct a fixed number of crimes, they are guilty as accomplices, not as members of a criminal association. *Id.* at 301.

173. In 1982 the Mafia assassinated Prefect Carlo Alberto Della Chiesa. Scotti, *supra* note 136, at 159. The La Torre-Rognoni Act was passed ten days later. *Id.*

174. Article 416-bis specifically targets the Mafia: "Whoever belongs to a Mafia association comprised of three or more people, is punished by imprisonment for three to six years." Tripp, *supra* note 170, at 301 n.328 (translation of C.P. art. 416-bis (It.) by author of Tripp).

175. *Id.* at 302.

over economic or administrative activity.<sup>176</sup> Under Article 416-bis, prosecutors no longer need to point to specific criminal acts; instead, they simply need to prove an association with the Mafia.<sup>177</sup> Witnesses are also unnecessary, as the prosecution is based on documentation of the economic and financial operations carried out by Mafia members.<sup>178</sup>

Initially, implementation of 416-bis was problematic because the legislature failed to define the terms “membership,” “belonging,” and “criminal group.”<sup>179</sup> The absence of clear definitions created a blurred boundary between Mafia members and innocent individuals.<sup>180</sup> For example, in June 1983, law enforcement arrested and indicted over a thousand individuals under 416-bis, many of whom were innocent.<sup>181</sup> Furthermore, since 416-bis did not require the use of witnesses to establish a connection to the Mafia, prosecutions relied heavily on written materials such as address books, letters written by “certified” Mafia members, attendance records, or Mafia trials and prison money order receipts.<sup>182</sup> Since many Italians share the same surnames, cases of mistaken identity were common.<sup>183</sup>

416-bis’s implementation was also hampered by the requirement under Italian law that preliminary trials be held within two months of indictment.<sup>184</sup> In mass-roundups, judges were forced to make rushed determinations based on hasty summaries of the evidence.<sup>185</sup> Likewise, while 416-bis proved capable of allowing the police to arrest an entire criminal organization from foot soldiers to leadership, the expansive

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176. “An association is a Mafia association when those that belong to it use the power of intimidation of the associative bond, and the power of oppression, and the code of silence that comes from the bond in order to commit crimes, to acquire by direct or indirect means the management or at least the control over economic activity, permits, authorizations, bids, and public contracts or to gain unjust favors or profits for oneself or others.” *Id.* at 301 n.328 (translation of C.P. art. 416-bis (It.) by author of Tripp).

177. Prosecutors are not required to prove the existence of an organized criminal structure. “[I]nvestigators only have to prove a connection between the Mafia’s method of procuring profits, and the types of illegal activities in which its members engage.” Scotti, *supra* note 136, at 160.

178. *Id.*

179. *Id.* at 160–61.

180. *Id.*

181. *Id.* at 161. On June 17, 1983, police arrested 856 people. 1,013 would later be indicted. MARCO JACQUEMET, CREDIBILITY IN COURT: COMMUNICATIVE PRACTICES IN THE CAMORRA TRIALS 48 (1996).

182. Scotti, *supra* note 136, at 161. “Certified” merely refers to individuals previously convicted of the crime of association. *Id.* at 161 n.155.

183. *Id.* at 161–62.

184. JACQUEMET, *supra* note 181, at 52.

185. In the June 17, 1983 roundup, the interrogation time for each defendant was twenty minutes, during which the judges had to determine whether there was sufficient evidence to commence a trial. *Id.*

provisions of the legislation made it difficult for the judiciary to balance their goal of enforcing the law while providing fair process to every accused individual.<sup>186</sup> Eventually, the Justice Department recognized that 416-bis prosecutions relied too heavily on circumstantial evidence and that the line between members and unaffiliated individuals needed to be clarified.<sup>187</sup> This led to an increased use of *pentiti* (collaborators from criminal organizations) as expert witnesses in 416-bis prosecutions.<sup>188</sup>

The Mafia's continued influence in Italian society is evidence that 416-bis has had limited effectiveness.<sup>189</sup> As long as the Mafia exerts control over the police force and the judiciary, and political figures continue to demonstrate willingness to tolerate Mafia presence, it is unlikely that Italy will make the legislative changes necessary to eradicate the Mafia.<sup>190</sup>

#### V. CONCLUSION: THE WEAKNESSES OF THE DELICATE APPROACH

Drafters of the Anti-Boryokudan law drew inspiration from RICO, rather than its Italian counterparts, due to concerns that implementing the European method of criminalizing organized crime membership would infringe on freedom of association.<sup>191</sup> The Anti-Boryokudan law does not mimic RICO, but instead operates as a middle ground between RICO and European provisions such as 416-bis. 416-bis criminalizes Mafia membership; RICO criminalizes participation in an organization involved in a pattern of racketeering.<sup>192</sup> In contrast, the Anti-Boryokudan Law subjects members of criminal organizations to higher standards when committing criminal acts. The effectiveness of RICO and the complications associated with 416-bis demonstrate an instructive blueprint

186. Benjamin Scotti, *Rico vs. 416-bis: a Comparison of U.S. and Italian Anti-Organized Crime Legislation*, 25 LOY. L.A. INT'L & COMP L. REV. 143, 162 (2000); The Hobbs Act, 18 U.S.C. § 1951 (2010).

187. Scotti, *supra* note 136, at 162.

188. JACQUEMET, *supra* note 181, at 53.

189. In January 2012 over 200,000 businesses were tied to Mafia lenders in Italy. James Mackenzie, *Mafia Now "Italy's No.1 Bank" as Crisis Bites: Report*, REUTERS (Jan. 20, 2012), <http://www.reuters.com/article/2012/01/10/us-italy-mafia-idUSTRE8091YX20120110>.

190. Scotti, *supra* note 136, at 164.

191. According to Hill:

The debate within Japan was thus conducted with reference to European and American models. The European approach, caricatured as criminalisation of organised crime group membership, was thought to violate constitutional guarantees of freedom of association and deemed inappropriate. Most attention was therefore directed at America's Racketeer Inspired and Corrupt Organisations Act (RICO).

Hill, *supra* note 42, at 14.

192. *See supra* Part III, Part IV.

for legislation that operatively eradicates organized crime.<sup>193</sup> In order to eliminate the Yakuza, Japanese legislatures can no longer sit on the fence. They must enact wide-reaching legislation similar to RICO that allows local police departments to subject Yakuza members to the highest levels of criminal-liability. The current legislation places too much of the onus upon Japanese citizens to either bravely challenge the Yakuza in civil court, or shame those associated with the Yakuza through public opinion. It remains unclear why the Diet has avoided enacting RICO-type legislation; however, the policies of the current regime invite speculation that the Diet does not want the Yakuza to go away.

There are a number of possible explanations for the Diet's failure to enact RICO-like legislation. Yakuza political connections or influence could be the cause, but the growing trends in legislation and public opinion suggest otherwise.<sup>194</sup> There is credence to the claim that the Yakuza and the police have a symbiotic relationship. A pervasive Yakuza threat creates the need for companies to hire Yakuza experts; coincidentally, these positions are often filled by retired police officers.<sup>195</sup>

While a Yakuza world dominated by three large gangs causes violence, the politicians may feel that it also offers stability and easily identifiable instruments of control. A destabilized Yakuza realm could result in widespread violence and chaos that the police would be unable to control effectively.

The Japanese government might also be factoring in the perceived social function of the Yakuza. Not only have the Yakuza acted as a

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193. From 1972 to 1997, RICO prosecutions in New York, Boston, Philadelphia, Cleveland, Detroit, Chicago, Kansas City, Los Angeles, and New Orleans took out La Cosa Nostra, the principle organized crime group in the United States at the time. Alexandra Marks, *The Untouchables No More: Mafia Loses Influence in US*, CHRISTIAN SCI. MONITOR (June 23, 1997), [http://www.csmonitor.com/1997/0623/062397.us.us.5.html/\(page\)/2](http://www.csmonitor.com/1997/0623/062397.us.us.5.html/(page)/2). In contrast, the Italian Government's over-reaching 416-bis, which resulted in a public relations nightmare and the tendency of the government to reach tacit agreements, has exacerbated the problem of organized crime in Italy. Scotti, *supra* note 136, at 163.

194. The public no longer tolerates politicians with Yakuza ties. *UPDATE: Justice Minister Quits After 'Mob Ties' Scandal*, THE ASAHI SHIMBUN (Oct. 23, 2012), [http://ajw.asahi.com/article/behind\\_news/politics/AJ201210230019](http://ajw.asahi.com/article/behind_news/politics/AJ201210230019). The business community is also aggressively pursuing measures to keep the Yakuza out of large Japanese businesses. *Gangster Register Aims to Bar Yakuza from Japan's Stock Market*, THE ASAHI SHIMBUN (Jan. 4, 2012), <http://ajw.asahi.com/article/economy/business/AJ201301040053>.

195. According to Hill:

Although it is not specified in the law how these organisations should be constituted, the prefectural centres are closely wedded to their respective police forces. Offices are generally situated within the local police headquarters and many of their employees are retired police officers. It is hard to avoid the conclusion that, in part, these centres were designed to create *amakudari* positions for police officers.

Hill, *supra* note 42, at 16.

conduit for dispute resolution between citizens, they offer a career path and social safety net to disenfranchised groups in Japanese society. With Japan's economy still affected after a twenty-year slump ending only about a decade ago, the government may consider the Yakuza a pragmatic or necessary alternative to unemployment benefits or other forms of government assistance.<sup>196</sup>

Because the ruling political parties have been unwilling to take on the Yakuza directly, it has placed most of the onus of combating the Yakuza on the public. The Anti-Boryokudan Law does, however, provide for the establishment of prefectural Elimination of Boryokudan Centers.<sup>197</sup> These centers are tasked with assisting Yakuza victims, conducting press campaigns, and helping members who wish to leave the gangs.<sup>198</sup> While these measures may appear insignificant in the grand scheme of large crime syndicates, the centers' high-profile campaigns have been championed as a major success of the legislation.<sup>199</sup> The Anti-Boryokudan Law also allows for those prefectural offices to file lawsuits requesting removal of local Yakuza offices.<sup>200</sup> The National Police Agency reported in 2011 that a number of prefectures had initiated such lawsuits.<sup>201</sup>

In addition to providing the public with greater power to combat the Yakuza, the Diet has also placed a greater burden on citizens to refrain from engaging in business interactions with Yakuza groups. The

196. See generally Steve Lohr, *From Japan's Slump in 1990s, Lessons for U.S.*, THE N.Y. TIMES (Feb. 9, 2008), [http://www.nytimes.com/2008/02/09/business/worldbusiness/09japan.html?page\\_wanted=all&\\_r=0](http://www.nytimes.com/2008/02/09/business/worldbusiness/09japan.html?page_wanted=all&_r=0).

197. Botaiho, Law No. 115 of 2006 and Law No. 53 of 2012, art. 32.

198. White Paper 2011, *supra* note 112, at 21-2.

199. The Tokyo police chief made a number of public appearances before the enactment of the 2012 revision. *Tokyo Police Chief Promotes Anti-Gang Legislation at J-League Match*, THE TOKYO REPORTER (Aug. 9, 2012), <http://www.tokyoreporter.com/2012/08/09/tokyo-police-chief-promotes-anti-gang-legislation-at-j-league-match/>. As part of his campaign, the head of the J-league, Japan's professional soccer league, banned players in the league from associating with Yakuza members. *Id.* The Fukoka Prefecture ran a well-publicized cash-for-weapons campaign, urging citizens to turn in any hand grenades in exchange for a reward. Jake Adelstein & Nathalie Kyoko-Stucky, *Handouts for Hand Grenades: Yakuza Gang War Leads to an Explosive Bounty*, THE WIRE (Apr. 2, 2012), <http://www.thewire.com/global/2012/04/handouts-hand-grenades-Yakuza-gang-war-leads-explosive-bounty/50624/>; see also White Paper 2011, *supra* note 112, at 21.

200. *New Yakuza Measure Tightens the Screw on Crime Groups*, THE ASAHI SHIMBUN (Jan. 24, 2012), [http://ajw.asahi.com/article/behind\\_news/social\\_affairs/AJ201201240001](http://ajw.asahi.com/article/behind_news/social_affairs/AJ201201240001). The revised law also allows the police to prohibit the Yakuza gang from using their office in the event of violent action in the area. *Law to Boost Cops' Power to Ban Gangs from Offices*, THE YOMIURI SHIMBUN (Oct. 15, 2011), <http://news.asiaone.com/News/AsiaOne+News/Crime/Story/A1Story20111015-305116.html>. Under the previous version of the act, the police could only prohibit office usage when the gang was involved in gang warfare. *Id.* This expands the scope of the law to cover any violent act by the gang. *Id.*

201. White Paper 2011, *supra* note 112, at 21-2.

Organized Crime Exclusion Laws enacted in 2011 place increased responsibility on civilians to lead the battle against Yakuza by prohibiting them from making payments to Yakuza members.<sup>202</sup> The laws were devised by the national government, but the individual prefectures each passed laws closely resembling the model version.<sup>203</sup> Generally, the laws target a range of activity, from payments of protection money by private companies to issuing loans to Yakuza members by banks.<sup>204</sup>

These laws initially seem vexing. At the time of their inception, if a Yakuza member threatened an individual, the individual was a victim, but the police were unable to arrest the Yakuza member unless he persisted in his threat.<sup>205</sup> If the individual succumbed to the Yakuza member's threat and paid the Yakuza, then that individual became an offender under the prefecture's Organized Crime Exclusion Law.<sup>206</sup>

Analysts note that the penalties for violating these laws are not severe.<sup>207</sup> However, violating the law allows the police to enter and search the property of an individual or company they suspect is not in compliance with the ordinance without a warrant.<sup>208</sup> The objective was to make it more expensive—both in terms of money and reputation—to comply with Yakuza demands than to report them.<sup>209</sup> The exclusion ordinances also promote the use of Boryokudan-exclusion clauses in business contracts.<sup>210</sup>

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202. *Battling the Yakuza*, AL JAZEERA (Aug. 18, 2012), <http://www.aljazeera.com/programmes/101east/2012/08/201281355545671696.html>.

203. Jake Adelstein, *Goodbye to the Yakuza*, THE WIRE (Oct. 1 2011), <http://www.thewire.com/global/2011/10/goodbye-Yakuza/43206/>.

204. *Id.*

205. *Id.*

206. *Id.*

207. The general punishments are a maximum fine of around ¥500,000 (\$5,000) or, in severe cases, a maximum one-year prison sentence. Rankin Part 2, *supra* note 15.

208. *Id.*

209. A retired police officer explained,

The new laws will make the price of paying off the Yakuza, in loss of face and in penalties, much more expensive than the actual cash payments to the Yakuza. It highly incentives firms not to cooperate or collude with organized crime, much as the revisions to the commerce law in December 1997, made it unacceptable for large listed companies to pay off sokaiya (総会屋), a/k/a racketeers. After a few major company executives were arrested along with the bad guys for riekikyo (利益供与) the pay-offs drastically declined, as did the number of sokaiya.

Adelstein, *supra* note 203.

210. While the ordinances vary by prefecture, Adelstein references Tokyo Prefecture's ordinance which requires "all companies operating within Tokyo to follow the ordinance by inserting organized crime exclusionary clauses into their contracts, and making an effort not to do business with the yYakuza and/or other anti-social forces." *Id.* This particular ordinance did include an exemption for companies that had already been working with Yakuza groups allowing them to avoid punishment if they reported their relationship to the police. *Id.* The police would then assist the company in severing the relationship with the Yakuza group. *Id.*

The National Government has also included these clauses in all public works contracts since 2009.<sup>211</sup> While some heralded this provision as the beginning of the end of the modern Yakuza, others viewed the ordinances as prescribing too much power to the police.<sup>212</sup>

In light of these exclusion ordinances, the 2012 revisions to the Anti-Boryokudan Act appear not to be the imposition of stricter restrictions on the Yakuza but instead a necessary counterbalance to duties imposed on ordinary citizens. Before the exclusion ordinances, if an individual felt that the protection order or injunction would be inadequate, an individual threatened by the Yakuza could choose to pay the Yakuza demand and not file a police report.<sup>213</sup> The exclusion laws make this payment illegal, leaving the individual with the choice to report the crime and receive little protection, on the one hand, or, alternatively, break the law.<sup>214</sup> The 2012 revisions to the Anti-Boryokudan Law address this by providing threatened individuals with the possibility of a greater level of protection and encouraging them to report the extortion attempt rather than be caught in a bind between violating the Exclusion Law or facing Yakuza violence.<sup>215</sup>

However, providing this modicum of increased protection to individuals and relying on community action will not eliminate the Yakuza from Japan. RICO and 416-bis demonstrate that legislation specifically crafted to attack the organizational hierarchy of gangs is the most effective method of eradicating organized crime.

211. White Paper 2010, *supra* note 108, at 106. This provision has received a great deal of press and praise in Japan. Hiroko Tabuchi, *Japan Pushing the Mob Out of Businesses*, NY TIMES (Nov. 18, 2010), <http://www.nytimes.com/2010/11/19/business/global/19yakuza.html?pagewanted=all>. The government vigorously promoted their ban of using contractors and labor with Yakuza ties in constructing the Tokyo Sky Tree. *Id.* The exclusion policy has also extended to the cleanup and rebuilding effort following the 2011 earthquake and tsunami. A senior Sumiyoshi-kai boss was arrested for dispatching workers to the reconstruction project at Fukushima Dai-ichi nuclear power plant in violation of labor dispatch laws. Jake Adelstein, *First Arrest Made Linking Yakuza with Fukushima Nuclear Clean-Up Crews*, THE WIRE (May 22, 2012), <http://www.thewire.com/global/2012/05/first-arrest-made-linking-yakuza-fukushima-nuclear-clean-crews/52649/>.

212. Rankin notes the case of a printing firm in Fukuoka, which was warned for printing business cards for a Yakuza boss. Rankin Part 1, *supra* note 9. He theorizes that the situation may play out such that, in order to prevent future police harassment of his business, he will have to ingratiate himself with the local police department through gift-giving and deference. *Id.*

213. Jake Adelstein, *Goodbye to the Yakuza*, THE WIRE (Oct. 1 2011), <http://www.thewire.com/global/2011/10/goodbye-Yakuza/43206/>. [will become will become Adelstein, *supra* note 188 when added into endnotes]

214. Colin P.A. Jones, *Tokyo ordinance a potential contract-killer*, THE JAPAN TIMES, (Nov. 15, 2011).

215. Botaiho, Law No. 115 of 2006 and Law No. 53 of 2012.

So far, the Anti-Boryokudan Law's primary effect has been to organize the public consciousness against the Yakuza.<sup>216</sup> Politicians must take advantage of this favorable environment and provide prosecutors with the tools necessary to pursue criminal organizations in large-scale, efficient prosecutions with stiff penalties for perpetrators. Because the Anti-Boryokudan Law lacks these measures, the Yakuza will remain an influential part of Japanese society.

*Edward F. Reilly Jr.\**

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216. Yakuza complain of fewer requests for their services because the public now perceives using the Yakuza to mediate disputes as wrong. Additionally, owners of bars and restaurants have in some cases also refused Yakuza advances to purchase overpriced goods or pay protection money. WOLFGANG HERBERT, *GLOBALIZATION AND SOCIAL CHANGE IN CONTEMPORARY JAPAN 156–57* (Jeremy Seymour Eades, Tom Gill, Harumi Befu eds., 2000). Public perception has also shifted in relation to celebrities with Yakuza connections. In 2011, Japan's most popular talk-show host retired abruptly after his connection with a Yakuza boss was revealed. Justin McCurry, *Japanese TV Host Shinsuke Shimada Resigns Over Yakuza Links*, THE GUARDIAN (Aug. 25, 2011), <http://www.theguardian.com/world/2011/aug/25/shinsuke-shimada-resigns-yakuza-links>. More recently, a Yakuza boss was arrested for hiding his own affiliation while playing on a golf course that prohibits Yakuza membership. *Gang Boss Arrested for Masquerading as Ordinary Citizen*, THE ASAHI SHIMBUN (Dec. 1, 2012), [https://ajw.asahi.com/article/behind\\_news/social\\_affairs/AJ201212010011](https://ajw.asahi.com/article/behind_news/social_affairs/AJ201212010011).

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