



2021

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Conor Byrnes
Touro Law Center

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Recommended Citation

Byrnes, Conor (2021) "Guilt by Association on the Docks and in the Casinos," *Touro Law Review*. Vol. 37 : No. 1 , Article 15.

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GUILT BY ASSOCIATION ON THE DOCKS AND IN THE CASINOS

*Conor Byrnes**

I. INTRODUCTION

The idea of guilt by association has been used throughout history, but most recently in the 1950s with McCarthyism¹ and in the 1990s with civil RICO cases.² Guilt by association has also been used in the labor and employment area.³ Current regulatory laws in certain industries⁴ hold their employees to unfairly high standards in an attempt to combat corruption.⁵ Such high standards make it easy to punish innocent and prospective employees.

This Note will use the term “guilt by association” in three different contexts.⁶ Section II of this Note will look at the history of guilt by association in America, focusing on McCarthyism and civil RICO cases. This section will analogize guilt by association as used historically, and in RICO, to the impact it has on employees regulated by the

* Conor Byrnes is a law student at Touro College Jacob D. Fuchsberg Law Center. He holds a bachelor’s degree in Criminal Justice from Marist College. Conor would like to recognize Paul Babchik, Senior Counsel for the Waterfront Commission of New York Harbor, for his help in developing the idea for the topic of this article. Conor would also like to thank Associate Dean Rodger Citron and Mike Petridis for their help in bringing this article together.

¹ Paul J. Achter, *McCarthyism*, BRITANNICA (Aug. 8, 2016), <https://www.britannica.com/topic/McCarthyism>.

² Sarah Baumgartel, *The Crime of Associating with Criminals? An Argument for Extending the Reves “Operation or Management” Test to RICO Conspiracy*, 97 J. CRIM. L. & CRIMINOLOGY 1, 46 (2006).

³ See N.Y. UNCONSOL. LAW § 9913 (6) (McKinney 2006); N.J. STAT. ANN. § 5:12-86 (f) (West 2011); 4 PA. Stat. and Cons. Stat. § 1202 (b)(23) (West 2017).

⁴ The waterfront and gaming industries are examples.

⁵ See N.Y. UNCONSOL. LAW § 9913 (6); N.J. STAT. ANN. § 5:12-86 (f); 4 PA. Stat. and Cons. Stat. § 1202 (b)(23).

⁶ Guilt by association when used to defame someone, guilt by association in a RICO context, and guilt by association in regulations by Waterfront and Gaming agencies.

agencies discussed below.⁷ Section III will provide an overview of some of the regulatory and licensing agencies that currently use guilt by association.⁸ These agencies mostly hold employees or applicants strictly liable for any associations they have with organized crime members or career criminals. The agencies do not consider if the person knew they were associating with an organized crime member or if that association will lead to actual corruption.

Section IV will discuss defenses employees may employ to fight a revocation of a license or registration due to a harmless association. The current standards employed by these agencies assume guilt without evidence or even the absence of evidence, rendering the current regulations overly broad. Finally, Section V will explain why these changes are needed. This Note will argue that these standards should be changed to require that the licensee or registrant knows or should know the person he/she is associating with is an organized crime member. Once a knowing association has been established, a perception of corruption from that association will be enough to deny or revoke a license or registration from that worker. However, this should be implemented using a sliding scale, which would take into consideration the amount of control or power a worker possesses through his/her job title. Workers that possess little or no control should be given more leniency over those that are in positions of power where corruption would have a more detrimental effect. Likewise, current employees should be given greater deference over applicants. These changes should eliminate the ability of these regulatory agencies to punish innocent workers. The goal of these agencies is to prevent corruption and organized crime from infiltrating the ports and casinos. While that is an important goal, their goal should also be to avoid punishing innocent employees and applicants.

II. THE HISTORY OF GUILT BY ASSOCIATION IN AMERICA

Guilt by association is defined as “[t]he attribution of guilt to individuals because of the people or organizations with which they

⁷ See discussion *infra* notes 57-121 and accompanying text.

⁸ The Waterfront Commission of New York Harbor, the New Jersey Casino Control Commission, and the Pennsylvania Gaming Control Board.

associate, rather than because of any crime that they have committed.”⁹ Three time periods in American History have used guilt by association – McCarthyism,¹⁰ civil RICO cases in the 1990s,¹¹ and the recent war on terror.¹² The analysis of some of these time periods below will provide a helpful context to the use of guilt by association in labor and employment.

A. McCarthyism and Guilt by Association

Historians coined the term “McCarthyism” as the label for Senator Joseph McCarthy’s actions and investigations during the 1950s.¹³ Today, this term is commonly associated with the defamation of character or reputation of innocent Americans by McCarthy.¹⁴ Indiscriminate allegations of a person’s associations with Communist organizations were publicized.¹⁵ This led to the public belief that the allegations were true when they were, in fact, false.¹⁶ McCarthy rose to prominence in 1950 by claiming in a speech that fifty-seven communists had made their way into the State Department.¹⁷ McCarthy would ultimately head the Committee on Government Operations and its Permanent Senate Subcommittee on Investigations.¹⁸ Over the next two years, McCarthy investigated numerous government departments and questioned an innumerable number of witnesses.¹⁹ While McCarthy “never made a case against anyone,” the accusations caused many to lose their jobs and face public condemnation for their alleged association with a communist organization.²⁰ McCarthy’s allegations were a clear use of guilt by association.

⁹ *Guilt by Association*, DICTIONARY.COM, <https://www.diction-ary.com/browse/guilt-by-association> (last visited Sept. 28, 2020).

¹⁰ Achter, *supra* note 1.

¹¹ Baumgartel, *supra* note 2, at 42.

¹² David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 2 (2003). This note will not focus on guilt by association in the context of the war on terrorism.

¹³ Achter, *supra* note 1.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

The period when McCarthy operated is now known as the Red Scare, which took place during the Cold War.²¹ During this time, there was widespread concern that communists, called “reds,” had infiltrated the government towards the end of Truman’s presidency.²² This concern was due to heightened political tensions between the United States of America and the Soviet Union.²³ Rare cases of espionage contributed to the paranoia.²⁴ All of these factors led to the rise in power and the popularity of Senator McCarthy.²⁵

People were labeled as “[C]ommunist sympathizers,” often incorrectly, and had their lives severely impacted.²⁶ “[S]ympathizers” were “hounded by law enforcement, alienated from friends and family and fired from their jobs.”²⁷ All of this terrible treatment was due to nothing more than a false allegation or an exercise of the democratic right to join a political party.²⁸ The Red Scare hysteria also played a part in hampering the civil rights movement of the time.²⁹ The FBI and J. Edgar Hoover were quick to label any kind of protest as a communist subversion.³⁰ This included protests led by Martin Luther King, Jr., in an effort to discredit the civil rights leader.³¹ The Red Scare and McCarthyism are an important time to remember when the use of guilt by association negatively impacted many American citizens. We see this used in some form today with certain regulatory and licensing agencies.³² It is important that this use of guilt by association on innocent citizens is not implemented again.

²¹ Paul H. Oehser, *United States: The Red Scare*, BRITANNICA (Oct. 26, 1998), <https://www.britannica.com/place/United-States/The-Red-Scare>.

²² *Id.*

²³ *Id.*

²⁴ *Id.* (noting that Julius and Ethel Rosenberg were convicted in 1951 for the theft of atomic secrets from the U.S. for the Soviets). It is important to note that the Rosenbergs were sentenced to death making them the only civilians ever executed for espionage. See Rodger Citron, *What the FBI Knew: The Case Against the Rosenbergs From the Investigators' Perspective*, JUSTIA (Sept. 6, 2018), <https://verdict.justia.com/2018/09/06/what-the-fbi-knew-the-case-against-the-rosenbergs-from-the-investigators-perspective>.

²⁵ Oehser, *supra* note 21.

²⁶ *Red Scare*, HISTORY (June 1, 2010), <https://www.history.com/topics/cold-war/red-scare>.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² See discussion *infra* notes 57-121 and accompanying text.

B. Civil RICO and Guilt by Association

The Racketeer Influenced and Corrupt Organizations Act was passed into law in 1970 with the purpose of eradicating organized crime.³³ The greatest concern with organized crime was its infiltration of legitimate businesses, resulting in corruption across many different industries.³⁴ The elements that contribute to a RICO violation include “(1) the presence of a defendant ‘person,’ (2) an ‘enterprise,’ (3) and a ‘pattern’ of (4) specifically defined predicate ‘racketeering’ acts.”³⁵ A “person” is defined as “any individual or entity capable of holding a legal or beneficial interest in property.”³⁶ Further, an “enterprise” is defined as “an individual, partnership, corporation, association, or other legal entity, and any union or group of individuals *associated* in fact although not a legal entity.”³⁷ Finally, a “pattern of racketeering activity” requires “at least two acts of racketeering activity . . . the last of which [having] occurred within ten years after a prior act of racketeering activity.”³⁸

RICO’s power has rarely been limited by the courts, so the Supreme Court’s decision in *Reves v. Ernst & Young*³⁹ was a significant ruling. In *Reves*, the Court adopted the “operation or management test,” which required an individual to manage or control the enterprise in order for that person to be liable under RICO.⁴⁰ The Court explained its “operation and management test” by discussing how it defined the words “conduct” and “participate” as they appear in the RICO statute.⁴¹ This led the Court to conclude that in order to “participate, directly or indirectly, in the conduct of such enterprise’s affairs,” Congress intended that person to have some hand in directing those affairs.⁴² This limitation is important because Congress intended to

³³ Baumgartel, *supra* note 2, at 3.

³⁴ *Id.* at 3-4.

³⁵ *Id.* at 5 (citing 18 U.S.C.A § 1962 (c) (West)).

³⁶ 18 U.S.C.A §1961 (3) (West).

³⁷ *Id.* at (4) (emphasis added).

³⁸ *Id.* at (5).

³⁹ 507 U.S. 170 (1993).

⁴⁰ *Id.* at 176.

⁴¹ *Id.* at 179 (“[C]onduct [requires] some degree of direction and the word participate [requires] some part in that direction.”).

⁴² *Id.* (“It seems that Congress chose a middle ground, consistent with a common understanding of the word ‘participate’ – ‘to take part in.’”).

ensure that outsiders, who would otherwise be exempt from liability, are not pulled back in by a broad interpretation of RICO.⁴³ Although this case dealt specifically with 18 U.S.C. § 1962(c),⁴⁴ the ruling brought a significant change to the level of involvement required to be held liable under RICO.⁴⁵ There is still criticism of how the courts interpret RICO, mainly with the courts' failure to take into account the level of involvement the defendant had in the criminal enterprise.⁴⁶

The heightened requirement implemented by the Supreme Court is analogous to the changes suggested later in this Note.⁴⁷ Civil RICO cases use a similar type of guilt by association as the regulatory agencies discussed in this Note. Unlike RICO, the agencies' rules and regulations have not been changed to limit the potential for innocent workers to be punished. The Supreme Court recognized that there needs to be something more than just a mere association to be held liable in a civil RICO case.⁴⁸ The proposed changes suggest that these agencies should follow suit.

III. REGULATORY AND LICENSING AGENCIES USING GUILT BY ASSOCIATION

The history of organized crime's involvement in and control of the waterfront and gaming industries is important when analyzing the current regulatory laws. Organized crime first came to power in America through its exploitation of Prohibition in the 1920s.⁴⁹ Following Prohibition, Lucky Luciano laid the foundation of the American Mafia that is still in operation today.⁵⁰ The Mafia retained control of the ports used during prohibition, specifically in New York and New Jersey,

⁴³ Baumgartel, *supra* note 2, at 3.

⁴⁴ *Reves*, 507 U.S. at 172.

⁴⁵ *Id.* at 179.

⁴⁶ Baumgartel, *supra* note 2, at 46; *see also* United States v. Oreto, 37 F.3d 739, 750 (1st Cir. 1994); Carrie J. Disanto, Case Comment, *Reves v. Ernst & Young: The Supreme Court's Enigmatic Attempt to Limit Outsider Liability Under 18 U.S.C. § 1962(C)*, 71 NOTRE DAME L. REV. 1059, 1070 (1996).

⁴⁷ *See* discussion *infra* Section IV.B.

⁴⁸ *Reves*, 507 U.S. at 179.

⁴⁹ *Mafia in the United States*, HISTORY, <https://www.history.com/topics/crime/mafia-in-the-united-states> (June 7, 2019).

⁵⁰ *Id.* (creating the Commission, the mob's governing body, and dividing the members into five families).

which were controlled by brothers Albert and Tony Anastasia.⁵¹ Due to the Anastasias' control, the Gambino Crime family has historically held a strong grip on the ports in New York and New Jersey, along with the Lucchese family.⁵² The ports afforded the American Mafia numerous ways to make illicit profits through smuggling, racketeering, illegal gambling, and extortion.

Illegal gambling has always been a staple of the American Mafia,⁵³ but the Mafia's involvement in Las Vegas casinos took this to new heights. The Mafia came to Las Vegas in the 1950s and saw enormous profits.⁵⁴ When law enforcement and corporate America began to run the Mafia out of town in the 1960s, it looked to other states, especially in the Northeast, with legalized gambling.⁵⁵ This was an easy transition because the Mafia had a stronghold on Atlantic City following Prohibition.⁵⁶

A. The Waterfront Commission of New York Harbor

The Waterfront Commission of New York Harbor (“Commission”) is a bi-state agency that seeks to fight organized crime and corruption in the New York and New Jersey ports.⁵⁷ The Waterfront Commission Act (“Waterfront Act”), which gives the Commission its power, states any license or registration may be revoked or suspended for, among other things, “[a]ssociation with a person who . . . [is] a member or associate of an organized crime group . . . where such association creates a reasonable belief that the participation of the applicant . . . would be inimical to the policies of this act.”⁵⁸

*Pontoriero*⁵⁹ involved a situation where the Commission was looking to revoke a longshoreman’s registration for an alleged

⁵¹ Mike Dickson, *Albert Anastasia – The Original Murder Inc. Part I*, AM. MAFIA HIST. (Sept. 21, 2014), <https://americanmafiahistory.com/albert-anastasia/>.

⁵² *Id.*

⁵³ *Mafia in the United States*, *supra* note 49.

⁵⁴ Jeff German, *The Mafia's history in Las Vegas: From Bugsy Siegel to Anthony Spilotro*, LAS VEGAS REV.J., <https://www.reviewjournal.com/local/local-las-vegas/the-mafias-history-in-las-vegas-from-bugsy-siegel-to-anthony-spilotro-413833/> (Oct. 21, 2019, 8:00 AM).

⁵⁵ *Id.*

⁵⁶ *Mafia in the United States*, *supra* note 49.

⁵⁷ *In re Pontoriero*, 106 A.3d 532, 535 (N.J. Super. Ct. App. Div. 2015).

⁵⁸ N.Y. UNCONSOL. LAW § 9913 (6) (McKinney 2006).

⁵⁹ 106 A.3d 532 (N.J. Super. Ct. App. Div. 2015).

association he had with two members of the Genovese crime family.⁶⁰ Pasquale Pontoriero held the position of hiring agent, which grants him some discretion in his ability to grant or deny work to longshoremen.⁶¹ Pontoriero was accused of associating with Tino Fiumara, a Genovese capo (captain), and Stephen DePiro, who took control of the ports after Fiumara's death.⁶² There was significant evidence to show that Pontoriero had an association with these two men.⁶³ Based on this evidence, the Commission brought an administrative hearing against Pontoriero, seeking to revoke his hiring agent license.⁶⁴ The Administrative Law Judge presiding over the hearing found that all charges against Pontoriero had been established and recommended his license be revoked.⁶⁵ The Administrative Law Judge also determined that Waterfront Act holds longshoremen strictly liable for their associations.⁶⁶ The Commission adopted the Administrative Law Judge's findings and revoked Pontoriero's license, which Pontoriero appealed to the New Jersey Appellate Division.⁶⁷

The New Jersey Appellate Division reviewed Pontoriero's appeal, which challenged the Commission's interpretation of the Waterfront Act.⁶⁸ Pontoriero argued that the Commission's findings were not supported by sufficient evidence, that the strict liability interpretation of the Waterfront Act was erroneous, and that revoking his license was "shocking to one's sense of fairness."⁶⁹ The Appellate Division started its analysis by interpreting and defining the language in the Waterfront Act and determined its scope.⁷⁰ The court agreed with the Commission's definition of "association," which was: "to keep

⁶⁰ *Id.* at 535.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 536 (establishing that Pontoriero served as secretary and treasurer for a known social club of the Genovese family, that he attended a private dinner party for Fiumara, and that he visited DePiro at his home twice within four or five months).

⁶⁴ *Id.*

⁶⁵ *Id.* at 537-38.

⁶⁶ *Id.* (determining that the Waterfront Act does not require the association be maintained for a criminal purpose nor that the longshoreman know or should know the criminal history of the person they are associating with).

⁶⁷ *Id.* at 538.

⁶⁸ *Id.* at 535.

⁶⁹ *Id.* at 538.

⁷⁰ *Id.* at 539.

company, as a friend, companion or ally.”⁷¹ This definition would apply to both “social and economic relationships.”⁷² The court refused to adopt a heightened legal definition of the word “association” as it would undermine the legislative intent of the Waterfront Act.⁷³ The court then defined the term “inimical” as “adverse to the public confidence, trust, credibility, integrity, and stability of the industry.”⁷⁴ The court did not require the Commission to prove that the association was for an illegitimate purpose nor that the applicant or registrant knew or should have known the criminal history of the person they were accused of associating with.⁷⁵ Thus, the court imposed a strict liability interpretation of the Waterfront Act.⁷⁶

The court noted it was just as concerned with the appearance the association created as with whether the association would actually lead to corruption.⁷⁷ The court reasoned this was the correct interpretation because the 2007 amendment⁷⁸ to the Waterfront Act, “explicitly abrogated any specific requirement of actual or constructive knowledge.”⁷⁹ The court explained that the Waterfront Act is strictly interpreted because the ports need to be highly regulated to prevent corruption and the influence of organized crime.⁸⁰ The court noted that organized crime’s control over the waterfront depends on a “perception of influence [just as much as] actual collusion between hiring agents and organized crime.”⁸¹

Pontoriero’s broad interpretation of the Waterfront Act means that workers can be removed or denied entry based on unknown or tenuous associations. The previous statutory language should not have been amended. The previous interpretation focused on the associations

⁷¹ *Id.* at 541.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 542 (“The alleged association need only ‘create a reasonable belief’ that the licensee’s continued participation is inimical to the Waterfront Act . . .”).

⁷⁸ The language prior to the 2007 amendment is important to keep in mind as a basis for my suggested changes to the guilt by association standard used by these agencies.

⁷⁹ *Id.* at 541 (noting the previous statute required that the licensee or registrant “*knows or should know*” the person they are associating with is a member or associate of an organized crime group).

⁸⁰ *Id.* at 542.

⁸¹ *Id.*

that had a greater certainty of leading to corruption rather than the unknowing association with an organized crime member that the statute now focuses on.⁸² The decision here should be an example to follow in future cases for the Commission. Even using my suggested changes,⁸³ Pontoriero would still have been subject to revocation. It was clear from the facts that he either knew or should have known of Fiumara and DePiro's status in the Genovese family. Even though this case set forth a strict liability interpretation of the Waterfront Act,⁸⁴ the case still shows the proper way the ports should be regulated.

B. The New Jersey Casino Control Commission

The New Jersey Casino Control Commission ("CCC") is tasked with issuing licenses to people or companies who seek to operate in a casino in New Jersey.⁸⁵ The Casino Control Act⁸⁶ ("CCA"), which grants the CCC its power, states that the CCC can deny a casino license to any applicant who is "an associate of a career offender or career offender cartel in such a manner which creates a reasonable belief that the association is of such a nature as to be inimical to the policy of this act."⁸⁷

In *In re Hotel and Restaurant Employees*,⁸⁸ the case involved hearings the CCC conducted into the possible disqualification of union members under the CCA.⁸⁹ President Frank Gerace and Business Manager Frank Materio were accused of associating with Nicodemo Scarfo, who led the Bruno crime family since 1981.⁹⁰ The CCC presented substantial evidence to show the association among Gerace, Materio, and Scarfo.⁹¹ There was Scarfo's phone list with Gerace and Materio on it.⁹² There was evidence that Gerace and Materio helped

⁸² *Id.*

⁸³ See discussion *infra* Section IV.B.

⁸⁴ See *Pontoriero*, 106 A.3d at 542.

⁸⁵ *In re Hotel & Rest. Emp. & Bartenders Int'l Union Loc. 54*, 496 A.2d 1111, 1117 (N.J. Super. Ct. App. Div. 1985).

⁸⁶ N.J. STAT. ANN. § 5:12 (West 2011).

⁸⁷ *Id.* at § 5:12-86 (f).

⁸⁸ 496 A.2d 1111 (N.J. Super. Ct. App. Div. 1985).

⁸⁹ *Id.* at 1116.

⁹⁰ *Id.* at 1117-18.

⁹¹ *Id.* at 1118-20.

⁹² *Id.* at 1118.

Scarfo obtain bail.⁹³ There was also evidence of business dealings among them and frequent social interactions.⁹⁴ Based on this evidence, the CCC disqualified Gerace and Materio because they associated with a career offender, and that association was inimical to the CCA.⁹⁵ Gerace and Materio appealed this decision to the New Jersey Appellate Division.⁹⁶

The Appellate Division began its analysis of the case by defining the term “inimical” as “harmful or adverse.”⁹⁷ The court determined that if the CCC had a “reasonable belief” the licensee’s association with a career offender was adverse to the policy of the CCA, it has the right to disqualify the licensee.⁹⁸ The court stated that it is not important whether the challenged association is itself improper, but whether it “constitutes evidence of an external influence.”⁹⁹ The court explained the public policy reasoning behind its decision by stating that there is a strong state regulatory interest in all aspects of casino activities.¹⁰⁰ This regulatory interest is necessary to promote the exclusion of criminals and organized crime figures from participating in the gaming industry through labor unions.¹⁰¹

Although the court did not expressly state it imposed a strict liability interpretation of the CCA as it did with the Waterfront Act in *Pontoriero*,¹⁰² it certainly implied that interpretation.¹⁰³ This is another regulation that may give the CCC too great a power. There is no requirement that the licensee know or should know he/she is associating with a career offender. Without actual knowledge as a requirement, the regulation has the potential to be severely harsh on those seeking to acquire a license to operate in a New Jersey casino. There are valid policy concerns for regulating the gaming industry. However, there needs to be a limit. The CCC should make it a goal to limit the punishment of innocent employees and applicants as well as preventing organized crime in the casinos. The court’s strict liability

⁹³ *Id.* at 1119.

⁹⁴ *Id.*

⁹⁵ *Id.* at 1117.

⁹⁶ *Id.*

⁹⁷ *Id.* at 1121

⁹⁸ *Id.* at 1122.

⁹⁹ *Id.* at 1124.

¹⁰⁰ *Id.* at 1121.

¹⁰¹ *Id.*

¹⁰² *In re Pontoriero*, 106 A.3d 532, 541 (N.J. Super. Ct. App. Div. 2015).

¹⁰³ *Hotel & Rest. Emp.*, 496 A.2d at 1124.

interpretation of the regulations opens up the possibility for innocent employees or applicants to be caught in a net that is cast too wide. The intent of the regulation can still be achieved even if its reach is narrowed so as to avoid punishing innocent employees and applicants.

C. The Pennsylvania Gaming Control Board

The Pennsylvania Gaming Control Board (“Gaming Board”) is responsible for issuing and reviewing licenses to operate in Pennsylvania casinos.¹⁰⁴ The Pennsylvania Race Horse Development and Gaming Act¹⁰⁵ (“Gaming Act”) gives the Gaming Board its regulatory power.¹⁰⁶ The Gaming Act affords the Gaming Board the power to reject an application for or renewal of a license based on two factors.¹⁰⁷ First, the applicant must show by “clear and convincing evidence that [he/she] is a person of good character, honesty, and integrity.”¹⁰⁸ Second, the applicant must also show that he/she is a person whose “associations do not pose a threat to the public interest or the effective regulation and control of [casino operations].”¹⁰⁹

In *Sonic Services Inc.*,¹¹⁰ the Gaming Board sought to revoke Sonic Services’ registration to operate restaurant services in a Pennsylvania casino.¹¹¹ Sonic Services was solely owned by Michael Giammarino, who was accused of associating with John Brescio, a member of the Genovese crime family.¹¹² Even though Brescio was Giammarino’s step-father, the Gaming Board felt that the business relationship between the two went beyond the familial ties¹¹³ making the association “a threat to the public interest or the effective regulation and control of [casino operations].”¹¹⁴ Since the relationship went

¹⁰⁴ *Sonic Serv. Inc., v. Pa. Gaming Control Bd.*, 219 A.3d 296, 298-99 (Pa. Commw. Ct. 2019).

¹⁰⁵ 4 PA. Stat. and Cons. Stat. §§ 1201-1214 (West 2017).

¹⁰⁶ 219 A.3d at 302.

¹⁰⁷ § 1202 (b)(23).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ 219 A.3d 296 (Pa. Commw. Ct. 2019).

¹¹¹ *Id.* at 298.

¹¹² *Id.*

¹¹³ *Id.* at 299 (establishing that Giammarino took a controlling interest in Brescio’s pizzeria (Lombardi’s) and that Brescio named Giammarino as the sole beneficiary of a trust he took control of when his wife, Giammarino’s mother, died).

¹¹⁴ 4 PA. Stat. and Cons. Stat. §1202 (b)(23) (West 2017).

beyond familial ties, the Gaming Board decided to revoke Sonic Services's registration which Giammarino appealed.¹¹⁵

The Pennsylvania Commonwealth Court reviewed Giammarino's appeal, which challenged the Gaming Board's interpretation of the Gaming Act.¹¹⁶ Giammarino argued there was a lack of sufficient evidence to establish the alleged association and that the Gaming Board failed to consider his efforts to disassociate from the organized crime members.¹¹⁷ The court began its analysis by interpreting the meaning of the Gaming Act, specifically the section concerning organized crime associations.¹¹⁸ The court defined "associate" as "to join often in a loose relationship as a partner, fellow worker, colleague, friend, companion, or ally."¹¹⁹ The court held that the main focus must be on the "effect that the offending association has on the policies to be served by the [Gaming Act]."¹²⁰ The court reasoned that the primary objective is to "protect the public through the regulation and policing of all activities involving gaming and practices that continue to be unlawful."¹²¹

This Pennsylvania court's interpretation is less clear than others of similar acts that do not allow an association with organized crime members or other career criminals. It is not clear if the applicant or licensee needs to know or should know the person he/she is associating with is a member of organized crime. It is unclear whether the statute is interpreted as a strict liability statute or not. This is troublesome for a different reason than the other cases analyzed. The lack of clarity makes it hard for someone to follow the rules and makes it difficult to predict what associations will be grounds for a revocation of or the failure to issue a license.

¹¹⁵ *Sonic Serv.*, 219 A.3d at 301.

¹¹⁶ *Id.* at 301-02.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 302.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 306.

¹²¹ *Id.*

IV. EMPLOYEE DEFENSES TO GUILT BY ASSOCIATION AND A CHANGE IN THE REGULATION

A. First Amendment Right of Freedom of Association

Employees that have had their licenses or registrations revoked or their applications denied sometimes argue that the regulation or act of the agencies has violated their First Amendment right to freedom of association.¹²² The First Amendment of the Constitution states, “Congress shall make no law . . . abridging the freedom of . . . the right of the people peaceably to assemble.”¹²³ The Supreme Court has interpreted the language of the First Amendment and found that it protects two types of associations.¹²⁴ The first type of association protected is a person’s choice to “enter into and maintain certain intimate human relationships.”¹²⁵ The second type of association protected is a person’s right to associate for the purpose of engaging in the activities allowed by the First Amendment.¹²⁶

In *Hotel and Restaurant Employees*, the union members claimed their right of intimate association was violated by the CCC when it revoked their license.¹²⁷ The union members claimed that the CCC’s decision to revoke their license due to their association with a member of organized crime, violated their First Amendment right.¹²⁸ The union members argued that their association with the organized crime member was purely social and an intimate human relationship that should be protected; the New Jersey Appellate Division disagreed.¹²⁹ The court reasoned that the CCC had a valid interest in “maintaining the integrity, as well as the appearance of integrity, of the gaming industry.”¹³⁰ The court noted that the right of association is

¹²² See *In re Hotel & Rest. Emp. & Bartenders Int’l Union Loc. 54*, 496 A.2d 1111 (N.J. Super. Ct. App. Div. 1985); see also *In re Application of Martin*, 447 A.2d 1290 (N.J. 1982).

¹²³ U.S. CONST. amend. I.

¹²⁴ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-18 (1984).

¹²⁵ *Id.* at 617.

¹²⁶ *Id.* at 618 (“[T]he Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion.”).

¹²⁷ See *Hotel & Rest. Emp.*, 496 A.2d 1111.

¹²⁸ *Id.* at 1124.

¹²⁹ *Id.* at 1126.

¹³⁰ *Id.* (citing *Lewitus v. Colwell*, 479 F.Supp. 439, 448 (D. Md. 1979)).

not absolute.¹³¹ This is especially true with intimate personal relationships.¹³² The only types of intimate personal relationships that are protected by the First Amendment are those that “attend the creation and sustenance of a family, the raising and educating of children and cohabitation with one’s relatives.”¹³³ The union members association was not a familial relationship. By conceding that the state has a compelling interest in deterring organized crime from gaining control of unions representing casino employees, the union members failed in their argument that their association was protected by the First Amendment.¹³⁴ A person invoking the First Amendment right to associate will usually not be granted protection because it is a high bar to prove there is a compelling interest. Employees should be afforded some protections and, therefore, a change is needed.

B. Changes to the Regulations

The current standard agencies use to regulate an employee’s association with an organized crime member should be changed to a stricter standard. The new standard should include a requirement that the licensee or registrant knows or should know the person they are associating with is a member of organized crime. Once a knowing association is established, if that association creates a perception of corruption, the worker or applicant should be removed or denied. However, this analysis should be implemented using a sliding scale that takes into consideration the level of control an employee possesses. Employees who possess little to no control would be given more leniency over those who possess considerable amounts of control. There needs to be a shift away from the strict liability interpretation of these association regulations. However, applicants should be given less deference than current employees. A strict liability interpretation would be appropriate for applicants.

These changes and limits are important to ensure that workers are not unfairly punished for harmless associations or when they did

¹³¹ *Id.* at 1127 (“Infringements on [the right to associate] may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.” (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984))).

¹³² *Id.* at 1126.

¹³³ *Id.* (quoting *Roberts*, 468 U.S. at 619).

¹³⁴ *Id.* at 1127.

not know they were associating with a member of organized crime. It would be unjust to hold workers strictly liable for a mere association they had no knowledge of. Similar to the limits placed on the RICO statute, these restrictions are necessary to limit the number of workers subject to punishment and to protect those who are innocent.

The proposed changes to the agencies' regulations were informed by using the limits *Reves*¹³⁵ placed on RICO as well as the language of the Waterfront Act prior to 2007.¹³⁶ In *Reves*, the Court limited the potential reach of RICO in civil suits.¹³⁷ A similarity between civil RICO cases and the agencies' regulations is the guilt by association aspect contained in both. Prior to *Reves*, the RICO statute allowed outsiders, those that had very little involvement in a criminal organization or group, to be held liable. The Supreme Court recognized a change was needed, which led to the *Reves* decision. A change with agencies' regulations is needed as well. The language of the Waterfront Act prior to its amendment in 2007 is a helpful starting point for potential changes. The language should never have been amended, which is why the first suggested change is to require a person have actual knowledge of their association.

The first element, actual knowledge, is important to ensure those who know they are associating with a member of organized crime are punished. Requiring a person to have actual knowledge of his/her association addresses a weakness in the current regulations and statutes. None of the cases discussed above hold that the licensee or registrant needs to have knowledge about their association.¹³⁸ To determine if the first element has been met, the agency should ask whether a reasonable person in the position of the registrant or licensee knows or should know whom they are associating with. While the State has a legitimate interest in limiting corruption and the presence of organized crime on the waterfront and in casinos, the rights and interests of the workers must also be taken into consideration.

¹³⁵ *Reves v. Ernst & Young*, 507 U.S. 170, 183 (1993) (holding that one is not liable under RICO unless that person participated in the operation or management of the enterprise).

¹³⁶ *In re Pontoriero*, 106 A.3d 532, 541 (N.J. Super. Ct. App. Div. 2015) ("Prior to 2007, the [Act] prohibited [an] [a]ssociation with a person whom the licensee or registrant *knows or should know* is a member or associate of an organized crime group or cartel or of a terrorist group or cartel.").

¹³⁷ *See Reves*, 507 U.S. 170.

¹³⁸ *See* discussion *supra* notes 57-121 and accompanying text.

The second element, the likelihood of corruption, provides further protection by coupling a perception of corruption with the sliding scale based on the control and power an employee possesses. This sliding scale would be used to ensure that the likelihood and severity of the punishment increases with the amount of control an employee possesses. This would work to punish those whose associations with members of organized crime would have a higher probability of leading to corruption. *Pontoriero* set forth these non-dispositive factors to determine the likelihood that corruption will result from an association:

- (1) The nature and sensitivity of the licensee's position;
- (2) The time elapsed since the licensee's last interaction with the associate;
- (3) The duration and frequency of the association;
- (4) The purpose and nature of the association;
- (5) Whether the association was attenuated through third-parties;
- (6) The associate's character and reputation;
- (7) The licensee's knowledge or reasonable efforts to determine the associate's character and reputation;
- (8) If there is more than one associate, the number of associates, and the relationship amongst them;
- (9) Termination of the association if any;
- (10) The reasons for such termination; and
- (11) Any other relevant facts or circumstances.¹³⁹

These factors established in *Pontoriero* are important and should be utilized in every association case analysis.¹⁴⁰ The ninth factor is one to especially consider as it could shed light on a different way to deal with these situations. Perhaps these agencies could impose a probationary period on those who are found to have knowing associations with members of organized crime. This probationary period can allow the worker to dissociate from that individual, and then the case can be reassessed at the end of the probation. Again, it is important to keep in mind that these are high-stakes situations because someone's livelihood is being taken away. The agencies should attempt to avoid termination while still working to achieve their goals. A probationary period allowing for dissociation is just one example of creative ways to resolve the issue that does not result in the worker being fired. This is necessary to protect the innocent workers who may have a very

¹³⁹ *Pontoriero*, 106 A.3d at 543.

¹⁴⁰ *Id.*

limited and harmless association with an organized crime member or a career criminal.

The proposed changes will allow for revocation of or the refusal to issue a license or registration to work for an association with a member of organized crime or career criminal where (1) the licensee or registrant knows or should know the person they are associating with is a member of organized crime; and (2) where that association results in a perception of corruption. The decision made by the agency should depend on the sliding scale discussed above. The agencies should also consider options other than termination that would benefit both the agency and the worker. The factors listed above should be used to aid the agency in making its decision.

V. WHY THESE CHANGES ARE NEEDED

When looking at the different contexts in which “guilt by association” has been used, we see mainly negative results. As discussed earlier, its use during the Cold War led to false accusations against many Americans, resulting in loss of jobs and destruction of the reputation of those accused.¹⁴¹ Further, we saw this develop with civil RICO cases in the 1990s and continue until the present, which led to or had the ability to lead to outsiders, who would otherwise be exempt from liability, being pulled in by a broad RICO statute.¹⁴² The regulatory agencies similarly apply guilt by association broadly. While their ultimate goal of preventing the infiltration of organized crime is very important to help protect their respective industries and the public as a whole, they should have another goal in mind as well. These agencies should craft their regulations to prevent innocent employees and applicants from being punished.

The regulatory changes are analogous to the Supreme Court's analysis of RICO's structure and implementation.¹⁴³ The Supreme Court decided to limit the scope and reach of RICO by requiring a person to have some management or control of the criminal operation in order to be held liable.¹⁴⁴ The Court determined it was important to

¹⁴¹ See discussion *supra* notes 13-32 and accompanying text.

¹⁴² See discussion *supra* notes 33-48 and accompanying text.

¹⁴³ See *Reves v. Ernst & Young*, 507 U.S. 170 (1993).

¹⁴⁴ *Id.* at 179 (“RICO liability is not limited to those with a formal position in the enterprise, but some part in directing the enterprise's affairs is required.”).

prevent those who were innocently or minimally involved in a criminal operation from being liable under RICO.¹⁴⁵ RICO's goal was to target and eradicate organized crime from legitimate businesses, not to catch innocent individuals in its wide net.¹⁴⁶ The statutes and rules of the agencies regulating the ports and casinos should be no different. They must not lose sight of the goal, which is to prevent the infiltration of organized crime. The goal is not to punish innocent employees and applicants.

Procedural due process is another reason these administrative procedures need to be specifically tailored. Procedural due process places constraints on governmental decisions that “deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.”¹⁴⁷ The Supreme Court dealt with this in the context of an administrative action in *Mathews v. Eldridge*.¹⁴⁸ This specific case dealt with social security benefits being paid to an injured worker, Eldridge.¹⁴⁹ The issue before the Court was whether the Fifth Amendment's Due Process Clause required a hearing prior to terminating Eldridge's benefits.¹⁵⁰

The Court acknowledged precedent that established the right to an “evidentiary hearing prior to the termination of welfare benefits.”¹⁵¹ A hearing is a requirement before an individual can be deprived of a property interest because a fundamental element of due process is the “opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”¹⁵² The Court established several factors that would dictate the specific due process required:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal

¹⁴⁵ *Id.*

¹⁴⁶ Baumgartel, *supra* note 2, at 3-4.

¹⁴⁷ *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

¹⁴⁸ *See id.*

¹⁴⁹ *Id.* at 323.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 325 (citing *Goldberg v. Kelly*, 397 U.S. 254 (1970)).

¹⁵² *Id.* at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

and administrative burdens that the additional or substitute procedural requirement would entail.¹⁵³

Along with the factors above, the most important consideration in “assessing the validity of any administrative decision-making process” is the “degree of potential deprivation that may be created.”¹⁵⁴ The Court held that the spirit of due process requires that “a person in jeopardy of serious loss be given notice of the case against him and [the] opportunity to meet it.”¹⁵⁵ The procedures simply need to be tailored in light of the impact of the decision to be made.¹⁵⁶ The Court ultimately decided that, in this case, an evidentiary hearing was not required before Eldridge's disability benefits could be terminated.¹⁵⁷

It is important to keep in mind that the type of “deprivation” involved in *Mathews* was social security benefits for an injury. While this is important, it is not nearly as grave as someone losing a job. Being fired or terminated from a job is a serious punishment that could be levied on someone. Therefore, a situation like that calls for the strongest protections. While these agencies hold hearings prior to terminating someone for violating an association regulation, there could be more protections afforded to the employees. This is exactly why these changes are needed. The utmost care must be taken that any decision to terminate is the right decision based on evidence. It is also why these agencies should explore options other than termination when the situation allows for it. As highlighted above, one such option could be the use of probationary periods. Procedural due process is important, and its principles are something these agencies should keep in mind.

Robert Sumner's case highlights the reason these changes are needed. Robert Sumner became a longshoreman in April of 2019 but was removed shortly after in August of 2020.¹⁵⁸ He was removed because of an Instagram post his friend, Brandon Garcia, put up six years before Sumner began working as a longshoreman.¹⁵⁹ Sumner was

¹⁵³ *Id.* at 335.

¹⁵⁴ *Id.* at 341.

¹⁵⁵ *Id.* at 348 (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring)).

¹⁵⁶ *Id.* at 349.

¹⁵⁷ *Id.*

¹⁵⁸ Jerry Capeci, *This Week in Gang Land: It's a Family Affair for New ILA Local President Brandon Garcia*, GANG LAND NEWS (Sept. 17, 2020), <https://www.ganglandnews.com/members/thisweek.htm?>

¹⁵⁹ *Id.*

friends with Garcia since childhood.¹⁶⁰ Unfortunately for Sumner, Garcia's grandfather, Albert "The Bull" Cernadas, is an associate of the Genovese family and a convicted waterfront racketeer.¹⁶¹ The Instagram post in question contained a photo of Sumner, Garcia, Al Cernadas Sr., and Al Cernadas Jr. attending a Spain versus Ireland soccer match at Yankee Stadium in 2013.¹⁶² At the time, the post was not an issue for Sumner, but it soon would become one.¹⁶³

Because of Cernadas's status, he was placed on the International Longshoremen's Association ("ILA") "Barred List" which prevented him from making contact with any ILA member.¹⁶⁴ This came back to bite Sumner once he began working as a longshoreman.¹⁶⁵ Shortly after he started, an official with the Commission discovered Garcia's Instagram post, which led the Commission to bring an administrative hearing against Sumner seeking his removal.¹⁶⁶ The only evidence of Sumner's association with Cernadas was the one Instagram post in which there was a comment "suggesting that Sumner had become Cernadas's favorite grandson."¹⁶⁷ Even though the Administrative Law Judge ("ALJ") presiding over the hearing found that Sumner led an "exemplary life" and had no "criminal or disciplinary history," he recommended revocation of Sumner's registration.¹⁶⁸ The ALJ found that Sumner knew of Cernadas's organized crime association and that the association created a "reasonable belief that [Sumner's] participation as a longshoreman would be inimical to the policies of the [Waterfront Act]."¹⁶⁹ It was determined that the Instagram post "clearly depict[ed] an association between Sumner and Cernadas, as a friend, companion or ally in a social relationship."¹⁷⁰

The ALJ also used evidence of fraud and misrepresentation with Sumner's prequalification interview.¹⁷¹ It was determined that

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Longshoreman Removed from Waterfront for Frauds and Association with a Genovese Crime Family Associate, Career Offender and Convicted Racketeer,*

Sumner, who was under oath, did not disclose his relationship with Brandon Garcia because he feared that may bring on questions about Cernadas.¹⁷² This, along with his association with Cernadas, led to Sumner's removal.¹⁷³

While the fraud and misrepresentations should not be condoned, Sumner's case highlights issues with the agencies' rules. It is unclear if Sumner knew of the strict liability interpretation of the Waterfront Act; however, if he did, then that knowledge could have motivated Sumner's misrepresentation. Even if Sumner did not know of the strict liability, he may have known that a single picture of him and Cernadas would mean he would not be allowed to work on the waterfront. Regardless of the weight the ALJ placed on the misrepresentation, the "association" was likely the determining factor. This demonstrates the problems present with these agencies.

Examining Sumner's case under the suggested changes, he would not have been removed had there been no fraud or misrepresentation. Even if the first element, knowing association, was met, the second element was not. There is a strong argument against removal when viewing the association in relation to the factors set forth in *Pontoriero* as well as the sliding scale. First, six years had elapsed since Sumner's association with Cernadas. Second, there was proof of an association on only one occasion, and the association was attenuated through Garcia. Finally, it can be inferred that the association ended since there is no proof of another meeting or interaction between the two. Likewise, because Sumner was a lower-level employee with little to no control or power, he would have been given more leniency under the sliding scale. It is also important to note that the association occurred before his employment began.

These changes are also needed, not because these agencies constantly revoke or fail to approve a registration or license for innocent associations, but because the power is too broad. The case highlighted above involving Robert Sumner has the potential to continue because of the way the agencies' rules and regulations are written and interpreted. Sumner's case is but one example of what could become a more common theme if the agencies are left with powers that are too broad and oppressive. We should not have to wait for a handful of

WATERFRONT COMM'N N.Y. HARBOR (Aug. 4, 2020),
<https://www.wcnyh.gov/newspage353.html>.

¹⁷² *Id.*

¹⁷³ *Id.*

employees or applicants to be wrongly accused and punished before making a change.¹⁷⁴

VI. CONCLUSION

Guilt by association has been used as an idea throughout history, mainly with negative consequences. It usually leads to innocent individuals being labeled as something they are not. This is prevalent today with certain regulatory and licensing agencies that operate on the waterfront and in the gaming industry. These industries have been overrun and controlled by organized crime, which required these agencies to develop a strict view on organized crime association among its licensees and registrants. While this is a valid concern, it should not outweigh the rights of workers in these industries and allow for an unfair application of guilt by association.

This is why these agencies rules and regulations should require a higher burden to remove a worker. There are alternative ways to regulate these industries that are less oppressive but that are still able to achieve their purpose. This change is important so that innocent workers who either had a harmless association with a member of organized crime or did not know they were associating with that kind of person are not unfairly punished. The only workers that should be punished are those that know they are doing something wrong. They must know or should know they are associating with a member of organized crime.

This Note is not meant to criticize any of these regulatory agencies. They carry out important work that promotes safety and security. However, when terminating someone's employment due to an organized crime association, care must be taken to ensure it is the right decision. These agencies could be more lenient towards these employees as required by *Mathews*. The suggested changes would not unduly burden these agencies or thwart their goals and objectives. Requiring actual knowledge of an association protects those who may have had harmless unknowing associations. The sliding scale will work to hold those employees who are granted supervisory powers and control to a higher standard. A wider range of remedies should

¹⁷⁴ This is analogous to the court's argument in *Hotel & Rest. Emp.* that "we need not wait for [the association's] detrimental effect on the . . . casino industry to become manifest before we can act." *Hotel & Rest. Emp. & Bartenders Int'l Union* Loc. 54, 496 A.2d 1111, 1124 (N.J. Super. Ct. App. Div. 1985).

be utilized, not just termination. One important alternative is the probation period discussed earlier. These are the kinds of solutions that procedural due process supports. When the deprivation of property is the removal of someone's livelihood, the stakes are at its highest. Overall, there should be a balance between fairness and employee rights. The interests of the employers and employees do not need to be at odds. Both sets of interests can be considered when important decisions regarding employment are made. The decision, however, needs to be correct.