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"SOMETHING BEYOND": THE UNCONSTITUTIONAL VAGUENESS OF RICO'S PATTERN REQUIREMENT

*Michael S. Kelley**

If ye by rules would measure
what doth not with your rules agree;
forgetting all your learning,
seek ye first what its rules may be.¹

In one of its last decisions of the 1989 term, the United States Supreme Court once again addressed a question involving the scope of the Racketeering Influenced Corrupt Organizations Act (RICO).² RICO generally prohibits individuals from engaging in a pattern of criminal conduct involving an "enterprise." This enterprise may be either a formal legal entity, such as a corporation, or an informal group of individuals. Originally designed to combat the infiltration of organized crime into legitimate businesses, RICO provides for treble damages in private civil actions and for enhanced penalties and forfeitures in criminal cases. Not surprisingly, such provisions have made RICO the darling of prosecutors and plaintiffs and the bane of criminal and civil defendants. These diverging interests have led to a number of challenges to RICO, the most recent being *H.J. Inc. v. Northwestern Bell Telephone Co.*³

In *H.J. Inc.*, the Supreme Court addressed what types of conduct constitute a "pattern of racketeering" under RICO.⁴ The petitioners, customers of Northwestern Bell Telephone Co., alleged that the company made payments to the Minnesota Public Utilities Commission to influence rate approvals.⁵ The petitioners brought their claims under section 1962 of RICO.⁶ The

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1. Hans Sachs in Richard Wagner, *DIE MEISTERSINGER*, Act I, Scene 3 (trans. Frederick Jameson).

2. Organized Crime and Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 941-48 (codified as amended at 18 U.S.C. §§ 1961-1968 (1988)).

3. 492 U.S. 229 (1989).

4. *Id.* at 233.

5. *Id.*

6. *Id.*

Court held that these payments amounted to bribes, which constituted "racketeering activity" under section 1961 of the Act, and remanded the case on the ground that the petitioners might be able to show a pattern of racketeering activity by satisfying the relationship and continuity requirements of the Act.⁷

In a concurring opinion, Justice Scalia stated that the Court's earlier decision in *Sedima, S.P.R.L. v. Imrex Co.*⁸ generated "the widest and most persistent circuit split on an issue of federal law in recent memory."⁹ The significance of Justice Scalia's concurring opinion, which was joined by three other justices, is its clanging intimation that RICO's pattern requirement may be unconstitutionally vague.¹⁰

This Article addresses the narrow question of whether the phrase "pattern of racketeering activity" satisfies the due process clause of the fifth amendment. Specifically, this Article analyzes whether the statute provides sufficient warning to potential defendants about prohibited conduct, and whether the statute provides law enforcement officials adequate guidance. Section I of the Article discusses the Racketeering Influenced Corrupt Organizations Act and its purposes. In Section II, the Article analyzes the different circuit court interpretations of "pattern," both before and in the wake of *H.J. Inc.* Section III outlines the void-for-vagueness doctrine, focusing on recent United States Supreme Court cases which have modified the doctrine. Section IV applies the void-for-vagueness doctrine to RICO's pattern requirement and concludes that the phrase "pattern of racketeering activity" is either facially or partially vague and, therefore, unconstitutional. Section V attempts to remedy RICO's vagueness by modifying the present statute. This section suggests that the phrase "pattern of racketeering activity" be replaced with the phrase "structural racketeering activity," and that the new

7. *Id.* at 234.

8. 473 U.S. 479 (1985) (5-4 decision). In *Sedima*, the petitioner alleged that the respondent, a joint venture partner, overbilled its expenses, thereby decreasing the proceeds realized by petitioner. *Id.* at 483-84. The petitioner filed claims under RICO sections 1962 and 1964. The Second Circuit dismissed the RICO claims for failure to state a claim. *Id.* at 484. The Supreme Court reversed and remanded stating that the petitioner "may maintain this action if the [respondents] conducted the enterprise through a pattern of racketeering activity." *Id.* at 500.

9. *H.J. Inc.*, 492 U.S. at 251 (Scalia, J., concurring).

10. Justice Scalia's concurrence states:

No constitutional challenge to this law has been raised in the present case, and so that issue is not before us. That the highest Court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when that challenge is presented.

Id. at 255-56. Chief Justice Rehnquist and Justices O'Connor and Kennedy joined Justice Scalia's concurring opinion.

phrase be defined explicitly in the statute. This proposed statute would pass the void-for-vagueness test without unduly restricting the scope of RICO.

I. THE PURPOSE AND SCOPE OF RICO

A. *The Context of RICO: The Organized Crime Control Act*

RICO was part of the comprehensive Organized Crime Control Act of 1970 (OCCA).¹¹ Congress enacted the OCCA to "seek the eradication of organized crime in the United States."¹² The OCCA's legislative history indicated a growing public concern with crime, particularly organized crime.¹³ For example, in urging the Senate to cease the debate over the bill's constitutionality, Senator John L. McClellan (D-Ark.) said:

Again, I insist that the crime situation in America today is such, and is progressing so rapidly, that it is imperative that this branch of Government, at least, take every action, enact every law, fashion every tool it can possibly fashion within the framework of the Constitution, to enable our law enforcement agencies and officials to combat the growing menace of crime.¹⁴

11. Pub. L. No. 91-452, 84 Stat. 922 (codified as amended in scattered sections of 18 U.S.C.). First proposed by Senator McClellan in January of 1969, the original bill, S. 30, 91st Cong., 1st Sess., did not contain the substantive provisions which the final bill, S. 30, 91st Cong., 2d Sess., contained: title VIII (dealing with syndicated gambling), title IX (dealing with racketeering), or title XI (dealing with the regulation of explosives). After the bill was amended to add these provisions, S. REP. NO. 617, 91st Cong., 1st Sess. (1969), the Senate passed S. 30 in January 1970. The House of Representatives also made certain changes in the bill, including an amendment added on October 7, 1970 which gave private plaintiffs a civil cause of action under Title IX. H.R. REP. NO. 1549, 91st Cong., 2d Sess. (1970), 116 CONG. REC. 35,203-04 (1970). On October 15, 1970, the final version of the Organized Crime Control Act became law.

12. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923. Although organized crime was the focus of the Organized Crime Control Act, certain provisions went beyond the context of organized crime. For example, the Dangerous Special Offender section of the OCCA (Title X), which provides enhanced penalties for particular types of offenders, applies to habitual offenders and to "professional" criminals as well as to racketeers. 18 U.S.C. § 3375(e) (1988).

Similarly, RICO's civil provisions allow private plaintiffs to sue defendants who engage in particular conduct even if the defendants have no link to organized crime. 18 U.S.C. § 1964 (1988); see 116 CONG. REC. 35,204 (1970) (comments by Rep. Poff, discussing difficulty of defining organized crime "precisely and definitively" and problems of limiting prohibitions to "a certain type of defendant").

13. See, e.g., 116 CONG. REC. 18,912 (1970) (statement of Sen. McClellan defending charges that the OCCA violated civil liberties by emphasizing its role in fighting organized crime); 116 CONG. REC. 35,205 (1970) (statement of Rep. Mikva, a dissenting member of the House committee that studied S. 30, noting that "the salutary purposes for which this bill aimed at organized crime was intended, somehow never c[a]me to fruition").

14. 116 CONG. REC. 25,193 (1970); see also 116 CONG. REC. 35,206-07 (1970). Representative Clancy noted that "[s]tronger laws are needed; let us pass them. Let us start enforcing

In enacting the OCCA, Congress created such new substantive laws as RICO, "cur[ed] a number of debilitating defects in the evidence-gathering process," and developed new penalties and remedies for organized crime.¹⁵

The OCCA established three substantive laws, two of which were designated to attack organized crime—the Syndicated Gambling provision (title VIII of the OCCA)¹⁶ and RICO (title IX of the OCCA).¹⁷ The Syndicated Gambling statute was Congress' response to the belief that "syndicated gambling is the mob's principal source of income."¹⁸ Congress' goal in enacting RICO was to destroy the financial base of criminal enterprises, thereby sapping their strength and hindering their infiltration into legitimate businesses. Such infiltration was the principal concern of RICO.¹⁹ Title VIII of the OCCA applies to anyone who "conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business."²⁰ The penalties under title VIII include fines and imprisonment.²¹ Similar penalties are also available for those who "conspire to obstruct" a state's criminal laws with the intent to aid an illegal gambling business.²²

the ones we have. . . . Rioters and organized groups who flaunt the law and destroy private property must be dealt with strongly." *Id.*

15. 116 CONG. REC. 18,912 (1970). Senator McClellan said that amended S. 30 was designed:

[T]o cure a number of debilitating defects in the evidence-gathering process in organized crime investigations, to circumscribe defense abuse of pretrial proceedings, to broaden Federal jurisdiction over syndicated gambling and related corruption where interstate commerce is affected, to attach and to mitigate the effects of racketeer infiltration of legitimate organizations affecting interstate commerce, and to make possible extended terms of incarceration for the dangerous offenders who prey on our society.

Id.

16. 18 U.S.C. §§ 1511, 1955 (1988).

17. 18 U.S.C. §§ 1961-1968 (1988). Title XI, the other substantive provision of the OCCA, dealt with the regulation of explosives moving in interstate commerce. *See* 18 U.S.C. §§ 841-848 (1988). The purpose of title XI was "to protect interstate and foreign commerce against interference and interruption by reducing the hazard to persons and property arising from misuse and unsafe or insecure storage of explosive materials." Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1101, 84 Stat. 922, 952.

18. 116 CONG. REC. 35,201 (1970) (statement of Rep. St. Germain that money which the syndicate uses to infiltrate legitimate business enterprises comes largely from gambling receipts); *see also* 116 CONG. REC. 35,294 (1970) (statement of Rep. Poff that "illegal gambling constitutes the criminal syndicates primary source of revenue"); 116 CONG. REC. 18,937 (1970) (statement of Sen. McClellan that "gambling is the greatest source of revenue for organized crime").

19. *See* 116 CONG. REC. 35,201 (1970).

20. 18 U.S.C. §§ 1511(a)(3), 1955(a).

21. *Id.* §§ 1511(d), 1955(a).

22. *Id.* § 1511(a).

While title VIII of the OCCA sought to restrict the flow of money into criminal organizations, RICO attempted to prevent organized crime from infiltrating legitimate businesses.²³ Moreover, on numerous occasions during Senate and House debates about RICO, legislators expressed their concern about "the subversion of our economic system by organized criminal activities."²⁴ Representative Richard H. Poff (R-Va.), one of the House sponsors of the OCCA, commented that "the growing infestation of racketeers into legitimate business enterprises" was perhaps the single most alarming aspect of the organized crime problem in the United States in recent years.²⁵ The Supreme Court also has noted that the major purpose behind RICO is to prevent such infiltration.²⁶

Although most comments relating to mob infiltration are merely vacuous diatribes, several legislators actually discussed the specific dangers posed by such infiltration. For example, in responding to criticisms of the OCCA by the American Civil Liberties Union (ACLU), Senator McClellan listed several problems that might develop once a criminal organization penetrates a business. The criminal enterprise might use terror tactics to gain a larger share of the market, thereby hurting competitors, bleed the firm of its assets and then put the company into bankruptcy, employ violence in conducting business, or create a monopoly and then raise prices to the detriment of consumers.²⁷ A criminal organization might also infiltrate a labor union and then sell labor peace to businesses, thereby stripping workers of their autonomy and hurting them financially.²⁸

23. This purpose is expressed clearly in the Statement of Findings and Purpose which precedes the OCCA:

The Congress finds that . . . this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; [and] organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, [and] seriously burden interstate and foreign commerce

Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 922-23.

24. 116 CONG. REC. 35,193 (1970) (statement of Rep. Poff); *see also* 116 CONG. REC. 35,196 (1970) (statement by Rep. Celler regarding the main features of the OCCA); 116 CONG. REC. 35,200 (1970) (statement by Rep. St. Germain regarding organized crime's effect on legitimate institutions); 116 CONG. REC. 35,215 (1970) (statement by Rep. Halpern regarding the "thriving business" of organized crime).

25. 116 CONG. REC. 35,295 (1970).

26. *United States v. Turkette*, 452 U.S. 576, 584 (1981). *Turkette* made clear, however, that RICO was not limited to the infiltration of legitimate businesses by organized crime. *Id.* The Court stated that "[t]here is no inconsistency or anomaly in recognizing that § 1962 applies to both legitimate and illegitimate enterprises." *Id.* at 585.

27. 116 CONG. REC. 18,939 (1970).

28. *Id.*

B. The Structure of the Racketeering Influenced Corrupt Organizations Act

The structure of RICO reflects Congress' intent to "[proscribe] certain kinds of conduct most commonly associated with attempts by organized crime to gain control or influence over legitimate enterprises."²⁹ The thrust of RICO is to prohibit the use of a pattern of racketeering activity to acquire or operate an enterprise engaged in interstate commerce.³⁰ "Racketeering activity" is defined to include such specified federal offenses as obstruction of justice, embezzlement of pension funds, bankruptcy and securities fraud, and drug activity.³¹ Racketeering activity also includes "any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for

29. SKADDEN, ARPS, SLATE, MEAGHER & FLOM, CORPORATE PRACTICE SERIES GUIDE TO RICO 4-5 (J.C. Fricano ed. 1986). A more direct method of attacking organized crime would be criminalizing the act of being a racketeer. This strategy, however, would violate the constitutional prohibition on status offenses. See *Robinson v. California*, 370 U.S. 660, 666 (1962).

30. 18 U.S.C. § 1962(a). Section 1962 actually criminalizes four types of activities involving "a pattern of racketeering activity or . . . collection of an unlawful debt." *Id.* § 1962(a)-(d). For the sake of simplicity, however, this Article uses the phrase "pattern of racketeering activity" to refer to both a pattern of racketeering activities and collection of unlawful debt.

31. 18 U.S.C. § 1961(1)(A). After listing the indictable state crimes in subpart (A), section 1961(1) delineates four classes of federal crimes:

(B) any act which is indictable under any of the following provisions of title 18, United States Code [which relates to bribery, sports bribery, counterfeiting, theft from interstate shipment, embezzlement from pension and welfare funds, extortionate credit transactions, fraud and related activity in connection with access devices, the transmission of gambling information, mail fraud, wire fraud, financial institution fraud, obscene matter, obstruction of justice, obstruction of criminal investigations, obstruction of State or local law enforcement, tampering with a witness, victim, or an informant, retaliating against a witness, victim, or an informant, interference with commerce, robbery, or extortion, racketeering, interstate transportation of wagering paraphernalia, unlawful welfare fund payments, the prohibition of illegal gambling businesses, the laundering of monetary instruments, engaging in monetary transactions in property derived from specified unlawful activity, use of interstate commerce facilities in the commission of murder-for-hire, sexual exploitation of children, interstate transportation of stolen motor vehicles, interstate transportation of stolen property, trafficking in certain motor vehicles or motor vehicles parts, white slave traffic], (C) any act which is indictable under title 29, United States Code (dealing with restrictions on payments and loans to labor organizations) or . . . (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act.

18 U.S.C.A. § 1961(1)(B)-(E) (West Supp. 1990).

more than one year.”³² These apparently disparate crimes are tied together by their frequent connection to business. Absent from this list are “individual” crimes such as rape, assault, or libel.³³ Section 1961 also defines “pattern of racketeering activity.” This definition imposes an additional element which a prosecutor or plaintiff must prove under RICO. A “‘pattern of racketeering’ requires at least two acts of racketeering activity” within ten years of each other.³⁴

Section 1962 of RICO uses the definitions of racketeering activity and pattern of racketeering activity to establish four substantive crimes involving an enterprise.³⁵ RICO prohibits a “person” from acquiring or operating an enterprise using money derived from a pattern of racketeering activity.³⁶ The statute also restrains an individual from using “a pattern of racketeering activity . . . 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.”³⁷ The concern of both prohibitions centers on organized crime gaining control of established businesses.³⁸ These provisions are distinguished by the manner in which racketeering activity is employed to gain control. In the latter provision, an individual employs racketeering activity as a means of infiltrating a business, while in the former he employs the racketeering activity to gain the financial resources needed to acquire or operate a business.

32. 18 U.S.C. § 1961(1)(A).

33. 116 CONG. REC. 18,946 (1970) (statement of Sen. McClellan noting that RICO is aimed at “economic” and “commercial” crimes).

34. 18 U.S.C. § 1961(5). At least one of the acts must have “occurred after the effective date of this chapter [RICO] . . . within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.” *Id.*

35. *Id.* § 1962(a)-(d). The statute broadly defines the term “enterprise” as “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.” *Id.* § 1961(4).

36. *Id.* § 1962(a). A “‘person’ includes any individual or entity capable of holding a legal or beneficial interest in property.” *Id.* § 1961(3). Thus, for the purposes of RICO, a “person” includes business entities as well as natural persons.

37. *Id.* § 1962(b).

38. In subsection 1962(a), Congress carved out an exception for the purchase of securities in the open market:

A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

Id. § 1962(a). This exception to the general provisions of subsection 1962(a), and the limitation on the exception, indicate congressional concern with mob control of business.

Section 1962 also makes it unlawful for "any person employed by or associated with any enterprise engaged in . . . 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."³⁹ The purpose of this provision is to prohibit the operation, not the acquisition, of an enterprise through a pattern of racketeering. This provision does not require the individual to participate as a principal in the activity. Instead, to violate the statute, an individual need only be *employed by* or *associated with* the organization and use racketeering activity "to conduct or participate . . . in the conduct of such enterprise's affairs."⁴⁰

Section 1962 also includes a subsection that weaves conspiracy into the statute. Subsection (d) prohibits "any person" from conspiring "to violate any of the provisions . . . of this section."⁴¹ Engaging in a conspiracy to commit any substantive violation of RICO subjects a defendant to the same penalties as engaging in the activity as a principal.

A violation of section 1962 is punishable by a fine, imprisonment for not more than twenty years, or both.⁴² In addition, the forfeiture provision requires a violator to forfeit to the government any interest acquired or maintained by means of a pattern of racketeering activity, any interest in an enterprise operated or maintained through such activity, or "any property constituting, or derived from, any proceeds which the person obtained" this way.⁴³ The forfeiture provision is one of the most potent weapons in the

39. *Id.* § 1962(c).

40. *Id.*

41. *Id.* § 1962(d).

42. *Id.* § 1963(a). This section provides in part: "Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years . . . or both. . . ."

43. *Id.* This section provides that violators:

[S]hall forfeit to the United States, irrespective of any provision of State law—

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any—

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

Id.

RICO arsenal because it allows the government to drain an enterprise of its financial resources.

Section 1963 contains two provisions which allow the government to protect an enterprise's assets from dissolution pending the resolution of the case. Under certain circumstances, a district court has authority to issue an injunction⁴⁴ or a temporary restraining order, and the temporary restraining order may even be issued without notice.⁴⁵ For a temporary restraining order, the government must show probable cause that the property would be subject to forfeiture if the defendant were convicted and that notice to the defendant would jeopardize the availability of the property for forfeiture.⁴⁶

Civil remedies are also available under RICO, both for the government and for private parties who are injured by the alleged pattern of racketeering activity.⁴⁷ District courts have the power to prevent violations of RICO by issuing divestiture orders, by restricting the future activities of those found liable, and by ordering the dissolution or reorganization of an enterprise.⁴⁸ Pending final resolution of the case, the United States Attorney General has

44. "Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture . . ." *Id.* § 1963(d)(1).

The court is empowered to issue such orders:

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered

Id. Unless extended by the court for good cause, this order is only effective for ninety days. *Id.*

45. *Id.* § 1963(d)(2).

46. *Id.* The temporary restraining order "shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension of a longer period." *Id.*

47. *Id.* § 1964.

48. *Id.* § 1964(a).

the authority to institute proceedings against persons engaged in racketeering and to seek relief as provided for under the statute.⁴⁹

Although missing in the Senate's original version of the bill, RICO also gives "[a]ny person injured in his business or property" by a section 1962 violation the ability to sue in district court and recover both treble damages and "the cost of the suit, including a reasonable attorney's fee."⁵⁰ The Supreme Court recognized that this section "bring[s] . . . the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources are deemed inadequate."⁵¹ The Court held that Congress, in enacting this subsection, intended to expand the number of people who would police RICO.⁵²

C. RICO's "Pattern" Requirement

The requirement of a pattern of racketeering activity lies at the heart of RICO. Whether the charge comes in a criminal prosecution or in a civil suit under section 1964, the predicate acts must form a pattern. Both courts and commentators have struggled to understand this term. According to RICO, a pattern of racketeering activity "requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity."⁵³ The Supreme Court, in *H.J. Inc. v. Northwestern Bell Telephone Co.*,⁵⁴ addressed whether two acts *alone* will satisfy this requirement or whether plaintiffs and prosecutors must allege some ad-

49. *Id.* § 1964(b). Critics of RICO often focus on the expanded penalties for individual defendants. Senator McClellan and other legislators, however, focused on the forfeiture and injunction remedies. For example, in defending S. 30 against critics during the House debates, Senator McClellan said the three primary devices for combating organized crime were forfeiture, civil antitrust remedies, and civil investigative procedures. 116 CONG. REC. 18,939 (1970).

In addition to allowing federal prosecutors to make civil investigative demands of private parties for documents relating to RICO prosecutions, the OCCA contained other procedural innovations which could simplify RICO prosecutions. See 18 U.S.C. § 1968. The statute gave United States Attorneys the power to convene special grand juries to investigate organized crime, provided immunity for certain witnesses in organized crime cases, established a witness protection plan, and provided for the use of depositions to preserve evidence. 18 U.S.C. §§ 3331, 3503, 6002 (1988). These provisions are related to the substantive provisions of title IX of OCCA in that they make RICO prosecutions easier. For example, the witness protection plan's liberalized immunity provisions make it more likely that insiders will be willing to testify against organized crime families.

50. 18 U.S.C. § 1964(c).

51. *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 151 (1987).

52. *Id.* at 152.

53. 18 U.S.C. § 1961(5).

54. 492 U.S. 229 (1989).

ditional element or elements. In *H.J. Inc.*, the majority found that two acts were not enough, but were merely "a minimum necessary condition for the existence of such a pattern."⁵⁵ According to the majority, Congress had a reason for using the word "requires" in the definition rather than the word "means," which was used in a number of other definitions.⁵⁶ By this choice of words, Congress indicated that "[s]ection 1961(5) concerns only the minimum *number* of predicates necessary to establish a pattern; and it assumes that there is something to a RICO pattern *beyond* simply the number of predicate acts involved."⁵⁷ To support this interpretation, the majority cited a speech by Senator McClellan, the principal sponsor of the OCCA. In this speech, he states that "proof of two acts of racketeering activity, without more, does not establish a pattern."⁵⁸

The majority also quoted Senator McClellan's speech in defending its interpretation of this "something beyond":

[A] person cannot "be subjected to the sanctions of title IX simply for committing two widely separated and isolated criminal offenses." Instead, "[t]he term 'pattern' itself requires the showing of a relationship" between the predicates, and of "the threat of continuing activity." "It is this factor of *continuity plus relationship* which combines to produce a pattern."⁵⁹

Based on RICO's legislative history, the Court established the two-pronged continuity and relationship test, which Justice White first suggested in footnote fourteen of *Sedima, S.P.R.L. v. Imrex Co.*⁶⁰

In interpreting the term "relationship," which is not found in the statute, the majority looked to the definition of "pattern" contained in the Dangerous Special Offender Act, title X of the OCCA.⁶¹ As originally formulated, the Dangerous Special Offender Act (DSO) provided enhanced sanctions for certain convicted felons.⁶² Under the DSO, if a court found a defendant to be either a habitual criminal, a "professional" criminal, or an organized

55. *Id.* at 237.

56. *Id.*

57. *Id.* at 238 (emphasis in original).

58. *Id.* (quoting Sen. McClellan, 116 CONG. REC. 18,940 (1970)).

59. *Id.* at 239 (emphasis in original).

60. 473 U.S. 479, 496 n.14 (1985). The Court noted that "the infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective." *Id.* (emphasis added).

61. *H.J. Inc.*, 492 U.S. at 239-40; see Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1001, 84 Stat. 922, 948-52.

62. 18 U.S.C. § 3575 (1982) (repealed in part by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, §§ 212(a)(1)-(2), 235(a)(1), 98 Stat. 1987, 2031). During a felony trial, a federal prosecutor could request that the court find the defendant to be a "dangerous special offender," as defined by title X of the OCCA.

crime leader, he could receive a twenty-five year sentence regardless of the sentence for the particular felony.⁶³ Although the statutory definition of habitual criminal does not mention the term "pattern," the DSO requires the defendant to have participated in a pattern of criminal conduct. Unlike the predicate acts for a RICO violation, which are specified state and federal crimes, "criminal conduct" under the DSO is broadly defined to include violations of the laws of any jurisdiction.⁶⁴ The definition of pattern is equally broad, providing that "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."⁶⁵ Following the dicta of *Sedima*, the majority in *H.J. Inc.* suggested that this definition of pattern should be imported from the DSO into RICO.⁶⁶ The majority believed that Congress did not intend "any more constrained a notion of the relationships between predicates" in RICO than in the DSO.⁶⁷

The four concurring justices, however, disagreed with this interpretation of the statute. They regarded as determinative the absences of similar definitions in the two titles.⁶⁸ Justice Scalia commented in his concurrence: "[U]nfortunately, if normal (and sensible) rules of statutory construction were followed, the existence of § 3575(e)—which is the definition contained in [title X] that was explicitly *not* rendered applicable to RICO—suggests that *whatever* pattern might mean in RICO, it assuredly *does not* mean that."⁶⁹

Because there was no discussion of this question during the Congressional debates over the OCCA, it is difficult to know Congress' intent. Only Senator McClellan's speech, in response to attacks upon the legislation by the

63. *Id.* A habitual criminal is an individual who has been convicted of three felonies on separate occasions, the present conviction within five years of the last. *Id.* For the court to find the defendant a professional criminal, he must have committed the offense as part of a pattern of criminal conduct, which is defined to include violations of the laws of any jurisdiction. In addition, the court has to find that the defendant exhibited special criminal skills and that he derived a substantial part of his income from criminal activity. Finally, a defendant may be found to be a "dangerous special offender" if the offense was committed in furtherance of a conspiracy of three or more people to engage in a pattern of criminal conduct, and the defendant either played a leadership role, employed violence, or bribed officials. *Id.* This provision was designed to deal primarily with the organized crime offender presumably because organized crime involved multiple defendants in a conspiracy to commit various criminal acts. *Id.*

64. *Id.*

65. *Id.* § 3575(e).

66. *H.J. Inc.*, 492 U.S. at 240.

67. *Id.*

68. *Id.* at 251 (Scalia, J., concurring).

69. *Id.* at 252 (emphasis in original).

ACLU and by the American Bar Committee of New York, offers any enlightenment. In discussing the meaning of "pattern of conduct" under the DSO, Senator McClellan stated: "[C]learly, just as in title IX, where the concept of 'pattern' is employed, the intent of S. 30 is clear, on its face and in the Senate committee report, that the term 'pattern' itself conveys the requirement of a relationship between various criminal acts."⁷⁰ Although the quote is not a model of clarity, it does support the majority's interpretation. At least Senator McClellan seemed to view the term "pattern" as having the same meaning in each Act, thus requiring some interrelationship between the predicate acts.

The same cannot be said of the continuity prong of the majority's test. Senator McClellan's speech does not support the inclusion of continuity in the definition of pattern. Although Senator McClellan quoted a paragraph from the Senate committee report which mentions continuity and relationship, the Senator commented that "[t]he term 'pattern' itself requires the showing of a relationship."⁷¹ He rephrased the committee comment, emphasizing the requirement of a relationship between the acts, but he did not mention continuity at all. Moreover, the paragraph of the Senate report mentions continuity in a particular context: "The infiltration of legitimate business normally requires more than *one* 'racketeering activity' and the threat of continuing activity to be effective."⁷² The committee report states that "this factor of continuity plus relationship . . . combines to produce a pattern."⁷³ If "continuity" were a separate requirement apart from the number of acts, as the majority argues, the Senate report would have said that infiltration normally requires more than *two* acts of racketeering, not just *one*, plus the threat of continuing activity. Therefore, it appears that the Senate committee interpreted continuity as resulting from the commission of multiple acts. Under this interpretation, "continuity" comes from the multiplicity of acts themselves; it is not a separate requirement *beyond* the predicate acts. This interpretation would also explain Senator McClellan's failure to mention "continuity" after quoting from the Senate report. For the Senator, the "something beyond" was merely a relationship among the acts.

In addition to misinterpreting Senator McClellan's comment, the *H.J. Inc.* majority used legislative commentary selectively in establishing its two-pronged test. First, the Senator's comment was made over four months after the Senate passed S. 30, and it was only a small part of a long, comprehen-

70. 116 CONG. REC. 18,943-44 (1970).

71. *Id.* at 18,940.

72. S. REP. NO. 617, 91st Cong., 1st Sess. 158 (1969) (emphasis added).

73. *Id.*

sive defense of the OCCA.⁷⁴ Although Senator McClellan apparently interpreted the language to require a relationship between acts, there was no mention of "something beyond" the number of acts requirement in any of the Senate discussions on the pattern of racketeering. Further, Senator Roman L. Hruska (R-Neb.), another sponsor of the bill, apparently did not believe anything else was required; he simply said that pattern "is defined in terms of a number of existing criminal offenses characteristic of organized crime activity."⁷⁵ He said nothing about either continuity or relationship.

Similarly, no member of the House mentioned these terms, even though the House Judiciary Committee was considering the bill when Senator McClellan made his comment. Because numerous congressmen mentioned RICO's multiple act requirement when the bill came before them, it cannot be argued that House members neglected the provision entirely. Most congressmen simply quoted from the text of the statute, noting that "pattern is defined to require at least two racketeering acts."⁷⁶ Neither relationship nor continuity was discussed.

Comments by several congressmen indicate their belief that two acts of racketeering by themselves would fulfill the pattern requirement. Representative William F. Ryan (D-N.Y.), one of three House Judiciary Committee members who dissented on the OCCA, attacked the pattern requirement because of the burden it placed on prosecutors.⁷⁷ Federal prosecutors, he argued, would have to "prove beyond a reasonable doubt two illegal acts—not just one—absent a prior conviction."⁷⁸ If he believed RICO required it, Representative Ryan would have noted the additional burden of proving a relationship among the acts and a threat of continuity.⁷⁹ Even Representative Poff, one of the bill's House sponsors and a member of the House subcommittee responsible for the bill, implied that the term "pattern" referred to the number of acts of racketeering. In summarizing the bill prior to the

74. Senator McClellan's speech was a detailed response to various criticisms of S. 30 by the American Civil Liberties Union and the American Bar Association of the City of New York. The speech covered 44 pages in the Congressional Record. 116 CONG. REC. 18,912-56 (1970).

75. *Id.* at 602.

76. *Id.* at 35,196 (statement of Rep. Cellar, a member of the House committee which proposed S. 30).

77. *Id.* at 35,208.

78. *Id.*

79. *See also id.* at 35,205 (comments of Rep. Mikva, another dissenting member of the House committee). Representative Mikva's gambling hypothetical (proposing that even a poker game which goes on past midnight may bring charges of syndicated gambling) involves two predicate acts and nothing more, implying that he did not believe anything else was required to prove a pattern. *Id.*

House vote, Representative Poff said that pattern "means simply two or more acts of racketeering."⁸⁰

As a whole, these vague comments hardly justify the continuity and relationship "test" elaborated in *H.J. Inc.* Senator McClellan's speech supports a relationship requirement, not a separate requirement of continuity or a threat of continuity. Further, numerous members of Congress apparently believed two acts of racketeering, without more, would satisfy the statute. Thus, although legislative history is generally a thin branch upon which to rest a judicial decision, it certainly does not support *H.J. Inc.*'s two-pronged test.

II. INTERPRETATIONS OF "PATTERN" IN THE CIRCUIT COURTS

Justice Scalia's concurrence in *H.J. Inc.* described the post-*Sedima* interpretations of RICO's pattern requirement as "the widest and most persistent circuit split on an issue of federal law in recent memory."⁸¹ The disparate interpretations of the term "pattern" by the appellate courts, despite some guidance by the Supreme Court, indicate that the pattern requirement is ambiguous at best and is unconstitutionally vague at worst. If the circuit courts do not understand what Congress meant by pattern, a nonlawyer could not be expected to understand the term.⁸² Because Justice Scalia's criticism of RICO's pattern requirement is based on a perception that the circuits' interpretations are too wide-ranging, it is important to understand these "kaleidoscopic" interpretations.⁸³

A. Policies and Factors

1. Policy Concerns Motivating the Pattern Requirement

There are at least three justifications for creating heightened penalties for the commission of multiple criminal acts over a period of time. First, a legislature might desire the marginal deterrence the additional penalties will pro-

80. *Id.* at 35,295. This statement was made over four months after Senator McClellan's comment, indicating that the Senator's interpretation of the term pattern had not been widely accepted, if even known.

81. 492 U.S. 229, 251 (1989) (Scalia, J., concurring).

82. If a nonlawyer could not understand the term, then he did not receive the warning the due process clause requires.

83. To aid the reader in understanding the various approaches, this section consists of two subparts. The first subsection explains the various policies which might lie at the heart of a statutory scheme like RICO. Understanding the variety of possible policies behind such a statute may help to explain why different courts established such dissimilar tests for finding a pattern. The second subsection catalogues the various factors which courts included in their respective tests.

vide.⁸⁴ Where an individual has already committed one crime, thereby incurring the risk of a particular penalty, the reduced penalty for subsequent acts may give him an incentive to commit other acts. For example, an individual who has already committed wire fraud by misrepresenting a business deal to one buyer, will be inclined to call another potential buyer if the additional penalty for the additional act is less than the original penalty for the original act. Having already incurred the risk of being jailed for period x (the average period of incarceration for one act of wire fraud), he will have an incentive to continue if an additional act will, on average, add only y period to the sentence (where y is substantially less than x). Assuming the reward for success in the second crime is the same or greater than the reward for success in the first crime, he would be risking a little more jail time for twice the payoff.⁸⁵ By raising the penalty for subsequent crimes, a legislative body might be attempting to remedy this problem. Committing an *additional* criminal act would subject an individual to at least twice the penalty of committing only one act.

The risk of increased injury might be a second motivating factor behind the establishment of heightened penalties for multiple crimes. Certain activities are proscribed because they injure people in some way; the assigned penalty somehow correlates to the injury inflicted.⁸⁶ For example, mail fraud is assigned a penalty of x and murder a penalty of $x + y$ because the latter injury is much more serious. When a defendant perpetrates the less injurious crime upon multiple victims, however, the increased injury results in a

84. See Ehrlich, *The Deterrent Effect of Criminal Law Enforcement*, 1 J. LEGAL STUD. 259 (1972).

The extent of offenders' specialization in crime is shown to be particularly influenced by the *marginal* penalty: the additional punishment imposed for the "last" offense committed by an offender. For example, if the marginal penalty is zero, as is the case when the court imposes concurrent imprisonment terms for a number of offenses, offenders will have an incentive to participate in criminal activity on a relatively full-time basis.

Id. at 264; see also Block & Sidak, *The Cost of Antitrust Deterrence: Why Not Hang a Price Fixer Now and Then?*, 68 GEO. L.J. 1131, 1132 n.6 (1980) (to deter criminal acts, the criminal sanctions must impose expected costs that exceed the expected benefits).

85. This reasoning may be compared to the economic concept of diminishing marginal returns. "The law of diminishing marginal returns holds that as the amount of some input is increased . . . while . . . other inputs are held constant, the resulting increments in output will decrease beyond some point." E. BROWNING & J. BROWNING, *MICROECONOMIC THEORY AND APPLICATIONS* (2d ed. 1986).

86. See Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability*, 85 HARV. L. REV. 1089, 1124-27 (1972); Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 292 (1983); Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857, 882 (1984).

heightened penalty. In some cases, the penalties of the lesser crime will be equal to that of the more serious crime.⁸⁷

RICO's heightened penalties may be based upon the assumption that multiple criminal acts which are not "isolated or sporadic" are often more injurious than separate acts. This assumption may be predicated on the requirement that RICO crimes involve a business. Because a business usually involves multiple individuals, there is a greater likelihood that a predicate act under RICO will cause more injury than a similar act standing alone. Accordingly, the risk of increased injury under a RICO violation justifies heightened penalties. Otherwise, these especially harmful activities would escape adequate deterrence.⁸⁸

Finally, fears about structural crime might cause a legislative body to pass a statute which raises penalties for multiple criminal acts. Structural crime is any crime which springs from a criminal infrastructure.⁸⁹ With structural crime, criminal acts are somehow connected to an organization whose existence is separate from the acts. As with planned crime, proof of multiple, connected acts might be used as a proxy for such an organization. Multiple, connected criminal acts often originate through a criminal enterprise. The most obvious example is the stereotypic Mafia—a highly specialized and extensive organization which controls a variety of criminal operations. Structural crime, however, is not limited to this type of organization.⁹⁰ If a group

87. Of course, because actual injuries vary based upon the particular circumstances of each victim, the assigned penalties only approximate the injury. The poor parent who is defrauded of his life savings of \$10,000 through a savings account scam is injured more than the wealthy investor whose broker defrauds him of the same amount by churning his account (churning is excessive trading in order to generate commissions). Although the legislature cannot envision every possibility, it gives each of these possibilities appropriate weight in its calculation of an appropriate penalty for fraud.

88. Of course, this view of crime assumes that each criminal act causes separate injury. In fact, an individual might be injured only once even though the defendant committed a number of criminal acts to inflict this injury.

89. For example, the "combination of organizational complexity and obscured individual responsibility" inherent in most corporations may give rise to such corporations committing structural crimes. Note, *Structural Crime and Institutional Rehabilitation: A New Approach to Corporate Sentencing*, 89 YALE L.J. 353, 358 (1979). In such a situation, "a corporation commits a criminal offense but no criminally culpable individual can be identified." *Id.* (citing *United States v. American Stevedores, Inc.*, 310 F.2d 47, 48 (2d Cir. 1962), *cert. denied*, 371 U.S. 969 (1963) (principal officers, directors, and shareholders acquitted of tax evasion where corporation was convicted)).

90. See generally Coffee, *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, 17 AM. CRIM. L.R. 419, 466-68 (1980) (businessmen acting in concert are more likely to undertake risks including criminal acts than are individuals); *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227 (1979) (discussing increased use of criminal sanctions against corporate criminals) [hereinafter *Corporate Crime*].

of corporate officers strips a corporation of its assets over a period of time, that would also satisfy the requirements for structural crime.⁹¹ Where several members of a securities firm develop and implement a plan to bilk clients, that crime would be structural. In all these cases, the criminal acts spring from a criminal infrastructure—a criminal organization with multiple members, each of whom has certain responsibilities within the structure.

When a group of individuals has established such a structure, a particular crime has a greater chance of succeeding. First, the organization is usually operating from a plan, which increases the likelihood of success. Also, individuals in the organization probably have specialized roles based upon their individual abilities. The likelihood that the crime will succeed is greater when the individual participants need only focus on a narrow area for which they have special talents or knowledge. Furthermore, a criminal infrastructure, once established, may live beyond the particular scheme. Having succeeded once with an arrangement, the same individuals may perpetrate a similar crime. More importantly, the infrastructure may survive even if a few of the participants are replaced. Like a corporation which lives on after its chief executive officer dies, the organization may survive the loss of individual members. These two dangers—increased likelihood of success and risk of future crime—justify the imposition of heightened penalties.

2. *Factors That Demonstrate A Pattern of Racketeering*

The federal circuit courts have looked to many factors in determining whether a defendant has met the pattern requirement. Some of the factors are numerical: the number of criminal acts; the number of distinct injuries; the number of victims; the number of perpetrators; and the number of “schemes,” “episodes,” or “transactions.” Although the first four factors are clear, what constitutes a scheme, episode, or transaction is less certain. As the majority pointed out in *H.J. Inc.*: “A ‘scheme’ is in the eye of the beholder, since whether a scheme exists depends on the level of generality at which criminal activity is viewed. . . . There is no obviously ‘correct’ level of generality for courts to use in describing the criminal activity alleged in RICO litigation.”⁹² The majority’s criticism is equally applicable to the

91. See *Corporate Crime*, *supra* note 90, at 1243.

[T]his theory [of corporate blameworthiness] recognized that generally the criminal acts of a modern corporation result not from the isolated activity of a single agent, but from the complex interactions of many agents in a bureaucratic setting. Illegal conduct by a corporation is the consequence of corporate processes such as standard operating procedures and hierarchical decisionmaking.

Id.

92. 492 U.S. 229, 241 n.3 (1989).

terms "episode" or "transaction." Courts generally define these terms as a series of criminal activities with a common purpose, goal, or objective.

In addition to numerical factors, courts have focused upon particular traits of the criminal activity: the length of time over which the crime was committed; the character of the activity—whether it involved murder or mail fraud, for example; and the connection of the crime to a continuing organization.⁹³ Finally, some circuit courts have asked whether the acts are interrelated, as indicated by a similarity of purposes, results, participants, victims, or methods.⁹⁴

B. Inconsistent Circuit Court Interpretations of "Pattern of Racketeering" Before H.J. Inc.

Prior to the Supreme Court's decision in *H.J. Inc.*, the views of the various circuits could have been divided into roughly five categories: (1) multiple schemes, (2) multiple factors, (3) continuity/relationship, (4) multiple acts plus continuity, and (5) relationship.⁹⁵ The following hypotheticals are intended to serve as a standard by which to compare the various circuit courts' interpretations of the pattern requirement.

1. Civil and Criminal Hypotheticals

It may be easier to distinguish between similar tests when each test is compared to a common set of facts. These two hypotheticals are based upon the Second Circuit's leading pattern cases, *United States v. Indelicato*⁹⁶ and *Beauford v. Helmsley*.⁹⁷

In the criminal hypothetical, the defendant murders two members of an organized crime "family" for the purpose of bringing stability to that family.

93. See generally *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986) (discussing the types of criminal activities necessary to prove a pattern).

94. These courts have followed the Supreme Court's lead in looking to the definition of pattern in the Dangerous Special Offenders Act. Compare *infra* text accompanying notes 180-83 with *infra* text accompanying notes 185-225.

95. For purposes of clarity, this Article attempts to organize these tests from the most restrictive to the most broad. In every scenario, the relationship test is the most encompassing because it requires nothing more than two interrelated acts of racketeering activity within the ten-year period. See *infra* notes 185-93 and accompanying text. Likewise, in most cases the multiple schemes test will be the most narrow because it requires two significant criminal events separate in time. See *Superior Oil*, 785 F.2d at 252. Between these extremes, however, the categorization breaks down in many situations. This Article merely attempts to impose a structure on a body of case law that is inconsistent and contradictory.

96. *United States v. Indelicato*, 865 F.2d 1370 (2d Cir.), cert. denied, 110 S. Ct. 56 (1989) (criminal RICO prosecution).

97. *Beauford v. Helmsley*, 865 F.2d 1386 (2d Cir.), vacated, 492 U.S. 914 (1989) (civil RICO action).

His orders come from an organized crime "Commission" whose members regulate the behavior of member families. Acting alone, the defendant commits the murders at the same instant by shooting the victims in a local restaurant.

In the civil hypothetical, the defendant company sells widgets through a national network of distributors. Each distributor leases a geographic area on a yearly basis. In connection with an offer to sell permanent distributorship rights in these areas to lessees, the company commits mail fraud. All 200 offering letters contain a material misrepresentation about the average profit of local distributors. Only fifty distributorships are purchased in the initial offering, so the company determines not to make any further solicitations. It will maintain a dual structure of owned and leased distributorships.

2. *Multiple Scheme as Applied by the Eighth Circuit before H.J. Inc.*

Before the Supreme Court rejected the multiple scheme interpretation in *H.J. Inc.*, the Eighth Circuit required more than one scheme to find a pattern of racketeering.⁹⁸ In *Madden v. Gluck*,⁹⁹ the Eighth Circuit explained that "although the alleged acts were sufficiently related to form a pattern," the acts "lacked sufficient continuity to form a 'pattern of racketeering activity.'"¹⁰⁰ Through this interpretation, the *Madden* Court implied that because the defendants never committed the illegal acts before or in another context, the requisite continuity was lacking.¹⁰¹

The Eighth Circuit believed that the word "activity" implied a unity of purpose among several acts. Therefore, when the statute required a pattern of racketeering activity, rather than a pattern of racketeering acts, the statute implied that multiple acts as a part of one activity could not satisfy the requirement. The Eighth Circuit viewed "scheme" as synonymous with "activity," thus explaining the requirement of at least two schemes to satisfy the statute.

98. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 829 F.2d 648, 649-50 (8th Cir. 1987), *rev'd*, 492 U.S. 229 (1989); *Madden v. Gluck*, 815 F.2d 1163 (8th Cir.), *cert. denied*, 484 U.S. 823 (1987). Since the Supreme Court's decision in *H.J. Inc.*, the Eighth Circuit has addressed the pattern question only once, in *Atlas Pile Driving Co. v. DiCon Finance Co.*, 886 F.2d 986 (8th Cir. 1989). See *infra* notes 208-13 and accompanying text.

99. 815 F.2d 1163 (8th Cir.), *cert. denied*, 484 U.S. 823 (1987).

100. *Madden*, 815 F.2d at 1164 (citing *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986)). In *Madden*, the plaintiff creditors and employees accused the defendant managers of looting the corporation through a series of illegal activities such as check kiting and asset diversion. *Id.*

101. *Id.*; see, e.g., *Superior Oil*, 785 F.2d at 257.

The Eighth Circuit defined "scheme" as a number of criminal acts in furtherance of a single purpose,¹⁰² a definition followed by many circuit judges.¹⁰³ The majority in *H.J. Inc.*, however, believed that the multiple scheme requirement adopted by the Eighth Circuit brought "a rigidity to the available methods of proving a pattern."¹⁰⁴ This rigidity would doom a RICO charge under the facts of either the civil or criminal hypothetical because both violations are motivated by a single goal. Neither a large amount of injury nor a multiplicity of crimes would overcome the existence of a single scheme.

3. Multiple Factors as Applied in the Third, Seventh, and Sixth Circuits

After the Supreme Court's decision in *H.J. Inc.*, the Third, Seventh, and Sixth Circuits followed the continuity and relationship test. Before that decision, however, none of these circuits engaged in that two-step analysis. Instead, these circuits employed a multiple factor test to determine if a pattern of racketeering was present. The multiple factor test is distinct from the continuity and relationship test, which employs the two-pronged analysis before discussing other facts.¹⁰⁵ Beyond the initial similarity of employing multiple factors, the tests diverge because they use varying factors and weigh the factors differently.

a. The Third Circuit's Six-Factor Test

The Third Circuit, in *Saporito v. Combustion Engineering, Inc.*,¹⁰⁶ considered six factors in judging whether a pattern was present: "(1) the number of unlawful acts; (2) the length of time over which the acts were committed; (3) the similarity of the acts; (4) the number of victims; (5) the number of perpetrators; and (6) the character of the unlawful activity."¹⁰⁷ The court considered these six factors in the context of a pension fund fraud that a corporation perpetrated upon selected employees.¹⁰⁸ Without any hint of

102. See *H.J. Inc.*, 829 F.2d at 650; *Madden*, 815 F.2d at 1164; *Ornest v. Delaware North Cos.*, 818 F.2d 651, 652 (8th Cir. 1987).

103. See *International Data Bank Ltd. v. Zepkin*, 812 F.2d 149, 155 (4th Cir. 1987); *Lipin Enters., Inc. v. Lee*, 803 F.2d 322 (7th Cir. 1986).

104. *H.J. Inc.*, 492 U.S. at 240-41.

105. See, e.g., *United States v. Indelicato*, 865 F.2d 1370 (2d Cir.), cert. denied, 110 S. Ct. 56 (1989); *United Energy Owners Comm., Inc. v. United States Energy Management Sys., Inc.*, 837 F.2d 356 (9th Cir. 1988); *Torwest DBC, Inc. v. Dick*, 810 F.2d 925 (10th Cir. 1987).

106. 843 F.2d 666 (3d Cir. 1988), vacated and remanded on other grounds, 489 U.S. 1049 (1989).

107. *Id.* at 676-77.

108. *Id.* at 668-69. The complaint alleged that Combustion Engineering discriminated against the 32 plaintiffs by inducing them to retire under a particular retirement plan while informing other potential retirees of a more lucrative plan soon to be instituted. *Id.* at 669.

analysis, the court evaluated the particular factors by comparing the facts of *Saporito* to the facts of two previous Third Circuit cases discussed below.¹⁰⁹

In *Barticheck v. Fidelity Union Bank/First National State*,¹¹⁰ two corporations and several individuals perpetrated twenty-three identical acts of fraud upon twenty victims. In contrast, *Marshall-Silver Construction Co. v. Mendel*¹¹¹ involved two "active" perpetrators, six criminal acts, and one victim. Because *Saporito* involved one corporate and four individual perpetrators, thirty-two acts of fraud, and thirty-two victims, the Third Circuit said the case came closer to the factual situation in *Barticheck* than in *Mendel*.¹¹² The court implied that none of the six factors were given special weight.¹¹³ Nevertheless, the Third Circuit recently admitted that the number of victims and the number of perpetrators were the most significant considerations in its multi-factor analysis.¹¹⁴ While the court did mention the RICO statute and its legislative history, it failed to incorporate them into its definition of pattern. Other circuits, meanwhile, based their analysis on one of these sources.¹¹⁵ The Third Circuit, however, seemed to have fashioned its own definition of pattern out of whole cloth. Moreover, the categories were extremely flexible. For example, why should the corporation's misrepresentation about the retirement plan be viewed as thirty-two acts rather than merely one act perpetrated against thirty-two victims? Also, why should the number of victims and perpetrators be given special weight? Giving these factors particular weight, without admitting as much, makes the court's analysis even more suspect.

Based on these cases, however, the Third Circuit probably would have found a pattern in the civil hypothetical. A crime involving two hundred acts of fraud and fifty victims would be more extensive than the crimes in either *Barticheck* or *Saporito*. The Third Circuit would not have found a pattern in the criminal hypothetical, however, unless the court actually began to consider the character of the crime, given the small number of victims and perpetrators.

109. *Id.* at 677.

110. 832 F.2d 36 (3d Cir. 1987).

111. 835 F.2d 63 (3d Cir. 1987).

112. *Saporito*, 843 F.2d at 677.

113. *Id.* at 676-77.

114. Recently, the Third Circuit acknowledged that, before *H.J. Inc.*, these two factors were the most significant in analyzing the pattern requirement. *Swistock v. Jones*, 884 F.2d 755, 758 (3d Cir. 1989).

115. *United States v. Indelicato*, 865 F.2d 1370 (2d Cir.), *cert. denied*, 110 S. Ct. 56 (1989) (analysis using RICO statute and legislative history); *Superior Oil Co. v. Fulmer*, 785 F.2d 252, 255 (8th Cir. 1986) (same).

b. *The Seventh Circuit's Four-Factor Analysis*

In *Morgan v. Bank of Waukegan*,¹¹⁶ the Seventh Circuit first announced the four factors that determined whether the predicate acts were sufficiently continuous to form a pattern. These four factors included: "(1) the number and variety of predicate acts and the length of time over which [the predicate acts] were committed, (2) the number of victims, (3) the presence of separate schemes and (4) the occurrence of distinct injuries."¹¹⁷ The *Morgan* court claimed that each case should be evaluated upon its particular facts, with no one factor weighing more heavily than another.¹¹⁸ In application, however, the number of "schemes," "episodes," or "transactions" usually proved dispositive.¹¹⁹

In *Brandt v. Schal Associates*,¹²⁰ the court refused to find a pattern where the complaint "posit[ed] only multiple acts in furtherance of a single episode of fraud by [the defendants] against a single victim."¹²¹ After repeating the four "relevant factors" enunciated in *Morgan*, the court concluded that, as in its recent RICO cases,¹²² "the predicate acts alleged by [the plaintiff did] not involve multiple injuries, multiple victims or multiple schemes."¹²³ The court did not explain why it gave such short shrift to the first prong of the four-part test. If the plaintiff's claim was correct, the defendants had committed numerous dissimilar criminal acts over at least several months. Nevertheless, the court found no pattern of racketeering activity. Moreover, although the *Brandt* court claimed to rest its holding on the lack of multiple victims or multiple injuries, as well as the presence of only one scheme, previous cases demonstrated that the key requirement was multiple schemes or

116. 804 F.2d 970 (7th Cir. 1986).

117. *Id.* at 975. Comparing these factors to the six factors in the Third Circuit's test, the Seventh Circuit has merely collapsed three factors into one prong—the number of acts, the similarity of acts, and the time covered by the crime. What distinguishes the Seventh Circuit's approach is its consideration of the number of separate schemes and distinct injuries rather than the number of perpetrators and the character of the activity.

118. *Id.* at 975-76.

119. *See infra* note 126.

120. 854 F.2d 948 (7th Cir. 1988).

121. *Id.* at 952. The plaintiff, assignee of subcontractor Crescent, alleged that Northwestern University and its construction manager concealed design defects in the curtainwall which Crescent was hired to build. *Id.* at 949. The plaintiff also charged the defendants with threatening to terminate Crescent's contract if the work was not performed, with making false back charges to Crescent, and with various acts of coercion. *Id.* at 950.

122. *Id.* at 952-53 (citing *Jones v. Lampe*, 845 F.2d 755 (7th Cir. 1988); *Medical Emergency Serv. Assocs. v. Foulke*, 844 F.2d 391 (7th Cir. 1988); *Lipin Enters. v. Lee*, 803 F.2d 322 (7th Cir. 1986)).

123. *Id.* at 953. Furthermore, because the operation would necessarily end with the completion of the construction project, there was little threat of continuing criminal activity.

transactions.¹²⁴ Between 1985 and 1989 the Seventh Circuit found a pattern in only one case involving a single scheme or transaction, and in that case there were three thousand injuries.¹²⁵

Judging by these cases, the Seventh Circuit would almost certainly not have found a pattern in the criminal hypothetical. There was one transaction in the criminal hypothetical, and there were only two crimes, two victims, and two injuries. The court has never considered the *type* of crime as a relevant factor, so the fact that the crimes were murders should not have affected the analysis. Whether the civil hypothetical would have constituted a pattern poses a more difficult question. Because all of the acts were in furtherance of a single scheme, that probably would have doomed a RICO charge in spite of the relatively large number of acts, victims, and injuries. Nevertheless, the court might have regarded fifty victims as a large enough number to tip the balance in favor of finding a pattern.

c. *The Sixth Circuit's Multiple-Factor Test*

While the Sixth Circuit initially appeared to require nothing more than two acts of racketeering within the statutory period,¹²⁶ in *Fleischhauer v. Feltner* it explicitly adopted a multi-factor test.¹²⁷ The Sixth Circuit first accepted *Sedima's* proposition that "while two acts are necessary, they may

124. In *Illinois Department of Revenue v. Phillips*, 771 F.2d 312 (7th Cir. 1985), cited by the *Morgan* court, the defendant mailed nine fraudulent sales tax returns over a nine-month period. *Id.* at 313. Although the Illinois State Government presumably was the only victim, the court held these "clearly distinct transactions" were enough to establish a pattern. *Id.* Similarly, in *Appley v. West*, 832 F.2d 1021 (7th Cir. 1987), the court found that two acts of mail fraud would constitute a pattern because these were "clearly distinct transactions ongoing over a period of time." *Id.* at 1028. Because only two crimes were committed, there could have been only two injuries. The presence of multiple transactions, however, proved dispositive in this situation as well. *Id.*

125. *Liquid Air Corp. v. Rogers*, 834 F.2d 1297 (7th Cir. 1987).

126. See *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 236 (1989) (discussing *United States v. Jennings*, 842 F.2d 159 (6th Cir. 1988)). The Court stated: "Nor can we agree with those courts that have suggested that a pattern is established merely by proving two predicate acts, see, e.g., *United States v. Jennings*." *H.J. Inc.*, 492 U.S. at 236. In *Jennings*, the government charged the defendant with using and distributing cocaine. 842 F.2d at 160. Two phone calls made two hours apart were the predicate acts for the purposes of RICO. *Id.* at 162. Noting that predicate acts may be considered "separate" even though they are proximate in time, the court stated: "[I]f the conduct of the defendant Jennings in the two telephone calls indicates two acts of racketeering activity, a pattern has been shown." *Id.* at 163. The court reversed the RICO conviction on the merits, however, finding that the second phone call did not implicate Jennings. *Id.* at 164.

127. *Fleischhauer v. Feltner*, 879 F.2d 1290, 1297-98 (6th Cir. 1989). The factors include: "the number and variety of predicate acts and the length of time over which they were committed, the number of victims, the presence of separate schemes and the occurrence of distant injuries." *Id.*

not be sufficient."¹²⁸ Then, the court of appeals chose to follow the tests enunciated by the Third and Seventh Circuits.¹²⁹ The *Feltner* court gave no statutory basis for its selection of factors, nor did it explain why these factors, and not others, were relevant in showing a pattern of racketeering activity. The Sixth Circuit also did not discuss the distinctions between the Third Circuit's and the Seventh Circuit's views. Some of the factors apparently proved dispositive, while others were completely ignored, when the multiple factor template was imposed upon the case at bar.¹³⁰ Like the other circuits, the *Feltner* court chose the factors it would apply. Even though there was only one fraudulent scheme, the court found dispositive the number of separate acts (nine), the number of victims (nineteen), the number of defendants (five), and the length of the scheme (apparently ten years).¹³¹ The court believed that this amounted to a pattern of racketeering. The court, however, gave no hint as to whether it would use these factors, or a different group of factors, in analyzing future cases.

Given this limited guidance, the Sixth Circuit probably would reach different results in the criminal and civil hypotheticals. Unless the character of the activity—murder—was given greater weight, the brevity of the scheme and the dearth of victims and perpetrators would prevent the court from finding a pattern of racketeering activity in the criminal hypothetical. In contrast, the large number of crimes and victims would lead the court to find a pattern in the civil hypothetical. The *Feltner* court found a pattern with nineteen victims and nine crimes, while the civil hypothetical involves fifty victims and two hundred criminal acts. If the court considered significant the number of defendants, the result might be different because only one defendant is involved in the civil case.

128. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985).

129. *Feltner*, 879 F.2d at 1298-99. In *Feltner*, nineteen plaintiffs entered into contracts to purchase nontheatrical distributorship rights in twenty-three films and television episodes. Supposedly, these rights would produce income and provide significant tax advantages. When the enterprise failed because of the poor quality of plaintiffs' copies and because numerous unauthorized copies were on the market, plaintiffs brought this fraud action against five defendants involved in the transaction. *Id.* at 1292-94.

130. *Id.* at 1298. While implicitly accepting the factors mentioned by the Third and Seventh Circuits, the court neither made reference to the similarity of the acts nor to the character of the activity, both of which are Third Circuit factors. Furthermore, the court did not refer to the number of distinct injuries, a Seventh Circuit factor. *Id.* Nor was the court attempting to formulate a list based upon these factors alone, for the court considered the number of perpetrators in the presence of separate schemes. *Id.* Neither the Third nor the Seventh Circuit considered this factor in their respective tests.

131. Although the actual fraud only lasted several months, the court apparently believed that duration should be measured by the length of the intended relationship between the parties—ten years. *Id.*

4. *Continuity and Relationship as Applied by the Tenth, Ninth, and Second Circuits*

Even before *H.J. Inc.*, the Tenth, Ninth, and Second Circuits employed the two-pronged *Sedima* test in analyzing RICO's pattern requirement.¹³² Within the parameters of this two-part analysis, however, the three courts interpreted "pattern" in radically different ways, based upon their understanding of the term "continuity."

a. *The Tenth Circuit*

The Tenth Circuit's test for finding a pattern of racketeering appears to be more liberal than the foregoing tests because it requires only *something* beyond a single scheme. In *Torwest DBC, Inc. v. Dick*,¹³³ a corporation sued three of its former directors for self-dealing in connection with the acquisition of another corporation, Denver Business Center (DBC).¹³⁴ Employing *Sedima's* two-part analysis, the *Torwest* court found that a relationship existed among "numerous" predicate acts because they all related to the same scheme.¹³⁵ To satisfy the continuity prong, the court required some evidence beyond a single scheme.¹³⁶ Relying on precedent,¹³⁷ the court implied that continuity could be shown in a number of ways: by evidence of multiple schemes, an ongoing scheme, or multiple victims and frauds.¹³⁸ In *Torwest*, however, the Tenth Circuit found none of these elements.¹³⁹ There could be

132. This connection differentiates these circuits from the Third and Seventh Circuits, which analyzed pattern generally, and from the Fifth and Eleventh Circuits, which only considered factors that indicate an interrelationship between acts.

133. 810 F.2d 925 (10th Cir. 1987).

134. *Id.* at 927. According to the complaint, the defendants had secretly formed Canusa Investments Ltd. for the purpose of buying DBC and selling it to Torwest at a profit. Using "nominees" to carry out the plan, the three directors, through Canusa, bought DBC for \$5.4 million and then sold it to Torwest for \$12.7 million. *Id.*

135. *Id.* at 928.

136. *Id.* at 929. The court stated that "a scheme to achieve a single discrete objective does not in and of itself create a threat of ongoing activity, even when that goal is pursued by multiple illegal acts, because the scheme ends when the purpose is accomplished." *Id.*

137. *Id.* at 928-29 (citing *Morgan v. Bank of Waukegan*, 804 F.2d 970, 976 (7th Cir. 1986); *Lipin Enters. Inc. v. Lee*, 803 F.2d 322, 324 (7th Cir. 1986); *Superior Oil Co. v. Fulmer*, 785 F.2d 252, 257 (8th Cir. 1986)).

138. *Id.*

139. *Id.* The court stated the "single scheme at issue involved one victim, Torwest DBC, and had a single goal, the recovery of secret profit through self-dealing in the sale of the DBC." *Id.*; see also *Edwards v. First Nat'l Bank*, 872 F.2d 347 (10th Cir. 1989) (upholding the district court's grant of summary judgment to defendant bank on the ground that no continuity was established).

no threat of continuing criminal activity because the scheme would end once the perpetrators achieved their objective.¹⁴⁰

Under this interpretation of continuity, neither of the hypotheticals would demonstrate a RICO pattern to the Tenth Circuit. The criminal case would not meet the court's requirements because it involved only one scheme with one goal. Likewise, the Tenth Circuit would probably not find the requisite continuity in the civil hypothetical. There were neither multiple schemes nor one ongoing scheme, but only "a scheme to achieve a single discrete objective."¹⁴¹ Moreover, the numerosity of the acts would probably not matter because the *Torwest* court acknowledged the presence of "numerous" criminal acts in that case, but did not mention this factor in its analysis.¹⁴² The outcome might be altered, however, should the number of victims become large enough. The court did mention the number of victims as a possible way of establishing continuity.¹⁴³ Whether fifty victims would be a large enough number to find continuity, and how much weight that one factor would receive, is unclear.

b. *The Ninth Circuit*

Prior to the decision in *H.J. Inc.*, the Ninth Circuit regarded continuity and relationship as relevant considerations, not as "a determinative two-pronged test."¹⁴⁴ Similar to the Second and Tenth Circuits, the Ninth Circuit did not find the relationship component to be problematic in most circumstances, but it struggled over continuity.¹⁴⁵ The Ninth Circuit did not enunciate a multi-factor test to guide its analysis, but instead considered whether the criminal acts were isolated or sporadic and thus not continuous.¹⁴⁶

In practice, however, the number of acts, the number of victims, and the term of the criminal operation have determined whether the activity is sufficiently continuous. In *United Energy Owners Commission v. United Energy Management Systems*,¹⁴⁷ the marketers, promoters, and purchasers of solar equipment sued the company that had contracted to install and maintain the equipment. The plaintiffs alleged that between May 1984 and August 1985,

140. 810 F.2d at 928-29.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Sun Savings & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 192 (9th Cir. 1987).

145. *See, e.g., United Energy Owners Comm., Inc. v. United States Energy Management Sys., Inc.*, 837 F.2d 356 (9th Cir. 1988) (discussing the various components of the "continuity requirement").

146. *Id.* at 360. This focus led the court to reject any requirement of multiple schemes or multiple episodes, which it viewed the Seventh and Tenth Circuits as requiring.

147. 837 F.2d 356 (9th Cir. 1988).

United Energy Management made numerous misrepresentations relating to their expertise, their intention to perform, and their progress.¹⁴⁸ In reversing the lower court, the Ninth Circuit found that the "multiple fraudulent acts involving multiple victims" were sufficiently related and posed a "sufficient threat of continuing activity."¹⁴⁹ In another Ninth Circuit case, the court of appeals found that a single fraudulent inducement involving a single victim did not establish a pattern.¹⁵⁰ Thus, these three factors—the number of victims, the number of acts, and the duration of the scheme—weigh most heavily in the Ninth Circuit's analysis.

If the court applied these three factors to the criminal hypothetical, it probably would not find a pattern of racketeering. Because the two murders were simultaneous, the scheme could not involve a shorter period. Further, there were only two acts of racketeering and only two victims. The Ninth Circuit has never considered the character of the crime as a relevant factor, as the Third Circuit has done. Therefore, the fact that two people were murdered, rather than merely defrauded, would presumably be irrelevant. The distributorship hypothetical, however, would produce a different result under the Ninth Circuit's analysis; a single scheme involving two hundred acts of fraud with fifty victims would amount to a pattern of racketeering.¹⁵¹

c. *The Second Circuit*

Prior to the Supreme Court's decision in *H.J. Inc.*, the Second Circuit in *United States v. Indelicato*¹⁵² and *Beauford v. Helmsley*¹⁵³ scrapped the pattern test it had employed since 1980.¹⁵⁴ Rather than requiring merely two

148. *Id.* at 359.

149. *Id.* at 361.

150. See *California Architectural Bldg. Prod., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1469 (9th Cir. 1987) (a "single fraud perpetrated on a single victim" does not amount to a pattern of racketeering) (citing *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1399 (9th Cir. 1986)), *cert. denied*, 484 U.S. 1006 (1988).

151. See *id.* at 1469. There, the court held that twenty-four acts of mail fraud in connection with a fraud upon several companies would satisfy the pattern requirement. The short life of that scheme, covering only five months, would be comparable to the time during which the distributorship offers were available.

152. 865 F.2d 1370 (2d Cir.), *cert. denied*, 110 S. Ct. 56 (1989).

153. 865 F.2d 1386 (2d Cir.), *vacated*, 492 U.S. 914 (1989).

154. Before these cases were decided, the Second Circuit followed the test it had first enunciated in *United States v. Weisman*, 624 F.2d 1118 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980). In *Weisman*, the Second Circuit rejected the argument that a RICO pattern required the predicate acts to be "'related' to each other through a 'common scheme, plan or motive.'" *Id.* at 1121. The court stated that a pattern could be proved through a showing of some connection between the acts and the affairs of the enterprise. *Id.* The *Weisman* court also considered factors including adopting bylaws, securing counsel, hiring employees, establishing offices, and seeking loans to determine if an enterprise existed. *Id.* at 1125. In addition, the "enterprise"

acts, the court began to demand that plaintiffs demonstrate a relationship between the acts and the threat of continuing violations, as *Sedima* suggested.¹⁵⁵ The Second Circuit also listed a number of factors necessary for the relationship, but the court was vague about the meaning of continuity.¹⁵⁶

In *Indelicato*, a criminal prosecution for a multiple murder, and in *Beauford*, a civil mail fraud case, the Second Circuit employed this new analysis. *Indelicato* involved the prosecution of a "soldier" in the Bonanno criminal organization for the murder of boss Carmine Galante and the simultaneous murder of two other gang members.¹⁵⁷ The defendant committed the murders at the direction of "the Commission," La Cosa Nostra, which hoped to bring stability to the Bonanno family by removing Galante. The only predicate acts charged in the indictment were the three murders.¹⁵⁸

After rejecting previous interpretations of pattern, the Second Circuit enumerated the factors that would demonstrate a relationship among the predicate acts.¹⁵⁹ "These include[d] proof of their temporal proximity, or

secured "procurement of additional funds through the 1973 public offering." *Id.* These factors plus the securities and bankruptcy fraud counts established the necessary relationship. See *United States v. Ianniello*, 808 F.2d 184, 191-92 (2d Cir.), *cert. denied*, 483 U.S. 1006 (1987) (where the enterprise's single purpose "was to skim profits and had no obvious terminating goal or date" which clearly established the "enterprise" requirement).

Following the Supreme Court's decision in *Sedima*, the Second Circuit reaffirmed this interpretation in *Ianniello*, explicitly stating that the court should apply the continuity and relationship prongs of the *Sedima* test to the enterprise requirement. The court said: "[W]e hold that when a person commits at least two acts that have the common purpose of furthering a continuing criminal enterprise with which that person is associated, the elements of relatedness and continuity which the *Sedima* footnote construes section 1962(c) to include are satisfied." *Id.* at 192.

Thus, a pattern of racketeering could be proved by two acts of racketeering activity, an extremely easy hurdle to overcome. The more difficult obstacle was demonstrating the existence of a RICO enterprise, which could not be established "unless there [was] proof that it [was] ongoing and that there [was] more than a single scheme having no demonstrable ending point." *Indelicato*, 865 F.2d at 1381 (discussing the court's past precedent). The effect of this interpretation was that a criminal RICO prosecution was generally successful, at least where organized crime was involved. Nevertheless, because private suits usually involved limited schemes with specific goals, these seldom met the stringent enterprise requirement. See, e.g., *Beck v. Manufacturers Hanover Trust Co.*, 820 F.2d 46 (2d Cir. 1987) (dismissed because of limited scope of the scheme), *cert. denied*, 484 U.S. 1005 (1988); *Albany Insurance Co. v. Esses*, 831 F.2d 41 (2d Cir. 1987) (same); *Furman v. Cirrito*, 828 F.2d 898 (2d Cir. 1987) (same). *Contra United States v. Benevento*, 836 F.2d 60 (2d Cir. 1987) (conviction reversed because there was no continuing criminal enterprise), *cert. denied*, 486 U.S. 1043 (1988).

155. *Beauford*, 865 F.2d at 1390-91; *Indelicato*, 865 F.2d at 1381.

156. *Beauford*, 865 F.2d at 1392-93 (court listed separately indictable acts, interrelated acts, and common goals); *Indelicato*, 865 F.2d at 1382-83 (court listed temporal proximity of the acts, common goals, similarity of methods, and repetitions).

157. *Indelicato*, 865 F.2d at 1372.

158. *Id.*

159. *Id.* at 1381.

common goals, or similarity of methods, or repetitions."¹⁶⁰ In addition, the court relied on the definition of pattern as developed under the Dangerous Special Offenders Act.¹⁶¹ Although proof of relationship was not limited to these factors, their presence indicates a connection between the acts.¹⁶² When the Second Circuit applied this relationship test in *Indelicato*, it only mentioned the similarity of purpose—the change in leadership in the Bonanno family.¹⁶³ Several other factors link the acts as well, however, such as the temporal proximity of the crimes and the similar methods of commission.¹⁶⁴

Although the three murders were clearly related, the court held that they alone did not demonstrate the requisite continuity.¹⁶⁵ The Second Circuit recognized a tension between the two elements, at least where the relationship is proved by temporal proximity.¹⁶⁶ This failure, however, did not doom the government's case. Without specifying the limitations on this test, the court held that certain factors *external to the acts themselves* could establish continuity or the threat of continuity.¹⁶⁷ In this case, the court held that the threat of continuity came from the nature of the "enterprise" itself, a criminal organization whose business is racketeering activity.¹⁶⁸ Even though the acts were simultaneous, their relation to an ongoing criminal enterprise provided the necessary continuity.

Although the new RICO analysis made little difference in *Indelicato*,¹⁶⁹ this relaxed test caused a reversal in the companion civil case, *Beauford v. Helmsley*.¹⁷⁰ In *Beauford*, tenants of a New York apartment building alleged various acts of mail fraud in connection with the conversion of their

160. *Id.* at 1382.

161. *Id.* "[C]riminal conduct would form a pattern if it embraced criminal acts that had, for example, 'the same or similar purposes, results, participants, victims, or methods of commission.'" *Id.*

162. *Id.* at 1382-83.

163. *Id.* at 1384.

164. *Id.* at 1382.

165. *Id.* at 1384-85.

166. *Id.* at 1383. "[O]bviously the shorter the elapsed time between the two acts, the less it can be said that the activity is continuing." *Id.*

167. *Id.*

168. *Id.* at 1384. "Where the enterprise is an entity whose business is racketeering activity, an act performed in furtherance of that business automatically carries with it the threat of continued racketeering activity." *Id.* at 1384-85.

169. Because continuity may be proved by the presence of a continuing enterprise under the Second Circuit's analysis, it appears that the *Indelicato* test is similar to the *Weisman/Ianniello* test where organized crime is involved. See Note, *RICO's "Pattern" Requirement: Void for Vagueness?*, 90 COLUM. L. REV. 489, 498-99 (1990).

170. 865 F.2d 1386 (2d Cir.), *vacated*, 492 U.S. 914 (1989). The Supreme Court vacated and remanded the case for further consideration in light of *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989).

apartments into condominiums.¹⁷¹ Reversing its earlier *Indelicato*-analysis holding, an *en banc* Second Circuit held that the tenants' complaint alleged a RICO pattern.¹⁷²

The *Beauford* court found that the acts of mail fraud were related because all the letters were sent to present and potential tenants and all the frauds had the same goal.¹⁷³ In searching for the threat of continuity, the Second Circuit considered "external" factors. Although the nature of the enterprise did not pose such a threat, similar to *Indelicato*, the Second Circuit found that the multiplicity of mailings and the probability of future mailings demonstrated continuity.¹⁷⁴ The latter factor comports with a narrow continuity "test" because previous condominium conversions of other sections of the same apartment complex involved multiple solicitations. Nevertheless, the first factor, the number of mailings, is consistent only with a loose interpretation of continuity. A multiplicity of simultaneous events does not seem to indicate that the events will continue.¹⁷⁵

When applied to the two hypotheticals, these liberal standards would find patterns of racketeering in both cases. Because *Indelicato* found continuity in the organized crime commission, and not in any factors connected with the murders, the fewer number of victims, acts and perpetrators in the hypothetical would be irrelevant. In both cases, the purpose for the crimes originated in an ongoing criminal enterprise. Given the expansive language in *Beauford*, the court would probably find continuity in the civil hypothetical also, although the company's decision to terminate the offer makes the case more difficult. The two hundred offers in the hypothetical are no more isolated or sporadic than the eight thousand fraudulent offers in *Beauford*.

171. *Beauford*, 865 F.2d at 1388. The complaint charged that both the real estate company, which owned the apartment, and the engineering firm in charge of the conversion made certain misstatements and omissions about the building's condition in the offering plans sent to tenants. *Id.*

172. *Id.* at 1389. In an earlier decision, a panel of the Second Circuit held that the complaint did not demonstrate the necessary continuity to prove an enterprise. The panel said that proof of only one scheme/episode would not meet this requirement. *See Beauford v. Helmsley*, 843 F.2d 103, 110 (2d Cir. 1988).

173. *Beauford*, 865 F.2d at 1392.

174. *Id.*

175. The Second Circuit's answer to this criticism is apparently based on its understanding of *Sedima*. According to the Second Circuit, the Supreme Court did not establish continuity and relationship as a rigid test in *Sedima* but merely wanted to indicate that "isolated" and "sporadic" acts would not form a pattern. *See United States v. Indelicato*, 865 F.2d 1370, 1375 (2d Cir.), *cert. denied*, 110 S. Ct. 56 (1989). The Second Circuit stated that the "[United States] Supreme Court does not enshrine 'continuity plus relationship' as a determinative two-pronged test." *Id.* at 1383. Thus, in arguing that over 8,000 acts of mail fraud were clearly not isolated or sporadic, the court never actually required continuity, but only required an absence of "isolation."

Assuming the court focused on the large number, rather than the potential for similar acts, these multiple acts of mail fraud would constitute a pattern of racketeering.

5. *Multiple Acts Plus Continuity as Applied by the Eleventh Circuit*

The Eleventh Circuit has examined the phrase "pattern of racketeering" on two occasions, both prior to the Supreme Court's decision in *H.J. Inc.*¹⁷⁶ In *Bank of America National Trust & Savings Association v. Touche Ross & Co.*,¹⁷⁷ five banks loaned International Horizons Corporation \$60 million based on financial statements audited by Touche Ross. When Horizons later filed for bankruptcy, leaving the banks with a \$16 million loss, they sued Touche Ross.¹⁷⁸ The plaintiffs alleged that over a three-year period, the accounting firm committed nine separate acts of mail and wire fraud to induce the banks to extend Horizons additional credit.¹⁷⁹

Although the Eleventh Circuit stated that a single scheme could satisfy the RICO pattern requirement,¹⁸⁰ the court noted that under its interpretation of *Sedima*, there must be "a showing of more than one racketeering activity and the threat of continuing activity."¹⁸¹ Even though such a threat was found in both cases, neither *Bank of America* nor the more recent case of *Durham v. Business Management Associates*¹⁸² defined the threat of continuity in any detail. In each case, the court merely quoted from the definition of pattern given in the Dangerous Special Offender Act (DSO).¹⁸³ Without linking these particular factors to the defendant's conduct, the

176. In both *Durham v. Business Management Associates*, 847 F.2d 1505 (11th Cir. 1988), and *Bank of America National Trust & Savings Association v. Touche Ross & Co.*, 782 F.2d 966 (11th Cir. 1986), the court's discussion was rather abbreviated. Consequently, it is difficult to determine the exact contours of the Eleventh Circuit's test. Nevertheless, the fundamental requirement is "a showing of more than one racketeering activity and the threat of continuing activity." *Bank of America*, 782 F.2d at 971.

177. 782 F.2d 966 (11th Cir. 1986).

178. *Id.* 968.

179. *Id.* at 971.

180. By directly addressing the question of whether multiple schemes or transactions were required to prove a pattern, the court implicitly acknowledged that only one scheme or transaction was present. The court's holding made clear that such a finding would not defeat a complaint of a RICO violation stating that "[a]cts that are part of the same scheme or transaction can qualify as distinct predicate acts." *Id.*

181. *Id.*

182. 847 F.2d 1505 (11th Cir. 1988).

183. *Bank of America*, 782 F.2d at 971; see also *Durham*, 847 F.2d at 1511 (definition of pattern stated with little discussion). Under the DSO, "criminal conduct forms a pattern if it embraces criminal acts with the same or similar purposes, results, participants, victims, or methods of commission." Dangerous Special Offender Act 18 U.S.C. § 3575(c)(3) (1982) (repealed 1984), construed in *Bank of America*, 782 F.2d at 971.

Bank of America court held that "nine separate acts of wire and mail fraud, involving the same parties over a period of three years," conducted for a common purpose, would satisfy the pattern requirement.¹⁸⁴

The Eleventh Circuit is distinguished from other circuit courts by its application of factors that normally demonstrate relationship to continuity.¹⁸⁵ Under *Sedima* and *H.J. Inc.*, the factors listed in the DSO definition are pertinent to determine whether the acts are sufficiently related.¹⁸⁶ The Eleventh Circuit has never discussed relationship; it has simply applied the DSO factors to the continuity question after finding multiple acts. Given the ease of finding these factors,¹⁸⁷ the result is an extremely flexible pattern requirement. Moreover, it appears that plaintiffs need only prove more than one racketeering activity and the threat of continuing activity. Therefore, factors such as an ongoing enterprise, the likelihood of future violations, or multiple "transactions" are not addressed.

Under the *Bank of America* and *Durham* decisions, crimes in the civil hypothetical would form a pattern. In the hypothetical, there were two hundred acts of mail fraud directed toward a common goal. Further, the same individuals perpetrated all two hundred crimes and employed the same method. It is unclear, however, whether the Eleventh Circuit would find a pattern under the facts of the criminal hypothetical. Although the crimes were virtually identical in method and were directed toward the same goal, they were few in number and virtually simultaneous. Given the sparse precedent in the Eleventh Circuit, it would be impossible to predict the court's decision.

6. Relationship as Applied by the Fifth Circuit

Soon after the *Sedima* decision, the Fifth Circuit decided to address the pattern issue by considering only the relationship between, or among, the predicate acts. In *R.A.G.S. Couture, Inc. v. Hyatt*,¹⁸⁸ a corporation alleged that its former president committed fraud by submitting false invoices to the corporation.¹⁸⁹ The only basis for the RICO claim was the defendant's use

184. *Bank of America*, 782 F.2d at 971.

185. Ironically, the Eleventh Circuit test, which never mentions relationship, mirrors the Fifth Circuit's test, which never discusses continuity. See *infra* notes 188-91 and accompanying text.

186. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985); *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 240 (1989).

187. In *H.J. Inc.*, the Supreme Court implied that it was relatively easy to find the DSO factors present. 492 U.S. at 251 (Scalia, J., concurring).

188. 774 F.2d 1350 (5th Cir. 1985).

189. *Id.* at 1351-52.

of the mails on two occasions.¹⁹⁰ In holding that these acts formed a pattern, the court did not mention continuity. Instead, it found that the acts of mail fraud were not isolated, but related.¹⁹¹ Although another Fifth Circuit panel questioned the wisdom of the *R.A.G.S. Couture* decision even before *H.J. Inc.*,¹⁹² the *R.A.G.S. Couture* analysis of pattern still is controlling.¹⁹³ Given this liberal test, it appears certain that the Fifth Circuit would find a pattern of racketeering in both the civil and the criminal hypotheticals.

C. *Developments in the Circuit Courts Since H.J. Inc.*

In the years since the Supreme Court decided *H.J. Inc.*, the complexion of RICO's pattern requirement has changed only slightly. Neither the Sixth, Ninth, nor Tenth Circuit has addressed the interpretation of pattern, leaving intact the disparate pre-*H.J. Inc.* interpretations.¹⁹⁴ While the Eleventh Circuit has begun to discuss the pattern requirement in terms of relationship and continuity,¹⁹⁵ *H.J. Inc.* seems to have had very little effect on the court's perspective.

The Eleventh Circuit continues to take a broad view of pattern. For example, in *United States v. Hobson*,¹⁹⁶ the court upheld the defendant's RICO conviction, finding that a single crime which simultaneously violated two statutes could satisfy the pattern requirement.¹⁹⁷ In the case, the defendant was found guilty of aiding and abetting the importation and possession of

190. *Id.* at 1354.

191. *Id.* at 1355.

192. See *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423, 426 (5th Cir. 1987) (although this panel followed the decision, it encouraged that the decision be overturned *en banc*).

193. See *Abell v. Potomac Ins. Co.*, 858 F.2d 1104, 1129 (5th Cir. 1988).

194. Both the Ninth and the Sixth Circuits have made indirect references to *H.J. Inc.*, even though they have not specifically addressed the meaning of the pattern requirement. In *United States v. Walgren*, 885 F.2d 1417, 1424-26 (9th Cir. 1989), the Ninth Circuit addressed the related question of whether a single act that violates two criminal statutes can be a "pattern of racketeering." In its discussion, the court cited the pre-*H.J. Inc.* cases of *California Architectural Bldg. Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466 (9th Cir. 1987), *cert. denied*, 484 U.S. 1006 (1988), and *Schreiber Distributing Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393 (9th Cir. 1986), thereby indicating these cases were unaffected by the Supreme Court's decision. *Walgren*, 885 F.2d at 1425 n.11.

In *Newmyer v. Philatelic Leasing, Ltd.*, 888 F.2d 385 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 2169 (1990), the Sixth Circuit reversed the dismissal of a RICO claim where the district court had applied the Eighth Circuit's multi-scheme analysis. *Id.* at 396-98. Beyond this obvious position, however, the court did not indicate its present understanding of the pattern requirement. *Id.*

195. See *United States v. Hobson*, 893 F.2d 1267 (11th Cir. 1990); *United States v. Alexander*, 888 F.2d 777 (11th Cir. 1989).

196. 893 F.2d 1267 (11th Cir. 1990).

197. *Id.* at 1268-69.

marijuana. On appeal, Hobson argued that his only act, making a 1.5 million dollar advance for a load of marijuana, did not demonstrate the requisite continuity.¹⁹⁸ The Eleventh Circuit rejected the argument, although it engaged in no more analysis than in its earlier decisions.¹⁹⁹ Focusing upon Hobson's participation as an organizer and his demand for repayment when the transaction fell through, the Court stated: "The facts described above . . . did not involve merely a single isolated act of paying money but rather a series of acts, including a demand for repayment of a large sum of money or delivery of marijuana to replace the load lost."²⁰⁰ Apparently the Court believed that this "series of acts" demonstrated continuity, and the demand for replacement marijuana " 'project[ed] into the future with a threat of repetition.' "²⁰¹ In practice, the Eleventh Circuit has continued to apply an extremely liberal pattern test. Here, an individual was convicted of the minimum number of acts, the acts were actually one act which violated two statutes, and he was not even a primary defendant but only an aider and abettor.

The Second Circuit similarly appears to have retained the broad interpretation of pattern it articulated in *Indelicato* and *Beauford*.²⁰² Relationship may still be tested by referring to the DSO list of factors. Continuity is tested by referring to the duration of the scheme.²⁰³ Moreover, the Second Circuit allows the continuity element to be proved by evidence of many crimes occurring over a short period.²⁰⁴ Even though the Supreme Court vacated and remanded *Beauford*, where the Second Circuit used the number of acts to support a finding of continuity, the circuit upheld its earlier decision.²⁰⁵ Given the flexibility of the Second Circuit's test and the Supreme Court's test,²⁰⁶ it is not surprising that district court decisions lack uniformity.²⁰⁷

The Eighth Circuit has reexamined the pattern requirement, having had its multiple-scheme test struck down in *H.J. Inc.* The Eighth Circuit first

198. *Id.*

199. *Id.*

200. *Id.* at 1269.

201. *Id.* (quoting *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 241 (1989)).

202. See *United States v. Kaplan*, 886 F.2d 536, 542-43 (2d Cir. 1989); *United States v. Bortnovsky*, 879 F.2d 30, 41 (2d Cir. 1989).

203. *Jacobson v. Cooper*, 882 F.2d 717, 720 (2d Cir. 1989) (citing *H.J. Inc.*, 492 U.S. at 240).

204. *Id.*

205. *Beauford v. Helmsley*, 893 F.2d 1433 (2d Cir. 1989).

206. Both Justice Scalia and subsequent appellate courts have criticized the *H.J. Inc.* continuity and relationship test for being extremely malleable. See *H.J. Inc.*, 492 U.S. at 251-56 (Scalia, J., concurring); *Management Computer Servs. v. Hawkins, Ash, Baptie & Co.*, 883 F.2d 48, 51 (7th Cir. 1989).

207. Note, *supra* note 169, at 504.

applied the Supreme Court's test in *Atlas Pile Driving Co. v. DiCon Financial Co.*,²⁰⁸ a case involving fraud in the financing and construction of two residential subdivisions. The plaintiff subcontractors alleged that a seller of land, a lender, and a general contractor devised a scheme to defraud the plaintiffs out of labor and materials on the two separate projects.²⁰⁹ The court had little trouble finding a relationship among the acts, noting that four of the five specific DSO considerations were present.²¹⁰ Though the Eighth Circuit found the continuity prong difficult to define, it held that the duration of the two fraudulent schemes established sufficient evidence of continuity.²¹¹

The Eighth Circuit then discussed the presence of multiple criminal schemes involving different subdivisions, different victim subcontractors, and "wholly separate and distinct" periods of construction.²¹² While recognizing that multiple schemes could no longer be the dispositive factor in its pattern analysis, the Eighth Circuit nevertheless considered multiple schemes based upon the Supreme Court's flexible language.²¹³ Thus, in *Atlas Pile Driving*, the court probably would have found the test satisfied, even under its previous multi-scheme test. It remains to be seen how the court will weigh the multiple scheme factor in future cases.

Because its previous interpretation only asked if the predicate acts were related, the Fifth Circuit also found it necessary to modify its pattern requirement after *H.J. Inc.* Soon after the Supreme Court's decision, the appellate court recognized that the decision had "narrowed the meaning of 'pattern,'" demanding the addition of a continuity prong.²¹⁴ But the court did not analyze the new test in any detail until 1990 in *Landry v. Air Line Pilots Association, International, AFL-CIO*.²¹⁵ *Landry* involved a suit by a

208. 886 F.2d 986 (8th Cir. 1989).

209. *Id.* at 988-89.

210. *Id.* at 994.

211. In *Atlas*, the fraudulent acts were separated by one and three years. *Id.* at 994-95.

212. *Id.* Notice in *Atlas* that the presence of different victims is one of the factors showing separate schemes, and thus continuity, while similar victims is one of the factors in the DSO relatedness test. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985). Consequently, the fact that the victims were different may be used by the court, not against a finding of relatedness, but for a finding of continuity.

213. *Atlas*, 886 F.2d at 994-95. The majority in *H.J. Inc.* first said a "'scheme' is in the eye of the beholder, since whether a scheme exists depends on the level of generality at which criminal activity is viewed." They went on to say, however, that proof of involvement in multiple schemes is "highly relevant" to the continuity inquiry. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 240 (1989).

214. *Smith v. Cooper/T. Smith Corp.*, 886 F.2d 755 (5th Cir. 1989). In *Smith*, this alteration proved dispositive, for the plaintiffs ultimately admitted that they could not satisfy the more rigorous *H.J. Inc.* test. *Id.* at 756.

215. 901 F.2d 404, 432-33 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 244 (1990).

group of pilots in connection with an agreement between their employer and their union allowing the airline to move its pilot base from Louisiana to El Salvador.²¹⁶

In applying the relationship prong of *H.J. Inc.*, the Fifth Circuit first cited the DSO list of factors and then asked which of these factors were applicable to *Landry*. Ultimately, the court found each one present, noting that "the relationship element is easily satisfied here by the pilots' allegations."²¹⁷ As to the continuity prong, the court found that the union and the union negotiator might be held to present continuing threats of racketeering. With respect to the union defendant, the court relied on a similar, but unrelated, suit against the union by another group of pilots. Like the *Landry* pilots, these plaintiffs alleged that the union "sold them out to protect itself from prosecution for the acts of sabotage it directed."²¹⁸ According to the court, the presence of such an action could demonstrate continuity because the union "pose[d] a threat of continuing harm to other victims."²¹⁹

Thus, like the Second Circuit, the Fifth Circuit will look beyond the acts themselves to some other source of continuity—here, unproven allegations in an unrelated proceeding. Given this willingness to find a threat of continuity, it is worth asking whether the addition of continuity as a consideration will actually affect the court's decisions. The old liberal relationship test may simply be wearing a new face.²²⁰

216. *Id.* at 408. In their RICO action, the pilots alleged that the airline, the union, and the union negotiator were attempting to accomplish four basic objectives—moving the pilot base, ending the union's representation of the pilots, insuring the union negotiator received retirement benefits and terminating the pilots' rights under the collective bargaining agreement. *Id.* at 425.

217. In applying the DSO factors, the court said:

First, all of the predicate acts were aimed at achieving a single goal—relocation of the pilots' base to El Salvador. Only through the accomplishment of this goal could all of the RICO defendants' subsidiary goals be accomplished. Second, we find the participants were the same: ALPA [the union] and Huttinger [the union negotiator]. Third, the victims were the same: the pilots. Finally, the events are in no way isolated, but are related in the sense that they all occurred or commenced during or grew out of the process of negotiating TACA's relocation program.

Id. at 433.

218. *Id.* at 426.

219. *Id.*

220. *But cf.* *Howell Hydrocarbons, Inc. v. Adams*, 897 F.2d 183 (5th Cir. 1990). In *Howell*, the court noted that a "single misrepresentation or fraudulent statement is not enough to provide the continuity required for a pattern of racketeering. There has been no indication of activities that amount to or threaten long term criminal activity." *Id.* at 193 (citing *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 240 (1989)).

Finally, the Third and Seventh Circuits have reexamined their pattern tests in light of *H.J. Inc.* Both these circuits are multi-factor circuits.²²¹ Given the importance of "scheme" in the Seventh Circuit's pre-*H.J. Inc.* analysis, it is significant that the Supreme Court criticized the term "scheme" as "highly elastic and amorphous."²²² The Seventh Circuit responded by removing "scheme" from its list of factors, suggesting that the "presence of separate schemes" is no longer "useful in analyzing the pattern element."²²³ While the Eighth Circuit considers the presence of separate schemes to be highly relevant in finding continuity, even if no longer determinative under *H.J. Inc.*,²²⁴ the Seventh Circuit has stopped considering schemes entirely. Instead, the Seventh Circuit uses three other factors from the *Morgan* test that are consistent with the Supreme Court's general guidelines.²²⁵

In *Management Computer Services v. Hawkins, Ash, Baptie & Co.*,²²⁶ the Seventh Circuit did not find a pattern when it followed this altered formula. Characterizing the case as "essentially a contract dispute," the court said that a case involving one victim, one transaction between the parties, and two predicate acts would not satisfy the pattern requirement.²²⁷ The *Management Computer* fraud was limited in scope, however, making it difficult to determine where the court draws the line between a pattern of racketeering and "isolated" criminal activity.

In a limited fraud involving one victim and one injury, the Third Circuit came to a somewhat different conclusion. In *Swistock v. Jones*,²²⁸ two individual plaintiffs alleged that their lessors, two individual owners of property and coal deposits, committed mail and wire fraud in inducing them to lease

221. Since *H.J. Inc.*, the Sixth Circuit has addressed the pattern requirement only tangentially. Citing the Supreme Court's opinion, the Sixth Circuit in *Callanan v. United States*, 881 F.2d 229 (6th Cir. 1989), recognized that a purported pattern of racketeering would be sufficient only if the predicate acts were both related and continuous. *Id.* at 234. Although the issue in *Callanan* was whether the acts would meet even the minimal two-act requirement, the court never discussed the meaning of these terms. *Id.* While nothing in *H.J. Inc.* would seem to undercut a multi-factor approach, it remains to be seen whether the circuit will retain this analytical method.

222. *H.J. Inc.*, 492 U.S. at 241 n.3.

223. *Management Computer Servs. v. Hawkins, Ash, Baptie & Co.*, 883 F.2d 48, 51 (7th Cir. 1989).

224. *Atlas Pile Driving Co. v. DiCon Financial Co.*, 886 F.2d 986, 994 (8th Cir. 1989).

225. *Morgan v. Bank of Waukegan*, 804 F.2d 970, 977 (7th Cir. 1986). The court takes a "natural and common sense approach" to pattern and focuses upon "long term" criminal conduct. *Id.* at 976-77.

226. 883 F.2d 48 (7th Cir. 1989).

227. *Id.* at 51.

228. 884 F.2d 755 (3d Cir. 1989).

the land.²²⁹ After employing the weighted six-factor test, the district court concluded that "the single injury, single victim scheme alleged by plaintiffs was legally insufficient to state a RICO pattern."²³⁰ In reversing the dismissal, the Third Circuit broadly interpreted the allegations.²³¹ According to the court, the alleged acts of mail and wire fraud were for the same purpose; therefore, the acts were related.²³² Furthermore, dismissal was inappropriate if the plaintiffs could prove continuity through any one of several mechanisms.²³³

The status of the six-factor test in the Third Circuit is unclear after *Swistock*. While some commentators have stated that the *Swistock* court retained the test even after *H.J. Inc.*,²³⁴ a closer reading of the opinion suggests otherwise.²³⁵ The Third Circuit never explicitly rejected either the six-factor test or any of its factors.²³⁶ The court in *Swistock* held that the number of victims and the quantity of injury were no longer dispositive.²³⁷ The opinion also indicated that two of the six factors—the length of the scheme and the number of predicate acts—were relevant in determining whether continuity

229. *Id.* at 756-57.

230. *Id.* at 758.

231. *Id.* The court said that "[a]lthough we also may have concluded in the pre-*H.J. Inc.* period that plaintiffs pled at most a state law fraud case, we are now bound to give the allegations a broader interpretation." *Id.*

232. *Id.* at 759 (both acts were aimed at obtaining a lease).

233. *Id.* For instance, because the predicate acts alleged by the plaintiffs occurred over the course of more than a year, plaintiffs might be able to prove "the existence of a closed-end period of repeated conduct of sufficient length" to indicate continuity. *Id.* In the alternative, the plaintiffs might be able to demonstrate a threat of continuity "by showing that the predicate acts . . . are part of an ongoing entity's regular way of doing business." *Id.* at 757 (quoting *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 242 (1989)).

234. Note, *supra* note 169, at 500.

235. The *Swistock* court said: "The district court correctly identified long-term racketeering activity or the threat thereof as the touchstone of the continuity concept. The district court, however, applied the six factor test which we had enunciated in *Saporito v. Combustion Engineering, Inc.*, 843 F.2d 666, 676-77 (3rd Cir. 1988)." *Swistock*, 884 F.2d at 757. The use of the word "however" suggests that this test may no longer be the guiding formula in the Third Circuit. Further, the court emphasized a method of proving continuity which heretofore had not been included in its analysis of the pattern requirement. Quoting from *H.J. Inc.*, the court said that " 'a threat of continuity of racketeering activity might be established at trial by showing that the alleged bribes were a regular way of conducting [the company's] ongoing business.' " *Id.* at 757 (quoting *H.J. Inc.*, 492 U.S. at 242). This consideration was not among the six *Saporito* factors.

236. At least one other post-*H.J. Inc.* case also indicates that the six-factor test is not yet dead. See *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1166 (3d Cir. 1989).

237. *Swistock*, 884 F.2d at 758.

existed.²³⁸ After *Swistock*, the meaning of pattern in the Third Circuit seems more ambiguous than before.²³⁹

These recent cases illustrate the amorphous nature of the Supreme Court's two-part test and indicate that the courts are diverging in their interpretations of RICO's pattern requirement.²⁴⁰ As the Seventh Circuit recently reported, "we find [the Supreme Court's] explanations of the terms continuity and relationship to be somewhat elastic."²⁴¹ Without concrete guidance from the statutory language, the legislative history, or even the Supreme Court, circuit courts continue to differ in their application of the pattern requirement.

III. THE VOID-FOR-VAGUENESS DOCTRINE

Under the due process clauses of the fifth and fourteenth amendments, federal and state statutes must be reasonably clear, or they will be struck down as unconstitutionally vague.²⁴² The requirement of reasonable clarity is based on two primary concerns. First, individuals should know what activities are prohibited so they can conform their conduct to the law's requirements.²⁴³ It seems unfair to punish someone who could not ascertain that his actions were prohibited. Second, law enforcement officials should be

238. *Id.*

239. In *Marshall-Silver Construction Co. v. Mendel*, 894 F.2d 593 (3d Cir. 1990), the Third Circuit raised the question of whether "'continuity' is solely a 'temporal concept'" or whether the extent of the criminal activity is relevant. *Id.* at 596-97. This new dispute over continuity is but further proof that *H.J. Inc.* generated as much ambiguity as it cured.

240. Note, *supra* note 169, at 504.

241. *Management Computer Servs. v. Hawkins, Ash, Baptie & Co.*, 883 F.2d 48, 51 (7th Cir. 1989) (citing *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 252-56 (1989) (Scalia, J., concurring)).

242. U.S. CONST. amends. V, XIV. As the Supreme Court stated in *Connally v. General Construction Co.*, 269 U.S. 385 (1926), the classic formulation of the void-for-vagueness doctrine, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Id.* at 391; see TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-31, 1033-35 (1988) (general discussions of the void-for-vagueness doctrine); Comment, *Reconciliation of Conflicting Void-for-Vagueness Theories Applied by the Supreme Court*, 9 HOUS. L. REV. 82 (1971) (same); Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960) (same); Note, *Big Mama Rag: An Inquiry Into Vagueness*, 67 VA. L. REV. 1523 (1981) [hereinafter Note, *Big Mama Rag*] (same).

243. *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972); *Cramp v. Board of Pub. Instruction*, 368 U.S. 278, 287 (1961); *Chalmers v. City of Los Angeles*, 762 F.2d 753 (9th Cir. 1985); *Levas & Levas v. Village of Antioch, Ill.*, 684 F.2d 446 (7th Cir. 1982); see R. ROUNTON, *TREATISE ON CONSTITUTIONAL LAW SUBSTANCE AND PROCEDURE*, § 20.9, at 34-37 (1986) (notice must be given so that the public can distinguish between criminal activity and an activity that relates to a fundamental constitutional right); Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985).

given guidance in enforcing statutes.²⁴⁴ Absent such guidance, those charged with enforcing the statute may act arbitrarily or discriminatorily in enforcing statutes.

These concerns are balanced against the need for broad and flexible statutes to cover the multiplicity of criminal situations that may arise. Consequently, courts rarely declare statutes "facially vague," which would imply that the statutes' requirements are so uncertain that they provide no standards. The effect of such a decision would render the entire statute unconstitutional.²⁴⁵ A reviewing court, however, may hold a law partially vague, which implies that the statute is unclear as applied to the defendant's behavior. If a court finds a law partially vague, the law cannot be applied to that particular defendant, but it remains intact. In these cases, the court often finds a "cure" for the deficiency—either a judicial interpretation of the statute which sufficiently narrows its meaning, or a scienter requirement which assures that the defendant knew that his conduct was prohibited. As a result of these limitations, courts seldom reverse legislative enactments using the void-for-vagueness doctrine.²⁴⁶

A. Purposes Behind the Requirement of Definiteness

Although the Supreme Court recently mentioned four policies behind prohibiting vague statutes, courts historically have addressed only two concerns—warning to potential defendants²⁴⁷ and guidance for law enforcement officials.²⁴⁸ It is unfair to punish an individual who has not been fairly

244. See *Papachristou*, 405 U.S. at 162, 168-71; *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971); *Giaccio v. Pennsylvania*, 382 U.S. 399, 403 (1966); *Brasslett v. Cota*, 761 F.2d 827, 838 (1st Cir. 1985); R. ROTUNDA, *supra* note 243, at 35.

245. See *Colautti v. Franklin*, 439 U.S. 379, 394-401 (1979); *United States v. United States Gypsum Co.*, 438 U.S. 422, 434-46 (1978); *Palmer v. City of Euclid*, 402 U.S. 544 (1971).

246. See *United States v. National Dairy Prods. Corp.*, 372 U.S. 29 (1963); *NAACP v. Button*, 371 U.S. 415, 433 (1963); *Lambert v. California*, 355 U.S. 225, 229 (1957); *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952); *Cotton States Mut. Ins. Co. v. Anderson*, 749 F.2d 663 (11th Cir. 1984).

247. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982). In *Village of Hoffman Estates*, one of two recent decisions analyzing the vagueness doctrine in some detail, Justice Marshall reiterated these policies and stated that "because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Id.* at 498 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)).

248. Although most Supreme Court opinions dealing with vagueness have focused on these concerns, Justice Brennan has mentioned two other reasons to invalidate indefinite statutes. In *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), Justice Brennan said a requirement of reasonable clarity "ensures that state power will be exercised only on behalf of policies reflecting an authoritative choice among competing social values . . . and permits meaningful judicial review." *Id.* at 629.

warned that particular actions are prohibited. Before being prosecuted for violating a law, an individual should have the opportunity to conform his conduct to the requirements of a statute. Where statutory language is so ambiguous that a person cannot know what conduct is proscribed, he has not been fairly warned.²⁴⁹

The language of a statute not only affects the conduct of potential defendants, it also affects the decisions of those who enforce the law. A law enforcement official's decision to prosecute a particular defendant will depend upon the defendant's actions and the official's understanding of the legal pro-

As in the enforcement sphere, effective judicial review is only possible if statutes are reasonably precise. If the statute is vague, the reviewing court has no standard against which to evaluate the decision of a lower court. Without such a standard, the appellate court presumably is less likely to reverse the trial court, especially where the standard of review is something other than *de novo* review. *State v. Mays*, 446 So. 2d 1195 (La. 1984). In other words, the presumption in favor of a lower court's determination is strengthened by an imprecise law. Assuming the appropriate standard of review is in place, the effect of increasing judicial deference will be the affirmation of some decisions that ordinarily would have been reversed.

This heightened deference also increases the probability that decisions influenced by improper motives will be upheld. Reviewing courts themselves are presumably less likely to be influenced by illegitimate factors, at least in part because the review is usually confined to the record. *Fineberg v. Niekerk*, 175 Cal. App. 3d 935, 221 Cal. Rptr. 106 (1985); *B/M Redev. Corp. v. Serrano*, 3 Conn. App. 409, 488 A.2d 848 (1985). Where a statute is so vague that the appellate court cannot be sure whether certain behavior comes within its proscriptions, it may be less obvious that prosecutors and juries are acting arbitrarily or discriminatorily. Only sufficiently definite statutes will ensure that such judicial review is meaningful. *Roberts*, 468 U.S. at 629; *Smith v. Goguen*, 415 U.S. 564, 575 (1976); *United States v. Reese*, 92 U.S. 214, 221 (1876).

Where a law is so vague that neither policemen, prosecutors, nor juries understand the particular statutory requirements, state power may be exercised on behalf of policies different from those the legislature intended. *Screws v. United States*, 325 U.S. 91, 151-52 (1945) (Murphy, J., dissenting). *Cf. Herndon v. Lowry*, 301 U.S. 242, 261 (1937); *United States v. Cohen Grocery Co.*, 255 U.S. 81, 92 (1921). Even if the enforcement officials do not discriminate and even if they act consistently, they may be supporting policies that contravene the legislature's intentions. For example, although the legislative goal of RICO unquestionably was the destruction of organized crime, the imprecision of the statutory language allows prosecutors to use it against ordinary corporate fraud. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985); *Saporito v. Combustion Eng'g, Inc.*, 843 F.2d 666, 678 (3d Cir. 1988); *Barticheck v. Fidelity Union Bank/First Nat'l State*, 832 F.2d 36, 40 (3d Cir. 1987); *Masi v. Ford City Bank and Trust Co.*, 779 F.2d 397, 401 (7th Cir. 1985). Only reasonable clarity will insure that enforcers use state power to further policies that the legislature supports.

249. *Village of Hoffman Estates*, 455 U.S. at 498; *see also Goguen*, 425 U.S. at 566 (Massachusetts flag misuse statute held unconstitutionally vague because it failed to differentiate between ceremonial and nonceremonial treatment). *But see Grayned v. City of Rockford*, 408 U.S. 104 (1972) (antinoise ordinance held not to be unconstitutionally vague because the statutory intent was aimed specifically toward the context of school activities). Vague laws are inefficient as well as unconstitutional, assuming the goal is to prevent certain types of conduct. A person cannot change his behavior to make it conform to the statute if he cannot tell what the statute requires.

scription.²⁵⁰ If a defendant's actions are similar to the description of a crime given by a statute, government officials will prosecute and a jury will convict. If the description of the prohibited behavior is excessively vague, however, both prosecutors and triers of fact will be without any guidance.²⁵¹ One danger is that these officials will act arbitrarily, convicting one defendant and acquitting another even though both are similarly situated. Even more offensive to due process is the potential for discriminatory enforcement. Without the guidance provided by clear statutory commands, officials may "pursue their personal predilections."²⁵² The Court recently has said that curbing this danger of unbridled discretion is the most important aspect of the vagueness doctrine.²⁵³

B. Legislative and Judicial Difficulties

The Supreme Court has stated that "an enactment is void-for-vagueness if its prohibitions are not clearly defined."²⁵⁴ The statute must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited."²⁵⁵ This apparently simple requirement masks a number of difficulties inherent in the legislative and judicial processes. Whenever the legislature drafts a narrow statute, it "risk[s] nullification by easy evasion of the legislative purpose."²⁵⁶ Sometimes certain defendants will fall outside the proscriptions of a statute because the legislature could not foresee, nor did it have the time to provide for, the countless permutations that might arise.²⁵⁷ This intrinsic difficulty makes courts deferential to legislative enactments, unless the statute implicates constitutional rights.²⁵⁸

The void-for-vagueness test also imposes problems for reviewing courts. Part of the difficulty arises because the indefiniteness of language²⁵⁹ requires

250. See Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

251. In *Village of Hoffman Estates*, Justice Marshall described the risk in such a situation: "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications." 455 U.S. at 498.

252. *Goguen*, 415 U.S. at 575 (cited in *Kolender v. Lawson*, 461 U.S. 352, 259 (1983)).

253. *Kolender*, 461 U.S. at 359.

254. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

255. *Id.*

256. *TRIBE*, *supra* note 242, at 1033 (citing *Colten v. Kentucky*, 407 U.S. 104, 107 (1972); *Winters v. New York*, 333 U.S. 507 (1948) (Frankfurter, J., dissenting)).

257. Of course, Congress could draft the statute to cover almost every conceivable situation, as it has codified the Internal Revenue Code.

258. See *infra* notes 262-301 and accompanying text.

259. As one commentator has noted: "There is no sharp line between language which is uncertain and language which is certain. What is uncertain at one time may be certain at

courts to evaluate a statute's vagueness in light of particular circumstances. Otherwise, judges would be relying solely on their subjective determinations of a statute's clarity. This realization, in addition to the knowledge judges have of the difficulties inherent in drafting statutes, may contribute to their unwillingness to strike statutes *in toto*. Making decisions based on particular circumstances, however, precludes the development of systematic rules of decision to guide later analysis. Thus, Supreme Court decisions are not devoid of informed reasoning, as certain commentators have suggested.²⁶⁰ Rather, the nature of the subject makes it more difficult to develop the general formulations needed to decide later cases. Whatever the reason, though, the void-for-vagueness doctrine's statements of purpose, to warn potential defendants and guide enforcement officials,²⁶¹ are of little help in analyzing specific statutes.

C. *Facial and Partial Challenges to Vague Statutes*

Courts addressing vagueness challenges face an unenviable task: to strike a balance in protecting defendants and guiding criminal enforcement, while allowing sufficient flexibility to make the statute viable. A similar conflict exists whenever someone challenges a statute under a clause of the United States Constitution. Regardless of whether a litigant challenges a statute under the free exercise clause, the free speech clause, or the due process clause, the reviewing court must consider the interests of the individual as well as the societal concern which motivated the legislation. The Supreme Court handles this tension, in part, by distinguishing between facial and partial challenges to a law.

According to the Supreme Court, in a facial attack on a statute the defendant "must establish that no set of circumstances exists under which the Act would be valid."²⁶² If the facial challenge is based on the due process clause of the fifth or fourteenth amendments, the defendant must argue that the statutory language is so unclear that it establishes no standard at all.²⁶³

another." Collings, *Unconstitutional Uncertainty—An Appraisal*, 40 CORNELL L.Q. 195, 195 (1955).

260. See, e.g., Note, *Big Mama Rag*, *supra* note 242, at 1543.

261. See *Connally v. General Constr. Co.*, 269 U.S. 385, 394 (1926); see also *supra* note 242 (discussing vague statutes and due process).

262. *United States v. Salerno*, 481 U.S. 739, 745 (1987) (rejecting a facial attack upon the Bail Reform Act under the eighth amendment).

263. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 n.7 (1982) (citing *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971)); see also *United States v. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921) (declaring facially vague a statute that prohibited making an "unjust or unreasonable rate").

In other words, no "hard core" of conduct is prohibited.²⁶⁴ Except in certain limited situations,²⁶⁵ the Court will "uphold the [facial] challenge only if the enactment is impermissibly vague in all of its applications."²⁶⁶ An example is the challenged statute in *Coates v. City of Cincinnati*.²⁶⁷ In *Coates*, a municipal ordinance made it a crime for groups "to assemble . . . on any of the sidewalks . . . [and to] conduct themselves in a manner annoying to persons passing by."²⁶⁸ The Court invalidated the statute *in toto* because the statute did not establish any standard, and it provided no advance guidance as to what conduct other persons would find annoying.²⁶⁹

Although the Court will normally entertain a facial challenge only if the statute is vague in all of its applications, the Court does not always require the defendant to shoulder this heavy burden.²⁷⁰ In *Kolender v. Lawson*, the Court reemphasized these exceptions in the context of a California vagrancy statute.²⁷¹ The statute required individuals to provide police officers with "credible and reliable" identification if the officer had "reasonable suspicion of criminal activity sufficient to justify a *Terry [v. Ohio]* detention."²⁷² Before evaluating the constitutionality of the statute, Justice O'Connor cited two exceptions to the rule requiring a statute to be vague in all of its applications. First, where a statute implicates "a substantial amount of constitutionally protected conduct," such as the freedom of speech or movement, a

264. *Smith v. Goguen*, 415 U.S. 566, 578 (1974).

265. Where first amendment or other constitutional rights are implicated, the Supreme Court will demand greater precision in statutory language. See *Kolender v. Lawson*, 461 U.S. 352, 359 n.8 (1983) (court will "permit a facial challenge if a law reaches 'a substantial amount of constitutionally protected conduct' ") (quoting *Village of Hoffman Estates*, 455 U.S. at 494). Like overbroad statutes, vague statutes may chill constitutionally protected activity because "citizens [will] 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Village of Hoffman Estates*, 455 U.S. at 494 n.6 (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)). Where constitutionally protected conduct is implicated or where discriminatory enforcement is a significant risk, the Court has not required that a statute be vague in all its possible applications. See *Kolender*, 461 U.S. at 358-59 n.8. In these situations of constitutionally protected conduct, a defendant may challenge the statute on grounds of vagueness and overbreadth even if his own conduct is clearly proscribed. See *Village of Hoffman Estates*, 455 U.S. at 495.

266. *Village of Hoffman Estates*, 455 U.S. at 495.

267. 402 U.S. 611 (1971).

268. *Id.* at 611 n.1.

269. *Id.* at 614 n.4. But see *Kolender*, 461 U.S. at 370 (White, J., dissenting) ("The upshot of our cases, therefore, is that whether or not a statute purports to regulate constitutionally protected conduct, it should not be held unconstitutionally vague on its face unless it is vague in all of its possible applications."). In *Coates* there were certainly situations in which conduct would clearly fall within the statutory proscriptions, such as spitting on a passerby. *Coates*, 402 U.S. at 611.

270. *Kolender*, 461 U.S. at 358-59 n.8.

271. *Id.* at 353.

272. *Id.* at 356. (citing 392 U.S. 1 (1968)).

facial challenge will be permitted even if certain behavior would unquestionably come within the statute.²⁷³ Second, where a statute imposes criminal penalties, “[t]his concern has, at times, led [the Court] to invalidate a criminal statute on its face even when it could conceivably have had some valid application.”²⁷⁴

In holding the vagrancy statute facially vague, Justice O’Connor focused on the amount of discretion given to police officers under the statute, a consideration which, prior to *Kolender*, had been subordinate to the notice given a defendant.²⁷⁵ Letting individual policemen determine whether a suspect has provided credible and reliable identification poses tremendous risks of arbitrary and discriminatory enforcement. Justice O’Connor believed that the vague statute encouraged arbitrary enforcement because it did not explain what would qualify as credible and reliable identification.²⁷⁶ Based on the decision in *Kolender*, the Court seemed more willing to entertain and to sustain “facial challenges in the arbitrary enforcement context.”²⁷⁷

Although courts are less likely to declare a statute facially vague because of a concern about arbitrary enforcement, they will frequently invalidate a statute as applied.²⁷⁸ Facial vagueness is distinguished from partial vagueness by the presence of “a hard core of circumstances to which the statute unquestionably applies” and which the ordinary person would recognize.²⁷⁹ In contrast, if the court determines that a defendant’s conduct falls outside this definite area, it will only invalidate the law as applied to him; the court will not discard the whole statute.²⁸⁰

In *Palmer v. City of Euclid*,²⁸¹ the Supreme Court followed this procedure in reversing a conviction under a “suspicious person ordinance.”²⁸² The

273. *Id.* at 359 n.8 (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982)).

274. *Id.* (citing *Colautti v. Franklin*, 439 U.S. 379, 394-401 (1979); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939)).

275. Justice O’Connor stated: “It is clear that the full discretion accorded to the police to determine whether the suspect has provided a ‘credible and reliable’ identification necessarily ‘entrust[s] lawmaking “to the moment-to-moment judgment of the policeman on his beat.” ’” *Kolender*, 461 U.S. at 360 (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974) (quoting *Gregory v. Chicago*, 394 U.S. 111, 120 (1969) (Black, J., concurring))).

276. *Kolender*, 461 U.S. at 360.

277. *Id.* at 359 n.8.

278. *Collings*, *supra* note 259, at 198; *see, e.g.*, *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (statute, while encompassing conduct within city’s power to prohibit, is unconstitutionally vague because no standard of conduct is specified).

279. *Collings*, *supra* note 259, at 206.

280. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982).

281. 402 U.S. 544 (1971).

282. *Id.* at 544-45.

statute, which prohibited individuals from being on the streets late at night "without any visible or lawful business," was applied to a man who discharged a female passenger and remained parked on the street.²⁸³ Although the Supreme Court declared the statute vague as applied to the defendant, holding that he was not fairly warned that his conduct was punishable, the Court did not invalidate the statute *in toto*.²⁸⁴

D. Cures For Vagueness

Even if a statute is unconstitutionally vague standing alone, courts often reject vagueness challenges if external factors appear to have "cured" the problem. Frequently, judicial glosses applied by a state supreme court or by a federal administrative agency provide enough definiteness to remedy a statute's vagueness.²⁸⁵ For example, in *Kolender*, the Supreme Court accepted the California Court of Appeals' interpretation of "credible and reliable" identification.²⁸⁶ Although the Supreme Court ultimately invalidated the statute as construed, it reaffirmed the reviewing court's obligation to "take the statute as though it read precisely as the highest court of the State has

283. *Id.*

284. *Id.* at 546.

285. Although judicial glosses by the highest court of a state and by a federal agency may "cure" an otherwise vague statute, this policy cannot be extended to federal appellate courts, as some commentators have erroneously assumed. See Note, *supra* note 169, at 510-12. State supreme courts and federal agencies are the final interpreters of their respective bodies of "law" because neither the Supreme Court nor any other institution has the authority to add its own gloss upon these interpretations. *Id.* A potential defendant can be assured that this interpretation draws the precise line between permissible and impermissible conduct.

But federal appellate courts' decisions are only tentative, subject to immediate reversal whether they "[converge] . . . around a reasonably consistent concept" or not; therefore, these decisions do not provide adequate guidance. *Id.* at 511-12. Until the Supreme Court gives a definitive interpretation to a statute, the defendant cannot be sure what a particular statute means. See, e.g., *Callanan v. United States*, 881 F.2d 229, 231 (6th Cir. 1989) (the court retroactively applied the *McNally* rule, which provided a new interpretation of substantive criminal law); *McNally v. United States*, 483 U.S. 350 (1987) (Court repudiated intangible rights theory in mail fraud cases, though this theory was "settled law . . . in every circuit that had considered the issue"). Therefore, even if the federal circuit courts were coming to some sort of consensus about pattern of racketeering, this consensus could not "cure" the vagueness of the term.

286. The Supreme Court determined that identification met this standard as long as the identification "carr[ie]d reasonable assurance that [it was] authentic and provid[ed] means for later getting in touch with the person who has identified himself." 461 U.S. 352, 357 (1983); see *People v. Solomon*, 33 Cal. App. 3d 429, 438, 108 Cal. Rptr. 867, 872 (1973), *cert. denied*, 415 U.S. 951 (1974) (court narrowly construed statute so that requiring identification was its primary purpose, not requiring a person to account for his or her presence).

interpreted it.'"²⁸⁷ In some cases, this judicial gloss has led the Supreme Court to uphold the challenged statute.²⁸⁸

Where the gloss comes from a federal agency charged with enforcing a statute and establishing regulations pursuant to that statute, the Court has also been less willing to invalidate the law. In *United States Civil Service Commission v. National Association of Letter Carriers*,²⁸⁹ the United States District Court for the District of Columbia found section 9(a) of the Hatch Act facially vague.²⁹⁰ Section 9(a) prohibited employees of Executive agencies or the District of Columbia from "tak[ing] an active part in political management or in political campaigns."²⁹¹ In reversing the lower court, the Supreme Court held that the "more refined definition" elaborated by the Civil Service Commission provided sufficient warning to potential defendants.²⁹² Moreover, individuals who were uncertain about the scope of a statute or rule could have requested a clarification from the Commission before acting.²⁹³ At least superficially, these decisions are consistent with the underlying purposes of the void-for-vagueness doctrine: judicial or administrative interpretations establishing the contours of legislation must warn potential defendants and guide enforcement officials.²⁹⁴

Requiring scienter in a statute will also cure statutory vagueness.²⁹⁵ The local ordinance in *Village of Hoffman Estates v. Flipside, Hoffman Estates*,

287. *Kolender*, 461 U.S. at 356 n.4 (quoting *Wainwright v. Stone*, 414 U.S. 21, 22-23 (1973)).

288. See, e.g., *Poulos v. New Hampshire*, 345 U.S. 395, 402 (1953) (court looked to New Hampshire Supreme Court interpretation in determining validity of state ordinance requiring license for public meetings); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

289. 413 U.S. 548 (1973) (lower court's jury instructions defining state statute viewed as binding in court as ruling on question of state law).

290. *Id.* at 553.

291. 5 U.S.C. § 7324(a)(2) (1988).

292. *National Ass'n of Letter Carriers*, 413 U.S. at 575. Similarly, in *Village of Hoffman Estates*, the Court did not consider the local ordinance alone, but reviewed the more narrow guidelines which elaborated the licensing standard in greater detail. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 501-02 (1982).

293. *National Ass'n of Letter Carriers*, 413 U.S. at 580. In *Village of Hoffman Estates*, Justice Marshall noted that in highly regulated areas, these complementary processes—elaborating rules and opining as to possible violations—justified less scrutiny by courts. *Village of Hoffman Estates*, 455 U.S. at 498. Because businesses are generally the subjects of such regulatory systems, these potential defendants "[could] be expected to consult relevant legislation in advance of action . . . [and] to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process." *Id.*

294. Of course, a question still arises regarding how far a defendant should be expected to go in ferreting out the warning. In his dissent in *National Association of Letter Carriers*, Justice Douglas focused upon the fact that the statute incorporated over 3,000 rulings of the Civil Service Commission. 413 U.S. at 595-96.

295. See, e.g., *Village of Hoffman Estates*, 455 U.S. at 499-503.

Inc. required store owners to obtain a license if they sold items "designed or marketed for use" with illegal drugs.²⁹⁶ Although the Court struggled with ambiguities inherent in the phrase "designed for use," it found a scienter requirement implicit in the phrase "marketed for use."²⁹⁷ The manager of defendant Flipside was found to have the requisite intent to "market for use" because a sign posted in his store read: "You must be 18 or older to purchase any head supplies."²⁹⁸ Noting that "head" is slang for a frequent drug user, the Court found that this action indicated the manager knew the items were to be used with illegal drugs.²⁹⁹ Although a number of critics have ridiculed scienter as a cure for vagueness,³⁰⁰ *Village of Hoffman Estates* shows how such a requirement can insure "a correspondence between the defendant's own cognitions and the description of the proscribed conduct in the relevant conduct rule."³⁰¹ If a defendant knows his conduct is proscribed by statute, regardless of how it might apply to others, then he must obey the law or face punishment for its violation.

IV. THE UNCONSTITUTIONAL VAGUENESS OF RICO'S PATTERN REQUIREMENT

Given the standard of clarity demanded of criminal statutes, RICO's pattern requirement fails a due process inquiry. While unconstitutional vagueness can never be demonstrated deductively,³⁰² a number of circumstances

296. *Id.* at 491.

297. "[A] retailer could scarcely 'market' items 'for' a particular use without intending that use." *Id.* at 502.

298. *Id.* at 502-03.

299. *Id.* at 503 n.20.

300. Dan-Cohen, *supra* note 250, at 660. In criticizing this cure for vagueness, Dan-Cohen quotes LaFave and Scott to suggest that scienter only applies to one's intention to do an act, not to knowledge of the statute. *Id.*

301. *Id.* at 663.

302. Vagueness cannot be demonstrated deductively because these determinations ultimately come down to subjective determinations by individual judges. The judge must simply decide whether particular language is clear enough to apprise prosecutors and potential defendants of the forbidden conduct. In this respect, a vagueness determination is analogous to a jury's evaluation in a negligence action of whether certain conduct is "reasonable."

To determine whether a statute is clear enough to show what conduct is forbidden, the reviewing court has only the general guidance of *Connally v. General Construction Co.*, 269 U.S. 385 (1926), and its progeny. In *Connally*, the Supreme Court stated that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Id.* at 391 (citing *International Harvester Co. v. Kentucky*, 234 U.S. 216, 221 (1914)). While stating the general policy behind the vagueness doctrine, this directive is of little practical value because each decision turns on the particular language of the given statute. Unless a subsequent case presents only a slight variation of a statutory term, each decision has no value as precedent. For example, *Lanzetta v. New Jersey*, 306 U.S. 451

indicate that the term "pattern" should be held void for vagueness: Congress' lack of agreement about the meaning of pattern;³⁰³ the scope of judicial disagreement about the term;³⁰⁴ and the multiplicity of judicial "tests" employing additional factors beyond continuity and relationship.³⁰⁵ In addition, the major policies supporting the void-for-vagueness doctrine suggest that "pattern" is unconstitutionally vague in most situations.³⁰⁶ Given the level of clarity required of criminal statutes, RICO is unconstitutional because it provides insufficient notice to potential defendants and inadequate guidance for public and private law enforcement.

A. *An Appropriate Standard of Clarity for RICO*

Due process requires that all statutes be reasonably clear.³⁰⁷ Nevertheless, the Supreme Court allows varying degrees of ambiguity depending on the type of statute at issue.³⁰⁸ For example, the Court requires great clarity where the law threatens to inhibit constitutional rights, such as the freedom of speech.³⁰⁹ In contrast, the Court tolerates more ambiguity where the statute regulates economic conduct. For a clear understanding of a regulation, businesses facing economic demands can carefully consider relevant legislation, inquire as to a regulation's ambiguous meaning, and resort to administrative action.³¹⁰ When analyzing RICO, an important distinction arises between statutes which impose civil versus criminal penalties.³¹¹ While incarceration and public humiliation may result from conviction for criminal offenses, civil suits usually result in damage awards and injunctive relief.³¹²

(1939), stated that a legislature must clearly define "gang" before making gang membership criminal. *Id.* at 453-55. The decision does not help subsequent courts—or a legislative body, for that matter—decide whether a term is clear enough to pass constitutional muster.

303. *See supra* notes 66-80 and accompanying text.

304. *See supra* notes 96-235 and accompanying text.

305. *Id.*

306. *See supra* notes 225-31 and accompanying text.

307. *See, e.g.,* *Boutilier v. Immigration and Naturalization Serv.*, 387 U.S. 118, 123 (1967).

308. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982).

309. *Id.*; *Smith v. California*, 361 U.S. 147, 151 (1959) ("stricter standards of permissible statutory vagueness may be applied to a statute having a potential inhibiting effect on speech").

310. *Village of Hoffman Estates*, 445 U.S. at 495 n.7; *see also* *Buckley v. Valeo*, 424 U.S. 1, 13 (1976) (ceilings on financial contributions limit freedom of political expression and association more severely than they limit freedom to contribute).

311. In *Village of Hoffman Estates*, Justice Marshall explained this distinction: "The Court has . . . expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." 455 U.S. at 489-99 (citing *Barenblat v. United States*, 360 U.S. 109, 137 (1959) (Black, J., dissenting)).

312. *See* Note, *Civil RICO is a Misnomer: The Need for Criminal Procedural Protections in Actions Under 18 U.S.C. § 1964*, 100 HARV. L. REV. 1288, 1291-94 (1987) (pointing out that "[a] legal sanction can be characterized as punishment only when it is accompanied by societal

In short, "due process justifies attention to fairness commensurate with the penalty involved."³¹³

The Supreme Court should demand tremendous specificity for RICO's criminal provisions—including the term "pattern."³¹⁴ In addition to a possible fine plus twenty years in prison, criminal RICO provides for forfeiture of all assets gained through racketeering activity.³¹⁵ Clarity is important due to the severity of the criminal penalties involved and the chance that a convicted RICO defendant will be branded a "racketeer." A more difficult question is whether courts should be more lenient in judging the language of RICO's civil provisions. Criminal and civil RICO cases define the substantive offenses in the same terms, and a private plaintiff must prove each element that would support a criminal RICO conviction. The penalties differ, however, for a criminal or civil violation.³¹⁶ If private plaintiffs can prove damage in their "business or property by reason of a violation of section 1962," then civil RICO provides for treble damages and attorneys fees.³¹⁷ This section also allows the United States Attorney General to institute proceedings and gives the courts broad powers, including the power to "order[] . . . any person to divest himself of any interest, direct or indirect, in any enterprise."³¹⁸

Stiff penalties, however, do not transform a civil statute into a criminal one. Where criminal and civil sanctions are aimed at the same conduct, there seems to be little justification for applying different standards to the same statutory language.³¹⁹ First, having two standards of clarity undermines the policy behind the void-for-vagueness doctrine.³²⁰ Second, where

denunciation of the commission of the act for which the sanction is applied"); see also Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958).

313. Note, *Big Mama Rag*, *supra* note 242, at 1556 n.6 (citing death penalty cases, which "make this point most clearly"); see, e.g., *Lockett v. Ohio*, 438 U.S. 586, 593 (1978) (where the Court considered the nature and circumstances of the offense, as well as the defendant's history, character and condition).

314. Note, *supra* note 169, at 518-19 (arguing that RICO's criminal provisions should be subject to strict scrutiny for vagueness).

315. 18 U.S.C. §§ 1963(a), (b); see also *supra* notes 41-45 and accompanying text (explaining criminal penalties imposed for violations of section 1962 and section 1963).

316. Note, *supra* note 312, at 1291-97 (arguing for greater procedural protections in civil RICO because the action is essentially a criminal charge).

317. 18 U.S.C. § 1964(c).

318. *Id.* § 1964(a).

319. Note, *supra* note 312, at 1292; see also Freeman & McSlarrow, *RICO and the Due Process "Void for Vagueness" Test*, 45 BUS. LAW. 1003, 1006 (1990) ("[I]t would be anomalous to find the language unconstitutionally vague where criminal sanctions are invoked, but clear enough to sustain imposition of punitive, though civil, sanctions.").

320. The policy behind the doctrine is to provide direction for defendants and law enforcement officials. See *supra* notes 226-28 and accompanying text.

private plaintiffs are functioning as surrogates for the government, in the position of "private attorneys general," concerns about guidance are even more important than if government lawyers were prosecuting the cases.

Recent Supreme Court opinions indicate that the Court would demand a high degree of clarity from both civil and criminal RICO provisions. In his concurrence in *H.J. Inc.*, Justice Scalia found that "RICO . . . must, even in its civil applications, possess the degree of certainty required for criminal laws."³²¹ This statement is consistent with the Court's greater concern for procedural fairness when a statute is punitive rather than remedial.³²² Ever since *Boyd v. United States*,³²³ decided in 1886, the Court has used the punitive/remedial standard to determine whether a statute is criminal or civil.³²⁴ If the Court finds a statute to be punitive, it jealously guards the defendant's due process rights.³²⁵ In spite of the label, the civil provision of RICO is punitive because it "imposes sanctions on a defendant for behavior that is already a crime and. . . has a scienter requirement."³²⁶ These characteristics cause courts to find a punitive purpose in the civil provisions, therefore requiring greater procedural protections. If a court follows this analysis and determines that the civil provisions are punitive, then the court should require the same level of clarity for a civil, criminal, or quasi-criminal suit.

Though not a RICO case, *Village of Hoffman Estates*, like *H.J. Inc.*, indicates that the Court will tolerate little ambiguity in RICO's civil provisions.³²⁷ In *Village of Hoffman Estates*, a local ordinance required businesses to obtain a license if they sold drug paraphernalia. The ordinance imposed a fine of between \$10 and \$500 if a business failed to obtain such a license.³²⁸ In spite of this modest penalty, the Court applied a "relatively strict test," viewing the statute as "quasi-criminal" rather than civil.³²⁹ The Court found it particularly significant that the ordinance had "prohibitory and stigmatizing effects" because no retailer would want to be known as a distributor of drug paraphernalia.³³⁰ If the *Village of Hoffman Estates* ordinance had to meet a "relatively strict" standard, RICO's civil provisions

321. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 255 (1989) (Scalia, J., concurring) (citing *FCC v. American Broadcasting Co.*, 347 U.S. 284, 296 (1954)).

322. Note, *supra* note 312, at 1292; see also *United States v. Halper*, 490 U.S. 435 (1989) (distinguishing between remedial and punitive civil statutes).

323. 116 U.S. 616 (1886).

324. See Note, *supra* note 312, at 1292-93 (containing a concise description of the court's distinction between a civil and criminal proceeding in *Boyd*).

325. *Id.* at 1293-94.

326. *Id.* at 1297.

327. *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 497-99 (1982).

328. *Id.*

329. *Id.* at 499.

330. *Id.* at 499 n.16.

should be held to the highest standard of clarity. Being known as a racketeer carries a greater stigma than being known as a seller of drug paraphernalia, and the potential financial penalties under civil RICO are much greater than even the maximum fine imposed under the *Village of Hoffman Estates* ordinance.³³¹

B. Congressional and Judicial Indications That the Pattern Requirement is Unconstitutionally Vague

As the discussion in Section I of this Article indicates, Congress apparently interpreted "pattern" in a variety of ways when it passed the Organized Crime Control Act. Senator McClellan, and those senators who prepared the Senate Report, believed pattern required "something beyond" two acts of racketeering.³³² The language in the Report is ambiguous, but these senators found this "something beyond" to be either continuity plus relationship, as Justice Brennan argued in *H.J. Inc.*, or relationship alone, as this Article suggests.³³³ Another group of congressmen apparently believed that the term "pattern" did not have any additional requirement and only referred to the number of predicate acts.³³⁴

This disagreement does not prove that the statute is unconstitutionally vague, for some congressmen might have misunderstood a reasonably clear term. Nevertheless, the inability of legislators to agree on a term's meaning should be weighed in a reviewing court's determination of whether a "reasonable person" would understand the statute. Moreover, the fact that Congress neither thrashed out the meaning of the term "pattern," nor even acknowledged the disagreement as to its meaning, indicates the inherent ambiguity in the word. Congress may have rushed over this term, believing everyone knew what "pattern" meant.³³⁵ Each legislator most likely read his own subjective understanding of the word "pattern" into the statute.

Disparate interpretations by reviewing courts, like disagreements among legislators, may also indicate that a statute is ambiguous. The history of RICO's pattern requirement is marked by varieties of interpretation. Before *Sedima*, many courts said pattern only referred to the number of predicate acts.³³⁶ Even after the Supreme Court imported continuity and relationship

331. See Freeman & McSlarrow, *supra* note 319, at 1006-08 (arguing that the treble damage provision of civil RICO makes the statute punitive).

332. See *supra* notes 53-74 and accompanying text.

333. *Id.*

334. See *supra* notes 67-74 and accompanying text.

335. See, e.g., *supra* note 80 and accompanying text (Rep. Poff implied that the meaning of the term pattern was simple and straightforward).

336. See, e.g., *United States v. Campanale*, 518 F.2d 352, 364 (9th Cir. 1975).

from the statute's legislative history, presumably adding more definiteness to the statute, federal courts continued to interpret pattern in different ways.³³⁷ For example, the Second Circuit, before 1989, required nothing more than two acts to find a pattern of racketeering.³³⁸ The Eighth Circuit, however, required more than one "scheme."³³⁹ In addition, several other circuits initially seemed to view the number of schemes as dispositive, although these courts often employed different labels, such as "episodes" or "transactions."³⁴⁰

A majority of the circuits, however, fall somewhere between these two extremes. The Third, Sixth, and Seventh Circuits have listed various factors which indicate the presence of a pattern, including the number of victims and the number of perpetrators.³⁴¹ The Tenth, Ninth, and Second (after *Indelicato*) Circuits have used some of these same factors in determining whether continuity and relationship have been separately established.³⁴² Other courts have employed certain factors to determine whether continuity or relationship is present, apparently ignoring the other prong of the *Sedima/H.J. Inc.* test.³⁴³

These varied interpretations of "pattern" support the claim that the term is vague. Statutory interpretation is the essence of the judicial function; long practice in such interpretation makes judges "specialists" in this area. Therefore, if judges, especially federal appellate judges, disagree radically about the interpretation of a statutory term, then it is reasonable to infer that the term is unclear. If the term is unclear to federal judges, then it will be unclear to laymen and prosecutors.

The numerous judicial "glosses" applied to the term "pattern"—from the Eighth Circuit's multi-scheme test to the Third Circuit's multi-factor test—also indicate that appellate courts do not think "pattern" is definite. By

337. See *supra* notes 81-241 and accompanying text.

338. See, e.g., *United States v. Weisman*, 624 F.2d 1118, 1121 (2d Cir. 1980).

339. See, e.g., *Madden v. Gluck*, 815 F.2d 1163, 1164 (8th Cir.), *cert. denied*, 484 U.S. 1006 (1987); *Superior Oil Co. v. Fulmer*, 785 F.2d 252, 257 (8th Cir. 1986).

340. See, e.g., *Brandt v. Schal Assocs., Inc.*, 854 F.2d 948, 953 (7th Cir. 1988); *Torwest DBC, Inc. v. Dick*, 810 F.2d 925, 928 (10th Cir. 1987).

341. See, e.g., *Fleischhauer v. Feltner*, 879 F.2d 1290, 1309 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1122 (1990); *Saporito v. Combustion Eng'g, Inc.*, 843 F.2d 666, 676 (3d Cir. 1988); *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986).

342. See, e.g., *United States v. Indelicato*, 865 F.2d 1370, 1376 (2d Cir.), *cert. denied*, 110 S. Ct. 56 (1989); *United Energy Owners v. United Energy Management*, 837 F.2d 356, 360 (9th Cir. 1988); *Torwest DBC*, 810 F.2d at 928.

343. Compare *Durham v. Business Management Assocs.*, 847 F.2d 1505, 1512 (11th Cir. 1988) (ignoring relationship and using factors listed in Dangerous Special Offender Act in determining continuity) with *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350, 1355 (5th Cir. 1985) (ignoring continuity and using the same factors in determining relationship).

including such concrete requirements as the number of acts or victims, the circuits have attempted to add some definiteness to the general language of *Sedima*. In evaluating whether a pattern exists, it is possible to count the number of victims and to judge "the character of the unlawful activity."³⁴⁴ One can determine, for example, that one crime is more serious than another. It is also possible to determine if various criminal acts were done in furtherance of a single "scheme" or "episode." Determining whether some activity exhibits "continuity or the threat of continuity," however, is more difficult. By defining pattern in a definite manner, the circuits have tried to give the district courts, and presumably defendants and prosecutors, guidance in understanding the term. Nevertheless, these decisions imply that the term is imprecise. Although these decisions do not prove that the term "pattern" is vague, the presence of multiple, widely divergent interpretations indicates some fundamental problem with the statute.

C. Policy Arguments Suggesting That "Pattern" Is Unconstitutionally Vague

1. Notice to Defendants

The policies underlying the definiteness requirement also suggest that "pattern" is unconstitutionally vague. First, RICO does not provide sufficient warning to potential defendants that particular conduct is prohibited.³⁴⁵ If the underlying predicate act has been clearly defined, however, it could be argued that the defendant has been reasonably warned that his conduct is illegal. Moreover, because two acts are necessary for a RICO violation, the defendant has been warned that committing multiple criminal acts may subject him to prosecution.³⁴⁶ Several courts followed this approach in response to the first vagueness attacks on the pattern requirement.³⁴⁷

344. *Swistock v. Jones*, 884 F.2d 755, 758 (3d Cir. 1989); *Feltner*, 879 F.2d at 1298.

345. See *infra* notes 368-93 and accompanying text.

346. See *infra* notes 347-64 and accompanying text.

347. See, e.g., *United States v. Campanale*, 518 F.2d 352, 364 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976); *United States v. Field*, 432 F. Supp. 55, 60-61 (S.D.N.Y. 1977), *aff'd mem.*, 578 F.2d 1371 (2d Cir.), *cert. dismissed*, 439 U.S. 801 (1978). For example, in *United States v. Campanale*, the Ninth Circuit simply stated that "[a]ny ambiguity is cured by 18 U.S.C. § 1961, which defines 'racketeering activity' with reference to specific offenses, 'pattern of racketeering activity' with reference to a definite number of acts of 'racketeering activity' within specified time periods, and 'enterprise' and 'person' with standard language of established meaning." 518 F.2d at 352. The court apparently saw no need for an additional warning which would define the requisite connection between the two acts. See also *United States v. White*, 386 F. Supp. 882, 884 (E.D. Wis. 1974) ("the only serious question is whether § 1962(c) gives [the defendant] adequate warning that the commission of more than one such criminal act under certain circumstances constitutes an additional, separate crime for which

The Supreme Court might accept this interpretation of RICO based on its recent *Fort Wayne Books, Inc. v. Indiana* decision.³⁴⁸ *Fort Wayne* involved first amendment and due process challenges to Indiana's RICO law, which was modeled after the federal statute but distinguished by its more detailed definition of pattern.³⁴⁹ Defendants were prosecuted under RICO for violating Indiana's obscenity statute, included in the list of predicate acts. In rejecting the defendant's vagueness argument, the Supreme Court stated that the RICO statute could not be unconstitutionally vague if the obscenity law was not, because the RICO statute encompassed the obscenity statute.³⁵⁰ The Court believed that due process required only reasonable clarity in the definition of the predicate acts.³⁵¹

The fundamental flaw in this reasoning is its failure to consider the *effect* of a RICO violation on the defendant's penalty. In numerous cases, a defendant may receive an expanded penalty for a minor crime solely because the additional RICO elements are present.³⁵² In *United States v. Stofsky*,³⁵³ for example, the court recognized that the defendant could receive a "twenty-year prison term, a \$25,000 fine and substantial forfeitures for the

there is a separate penalty") (quoting *United States v. Stofsky*, 409 F. Supp. 609, 612 (S.D.N.Y. 1973)).

348. *Fort Wayne Books v. Indiana*, 489 U.S. 46 (1989).

349. Apparently, the Indiana legislature borrowed its definition of pattern from the Dangerous Special Offender Act; the language of the two statutes is identical. *Id.* at 51; see *supra* note 53 and accompanying text.

350. *Fort Wayne Books*, 489 U.S. at 58-59 n.7 ("it would seem that the RICO statute is inherently less vague than any state obscenity law" because the prosecution would have to prove the crimes themselves plus the connection).

351. Justice Stevens, joined by Justices Brennan and Marshall, dissented on the question of the Indiana statute's vagueness. *Id.* at 76 (Stevens, J., dissenting). Likening the pattern requirement to Justice Stewart's "I know it when I see it" standard for obscenity, *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring), Justice Stevens argued that "[r]eference to a 'pattern' of at least two violations only compounds the intractable vagueness of the obscenity concept itself." *Fort Wayne Books*, 489 U.S. at 76 (Stevens, J., dissenting). Justice Stevens did not discuss whether the state statute, which employed the Dangerous Special Offender definition, was any more definite than the definition of pattern in the federal statute.

352. See, e.g., *United States v. Haley*, 689 F. Supp. 717, 720 (E.D. Mich. 1988) (judges found guilty of bribery received lesser penalties than those found guilty of bribery and RICO violations); *Fort Wayne Books*, 489 U.S. at 46. The criminal penalties for a RICO violation under Indiana law are more severe than those authorized in an obscenity offense. If the petitioner in *Fort Wayne Books* were found guilty of the two RICO counts, he would face a maximum of 10 years in prison and a \$20,000 fine; if he were only convicted of the six obscenity offenses, the maximum punishment would be 6 years in jail and \$30,000 in fines. 489 U.S. at 46. Of course, in those cases where conviction for the predicate crimes separately will result in a virtually identical penalty, a warning argument is not compelling.

353. 409 F. Supp. 609 (S.D.N.Y. 1973).

commission of two misdemeanors within a period of ten years."³⁵⁴ A RICO conviction may result in penalties far greater than the penalties imposed for the predicate acts. Consequently, potential defendants deserve clear warning about each element of a crime. Assigning light sentences for isolated acts, but heavy sentences for connected acts, indicates that the acts become serious only when they are connected. If this relationship can transform a minor crime into a major one, a potential defendant deserves to have the connection clearly defined.³⁵⁵

While none of the early courts addressing the pattern issue held that RICO's pattern requirement was unconstitutionally vague, many implied that "pattern" had to be reasonably clear.³⁵⁶ It is not enough, as the Ninth Circuit argued, to have clarity for the predicate crimes and the minimum number of crimes.³⁵⁷ In *United States v. Boffa*,³⁵⁸ one of the few decisions to examine the pattern question in any detail, the Delaware District Court stated that "any reasonable person would realize that if he pursued the [alleged] course of activity. . . he would be conducting or participating in the conduct of the Enterprise's affairs through a pattern of racketeering activity."³⁵⁹ After holding that the defendant had notice, the court had no occasion to discuss the need for clarity in the pattern requirement.³⁶⁰ The court's detailed discussion of "pattern," however, implies that the term should be subject to due process scrutiny. The court noted that the defendant was apprised of the Third Circuit's liberal interpretation of "pattern," which required each act to be "in some way connected to the affairs of the Enterprise."³⁶¹ The court then said that the defendant had notice "even under the very narrow definition of the term 'pattern' which has been adopted by some courts."³⁶² This narrow definition required the acts to be related by "some common scheme, plan or motive."³⁶³ If the defendant had

354. *Stofsky*, 409 F. Supp. at 614; see 18 U.S.C. § 1963. Since *Stofsky*, the RICO statute has been amended to reflect the following penalties under 18 U.S.C. § 1963: fines, maximum prison sentence of 20 years (or life if the violation of RICO includes a racketeering activity for which the maximum penalty includes life imprisonment), and forfeiture of any interest acquired in violation of section 1962.

355. Freeman & McSlarrow, *supra* note 319, at 1009-10.

356. See, e.g., *United States v. Campanale*, 518 F.2d 352, 364 (9th Cir. 1975) (court stated that "it is true that if not defined, terms such as 'pattern of racketeering activity' would be unmanageable."), *cert. denied*, 423 U.S. 1050 (1976).

357. *Id.*

358. 513 F. Supp. 444 (D. Del. 1980).

359. *Id.* at 462.

360. *Id.*

361. *Id.* at 463.

362. *Id.* (citing *United States v. White*, 386 F. Supp. 882, 883 (E.D. Wis. 1974); *United States v. Stofsky*, 409 F. Supp. 609, 613-14 (S.D.N.Y. 1973)).

363. *Id.* (quoting *Stofsky*, 409 F. Supp. at 614).

adequate warning anyway, there would be no reason to stress that he had notice of these "interpretative" requirements. Thus, a number of courts apparently believed that the pattern requirement had to be reasonably clear to potential defendants.³⁶⁴

2. Guidance For Law Enforcement Officials

While the policy of providing notice to potential defendants is vitally important, "the more important aspect of the vagueness doctrine 'is not actual notice, but . . . the requirement that a legislature establish minimal guidelines to govern law enforcement.'" ³⁶⁵ When RICO is examined in light of this policy, the vagueness argument is even more compelling.

a. Criminal Prosecution

Given the circuits' contradictory interpretations of "pattern," a government lawyer has little guidance in deciding whether to charge a defendant with a RICO violation. Cases do exist which would establish a pattern in all circuits. For example, if a group of individuals organized to commit criminal acts, and then pursued their goal in several contexts against numerous victims over a significant period of time, then every circuit would find a pattern of racketeering.³⁶⁶ The circuits' interpretations begin to differ when fewer acts are committed and there are fewer victims.

In a situation similar to *Indelicato*, involving only three crimes, a United States Attorney would have little guidance in determining whether his case meets the pattern requirement. The Second Circuit's expansive interpretation of pattern seems to support a RICO charge.³⁶⁷ The Third and Seventh Circuit's more restrictive views would not.³⁶⁸ Without clear guidance, a United States Attorney has broad discretion in deciding whether to charge a defendant under RICO. If a United States Attorney prosecutes a case that the legislature did not intend to come within the statute,³⁶⁹ government resources will be wasted.

More importantly, the absence of guidance to law enforcement officials may result in "'arbitrary and discriminatory applications,'" ³⁷⁰ or the prose-

364. See *White*, 386 F. Supp. at 883-84; *Stofsky*, 409 F. Supp. at 612.

365. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974)).

366. See *supra* notes 83-225 and accompanying text.

367. See *supra* notes 145-67 and accompanying text.

368. See *supra* notes 100-19 and accompanying text.

369. See *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); see also *supra* note 248 (discussing *Roberts*).

370. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982) (quoting *Grayned v. City of Richmond*, 408 U.S. 104, 108-09 (1972)).

cutor may pursue his own predilections.³⁷¹ The danger of prosecutorial abuse is always present because the system of justice in the United States grants prosecutors great discretion. There is virtually no judicial review of a prosecutor's decision to pursue or to drop charges.³⁷² Furthermore, the dangers of unchecked prosecutorial abuse are heightened under RICO because of the general language of the statute and the long list of predicate acts.³⁷³ RICO's use against such diverse "enterprises" as labor unions, securities brokers, law firms, "right-to-life" groups, and accounting firms shows the statute's breadth and the discretion it invests in federal prosecutors.³⁷⁴

The concern about public pressure on federal prosecutors is magnified because RICO allows prosecutors such broad discretion. Prosecutors may choose to prosecute a defendant because of the type of crime committed, even though the extent of the activity was limited. For example, if a pro-choice group pressured the local United States Attorney's Office to prosecute members of Operation Rescue, the United States Attorney might bring the charge even if it involved only two criminal misdemeanors. Furthermore, a prosecutor could refuse to seek an indictment against a brokerage house, or even a criminal syndicate, where a more elaborate scheme was present. RICO is a dangerous weapon because, in addition to the problem of public pressure, possible benefits may accrue to individual prosecutors and local United States Attorneys' offices for using the statute to prosecute cases. Former United States Attorney Rudolph Giuliani has demonstrated that prosecuting certain types of cases can catapult individuals into the public eye.³⁷⁵ The danger is that United States Attorneys may choose to prosecute RICO

371. *Smith v. Goguen*, 415 U.S. 566, 575 (1974).

372. *Inmates of Attica Correctional Facility v. Rockefeller*, 474 F.2d 375, 379-80 (2d Cir. 1973).

373. Winick, *Forfeiture of Attorneys' Fees Under RICO and CCE and the Right to Counsel of Choice: The Constitutional Dilemma and How to Avoid It*, 43 U. MIAMI L. REV. 765, 852 n.425 (1989) ("[b]ecause prosecutors easily can allege many crimes as RICO offenses"); *Symposium: White Collar Crime: RICO Forfeiture In Practice: A Prosecutorial Perspective*, 52 U. CIN. L. REV. 404, 405 n.15 (1983) ("[t]he prosecutor has considerable discretion in his decision to bring RICO charges"); Comment, *The Need for Greater Double Jeopardy and Due Process Safeguards in RICO Criminal and Civil Actions*, 70 CALIF. L. REV. 724, 727 (1982) ("wide discretion prosecutors have to bring such prosecutions"); see also *United States v. Davidoff*, 845 F.2d 1151, 1154 (2d Cir. 1988) ("wide latitude accorded the prosecution to frame a charge that a defendant has 'conspired' to promote the affairs of an 'enterprise' through a 'pattern of racketeering activity'").

374. See Huestis, *RICO: The Meaning of 'Pattern' Since Sedima*, 54 BROOKLYN L. REV. 621, 622 n.8 (1988) (listing types of cases).

375. See, e.g., *Giuliani Weighs Private Post as Step to Senate Race*, N.Y. Times, Dec. 3, 1987, at B1, col. 2.

cases, not because the challenged conduct is egregious, but because the public is captivated by certain types of crime.

Finally, without adequate direction, discrimination may influence a prosecutor's decision about whom to charge under RICO. Although there is a risk of discriminatory enforcement for all vague statutes, the risk is even greater where the target is organized crime. The public perceives organized crime as governed by several Italian families, and such perception pervades the legislative history of the Organized Crime Control Act.³⁷⁶ The statute, however, makes no mention of particular ethnic groups, or even of "gangs" generally. Instead, it prohibits broad classes of criminal conduct involving an enterprise.³⁷⁷ The danger is that prosecutors will act based on such a perception of organized crime, regardless of the accuracy of the perception.

The Department of Justice (DOJ) has established institutional structures to guide United States Attorneys who are planning to prosecute RICO cases. These structures include a set of guidelines for RICO prosecutions and a separate RICO office designed to oversee government use of the statute.³⁷⁸ This action by the DOJ, which advocates internal controls, attests to the Department's concern about abuse of the statute. In addition, DOJ's establishment of prosecutorial guidelines indicates that it believes RICO provides inadequate guidance to prosecutors regarding who should be prosecuted.

Although these guidelines are preferable to no guidance, they are not law. Therefore, to the degree that individual prosecutors are free from DOJ control, these guidelines are largely irrelevant. Moreover, several studies have indicated that DOJ has limited control over many federal prosecutors. According to J. Eisenstein, "[c]rucial differences in the recruitment, resources, political support from the community, and organizational status of U.S. Attorneys . . . translate into substantial autonomy."³⁷⁹ Given this institutional autonomy and the great latitude which RICO provides, a lack of prosecutorial guidance on "pattern" is especially dangerous.

376. See, e.g., 116 CONG. REC. 18,940-41 (1970) (statement of Sen. McClellan, discussing *La Cosa Nostra*).

377. Cf. *Lanzetta v. New Jersey*, 306 U.S. 451, 458 (1939) (declaring unconstitutionally vague a state statute which punished "gang" membership without adequately defining the term).

378. Dennis, *Current RICO Policies of the Department of Justice*, 43 VAND. L. REV. 651, 654-55 (1990) ("all government actions were and are subject to strict internal review and controls"); Dombrink & Meeker, *Racketeering Prosecution: The Use and Abuse of RICO*, 16 RUTGERS L.J. 633, 641 (1985).

379. Dombrink & Meeker, *supra* note 378, at 642 (quoting J. EISENSTEIN, COUNSEL FOR THE UNITED STATES 55 (1978)).

b. Civil Enforcement

Although RICO's ambiguous pattern requirement risks arbitrary and discriminatory criminal prosecutions, the greater danger comes from suits by private plaintiffs. Unless the public demands prosecution of particular individuals, or certain types of cases, there is no special risk of prosecutors intentionally abusing RICO. United States Attorneys' salaries are not tied to successful prosecutions of RICO cases, and it is assumed that United States Attorneys will save RICO for more egregious cases.³⁸⁰ 18 U.S.C. § 1964(c), however, allows private plaintiffs to enforce RICO. An ambiguous definition of pattern is most troubling in private suits.³⁸¹ Under civil RICO, full discretion is given to the individual attorney of each private plaintiff. Once it is established that a defendant has committed at least two predicate acts within a ten-year period, the plaintiff's lawyer then decides if the acts form a pattern of racketeering. Moreover, the attorney determines whether the requisite "something beyond" is present in his client's case.³⁸²

A private right of action coupled with ambiguous statutory language is troubling under any circumstances, but it is especially troubling under RICO because the statute provides for treble damages and attorney's fees.³⁸³ These provisions give a plaintiff and his attorney every incentive to charge a defendant with a RICO violation whenever possible. In the criminal context, there are some internal controls on charges of racketeering; in the civil RICO context, however, the private attorney determines whether to pursue a suit.

In addition, arbitrary and discriminatory enforcement is a greater danger under civil RICO because many more suits are brought under this section. Limitations on resources restrict the number of RICO criminal prosecutions the government may bring, but there are no such external limits on private plaintiffs, as demonstrated by the huge number of civil RICO suits brought

380. This assumption is based upon the fact that a RICO prosecution, with its requirements of multiple criminal acts, is more difficult to prove than an underlying crime by itself.

381. In *Kolender*, Justice O'Connor found especially troubling the "full discretion accorded to the police to determine whether the suspect [had] provided a 'credible and reliable' identification." *Kolender v. Lawson*, 461 U.S. 352, 360 (1983) (citing *Smith v. Goguen*, 415 U.S. 566, 575 (1974)).

382. Of course, under the Federal Rules of Civil Procedure, an attorney may be sanctioned where motions he files are not "grounded in fact," not "warranted by existing law," or "interposed for any improper purpose, such as to harass or to cause unnecessary delay." FED. R. CIV. P. 11. Given the lack of agreement about the meaning of the term *pattern*, however, proof of two acts without anything else would probably meet this minimal standard.

383. 18 U.S.C. § 1964(c); see *supra* notes 50-52 and accompanying text.

each year.³⁸⁴ Any plaintiff whose attorney believes his case meets the pattern requirement can allege a RICO violation. The void-for-vagueness doctrine is based on the belief that a vague statute increases the probability of arbitrary and discriminatory prosecutions; therefore, allowing these additional civil suits increases the likelihood that some will have deleterious effects. Not only may RICO be employed as a litigation tactic, but plaintiffs' attorneys acting in good faith may use this powerful weapon whenever possible.³⁸⁵ Enticed by the prospect of treble damages and attorney's fees, plaintiffs' attorneys may push the boundaries of the statute far beyond the core situations envisioned by Congress. Such action increases the risk that RICO will be used against individuals who were never intended to be a target of the statute.

D. Conclusion: Facial and Partial Vagueness

RICO's pattern requirement threatens fifth amendment freedoms by combining an ambiguous term with a statute granting tremendous discretion to prosecutors and private plaintiffs. The result of this combination requires that the statute be held facially vague. Under *Kolender*, a defendant may challenge a criminal statute on its face "even when it could conceivably have some valid application."³⁸⁶ The defendant need not demonstrate that the statute is vague in all its applications, as required in a noncriminal context.³⁸⁷ Moreover, *Kolender* suggests that when arbitrary and discrimina-

384. See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 481 (1985) (citing *Report of the Ad Hoc Civil RICO Task Force*, A.B.A. SEC. CORP. BANKING & BUS. L. 55-56 (1985)). Through 1982, fewer than seventy RICO cases had been reported, but in 1983 the number of RICO cases decided exceeded the total amount from previous years. Huestis, *supra* note 374, at 622 n.8. In 1984, the number of RICO cases filed increased by approximately 30%. *Id.*

385. See *Freeman & McSlarrow*, *supra* note 319, at 1009.

386. *Kolender v. Lawson*, 461 U.S. 352, 359 n.8 (1983). Without the guidance of *Kolender*, a number of lower federal courts held that RICO's pattern requirement was not facially vague because it was not vague in all of its applications. They did not consider the special dangers of arbitrary enforcement but only asked if the defendant had adequate notice. See, e.g., *United States v. Boffa*, 513 F. Supp. 444, 462 (Del. 1980).

387. Of course, in *Kolender* the conduct governed by the ambiguous personal identification requirement was constitutionally-protected. See *Kolender*, 461 U.S. at 361. The Court quite explicitly grounded its holding upon the right to move freely without arbitrary interference by the police by stating that "[o]ur concern here is based upon the 'potential for arbitrarily suppressing First Amendment liberties . . .'. In addition, § 647(e) implicates consideration of the constitutional right to freedom of movement." *Id.* at 358 (citations omitted). Such language demonstrates that the type of conduct being regulated had a great impact upon the Court's holding. The combination of ambiguous statutory language with probable encroachments on constitutionally protected conduct seems to have had a significant impact on the Court's determination that the statute was facially vague.

In contrast, RICO does not trench upon constitutionally protected conduct, unless the predicate crimes themselves implicate constitutional rights. See, e.g., *Fort Wayne Books, Inc. v.*

tory enforcement is a danger, courts should allow a defendant to attack the statute without having to allege that it is vague as applied to his conduct. Under RICO's enforcement scheme, there are dangers that public pressure may influence the charging of particular groups under criminal RICO, and also that the treble damage provision in civil RICO may encourage plaintiffs to allege a RICO violation. This danger of discriminatory enforcement supports a holding of facial vagueness.³⁸⁸

Even if a reviewing court would not declare RICO's pattern requirement void *in toto*, however, there are numerous situations where the term should be found vague as applied to particular defendants. For example, referring back to the criminal hypothetical employed in Section II, assume that the defendant has committed two acts of mail fraud. Further assume that the Commission ordered the defendant to defraud the two individuals, thereby weakening the individuals' financial base. The defendant in this situation can argue that he has not been fairly warned that his conduct meets the pattern requirement because, although he has committed two predicate acts, whether the acts demonstrate the requisite "something beyond" depends on the circuit.

The Fifth Circuit would find a pattern because the acts unquestionably relate to each other.³⁸⁹ The Tenth Circuit, however, would not find a pattern because "[a] scheme to achieve a single discrete objective does not in and of itself create a threat of ongoing activity."³⁹⁰ Under the Second Circuit's *Indelicato* analysis, the acts would form a pattern because they are related to a continuing criminal enterprise.³⁹¹ In the Seventh Circuit, the small number of criminal acts, the short life of the crime, and the few victims would probably doom the charge, even though the number of "schemes" is no longer considered.³⁹²

Consequently, the policy decision should be the same whether one accepts the more expansive argument that RICO's pattern requirement is facially vague, or the more limited argument that the term is vague in different situa-

Indiana, 489 U.S. 46, 84-85 (1989). Therefore, the court would be less likely to uphold a facial vagueness challenge in spite of the high risk of discriminatory enforcement.

388. See *Torwest DBC, Inc. v. Dick*, 810 F.2d 925 (10th Cir. 1987).

389. See *supra* notes 188-93 and accompanying text.

390. *Torwest*, 801 F.2d at 928-29. For example, one commentator has suggested that securities fraud should be narrowly construed "to cover only [those] types of activities" where organized crime is likely to be involved. Note, *RICO and Securities Fraud: A Workable Limitation*, 83 COLUM. L. REV. 1513, 1543 (1983); see *supra* notes 127-38 and accompanying text.

391. See *supra* notes 154-75 and accompanying text.

392. See *supra* notes 116-25 and accompanying text.

tions. Congress should revamp RICO to cure this indefiniteness, either by redefining the term "pattern" or by redesigning the whole statute.³⁹³

V. LEGISLATIVE ACTION

Concerned that RICO was being used for purposes far different from those originally intended by Congress, numerous commentators have suggested ways to limit the statute's scope.³⁹⁴ Each of these commentators has begun his analysis with the presumption that the original Racketeering Influenced Corrupt Organizations Act has been disfigured by its use since 1970. They point to the use of RICO, by United States Attorneys and private plaintiffs, in cases involving "legitimate" businesses, such as Drexel Burnham Lambert, and innocent organizations, such as Operation Rescue.³⁹⁵ These commentators also focus on private plaintiffs' excessive use of the statute in cases of "garden variety" fraud.³⁹⁶ Such uses, these commentators assert, demonstrate that RICO is being employed in ways contrary to Congress' intent.

In contrast to these commentators, this Article does not assume that RICO has been twisted beyond all semblance of its original form. Consequently, this Article's legislative prescription does not attempt to return RICO to its roots, or to redefine pattern to encompass only traditional organized crime. This Article assumes that Congress is aware that RICO is being used in ordinary corporate cases. Whether Congress originally envisioned RICO to be employed in these ways, it has heard this complaint since the early 1980s.³⁹⁷ Nevertheless, Congress has left the statute virtually unchanged. Instead, this Article assumes that RICO's pattern requirement is

393. Two commentators have argued that "[c]ongressional amendment, rather than voiding the statute on vagueness grounds, is the appropriate way to limit RICO." Note, *supra* note 169, at 526. But such a view misconstrues the role of the courts in a due process vagueness inquiry. Courts must determine whether a statute, as drafted, is sufficiently clear to be understood by potential defendants and prosecutors. Whether the legislature should or would amend a statute is beyond the duty of a reviewing court.

394. See Huestis, *supra* note 374, at 644-47; Note, *supra* note 169, at 498.

395. See Note, *supra* note 169, at 522 n.254; Comment, *RICO Forfeiture: Secured Lenders Beware*, 90 COLUM. L. REV. 1199, 1217 (1990) (regarding Drexel Burnham Lambert); Note, *The Use of Civil RICO Against Antiabortion Protesters and the Economic Motive Requirement*, 90 COLUM. L. REV. 1341 (1990) (regarding Operation Rescue).

396. See, e.g., Comment, *What Have They Done to Civil RICO: The Supreme Court Takes the Racketeering Requirement Out of Racketeering*, 35 AM. U.L. REV. 821 (1986); Note, *Civil RICO and "Garden Variety" Fraud—A Suggested Analysis*, 58 ST. JOHN'S L. REV. 93 (1983); Comment, *Civil RICO Actions in Commercial Litigation: Racketeer or Businessman?*, 36 S.W. L.J. 925 (1982).

397. See also Note, *supra* note 169, at 526. "Congress's failure to amend RICO to narrow its scope suggests that Congress has acquiesced in the courts' expansive interpretation of the statute." *Id.*

too ambiguous to pass constitutional muster as presently defined. Congress should amend the definition of pattern because, even if it is not facially vague, the term would be partially vague in many situations.

Even without the assumption that RICO should be drafted to apply only to traditional criminal enterprises, it still would be necessary to make certain assumptions about the types of activity covered by the statute. Congress would have established huge penalties for predicate acts connected by a pattern only if something about the pattern made the separate criminal acts particularly destructive. Congress, however, was unclear about what caused the heightened danger, and its statutory language needed clarification. The Supreme Court asserted, in *Sedima*, that the statutory language regarding "pattern" required "something beyond" two acts.³⁹⁸ With no more guidance than continuity and relationship, the lower courts made their own assumptions about why a pattern of racketeering activity was especially dangerous. These assumptions then shaped the tests established by the courts to determine whether a pattern was present. Some courts assumed RICO was based on the quantity of injury, while other courts believed that the statute dealt with the extent of the criminal activity. This Article assumes that RICO is aimed at structural crime.³⁹⁹

A. Proposal For Altering The Statutory Language Of RICO

Based on the assumption that Congress focused on structural crime in RICO, this Article recommends several changes. First, Congress should amend section 1962, which prohibits particular activities, to replace all references to "pattern" with the word "structural."⁴⁰⁰ Because "pattern of racketeering" would no longer be part of the substantive crime, the phrase should be removed from the definitional section of the statute. The amended statute should retain the requirement that two acts occur within a ten-year period, but should include this requirement in the definition of racketeering activity—not the definition of "pattern."⁴⁰¹ The new term "structural" should be defined as follows:

398. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985).

399. See *supra* note 89 and accompanying text.

400. Thus, section 1962(c) should read:

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 structural racketeering activity or collection of unlawful debt.

401. Thus, the new definition should read:

"Racketeering activity" means two of more (A) acts or threats involving murder, kidnapping, gambling. . . which are chargeable under State law and punishable by imprisonment for more than one year; (B) acts which are indictable under any of the

"[S]tructural racketeering activity" is only demonstrated where all of the following are proven: (1) more than one person participated in the crime or crimes, including conspirators; (2) the participants filled specialized roles; and (3) the racketeering acts were not simultaneous or virtually simultaneous.

B. Defense of Proposal

In defending this proposal, this Article addresses the following issues: (1) why it is necessary to omit the term "pattern;" (2) whether this proposal achieves the purpose behind the enactment of RICO; and (3) whether the new statute avoids the problems of the old statute.

The danger of retaining the term "pattern," while elaborating a clearer definition, is that assumptions will "taint" subsequent interpretation. As the foregoing discussion illustrates, the term "pattern" carries a great deal of interpretative baggage in each circuit. Each appellate court has established a test for determining whether a pattern exists based on its own assumptions about Congress' intended target in RICO. Especially in close cases, courts might import these old tests into the new statute, thus subordinating the new elements in the process. Replacing the phrase "pattern of racketeering" with the phrase "structural racketeering" will make clear that the old phrase has been discarded, not merely reconditioned.

Use of the word "structural" will indicate to courts that the presence of a criminal infrastructure makes the predicate acts especially dangerous. In the past, numerous courts have reasonably assumed that the phrase "pattern of racketeering" refers to some connection between or among the acts.⁴⁰² Such an interpretation comports with the common meaning of pattern. Usually the word refers to a connection between or among discrete items, not their connection to something else. If Congress passed RICO in an attempt to dismantle criminal infrastructures, prohibiting certain patterns of conduct was a clumsy and confusing mechanism. Although prohibiting a pattern of racketeering implies that the acts are particularly destructive because of their relationship, they are actually more dangerous because they grow out

following provisions of Title 18 . . . ; (C) acts which are indictable under Title 29 . . . (D) offenses involving fraud . . . , or (E) acts which are indictable under the Currency and Foreign Transactions Reporting Act which occurred within ten years of each other.

402. Compare the Fifth Circuit's test in *R.A.G.S. Couture v. Hyatt*, 774 F.2d 1350 (5th Cir. 1985), which merely asks if there is a relationship between the acts, with the Second Circuit's continuity and relationship test. Under the Second Circuit cases of *United States v. Indelicato*, 865 F.2d 1370 (2d Cir.), *cert. denied*, 110 S. Ct. 56 (1989) and *Beauford v. Helmsley*, 865 F.2d 1386 (2d Cir.), *vacated*, 492 U.S. 914 (1989), continuity may be proved by factors unrelated to the acts themselves.

of a criminal structure. The acts are not more destructive in combination than in isolation, but they serve as clues that a criminal infrastructure exists. Use of the phrase "structural racketeering," with its three indicia of structure, will remedy the confusion. Courts will understand that the real target of RICO is structural crime—not patterned crime.

The second issue concerns this Article's choice of a particular statutory method for attacking structural crime, assuming this was Congress' intended target. The amended statute retains the requirement of two predicate acts within a ten-year period, although this requirement is placed within the definition of "racketeering activity." In addition, a requirement of "structural racketeering activity" would replace the pattern requirement. Structural racketeering activity would require two or more participants, including those convicted of conspiracy to violate the Act, specialized roles for each defendant, and non-simultaneous predicate acts.⁴⁰³ These three elements together demonstrate that the crimes are not random and unrelated, but are connected to a criminal infrastructure.

Multiple participants are an essential characteristic of a criminal organization. The danger of a criminal infrastructure is that participants within the criminal organization are readily and easily interchangeable. Just as the death of the chief executive officer does not destroy a corporation, so the incarceration of a leader of a criminal organization will not shatter the structure. This danger, however, exists only if there is someone to take over the position. When an individual acts alone, his conviction will prevent future crime no matter how elaborate his plan. Therefore, it seems reasonable to require proof that the defendant acted in concert with at least one other person—a person who might continue the illegal activity if the first person were incarcerated. The presence of multiple participants also makes it more likely that some structure exists.⁴⁰⁴ When individuals participate in an undertaking, they ordinarily follow some organization plan. They usually do not act randomly. The larger the number of participants, the greater the chance that they are organized.

Role specialization among the participants also suggests that an ongoing criminal structure may be the source of the predicate acts. By definition, such specialization indicates that an organization is present. Undifferentiated individuals acting randomly do not carry out structural activity, as in

403. By drafting more exact language, fewer criminal or civil suits may be brought. This is simply the result of restricting the discretion presently given to United States Attorneys and to lawyers for private plaintiffs. Presumably, the defendants who escape prosecution because of the tightening of language will be the marginal cases who should not have been prosecuted in the first place.

404. See *Indelicato*, 865 F.2d at 1382.

the case of a riot. Instead, persons with particular abilities or talents play limited parts in the operation. For example, in the typical bank robbery, someone plans the operation, someone drives the vehicle, someone breaks into the safe, and someone holds the customers and employees hostage during the operation. The advantage of specialization is that each individual can focus on his particular responsibilities without having to master the entire operation. Specialization increases the chance that a crime will be successful because each person can become an expert in his limited area.

Moreover, role specialization makes it more likely that structural crimes will be committed in the future. An individual who has become an expert marksman in preparation for a successful bank robbery has every incentive to continue in this position with the organization. For the marksman with a specific expertise to be successful, the organization must continue to operate, with each person playing his role. To the extent that each member is dependent on the other members with specialized abilities, this pressure to maintain the organization will be magnified. Thus, the presence of role specialization in a criminal operation increases the likelihood that the organization will survive beyond the particular crime.

While not conclusive, the requirement that the acts be separate in time will avoid punishing nonstructural offenders and will increase the probability that a criminal infrastructure exists. Simultaneity, or virtual simultaneity, among several criminal acts indicates impulsiveness and spontaneity. If the entire criminal operation takes only a few moments or hours—from the first action taken to effectuate the first crime to the last action taken to conclude the last crime—it is likely that the crime was spontaneous.⁴⁰⁵ Impulsive crimes are not the threats RICO sought to remedy. They are not planned or carried out as part of an ongoing criminal organization. Therefore, establishing a bright-line rule will protect the impulsive actor.

Planned schemes usually involve a number of preparatory steps. Therefore, a “virtually simultaneous” rule would also cover structural crime. It is possible that a group of individuals could carry out a plan in which all of the acts were simultaneous. The number of these cases would be few, however, because the time period begins with the first step in the commission of the crime, not the first illegal act.⁴⁰⁶ If this time period is defined in terms of actions, not crimes, then few structural crimes should fall through the RICO net.

405. Examples include a series of threats directed at management by union leaders or a double murder where a husband suddenly discovers his wife with her lover.

406. In a securities fraud scheme, for example, the sending of a letter to potential investors to whet their appetites for a security to be offered later would count as the first action, even if the fraudulent offers themselves were mailed simultaneously.

The final issue is whether the proposed statute brings enough definiteness to RICO to remedy the void-for-vagueness problem. The three factors which define structural racketeering are relatively concrete. Consequently, both prosecutors and potential defendants would be able to determine if certain conduct falls within the statutory proscriptions. Numbers are probably the least ambiguous of all terms, so the numerical requirement of at least two participants would pass constitutional muster. The temporal requirement is also reasonably clear. It is not difficult to determine if the first action taken to effectuate the first crime and the last action taken to complete the last crime are "simultaneous or virtually simultaneous." The narrowness of this exception should apprise prosecutors and defendants that any extended criminal activity will come within the proposed statute.

Although role specialization is more ambiguous than either the numerical or the temporal requirements, it should also survive a due process challenge. A court would focus on whether the operation would achieve its desired result if the defendant played his part unaided by others. Both the potential defendant and the prosecutor know the plan—the defendant from his personal knowledge and the prosecutor from his witnesses. Further, role specialization can be inferred from the type of plan. There is role specialization if the entire plan will fail because any individual fails in his assigned duty. If both defendants and prosecutors can determine whether the defendant has played a specialized role, then the phrase "role specialization" provides notice and guidance.

Applying the proposed statute to several situations will demonstrate that it is more definite than the vague continuity and relationship test. In *Indelicato*, the Second Circuit struggled to find the requisite continuity among the acts, ultimately looking beyond the acts to the criminal enterprise.⁴⁰⁷ The court based its decision on the assumption that RICO was designed to attack structural crime.⁴⁰⁸ The court, however, did violence to the statute when it satisfied the continuity requirement through the Commission. If continuity and relationship are characteristics of a pattern of racketeering acts, then the acts must demonstrate these traits.

In contrast, if the Second Circuit had employed the proposed statute, the court would have found a RICO violation without stretching the pattern requirement beyond recognition. The first requirement was met: two other men aided *Indelicato* in the shooting, and several other individuals carried out preliminary functions.⁴⁰⁹ There was also some role specialization, even

407. *Indelicato*, 865 F.2d at 1383-85.

408. *Id.* at 1381-84.

409. *Id.* at 1372.

though the murder required the three "soldiers" to perform the same task. The order to commit the murders came from the Commission, and various members of the Commission were involved in the planning.⁴¹⁰ Further, one individual was given the responsibility of collecting the various weapons and bringing them to Indelicato.⁴¹¹ Of the three requirements, the separateness requirement is the most difficult because the three murders were virtually simultaneous. In this case, however, certain collateral activity satisfies this requirement. The getaway car was stolen a month before the murder, and the weapons were retrieved from the "safe house" at least several days earlier.⁴¹² Therefore, even though the murders were simultaneous, certain activities needed to consummate the murders covered a substantial period of time. If no collateral criminal activity had been involved, then the temporal requirement would have precluded a RICO charge. As in the criminal hypothetical outlined in Section II of this Article, it also would be difficult to show role specialization if there were no collateral activity. In addition, the virtual simultaneity of the acts would fail to satisfy the temporal requirement.

The amended statute would also provide more guidance in the civil context, where the circuits have differed radically. This is particularly true for those appellate courts that attach significance to the number of schemes, transactions, or episodes. In *Brandt v. Schal Associates, Inc.*,⁴¹³ for example, the Seventh Circuit refused to find a pattern where there was only one scheme.⁴¹⁴ Continuity was not demonstrated because the scheme would end once the perpetrators achieved their objective.⁴¹⁵ The proposed statute does not contain such inherent ambiguity. Under the facts of *Brandt*, the defendants, the prosecutor, and the court would be able to determine, with a greater degree of certainty, that the alleged conduct violated RICO. Assuming Mr. Brandt's allegations were true, at least two members of Schal Associates, as well as personnel at Northwestern University, participated in the fraud. The fraud would meet the temporal separation requirement because

410. *Id.*

411. *Id.*

412. *Id.*

413. 854 F.2d 948 (7th Cir. 1988) (suit by successor of construction subcontractor under RICO for concealment of design flaws, threatened termination of the contract, and fraudulent filing of expense assessments against subcontractor).

414. *Id.* at 952. Although the Seventh Circuit no longer considers "scheme" among its list of factors, the facts of the *Brandt* case provide a convenient vehicle for illustrating the clarity of the amended statute when compared to analyses which rely on "schemes."

415. *Id.* at 953. As Justice Brennan noted in *H.J. Inc.*, "'scheme' is hardly a self-defining term. A 'scheme' is in the eye of the beholder, since whether a scheme exists depends on the level of generality at which criminal activity is viewed." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 241 n.3 (1989).

the scam involved several fraudulent backcharges made against the plaintiff/subcontractor during the construction project. Finally, although the opinion does not detail the defendants' individual responsibilities in the operation, it is likely that each played some specialized role.

In addition to providing a clearer standard than those founded on schemes, transactions, or episodes, the proposed statute avoids the weighing problem of multi-factor tests. In *Saporito*, for example, the Third Circuit supposedly applied the six factors of its pattern test.⁴¹⁶ *Saporito* involved four individuals, in addition to the defendant corporation, who perpetrated a fraud on thirty-two victims over several months.⁴¹⁷ The court omitted any consideration of the character of the acts, however, and added its own gloss to one factor. The court inferred that there was a distinction between passive and active perpetrators.⁴¹⁸ By requiring that plaintiffs and prosecutors meet all three conditions for "structural racketeering activity," the weighing problem would be remedied. The first two requirements are met because more than one person was involved, and the fraud covered several months. As in *Brandt*, the *Saporito* decision does not describe the operation in enough detail to determine how each of the defendants participated. Nevertheless, because each defendant was an officer in the corporation, they probably had particular roles.

This proposed statute would be equally definitive where a large, but temporally restricted, operation was present. In the civil hypothetical, a single defendant used the mails to distribute several hundred fraudulent offers to purchase distributorships. Although he employed the mechanisms of his corporation, he did not conspire with other officers or employees. Assuming he mailed the letters at virtually the same time, all three requisite factors would be lacking. There were no multiple defendants, there was no role specialization, and the criminal acts were simultaneous. Although the outcome would be different from that in many of the cases discussed above, the determination would be clear for the defendant, the prosecutor, and the court.

VI. CONCLUSION

RICO attacks organized crime by combining strict penalty provisions and broad prohibitions on racketeering activity. The term "pattern" is fundamental to this enforcement scheme because a pattern of racketeering must be proved under both the civil and criminal sections of the statute. Yet, "pat-

416. *Saporito v. Combustion Eng'g, Inc.*, 843 F.2d 666, 670 (3d Cir. 1988).

417. *Id.*

418. *Id.* at 667 n.17.

tern" never has been clearly defined. While the term means multiple acts of racketeering within a ten-year period, it has been interpreted to require "something beyond" this minimum. Federal courts, however, have disagreed vehemently in their understanding of this requirement, even though the Supreme Court has twice attempted to provide guidance.

Given the severe penalties of RICO, such disagreement indicates that the statute may be unconstitutionally vague. Where federal judges cannot understand a criminal provision, there is a great danger that potential defendants and prosecutors will not understand it either. Because of this threat to due process, Congress should restructure RICO. The statute has become far too important to dismantle entirely, but the slippery concept of a pattern must be removed. Due process demands greater specificity in criminal statutes than "something beyond."