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BEHOLD, THE DAY OF JUDGMENT: IS THE RICO PATTERN REQUIREMENT VOID FOR VAGUENESS?

ROBERT D. LUSKIN*

Twenty years of judicial interpretation of the Racketeer Influenced and Corrupt Organizations Act ("RICO")¹ has cast a pall of confusion over the statute's "pattern of racketeering activity" requirement.² In *H.J. Inc. v. Northwestern Bell Telephone Co.*,³ four Justices of the Supreme Court explicitly recognized the depths of confusion to which the courts have sunk, observing that the majority's muddled exegesis of RICO's pattern requirement "bode[d] ill for the day" when a vagueness challenge to the statute was properly before the Court.⁴

As the British historian A.J.P. Taylor observed, "nothing is inevitable until it happens."⁵ Nevertheless, in the history of RICO jurisprudence, the "Age of the Vagueness Challenge" surely dawns. What is astounding is that it has taken lawyers and courts twenty years to ask whether the statute makes sense. Equally astounding is that we are about to embark upon a serious debate over whether a "person of ordinary intelligence" is capable of understanding terms so opaque that the search for their true meaning has generated "the widest and most persistent circuit split" in recent times.⁶

Despite the impressive amount of case law assessing the con-

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¹ 18 U.S.C. §§ 1961-1968 (1988 & Supp. 1990).

² See *id.* § 1961(5). A pattern of racketeering activity includes "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." *Id.*

³ 109 S. Ct. 2893 (1989).

⁴ *Id.* at 2909 (Scalia, J., concurring).

⁵ Hutchinson, *Daily Telegraph*, Jan. 7, 1980, reprinted in F.S. PEPPER, *HANDBOOK OF 20TH CENTURY QUOTATIONS* 184 (1984).

⁶ *Northwestern Bell*, 109 S. Ct. at 2906-07 (Scalia, J., concurring).

stitutionality of RICO prior to *Northwestern Bell*,⁷ no court had addressed the vagueness questions raised by Justice Scalia in his concurring opinion to that decision. To the contrary, the cases rejecting constitutional challenges to RICO all derive from a handful of early cases construing terms other than "pattern of racketeering," or measuring the intelligibility of the pattern requirement against definitions that have long since been discarded as overly simplistic.⁸ The first trickle of cases spawned by Justice Scalia's concurrence in *Northwestern Bell* promises little more.⁹ Displaying either commendable restraint or utter cowardice, depending upon one's perspective, the courts seem content to duck the issues squarely raised by *Northwestern Bell* through a number of avoidance devices. These devices include reliance on "precedent," the need to review the statute "as applied," or focusing the due process inquiry on the predicate offenses rather than the terms of the RICO statute itself.

This Article will first look at the general constitutional doctrines governing the vagueness challenges. It will attempt to apply those standards to the term "pattern of racketeering activity" as it is now understood. The Article then will consider the various means by which courts successfully have, thus far, deflected thoughtful challenges to the constitutionality of the pattern requirement.

⁷ See *United States v. Tripp*, 782 F.2d 38, 41-42 (6th Cir.), *cert. denied*, 475 U.S. 1128 (1986); *United States v. Ruggiero*, 726 F.2d 913, 923 (2d Cir.), *cert. denied*, 469 U.S. 831 (1984); *United States v. Martino*, 648 F.2d 367, 381 (5th Cir.), *reconsidered in part*, 650 F.2d 651 (5th Cir.), *cert. denied*, 456 U.S. 943 (1982); *United States v. Huber*, 603 F.2d 387, 397 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980); *United States v. Swiderski*, 593 F.2d 1246, 1249 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979); *United States v. Hawes*, 529 F.2d 472, 477-79 (5th Cir. 1976); *United States v. Campanale*, 518 F.2d 352, 364-65 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976); *United States v. Cappetto*, 502 F.2d 1351, 1356-59 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975).

⁸ See *Swiderski*, 593 F.2d at 1249 (citing *United States v. Elliott*, 571 F.2d 880, 903-05 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978)). The *Swiderski* court characterized the *Elliott* decision as "the most persuasive reasoning for finding RICO constitutional." *Id.* However, the question addressed in *Elliott* concerned how directly an individual must be associated with the enterprise, not the requisite pattern of racketeering activity. See *Elliott*, 571 F.2d at 903.

⁹ See *Firestone v. Galbreath*, 747 F. Supp. 1556, 1581 (S.D. Ohio 1990). The court found the statute unconstitutional as applied and thus avoided any issue of facial unconstitutionality. *Id.*; *United States v. Paccione*, 738 F. Supp. 691, 694-96 (S.D.N.Y. 1990); see also *Beck v. Edward D. Jones & Co.*, 735 F. Supp. 903, 905 (C.D. Ill. 1990) (noting *Northwestern Bell's* determination that "pattern of racketeering activity" is definable).

I. "PATTERN OF RACKETEERING ACTIVITY": VOID FOR VAGUENESS?

A. *The Vagueness Doctrine*

Vagueness challenges to criminal laws are grounded in two distinct constitutional due process considerations. First, the vagueness doctrine is designed to ensure that individuals are properly warned *ex ante* of the criminal consequences of their conduct.¹⁰ Chief Justice Warren articulated this "fair notice" rationale in his oft-cited *United States v. Harriss*¹¹ opinion:

The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.¹²

Second, vague laws are constitutionally suspect because they delegate excessive enforcement discretion to the Executive Branch.¹³ Justice O'Connor has labeled this danger "the more important aspect of the vagueness doctrine."¹⁴ A vague, "standardless" law affords too great an opportunity for criminal law enforcement to be motivated by the "personal predilections" of police officers, prosecutors and juries.¹⁵ Overabundant discretion also implicates Article III's separation of powers concerns.¹⁶ For the legislature to cast its criminal proscriptions so broadly and ambiguously as to allow the courts freely to "step inside and say who could be rightfully detained, and who should be set at large," would, "to some extent, substitute the judicial for the legislative department of government."¹⁷

Taken together, these principles suggest that the task of a

¹⁰ See *Jordan v. De George*, 341 U.S. 223, 230 (1951) (defendant's two fraud convictions enough to avoid issue of vagueness of phrase "moral turpitude").

¹¹ 347 U.S. 612 (1954).

¹² *Id.* at 617.

¹³ See *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). "[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis" *Id.*

¹⁴ *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

¹⁵ *Id.* at 358 (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)).

¹⁶ See U.S. CONST. art. III.

¹⁷ *Kolender*, 461 U.S. at 358 n.7 (quoting *United States v. Reese*, 92 U.S. 214, 221 (1875)).

court presented with a vagueness challenge is inherently subjective, but relatively straightforward. It would be a grave mistake, however, to take these principles at face value. While enunciating broad rules designed to protect individuals from fundamental unfairness, courts have resisted the efforts of lawyers to "convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited."¹⁸

The result is a series of doctrines that effectively undercut the "fair notice" test. As a general matter, the Court consistently has excused Congress from the burden of enacting legislation of the highest level of clarity; the existence of less vague alternatives simply cannot provide grounds for a successful challenge. In practice, courts have acknowledged the inexactness of language and the difficulty of line-drawing by holding that due process will tolerate some vagueness at the frontiers of a statute if "the general class of offenses to which the statute is directed is plainly within its terms."¹⁹

The courts have glossed the doctrine through a number of specific devices designed to place ambiguous terms in context, rather than judge them against objective standards of linguistic precision. Outside the first amendment context, courts have resisted mere facial challenges. Defendants must establish that the statute could not reasonably be applied to their own conduct, rather than that of a hypothetical defendant.²⁰ Additionally, courts have relaxed vagueness standards when a requirement of specific intent works to reduce the risk of punishing persons who act in good faith,²¹ when seemingly vague terms might nevertheless be intelligible to the class of persons to whom a statute is directed,²² or where terms have an established common-law meaning.²³

Not surprisingly, virtually any vagueness inquiry, no matter

¹⁸ *Colten v. Kentucky*, 407 U.S. 104, 110 (1972).

¹⁹ *Harriss*, 347 U.S. at 618.

²⁰ See *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988) (vagueness challenges to statutes not threatening first amendment interests judged on "as applied" basis); *United States v. Powell*, 423 U.S. 87, 92-93 (1975) (vagueness challenges to statutes not threatening first amendment freedoms examined in light of facts).

²¹ See *Hygrade Provision Co. v. Sherman*, 266 U.S. 497, 501 (1925).

²² See *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926); *Hygrade Provision Co.*, 266 U.S. at 502.

²³ See *Connally*, 269 U.S. at 391.

how diligent, has a distinctly rudderless quality. The lack of an articulable standard enables courts to ignore vagueness arguments and rely uncritically on precedent. Ironically, the doctrine's softness yields perverse results in practice: the more opaque the statute, and, consequently, the more confused the courts are about its meaning, the less likely they are to undertake any rigorous vagueness inquiry. RICO jurisprudence demonstrates the possibility for courts utterly to confuse the meaning of a basic statutory term such as "pattern of racketeering," while summarily dismissing the challenges of defendants who claim equally to be befuddled.

B. *Implications of Northwestern Bell*

Prior to *Northwestern Bell*, the circuit courts were widely split on the question of what constitutes a RICO pattern. Their divergent conclusions have functioned effectively to create variant criminal offenses.²⁴ At one end of the spectrum, courts have held that a pattern could be established merely by demonstrating the performance of any two predicate acts.²⁵ Under this formulation, RICO appeared to be a purely remedial provision enhancing sentences for multiple violations of the predicate offenses. Despite its breadth, the interpretation had at least one distinct advantage: since the performance of *any two* predicate offenses exposed an individual to RICO liability, it cured the pattern requirement of any vagueness problems.²⁶ At the other end of the spectrum, some courts focused on the Supreme Court's sphinx-like observation in *Sedima, S.P.R.L. v. Imrex Co.*²⁷ that "while two acts are necessary, they may not be sufficient."²⁸ Drawing on the Court's hints about "continuity plus relationship,"²⁹ these courts struggled to develop more elaborate definitions of "pattern." A number of circuits developed

²⁴ See, e.g., Blakey, *Is "Pattern" Void for Vagueness?*, Civ. RICO Rep. 6 (Dec. 12, 1989). 6 (handling of "pattern" after *Sedima* portends some courts holding RICO unconstitutionally vague).

²⁵ See *Superior Oil Co. v. Fulmer*, 785 F.2d 252, 255-56 (8th Cir. 1986); *United States v. Parness*, 503 F.2d 430, 441-42 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975).

²⁶ See, e.g., *United States v. Jennings*, 842 F.2d 159, 162-63 (6th Cir. 1988) (defendant's RICO conviction reversed since two racketeering acts not found); *R.A.G.S. Couture v. Hyatt*, 774 F.2d 1350, 1354-55 (5th Cir. 1985) (two alleged acts of mail fraud constituted "pattern" under RICO); *United States v. Watchmaker*, 761 F.2d 1459, 1475 (11th Cir. 1985) (defendant's violations of same murder statute three separate times constituted three predicate acts sufficient for RICO violation), *cert. denied*, 474 U.S. 1100 (1986).

²⁷ 473 U.S. 479 (1985).

²⁸ *Id.* at 496 n.14.

²⁹ *Id.* at 497 n.14.

wide-ranging tests that examined factors such as "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 distinct injuries."³⁰

Taking yet a different tack, the Eighth Circuit in *Northwestern Bell* held that a defendant must have engaged in multiple or separate illegal "schemes" in order to be prosecuted for a pattern of racketeering activity.³¹ This approach raised troubling questions about what constituted a separate "scheme." At the same time, however, the Eighth Circuit's approach retained some of the binary simplicity of the "any two predicate acts" approach to pattern, and dramatically reduced the number of variables to be considered in determining whether a defendant's conduct satisfied RICO.

Northwestern Bell thus presented the Supreme Court with an area of the law replete with confusion. The circuits were rather divisively split, thereby creating a difficult and uneasy situation, considering RICO's severe civil and criminal penalties. In addition, *Sedima* had spawned judicial confusion and uncertainty in discerning exactly how much more than any two acts was required to establish a pattern. Terms such as "scheme" and "continuity" persistently eluded concrete explanation, and multi-factor inquiries proved disturbingly malleable.

Justice Brennan, writing for the Court, attempted to develop a more "meaningful concept" of RICO's pattern requirement.³² Drawing upon the legislative history, he explicitly reaffirmed the suggestions of the Court in *Sedima*.³³ He concluded that a RICO pattern is a function of both *continuity* and *relationship*.³⁴ The majority understood "relationship" to mean that the acts have "the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated . . . and are

³⁰ *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986); see also *Brandenburg v. Seidel*, 859 F.2d 1179, 1185 (4th Cir. 1988) (factors determining "pattern" requirement); *Saporito v. Combustion Eng'g, Inc.*, 843 F.2d 666, 676 (3d Cir. 1988) (same), *vacated and remanded on other grounds*, 489 U.S. 1049 (1989).

³¹ *H.J. Inc. v. Northwestern Bell Tel. Co.*, 829 F.2d 648, 650 (8th Cir. 1987), *rev'd*, 109 S. Ct. 2893 (1989).

³² *Northwestern Bell*, 109 S. Ct. at 2899.

³³ See *Sedima*, 473 U.S. at 496 n.14; see also *supra* note 24 and accompanying text (two predicate acts sufficient for liability).

³⁴ *Northwestern Bell*, 109 S. Ct. at 2900. Justice Brennan stated that predicate acts must "amount to or pose a threat of continued criminal activity" and also must, in some way, be related. *Id.*

not insulated events.”³⁵ In addition, “continuity is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition.”³⁶

Justice Scalia, in a separate concurrence, attacked the majority’s reasoning. He disparaged the imprecision of the majority’s “continuity plus relationship” concept, contending that it was as useful to lower courts as advising them that “life is a fountain.”³⁷ Justice Scalia first examined Justice Brennan’s description of relatedness. Justice Brennan had looked to section 3575(e) to give meaning to the term “relationship.” However, while section 3575 instructs courts and prospective defendants to consider certain enumerated factors, it provides no guidance as to the *nature* of the nexus between the factors necessary to establish “relationship.” Finding a relationship among acts is not a neutral process of cataloguing objective similarities and differences. As Professor Gould, a Harvard paleontologist, has observed, “classifications are human impositions, or at least culturally based decisions on what to stress among a plethora of viable alternatives, classifications are therefore theories of order, not simple records of nature.”³⁸ Depending on the ordering principle that informs the concept of “relationship,” any two acts may appear related, or not. Without some ordering principles, the concept of “relationship” is as elastic as is possible for a term to be.

Justice Scalia questioned whether it is sufficient that the victims of both predicate acts are women.³⁹ Or, would it suffice if the participants in two distinct predicate acts have knowledge of each other’s activities? Factors affecting any particular relationship may be so numerous and wide-ranging that, standing alone and unexplained, they provide little guidance as to what predicate activity is related for the purposes of the pattern requirement. As it now stands, prosecutors can pick the most advantageous section 3575 factors, and then simply overlay the level of generality necessary to construct a “relationship.”

The vague nature of the factors outlined by Justice Brennan

³⁵ *Id.* at 2901 (citing 18 U.S.C. § 3575(3) (1988)).

³⁶ *Id.* at 2902.

³⁷ *Id.* at 2906-07 (Scalia, J., concurring).

³⁸ Gould, *Taxonomy as Politics: The Harm of False Classification*, DISSENT 73, 73 (Winter 1990).

³⁹ *Northwestern Bell*, 109 S. Ct. at 2907 (Scalia, J., concurring).

carries the further risk that the concept of relatedness may soon collapse onto the separate concepts of enterprise or defendant. Section 3575's vague laundry list suggests that finding a relationship between predicates may simply mean demonstrating no more than that the same individual defendant committed the predicate acts or that the acts were related to the enterprise, even if they were not otherwise related to each other. Therefore, in the case of so-called legitimate enterprises, the predicate acts, if committed by employees of the enterprise, will be related to the enterprise even if the defendants or the acts are not themselves meaningfully related. Similarly, for association-in-fact enterprises, where the defendants have come together for a limited purpose, the predicate acts can be seen as related through the defendants, even if the acts are not otherwise related.

Thus, while the terms "related" or "relationship" may not themselves be vague, in the sense that they imply something about the classification of similarities and differences, they are entirely without meaning. Except for the narrow class of cases involving repetitive conduct by the same individual, they offer little, if any, guidance about when or how this element might be satisfied.

Justice Scalia expressed equal puzzlement with the majority's definition of continuity, finding it even more opaque than that of "relationship."⁴⁰ At first blush, it would seem that any two predicates could be characterized as constituting a "closed period" of conduct. But the Court clearly did not intend the definition to be drawn that broadly; predicate acts that fail to extend over a "substantial period of time" and do not threaten "future criminal conduct" do not satisfy the continuity requirement.⁴¹ Justice Brennan's caveat is difficult to understand. In attempting to confine the concept of closed-ended continuity, ostensibly a *retrospective* notion, why look to the threat of *future* criminal conduct? The reference to future criminal conduct in modifying closed-ended continuity is all the more confusing, considering Justice Brennan's initial disjunctive construction; continuity refers either to a closed period of repeated conduct *or* to past conduct that projects into the future with a threat of repetition.⁴²

Finally, taking Justice Brennan's definition on its own terms,

⁴⁰ *Id.* (Scalia, J., concurring).

⁴¹ *Id.* at 2902.

⁴² *Id.*

one must wonder what the phrase "threat of continuity" means. Justice Brennan has suggested that the phrase refers to those predicates which naturally lead to predictable repeat episodes, such as extortion or protection payments.⁴³ However, the line between continuity and the threat of continuity is illusory; extortion and protection rackets surely are continuing, not merely *threatening* continuity. Moreover, it is difficult to imagine, in any matter in which the alleged criminal activity is terminated by arrest or indictment, that a prosecutor could not successfully plead the "threat" of continuity based simply on the fact that the conduct had not terminated.⁴⁴

The immediate aftermath of *Northwestern Bell* suggests that Justice Scalia's skepticism of the majority's attempts to clarify pattern was well-founded. In *Atlas Pile Driving Co. v. DiCon Financial Co.*,⁴⁵ the Eighth Circuit stated that "predicate acts extending over a few weeks or months" does not constitute continuity,⁴⁶ but declined to suggest what period of time was necessary to satisfy the continuity requirement. The court simply noted that a period greater than three years evinced continuity. Similarly, in *Fleet Credit Corp. v. Sion*,⁴⁷ the First Circuit took a "we know it when we see it" approach and held that activity over a four and one-half year period was continuous, but that something less might not have been sufficient.⁴⁸

Finally, some courts have recognized explicitly the futility of *Northwestern Bell*. In *Management Computer Services, Inc. v. Hawkins, Ash, Baptie & Co.*,⁴⁹ the Seventh Circuit found "[*Northwestern Bell's*] explanations of the terms continuity and relationship to be somewhat elastic."⁵⁰ Thus, Judge Flaum simply con-

⁴³ *Id.*

⁴⁴ See *id.* at 2901-02. The majority's concept of acts that "threaten" continuity carries with it the further risk that in looking for the "threat" of continuity, courts will focus on the character or other criminal activities of the *defendants*, rather than concentrate on whether the "threat" is related to the conduct of the enterprise's affairs. *Id.*

⁴⁵ 886 F.2d 986 (8th Cir. 1989). It would be an interesting, but nevertheless daunting task to try to classify the predicate offenses set out in section 1961(1), such as extortion or blackmail, to determine which by their nature threaten continuity, and which, by contrast, are more naturally sporadic.

⁴⁶ *Id.* at 994.

⁴⁷ 893 F.2d 441 (1st Cir. 1990).

⁴⁸ *Id.* at 446-47.

⁴⁹ 883 F.2d 48 (7th Cir. 1989).

⁵⁰ *Id.* at 51; see also *Service Eng'g Co. v. Southwest Marine, Inc.*, 719 F. Supp. 1500, 1508 (N.D. Cal. 1989) (predicate acts extending over weeks or months insufficient).

cluded that continuity properly implicates "long-term criminal conduct."⁵¹

Judgments of pattern likely will continue to be extraordinarily ad hoc as the circuit courts continue to fail to lay down workable rules regarding the temporality of predicate acts. We are left, then, with little clue as to the meaning of the terms relationship and continuity. This ambiguity can only perpetuate what Justice Scalia called the past "kaleidoscope of circuit positions."⁵² More importantly, we are faced with terms whose meaning are elusive at best, and made even more inaccessible through well-meaning but unenlightening judicial intervention.

II. JUDICIAL ATTEMPTS AT CLARIFYING THE PATTERN REQUIREMENT

Given the difficulty and the potential consequences of a serious vagueness challenge to the pattern requirement, courts have struggled to find alternatives to explaining the pattern requirement in terms comprehensible to the "person of ordinary intelligence." Three alternatives are emerging: (i) reliance on "precedent"; (ii) resort to an "as applied" analysis; and (iii) focusing the due process inquiry on the predicate offenses, rather than on the RICO violation. None of these devices, however, will enable the courts to sidestep a vagueness challenge indefinitely.

Arguments based upon precedent rest shakily atop a handful of cases which either construe terms other than the pattern requirement or which involve straightforward and mechanical interpretations of "pattern" that have not survived intervening judicial interpretation. The use of the "as applied" analysis, while sound as a matter of constitutional law, can do no more than postpone RICO's day of reckoning. Finally, efforts to focus the due process inquiry on the predicate offenses are fundamentally unsound both as a matter of law and fairness.

A. *Precedent*

By weight of numbers alone, there now exists an impressive array of authority in at least five circuits upholding various provisions of RICO against vagueness challenges.⁵³ However, most of

⁵¹ *Management Computer*, 883 F.2d at 51.

⁵² *Northwestern Bell*, 109 S. Ct. at 2908 (Scalia, J., concurring).

⁵³ See, e.g., *United States v. Ruggiero*, 726 F.2d 913, 923 (2d Cir.) (RICO not constitu-

these decisions derive directly from a handful of seriously flawed, early decisions of questionable utility.

A number of these decisions, construing terms other than "pattern of racketeering," have emerged as standing for different and frequently broader propositions.⁵⁴ For example, the Fifth Circuit, in *United States v. Hawes*,⁵⁵ addressed a narrowly focused challenge to the term "enterprise,"⁵⁶ which later was relied upon as the sole authority to repel a general vagueness challenge.⁵⁷ Similarly, the Sixth Circuit relied upon *Hawes* to deflect a challenge to the term "racketeering activity,"⁵⁸ as did the Second Circuit for the proposition that the term "pattern" was not unduly vague.⁵⁹

This sort of lateral thinking has continued even after the Supreme Court's holding in *Northwestern Bell*. For example, in *Beck v. Edward D. Jones & Co.*,⁶⁰ an Illinois district court relied upon both *Hawes* and *United States v. Martino*⁶¹ to support the notion that "any person of average intelligence could determine what actions would make him liable for participating in an enterprise through a pattern of racketeering activity."⁶²

Another group of cases, decided long before the evolution of the concepts of continuity and relationship, have held that the

tionally vague as applied to illegal enterprises), *cert. denied*, 469 U.S. 831 (1984); *United States v. Martino*, 648 F.2d 367, 381 (5th Cir.) (RICO interpretation constitutional if comporting with average person's understanding), *vacated in part*, 650 F.2d 651 (5th Cir. 1981), *cert. denied*, 456 U.S. 949 (1982); *United States v. Huber*, 603 F.2d 387, 393 (2d Cir. 1979) (RICO not so vague as to fail to give notice of illegality of activities), *cert. denied*, 445 U.S. 927 (1980); *United States v. Campanale*, 518 F.2d 352, 364 (9th Cir. 1975) (RICO not unconstitutionally vague because of statutory definitions), *cert. denied*, 423 U.S. 1050 (1976).

⁵⁴ See *United States v. Tripp*, 782 F.2d 38, 41-42 (6th Cir.) (challenge based on vagueness of incorporated offenses), *cert. denied*, 475 U.S. 1128 (1976); *United States v. Hawes*, 529 F.2d 472, 478-79 (5th Cir. 1976) (challenge based on vagueness of enterprise); *United States v. Cappetto*, 502 F.2d 1351, 1357-58 (7th Cir. 1974) (challenge principally directed to civil injunctive provisions of section 1964), *cert. denied*, 420 U.S. 925 (1975).

⁵⁵ 529 F.2d 472 (5th Cir. 1976).

⁵⁶ *Id.* The court rejected the defendant's argument that only legitimate enterprises were reached by the statute, and instead held that "enterprise" under section 1962(4) had a very broad meaning. *Id.* at 479; see 18 U.S.C. § 1962(4) (1988).

⁵⁷ See *United States v. Martino*, 648 F.2d 367, 381 (5th Cir.), *vacated in part*, 650 F.2d 651 (5th Cir. 1981), *cert. denied*, 456 U.S. 949 (1982).

⁵⁸ *Tripp*, 782 F.2d at 42.

⁵⁹ *United States v. Huber*, 603 F.2d 387, 393 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980).

⁶⁰ 735 F. Supp. 903 (C.D. Ill. 1990).

⁶¹ 648 F.2d 367 (5th Cir.), *vacated in part*, 650 F.2d 651 (5th Cir. 1981), *cert. denied*, 456 U.S. 949 (1982).

⁶² *Beck*, 735 F. Supp. at 906.

term "pattern" is not unduly vague.⁶³ Relying upon the definition of the term "pattern" found in section 1961, these cases assumed that a pattern meant simply the commission of at least two predicate acts. For example, the Ninth Circuit, in *United States v. Campanale*,⁶⁴ acknowledged with unusual candor that "if undefined, terms such as 'pattern of racketeering activity' would be unmanageable."⁶⁵ However, the court noted that since the term is defined "with reference to a definite number of acts of 'racketeering activity' within specified time periods," there remains no risk of confusion.⁶⁶

This approach has been superseded by the Supreme Court's elaboration of the pattern requirement in both *Sedima* and *Northwestern Bell*. No longer will "any two" predicate acts suffice. The Court in *Northwestern Bell* expressly stated that the prosecution must clearly demonstrate "continuity and relationship" in criminal RICO prosecutions. Therefore, vagueness attacks can no longer be dismissed in this fashion. Nevertheless, the collapse of this response to vagueness claims illustrates that the statutory difficulties exceed faulty draftsmanship. Although it may have been unwise or unduly harsh to define "pattern" by reference to a "definite" number of acts within a "specified period," this provision unquestionably solved the vagueness problem. However, the larger difficulties, identified by Justice Scalia in *Northwestern Bell*, are essentially the offspring of judicial interpretation, originating with the Court's misconceived "continuity and relationship" approach to limit the perceived abusive application of the statute in civil cases.

B. "As Applied" Analysis

The strongest deterrence to a vagueness challenge is the judicial doctrine of assessing the constitutionality of a provision only "as applied." Courts have asserted that while RICO may have vagueness problems with respect to some hypothetical defendant,

⁶³ See, e.g., *United States v. Swiderski*, 593 F.2d 1246, 1249 (D.C. Cir. 1978) (where both defendants had contact with broadly-defined enterprise, statute not unconstitutionally vague), *cert. denied*, 441 U.S. 933 (1979); *United States v. Stofsky*, 409 F. Supp. 609, 612-14 (S.D.N.Y. 1973) ("conduct [or participation] . . . in the conduct of the affairs of the enterprise" through a pattern of racketeering activity not vague), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976).

⁶⁴ 518 F.2d 352 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976).

⁶⁵ *Id.* at 364.

⁶⁶ *Id.* (citing 18 U.S.C. § 1961 (1988)).

if RICO does, clearly and understandably, apply to the particular defendant who is before the court, the vagueness challenge fails. Even when defendants have tendered "facial" challenges, courts have maintained that "the nature of the inquiry that must be made to determine facial ambiguity is not significantly different from that which must be made to determine ambiguity as applied."⁸⁷ Rather, "in determining the sufficiency of the notice[,] a statute must of necessity be examined in the light of the conduct with which a defendant is charged."⁸⁸ Thus, a fair amount of ambiguity around the margins of a statute is insufficient to void the whole statute, so long as the defendant's conduct can be located within the discernible core of proscribed conduct.

While unquestionably correct in terms of constitutional law, the "as applied" doctrine will not pose a permanent obstacle to adjudication of the vagueness question. Rather, it is likely to ensure that the vagueness challenges will be heard in civil cases not involving activity commonly thought to constitute "racketeering." Indeed, the first district court decision to uphold a vagueness challenge arose in precisely the context thought to fall outside the original intent of Congress.⁸⁹ *Firestone v. Galbreath* involved a civil RICO action brought by a group of grandchildren in the name of

⁸⁷ *United States v. Boffa*, 513 F. Supp. 444, 461 (D. Del. 1980); see also *United States v. Powell*, 423 U.S. 87, 92 (1975) (absent first amendment considerations, vagueness challenges "must be examined in light of the facts of the case"); *United States v. Raines*, 362 U.S. 17, 22 (1960) (proscribing declaration of act of Congress unconstitutional "with reference to hypothetical cases"); *United States v. Angiulo*, 897 F.2d 1169, 1179 (1st Cir.) (statute not rendered unconstitutional because of potential uncertainties in hypothetical situations), *cert. denied*, 111 S. Ct. 130 (1990).

The courts appear to take "facial" challenges seriously only in the first amendment context. See *United States v. National Dairy Prods. Corp.*, 372 U.S. 29, 36 (1963) (approach to vagueness doctrine in first amendment cases "concerned with the vagueness of the statute 'on its face' because such vagueness may in itself deter constitutionally protected and socially desirable conduct"); *Harriss*, 347 U.S. at 617-26 (Lobbying Act not too vague to violate freedoms of first amendment).

⁸⁸ *National Dairy Prods. Corp.*, 372 U.S. at 33; see also *United States v. Parness*, 503 F.2d 430, 442 (2d Cir. 1974) ("test is whether the statute conveys adequate warning as applied in specific situation"), *cert. denied*, 419 U.S. 1105 (1975). Consider the recent First Circuit decision in *Angiulo*, where the defendants cited Justice Scalia's concurrence in *Northwestern Bell*, and contended that RICO's pattern requirement was impermissibly vague. *Angiulo*, 897 F.2d at 1179. Judge Bownes responded, however, by stating that in order for the defendants to succeed, they must demonstrate that "persons of ordinary intelligence in the defendant's situation [would not have had] fair notice that the gambling, loansharking and conspiracy offenses with which they were charged constituted an unlawful 'pattern of racketeering activity.'" *Id.* at 1178-79 (emphasis added).

⁸⁹ See *Firestone v. Galbreath*, 747 F. Supp. 1556, 1581 (S.D. Ohio 1990).

their late grandmother's estate and family trust against the estate of her former husband, its lawyers, and accountants, alleging that the defendants had stripped systematically their grandmother's estate over a period of decades.⁷⁰ In holding for the defendants, the district court emphasized that:

Unlike the organized crime scenario before the First Circuit in *Angiulo*, the circumstances of the instant case, which involves a dispute between family members concerning whether certain property should have remained in a relative's estate, are in all likelihood far removed from the typical situations which Congress envisioned as being within RICO's scope of coverage.⁷¹

However, in conducting an "as applied" analysis, courts risk placing too much emphasis on the identity of the defendants rather than on whether the term "pattern" provided the defendants with adequate notice of the risks arising from their conduct.

In cases involving organized crime, courts have been quite willing to find the statute constitutional "as applied," largely because the defendants were engaged in "precisely the type of activity Congress sought to reach through RICO."⁷² Although correct, the discussion of legislative intent seems beside the point; the issue is not what conduct Congress intended to target, but how successfully its intent was translated into legislation. The "as applied" test in this context should be relatively straightforward: whether the defendants could have reasonably understood that their activities constituted a "pattern of racketeering activity."⁷³ Properly applied, it is unlikely to give any more notice to an individual engaging in a few acts of loansharking than to an attorney accused of mail fraud that his conduct forms a "pattern." Nevertheless, the available evidence suggests that courts will indeed distinguish between criminal and civil cases, perpetuating RICO's curious jurisprudential phenomenon of showing considerably more solicitude to civil than to criminal defendants facing the greater hazards of im-

⁷⁰ *Id.* 1565-66.

⁷¹ *Id.* 1581.

⁷² *United States v. Angiulo*, 897 F.2d 1169, 1179 (1st Cir.), *cert. denied*, 111 S. Ct. 130 (1990); *United States v. Ruggiero*, 726 F.2d 913, 923 (2d Cir.), *cert. denied*, 469 U.S. 831 (1984).

⁷³ To be sure, a vagueness challenge may also succeed under circumstances where Congress has not adequately identified the class of persons subject to the statute. *See Harriss*, 347 U.S. at 618. However, the challenge addressed to the pattern requirement revolves around whether the term carries any clearly understandable meaning even to those persons plainly within the ambit of the statute.

prisonment and forfeiture.

C. A Close Look at the "Predicate Offenses"

Some courts and commentators have suggested that the clarity of the underlying predicate offenses effectively rids RICO of its vagueness problems.⁷⁴ Professor Blakey, an early proponent of the expansive uses of RICO, wrote that "[a] person convicted of RICO lost his innocence when he violated the predicate offense." Accordingly, that person received his vagueness "bite" at that point. Complaining about RICO itself is asking for "two bites" out of the "vagueness apple."⁷⁵ So long as defendants have adequate notice that the predicate acts comprising the pattern of racketeering are themselves illegal, Professor Blakey and others contend that defendants can have no legitimate due process objection to a lack of notice with respect to RICO.

This argument found significant support from the Supreme Court in *Fort Wayne Books, Inc. v. Indiana*.⁷⁶ The defendants in *Fort Wayne* argued that Indiana's state RICO statute, which closely tracks the federal provision, was unconstitutionally vague as applied to obscenity predicate offenses.⁷⁷ Writing for the majority, Justice White responded that "[g]iven that the RICO statute totally encompasses the obscenity law, if the latter is not unconstitutionally vague, the former cannot be vague either."⁷⁸

The argument most recently has found acceptance in *United States v. Paccione*,⁷⁹ where the District Court for the Southern District of New York cited Justice White's observation with approval. The *Paccione* court rejected a challenge based on Justice Scalia's concurrence in *Northwestern Bell*, because the defendants

⁷⁴ See, e.g., *United States v. Swiderski*, 593 F.2d 1246, 1249 (D.C. Cir. 1978) (RICO not unconstitutionally vague because shifting definition of "enterprise" is necessary in view of "fluid nature" of criminal associations), *cert. denied*, 441 U.S. 933 (1979); *United States v. Elliott*, 571 F.2d 880, 903-05 (5th Cir.) (defendants did not have greater "notice" problem of possible criminal liability than under more conventional conspiracy concepts), *cert. denied*, 493 U.S. 953 (1978); *United States v. Parness*, 503 F.2d 430, 442 (2d Cir. 1974) (interstate transportation of two cashiers' checks indictable under criminal statute held to be unambiguous predicates for section 1962(b) pattern), *cert. denied*, 419 U.S. 1105 (1975); *United States v. Paccione*, 738 F. Supp. 691, 698 (S.D.N.Y. 1990) (mail and wire fraud considered well-defined predicate offenses).

⁷⁵ Blakey, *supra* note 24, at 7.

⁷⁶ 489 U.S. 46 (1989).

⁷⁷ *Id.* at 58.

⁷⁸ *Id.*

⁷⁹ 738 F. Supp. at 698.

could not show that the mail and wire fraud predicates were unconstitutionally vague.⁸⁰

The approach illustrated by the *Paccione* court, however, is inherently flawed. It assumes that RICO does not define a new criminal offense, but simply provides additional remedies in circumstances where a defendant has committed a pattern of predicate offenses in the conduct of an enterprise.⁸¹ From this perspective, any due process inquiry will involve only the predicate criminal offenses.

Although RICO operates as a unique type of criminal statute, it is no less a new substantive offense, different in character than the predicate acts of racketeering.⁸² As Professor Lynch has observed:

In substance, as well as in form, section 1962(c) defines a substantive crime. The RICO offense is *not* reducible to the predicate acts of racketeering. If the jury determines beyond a reasonable doubt that the defendant committed those acts, it still must find an additional element before it can convict: that the predicate acts were committed in the conduct of the affairs of an enterprise.⁸³

This additional element has allowed courts to deny claims arising under the fifth amendment's double jeopardy clause when the relationship of RICO and its predicate offenses is involved. Courts consistently have held that the government may successively prosecute a defendant both for substantive offenses and RICO offenses in which the substantive offenses are pled as predicates.⁸⁴ The courts have reasoned that the double jeopardy clause

⁸⁰ See *id.*

⁸¹ See *United States v. Neapolitan*, 791 F.2d 489, 495 (7th Cir.), *cert. denied*, 479 U.S. 940 (1986); Blakey, *supra* note 24, at 7.

⁸² See Lynch, *RICO: The Crime of Being a Criminal, Parts III & IV*, 87 COLUM. L. REV. 920, 937-39 (1987). The argument that RICO is remedial only makes sense, if at all, in the context of offenses under section 1962(c). It is certainly true that section 1962(a), concerning the investment of the proceeds of a pattern of racketeering, and section 1962(b), involving the acquisition of an interest in any enterprise through a pattern of racketeering activity, constitute altogether new and substantive criminal offenses. Because RICO defines a separate crime, it generates disturbing evidentiary, jurisdictional, and venue-related problems. *Id.* at 940-41.

⁸³ *Id.* at 942.

⁸⁴ See, e.g., *United States v. Esposito*, 912 F.2d 60, 65 (3d Cir. 1990) (defendant acquitted on RICO charges could still be prosecuted for narcotics offenses); *United States v. Grayson*, 795 F.2d 278, 282 (3d Cir. 1986) (Congress intended earlier conviction to serve as predicate act in later RICO prosecution), *cert. denied*, 479 U.S. 1054 (1987); *United States v.*

is not violated by successive or multiple prosecutions precisely because RICO and the predicates constitute distinct criminal offenses.

Most recently, the Court of Appeals for the Third Circuit held that a defendant could be prosecuted for substantive offenses following an acquittal on RICO charges in which the substantive crimes were charged as predicates.⁸⁵ The court found that not even the same underlying "conduct" was involved in the predicate and RICO offenses, and concluded that,

the even more complex conduct needed to support a RICO charge, such as the requirement of both an enterprise and a pattern of activity, constitutes an offense different than and separate from that encompassed by the narcotics charges alleged here, even if they were predicate acts or evidence used to prove the racketeering.⁸⁶

The double jeopardy implications of RICO's separate and distinct status strongly indicate that it constitutes a separate offense. Additionally, this separate status benefits the government by providing greater flexibility as to statutes of limitations, venue, evidence, and sentencing.⁸⁷

The notion that a criminal defendant has only "one bite" at the due process apple is deeply troubling from more than a purely legalistic perspective. In theory, the "one bite" rule would permit the government to subject an individual to any deprivation of a right without any notice once he has committed a single offense. The substantial unfairness resulting from a "one bite" rule is also evident in typical RICO prosecutions. In some cases, such as those

Persico, 774 F.2d 30, 32 (2d Cir. 1985) (district judge correctly determined double jeopardy clause not a bar to trial on pending RICO charges); *United States v. Licavoli*, 725 F.2d 1040, 1049-50 (6th Cir.) (double jeopardy not a bar to government using bribery conviction as predicate offense for RICO violation), *cert. denied*, 467 U.S. 1252 (1984); *United States v. Phillips*, 664 F.2d 971, 1009 n.55 (5th Cir. 1981) (RICO conviction carries no immunity from prosecution for offenses charged as predicate acts), *cert. denied*, 457 U.S. 1136 (1982).

⁸⁵ *Esposito*, 912 F.2d at 65.

⁸⁶ *Id.*

⁸⁷ See *Lynch*, *supra* note 82, at 940-41. A court may even impose consecutive sentences for violation of RICO and the predicates. See, e.g., *United States v. Peacock*, 654 F.2d 339, 348 (5th Cir. 1981) (imposition of consecutive sentences for racketeering counts and mail fraud counts), *cert. denied*, 464 U.S. 965 (1983); *United States v. Boylan*, 620 F.2d 359, 361 (2d Cir.) (multiple sentences imposed on union manager convicted of racketeering and receipt of illegal payments), *cert. denied*, 449 U.S. 833 (1980); *United States v. Rone*, 598 F.2d 564, 572 (9th Cir. 1979) (consecutive sentences imposed for substantive RICO offense and two underlying acts of extortion), *cert. denied*, 445 U.S. 946 (1980).

involving predicate offenses committed in relation to the affairs of a legitimate enterprise, proof of the existence of the enterprise and its relationship to the predicate acts may well be a relatively straightforward approach. In the case of an association in fact, however, the existence of the enterprise and its corresponding relationship to the defendants and their acts may be more difficult and controversial. In either case, the argument that a defendant is entitled to no additional due process protection once given fair warning of the predicate offenses is profoundly unfair. In the first instance, the defendant who has committed predicate offenses in the context of a legitimate enterprise has, in effect, received no fair warning that what may fairly be characterized as incidental aspects of his conduct nevertheless may vastly increase his criminal exposure. In the second case, the "one bite" theory absolves the government of any obligation to notify the defendant of conduct that, as Professor Lynch has observed, "constitutes the essence of the crime."⁸⁸

CONCLUSION

It is difficult to escape the conclusion that the day of reckoning for vagueness challenges to RICO dawns. Justice Scalia's concurrence in *Northwestern Bell* invites numerous challenges to the pattern requirement, and perhaps to other similarly ambiguous terms as well.⁸⁹ Thus far, the courts have demonstrated an unusual reluctance to address these constitutional challenges. Perhaps the extreme difficulty and disagreement concerning the meaning of RICO's elastic provisions has discouraged courts from confronting such challenges. Judicial avoidance of the necessary rigorous analysis presented by a vagueness challenge will nonetheless collapse, because of the weakness of the doctrines the courts have so far used to deflect scrutiny, or because of the sheer volume of litigation that Justice Scalia's remarks are sure to trigger.

⁸⁸ See Lynch, *supra* note 82, at 943.

⁸⁹ See Reed, *The Defense Case for RICO Reform*, 43 VAND. L. REV. 691, 722 (1990) (outlining challenge to RICO nexus requirement).