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The Defense Case for RICO Reform

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I. INTRODUCTION

Frequent use of the Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO)[1] by government and private litigants has prompted a chorus of criticism[2] during the last five years. This criticism

* Attorney, Asbill, Junkin, Myers & Buffone, Washington, D.C. B.A., McGill University, 1978; J.D., Georgetown University Law Center, 1982.

1. Organized Crime Control Act of 1970, Pub. L. No. 91-452, tit. IX, 84 Stat. 941, 947-48 (1971) (codified at 18 U.S.C. §§ 1961-1968 (1988)).

2. *See, e.g.*, Abrams, *A New Proposal for Limiting Private Civil RICO*, 37 UCLA L. REV. 1

has not been restricted to the narrow confines of the legal profession; many respectable newspapers recently have issued calls for the outright repeal of RICO.[3] Attorneys who regularly defend against criminal or civil RICO allegations cannot take credit for the increasing dissatisfaction with RICO. Rather, it is the successes, and indeed the excesses, of RICO's proponents that have tarnished the statute's image.[4]

RICO's revolutionary application to increasingly broad areas of human conduct has unsettled jurists, lawyers, and laypersons.[5] Although Congress was driven in 1970 to devise a cure for the disease of organized crime, RICO has been applied almost exclusively in other contexts.[6] While Congress often has enacted legislation that has unintended consequences, the gap between the legislative goals of RICO and its practical impact is dramatic, and these unintended consequences continue to mount.

(1989); Lacovara & Aronow, *The Legal Shakedown of Legitimate Business People: The Runaway Provisions of Private Civil RICO*, 21 NEW ENG. L. REV. 1 (1985); *see also Oversight on Civil RICO: Hearings Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 632 (1985) [hereinafter *Senate RICO Hearings*] (statement of Edward I. O'Brien, President of the Securities Industry Association) (suggesting that "the private right of action in RICO is not essential for redressing wrongs, since there are ample remedies existing in both federal and state law").

3. *Can RICO Be Reformed?* (editorial), Richmond Times-Dispatch, Nov. 6, 1989, at A16, col. 1 (proposing that RICO be repealed); *Giuliani's Legacy* (editorial), Wall St. J., Oct. 25, 1989, at A18, col. 1 (stating that "only the complete repeal of RICO can guarantee an end to injustices in its name"); *It's Time to Rescind RICO* (editorial), L.A. Times, Aug. 16, 1989, at B6, col. 1.

4. Two areas of abuse alleged frequently are the use of RICO for malicious prosecution and the abuse of the RICO statutory scheme. *See generally* Goldsmith, *Civil RICO Abuse: The Allegations in Context*, 1986 B.Y.U. L. REV. 55, 66-84.

5. *See, e.g.*, Rehnquist, *Reforming Diversity Jurisdiction and Civil RICO*, 21 ST. MARY'S L.J. 5 (1989) (originally presented at the Brookings Institution's Eleventh Seminar on the Administration of Justice, Apr. 7, 1989); A.B.A. SECTION OF CORP., BANKING & BUSINESS LAW REPORT OF THE AD HOC CIVIL RICO TASK FORCE 4-5 (1985) [hereinafter ABA RICO REPORT]; Hentoff, *RICO Stalks the Press*, VILLAGE VOICE, Oct. 17, 1989, at 22. Donald Egan, Counsel for the defendant in Haroco v. American Nat'l Bank & Trust Co., 747 F.2d 384 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985), suggests the broad application of RICO to cases beyond Congress's intent burdens the courts and increases the costs to civil litigants. *Senate RICO Hearings*, *supra* note 2, at 648. Egan noted:

> An attorney is not "abusing" civil RICO if he creatively applies the expansive language to circumstances which Congress did not contemplate. Rather, he is using his skills as an advocate to represent his client in the best possible manner. It is up to Congress to draft the statute so it cannot be misapplied.

Id. at 647.

6. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985) (acknowledging that private civil RICO actions "are being brought almost exclusively against such defendants [respected and legitimate enterprises], rather than against the archetypal, intimidating mobster"). RICO violations have been raised in a variety of contexts. *See, e.g.*, McLendon v. Continental Group, Inc., 602 F. Supp. 1492 (D.N.J. 1985) (employment grievance); White v. Fosco, 599 F. Supp. 710 (D.D.C. 1984) (attorney-client conflicts); Congregation Beth Yitzhok v. Briskman, 566 F. Supp. 555 (E.D.N.Y. 1983) (dispute over entitlement to Hassidic Jewish leadership position); Barker v. Underwriters at Lloyd's London, 564 F. Supp. 352 (E.D. Mich. 1983) (refusal to pay insurance claim); Pit Pros, Inc. v. Wolf, 554 F. Supp. 284 (N.D. Ill. 1983) (dispute between landlord and tenant).

As RICO enters its third decade, it stands before the court of public opinion, indicted but not convicted. The charges against RICO come from all quarters. Repeal or meaningful reform is necessary. Clearly, it is time to reconsider RICO, its purposes, and its effects.

Part II of this Article briefly will examine RICO's short history to identify both intended and unintended developments in its evolution and to highlight some areas that have given rise to public concern over RICO's growth. Part III of this Article will address the political and policy implications of these developments. Finally, after concluding that no satisfactory political resolution is likely, Part IV of this Article will suggest that the "void for vagueness" doctrine should play a significant role in repealing RICO or in restricting its currently overbroad reach.

II. The Origins of the Controversy over Rico

When Congress considered RICO in 1969 and 1970, the proposed bill's objective was as clear as its name: The Organized Crime Control Act of 1970.[7] Congress, however, could not draft statutory language proscribing membership in organized crime because of constitutional prohibitions against status offenses and because of vagueness concerns. Apparently aware of these obstacles to a direct prohibition of organized crime, Congress chose indirect means to reach organized crime. Congress drafted a statute that singled out certain types of criminal activity, designated as "racketeering activity," and imposed severe sanctions on those who committed a pattern of these offenses.[8] Congress, however, was not attempting merely to create another penalty provision for recidivists.[9] Rather, Congress was attempting to protect legitimate businesses from the unhealthy influence of organized crime as revealed by previous congressional investigations.[10]

Precluded from directly criminalizing membership in organized crime, Congress chose to attack organized crime indirectly in 1970 by preventing it from gaining a foothold in legitimate business.[11] The device Congress employed, RICO, reached only conduct that already was prohibited by the criminal code. RICO's novel contribution consisted of

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7. Pub. L. No. 91-452, 84 Stat. 922 (1970) (codified at 18 U.S.C. §§ 1961-1968 (1988)).

8. 18 U.S.C. §§ 1962-1964 (1988).

9. *See* United States v. Bledsoe, 674 F.2d 647, 659 (8th Cir. 1982), *cert. denied*, 459 U.S. 1040 (1983).

10. Pub. L. No. 91-452, 84 Stat. 922-23 (1970); S. Rep. No. 617, 91st Cong., 1st Sess. 2 (1969) (stating that the purpose of the act is "to seek the eradication of organized crime in the United States").

11. *See* Lynch, *RICO: The Crime of Being a Criminal* (pts. 1 & 2), 87 Colum. L. Rev. 661, 674-78 (1987) (stating that the legislative objective of RICO was to prevent infiltration of legitimate business by organized crime).

elevating certain types of criminal conduct to a new level of culpability when the conduct had a corrupting influence on legitimate business. Driven by constitutional fears to seek neutral statutory language to mask the ultimate objective of eradicating the Mafia, Congress used three key concepts to define this new crime.

First, Congress identified twenty-four federal and eight state offenses as the hallmarks of organized crime.[12] These selected criminal offenses were labeled "racketeering activity" in RICO and became known as predicate acts for RICO liability.[13] Second, Congress determined that RICO liability would be imposed only for committing a pattern of such racketeering acts, or in rare cases, for a single collection of an unlawful debt.[14] Finally, this predicate criminal conduct had to corrupt an enterprise.[15] These three core elements—predicate activity, the pattern of such activity, and the affected enterprise—constitute the principal means by which Congress intended to distinguish the racketeer from the mere criminal.

By enacting RICO, the ninety-first Congress did not stop at creating a new crime; it also fashioned unprecedented sanctions for violating this crime. Congress added criminal forfeiture to the federal criminal code as a RICO sanction.[16] RICO's forfeiture provisions not only authorize the government to confiscate the spoils of racketeering, but also enable the government to seize a defendant's assets that provided a source of influence over a corrupted legitimate enterprise, even if the assets were earned legitimately.[17] The forfeiture of wholly legitimate assets was justified as necessary to achieve RICO's purgative goals: racketeers and any economic influence they might hold over an enterprise must be purged from the enterprise.[18] Congress also enacted provisions for private enforcement of RICO, promising treble damages and attor-

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12. 18 U.S.C. § 1961(1) (1982); *White Collar Crime: Second Annual Survey of Law*, 19 AM. CRIM. L. REV. 173, 351 (1981) [hereinafter *White Collar Crime*].

13. 18 U.S.C. § 1961(1) (1988); CRIMINAL DIV., U.S. DEP'T OF JUSTICE, RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS (RICO): A MANUAL FOR FEDERAL PROSECUTORS 6 (1988) (stating that "listed crimes are often informally called 'predicate crimes,' because they make up the 'predicate' for a RICO violation").

14. 18 U.S.C. § 1962(a)-(d) (1988). "Pattern of Racketeering activity" is defined in *id.* § 1961(5).

15. *See id.* § 1962(a)-(c). In passing the Racketeer Influenced and Corrupt Organizations Act, Congress used the statutory term "enterprise" to designate those entities it was attempting to protect from organized crime. *Id.* § 1961(4).

16. *Id.* § 1963(a).

17. *Id.* §§ 1962-1963; *see* United States v. Marubeni Am. Corp., 611 F.2d 763, 769 n.12 (9th Cir. 1980).

18. *See* Pub. L. No. 91-452, 84 Stat. 922-23 (1970) (outlining the goals of RICO); *see also Marubeni Am. Corp.*, 611 F.2d at 769 n.11; 115 CONG. REC. 9567 (1969) (statement of Sen. John L. McClellan) (stating that forfeiture will "remove the organized crime element from a particular field of activity, as well as the illegal profit potential").

ney's fees to those who successfully prosecuted such "civil" RICO claims.[19] Wittingly or not, Congress created powerful financial incentives for aggressive use of RICO by government counsel and their private surrogates by offering broad forfeitures in criminal RICO cases and treble damages in civil RICO cases.

The dramatic increase in the use of RICO in criminal and civil prosecutions beginning in the early 1980s[20] can be explained, in part, by the lure of financial rewards that RICO offers. The predominant reason for the increased use of RICO, however, lies in the elasticity of RICO's limiting principles of "predicate" acts, a "pattern" of racketeering conduct, and an involved "enterprise." While these terms were meant to distinguish between the common criminal and the organized criminal, they were not equal to the task. Accordingly, RICO's perceived and actual overbreadth can be traced directly to the failure of these statutory terms to place meaningful limits on RICO's reach in either criminal or civil prosecutions.

Congress and the courts share the blame for the ineffectiveness of RICO's three core elements as restrictions on RICO's application. Congress is culpable because it drafted these limiting provisions in vague and broad language with little or no elaboration furnished by RICO's definitional sections.[21] Defenders of this imprecise drafting suggest that Congress made RICO overinclusive in order to afford maximum prosecutorial flexibility in rooting out the intended target of organized crime.[22] Under this explanation, Congress meant to offset RICO's overinclusive character by allowing prosecutorial discretion to limit RICO's application to the group Congress clearly intended to target: organized crime. Under this view, although Congress employed a shotgun style in drafting the statute, it clearly was relying on the Justice Department to apply RICO in a discriminating fashion consistent with RICO's announced objective of eradicating organized crime.[23]

Whether or not this reliance on the Justice Department to narrow RICO was justified, Congress clearly must shoulder the blame for enacting an overbroad penal statute in 1970. Congress subsequently exacer-

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19. 18 U.S.C. § 1965(c) (1988).

20. *See* ABA RICO REPORT, *supra* note 5, at 1-2, 55 (providing statistical analysis of the increase in civil RICO prosecutions between 1970 and 1984); *see also White Collar Crime*, *supra* note 12, at 353 n.112; Rehnquist, *supra* note 5, at 9 (noting that civil RICO filings have increased eight-fold from 1983 to 1988).

21. *See* 18 U.S.C. § 1961 (1988).

22. *See* Blakey & Gettings, *RICO: Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1017 n.45 (1980); Goldmsith, *Civil RICO Reform: The Basics for Compromise*, 71 MINN. L. REV. 827, 831 & n.24 (1987); Goldsmith, *Civil RICO Abuse: The Allegations in Context*, 1986 B.Y.U. L. REV. 55, 73-75.

23. *See* Lacovara & Aronow, *supra* note 2, at 2.

bated the problem in 1984, 1986, 1988, and 1989 when it added new predicate offenses, including such broad offenses as credit card fraud, money laundering, obscenity, and bank fraud to the growing list of racketeering acts triggering a RICO violation.[24]

Federal courts are also responsible for RICO's broad reach. When criminal prosecutors first used RICO in the late 1970s, federal courts interpreted RICO's three core elements expansively.[25] This early liberal construction of RICO's scope by federal judges in criminal cases gradually overcame prosecutors' initial hesitancy to tackle RICO's unfamiliar and complex terminology. By 1980, RICO was a familiar and potent weapon in a federal prosecutor's arsenal. Despite an occasional judicial warning to prosecutors not to invoke RICO too lightly,[26] courts regularly rejected efforts to interpret narrowly RICO's three core elements.[27] For its part, the Justice Department nurtured RICO's warm judicial reception by instituting internal approval requirements for RICO prosecutions, which ensured that courts would not be deciding the proper scope of RICO in cases with sympathetic defendants.[28] Hence, courts initially addressed the question of RICO's proper scope in a series of

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24. Pub. L. No. 101-73, 103 Stat. 183, 506 (1989) (relating to financial institution fraud); Pub. L. No. 100-690, 102 Stat. 4181, 4402 (1988) (relating to offenses relating to sexual exploitation, fraud, the use of interstate commerce facilities in the commission of murder-for-hire, and the sexual exploitation of children); Pub. L. No. 99-646, 100 Stat. 3592 (1986) (as amended by Pub. L. No. 100-690, 102 Stat. 4181 (1988)) (relating to tampering with a witness, victim, or informant and to the obstruction of state or local law enforcement); Pub. L. No. 99-570, 100 Stat. 3207 (1986) (relating to laundering of monetary instruments); Pub. L. No. 98-547, 98 Stat. 2754, 2770 (1984) (relating to interstate transportation of stolen motor vehicles); Pub. L. No. 98-473, 98 Stat. 1837, 2143 (1984) (relating to obscene matter).

25. *See, e.g.*, United States v. Turkette, 452 U.S. 576, 593 (1981) (concluding that wholly illegitimate businesses can constitute RICO enterprises); United States v. Elliott, 571 F.2d 880, 899 (5th Cir.) (holding that two brothers constituted a "loosely connected" criminal network sufficient to serve as an enterprise), *cert. denied*, 439 U.S. 953 (1978); United States v. Moeller, 402 F. Supp. 49, 58 (D. Conn. 1975) (determining that two acts, arson and kidnapping, that occurred in the course of a single episode, established the requisite RICO pattern).

26. *See* United States v. Thordarson, 646 F.2d 1323, 1328-29 n.10 (9th Cir.), *cert. denied*, 454 U.S. 1055 (1981); United States v. Weisman, 624 F.2d 1118, 1123 (2d Cir.), *cert. denied*, 449 U.S. 871 (1981); United States v. Huber, 603 F.2d 387, 395-96 (2d Cir. 1979), *cert. denied*, 455 U.S. 927 (1980).

27. *See, e.g.*, *Turkette*, 452 U.S. at 576 (defining "enterprise" broadly); *Weisman*, 624 F.2d at 1118 (defining "pattern" broadly); United States v. Frumento, 563 F.2d 1083, 1086-89 (3d Cir. 1977) (concluding that a prior acquittal of a state offense is no bar to use as a RICO predicate), *cert. denied*, 434 U.S. 1072 (1978); United States v. Forsythe, 560 F.2d 1127, 1134-35 (3d Cir. 1977) (noting that state predicates generically encompass all such state offenses); United States v. Hawes, 529 F.2d 472, 479 (5th Cir. 1976) (acknowledging that "Congress gave the term 'enterprise' a very broad meaning"); *Moeller*, 402 F. Supp. at 55-56 (noting that the "common sense interpretation of the word 'pattern' implies acts occurring in different criminal episodes," but refusing to narrow the pattern requirement accordingly).

28. *See* CRIMINAL DIV., U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-110 (1989) [hereinafter U.S.A.M.].

large scale drug[29] and public corruption[30] prosecutions.

A. *Predicate Offenses Under RICO*

In the context of the early drug and public corruption prosecutions, federal courts had little difficulty in approving expansive interpretations of RICO's predicate offenses. Even in cases when the alleged criminal misconduct did not fit squarely within RICO's list of predicate offenses, federal courts upheld prosecutors' efforts to expand this list through creative use of the mail or wire fraud predicate offenses. For example, although criminal tax fraud is not a RICO predicate offense, the government successfully has prosecuted several defendants under RICO by recasting tax violations as violations of the mail or wire fraud statutes, which are RICO predicates.[31]

B. *RICO's Pattern Element*

The proper limitation of RICO's pattern element has been litigated frequently. Initially, the pattern element was construed broadly in criminal RICO prosecutions, reflecting a general judicial receptiveness to the use of criminal RICO.[32] RICO's statutory definition of "pattern" merely requires proof of more than one predicate offense within a ten year period,[33] and early RICO opinions in criminal cases required either proof of only two offenses or, at most, that two offenses somehow be related to each other in a logical manner[34] or to the alleged enterprise.[35] After private plaintiffs increasingly began to use civil RICO in the mid-1980s, federal courts, at the urging of the Supreme Court, began to reconsider their prior expansive construction of RICO's pattern element.

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29. *See, e.g.*, United States v. Elliott, 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978).

30. *See, e.g.*, United States v. Sutherland, 656 F.2d 1181 (5th Cir. 1981), *cert. denied*, 455 U.S. 949 (1982); United States v. Lee Stoller Enters., 652 F.2d 1313 (7th Cir.) (en banc), *cert. denied*, 454 U.S. 1082 (1981).

31. *See, e.g.*, United States v. Porcelli, 865 F.2d 1352 (2d Cir. 1989); United States v. Busher, 817 F.2d 1409 (9th Cir. 1987); *see also* Illinois Dep't of Revenue v. Phillips, 771 F.2d 312 (7th Cir. 1985).

32. *See, e.g., Weisman*, 624 F.2d at 1122 (concluding that predicate acts need not be related to each other to constitute a pattern, but that acts merely must be done in the conduct of the enterprise's affairs to be a pattern, and expressly rejecting the contention that pattern definition in 18 U.S.C. § 3575 (1988) is applicable to pattern definition in 18 U.S.C. § 1961(4) (1988)); United States v. Starnes, 644 F.2d 673, 677-78 (7th Cir.), *cert. denied*, 454 U.S. 826 (1977) (holding that "pattern" merely requires proof of two acts connected in some logical manner); *see also supra* note 5 and accompanying text.

33. 18 U.S.C. § 1961(5) (1988).

34. *Starnes*, 644 F.2d at 677-78; United States v. Kaye, 556 F.2d 855, 860-61 (7th Cir.), *cert. denied*, 434 U.S. 921 (1977).

35. United States v. Bright, 630 F.2d 804, 830 n.47 (5th Cir. 1980); *Weisman*, 624 F.2d at 1122-23.

In the now famous footnote fourteen in *Sedima, S.P.R.L. v. Imrex Co.*[36] the Supreme Court identified the failure of lower courts to fashion a "meaningful concept of pattern" as the cause of civil RICO's overbreadth.[37]

The *Sedima* majority opinion failed to note, however, that RICO's pattern element originally was defined in criminal RICO prosecutions and that a meaningful definition of pattern was not articulated in these early criminal cases. Indeed, prior to *Sedima*, most lower courts were unaware that anything was amiss in their understanding of what constituted a pattern of racketeering activity.[38] After *Sedima*, these early, broad precedents defining criminal RICO pattern would prove problematic for a judiciary bent on pruning back civil RICO.[39] Some lower courts tried to avoid the broad "pattern" definition by holding that pattern definitions formulated in criminal RICO opinions were not binding in civil RICO cases. These courts thus endorsed a broad pattern definition for criminal RICO cases and a different, narrower pattern definition for civil RICO cases.[40] This indefensible articulation of a double standard for a RICO pattern ultimately was repudiated;[41] it is symptomatic, however, of a general judicial willingness to tolerate RICO's overbreadth in a criminal context but not when applied in a civil prosecution.

The most recent judicial comment on RICO's pattern element came in 1989 when the Supreme Court addressed the competing definitions crafted by the appellate courts after *Sedima*. In *H.J. Inc. v. Northwestern Bell Telephone Co.*[42] a majority of the Supreme Court held that a RICO pattern is established when the defendant's predicate offenses are related and continuous or at least pose the threat of continuity.[43] The *H.J. Inc.* majority appropriated the pattern relationship

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36. 473 U.S. 479 (1985).

37. *Id.* at 496 n.14.

38. *See, e.g.*, United States v. Morris, 532 F.2d 436, 442 (5th Cir. 1976) (holding that playing several illegal card games within 19 months was not "sporadic"); United States v. Fineman, 434 F. Supp. 189, 193-94 (E.D. Pa. 1977) (holding that accepting four bribes over a 30-month period constituted a pattern).

39. *See, e.g.*, United States v. Ianniello, 808 F.2d 184 (2d Cir. 1986), *cert. denied*, 483 U.S. 1006 (1987), *overruled*, United States v. Indelicato, 865 F.2d 1370 (2d Cir. 1989); R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350, 1355 (5th Cir. 1985).

40. *See, e.g.*, Franklin & Joseph, Inc. v. Continental Health Indus., Inc., 664 F. Supp. 719, 723 (S.D.N.Y. 1987); Shopping Mall Investors, N.V. v. E.G. Frances & Co., No. 84 Civ. 1469 (JFK) (S.D.N.Y. Jan. 29, 1987) (LEXIS, Genfed library, Dist file). This double standard is at odds with longstanding canons of interpretation favoring narrow interpretation of penal laws.

41. *See* Beck v. Manufacturers Hanover Trust Co., 820 F.2d 46, 51-52 (2d Cir. 1987), *cert. denied*, 484 U.S. 1005 (1988).

42. 109 S. Ct. 2893 (1989).

43. *Id.* at 2902.

test from the definition provided by the ninety-first Congress in another title of the Organized Crime Control Act of 1970,[44] instead of using the statutory pattern definition provided by Congress for RICO.[45] In a pointed concurring opinion, Justice Scalia, writing for four Justices, observed that the absence of such a statutory definition for the "pattern" element in RICO normally would suggest that Congress did not intend to apply this unrelated definition to RICO.[46] Because even the *H.J. Inc.* majority acknowledged that the concepts of continuity and relationship are ill-formed and must await further judicial elaboration,[47] it should be obvious that RICO's pattern element is not effective as a principle of limitation. If anything, the *H.J. Inc.* majority's deferral of a specific pattern definition for future elaboration on a case-by-case basis strongly suggests that courts will continue to tolerate broad pattern allegations in criminal cases while enforcing much narrower definitions in civil cases.

C. RICO Enterprises

RICO's enterprise element has fared even worse than the pattern element as a means of limiting the statute's reach. In many respects, this is RICO's greatest failure because the "enterprise" concept was RICO's singular contribution to criminal law.[48] Congress enacted RICO primarily to combat enterprise criminality: the notion of enterprise criminality, of mobsters infiltrating a legitimate business and corrupting it, was the primary reason for enacting RICO.[49] Just as the social dangers posed by concerted action gave rise to conspiracy doctrine, the perceived dangers of enterprise criminality were asserted by RICO's proponents as the justification for such strong, purgative measures.[50] RICO's enterprise element, however, no longer significantly limits RICO's reach.

As originally formulated, RICO's "enterprise" element reflected Congress's general intent to prevent organized crime from infiltrating legitimate businesses. Hence, Congress defined the enterprise element for a RICO prosecution in terms of the entities to be protected: corporations, partnerships, and unions.[51]

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44. *See* 18 U.S.C. § 3575(e) (1988) (partially repealed 1984).
45. *H.J. Inc.*, 109 S. Ct. at 2900-01.
46. *Id.* at 2907.
47. *Id.* at 2902.
48. Blakey & Gettings, *supra* note 22, at 1013-14.
49. *See* Pub. L. No. 91-452, 84 Stat. 922-23 (1970); *see also* S. REP. No. 617, *supra* note 10, at 76; Lynch, *supra* note 11, at 678 (parsing legislative history to conclude that the purpose of RICO is the elimination of the infiltration of organized crime into legitimate entities).
50. *See* Pub. L. No. 91-452, 84 Stat. 922-23 (1970).
51. 18 U.S.C. § 1961(4) (1988).

In 1981 the Supreme Court, in *United States v. Turkette*,[52] held that RICO's enterprise element included not only legitimate businesses but also wholly illegitimate associations of individuals or entities.[53] After *Turkette*, RICO encompassed prosecutions of individuals who associate solely to conduct criminal behavior, indicating that criminal groups can constitute a RICO enterprise. As a result, enterprise allegations in RICO cases are limited only by the ingenuity of prosecuting counsel because almost any combination of individuals or entities can serve as an enterprise.[54] Enterprise allegations largely are driven by the financial incentives that RICO offers. In criminal prosecutions the government invariably adopts an enterprise allegation calculated to maximize its potential forfeiture recovery, often by alleging that a legal entity is the enterprise and then confiscating the defendant's interests, however acquired, in this legal entity. Private plaintiffs create elaborate combinations of associated individuals or legal entities and expediently label them as enterprises in their campaign to find a pocket deep enough to pay treble damages.[55]

D. The Consequences of RICO's Overbreadth

Because Congress and the federal courts have failed to limit RICO, the statute has grown more expansive. This growth has resulted in a variety of controversial developments.

1. RICO "Megatrials"

Criminal RICO prosecutions have become more commonplace, and any major criminal prosecution is likely to include a RICO count regardless of the subject matter of the alleged wrongdoing. RICO's versatility has allowed RICO prosecutions for tax,[56] securities,[57] commodities, and bankruptcy fraud[58] as well as for obscenity,[59] drug,[60] or gambling

52. 452 U.S. 576 (1981).

53. *Id.* at 580.

54. *See, e.g.*, United States v. Porcelli, 856 F.2d 1352, 1363-64 (2d Cir.), *cert. denied*, 110 S. Ct. 53 (1989); United States v. Thevis, 665 F.2d 616, 625 (5th Cir.), *cert. denied*, 459 U.S. 825 (1982); General Accident Ins. Co. v. Fidelity & Deposit Co., 598 F. Supp. 1223, 1243 (E.D. Pa. 1984).

55. *See, e.g.*, Casperone v. Landmark Oil & Gas Corp., 819 F.2d 112, 115 (5th Cir. 1987) (holding that an enterprise consists of a corporation, its president, and its attorney).

56. United States v. Busher, 817 F.2d 1409 (9th Cir. 1987); United States v. Standard Dry Wall Corp., 617 F. Supp. 1283 (E.D.N.Y. 1985).

57. United States v. Bledsoe, 674 F.2d 647 (8th Cir. 1982), *cert. denied*, 459 U.S. 1040 (1983); United States v. Pray, 452 F. Supp. 788 (M.D. Pa. 1978).

58. United States v. Tashjian, 660 F.2d 829 (1st Cir.), *cert. denied*, 454 U.S. 1102 (1981); United States v. Weisman, 624 F.2d 1118 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980).

59. United States v. Pryba, 674 F. Supp. 1504 (E.D. Va. 1987).

60. United States v. Schell, 775 F.2d 559 (4th Cir. 1985), *cert. denied*, 475 U.S. 1098 (1986).

violations.[61]

Criminal RICO prosecutions also have spawned the RICO "megatrial," the government prosecution of a dozen or more RICO defendants in a single proceeding that lasts many months. The longest federal criminal case, a twenty-one month trial, was a RICO megatrial.[62] These megatrials tax juries, judges, and defendants alike. Juries are asked to absorb months of testimony and volumes of evidence and then make numerous detailed factual findings necessary for a RICO verdict. Judges are asked to preside over mammoth trials and then instruct the jury in concepts that legal scholars find incomprehensible. For the RICO defendant caught up in these proceedings, the process itself is a form of punishment, made worse by the financial burden of legal fees.

2. RICO Forfeitures

RICO's forfeiture provisions[63] have changed the landscape of criminal litigation. Under RICO, prior to filing criminal charges the government can threaten to impoverish defendants by stripping them of their ill-gotten wealth and their legitimately gained resources. Prior to trial, the government routinely takes the position, for example, that a defendant's past salary and future pension benefits from a company dubbed a RICO enterprise are subject to forfeiture under RICO.[64] Stock or other interests the defendant has in the business are also subject to forfeiture.[65]

The broad RICO forfeiture is unique because it requires a defendant to forfeit any property interest, however legitimate, to the government if that interest affords the defendant a source of influence over the alleged RICO enterprise.[66] RICO subjects a defendant's legitimately accumulated wealth to forfeiture solely because the defendant owns this wealth as a part of an interest in a legitimate business enterprise. For example, in *United States v. Porcelli*[67] the Second Circuit upheld the forfeiture of a chain of gas stations, totalling twenty-nine separate corporations, owned and operated by the defendant. Mr. Porcelli forfeited these properties to the federal government because he was convicted under RICO for failure to pay state sales taxes to New York for gaso-

61. United States v. Ruggiero, 754 F.2d 927 (11th Cir.), *cert. denied*, 471 U.S. 1127 (1985).

62. *See* United States v. Acceturo, Crim. No. 85-292 (D. N.J. 1985) (acquittal).

63. 18 U.S.C. § 1963 (1988).

64. *See, e.g.*, United States v. Horak, 833 F.2d 1235, 1242-43 (7th Cir. 1987); United States v. Regan, No. 88-Cr.-517 (S.D.N.Y. Nov. 27, 1989).

65. *See Porcelli*, 865 F.2d at 1352; United States v. Cauble, 706 F.2d 1322 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984).

66. *See* 18 U.S.C. § 1963(a)(2) (1988); *see, e.g., Porcelli*, 865 F.2d at 1365; United States v. Anderson, 782 F.2d 908, 917-18 (11th Cir. 1986).

67. 865 F.2d 1352 (2d Cir. 1989).

lines sales, although these state tax obligations also were enforced separately by means of a distinct RICO forfeiture verdict.[68]

Courts generally have not tempered the broad statutory reach of RICO's forfeiture provisions, and they have upheld the Justice Department's position that such forfeitures are mandatory and give courts no authority to mitigate the scope of any RICO forfeiture obtained.[69] Indeed, the only respite from RICO's forfeiture provisions generally recognized by federal courts is the eighth amendment's prohibition on disproportionate punishment.[70] While this protection may be of limited use to criminal defendants, it is of no use to third parties whose property interests are enmeshed in a RICO case. Those who have extended commercial credit to the defendant or who own property jointly with the defendant must await the outcome of the RICO case to obtain judicial review over their property claims.[71] These third-party property owners, although not charged with a crime, have the burden of proof in a posttrial proceeding to demonstrate that their property interests fit within the limited statutory exemptions available from the government's forfeiture judgment.[72]

RICO's forfeiture provisions also permit the government to obtain court orders barring a RICO defendant from using these presumptively legal assets prior to trial, even if that wealth is necessary to pay for pretrial living expenses or to defend against the charges brought.[73] A sharply divided Supreme Court upheld the constitutionality of using such pretrial restraining orders to bar a defendant from paying attorney's fees.[74] The Second Circuit has gone even further, extending the government's pretrial RICO authority to include the use of restraining orders to bar third parties not subject to RICO charges from using their assets during the pendency of the criminal case.[75]

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68. *Id.* at 1355, 1365.

69. *See* United States v. L'Hoste, 609 F.2d 796, 809 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980). *See generally* Reed, *Criminal Forfeiture Under the Comprehensive Forfeiture Act of 1984: Raising the Stakes*, 22 AM. CRIM. L. REV. 747, 753-54 (1985).

70. *See, e.g., Porcelli*, 865 F.2d at 1366; United States v. Feldman, 853 F.2d 648, 663 (9th Cir.), *cert. denied*, 109 S. Ct. 1164 (1988); United States v. Busher, 817 F.2d 1409, 1415 (9th Cir. 1987).

71. *See* 18 U.S.C. § 1963(i) (1988) (barring third-party intervention or bringing independent suit against the United States pending a criminal case). The constitutionality of this provision has not been tested. *See generally* Reed, *supra* note 69.

72. 18 U.S.C. § 1963(*l*) (1988).

73. *Id.* § 1963(d).

74. *See* Caplin & Drysdale, Chartered v. United States, 109 S. Ct. 2646 (1989); United States v. Monsanto, 109 S. Ct. 2657 (1989).

75. *See* United States v. Regan, 858 F.2d 115 (2d Cir. 1988).

a. Fee Forfeiture

The Supreme Court's fee forfeiture opinions are remarkable not only for their result but also for the reasoning employed by the majority to reach this result. Criminal forfeiture was introduced into federal law in 1970 as a RICO sanction;[76] by 1989 Congress had enacted criminal forfeiture as a sanction for a growing number of other criminal offenses,[77] including all drug offenses.[78] From its beginning with RICO, however, the purpose of criminal forfeiture has been clear—to punish criminal violators for their criminal conduct.[79] In 1989, however, the Supreme Court's fee forfeiture opinions supplemented the penal purposes supporting the introduction of criminal forfeiture in 1970 by adding the objectives of revenue raising for the Justice Department and restitution for crime victims as legitimate goals for criminal forfeiture.[80] Criminal forfeiture, however, was enacted as a new means to punish racketeers; it was never intended to be a bake sale for the Justice Department.

This remarkable expansion in the legitimate objectives of criminal forfeiture cannot be traced to any congressional enactment nor to any practice of the Justice Department. For example, the new "restitutionary" objective of criminal forfeiture is not authorized under RICO's forfeiture provisions, nor is it implemented in practice by the Justice Department. Simply stated, the Justice Department does not use the forfeiture laws to provide restitution to the victims of a defendant's criminal conduct.[81] Indeed, those who typically seek administrative relief from a forfeiture ruling are seeking relief from the government's

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76. *See Measures Relating to Organized Crime: Hearings Before the Subcomm. on Crime of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 407 (1969) (statement of Deputy Attorney General Kleindienst) (providing Justice Department support for "revival of the concept of forfeiture as a criminal penalty" in proposed RICO bill); *see also* S. REP. No. 225, 98th Cong., 1st Sess. 82 (1983) (stating that "[f]rom that time [1790] until 1970 there was no criminal forfeiture provision in the United States Code"). *See generally* Reed & Gill, *RICO Forfeitures, Forfeitable "Interests," and Procedural Due Process*, 62 N.C.L. REV. 57, 59-69 (1983).

77. *See, e.g.*, 18 U.S.C. § 982 (1988) (money laundering or currency reporting violations); *id.* § 1467 (offenses relating to obscene matter); *id.* § 2253 (sexual exploitation of children or transporting child pornography); *id.* § 793(h) (transferring or communicating national defense information).

78. *Id.* § 853.

79. *See Organized Crime Control: Hearings on S. 30 and Related Proposals Before Subcomm. No. 5 of the House Judiciary Comm.*, 91st Cong., 2d Sess. 107 (1970) (statement of Sen. John L. McClellan); *see also* United States v. Lizza Indus., Inc., 775 F.2d 492, 498 (2d Cir. 1985) (stating that "[f]orfeiture under RICO is a punitive, not a restitutive, measure"), *cert. denied*, 475 U.S. 1082 (1986); United States v. Rubin, 559 F.2d 975, 992 (5th Cir. 1977), *vacated and remanded*, 439 U.S. 810 (1978), *reinstated in relevant part*, 591 F.2d 278 (5th Cir.), *cert. denied*, 444 U.S. 864 (1979).

80. *Caplin & Drysdale*, 109 S. Ct. at 2654-55.

81. *See* 28 C.F.R. pt. 9 (1989) (regulations governing remission or mitigation of criminal forfeitures; no reference to restitution as a purpose of civil or criminal forfeiture mitigation or remission decisions).

action, not from the defendant's action. As the Second Circuit previously observed: "Forfeiture under RICO is a punitive, not a restitutive, measure."[82] Moreover, in RICO, Congress expressly provided a restitutive remedy for RICO victims: a claim for treble damages against the defendant.[83] Finally, Congress already has enacted and refined a statutory framework for victim restitution, a system that contains no reference to government financial involvement in meeting the legitimate restitutionary needs of victims.[84] The argument that this newly discovered "restitutionary" purpose of criminal forfeiture is merely a *deus ex machina* offered to bolster the Supreme Court's intended conclusion in the fee forfeiture cases is supported by the fee forfeiture cases before the Supreme Court. These were drug cases, in which victim restitution would be problematic.

Similarly, the Supreme Court's recognition of a legitimate government "pecuniary interest" in maximizing criminal forfeiture in order to fund the Justice Department's Asset Forfeiture Fund to use forfeiture proceeds for law enforcement purposes, has no basis in the legislative history concerning criminal forfeiture. The creation of an Asset Forfeiture Fund in 1984 was a congressional reaction to the chronic mismanagement of seized assets by government agencies, which led to a situation in which "the sale of forfeited property realizes less than the expenses incurred by the government in storing, maintaining, and selling the property, [and] the net loss must be carried by the agency's budget."[85] The Asset Forfeiture Fund was created to ensure better management of seized assets and to reduce the financial burden of this management on the seizing agency. Thus, this Fund was intended to be a means of promoting the ends of forfeiture, and not to be an end in itself. According to the majority opinion in *Caplin & Drysdale*, however, the government appears to have a legitimate financial incentive to maximize forfeiture solely for revenue raising purposes, a goal not traditionally associated with our criminal process.

b. The Expansion of RICO Forfeiture Law

Wholly apart from the Supreme Court's forfeiture decisions, Congress significantly expanded RICO's forfeiture provisions in the 1980s. To defeat efforts that frustrated RICO forfeitures through preconviction transfers, Congress applied the "relation back doctrine" to RICO

82. *Lizza Indus.*, 775 F.2d at 498.
83. 18 U.S.C. § 1964(c) (1988).
84. *See id.* § 3663.
85. S. REP. No. 225, *supra* note 76, at 197.

forfeitures in 1984.[86] Under the relation back doctrine, the government's title to forfeited property relates back to the time when the property's use violated RICO.[87] This doctrine prevents the defendant from transferring good title to forfeitable property prior to his conviction.

Under English common law, the relation back doctrine was limited to land and did not affect a defendant's chattel. As Blackstone observed:

> Therefore, a traitor or felon may bona fide sell any of his chattels, real or personal, for the sustenance of himself and family between the fact and conviction: for personal property is of so fluctuating a nature, that it passes through many hands in a short time; and no buyer could be safe, if he were liable to return the goods which he had fairly bought, provided any of the prior vendors had committed a treason or felony.[88]

Congress has not been as accommodating, however, and has not enacted any provision to permit a defendant to use his assets to pay for living expenses or bona fide expenses prior to the verdict. In the wake of the Supreme Court's unequivocal refusal to recognize an exception to pretrial restraint or post-trial forfeiture of assets for payment of necessary legal expenses, it is unlikely that RICO defendants have a legal right to use allegedly forfeitable funds to sustain themselves or their families pending resolution of the RICO charges.

In addition to placing a defendant's ability to sustain himself or his family in jeopardy, the relation back doctrine sends a warning signal to all who have previously dealt with the defendant and those with whom the defendant will deal in the future. When a RICO indictment is filed, the defendant becomes a commercial leper: those who previously have dealt with the defendant cannot be sure that the defendant can perform existing contractual obligations or honor future commitments, and the cloud of a government title claim will hover over completed transactions.

Significantly, all of these consequences flow from a RICO indictment, not from a conviction. It is not surprising, therefore, that the mere threat of a RICO indictment can disable a defendant financially, especially a defendant engaged in an otherwise legitimate business. For business associates or partners of the defendant, the consequences can be worse: even though not accused, their assets can be restrained and their prior transactions turned asunder under the relation back doc-

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86. *See* 18 U.S.C. § 1963(c) (1988).
87. *See generally* Reed, *supra* note 69, at 756-57.
88. 4 W. BLACKSTONE, COMMENTARIES 387-88 (1803).

trine; moreover, RICO prohibits them from intervening in the criminal case or filing an independent suit in order to resolve their property disputes.[89] Thus, these third parties become victims themselves, because they must wait months or even years for resolution of the government's claims before they will have a limited statutory opportunity to defend their property interests.[90]

In 1984 Congress also added an alternative fine provision to RICO, authorizing judges to impose a fine of up to twice the defendant's gross criminal profits, as another method to prevent the frustration of forfeiture by preconviction transfers.[91] This alternative fine provision was inserted by the Conference Committee in lieu of the Justice Department's proposal to create a substitute assets forfeiture provision that would permit the government to confiscate a defendant's legitimate assets if forfeitable assets were unavailable for forfeiture after trial.[92]

Thus, by dint of the relation back doctrine, the alternative fine provision, and enhanced pretrial seizure authority, Congress in 1984 significantly strengthened the Justice Department's ability to block any attempt to frustrate forfeiture through preconviction transfers. The Department was not satisfied, however, and in 1986 persuaded Congress to adopt the substitute assets forfeiture authority that Congress had declined to grant in 1984.[93] This statutory authority almost had become unnecessary because several federal courts, in the intervening period, had held that the government could execute a criminal forfeiture judgment by seizure of a defendant's legitimate assets.[94] As a result of these events and the overlapping statutory provisions, the Justice Department can place a defendant's legitimate and illegitimate assets at risk in a RICO prosecution.

It is one thing for Congress to reintroduce criminal forfeiture into the federal criminal code as a valuable means to combat crime by punishing RICO offenders; it is quite another to embrace criminal forfeiture laws that would have been considered too harsh for English common law. The substantial equities that lie in favor of allowing the criminally accused to use his or her assets for necessary living expenses prior to an adjudication of the government's allegations more than offset any marginal interest the government has in imposing punishment upon convic-

89. *See* 18 U.S.C. § 1963(i) (1988).

90. *See id.* § 1963(*l*).

91. *Id.* § 1963(a).

92. *See* H.R. REP. No. 1159, 98th Cong., 2d Sess. 418-19 (1984) (Conference Report).

93. *See* 18 U.S.C. § 1963(m) (1988).

94. *See, e.g.*, United States v. Ginsberg, 773 F.2d 798 (7th Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1011 (1986); United States v. Navarro-Ordas, 770 F.2d 959 (11th Cir. 1985); United States v. Conner, 752 F.2d 566, 576 (11th Cir. 1985).

tion. Even under English common law at the time our country was founded, the king could not render the accused a pauper before proving him a convict. Because punishment is the true objective of forfeiture, it is a goal that must await conviction.[95]

The government has ample, duplicative, and overlapping remedies to thwart preconviction transfers intended to defeat forfeiture upon conviction. The only possible justification for employing these measures pretrial to impoverish the accused is a false one: to maximize the financial recovery of the Justice Department. This justification is unbecoming of a system of criminal justice that purports to be guided by "the evolving standards of decency that mark the progress of a maturing society."[96]

3. Civil RICO

RICO's civil provisions, generally dormant during its first decade, also have generated great controversy. Private parties first began to use RICO's civil remedies after federal courts had upheld broad applications of RICO in criminal prosecutions. Enticed by treble damages and attorney's fees, plaintiffs' counsel were as resourceful as prosecutors in using RICO as a blunt instrument against their adversaries. Like federal prosecutors, civil RICO plaintiffs have relied on the broader RICO predicates such as the mail and wire fraud statutes to transform common-law contract and tort suits into RICO violations.[97] While these civil claims fit squarely within RICO's accommodating language, federal courts and civil defense counsel initially recoiled at this use of RICO.[98] The Supreme Court, however, already was committed to broad, literal interpretations of RICO when pressed by the government in criminal prosecutions[99] and continued to interpret RICO's civil provisions broadly.[100] Moreover, the Supreme Court subsequently resolved practical issues in civil RICO concerning arbitrability[101] and the statute of

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95. *See* United States v. Salerno, 481 U.S. 739, 746-48 (1987) (concluding that due process prohibits punishment prior to conviction).

96. Trop v. Dulles, 356 U.S. 86, 101 (1958) (Warren, C.J., joined by Black, Douglas, and Whittaker, J.J.).

97. *See generally* R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350, 1355 (5th Cir. 1985).

98. *See, e.g.*, Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 500 (1985) (Marshall, J., dissenting); Furman v. Cirrito, 828 F.2d 898, 903 (2d Cir. 1987), *overruled*, United States v. Indelicato, 865 F.2d 1370 (2d Cir. 1989); Illinois Dep't of Revenue v. Phillips, 771 F.2d 312 (7th Cir. 1985); *cf.* Sun Sav. & Loan Ass'n v. Dierdorff, 825 F.2d 187, 196-97 (9th Cir. 1987).

99. *See* Rusello v. United States, 464 U.S. 16 (1983); United States v. Turkette, 452 U.S. 576 (1981).

100. *See, e.g., Sedima*, 473 U.S. at 479.

101. *See* Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) (stating that RICO claims are arbitrable).

limitations,[102] which removed ambiguities about RICO's use as a civil litigation weapon. Finally, in 1989, when the Court first construed a core element of RICO in a civil RICO case, the "pattern" element, the Court adhered to its prior practice of construing RICO both literally and broadly.[103]

Private use of civil RICO has enabled abortion services providers to sue their political adversaries,[104] management to sue their labor adversaries,[105] state taxing authorities to sue for treble tax liability,[106] and terminated employees to sue for wrongful discharge.[107] These creative uses of civil RICO, however, are atypical; the mainstream of civil RICO litigation continues to be dominated by general fraud claims, sometimes called "garden variety" fraud. Many of these claims previously were resolved in state courts under state common-law principles. Using broad mail fraud precedent, plaintiffs now can bring these cases in federal court as RICO suits and avoid many of the common-law limitations on fraud claims, such as a higher burden of proof[108] or the traditional requirement of proof by the plaintiff of justifiable reliance on the defendant's representations.[109] In using the mail fraud provisions to scale down their burden of proof, private attorneys general under RICO are following the familiar path of criminal prosecutors who frequently have used mail fraud to make cases in which other, more specific, criminal statutes impose more substantial proof burdens. Plaintiffs also use civil RICO in areas otherwise subject to comprehensive statutory regulation, such as securities, commodities, bankruptcy, and pension fraud, and thereby avoid the various statutory limitations on private actions and remedies in these fields.[110]

In short, civil RICO has federalized fraud litigation and has undermined various statutory enforcement mechanisms carefully crafted by Congress to address certain fields of commerce. RICO's proponents, es-

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102. Agency Holding Corp. v. Malley-Duff & Assoc., 483 U.S. 143 (1987) (adopting a four-year limitation period for RICO claims).

103. *See* H.J. Inc. v. Northwestern Bell Tel. Co., 109 S. Ct. 2893 (1989).

104. Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342 (3d Cir. 1989). *See generally* Melley, *The Stretching of Civil RICO: Pro-Life Demonstrators Are Racketeers?*, 56 UMKC L. REV. 287 (1988).

105. *See* Yellow Bus Lines v. Local Union 639, 839 F.2d 782 (D.C. Cir. 1988); MHC, Inc. v. United Mine Workers, 685 F. Supp. 1370 (E.D. Ky. 1988).

106. *Phillips*, 771 F.2d at 317.

107. Shearin v. E.F. Hutton, 885 F.2d 1162 (3d Cir. 1989).

108. *See* Wilcox v. First Interstate Bank of Or., N.A., 815 F.2d 522, 531 (9th Cir. 1987).

109. *See, e.g.*, Armco Indus. Credit Corp. v. SLT Warehouse Co., 782 F.2d 475, 482-83 (5th Cir. 1986) (indicating that reliance is not necessary for mail fraud); Federal Deposit Ins. Corp. v. Kerr, 637 F. Supp. 828, 834 (W.D.N.C. 1986). *But see* Brandenburg v. Seidel, 859 F.2d 1179, 1188 n.10 (4th Cir. 1988).

110. *See supra* notes 56-58.

pecially Professor G. Robert Blakey, argue that fraud no longer can be left to state courts and that fraud victims deserve a federal forum and extraordinary remedies to protect themselves in today's complex world.[111] The force of this argument, however, was undermined recently by the Supreme Court in *Tafflin v. Levitt*,[112] in which the Court noted that it had full faith "in the ability of state courts to handle the complexities of civil RICO actions." Indeed, the *Tafflin* opinion observed that the Supreme Court's prior affirmation of the competency of arbitration panels to resolve civil RICO claims[113] would render anomalous any suggestion that state courts are inadequate for this task. Moreover, the *Tafflin* Court's confidence in the ability of state courts to resolve civil RICO claims was buoyed precisely because many RICO claims deal with fraud allegations "over which state courts presumably have greater expertise."[114] Thus, federal civil RICO cannot be justified on the grounds that state courts are incompetent to resolve sophisticated fraud claims; rather, the argument must rest on the claim that state common-law fraud actions and remedies, by their nature, are inadequate to address sophisticated schemes to defraud.

Even if fraud victims currently need federal enforcement, however, Congress did not think it was designing a federal role in fraud containment when it enacted RICO in 1970.[115] RICO's complex structure was not aimed at generic fraud; rather, Congress saw the statute as a means of targeting a specific type of crime: organized crime.[116] Congress has yet to make the judgment that common-law fraud, as enforced in state court, is inadequate to police modern commerce. No evidence exists that the 91st Congress was enacting civil RICO in 1970 as a species of common-law tort reform. Likewise, Congress has yet to make the judgment that a general fraud action is necessary to supplement or supplant existing federal fraud enforcement schemes.

The absence of a congressionally articulated rationale for civil RICO, other than the vestigial concern about organized crime, has not stopped RICO's proponents from trying to supply a rationale. Professor Blakey, for example, has analogized RICO's objectives to those of the antitrust laws; instead of promoting competition in interstate commerce, however, RICO promotes integrity in interstate commerce.[117]

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111. *See* Blakey, *RICO Debate*, 2 CONST. 33 (1990).

112. 110 S. Ct. 792, 798 (1990).

113. *See McMahon*, 482 U.S. at 239.

114. *Tafflin*, 110 S. Ct. at 798.

115. *See* Pub. L. No. 91-452, 84 Stat. 922, 922-23 (1970) (codified at 18 U.S.C. §§ 1961-1968 (1988)).

116. *See id.*

117. Blakey, *supra* note 111, at 33.

The Supreme Court, however, recently has suggested that the federal interest in private RICO enforcement is less compelling than the federal interest in private antitrust enforcement. In *Shearson/American Express, Inc. v. McMahon*[118] the Supreme Court observed that while antitrust violations "have a widespread impact on national markets as a whole," most civil RICO claims are aimed only at fraud claims, not organized crime, thus rendering the need for private enforcement of RICO "less plausible than it is for the typical antitrust plaintiff."[119] Even Justice Byron White, the author of the Supreme Court's broadest pronouncements on RICO,[120] recently suggested that improper state court construction of RICO's langage was not as dangerous as "improper interpretation of the federal antitrust laws, which could have a disastrous effect on interstate commerce, a particular concern of the federal government."[121] The Supreme Court obviously has not placed private enforcement of RICO on the same level of importance as it historically has attributed to antitrust enforcement.

Fraud, however, may well have a negative impact on interstate commerce sufficient to invoke a federal policy interest that is not being adequately addressed by state causes of action. If fraud, as Professor Blakey has argued, is a multibillion dollar business, then a compelling case can be made that the victims of such fraud deserve a federal remedy. Congress, however, has not yet made that policy judgment. Even if Congress concluded that such federal statutory action was necessary, it has never examined RICO to determine whether RICO's complex statutory structure is suitable for this task.

Because Congress has never examined carefully the validity of the currently articulated rationale for civil RICO, federal courts must handle the practical consequences of expansion of civil RICO without the benefit of congressional guidance. Courts have become increasingly hostile to civil RICO because it increases and complicates their workload, prompting federal judges to lend their voices to the call for RICO reform.[122]

The federal government also has used civil RICO to take over organizations. Using civil RICO, the federal government has taken over local labor unions and asserted control over the Teamsters, the largest labor union in America. These actions, prompted by civil allegations that organized crime dominates these unions, effectively have disen-

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118. 482 U.S. 220 (1987).

119. *Id.* at 241-42.

120. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985); United States v. Turkette, 452 U.S. 576 (1981).

121. *Tafflin*, 110 S. Ct. at 800 (White, J., concurring).

122. *See* Rehnquist, *supra* note 5, at 9-13.

franchised the rank and file union members because the government or its designates manage the affairs of these unions. It is no surprise that the membership would rankle under such direct government domination; in the first local placed under a government trusteeship,[123] the first free election brought victory for the slate associated with the previously deposed leadership. The government, however, did not stop at taking over the union in that case. Instead, the government brought a subsequent civil RICO suit against the trucking firm that had collective bargaining contracts with the local and sought to invalidate the prior contracts and impose new collective bargaining agreements.[124] Thus, through civil RICO the government has arrogated to itself the power to displace both labor and management at the bargaining table and to enforce involuntary labor agreements on both sides.

III. Reform Efforts

A. Congressional Reform Efforts

Many voices have called for RICO's repeal or reform, creating a consensus that the status quo is no longer acceptable. The momentum for a re-examination of RICO, however, has not been consistent. Most pressures for reform have come from appeals for exemption by specifically affected interest groups willing to let the RICO juggernaut proceed as long as they are placed out of harm's way.

The pending Senate reform bill, Senate Bill 438,[125] is a classic example of reform by exemption: it contains nothing more than a series of special interest exemptions from civil RICO aimed at placating numerous lobbying groups, which thus hope to opt out of the RICO problem.[126] These special interest groups, including the securities, insurance, and banking lobbies, carefully have distanced themselves from any effort to rein in the use of RICO by criminal prosecutors. Rather, they hope to restrict reform to civil RICO and particularly to themselves and thereby achieve a limited repeal of civil RICO as applies to them.[127]

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123. United States v. Local 560, Int'l Bhd. of Teamsters, 780 F.2d 267 (3d Cir.), *cert. denied*, 476 U.S. 1140 (1986).

124. United States v. New England Motor Freight, Civ. 88-4396 (Oct. 13, 1988) (case was settled).

125. S. 438, 101st Cong., 2d Sess. (1990).

126. *Id.*

127. Some of these special interests, however, have a legitimate point: if Congress enacts comprehensive statutory enforcement mechanisms over a regulated industry such as the securities field, including private enforcement provisions, Congress should not, by accident, create a different, and more powerful, private cause of action applicable to the industry. If Congress accepts this position, however, it should at least consider whether existing statutory enforcement mechanisms are fulfilling their original mission. For example, the banking, securities, and commodities industries have distinguished themselves in recent years through widespread allegations of misconduct,

The irony of the "reform" package reflected in Senate Bill 438 is that the Senate bill, spurred to curtail the overbreadth of RICO, proposes more than two dozen new predicate offenses,[128] even though the Justice Department is not seeking the addition of these predicates. In a transparent trade-off, Senators can appear tough on crime while offering relief to selected civil RICO defendants.

The House Subcommittee on Crime, however, currently is considering more meaningful reform. Representative William J. Hughes, who chairs that subcommittee, has indicated that he is contemplating legislation that would codify the pattern definition articulated in *H.J. Inc. v. Northwestern Bell Telephone Co.*[129] His draft bill also would introduce a gatekeeper concept whereby trial judges screen each civil RICO case filed to determine whether it is properly within the ambit of RICO.[130] These changes, while providing a refreshing acknowledgement that RICO needs substantive reform, nonetheless fail to address the root causes of RICO's overbreadth. For example, codifying the pattern definition formulated by the *H.J. Inc.* majority is not a logical response either to the majority or to the concurring opinion in that case. The *H.J. Inc.* majority offered an admittedly underdeveloped pattern definition but indicated that further clarity must await future case law or greater precision from Congress.[131] Congress should heed this invitation. The *H.J. Inc.* concurring opinion caustically described the majority's pattern definition as being as instructive as "life is a fountain."[132] Codification of *H.J. Inc.*'s pattern definition will not add greater clarity to RICO's pattern definition nor will it significantly narrow RICO's scope.

The gatekeeper concept, while perhaps a useful device for limiting civil RICO, will do nothing to limit RICO's use in criminal prosecutions. Indeed, the premise of a gatekeeper provision—that civil RICO should be limited to misconduct sufficiently egregious to fall within the range of conduct Congress intended RICO to reach—is tantamount to a confession by Congress that RICO's current language is inadequate for this task. With a gatekeeper provision, the only difference between criminal and civil RICO prosecutions is that the Justice Department can employ fully RICO's overbroad language, but civil plaintiffs must establish that their case is the type of case Congress fully intended RICO to cover.[133]

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hardly a compelling basis upon which to argue for a reduction in private enforcement tools.

128. S. 438, *supra* note 125.

129. 109 S. Ct. 2893, 2899-2905 (1989).

130. Hughes Draft RICO Bill (source on file with *Vanderbilt Law Review*).

131. *H.J. Inc.*, 109 S. Ct. at 2902.

132. *Id.* at 2907.

133. *See id.* at 2905. This double standard is particularly ironic because the Supreme Court

The gatekeeper concept demonstrates that Congress is willing to trust the Justice Department with an open-ended criminal statute whereas it is unwilling to vest such discretion in private plaintiffs. This double standard, while politically understandable, reaffirms the original intent of Congress to enforce RICO in a discriminatory fashion.

The draft gatekeeper limiting language is indicative of the nagging problem that has plagued RICO from its inception: how to limit RICO's reach without creating a vague status offense. For example, Congress is considering a draft of the gatekeeper bill under which a trial court, upon the filing of a civil RICO complaint, must determine whether the conduct alleged is of the sort Congress intended civil RICO to reach: "organized crime and major white collar crime, when such crime has as its objective large economic gain through fraudulent or coercive practices or improper governmental influence."[134] If the court concludes that the plaintiff's claim does not further this objective, then the claim may be sanctionable as a "frivolous" RICO suit.

Linking RICO liability to the amorphous phrase "white-collar crime" is a candid acknowledgement of RICO's metamorphosis from a measure aimed at organized crime to an all purpose prosecutorial vehicle for complex or sophisticated crime. This development has occurred because of RICO's versatility, and not because of congressional intent. Unfortunately, the term "white-collar" crime is as ill-defined as "organized crime." Placing such a burden of proof on a private civil RICO plaintiff at the commencement of a RICO suit is problematic because, absent a definition for white-collar or organized crime, the plaintiff faces the disadvantage of not knowing what is necessary to plead or prove a claim. In addition, limiting such a burden of proof to civil RICO plaintiffs suggests that Congress did not intend to place a similar burden on the government. Hence, while private plaintiffs are reined in by the white-collar or organized crime limitation on civil RICO, federal prosecutors are free to apply RICO in any context falling within the statute's literal and accommodating reach. Ironically, civil defendants are offered the protection of a limiting principle, however vague, on RICO's reach, but criminal defendants must parse RICO's commodious language to ascertain whether Congress intended RICO to penalize their conduct. Thus, a defendant may be criminally liable under RICO for conduct that would not justify a private civil enforcement suit. This result may be a windfall for civil defendants but it is a loss to private

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and the lower federal courts already have abandoned any effort to divine true congressional intent in RICO. They have chosen instead a literalist approach whereby courts simply apply RICO's "commodious language" regardless of the result. *Id.* at 2904; Furman v. Cirrito, 828 F.2d 898, 903 (2d Cir. 1987); R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350, 1355 (5th Cir. 1985).

134. Discussion Draft of Oct. 18, 1989, House of Representatives.

plaintiffs victimized by a RICO violation.

This policy debate over the pressing need to limit civil RICO has yet to focus on the real cause of RICO's overbreadth: the broad and elastic nature of its component parts. Civil RICO derives its breadth from the breadth of criminal RICO. A civil RICO claim depends on the establishment of a criminal RICO violation. The breadth of the underlying criminal RICO offense and its elastic elements make RICO a formidable and versatile weapon for private or government counsel. Recognition that RICO's problems lie in the overbreadth of its core elements is essential to any meaningful reform effort.

B. The Justice Department Guidelines

The Justice Department, secure in its belief that few politicians are willing to curtail RICO and risk appearing soft on organized crime, has tried to head off any significant reduction in its RICO powers by touting its own self-restraint and by supporting civil RICO limitations.

1. The Tax Fraud Guideline

To demonstrate its self-restraint, the Department in 1989 promulgated new "Guidelines" applicable to RICO prosecutions.[135] The first change concerned the use of RICO to prosecute tax fraud.[136] In the *Princeton/Newport*[137] case, prior to the new Guidelines, federal prosecutors were permitted to prosecute defendants under RICO for tax fraud, even though tax fraud is not a RICO predicate, by the expedient and common method of charging tax fraud activity as a mail fraud violation.[138] Soon after the verdict in the *Princeton/Newport* case, however, the Justice Department promulgated new Guidelines, indicating that absent various exceptions, the Department would not authorize the use of mail fraud as a surrogate for tax fraud in order to bring a RICO case.[139] These Guidelines are not binding on the government,[140] but the Department has offered them as examples of the self-restraint it exercises in bringing RICO prosecutions. This new tax policy was interpreted widely as a response to the criticism the government received for

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135. U.S.A.M., *supra* note 28.

136. *Id.*

137. United States v. Regan, 713 F. Supp. 629 (S.D.N.Y. 1989).

138. *See id.*; *see also* United States v. Porcelli, 865 F.2d 1352 (2d Cir.) (finding state sales tax violations as mail fraud predicates), *cert. denied*, 110 S. Ct. 53 (1989); United States v. Busher, 817 F.2d 1409, 1412 (9th Cir. 1987) (finding federal tax violations as mail fraud predicates).

139. *See* U.S.A.M., *supra* note 28, § 6-4.211(1) (as amended by letter of July 3, 1989 of Shirley D. Peterson, Assistant Attorney General, Tax Division).

140. *See Busher*, 817 F.2d at 1411-12 (indicating that RICO Guidelines are not enforceable); U.S.A.M., *supra* note 28, § 1-1.100.

prosecuting the *Princeton/Newport* tax fraud case under RICO and seeking RICO forfeiture of more than fifteen million dollars in defendants' partnership/enterprise assets for tax evasions of approximately sixty thousand dollars. When the defendants were sentenced, however, the government indicated that the Princeton/Newport prosecutions fit within the newly promulgated Guidelines,[141] and the sentencing court concurred, observing that the new tax fraud Guideline "does not bar this or future tax fraud and mail fraud charges from being brought under the RICO statute."[142]

2. The Temporary Restraining Order Guideline

The new Guideline on authorization to seek pretrial restraining orders, promulgated at about the same time as the tax fraud Guideline, offers little comfort either to defendants or to affected third-party property owners.[143] The Justice Department openly acknowledged that this Guideline was promulgated because "[s]ome highly publicized cases involving RICO TROs have been the subject of considerable criticism in the press, because of a perception that pretrial freezing of assets is tantamount to a seizure of property without due process."[144] Ironically, for years it was the federal courts, and not the press, that had rejected the government's contentions in RICO litigation that defendants and third parties had no due process rights to prevent or mitigate broad pretrial restraining orders sought by the government.[145] Despite this almost uniform judicial rejection, it was the press that stirred the Department to promulgate a Guideline. The Guideline adopted did not commit the Department to affording any due process safeguards in court, but indicated prior Department authorization was necessary before a line prosecutor could seek a pretrial restraining order from the court.[146]

The new Guideline further indicates that the Organized Crime and Racketeering Section, which conducts all internal RICO authorizations,

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141. *Regan*, 713 F. Supp. at 629.

142. United States v. Regan, 726 F. Supp. 447, 455 (S.D.N.Y. 1989).

143. *See* U.S.A.M., *supra* note 28, § 9-110.414 (as amended by letter from Edward Dennis, Assistant Attorney General, Criminal Division (June 30, 1989)).

144. Letter from Edward Dennis, Assistant Attorney General, Criminal Division (June 30, 1989).

145. Reed, *supra* note 69, at 761-63, 781-82; Reed & Gill, *supra* note 76, at 83-94; *see, e.g.*, United States v. Harvey, 814 F.2d 905, 928-29 (4th Cir. 1987); United States v. Crozier, 777 F.2d 1376 (9th Cir. 1985); United States v. Lewis, 759 F.2d 1316, 1324-25 (8th Cir.), *cert. denied*, 474 U.S. 994 (1985); United States v. Long, 654 F.2d 911, 915-16 (3d Cir. 1981); *see also* United States v. Thier, 801 F.2d 1463, 1466-70 (5th Cir. 1986); U.S. DEP'T OF JUSTICE, HANDBOOK ON THE COMPREHENSIVE CRIME CONTROL ACT OF 1984, at 44-45 (construing § 1963(e) as a congressional rejection of prior due process precedent requiring an evidentiary hearing before issuance of pretrial restraining orders). *But see* United States v. Musson, 802 F.2d 384 (10th Cir. 1986).

146. U.S.A.M., *supra* note 28, § 9-110.414.

would consider any anticipated impact that forfeiture and the TRO would have on innocent third parties.[147] The Guideline states further that "the government's policy is not to seek the fullest forfeiture permissible under the law where that forfeiture would be disproportionate to the defendant's crime."[148] While this nonbinding denial of a government policy to maximize forfeiture in all cases is a worthy government aspiration, the government has not taken such a generous stance when such matters are raised in court. In *Caplin & Drysdale, Chartered v. United States*,[149] for example, the government contended, and the Supreme Court agreed, that the "strong government[al] interest in obtaining full recovery of all forfeitable assets" overrides any sixth amendment interest criminal defendants might have in using their presumptively legitimate assets to pay for their criminal defense.[150] In addition, the Supreme Court sustained the government's argument that it had a legitimate pecuniary interest in forfeiture favoring recovery of "*all* forfeitable assets" for potential subsequent use in the government's law enforcement efforts.[151] Thus, contrary to the aspirational policy language in the RICO Guidelines, the Justice Department successfully has fought in court for the right to maximize its forfeiture recovery before and after trial, even if only for general revenue raising purposes, as opposed to penal purposes.

In light of the enactment of separate criminal forfeiture provisions during the 1980s for several RICO predicates, the question becomes whether RICO's forfeiture provisions are necessary. As previously explained, RICO's broad authorization of enterprise forfeiture raises unique eighth amendment proportionality concerns. When the government has a number of other criminal forfeiture sanctions available, especially those under the broad federal money laundering statutes,[152] the continued need for broad RICO enterprise forfeitures is certainly less compelling. For example, under the federal money laundering statutes, the government may secure the forfeiture of any proceeds of any RICO predicate.[153] Because the government can claim these illicit proceeds directly without proving the existence of a RICO enterprise or a pattern

147. *Id.*

148. *Id.*

149. 109 S. Ct. 2646 (1989).

150. *Id.* at 2655.

151. *Id.* at 2654 (emphasis in original).

152. *See* 18 U.S.C. §§ 1956, 1957 (1988) (relating to substantive money laundering offenses); *id.* § 981 (authorizing civil forfeiture for money laundered assets); *id.* § 982 (relating to criminal forfeiture of property used in or traceable to money laundering).

153. *See id.* § 1956(7)(A). In fact, the head of the Justice Department's Asset Forfeiture Office recently announced that: "Federal prosecutors see the future in 18 U.S.C. § 1956. They don't see the future in RICO." 4 CORP. CRIME REP. no. 10, at 2 (March 12, 1990).

of racketeering activity, RICO's forfeiture provisions are no longer necessary to trace the flow of illicit money. Thus, the remaining benefit to the government from RICO's forfeiture provisions is the enhancement of the government's ability to obtain enterprise forfeiture—the forfeiture of a defendant's interests in a legitimate business regardless of whether those assets were acquired illegally.[154] Both the courts and the Justice Department have expressed concern about the potential overbreadth of this forfeiture language in RICO that allows the government to reach legally acquired assets.[155] Accordingly, RICO's unique enterprise forfeiture provisions are also its most controversial. Because the "profits of crime" are equally subject to forfeiture under the much simpler money laundering statute, a legitimate issue arises whether RICO's forfeiture provisions are either obsolete or constitutionally suspect.

3. Problems with the Guidelines

Reliance on the Justice Department's RICO Guidelines is misplaced because the Guidelines are not enforceable in court, and they are riddled with exceptions. Certainly the Organized Crime and Racketeering Section of the Justice Department faithfully has attempted to enforce the Guidelines. For bureaucratic and political reasons, however, the regional United States Attorneys offices have not hesitated to assert tbeir autonomy on decisions to bring RICO charges. Often such charges arise in high profile cases, and local federal prosecutors are reluctant to subject themselves to the letter or spirit of the Guidelines that might jeopardize an important prosecution. The RICO Guidelines, while well intentioned, are no substitute for legally enforceable limitations on the reach of RICO. The existence of the Guidelines is a tacit admission by the Justice Department that RICO's literal language is overbroad, and that prosecutors should not take RICO to its literal limits. Federal courts, on the other hand, have not hesitated to employ a liberal approach to RICO.

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154. An argument could be made that forfeiture under § 1963(a)(1) is more expansive than the forfeiture available under § 982(a) and thus the government might have a broader stake in pursuing forfeiture under § 1963(a)(1). Because federal courts have not yet interpreted the scope of the language in § 982(a) authorizing forfeiture of "any property, real or personal, involved in [a money laundering] offense, or any property traceable to such property," it is premature to speculate on which forfeiture statute is broader. *Id.* § 982(a).

155. *See* United States v. Porcelli, 865 F.2d 1352, 1364-66 (2d Cir.), *cert. denied*, 110 S. Ct. 53 (1989); United States v. Busher, 817 F.2d 1409, 1414-15 (9th Cir. 1987); U.S.A.M., *supra* note 28, § 9-110.414.

4. Joinder Under RICO

The Justice Department also has defended RICO on the ground that it provides the prosecution with joinder possibilities that are not available under other criminal provisions. Specifically, the government argues that RICO enables it to join multiple claims and defendants in one suit when joinder otherwise could not be accomplished.[156] It is not clear that the degree of joinder available under RICO, however, is any greater than that available under federal conspiracy law.[157] For example, an agreement among defendants to commit multiple criminal acts under the auspices of a legitimate entity probably would be within the reach of conspiracy law, thus eliminating the need to invoke RICO for criminal liability purposes. RICO's only potential joinder benefit is the joinder of wholly illicit associations of criminals; the government claims that RICO enables it to join the little fish with the big one in prosecuting group criminality.[158] The government's "big fish, little fish" justification for RICO, however, appears to be more like a desire to engage in "drop net fishing."

Traditional conspiracy law, however, already has served the prosecutorial need for joinder well. Firmly established conspiracy doctrine declares that the conspirators need only a tacit agreement and a general knowledge of each other's existence.[159] Moreover, the government invariably charges a RICO conspiracy in real organized crime prosecutions and appears willing to assume the burden of proving a conspiratorial agreement, albeit a diffuse one, in organized crimes cases. The benefit of RICO over conspiracy in this limited area of RICO prosecutions appears to lie not in joinder, but in the diluted proof required to establish a defendant's knowledge of the activities of other joined defendants. At some point, however, a defendant's knowledge of the activities of criminal associates might be so de minimis that traditional conspiracy law might preclude joinder while RICO conspiracy doctrine might tolerate joinder. If so, then RICO adds a modest element of joinder not available under conspiracy law, but this would apply only to persons peripherally related to a crime organization.

The RICO joinder provisions are only marginally more beneficial

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156. *See* Dennis, *Current RICO Policies of the Department of Justice*, 43 VAND. L. REV. 651, 653 (1990).

157. *See, e.g.*, United States v. Toro, 840 F.2d 1221, 1238 (5th Cir. 1988) (stating that "separate conspiracies with different memberships may be joined if they are part of the same series of acts or transactions").

158. *See* Dennis, *supra* note 156, at 653-54.

159. *See, e.g.*, Blumenthal v. United States, 332 U.S. 539, 557 (1947); United States v. Masters, 840 F.2d 587, 592 (8th Cir. 1988); United States v. Donsky, 825 F.2d 746, 753-54 (3d Cir. 1987).

than those available under modern conspiracy law.[160] Moreover, in organized crime prosecutions in which the government has invoked RICO's supposed joinder advantages most often, the government has antagonized judges, juries, and defendants with the practical burdens associated with such multiple defendant RICO "mega-trials."[161] RICO's joinder capabilities have become a burden to the government, particularly in organized crime cases. The longest RICO megatrial, *United States v. Accetturo*,[162] lasted twenty-one months and resulted in not guilty verdicts for all twenty defendants on all seventy-seven counts, a remarkable verdict given that the defense case lasted for less than one day. The Second Circuit, in the so-called Pizza Connection Case,[163] recently suggested prospective rules that decidedly favor severance over joinder of defendants for RICO cases expected to last more than four months.[164] Thus, for the marginal joinder advantages that RICO offers, the burdens associated with enhanced joinder have caused many practical problems for prosecutors, including the increased hostility of the judges and juries that must suffer through these lengthy proceedings.

5. Sentencing Guidelines

Finally, the Justice Department values RICO because the statute affords the government the ability to display the "big picture" of organized criminality.[165] This big picture, however, will come to the attention of the sentencing judge under the new Sentencing Guidelines. These Guidelines require that a defendant's criminal conduct be disclosed, examined, and weighed for purposes of computing an appropriate sentence.[166] Under the Sentencing Guidelines, the severity of a RICO sentence should be no different than a conspiracy conviction for the same offenses, if the offenses are grouped together.[167] Moreover, increased periods of confinement generally will fall upon the white-collar offender as a result of the Sentencing Guidelines. In the federal Sentencing Guidelines, the Sentencing Commission has implemented a deliberate policy of increasing incarceration for economic crimes such as

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160. *But see* Lynch, *supra* note 11, at 952-53.

161. *See* United States v. Casamento, 887 F.2d 1141 (2d Cir. 1989); United States v. Gallo, 668 F. Supp. 736 (E.D.N.Y. 1987).

162. 783 F.2d 382 (3d Cir. 1986).

163. *Casamento*, 887 F.2d at 1147.

164. *Id.* at 1152.

165. *See* Dennis, *supra* note 156, at 671.

166. *See* Sentencing Guidelines § 1B1.3 (1990).

167. *Id.* § 3D1.2(d). A possible exception could occur with a different base level offense. *See id.* § 2X1.1 (stating that conspiracy offenses are subject to the same base offense level as object offense for conspiracy).

fraud, insider trading, and theft,[168] thereby increasing deterrence of white-collar crime through stiff mandatory sentencing, which is advanced regardless of RICO's presence in the penal code. Accordingly, with or without RICO, the big story will be told to the court, and the defendant's sentence will not be enhanced substantially by adding RICO charges.

C. *The Overbreadth of RICO*

The government has used RICO effectively in its fight against organized crime since the mid-1980s. The government's recent success against organized crime is equally attributable, however, to an increased allocation of prosecutorial resources and to an increased use of electronic surveillance, transactional immunity, and witness protection. The money laundering statutes,[169] the broadened mail fraud statute,[170] and the sentencing guidelines soon may eclipse RICO as the prosecutor's weapon of choice against organized crime. The question then becomes whether RICO, with all its attendant problems, is a necessary weapon to combat organized crime, or whether a narrower statute is appropriate.

In *Sedima, S.P.R.L. v. Imrex Co.*[171] the Supreme Court isolated the problem of civil RICO's overbreadth as the "breadth of the predicate offenses . . . and the failure of Congress and the courts to develop a meaningful concept of 'pattern.' "[172] The Court acknowledged that RICO's troubling overbreadth is due to the overinclusive nature of criminal RICO and its elements. In *Sedima* and in *H.J. Inc. v. Northwestern Bell Telephone Co.*[173] bare majorities of the Supreme Court declined to reform or to restrict RICO, preferring to place this task upon Congress. Justice Scalia's pointed concurrence for four Justices in *H.J. Inc.* has made it apparent, however, that the Court's patience with Congress is dwindling. Unfortunately, Congress does not appear willing to examine the root cause of RICO's overbreadth—its elastic elements. In his concurring opinion Justice Antonin Scalia focused on a potential constitutional cure for the ills of RICO: the "void for vagueness" doctrine. The following section will analyze how Justice Scalia's prescription may be just the tonic that RICO reform needs.

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168. U.S. SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL § 1.8 (1990).
169. 18 U.S.C. §§ 1956, 1957 (1988).
170. *Id.* § 1346.
171. 473 U.S. 479 (1985).
172. *Id.* at 500.
173. 109 S. Ct. 2893 (1989).

IV. RICO AND THE VOID FOR VAGUENESS DOCTRINE[174]

In *H.J. Inc. v. Northwestern Bell Telephone Co.*[175] Justice Scalia penned a concurring opinion practically inviting a constitutional challenge to the statutory term "pattern" of racketeering activity. Justice Scalia's concurrence, joined by Chief Justice William Rehnquist and Justices Sandra Day O'Connor and Anthony Kennedy, is remarkable for several reasons. First, Justice Scalia's comments were completely volunteered; the litigants in *H.J. Inc.* had not made a vagueness challenge to RICO's pattern element.[176] Second, a judicial determination that RICO's pattern element is constitutionally defective would undermine the validity of hundreds of convictions, forfeitures, and civil judgments. It is remarkable that four Justices of the Supreme Court not only would entertain, but also openly suggest such a challenge. Third, Justice Scalia failed to acknowledge a substantial body of lower court precedent that has rebuffed vagueness challenges to RICO in the early days of its judicial interpretation. At a minimum, Justice Scalia's concurrence revitalizes the argument that the constituent elements of RICO are unconstitutionally vague.

Justice Scalia's unusual concurrence was prompted by his acknowledged inability to "provide an interpretation of RICO that gives significantly more guidance concerning its application" than the majority opinion gave.[177] According to Justice Scalia, the majority opinion in *H.J. Inc.* provides as much guidance to potential defendants about how to avoid RICO liability as the advice "life is a fountain."[178] Justice Scalia concluded: "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 [a vagueness] challenge is presented."[179]

As defense counsel continue their search for a RICO Achilles' heel, this invitation by Justice Scalia may soon rival footnote fourteen in *Sedima* as the most litigated RICO attack. In particular, the "continuity" element of the *H.J. Inc.* pattern definition is ripe for a vagueness challenge. Since the *H.J. Inc.* decision, federal appellate courts have held that four month[180] and one year[181] periods are insufficiently

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174. The discussion of vagueness is adapted from D. SMITH & T. REED, CIVIL RICO (1989). It is used with permission of the publisher, Matthew Bender.

175. *H.J. Inc.*, 109 S. Ct. at 2906 (Scalia, J., concurring).

176. *Id.* at 2909. The frequency with which the Supreme Court volunteers possible constitutional infirmities in a federal statute is rare indeed.

177. *Id.* at 2908.

178. *Id.* at 2907.

179. *Id.* at 2909.

180. Parcoil Corp. v. Nowsco Well Serv., Ltd., 887 F.2d 502 (4th Cir. 1989).

181. Fiorentino v. Converse, 16 RICO L. REP. 563, 564 (3d Cir. 1989).

continuous to constitute a pattern of racketeering activity. With these differing periods, it will be difficult, if not impossible, for ordinary people to know at what point their activity crosses the pattern threshold.

While the *H.J. Inc.* concurrence was directed at the vagueness associated with RICO's pattern element, other essential elements of RICO are equally subject to challenge on vagueness grounds. For example, the nexus requirement in actions brought under section 1962(c), which requires a relationship between a RICO defendant's criminal conduct and the RICO enterprise, has generated imprecise judicial interpretations.[182] The nexus requirement is not defined in section 1961, RICO's definitional section. Moreover, "the statute itself does not specify 'the degree of interrelationship between the pattern of racketeering and conduct of the enterprise's affairs.' "[183] Courts have employed two distinct tests, the *Scotto* test or the *Cauble* test, to define RICO's nexus requirement. In *United States v. Scotto*,[184] the Second Circuit held that the nexus requirement is satisfied either when the defendant is enabled to commit the predicate offenses solely because of the defendant's position in the enterprise or when the predicate offenses are related to the activities of the enterprise. Conversely, in *United States v. Cauble*,[185] the Fifth Circuit rejected the *Scotto* test and formulated a nexus test that required proof of (i) the commission of predicate offenses, (ii) the defendant's position in the enterprise facilitated by his or her commission of these predicates, *and* (iii) that "the predicate acts had some effect on the lawful enterprise."[186] These distinct tests are very ambiguous. In both circuits, however, the government need not prove that the defendant's predicate offenses benefited the enterprise in any way.[187] How a defendant's conduct "affects" an enterprise under the *Cauble* test or is related to the affairs of the alleged enterprise under the *Scotto* test is largely undefined. Although the *Cauble* and *Scotto* tests are clearly different tests[188] and appellate courts are divided over which test to apply, they are both ambiguous.[189] For example, the Fifth Circuit's nexus definition requires only that a defendant's conduct must "affect" an enterprise.[190]

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182. *See* cases cited *infra* note 189.

183. United States v. Robilotto, 828 F.2d 940, 947 (2d Cir. 1987) (quoting United States v. Scotto, 641 F.2d 47, 54 (2d Cir. 1980)), *cert. denied*, 484 U.S. 1011 (1988).

184. 641 F.2d 47, 54 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981).

185. 706 F.2d 1322 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984).

186. *Id.* at 1332-33.

187. *See Cauble*, 706 F.2d at 1333 n.24; *Scotto*, 641 F.2d at 54.

188. *See Robilotto*, 828 F.2d at 948 (comparing *Cauble* to the Second Circuit test); United States v. Carter, 721 F.2d 1514, 1527 n.16 (11th Cir.), *cert. denied*, 469 U.S. 819 (1984).

189. *Compare* United States v. Blackwood, 768 F.2d 131, 138 (7th Cir.) (*Cauble* test), *cert. denied*, 474 U.S. 1020 (1985) *with Robilotto*, 828 F.2d at 940 (*Scotto* test) *and* United States v. Provenzano, 688 F.2d 194, 200 (3d Cir.), *cert. denied*, 459 U.S. 1071 (1982) (*Scotto* test).

190. *See Cauble*, 706 F.2d at 1322.

Indeed, the D.C. Circuit has demonstrated recently the vagueness of the two competing nexus tests by confusing them as the same test.[191] The complexity of RICO may inspire vagueness challenges to RICO in its entirety.

Impermissibly vague criminal laws have two vices. First, because we believe people are "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,"[192] so that they may conform to what is lawful. The requirement of fair notice is essential to due process because "[n]o one may be required at peril of life, liberty or property to speculate as the meaning of penal statutes."[193] The second vice of vague penal statutes is that they delegate "basic policy matters to policemen, judges, and juries for resolution on an ad hoc basis, with the attendant dangers of arbitrary and discriminatory application."[194]

It is this latter vice, the danger of discriminatory enforcement, that the Supreme Court has labeled "the more important aspect of the vagueness doctrine."[195] When the legislature fails to provide minimal guidelines to govern law enforcement officials, "a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.' "[196] Such a result would confer lawmaking authority on the executive or judiciary branches, rather than on the legislative branch. As the Supreme Court remarked more than a hundred years ago:

> It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government.[197]

Accordingly, the "void for vagueness" doctrine also plays a role in placing the sole responsibility for defining federal crimes on Congress.[198]

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191. *See* Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 839 F.2d 782, 793 (D.C. Cir. 1988).

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

193. Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) (holding a state statute that criminalized being a "gangster" invalid as unconstitutionally vague).

194. *Grayned*, 408 U.S. at 108-09.

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

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

197. United States v. Reese, 92 U.S. 214, 221 (1876), *quoted in* Kolender v. Lawson, 461 U.S. 352, 358 n.7 (1983).

198. In United States v. Kozminski, 108 S. Ct. 2751 (1988), the Supreme Court identified the purposes of the rule of lenity as promoting fair notice, minimizing selective or arbitrary enforcement, and maintaining the proper balance between Congress, prosecutors, and the courts. *Id.* at 2764. The *Kozminski* opinion reaffirmed that federal crimes are defined by Congress and suggested that the Court would not "tolerate the arbitrariness and unfairness of a legal system in which the judges would develop the standards for imposing criminal punishment on a case-by-case basis." *Id.*

The substantial notice and discriminatory enforcement issues presented by RICO call into question the continued validity of numerous cases rejecting vagueness challenges to RICO. While the number of circuit and district court opinions upholding RICO charges against vagueness challenges is impressive,[199] the reasoning of these decisions is not persuasive.

Most courts rejected vagueness challenges by citing early criminal RICO precedents in which courts perfunctorily dismissed such challenges.[200] Most of these early circuit court opinions occurred in criminal cases decided long before the judiciary developed an interpretation of a RICO "pattern" requiring proof of continuity and relationship between the alleged predicate acts. In fact, these early RICO cases employed pattern definitions that could be considered both crude and overbroad in the wake of *Sedima*[201] and *H.J. Inc.*[202] The rationales under which these courts rejected vagueness challenges are no longer valid. For example, in *United States v. Campanale*,[203] the Ninth Circuit, to its credit, responded to a vagueness challenge with the observation that "it is true that, if undefined, terms such as 'pattern of racketeering activity' would be unmanageable."[204] The *Campanale* opinion went on to conclude, however, that any ambiguity is cured by RICO's definitional section, section 1961, which provides general definitions for "racketeering acts," a "pattern," an "enterprise," and a "person." The problem with this reasoning is that the definition of a pattern of racketeering activity adopted in *H.J. Inc.* is not set forth in section 1961, but, as Justice Scalia acerbically noted in his concurrence, is rooted in the language of a different statute.[205] Finally, these earlier rulings did not have the benefit of Justice Scalia's concurring opinion in *H.J. Inc.* with its pointed criticism of the persistent ambiguity of the statutory term "pattern," which exists despite the best efforts of the lower courts and the majority opinion in *H.J. Inc.* to define the term. The questionable reasoning of these lower court precedents should not be a substantial obstacle to a more careful examination of the application of the vagueness doctrine to RICO or its constituent elements.

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199. *See, e.g.*, United States v. Morelli, 643 F.2d 402, 412 (6th Cir. 1981); United States v. Aleman, 609 F.2d 298 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); United States v. Huber, 603 F.2d 387 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980); United States v. Campanale, 518 F.2d 352 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976); United States v. Stofsky, 409 F. Supp. 609 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976).

200. *See, e.g.*, United States v. Tripp, 782 F.2d 38, 42 (6th Cir. 1986).

201. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985).

202. H.J. Inc. v. Northwestern Bell Tel. Co., 109 S. Ct. 2893 (1989).

203. 518 F.2d 352 (9th Cir. 1975).

204. *Id.* at 364.

205. *H.J. Inc.*, 109 S. Ct. at 2907.

A. Vagueness and the Pattern Element

After *H.J. Inc.* the ability of RICO's "pattern" element to withstand a direct "void for vagueness" challenge is open to question. In *Newmyer v. Philatelic Leasing, Ltd.*[206] the vagueness challenge to RICO's pattern element was raised for the first time on appeal. The Sixth Circuit declined to entertain this challenge because "proper resolution of the question of RICO's constitutionality is not beyond any doubt, and no injustice would result from allowing the issue to be addressed in the first instance by the district court."[207] Justice Scalia's invitation to challenge the constitutionality of RICO was clear. Perhaps more telling is the failure of the five-member majority in *H.J. Inc.* to allude to the vagueness issue, even though they supported a broad, imprecise, judicial definition of the pattern element.[208]

Although the majority in *H.J. Inc.* specifically disagreed with Justice Scalia's concurrence on other issues,[209] they offered no response to Scalia's jarring suggestion that the majority's handiwork merely confirmed the unconstitutional vagueness of the statute. The majority offered this candid confession:

> The limits of the relationship and continuity concepts that combine to define a RICO pattern, and the precise methods by which relatedness and continuity or its threat may be proved, cannot be fixed in advance with such clarity that it will always be apparent whether in a particular case a "pattern of racketeering activity" exists. The development of these concepts must await future cases, absent a decision by Congress to revisit RICO to provide clearer guidance as to the Act's intended scope.[210]

This confession by the *H.J. Inc.* majority may reflect only the *de rigueur* plea to Congress to clarify the intended scope of RICO.[211] The majority's confession that the definition it provided lacked sufficient clarity to be useful in any given case is significant because Justice Scalia needed only one more vote to raise his doubts about the vagueness of the pattern element into a holding. In this context, the majority's reference to the need for congressional clarification of the scope of RICO's pattern element may be more a threat than a suggestion. Indeed, Representative William J. Hughes, Chair of the House Judiciary Subcommittee, which has jurisdiction over RICO reform efforts, has aptly described the *H.J. Inc.* opinion as a shot across the bow of Con-

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206. 888 F.2d 385 (6th Cir. 1989).

207. *Id.* at 399.

208. *H.J. Inc.*, 109 S. Ct. at 2900-02.

209. *See, e.g., id.* at 2902 n.4 (disagreeing with the concurring opinion's observation that Congress intended RICO to reach short term racketeering activity).

210. *Id.* at 2902.

211. *See, e.g., Sedima*, 473 U.S. at 499.

gress.[212] The majority opinion's alternative suggestion, to await future judicial clarification, runs counter to the principle that there is no federal common law of crime.[213]

The cleavage of the Supreme Court on this issue also is relevant to the success of any future vagueness challenge. The concurring Justices in *H.J. Inc.*, Chief Justice Rehnquist, and Justices O'Connor, Scalia, and Kennedy, are not viewed generally as soft on crime or criminals. Justice O'Connor, however, has authored a leading vagueness opinion in *Kolender v. Lawson*,[214] in which she upheld a vagueness challenge to a California loitering and identification law. In a recent case, *United States v. Kozminski*,[215] Justice O'Connor also rejected the suggestion that judges could "develop the standards for imposing criminal punishment on a case-by-case basis."[216]

In a state RICO opinion handed down in the same term as *H.J. Inc.*, *Fort Wayne Books, Inc. v. Indiana*,[217] three of the Justices in the *H.J. Inc.* majority, Justices Brennan, Marshall, and Stevens, described RICO's "pattern" definition as only compounding the "intractable vagueness" of the underlying predicate offense of obscenity.[218] Thus, at least seven Justices have alluded to the potential vagueness problems inherent in RICO's pattern element. Some may argue that any vagueness problems can be cured by future judicial clarifications. Indeed the *H.J. Inc.* majority noted that the development of the "concepts" of continuity and relatedness "must await future cases."[219] In *United States v. Kozminski*,[220] however, the Supreme Court observed:

> It is one thing to recognize that some degree of uncertainty exists whenever judges and juries are called upon to apply substantive standards established by Congress; it would be quite another thing to tolerate the arbitrariness and unfairness of a legal system in which the judges would develop the standards for imposing criminal punishment on a case-by-case basis.[221]

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212. *See* Address by Representative William J. Hughes, *Vanderbilt Law Review* Symposium (Nov. 11, 1989); *see also* Hughes, *RICO Reform: How Much Is Needed?*, 43 VAND. L. REV. 639 (1990).

213. *See* United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812).

214. 461 U.S. 352, 358 (1983).

215. 108 S. Ct. 2751 (1988).

216. *Id.* at 2764. The other *H.J. Inc.* concurring Justices, as well as Justice White, joined this opinion.

217. 109 S. Ct. 916 (1989).

218. *Id.* at 931, 934 (Stevens J., joined by Brennan and Marshall, JJ., dissenting). Justice Stevens observed that, "[i]ronically, the legal test for determining the existence of a pattern of racketeering activity has been likened to 'Justice Stewart's famous test for obscenity—"I know it when I see it"—set forth in his concurrence in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).' " *Id.* at 934 n.14.

219. *H.J. Inc.*, 109 S. Ct. at 2902.

220. 108 S. Ct. 2751 (1988).

221. *Id.* at 2764.

B. *Vagueness Challenges to RICO As a Whole*

While the *H.J. Inc.* opinion dealt only with RICO's pattern element, and Justice Scalia's concurrence was aimed directly at the majority's attempt to provide a clear definition for this element, potential vagueness problems may afflict RICO generally. RICO's potential for lack of notice or discriminatory enforcement challenges is not tied solely to the imprecision of its "pattern" element. RICO criminalizes certain relationships between individuals, their conduct, and some "enterprise;" RICO is distinct because it purports to elevate certain criminal conduct to a more serious offense when it occurs within these criminal relationships. Given the complexity of these various relationships, it may be argued that vagueness infects the entire statute.

A vagueness challenge to RICO as a whole must address the Supreme Court's reasoning in the recent case, *Fort Wayne Books, Inc. v. Indiana.*[222] In *Fort Wayne Books* Justice White, writing for a majority, which included Chief Justice Rehnquist and Justices Blackmun, Scalia, and Kennedy, rejected a vagueness challenge to the obscenity predicate offenses under Indiana's state RICO statute.[223] Justice White found no merit in the vagueness challenge because he found no vagueness in the underlying obscenity statute. Specifically, Justice White asserted: "Given that the RICO statute totally encompasses the obscenity law, if the latter is not unconstitutionally vague, the former cannot be vague either."[224] Justice White elaborated on this truncated reasoning in footnote seven, explaining that Indiana's RICO statute was "more limited" in scope than the state's obscenity laws because it required proof of a "pattern" of obscenity. Because the State must prove that "all the elements of an obscenity offense are present, and then some," Justice White concluded that RICO was not unconstitutionally vague as applied in obscenity prosecutions.[225]

Justice White's reasoning in *Fort Wayne Books* may be read as requiring a rejection of vagueness challenges to RICO when the underlying predicate offense is not unconstitutionally vague. In dicta, the *Fort Wayne Books* majority opinion mused that the pattern element "seemed" to make RICO less vague.[226] This broad reading of *Fort Wayne Books* is difficult to accept both logically and in light of Justice Scalia's concurrence in *H.J. Inc.*

First, Justice White's explanatory footnote is an exercise in ques-

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222. 109 S. Ct. 916 (1989).
223. *Id.* at 924-25.
224. *Id.* at 925.
225. *Id.* at 925 n.7.
226. *Id.*

tion begging. Even if the underlying predicate offense of obscenity is not vague, the vagueness analysis then focuses on what are the "and then some" elements that clearly differentiate this defendant's conduct from the conduct of those who merely commit obscenity offenses. For example, the predicate offense of murder is not unconstitutionally vague, but this does not mean that those who commit two murders are placed on notice that they are guilty of racketeering. In *United States v. Aleman*[227] the government convicted two defendants under RICO for engaging in three home burglaries. The *Aleman* opinion rejected a vagueness challenge on the theory that the defendants joined together to form an association: an enterprise.[228] The defendants obviously had notice that burglary is a crime; whether they knew what constituted the "and then some" element that might also violate the federal RICO statute is a separate question.

Justice White's suggestion that the "pattern" element would "seem" to make the RICO statute inherently less vague did not escape the attention of Justice Stevens, writing in dissent and joined by Justices Brennan and Marshall. Justice Stevens labeled this argument a "non sequitur."[229] According to Justice Stevens, RICO's reference "to a 'pattern' of at least two violations only compounds the intractable vagueness of the obscenity concept itself."[230] Justice Stevens rejected the Court's construction of the RICO statute because it would require "nothing more than proof that a defendant sold or exhibited to a willing reader two obscene magazines."[231] Justice Stevens indicated he would find such a statute "unconstitutional even without the special threat to First Amendment interests posed by" RICO's remedies.[232]

Four months after *Fort Wayne Books*, the Supreme Court issued its opinion in *H.J. Inc.*[233] The Court focused on the breadth of civil RICO and, in particular, the role of the "pattern" element in circumscribing RICO's reach. Three of the four Justices who joined Justice White's assertion in *Fort Wayne Books* that RICO's "pattern" element "would seem" to make RICO less vague expressed doubts about whether RICO's pattern definition would pass constitutional muster when challenged for vagueness.[234] The three dissenting Justices in *Fort*

227. 609 F.2d 298 (7th Cir. 1979).
228. *Id.* at 305.
229. *Fort Wayne Books*, 109 S. Ct. at 934 (Stevens, J., dissenting).
230. *Id.*
231. *Id.*
232. *Id.*
233. 109 S. Ct. 2893 (1989).
234. *Fort Wayne Books*, 109 S. Ct. at 925 n.7. Chief Justice Rehnquist and Justice Kennedy joined Justice Scalia in his *H.J. Inc.* concurring opinion and were part of the *Fort Wayne Books* majority. *H.J. Inc.*, 109 S. Ct. at 2906. Justice O'Connor, who also joined in Justice Scalia's concur-

Wayne Books who contended that RICO's "pattern" element compounded the constitutional vagueness defects in the obscenity statute joined the majority in *H.J. Inc.*[235]

It is difficult to reconcile the shifting allegiances of these Supreme Court Justices as they considered the same issue in different cases only four months apart. A plausible, if superficial, explanation is that these swings in voting reflect an underlying force that has driven RICO jurisprudence from the beginning: judicial views on RICO are affected by whose ox is being gored in any particular case. In *Fort Wayne Books*, for example, Justice Stevens's antipathy to RICO and his vagueness concerns may have been rooted in his longstanding view that almost all obscenity prosecutions are unconstitutional, and that RICO only exacerbates the inherent vagueness defects of such prosecutions.[236] A vote against RICO's use in obscenity prosecutions, however, does not extend necessarily to a vote against civil RICO entirely because Justice Stevens joined the majority opinions in both *Sedima* and *H.J. Inc.*

Chief Justice Rehnquist, on the other hand, does not share Justice Stevens' reservations about obscenity prosecutions, but he recently has made known his reservations about the widespread use of civil RICO and the resulting increase in the judicial workload.[237] A vote against civil RICO on vagueness grounds, especially a nonbinding vote, might be appealing whereas a vote against RICO obscenity prosecutions might not. This superficial explanation for the Supreme Court's divided loyalties on the issue of RICO's potential vagueness is not satisfactory. If pressed, courts will have to reconcile *Fort Wayne Books* and *H.J. Inc.*

A simplistic reconciliation of the conflicting vagueness positions between *Fort Wayne Books* and the concurrence in *H.J. Inc.* is that *Fort Wayne Books* controls because it is a majority opinion, not a mere concurrence. This resolution, however, fails to recognize that three of the five members of the *Fort Wayne Books* majority were also members of the concurring opinion in *H.J. Inc.* More importantly, the rationale of the *H.J. Inc.* concurring opinion—that RICO's "pattern" element is constitutionally suspect because undefined—is irreconcilable with the reasoning employed by the *Fort Wayne Books* majority.

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rence in *H.J. Inc.*, dissented from the relevant portion of *Fort Wayne Books* on jurisdictional grounds. *Fort Wayne Books*, 109 S. Ct. at 930. Justice Blackmun, the only Justice to join both the *Fort Wayne Books* and the *H.J. Inc.* majority opinions, issued a concurring opinion in *Fort Wayne Books* indicating that he did not believe the Court had jurisdiction but did concur in the judgment of the majority that obscenity predicates could form the basis of a RICO conviction. *Id.* at 930.

235. Justices Brennan and Marshall joined Justice Stevens's dissent in *Fort Wayne Books*, 109 S. Ct. at 931, but these three joined the majority in *H.J. Inc.*, with Justice Brennan authoring the majority opinion. *H.J. Inc.*, 109 S. Ct. at 2893.

236. *See Fort Wayne Books*, 109 S. Ct. at 934-35 n.15.

237. *See* Rehnquist, *supra* note 5.

If *Fort Wayne Books* stands for the proposition that RICO is immune from a vagueness challenge when the underlying RICO predicate is not unconstitutionally vague, then the vagueness of RICO's pattern element is irrelevant and the concurring Justices in *H.J. Inc.* were indulging in idle speculation about a matter ostensibly already resolved in *Fort Wayne Books*. Certainly, the bribery predicate offenses in *H.J. Inc.* were as sufficient, and possibly clearer, from a vagueness perspective as the obscenity predicates in *Fort Wayne Books*. If the only vagueness issue for RICO was the constitutional sufficiency of predicate violations, the rumblings of the *H.J. Inc.* concurrence would be misplaced, because the concurring Justices there were confronted with nonvague bribery predicate allegations.

Alternatively, if *Fort Wayne Books* stands for the proposition that RICO's pattern element renders RICO less vague because it defines the "and then some" element that catapults a mere criminal into a racketeer, then the *H.J. Inc.* concurring opinion represents a radical challenge to the accuracy of this conclusion. Because three of the five Justices who formed the *Fort Wayne Books* majority would make this challenge, this interpretation of *Fort Wayne Books* should be rejected.

The dissenters in *Fort Wayne Books*, Justices Stevens, Brennan, and Marshall, may have been persuaded to join the majority in *H.J. Inc.* because the definition of pattern provided therein was presumptively sufficient to survive a vagueness challenge, which might save RICO from a vagueness defect.[238] This argument, however, cannot be sustained by the *H.J. Inc.* majority opinion, which assiduously avoided any direct discussion of potential vagueness problems. This silence is inexplicable given the pointed nature of the concurring opinion. This argument also is undermined by the *H.J. Inc.* majority's confession that the pattern definition it provided lacked clarity that might be provided in the future by case law or by Congress.

The shifting allegiances, demonstrated by the voting of the Justices in the *Fort Wayne Books* and *H.J. Inc.* decisions, are not confined to the Supreme Court. The development of RICO jurisprudence has been marked by an initial judicial receptivity to broad interpretation of RICO in criminal prosecutions that has given way to an increased skepticism about RICO's reach in civil cases. One possible explanation for this judicial dissonance is that some federal judges believe that although federal prosecutors are using RICO discriminately, private at-

238. For example, in *Fort Wayne Books*, Justice Stevens appears to criticize the majority for interpreting RICO's pattern element as requiring only two obscenity violations. *Fort Wayne Books*, 109 S. Ct. at 934. The substantial gloss placed on the pattern element in *H.J. Inc.* may have allayed some of Justice Stevens's concerns about the use of the pattern element as a limiting concept in RICO cases. *See H.J. Inc.*, 109 S. Ct. at 2899-2900.

torneys cannot be trusted to invoke RICO only in proper cases. Under traditional vagueness doctrine, however, this should make RICO more, not less, suspect. Courts should not rely on the prosecution to determine the appropriate ambit of a criminal sanction; this is a task constitutionally assigned to Congress. Discriminatory enforcement is a dangerous vice of imprecise penal laws.

One possible response to a vagueness challenge to RICO or its constituent elements is that any notice deficiencies afflicting the statute are cured by requiring a specific intent mens rea. The Supreme Court has upheld statutes against vagueness challenges on the ground that the specific intent requirement assures that a defendant will not be held liable unless he knowingly and willfully commits the offense.[239] An initial defect in this argument is that many courts have held that RICO is not a specific intent crime and requires no more showing of mens rea than that required by the underlying predicate offenses.[240] While imposing a specific intent requirement on RICO may alleviate potential notice problems, it still would leave considerable discretion in the hands of the prosecution for discriminatory enforcement.

The "void for vagueness" doctrine may prove a useful vehicle through which federal courts may accomplish what Congress has not: narrowing RICO and its constituent elements. Under the "void for vagueness" doctrine, the Court may be asked to revisit prior RICO precedent to determine whether the various judicial glosses placed on the broad literal language of RICO render the statute sufficiently precise to avoid the evils of lack of notice or discriminatory enforcement. Finally, because vagueness challenges are typically available only on an as applied, as opposed to facial, basis,[241] courts would retain flexibility in redefining the proper scope of RICO.

The *Porcelli*[242] case provides an example of how such challenges could operate to narrow RICO. In *Porcelli* the federal government used RICO to prosecute the owner of a gas station chain for failure to pay state sales tax.[243] Oddly enough, failure to pay state sales tax was not a crime under applicable New York law.[244] The Second Circuit observed that "prosecution of a state sales tax evader for a RICO violation

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239. *See, e.g.*, Screws v. United States, 325 U.S. 91, 103 (1945); Hygrade Provision Co. v. Sherman, 266 U.S. 497, 502-03 (1925); United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921).

240. *See, e.g.*, United States v. Biasucci, 786 F.2d 504, 512 (2d Cir. 1986); United States v. Pepe, 747 F.2d 632, 675-76 (11th Cir. 1984); United States v. Romano, 684 F.2d 1057, 1065 (2d Cir.), *cert. denied*, 459 U.S. 1016 (1982); United States v. Boylan, 620 F.2d 359, 361-62 (2d Cir.), *cert. denied*, 449 U.S. 833 (1980).

241. *See* Parker v. Levy, 417 U.S. 733, 756 (1974).

242. United States v. Porcelli, 865 F.2d 1352 (2d Cir.), *cert. denied*, 110 S. Ct. 53 (1989).

243. *Id.*

244. *Id.* at 1357.

pushes that law to its outer limits."[245] Nonetheless, the Second Circuit upheld the prosecution of these state sales tax delinquencies as federal mail fraud violations under the strained reasoning that failure to pay the sales tax deprived the State of New York of its property right to bring a civil tax enforcement action.[246] As a result, Mr. Porcelli was convicted under RICO and ordered to forfeit the amount of tax outstanding, approximately four million dollars, and all his affiliated gasoline corporations, which were more than worth twice that amount. It is unlikely that the defendant had notice that failure to pay state sales tax would make him a RICO violator subject to these substantial penalties. The potential for discriminatory enforcement of RICO is palpable, and it is likely that Mr. Porcelli was the victim of discriminatory enforcement.

The *Porcelli* opinion came down in January 1989, six months before Justice Scalia penned his concurrence in *H.J. Inc.* After *H.J. Inc.* and *Fort Wayne Books*, RICO's critics hope Congress and the courts will be emboldened to look anew at RICO's use. Because it is unlikely that Congress will narrow substantially RICO's core criminal elements, courts should heed Justice Scalia's invitation to re-examine RICO under the void for vagueness doctrine and narrow its reach.

V. CONCLUSION

A general consensus has emerged that RICO "is developing into something quite different from the original conception of its enactors."[247] The blame for this metamorphisis ultimately must rest with Congress, the body responsible for RICO's language and its breadth. While the federal judiciary is partially responsible for the breadth that RICO has assumed in its first twenty years, that a continuing dispute exists over RICO's actual or intended scope must be charged to the body whose intent RICO is supposed to embody—Congress. Unfortunately, for a variety of reasons, Congress has never mustered the political will to undertake meaningful reform.

In the absence of congressional action, the courts should parse carefully the language provided by Congress to determine if RICO is sufficiently precise to survive a vagueness challenge. In doing this, courts should reject the double standard that often has attended criminal and civil RICO claims: courts should place criminal claims under the same scrutiny as civil claims. In practice, however, federal judges have been loath to restrict federal prosecutors' use of criminal RICO

245. *Id.* at 1355.
246. *Id.* at 1361-62.
247. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 500 (1985) (referring to civil RICO).

but many have outdone themselves in finding ways to limit private use of the same statute.

In the early days of RICO's interpretation, it was perhaps understandable that courts would reject vagueness and other challenges to RICO, especially when confronted with the defendants carefully selected by the Justice Department. On the criminal side, however, RICO has become almost obsolete, as federal prosecutors have been equipped with many new tools, such as the money laundering laws, the broadened forfeiture laws, and the Sentencing Guidelines that can and probably will displace RICO. Consequently, judicial fear that tinkering with RICO will substantially undermine law enforcement is largely misplaced. In this new environment, the courts should accomplish what Congress has failed to do: place reasonable limits on RICO's reach.