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Recommended Citation

Micheal Goldsmith, *Rico and Pattern: The Search for Continuity Plus Relationship*, 73 Cornell L. Rev. 971 (1988)
Available at: <http://scholarship.law.cornell.edu/clr/vol73/iss5/5>

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RICO AND "PATTERN:" THE SEARCH FOR "CONTINUITY PLUS RELATIONSHIP"

Michael Goldsmith †

In ordinary usage, the term pattern often means "a series of events [with] an arrangement of parts, elements, or details that suggest a design or orderly distribution."¹ Though easily understood in most contexts, the meaning of pattern is currently the most controversial interpretative issue arising under the federal Racketeer Influenced and Corrupt Organizations law ("RICO").² The definition of pattern is critical to RICO because almost everything outlawed by the law requires proof of a "pattern of racketeering activity."³ Moreover, in addition to defining criminal activity, the

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The author wishes to thank Constance Healey, Austen Henry, Gary Hill, Karen Newmeyer, and Rose S. Wilson for their assistance on this project.

¹ WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1794 (2d ed. 1943), quoted in Brief for Respondent at 16, *H.J. Inc. v. Northwestern Bell Telephone* (on writ of certiorari to the United States Court of Appeals for the Eighth Circuit), cert. granted, 56 U.S.L.W. 3632, 3647 (U.S. Mar. 22, 1988) (No. 87-1252) [hereinafter Respondent's Brief]. Respondent's Brief also cites dictionary definitions of pattern that include, among others, "a combination of . . . acts . . . forming a consistent or characteristic arrangement" and a "frequent or widespread incidence." *Id.* at 15. Because this article ultimately attacks the position taken by respondent in *H.J. Inc.*, it is useful to begin our analysis at the same starting point. Accordingly, I rely upon the definitions proffered by respondent. At the same time, however, it is important to recognize that the word pattern, as with many words in our language, has a variety of meanings. See, e.g., WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1657 (1986) (16 different meanings); 7 THE OXFORD ENGLISH DICTIONARY 565-66 (1933 & 1982 Supp.) (13 meanings). Therefore, the "ordinary" meaning of pattern may be multifaceted and very much dependent upon the context within which the term is being used. See *infra* notes 93, 163 & 165 and accompanying text. See also Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417 (1898-99) ("It is not true that in practice (and I know no reason why theory should disagree with facts) a given word or even a given collocation of words has one meaning and no other. A word generally has several meanings, even in the dictionary. You have to consider the sentence in which it stands to decide which of those meanings it becomes in the particular case. . . .").

² 18 U.S.C. §§ 1961-68 (1984 & Supp. 1988). See Note, *Clarifying a Pattern of Confusion: A Multifactor Approach to Civil RICO's Pattern Requirement*, 86 MICH. L. REV. 1745, 1748 (1988) [hereinafter *Pattern of Confusion*]; Note, *The Pattern Requirement in Civil RICO is Working: Case Law After Sedima*, 33 VILL. L. REV. 205, 209 (1988) [hereinafter *The Pattern Requirement is Working*] (noting extensive split of authority).

³ 18 U.S.C. § 1962 (1982).

concept governs the availability of civil relief, and affects a variety of criminal and civil procedural issues.⁴

The controversy surrounding this element stems from two factors. First, RICO does not define "pattern of racketeering activity." Instead, the law states that such a pattern "requires at least two acts of racketeering activity" within ten years of each other.⁵ Second, in a 1985 decision entitled *Sedima, S.P.R.L. v. Imrex Co.*,⁶ the Supreme Court suggested that RICO's "extraordinary" breadth stems from the judiciary's failure to interpret the pattern element meaningfully and not simply from statutory design.⁷ Accordingly, in what has become a landmark footnote, Justice White's majority opinion advanced the following suggestion:

The legislative history supports the view that two isolated acts of racketeering do not constitute a pattern. As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of 'continuity plus relationship' which combines to produce a pattern."⁸

After *Sedima*, pattern became the most frequently litigated issue under RICO.⁹ Though the concept of "continuity plus relationship" clarified and narrowed the pattern element, courts have not achieved consensus.¹⁰ Thus, the Supreme Court recently granted certiorari in *H.J. Inc. v. Northwestern Bell Telephone Co.*¹¹ to clarify the matter. At issue in *H.J. Inc.* is the propriety of an Eighth Circuit rule that a pattern must consist of multiple schemes.¹² By shifting the focus of inquiry from "continuity plus relationship"¹³ to an arbitrary

⁴ See *infra* notes 39-45 & 59-79 (pattern in criminal and civil cases); Brief of *Amici Curiae* Attorney General Robert K. Corbin of Arizona et al., at 9. Pattern may, for example, affect the availability of collateral estoppel, *Lewisville Properties Inc. v. Gray*, 819 F.2d 946, 950 (5th Cir. 1988), and the application of the limitations period, *United States v. Persico*, 832 F.2d 705, 713-15 (2d Cir. 1987), *cert. denied* 108 S. Ct. 1995 (1988). See also Blakey & Cessar, *Equitable Relief Under Civil RICO: Reflections on Religious Technology Center v. Wollersheim: Will Civil RICO Be Effective Only Against White-Collar Crime?*, 62 NOTRE DAME L. REV. 526, 536 (1987).

⁵ 18 U.S.C. § 1961(5) (1984) (emphasis added). The absence of an express definition reflects a conscious legislative choice. See *infra* notes 30 & 182 and accompanying text.

⁶ 473 U.S. 479 (1985).

⁷ *Id.* at 500.

⁸ *Id.* at 496 n.14 (quoting S. REP. No. 617, 91st Cong., 1st Sess. 158 (1969)) (emphasis added).

⁹ See Blakey & Cessar, *supra* note 4, at 620.

¹⁰ See *infra* notes 59-79 and accompanying text.

¹¹ 829 F.2d 648 (8th Cir. 1987), *cert. granted*, 56 U.S.L.W. 3632, 3647 (U.S. Mar. 22, 1988) (No. 87-1252).

¹² *Id.* at 650; see *infra* notes 74-79 and accompanying text.

¹³ *H.J. Inc.*, 829 F.2d at 650 ("We have followed the *Sedima* Court's intimations and

counting of schemes, the Eighth Circuit test presents the most restrictive interpretation of pattern to emerge. Under its guise, the scope of RICO has been unduly curtailed.

The potential significance of *H.J. Inc.*, however, transcends Eighth Circuit doctrine. Because other circuits have likewise failed to resolve the pattern question, the situation demands more definitive direction from the Supreme Court. Such direction, however, may prove problematic because RICO is under ideological attack. White collar institutions view the grant of *certiorari* as an opportunity to resurrect previously rejected doctrine limiting RICO to traditional organized crime.¹⁴ Various *amici* representing white collar interests have filed briefs arguing that pattern must be interpreted in light of a supposed congressional intent to limit RICO to organized crime.¹⁵ Given this asserted intent, *amici* claim that pattern must be restricted to reach only those persons habitually or regularly engaged in organized criminal activity.¹⁶ These arguments, though alluring, are inconsistent with RICO's text, legislative history, and purposes.

This Article proposes an "ordinary meaning" approach to pattern closely tied to RICO's text and consistent with other federal jurisprudence employing similar terminology. This reading of the pattern element may appropriately curtail RICO's "extraordinary" breadth without impeding RICO's goal of attacking enterprise criminality in all forms. The Article consists of five parts. Part I reviews the nature and structure of RICO. Part II sets forth the historical context of the present debate. Part III examines *Sedima's* aftermath and criticizes the multiple scheme test. Part IV considers the organized crime oriented pattern limitation proposed by *amici* in *H.J. Inc.* Finally, Part V provides a framework for resolution of the pattern issue.

I

THE NATURE AND STRUCTURE OF RICO

RICO comprises Title IX of the Organized Crime Control Act

have required the combination of continuity plus relationship to establish the necessary pattern.") (citation omitted).

¹⁴ See *infra* notes 51-55 and accompanying text.

¹⁵ See Brief for the American Institute of Certified Public Accountants as *Amicus Curiae* in Support of Respondents at 3 [hereinafter AICPA Brief]; Brief for the AFL-CIO as *Amicus Curiae* Supporting Respondents at 3-4 [hereinafter AFL-CIO Brief]; Brief for the National Association of Manufacturers as *Amicus Curiae* in Support of Respondents at 3 [hereinafter NAM Brief]; Brief for The Washington Legal Foundation in Support of Respondents as *Amici Curiae* at 3 [hereinafter WLF Brief]. The U.S. Chamber of Commerce also filed a supporting brief, but advanced a less drastic position. Brief for the Chamber of Commerce of the United States of America as *Amici Curiae* at 6.

¹⁶ See *supra* note 15; see also *infra* notes 107-15 and accompanying text.

of 1970.¹⁷ Title IX embodies a new approach to law enforcement: the creation of substantive legislation designed to attack "enterprise criminality."¹⁸ Both the common law and traditional criminal legislation concentrated on convicting individual offenders. However, by 1970, numerous studies had established that such prosecutions were ineffectual in combating systemic criminality.¹⁹ Though individual prosecutions often succeeded, enterprises fostering illicit activity usually survived. This problem was especially pronounced in the area of organized crime, whose diversified activities pervade American society.²⁰

Accordingly, Congress directed RICO against enterprises engaged in systemic crime. Individual offenders still face prosecution under RICO, but they are charged with committing crimes whose seriousness is enhanced by virtue of defined relationships to an enterprise. RICO section 1962 contains four prohibitions that together address each mode in which an enterprise may be used to promote systemic crime: (1) section 1962(a) makes it unlawful for anyone who has received income from a pattern of racketeering activity to invest the proceeds of such activity in an enterprise; (2) section 1962(b) prohibits anyone from acquiring or maintaining an interest in an enterprise through a pattern of racketeering activity; (3) section 1962(c) makes it illegal for anyone associated with an enterprise to conduct its affairs through a pattern of racketeering activity; and (4) section 1962(d) outlaws conspiring to violate any of the preceding provisions.²¹ Offenders potentially face enhanced criminal penalties and civil sanctions that include treble damages,

¹⁷ Pub. L. No. 91-452, 84 Stat. 941 (1970).

¹⁸ Professor G. Robert Blakey, widely recognized as the principal draftsman of RICO, states that the law sought "to provide new legal remedies for all types of organized criminal behavior, that is, *enterprise criminality*—from simple political corruption to sophisticated white-collar crime schemes to traditional Mafia-type endeavors." Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1013-14 (1980) (emphasis added); see also Goldsmith, *RICO and Enterprise Criminality: A Response to Gerard E. Lynch*, 88 COLUM. L. REV. 774, 774-76 (1988) (quoting case law).

¹⁹ See Goldsmith, *supra* note 18, at 774, 780-84.

²⁰ Congressional Statement of Findings and Purpose, Pub. L. No. 91-452, 84 Stat. 922 (1970) ("[O]rganized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption."). A title and declaration of policy are important aids in construing legislation. *Block v. Hirsh*, 256 U.S. 135, 154 (1921) ("entitled at least to great respect"). Nevertheless, a restrictive preamble may not be used to limit a clear text. *United States v. Briggs*, 50 U.S. (9 How.) 353, 355 (1850); *Roush v. State*, 413 So. 2d 15, 18-19 (Fla. 1982).

²¹ 18 U.S.C. § 1962 (1982). Each of these provisions may also be violated through activity involving "the collection of an unlawful debt." The unlawful debt provision of RICO does not require proof of a pattern of racketeering activity. *United States v. Angulo*, 847 F.2d 956, 964 (1st Cir. 1988). See Blakey & Cessar, *supra* note 4, at 529 ("by, through, or against an enterprise").

attorney's fees, and injunctive restraints.²² Furthermore, Congress directed the courts to construe RICO liberally to effectuate the statutory goal of ridding society of enterprise criminality.²³

Two concepts recur as elements of each prohibition imposed by RICO: "enterprise" and "pattern of racketeering activity." Both of these concepts reflect the intent that RICO's enhanced penalty structure apply only to those who engage in a course of criminal activity of an organized nature.²⁴ Significantly, however, RICO does not limit the enterprise element to illicit groups such as organized crime families. Instead, the law suggests that an enterprise may include both licit and illicit organizations.²⁵ Similarly, RICO does not limit "racketeering activity" to violent offenses popularly associated with organized crime. Racketeering activity is explicitly defined to include various types of frauds and other misconduct often committed by white collar criminals.²⁶ RICO, however, requires more than use or involvement of an enterprise in racketeering activity. The law also requires a "*pattern* of racketeering activity."²⁷ Thus, the debate over pattern concerns a statutory element that is crucial to RICO's entire matrix.

Ironically, Congress consciously chose not to define "pattern of racketeering activity." Whereas Congress explicitly defined RICO's other statutory elements,²⁸ it merely limited pattern by a minimum requirement of two racketeering predicates committed within ten years of each other.²⁹ By limiting pattern rather than defining it, Congress provided flexibility sufficient to accommodate a variety of

²² 18 U.S.C. §§ 1963-64 (1984 & Supp. 1988).

²³ 18 U.S.C. § 1961 note (1982); see generally Note, *RICO and the Liberal Construction Clause*, 66 CORNELL L. REV. 167 (1980). The significance of this directive is examined *infra* notes 88 & 164.

²⁴ See Organized Crime Control Act of 1969, S. REP. NO. 617, 91st Cong., 1st Sess. 158 (1969) ("threat of continuing activity") [hereinafter Senate OCCA Report]; 116 CONG. REC. 585, 591 (1970) (statement of Senator McClellan) (criminal organizations pose continuing threat); A. MATHEWS, REPORT OF THE AD HOC CIVIL RICO TASK FORCE OF THE ABA SECTION OF CORPORATION, BANKING, AND BUSINESS LAW 71-72 (1985) [hereinafter CIVIL RICO TASK FORCE].

²⁵ *United States v. Turkette*, 452 U.S. 576, 591 (1981); 18 U.S.C. § 1961(4) (1984) provides that "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."

²⁶ 18 U.S.C. § 1961(1) (1984). Predicates designated as racketeering activity may be categorized as crimes of "(1) violence; (2) provision of illegal goods and services; (3) corruption in the labor movement or among public officials; and (4) commercial and other forms of fraud." Blakey, *The Civil RICO Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 300-06 (1982).

²⁷ 18 U.S.C. § 1962 (1982) (emphasis added); see *supra* text accompanying note 21.

²⁸ See 18 U.S.C. § 1961(1), (2), (6)-(8) (1982) (defining various terms including "racketeering activity," "state," and "enterprise").

²⁹ See *supra* note 5.

situations involving a course of criminal conduct.³⁰ Though the absence of a precise definition is now critical, the pattern controversy is actually part of a much larger debate over the propriety of RICO itself. The context of that debate must be understood before the pattern issue can be resolved.

II

THE CONTEXT OF DEBATE

RICO has inspired controversy from its inception. The original debates surrounding this law addressed a concern that survives to this day: the question of statutory breadth. Legislators opposed to RICO argued that the statute's reach inappropriately extended beyond traditional organized crime.³¹ RICO sponsors, however, responded that the law would be objectionable if limited to a certain type of defendant.³² Moreover, though traditional organized crime provided the initial catalyst for the Organized Crime Control Act of 1970, including RICO, its sponsors stressed the need to craft a statute capable of reaching other forms of crime as well.³³ These views

³⁰ See 116 CONG. REC. 35,302 (1970) (statement of Representative Cellar); see also *infra* notes 73 & 93, 163 and accompanying text; cf. Senate OCCA Report, *supra* note 24, at 165 (stating that the "variety of . . . relationships precludes more detailed specification" of pattern in Title X of the Organized Crime Control Act); *infra* note 181 and accompanying text.

³¹ Blakey, *supra* note 26, at 264 n.78, 268-79 (containing a detailed review of these criticisms). The Supreme Court considered it significant that, notwithstanding such criticism, Congress enacted RICO with white collar crimes as predicate offenses. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 498-99 (1985).

³² For example, Representative Poff, who co-sponsored RICO, observed:

The gentleman inquired rhetorically as to why no effort was made to define organized crime in this bill. It is true that there is no organized crime definition in many parts of the bill. This is, in part, because it is probably impossible precisely and definitively to define organized crime. But if it were possible, I ask my friend, would he not be the first to object that in criminal law we establish procedures which would be applicable only to a certain type of defendant? Would he not be the first to object to such a system?

116 CONG. REC. 35,204 (1970). See generally Lynch, *RICO: The Crime of Being a Criminal*, 87 COLUM. L. REV. 661, 685-88 (1987) (arguing that Congress intended to address organized crime but had difficulties defining this concept).

³³ Senator McClellan, the Organized Crime Control Act's principal sponsor, responded to criticism that the Act was not limited to organized crime as follows:

The danger posed by organized crime-type offenses . . . has provided the occasion for our examination of the working of our system of criminal justice. But should it follow . . . that any proposals for action stemming from that examination be limited to organized crime?

. . . [This] confuses the occasion for reexamining an aspect of our system . . . with the proper scope of any new principle or lesson derived from that reexamination. . . . Is there any good reason why we should not move . . . across the board?

....

. . . [T]he objection [also] confuses the role of the Congress with the

ultimately prevailed, as both houses of Congress enacted RICO by substantial majorities.³⁴

Since its enactment, however, RICO has survived a series of attempts to curb its broad language. Criminal defendants made the first efforts to restrict RICO's reach. Because the statute gave prosecutors unprecedented powers,³⁵ defendants struggled to avoid its scope. In the scramble that ensued, defense counsel sometimes advanced conflicting arguments. For example, white collar defendants argued that RICO reached only traditional organized crime,³⁶ while some organized crime defendants maintained that RICO applied *only* to legitimate businesses.³⁷ Both arguments failed because neither the enterprise element nor the statutory definition of "person" contains such exclusions.³⁸

Criminal defendants also sought to confine the pattern element narrowly. Here, too, they advanced somewhat contradictory argu-

role of a court. Out of a proper sense of their limited lawmaking function, courts ought to confine their judgments to the facts of the case before them. But the Congress in fulfilling its proper legislative role must examine not only individual instances, but whole problems. . . . [I]t has a duty not to engage in piecemeal legislation. Whatever the limited occasion for the identification of a problem, the Congress has the duty of enacting a principled solution to the entire problem.

116 CONG. REC. 18,913-14 (1970). Congressman Poff made a similar statement before the House of Representatives. *Id.* at 35,344. *See infra* note 144 and accompanying text.

³⁴ The Senate initially approved S.30, the Organized Crime Control Act of 1970, by a vote of 73 to 1. 116 CONG. REC. 972 (1970). The House of Representatives approved the bill by a vote of 341 to 26. *Id.* at 35,363. The Senate gave it final approval by voice vote. *Id.* at 36,296.

³⁵ *See generally* Lynch, *supra* note 32, at 661-63, 928-32 (citing other authority); Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 FORDHAM L. REV. 165, 170 (1980) (reviewing prosecutorial advantages).

³⁶ Tarlow, *supra* note 35, at 205-06 n.218 (citing cases in which the issue was raised by defendants who argued that governmental entities may not be RICO enterprises).

³⁷ *See id.* at 191-92; *United States v. Turkette*, 452 U.S. 576, 579-80 (1981) (rejecting the argument that RICO applies only to legitimate businesses).

³⁸ 18 U.S.C. § 1961(3) (1982) provides that "'person' includes *any individual or entity* capable of holding a legal or beneficial interest in property" (emphasis added). Similarly, RICO's criminal penalties apply to "[w]hoever violates any provision of section 1962 . . ." 18 U.S.C. § 1963 (1984 & 1988 Supp.) (emphasis added). The term "whoever" is defined to "include corporations, companies, associations, firms, partnerships, societies, joint stock companies, as well as individuals." 1 U.S.C. § 1 (1982). Thus, neither of these definitions is limited to individuals or to organized crime. *See United States v. Turkette*, 452 U.S. 576, 580-81, 585 (1981) (rejecting legitimate business limitation); *United States v. Aleman*, 609 F.2d 298, 303 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980) (rejecting organized crime limitation); *see also* Blakey & Gettings, *supra* note 18, at 1023-24 nn.85-87 (extensive list of cases). Because other titles of the Organized Crime Control Act are expressly limited to organized crime, *see infra* note 117 and accompanying text, the absence of such a limitation in RICO reflects a conscious legislative choice. *See, e.g., United States v. Aleman*, 609 F.2d at 303-04; *see also infra* note 52 and accompanying text. Furthermore, in other contexts, courts have declined to impose an organized crime limitation because of definitional difficulties attendant to this concept. *See infra* note 151 and accompanying text.

ments. Because prosecutors began using RICO to avoid procedural rules precluding joinder of multiple defendants and diverse crimes in a single trial,³⁹ defendants argued that pattern requires the racketeering acts to be connected to each other through some common scheme or plan.⁴⁰ Ironically, this argument almost amounts to a claim that *only* a single scheme may qualify as a pattern under RICO.⁴¹ Ultimately, courts found that a pattern might be established by showing a common scheme,⁴² but held that pattern does not require such proof.⁴³ Accordingly, defendants then argued that pattern *requires* proof of multiple schemes or episodes. This argument also failed. Though a few courts agreed that a single criminal episode—involving the commission of several crimes—ought not be a basis for pattern,⁴⁴ judges felt bound by the mistaken belief that two predicates within ten years automatically constitute a pattern of racketeering activity.⁴⁵

Attempts to restrict the scope of RICO's sanctions also failed.⁴⁶

³⁹ See Tarlow, *RICO Revisited*, 17 GA. L. REV. 291, 417-18 (1983); Lynch, *supra* note 32, at 928-32.

⁴⁰ See, e.g., Tarlow, *supra* note 35, at 219; United States v. Weisman, 624 F.2d 1118, 1121-22 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980).

⁴¹ Under this approach, a single scheme is often a prerequisite to pattern because the presence of disparate crimes may negate the common scheme. See Tarlow, *supra* note 35, at 216.

⁴² See, e.g., United States v. Teitler, 802 F.2d 606, 612 (2d Cir. 1986).

⁴³ See, e.g., United States v. Weisman, 624 F.2d 1118, 1122 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980). Indeed, prior to 1985, the uniform holding was that "two acts," not "two schemes," were all that was required to establish a "pattern." See, e.g., United States v. Calabrese, 645 F.2d 1379, 1389 (10th Cir.), *cert. denied*, 454 U.S. 831 (1981); United States v. Weatherspoon, 581 F.2d 595, 602 (7th Cir. 1978); United States v. Parness, 503 F.2d 430, 441-42 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975).

⁴⁴ See United States v. Moeller, 402 F. Supp. 49, 57-58 (D. Conn. 1975), *cert. denied*, 429 U.S. 1039 (1977); *cf.* Exeter Towers Assocs. v. Bowditch, 604 F. Supp. 1547, 1554 (D. Mass. 1985) (pattern of racketeering activity not satisfied by proof that in purchasing a single mortgage, defendants committed two or more predicate acts of mail fraud); Teleprompter of Erie, Inc. v. Erie, 537 F. Supp. 6, 12-13 (W.D. Pa. 1981) (pattern of racketeering activity not satisfied by proof of numerous bribes to one official by defendant's employees at the same fundraiser).

⁴⁵ See Note, *The Pattern Element of RICO Before and After Sedima: A Look at Both Federal and Florida RICO*, 15 FLA. ST. U.L. REV. 321, 327 (1987) [hereinafter *Federal and Florida RICO*]; Note, *Reconsideration of Pattern in Civil RICO Offenses*, 62 NOTRE DAME L. REV. 83, 86-87 (1986) (citing cases) [hereinafter *Reconsideration of Pattern*]. Judge Newman in United States v. Moeller, 402 F. Supp. 49, 57-58 (D. Conn. 1975), *cert. denied*, 429 U.S. 1039 (1977), felt bound by United States v. Parness, 503 F.2d 430, 441-42 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975). Normally a careful jurist, Judge Newman failed to recognize that *Moeller* involved "pattern" in section 1962(c), while *Parness* involved "pattern" in section 1962(b). As such, differing constructions of the term might well have been proper in the two differing contexts. See *infra* notes 73 & 93.

⁴⁶ *Russello v. United States*, 464 U.S. 16, 20-22 (1983) (forfeiture provision extends to racketeering proceeds).

The judiciary recognized that RICO's reach was broad.⁴⁷ However, given the evils of organized crime, courts declined to curtail the statute.⁴⁸ Judicial attitudes changed only when civil RICO came into vogue. At first, the private bar failed to recognize the enormous potential of civil RICO.⁴⁹ When such litigation commenced in the early 1980's, however, RICO plaintiffs immediately encountered judicial hostility. Though RICO's prohibitions do not distinguish between criminal and civil litigation, many judges viewed the application of civil RICO to white collar institutions as an anti-Mafia law run amuck.⁵⁰

Consequently, courts imposed a series of "organized crime" type limitations on civil RICO which differed from one another in style but not in effect. Initially, a few courts expressly ruled that civil RICO applies only to defendants engaged in traditional organized crime activity.⁵¹ Though courts later rejected this preclusion as unsupported by the statute's text or legislative history,⁵² many judges indirectly imposed a similar limitation by requiring proof of a "competitive" or "racketeering" injury.⁵³ Another judicial limitation, adopted by the Second Circuit, threatened to gut civil RICO by requiring a criminal conviction as a prerequisite to relief.⁵⁴ In *Sedima*

⁴⁷ See *id.* at 21-22; *United States v. Turkette*, 452 U.S. 576, 586-87, 593 (1981); see also *Lynch*, *supra* note 32, at 694-97.

⁴⁸ See *Russello*, 464 U.S. at 26-28; *Turkette*, 452 U.S. at 588-90.

⁴⁹ See CIVIL RICO TASK FORCE, *supra* note 24, at 55 (noting only nine civil RICO cases reported before 1980 and substantial increase beginning in 1983).

⁵⁰ See, e.g., *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 529-30 (1985) (Powell, J., dissenting); *In re Dow Co. "Sarabond" Products Liability Litigation*, 666 F. Supp. 1466, 1470-71 (D. Colo. 1987) (Kane, J.).

⁵¹ See *Saine v. A.I.A., Inc.*, 582 F. Supp. 1299, 1308 (D. Colo. 1984) (Kane, J.) ("It was, however, the declared purpose of Congress to 'seek the eradication of organized crime in the United States.'"); *Waterman S.S. Corp. v. Avondale Shipyards, Inc.*, 527 F. Supp. 256, 260 (E.D. La. 1981); *Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109, 113 (S.D.N.Y. 1975).

⁵² See, e.g., *Plains Resources, Inc. v. Gable*, 782 F.2d 883, 887 (10th Cir. 1986); *Owl Constr. Co. v. Ronald Adams Contractor, Inc.*, 727 F.2d 540, 542 (5th Cir.) ("[C]ourts and . . . commentators have persuasively and exhaustively explained why . . . RICO . . . [is not limited] to organized crime. . ."), *cert. denied*, 469 U.S. 831 (1984); see also *supra* note 38.

⁵³ See, e.g., *Van Schaick v. Church of Scientology*, 535 F. Supp. 1125, 1137 (D. Mass. 1982); *North Barrington Dev., Inc. v. Fanslow*, 547 F. Supp. 207, 211 (N.D. Ill. 1980). Ironically, the courts failed to define these terms with precision. See *Sedima*, 473 U.S. at 494 ("hampered by the vagueness of that concept"). The Second Circuit, however, defined racketeering injury as "'an injury different in kind from that occurring as a result of the predicate acts themselves, or not simply caused by the predicate acts, but also caused by an injury which RICO was designed to deter.'" *Id.* at 485. Competitive injury "seems to refer to any kind of injury resulting from the competitive advantage gained by the RICO violator through resort to illegal business tactics." Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 HARV. L. REV. 1101, 1110 n.49 (1982).

⁵⁴ *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 496 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985); see also Goldsmith, *Civil RICO Reform: The Basis For Compromise*, 71 MINN. L.

the Supreme Court ultimately rejected these judicial attempts to rewrite RICO.⁵⁵ The Supreme Court's decision, however, set in motion two streams of activity. First, because Justice White's majority opinion suggested that only congressional reform could moderate RICO's breadth,⁵⁶ lobbyists initiated a massive campaign to achieve this end.⁵⁷ Second, because Justice White suggested that "pattern" might offer a way to curtail RICO's breadth, the judiciary immediately concentrated on narrowing this element. Though Congress has not narrowed the pattern element,⁵⁸ judicial action has often achieved this result.

III

SEDIMA'S AFTERMATH

Since *Sedima*, most courts have narrowed the pattern element substantially.⁵⁹ Nevertheless, judicial efforts have failed to achieve either clarity or consistency. Because the cases are in disarray, it is

REV. 827, 849-52 (1987) (discussing effect of prior conviction requirement); Note, *Civil RICO: Prior Criminal Conviction and Burden of Proof*, 60 NOTRE DAME L. REV. 566, 572 (1985).

⁵⁵ 473 U.S. at 481, 493. The judicially imposed limitations would have rewritten civil RICO, 18 U.S.C. § 1964(c), as follows: "Any person *competitively* injured by *organized crime* in his business or property by reason of a violation of section 1962 of this chapter may sue therefore *any person convicted of a violation of section 1962 or racketeering activity* in any appropriate United States district court and shall recover threefold the damages he sustains *for any injury distinct from said racketeering activity* and the cost of the suit, including a reasonable attorney's fee." The Supreme Court has responded aptly and bluntly to judicial efforts of this kind: "The short answer is that Congress did not write the statute that way." *Russello v. United States*, 469 U.S. 16, 23 (1983) (quoting *United States v. Naftalin*, 441 U.S. 768, 773 (1979)).

⁵⁶ *Sedima*, 473 U.S. at 499.

⁵⁷ See Goldsmith, *supra* note 54, at 829-30, 848-55; see also Note, *Congress Responds to Sedima: Is There a Contract Out on Civil RICO?*, 19 LOY. L.A.L. REV. 851, 868-69, 871-74 (1986).

⁵⁸ Thus far, Congress has not amended the pattern element. See *Pattern of Confusion*, *supra* note 2, at 1784-85 (present reform proposals do not address this issue).

⁵⁹ See *infra* notes 63-79 and accompanying text. In fact, in their enthusiasm to curtail the scope of civil RICO many federal courts have improperly applied restrictive federal jurisprudence to certain state RICO statutes that expressly define pattern, using different terminology than the federal statute. See *Behunin v. Dow Chem. Co.*, 650 F. Supp. 1387, 1390 (D. Colo. 1986) (Kane, J.); *Cook v. Zions First Nat'l Bank*, 645 F. Supp. 423, 426 (D. Utah 1986). For example, state RICO laws often differ from their federal counterpart by using terms such as "incidents," or "events" in their definition of "pattern." See, e.g. Fla. Stat. Ann. § 772.02 (1986) (incidents); *State v. Russo*, 493 So. 2d 504, 505 (Fla. App. 4th Dist. 1986) (noting "incidents" under state statute rather than "acts"). See also *State v. Fletcher*, 751 P.2d 805, 816 n.5 (Utah App. 1988) (pattern under state law "does not operate from the same sparse language of the RICO Act."). Federal courts that impose interpretations of federal RICO on state statutes brazenly ignore statutory text to the contrary. See Brief of *Amici Curiae* Attorney General Robert K. Corbin of Arizona et al., at 2 n.4, 17 n.29, for a detailed discussion of the improper activities of district courts in Colorado to restrict Colo. Rev. Stat. § 18-17-103 (Supp. 1984).

difficult even to categorize the different jurisprudential views. Various wrinkles, which have modified the prevailing tests, and the presence of contradictory opinions within several circuits complicate this task.⁶⁰ Notwithstanding this "bedlam,"⁶¹ the pattern cases generally conform to one of four positions.⁶²

First, the least restrictive view of pattern rejects *Sedima's* footnote analysis as mere dictum, and holds that two related racketeering acts, within ten years, satisfy the pattern requirement.⁶³ This position, however, effectively nullifies the pattern element in commercial fraud cases. Under federal jurisprudence, each mailing or interstate wire communication made in furtherance of a scheme to defraud constitutes a separate violation of the mail or wire fraud statutes.⁶⁴ As virtually every major commercial transaction generates at least two mailings or interstate telephone calls,⁶⁵ the predicates required for a pattern are too readily available. Congress' clear intent to make the pattern element a meaningful requirement indicates the error of this analysis.⁶⁶

The second view of pattern focuses expressly on the concept of "continuity plus relationship."⁶⁷ Some courts simply hold that pat-

⁶⁰ See *infra* notes 63, 67-69, 71 & 79 and accompanying text.

⁶¹ See *Furman v. Cirrito*, 828 F.2d 898, 910 (2d Cir. 1987) (Pratt, J., dissenting) (discussing bedlam within Second Circuit); see also *Beauford v. Helmsley*, 843 F.2d 103, 109 (2d Cir. 1988); *Andreo v. Friedlander, Gaines, Cohen, Rosenthal & Rosenberg*, 660 F. Supp. 1362, 1369 (D. Conn. 1987); *Chronister v. Atlantic Richfield Co.*, 653 F. Supp. 1576, 1582 (M.D. Pa. 1987); *Penterelli v. Spector Cohen Gadon & Rosen*, 640 F. Supp. 868, 873 (E.D. Pa. 1986).

⁶² See *Pattern of Confusion*, *supra* note 2, at 1754 (presenting three differing views); *The Pattern Requirement is Working*, *supra* note 2, at 214-15 (four views).

⁶³ See *United States v. Ianniello*, 808 F.2d 184, 190 (2d Cir. 1986), *cert. denied*, 56 U.S.L.W. 3853 (1987); *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350, 1355 (5th Cir. 1985). Both opinions have been criticized. In *Hyatt*, a 5th Circuit panel disputed its validity but felt bound by precedent. *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423, 425-26 (5th Cir. 1987). A Second Circuit panel questioned *Ianniello's* continued validity in *Beauford v. Helmsley*, 843 F.2d 103, 109-10 (2d Cir. 1988), *reh'g en banc pending*.

⁶⁴ Rakoff, *The Federal Mail Fraud Statute* (Part 1), 18 DUQ. L. REV. 771, 777-78 (1980) (citing case law); see also 18 U.S.C. § 1341 (1982).

⁶⁵ See, e.g., *Roeder v. Alpha Indus., Inc.*, 814 F.2d 22, 31 (1st Cir. 1987) (transactions rarely do not involve use of the mails).

⁶⁶ For example, Congress stressed that pattern is "essential to the operation of the statute." Senate OCCA Report, *supra* note 24, at 157; see also Note, *The Pattern Requirement of Civil RICO*, 74 Ky. L.J. 623, 628-31 (1986) (reviewing legislative history). In effect, the least restrictive view of pattern provides no protection against an unduly broad application of the statute. Consequently, RICO may improperly encumber ordinary disputes in areas as diverse as trusts and estates, domestic relations, and patent litigation. Because Congress did not intend this result, such use of RICO has sparked criticism. Note, *supra* note 57, at 856-59 (summary of criticism). Because ordinary disputes in these areas do not involve a threat of continuity, they do not constitute a pattern of racketeering activity.

⁶⁷ See *supra* text accompanying note 8.

tern is determined by the presence of this concept.⁶⁸ Others have refined this approach by proposing various factors to apply in determining whether "continuity plus relationship" exists. These factors include: 1) the number and variety of predicate acts; 2) the duration of criminal activity; 3) the number of victims; 4) the existence of multiple schemes; and 5) the infliction of distinct injuries.⁶⁹ This approach to pattern requires careful consideration of the facts of each case. Though somewhat lacking in predictability, the standard has often achieved appropriate results.⁷⁰

The third approach to pattern is known as the multiple episode test. In essence, this test requires predicate crimes constituting a pattern to be both related in some respect and to produce injury separately in time and place.⁷¹ Under this standard, multiple mailings or wire communications effecting a single injury do not qualify as a pattern of racketeering activity. This test has also achieved appropriate results.⁷² However, the test risks occasional error by counting episodes rather than emphasizing "continuity." For example, absent some threat of continuity, two distinct criminal episodes should not automatically qualify as a pattern. On the other hand, the presence of two episodes ought not be an absolute prerequisite to pattern, since a single illicit event may sometimes pose a threat of continuity.⁷³

⁶⁸ See *Sun Sav. & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 191-94 (9th Cir. 1987); *Roeder v. Alpha Indus.*, 814 F.2d 22, 30-31 (1st Cir. 1987).

⁶⁹ See *Medical Emergency Serv. Assocs. v. Foulke*, 844 F.2d 391, 394 (7th Cir. 1988); *Bartcheck v. Fidelity Union Bank*, 832 F.2d 36, 38-39 (3d Cir. 1987).

⁷⁰ See *Saporito v. Combustion Eng'g, Inc.*, 843 F.2d 666, 676-78 (3d Cir. 1988) (systemic fraud against multiple victims is pattern); *Paradise Hotel Corp. v. Bank of Nova Scotia*, 842 F.2d 47, 53 (3d Cir. 1988) (single bankruptcy not a pattern); *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1304-05 (7th Cir. 1987) (multiple distinct injuries constitute pattern); *Skycom Corp. v. Telstar Corp.*, 813 F.2d 810, 818 (7th Cir. 1987) (single commercial transaction not a pattern); *Marks v. Pannell Kerr Forster*, 811 F.2d 1108, 1110-12 (7th Cir. 1987) (single limited fraud against single victim not a pattern); *Lipin Enters. v. Lee*, 803 F.2d 322, 324 (7th Cir. 1986) (a single sale of stock does not constitute a pattern).

⁷¹ See Goldsmith, *supra* note 54, at 863-64 n.171 (discussing test and setting forth cases); RICO Cases Committee, Criminal Justice Section of the American Bar Association, *Jury Instructions for Civil and Criminal RICO Cases with Commentary*, 1987 B.Y.U. L. Rev. 1, 24, 37-40; see also *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986) (citing other cases). Note that, though the Seventh Circuit has not repudiated the episode test, recent decisions from that jurisdiction have emphasized the multiple factor approach to pattern. See *supra* notes 69-70 and accompanying text. See *infra* notes 162 & 178 and accompanying text.

⁷² See *Louisiana Power & Light Co. v. United Gas Pipe Line Co.*, 642 F. Supp. 781, 809 (E.D. La. 1986) (fraudulent monthly bills, each inflicting separate injury, constitute pattern); *United States v. Freshie Co.*, 639 F. Supp. 442, 444-45 (E.D. Pa. 1986) (eleven bribes over three years constitute a pattern); *Soper v. Simmons Int'l, Ltd.*, 632 F. Supp. 244, 250-55 (S.D.N.Y. 1986) (single fraudulent episode not a pattern).

⁷³ Sometimes, continuity may be inferred from the nature of the crime. For example, extortion inherently carries a threat of future criminality. Cf. *United States v.*

Finally, the most restrictive view of pattern is the multiple scheme test. Under this rule, a single criminal scheme fails to satisfy the pattern element regardless of the number of predicates involved.⁷⁴ The District Court for the Northern District of Illinois initially advanced this doctrine in *Northern Trust Bank/O'Hare N.A. v. Inryco, Inc.*⁷⁵ The court considered whether four illegal kickback payments, made to a purchasing agent through the mails, constituted a pattern of racketeering activity. In declining to find a pattern, Judge Milton I. Shadur commented:

"[P]attern" connotes similarity, hence the cases' proper emphasis on relatedness of the constituent acts. But "pattern" also connotes a multiplicity of events: Surely the continuity inherent in the term presumes repeated criminal *activity*, not merely repeated *acts* to carry out the *same* criminal activity. It places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a "pattern of racketeering activity."⁷⁶

At first impression, *Inryco* appears to suggest a multiple episode test. However, Judge Shadur never considered whether each kickback payment might qualify as a distinct episode (with each episode reflecting a separate injury to plaintiff).⁷⁷ Moreover, his opinion rejected earlier precedent sustaining a single scheme as a pattern and concluded that "the single scheme does not appear to represent the necessary 'pattern of racketeering activity.'"⁷⁸ Subsequent courts, eager to restrain the scope of civil RICO, have employed similar

Brooklier, 685 F.2d 1208, 1217 (9th Cir. 1982), *cert. denied*, 459 U.S. 1206 (1983). Similarly, if several murders are committed to facilitate the commission of future offenses, the fact that the homicides occurred at the same time and place ought not preclude finding a pattern. Finally, a threat of continuity occasionally may be inferred from the ongoing operations of the enterprise. *Cf.* *United States v. Ianniello*, 808 F.2d 184, 190-91 (2d Cir. 1986), *cert. denied*, 56 U.S.L.W. 3853 (1987) (continuity inferred from ongoing activities of enterprise); *United States v. Watchmaker*, 761 F.2d 1459, 1474-76 (11th Cir. 1985), *cert. denied*, 474 U.S. 1100 (1986) (single episode homicides constitute pattern). See *Reconsideration of Pattern*, *supra* note 45, at 95-96.

⁷⁴ See *Pattern of Confusion*, *supra* note 2, at 1748-49; *The Pattern Requirement is Working*, *supra* note 2, at 215-16.

⁷⁵ 615 F. Supp. 828 (N.D. Ill. 1985).

⁷⁶ *Id.* at 831.

⁷⁷ *Id.* at 831-33. Judge Shadur should have considered whether the kickbacks constituted separate payments or merely installments of a single payment. *Blakey & Cessar*, *supra* note 4, at 539 (citing other examples of this distinction in federal law). The Eighth Circuit likewise failed to consider this issue when it adopted the multiple scheme rule in *Superior Oil Co. v. Fullmer*, 785 F.2d 252, 255-58 (8th Cir. 1986). The claim in *Superior Oil* could have been properly dismissed simply by recognizing that the complaint essentially alleged a single theft. *Blakey & Cessar*, *supra* note 4, at 538. Thus the multiple scheme test was unnecessary to a proper outcome and actually diverted from proper analysis.

⁷⁸ *Inryco*, 615 F. Supp. at 833.

analyses to arrive at a multiple scheme requirement.⁷⁹

The restrictive effect of the multiple scheme rule is apparent. Comparison with the multiple episode standard best illustrates this effect. Consider the following hypothetical: *Assume that a defense contractor bribes a government purchasing agent to obtain inside information for a series of bids to construct military aircraft. They agree that each time the contractor wins a bid on this basis, the contractor will mail a check for \$35,000 to the agent's bank account in a foreign country.* This scenario properly qualifies as a pattern under the multiple episode test. Each \$35,000 payment is a distinct criminal event reflecting independent harm to the government and to competing contractors. Thus, though arguably only a single scheme, it violates RICO. Under the multiple scheme test, however, this scenario does not satisfy the pattern element and RICO does not apply.

Of course, it is arguable that the preceding scenario actually involves multiple schemes—with each bid amounting to a separate scheme. However, the application of RICO then turns on how a court chooses to characterize the crime or crimes at issue. Presumably, “good” RICO cases would be viewed as multiple schemes, and “bad” RICO cases would be rejected as “mere” single schemes. A standard so prone to result-oriented decisions is no standard at all.⁸⁰ As applied, the multiple scheme rule resembles the previously rejected organized crime limitation. Courts routinely dismiss civil RICO claims against white collar defendants under its rubric.⁸¹ This restrictive approach to pattern contradicts *Sedima*, and cannot be justified by statutory text, legislative history, or sound policy.

Sedima contains no language suggesting that pattern should be determined by a multiple scheme standard. Indeed, though the complaint in *Sedima* alleged only a single fraudulent scheme,⁸² Justice White did not question the pleading's validity. Nor did the Court rule that two predicate acts, standing alone, may *never* constitute a pattern of racketeering activity. The opinion merely states the “implication . . . that while two acts are necessary, they *may* not be

⁷⁹ See *Superior Oil Co. v. Fullmer*, 785 F.2d 252, 257 (8th Cir. 1986); *Professional Assets Management, Inc. v. Penn Square Bank*, 616 F. Supp. 1418, 1421-22 (W.D. Okla. 1985). See also *Pitts v. Turner & Boisseau, Chartered*, 850 F.2d 650, 652 (10th Cir. 1988) (implicitly moving towards a multiple scheme standard). In addition, some courts, though declining to adopt the multiple scheme test, have imposed other requirements on the pattern element. For example, the Fourth Circuit has suggested that pattern may not be established absent allegations of “ongoing unlawful activities whose scope and persistence pose a special threat to social well-being.” *International Data Bank v. Zepkin*, 812 F.2d 149, 155 (4th Cir. 1987).

⁸⁰ See *infra* note 105 and accompanying text.

⁸¹ See *infra* note 102 and accompanying text.

⁸² *Sedima*, 473 U.S. at 483-84.

sufficient."⁸³ Furthermore, the Court surely did not intend subsequent interpretations of pattern to focus exclusively on dictum contained in a footnote. Other aspects of *Sedima* must also be considered.

The thrust of *Sedima* is consistent with RICO's broad remedial purpose. Of primary import, the Court struck down two judicially imposed limitations designed to eviscerate the statute.⁸⁴ In doing so, Justice White looked to the law's text and rejected the claim that "Congress could have no 'inkling of [RICO's] implications' " for white collar crime.⁸⁵ RICO's text, he properly observed, applies to "any person."⁸⁶ Furthermore, *Sedima* stressed that courts should not impose "novel" limitations absent supporting legislative history.⁸⁷ Finally, Justice White observed that "[t]he statute's 'remedial purposes' are nowhere more evident than in the provision of a private action for those injured by racketeering activity."⁸⁸ The Court accordingly rejected narrow statutory interpretations intended to render civil RICO useless against white collar institutions. Instead, Justice White stated that "[t]he fact that [civil RICO] is used against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued."⁸⁹ *Sedima's* broad view of RICO is consistent with Supreme Court precedent,⁹⁰ and provides

⁸³ *Id.* at 496 n.14 (emphasis added).

⁸⁴ *Id.* at 485-86.

⁸⁵ *Id.* at 495 n.13.

⁸⁶ *Id.* at 495.

⁸⁷ *Id.* at 490.

⁸⁸ *Id.* at 498. The Court qualified this statement by suggesting, at least for purposes of argument, that the liberal construction clause might not apply to sections 1961 and 1962. *Id.* at 495 n.10. Congress, however, drew no such distinction. The liberal construction requirement applies to Title IX in its entirety, Pub. L. No. 91-452 § 904(a), 84 Stat. 947 (1970), and neither the Supreme Court nor the majority of federal courts have applied the clause in such a restrictive manner. *Cf.* *United States v. Turkette*, 452 U.S. 576, 587-93 (1981) (interpreting enterprise element). *See, e.g.,* *United States v. Perholtz*, 842 F.2d 343, 352-53 (D.C. Cir. 1988); *United States v. Garner*, 837 F.2d 1404, 1419 (7th Cir. 1987), *cert. denied*, 108 S.Ct. 2022 (1988); *United States v. Licavoli*, 725 F.2d 1040, 1045 (6th Cir.), *cert. denied*, 467 U.S. 1252 (1984); *United States v. Mazzei*, 700 F.2d 85, 90 (2d Cir.), *cert. denied*, 461 U.S. 945 (1983). *See also* *Williams v. Hall*, 683 F. Supp. 639, 642 (E.D. Ky. 1988) (RICO must be liberally construed. Section 1962(d) conspiracy upheld.) The contrary rule of lenity has been abolished in most jurisdictions. Indeed, the rule of lenity is irrelevant in this context since its application is limited to situations in which the legislature has failed to express a preference for how ambiguities in a statute are to be construed. N. SINGER, 2A STATUTES AND STATUTORY CONSTRUCTION §§ 45.02 & 45.09 (1984). This is not the case with RICO. *See generally* Blakey, *supra* note 26, at 245 n.25, 288-90 n.150; Blakey & Cessar, *supra* note 4, at 532 n.21. *See also supra* note 23 and accompanying text.

⁸⁹ *Sedima*, 473 U.S. at 499.

⁹⁰ Two Supreme Court decisions addressed RICO before *Sedima*. On each occasion, the Court construed the statute broadly, consistent with its remedial objectives. *See*

the context within which the multiple scheme test must be considered.

Turning first to statutory text, RICO provides no basis for imposing a multiple scheme requirement. The word "scheme" does not appear in the law, much less in any statutory treatment of pattern.⁹¹ Whereas "scheme" implicitly requires an examination of a violator's state of mind, RICO characterizes "pattern" in terms of "acts."⁹² RICO uses no concepts even remotely suggestive of a multiple scheme requirement. Moreover, the multiple scheme test is squarely contrary to the explicit text of section 1962(b), which necessarily applies to single schemes.⁹³

The multiple scheme requirement also finds no support in the legislative history. As initially proposed, pattern included a minimum requirement of only a single predicate act after the effective date of the statute.⁹⁴ In response to Justice Department criticism,⁹⁵ Congress amended the pattern element to provide for a two-predicate minimum. The Justice Department, however, opposed any fur-

Russello v. United States, 464 U.S. 16, 27 (1983); United States v. Turkette, 452 U.S. 576, 587-90 (1981).

⁹¹ See *Barticheck v. Fidelity Union Bank*, 832 F.2d 36, 39 (3d Cir. 1987) (" 'scheme' is hardly a self defining term, and it appears nowhere in the RICO statute"); *Sun Sav. & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 193 (9th Cir. 1987) ("neither RICO's language nor *Sedima's* interpretation of it supports a requirement of substantive unconnectedness, i.e., separate episodes or schemes.").

⁹² The multiple scheme test requires analyzing the defendant's state of mind because the presence of multiple objectives depends upon his intent. As a consequence, the multiple scheme standard encourages semantic games. See *infra* note 105 and accompanying text. The benefit of focusing on acts of conduct is analyzed *infra* notes 171-96 and accompanying text.

⁹³ Section 1962(b) prohibits acquiring an interest in an enterprise through a pattern of racketeering. Therefore, this prohibition, by definition, contemplates a single scheme: the illicit acquisitions of an interest in an enterprise. See, e.g., *United States v. Parness*, 503 F.2d 430, 441-42 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975). The multiple scheme requirement would nullify this prohibition. See Goldsmith, *supra* note 54, at 865 n.175 (citing case law). See also *infra* note 97. Likewise, both sections 1962(a) and (d) are concerned with activity that does not necessarily involve multiple schemes. For example, the section 1962(a) prohibition against investing the proceeds of racketeering activity in an enterprise reflects congressional concern with money laundering; see *Lynch, supra* note 32, at 681; Note, *Investing Dirty Money: Section 1962(a) of the Organized Crime Control Act of 1970*, 83 YALE L.J. 1491, 1493 (1974). Money laundering, however, is a serious social problem irrespective of whether multiple schemes generated the funds. Similarly, section 1962(d), which outlaws conspiracy to violate RICO, potentially reaches inchoate conduct—such as a contemplated single scheme—that has not yet ripened into multiple schemes. Imposition of a multiple scheme requirement under such circumstances would be "absurd" and "surprising." *Turkette*, 452 U.S. at 587.

⁹⁴ S.1861, 91st Cong., 1st Sess., 115 CONG. REC. 9569 (1969) (" 'pattern of racketeering activity' includes at least one act occurring after the effective date of this chapter"). Another precursor to RICO used the term "criminal activity" rather than pattern. See S.1963, 91st Cong., 1st Sess., 115 CONG. REC. 6995 (1969). It included "any act"; multiple acts were not required.

⁹⁵ See Senate OCCA Report, *supra* note 24, at 122.

ther constraints on pattern. Assistant Attorney General Will Wilson, when asked to comment on a proposed three-predicate minimum, responded that such "additional requirements would make [RICO] virtually unenforcible [sic]."⁹⁶ Obviously, the Department would have opposed a more demanding multiple scheme requirement, and there is no indication that Congress ever considered it.⁹⁷

Instead, the legislative record suggests that Congress intended to give pattern its ordinary meaning.⁹⁸ At the time, this meant that the activity must not be "isolated" or "sporadic."⁹⁹ Consistent with this theme, the Senate Report accompanying RICO states that it is the "factor of continuity plus relationship which combines to produce a pattern."¹⁰⁰ Continuity and relationship, however, are potentially mutually exclusive concepts under a multiple scheme test. To the extent that a complaint alleges multiple schemes, it becomes more difficult to allege the requisite "relationship" factor; however, when a close relationship between predicates is alleged, the events are more prone to be characterized as merely a single scheme. Consequently, counsel faces an absurd conflict between pleading con-

⁹⁶ *Organized Crime Control: Hearings before Subcommittee No. 5 of the House Comm. on the Judiciary, on S.30 and Related Proposals*, 91st Cong., 2d Sess. 664 (1970) (statement of Will Wilson) [hereinafter *Organized Crime Control Hearings*].

⁹⁷ See *Lawaetz v. Bank of Nova Scotia*, 653 F. Supp. 1278, 1286 (D. St. Croix 1987) ("RICO's language and legislative history are devoid of a multiple episode requirement."). Cf. *J.G. Williams v. Regency Properties, Ltd.*, 672 F. Supp. 1436, 1441 (N.D. Ga. 1987) (compromise position more consistent with the legislative history). Indeed, Senators Byrd and Dole provided examples of racketeering against which RICO was aimed that constituted single scheme activity. 116 CONG. REC. 607 (1970) (arson-murder scheme designed to compel supermarket chain to purchase detergent sold by mob-controlled company); 116 CONG. REC. 36,296 (1970) (same). The Senate Report accompanying RICO provides other examples of single scheme activity that is within the statute. E.g., Senate OCCA Report, *supra* note 24, at 77 (bankruptcy bustout). "Bustout" scams are particularly enlightening. See generally Davidson, *Schemes and Methods Used in Perpetrating Bankruptcy Frauds*, 71 CON. L.J. 383 (1966). For a pre-RICO example, see *United States v. Wolcott*, 379 F.2d 521, 529 (7th Cir.), *cert. denied*, 389 U.S. 929 (1967). For a post-RICO example, see *Sutliff, Inc. v. Donovan*, 727 F.2d 648, 653 (7th Cir. 1984). Such scams seldom involve more than a single scheme or last longer than a relatively brief period and they usually envision the end of the enterprise that is acquired and fraudulently put out of business. It is difficult, if not impossible, to square the paradigmatic bustout scheme with some post-*Sedima* efforts to restrict RICO, not only involving "pattern," but also involving "enterprise." Here, too, these results are contrary to manifest congressional intent. See, e.g., *Furman v. Cirrito*, 828 F.2d 898, 903 (2d Cir. 1987) (no RICO violation; partnership must continue to be enterprise).

⁹⁸ *Organized Crime Control Hearings*, *supra* note 96, at 665 (statement of Ronald L. Gainer) ("pattern has to be construed with its normal meaning"); see also *infra* note 99.

⁹⁹ See 116 CONG. REC. 18,940 (1970) (statement of Senator McClellan); *id.* at 35,193 (statement of Representative Poff).

¹⁰⁰ Senate OCCA Report, *supra* note 24, at 158.

tinuity and relationship.¹⁰¹ Congress could not have intended such a dilemma.

Finally, the multiple scheme test fails from a policy standpoint. First, it confers RICO immunity upon single scheme activity regardless of duration.¹⁰² Second, though courts tolerate such results in civil cases, the potentially adverse consequences in worthwhile criminal cases will likely cause uneven application.¹⁰³ Third, the multiple scheme standard is imprecise. As yet, no court has clearly defined it.¹⁰⁴ Consequently, RICO defendants are motivated to generalize the allegations against them, and plaintiffs artificially attempt to splinter each claim into a multiplicity of schemes.¹⁰⁵ Chaos results.

Perhaps for these reasons, none of the five *amicus* briefs filed by civil RICO opponents in *H.J. Inc.* even attempts to justify the multiple scheme rule.¹⁰⁶ Instead, most urge a pattern standard that limits RICO to traditional organized crime cases and excludes white collar criminal activity from its realm. Because this view of pattern lacks foundation, it must be rejected.

¹⁰¹ See, e.g., Goldsmith, *supra* note 54, at 865 n.175 (citing cases recognizing this dilemma).

¹⁰² See *Barticek v. Fidelity Union Bank*, 832 F.2d 36, 39 (3d Cir. 1987) (rejecting multiple scheme test, in part for this reason); *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986) (same). The Eighth Circuit, however, has tolerated such results in civil cases. See *Ornest v. Delaware North Cos.*, 818 F.2d 651, 652 (8th Cir. 1987) (skimming concession commissions during eight-year period not a pattern); *Deviries v. Prudential-Bache Sec., Inc.*, 805 F.2d 326, 329 (8th Cir. 1986) (churning during six-year period not a pattern).

¹⁰³ For example, the Eighth Circuit has struggled to find multiple schemes in the context of a single RICO narcotics conspiracy. *United States v. Kragness*, 830 F.2d 842, 860 (8th Cir. 1987). In *Kragness*, the Court indulged in some creative dissection of defendants' trafficking activities and found multiple schemes because defendants had imported a variety of narcotics. Had the case involved a single type of narcotic, the court could not have reached this result. See also *County of Suffolk v. Long Island Lighting Co.*, 685 F. Supp. 38 (E.D.N.Y. 1988) ("Were the alleged scheme one of a criminal mob rather than [a power company], appeal from a conviction on continuity grounds would be laughed out of court.").

¹⁰⁴ Thus, it "merely substitutes one set of definitional problems for another." *Roeder v. Alpha Indus., Inc.*, 814 F.2d 22, 31 (1st Cir. 1987); see also *Paul S. Mullin & Assocs., Inc. v. Bassett*, 632 F. Supp. 532, 541 (D. Del. 1986).

¹⁰⁵ Such techniques ought not be tolerated. They are made possible by the elastic character of the term "scheme." See *supra* note 92. To avoid these practices, courts must establish a standard that does not promote such lawyering. See *Jones v. Lampe*, 845 F.2d 755, 758 (7th Cir. 1988) (may not splinter a single fraud into component parts); *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423, 426 (5th Cir. 1987) (criticizing "semantical game of generalizing the illegal objective" and focusing instead on "discrete criminal events") (Higgenbotham, J.).

¹⁰⁶ Indeed, even respondent Northwestern Bell Telephone Company does not attempt to sustain the multiple scheme test on its merits. Instead, Respondent's Brief focuses on the facts and argues that, given the allegations, no pattern exists under any reasonable standard. Respondent's Brief, *supra* note 1, at 31-45.

IV

THE ORGANIZED CRIME LIMITATION ON PATTERN

The *amicus* briefs in *H.J. Inc.* take different approaches in arguing for an organized crime based pattern limitation. One brief argues expressly that courts must interpret pattern narrowly to reach only traditional organized crime.¹⁰⁷ Others pursue the same result without expressly calling for an organized crime limitation.¹⁰⁸ Both positions are deceptively simple. Both are wrong. And both threaten to make RICO the sort of status-based offense Congress expressly rejected.¹⁰⁹

Though the *amici* characterize their arguments somewhat differently, they advance common grounds for limiting pattern. Their argument essentially attempts to combine the "ordinary meaning" of pattern with RICO's historic focus on organized crime. The following summary presents this erroneous position: Based on dictionary definitions of pattern, "a single theme dominates: 'pattern' means actions that 'characterize' or 'typify' a person's conduct."¹¹⁰ Legislative history supports this interpretation. RICO arose as an effort to combat organized crime. Because constitutional constraints against status-based offenses preclude outlawing membership in organized crime, Congress adopted the pattern element to criminalize conduct committed by organized crime members. As Congress considered this issue, it imposed a series of progressively restrictive changes on the pattern element which culminated in existing law. Given the legislative emphasis on organized crime, "[b]oth the creation of the 'pattern' requirement and the successful efforts to narrow it reflected Congress' continuing effort to create a formulation that would attack *habitual* or *career* criminals without sweeping in other criminals, much less people who are engaged primarily in lawful and respected business and professional endeavors."¹¹¹ Thus, RICO's sponsors stated that its reach beyond organized crime would only be "incidental."¹¹² To achieve this result, these *amici* contend, pattern must mean "typical" or "characteristic" behavior.¹¹³ Furthermore, they argue that, this definition necessarily excludes single criminal

¹⁰⁷ WLF Brief, *supra* note 15, at 3.

¹⁰⁸ AICPA Brief, *supra* note 15, at 3; NAM Brief, *supra* note 15, at 3; AFL-CIO Brief, *supra* note 15, at 3-4.

¹⁰⁹ See Goldsmith, *supra* note 18, at 790 ("RICO was drafted in response to status-based criticisms of [an earlier bill,]"). The *amici* briefs radically changed the major issue being considered by the Supreme Court. Though the Court initially granted *certiorari* to address the multiple scheme requirement, *see supra* note 11, the proposed organized crime-type limitation will probably receive the most attention.

¹¹⁰ AICPA Brief, *supra* note 15, at 7.

¹¹¹ *Id.* at 13-14.

¹¹² *Id.* at 14.

¹¹³ *Id.* at 15.

episodes or situations in which the defendant's racketeering activity does not amount to a "substantial" part of his overall conduct.¹¹⁴ Accordingly, the *amici* cite Seventh Circuit case law suggesting that "the 'pattern requirement was intended to limit RICO to those cases in which racketeering acts are committed in a manner *characterizing* the defendant as a person who *regularly* commits such crimes.'" ¹¹⁵

This argument distorts both the language and intent of RICO. First, under the proposed definition, pattern modifies the person and enterprise elements of RICO instead of the *conduct* contemplated by the term "pattern of racketeering *activity*." Both the person and enterprise elements, however, are separately defined in provisions that expressly extend beyond traditional organized crime and do not touch upon the concept of professional or habitual criminal.¹¹⁶ These provisions contrast sharply with other sections of the Organized Crime Control Act of 1970 that are specifically limited to organized crime or are otherwise restricted to career criminals.¹¹⁷ Second, since the statutory text uses "pattern" to modify "racketeering activity," the law requires only that the predicate acts *themselves* constitute a pattern; it does not require proof of some larger pattern involving the defendant's overall affairs.¹¹⁸ Finally, in con-

¹¹⁴ *Id.* at 19-20.

¹¹⁵ *Id.* at 7 (quoting *Lipin Enters. Inc. v. Lee*, 803 F.2d 322, 324 (7th Cir. 1986)).

¹¹⁶ *See supra* notes 25 & 38 and accompanying text.

¹¹⁷ *See* 18 U.S.C. § 510, 84 Stat. 933 (witness protection program); 18 U.S.C. § 3503, 84 Stat. 934 (depositions to preserve testimony). Ironically, even these provisions have not been confined to traditional organized crime. *See, e.g.*, *United States v. Carter*, 493 F.2d 704, 707-08 (2d Cir. 1974) (deposition to preserve testimony in white collar crime case). *Cf.* 82 Stat. 209 (1968) (Title I of Omnibus Crime Control and Safe Streets Act containing definition of organized crime). The presence of such language in other sections of the Organized Crime Control Act has accounted for the reluctance of some courts to impose an organized crime limitation on RICO. *See supra* note 38. Moreover, Congress has since eliminated these organized crime limitations. Pub. L. No. 94-64, 89 Stat. 373, 374 (1975); Pub. L. No. 98-473, 98 Stat. 3546 (1984). *See also infra* notes 123-24 and accompanying text (Dangerous Special Offenders law limited to habitual offenders, professional criminals, and organized crime violators).

¹¹⁸ *Cf. Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985) (RICO "is used against respected businesses allegedly engaged in a pattern of *specifically identified* criminal conduct. . . .") (emphasis added). By analogy, courts have properly rejected the proposition that an alleged pattern lacks continuity unless the crime is ongoing at the time the RICO suit is pending:

[S]uch a requirement would produce anomalous results. This approach would allow a party to maintain a RICO claim if he brought suit before the unlawful scheme had attained its objective. . . . This same interpretation . . . would deny a RICO cause of action in a case where the scheme had fully accomplished its goal. Yet it is the completed scheme that inflicts the greater harm and more strongly implicates the remedial purposes of RICO.

Bartcheck v. Fidelity Union Bank, 832 F.2d 36, 39 (3rd Cir. 1987); *see also Sun Sav. & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 194 n.5 (9th Cir. 1987).

trast to other federal laws employing pattern terminology, RICO neither requires other criminal episodes¹¹⁹ nor characterizes the pattern element in enhanced terms.¹²⁰ Instead, RICO only limits pattern by requiring at least two related predicates within ten years of each other.¹²¹

The attempts of *amici* to limit RICO to habitual or career criminals also ignore the structure of the Organized Crime Control Act of 1970.¹²² Title X of that Act, entitled the Dangerous Special Offenders law, already reaches habitual and career criminals.¹²³ In contrast to RICO, Title X's legislative history expressly emphasizes concepts such as "habitual" and "professional" criminals.¹²⁴ Title X is designed to be a potential sentence enhancer applicable to *all* federal felonies, including RICO, that involve aggravated forms of criminality.¹²⁵ Accordingly, it is illogical to read its enhancement concepts into RICO, which is actually subordinate to Title X. To do so restricts RICO only to Title X's vision of aggravated criminality, thereby improperly merging two separate titles of the same Act. Congress did not intend this result, since it used special language to limit the operation of a comparable pattern provision in Title X but

¹¹⁹ The habitual offender provision of the Special Dangerous Offenders law requires at least two prior offenses "committed on occasions different from one another." 18 U.S.C. § 3575(e)(1) (1982). Though this requirement does not modify the statute's pattern component, it is contained in a parallel provision of the law. Furthermore, section 3575(e)(2) of that statute, which utilizes pattern, requires that the pattern must have "constituted a substantial source of his income." See *Iannelli v. United States*, 420 U.S. 770, 787 (1975); *United States v. Felder*, 744 F.2d 18, 19 (3d Cir. 1984). See *infra* note 126 and accompanying text.

¹²⁰ Cf. 7 U.S.C. § 1712(a) (1982) ("consistent pattern"); 19 U.S.C. § 1673(a)(2)(A)(ii) (Supp. IV 1986) ("extraordinary pattern"); 20 U.S.C. § 1082(g)(2)(A)(i) (Supp. IV 1986) ("clear and consistent pattern"); 49 U.S.C. § 521(b)(2) (1982 & Supp. III 1985) ("serious pattern"); 49 U.S.C. § 1602(f) (1982) ("continuing pattern."); see also *supra* note 119.

¹²¹ See *supra* note 5. Though Congress recognized that more than two predicates will usually be required, the two-predicate minimum obviously contemplates the possibility of a two-act pattern. See *supra* note 30 and accompanying text. Furthermore, the *amici* fail to recognize that Congress, in effect, has defined pattern in terms of "continuity plus relationship." *Supra* text accompanying note 8. Therefore, the task is now to define "continuity plus relationship" rather than to define pattern.

¹²² Structure is relevant in reading RICO. *Agency Holding Corp. v. Malley-Duff & Assocs.*, 107 S. Ct. 2759, 2765 (1987); *Russello*, 462 U.S. at 22-23; *Turkette*, 452 U.S. at 582, 587.

¹²³ 18 U.S.C. § 3575 (1982).

¹²⁴ Senate OCCA Report, *supra* note 24, at 164-65; Organized Crime Control Act of 1979, H.R. REP. No. 1549, 91st Cong., 2d Sess. 61-62 (1970) [hereinafter House Report]. The legislative history to Title X also refers to "organized crime" offenders in connection with the sentence enhancement provision intended to apply to them. *Id.* In contrast, similar terminology does not appear in congressional reports addressing RICO's pattern element. See Senate OCCA Report, *supra* note 24, at 158; House Report, *supra*, at 4010, 4037.

¹²⁵ 18 U.S.C. § 3575(e) (1982). RICO could then *only* have an aggravated form of violation.

not in Title IX (RICO). Title X, in pertinent part, intends that "the pattern must be a substantial source of the defendant's income. . . ." ¹²⁶ Though no similar language appears in RICO or its legislative history, ¹²⁷ *amici* ask that the court read it into the statute. ¹²⁸ There is no basis for doing so. Moreover, even if Title X's version of habitual offender were incorporated into RICO, the Dangerous Special Offender law requires three independent convictions to qualify an individual for this status. ¹²⁹ Thus, a lifetime of crime is not required before an offender may be characterized as a habitual criminal. ¹³⁰ Under the *amici* position, however, three acts would virtually never constitute a pattern since three instances rarely characterize a person's overall conduct. ¹³¹

In contrast, Congress recognized that two predicates may not always qualify as a pattern but opted to address this element flexibly by declining to adopt a proposal calling for three predicates. ¹³² Rather than respect this flexibility, *amici* seek to unduly restrain the pattern element in two ways: 1) by arbitrarily precluding single episodes (involving multiple predicates) from qualifying as a pattern, *amici* disregard the possibility that the particular criminal activity or the enterprise itself may imply a threat of continuity; ¹³³ and 2) by requiring that a pattern must be characteristic of a defendant's affairs generally (and constitute a substantial portion thereof), *amici* seek to confine RICO to enterprises that are wholly corrupt. ¹³⁴ Ironically, this position constitutes the obverse of the argument, rejected by the Supreme Court in *United States v. Turkette*, that RICO only applies to legitimate businesses. ¹³⁵ In contrast, under the interpretation proposed by *amici*, white collar institutions would no longer be subject to RICO because the vast majority of their activity is ordinarily legitimate. ¹³⁶

¹²⁶ Senate OCCA Report, *supra* note 24, at 165; *see supra* note 119 and accompanying text.

¹²⁷ *See supra* note 5; Senate OCCA Report, *supra* note 24, at 158-59.

¹²⁸ *See supra* notes 107-15 and accompanying text.

¹²⁹ 18 U.S.C. § 3575(e)(1) (1982).

¹³⁰ Other habitual offender laws ordinarily do not require more than three prior offenses. *See, e.g.*, N. KITTREY & E. ZENOFF, SANCTIONS, SENTENCING, AND CORRECTIONS: LAW, POLICY, AND PRACTICE 632-37 (1981) (citing extensive authority).

¹³¹ *Cf.* FED. R. EVID. 406 advisory committee note (observing that "[c]haracter is a generalized description of one's disposition" and that habit "describes one's regular response to a repeated specific situation").

¹³² *See supra* notes 30 & 96 and accompanying text.

¹³³ *See supra* note 73 and accompanying text.

¹³⁴ *See* AICPA Brief, *supra* note 15, at 27 (illustrative RICO cases limited to corrupt organizations); NAM Brief, *supra* note 15, at 18-21 (same).

¹³⁵ *Supra* notes 37-38 and accompanying text.

¹³⁶ For example, a corporation may have a twenty-year record of profitability through wholly legitimate practices, but then be motivated by sudden economic pressures to engage in systemic fraud for six months. Under such circumstances, a long

Such a result is not justified from any standpoint. It ignores RICO's title, which extends to "Racketeer Influenced" as well as to "Corrupt Organizations."¹³⁷ It also disregards statutory definitions that obviously include white collar institutions as potential defendants and designate certain frauds as predicate offenses.¹³⁸ These provisions, which were recognized by the Supreme Court in *Sedima*,¹³⁹ are supported by extensive legislative history indicating an intent to reach white collar criminal activity.¹⁴⁰ For example, whereas bills preceding RICO focused either on licit or illicit enterprises,¹⁴¹ RICO addresses both types of organizations.¹⁴² Similarly, in contrast to RICO antecedents limiting predicate offenses to crimes closely associated with organized crime, RICO incorporated white collar offenses despite criticism that doing so creates a statute of inordinate breadth.¹⁴³ Congress extended RICO to white collar activity because it recognized that persons such as accountants, bankers, and lawyers also engage in extensive crime.¹⁴⁴ Thus, Congress viewed RICO as an opportunity for widespread reform.¹⁴⁵ This phenomenon is reflected throughout the Organized Crime Control Act of 1970, as Congress expanded several other titles be-

record of legitimacy ought not preclude the application of RICO. *Cf.* *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1303-05 (7th Cir. 1987) (nineteen separate acts causing injury over seven-month period constitute pattern). Nor should RICO be precluded if a corporation restricts its illicit activities to one percent of its overall business practices. *See infra* notes 152-61 and accompanying text.

¹³⁷ *See* Blakey & Gettings, *supra* note 18, at 1025 n.91 (discussing the development and significance of RICO's title).

¹³⁸ *See supra* notes 25-27 & 38 and accompanying text. In contrast, by focusing on the so-called professional criminal, the model proposed by *amici* predominantly contemplates only individuals being sued or prosecuted. Furthermore, the proposal is likely to raise definitional problems akin to those that originally accounted for rejection of an organized crime limitation. *See supra* notes 32-33 & 38 and accompanying text.

¹³⁹ *See supra* notes 85-89 and accompanying text.

¹⁴⁰ *See supra* notes 31-33 and accompanying text.

¹⁴¹ *See* Goldsmith, *supra* note 18, at 777, 782-83. *Compare* S.2187, 89th Cong., 1st Sess., 111 CONG. REC. 14,680 (1965) (illicit organization), *with* S.1623, 91st Cong., 1st Sess., 115 CONG. REC. 6992 (1969) (licit enterprise).

¹⁴² *See supra* note 25 and accompanying text.

¹⁴³ *See supra* notes 26 & 31 and accompanying text.

¹⁴⁴ *See* 113 CONG. REC. 17,998 (1967) (statement of Senator Hruska, RICO co-sponsor, mentioning infiltration and corruption of brokerage houses and accounting firms); 113 CONG. REC. 17,950 (1967) (statement of Representative McClory, RICO co-sponsor, observing that "business racketeers" and "criminal cartels employ staffs of attorneys, accountants, and business consultants" to "protect themselves from suit and prosecution"); 116 CONG. REC. 592 (1970) (statement of Senator McClellan, RICO co-sponsor, providing list of corrupted businesses which included accounting, banking, insurance, and securities firms); *see also* *Papai v. Cremosnik*, 635 F. Supp. 1402, 1411 (N.D. Ill. 1986) ("to the extent RICO is used as a weapon against 'white collar crime,' this purpose is not contrary to the intent of Congress but is in fact one of the 'benefits' Congress saw the Act as providing").

¹⁴⁵ *See supra* note 33 and accompanying text.

yond their initial organized crime context.¹⁴⁶

Furthermore, although Senator John L. McClellan, RICO's principal sponsor, intended only an "incidental"¹⁴⁷ reach beyond "organized crime," he never considered organized crime to be limited to the Mafia.¹⁴⁸ Nor would there be any reason to exclude organized white collar crime from a statute designed to attack enterprise criminality.¹⁴⁹ Indeed, no other federal statute, conceived in response to organized crime, has been applied in so limited a manner.¹⁵⁰ On the contrary, the Court has not hesitated to apply such legislation to defendants not associated with traditional organized crime.¹⁵¹

RICO has been used to successfully attack organized white col-

¹⁴⁶ See, e.g., *United States v. Schell*, 692 F.2d 672, 674 (10th Cir. 1982) (Title X, 18 U.S.C. § 3575); *United States v. Box*, 530 F.2d 1258, 1265 n.19 (5th Cir. 1976) (Title VIII, 18 U.S.C. § 1955); *United States v. Schwanke*, 598 F.2d 575, 578 (10th Cir. 1979) (Title XI, 18 U.S.C. § 841-48). See also *supra* note 33 and accompanying text; *Oversight on Civil RICO Suits: Hearings Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 430 (1985) [hereinafter *Oversight Hearings on Civil RICO Suits*] (statement of National Association of Attorneys General—National District Attorneys Association) (reviewing legislative history).

¹⁴⁷ AICPA Brief, *supra* note 15, at 14 (quoting Senator McClellan). Contrary to the AICPA Brief, the term "incidental" does not necessarily mean "minor"; it also means "concomitant." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1142 (1971).

¹⁴⁸ See COMMISSION ON THE REVIEW OF NATIONAL POLICY TOWARD GAMBLING, GAMBLING IN AMERICA 181-82 (1976) (statement of Senator McClellan) ("[I]n none of the hearings or in the processing of legislation in which I have been involved has the term [organized crime] been used in this circumscribed fashion.").

¹⁴⁹ See *infra* notes 159-60 and accompanying text.

¹⁵⁰ See Blakey, *Definition of Organized Crime in Statutes and Law Enforcement Administration*, PRESIDENT'S COMMISSION ON ORGANIZED CRIME, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL, THE IMPACT: ORGANIZED CRIME TODAY 511-80 (1986) (extensive analysis of judicial decisions interpreting statutes aimed at organized crime).

¹⁵¹ For example, although the Hobbs Act, 18 U.S.C. § 1952 (1982), originated as anti-racketeering legislation, the Supreme Court has declined to require proof of some form of judicially defined racketeering as a prerequisite to conviction. *United States v. Culbert*, 435 U.S. 371, 373-77 (1978). In reaching this result, the Court emphasized the absence of statutory text or legislative history suggesting congressional intent to limit the law to organized crime, and stated that the absence of a statutory definition of racketeering could create problems of vagueness. *Id.* Significantly, RICO defines racketeering in terms not limited to traditional organized crime, *supra* note 26 and accompanying text, and RICO's sponsors expressed similar concerns about the constitutionality of legislation limited to organized crime. See *supra* note 32 and accompanying text. See also *Perrin v. United States*, 444 U.S. 37, 46-48 (1979) (Statute prohibiting interstate travel "in aid of racketeering enterprises" is not limited to organized crime and includes white collar criminal activity); *United States v. Fabrizio*, 385 U.S. 263, 265-67 (1966) (anti-gambling statute, enacted as part of Attorney General's organized crime package, is not limited to traditional organized crime; "[a] statute limited without a clear definition of the covered group, as would be the case with § 1953 under appellee's view of it, might raise serious constitutional problems").

As *amici* offer no definition of professional or career criminal, similar vagueness problems would arise if such terminology were read into RICO. In this respect, it would be inappropriate to rely on Title X's definition because Congress did not use these concepts in RICO. See *supra* notes 123-24 and accompanying text.

lar criminals including politicians,¹⁵² judges,¹⁵³ lawyers,¹⁵⁴ accountants,¹⁵⁵ businesses, and businessmen.¹⁵⁶ However, because such cases usually involve individuals or entities whose activities are predominantly licit, similar efforts would fail under the definition of pattern advanced by *amici*.¹⁵⁷ The facts of *H.J. Inc.* illustrate this unfortunate result. The complaint alleges that, during a period encompassing several years, Northwestern Bell bribed members of the Minnesota Public Utilities Commission. Although the bribes given to each of several commissioners allegedly exceeded \$100,000, *amici* argue that RICO does not apply because this activity represents an insubstantial portion of Northwestern Bell's overall legitimate business.¹⁵⁸ This view of pattern is so restrictive that it may even threaten the application of RICO against traditional organized crime activities.¹⁵⁹ Ultimately, however, the white collar offender

¹⁵² See, e.g., *United States v. Thompson*, 685 F.2d 993, 994-95 (6th Cir.), *cert. denied*, 459 U.S. 1072 (1982) (office of the governor); *United States v. Long*, 651 F.2d 239, 241 (4th Cir.), *cert. denied*, 454 U.S. 896 (1981).

¹⁵³ See, e.g., *United States v. Stratton*, 649 F.2d 1066, 1074-75 (5th Cir. 1981) (Florida's Third Judicial Circuit); *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985) (state judge prosecuted under Operation Greylord).

¹⁵⁴ See, e.g., *United States v. Jannotti*, 501 F. Supp. 1182, 1185-86 (E.D. Pa. 1980) (lawyers and city council members), *rev'd on other grounds and conviction reinstated*, 673 F.2d 578 (3d Cir. 1982).

¹⁵⁵ See *Schact v. Brown*, 711 F.2d 1343 (7th Cir.), *cert. denied*, 464 U.S. 1002 (1983); *Blakey & Cessar*, *supra* note 4, at 566-67 n.187 (noting accountant's multimillion dollar settlement in major fraud litigation).

¹⁵⁶ See, e.g., *United States v. Hartley*, 678 F.2d 961 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983); *United States v. Marubeni Am. Corp.*, 611 F.2d 763, 765-66 (9th Cir. 1980) (foreign corporations).

¹⁵⁷ The following excerpt from an *amicus* brief illustrates that this result is precisely what RICO opponents seek to achieve:

The instant case raises . . . the following question: does a plaintiff (or a prosecutor) state a case under . . . (RICO) . . . by pleading that certain officials and agents of a business corporation—which, in fact provides a useful, lawful service . . . have repeatedly over a number of years committed a particular type of criminal wrong . . . in order to further the corporation's business interests? We submit that the answer to that question is "no."

AFL-CIO Brief, *supra* note 15, at 3. If the answer is no, the battle against white collar crime will suffer an unprecedented setback. For example, RICO would not be applicable to the recent Pentagon procurement scandal because the activities of most defense contractors are predominantly licit. See generally *The Enemy Within*, U.S. NEWS & WORLD REP., July 4, 1988, at 16. Indeed, an adverse ruling on the pattern issue may result in previous convictions being vacated. See, e.g., *United States v. Murphy*, 836 F.2d 248, 254 (6th Cir. 1988); *United States v. Gimbel*, 830 F.2d 621, 627 (7th Cir. 1987).

¹⁵⁸ AICPA Brief, *supra* note 15, at 28; NAM Brief, *supra* note 15, at 18.

¹⁵⁹ For example, organized crime's infiltration of a business does not necessarily result in the enterprise subsequently being conducted predominantly through illicit means. Instead, the enterprise may serve as a legitimate front for money laundering or other illegal activities. See, e.g., THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME—ANNOTATIONS AND CONSULTANTS' PAPERS, TASK FORCE ON ORGANIZED CRIME 4 (1967); see also

stands to receive the most benefit from an unduly narrow interpretation of pattern. However, given both the gravity of white collar crime today¹⁶⁰ and RICO's explicit text,¹⁶¹ excluding such offenders from coverage is intolerable.

Additional factors militate against an organized-crime limitation for pattern. First, regularity, as an aspect of pattern, has not been applied restrictively, even by the circuit court initially advancing this limitation. Rather, regularity of criminal activity is one of several factors determining the existence of pattern.¹⁶² Second, since the word "pattern" may properly have a variety of meanings,¹⁶³ there is no basis in law for giving it the narrowest possible interpretation—especially in a statute which is governed by a liberal construction clause¹⁶⁴ and which anticipates different meanings in different sections.¹⁶⁵ Third, to the extent that *amici* claim that pat-

THE CASH CONNECTION: ORGANIZED CRIME, FINANCIAL INSTITUTIONS, AND MONEY LAUNDERING: INTERIM REPORT, PRESIDENT'S COMMISSION ON ORGANIZED CRIME 11, 26 (1984) (involvement of legitimate businesses in money laundering). Significantly, money laundering has recently been added as a RICO predicate offense. 18 U.S.C. § 1956 (Supp. IV 1986). Bankruptcy bustouts, though classic organized crime activity, might likewise fail to qualify as a pattern. See *supra* note 97 and accompanying text.

¹⁶⁰ See, e.g., Goldsmith, *supra* note 54, at 832-34 (noting that fraud losses exceed \$200 billion annually); *Oversight Hearings on Civil RICO Suits*, *supra* note 146, at 633, 647-50 (statement of National Association of Attorneys General) (emphasizing lack of prosecutorial resources). The Supreme Court is aware of the extent of the problem: "White-collar crime is 'the most serious and all-pervasive problem in America today.' Although this statement was made in 1980, there is no reason to think the problem has diminished in the meantime." *Braswell v. United States*, 108 S. Ct. 2284, 2294 n.9 (1988) (citation omitted).

¹⁶¹ See *supra* notes 25-26 & 38 and accompanying text.

¹⁶² See *S.K. Hand Tool Corp. v. Dresser Indus.*, 852 F.2d 936, 940 (7th Cir. 1988) (rejecting "multiplicity of schemes as the definite touchstone").

¹⁶³ See *supra* notes 1, 73 & 93 and accompanying text. Indeed, given the variety of potential enterprises, racketeering activities, and prohibitions that arise under RICO, the term pattern may occur in at least 240 different contexts. Brief of *Amici Curiae* Attorney General Robert K. Corbin, et. al, at 10 n.17 ("'Pattern' may be used in RICO violation in at least 240 different contexts [3 (sections) x 5 (kinds of enterprises) x 4 (kinds of predicate offenses) x 4 (roles in violations) = 240]."). The definition of pattern must be sufficiently accommodating to work well in each of these contexts. Significantly, it is not unusual for the same word to have different meanings in different contexts. See, e.g., *Skelly Oil Co. v. Phillips Petroleum*, 339 U.S. 667, 678 (1950) ("The same word, in different settings, may not mean the same thing."); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 414 (1819) ("Such is the character of human language, that no word conveys to the mind in all situations, one single definite idea . . ."); *Holmes*, *supra* note 1, at 417-20.

¹⁶⁴ See *supra* notes 23 & 88 and accompanying text. The liberal construction directive is critical because, given the choice between a narrow or broad construction of any element, it necessitates choosing the broader interpretation. See *supra* note 88 (citing cases adopting broad interpretation).

¹⁶⁵ See *supra* notes 1, 73, 93 & 163 and accompanying text. If pattern means only "characteristic" or "typical" conduct, *supra* note 104 and accompanying text, RICO sections 1962(a), (b), and (d) will often be rendered nullities just as they would be under the multiple scheme test. *Supra* notes 93 & 159 and accompanying text.

tern must be confined to quell civil RICO abuse,¹⁶⁶ their argument to the Court is misdirected. Such issues require legislative action rather than judicial reinterpretation of a basic statutory element.¹⁶⁷ Moreover, the record indicates that claims of abuse and judicial overload made by RICO opponents have been exaggerated in a blatant effort to avoid statutory liability.¹⁶⁸ Fourth, restricting pattern under RICO may likewise curtail similar terminology in other federal legislation.¹⁶⁹ Thus, the resolution of this issue stands to have systemic consequences. For these reasons, this latest attempt to re-write¹⁷⁰ the RICO statute should be rejected.

Fortunately, the pattern issue may be resolved without effects adverse to RICO or other federal laws. An appropriate solution may be derived from both RICO's text and other applications of pattern terminology in federal jurisprudence.

V

THE MEANING OF PATTERN

Ironically, most attempts to resolve the pattern issue have failed to consider *all* available statutory text. The definition of pattern contained in section 1961(5) is only a starting point. Because the provision "requires at least two acts of *racketeering* activity,"¹⁷¹ one must also consider the term "racketeering activity." RICO defines racketeering activity by providing a list of predicate crimes in section 1961(1). Each crime designated as racketeering activity is characterized as either an "act," "threat," or "offense."¹⁷² This choice

¹⁶⁶ NAM Brief, *supra* note 15, at 22-26; WLF Brief, *supra* note 15, at 9.

¹⁶⁷ See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499-500 (1985). Ironically, the most recent proposals to reform RICO do not seek to restrict the pattern element. See *Pattern of Confusion*, *supra* note 2, at 1783. If the *amici* pattern arguments were legitimate, one would expect pattern to be a central focus of their lobbying efforts. The absence of such an effort belies their arguments before the Supreme Court.

¹⁶⁸ See, e.g., Goldsmith, *supra* note 54, at 838-48; Goldsmith & Keith, *Civil RICO Abuse: The Allegations in Context*, 1986 B.Y.U. L. REV. 55, 68-71 (abuse issue has been grossly misrepresented); Note, *supra* note 57, at 874-82. Note that the number of RICO filings has leveled off at approximately 1000 per annum. N.Y. Times, Aug. 1, 1988, at 1, col. 5 & 84, col. 6. Moreover, approximately sixty percent of these cases are also based on other jurisdictional grounds. Blakey & Cessar, *supra* note 4, at 619. See chart on next page. Thus, such litigation does not overwhelm federal courts.

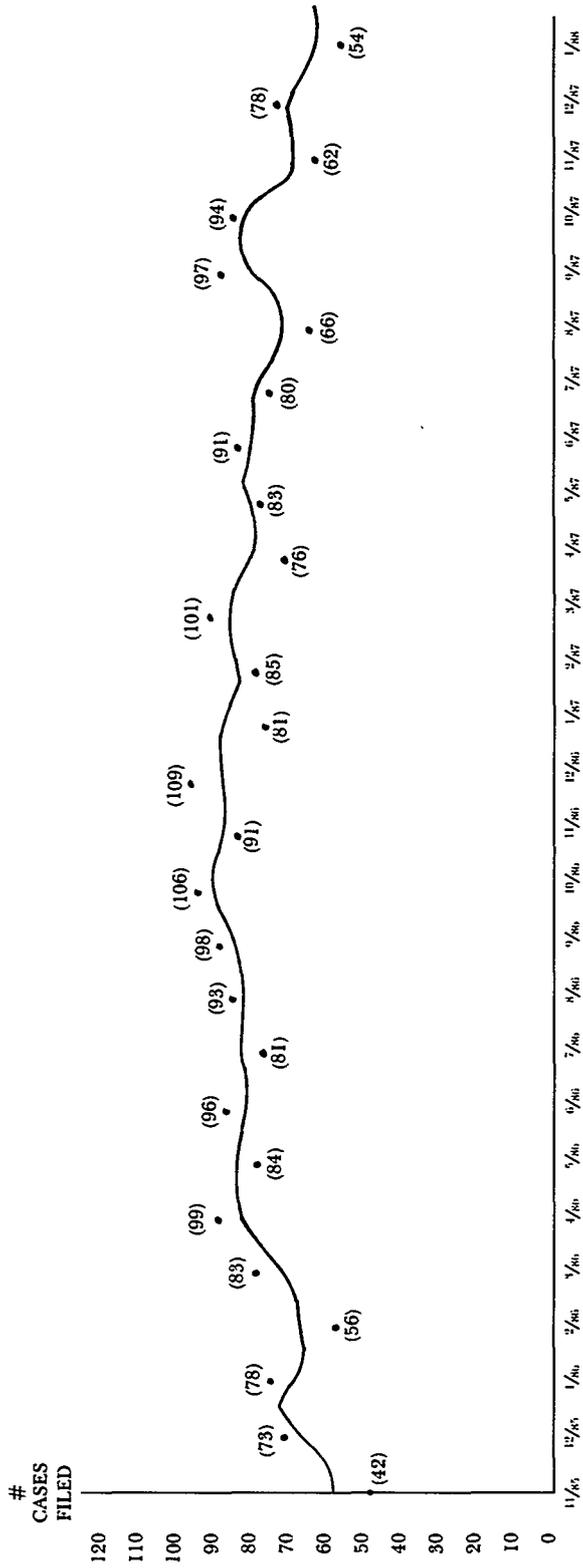
¹⁶⁹ See *supra* note 120 and accompanying text; *infra* notes 187-91 and accompanying text.

¹⁷⁰ In effect, *amici* propose re-writing the statutory definition of "pattern" so that it would modify "person" as follows: "'person' means [includes] any individual or entity capable of holding a legal or beneficial interest in property and *who habitually or typically engages in professional or organized crime-type criminal activity.*" See also *supra* note 55.

¹⁷¹ 18 U.S.C. § 1961(5) (1982).

¹⁷² 18 U.S.C. § 1961(1) (Supp. III 1985). Although some might consider the terms "act" and "offense" to be interchangeable, Congress must have intended them to have different meanings. The text of RICO is very specific, particularly in its definitional sec-

RICO CASES FILED NOV. 85 - JAN. 88



Total—
 26 Months - 2195
 (84 per month)
 11-85 through 1-88

of terminology is important because, under some federal laws, a single criminal *act* may produce numerous *offenses*.¹⁷³ As applied to RICO, this doctrine means that pattern may be absent when multiple "offenses" only effect a single act of racketeering activity.¹⁷⁴

This statutory interpretation precludes the application of RICO to most routine commercial disputes.¹⁷⁵ Such disputes typically involve numerous communications, each of which may qualify as a separate "offense" under federal mail and wire fraud statutes.¹⁷⁶ Indeed, federal fraud law affords a classic example of how a single criminal act may engender multiple offenses.¹⁷⁷ However, because RICO characterizes mail or wire fraud as an "act" rather than as an "offense," the statute does not contemplate each violation automatically constituting a separate "act" of racketeering. Instead, when such communications produce but a single injury, they constitute only a single act of racketeering and ordinarily do not make a pattern.¹⁷⁸

Though the preceding analysis eliminates many potential RICO cases, it does not itself resolve the question of when multiple criminal *acts* constitute a pattern. The Supreme Court, however, provided insight into this question even before *Sedima*. In *United States*

tion. See *Iannelli v. United States*, 420 U.S. 770, 789 (1975) ("The [Organized Crime Control] Act is a carefully crafted piece of legislation."); 116 CONG. REC. 18,912 (1970) (statement of Senator McClellan ("carefully drafted" bill); *id.* at 35,204-05 (statement of Representative Poff) (in his "experience, no single measure [has] received more thorough consideration by a legislative committee than this bill."). The careful choice of terminology is reflected by the different meanings given to words such as "means" and "includes" in the definitions set forth in section 1961. See *Blakey & Cessar*, *supra* note 4, at 241 n.16 (considering difference in terminology); *Heivering v. Morgan's*, 293 U.S. 121, 125 n.1 (1934) (distinguishing between the legislative use of these terms).

¹⁷³ See *infra* note 177 and accompanying text.

¹⁷⁴ *Cf.* *Blakey & Cessar*, *supra* note 4, at 537 n.37 ("no reason exists when examining the 'acts' that make up an alleged 'pattern' to focus on a *purely* jurisdictional 'act,' that is, a mailing, a use of wire communication, or interstate or foreign transportation"). Though similar analysis has been rejected by a few pre-*Sedima* decisions, see *United States v. Weatherspoon*, 581 F.2d 595, 601-02 (7th Cir. 1978); *Noland v. Gurley*, 566 F. Supp. 210, 217 (D. Colo. 1983), these cases failed to consider the difference between the terms "offense" and "act." Moreover, these decisions were rendered at a time when the federal courts assumed—without analysis—that two predicate crimes, related either to each other or to the enterprises, automatically constituted a pattern. See *supra* notes 44-45 and accompanying text. *Sedima*, however, mandates that pattern must be approached in more analytical terms. See *supra* notes 7-8 and accompanying text.

¹⁷⁵ Thus, this analysis provides an important supplement to the Supreme Court's recent decision holding RICO claims subject to arbitration agreements. *Shearson-American Express v. McMahon*, 107 S. Ct. 2332, 2343-46 (1987).

¹⁷⁶ See *supra* note 65 and accompanying text.

¹⁷⁷ See 18 U.S.C. § 1341 (1982); *supra* note 64 and accompanying text.

¹⁷⁸ See *Blakey & Cessar*, *supra* note 4, at 537 n.37. *S.K. Hand Tool v. Dresser Indus.*, 852 F.2d 936, 942-43 (7th Cir. 1988) (emphasizing the importance of each act causing injury and reviewing cases in light of this concept).

v. Turkette,¹⁷⁹ the Court said that "pattern of racketeering activity is . . . a series of criminal acts. . . ." ¹⁸⁰ RICO's legislative history supports this view. In considering pattern, Congress stressed only that the acts must not be "sporadic" or "isolated."¹⁸¹ When combined with the notion of "continuity plus relationship," the concept of pattern as a series of related acts emerges. The use of pattern in Title X of the Organized Crime Control Act reinforces this analysis. Though *amici* suggest otherwise, *Sedima* properly considered Title X to be a "useful" reference: "[C]riminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." ¹⁸²

This description combines relationship and continuity in readily understandable terms.¹⁸³ For this reason, it has also been used to define pattern in many state RICO laws.¹⁸⁴ Though primarily il-

¹⁷⁹ 452 U.S. 576 (1981).

¹⁸⁰ *Id.* at 583.

¹⁸¹ See *supra* notes 8 & 99 and accompanying text. Significantly, Congress did not use the terms "habitual" or "typical" in connection with "pattern of racketeering activity."

¹⁸² 473 U.S. at 496 n.14 (quoting 18 U.S.C. § 3575(e) (1982)). *Amici* criticize the Supreme Court's suggestion on the grounds that RICO is harsher than Title X, and therefore demands a more stringent pattern requirement. AICPA Brief, *supra* note 15, at 24. This argument, however, disregards the statutory structure of the Organized Crime Control Act. See *supra* notes 122-29 and accompanying text. Moreover, the legislative record suggests that Congress intended pattern to have similar applications to both Title IX and Title X. Congress adopted section 3575(e) in response to criticism by the ABA that Title X, as proposed, failed to define pattern. *Organized Crime Control Hearings*, *supra* note 96, at 698 (statement of ABA President Edward L. Wright); 116 CONG. REC. 35,202 (1970). Congress adopted a description of pattern, proposed by the ABA, that was drawn from the Senate Report and designed to provide more "specificity." *Id.*; see Senate OCCA Report, *supra* note 24, at 165. Since the description uses the word "if" and is essentially illustrative, there is no reason to believe it does not apply equally to Title IX. In contrast, the Dangerous Special Offenders law defined other provisions in terms of "means" or "includes." 18 U.S.C. § 3575(e) ("substantial source of income means"; "special skill or expertise in criminal conduct includes"). Section 3575(e) has since been repealed and replaced by a comparable provision in the new sentencing guidelines, 28 U.S.C. § 994(i)(2) (Supp. III 1985).

¹⁸³ One commentator erroneously suggests that this provision is of limited value in interpreting pattern under RICO because section 3575(e) deals only with the "relationship" prong of pattern. Black, *Racketeer Influenced and Corrupt Organizations (RICO)—Securities and Commercial Fraud as Racketeering Crime after Sedima: What is a "Pattern of Racketeering Activity"?*, 6 PACE L. REV. 365, 383 (1986). However, since section 3575(e) also requires that the crimes not be "isolated," continuity is addressed as well. *Cf. Moorehead v. State*, 383 So. 2d 629, 630 (Fla. 1980) (interpreting similar language of Florida RICO to require continuity).

¹⁸⁴ See, e.g., FLA. STAT. ANN. § 772.02 (1986) & § 895.02 (1985); GA. CODE ANN. 16-14-3 (1983); IDAHO CODE § 18-7803 (1981). In rejecting a vagueness challenge to the Florida law based on the pattern element, the Florida Supreme Court noted that the state definition of pattern was derived from federal RICO. *Moorehead v. State*, 383 So. 2d 629, 630 (Fla. 1980). In doing so, *Moorehead* cited pre-*Sedima* federal cases rejecting

lustrative,¹⁸⁵ this language clearly contemplates that any *series of related crimes* will qualify as a pattern.¹⁸⁶ This view of pattern is consistent with ordinary usage and other federal jurisprudence. For example, recently enacted money laundering legislation penalizes violators engaged in "a pattered of . . . illegal activity."¹⁸⁷ Courts have uniformly held that pattern in this context "consists of repeated violations or a series of violations."¹⁸⁸ In addition, the Kingpin drug statute uses the term "series" to characterize continuing activity comparable to RICO.¹⁸⁹ Likewise, various civil rights laws contain pattern provisions or parallel requirements that may be satisfied by proof of a series of discriminatory acts.¹⁹⁰ Finally, under

similar challenges to RICO, and effectively equated pattern in RICO with its embodiment in Title X. *Id.* See *Florida and Federal RICO*, *supra* note 45, at 345 n.117 (1987). Because the states sought to avoid litigation over pattern, they often chose to define this element specifically, *see, e.g.*, FLA. STAT. ANN. § 772.02 (1986) & § 895.02 (1985); GA. CODE ANN. § 16-14-3 (1983); IDAHO CODE § 18-7803 (1981) (using the term pattern "means"). Though federal courts have often ignored the difference in terminology between RICO and state laws, *supra* note 59, state judges have been truer to the text of their statutes. For example, Florida's definition of pattern is based on the text of Title X's description of pattern. FLA. STAT. ANN. § 772.02 (1986) & § 895.02 (1985). The Florida Supreme Court has applied this language in a straightforward manner to include both the continuity and relationship prongs of pattern. *See Bowden v. State*, 402 So. 2d 1173, 1174 (Fla. 1981). *Bowden* observed that the continuity plus relationship standard serves to confine RICO to professional criminals. *Id.* Since Florida's statute is derived from Title X's view of who is a professional criminal, the Court's observation properly reflects statutory text. In addition, the court's analysis is preferable to the *amici* approach which seeks to make professional criminal status the standard for pattern, thereby reversing the means with the ends of analysis. Thus, after *Bowden*, the Florida statute has neither been limited to "organized crime" nor held to exclude "garden variety fraud." *Banderas v. Banco Central del Ecuador*, 461 So. 2d 265, 269-70 (Fla. App. 3d Dist. 1985).

¹⁸⁵ See *supra* note 186.

¹⁸⁶ See generally *United States v. DiFrancesco*, 449 U.S. 117 (1980). The Court, however, noted that the issue of the applicability of § 3575 was not before it. *Id.* at 123 n.7. See also *United States v. Kerr*, 686 F. Supp. 1187 (W.D. Pa. 1988).

¹⁸⁷ 31 U.S.C. § 5322(b) (1982).

¹⁸⁸ See, *e.g.*, *United States v. Bank of New England*, 821 F.2d 844, 852-53 (1st Cir.), *cert. denied*, 108 S. Ct. 328 (1987); *United States v. Valdes-Guerra*, 758 F.2d 1411 (11th Cir. 1985); *United States v. Dickinson*, 706 F.2d 88, 91-93 (2d Cir. 1983). See also *supra* text accompanying note 1 (ordinary usage).

¹⁸⁹ 21 U.S.C. § 848(b)(2) (1982). The Supreme Court has indicated that "series" under this law requires the commission of three acts. *Garrett v. United States*, 471 U.S. 773, 774 (1985).

¹⁹⁰ For example, in civil rights suits against government entities, courts have routinely held that a "series of incidents" may provide a basis for inferring the existence of a "custom or policy" of discrimination. See *Henry v. Farmer City State Bank*, 808 F.2d 1228, 1237 (7th Cir. 1986); *Shaw v. California Dep't of Alcoholic Beverage Control*, 788 F.2d 600, 610 (9th Cir. 1986) (may infer pattern from series); *Mustfov v. Rice*, 663 F. Supp. 1255, 1261 (N.D. Ill. 1987) (same); *Gomez v. City of West Chicago*, 506 F. Supp. 1241, 1243, 1245 (N.D. Ill. 1981) (seven incidents provide basis for inference); *Diem v. City of San Francisco*, 686 F. Supp. 806 (N.D. Cal. 1988). Similarly, the Supreme Court has interpreted "pattern or practice" in a variety of civil rights laws to require "more than the mere occurrence of isolated . . . or sporadic discriminatory acts." *International*

the law of evidence, series proof is often used to establish a pattern of conduct.¹⁹¹ Accordingly, since "series" is an appropriate mechanism for arriving at pattern, "continuity" is satisfied by proof of a series of predicate "acts." In addition, to meet the "relationship" aspect of pattern, the acts must be related either to the enterprise or to each other.¹⁹²

This interpretation, however, fails to address two situations. First, RICO clearly contemplates the possibility of two predicates qualifying as a pattern¹⁹³ yet two acts do not make a series.¹⁹⁴ The definition of pattern, therefore, must accommodate the possibility of a two-predicate pattern. Second, because the preliminary definition of pattern focuses only on racketeering activity that RICO treats as an "act,"¹⁹⁵ the definition must also address activity that

Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977) (emphasis added); *see also* *Bazemore v. Friday*, 478 U.S. 385 (1986). While the Court has also stated that discrimination must be "the company's standard operating procedure—the regular rather than the unusual practice," *International Bhd. of Teamsters*, 431 U.S. at 336, it has cited with approval appellate decisions and legislative history interpreting pattern in pragmatic ordinary terms. *Id.* at 336 n.16 (noting intent to give pattern its "usual" meaning rather than treating it as a "term of art"); *see* *United States v. Jacksonville Terminal Co.*, 451 F.2d 418, 438, 441 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972); *United States v. Ironworkers Local 86*, 443 F.2d 544, 552 (9th Cir.), *cert. denied*, 404 U.S. 1023 (1971); *United States v. West Peachtree Tenth Corp.*, 437 F.2d 221, 227 (5th Cir. 1971); *United States v. Mayton*, 335 F.2d 153, 158-59 (5th Cir. 1964). Thus, Congress and the Court intend "pattern" to be flexibly applied. This flexibility is illustrated by the Supreme Court's conclusion that merely five incidents may constitute a "continuing pattern" that extends the limitations provision of such laws. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380-81 (1982). Moreover, the legislative history to the civil rights laws suggests that, if discrimination is ongoing, a "pattern" exists even if the discrimination is confined to a branch of a large business. *See* 110 CONG. REC. 15,895 (1964) (statement of Representative Celler).

¹⁹¹ *See, e.g.*, *Sherrod v. Berry*, 827 F.2d 195, 206 (7th Cir. 1987); *United States v. Birkenstock*, 823 F.2d 1026, 1027-28 (7th Cir. 1987); *United States v. Faulkner*, 538 F.2d 724, 728 (6th Cir. 1976).

¹⁹² *See, e.g.*, *United States v. Weisman*, 624 F.2d 1118, 1121-23 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980); *United States v. Bright*, 630 F.2d 804, 830 n.47 (5th Cir. 1980). This interpretation of pattern is proper, and is consistent with the judiciary's rejection of the common scheme as a prerequisite to pattern. *Supra* notes 42-43. As an ABA study group recognized:

Confining the statute's application to those patterns where a direct relationship existed between each of the predicate offenses would limit the application of RICO to a single offenses pattern, including a narrow range of cognate or subservient offenses. For example, it might only be possible to combine into a single pattern drug offenses and violence or corruption offenses, where the violence or corruption was used to advance the drug activity. . . . [T]his . . . would be unwise. Modern criminal organizations that are, in effect, conglomerates of crime involve a wide range of offenses; they should not be beyond the reach of the statute.

AMERICAN BAR ASSOCIATION, SECTION ON CRIMINAL JUSTICE, COMMITTEE ON RICO, MODEL STATE LEGISLATION ON SOPHISTICATED CRIMINAL ACTIVITY 36-37 (1985).

¹⁹³ *See supra* notes 30, 96 & 132 and accompanying text.

¹⁹⁴ *See supra* note 189.

¹⁹⁵ *See supra* notes 171-72 and accompanying text.

RICO characterizes as an "offense" or a "threat." Fortunately, the same solution resolves both of these needs. Because continuity or *its threat* may also be inferred from either the nature of the crime or the enterprise itself,¹⁹⁶ these factors must be added to make the definition of pattern all-inclusive. Thus, pattern means two or more predicates that 1) are related either to each other or to the enterprise; and 2) constitute a series of acts or otherwise pose a threat of continuity.

This definition of pattern has many advantages. First, it is based directly on statutory text and legislative history. Second, it conforms to other definitions of pattern in federal law. Third, it is easy to apply. Fourth, it works equally well under each prohibition imposed by RICO. Finally, properly applied, it provides a way to curtail RICO's scope without impeding the statute's purpose.¹⁹⁷

CONCLUSION

Justice Cardozo once wrote that "[c]onsequences cannot alter statutes, but may help to fix their meaning. Statutes must be so construed, if possible, that absurdity and mischief may be avoided."¹⁹⁸ If RICO is interpreted accordingly, the multiple scheme test deserves to be rejected for its absurdity, and the proposed organized crime limitation rejected for its mischief.

The enactment of RICO reflected a legislative choice to mount an aggressive attack on enterprise criminality. Congress intended that white collar criminals, engaged in a course of enterprise violations, be subject to RICO liability. The statute's opponents seek to avoid this result through an ideological assault designed to constrain the pattern element. If RICO is to have an ideology, however, it must be that *all* who engage in enterprise criminality are subject to sanction.¹⁹⁹ The pattern element, when properly understood, can facilitate this goal without improperly expanding RICO's reach. Given the lower courts' failure to implement this legislative design, the responsibility to do so now falls upon the Supreme Court.

¹⁹⁶ See *supra* notes 1, 73, 93 & 97 and accompanying text. Properly applied, these factors would not convert an ordinary business dispute, *supra* note 66, into a RICO claim. Cf. *supra* note 69 and accompanying text.

¹⁹⁷ Cf. *supra* notes 73, 93, 163 & 165 and accompanying text. The proposed definition also works well with respect to the procedural consequences of pattern. See *supra* note 4.

¹⁹⁸ *Matter of Rouss*, 221 N.Y. 81, 91, 116 N.E. 782, 785 (1917).

¹⁹⁹ See *supra* notes 32-33 and accompanying text. Cf. *United States v. Carter*, 493 F.2d 704, 708 (2d Cir. 1974) ("We all stand equal before the bar of criminal justice, and the wearing of a white collar . . . does not preclude the organized pursuit of unlawful profit.").