

CRIMINAL RELATIONSHIPS: VERTICAL AND HORIZONTAL RELATEDNESS IN CRIMINAL RICO

INTRODUCTION

The Racketeer Influenced and Corrupt Organizations Act (RICO)¹ has been an immensely successful federal law in the fight against crime in the United States. The most extensively used provision of that act is 18 U.S.C. § 1962(c). The text of § 1962(c) reads: “It shall be unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.”² This Note considers Second Circuit doctrine under the “pattern of racketeering activity” requirement. In particular, this Note will analyze the horizontal and vertical relatedness elements developed by the Second Circuit following the Supreme Court’s pronouncement that a “pattern” requires “continuity plus relationship.”³ In short, horizontal relatedness is the requirement that there be an interrelationship *between* the crimes that form predicate offenses under RICO. Vertical relatedness is the notion that those same offenses must be related to the RICO enterprise. The ultimate conclusion is that a clear distinction between these elements is a desirable limit on RICO’s breadth, but that the Second Circuit’s use of indirect relation has erased the boundary between these two elements.

Judicial interpretations of RICO are not only permissible, but also desirable. RICO is a broadly written statute. Coupled with Congress’s silent approval of its broad application by the courts, the only possible limits on the statute will come from judicial interpretations of its expansive terms. This Note will argue that the elements of horizontal and vertical relatedness developed by the Second Circuit act as a limit on RICO. Keeping these elements distinct is not only desirable, but also preserves the effectiveness of RICO.

Part I addresses the history of RICO and how the relationship prong of the Supreme Court’s “continuity plus relationship”⁴ test has evolved into

1. Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–1968 (2006).

2. 18 U.S.C. § 1962(c).

3. *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239 (1989).

4. *See id.*

the horizontal and vertical relatedness elements in the Second Circuit. Part II examines why the elaboration of horizontal and vertical relatedness elements was a permissible and logical extension of both the “continuity plus relationship” test and the language of § 1962. Part III briefly looks at the approach taken by other circuits. Part IV explains why the Second Circuit’s use of indirect relation to prove horizontal relatedness is an erroneous practice. It also addresses some arguments in favor of retaining the use of indirect relation to prove horizontal relatedness. Part V proposes three alternative solutions: (1) the Second Circuit should discontinue its use of indirect relation; (2) the Second Circuit should dispense with the labels of “horizontal” and “vertical” relatedness, and return to an inquiry based on the language of the Supreme Court’s “continuity plus relationship” test; or (3) the Second Circuit should clarify its doctrine by abandoning the requirement of horizontal relatedness.

This Note will not consider the element of continuity, which is the first prong of the “continuity plus relationship” test established by the Supreme Court to determine whether predicate offenses constitute a “pattern of racketeering activity.”⁵ This Note is also unconcerned with the enterprise⁶ and participation elements, joinder, jurisdiction, or other matters generally disposed of by other articles on RICO. The focus of this Note is narrow because RICO itself is very broad. An attempt to discuss multiple factors would either be short and superficial, or lengthy and complex.⁷

I. HISTORY

RICO was passed in 1970 as part of the comprehensive Organized Crime Control Act (OCCA).⁸ The push for its enactment came after a growing concern with the widespread influence exercised by La Cosa Nostra, commonly referred to as the Mafia.⁹ Because of this history, it is

5. *Id.* For a discussion of this element, see Ross Bagley et al., *Racketeer Influenced and Corrupt Organizations*, 44 AM. CRIM. L. REV. 901 (2007).

6. The term “enterprise” is defined as “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity. . . .” 18 U.S.C. § 1961(4). The type of enterprise this Note is concerned with is the so-called “associated-in-fact” enterprise, which reaches wholly criminal enterprises. *See* United States v. Turkette, 452 U.S. 576, 580–81 (1981) (“Had Congress not intended to reach criminal associations, it could easily have narrowed the sweep of the definition by inserting a single word, ‘legitimate.’”).

7. For a thorough and in-depth analysis of RICO and all of its implications, see Gerard E. Lynch, *RICO: The Crime of Being a Criminal* (pts. 1 & 2) 87 COLUM. L. REV. 661 (1987), (pts. 3 & 4) 87 COLUM. L. REV. 920 (1987).

8. Organized Crime Control Act, Pub. L. No. 91-452, 84 Stat. 941 (1970).

9. Lynch (pts. 1 & 2), *supra* note 7, at 666–80 (relating the history of RICO from President’s Commission on Law Enforcement and Administration of Justice in 1967 through introduction of S.

widely believed that RICO's only purpose was to eradicate organized crime.¹⁰ However, it has been argued that this cannot be true in light of constitutional concerns that accompany the targeting of a specific group of people with a federal criminal statute.¹¹ Indeed, the Supreme Court itself has held that there is no requirement of an "organized crime" nexus in the statute.¹²

Other than expanding the list of predicate offenses, Congress has done nothing to change the substantive terms of RICO in the more than thirty years since its enactment.¹³ Clarification of its provisions has come through the courts. The first major interpretation by the Supreme Court came in *United States v. Turkette*.¹⁴ In that case, the Supreme Court determined that the term "enterprise" was not confined to legitimate enterprises, but instead included wholly criminal enterprises.¹⁵ This had the effect of making § 1962(c) applicable to groups of individuals "associated in fact,"¹⁶ whose only purpose was to commit crimes.

The broad language of the "pattern of racketeering activity" element of § 1962¹⁷ was subject to diverse interpretations by the federal circuits.¹⁸ The Supreme Court first addressed this element in the now famous footnote fourteen of *Sedima, S.P.R.L. v. Imrex Co.*¹⁹ In that footnote, it

1861, precursor to bill that would become Organized Crime Control Act); *see also* S. REP. NO. 91-617, at 35-46 (1969) (discussing problem of organized crime, in particular La Cosa Nostra, and the need for a response).

10. *See* G. Robert Blakey & Thomas A. Perry, *An Analysis of the Myths That Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: "Mother of God—Is This the End of RICO?"*, 43 VAND. L. REV. 851, 860-68 (1990) (discussing this belief as one of the myths about RICO).

11. 116 CONG. REC. 35,204 (1970) (statement of Rep. Poff) ("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?"); *see also* Lynch (pts. 1 & 2), *supra* note 7, at 686.

12. *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 249 (1989) ("We thus decline the invitation to invent a rule that RICO's pattern of racketeering concept requires an allegation and proof of an organized crime nexus.").

13. Congress has made one amendment to § 1962 since its enactment. It substituted the word "subsection" for "subsections" in subsection (d). *See* Anti-Drug Abuse Act, Pub. L. No. 100-690, § 7033, 102 Stat. 4181, 4398 (1988).

14. 452 U.S. 576 (1981).

15. *Id.* at 580.

16. 18 U.S.C. § 1961(4) (2006).

17. *Id.* § 1962.

18. *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 236 (1989) (noting a "plethora of different views expressed by the Courts of Appeals"). For a discussion of different approaches taken by the Circuits, *see* Paul William Flowers, Comment, *H.J. Inc.: Targeting Federal RICO's Pattern Requirement [sic] to Long-Term Organized Criminal Activity*, 51 OHIO ST. L.J. 713, 717-25 (1990); Aaron R. Marcu & Pamela Rogers Chepiga, *The Evolution of RICO's "Pattern-of-Racketeering" Element: From Sedima to H.J. Inc. and its Progeny*, in CIVIL RICO 1990, 118-20 (1990).

19. 473 U.S. 479, 497 n.14 (1985).

alluded to the need for “continuity plus relationship”²⁰ to satisfy the “pattern of racketeering activity” requirement. The Court gave its definitive statement on this element in *H.J. Inc. v. Northwestern Bell Telephone Co.*²¹

A. *H.J. Inc. and the “Continuity Plus Relationship” Test*

In *H.J. Inc.*, a group of customers filed a class action lawsuit against Northwestern Bell under RICO’s civil provision.²² They alleged violations of, *inter alia*, § 1962(c) based on cash payments to the Minnesota Public Utilities Commission (MPUC) in exchange for approval of unfair utility rates.²³ The case was dismissed in the district court because it did not meet the multiple-scheme test of the Eighth Circuit.²⁴ After being affirmed by the Eighth Circuit Court of Appeals, the case went to the Supreme Court.²⁵ At issue was the proper interpretation of § 1962(c)’s “pattern of racketeering activity” element.

The Court began by reiterating its position in *Sedima* that RICO should not be given a restrictive interpretation.²⁶ It noted that the definition of “pattern of racketeering activity” does not say what the term *means*, but rather gives a minimum necessary condition for the existence of a pattern.²⁷ Looking to both the language of the statute and its legislative history, the Court emphasized its reasoning in the *Sedima* footnote that something more than the statutory minimum number of predicate offenses is necessary to establish a pattern.²⁸ The *H.J. Inc.* Court stated that, in normal usage, a pattern is an “arrangement or order of things or activity,”

20. *Id.* (examining legislative history).

21. 492 U.S. 229 (1989).

22. 18 U.S.C. § 1964 (2006).

23. *H.J. Inc.*, 492 U.S. at 233.

24. *Id.* at 234. The Eighth Circuit’s “multiple schemes” test originated in *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986). While the court concluded that the “relationship” prong of the “continuity plus relationship” test from *Sedima* had been met, the “continuity” prong had not. *Id.* at 257. Continuity was not established because only “one isolated fraudulent scheme” had been shown. *Id.* The district court in *H.J. Inc.* interpreted this holding as “an ‘extremely restrictive’ test for a pattern of racketeering activity that required proof of ‘multiple illegal schemes.’” *H.J. Inc.*, 492 U.S. at 234.

25. *H.J. Inc.*, 492 U.S. at 234–35. The Court rejected the Eighth Circuit’s multiple scheme test. *Id.* at 240–41. It did so based on its interpretation of the continuity prong of the “continuity plus relationship” test. *Id.* For more on the Court’s discussion of continuity, see *infra* note 32 and accompanying text.

26. *H.J. Inc.*, 492 U.S. at 236.

27. *Id.* at 237 (“It thus places an outer limit on the concept of a pattern of racketeering activity that is broad indeed.”). See 18 U.S.C. § 1961(5) (requiring at least two predicate acts).

28. *H.J. Inc.*, 492 U.S. at 237–38; see also 116 CONG. REC. 18,940 (1970) (statement of Sen. McClellan) (“[P]roof of two acts of racketeering activity, without more, does not establish a pattern.”).

and it is the “relationship that they bear to each other or to some external organizing principle that renders them ‘ordered’ or ‘arranged.’”²⁹ However, the statute mentions no requirement of an organizing principle.³⁰ Combining this with the legislative history of RICO, the Court found that Congress had in mind a flexible approach to the term “pattern.” But this term, the Court said, was not intended to apply to isolated or sporadic activity.³¹ Relying on statements in the legislative history, the Court then held that a RICO pattern requires that the predicate offenses “are related, and that they amount to or pose a threat of continued criminal activity.”³²

The Court then quickly dispensed with the meaning of relatedness by referring to another section of the OCCA, which defined pattern in terms of the relationship between acts.³³ Under that section, relationship entails “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.”³⁴ However, the Court refrained from establishing a more detailed method for understanding how these factors contribute to the concept of a “pattern.” Instead, it left further development to the lower courts.³⁵ Applying the concept of relatedness to

29. *H.J. Inc.*, 492 U.S. at 238.

30. *Id.*

31. *Id.* at 239.

32. *Id.* (internal emphasis omitted); see also S. REP. NO. 91-617, at 158 (1969) (“It is this factor of continuity plus relationship which combines to produce a pattern.”). The Court noted that the proof required for relatedness and continuity would often overlap. However, it did not elaborate on how this overlap may occur. *H.J. Inc.*, 492 U.S. at 239. It may be worthwhile, in a future article, to investigate whether this is a desirable assumption. But it is beyond the scope of this Note.

The Court’s discussion of continuity is much longer than its discussion of relatedness. It can be either closed-ended (a closed period of related conduct) or open-ended (past conduct with a threat of repetition). *Id.* at 241. Closed-ended continuity entails related predicate offenses occurring over a substantial period of time. *Id.* at 242 (noting that Congress was concerned with long-term activity). Where this cannot be proved, there must be a threat of continuity (i.e. open-ended continuity). This is a fact-sensitive determination, and can be either explicit or implicit. *Id.*

The Court found that Congress was concerned with long-term criminal conduct. *Id.* at 242. And that predicate offenses “extending over a few weeks or months and threatening no future criminal conduct do not satisfy [the continuity requirement].” *Id.* This is not to say that predicate offenses occurring close together in time cannot show continuity. In such a case, the predicate offenses may “include a specific threat of repetition extending indefinitely into the future, and thus supply the requisite threat of continuity.” *Id.*

Continuity may also be established where (1) the defendant operates as part of a long-term criminal enterprise (including organized crime groups), or (2) the offenses are a regular way of conducting an ongoing legitimate business. *Id.* at 243.

33. *H.J. Inc.*, 492 U.S. at 239–40 (referring to Dangerous Special Offender Sentencing Act, Pub. L. No. 91-452, § 1001(a), 84 Stat. 922, 948–50 (formerly codified under 18 U.S.C. §§ 3575–3578), repealed by Sentencing Reform Act of 1984, Pub. L. No. 98-473, ch. II, § 212(a)(2), 98 Stat. 1837, 1987 (1984)). The Court was referring to subsection (e) of § 3575.

34. Dangerous Special Offender Sentencing Act, § 1001(a), 84 Stat. 922, 950.

35. *H.J. Inc.*, 492 U.S. at 243. The Court did take time to reject the argument that a RICO pattern

the facts of the case, the Court easily found a possible relationship. The acts committed by Northwestern Bell were said to be related by the common purpose of influencing MPUC officials to approve unreasonable rates.³⁶

B. Pattern and Relatedness in the Second Circuit

Only five months prior to the Supreme Court's decision in *H.J. Inc.*, the Second Circuit, sitting *en banc*, decided *United States v. Indelicato*.³⁷ In *Indelicato*, the Second Circuit made a lengthy review of its prior precedent in an attempt to clarify the meaning of a "pattern of racketeering activity."³⁸ At the time, the controlling precedent in the Second Circuit was *United States v. Ianniello*,³⁹ which had held that *Sedima's* footnote fourteen "continuity plus relationship" applied to the enterprise requirement,⁴⁰ and that two predicate offenses were sufficient to establish a pattern.⁴¹ *Indelicato* overruled *Ianniello* on both issues, holding that two predicate offenses alone are not sufficient to establish a pattern, and that "continuity plus relationship" applied to the pattern requirement of § 1962(c), rather than the enterprise requirement.⁴² The court also reasoned that predicate offenses not directly related to each other could nonetheless be indirectly related if they were related to the enterprise.⁴³

requires an organized crime limitation. *Id.* at 243–44. This argument is based on the belief that RICO was solely intended to eradicate organized crime. *Id.* The Court found nothing in the language of RICO or its legislative history that indicated Congress had such a limitation in mind. *Id.* at 244.

36. *Id.* at 250.

37. 865 F.2d 1370 (2d Cir. 1989).

38. *Id.* at 1373–80.

39. 808 F.2d 184 (2d Cir. 1986).

40. *Id.* at 190 ("[R]elatedness is supplied by the concept of 'enterprise' . . . This also supplies the necessary element of continuity, since an enterprise is a continuing operation.")

41. *Id.* at 192 ("[W]e hold that when a person commits at least two acts that have the common purpose of furthering a continuing criminal enterprise with which that person is associated, the elements of relatedness and continuity . . . are satisfied.")

42. *Indelicato*, 865 F.2d at 1382. At the same time that the Second Circuit overruled *Ianniello*, it declined to hold that an earlier case stood for the proposition that two predicate offenses alone could constitute a pattern. *Id.* (considering *United States v. Weisman*, 624 F.2d 1118 (2d Cir. 1980)). In *Weisman*, the defendant argued that the jury instruction was erroneous because the term "pattern of racketeering" implicitly requires a showing of relationship between the predicate offenses. *Weisman*, 624 F.2d at 1121. The *Weisman* court rejected this argument. *Id.* at 1122. Part of its reasoning included the fact that the enterprise itself provides a link between the offenses. *Id.*

43. *Indelicato*, 865 F.2d at 1383 ("In some cases . . . relatedness . . . may be proven through the nature of the RICO enterprise. . . . [T]wo racketeering acts that are not directly related to each other may nevertheless be related indirectly because each is related to the RICO enterprise.") Indirect relation is when interrelationship between predicate offenses (horizontal relatedness) is proven through evidence of their relation to the enterprise (vertical relatedness). See Part IV for a more detailed discussion and critique of this principle.

The next year, in *United States v. Long*,⁴⁴ the Second Circuit first used the terms “horizontal relatedness” and “vertical relatedness.”⁴⁵ The court explained that horizontal relatedness refers to the interrelationship between predicate offenses, and that vertical relatedness refers to the relationship of the predicate acts to the enterprise.⁴⁶ In *Long*, the defendants’ trial occurred before *Indelicato* was decided, and the jury instruction did not reflect the change in the law.⁴⁷ The Second Circuit reversed the convictions because it was unclear whether the jury could have found the predicate offenses horizontally related.⁴⁸

Next, in *United States v. Minicone*,⁴⁹ the Second Circuit elaborated its vertical and horizontal relatedness requirements. Citing *Indelicato*, it explained that horizontal relatedness includes not only direct relatedness between predicate offenses, but also indirect relatedness⁵⁰ if each offense is related to the enterprise.⁵¹ Vertical relatedness is established if the predicate offenses are related to the activities of the enterprise, but can also be shown if the defendant was able to commit the offenses “solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise.”⁵²

In *United States v. Polanco*, the Second Circuit reaffirmed its reasoning in *Minicone*.⁵³ However, it made a significant simplification of the

44. 917 F.2d 691 (2d Cir. 1990).

45. *Id.* at 697 (“Under *Indelicato* and *H.J. Inc.*, therefore, the government must prove that two racketeering acts were related to each other (‘horizontal’ relatedness) as well as related to the enterprise (‘vertical’ relatedness) . . .”).

46. *Id.*

47. *Id.* at 696.

48. *Id.* at 697–98 (“A pattern instruction containing the horizontal relatedness element was critical in the instant matter.”) *But see* *United States v. Alkins*, 925 F.2d 541, 553 (2d Cir. 1991) (*Janniello* instruction did not rise to level of plain error because substantial evidence that predicate offenses were related to one another).

49. 960 F.2d 1099 (2d Cir. 1992).

50. As discussed more fully in Part IV, *infra*, indirect relation is the use of vertical relatedness to establish horizontal relatedness.

51. *Minicone*, 960 F.2d at 1106; *see also* *United States v. Dinome*, 954 F.2d 839, 843 (2d Cir. 1992) (quoting *Indelicato*, 865 F.2d at 1383–84). In *Dinome*, the defendants argued that there was spillover prejudice from the admission of evidence of crimes committed by *other* members of the enterprise. The Second Circuit held it was not prejudicial because “it tended to prove: (i) the existence and nature of the RICO enterprise and (ii) a pattern of racketeering activity on the part of each defendant by providing the requisite relationship and continuity of illegal activities.” *Dinome*, 954 F.2d at 843. Thus, the court was allowing evidence of crimes committed by other people to prove the nature of the enterprise, which could then be used through indirect relation to prove relatedness between the defendants’ predicate offenses. *See supra* note 43.

52. *Minicone*, 960 F.2d at 1106 (quoting *United States v. Robilotto*, 828 F.2d 940 (2d Cir. 1987)) (emphasis and quotation marks omitted).

53. *United States v. Polanco*, 145 F.3d 536, 541 (2d Cir. 1998) (“A predicate act is related to a different predicate act if each predicate act is related to the enterprise.”).

definitions. Under *Polanco*, “[a] predicate act is ‘related’ to an enterprise if it is ‘related to the activities of that enterprise,’” and “is related to a different predicate act if each predicate act is related to the enterprise.”⁵⁴

The Second Circuit’s most recent pronouncement on the vertical and horizontal relatedness elements came in *United States v. Daidone*.⁵⁵ In that case, the court synthesized its prior precedent with *H.J. Inc.*⁵⁶ It noted that *H.J. Inc.* was not to be given a narrow reading, and the factors given in that case were merely a starting point to the relationship inquiry.⁵⁷ While reasoning that horizontal and vertical relatedness elements provide a limit on RICO liability, the court placed great emphasis on the common overlap in proof for the two elements.⁵⁸ As the court stated, this overlap exists “because predicate crimes will share common goals (increasing and protecting the financial position of the enterprise) and common victims (e.g., those who threaten its goals), and will draw their participants from the same pool of associates (those who are members and associates of the enterprise).”⁵⁹

II. WHY HORIZONTAL AND VERTICAL RELATEDNESS ARE LOGICAL

As stated in *Daidone*, the purpose of having horizontal and vertical relatedness elements is to place an outer limit on RICO liability.⁶⁰ Predicate offenses may be horizontally or vertically related, yet still isolated. Requiring proof of both, however, guards against such isolated crimes, which the Court has said do not constitute a “pattern.”⁶¹ Allowing the prosecution to prove horizontal relatedness by showing that the

54. *Id.* (citing *Minicone*, 960 F.2d at 1106). *But see* *United States v. Amato*, 86 F. App’x 447, 450 (2d Cir. 2004) (using *Minicone*’s two possible options for proving vertical relatedness); *United States v. Mason*, 2001 WL 69442, at *6 (S.D.N.Y. Jan. 29, 2001) (finding horizontal relatedness because of “similarity of victims, participants, locations, and purposes”). For a criticism of the way the Second Circuit defines and applies the vertical and horizontal relatedness elements, see Barry Tarlow, *RICO Report*, THE CHAMPION, Nov. 1998, at 37, 37–42 (“[T]he *Polanco* court defined horizontal and vertical relatedness in exactly the same way The *Polanco* court thus eliminated any distinction between horizontal and vertical relatedness.”).

55. 471 F.3d 371 (2d Cir. 2006).

56. *Id.* at 375–76 (looking to *H.J. Inc.*, *Indelicato*, *Minicone*, and *Polanco*).

57. *Id.* at 375.

58. *Id.* at 376. Specifically, the court stated, “Requiring inquiries into horizontal and vertical relatedness places limits on the outer reach of RICO liability. The necessity of proving such relationships, however, does not prohibit a RICO conviction merely because it is formed on a pattern of racketeering activity proven by overlapping evidence tending to establish proof satisfying both inquiries.” *Id.*

59. *Id.* at 376 (noting that overlapping evidence “is a familiar phenomenon in RICO cases”).

60. *Id.* at 376.

61. *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239 (1989).

predicate acts are related to the enterprise effectively negates the horizontal element by erasing the line between horizontal and vertical relatedness.⁶² This practice contradicts the purpose stated in *Daidone* by removing the limit imposed by distinct horizontal and vertical elements.

Distinct horizontal and vertical elements are not only a desirable barrier to RICO conviction, but also flow directly from the words of RICO and the decision in *H.J. Inc.* In order to demonstrate this, it is necessary to first establish why the Supreme Court's elaboration in *H.J. Inc.* was a permissible interpretation.

A. *The Logic of H.J. Inc.*

A pattern of racketeering activity “requires at least two acts of racketeering activity . . . the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity.”⁶³ As the Supreme Court noted, this definition only sets the minimum number of acts that could possibly satisfy the requirement, but requires something more than two predicate offenses.⁶⁴ The definition and the term “pattern” itself use language that does not readily explain its meaning.⁶⁵ As is its customary practice, the Court looked to the dictionary for the ordinary meaning of “pattern,” which stated that “[a] pattern is an ‘arrangement or order of things or activity.’”⁶⁶ So a pattern of racketeering activity is an arrangement or order of racketeering activity. This articulation, however, merely begs the question: what is it that arranges or orders two acts of racketeering so that they constitute a pattern? As the Court correctly reasoned, it is not the number of acts alone that establish the pattern, but how they are related, either to each other or to some organizing principle.⁶⁷

But this reasoning does no more than establish that predicate acts of racketeering must be related to each other or to some “organizing principle.” This is no great revelation. It is only natural to expect a “pattern” of things to have something in common that ties them all

62. See Tarlow, *supra* note 54, at 41.

63. 18 U.S.C. § 1961(5) (2006).

64. *H.J. Inc.*, 492 U.S. at 238; See also *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 n.14 (1985).

65. See *H.J. Inc.*, 492 U.S. at 237 (noting that Congress frequently used broad terms and concepts in RICO).

66. *Id.* at 238 (quoting 11 OXFORD ENGLISH DICTIONARY 357 (James A. H. Murray et al. eds., 2d ed. 1989)).

67. *H.J. Inc.*, 492 U.S. at 238.

together.⁶⁸ This leads to the question, what factors should a court look to in determining whether predicate offenses are related for RICO purposes?

To answer this question, the Court chose to look to another section of the OCCA,⁶⁹ the Dangerous Special Offender Sentencing Act.⁷⁰ This act defined a pattern in terms of the relationship between criminal acts.⁷¹ There is a pattern if the conduct “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.”⁷² Although Justice Scalia disagreed with this step,⁷³ it was a logical one to take. Faced with broad statutory language, the Court examined the context of RICO by referring to another statute enacted at the same time.⁷⁴ The Court was making an effort to provide direction for lower courts in RICO cases.⁷⁵ Consequently, the “continuity plus relationship” test was a permissible interpretation by the Court engaging in its usual statutory construction.

If the “continuity plus relationship” test was a permissible interpretation for the Court to make, then it was necessary to define what is meant by “relationship.” The Court chose to incorporate a definition written by Congress in a contemporary section of the OCCA, rather than invent its own. Thus, the Court’s elaboration of what relationship means in the context of a RICO pattern was a permissible and logical interpretation.

Not only was this interpretation permissible, but it was also desirable. The Court was faced not only with differing interpretations from the

68. This line of reasoning is not as easy to apply to the continuity prong of the test. In common usage, the term pattern does not bring to mind the temporal aspect that continuity represents. However, the legislative history allowed the Supreme Court to make the logical connection between RICO’s pattern element and continuity. *See id.* at 239, 242 (“Congress was concerned in RICO with long-term criminal conduct.”).

69. *Id.* at 239.

70. Dangerous Special Offender Sentencing Act, Pub. L. No. 91-452 § 1001(a), 84 Stat. 922, 948-50 (1970).

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

72. Dangerous Special Offender Sentencing Act, § 1001(a), 84 Stat. 922, 950. The language comes from 18 U.S.C. § 3575(e), which has been repealed.

73. *H.J. Inc.*, 492 U.S. at 252 (Scalia, J., dissenting). Justice Scalia stated, “Unfortunately, if normal (and sensible) rules of statutory construction were followed, the existence of § 3575(e)-which is the definition contained in another title of the Act that was explicitly *not* rendered applicable to RICO-suggests that *whatever* ‘pattern’ might mean in RICO, it assuredly *does not* mean that.” *Id.*

74. This is arguably a better practice than looking to wholly different titles of the United States Code, or to statutes enacted at different times.

75. *See H.J. Inc.*, 492 U.S. at 236 (“[A]s the plethora of different views expressed by the Courts of Appeals . . . demonstrates, . . . developing a meaningful concept of ‘pattern’ within the existing statutory framework has proved to be no easy task.”).

Courts of Appeals, but also with a lack of development from Congress.⁷⁶ In the thirty-seven years since RICO was enacted, Congress has only amended § 1962 once.⁷⁷ Indeed, Congress has implicitly approved of the expansive readings the courts have given to RICO's broad language.⁷⁸ This lack of action on the part of Congress leads to the conclusion that any limit which is to be put on RICO must come from the courts.⁷⁹ With this understanding of the need for judicial interpretation, and the Court's logic in *H.J. Inc.*, it becomes clear that the Second Circuit took the next logical step.⁸⁰

The upside to the broad language of RICO is that it provides leeway for judicial interpretation. When a statute defines a broad term such as "pattern" only by indicating a minimum number of predicate offenses, it cannot be argued that courts should not be allowed to impose logical definitions. *H.J. Inc.* represents such an effort. However, in *H.J. Inc.* the Court itself noted that "[t]he development of these concepts must await

76. *Id.* at 236 ("Congress has done nothing . . . further [since the *Sedima* decision] to illuminate RICO's key requirement of a pattern of racketeering . . .").

77. *See* Anti-Drug Abuse Act, Pub. L. No. 100-690, § 7033, 102 Stat. 4181, 4398 (1988) (substituting "subsection" for "subsections" in § 1962(d)). At the time of *H.J. Inc.*, RICO had been in force for almost two decades.

78. Lynch (pts. 1 & 2), *supra* note 7, at 712–13 ("If RICO has evolved into something different from what Congress intended at its creation, it is difficult to escape the conclusion that Congress has looked at what has evolved, and pronounced it good."). The Court has noted "that RICO is to be liberally construed to effectuate its remedial purposes." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 498 (1985) (quoting Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970)) (internal quotations omitted).

79. Many commentators have advocated for legislative action to replace or reform RICO. *See, e.g.,* Lisa Barsoomian, *RICO "Pattern" Before and After H.J. Inc.: A Proposed Definition*, 40 AM. U. L. REV. 919, 953–55 (1991) (proposing to redefine "pattern of racketeering activity"); Lynch (pts. 3 & 4), *supra* note 7, at 971–77 (arguing that RICO be replaced by a series of smaller statutes); Terrance G. Reed, *The Defense Case for RICO Reform*, 43 VAND. L. REV. 691, 711–14 (1990) (emphasizing need for reform and criticizing congressional reform efforts); R. Stephen Stigall, Comment, *Preventing Absurd Application of RICO: A Proposed Amendment to Congress's Definition of "Racketeering Activity" in the Wake of National Organization for Women, Inc. v. Scheidler*, 68 TEMP. L. REV. 223, 245–48 (1995) (arguing for reduction of list of predicate offenses in context of civil RICO). However, in light of the lack of amendments to § 1962(c) it seems that Congress is unlikely to heed such calls. Therefore, the only alternatives are judicial interpretations and prosecutorial abstention. *See* Barsoomian, at 920 ("A liberal construction of the statute's broad language means not only that the discretion to invoke RICO remains with prosecutors . . . , but also that the courts must define RICO's scope and prevent its abuse."). However, the adaptability and breadth of RICO make it attractive to prosecutors who can make creative claims. *See* Lynch (pts. 1 & 2), *supra* note 7, at 662 ("[P]rosecutors have seized on the virtually unlimited sweep of the language of RICO to bring a wide variety of different prosecutions in the form of RICO indictments.").

80. *See* Tarlow, *supra* note 54, at 37 ("The relationship of racketeering acts to each other can best be described as 'horizontal relatedness,' while the relationship of racketeering acts to the enterprise can best be described as 'vertical relatedness.'") (citing *United States v. Minicone*, 960 F.2d 1099, 1106 (2d Cir. 1992)).

future cases”⁸¹ Thus, the Court expressly authorized further development by the lower courts. The Second Circuit’s horizontal and vertical relatedness elements are just such a development.

B. Horizontal Relatedness

Horizontal relatedness can be seen as entirely consistent with the decision in *H.J. Inc.* Horizontal relatedness is nothing more than *H.J. Inc.*’s definition of “relationship.”⁸² Indeed, the Court in *H.J. Inc.* was concerned with the interrelationship between predicate offenses.⁸³ When determining whether predicate offenses have similar “purposes, results, participants, victims, or methods of commission,” a court is investigating how those acts are connected to each other.⁸⁴ For example, a group of criminals associating together to commit arson⁸⁵ in exchange for money can demonstrate these factors. Each act of arson has the purpose of making money for the group, results in the destruction by fire of buildings, includes the members of the group as participants in each act, and uses the lighting of a fire as the method of commission. Each act of arson committed by the group is thus related to the other acts.

An argument can be made that the Second Circuit did not have *H.J. Inc.* in mind when it elaborated the horizontal relatedness element. Early cases in that circuit using the term “horizontal relatedness” only mentioned *H.J. Inc.* in passing, and only cited it for the “continuity plus relationship” test.⁸⁶ However, many of these early cases relied on the

81. *H.J. Inc.*, 492 U.S. at 243.

82. See *United States v. Muyet*, 994 F. Supp. 501, 508 (S.D.N.Y. 1998) (defining horizontal relatedness with *H.J. Inc.*’s list of factors); see also *United States v. Daidone*, 471 F.3d 371, 375 (2d Cir. 2006) (discussing *H.J. Inc.* factors in context of defendant’s horizontal relatedness argument). The defendant in *Daidone* made this very argument. *Daidone*, 471 F.3d at 374. However, the court rejected the argument, relying on the principle of indirect relation as discussed in *Polanco* and *Minicone*. *Id.* at 375 (“Accordingly, the requirements of horizontal relatedness can be established by linking each predicate act to the enterprise”).

83. See *H.J. Inc.*, 492 U.S. at 238, 240.

84. See, e.g., *United States v. Mitchell*, 51 F. App’x 355, 357 (2d Cir. 2002) (predicate offenses both involved robbing from drug dealers by members of the enterprise); *Muyet*, 994 F. Supp. at 509–10 (discussing similarity of participants, purpose, and victims among the thirteen predicate acts charged).

85. Arson is a predicate offense for purposes of RICO if it “is chargeable under State law and punishable by imprisonment for more than one year” 18 U.S.C. § 1961(1)(A) (2006). Assume for this example and following examples that the acts committed by the arson ring meet these requirements.

86. See, e.g., *United States v. Long*, 917 F.2d 691, 697 (2d Cir. 1990) (citing *H.J. Inc.* as part of string citation); *United States v. Minicone*, 960 F.2d 1099, 1106 (2d Cir. 1992) (quoting *H.J. Inc.* for “continuity plus relationship” test). More recently, the Second Circuit has cited *H.J. Inc.* for its relationship factors. *Daidone*, 471 F.3d at 375. See Part IV for a discussion of why the Second

decision in *Indelicato*.⁸⁷ In that case, the Second Circuit relied on the exact same provision of the OCCA that the Supreme Court later looked to for help in defining relationship.⁸⁸ Thus, the list of factors approved by the Supreme Court in *H.J. Inc.* was already in place in the Second Circuit when it developed the horizontal relatedness element.

C. Vertical Relatedness

Vertical relatedness requires that the predicate offenses be related to the RICO enterprise.⁸⁹ Although the same argument cannot be made that this element stems from *H.J. Inc.*, the statute itself implicitly requires this type of relationship.⁹⁰ For RICO liability to attach under § 1962(c), a person must “conduct or participate, directly or indirectly, in the conduct of [a RICO] enterprise’s affairs *through* a pattern of racketeering activity”⁹¹ If one is conducting the affairs of an enterprise through a pattern of activity, then the acts which constitute the pattern have to be the vehicle through which the affairs of the enterprise are carried on.⁹² If there is no connection between the predicate offenses and the enterprise, there would be no reason to attach federal criminal liability.

This interpretation is supported by the legislative intent behind the enactment of RICO. Congress was primarily concerned with criminal groups that used racketeering acts to infiltrate legitimate businesses.⁹³ It was the use of such tactics to achieve the goal of infiltration that justified the imposition of federal criminal liability.⁹⁴ The addition of subsection (c)

Circuit’s development of the horizontal relatedness element has not been entirely faithful to *H.J. Inc.*

87. See, e.g., *Long*, 917 F.2d at 697; *United States v. Alkins*, 925 F.2d 541, 551 (2d Cir. 1991); *Minicone*, 960 F.2d at 1106.

88. *United States v. Indelicato*, 865 F.2d 1370, 1382 (2d Cir. 1989) (quoting 18 U.S.C. § 3575(e)).

89. See *Minicone*, 960 F.2d at 1106 (stating predicate offenses “must be related to the enterprise (‘vertical’ relatedness)”); *Daidone*, 471 F.3d at 375 (quoting this language).

90. See *Indelicato*, 865 F.2d at 1384; see also Edward S.G. Dennis, Jr., *Current RICO Policies of the Department of Justice*, 43 VAND. L. REV. 651, 665 (1990) (“[E]ach of the three substantive RICO offenses requires a specific nexus between the racketeering acts and the enterprise. Therefore, RICO already has a built-in ‘relationship’ requirement.”).

91. 18 U.S.C. § 1962(c) (2006) (emphasis added).

92. See *Indelicato*, 865 F.2d at 1384 (“[F]or each of the substantive RICO subsections prohibits a specific type of interplay between a pattern of racketeering activity and the enterprise.”).

93. See *Lynch* (pts. 1 & 2), *supra* note 7, at 676 (describing views of Sen. Hruska in a precursor bill that would eventually become RICO).

94. S. REP. NO. 91-617, at 76–78 (1969) (“Obviously, the time has come for a frontal attack on the subversion of our economic system by organized criminal activities. That attack must begin, however, with the frank recognition that our present laws are inadequate to remove criminal influences from legitimate endeavor organizations.”).

to the original bill allowed prosecution of those who continued to carry on the affairs of the infiltrated business through the use of racketeering acts.⁹⁵ Thus, it is not merely the fact that predicate offenses are committed, but that they relate to what the enterprise is trying to accomplish.⁹⁶

The implicit requirement of vertical relatedness in § 1962 is even more apparent where the enterprise is wholly criminal. The whole business of these “associated in fact” enterprises is to commit crimes.⁹⁷ The only way that the affairs of a wholly criminal enterprise can be conducted is through committing crimes. And the persons who commit the crimes necessarily participate in the conduct of the affairs of the enterprise.⁹⁸

In discussing this element, the Second Circuit established that vertical relatedness can be found if the defendant “was enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise”⁹⁹ This is a logical extension of the words of the statute. If a defendant was able to commit an offense solely because he was a member of an enterprise, then it is his participation in the affairs of the enterprise¹⁰⁰ which enabled him to commit that offense. For example, assume that the arson ring from the previous example was known to exclusively control an area of New York

95. Lynch (pts. 1 & 2), *supra* note 7, at 682.

96. *Indelicato*, 865 F.2d at 1384 (“[N]o RICO violation can be shown unless there is proof of the specified relationship between the racketeering acts and the RICO enterprise.”).

97. *See* *United States v. Masters*, 924 F.2d 1362, 1366 (7th Cir. 1991) (“The business of a criminal enterprise is crime.”).

98. Though it seems that this would lead to the conclusion that horizontal relatedness is not necessary in the case of associated in fact enterprises, this is not true. A person is not guilty of violating RICO for merely participating in the commission of crimes which constitute the affairs of the enterprise. The participation must form a pattern of racketeering activity. 18 U.S.C. § 1962(c) (2006). And it follows from *H.J. Inc.* that a “pattern of racketeering activity” requires interrelatedness between the predicate offenses. *See* Part II.B.

99. *United States v. Minicone*, 960 F.2d 1099, 1106 (2d Cir. 1992) (quoting *United States v. Robilotto*, 828 F.2d 940, 947–48 (2d Cir. 1987)) (emphasis and internal quotations omitted); *see also* *United States v. Muyet*, 994 F. Supp. 501, 510 (S.D.N.Y. 1998) (“[T]he gang did not simply allow anyone to commit [murder], only those close associates who had earned the trust of the group.”).

Predicate offenses are also vertically related to an enterprise if they are “related to the activities of that enterprise.” *Id.*; *see, e.g.*, *United States v. Amato*, 86 F. App’x 447, 450 (2d Cir. 2004) (activities of enterprise included criminal acts undertaken to gain confidence and respect of other members). This is fairly intuitive and needs no extended discussion. For example, if a member of a narcotics trafficking enterprise launders the proceeds of its drug sales, it is unquestionable that the money laundering is related to the activities of the enterprise. The money that is laundered comes from the major activity of the enterprise: drug trafficking. And the purpose in laundering the money is to conceal the source of the money. However, the Second Circuit has said that the predicate act need not be in furtherance of the enterprise to be related to the activities of the enterprise. *See* *United States v. Thai*, 29 F.3d 785, 815 (2d Cir. 1994); *Muyet*, 994 F. Supp. at 509.

100. Under § 1962(c), a person associated with a RICO enterprise is proscribed from conducting or participating in the affairs of that enterprise. 18 U.S.C. § 1962(c).

City. Within its territory, any acts of arson were committed by that ring. If a member of the arson ring set fire to a building within that territory, he could only commit that specific act of arson because he was a *member* of the ring. Likewise, if the defendant was able to commit the offense because of his involvement in, or control over, the affairs of the enterprise, then the offense is vertically related to the affairs of the enterprise because the enterprise provided an opportunity which otherwise would not exist.

Also, if the defendant exercises control over the affairs of the enterprise, his position allows him to draw on resources that he would otherwise not have. Assume the leader of the arson ring is commissioned to commit an act of arson that requires a group of people working in concert. Further assume that he was approached because of the reputation of his group for excellence in the field of arson. If he was simply an individual arsonist, he would not have been approached. His position as leader of the arson ring, which allowed him to marshal the forces of the other members, gave him the opportunity to commit the offense which otherwise would not have existed. That act of arson is therefore related to the arson ring enterprise.

The Second Circuit's elaboration of the horizontal and vertical relatedness elements was a logical extension from the words of § 1962(c) and the decision in *H.J. Inc.* Furthermore, in taking this step the Second Circuit was obeying the Supreme Court's express authorization to further interpret the "continuity plus relationship" test.¹⁰¹

III. RELATEDNESS ON OTHER CIRCUITS¹⁰²

In analyzing relatedness, a majority of circuits simply use the list of factors from *H.J. Inc.* The First, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits find that predicate offenses are related if they share "similar purposes, results, victims, or methods of commission, or otherwise are interrelated by distinguishing

101. *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 243 (1989) ("The development of these concepts must await future cases, absent a decision by Congress to revisit RICO to provide clearer guidance as to the Act's intended scope.").

102. For further reading on pattern and relatedness in other circuits, see Bagley, *supra* note 5, at 907–10. The cases cited by the Bagley article include the following: *United States v. Hively*, 437 F.3d 752, 761–62 (8th Cir. 2006); *N. Bridge Assocs. v. Boldt*, 274 F.3d 38, 42 (1st Cir. 2001); *Howard v. Am. Online Inc.*, 208 F.3d 741, 746 (9th Cir. 2000); *United States v. Richardson*, 167 F.3d 621, 626 (D.C. Cir. 1999); *United States v. To*, 144 F.3d 737, 747 (11th Cir. 1998); *Edmondson & Gallagher v. Alban Towers Tenants Ass'n*, 48 F.3d 1260, 1265 (D.C. Cir. 1995); *Tabas v. Tabas*, 47 F.3d 1280, 1294 (3d Cir. 1995); *United States v. Blandford*, 33 F.3d 685, 703 (6th Cir. 1994).

characteristics.”¹⁰³ The Third and Sixth Circuits are similar to the Second in that they allow interrelationship between predicate offenses to be proved by showing that the predicate offenses are related to the enterprise.¹⁰⁴

The majority of circuits are correct in using the list of factors in *H.J. Inc.* This is not to say that these circuits do not require that predicate offenses be related to the enterprise. There is still the inherent requirement that the predicate offenses have a vertical nexus to the enterprise.¹⁰⁵ In reality, these courts are still determining whether the predicate offenses exhibit both horizontal and vertical relatedness.¹⁰⁶ The advantage of the Second Circuit’s method is that these requirements are expressly identified. As discussed in Part II.B, horizontal relatedness is required by the decision in *H.J. Inc.* The requirement of vertical relatedness, however,

103. See, e.g., *United States v. Browne*, 505 F.3d 1229, 1258 (11th Cir. 2007); *Hively*, 437 F.3d at 761; *United States v. Smith*, 413 F.3d 1253, 1269 (10th Cir. 2005); *United States v. Cianci*, 378 F.3d 71, 88 (1st Cir. 2004); *N. Bridge Assocs.*, 274 F.3d at 42; *W. Assocs. Ltd. P’ship, ex rel. Ave. Assocs. Ltd. P’ship v. Mkt. Square Assocs.*, 235 F.3d 629, 633 (D.C. Cir. 2001); *Howard*, 208 F.3d at 749; *Anderson v. Found. for Advancement, Educ. & Employment of Am. Indians*, 155 F.3d 500, 505–06 (4th Cir. 1998); *United States v. Keltner*, 147 F.3d 662, 669 (8th Cir. 1998); *Corley v. Rosewood Care Ctr., Inc.*, 142 F.3d 1041, 1048 (7th Cir. 1998); *Heller Fin., Inc. v. Grammco Computer Sales, Inc.*, 71 F.3d 518, 524 (5th Cir. 1996); *United States v. Maloney*, 71 F.3d 645, 661 (7th Cir. 1995); *United States v. Starrett*, 55 F.3d 1525, 1543 (11th Cir. 1995); *United States v. Grubb*, 11 F.3d 426, 440 (4th Cir. 1993).

104. See, e.g., *United States v. Irizarry*, 341 F.3d 273, 292 n.7 (3d Cir. 2003); *United States v. Corrado*, 227 F.3d 543, 554 (6th Cir. 2000) (“The predicate acts do not necessarily need to be directly interrelated; they must, however, be connected to the affairs and operations of the criminal enterprise.”); *United States v. Eufrazio*, 935 F.2d 553, 566 (3d Cir. 1991) (“[S]eparately performed, functionally diverse and directly unrelated predicate acts and offenses will form a pattern under RICO, as long as they all have been undertaken in furtherance of one or another varied purposes of a common organized crime enterprise.”).

The Sixth Circuit adopted its reasoning from a Second Circuit case, *United States v. Locascio*, 6 F.3d 924, 943 (2d Cir. 1993). In *Corrado*, the Sixth Circuit stated, “We adopt the holding in a somewhat similar organized-crime case on the relatedness question: ‘[T]he relatedness requirement can be satisfied by proof that: (1) the defendant was enabled to commit the offense solely by virtue of his position in the enterprise; or (2) the offense was related to the activities of the enterprise.’” *Corrado*, 227 F.3d at 554 (quoting *Locascio*). However, the court was confused on this point, because the language it adopted is used in the Second Circuit in reference to vertical relatedness. See *Minicone*, 960 F.2d at 1106. Properly viewed, the element that the court was trying to establish was horizontal relatedness.

Allowing interrelationship to be proved by showing the predicate offenses are related to the enterprise is indirect relation. For further discussion on the concept of indirect relation, see Part IV.

105. See, e.g., *Smith*, 413 F.3d at 1272 (“In a RICO prosecution, the Government must prove a relationship between the racketeering activity and the enterprise.”); *United States v. Marino*, 277 F.3d 11, 27 (1st Cir. 2002) (“It is clear that by using the word ‘through,’ Congress intended some connection between the defendant’s predicate acts and the enterprise.”).

106. See *Tarlow*, *supra* note 54, at 37 (“The relationship of racketeering acts to each other can best be described as ‘horizontal relatedness,’ while the relationship of racketeering acts to the enterprise can best be described as ‘vertical relatedness.’”).

is discerned by considering the structure of § 1962(c). In order to “conduct” a RICO enterprise “through” a pattern of racketeering activity, the predicate acts must be the means by which the enterprise’s affairs are carried out.¹⁰⁷ To determine the existence of vertical relatedness, the Second Circuit has evolved a separate test.¹⁰⁸ Express identification of the two elements thus allows for a more substantive analysis of the sufficiency of the evidence adduced as proof, and establishes another safeguard against unwarranted prosecution under RICO. Part IV considers how the protections thus established are undermined by the Second Circuit’s use of indirect relation.

The Third and Sixth Circuits fall into the same trap as the Second Circuit. As discussed more fully in Part IV, *infra*, allowing the relation of a predicate offense to the enterprise to prove its relationship with other predicate offenses is the practice of indirect relation. This practice erases the distinction between the interrelationship between predicate offenses themselves (horizontal relatedness) and the nexus between predicate offenses and the enterprise (vertical relatedness). It is also unfaithful to the Supreme Court’s pronouncement of the “continuity plus relationship” test in *H.J. Inc.*¹⁰⁹

107. See Randy D. Gordon, *Crimes That Count Twice: A Reexamination of RICO’s Nexus Requirements Under 18 U.S.C §§ 1962(c) and 1964(c)*, 32 VT. L. REV. 171, 174 (2007). Gordon draws a distinction between the approach taken by the Second Circuit (in which horizontal relatedness requires interrelationship between predicate acts and vertical relatedness requires that the acts be related to the enterprise), and the approach that horizontal relatedness satisfies the “pattern” requirement, while vertical relatedness satisfies the “conduct” requirement. *Id.* He states:

The second approach, or test, seems the sounder of the two for two reasons. First, it accords with the common meaning of “pattern,” which connotes a physical relationship of elements—e.g., thread or yarn—coming together to form a recognizable graphic. Second, the question of whether acts relate to an enterprise permits an end-run around the standard established in *H.J., Inc., v. Northwestern Bell Telephone Co.*

Id. This distinction, however, is somewhat misleading. As discussed in Part II.C, the Second Circuit’s vertical relatedness requirement is a product of the language of § 1962(c). Therefore, the two approaches identified by Gordon are the same. The “end-run around” that he identifies is simply the problem considered in this Note: the erroneous practice of “indirect relation” to prove horizontal relatedness. *Id.* at 174–75 (citing *United States v. Polanco*, 145 F.3d 536 (2d Cir. 1998) and *Tarlow*, *supra* note 54).

108. Vertical relatedness exists if the defendant “was enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise” *Minicone*, 960 F.2d at 1106 (quoting *United States v. Robilotto*, 828 F.2d 940, 947–48 (2d Cir. 1987)) (emphasis and internal quotations omitted).

109. See *supra* note 32 and accompanying text.

IV. SECOND CIRCUIT ERRORS: INCONSISTENCY AND INDIRECT RELATION

Notwithstanding the fact that the Second Circuit has engaged in a permissible act of interpretation in formulating the horizontal and vertical relatedness elements, its application of those elements has been inconsistent and self-defeating.¹¹⁰ In *Long*, the court reversed the defendant's RICO conviction because the jury instruction failed to require a finding of horizontal relatedness.¹¹¹ However, in *Minicone* the court affirmed a RICO conviction for one of the defendants, even though the evidence of relationship between the predicate offenses was "tenuous."¹¹² In *Polanco*, the court explicitly stated that predicate offenses are related to each other if each is related to the enterprise.¹¹³ But this definition erases the line between horizontal and vertical relatedness. In fact, one commentator has criticized the holding in *Polanco* for this very reason.¹¹⁴

The glaring error that the Second Circuit has committed is the reliance on indirect relation utilized in the *Polanco* decision. Indirect relation occurs when the interrelationship between predicate offenses (horizontal relatedness) is proved through evidence of their relation to the enterprise (vertical relatedness). This practice has its roots in the Second Circuit's decision in *Indelicato*,¹¹⁵ and was accepted and emphasized in later

110. See Tarlow, *supra* note 54, at 41. Another area of confusion in the Second Circuit seems to be whether the pattern requirement applies to a collection of unlawful debt. One case has held that "[u]nlike a pattern of racketeering activity which requires proof of two or more predicate acts, to satisfy RICO's collection of unlawful debt definition the government need only demonstrate a single collection." *United States v. Giovanelli*, 945 F.2d 479, 490 (2d Cir. 1991) (internal quotation marks omitted); see also, *United States v. Megale*, 363 F. Supp. 2d 359, 364 n.5 (D. Conn. 2005) ("Where the government need only prove one collection of an unlawful debt, it would not be logical to require the government to prove that this single act is related to other predicate acts."). However, only four months later, the court found that a defendant's collection of unlawful debt combined with his extortion activities formed the requisite pattern. *Minicone*, 960 F.2d at 1108. If a single instance of collection of unlawful debt is sufficient for a RICO conviction, it would seem there would be no need to discuss it in the context of a pattern. It seems that a final resolution of this issue will be found in a discussion of statutory construction. However, this is beyond the scope of this Note.

111. *United States v. Long*, 917 F.2d 691, 698 (2d Cir. 1990) ("A pattern instruction containing the horizontal relatedness element was critical in the instant matter.").

112. *Minicone*, 960 F.2d at 1107. The court looked to the nature of the RICO enterprise, and the connection of the predicate offenses to the enterprise. *Id.*

113. *United States v. Polanco*, 145 F.3d 536, 541 (2d Cir. 1998). It is worth noting that the defendant in *Polanco* was charged with seven predicate offenses, only one of which he argued was not related to the others. While it seems that in this context the court's definition of horizontal relatedness is non-determinative, it is still illustrative of the Second Circuit's inconsistent application of the elements.

114. Tarlow, *supra* note 54, at 41.

115. *United States v. Indelicato*, 865 F.2d 1370, 1383 (2d Cir. 1989) ("[T]wo racketeering acts that are not directly related to each other may nevertheless be related indirectly because each is related to the RICO enterprise.").

decisions.¹¹⁶ This practice has the effect of allowing the prosecution to convict a defendant without meeting the Supreme Court's definition of relatedness in *H.J. Inc.*¹¹⁷ Indirect relation is simply vertical relatedness under a different name.¹¹⁸

The Second Circuit's adherence to this practice, established by a decision that predates *H.J. Inc.*, is unfaithful to that decision. Faced with a divergence in the Courts of Appeals as to the meaning of the term "pattern of racketeering activity,"¹¹⁹ the Supreme Court established a uniform test.

116. See *Minicone*, 960 F.2d at 1106; *Polanco*, 145 F.3d at 541; *United States v. Daidone*, 471 F.3d 371, 375 (2d Cir. 2006). It is interesting to note that the theory of indirect relation was explicitly rejected by the Second Circuit in a post-*Indelicato* case. *United States v. Long*, 917 F.2d 691, 697 (2d Cir. 1990). In *Long*, the defendant was convicted after the jury was given an instruction under the Second Circuit's pre-*Indelicato* precedent. *Id.* at 696. That instruction required only that the acts be related to the activities of the enterprise, but they did not have to relate to each other. *Id.* On appeal, the government argued that since the jury had to find that the predicate offenses were related to the enterprise, the jury necessarily had to find that they were interrelated. *Id.* at 697. This is precisely the reasoning that is used to justify indirect relation. The court was quite straightforward in its rejection. "This plainly did not satisfy the *Indelicato* requirements of proof of both 'horizontal relatedness' and threat of continuity of criminal activity." *Id.* Somewhat fittingly, *Long* is the first case to use the terms "horizontal" and "vertical" relatedness.

117. This is not to say that federal prosecutors will jump at the opportunity to bring RICO charges under the relaxed relatedness requirements of the Second Circuit. The United States Attorneys' Manual specifically states that "No RICO criminal indictment or information . . . shall be filed . . . without the prior approval of the Criminal Division." UNITED STATES DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, § 9-110.101 (1999) [hereinafter USAM], available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/110mcrm.htm. Approval is not automatic. Rather, "not every proposed RICO charge that meets the technical requirements of a RICO violation will be approved. Further, the Criminal Division will not approve 'imaginative' prosecutions under RICO which are far afield from the congressional purpose of the RICO statute." *Id.* § 9-110.200. The manual also states that it is inappropriate to charge RICO merely for use as a bargaining tool for later plea bargaining on lesser counts. *Id.* § 9-110.320; see also *Dennis*, *supra* note 90, at 671-72 (strongly emphasizing that RICO courts are not used for leverage in plea negotiations). The manual also gives a list of considerations, which are termed "requirements," before seeking approval for a RICO charge. However, only one of these considerations need be present. USAM, § 9-110.310. And it must be remembered that "[t]hese guidelines provide only internal Department of Justice guidance." *Id.* § 9-110.200.

This Note does not argue that the Department of Justice abuses its prosecutorial power by bringing unfounded RICO charges. The issue under consideration is whether current Second Circuit practice allows RICO defendants to be convicted without satisfying all of the required elements. Specifically, the Second Circuit's use of indirect relation does not satisfy *H.J. Inc.*'s definition of relationship. So the error is not inherently due to the decisions made by federal prosecutors. Rather, bad cases are made permissible by the law of the circuit. Prosecutorial abuse of RICO may exist, but the issue is outside the scope of this Note. For competing views on this issue, compare *Dennis*, *supra* note 90 (emphasizing internal policies of Department of Justice that limit prosecutorial abuse), with Earle A. Partington, *RICO, Merger, and Double Jeopardy*, 15 U. PUGET SOUND L. REV. 1, 17-25 (1991) (discussing potential for prosecutorial abuse of RICO in context of double jeopardy and conspiracy, and in conjunction with Continuing Criminal Enterprise statute).

118. See *Tarlow*, *supra* note 54, at 41.

119. *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 236 (1989).

This test was “continuity plus relationship.”¹²⁰ It also set out a list of factors to be used when determining whether predicate offenses are related.¹²¹ As demonstrated above, the list of factors in *H.J. Inc.* directly mirrors the concept of horizontal relatedness.¹²² By allowing indirect relation to suffice, the Second Circuit has undermined *H.J. Inc.* by discarding horizontal relatedness in favor of vertical relatedness.¹²³

Further evidence that the practice of indirect relation is untenable can be seen in the treatment of “collection of unlawful debt”¹²⁴ in the Second Circuit. Both the Court of Appeals and the District Court for the District of Connecticut have held that only a single instance of collection of unlawful debt need be proved to satisfy a charge under RICO.¹²⁵ Under this view there are two possible ways to establish a violation of § 1962(c). The government can prove a “pattern of racketeering activity” or “collection of unlawful debt.” If this is a valid distinction, then the use of indirect relation would tend to undermine that distinction. Allowing a single instance of collection of unlawful debt to constitute a RICO violation means that horizontal relatedness to other predicate acts is not necessary. Only vertical relatedness to the enterprise need be shown.¹²⁶ However, it is the nature of indirect relation that a “pattern of racketeering activity” is proved by showing that the predicate offenses are all related vertically to the enterprise. No horizontal relation between predicate acts need be proved in order to establish a pattern. Thus, both a “pattern of racketeering activity” and a “collection of unlawful debt” are proved through a showing of vertical relation to the enterprise, and the distinction between them fails.

Three arguments can be made that the Second Circuit’s use of indirect relation is neither inconsistent with the principles underlying *H.J. Inc.* nor

120. *Id.* at 239.

121. *Id.* at 240. It needs to be remembered that this list of factors is non-exhaustive. The language quoted by the Court in *H.J. Inc.* includes the phrase “or otherwise are interrelated by distinguishing characteristics . . .” *Id.* This leaves room for future courts to identify other factors that might be relevant to relatedness determinations. This helps RICO to retain some flexibility in order to deal with highly adaptable criminals. See Flowers, *supra* note 18, at 731. For further discussion, see *infra* Parts IV.A–B.

122. See *supra* Part II.B.

123. See Tarlow, *supra* note 54, at 40. Tarlow believes that this emphasis on vertical relatedness shows that the Second Circuit is relying on pre-*H.J. Inc.* precedent. He cites *United States v. Weisman*, 624 F.2d 1118 (2d Cir. 1980). Tarlow, *supra* note 34, at 40. The same can be said of the Second Circuit’s reliance on *Indelicato* and its indirect relation.

124. 18 U.S.C. § 1962(c) (2006).

125. See *United States v. Giovanelli*, 945 F.2d 479, 490 (2d Cir. 1991) (“Unlike a ‘pattern of racketeering activity’ which requires proof of two or more predicate acts, to satisfy RICO’s ‘collection of unlawful debt’ definition the government need only demonstrate a single collection.”); *United States v. Megale*, 363 F. Supp. 2d 359, 363 (D. Conn. 2005) (quoting same).

126. *Megale*, 363 F. Supp. 2d at 364 n.5.

the purposes behind RICO. First, the list of factors in *H.J. Inc.* is broad enough to allow this practice. Second, both *H.J. Inc.* and Second Circuit cases have emphasized the flexible nature of RICO,¹²⁷ and eliminating indirect relation would replace this flexibility with rigid categories. Finally, RICO is meant to reach criminals that are highly adaptable.¹²⁸ Precluding the use of indirect relation would ossify the statute to the point that it could not adequately deal with these highly adaptable criminals. Each argument will be discussed in turn.

A. *H.J. Inc. Allows Indirect Relation*

The first argument is that the list in *H.J. Inc.* authorizes the use of indirect relation to prove horizontal relatedness.¹²⁹ That list includes the possibility that predicate offenses can be “otherwise . . . interrelated by distinguishing characteristics”¹³⁰ This argument is bolstered by the Court’s statement that Congress’s vision of “relationship” was not a “constrained” one.¹³¹ This notion is expansive enough to include the relation of the predicate offenses to the enterprise (i.e. vertical relatedness) as the interrelating factor. Indirect relation to prove horizontal relatedness is therefore well within the parameters set by *H.J. Inc.*

The most direct response is that this argument leads to an incongruous result. If all that is needed is to show that the predicate offenses are related to the enterprise, then there is no need to consider whether there are similar purposes, victims, participants, or methods of commission. In any

127. *See H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239 (1989) (“The legislative history . . . shows that Congress indeed had a fairly flexible concept of pattern in mind.”); *United States v. Daidone*, 471 F.3d 274, 375 (2d Cir. 2006) (stating that Daidone’s interpretation of the *H.J. Inc.* factors as “specific requirements for finding horizontal relatedness distinct from vertical relatedness simply creates an overly formal conception of this element”). However, the Second Circuit’s treatment of “collection of unlawful debt” is another area in which there is inconsistency. *See supra* note 110.

128. 116 CONG. REC. 35,203 (1970) (comment of Sen. McClory) (“[The OCCA] places in the hands of the prosecution a number of necessary weapons in order to deal with the sophisticated operations of organized crime”); *Id.* at 18,940 (statement of Sen. McClellan) (“Members of La Cosa Nostra and smaller organized crime groups are sufficiently resourceful and enterprising that one constantly is surprised by the variety of offenses that they commit.”).

129. *See Flowers, supra* note 18, at 731 (“Because RICO was drafted with ‘a desire to avoid creating loopholes for clever defendants and their lawyers,’ courts should be receptive to new and novel methods of satisfying [the relatedness] requirement.”). Although Flowers emphasizes the flexibility of the relatedness requirement, he also argues that “relationships which are purely coincidental, fortuitous, or inherent in all criminal acts, mark activity which is properly characterized as random, unorganized, and outside RICO’s purview.” *Id.*

130. *H.J. Inc.*, 492 U.S. at 240; *see Flowers, supra* note 18, at 731 (“Indeed, the ‘or otherwise’ language of [§ 3575(e)] clearly suggests that this definition is not all encompassing.”).

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

prosecution under subsection § 1962(c), the prosecution has to prove both the existence of a RICO enterprise, and the defendant's association with that enterprise.¹³² There must also be some connection between the predicate offenses and the enterprise, or otherwise there would be no need to criminalize the conducting of the affairs of an enterprise through a pattern of such predicate offenses. As the Court reasoned in *H.J. Inc.*, however, a "pattern of racketeering activity" requires a relationship *between* the predicate offenses.¹³³ This is an extra step beyond showing that they are connected to the enterprise. In effect, indirect relation obviates the need for the rest of the list in *H.J. Inc.* In that case, if the argument were correct, the Supreme Court need not have gone to the trouble of looking to § 3575. It could have just said that predicate offenses are related if they each relate to the enterprise.

Also, the *H.J. Inc.* list concludes with the direction that predicate offenses are not "isolated events."¹³⁴ Indeed, the Court and the Second Circuit have both emphasized that isolated activity is not meant to be reached by RICO.¹³⁵ Horizontal relatedness, as established by the list in *H.J. Inc.*, is more likely to protect against RICO convictions of such isolated events. The definition of "isolated" is "[p]laced or standing apart or alone; detached or separated from other things or persons; unconnected with anything else; solitary."¹³⁶

Horizontal relatedness ensures that there is a connection between predicate offenses so that they can be considered a pattern. Horizontal relatedness is better able to protect against RICO convictions for predicate offenses that are "detached or separated" from each other. Indirect relation, i.e., vertical relatedness, allows the relation of "detached or separated" predicate offenses.

132. 18 U.S.C. § 1962(c) (2006) ("It shall be unlawful for any person employed by or associated with any enterprise . . .").

133. *H.J. Inc.*, 492 U.S. at 238–39.

134. *Id.* at 240 (quoting 18 U.S.C. § 3575(e)).

135. *Id.* at 239 ("A pattern is not formed by 'sporadic activity' . . . and a person cannot 'be subjected to the sanctions of [RICO] simply for committing two widely separated and isolated criminal offenses' . . .") (quoting, respectively, S. REP. NO. 91-617, at 158 (1969) and 116 CONG. REC. 18,940 (1970) (statement of Sen. McClellan)); *United States v. Indelicato*, 865 F.2d 1370, 1383 (2d Cir. 1989); *United States v. Minicone*, 960 F.2d 1099, 1106 (2d Cir. 1992).

136. 8 THE OXFORD ENGLISH DICTIONARY 123 (James A. H. Murray et al. eds., 2d ed., 1989).

B. RICO Has a Flexible Nature, and Should Not Be Confined By Formal Categories

Both the Supreme Court and the Second Circuit have emphasized the flexible nature of RICO.¹³⁷ The second argument suggests that drawing a distinct line between horizontal and vertical relatedness would create formal categories, defeating Congress's intent.¹³⁸ Indirect relation, it can be argued, is more faithful to this congressional intent because it is more flexible.

However, indirect relation allows two predicate offenses, without more, to form a pattern. One of the basic principles of *H.J. Inc.* is that there must be something beyond the number of predicate offenses to form a pattern.¹³⁹ It is for this reason that the Supreme Court set out the "continuity plus relationship" test. Two predicate offenses may be isolated, in that they are "detached or separated from other things or

137. *H.J. Inc.*, 492 U.S. at 238 ("It is reasonable to infer . . . that Congress intended to take a flexible approach . . ."); *United States v. Daidone*, 471 F.3d 371, 375 (2d Cir. 2006). Indeed, the Supreme Court noted that there may be overlap of evidence. *H.J. Inc.*, 492 U.S. at 239. However, it stated that this overlap occurs between the continuity and relationship prongs of the test. *Id.* This overlap helps to retain the flexibility envisaged by Congress.

138. *See Daidone*, 471 F.3d at 375. At least one district court in the Second Circuit has expressed frustration with all of the interpretations and requirements that have been pronounced by different courts over the years. *United States v. Bellomo*, 263 F. Supp. 2d 561, 564–66 (E.D.N.Y. 2003). The exasperation felt by the court was palpable. "To collect and recite even a minute sampling of [RICO] cases . . . would be an ambitious exercise if not an exercise in intellectual frustration and provide such guidance as the Court may wish them to provide in arriving at a decision." *Id.* at 565. In a footnote, the court stated "[i]f one objective of precedent is to provide some guidance for future conduct with relative assurance that such conduct is within the law, the precedents in this area have missed the mark by a wide margin." *Id.* at 565 n.1. Instead of looking to whether requirements like vertical and horizontal relatedness were satisfied, the court opted for a "realistic, common sense" approach. *Id.* at 565.

This may have been acceptable in that case, which involved the prosecution of Vincent Gigante, the boss of the Genovese Organized Crime Family. *Id.* at 564. But there is a difference between the boss of a major La Cosa Nostra family and the person who cleans his office. *See United States v. Viola*, 35 F.3d 37, 43 (2d Cir. 1994). In *Viola*, defendant Formisano was the janitor and handyman for the boss of a criminal enterprise. He was convicted of RICO for twice transporting goods for his boss. This conviction was overturned because "[t]here was no evidence that [Formisano] was even aware of the broader enterprise." *Id.*

Although the *Viola* court did not base its ruling on a lack of vertical or horizontal relatedness, it did look to the reasoning of *Reves v. Ernst & Young*, 507 U.S. 170 (1993) (operation or management test). The point is that the *Viola* court had to look to one of the "sophisticated rules qualified by subtle nuances and Talmudic distinctions" that the *Bellomo* court was so quick to condemn. *Bellomo*, 263 F. Supp. 2d at 565. Had the *Viola* court taken the common sense approach, a janitor may have gone to prison for violating RICO.

139. *H.J. Inc.*, 492 U.S. at 238 (quoting 116 CONG. REC. 18,940 (1970) (statement of Sen. McClellan)). The Supreme Court expressly rejected the use of two predicate offenses, without more, to find a pattern. *Id.* at 236.

persons,”¹⁴⁰ but are still vertically related to the enterprise. Although Congress intended a flexible approach to the pattern concept, it also intended a “more stringent requirement” than just two predicate offenses.¹⁴¹

Beyond this, if the development of the “continuity plus relationship” test and the horizontal and vertical relatedness elements were permissible interpretations of § 1962, then it cannot be said that disallowing indirect relation would reduce its flexibility. Otherwise, *H.J. Inc.* and vertical and horizontal relatedness would fail for the same reason. Maximum flexibility would be realized by only requiring that there be two predicate offenses, as under the Second Circuit’s pre-*Indelicato* precedent.¹⁴² If flexibility is the trait desired, then *H.J. Inc.* was wrongly decided because it does not provide the maximum flexibility possible. Requiring horizontal relatedness does not diminish the flexibility of RICO within the bounds intended by Congress. After all, the list in *H.J. Inc.* itself is a broad and open-ended group of factors.¹⁴³

C. RICO Is Meant to Reach Highly Adaptable Criminals

The third argument suggests that disallowing the use of indirect relation would ossify § 1962 to the point that it could not reach these highly adaptable criminals. Indeed, one of the sponsors of RICO emphasized the fact that the list of predicate offenses was long in light of the resourcefulness of the criminals at whom the statute was aimed.¹⁴⁴

The response to this argument is that RICO in its present application possibly contains a troubling amount of overbreadth.¹⁴⁵ The Supreme

140. 8 THE OXFORD ENGLISH DICTIONARY 123 (James A. H. Murray et al. eds., 2d ed., 1989).

141. *H.J. Inc.*, 492 U.S. at 237.

142. See *United States v. Ianniello*, 808 F.2d 184, 192 (2d Cir. 1986).

143. The list in *H.J. Inc.* is not exhaustive. The language “otherwise . . . interrelated by distinguishing characteristics” allows courts to recognize new factors. This would be part of the further development by the lower courts envisioned in the case. *H.J. Inc.*, 492 U.S. at 243. The Second Circuit has recognized that this list is a starting point, not the end of the inquiry. *United States v. Daidone*, 471 F.3d 371, 375 (2d Cir. 2006) (“We read the list . . . [as] a starting point for the relatedness inquiry as a whole . . .”).

144. 116 CONG. REC. 18,940 (1970) (statement of Sen. McClellan) (“It is impossible to draw an effective statute which reaches most of the commercial activities of organized crime, yet does not include offenses commonly committed by persons outside organized crime as well.”). See Lynch (pts. 1 & 2), *supra* note 7, at 686–88, for a discussion of the difficulty in defining “organized crime.”

145. See, e.g., *H.J. Inc.*, 492 U.S. at 255–56 (Scalia, J., concurring) (raising possibility of constitutional vagueness challenge to RICO); Reed, *supra* note 79, at 720–32. Reed conducts a detailed discussion of why RICO, and the pattern element in particular, is open to a vagueness challenge.

Court has noted that the statute uses expansive terms.¹⁴⁶ This is confounded by the use of such broad federal criminal statutes as the mail¹⁴⁷ and wire¹⁴⁸ fraud statutes as predicate offenses.¹⁴⁹ As discussed above,¹⁵⁰ Congress has implicitly accepted the broad application of RICO by not amending it. In light of the pervasive criticism of RICO's breadth, some limit must be placed on it. This limitation must come from the courts.¹⁵¹

Requiring a more distinct separation between horizontal and vertical relatedness is simply one limit on the breadth of RICO. It cannot be denied that RICO has been a valuable prosecutorial tool in the conviction of criminals that would otherwise be immune from prosecution.¹⁵² However, even with a distinct separation between horizontal and vertical relatedness elements, RICO retains a number of advantages for the prosecution.¹⁵³

There is also a federalism argument that RICO allows the government to intrude into affairs that should be left to the states. *Id.* RICO allows state crimes to form predicate offenses. 18 U.S.C. § 1961(1) (2006). But a violation of a specific state criminal statute need not be shown. It is only necessary that the conduct be *chargeable* under state law. *Id.* Thus, the argument is that federal prosecutors are pursuing convictions for activity that should be charged and punished under state law. However, further explanation of this argument is beyond the scope of this note.

146. *Russello v. United States*, 464 U.S. 16, 21 (1983) (noting Congress's consistent use of terms and concepts of breadth in RICO); *H.J. Inc.*, 492 U.S. at 237.

147. 18 U.S.C. § 1341 (2006).

148. *Id.* § 1343.

149. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 500 (1985) (noting broad use of civil RICO due to breadth of predicate offenses); *H.J. Inc.*, 492 U.S. at 236 (expansive use of RICO due to breadth of predicate offenses applies both to civil and criminal context); *see also* Barsomian, *supra* note 79, at 920 ("In particular, the inclusion of mail, wire, and securities fraud as predicate acts is often blamed for the explosive use of RICO over the past ten years.").

150. *See supra* Part I.

151. *See supra* Part II.A.

152. *Lynch* (pts. 1 & 2), *supra* note 7, at 664. One of the major deficiencies in the federal criminal laws before RICO was enacted was inadequate punishment. These laws provided no way to cut off the flow of money which is an organized crime group's lifeblood. S. REP. NO. 91-617, at 78 (1969). If a member was sent to prison, there were others ready to fill in the gap. *Id.* The flow of money would continue uninterrupted. RICO addressed this lack by including a criminal forfeiture provision, § 1963, which provides that a convicted defendant must forfeit his interest in the enterprise. 18 U.S.C. § 1963 (2006). Thus, a RICO conviction can severely damage the financial resources of a RICO enterprise.

153. *See Lynch* (pts. 1 & 2), *supra* note 7, at 740 (joinder of defendants in same trial that would otherwise require separate trials); *see also Lynch* (pts. 3 & 4), *supra* note 7, for a discussion of the ways in which RICO as a whole has been used advantageously by prosecutors. These include jurisdictional reach to crimes that would otherwise fall under state law, RICO's use as an expanded conspiracy statute, and its use as a penalty enhancer. *Id.* Another commentator argues that "[t]he relationship requirement should therefore be applied to every act, event, and circumstance purported to evince a RICO pattern." Flowers, *supra* note 18, at 732. This reasoning would allow prosecutors to offer evidence beyond the predicate offenses charged, making it easier to prove a pattern. This is arguably the course taken by the court in *United States v. Dinome*, 954 F.2d 839, 843 (2d Cir. 1992). *See supra* note 51 and accompanying text. However, Flowers cautions that "[t]hese facts are relevant only if related to each other in a manner which demonstrates organized and systematic criminal conduct." Flowers, *supra* note 18, at 732.

It must also be remembered that to obtain a conviction under RICO the defendant must necessarily have committed two underlying offenses.¹⁵⁴ If there is sufficient evidence to prove that these offenses were committed for purposes of RICO, then the defendant could very easily face the normal punishment for these offenses without recourse to RICO.¹⁵⁵ In

Also, when predicate offenses are charged because they would be violations of state law, RICO does not incorporate state definitions of those crimes or state procedure. *See United States v. Diaz*, 176 F.3d 52, 87 (2d Cir. 1999); *United States v. Miller*, 116 F.3d 641, 675 (2d Cir. 1997). “The statute is meant to define, in a more generic sense, the wrongful conduct that constitutes the predicates for a federal racketeering charge.” *United States v. Paone*, 782 F.2d 386, 393 (2d Cir. 1986). This has the advantage of excusing federal prosecutors from becoming experts on state law when they bring a RICO charge. Definitions of crimes vary from state to state. If state definitions applied, a prosecutor that proved arson as a predicate offense in one state may not be able to prove arson in another state given the same facts. This would create a complex patchwork of case law, while at the same time providing loopholes for sophisticated criminals. But since state law crimes that serve as predicate offenses are considered in the generic, a federal prosecutor can rely on *stare decisis*. A prosecutor that proves arson as a predicate offense in the Southern District of New York can use that decision while proving arson as a predicate offense in the Middle District of California.

154. This is implicit from the fact that § 1962 requires evidence of a pattern of racketeering activity. The definition of “pattern” requires, *at a minimum*, two acts of racketeering. 18 U.S.C. § 1961(5) (2006). The possibility exists that the defendant could be convicted for collection of unlawful debt. *Id.* § 1962(a)-(c). Whether or not the collection of unlawful debt is subject to the pattern requirement is in doubt. *See supra* note 110. However, this does undermine the fact that the defendant has committed *some* underlying offense.

155. This does not take into account any statutes of limitation which may preclude charges for these offenses being brought. One advantage of RICO is that it provides for a somewhat indefinite statute of limitations, even taking into account the normal five-year statute of limitations for non-capital offenses under 18 U.S.C. § 3282 (2006). The definition of pattern requires only that the last predicate offense charged “occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.” *Id.* § 1961(5). For a RICO conviction, at least one predicate offense had to occur during the five-year statute of limitations. *See United States v. Persico*, 832 F.2d 705, 714 (2d Cir. 1987). If the last act of racketeering activity charged against a defendant was in 2003, but he had been in prison from 1990 until 2003, then theoretically he could be charged under RICO if he committed a related predicate offense in 1980. The gravamen of a RICO charge under § 1962(c) is conducting the affairs of a RICO enterprise through a pattern of racketeering activity, not the underlying activity itself. Therefore, it does not matter if the predicate offenses themselves would be barred by statutes of limitation. RICO merely requires proof of their occurrence, not that they occurred within a period of time not barred by a statute of limitations.

This advantage of avoiding statutes of limitations also illustrates how important it is to have distinct horizontal and vertical relatedness requirements. *See United States v. Long*, 917 F.2d 691, 697 (2d Cir. 1990). In *Long*, only three of the charged predicate offenses occurred within the five-year statute of limitations. *Id.* If none of these offenses had been related to other predicate offenses, then the RICO prosecution would have been time barred. On the other hand, if indirect relation were used the statute of limitations would have proved to be no obstacle if the predicate offenses were related to the enterprise. This is one of the inherent dangers of using indirect relation. A defendant could commit two offenses which are wholly unrelated except for the fact that they are both vertically related to an enterprise. They may be the only crimes that the defendant has ever committed. They could be fifteen years apart. Under indirect relation, the defendant would still be guilty of RICO. It is hard to see how these offenses could be seen as other than “two widely separated and isolated” offenses, which are beyond the purview of the statute. *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 236, 239 (1989).

For another example of the advantage that RICO gives prosecutors in avoiding statutes of limitations, see *United States v. Daidone*, 471 F.3d 371 (2d Cir. 2006). In *Daidone*, two of the

some cases, the defendant may not merit the harsh federal punishments available under RICO.¹⁵⁶ Providing for a more distinct separation between horizontal and vertical relatedness elements does not necessarily entail that these criminals won't be convicted and punished for crimes that they have committed. This single limit may simply exclude those defendants who do not necessarily merit the harsh punishments of RICO.¹⁵⁷

V. PROPOSAL

The line between horizontal and vertical relatedness has been erased by the practice of allowing indirect relation to prove horizontal relatedness. The Second Circuit should reject this practice. The Supreme Court's pronouncement in *H.J. Inc.* provided the foundation for the separation of these two elements. The Second Circuit should return to this foundation by once again requiring an interrelationship between predicate offenses beyond vertical relatedness to the enterprise. Such a decision would not only reaffirm the principles underlying the Supreme Court's decision in *H.J. Inc.*, but would provide a single—though much-needed—limit on RICO.

This limit would help ensure that isolated acts are not subjected to the severe penalties that accompany a RICO conviction. Such isolated acts have been consistently held to be outside the purview of RICO.¹⁵⁸ These acts should be prosecuted under the laws that they violate. If Congress sees fit, it can amend RICO to include such isolated acts. But this decision should be left with Congress.

This limit would not reduce the efficacy of RICO in accomplishing its goal of eliminating criminal enterprises and their influence over legitimate businesses. RICO would still retain many advantages for prosecutors, such

predicate offenses charged took place in 1989 and 1990. *Id.* at 373. The defendant had also taken part in loansharking from 1988 to 1999. *Id.* Although the defendant was first indicted in 2002 and tried in 2004, the prosecution was able to use events that had taken place in 1989 and 1990 to secure a RICO conviction. Brief for Defendant-Appellant at 4, 7, *United States v. Daidone*, 471 F.3d 371 (2d Cir. 2006) (No. 04-3784-cr), 2004 WL 5280159.

156. *See* 18 U.S.C. § 1963 (providing up to twenty years or life imprisonment, fines, and mandatory forfeiture).

157. For an example of a defendant who was acquitted of the § 1962(c) charge against him, see *United States v. Viola*, 35 F.3d 37 (2d Cir. 1994). Defendant Formisano worked for the leader of a criminal enterprise doing janitorial work. On two occasions he transported stolen goods for his employer and returned the proceeds. It was on the basis of these two acts that he was prosecuted under RICO. The Second Circuit reversed his conviction. *Id.* at 43. Although his acts could be said to be horizontally related, his case is illustrative of the fact that RICO charges are brought against those who plainly do not merit RICO punishment.

158. *See, e.g., H.J. Inc.*, 492 U.S. at 239.

as joinder, venue, and evidentiary advantages.¹⁵⁹ It also has the advantage of including broad statutes like money laundering, mail fraud, and wire fraud as predicate offenses. These broad statutes combine with the breadth of RICO itself to provide the flexibility needed to capture and punish highly adaptable criminals.

In the alternative, the Second Circuit could dispense with the terms “horizontal” and “vertical” relatedness. As discussed in Part III, the majority of circuits look to the list of factors in *H.J. Inc.* to determine the relationship prong of the “continuity plus relationship” test. At the same time, they recognize that there must be a nexus between the predicate offenses and the enterprise. This Note has argued that such an analysis is equivalent to the Second Circuit’s practice, in that it looks both to interrelationship between predicate acts, and to the relation of those acts to the RICO enterprise. Dispensing with the terms “horizontal” and “vertical,” however, could emphasize the reality that there are two separate requirements. The Second Circuit could then end its use of the erroneous practice of indirect relation.

If nothing else, the Second Circuit should abolish the distinction between vertical and horizontal relatedness. Instead of paying lip service to horizontal relatedness, it could unequivocally state that vertical relatedness is all that is needed. If it recognized that the use of indirect relation has virtually eliminated the horizontal relatedness requirement, it could cure the inconsistency of application in its case law. Defendants and defense lawyers would have notice that horizontal relatedness is a fruitless argument, saving time and money. As this Note has argued, such an approach would be completely inconsistent with the Supreme Court’s decision in *H.J. Inc.*, but it would at least be honest about the reality of Second Circuit practice.

CONCLUSION

Criminal RICO has a long history of broad interpretation and expansive use. Congress’s implicit authorization of this practice leads to the necessity of judicial action if any limits are to be imposed. The Supreme Court in *H.J. Inc.* made a permissible interpretation of the broad definition of “pattern of racketeering.” This was done for the purpose of providing some guidance to the Courts of Appeals, while at the same time protecting against the use of RICO prosecutions where predicate offenses are isolated

159. See *supra* note 149 and accompanying text.

acts. However, the Supreme Court left further development to the lower courts. The Second Circuit's elaboration of the horizontal and vertical relatedness elements was a part of this development. Horizontal and vertical relatedness are themselves logically consistent with both the words of § 1962(c) and the decision in *H.J. Inc.*

Daidone is the Second Circuit's most recent decision dealing with horizontal and vertical relatedness. That decision reaffirmed the practice of using indirect relation to prove horizontal relatedness, while at the same time stating that horizontal and vertical relatedness are meant to provide outer limits on RICO's use. Does the reasoning in *Daidone* really establish that there are outer limits? The answer to this question is no. Indirect relation erases the line between horizontal and vertical relatedness, and is unfaithful to the decision in *H.J. Inc.* There should be a more distinct separation between these elements. This can be done by eliminating the use of indirect relation. This approach would provide a single limitation on RICO's broad application without sacrificing the flexibility of RICO.

*Colman D. McCarthy**

* J.D. (2009), Washington University School of Law. I would like to thank Samuel Buell, Associate Professor of Law at Washington University School of Law. His comments helped to refine the arguments contained in this Note.