# Gang Members of Common Intelligence: The Relevance of the Vagueness Doctrine in RICO Prosecutions of Urban Street Gangs

Kevin Hasenfang†

This article will examine the constitutionality of the criminal provisions of the Racketeer Influenced and Corrupt Organizations ("RICO") Act, specifically focusing on whether or not the application of the statute to sophisticated urban street gangs is in violation of the vagueness doctrine derived from the due process clauses of the Fifth and Fourteenth Amendments.[1] The analysis will concentrate on constitutional challenges to specific elements of the statute,[2] with distinct attention paid to its controversial "pattern of racketeering" and "enterprise" requirements. Given the legal precedent set by numerous challenges to various elements of the statute and recent attempts to define those elements, I argue that the RICO statute, though broad in scope, is not unconstitutionally vague or ambiguous in the context of urban street gang prosecutions.

---

†: Kevin Hasenfang is a third-year in the College, majoring in Public Policy Studies.

1: For a brief discussion of other challenges to the constitutionality of RICO prosecutions, based on the First Amendment, the Tenth Amendment, and the Ex Post Facto Clause of Article I § 10 of the United States Constitution, see Frank Marine, *Criminal RICO: 18 U.S.C. 1961-1968, A Manual for Federal Prosecutors* 303-310 (5th ed. 2009), online at http://www.justice.gov/sites/default/files/usam/legacy/2014/10/17/rico.pdf.

2: I do not address, in the present analysis, the "interstate or foreign commerce" requirement, as the standard is so well defined in federal law that no vagueness challenge to this element can realistically be raised. See, *e.g.*, *United States v. Kramer,* 355 F.2d 891 (7th Cir. 1966), *cert. denied in part and granted in part*, 384 U.S. 100 (1966).

## I. Background

To many, the term "organized crime" evokes exaggerated images of Italian-American Mafiosi operating during the Prohibition era. The concept, however, is continuously evolving. In reality, any group with malicious intent, from a drug cartel to a hedge fund, can be classified as an organized criminal enterprise. In major cities across the United States, urban street gangs are beginning to emerge as the new face of organized crime. These street gangs pose a serious and steadily increasing threat to the modern urban center.

Most street gangs function as highly sophisticated criminal enterprises, deeply embedded within their communities and increasingly engaged in non-traditional gang-related crimes such as human, drug, and weapons trafficking.[3] Additionally, street gangs mercilessly continue to be disproportionately responsible for violent crime in urban areas; roughly 48 percent of all violent crime is gang-related, and that proportion increases to nearly 90 percent when looking at urban and suburban communities alone.[4] These street gangs recruit aggressively, specifically targeting at-risk youth in low-income neighborhoods. Consequently, there has been a 40 percent increase in gang membership nationally between 2009 and 2011.[5]

Traditional gang enforcement strategies, particularly in urban and suburban areas, have commonly relied on reactive police responses to street-level criminal activity. In coordination with local law enforcement, prosecutors have then typically pursued strategic plea agreements with these street-level offenders in order to develop actionable intelligence on higher-ranking individuals within the gang's hierarchy. This, however, is inefficient; as these gangs evolve, becoming ever more structured and methodical, so must the government's enforcement mechanism. In the late 1980s, federal prosecutors began exploring how a broadened interpretation of the Racketeer Influenced and Corrupt Organizations ("RICO") Act might function as an aggressive means of dismantling sophisticated urban street gangs.

---

3: *2013 National Gang Report,* National Gang Intelligence Center 12 (2013), online at http://www.fbi.gov/stats-services/publications/national-gang-report-2013.

4: *2011 National Gang Threat Assessment: Emerging Trends,* National Gang Intelligence Center 9 (2011), online at http://www.fbi.gov/stats-services/publications/2011-national-gang-threat-assessment/2011-national-gang-threat-assessment-emerging-trends.

5: *Id.* at 11.

## II. Overview of Criminal RICO

The RICO Act, 18 U.S.C. §§ 1961-1968, was enacted in 1970 as Title IX of the Organized Crime Control Act of 1970[6] in order to target the Mafia and white-collar crime. RICO provides for both civil remedies[7] and criminal penalties.[8] The statute's criminal provisions, with which this analysis is concerned, provide significant criminal penalties for "persons" who engage in a "pattern of racketeering activity" or "collection of an unlawful debt" while maintaining a relationship with an "enterprise" engaged in or affecting "interstate or foreign commerce."[9]

Four substantive criminal activities are specifically proscribed by the RICO statute.[10] Section 1962(a) prohibits any person from using or investing, directly or indirectly, the proceeds of a pattern of racketeering activity or collection of unlawful debt in the acquisition, as well as the establishment or operation of any enterprise affecting interstate or foreign commerce. Section 1962(b) prohibits any person from acquiring or maintaining, directly or indirectly, an interest in an enterprise affecting interstate or foreign commerce through a pattern of racketeering activity or collection of unlawful debt. Section 1962(c) prohibits any person associated with an enterprise affecting interstate or foreign commerce from conducting or participating, directly or indirectly, in the enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt. Section 1962(d) prohibits any person from conspiring to commit any of the three preceding substantive criminal violations. The RICO statute provides criminal penalties, based on the underlying racketeering activity, up to and including a maximum life sentence and/or a fine under Title 18, along with guidelines for asset forfeiture and the pre-trial prevention of asset dissipation.[11]

## III. Vagueness Doctrine

Criminal statutes are required, by constitutional rule, to state explicitly and definitely what conduct is punishable. This rule, the vagueness doctrine, is derived from the due process clauses of the Fifth and Fourteenth Amendments. Criminal statutes that violate this doctrine are "void for vagueness" or

6: See Pub. L. No. 91-452 (1970).
7: See 18 U.S.C. § 1964.
8: See 18 U.S.C. § 1963.
9: Marine, *Criminal RICO: 18 U.S.C. 1961-1968* at 1 (cited in note 1).
10: See 18 U.S.C. § 1962.
11: See 18 U.S.C. § 1963.

"unconstitutionally vague." By requiring overt notice of what conduct does and does not violate a criminal law, the vagueness doctrine protects the rights of citizens to fair criminal procedure and due process of law. Additionally, the vagueness doctrine protects citizens from arbitrary enforcement of the laws and arbitrary prosecutions by imposing limits on the extent of a legislature's delegation of legal authority to judges or administrators.[12]

The Supreme Court in *Connally v. General Construction Co.*,[13] wrote that:

> the terms of a penal statute must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties…and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.[14]

In order to satisfy the due process clauses of the Fifth and Fourteenth Amendments, then, courts have held that "individuals are entitled to understand the scope and nature of statutes which might subject them to criminal penalties."[15] Going further, the Court outlined in *Skilling v. United States*[16] that a penal statute "must define the criminal offense (1) with sufficient definiteness that ordinary people can understand what conduct is prohibited and (2) in a manner that does not encourage arbitrary and discriminatory enforcement."[17]

The Court has consistently restricted vagueness challenges to real cases, on an as-applied basis, as opposed to general considerations of hypothetical sets of facts. It has maintained that "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others."[18] This is necessary so as to prevent the court from "[invalidating] a criminal statute on its face even when it could conceivably have had some valid application."[19] To this end, the Court held

---

12: *Kolender v. Lawson*, 461 U.S. 352 (1983).
13: 269 U.S. 385 (1926).
14: *Id.* at 391. See also *International Harvester Co. v. Kentucky*, 234 U.S. 216, 221 (1914).
15: *Hedges v. Obama*, 2012 U.S. Dist. LEXIS 68683 (2012).
16: 130 S. Ct. 2896 (2010).
17: *Id.* at 2928. Also see *Coates v. Cincinnati,* 402 U.S. 611 (1971).
18: *Village of Hoffman Estates v. Flipside, Hoffman Estates Inc.*, 455 U.S. 489, 495 (1982).
19: *Kolender v. Lawson*, 461 U.S. 352, 358 n. 8 (1983).

in *United States v. Mazurie*[20] that "vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand"[21] without regard to the statute's facial validity.[22] Additionally, the Court definitively stated in *United States v. Salerno*[23] that a facial challenge to a statute "must establish that no set of circumstances exists under which the [statute] would be valid."[24]

Vagueness challenges to RICO directed toward either its civil or criminal provisions, must necessarily rely on "the facts of the particular case in which the claim is asserted."[25] Such attacks to the statute, therefore, have historically not seen much success in the courts. Regardless, there is still great concern about the difficulty of interpreting the plain language of the statute and arriving at a well-understood definition for each of its various elements. Note, for example, the concurring opinion written by Justice Scalia in *H.J. Inc. v. Northwestern Bell Telephone Co.*,[26] in which four Justices emphasized that:

> it is also true that RICO, since it has criminal applications as well, must, even in its civil applications, possess the degree of certainty required for criminal laws. No constitutional challenge to this law has been raised in the present case, and so that issue is not before us. That the highest Court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when that challenge is presented.[27]

This acknowledgement prompted numerous vagueness challenges, many of which were led by gang members, to the RICO statute. Between the *H. J. Inc.* decision in 1989 and 2009, all ten federal courts of appeals that addressed the RICO vagueness argument rejected it. In each case, courts found that "the defendants had adequate notice that their conduct fell within the proscriptions of RICO and that consequently their vagueness challenges…were meritless."[28] However, the constitutional concern here—

---

20: 419 U.S. 544 (1975).
21: *Id.* at 550.
22: Also see *United States v. Nadi*, 996 F. 2d 548 (2d Cir. 1993).
23: 481 U.S. 739 (1987).
24: *Id.* at 745.
25: Marine, *Criminal RICO: 18 U.S.C. 1961-1968* at 304 (cited in note 1).
26: 492 U.S. 229 (1989).
27: *Id.* at 255-56 (Scalia, J., concurring). Chief Justice Rehnquist and Justices O'Connor and Kennedy joined Justice Scalia's concurrence.
28: Marine, *Criminal RICO: 18 U.S.C. 1961-1968* at 304 (cited in note 1).

whether RICO is "too vague to put persons on notice that their activities are illegal and, alternately, casts too large a net and "captures" innocent actors in an enterprise"[29]—remains.

### IIIa. Pattern of Racketeering Activity

Section 1961(5) defines a "pattern of racketeering activity" as "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity."[30] According to internal guidelines at the U.S. Department of Justice, these violations "may both be state offenses, federal offenses, or a combination of the two; they may be violations of the same statute, or of different statutes; and the acts need not have previously been charged."[31]

A number of cases, specifically regarding the ambiguity of the term "pattern," have held that the term itself is not unconstitutionally vague.[32] This is important, as was noted in *United States v. Campanale*,[33] because "[w]ith respect to the argument that this statute is vague and ambiguous, it is true that, if undefined, terms such as "pattern of racketeering activity" would be unmanageable."[34] To resolve this dispute, the Ninth Circuit held in *Campanale* that any ambiguity "is cured by 18 U.S.C. § 1961, which defines "racketeering activity" with reference to specific offenses, "pattern of racketeering activity" with reference to a definite number of acts of "racketeering activity" within specified time periods, and "enterprise" and "person" with standard language of established meaning."[35]

A significant vagueness challenge to RICO's "pattern of racketeering activity" requirement which focused on the term "pattern," on the other hand, was raised in *United States v. Tripp*.[36] In *Tripp*, the defendant claimed that "the RICO statute, by adopting the laws of the states in defining 'racketeering activity'…violates the Fifth Amendment Due Process Clause by creating a

---

29: *United States v. Swiderski*, 593 F. 2d 1246, 1249 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979).

30: 18 U.S.C. § 1961(5). For the substantive list of enumerated criminal offenses which qualify as predicate acts under the racketeering activity requirement, see 18 U.S.C. § 1961(1).

31: Marine, *Criminal RICO: 18 U.S.C. 1961-1968* at 89 (cited in note 1).

32: See *Swiderski,* 593 F. 2d at 1246.

33: 518 F. 2d 352 (9th Cir. 1975).

34: *Id.* at 364.

35: *Id.*

36: 782 F.2d 38 (1986).

lack of national uniformity and by not properly notifying a person that his conduct is illegal."[37] The court swiftly rejected this argument, declaring that there is no "constitutional objection to a criminal statute that incorporates state law for purposes of defining illegal conduct" and that this holds true "even if the result is that conduct that is lawful under the federal statute in one state is unlawful in another."[38] Moreover, the court suggests in *Tripp* that a more appropriate challenge would be to "allege that the state offenses involved [in 18 U.S.C. § 1961(1)(A)] themselves are 'void-for-vagueness.'"[39]

Legal precedent indicates, then, that the plain language of the statute, specifically the definition of the "pattern of racketeering activity" requirement, is sufficient to put defendants on notice. In *Beck v. Edward D. Jones & Co.*,[40] an Illinois district court ruled that "any person of average intelligence could determine what actions would make him liable for participating in an enterprise through a pattern of racketeering activity."[41] This suggests that future vagueness challenges to the element will undoubtedly fail.

### IIIb. Collection of an Unlawful Debt

Section 1961(6) defines an "unlawful debt" as "a debt (a) incurred or contracted in gambling activity which was in violation of the law…or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (b) which was incurred in connection with the business of gambling in violation of the law…or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate."[42] This is, of course, an alternative to the "pattern of racketeering activity" requirement and not necessary to pursue RICO charges. Because the unlawful debt must be incurred through illicit gambling or loansharking activities, this is superfluous to the present analysis. Though urban street gangs may, in fact, engage in illicit gambling or loansharking activities, the "pattern of racketeering activity" is significantly more common in pursuit of RICO charges against street gang members.

---

37: *Id.* at 41-42.
38: *Id.* at 42.
39: *Id.*
40: 735 F. Supp. 903 (I.L.C.D. 1990).
41: *Id.* 906.
42: 18 U.S.C. § 1961(6).

### IIIc. Enterprise

Section 1961(4) defines an "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[43] This definition broadly encompasses a wide variety of types of enterprises, yet many have questioned whether wholly illegitimate organizations, and thereby street gangs, fit at all within the plain language of the element. Specifically, critics of a broadened application of the statute argue that "the sole purpose of RICO [is] to protect legitimate enterprises from infiltration by organized crime."[44]

In *United States v. Turkette*,[45] the Court ended this dispute by holding that "neither the language nor structure of RICO limits its application to legitimate 'enterprises'" and that an application "also to criminal organizations does not render any portion of the statute superfluous nor does it create any structural incongruities within the framework of the Act."[46] Moreover, the Court went as far as to suggest that "insulating the wholly criminal enterprise from prosecution under RICO is…incongruous."[47] Additionally, *Turkette* narrowed the applicability of the RICO statute by requiring "evidence of an ongoing organization, formal or informal" in which "the various associates function as a continuing unit."[48] Still, as one court has noted, the definition of "enterprise" is continuously shifting based on the "fluid nature of criminal associations."[49] Furthermore, the Court held in *Boyle v. United States*[50] that an "association-in-fact enterprise under RICO" needs not have "an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages."[51]

In order to establish that the members of the enterprise "operated together in a coordinated manner, in furtherance" of shared objectives, prosecutors may rely on:

---

43: 18 U.S.C. § 1961(4).
44: Jan Neuenschwander, *RICO Extended to Apply to Wholly Illegitimate Enterprises*, 72 J. Crim. L. & Criminology 1426, 1429 (1981).
45: 452 U.S. 576 (1981).
46: *Id.* at 587.
47: *Id.*
48: *Id.* at 583.
49: *Swiderski,* 593 F. 2d at 1249.
50: 556 U.S. 938 (2009).
51: *Id.* at 941.

> a wide variety of direct and circumstantial evidence including, but not limited to, inferences from the members' commission of similar racketeering acts in furtherance of a shared objective, financial ties, coordination of activities, community interests and objectives, interlocking nature of the schemes, and overlapping nature of the wrongful conduct.[52]

This is particularly interesting, in terms of statutory ambiguity and vagueness, because it is rare that every individual who contributes to the mission of a criminal enterprise actually identifies as a member of the illegitimate organization; in many instances, individuals that engage in criminal activity that benefits the enterprise are only associated-in-fact.

It has been determined, in this regard, that it is not necessary, in proving the existence of the enterprise, to show that "every member of the enterprise participated in or knew about all its activities."[53] Rather, it is only necessary that the defendant "know the general nature of the [enterprise] and that the [enterprise] extends beyond his individual role."[54] To this end, it was determined by the District of Columbia Circuit in *United States v. Perholtz*[55] that "it is not essential that each and every person named in the indictment be proven to be a part of the enterprise," as the enterprise "may exist even if its membership changes over time or if certain defendants are found… not to have been members at any time."[56] As such, it also appears that an individual newly associated with an active urban street gang may be indicted under RICO charges predicated on any and all racketeering activities, charged against the defendant or uncharged altogether, which are carried out by the associated gang prior to the individual defendant's involvement.[57]

For some time, defense attorneys and scholars questioned whether there exists an economic motive requirement implicit in RICO's "enterprise" element. Indeed, the organized criminal enterprises at which RICO was originally targeted were profit-seeking entities and motivated by economic goals. However, the Court held in *National Organization for Women v.*

---

52: Marine, *Criminal RICO: 18 U.S.C. 1961-1968* at 62 (cited in note 1).
53: *United States v. Cagnina,* 697 F. 2d. 915, 922 (11th Cir. 1983).
54: *United States v. Rastelli*, 870 F. 2d. 822, 827-28 (2d Cir. 1989).
55: 842 F. 2d. 343 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 821 (1988).
56: *Id.* at 364 (citations omitted).
57: For a brief discussion regarding the admission of evidence related to uncharged crimes, see Marine, *Criminal RICO: 18 U.S.C. 1961-1968* at 371-73 (cited in note 1).

*Scheidler*[58] that RICO does not require "proof that either the racketeering enterprise or the predicate acts of racketeering were motivated by an economic purpose."[59] Moreover, the Court went so far as to declare that "the statutory language is unambiguous" and there is no "clearly expressed intent to the contrary [in the legislative history] that would warrant a different construction."[60] This will undoubtedly prove significant in the near future, as the Department of Justice actively explores the use of purely violent criminal acts as historical predicates for RICO prosecutions of urban street gangs.

## IV. Conclusion

It is true that RICO prosecutions of urban street gangs have always been met with a great deal of skepticism. In 1993, survey research demonstrated that roughly one-third of local prosecutors "would continue to rely entirely on traditional criminal statutes in prosecuting organized crime, with 27 percent citing the possibility that RICO-driven prosecutions will fail and 17 percent citing the legal complexity of the statute itself."[61] Some prosecutors, especially on the local level, still assume that judges would only allow a narrow application of the statute, thus "limiting practical applications of the statute to white-collar offenses alone."[62] This, as we have seen, is simply not the case.

It is true that Congress, when they passed the RICO Act in 1970, was not anticipating the fluid nature of organized crime or the application of the statute to urban street gangs. As the Court declared in *Sedima, S.P.R.L. v. Imrex Co.,*[63] however, "[t]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth."[64] Indeed, it has been shown that RICO prosecutions of urban street gangs fit well within the plain language of the statute. Given the legal precedent set by numerous challenges to elements of the statute, particularly those directed toward the "pattern of racketeering activity" and "enterprise" requirements, and the many recent efforts by various courts to

58: 510 U.S. 249 (1994).
59: *Id.* at 252.
60: *Id.* at 261 (citations omitted).
61: Donald Rebovich, Kenneth R. Coyle, & John C. Schaaf, *Local Prosecution of Organized Crime: The Use of State RICO Statutes,* National Criminal Justice Reference Service 14 (1993), online at https://www.ncjrs.gov/pdffiles1/Digitization/143502NCJRS.pdf.
62: *Id.* at 16.
63: 473 U.S. 479 (1985).
64: *Id.* at 499 (citing *Haroco, Inc. v. American National Bank & Trust Co. of Chicago,* 747 F. 2d 384, 398 (7th Cir. 1984).

define those same elements, it is clear that the RICO statute, though broad in scope, must not be considered unconstitutionally vague or ambiguous in the context of urban street gang prosecutions.