Introductory Remarks and a Comment on Civil RICO's Remedial Provisions

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This Symposium comes at a very opportune time. RICO seems to be on everyone's mind. The attention that RICO has garnered in the last few years in the courts, the press, and the legal academy has increased steadily, and the cries for change, at least from some quarters, have become deafening. Judge David Sentelle of the D.C. Circuit Court of Appeals recently labeled RICO "The Monster That Ate Jurisprudence;"[1] Chief Justice William Rehnquist has repeatedly called for a defederalization of RICO;[2] and groups as diverse as the *Wall Street Journal*, the *Washington Post*, and the American Civil Liberties Union have argued vociferously for a curtailment of the present statute.

Four years ago the Supreme Court in *Sedima, S.P.R.L. v. Imrex Co.*[3] pointedly told Congress that the remedy for the perceived overbreadth of RICO lies with the legislative branch. Despite this open invitation and a variety of legislative proposals, Congress has yet to address these problems. In each legislative session RICO opponents bravely predict that the days of the extant version of RICO are numbered. Every session to date, including the latest one, however, has failed to produce the promised amendment.

In addition to the movement for statutory amendment, the current version of RICO now faces Justice Antonin Scalia's not so veiled threat last term in *H.J. Inc. v. Northwestern Bell Telephone Co.*,[4] that the Court would find the statute unconstitutionally vague when presented

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1. *Wounding the RICO Beast*, Wash. Times, Nov. 27, 1989, at F2, col. 1.

2. *See* Rehnquist, *Reforming Diversity Jurisdiction and Civil RICO*, 21 ST. MARY'S L.J. 5 (1989) (originally presented at the Brookings Institution's Eleventh Seminar on the Administration of Justice, Apr. 7, 1989); Rehnquist, *Get RICO Cases out of My Courtroom*, Wall St. J., May 19, 1989, at A14, col. 4.

3. 473 U.S. 479, 499-500 (1985).

4. 109 S. Ct. 2893, 2908-09 (1989) (Scalia, J., concurring).

with the appropriate case. Three other Justices joined Justice Scalia in raising the possibility that the Constitution may limit RICO's future.

Despite this outcry for change, RICO is not without its defenders. Few would contest the proposition that RICO has enabled the United States Attorneys, with guidance from the Criminal Division of the Department of Justice, to secure a number of important convictions. Federal prosecutors readily admit that RICO has become one of the government's more effective tools for attacking drug trafficking and official corruption. Any proposed change in RICO must be measured not only in terms of its purported benefits in decreasing the statute's perceived abuses, but also in terms of the costs that it may impose on desirable law enforcement efforts.

With this uncertainty surrounding RICO, the *Vanderbilt Law Review* Symposium attempts to assess the current state of RICO, and to set forth the arguments over its appropriate future course. It has fallen to me to preface this enterprise, and I think that the proper place to begin this Symposium is with a short description of RICO's statutory framework. It is this framework that RICO opponents cite as the root of the problem.

Passed in 1970, RICO had what all agree is a noble and uplifting purpose, namely, the rooting out of organized crime from legitimate business. Spurred on by the *1967 Report of the President's Commission on Law Enforcement and Administration of Justice*,[5] Congress feared that organized crime had begun to move from its traditional revenue raising activities such as gambling and prostitution, into what, on their face, were legitimate business activities.

While academics continue to disagree over whether Congress intended RICO to extend beyond the paradigmatic case of an organized crime family running a legitimate business, it is well settled that RICO today ranges far beyond such a situation. As is now well known, the ubiquity of RICO in the federal courts arises from the statute's capacious language. Section 1962 of title 18 of the United States Code delineates what constitutes a RICO violation. The operative terms in this provision are "pattern of racketeering activity" and "enterprise." Basically, section 1962 prohibits (1) the use of money gained from a "pattern of racketeering activity" in acquiring or operating any "enterprise" engaged in interstate commerce;[6] (2) the acquisition of such an enterprise through a pattern of racketeering activity;[7] (3) the running of such

5. PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967).

6. 18 U.S.C. § 1962(a) (1988).

7. *Id.* § 1962(b).

an enterprise through a pattern of racketeering activity;[8] and (4) the conspiracy to do any of these activities.[9] Simply put, almost any connection between a pattern of racketeering activity and an enterprise engaged in interstate commerce constitutes a RICO violation.

Section 1961 defines the terms "pattern of racketeering activity" and "enterprise," and these definitions more than anything else give RICO its expansive reach. While section 1961 purports to define "pattern of racketeering activity," in reality it only places modest constraints on the term's outer limits. The statute simply states that a pattern of racketeering activity requires at least two acts of racketeering activity that occurred during the last ten years.[10] As the Court noted last Term, "developing a meaningful concept of 'pattern' within the existing statutory framework has proved to be no easy task."[11] Even after the Court's attempt at defining what constitutes a "pattern," it is clear that the "pattern" requirement—whatever it is—places little constraint on RICO's reach.

Similarly, the definition of "enterprise" in section 1961 fails to exclude any significant class of cases from RICO. Section 1961 defines "enterprise" to include any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity.[12] It is difficult to think of a way Congress could have defined "enterprise" in a broader fashion.

Thus, the definitions of "pattern" and "enterprise" do little to place meaningful limits on RICO's scope. Neither, however, do they in and of themselves bring any actual conduct within RICO's maw. This task is left to section 1961's definition of "racketeering activity." It is this definition that gives RICO its catholic character. Section 1961 divides racketeering activities into three rather broad categories. The first contains state law crimes including any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or dangerous drugs, that are punishable under state law by imprisonment for more than one year.[13] The second category includes acts criminalized by various provisions of the United States Code. These acts are those of bribery, sports bribery, counterfeiting, theft from interstate shipment, embezzlement from pension and welfare funds, extortionate credit transactions, transmission of gambling information, mail fraud, wire fraud, trafficking in obscene ma-

8. *Id.* § 1962(c).
9. *Id.* § 1962(d).
10. *Id.* § 1961(5).
11. *H.J. Inc.*, 109 S. Ct. at 2899.
12. 18 U.S.C. § 1961(4) (1988).
13. *Id.* § 1961(1)(A).

terial, sexual exploitation of children, money laundering, dealing in stolen cars, obstruction of justice, obstruction of criminal investigations, obstruction of state or local law enforcement, interference with commerce, racketeering, interstate transportation of wagering paraphernalia, receiving unlawful welfare fund payments, illegal gambling, interstate transportation of stolen property, trafficking in contraband cigarettes, engaging in white slavery, and violating restrictions on loans to labor unions.[14] The final group of racketeering activity under section 1961 includes bankruptcy fraud, security fraud, and drug dealing.[15]

These "racketeering activities" have come to be called "predicate acts." The two predicate acts that have received the most attention by opponents of RICO are those of mail fraud and wire fraud, which simply prohibit the use of the mails and the wire for fraudulent purposes.[16] The malleability of these two crimes in the hands of federal prosecutors, and more importantly, private attorneys, has led to the propagation of RICO suits. Taking section 1961's definitions and reading them back into section 1962's substantive prohibitions, it becomes readily apparent that RICO is indeed a statute that covers an immense range of activity. Once a clever lawyer can characterize an opponent's actions as constituting one or two of the myriad of predicate acts, it takes little imagination to deem those actions RICO violations.

Of course, such a substantive sweep alone cannot serve as an indictment of RICO. First one must decide whether the breadth of the statute is warranted. Even if one concludes that it is not, however, this conclusion still does not condemn the statute. Even the broadest statute will have little impact if there are no means for its enforcement. Indeed, the existence of the crimes of mail fraud and wire fraud have existed since the last century and yet have failed to raise the substantial outcry accompanying RICO. This failure can be largely attributed to the fact that they do not contain private causes of action. Thus, any analysis of the impact of RICO's substantive prohibitions cannot be divorced from an analysis of its remedial provisions. A statute's bark simply may not be accompanied by a notable bite.

RICO's bark, however, is accompanied by a bite worthy of a pit bull. This bite can be felt either through criminal or civil penalties. Section 1963 delineates RICO's criminal penalties. It provides a maximum prison term of twenty years, or life when the underlying predicate of-

14. *Id.* § 1961(1)(B), (C).

15. *Id.* § 1961(D).

16. *See id.* § 1341 (mail fraud); *id.* § 1343 (wire fraud). Susan Getzendanner argues that these two predicate acts should be eliminated. *See* Getzendanner, *Judicial "Pruning" of "Garden Variety Fraud" Civil RICO Cases Does Not Work: It's Time for Congress to Act*, 43 VAND. L. REV. 673, 679-81 (1990).

fense carries a life sentence.[17] Such penalties do not seem overly harsh. The true force of the criminal penalties, however, is RICO's forfeiture provision. Section 1963 authorizes the forfeiture of (1) any interest the defendant received by virtue of committing a RICO violation,[18] (2) any interest in any enterprise that has been established or run in violation of RICO,[19] and (3) any proceeds the defendant received from committing RICO violations.[20] This forfeiture provision is not linked to the harm caused by the RICO violations themselves; whatever RICO touches, the convicted defendant loses.

Moreover, forfeiture under section 1963 occurs when the RICO offense is committed, not upon conviction. The government thus is able to trace assets to the hands of third parties, and recover these assets so long as the third party had reasonable cause to believe that the property was subject to forfeiture.[21] The Supreme Court confirmed the import of this provision last Term when it held that such tracing includes the recovery of monies paid by RICO defendants to their attorneys.[22] In addition to this postconviction remedy, the government also, in order to ensure that forfeitable property does not disappear during trial, has the right to get a temporary restraining order and injunction to prevent dissipation of the property.[23] Shortly before this Symposium began, the Justice Department issued a clarification of when it will seek to use these draconian provisions.[24] The appropriateness of the so-called "criminal RICO" provisions continues to be debated.[25]

Despite the creation of the potent weapon of forfeiture, Congress did not leave the enforcement of RICO's broad provisions to federal prosecutors. Instead, it added a civil remedy, under the now familiar guise of the private attorney general rationale. This remedy is set forth in section 1964(c). Modeled after the country's antitrust laws, this statute provides that any person injured by a RICO violation may sue in federal court and recover treble damages plus reasonable attorney's fees.[26] It is this civil remedy, coupled with the ingenuity of lawyers, that has resulted in the use of RICO in a variety of unexpected situations.

Like many, I find serious difficulties in the current version of

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17. 18 U.S.C. § 1963(a) (1988).
18. *Id.* § 1963(a)(1).
19. *Id.* § 1963(a)(2).
20. *Id.* § 1963(a)(3).
21. *Id.* § 1963(c).
22. *See* Caplin & Drysdale, Chartered v. United States, 109 S. Ct. 2646 (1989).
23. 18 U.S.C. § 1963(d) (1988).
24. CRIMINAL DIVISION, U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL (1989).
25. *See generally* Dennis, *Current RICO Policies of the Department of Justice*, 43 VAND. L. REV. 651 (1990); Reed, *The Defense Case for RICO Reform*, 43 VAND. L. REV. 691 (1990).
26. 18 U.S.C. § 1964(c) (1988).

RICO. Before commenting on the provision of RICO I find particularly objectionable (treble damages), I want to note a few considerations that I think should be considered when assessing any of the proposals made during this Symposium. The first thought is in the nature of a caveat: When considering proposals for change one must measure the benefits of reducing RICO abuse against the costs of reducing beneficial RICO use. RICO bashing has become fashionable for those of all political persuasions. In such a heated atmosphere, it is easy to focus solely on perceived problems and propose legislative amendments that strike at these problems swiftly and surely. What often gets lost in such a state of affairs is the question of whether a proposed course of action would frustrate what are some of the undeniably proper uses of RICO.

When evaluating the proposals coming out of this Symposium, it is also important to keep in mind the concern for federalism. One need not see an encroachment on federalism behind every bush before questioning the wisdom of the current statutory scheme. The list of predicate acts captures a great many areas normally thought to be the exclusive domain of state law. The predicate acts include both overtly state law crimes and broad federal crimes, such as mail fraud and wire fraud, into which many state law violations can be shoehorned. Any rethinking of RICO should consider the appropriate division of authority between federal and state courts.

Another point that should be considered, assuming that problems exist with RICO which should be addressed (and I think there are), is whether Congress should modify the substantive scope of RICO or its remedial provisions. The resolution of this question depends on what one views as problems with RICO. Those who by and large are happy with the results that have been obtained under criminal RICO but object to what Justice Thurgood Marshall described as civil RICO's "federalization of broad areas of state common law of frauds"[27] will favor tinkering with the remedial portions of RICO. Those who decry the threat that RICO makes by its broad terms support restrictions in the substantive coverage of RICO.

Members of the latter camp must address a final question: How much do we as a society trust prosecutorial discretion? By criminalizing a wide range of conduct, Congress entrusted the executive branch in general and the Department of Justice in particular with deciding when the draconian sanctions of RICO should be brought to bear on a given activity. Those who do not trust the prosecutors to make this decision wisely must do more than state the truism that "we are a government of laws, not of men." All laws involve a degree of discretion in their

27. 473 U.S. 479, 501 (1985) (Marshall, J., dissenting).

enforcement, but the real concerns are how to decide what constitutes too much discretion, and whether prosecutors employ too much discretion in their enforcement of RICO. In answering these questions, we also must decide whether to focus on potential abuses, which would conflate the reach of criminal RICO with that of civil RICO, or on actual uses of criminal RICO, which to date have been far more restrained.

I raise these points because I find them both important and difficult. Although I have some thoughts on the appropriate resolution of these issues, I am content for the present moment not to burden this audience with my tentative conclusions about them. I mention these considerations more as tools for evaluating the products of this Symposium rather than as firm conclusions in and of themselves.

There is one issue, however, that I do wish to discuss briefly because, quite frankly, I find it to be a relatively easy question: Whether the current damages provision for private civil RICO suits[28] should be amended. It should. Much of the current controversy over RICO focuses on the statute's civil damages provision. This provision awards victorious plaintiffs treble damages plus attorney's fees. Much has been written over the lack of congressional thought that accompanied the inclusion of a civil damages provision in RICO. I do not wish to canvass this material; rather, I simply want to address, as a normative matter, the merits of RICO's current trebling of damages and award of attorney's fees. Moreover, in the interest of brevity, I attempt to adumbrate my thoughts on the matter rather than attempting to set them forth in great detail.

Let me state my conclusion first: Two basic flaws exist in the current version of civil RICO's damages provision. The first is that there is little justification for a multiplier and the one-way shifting of attorney's fees in the context of commercial disputes, the area in which civil RICO seems to be most often invoked.[29] The second is that the damages provision promotes what I call "theory-shopping," by which I mean the incentive of lawyers to frame an otherwise state law claim into a civil RICO claim simply to obtain the possibility of recovering treble damages plus attorney's fees. I explain these conclusions in turn.

To evaluate the appropriateness of RICO's civil damages provision, one first must answer the general question of why we as a society subsidize a judicial system that awards damages to injured parties in private

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28. 18 U.S.C. § 1964(c) (1988).

29. *See generally Sedima*, 473 U.S. at 506 (stating that "[i]n practice . . . [the civil RICO] provision frequently has been invoked against legitimate business in ordinary commercial settings"); A.B.A. SECTION OF CORP., BANKING & BUS. LAW, REPORT OF THE AD HOC CIVIL RICO TASK FORCE (1985).

disputes. The normative desirability of awarding treble damages and attorney's fees cannot be answered either by their existence in RICO, or their existence in other statutes, such as the Clayton Act.[30] Only when we decide what role civil damages should play in our society can we intelligently address the question of what constitutes the appropriate level of damages.

The obvious answer for why we award civil damages is that such damages deter conduct that society, through legislative or common-law decision making, has deemed inappropriate. By penalizing those who engage in such conduct, we make it less likely that people will undertake such conduct.[31] The seller who promises to ship working radios but is tempted to ship nothing but transistors knows that he will face paying contract damages if he acts on this temptation. The expectation of paying damages, along with the seller's interest in preserving his or her reputation, forces the seller to heed society's judgment that, as a general matter, parties should live up to their contractual obligations.

Identifying deterrence as a rationale for awarding damages, however, cannot end the inquiry.[32] As is common with many questions, the obvious answer in the case of why we have civil damages is incomplete. This incompleteness arises from the problem of over-deterrence; if damages are set at too high a level, such as a total forfeiture of assets from the injuring party to the injured party, two distinct problems arise. The first is that parties will not even attempt to undertake conduct that falls close to the line between legal and prohibited conduct. Even if the line demarcating liability from nonliability is clear, which it often is not, the uncertainties inherent in the judicial system will cause parties to shy away from the line. The cost to society in such a situation is that the actor is deterred from engaging in conduct that society has not determined to be socially undesirable. For example, if the penalty for Alaskan oil spills is bankruptcy, few major oil firms would want to

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30. Clayton Act, ch. 323, § 4, 38 Stat. 730, 731 (1914) (codified as amended at 15 U.S.C. § 15(a) (1988)). *But see* Goldsmith, *Civil RICO Reform: The Basis for Compromise*, 71 MINN. L. REV. 827, 871 (1987) (stating that "RICO is not unique; it is merely one of numerous federal statutes providing [treble damages]").

31. One also might suggest that damages are designed to compensate injured parties. I find this suggestion unhelpful. The problem with such a suggestion is that it readily collapses in the deterrence rationale. The driving force behind the compensation rationale, at least in cases other than that of strict liability, is that the defendant has engaged in inappropriate conduct. Thus, we quickly come back to the notion that there is certain conduct which society has deemed inappropriate.

In any event, such a rationale at most would provide for single damages, which may or may not include an award of attorney's fees. The proponents of the current version of civil RICO's damages provision make no case by relying on the compensatory nature of damages.

32. *But see* Goldsmith, *supra* note 30, at 834-35 (focusing solely on the deterrence rationale without articulating a limiting principle).

discover and ship oil from Alaska, even though we as a society are better off developing our own oil resources.

The second form of over-deterrence stems from the fact that it is often difficult to determine before the fact that a certain type of generalized conduct is always undesirable. Perhaps the best example of this point is the recent literature on the theory of efficient breach of contract. As a general matter, society is better off if people are encouraged to live up to their promises. A procedure to enforce promises, underwritten by the public fisc, helps to reduce the uncertainty, and therefore the costs, of doing business. Yet there are occasions when all would be better off if promisors broke their promises. For example, one can readily imagine a seller of paper in Georgia contracting to sell a ton of paper to a buyer in Chicago for 100 dollars on January 1. If on January 1 the market price for a ton of paper in Chicago is 102 dollars, but the market price in Georgia is 105 dollars, society is better off if the seller breaches because the paper will end up in the hands of the party that values it the most. If we set the damages in this case at too high a level—anything over five dollars—the seller would have no incentive to make the socially optimal choice.[33]

Generalizing from these observations, optimal damages should both encourage actors to avoid socially undesirable conduct and at the same time not deter them from engaging in socially desirable conduct. To achieve this result, it is necessary for actors both to receive the benefits of their actions and to bear the cost of those actions. When actors are forced to balance the full cost of their actions against the full benefits, they are most likely to pursue only that conduct which produces a net gain. Stated differently, an optimal damages rule would internalize both the costs and the benefits of any given conduct.

This observation leads directly to the conclusion that the inquiry into a law's appropriate remedial provisions cannot be divorced from the law's substantive provisions. This truth can be seen when we ask what, as a general matter, the benchmark damage provision should be. As a general matter, most parties reap the full benefits of their actions. In other words, they will internalize the benefit of their actions without any stimulus from the legal system.

The more pervasive problem is making parties internalize the cost of their actions. Absent a legal regime, the party who intentionally breaches a contract obtains the benefits of the breach, while placing the cost of the breach upon the party with whom he or she had contracted.

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33. For a similar analysis, see Easterbrook & Fischel, *Optimal Damages in Securities Cases*, 52 U. CHI. L. REV. 611, 614-15 (1985). For a general discussion of contract damages, see R. POSNER, ECONOMIC ANALYSIS OF LAW 105-22 (3d ed. 1986).

If we lived in a world in which the legal system always correctly identified those persons who impose costs on others, the legal rule that would force such persons to internalize the cost of their behavior would be obvious: actual damages. If a party to a contract knew for a certainty that he or she would be liable for actual damages if he or she breached the contract, that party would only breach if the benefits of the breach exceeded the cost. In other words, the party would breach only if the assets involved would be put to a better use than they would be if the contract were performed. Thus, in a world of perfect enforcement, the optimal damage rule would be to award actual damages because it forces actors to weigh the costs of their actions against the benefits.

Of course, actual damages is not always the optimal damages rule. The linchpin of the actual damage rule is the critical assumption that the probability of paying actual damages is always one hundred percent.[34] As soon as the possibility of paying damages decreases from a certainty, wrongdoers are not forced to internalize the expected harm of their actions. If persons deciding whether to perform contracts believe that there is only a fifty percent chance that they will have to pay the damages breach will cause, they may choose to breach even in situations in which, from society's standpoint, it would be better if they were to perform the contractual obligations.[35]

The probability of paying damages decreases from one hundred percent for a variety of reasons, such as the possibility that the actor's conduct will not be detected, the likelihood that not every party suffering harm will have the incentive to bring a lawsuit, the fact that some people may not even realize that they suffer harm, and the possibility that the legal system incorrectly will conclude that the legal standard was not violated. Not only will all of these factors lead actors to discount the damages that they would have to pay if they were found liable, but the importance of these factors in setting a damage rule also varies depending on the substantive nature of the crime. For example, in the antitrust context, the allocative loss caused by monopolistic behavior normally is not considered part of the damages that a plaintiff is allowed to recover. It is thus necessary to devise a multiplier to take account for this fact. Otherwise, a firm deciding whether to engage in

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34. This observation assumes that the legal system accurately perceives legal breaches. To the extent that the system suffers from acute liability determination problems, such problems may argue for a multiplier coupled with an extremely high burden of proof on the plaintiff. *See* Johnston, *Punitive Liability: A New Paradigm of Efficiency in Tort Law*, 87 COLUM. L. REV. 1385 (1987).

35. For an excellent discussion of the role of imperfect detection, see Farber, *Reassessing the Economic Efficiency of Compensatory Damages for Breach of Contract*, 66 VA. L. REV. 1443, 1455-68 (1980).

monopolistic behavior will not be forced to internalize the full cost of pursuing such a course of action, and thus will be deterred from making the optimal decision.[36]

Before analyzing RICO's current damage provision in light of these concerns, I must address a common objection to the above analysis. This objection centers on the fact that RICO offenses are not, like ordinary tort or contract cases, merely the domain of private law. Rather, the objection rests in the fact that all RICO offenders must be shown to have committed a crime. This fact alone, it may be suggested, justifies ignoring notions of efficiency.[37] According to this argument, racketeering is simply bad, and we should not countenance the notion of efficient racketeering behavior.

This argument is wanting because it fails to acknowledge RICO's expansive scope. This failure leads to analysis that focuses on the wrong paradigmatic case. Congress may have intended RICO's main, if not exclusive, focus to be the infiltration of legitimate business by organized crime. If RICO's reach was in fact cabined to such situations, the argument that all RICO violations are inherently bad and should be sanctioned might have some merit. Yet not only is RICO's reach much broader than in the case of infiltration of legitimate business by organized crime, in practice civil RICO has little to do with such situations. One cannot be surprised by the fact that RICO's civil provisions have had little, if any, effect on the country's fight against organized crime.[38]

The reasons for this result are fairly obvious. Normally, the only risk that a plaintiff undertakes in bringing suit is the risk of losing, which translates into paying one's own attorney's fees. The costs of bringing a suit against organized crime, however, are much higher. RICO's promise of treble damages plus attorney's fees simply is not enough to induce potential plaintiffs to undertake the risk that organized crime will bypass the legal process and resort to its traditional means of dispute resolution.

This failure does not mean that civil RICO has been consigned to relative obscurity. It most certainly has not. The predicate offenses involved in the bulk of civil RICO suits seem to be those of mail fraud and wire fraud. The criminalization of these acts, however, cannot serve

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36. *See* Easterbrook, *Detrebling Antitrust Damages*, 28 J.L. & ECON. 445, 454-58 (1985).

37. *See, e.g.*, Turley, *The RICO Lottery and the Gains Multiplication Approach: An Alternative Measurement of Damages Under Civil RICO*, 33 VILL. L. REV. 239, 250-64 (1988).

38. *See Oversight on Civil RICO Suits Brought Under 18 U.S.C. 1964(c): Hearings Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 104 (1985) (testimony of Stephen S. Trott, Assistant Attorney General, Criminal Division, Department of Justice). Assistant Attorney General Trott stated that "private civil RICO has not had a significant impact on the organized crime problem in the United States. . . . I think the private attorney general concept . . . has not borne the fruit expected of it by the authors of this statutory scheme." *Id.*

as the basis for jettisoning notions of efficiency in assessing the appropriateness of RICO's damages provision. In a real sense, the crimes of mail fraud and wire fraud are crimes in name only.[39] The breadth of these statutes is constrained severely by prosecutorial discretion. Only a small fraction of activities that could be deemed mail fraud or wire fraud ever catch the interest of federal prosecutors.

Thus, the fact that RICO involves crimes has no impact on determining what the optimal damage rule for civil RICO should be. In assessing the desirability of treble damages plus attorney's fees, however, it is necessary, for the reasons discussed above, to have in mind the "typical" RICO case. Only by having some indication of the nature of such an action can we intelligently ask whether a move away from the baseline of actual damages is warranted. For reasons just discussed, Congress's view of a typical RICO case simply cannot serve as the appropriate vehicle for determining the optimal damage rule for civil RICO. The paradigm that should be used is a dispute between two businesses. I choose this paradigm for three reasons. First, it is my impression that a plurality, if not a majority, of RICO cases are of this nature. Although I do not profess to have extensive empirical evidence on the point, many RICO cases in fact do appear to fit this description, and given the treble damages provision, all commercial lawyers have an incentive to turn their ordinary business suits into RICO cases. Second, even if I am mistaken on the first point, the competing choices for the "typical" RICO case that might be put forward—labor corruption, official corruption, and securities fraud—can be handled better through the existing federal statutes governing labor organizations, bribery, and the sale of securities. It is the ordinary business dispute that is the hallmark of civil RICO. To be sure, this ordinary business litigation does not encompass all of the uses of civil RICO. Yet it cannot be gainsaid that such litigation comprises a substantial percentage of all civil RICO suits. If the defenders of civil RICO flounder on the rocks of commercial litigation, it seems to me that they must then supply a justification for the remaining uses of civil RICO along with a narrowing statute. Finally, quite frankly, as a professor of commercial law, it is the use of civil RICO in the commercial context that draws my academic interest.

Once commercial litigation becomes the testing ground for civil RICO's damages provision, the extant rule fails miserably. Simply stated, few reasons in this type of litigation justify the use of any multiplier, let alone one that triples damage awards. As a general matter, in the commercial context the probability of detection and of the injured

39. For an examination of this point, see Abrams, *A New Proposal for Limiting Private Civil RICO*, 37 UCLA L. REV. 1, 8-10 (1989).

party bringing a suit approach a near certainty. Perhaps the most significant factor in this conclusion is that most breaches in performance in the commercial setting are relatively easy to detect. One company usually is readily aware of another company's failure to live up to its legal duty. For example, when suppliers do not supply the right goods or when financial predictions turn out to be way off the mark, the party harmed by such actions generally recognizes the extent and the source of the harm.

Coupled with this fact are the additional considerations that the party harmed usually suffers the full extent of the injury and has sufficient incentive to bring suit. Generally, the number of parties involved in a commercial transaction is relatively small. Moreover, when these transactions unravel, one party is left, in the absence of a legal rule shifting the loss, holding the bag. This loss also ordinarily will be well in excess of the resulting litigation costs. We thus do not have to worry about the harm being spread among so many actors that none of them has the incentive to bring suit.

In short, the need to require actors to internalize the costs of their actions does not justify civil RICO's award of treble damages to victorious plaintiffs. While there may be situations in which an award of actual damages in the business setting will be insufficient to induce the injured party to seek redress, it seems that any multiplier is more likely to make parties overestimate the costs of their action than it is to compensate for the relatively small chance that costs will not be fully internalized. RICO's current award of treble damages is thus likely to prevent some parties from engaging in socially beneficial conduct.

There remains the question of RICO's asymmetrical treatment of attorney's fees. Some may assert that, in the absence of an award of attorney's fees, injured parties in a regime of actual damages may have an insufficient incentive to bring suit.[40] Two problems exist with this argument. First, it does not depend in any way on the peculiar nature of a RICO offense; rather, it is an argument for awarding attorney's fees in all cases. Second, and more importantly, it does not justify the current one-way nature of such fees under RICO. If a firm knows that it will have to pay for its opponent's fees if it loses a RICO suit brought against it, but must pay its own fees if it wins, the firm will be more likely to avoid socially desirable conduct that is close to the RICO line. Even if one had a regime that awarded only actual damages, a firm de-

40. For example, Professor Michael Goldsmith suggests that, "[b]ecause attorneys fees under RICO are only available to successful claimants, every plaintiff risks paying counsel costs if the case is lost or even settled. Given this risk, many potential plaintiffs would forego suit if the ultimate recovery were limited to actual damages." Goldsmith, *supra* note 30, at 847 (footnotes omitted).

ciding whether to engage in conduct that might constitute a RICO violation would have to consider the probability of facing a RICO suit. If the firm prevails, its cost will be its own fees; if it loses, its cost will not only be damages, but also its opponent's fees. Thus, as a general matter, the expected litigation cost of a RICO suit is greater for a defendant than it is for a plaintiff. Given these costs, businesses systematically will err on the side of caution in making decisions. In other words, they will not engage in conduct that approaches the line demarcating the boundary of socially desirable conduct. While there is a legitimate debate over the desirability of the English Rule on fees as opposed to the American Rule, I see no justification for the hybrid rule in the RICO context.[41]

In other words, I find no reason to believe that the nature of RICO violations justifies the current damages provision. The appropriate solution would be to detreble the damages for RICO violations, and then decide whether there is a subset of current RICO violations in which trebling is justified. Such an amendment would go a long way toward curbing RICO abuse.

As mentioned earlier, RICO's treble damages provision creates a second unnecessary societal cost. It is the cost of what I term "theory shopping." Most, if not all, current RICO claims are thinly disguised business disputes that could be brought under state law. The primary reason these cases become RICO cases is, of course, the prospect of treble damages and attorney's fees for the prevailing plaintiff. Indeed, because plaintiffs can append state law claims to their federal RICO claims, they lose nothing by going into the federal forum while gaining the ability to seek super-compensatory damages. This benefit not only increases the expected value of a plaintiff's suit, but it also increases the leverage the plaintiff will have in settlement negotiations.

There is, however, a cost associated with such action. RICO and state business law overlap; they do not converge. In other words, the RICO plaintiffs have to prove more than that they would prevail under state law. Namely, they must prove that a "pattern of racketeering activities" existed, and that a defendant committed the predicate acts. These matters of proof, which may consume significant litigation expense both in attorney and court time, do not identify cases for which trebling is appropriate. Deciding that a tort or a breach of contract also constitutes mail fraud under federal law describes nothing about the extent to which a party will internalize the cost of his or her actions when deciding on a course of conduct. This point has particular bite when two of these crimes—mail fraud and wire fraud—are, as previously discussed, crimes in name only. As noted earlier, prosecutorial

41. *See, e.g.*, Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975).

discretion ensures that most conduct that falls within the broad sweep of the statute's language never is prosecuted. Even given unlimited resources, prosecutors would not seek criminal enforcement against most parties who find themselves on the wrong end of a civil RICO lawsuit.

The extra requirements that RICO imposes on state law fraud actions do not identify any reason for a multiplier. They do, however, impose social costs. These costs are of two varieties. The first is the simple cost of litigating the added elements that RICO requires the successful plaintiff to prove. Time and money must be spent in proving the existence of the predicate acts and convincing the trier of fact that these acts constitute a pattern.

There is a second cost as well. The bonus of treble damages plus attorney's fees encourages plaintiffs to stretch the predicate acts as wide as possible. Such a stretch tends to increase uncertainty, and one can realistically expect that courts will differ in their acceptance of such attempts at expansion. With such uneven results, it is increasingly difficult for parties to determine before the fact whether or not their conduct will be deemed to fall on the liability side of the RICO line.

Stepping back from a sole focus on the costs that RICO's damages provision imposes, detrebling RICO awards and eliminating one-way attorney's fees would have an added benefit: it would reduce the inroads that RICO currently makes on federalism. To be sure, some RICO litigation is driven by the desire to get into federal court. Much RICO litigation, however, is undoubtedly driven by the promise of treble damages to the victorious plaintiff. It may be difficult to assess the volume of the flow of litigation back into state courts, but undoubtedly there would be a great deal. The party deciding whether or not to bring a state law claim simply faces the choice that every diversity defendant now faces: which forum would prove more hospitable to the claim. The attraction of treble damages plus attorney's fees would no longer entice all plaintiffs into the federal seas.

Thus, it appears that society gains little from RICO's award of treble damages and one-way shifting of attorney's fees. Were Congress to detreble damages and provide for a symmetrical treatment of attorney's fees, it would do much to stem current cases of the misuse of RICO.