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THE RICO LOTTERY AND THE GAINS MULTIPLICATION APPROACH: AN ALTERNATIVE MEASUREMENT OF DAMAGES UNDER CIVIL RICO

Jonathan Turley*

INTRODUCTION

In the Eastern District of New York, Hasidic rabbis file charges of racketeering against their counterparts in a rival Hasidic sect for an alleged attempted takeover of a synagogue. In the Southern District of New York, a 92 year-old woman charges her 75 year-old son-in-law with racketeering in diverting her social security checks and other funds. In Massachusetts, an ex-church member charges church elders with racketeering for alleged theft of her garbage and with general harassment while, back in New York, a divorced woman files the same charge against her estranged husband for failure to comply with their divorce settlement. The list is seemingly endless as racketeering charges of

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4. Nathan, supra note 2, at 31 (citing Alton v. Alton, No. 82 Civ. 0795 (S.D.N.Y. 1982) (RICO action dismissed "[while] in Gunther v. Dinger, 81 Civ. No. 6985 (S.D.N.Y. filed 1982), the court sustained the complaint in which a daughter and heir of the deceased, sued the widow and three other children of

(239)
every possible stripe and color clog the dockets of state and federal courts. The method to this madness can be found in title IX of the Organized Crime Control Act of 1970, entitled “Racketeer Influenced and Corrupt Organizations,” better known as RICO.

RICO is the product of a massive legislative campaign for the avowed purpose of “seek[ing] the eradication of organized crime in the United States.” The 1950s witnessed widespread public outcry following reports of an expanding underworld presence in legitimate businesses. As a bipartisan effort, RICO was intended to root out the influence of organized crime through the enforcement of both criminal and civil penalties. In designing RICO, Congress was cognizant of the fact “that it was entering a new domain of federal involvement . . . [and that] existing law, state and federal, was not adequate to address the problem.” RICO’s sponsors committed themselves to developing new, and more potent, weapons to carry out its intent. With almost jesuitical fervor, the drafting committees wrote the operative provisions of RICO broadly to eliminate any possible loopholes or shortfalls in the language that might be exploited by mobsters. Rather than

the deceased for alleged fraud in the administration of the estate and conversion of assets]).

5. In Sedima, S.P.R.L. v. Imrex Co. Inc., Justice White, writing for the majority, noted that “[o]f 270 district court RICO decisions prior to this year, only 3% (nine cases) were decided throughout the 1970s, 2% were decided in 1980, 7% in 1981, 13% in 1982, 31% in 1983, and 43% in 1984.” 473 U.S. 479, 481 n.1 (1985). Between September 1985 and June 1986, there were a reported 614 civil RICO cases filed in federal court. 614 Civil RICO Suits Filed Between September, 1985 and June 30, 1986, 5 RICO L. Rep. 246 (1987). This figure does not include cases filed in the twenty states with “little RICO” statutes. See Cohen, State RICO Statutes, 4 RICO L. Rep. 660, 660-62 (1986).


9. ABA Report, supra note 8, at 86. Senator Hruska, one of civil RICO’s drafters, actually felt that of the Act’s two parts—criminal and civil—the civil penalties were the more important:

[T]he criminal provisions are intended primarily as an adjunct to the civil provisions which I consider as the more important feature of the [Act]. . . . The [Act] is innovative in the sense that it vitalizes procedures which have been tried and proved in the antitrust field and applies them into the organized crime field where they have been seldom used before.

Id. (quoting Sen. Hruska).


defining a class of “organized criminals,” 12 Congress defined a wide variety of illegal activity that constitutes a “pattern of racketeering.” 13  In addition to this highly generalized definition of racketeering behavior, Congress expanded the scope of the Act even further by exposing racketeers to civil suit as well as criminal prosecution and thereby opening a “second front” against organized crime.

If the scope of RICO indicated the gravity of the racketeering problem in Congress’ eyes, the penalties of the statute demonstrated the clear intent of Congress to put matters right. On the criminal side, 14 Congress gave prosecutors stiff sentences 15 and

Seventh Circuit dealt with this point, in Sutliff, Inc. v. Donovan Cos., as follows: “Congress deliberately cast the net of liability wide, being more concerned to avoid opening loopholes through which minions of organized crime might crawl to freedom than to avoid making garden-variety frauds actionable in federal treble-damage proceedings—the price of eliminating all possible loopholes.” 727 F.2d 648, 654 (7th Cir. 1984); see also Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 504 (2d Cir. 1984) (Cardamone, J., dissenting), rev’d, 473 U.S. 479 (1985).

12. RICO’s drafters consciously avoided defining such terms as “organized crime” or “organized criminal” for both practical and strategic reasons. Practically, such a definition was thought to be fraught with constitutional and even racial difficulties:

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

116 Cong. Rec. 35,204 (1970) (statement of Rep. Poff); see also id. at 35,344 (statement of Rep. Poff) (“The curious objection has been raised to [the Act] as a whole, and to several of its provisions in particular, that they are not somehow limited to organized crime—as if organized crime were a precise and operative legal concept, like murder, rape or robbery.”).

13. Under the Act, a “pattern of racketeering” can amount to little more than two predicate offenses (which include mail and wire fraud). 18 U.S.C. § 1961(5) (1982). This generous definition incensed a number of congressmen, including Representative Abnor Mikva: “[U]nder this definition, if five . . . of [my colleagues] engage in . . . a game of poker and it lasts past midnight . . . thus continuing for a period of 2 days, then [they] have been running an organized gambling business and [they] can get 20 years . . . .” 116 Cong. Rec. 35,204 (1970) (statement of Rep. Mikva).


(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.
the right to seize and sell property belonging to convicted racketeers. On the civil side, Congress applied the same private enforcement mechanism that proved highly successful in the antitrust area. The remedies included treble damages and attorney’s fees, in addition to generous provisions concerning

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper.

Id. § 1963.
15. Id. § 1963(a).
16. Id. § 1963(c).
17. Id. § 1962. Section 1962 provides in part:
   (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
   (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
   (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, 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.
   (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Id. § 1962 (footnote omitted).

18. The incorporation of antitrust remedies into RICO was done at the suggestion of the ABA’s antitrust section which confirmed that racketeering had severe anti-competitive effects, as well as other social costs. The substance of the report by the antitrust section and its subsequent history is laid out extensively in the ABA Report:

The Section agreed “that organized crime must be stopped,” and further agreed that “the time tested machinery of the antitrust laws contains several useful and workable features which are appropriate for use against organized crime,” including, in addition to criminal penalties, civil enforcement by private party treble damage actions. The ABA Section stressed, however, that . . . [b]y placing the antitrust type enforcement and discovery procedures in a separate statute, a commingling of criminal enforcement goals with the goals of regulating competition is avoided.”

ABA REPORT, supra note 8, at 81.

20. Id.
standing, and the statute of limitations.

In developing civil RICO’s damages provisions, Congress relied heavily on the antitrust penalties contained in section four of the Clayton Act, particularly the latter’s treble damages provision. Yet, for many congressmen and commentators, the similarities between RICO and the Clayton Act were overshadowed by critical dissimilarities. Preeminent among these differences are the specified predicate acts required to trigger RICO. Included in the long list of predicate offenses are mail and wire fraud, any two related instances of which will satisfy the Act’s definition of a “pattern of racketeering.” Since each letter or

21. Id.
22. Id. § 1965(b).
23. Id. § 1961(5).
25. RICO’s sweeping language prompted three congressmen, Mikva (Illinois), Conyers (Michigan), and Ryan (New York), to dissent from the House Judiciary Committee Report. ABA Report, supra note 8, at 117. Fearing that innocent businessmen would be harassed, the congressmen continued their opposition on the House floor. Id. Congressman Mikva went as far as to offer an amendment that would provide treble damages for defendants sued maliciously under RICO. Id. at 118.
29. Id.
30. Id. § 1961(5). To prevail under civil RICO a civil litigant must prove that (1) a person (which is defined to include businesses), (2) through the commission of two or more acts (3) which constitute a pattern (4) of racketeering activity, (5) directly or indirectly has (i) invested in, (ii) maintained an interest in, (iii) participated in the conduct of or (iv) conspired to do (i), (ii) or (iii) in (6) an enterprise, (7) the activities of which affect interstate or foreign commerce. Id.
phone call conveying fraudulent information qualifies as a separate offense, the threshold for a provable pattern of racketeering was set quite low for RICO plaintiffs. Nevertheless, congressional attempts to reduce the breadth and bite of RICO floundered before an effort to strike “a mortal blow against the property interests of organized crime.”

The inevitable effect of including mail and wire fraud as predicate acts under RICO was the snaring of large numbers of defendants far removed from the back rooms of La Cosa Nostra. Courts watched in dismay as RICO brought the full weight of its mob-fighting remedies to bear upon businessmen in “garden-variety fraud cases.” As a result, judges balked and re-


31. The pattern requirement has been a point of disagreement among the circuits and now appears to be set for a Supreme Court review. See infra note 44 and accompanying text.

32. See Comment, Civil RICO: Pleading Fraud for Treble Damages, 45 Mont. L. Rev. 87, 95 (1984).

33. The latest, unsuccessful attempt at amending civil RICO was H.R. 5445, which would have eliminated the availability of treble damages in most cases. For a discussion of the proposed amendment, see infra note 45.

34. See ABA REPORT, supra note 8, at 86 (quoting 116 CONG. REC. 602 (1970) (statement of Sen. Hruska)).

35. Id. at 117. A 1982 ABA study found that forty-three percent of civil RICO suits in federal court allege security fraud violations while thirty-seven percent involve other forms of commercial fraud. Id. at 55-56. The ABA noted that only “nine percent of the cases involve allegations of criminal activity of a type generally associated with professional criminals (arson, bribery, embezzlement, commercial bribery, extortion, gambling, theft, political corruption).” Id. at 56 (footnote omitted); cf. Oversight on Civil RICO Suits, Hearings Before the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. 126 (1985) [hereinafter Hearings] (statement of Stephen S. Trott, Ass’t Att’y Gen) (noting that two-thirds of civil RICO suits involve mail, wire or securities fraud while “[r]oughly seven percent appear to have been brought against organized crime figures or on the basis of violent or other non-fraudulent conduct common to organized crime”). Among the organizations found to be “racketeering enterprises” under the Act were the Bureau of Cigarette and Beverage Taxes in the State of Pennsylvania, United States v. Frumento, 563 F.2d 1083, 1092 (3d Cir. 1977), cert. denied, 434 U.S. 1072 (1978); the office of the county judge of Craighead County, Arkansas, United States v. Clark, 646 F.2d 1259, 1264 (8th Cir. 1981); and the police department of the city of Macon, Georgia, United States v. Brown, 555 F.2d 407, 416 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978).

36. The use of RICO in “garden variety fraud” cases was recently upheld in Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985). For a strong presentation of the opposite view, see Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482 (2d Cir. 1984), rev’d, 473 U.S. 479 (1985); see also Furman v. Cirrito, 741 F.2d 524, 529 (2d Cir. 1984) (“If the conduct of such people can sometimes fairly be characterized as ‘garden variety fraud’, we can only conclude that by the RICO statute congress has provided an additional means to weed that ‘garden’ of its fraud.”), vacated and remanded, 473 U.S. 922 (1985) (remanded for consideration in light of
sisted.\textsuperscript{37} To these judges, civil RICO's treble damages remedy and procedural advantages in cases of simple fraud appeared not only excessive, but a virtual federalization of common-law fraud.\textsuperscript{38}

In response to what they perceived to be unwarranted and unfair advantages for plaintiffs, judges developed a number of strict interpretive restraints upon civil RICO's use.\textsuperscript{39} These included a requirement that plaintiffs establish an affiliation of defendants with organized crime;\textsuperscript{40} a racketeering injury beyond that of the predicate offense,\textsuperscript{41} or a "competitive injury;"\textsuperscript{42} raising

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37. For a discussion of restraints imposed by district courts on civil litigants under RICO, see Note, Civil RICO: The Temptation and Impropriety, supra note 26, at 1105-15.


42. The competitive injury requirement was rejected by the Supreme Court in Sedima, S.P.R.L. v. Imrex Co., Inc. 473 U.S. 479, 493-95 (1985). See Schacht v. Brown, 711 F.2d 1343, 1356-58 (7th Cir.) (also rejecting competitive injury requirement), cert. denied, 464 U.S. 1002 (1983); see generally Comment, Reading the "Enterprise" Element Back Into RICO: Sections 1962 and 1964(c), 76 NW. U.L. REV. 100, 125-26 (1981); Comment, Civil RICO Actions in Commercial Litigation, supra note 26, at 949; Note, Civil RICO: The Temptation and Impropriety, supra note 26, at 1109-14.
the burden of proof;\textsuperscript{43} strictly interpreting the pattern requirement\textsuperscript{44} and limiting the use of treble damages\textsuperscript{45} to parties with clear racketeering ties rather than "legitimate" business persons.\textsuperscript{46} Moreover, many judges,\textsuperscript{47} spurred by a host of commen-


\textsuperscript{44} The Supreme Court recently granted the writ of certiorari in a case which will clarify the pattern requirement. See H.J., Inc. v. Northwestern Bell Tel. Co., 829 F.2d 648 (8th Cir. 1987), cert. granted, 108 S. Ct. 1219 (1988). The Eighth Circuit follows a strict interpretation of "continuity plus relationship," the phrase used by the Supreme Court in Sedima to describe the pattern requirement. See, e.g., Holmberg v. Morrisette, 800 F.2d 205, 209-10 (8th Cir. 1986), cert. denied, 107 S. Ct. 1953 (1987). Under the Eighth Circuit test, a civil RICO plaintiff must show that the predicate acts were committed as part of more than one fraudulent scheme or criminal episode. Superior Oil Co. v. Fulmer, 785 F.2d 252, 257 (8th Cir. 1986). This strict interpretation has rightly been rejected by the Second, Seventh, Ninth, and Eleventh Circuits. See, e.g. Sun Sav. & Loan Ass'n v. Dierdorff, 825 F.2d 187, 192 (9th Cir. 1987); United States v. Ianniello, 808 F.2d 184, 192-93 (2d Cir. 1986), cert. denied, 107 S. Ct. 3229 (1987); Bank of Am. Nat'l Trust & Sav. Ass'n v. Touche Ross & Co., 782 F.2d 966, 971 (11th Cir. 1986); Illinois Dep't of Revenue v. Phillips, 771 F.2d 312, 313 (7th Cir. 1985). It is ironic that, after expressly instructing courts not to judicially amend RICO through narrow interpretations, the Court's mere mention of "continuity plus relationship" should become the new method of judicial "RICO reform." Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.14 (1985). Like Sedima, H.J., Inc. appears to have more to do with judicial sentiments than legislative intent regarding the scope of civil RICO.

\textsuperscript{45} In 1987, a bill was offered by the House Judiciary Committee's Subcommittee on Criminal Justice which would have drastically limited the use of treble damages in civil RICO cases. The bill, H.R. 5445, originally included an outright elimination of treble damages in civil cases but was later modified to limit treble damages for governmental suits and for private suits when brought against defendants already convicted criminally. While the bill passed the House, it was tabled in the Senate. For an excellent discussion of the bill and its provisions, see Goldsmith, supra note 43, at 855-88; see also notes 175-82 and accompanying text.

\textsuperscript{46} A number of critics of civil RICO single out the Act's harsh label as unfair to "legitimate businessmen" sued under the Act. See, e.g., Hearings, supra note 35, at 248 (statement of Ray J. Groves, Chairman, Am. Inst. of Certified Public Accountants); Horn, The Venue of the Debate Shifts From the Courts to the Congress, Nat'l L.J., Aug. 26, 1985, at 24, col. 3; Comment, Congress Responds to Sedima: Is There a Contract Out on Civil RICO?, 19 Loy. L.A.L. Rev. 851, 869-70 (1986); Comment, Liability for General Business Fraud: Putting a Contract Out on RICO Treble Damages, 45 U. Pitt. L. Rev. 481, 493-94 (1984). The stigmatization is thought so severe that a higher standard of proof has been advocated for civil
Defrauding the public, whether by fraud, forgery, or through other
means, is a crime. The Clayton Act, however, has been interpreted
to extend broader protection to businesses and individuals involved
ing the business. The act is designed to prevent and punish
competitive conduct that has an anticompetitive effect. The
Supreme Court has held that the act applies to both
individuals and businesses, and that the primary purpose of
the act is to prevent anticompetitive conduct.

While most of these suggested requirements were rejected by
the United States Supreme Court in Sedima, S.P.R.L. v. Imrex Co., it
is still possible that Congress could incorporate them into
RICO. Indeed, legal academics have put forward a number of
possible amendments to RICO's damages section. This paper
is concerned with one of these proposed restrictions which I will
call the Clayton Act approach. Under this approach, courts would
follow the remedies provision of the Clayton Act when awarding
treble damages. Rather than simply trebling the damages caused
by the predicate acts in a particular case (as RICO does presently),
the Clayton Act approach would treble only three types of proven
damages: increased business costs, lost profits, and re-
duction in the value of the plaintiff's business.

RICO cases. See supra note 45. In 1982, the criminal justice section of the Amer-
ican Bar Association endorsed the proposed use of "criminal" in lieu of "racke-
teering" in the Act, stating that "th[e] stigma of labelling one a racketeer is
particularly unfair since RICO is not applied solely to racketeers or offenses
committed by racketeers but has also been applied to businessmen and politici-
ans engaged in criminal conduct unrelated to traditional notions of organized
crime." American Bar Association: Report to the House of Delegates, Sec-
tion on Criminal Justice 4 (1982); see also Goldsmith, supra note 43, at 859-60.
The Supreme Court, however, has dismissed this "labelling argument" as
overly generous to defendants who are, at best, guilty of a pattern of fraudulent
behavior:

[A] civil RICO proceeding leaves no greater stain than do a number of
other civil proceedings. Furthermore, requiring conviction of the predi-
cate acts would not protect against an unfair imposition of the "racke-
ear" label. If there is a problem with thus stigmatizing a garden-variety
defrauder by means of a civil action, it is not reduced by making certain
that the defendant is guilty of fraud beyond a reasonable doubt.

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 492 (1985) (emphasis in original); see
crime" is "a shorthand method of referring to a large and varying group of
individual criminal offenses committed in diverse circumstances."); Hearings, supra
note 35, at 13 (statement by Philip A. Feigin, chairman, Special Projects Comm.,
Enforcement Section, North Am. Sec. Admin. Ass'n, Inc.) (rejecting "sanitized
phrases [such as 'garden variety fraud' and 'technical violations'] often used by
'legitimate businesses and individuals' to distinguish their frauds from the 'real'
frauds perpetrated by the 'real' crooks.").

47. For a listing of courts suggesting the adoption of many of the character-
istics of the Clayton Act either implicitly or explicitly, see Comment, supra note
48. See, e.g., Pannon, supra note 26; ABA Report, supra note 8, at 276-78.
49. For a history of how the Clayton Act model was introduced into the
statute, see ABA Report, supra note 8, at 79-97.
51. ABA Report, supra note 8, at 239-80; see also Goldsmith, supra note 43;
Pannon, supra note 26.
52. Pannon, supra note 26, at 349 n.11.
In this Article, I will argue that the Clayton Act approach is fundamentally inconsistent with the purposes and structure of civil RICO. As an alternative to this approach, I will suggest a new method for calculating damages that would differentiate between those businesses that are substantially and those that are fractionally reliant on racketeering profits. This method of calculation, which I will call gains multiplication, would use the actual gains received through racketeering to determine the baseline damages subject to trebling. Under the gains multiplication approach, those businesses substantially reliant upon gains received from racketeering would be eliminated from the marketplace, as intended under RICO. Yet, those businesses only fractionally reliant would be expected to remain solvent, though deterred from future racketeering. Although perhaps artless, the simple trebling of racketeering gains will be suggested as an effective and easy method of determining racketeering reliance. More importantly, however, the gains multiplication approach is meant to focus attention on RICO's underlying philosophy of damages as a basis for any future modifications of the Act. Without an appreciation of the economic and normative foundations of RICO's damages provisions, new approaches taken from the antitrust area will likely exacerbate, rather than eliminate, any current problems in the Act.

I will begin my discussion by considering the basic approaches used under RICO and the Clayton Act to measure damages and to deter violations. It will be shown how RICO was designed to "penalty maximize," or drive up damages as high as possible so as to force racketeering businesses into insolvency. It will then be shown how the Clayton Act strives for cost minimization by setting damages to match the cost of a violation to society. In this way, the Clayton Act operates to "price" violations and ultimately encourages "efficient violations," or violations that are of greater net benefit to the violator than detriment to society. A pricing system, it will be argued, is anathema to RICO's penalty maximization scheme which strives to proscribe all racketeering without distinction through a system of sanctions.

The Clayton Act's pricing and RICO's sanctioning systems will then be examined in terms of their underlying methods for calculating damages. A pricing system, it will be shown, requires a harm-oriented measurement of damages that establishes the harm produced by the violation. This is essential if a proper "pricing," and thereby an efficient violation, can be deduced.
system of sanctions, conversely, is optimally tied to a gain-oriented measurement of damages so as to deny any profit-making that would lead to efficient violations.

A gain-oriented structure will be offered as more in keeping with RICO's original purpose and penalty-maximizing scheme. The difficulty in calculating social costs, problems of information deficiency, "perverse incentives," and the community's perception of racketeering as malum in se will be presented as contributing reasons for rejecting cost minimization as an acceptable alternative for measuring damages. The discussion will then turn to the alternative method for calculating racketeering damages suggested in this Article, the gains multiplication approach. This approach, it will be argued, retains RICO's intended sanctioning system but refines its use of penalty maximization to differentiate between types of racketeers. Finally, it will be shown how, by trebling racketeering gains, RICO can provide society with an easy litmus test for determining the reliance of individual firms on racketeering proceeds. With this test, society can remove from the market those firms that are substantially reliant on racketeering while reforming firms with only a fractional reliance.

PART I
RICO AND THE CLAYTON ACT: RIVALING NOTIONS OF OPTIMAL DETERRENCE AND DAMAGES

Any discussion of the possible incorporation of Clayton Act remedies into RICO must necessarily consider the particular purposes behind the remedy provisions of both acts.53 These purposes are in fact difficult to reconcile either in terms of the level of deterrence or the level of damages envisioned by their drafters. The purposes of antitrust regulation under the Clayton Act are, primarily, to compensate victims, maintain a competitive market and to reform businesses involved in inefficient and anti-competitive behavior.54 The purpose of RICO, in contrast, is the deter-

53. Gorelick, The Measure of Damages of RICO Actions in RICO: THE SECOND STAGE (ABA ed. Oct. 1984) ("There are no reported cases discussing the measure of damages in RICO actions."); Parnon, supra note 26, at 348 ("[A]lmost no attention has been paid to civil RICO damages by the courts, Congress, or commentators.").

54. Since the Clayton Act strives to restore a competitive environment to the market, courts will usually deny treble damages in antitrust cases which would threaten a company with economic ruin. Ralston v. Capper, 569 F. Supp. 1575, 1580 (E.D. Mich. 1983). "RICO," the Ralston court urged, "has the opposite purpose. It is precisely designed to ruin those individuals and enterprises it is aimed at. It is not designed to increase their efficiency or protect them from
rence of possible racketeers by ruining businesses found guilty of racketeering. Accordingly, the Clayton Act approach strives for cost minimization in dispensing damages while the RICO's predicate act approach strives for penalty maximization. The following discussion will examine the development and significance of both the penalty maximization and cost minimization approaches to measuring damages under the two acts.

A. RICO: Penalty Maximization

1. Deterrence through Penalty Maximization

The primary purpose of civil RICO is prosecutorial, not compensatory. While the victims of racketeering were carefully considered by Congress, the use of treble damages and the special insolvency. "Id. (emphasis in original). In Cenco, Inc. v. Seidman & Seidman, Judge Posner concluded that "analogies of civil RICO to section 4 of the Clayton Act are forced." 686 F.2d 449, 457 (7th Cir.), cert. denied, 459 U.S. 880 (1982); see also Schacht v. Brown, 711 F.2d 1343, 1358 (7th Cir.) (rejecting analogies between RICO and antitrust laws), cert. denied, 464 U.S. 1002 (1983); Bennett v. Berg, 685 F.2d 1053, 1059 (8th Cir. 1982) (noting that different policies underlie RICO and antitrust laws), cert. denied, 464 U.S. 1008 (1983).

Significantly, further analogies to the Clayton Act came up a number of times during the debates and were consistently rejected. Senator Hruska, one of the sponsors of the legislation disavowed antitrust standing entirely. Schacht, 711 F.2d at 1358 n.18 (quoting 115 Cong. Rec. 6,992 (1969)). Another RICO sponsor, Senator McGovern stated that, "[t]here is . . . no intention here of importing the great complexity of antitrust law enforcement into this field." Id. (quoting 115 Cong. Rec. 9,567 (1969)). Perhaps more importantly, Congress passed over an alternative piece of legislation to RICO that would have simply amended the Clayton Act to include remedies for racketeering. Id.

The Congressional Statement of Findings and Purposes in RICO states:

It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.


The perception of RICO as first and foremost compensatory neglects the fact that the civil provisions were developed as an alternative to the criminal provisions to further this war on crime. "Congress' concern [under RICO]." Justice Marshall noted, "was not for the direct victims of the racketeers' acts whose state and federal laws already protected, but for the competitors and investors whose businesses and interests are harmed or destroyed by racketeers, or whose competitive positions decline because of infiltration in the relevant market." Sedima, 473 U.S. at 519 (Marshall, J., dissenting).

Compensation, while not the primary objective of RICO was still a factor. Senator Hruska stated in debate:

[T]he [Act] also creates civil remedies for the honest businessman who has been damaged by unfair competition from the racketeer businessman. Despite the willingness of the courts to apply the Sherman Antitrust Act to organized crime activities, as a practical matter, the
procedural devices in RICO were meant primarily as alternative weapons in the fight against organized crime in lieu of, or in conjunction with, the criminal penalties. "What is needed here," the drafters stressed, "are new approaches that will deal not only with individuals, but also with the economic base [of organized crime]. . . . [i]n short, an attack must be made on their source of economic power itself, and the attack must take place on all available fronts." 59

On the civil "front," Congress opted for the private enforcement mechanism that proved effective in the antitrust area—treble damages awards. 60 Although treble damages were integrated into the statute relatively late in RICO's drafting, 61 the purpose of using a multiplier for damages was clear. Congress intended the criminal penalties to reduce the actual numbers of racketeers while the civil penalty was intended to reduce the amount of racketeering generally. 62 To accomplish this latter objective, treble damages were designed not just to punish businesses found guilty under RICO but to actually ruin them 63 and

legitimate businessman does not have adequate civil remedies available under that Act. This [Act] fills that gap.

ABA REPORT, supra note 8, at 87 n.98 (quoting 115 CONG. REC. 6,993 (1969) (statement of Sen. Hruska)).

58. Id. at 86 (remarks of Sen. Hruska).


60. 18 U.S.C. § 1964(c) (1982). Section 1964(c) provides: "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."

61. ABA REPORT, supra note 8, at 87-89.

62. In his statement to the Senate in 1969, President Nixon observed that: "[t]he arrest, conviction, and imprisonment of a Mafia lieutenant can curtail operations, but does not put the syndicate out of business. As long as the property of organized crime remains, new leaders will step forward to take the place of those we jail." Id. at 94 (quoting H.R. Doc. No. 105, 91st Cong., 1st Sess. 6 (1969)); see also id. at 95 (quoting S. REP. No. 617, 91st Cong., 1st Sess. 79 (1969) (statement of J. Mitchell, U.S. Att'y Gen.) ("While the prosecutions of organized crime leaders can seriously curtail the operations of the Cosa Nostra, as long as the flow of money continues, such prosecutions will only result in a compulsory retirement and promotion system as new people step forward to take the place of those convicted.").

thereby deliver "a mortal blow against the property interests of organized crime." 64

The "mortal blow" of civil RICO would come ostensibly from driving up the costs of racketeering for the racketeer. Most of those costs are obviously derived from the RICO multiplier. There is, however, the added cost inflicted upon a racketeering firm through simple litigation expenses. RICO guarantees potential litigants attorney's fees, 65 liberal venue and service of process provisions, 66 and the ability to join a large number of defendants 67 in an apparent effort to maximize the number of cases as well as the amount of damages. These inducements were intended to bring about something akin to death by exposure by driving up the racketeers' costs through repeated private actions with a high likelihood of success. 68 As one court put it, "RICO's lure of treble damages and attorney's fees draws litigants and lawyers . . . like lemmings to the sea." 69

2. The RICO Lottery: Penalty Maximization through Excessive Rent-seeking

In its combination of high damages and easy prosecution, Congress inadvertently created a more potent device for penalty maximization than originally anticipated. Assuming litigation costs are reasonably considered as penalties in themselves, a collateral benefit of this mix is the possible elevation of racketeering costs due to excessive rent-seeking. 70 A "rent" has been defined

66. Id. § 1965(a).
67. Id. § 1965. RICO trials are often referred to as "mega-trials" because of the large number of defendants joined, usually in criminal cases like the famous twenty-two defendant, "Pizza-connection" mafia trial in the Southern District of New York. See generally Moss, Mega-Trials: Risks and Rewards, 74 A.B.A. J. 74 (Mar. 1, 1988). Recently, a district court held that such trials are prejudicial to the defendants and tax the court system and, accordingly, severed the fourteen-defendant RICO case. United States v. Gallo, 668 F. Supp. 736 (E.D.N.Y. 1987).
70. The following discussion of rent-seeking will be using that term only in its more general sense. For the purposes of this paper, rent-seeking is used to refer to the excessive side of rent-seeking. The ironic twist in this context is that the villain of social welfare economists—excessive rent-seeking—may be highly valued in the RICO area.
as a "payment to a resource owner over and above the amount his resources could command in their next-best alternative use." Rent-seeking occurs where there are scarce resources competing for a particular transfer of a good or service. While rent-seeking is a normal part of a competitive economy, the welfare costs of excessive rent-seeking are potentially very high.

In his article *Efficient Rent Seeking*, Gordon Tullock presents an analysis of the rent-seeking phenomenon through a simple lottery analogy. The lottery is composed of two players with a $100 prize at stake. Each player, Tullock shows, will invest according to what he thinks the other party will do. The optimal investment will depend on the ability of both players to gauge the best strategy in terms of the possible return on their investment. When excessive rent-seeking occurs in the lottery, social waste results; the aggregate total spent on the rent-seeking exceeds the value of the rent itself. In addition, under this example we see how an increase in the value of the prize will result in an increase in the level of rent-seeking.

The use of the Tullock’s lottery example can be used to better understand RICO’s “litigation lottery.” The socially optimal solution for RICO is to drive up the costs for defendants in proportion to their likelihood of being convicted and thereby the likelihood of their being true racketeers. This might, in fact, be achieved under the present system through the incentives for plaintiffs to press promising claims. In a case with a substantive charge, the plaintiff can be expected to spend a comparatively large amount of money on the suit since the probability of his prevailing is fairly high and, should he do so, all costs would be borne ultimately by the defendant. Conversely, the plaintiff

72. Id. at 19.
73. Id. at 19 n.2.
75. Id.
76. Id.
77. Id.
78. Id. at 60.
79. One of the collateral benefits of civil RICO’s guarantee of attorney’s fees is that plaintiffs are less likely to be “scared off” by institutional defendants with threats of a “paper blizzard.” Goldsmith, supra note 43, at 847 n.83 (quoting Corrigan, *Rolling Back RICO*, 18:5 Nat’l J. 2114, 2116 (1986)). Similarly, another commentator notes that “[a]ttorney’s fees . . . also discourages [sic] unscrupulous defendants from conducting dilatory and unnecessarily expensive lit-
would elect to spend less when conviction, and thereby attorney’s fees and costs, are far less certain. In cases where there is a high likelihood of conviction, therefore, both the plaintiff and the defendant can be expected to spend excessively. The plaintiff will spend in the confidence that a conviction can be obtained with an award of his costs, while the defendant will invest comparatively in order to avoid a large potential loss. Where a plaintiff is less than sure of his chance of winning the suit, he will want to minimize costs and would be therefore expected to lower his investment accordingly.

There are, however, obvious weaknesses in penalty maximization revealed by the lottery analogy. That the rent in civil RICO is of an unknown value will likely lead to some degree of excessive rent-seeking in low probability conviction cases, though it should still be less than that involved in a case with a high conviction probability. Moreover, in the absence of actual knowledge of precisely what damages will be accessed, neither party can be assured that the opposing party will invest according to Tullock’s logical format. Consequently, society may successfully force excessive spending by racketeers in cases where there is a high likelihood of conviction at the possible cost of increasing excessive rent-seeking in cases where there is a low likelihood of conviction.

80. This natural selection of stronger cases is already quite common in areas like medical and legal malpractice where contingency fees are widely used. Plaintiff firms will be reluctant to take on low probability cases, particularly with the expanded use of rule 11 sanctions in federal courts. Blakey, The Act Is Neither Anti-Business Nor Pro-Business, It’s Pro-Victim, Nat’l J., Aug. 26, 1985, at 24, col. 2 (noting there is no evidence of problem with frivolous suits under RICO and that current sanctions are more than adequate to handle those that do exist); see also Hearings, supra note 35, at 361-62 (statement of Steven Twist, Chief Ass’t Atty Gen., State of Arizona) (“There is scant evidence that RICO has created baseless litigation in any greater proportion than other causes of action . . . . [T]here is now no empirical data that shows RICO is more abused than an ‘average’ cause of action.”).

81. Goldsmith, supra note 43, at 846-47 (“Counsel fees are essential because they encourage litigants to undertake complex cases and discourage defendants from resisting valid claims with a barrage of motion practice.”).

82. Although excessive rent-seeking in low probability conviction cases might occur, the prosecution of frivolous civil RICO suits does not appear to be the systemic problem. See supra note 80.

83. Tullock, supra note 74, at 56.

84. Id. at 60-62. The election of the parties to litigate in most cases under RICO (when they should otherwise settle) can be viewed as an enhancement of RICO’s penalty maximization scheme.
The unwillingness to settle would be enhanced under civil RICO for two reasons. First, a defendant is not likely to offer a settlement figure anywhere near the amount of the potential damages. This is because RICO's whole objective is to set damage awards at a sum great enough to ruin, or at least cripple, a racketeering business. Secondly, the unusually high prizes and easy prosecution under civil RICO undermine the motivation for plaintiffs to settle civil disputes. Moreover, even if litigation costs under RICO threaten to dwarf actual damages, the unknown nature of RICO's usually high penalty will often sustain penalty-maximizing, rent-seeking behavior.

B. The Clayton Act: Cost Minimization

Clayton Act remedies operate under a principle fundamentally in conflict with penalty maximization. Under the Clayton Act, costs to the violator are minimized so that antitrust damages will deter only those inefficient violations with negative net allocative results. The concept of cost minimization was imported from the criminal context where it was applied in a study by Gary Becker in his seminal work, Crime and Punishment: An Economic Approach. In his study of criminal penalties, Becker argued that, in establishing the penalty for a crime, society should consider three types of costs: (1) the costs of the occurrence of the violation itself; (2) the processing costs involved in apprehending and convicting the violator; and (3) the costs of administering the punishment.

Society, according to Becker, must seek to minimize these

85. Id. at 60-62. But cf. Hearings, supra note 35, at 127 (statement by U.S. Ass't Att'y Gen. Stephen S. Trott) (Department of Justice study showed that sixty-one percent of 163 civil RICO cases surveyed were voluntarily terminated by agreement of parties before trial).
86. One commentator recently noted that since "most antitrust suits are settled now at close to actual damages . . . it may be necessary to authorize treble damages to assure that deserving victims received actual damage in the RICO area." Hearings, supra note 35, at 416 (statement of the Nat'l Ass'n of Att'y Gen. and Nat'l Dist. Att'y Ass'n) (emphasis in original); see also Goldsmith, supra note 43, at 837 n.42 (quoting Lacovara, Wright & Aronow, Legislative Reform of Civil RICO: The Business Community's Perspective, in Law & Business, Inc., Civil RICO Litigation 240-41 (1985) ("The mere threat of a private RICO suit produces settlements because the risk of treble damages, attorney's fees, expensive discovery, and the public label 'racketeer.'").
88. Becker, supra note 87, at 170-80.
costs and reach the most advantageous level of damages by trading off increases and decreases among these three categories. Consequentially,” one commentator wrote, “sanctions of equal value can be generated by varying the frequency of punishment inversely with the severity of punishment.” Obviously the danger to be avoided in this process is to have a level of damages that is too high or too low. In the former case, society will be spending an excessive amount of money on enforcement while deterring too much of the proscribed behavior. In the latter case, society will pay the price for not deterring enough of the proscribed behavior. The objective is to decide on a price “where the costs associated with a marginal increase in price would exceed the cost savings resulting from the decreased incidence of the harmful conduct.” This balancing is probably most familiar to students of contracts in the context of the “efficient breach.” Although the “efficient breach” is not the result of strict cost minimization, the notion behind the “efficient breach” is that society will benefit from a breach when the benefits from a breach are greater than the resulting damages. Society encourages such breaches in an attempt to optimally allocate its resources.

The raison d’être of cost minimization under the Clayton Act, therefore, is the efficient antitrust violation. In this way, damages under cost minimization serve a more sophisticated purpose than under penalty maximization where they are simply the final, definitive result of RICO’s bankruptcy forcing provisions. In the Clayton Act, damages become a part of a winnowing out process through which society deters only those violations with less value to the violator than detriment to society.

The great challenge in the Clayton Act’s use of damages, however, is the need to calculate the social harm caused by some violations. The selective deterrence of inefficient antitrust violations is necessarily linked to society’s ability to gauge the harm incurred through antitrust violations. In some monopolies, computing social costs may be accomplished by simply comparing the

89. Schwartz, supra note 87, at 1076.
90. Id. at 1076-77.
91. Id. at 1079-80.
92. Id. at 1080.
93. Id.
94. Id.
96. Id. at 166-68.
97. Schwartz, supra note 87, at 1079.
pre- and post-monopoly prices. Nevertheless, due to the difficulty of measuring diffuse or hidden costs,\(^98\) the measurement of damages in most private antitrust cases never truly corresponds to the actual social harm caused by the antitrust violation.\(^99\) Rather, courts generally accept the plaintiff’s damages as rough corollaries of social harm. Plaintiff losses in antitrust cases, therefore, take on an added dimension as measures of social losses. Antitrust violations promising greater returns to the violator than losses to the plaintiff are deemed efficient and beneficial for society while all other violators are sharply curtailed.

The use of plaintiff losses in this way has been encouraged by leading antitrust theoreticians. Schwartz, for example, argues that plaintiff losses are essential in determining allocative harm caused by monopoly pricing. Although plaintiff losses are not mirror images of societal losses, Schwartz writes, “it is possible that the measures of damages, although not explicitly focusing on allocative consequences, might represent reasonable proxies for social harm.”\(^100\) If efficiency is the sole goal of antitrust regulations, plaintiff losses will at least place the line of demarcation between inefficient and efficient violations high enough to have a net beneficial societal result.

The realization of the efficient antitrust violation is a goal central to the Clayton Act’s cost minimization approach, yet distinctly foreign to RICO’s penalty maximization scheme.\(^101\) As will be shown below, RICO’s aversion to the efficiency goals of


\(^99\) Schwartz, supra note 87, at 1084.

\(^100\) Id. Note that, according to Judge Posner, to translate the figure measuring social harm into a penalty would be inefficient, even if it could be calculated. R. Posner, Economic Analysis of Law 236 (2d ed. 1977). “[T]he effective deterrence of the [viator],” writes Posner, “does not require a monetary penalty as large as the social costs of the violation, since those social costs are not received as gains by the [viator].” Id.


Antitrust regulation is designed to promote marketplace competition and is increasingly focused on market efficiency rather than harm suffered by individual businesses. RICO, on the other hand, is not concerned with either market efficiency or promoting competition, but instead is designed to inflict severe financial injury on those who commit crimes in operating an enterprise or who use an enterprise to insulate themselves from less severe penalties.

Id. (citations omitted).
the Clayton Act is the result of a perception by RICO's drafters that racketeering was fundamentally and irredeemably harmful to society.

**PART II**

**THE CLAYTON ACT APPROACH AND RACKETEERING: PRICING A MALUM IN SE CRIME**

The notion of an "efficient violation" separates RICO from the policies underlying the Clayton Act. Legislative debate on civil RICO precludes any suggestion that Congress envisioned an "efficient racketeering violation" under the Act.102 "[T]o the extent," one court noted "that antitrust law and policy are increasingly concerned primarily with market efficiency rather than the deleterious effects of concentrated market power itself, analogies to that body of law become increasingly irrelevant, since the exercise of social power by organized crime is thought to be malum in se."103

The perception of racketeering as malum in se is fundamental to an understanding of the intrinsic conflict between these two acts. Unlike antitrust violations that are viewed as having some deleterious effects when efficient, RICO violations were considered so inherently bad as to require a system of sanctions rather than prices. The malum in se community standard is in many ways the linchpin between Congress' intention to deprive racketeers of any racketeering gains and the eventual sanctioning device adopted by Congress.104

The price versus sanction distinction was developed largely by Cooter in his seminal work, *Prices and Sanctions*.105 Cooter divided all damages between these two polars.106 Antitrust damages are often viewed as "prices"107 set by the state, which must

102. See, e.g., *Organized Crime Control, Hearings on S.30 and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary, 91st Cong., 2d Sess. 106-07 (1970)"("The improved remedies and procedures of title IX offer the first real hope for advancing the federal effort against organized crime...and promise to provide a vehicle for cleansing the streams of commerce of one of their most harmful pollutants."); see also *ABA REPORT, supra* note 8, at 94-95.


104. See, e.g., Goldsmith, *supra* note 43, at 835 ("[T]reble damages serve a socially desirable compensatory function."); cf. Goldsmith & Keith, *supra* note 26, at 81 ("[O]nce the extent of fraud in our society has been recognized, providing victims with treble damages seems neither drastic nor inappropriate.").


106. *Id.* at 1524-25.

be paid for an activity to occur.\textsuperscript{108} Along these same lines, a pricing system is closely correlated with external costs so that a violation's price increases with a comparative increase in the degree of external harm.\textsuperscript{109} Pricing systems are thus more harm-oriented and cost minimizing by nature. In planning its future conduct, a firm will consider these prices as any other cost of doing business.\textsuperscript{110} Many theorists would argue that, if the behavior contemplated would still be profitable after discounting the price imposed by society, such behavior results in efficient allocation of resources and should be encouraged.\textsuperscript{111}

Conversely, a sanction is a detriment imposed by society to prevent an activity from occurring.\textsuperscript{112} Unlike a price, which will increase with the external costs, a sanction will increase with the need for deterrence.\textsuperscript{113} The need for deterrence, moreover, is often indicated by the nature of the actor's intent when committing the violation.\textsuperscript{114} Consequently, even if external costs are roughly equal, society might legitimately impose a heavier sanction on those violators who act intentionally or deliberately while lowering the sanction for unintentional or spontaneous actors.\textsuperscript{115} The central concern of a sanction is to deter the violation while the central concern in pricing is the proper internalization of the costs resulting from the violation.\textsuperscript{116} A sanction will often involve a multiplier of the actual damages and bear little practical relation to the injury itself, save the base figure subject to multiplication.

Congress' imposition of a sanctioning system under RICO stems from its adherence to the community standard of racketeering as \textit{malum in se}. Congress never embraced the notion of the "efficient racketeering," but rather insisted that racketeering firms be eliminated altogether.\textsuperscript{117} Market considerations and

\footnotesize{108. \textit{Id.} at 1079-85; \textit{Cooter, supra} note 105, at 1525 ("[A] price is a payment of money which is required in order to do what is permitted.") (emphasis in original).


110. \textit{Id.} at 1525-30.


112. \textit{Cooter, supra} note 105, at 1537.

113. \textit{Id.} at 1525-30.

114. \textit{Id.} at 1537.

115. \textit{Id.}

116. \textit{Id.}

117. Ralston v. Capper, 569 F. Supp. 1575, 1580 (E.D. Mich. 1983); \textit{see also} Carter v. Berger, 777 F.2d 1173, 1176 (7th Cir. 1985) ("RICO was designed to make life hard for repeat violators of the criminal law, and it must be generously construed to promote the goal of deterrence.").}
cost-benefit analysis are foreign to the RICO area. One court emphasized this difference between the two acts by noting that in the antitrust area "[o]ne less business in a given area will increase concentration, thus decreasing competition [while in the racketeering area] it does not matter if an illegal business activity is ruined—indeed that is exactly what RICO is endeavoring to accomplish." Notions of Pareto efficiency where one party gains without worsening the position of any other party are plainly absent in the community standard underlying RICO's damages section.

Congress' intended use of the trebling multiplier as a sanction, to ruin racketeers without distinction, has miffed numerous courts and commentators. These critics point to the adoption of the broader base for damages as amounting to an unjust windfall for plaintiffs. Of particular concern for scholars are contractually related predicate acts which entail expectation or restitution interests. In arguing for the Clayton Act approach, one commentator gives the example of a case involving a corporate insider who buys stock from his shareholders for $40,000 only to sell the same stock two years later for $700,000. In that case, Janigan v. Taylor, the court awarded restitutionary damages of $700,000, or 17.5 times the purchase price received by the plaintiffs. The commentator correctly notes that, had this case been brought under RICO, the $700,000 in damages could have been trebled.

The Janigan example illustrates the implicit preference often revealed in RICO studies for harm-oriented damages and pricings. When viewed in terms of antitrust theory, such potential awards appear excessive and inefficient. As a price, the multiplier in Janigan would clearly be too high and its effect would be to

120. For a listing of such courts, see Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 388 n.4 (7th Cir. 1984), aff'd, 473 U.S. 606 (1985).
121. Id. at 404-05.
122. Parnon, supra note 26, at 352-53.
123. Id. at 353 n.40.
124. 344 F.2d 781 (1st Cir.), cert. denied, 382 U.S. 879 (1965).
125. Parnon, supra note 26, at 353 n.40.
126. Id.
allow too little of the activity to occur.\textsuperscript{127} Congress, however, sought not to establish a price, but a sanction and, as such, a multiplier of 52.5 on the original purchase price may be valid. As Cooter notes, "[a] sanction typically creates an abrupt jump in an individual's costs when he passes from the permitted zone into the forbidden zone where behavior is sanctioned."\textsuperscript{128} Moreover, the use of pricing logic in the RICO area illustrates the difficulty of applying certain economic values to areas like racketeering which involves offenses considered malum in se. "[T]he economic perspective," Cooter points out, "is blind to the distinctively normative aspect of law, viewing a sanction for doing what is forbidden merely as the price for what is permitted."\textsuperscript{129} Furthermore, as shown below, the theoretical quandary involved in using cost minimization in a malum in se area is complicated further by difficult practical problems.

A. Dangers of Hidden Costs and Perverse Incentives

Under Cost Minimization

The community standard issue aside, the very act of employing cost minimization in RICO requires some sort of calculation of the costs of a racketeering violation to society.\textsuperscript{130} As was mentioned earlier, this can be often done in the antitrust area with relative accuracy because of the quantifiable nature of the violation.\textsuperscript{131} Racketeering, however, encompasses a wide range of violations in an assortment of areas.\textsuperscript{132} While governmental studies estimate the social cost of fraud at $200 billion annually,\textsuperscript{133} these studies are hampered by a lack of reliable information on the level of fraud occurring undetected in society and, therefore, vary widely in both methodology and conclusion.\textsuperscript{134} This information

\textsuperscript{127} It should be noted that a price can theoretically involve a multiplier if the base figure, when multiplied, will accurately reflect social costs. See infra notes 188-91 and accompanying text.

\textsuperscript{128} Cooter, supra note 105, at 1523.

\textsuperscript{129} Id.

\textsuperscript{130} For a discussion of cost minimization, see supra notes 87-101 and accompanying text.

\textsuperscript{131} R. Posner, supra note 100, at 234. This is not to suggest that concealability problems do not exist in antitrust, but rather that the problems are on the whole less than those encountered in the racketeering area.

\textsuperscript{132} ABA Report, supra note 8, at 71-72.

\textsuperscript{133} United States Dep't of Justice, Annual Report of the Attorney General 42 (1984) ("White collar crime results in the loss of $200 billion annually from our national economy . . . .").

\textsuperscript{134} Congressional Research Serv., Library of Congress, Fraud in Defense Procurement 2 (May 15, 1986) (containing estimate of between $23 billion to $38 billion
deficiency could produce serious systemic consequences under a pricing system.

The high information requirements of pricing systems was aptly shown by Cooter. In order to use a pricing system, Cooter argued, costs of all violations must be internalized by the price so that only violations that "pay their own way" will be encouraged. This price, therefore, must include the harm suffered by the victims and the costs of enforcement. The value of a victim's loss and a society's enforcement, moreover, must be adjusted by the probability of an offender's prosecution. "If benefits and costs are balanced at the margin, then the number of crimes would be relatively elastic with respect to the price, so errors in computing damages would affect the amount of crime." Large errors are likely to be prevalent under pricing systems, Cooter continued, since calculating the costs of an offense to a class of victims is naturally empirical and imprecise. As a result, sanctioning systems are inherently superior to pricing systems since the information requirements are much lower.

The presence of an information deficiency renders cost minimization and its pricing scheme untenable in any regulatory scheme since the underlying system of pricing requires a firm projection of societal harm. When a standard for behavior is known, while the cost of deviations from that standard is not, sanctions are normally required. The major reason for this preference is the inherent elasticity of behavior under pricing systems. There is a high degree of behavioral responsiveness to pricing changes. This general sensitivity to pricing systems can

of losses annually): Congressional Research Serv., Library of Congress, Drug Fraud 1 (containing estimate of $10 billion in losses annually). For an excellent listing of these and other studies on fraud, see Goldsmith, supra note 43, at 833-34 n.31.

135. Cooter, supra note 105, at 1550.
136. Id.
137. Id.
138. Id.
139. In addition to the antitrust area, the notion of pricing violations has also taken hold in the environmental field where the government actively sells "pollution rights" under the Clean Air Act. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). For a variation of the pollution right, the "pollution tax," see Cooter, The Cost of Coase, 11 J. LEGAL STUD. 1 (1982).
140. Cooter, supra note 105, at 1532-36.
141. Id. at 1524 ("Since behavior is relatively responsive to prices, an error in setting an official price will have a large effect on behavior; since behavior is relatively unresponsive to the level of a sanction, modest errors in the level of sanctions will have little effect upon behavior.").
be especially dangerous in areas with a high concealability factor.\textsuperscript{142} Since behavior will fluctuate consistently with price changes, a pricing (and the data supporting it) must insure a high degree of accuracy.\textsuperscript{143} Yet, errors in calculating costs are probably inevitable in the furtive world of the racketeer where hidden costs necessarily accompany hidden acts.\textsuperscript{144} Thus, the information deficiency under RICO is likely to be far more acute than in other, less clandestine areas.

In addition to the information deficiency impasse in using a pricing system in RICO, there is also a second practical problem concerning the implications of awarding damages to plaintiffs for the harm they incur. Ironically, the use of a harm-oriented measurement of damages might actually result in an incentive for victims to prolong racketeering enterprises so as to increase their losses.\textsuperscript{145} If a person can only treble lost profits, increased business costs, and the decreased value of his business, as under the Clayton Act, a victim may find it advantageous to delay prosecuting a racketeer until the racketeer's activities (and thereby the victim's losses) are increased.\textsuperscript{146} This moral hazard—or "perverse incentive"—would only be enhanced by procedural or evidentiary advantages afforded plaintiffs. A potential litigant would have the perverse incentive to work in silent collusion to increase his

\textsuperscript{142} Id.
\textsuperscript{143} Id.
\textsuperscript{144} The difficulty in computing the social costs of a RICO violation, a necessity under a cost minimization system, is only compounded by the difficulty in finding the proper multiplier. While we will consider this more in the following section, it should be noted that the size of the antitrust multiplier is usually tied to the concealability of the offense. Theoretically, the multiplier should increase with the difficulty of detecting a violation. Consequently, if one of three antitrust violations can be detected and prosecuted on the average, then the multiplier might be two. In cases where the concealability factor is low, as in a merger, Judge Posner has argued for the rejection of treble damages. R. Posner, supra note 100, at 235. For trebling to be an efficient vehicle, the probability of detection, according to Posner, must be less than one, otherwise single remedies should be employed.

The concealability notion of economic theory is hardly an arcane matter, yet its application to RICO would be prohibitively complex. As noted earlier, the data on the amount of racketeering remains sketchy at best. The concealability of a violation can only be gauged after one estimates the rough incidence of violations in a population. Consequently, calibrating the relative size of the multiplier by a concealability factor in the RICO context would be illusory and unsupportable.


\textsuperscript{146} Breit & Elzinga, supra note 145, at 430-33; Butler, supra note 145, at 51.
losses, in anticipation of an eventual damages multiplier, rather than to take action to reduce his losses.

The danger of perverse incentives is vividly illustrated in a case discussed by Breit and Elzinga. In that case, a drive-in theatre owner kept two sets of books in anticipation of an antitrust suit in which he would star as the victimized small businessman: one showing his artificially low profits arising from the violation and another showing the treble damages he could expect under the antitrust laws.\textsuperscript{147} Similarly, RICO's adoption of the Clayton Act approach could well invite such opportunistic pursuit, perhaps leading to unnecessarily prolonged associations between racketeering victims and racketeers.\textsuperscript{148} Although the present penalty-maximizing scheme under RICO would no doubt bestow greater benefit upon the plaintiff than would simple Clayton Act damages, the perverse incentive experienced under a gains-oriented measurement of damages is likely to be less than that encountered under a harm-oriented measurement (where a plaintiff's collateral losses are subject to trebling).\textsuperscript{149}

B. Returning to Gain-oriented Measurement Under RICO

As we have seen so far, RICO was devised to place a sanction on racketeering. This stands in contradiction to the basic approach of the Clayton Act's cost minimization which places a price on antitrust violations so that efficient violations might still occur. RICO's damages provision illustrates Congress' inability to correlate the community standard underlying RICO with an established method of computing damages. On the one hand, Congress incorporated into RICO the harm-oriented damages language borrowed from the Clayton Act which, as we have seen, is vital to reaching efficient violations. Yet, on the other hand, Congress clearly considered the possibility of balancing racketeer costs and benefits to be unacceptable.\textsuperscript{150} The gain-oriented (penalty-maximizing) purposes of RICO were essentially grafted onto the harm-oriented (cost-minimizing) provision borrowed from

\textsuperscript{147} Breit & Elzinga, supra note 145, at 431 (citing Woolner Theatres, Inc. v. Paramount Pictures Corp., 333 F. Supp. 658 (E.D. La. 1970)).

\textsuperscript{148} Butler, supra note 145, at 51-52. There is no indication that perverse incentive problems are common under the present system. Perverse incentives, often considered in the antitrust area, are discussed here as an added contrast between gain- and harm-oriented measurements.

\textsuperscript{149} For a discussion of the Clayton Act damage measurement, see infra notes 172-74 and accompanying text.

\textsuperscript{150} Nathan, supra note 2, at 10.
the Clayton Act by expanding the base for trebling. The use of the predicate acts, instead of the limited categories of the Clayton Act, to supply the trebling base under RICO allows penalty maximization to occur and insures that the ill-gotten gains of the racketeer will be redistributed.

Nevertheless, seen as a harm-oriented system of measuring damages, RICO’s predicate act approach differs little structurally from the Clayton Act. Under the predicate act approach, after the plaintiff has proven that his injuries were caused by the predicate acts, these damages automatically become subject to possible trebling. While the result is slightly different under the Clayton Act, it is a difference only in degree. That is, under the Clayton Act, while harm-oriented damages are trebled, the base categories of damages subject to trebling are smaller, and thus the plaintiff’s damages award will be less.

In enacting civil RICO, Congress appears to have envisioned a gain-oriented, rather than a harm-oriented, measurement of damages. Legislative history indicates that Congress intended civil RICO damages to ruin racketeering businesses or, in the very least, to deprive businesses of their racketeering profits. Citing the legislative debate over the passage of RICO, the Supreme Court, in United States v. Turkette, concluded that “[t]he aim [of civil RICO] is to divest the [racketeering] association of the fruits of ill-gotten gains.” Other federal courts have found this stated purpose determinative in rejecting limitations on damages based on an analogy to Clayton Act damages. “Such a rule [limiting damages],” one court stated, “would leave money derived from actions prohibited by RICO precisely where Congress did not intend it to remain, in the hands of RICO violators.” The import of this interpretation is that Congress intended for civil RICO damages to center on the profits made through racketeering. This is not to say that a harm-oriented measurement of

152. For a discussion of the purpose of civil RICO, see supra notes 56-86 and accompanying text.
154. Id.
damages could not work to deprive racketeers of profits, but simply that the emphasis of RICO is on racketeering gains rather than its harm. More importantly, harm-oriented damages are most useful in facilitating the “efficient violation” where the profits outweigh the costs to society. This efficiency notion, as previously shown, is alien to Congress’ view of racketeering as *malum in se*.

**PART III**

**FOCUSED PENALTY MAXIMIZATION: THE GAINS MULTIPLICATION APPROACH**

The discussion in the preceding section described how Congress utilized a system of penalty maximization and sanctions to combat the *malum in se* crime of racketeering. It was further shown how penalty maximization is better suited to the task of deterring racketeers than the Clayton Act’s (harm-oriented) cost minimization because of the latter’s problems of information deficiency and perverse incentives. We must now turn to the question of the proper damages approach under civil RICO. On this point, RICO’s blind penalty maximization and the use of sanctions part company. Although sanctions are intended to deter violations, this deterrence is usually not intended to be accomplished at any cost, but rather should be adjusted to ruin only those offenders displaying some particular characteristics such as premeditation or recidivism. RICO, as we have seen, was designed to ruin racketeers, if necessary, without distinguishing between the types of racketeers. In reaching some conclusion as to the optimal sanction, these two notions must be reconciled with the special problems that attend racketeering.

**A. Distinguishing Between Fractional and Substantial Racketeers**

After opting for a sanctioning rather than a pricing system, a policy-maker must grapple with the size of that sanction. What little consideration commentators have given this subject has tended to link the size of the sanction with the intent of the violator. This is integrally related to the purpose of sanctioning which is to discourage what Cooter refers to as the “exceptional actor.”

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158. *Id.*
159. *Id.* at 1543.
160. *Id.*
ages cheaper than adhering to the community standard. Cooter argues that, in setting a sanction, the policy-maker must account for two classes of violators: those who intentionally, deliberately, or repeatedly violate the standard and those whose violations are unintentional or spontaneous. The result is that the size of the sanction is not only determined by the mental state of the violator, but, as we will see, is inevitably set to thwart the behavior of the most socially deviant class or, in this context, those most reliant on racketeering.

Exceptional actors normally include recidivists and other violators whose conduct falls substantially short of the social norm. These individuals can be referred to as “substantial racketeers” because of their substantial reliance on racketeering proceeds. Conversely, the racketeers who are only fractionally reliant on the proceeds from racketeering can be referred to as “fractional racketeers.” Due to his fractional reliance, a racketeer of this latter type will likely adopt behavior only a fraction below the social norm. Cooter anticipated that the discongruity between these two groups would be rectified by the adoption of a sanction severe enough that “even the exceptional injurer will minimize his expected cost by conforming to the legal standard.” Practically, therefore, the sanction will be set by reference to the most deviant class: the substantial racketeer. Accordingly, a sanction cannot be too low if it is to have a real impact on the substantial racketeer.

If it is clear that a sanction can be too low, can it be too high? One answer is that a sanction out of proportion to the social costs of the violation will lead to rampant inefficiency by disallowing violations which would bring more benefit to a party than harm to society. Yet this solution, as we saw earlier, is difficult to rec-

161. *Id.* at 1537.
162. An analogous point was made in testimony on civil RICO before the Senate Committee on the Judiciary:
If our society authorizes the recovery of only actual damages for deliberate anti-social conduct engaged in for profit, it lets the perpetrator know that if he is caught, he need only return the misappropriated sums. If he is not caught, he may keep his ill-gotten gains, and even if he is caught and sued, he knows that he may be able to defeat part of the damages claims or at least compromise it. In short, the balance of risk under traditional simple damage recovery provides little disincentive to those who engage in such conduct.

oncile with the assumptions underlying RICO. The social costs of racketeering defy computation.\textsuperscript{165} Moreover, even if they were capable of calculation, the \textit{malum in se} community standard presupposes the absence of an efficient level of racketeering. Another answer is that it would unjustly enrich opportunistic plaintiffs.\textsuperscript{166} This would only be relevant, however, if the purpose of the Act were purely compensatory.\textsuperscript{167} Quite to the contrary, RICO is first and foremost a penalty-maximizing statute and is largely unconcerned with who gets the damages so long as the violator’s resources are duly depleted.

A more provocative answer to this question might be that it is disadvantageous to pummel the businesses of fractional racketeers when society may want to reform, rather than ruin, this class of racketeers. While the community standard and the Act fail to differentiate between the fractional and the substantial racketeer, distinguishing between these two classes would have two principal advantages. First, society can encourage businesses to minimize practices of racketeering by modifying the eventual penalty to reflect the degree of reliance of the particular firm on such practices. Second, society can avoid the social costs of crippling or ruining fractional businesses by setting a sanction which punishes such businesses only to the point of barring any “efficient racketeering.”

B. \textit{Gain-oriented Damages and the Elasticity of Behavior}

The inevitable social waste resulting from the blanket application of penalty maximization offers persuasive support for reforming, rather than ruining, fractional racketeers. Eradicating substantial racketeers, however, without eliminating firms from both groups indiscriminately, is a problem of delicate balancing. There has been considerable debate on how to protect the fractional racketeer.\textsuperscript{168} Some commentators suggest that Congress differentiate between acts or methods of racketeering, taking care to specify the various damages for each.\textsuperscript{169} This approach has

\textsuperscript{165} A 1982 study concluded that \$200 billion are lost to fraud annually. \textit{See supra} notes 133-34 and accompanying text.

\textsuperscript{166} \textit{See generally} Breit & Elzinga, \textit{supra} note 145, at 430-33; Butler, \textit{supra} note 145, at 51.

\textsuperscript{167} For a discussion of RICO as a penalty-maximizing statute, see \textit{supra} notes 70-86 & 112-29 and accompanying text.

\textsuperscript{168} While the term “fractional racketeer” is a creation of this Article, most suggested limitations on the scope of the Act center on defendants with less traditional or less substantial racketeering activities.

\textsuperscript{169} \textit{ABA Report, supra} note 8, at 276-78.
been rightly attacked as unwieldy and imprecise.\textsuperscript{170} Another plan would eliminate mail, wire and securities fraud from the predicate acts in order to reduce the number of persons prosecuted under RICO.\textsuperscript{171} This plan, however, would only reduce RICO’s potential effectiveness by allowing those substantial racketeers detected by the mail and wire fraud provisions to escape prosecution with the fractional racketeers. RICO’s weakness is not that it draws too many types of racketeers into its net but rather that, once racketeers are caught, the Act fails to sort them out in terms of damages.

Other commentators have argued for measures similar to the Clayton Act approach where a lower cap would be placed on the allowable damages.\textsuperscript{172} This idea would bar penalty maximizing, however, even for substantial racketeers. Moreover, while fractional racketeers would be brought back into alignment with the community standard, this would not likely bring highly deviant social behavior up to the social norm.\textsuperscript{173} Substantial racketeers would likely engage in episodes of “efficient racketeering.” High potential damages, therefore, would be more advantageous to avoid elasticity of behavior and to insure fatal penalty maximization for substantial racketeers.\textsuperscript{174}

Recently, a legislative plan was introduced in Congress that would have restricted the availability of treble damages only to cases where the defendant had already been convicted criminally under the Act.\textsuperscript{175} This amendment to civil RICO, contained in H.R. 5445, passed the House of Representatives but was tabled in

\textsuperscript{170} Id. at 277.

\textsuperscript{171} Id. at 247-63. The advocates of this approach would certainly cut down the number of civil RICO cases since an estimated ninety percent of civil RICO cases that go to final judgment rely on mail, wire or security fraud as predicate offenses. Id. at 243 (“About 57 percent of the cases involve solely or primarily mail or wire fraud predicate offenses, 35 percent rely solely or primarily on allegations of securities fraud.”).

\textsuperscript{172} Id. at 276-78; see also Parnon, supra note 26, at 349-54.

\textsuperscript{173} Cooter, supra note 105, at 1524.

\textsuperscript{174} Id. at 1532-36.

\textsuperscript{175} House Subcommittee Approves Bill Eliminating RICO’s Treble Damage Provision, 2 Civ. RICO Rep. (BNA) 2 (Aug. 20, 1986); see also Goldsmith, supra note 43, at 855-59. This bill originally would have eliminated treble damages altogether. Similar efforts have been made in the antitrust area. In 1987 (when H.R. 5445 was pending), two bills were introduced that would have eliminated treble damages for the majority of antitrust violations. See S. 539, 100th Cong., 1st Sess. (1987); H.R. 1155, 100th Cong., 1st Sess. (1987); see also Remarks of Assistant Attorney General Douglas H. Ginsburg to National Health Lawyers Association on Health Care and Antitrust Reform Legislation (Jan. 16, 1986), reprinted in 50 Antitrust & Trade Reg. Rep. (BNA) No. 1249, at 174 (Jan. 23, 1986).
the Senate by a 47-44 vote.\textsuperscript{176} This suggested modification to
civil RICO is interesting in that it would have presumably focused
civil RICO's penalty-maximizing sanction on substantial racketeers. This limitation on treble damages is, however, unadvisable
for many of the reasons considered earlier. Prosecutors are
widely known to have limited resources with which to prosecute
white-collar criminals.\textsuperscript{177} Most fractional, and many substantial,
racketeers would very likely never receive a criminal conviction
that would make them subject to treble damages under the Act.\textsuperscript{178}
Lost would be the needed deterrent for fractional racketeers.
Lost also would be one of the greatest advantages in opening the
"second front" against racketeers. It was precisely because pros-
escutors can only bring a limited number of racketeering cases that
Congress opted for the use of the private attorneys general that
had proven so successful in the antitrust area.\textsuperscript{179} Moreover, the
bill would succeed in effectively raising the standard of proof in
civil RICO cases—a change that critics of the Act have thus far
been unsuccessful in accomplishing through the courts.\textsuperscript{180} Civil
RICO's standard of proof—by a preponderance of the evidence—
has always displeased some courts\textsuperscript{181} and commentators\textsuperscript{182} who
point to the Act's high damages and stigma as grounds for raising

\textsuperscript{177} Blakey, supra note 80, at 28, col. 1 ("Public enforcement cannot be
relied upon to do the whole job of policing fraud.").
\textsuperscript{178} H.R. 5445 did allow for treble damages in actions brought by govern-
mental agencies. For a reproduction of the bill, see Goldsmith, supra note 43, at
904-11. This authority, however, would do little to improve the Act's overall
deterrent effect, given the already limited ability of federal prosecutors to bring
fraud cases.
\textsuperscript{179} In the 1985 hearings on RICO, the Justice Department stated that
"[o]nly a small percentage of suspected [illegal] activities can be investigated
thoroughly, and only a fraction of those investigated can be effectively prose-
cuted. It was in recognition of these practical limitations that Congress elected
to augment governmental efforts against organized crime by encouraging pri-
Villanova Law Review, Vol. 33, Iss. 2 [1988], Art. 1
tate initiatives." RICO Reform: Hearings Before the Subcomm. on Criminal Justice of the
(statement of J. Keeney, U.S. Deputy Ass't Att'y Gen.).
Similar concerns led to the creation of private enforcement mechanisms in
the antitrust area. The result is that eighty-four percent of all civil and criminal
antitrust cases, brought between 1960 and 1980, were instituted by private
plaintiffs. Blakey, supra note 80, at 28, col. 1 (studying 22,585 civil and criminal
cases).
\textsuperscript{180} See, e.g., Liquid Air Corp. v. Rogers, 834 F.2d 1297, 1302 (7th Cir.
1987); Wilcox v. First Interstate Bank, 815 F.2d 522, 531 (9th Cir. 1987); Cullen
\textsuperscript{181} See Note, Government Corruption, supra note 43, at 1544 n.75 (citing stan-
dard of proof required by various courts).
\textsuperscript{182} See, e.g., Note, Enforcing Criminal Laws, supra note 43, at 1064.
measuring civil RICO damages

the standard. This change is partially achieved by requiring a

criminal conviction—under the higher criminal standard—before
treble damages can be sought in private, civil proceedings. The

logical outcome of this restriction is the virtual elimination of
treble damages in the vast majority of cases and, thereby, the loss
of most of civil RICO’s penalty-maximizing potential.

To sum up, a major stumbling block in developing alterna
tives to the present RICO remedies is the capability, and accepta
bility, of distinguishing between fractional and substantial racketeers. Yet, this distinction is not wholly at odds with Cong
gress’ underlying reason for penalty maximizing. There was cer
tainly a perception among many of the congressmen who spoke in
the committee debates, that firms reliant on racketeering are not
likely to metamorphose into law-abiding businesses through fines
or other forms of government coercion. Congress’ objective to
ruin racketeers would make more sense for firms which are totally
or heavily reliant on racketeering for their profits. Such firms
could legitimately be considered socially parasitic and irredeem
able. It may well be most efficient to redistribute the resources of
such firms back among the general population. In this way, after
separating these two racketeering types, a sanction would work as
a legal triage to disperse businesses too heavily reliant on racke
teering to be reformed while supplying a sanction large enough
to deter racketeering by fractional firms by forcing these firms up
to the level of the social norm. This separation, moreover,
might be brought about by trebling the gains, rather than the
harm, produced by racketeering.

C. The Impact and Use of Gain-oriented Measurement in Four
Different Racketeering Situations

A gain-oriented measurement approach to RICO damages
would allow plaintiffs to receive treble the amount of the gains
that they could show were received by the defendant through the
racketeering. The impact that a shift from harm-oriented to gain
oriented measurement would have on RICO cases would vary
radically depending upon the nature of the racketeering enter
prise. For purposes of analysis, RICO cases can be broken down
into four principal groups: first, those cases where racketeering

183. See, e.g., S. Rep., supra note 59, at 78 (noting that racketeering firms
easily replace convicted participants and continue illegal activities); see also ABA
Report, supra note 8, at 92-95.

184. Cooter, supra note 105, at 1527.
gains equal the harm inflicted; second, those cases where the
gains are difficult or impossible to gauge; third, those cases where
the gains are greater than the harm; and fourth, those cases where
the gains are less than the harm. Each of these case groups will
be considered separately below in terms of what impact, if any, a
shift to gain-oriented measurement would have on actual damage
awards under RICO. As will be shown, only damages in two of
the case groups would be substantially affected by the use of gain-
oriented measurement of damages. It is in these two case groups,
not coincidentally, that the dangers associated with efficient viola-
tions and perverse incentives are most likely to be a problem. 185

The first case group encompasses those situations where the
harm produced equals the gain derived from a racketeering enter-
prise. An example is the following: Fly’em High Flaggole Com-
pany, a fledgling flagpole business, contracts with Polecat, Inc., to
manufacture the fiberglass cylinders that Fly’em High uses to
make its flagpoles. Polecat assures Fly’em High in repeated tele-
phone conversations that its AAA class fiberglass, when fashioned
into poles, can withstand two hundred-mile-an-hour winds. Un-
beknownst to Fly’em High, who begins taking flagpole orders,
Polecat is in reality a fly-by-night company that produces fiber-
glass that will crimp under as little as a five-mile-an-hour breeze.
Polecat is able to hide this fact through the collusion of a Fly’em
High vice-president who falsifies test results. Fortunately for
Fly’em High, the technical flaw is caught before actual work is
done on the cylinders and the company is able to rely on another
manufacturer to meet its orders. Nevertheless, Fly’em High is out
of the $50,000 paid to Polecat for the flaccid fiberglass.

Fly’em High’s case is illustrative of many situations where a
fraudulent enterprise results in harm to the plaintiff that is equal
to the defendant’s gain. Since no work on the cylinders had be-
gun (and assuming no lost-volume problem arises), Polecat’s
$50,000 gain is Fly’em High’s loss. Under this type of fact situa-
tion, the damages resulting from a gain-oriented measurement
will mirror the damages under a harm-oriented measurement.
Cases within this group would, therefore, remain unchanged by a
methodological shift to a purely gain-oriented measurement
approach.

A similar result is reached in the second case group where
gain is difficult or impossible to gauge. An example would be

185. For the gains multiplication approach applied to four cases of reli-
gious racketeering, see Turley, supra note 8, at 490-96.
when, after closing the deal, Polecat used the proceeds from the Fly'ems High contract, and a number of other similar flagpole deals, to secure low interest loans for a major media campaign before the Fourth of July. The $50,000 received from Fly'ems High, in addition to the $300,000 it received for the other companies, also allows Polecat to satisfy pressing loan payments so that it can continue to expand in its flagpole operation.

The gains received by Polecat from defrauding Fly'ems High are, in this situation, speculative and uncertain. Even though some gain beyond the $50,000 is apparent, the true relation between the $50,000 and later profits is probably impossible to measure accurately. In these cases, the influx of racketeering proceeds from a particular enterprise may only be a fraction of the total proceeds used in developing later gains, and thus its value in achieving those gains is highly debatable. The proper measurement in these cases is simply the plaintiff's losses since this figure can be accepted, at a minimum, as racketeering gains. Although there are situations where it cannot be assumed that the gains will equal the harm, it would be the defendant's burden to so show. In situations like the above, however, the gain-oriented measurement will not be substantially different from the current harm-oriented measurement.

A shift to gain-oriented measurement of damages does become important in the last two case groups. In the third case group, the racketeering gains are greater than the harm inflicted. This situation would arise if Polecat, having successfully defrauded Fly'ems High, takes its $50,000 and uses it to buy a principal share of a defense contracting company whose stock is rapidly rising. During the three years preceding trial, Polecat's initial investment skyrocketed to a value of $200,000, a clear $150,000 profit beyond its racketeering proceeds. Under a harm-oriented measurement approach, Polecat would pay $50,000, Fly'ems High's losses, plus trebling, or $150,000. This would still result in a $50,000 profit and make its flagpole venture an efficient RICO violation. Under the gain-oriented measurement approach, on the other hand, Polecat would pay $200,000, the gains from its racketeering, plus trebling, or $600,000.

The ability of plaintiffs in the third case group to show a direct relationship between racketeering proceeds and profits derived from those proceeds is critical. Unlike the second case group where this nexus was missing, cases in this group involve situations where calculation is possible and the baseline for treb-
ling can be accurately increased. Moreover, the case within this group represents those situations where an efficient violation under RICO is possible. Gain-oriented measurement in these cases forecloses the possibility of an efficient racketeering violation under RICO.

The final case group contains those cases where the gains are less than the harm produced by the racketeering. For example, assume that Fly’em High did not discover the shoddy material until after it had installed hundreds of flagpoles in the Fourth of July rush. As the first flagpoles jackknife, Fly’em High’s business plummets to almost nothing. Unable to secure loans and confronted with hundreds of lawsuits from patriotic organizations, Fly’em High folds. In the meantime, Fly’em High’s president, left with a $500,000 business loss and thousands of Dali-like flagpoles, sues Polecat as a racketeering enterprise.

The harm caused by Polecat’s fraudulent enterprise is now $550,000 in comparison to its original $50,000 gain. Accordingly, a harm-oriented measurement, with RICO’s trebling multiplier, would transform this $50,000 gain into a penalty of $1,650,000, as opposed to $150,000 under the gain-oriented measurement. The obvious problem with this figure is that the damages are entirely divorced from the gravity of the original racketeering offense and the degree to which Polecat actually relies upon racketeering proceeds. Just as the third case group is illustrative of the problem of efficient violations under RICO, this fourth case group illustrates the danger of perverse incentive. The trebling of one’s business loss is a tantalizing prospect, particularly in the wavering flagpole business. The incentive to willingly succumb to bankruptcy is clearly present. In such a circumstance, Polecat, benefiting neither from Fly’em High’s insolvency nor its $50,000 debt, can well question who is the ultimate racketeer and who is the victim. More importantly, however, this emphasis will most affect those racketeers with modest, fractional reliance on racketeering for their proceeds. Unlike the substantial racketeers in the third case group who benefit from efficient racketeering, these racketeers will often be pushed into insolvency because their gain is not great enough to cover the potential indirect repercussions of the victim.

As these four case groups demonstrate, gain-oriented measurement of damages will alter actual awards only in the two case groups where efficient violations and perverse incentives can presently skew the method of calculating damages. Moreover in
the first three case groups, where the ratio of gain to harm is equal, uncertain or greater, plaintiffs will be guaranteed a damages figure equal to their losses. So long as they can carry their burden of proving their losses, damages in these areas should never fall below those attainable under the present system. In the third case group, moreover, damages are likely to far exceed damages under a harm-oriented measurement.

In the fourth case group, where the gains accrued are less than the harm inflicted, damages would often be lower than awards possible under the present harm-oriented measurement. In these cases, the plaintiff could receive full value for his business losses, but not treble those losses. It would be incumbent upon the plaintiff to show that a percentage of his losses were in fact racketeering gains. Otherwise, plaintiffs should not expect RICO to afford them any relief beyond conventional civil remedies. RICO was not designed to give racketeering victims a windfall remedy but to eliminate racketeering as a profitable enterprise.186 Losses that were of no benefit to the racketeer will only hamper RICO's effectiveness by making the sanction dependent on the unknown fragility of the victim rather than the reliance of the racketeer. Concentrating on harm instead of gain not only inhibits the use of RICO to differentiate between racketeers but, as we will see, negates the most promising use of the trebling multiplier as a screening method for substantial racketeers.

The use of a gain-oriented measurement of damages would allow society to detect the reliance of a firm on the proceeds of each racketeering enterprise. This justification for gain-oriented damages, it should be noted, is different from Congress' implicit preference for gain-oriented damages. Congress saw RICO as penalty maximizing and, at the very least, denying racketeers of their "ill-gotten gains."187 Gain-oriented damages satisfy both purposes by both increasing damages and measuring the gains rather than the injuries produced by the violation. In this context, however, gain-oriented damages are being offered as one component in a system that differentiates between substantial and fractional racketeers. Gain-oriented damages alone will not nec-

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186. ABA Report, supra note 8, at 94; see also Hearings, supra note 35, at 937-38 (statement of P. Budeiri, Staff Att’y, Public Citizen’s Congress Watch) (“Since money is apparently an extremely important possession of those who engage in financial crime, they will best be deterred by the sure prospect of being fined in multiples of the amount they hope to steal.”).

essarily indicate the reliance of the firm on racketeering practices as a whole.

The gain-oriented measurement of damages will supply a reliable figure for a firm engaged in a particular pattern of racketeering. If true reliance is to be gauged beyond the offense uncovered, society requires an additional method of calibration. Any such method must have two attributes. First, the method should be easy to administer. That is, long lists or categories of various offenses and penalties must be avoided if the objective of netting a large number of defendants is to be realized. Second, the method must distinguish between firms based upon what percentage of the firm's business is attributed to racketeering. In other words, a "Mom and Pop" store guilty of only a small instance of "garden variety fraud" should be allowed to stay solvent with a stiff sanction, while a large company whose operation depends significantly upon fraud should be eliminated through penalty maximization. A sanction under RICO should ultimately prove fatal for firms which could withstand the payment of actual damages but which still rely heavily on tainted funds. Yet any percentage established statutorily by Congress for such reliance would be inherently arbitrary and subject to disagreement on a case-by-case basis. The answer may be found in precisely the weapon Congress turned to in the final hours of RICO's creation: the trebling multiplier.

D. Trebling: A Litmus Test for Racketeers

As early as 1278 and the Statute of Gloucester, treble damages have been part of our jurisprudence. In economic studies, trebling has been traditionally tied to the concealability factor of a given crime. Under a cost-benefit analysis, the likelihood of a crime occurring is a factor of the crime's profitability, the likelihood of apprehension, and the size of the sanction. For example, normally the penalty for an antitrust violation should equal its social cost. This is not the case, however, where the violation is concealable since "the prospective violator will discount . . . the punishment cost by [the likelihood of apprehension] in determining the expected punishment cost for the violation." 191

189. See supra note 144.
191. Id. at 223.
Thus, a multiplier should increase with the concealability of a violation.\textsuperscript{192} This is certainly germane to racketeering, which by its very nature, is highly concealable.\textsuperscript{193} Unlike some illegal monopolies or mergers in antitrust, fraud is usually concealed from one of the parties. Consequently, if a multiplier is properly tied to the uncertainty and difficulty of prosecution, it is valid, in areas like fraud, to adopt treble damages “to alter the cost-benefit calculation.”\textsuperscript{194}

While many arguments can be made for applying a multiplier in the area of civil RICO, the use of the multiplier in the gains multiplication approach only relates peripherally to its more traditional purpose. For the purposes of RICO, the real promise of trebling stems from its capability of “sorting out” firms. Regardless of the concealability of the predicate act, society has an interest in arranging the demise of firms which are functioning well below a social norm.\textsuperscript{195} Trebling offers a crude yet self-effectuating method for detection and differentiation. With trebling, only those firms with a fractional reliance are likely to survive a three-fold loss of their racketeering profits. In this way, such artificial distinctions as recidivists and first-time offenders\textsuperscript{196} can be put aside in favor of a straight reliance test. The intent factor is not controlling in gains multiplication, though the intent of the defendant might be demonstrated by the fractional or substantial reliance of her firm. In this way, society will present equal pressure on all convicted firms so that the determinative factor is reliance.\textsuperscript{197}

The obvious problem with this method is its imprecision. The differences in the ability of various firms to adjust to large unexpected losses is not considered. It is not clear whether this

\textsuperscript{192} See supra note 144.

\textsuperscript{193} In a study of fraud against the government, the General Accounting Office concluded that “[m]ost fraud . . . [goes] undetected . . . the chances of being prosecuted and eventually going to jail [for fraud] are slim . . . . The sad truth is that crime against the government often does pay.” Goldsmith & Keith, supra note 26, at 83 n.119 (quoting General Accounting Office, Fraud in Government Programs: How Extensive Is It? How Can It Be Controlled, iii (1980)); see also supra note 179 and accompanying text.

\textsuperscript{194} Goldsmith, supra note 43, at 835 n.37.

\textsuperscript{195} Cooter, supra note 105.

\textsuperscript{196} Id. at 1532-33.

\textsuperscript{197} For this to be the case, however, treble damages would have to be used more often than they are used currently. The ABA Task Force on civil RICO reported that it could find only nine cases that resulted in treble damages. ABA Report, supra note 8, at 58 (“The Task Force is aware of very few Civil RICO cases that have gone to judgment . . . .”).
potential for error is great enough to merit the rejection of this alternative method of measurement. Yet, gains multiplication does promise many of the characteristics discussed earlier as necessary for an effective racketeering deterrent. For example, the gains multiplication approach allows the rough numbers of defendants to remain high, bringing the sanction to bear on a wide variety of racketeers. Likewise, under gains multiplication, the community standard of malum in se is still given meaning through the eradication of substantial racketeers. Trebling profits would be retained to permit a large enough prize to discourage settling of suits. Finally, the sanction would be high enough to avoid the problem of elasticity of conduct which arises when penalties are tied too closely to actual costs.

Penalty maximization is still part of the damages formula under the gains multiplication approach but it is now focused on the key element of reliance. RICO would still strive to ruin certain racketeers by increasing damages to a point where substantial racketeers would be forced out of business. The driving purpose of the RICO damages, however, would no longer be to blindly penalty maximize. The purpose of the multiplier, therefore, would be seriously undercut by the trebling of costs unrelated to a firm’s actual reliance on racketeering profits.

The more pressing problem, however, may arise before trial in the form of a perverse incentive similar to the one considered earlier.\textsuperscript{198} If a plaintiff can expect to receive the racketeer’s trebled profits in addition to the usual actual damages, there is every incentive to stand in silent collusion as the racketeering continues.\textsuperscript{199} This is a variation on the perverse incentive encountered earlier in applying the Clayton Act remedies. There, the plaintiff prolonged the racketeering association in order to increase his own damages. Here, the plaintiff would not be suing for his lost profits, but for the profits gained by the racketeer. Nevertheless, the incentive remains the same: to assist the racketeer through calculating acquiescence. Once again, the distinction between who is the racketeer and who is the victim could become difficult to discern in such a case. Yet differences exist. Unlike the earlier perverse incentive problem, a RICO plaintiff cannot act predatorily and expect a comparable return under the gains multiplication approach. For example, catastrophic losses, like those

\textsuperscript{198} For a discussion of the perverse incentive, see supra notes 145-49 and accompanying text.
\textsuperscript{199} See supra notes 147-48 and accompanying text.
considered in the third case group, would not be subject to trebling. Moreover, the calculating plaintiff would run into practical difficulties under the gains multiplication approach. Instead of counting on trebled losses, a plaintiff under this approach could only estimate racketeer gains. While this would likely guarantee a plaintiff a base figure equal to losses, as in case group one, it would make windfalls, as in case group four, difficult to predict. The likely result is probably a small decrease in the level of perverse incentives under the Act while reaping the other systemic benefits of gains multiplication.

**Conclusion**

RICO and the Clayton Act appear destined to battle for total dominion over the proper use of treble damages in civil cases. Like Remus and Romulus, both acts share a common ancestry and many common traits. Both are designed to bring about marketwide changes through litigation. Both employ the novel use of "private attorneys general" and both contain an array of procedural and substantive incentives to sustain a "second front." Most importantly, both allow for treble damage awards. Given these similarities, and Congress' open borrowing of Clayton Act provisions in creating RICO, it is natural that critics of RICO should continually try to amend the Act by reference to antitrust penalties.

This Article attempts to show why there is a limit to the analogies that can be drawn between RICO and the Clayton Act. That limit is reached in the measurement of damages. The treble damages provisions of the two acts rest on fundamentally conflicting economic and normative realities in their respective areas. The Clayton Act’s cost minimization approach is geared towards pricing antitrust violations so as to encourage efficient violations while deterring violations that cost society more than they benefit the violator. Conversely, civil RICO works to penalty maximize through a system of sanctions so as to deter all racketeering violations—violations considered by society to be *malum in se*.

The gains multiplication approach is offered as a working example of a new method for calculating damages under civil RICO that incorporates RICO’s penalty-maximizing philosophy of damages. This approach would retain penalty maximization while concentrating on the racketeer’s gains, rather the victim’s losses, in measuring damages. In so doing, it is argued, RICO’s penalty-maximizing functions will focus on racketeering reliance and ac-
quire a needed ability to more accurately differentiate between types of racketeering firms.

The gains multiplication approach is not a panacea for all of RICO’s ills but it is an example of how the Act can be changed without significantly changing the Act’s original purpose. While this new approach has much to recommend it, it is of secondary importance to the general point that it is meant to illustrate. Future efforts at modifying civil RICO’s penalty provisions that rely on antitrust analogies must consider the fundamentally divergent purposes of damages under the two acts. Congress and the courts must come to accept that, as with the legendary twin brothers of pre-Rome, irreconcilable differences between the two acts linger below the surface and these differences cannot be resolved within the same statutory framework without the practical elimination of one scheme in favor of the other.