

# OF CHARACTERIZATION AND OTHER MATTERS: THOUGHTS ABOUT MULTIPLE DAMAGES

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*“The laws of a nation form the most instructive portion of its history....”*<sup>1</sup>

## I

### INTRODUCTION

Santayana voiced an often quoted aphorism when he suggested “[t]hose who cannot remember the past are condemned to repeat it.”<sup>2</sup> The melancholy truth may be, however, that “[w]hat experience and history teach is this—that people and governments never have learned anything from history.”<sup>3</sup> If history cannot give us all kinds of scientific knowledge,<sup>4</sup> and permit us to make estimates of the future with the degree of precision that we can predict the outcome of standard experiments in physics and chemistry, its study at least ought to give us insight into the human condition, no mean achievement.

I am somewhat uncomfortable in a conference on law and economic policy. The law part does not bother me; I have practiced it, worked to reform it through legislation, and taught it for more years than I care to admit; it is the economic part that troubles me.<sup>5</sup> Modern economic analysis owes too much, for my druthers, to the conceit of Bentham and his followers in their arrogant reliance on disembodied reason. In fact, they have “shaped the course of law reform” for large segments of the modern world; unfortunately, they “neglected all the complex social evolution which . . . [went into] the making of . . . [that] world and individuals” in it; and for that “reason . . . , they considered that the study of history was a matter of minor importance.”<sup>6</sup> Bentham and his many followers too often tend to rely on a handful of assumptions and

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1. EDWARD GIBBON, *THE DECLINE AND FALL OF THE ROMAN EMPIRE* 669 (1932).
2. 1 GEORGE SANTAYANA, *LIFE OF REASON* 284 (1905).
3. GEORGE W.F. HEGAL, *PHILOSOPHY OF HISTORY* 6 (rev. ed 1900); see also GEORGE B. SHAW, *HEARTBREAK HOUSE* 45 (6th ed. 1927).
4. See generally KARL POPPER, *THE POVERTY OF HISTORICISM* (Routledge ed. 1994).
5. To paraphrase ROBERT BOLT, *A MAN FOR ALL SEASONS* 37 (Vintage 1962), the currents and eddies of allocative efficiency, which some find such plain sailing, I can't navigate. I'm no voyager. But in the thickets of the law, oh, there I'm a forester.
6. WILLIAM HOLDSWORTH, *THE HISTORIANS OF ANGLO-AMERICAN LAW* 23-24 (1927).

reason alone—coupled with a veneer of mathematics—to describe and predict the course of the complex processes of human society.<sup>7</sup>

I do not deny the explanatory or predictive power of economic analysis, or its necessity, if we are effectively to intervene in the world of action—by law or otherwise. I am arguing only that economic analysis must be substantially supplemented by other insights, perhaps from history or ethics. Admittedly, economic analysis says little about ethics beyond pricing.<sup>8</sup> In short, economic analysis often knows the price of everything and the value of nothing.<sup>9</sup>

7. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 3-18 (4th ed. 1992).

8. Since economics does not answer the question whether the existing distribution of income and wealth is good or bad, just or unjust (although it can tell us a great deal about the costs of altering the existing distribution, as well as about the distributive consequences of various policies), neither does it answer the ultimate question of whether an efficient allocation of resources would be socially or ethically desirable. ... [The economist] can predict the effect of legal rules ... on value and efficiency ... but he cannot issue mandatory prescription for social change.

*Id.* at 14. Compare RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* ch. 4 (1981) (contending that autonomy and respect for choice and consent justifies the free market and wealth maximization as goals of legal decision making), with Robin West, *Authority, Autonomy and Choice: The Role of Consent in the Moral and Political Vision of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985) (arguing based on the insights of Kafka that Posner's justification of wealth maximization rests on an inadequate view of human motivation), and Richard A. Posner, *The Ethical Significance of Free Choice: A Reply to Professor West*, 99 HARV. L. REV. 1431 (1985).

As I have always thought that Fuller got the better of Hart on the question of "positivism" (another legacy of Bentham), I find West's insights, in Popper's term, to be a "falsification" of Posner's general theory. See POPPER, *supra* note 4, at 132-34:

[I]n science we are always concerned with explanation, predictions and tests ... Agreement with [the experiment or other observations] is taken as corroboration of the hypothesis, though not as final proof; clear disagreement is considered as refutation or falsification. ... This view is sometimes considered paradoxical; our aim, it is said, is to establish theories, not to eliminate false ones. But just because it is our aim to establish theories as well as we can, we must test them as severely as we can; that is, we must try to find fault with them, we must try to falsify them. Only if we cannot falsify them in spite of our best efforts can we say that they have stood up to severe tests. This is the reason why the discovery of instances which confirm a theory means very little if we have not tried, and failed, to discover refutations. For if we are uncritical we shall always find what we want; we shall look for, and find, confirmations, and we shall look away from, and not see, whatever might be dangerous to our pet theories. In this way it is only too easy to obtain what appears to be overwhelming evidence in favour of a theory which, if approached critically, would have been refuted. In order to make the method of selection by elimination work, and to ensure that only the fittest methods survive, their struggle for life must be made severe.

Compare H.L.A. Hart, *Positivism and The Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958) (arguing that, duly modified, positivism remains the best explanation of law), with Leon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958) (arguing that, even as duly modified, positivism is a poverty stricken explanation of law). For me, these two debates are like the sword fight between Tyrone Power and Basil Rathbone in *The Mark of Zorro* (1940), in which Power cut through the base of the candles with his rapier without tipping the candles over and Rathbone laughed, believing Power missed them altogether. Like the necks of the candles, Hart and Posner were decapitated; they just did not realize it. Posner, on the other hand, questions the value of ethics to law. See RICHARD POSNER, *THE PROBLEMS OF JURISPRUDENCE* 348, 454-69 (1990) ("When it comes to specific cases, it lets us down.").

Unadorned consequentialism, to which a thorough economic analysis eventually leads, is self-contradictory; it seeks to promote the value of autonomy, but in a world of more than one actor—our world—it destroys autonomy. Compare JEAN-FRANCOIS STEINER, *TREBLINKA* 56-71 (1967) (telling the story of the Vilna ghetto in Lithuania, in which the Nazis, by giving its inhabitants a series of choices between greater and lesser evils, led them to cooperate in the ghetto's ultimate liquidation,

## II

## HISTORICAL BACKGROUND

“Such is the unity of all history,” Pollock and Maitland began their classic study of the history of English law, “that anyone who endeavors to tell a piece of it must feel that his first sentence tears a seamless web.”<sup>10</sup> The idea that certain kinds of conduct should be vindicated by an award of multiple damages runs deep. Biblical law embodied the idea for theft and trespass.<sup>11</sup> Greek law,

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despite their own folk wisdom: “When the idolator says, ‘Deliver one of your own people to us, we will kill him, but if you refuse we will kill you all’ let all consent to perish and let not one soul of Israel willingly be delivered to the idolator.”), with J.R. LUCAS, RESPONSIBILITY 31-56 (1993) (arguing that consequentialism ultimately undermines the integrity of the individual person, that is, his moral autonomy, and, therefore, surrenders it to the other and frustrates the good that consequentialism seeks to achieve, responsible choice), and ENCYCLICAL LETTER OF JOHN PAUL II, THE SPLENDOR OF TRUTH (VERITATIS SPLENDOR) (Pauline Books, undated) (arguing to the same position based on the Judeo-Christian tradition) (Daniel 13:22-23 (story of Susana, a martyr to integrity); Romans 3:8 (not licit to “do evil that good may come of it”)). Nevertheless, tragically, consequentialism *is* the modern perspective. Compare Regina v. Dudley & Stephens, 14 Q.B.D. 273 (1884) (necessity does not justify taking an innocent life), with MODEL PENAL CODE AND COMMENTARIES §3.02 n.15 (1985) (choice of evils) (“Suppose, however, the citizens of a town receive a credible threat, say from a foreign invader, that everyone in the town will be killed unless the townspeople themselves kill their mayor, who is hiding. If the townspeople accede they would have a substantial argument against criminal liability under this section.”).

When the sources of the law run out, judges must turn to other sources for guidance: economics, history, or morality. See JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 302 (2d ed. 1927) (“When a case comes before a court for decision . . . there may be no statute, no judicial precedent, no professional opinion, no custom bearing on the question involved, and yet the court may decide the case somehow. . . . He must . . . determine what the law ought to be: he must have recourse on the principles of morality.”). But should the morality be rooted in “sentiment” or “reason”? Compare BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 43 (1921) (“sentiment of justice”), with LON L. FULLER, THE LAW IN QUEST OF ITSELF 65, 122-23 (1940) (“reason”) (arguing that “[t]he facts most relevant to legal study [are] moral facts”). The connection between law and morality, too, is more persuasive than Gray concedes. See ROSCOE POUND, LAW AND MORALS 63 (1926) (“In truth, there are continual points of contact with morals at every turn in the ordinary course of judicial administration.”). Economics alone, therefore, will not do. In the last analysis, justice—morality—is what it is all about.

9. Despite its scientific allure, economic analysis may be more closely related than it would like to admit to the “law in politics” crowd, the Critical Legal Studies Movement. See George Stigler, *The Politics of Political Economics*, in ESSAYS IN THE HISTORY OF ECONOMICS 63 (1965):

The apparatus of economics is very flexible: without breaking the rules of the profession—by being illogical or even by denying the validity of the traditional theory—a sufficiently clever person can reach any conclusion he wishes on any real problem. . . . In general there is no position . . . which cannot be reached by a competent use of respectable economic theory.

10. 1 FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW 1 (2d ed. 1899).

11. See, e.g., Exodus 22.1 (requiring for the theft of ox or sheep, if killed, restoration of five for ox and four for sheep); 2 Samuel 12:1-6 (requiring fourfold restoration for taking a lamb). Little is known, however, of the adjudication and administration of justice in ancient Israel. No special Hebrew terms exist for “crime” or “criminal.” The same words—“sin,” “transgress,” etc.—are used to describe offenses against other persons and offenses against God. Nevertheless, while God surely punished all “sins,” not all “sins” were punished by Israelite society. The sanctions imposed, too, reflected undifferentiated notions of vengeance (personal and divine), composition, and compensation or restoration. Circumstances, moreover, often made a crucial difference. A thief caught stealing, for example, during the day could not be killed, but if he was caught in the night, he could be slain without penalty. See generally Samuel Greengus, *Criminal Law*, in 7 THE ENCYCLOPEDIA OF RELIGION (1987). The point remains: The scales of justice were not thought to be “even” with the simple return of only what was taken.

too, provided for double damages if stolen property was recovered and for tenfold damages otherwise.<sup>12</sup> Nevertheless, the rationale behind the various sanctions found in the law of the ancient world did not clearly differentiate what is commonplace to us: "tort" and "crime." Roman law is illustrative. The delict of theft ran back at least to the Twelve Tables (450 B.C.).<sup>13</sup> "[T]he penalty . . . [was] four times the value of the thing stolen" when the offender was caught in the act (manifest theft); otherwise, it was double (non-manifest theft)<sup>14</sup>; robbery, on the other hand, called "for fourfold damages within one year, for single damages after the year . . . [was] up."<sup>15</sup> "The action for theft, for double or fourfold [was] entirely penal (*ad poenae persecutionem*)."<sup>16</sup> The action for robbery, however, "was not all penalty (*non totum poena*) . . . . The fourfold award include[d] restoration (*et extra poenam rei persecutio*) so that the penalty [was] in fact threefold, whether the robber is caught in the act or not."<sup>17</sup> As with Biblical and Greek law, Roman law did not, therefore, fully make our distinction between "crime" and "tort." "[T]he delictal sanction, which originated as a substitute for private vengeance, retained to the . . . end . . . a punitive character."<sup>18</sup> Delict had four essential elements: (1) *actus* (2) *iniuria* (3) *damnum*, and (4) title

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12. See 5 C. KENNEDY, *THE ORATIONS OF DEMOSTHENES* app.6, at 187 (1909) (quoting a law of Solon), *quoted in* JOHN HENRY WIGMORE, *PANORAMA OF THE WORLD'S LEGAL SYSTEMS* 343 (1936). MICHAEL GAGARIN, *AESCHYLEAN DRAMA* 13 (1976) observes:

*Dike*[, that is, justice or judgment] in its largest sense[,] is the society's system for settling disputes peacefully. This system among the early Greeks differed in a fundamental way from our own legal system. The legal process in early Greece was essentially a system of peaceful arbitration, whereby a settlement (*dike*) is made between two conflicting claims, each claim itself being a *dike*. The fairness (straightness) of the settlement is determined by its acceptability to both sides and to the public.

The meaning of *dike*, however, is hardly settled. See generally JOHN KELLY, *WESTERN LEGAL THEORY* 7-9 (1992). For the view that *dike* has to do with prudence (avoiding divine punishment) rather than justice or morality, see V.A. Rodgers, *Some Thoughts on AIKH*, 21 *CLASSICAL Q.* 289 (1971). For a dissenting voice to Gagarin and Rodgers, see Matthew W. Dickie, *Dike as a Moral Term in Homer and Hesiod*, 73 *CLASSICAL PHILOLOGY* 91 (1978). See generally DAVID LUBAN, *LEGAL MODERNISM* 283-334 (1994). Luban concludes:

[T]he Platonic apotheosis of legal instrumentalism is its refutation. We have traced its gradual sophistication from the Hymn to Hermes, through the Iliad and the Oresteia, to Plato. Homer supplemented the Hymn to Hermes by noting the human cost of renouncing the quest for justice. Aeschylus added that abandoning justice for the sake of stability requires hierarchy, the continued dominance of dominant interests. And Plato showed that reconciling people in an instrumentalist system requires a society whose own workings are hidden from the majority of people. At the end, the bucolic idyll of friendship among the gods set to the enchanting music of Apollo's lyre has become, first, an unfair trial set to the enchanting music of Apollo's deceptions and, finally, a suffocating theocracy. The instrumentalist vision has died of over sophistication.

*Id.* at 332. See generally 2 ROSCOE POUND, *JURISPRUDENCE* 18-25 (1959).

13. See G. INST. 1.217 (F. deZulveta trans. 1958).

14. ALAN WATSON, *THE LAW OF THE ANCIENT ROMANS* 76 (197); J. INST. 4.121 (Peter Binks & Grant McLeod trans. 1987).

15. J. INST., *supra* note 14, at 4.125.

16. *Id.* at 4.123.

17. *Id.* at 4.125. *Poena* and its cognate *poenalis* may be translated, not only as "penalty," but also as "satisfaction." See OXFORD LATIN DICTIONARY 1395-96 (1984).

18. BARRY NICHOLAS, *AN INTRODUCTION TO ROMAN LAW* 207-08 (1962).

to the property in the plaintiff. *Iniuria* reflected our idea of “insult.”<sup>19</sup> It is best translated, not as “injury,” but as “outrage.”<sup>20</sup> The “extent of the injury” was measured not by physical injury, but by “honor,” reflected in “the desire for vengeance,”<sup>21</sup> a distinction that is crucial to the difference in damages for “manifest” and “non manifest” theft.<sup>22</sup>

The earliest multiple damage provision in Anglo-American law was the Statute of Cloucester in 1278.<sup>23</sup> Modern antitrust statutes are not all that modern; they owe their origin to the Statutes Against Monopolies in 1624.<sup>24</sup> Rightly, the English Parliament recognized, Holdsworth tells us, that it was “one thing to pass statutes and . . . quite another thing to insure that [they were] actually enforced.”<sup>25</sup> Accordingly, “it was a common expedient [in the Middle Ages and beyond] to give the public at large an interest in seeing that a statute was enforced . . . .”<sup>26</sup> The multiple damage enforcement mechanism was also present in early colonial law in America.<sup>27</sup> Its wisdom, too, is reflected in a number of federal statutes today, particularly in the commercial law area.<sup>28</sup>

### III

#### AN OUTLINE OF THE HISTORY OF MULTIPLE DAMAGES

##### A. Liquidated Damages and Penalties

The idea of “multiple” damages, that is, damages that concededly exceed “actual” damages, but are not necessarily “punitive”<sup>29</sup> is, therefore, hardly an

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19. 3 POUND, *supra* note 12, at 36.

20. *See, e.g.*, G. INST., *supra* note 13, at 227.

21. 3 POUND, *supra* note 12, at 36.

22. The distinction, which is complex, is elaborated in J. INST., *supra* note 14, at 4.121. *See generally* KELLY, *supra* note 12, at 73-74 (tracing Roman theory of punishment).

23. Edw. ch.5 (1278) (Eng.) (treble damage for waste).

24. 21 Jac. ch.3, §4 (1624) (Eng.) (treble damages for those injured by unlawful monopolies).

25. *See* 4 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 335 (3d ed. 1945).

26. *Id.*

27. THE LAWS AND LIBERTIES OF MASSACHUSETTS 5 & 24 (1648) (providing for treble damages for pilfering and theft and gaming).

28. *See, e.g.*, 12 U.S.C. § 1464 (1982) (Home Owners' Loan Act of 1933), 1975 (Bank Holding Company Act), 2607 (Real Estate Settlement Act of 1974); 15 U.S.C. §§ 15 (1982) (Clayton Act), 72 (Revenue Act of 1916) (restraints on import trade), 1117 (Trademark Act of 1946), 1693f (Electronic Fund Transfer Act), 1989 (Motor Vehicle Information and Cost Savings Act); 22 U.S.C. § 4209 (1982) (penalties imposed on consular officers for exacting excessive fees); 30 U.S.C. § 689 (1982) (Lead and Zinc Stabilization Program); 35 U.S.C. § 284 (1982) (patents); 42 U.S.C. § 9607 (1982) (CERCLA); 45 U.S.C. § 83 (1982) (government aided railroads); 46 U.S.C. § 1227 (1982) (Merchant Marine Act of 1970).

29. As soon as “punitive” is used, the twin dangers quickly arise of a jurisprudence of labels, *Heneford v. Silas Mason Co.*, 300 U.S. 577, 586 (1937) (Cardozo, J.) (“[L]abels . . . are subject to the dangers that lurk in metaphors . . . and must be watched with circumspection”) and the movement into that “Lawyer’s Paradise where all words have a fixed, precisely ordained meaning.” JAMES BRADLEY THAYER, PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 428-29 (1898). *But see* *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 414 (1819) (Marshall, C.J.) (“Such is the character of human language that no word conveys to the mind, in all situations, one single definite idea.”).

innovation. It is a simplistic idea, in short, that blithely asserts that *all* damages are *either* “actual” or “punitive.” Liquidated damages are the classic counter example. They are not so easily categorized. Liquidated damages—at least in modern law—are best defined as a sum that a party to a contract agrees to pay or a deposit that he agrees to forfeit, if he breaks some promise.<sup>30</sup> Over time, “liquidated” damages were upheld and sharply distinguished from their evil twin, “penalties,” which could not be enforced.

That we should make any special rules of validity on promises to pay damages is counter-intuitive. The usual presumption is that the law is not wiser than the parties, but will give them freedom to bind themselves. We uphold, as a matter of course, the making of agreements to pay agreed-upon amounts of damages *after* the breach in the form of settlements. Arguably, the same free-

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A careful use of language is required: “civil,” “criminal,” “punitive,” “penal,” “remedial,” “compensatory,” and “regulatory.” At least here, “civil” and “criminal” will not relate to a characterization of the sanction, but solely to the mode of procedure. *Cf.* LEWIS CARROL, *ALICE’S ADVENTURES IN WONDERLAND AND THROUGH THE LOOKING GLASS* 186 (Signet 1960) (“When I use a word,” Humpty Dumpty said, in rather a scornful tone, “it means just what I choose it to mean—neither more nor less.” “The Question is,” said Alice, “whether you can make words mean so many different things.” “The question is,” said Humpty Dumpty, “which is to be master—that’s all.”). The distinction will simply be between proceedings governed by rules of criminal procedure, as opposed to rules of civil procedure. I will also try to avoid the traditional common law division of sanctions into “civil” and “criminal” categories. That division is not entirely clear, as civil sanctions often impose punishment, and criminal sanctions are increasingly remedial in nature. “Punitive” and “penal” are also often confusing. Instead, I will try to refer to two distinct aspects of modern legal “punishment.” The first is the notion of the deprivation inflicted on a person for purely vindictive or retributive purposes. In this sense, society punishes a person solely because he “deserves” it by transgressing the rules governing social behavior. This “past-looking” notion of punishment was the original and sole reason for the criminal law. At the time of the Enlightenment, however, punishment tended to take on exclusively, a second meaning based on a Benthamite view of deterrence, the notion that the infliction of the deprivation of life, liberty, or property might help shape future conduct. “Penal” and “punitive” today encompass both notions; they also generally imply a requirement of moral blameworthiness on the part of the defendant involved. *See generally* LEON RADZINOWICZ, *IDEOLOGY AND CRIME* (1966). *Compare* James William Cecil Turner, *The Mental Element in Crimes at Common Law*, 6 *CAMBRIDGE L.J.* 31, 37-48 (1936) (arguing that the development of criminal law was from strict liability, through culpable negligence, to a minimum of recklessness), *with* OLIVER W. HOLMES, *THE COMMON LAW* 34-62 (Howe ed. 1963) (arguing that the development of criminal law was from the desire for vengeance against intentional wrongs [subjectively assessed] to the desire to prevent dangerous conduct [objectively assessed], from moral retribution based on the assumption of a responsible person to utilitarian deterrence based on the assumption of behaviorism), *and* *United States v. Barker*, 514 F.2d 208, 227-37 (D.C. Cir.) (Bazelon, C.J., concurring) (after tracing the history of criminal responsibility, arguing for the adoption of a mistake of law standard, as a natural development of the concept of *mens rea*, based on the theory of punishing the vicious will).

That these concepts—and labels—are still vexing is amply demonstrated by recent decisions of the Supreme Court. *See, e.g.,* *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997) (upholding Kansas’s sexual predator statute, which extends incarceration after the end of a term of imprisonment through a civil proceeding); *Hudson v. United States*, 118 S. Ct. 488, 492-502 (1997) (overruling *United States v. Halper*, 490 U.S. 435 (1989)) (distinguishing between “civil” and “criminal” sanctions for purpose of double jeopardy). My understanding of the history of multiple damage recovery owes much to a summer at the Cornell Law School spent researching that history with Kevin Goering. *See* Kevin Goering, *The Character of Treble Damages: Conflict Between A Hybrid Mode of Recovery of a Jurisprudence of Labels*, in *MATERIALS ON RICO* 428 (1980).

30. *See* CHARLES T. MCCORMICK, *DAMAGES* 599 (1935). My analysis here relies heavy on McCormick’s able scholarship; much of the text is largely a paraphrase of his work.

dom should be accorded to agreements *beforehand* to pay damages for a future breach.

A power to bind yourself to pay a certain sum if you fail to carry out a promise was no doubt freely conceded at an early period of our law. If you desired to give assurance of the repayment of a loan or the conveyance of land, you customarily made a written promise under seal to pay a definite sum fixed often larger than the value of the loan or the land to the person to whom the obligation was owed. Such a “bond” followed this form: After a promise absolute in terms to pay the sum of money, a “condition” was inserted that if the obligation to repay the loan or convey the land were performed by a certain day, the promise to pay the money would be void, a condition subsequent. This writing, a “penal” bond, could be the basis for a suit against the signer in debt upon the sealed promise to pay the money, and at the common law, unless the defendant could show that he promptly performed the condition, judgment would be rendered against him for the “penalty,” as it was “nominated in the bond.”<sup>31</sup>

All of us, however, are likely to be beguiled by the “illusions of hope,”<sup>32</sup> and we feel so certain of our ability to carry out our engagements that our confidence leads us to make extravagant promises. Where penal bonds were given to secure the repayment of loans, this willingness to take the risk of future burdens disproportionate to the size of the endeavor was also “often reinforced by the overpowering economic needs of the borrower.”<sup>33</sup> A similar inequality of bargaining power and delusive confidence in the future laid the borrower open to the forfeiture of his property by the mortgage and to the oppressive exactions of usury. Freedom of contract came, therefore, to be curtailed in the interests of equity. The creditor that took a mortgage that purported to invest in him the legal title to the land, absolute if the debt were not paid, was forced by the court of chancery to allow the debtor to redeem his land after the agreed time for payment had passed; usury laws similarly curbed the amounts that might be charged for the use of money.<sup>34</sup>

“Penal” bonds were treated similarly. Courts of chancery early on gave relief against the draconian common law rule by preventing the creditor from collecting any more of his judgment than the amount of the loan or the value of the land.<sup>35</sup> In the reign of Henry VIII, Sir Thomas More, the Lord Chancellor,

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31. *Id.* at 601.

32. *Id.*

33. *Id.*

34. *See id.*

35. The history is recounted in 5 HOLDSWORTH, *supra* note 25, at 293-330. *See also* Sun Printing & Pub Ass'n v. Moore, 183 U.S. 642, 660-61 (1901) (citations omitted):

At common law prior to the statute of 8 & 9 William III, c. 11, in actions “upon a bond, or on any penal sum, for non-performance of any covenants or agreements, contained in any indenture, deed, or writing,” judgment, when entered for the plaintiff, was for the amount of the penalty, as of course. . . . Equity, however, was accustomed to relieve in cases of penalties annexed to bonds and other instruments, the design of which was to secure the due fulfillment of a principal obligation. . . . The effect of the passage of the statute was to restrict suitors in

for example, attempted to persuade the judges of the law courts to adopt the rule and give judgment only for the plaintiff's actual loss:

[More] summoned them to a conference concerning the granting relief at law, after the forfeiture of bonds, upon payment of principal, interest, and costs, and when they said they could not relieve against the penalty, he swore by the body of God he would grant an injunction.<sup>36</sup>

Later, the common law courts adopted More's suggestion, and they began to stay proceedings, where the bond secured a debt, and the debt was paid by the defendant with interest and costs. This practice was sanctioned by a statute of Anne,<sup>37</sup> and, in the reign of William III,<sup>38</sup> another statute was passed to require the plaintiff in an action on a penal bond to "assign" in his declaration the specific breaches of the "condition" for which he may recover only such actual damages as he proves. Similar statutes are widely found in this country.<sup>39</sup> Whether by statute or by decision, the rule is universally followed today that the measure of damage upon a bond with "penalty" is the plaintiff's actual damage from the breach of condition. A "penalty," as such, is not, therefore, recoverable. At the same time, promises to pay a certain sum in money for future defaults that could not be exactly valued were seen as legitimate expedients to avoid the uncertainty of a jury's finding and were enforced. Accordingly, agreements to pay a definite sum if the promisor's son should poach on

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actions for penalties to a collection of the actual damages sustained. As a result, also, courts of law were thereafter frequently under the necessity of determining whether or not an agreed sum stipulated in a bond or other writing to be paid, in the event of a breach of some condition, was in reality a penalty or liquidated damages.

Of course, courts of common law, merely by reason of the statute of 8 & 9 William III, referred to, did not acquire the power to give relief in cases of contract, where a court of equity would not have exercised a similar power. Now courts of equity do not grant relief in cases of liquidated damages—that is, cases "when the parties have agreed that, in case one party shall do a stipulated act, or omit to do it, the other party shall receive a certain sum, as the just, appropriate and conventional amount of the damages sustained by such act or omission." ... And, as long ago as 1768, Lord Mansfield, in *Lowe v. Peers*, said: "Courts of equity will relieve against a penalty, upon a compensation; but where the covenant is to pay a particular liquidated sum, a court of equity can not make a new covenant for a man; nor is there any room for compensation or relief." Commenting upon the judgment of Lord Eldon is one of the leading cases on the subject of liquidated damages:

He perfectly well knew that whatever had been the doctrine of equity at one time, it was not then the doctrine of equity to give relief on the ground that agreements were oppressive where the parties were of full age and at arm's length. It is very likely, and I believe it is true historically, that the doctrine of equity did arise from a general notion that these acts were oppressive. At all events, long before his time, it had been well settled in equity that equity did relieve from forfeiture for non-payment of money, and I think I may say, in modern times, from nothing else.

The doctrine of equity as respects the withholding of or granting relief against a contract because of inadequacy of consideration, illustrates the conservative disposition of equity not to interfere unnecessarily with the contracts of individuals. Equity declines to grant relief because of inadequacy of price, or any other inequality in the bargain; the bargain must be so unconscionable as to warrant the presumption of fraud, imposition or undue influence.

36. *Wylle v. Wilkes*, 2 Doug 519, 521, 28 Eng. Rep. 331, 333 (K.B. (1780)) (Mansfield, J.).

37. 4 & 5 Anne, ch.16 §§ 12, 13.

38. 8 & 9 Wm III, ch.11 § 8.

39. See MCCORMICK, *supra* note 30, at 602.

plaintiff's land,<sup>40</sup> or if the promisor should marry any person other than the plaintiff,<sup>41</sup> were declared to be enforceable. The common law distinction between "penalties" and "liquidated damages" was quickly reflected in American law.<sup>42</sup> The tendency, too, came to be to resolve doubt in favor of the enforcement of such clauses as agreements for liquidated damages.<sup>43</sup>

## B. Nominal Damages

Similarly, "nominal" damages cannot easily be categorized as "actual" or "punitive." They are, in short, neither "compensatory" nor "exemplary." When a plaintiff proves an invasion of a legal right but cannot show any resulting loss, the law traditionally called it *injuria sine damno*.<sup>44</sup> Such damages serve as "a mere peg on which to hang costs."<sup>45</sup> Accordingly, they strictly serve neither a "compensatory" nor a "penal" goal.<sup>46</sup>

40. See, e.g., *Roy v. The Duke of Beaufort*, 2 Atk. 190 (1741).

41. See, e.g., *Lowe v. Peers*, 4 Burr. 2225 (1768).

42. See, e.g., *Kemble v. Farren*, 6 Bing. 141 (1829).

43. See, e.g., *United States v. Bethlehem Steel Co.*, 205 U.S. 105, 118-19 (1907):

There has, in almost innumerable instances, been a question as to the meaning of language used in that part of a contract which related to the payment of damages for its non-fulfillment, whether the provision therein made was one for liquidated damages or whether it meant a penalty simply, the damages to be proved up to the amount of the penalty. This contract might be considered as being one of that class where a doubt might be claimed, if nothing but the contract were examined. The courts at one time seemed to be quite strong in their views and would scarcely admit that there ever was a valid contract providing for liquidated damages. Their tendency was to construe the language as a penalty, so that nothing but the actual damages sustained by the party aggrieved could be recovered. Subsequently the courts became more tolerant of such provisions, and have now become strongly inclined to allow parties to make their own contracts, and to carry out their intentions, even when it would result in the recovery of an amount stated as liquidated damages, upon proof of the violation of the contract, and without proof of the damages actually sustained. ... The question always is, what did the parties intend by the language used? When such intention is ascertained, it is ordinarily the duty of the court to carry it out.

44. See, e.g., *Pinder v. Wadsworth*, 2 East 154 (1802) (judgment entered in favor of suitor for taking away manure from the common, though suitor without damage, to prevent wrongdoer from obtaining a right through repeated wrongs where no damage resulted).

45. *Beaumont v. Greatland*, 2 C.B. 494, 499 (1896) (Maule, J.). Costs are no mean matter in English law, for they include, contrary to American law, counsel fees. Pollock and Maitland report that before the time of Edward I, in many actions, "a successful plaintiff might often under the name of 'damages' obtain compensation which could cover the costs of litigation as well as all other harm that he had sustained." 2 POLLOCK & MAITLAND, *supra* note 10, at 597. MCCORMICK, *supra* note 30, at 234-37 adds:

[The] rule allowing plaintiff his "costs" was broadened in 1275 by the Statute of Gloucester to cover also actions for the recovery of land, then an all-important type of litigation. A series of statutes, beginning in the reign of Henry VIII and ending in that of Anne, extended finally the same advantage to successful defendants. Thus, in the common law courts, the rule became established in England long before the American Revolution that, except in some cases where the plaintiff recovers only trivial damages, the party who wins a lawsuit is entitled to recover from the losing adversary the "costs" of the litigation.

As Pollock and Maitland put it, "[i]n *expensarum causa victus victori condemnandus est*. . . is a principle to which English, like Roman, law came but slowly." POLLOCK & MAITLAND, *supra* note 10, at 597.

Typically, each party in American law, on the other hand, bears his own counsel's fees. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 427-71 (1975) (no common law right to attorney fees as private attorney general; attorney fees must be authorized by statute). The rule is not,

### C. Accumulative Damages

Not much discussed or even recognized today, the nineteenth century knew another type of damages, neither “actual” nor “punitive”: a form of liquidated damages for “accumulative harm.”<sup>47</sup> Typically, such damages were authorized

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however, without common law exceptions. *See, e.g.*, *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 123-27 (1885) (an attorney possess a legitimate claim rooted in notions of unjust enrichment to fees payable out of a common fund that his efforts helped create for the benefit of others); *Christianburg Garment Co. v. Equal Employment Opportunity Comm.*, 434 U.S. 412, 415-22 (1978) (defendant, if he prevails, may receive attorneys’ fees for frivolous, unreasonable, or foundationless suits).

46. “Nominal” damage must, of course, be “nominal,” not merely small. *Compare Osborn v. Leach*, 45 S.E. 783, 785 ( N.C. 1904) (“a penny”), *with Broads v. Mead*, 16 P. 46, 50 (Cal. 1911) (judgment of \$100 reduced on appeal to \$1). *See also Carey v. Piphus*, 435 U.S. 247, 266-67 (1978) (42 U.S.C. §1983) (“nominal” damages for violations of procedural due process; “not to exceed one dollar”).

47. The classic article analyzing the concept is Lawrence Vold, *Are Threefold Damages Under the Anti Trust Act Penal or Compensatory*, 28 KY. L.J. 117, 157-58 (1940):

[C]losely analyzed, the threefold damage provision is remedial to the plaintiff, compensatory in its nature in liquidating compensation for accumulative intangible harm incurred outside of and beyond the ordinarily recoverable legal damages to the business or property. It is a penalty upon the defendant only in the loose sense of penalty as signifying a burden encountered by the defendant as a consequence of his wrongdoing. In that broad sense of penalty this provision of course is a burden to the defendant in requiring him to make compensation for damage wrongfully caused, comparable to the burden that is imposed by every provision which imposes legal liability to make compensation to the injured party. The three-fold damage provision is a provision for liquidated compensation for accumulative harm, largely intangible in its nature, which is so conspicuous a part of the loss suffered when a going business is destroyed in violation of the anti-trust act.

Unfortunately, the tendency today is to classify automatically any damage recovery more than “actual” as necessarily “punitive” or “penal.” *See, e.g.*, *Neibel v. TransWorld Assurance Co.*, 108 F.3d 1123, 1130 (9th Cir. 1997) (discussing treble damages under antitrust and RICO). The tendency is ahistorical. *See generally* *Huntington v. Attrill*, 146 U.S. 657, 666-68 (1892) (a judgment for debt not penal—in the international law sense—precluding enforcement by another state) (citations omitted):

[T]here is danger of being misled by the different shades of meaning allowed to the word “penal” in our language.

In the municipal law of England and America, the words “penal” and “penalty” have been used in various senses. Strictly and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offence against its laws. But they are also commonly used as including any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered. They are so elastic in meaning as even to be familiarly applied to cases of private contracts, wholly independent of statutes, as we speak of the “penal sum”: or “penalty” of a bond. . . .

Penal laws, strictly and properly, are those imposing punishment for an offence committed against the State, and which, by the English and American constitutions, the executive of the State has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal.

The action of an owner of property against the hundred to recover damages caused by a mob was said ... to be “penal against the hundred, but certainly remedial as to the sufferer.” A statute giving the right to recover back money lost at gaming, and, if the loser does not sue within a certain time, authorizing a *qui tam* action to be brought by any other person for threefold the amount, has been held to be remedial as to the loser, though penal as regards the suit by a common informer. ... As said by Mr. Justice Ashhurst in the King’s Bench[,] “it has been held, in many instances, that where a statute gives accumulative damages to the party grieved, it is not a penal action.” ... Thus a statute giving to a tenant, ousted without notice, double the yearly value of the premises against the landlord, has been held to be “not like a penal law where a punishment is imposed for a crime,” but “rather as a remedial than a penal law,” because “the act indeed does give a penalty, but it is to the party grieved.” ... So

by statute.<sup>48</sup> The concept is reflected, for example, in the Supreme Court's jurisprudence under the False Claims Act,<sup>49</sup> which authorizes a recovery of dou-

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in an action given by statute to a traveler injured through a defect in a highway, for double damages against the town, it was held unnecessary to aver that the facts constituted an offence, or to conclude against the form of the statute, because, as Chief Justice Shaw said: "The action is purely remedial, and has none of the characteristics of a penal prosecution. All damages for neglect or breach of duty operate to a certain extent as punishment; but the distinction is that it is prosecuted for the purpose of punishment, and to deter others from offending in like manner. Here the plaintiff sets out the liability of the town to repair, and an injury to himself from a failure to perform that duty. The law gives him enhanced damages; but still they are recoverable to his own use, and in form and substance the suit calls for indemnity."

The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual, according to the familiar classification of Blackstone: "Wrongs are divisible into two sorts or species: private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals; and are thereupon frequently termed civil injuries; the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community; and are distinguished by the harsher appellation of crimes and misdemeanors." WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND.

48. See, e.g., *Burrett v. Ward*, 42 Vt. 80, 93 (1869) (double damages for harm to sheep to compensate for "accumulative harm"); see also *Brady v. Daly*, 175 U.S. 148, 154-58 (1899) (copyright infringement):

[The copyright statutes] all use the word "damages" when referring to the wrongful production of a dramatic composition. No word of forfeiture or penalty is to be found in them on that subject. It is evident that in many cases it would be quite difficult to prove the exact amount of damages which the proprietor of a copyrighted dramatic composition suffered by reason of its unlawful production by another, and yet it is also evident that the statute seeks to provide a remedy for such a wrong and to grant to the proprietor the right to recover the damages which he has sustained therefrom.

The idea of the punishment of the wrongdoer is not so much suggested by the language used in the statute as is a desire to provide for the recovery by the proprietor of full compensation from the wrongdoer for the damages such proprietor has sustained from the wrongful act of the latter. In the face of the difficulty of determining the amount of such damage in all cases, the statute provides a minimum sum for a recovery in any case, leaving it open for a larger recovery upon proof of greater damage in those cases where such proof can be made. The statute itself does not speak of punishment or penalties, but refers entirely to damages suffered by the wrongful act. The person wrongfully performing or representing a dramatic composition is, in the words of the statute, "liable for damages therefor." This means all the damages, that are the direct result of his wrongful act. The further provision in the statute, those damages shall be at least a certain sum named in the statute itself, does not change the character of the statute and render it a penal instead of a remedial one. [W]e think it provides for the recovery of neither a penalty nor a forfeiture.

If, upon the trial of such an action, the court should find from the evidence that the plaintiff had, in fact, sustained a greater amount than the minimum sum of damages provided in the statute, and should direct judgment in his favor for the sum so proved, would that judgment be for a penalty? On the contrary, it would be for the actual amount of damages which the evidence showed had been sustained by the plaintiff, and his recovery of that sum would be the recovery provided by the law for the wrong which he had suffered. When the evidence does not warrant a greater than the minimum recovery, the amount named in the statute still constitutes the remedy provided by the law, which plaintiffs can pursue.

49. Currently, the provisions of the Act are codified in 31 U.S.C. § 3729-33 (1994). The statute was originally enacted in 1863, Act of March 2, 1863, 12 Stat. 696-98. It was later reenacted as Rev. Stat. §§ 3409-94, 5438 (1878). See *U.S. ex rel Newsham v. Lockheed Missiles and Space Co.*, 722 F. Supp. 607, 609-10 (N.D. Cal. 1989) (discussing history, including 1986 amendment that revived the Act, a modern version of the common law action: *qui tam pro donino rege quam pro se ipso in hac parte sequitur*).

ble damages for fraud against the government, including in actions brought by an informant in the name of the United States.<sup>50</sup> Other statutory claims for relief are sometimes, yet only rarely, similarly viewed.<sup>51</sup>

50. See *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 549-52 (1943):

This remedy does not lose the quality of a civil action because more than the precise amount of so-called actual damage is recovered. As to the double damage provision, it cannot be said that there is any recovery in excess of actual loss for the government, since in the nature of the *qui tam* action the government's half of the double damages is the amount of actual damage proved. . . . [T]he chief purpose of the [Act] was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole.

*Accord United States v. Bornstein*, 423 U.S. 303, 314 (1976) (double first then credit for payments) ("[T]his make-whole purpose of the Act is best served by doubling the [g]overnment's damages before any compensatory payments are deducted.").

51. See, e.g., *Porter v. Household Finance Corp. of Columbus*, 385 F. Supp. 336, 340 (S.D. Ohio 1974) (Truth in Lending Act: recovery double finance charge form of liquidated damages); *Schwarzel v. Holenshade*, 121 F. Cas. 722 (No. 12,506) (S.D. Ohio 1866) (Patent Law: recovery of treble damages designed to compensate fully where actual damage would be inadequate). See generally Goering, *supra* note 29, at 488-503 (collecting conflicting authorities classifying statutes authorizing multiple damage recovery and deciding various issues under them, including vicarious liability, assignability, survivability, and statute of limitation).

How to treat these various issues should not be an issue of "classification," but "purpose." It ought to turn not on formal, but functional considerations. A multi-factor approach, case by case, would avoid a universal rule that would be, in turn, under- or over-inclusive. The issue of survival is illustrative. Neither the text nor the legislative history of RICO, for example, provides an answer to the issue of survival. The issue of survival is, therefore, determined by federal common law. See, e.g., *Carlson v. Green*, 446 U.S. 14, 23 (1980) (*Bivens* Eighth Amendment action survives death of plaintiff). During the nineteenth century, the Supreme Court treated survival formally. A statute was "classified"; the decision was then largely a matter of deduction. See, e.g., *Schreiber v. Sharpless*, 110 U.S. 76, 80 (1884) (*qui tam* action for penalties and forfeitures for copyright infringement does not survive death of defendant) ("nature of the cause of action"); *United States v. Daniel*, 471 U.S. (6 How.) 11, 134 (1848) (action on trespass on case does not survive death of defendant; "the action arises *ex delicto*"). During the twentieth century, however, courts say they eschew formalism. *Carlson* marks a turning point for survival, at least for the Supreme Court. Adopting a multi-factor test to decide if the decedent possessed a *Bivens* and a Federal Tort Claim Act claim for relief, the Court held that both claims could be brought and that the *Bivens* claim survived in light of the "goals of *Bivens* actions." 446 U.S. at 25. Indeed, in light of *Carlson* and *Robertson v. Wegmann*, 436 U.S. 584 (1978), discussed below, the Supreme Court, it can be argued, already follows a multi-factor approach; lower courts merely do not yet recognize it. That approach should be adopted on other "classification" issues under RICO and similar statutes. Sometimes, of course, the conflict between a multi-factor approach and a bright-line rule is put as a conflict between a standard (drive reasonably) and a rule (drive 55). See generally CASS. R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 106-08, 110-15, 130-35 (1993) (catalogue of virtues and vice of "rules" and "standards"). The adoption of the concrete multi-factor approach suggested here to survival, to be applied case by case, would, however, be a hybrid, neither a pure rule (always/never survive) nor a standard (survive, or not, "when appropriate"). It would also not reflect the vice of vagueness associated with an "all the facts and circumstance" standard. Judges and litigants would have guidance; not any decision could be reached. The process of analysis should begin with the common law rule: no survival. Each factor reflecting the policy of the statute should be examined. Unless a particular fact situation "successfully" passed each factor, the common law rule should obtain. The issue, therefore, ought to be resolved by examining at least five factors, each of which reflects, more or less, the essential characteristics of a bright-line rule. Other factors might, in certain situations, be relevant. See, e.g., *Roma Construction Co. v. Russo*, 96 F.3d 566, 510 n.2 (1st Cir. 1996) (discussing the possible application of an equal involvement defense to RICO). If applicable, it might make the issue of survival moot. But they, too, would have to reflect the policy of the statute to be considered.

1. *Character of Death*: Compare *Faircloth v. Finesod*, 938 F.2d 513, 518 (4th Cir. 1991) (survival of plaintiff) ("kill. . . victims") with *State Farm Fire & Cas. v. Caton*, 540 F. Supp. 673, 682 (N.D. Ill. 1982) (survival of defendant; "figures' assets may be held by nominees"). If the death was natural, it would

not be necessary to hold that the claim for relief survived to avoid the legal consequences of an intentional homicide. It should abate. See also *Robertson v. Wegmann*, 136 U.S. 584, 590-92 (1978) (survival under 42 U.S.C. § 1983 (1994) is controlled by 42 U.S.C. § 1988 (1994); state law adopted, unless “inconsistent” with federal policy; caveat expressed “no claim that illegality caused plaintiff’s death”).

2. *Other Perpetrators if Any*: RICO claims for relief give rise to joint and several liability. See, e.g., *Fleischhouser v. Feltner*, 897 F.2d 1290, 1300 (6th Cir. 1989). If the relative culpability of multiple perpetrators were relatively equal, no reason would exist to adopt a rule of survival. Unequal culpability would present an issue of unjust enrichment. Absent that fact, the goals of ample compensation to the victim and adequate incentive to sue would be met by a treble damage recovery with counsel fees against the other perpetrators; it would not be necessary, therefore, to “inflict . . . punishment for their fathers’ wickedness on the children.” *Exodus* 20:5.

3. *Deterrence*: Any sanction for intentional conduct—criminal or civil, actual or treble damages—serves a deterrent function; it is a question of degree, not kind. Deterrence is general (to the public) and specific (to the individual). See generally Johannes Andenas, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949 (1966). Where the perpetrator is dead, specific deterrence is not possible. The goal of general deterrence, too, may be adequately served by an award made against the other perpetrators as well as the general threat to award such damages against others. Few engage in crime hoping to escape sanction by dying before they enjoy the fruits of the offense. That it might not be awarded in a specific case would not undermine its basic general deterrence character.

4. *Incentive to Sue*: The goal of an incentive to sue could be met by recovery against the other perpetrators, if they were present; if not, survival would be appropriate.

5. *Unjust Enrichment*: To the degree that a dead perpetrator’s estate gained by his RICO conduct that gain could be recaptured (or prevented) by an action for unjust enrichment under state law to recover ex aequo et bono that which it would be against equity and good conscience to permit the estate of the dead perpetrator to keep (or gain). No need would be present for survival of the multidamage award.

The liberal construction clause ought not be held to resolve the issue of survival in every case. See 84 Stat. 947 (1970) (“liberally construed to effectuate its remedial purposes”). Terming the statute “remedial” for one purpose “does [not] help . . . to determine what [other] purposes Congress had in mind. Those must be gleaned from the statute through the normal means of construction.” *Reves v. Ernst & Young*, 507 U.S. 170, 183-84 (1993). Inferring from one aspect of a class (remedial for interpretation) to the character of the entire class (remedial for all purposes, including survival) is an example of the fallacy of Hasty Generalization. See NICHOLAS CAPALDO, *THE ART OF DECEPTION* 118-19 (1987) (reasoning from a property of an unrepresentative sample of a group to the character of the group itself is improper).

Nor should the issue be resolved by an analogy without an independent analysis of considerations of policy. Antitrust treble damage claims survive. See, e.g., *Barnes Coal Corp. v. Retail Mediators Ass’n*, 128 F.2d 645, 6458 (9th Cir. 1942). RICO is based on antitrust. See *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 266 (1992). Should a court follow the antitrust analogy? The antitrust analogy, however, cuts both ways. The Supreme Court used it to place a statute of limitations on RICO, *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 156-57 (1987); it did not use it to determine exclusive jurisdiction in the federal courts, *Tafflin v. Levitt*, 493 U.S. 455, 462-63 (1990). Reasoning by analogy in the law, of course, reflects “an importance . . . [that] cannot be overstated.” RUGGERO J. ALDISERT, *LOGIC FOR LAWYERS* 95 (1989). Nevertheless, such reasoning must be “carefully” appraised. *Id.* Ultimately, it is a question of “when [is] . . . it just to treat different cases as though they were the same?” *Id.* at 102. That always turns on “reasons.” *Id.* “The fairness and durability of a judicial decision will always be directly dependent upon how thoughtfully and disinterestedly the court has first identified and then weighed the conflicting social interests involved.” *Id.* Bright-line rules to one side, no escape can be made in the law from the necessity to exercise wise and just judgment.

While he termed this suggested multi-factor approach “creative” when I argued it in *Epstein v. Estate of Epstein*, 966 F. Supp. 260, 260-63 (S.D.N.Y. 1997) (RICO survives death of defendant as a matter of “classification” and analogy to antitrust law; conflicting decisions reviewed), Judge Jed Rakoff was not persuaded to adopt it. His opinion should not be followed on survival; a multi-factor approach should be adopted, not only on survival, but on all “characterization” issues. Policy, not logic, ought to be followed. See 1 OLIVER WENDELL HOLMES, *THE COMMON LAW* 32 (Howe ed., 1963) (“not logic [but] experience”; “[it] is too much to sacrifice good sense to a syllogism”).

#### D. Punitive Damages

“Punitive” damages—sometimes referred to as “exemplary damages,” “vindictive damages,” or “smart money”—concededly exceed “actual” damages; they are not generally thought to be solely or even mainly “compensatory.”<sup>52</sup> Nevertheless, the issue is not without doubt. In England, where exemplary damages originated, for example, they were not clearly a distinct, strictly punitive element; instead, they were an aggravated allowance of compensatory damages in situations where, echoing Roman law, “outrage” was present.<sup>53</sup> That concept is still reflected in a minority of American jurisdictions.<sup>54</sup> To the degree that “punitive” damages are not seen as at least partly

52. See generally MCCORMICK, *supra* note 30, at 275-98.

53. See *id.* Subsequently, English courts severely limited exemplary damages. See, e.g., *Rooke v. Bernard*, [1964] A.C. 1129, 1121 (Devlin, J.) (excising “an anomaly from the law of England”). Nevertheless, they may still be awarded in two situations: (1) where government servants act oppressively and (2) where “the defendant’s conduct has been calculated by him to make a profit for himself which may exceed the compensation payable to the plaintiff.” *Id.* at 1226. *Accord* *Broone v. Cassell & Co.*, [1972] 2 W.L.R. 645.

54. See, e.g., *Wise v. Daniel*, 190 N.W. 746, 747 (Mich. 1922):

If a cow kicks a man in the face the consequent physical hurt may equal that from a kick in the face with a hob-nailed boot, but the “cussedness” of the cow raises no sense of outrage, while the malicious motive back of the boot kick adds materially to the victim’s sense of outrage. If a man employs spite and venom in administering a physical hurt he must not expect his maliciousness to escape consideration when he is cast to make compensation for his wrong. If the defendant maliciously inflicted the injury then the jury had a right to take into consideration such fact together with all the circumstances disclosed and award such sum by way of compensation as the plaintiff ought to receive, and the defendant ought to be made to pay.

See *Morganroth & Morganroth v. DeLorean*, 123 F.3d 347, 384 (6th Cir. 1997) (discussion of differences between “exemplary” and “punitive” damages under Michigan law).

The scope and rationale of the modern rule is reviewed in *Smith v. Wade*, 461 U.S. 30, 34-38 (1983) (42 U.S.C. §1983 (1994) authorizes punitive damages where defendant’s conduct reflects reckless or callous indifference to federally protected rights or an evil motive or intent); *Palmisano v. Toth*, 624 A.2d 314, 317-20 (R.I. 1993) (rationale of modern rule is punishment and deterrence; production of documents showing wealth compelled). See also *Scott v. Donald*, 165 U.S. 58, 86-87 (1896) (“Damages have been defined to be the compensation which the law will award for an injury done, and are said to be exemplary and allowable in excess of the actual loss, where a tort is aggravated by evil motive, actual malice, deliberate violence, or oppression. While some courts and text-writers have questioned the soundness of this doctrine, it has been accepted in England, in most of the [s]tates of this Union, and has received the sanction of this court.”); *Day v. Woodworth*, 54 U.S. (13 How) 363 (1851). In *Day*, Justice Gries observed:

It is a well-established principle of the common law that, in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive[,] or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers, but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By the common, as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages inflicted by way of penalty or punishment given to the party injured. In many civil actions, such as libel, slander, seduction, etc., the wrong done to the plaintiff is incapable of being measured by a money standard, and the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant’s conduct, and may properly be termed exemplary or vindictive rather than compensatory.

*Id.* at 398-99.

compensatory, they are, of course, sharply criticized, and they are not universally accepted.<sup>55</sup> Absent some form of “tort reform,”<sup>56</sup> they remain, however modified, the general rule.<sup>57</sup>

55. See, e.g., *Fay v. Parker*, 53 N.H. 342, 382 (1873) (Foster, J.) (extensive review of authorities):

How could the idea of punishment be deliberately and designedly installed as a doctrine of civil remedies? Is not punishment out of place, irregular, anomalous, exceptional, unjust, unscientific, not to say absurd and ridiculous, when classed among civil remedies? What kind of a civil remedy for the plaintiff is the punishment of the defendant?

*But see* *Vratsenes v. N.H. Auto, Inc.*, 289 A.2d 66, 67 (N.H. 1972) (“While exemplary damages may not be awarded under *Fay*, compensatory damages may be adjusted to take into consideration malicious conduct to reflect insult.”) (citing *Bixby v. Dunlap*, 56 N.H. 456, 462 (1876)).

56. No objective observer can seriously argue that our tort system is efficient, effective, or fair. While more people are seriously injured than ever before by defective products or negligent conduct, it costs too much to get adequate compensation to those who need it. See, e.g., Eugene R. Anderson & Mary L. Kahn, *A Ten Point Proposal for Asbestos Superfund*, FORUM (Spring 1983). But strange legislative remedies are offered in the name of “reform.” Those who are a federalist on other issues ignore the tenets of federalism here. Tort reform is seen as a national problem requiring a national solution; the remedies proposed would curtail by national legislation the fees of plaintiffs’ lawyers by circumscribing the contingent-fee system and cap noneconomic damage awards, including punitive damage awards. See FORTUNE, July 7, 1986, at 35-36 (Reagan administration backs tort reform). Reaganism survives Reagan. See Rachel Witmer, *Congress Examine Shift to State Actions Following 1995 Securities Litigation Reform*, 69 BNA Bank Rep. 424 (1997) (reporting a move to preempt in H.R. 1689 federally all state claims for relief for fraud in securities litigation). The shameful history of the 1985 Act is told and the Act is analyzed in G. Robert Blakey & Kevin Roddy, *Reflections on Reves v. Ernst & Young*, 33 AM. CRIM. L. REV. 1676-1702 app.1 (1997) (securities fraud reform). If victims are given less access to lawyers, or damage awards are automatically lowered, society will, of course, be burdened with less litigation, yet not because fewer wrongs are done, but because less access to the courts is available. Little is said, too, about reforming insurance company inefficiency, curtailing the medical fees of health-care professionals, who maintain a wasteful system of “socialized” accounts receivables through government and private insurance programs, but who are largely able to maintain marketplace freedom in price setting, or of weeding out from the profession the incompetent doctors, whose conduct gives rise in the first place to malpractice suits. Compare Stein, *Medical Negligence Needs a Study*, N.Y. TIMES, May 30, 1987, at 15 (estimates of 260,000 to 300,000 injuries and deaths in hospitals each year from negligence), with NEWSWEEK, Jan. 26, 1987, at 62-63 (small percentage of physicians account for disproportionate number of malpractice claims, but nationwide only 406 medical licenses revoked in 1985); N.Y. TIMES, Feb. 4, 1986, at 9 (20,000 to 45,000 of 400,000 physicians not fully competent, but only 1,400 disciplinary actions each year). Neither is attention paid to the fees of defense counsel for whom, in light of insurance-company reimbursement of the insured, little economic disincentive is present not to run the meter in major litigation before trying to achieve a realistic settlement, even where liability and amount of damage are not seriously in dispute. Nor are responsible proposals being seriously considered that would create a substitute for the tort system that might be a more efficient, effective, or fair system of social insurance for the medical and other injuries, which are an inevitable incident of life in modern society. Here, the trial lawyers of both camps join hands with the insurance industry in conspiring against the rights of society. See GEORGE B. SHAW, *THE DOCTOR’S DILEMMA* act 1, l. 32 (Brentano ed., 1909) (“all professions are conspiracies against the laity”). Instead, “tort law reform” is a euphemism for choosing to enhance the power of one side in an adversary system, which would move the clock, not forward to a better system for the 21st century, but backward to restore a discredited 19th century system, where only the well-to-do are protected by lawyers or are able to vindicate in court their injuries. See Oliver Goldsmith, *The Traveler*, in GOLDSMITH: SELECTED WORKS 600 (Rupert Hand-Davis ed. 1950) (“Laws grind the poor and rich men rule the law.”). Nevertheless, “tort reform” is carrying the day in the nation. Between 1995 and 1997, twenty-eight states passed some form of legislation; sweeping reform was recently passed in Illinois, Texas, Ohio, and Louisiana. See Letter of Shermay Joyce (undated), President of the American Tort Reform Association, to selected law professors (reviewing 1997 activity in Alaska, Arkansas, Hawaii, Iowa, Louisiana, Maryland, Minnesota, Montana, North Carolina, North Dakota, South Dakota, Texas, Utah, and West Virginia) “All aspects of the traditional tort system, including any punitive damages, are being substantially restricted. ‘Reform’ looks more and more like ‘chloroform.’” *Id.*

57. See RESTATEMENT (SECOND) OF TORTS § 901 (1979). Section 901 provides:

### E. Actual Damages

Finally, we come to “actual” damages, a misnomer of undeniable dimensions. Here, too, “[u]pon this point a page of history is worth a volume of logic.”<sup>58</sup> The story is too long to tell in detail, but its outlines may be sketched. Its history is similar to that of Roman law. Our law begins in the Saxon era with, not “compensation,” but “composition.”<sup>59</sup> The awarding of money dam-

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The rules for determining the measure of damages in tort are based upon the purposes for which actions of tort are maintainable. These purposes are:

- (a) to give compensation, indemnity, or restitution for harms;
- (b) to determine rights;
- (c) to punish wrongdoers and deter wrongful conduct; and
- (d) to vindicate parties and deter retaliation or violent and unlawful self-help.

*Id.*

58. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.).

59. POUND, *supra* note 12, at 375-79 (“An injured person in certain cases is required to accept a composition for his vengeance and is prevented from helping himself. . . . A tariff of compositions [is provided] which the injured party must take for the wrongs specified, which also he can compel the wrongdoer to pay.”); *see also* MCCORMICK, *supra* note 30, at 22. McCormick selects items from a long list contained in the Laws of Ethelbert of about 600 A.D.:

34. If there be an exposure of the bone, let bot be made with III shillings.

39. If an ear be struck off, let bot be made with XII shillings.

40. If the other ear hear not, let bot be made with XXV shillings.

43. If an eye be (struck) out, let bot be made with I shillings.

45. If the nose be pierced let bot be made with IX shillings.

50. Let him who breaks the chin-bone pay for it with XX shillings.

51. For each of the four front teeth, VI shillings; for the tooth which stands next to them, IV shillings; for that which stands next to that, III shillings; and then afterwards, for each a shilling.

54. If a thumb be struck off, XX shillings. If a thumb nail be off, let bot be made with III shillings. If the shooting (*i.e.*, fore) finger be struck off, let bot be made with VIII shillings. If the middle finger be struck off, let bot be made with IV shillings. If the gold (*i.e.*, ring) finger be struck off, let bot be made with VI shillings. If the little finger be struck off, let bot be made with III shillings.

55. For every nail a shilling.

57. If anyone strike another with his fist on the nose, III shillings.

59. If the bruise be black in a part not covered by the clothes, let bot be made with scaetts.

60. If it be covered by the clothes, let bot for each be made with XX scaetts.

*Id.* *See generally* 1 POLLOCK & MAITLAND, *supra* note 10, at 46-48. Pound summarizes the early history in this way:

[T]he first theory of liability was in terms of a duty to buy off the vengeance of him to whom an injury had been done whether by oneself or by something in one’s power. The idea is put strikingly in the Anglo-Saxon legal proverb, “Buy spear from side or bear it,” that is, buy off the feud or fight it out. One who does an injury or stands between an injured person and his vengeance, by protecting a kinsman, a child, or a domestic animal that has wrought an injury, must compound for the injury or bear the vengeance of the injured. As the social interest in peace and order—the general security in its lowest terms—comes to be secured more effectively by regulation and ultimate putting down of the feud as a remedy, payment of composition becomes a duty rather than a privilege, or in the case of injuries by persons or things in one’s power a duty alternative to a duty of surrendering the offending child or animal. The next step is to measure the composition not in terms of the vengeance to be bought off but in terms of the injury. A final step is to put it in terms of reparation. These steps are taken haltingly and merge into one another, so that we may hear of a “penalty of reparation.” But the result is to turn composition for vengeance into reparation for injury [by] recovery of a sum of money by way of a penalty.

ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 74 (1954).

ages as compensation did not, in fact, arise until more than 100 years after the Norman Conquest in 1066.<sup>60</sup> “[T]he remedy of damages came first into English practice at about the same time that English courts began to use juries, and was, like the jury itself, a foreign importation.”<sup>61</sup> As long as jurors were free to fix the amount by their own light, “no *law* of damages . . . [was] needed.”<sup>62</sup> Typically, damages were fixed by the jury in light of their personal knowledge of local conditions, not known, of course, to the judge who was sent out from London. Slowly, however, the courts began to exercise control over the process, chiefly by granting a new trial, an innovation forced on common law courts by equity in the early 1600s.<sup>63</sup> In 1695, Chief Justice Holt, for example, demanded of a jury reasons for its verdict of £62,000 for two hours of false imprisonment; when it was “shy of giving a reason,” he bluntly told it that it did not have “an absolute despotic power,” and the full bench granted a new trial.<sup>64</sup> Parallel with the development of the power to grant new trials was, of course, the practice of guiding the jury beforehand by instructions<sup>65</sup> The complicated history of what those instructions had to contain is tied up in the complicated history of the forms of action,<sup>66</sup> a story that, fortunately, need not be told here.<sup>67</sup>

Eventually, by the middle of the nineteenth century, however, a pattern of general rules developed, distinguishing, for example, between torts and contracts.<sup>68</sup> Damages, too, were to be certain, not speculative; if the *fact* of dam-

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60. See MCCORMICK, *supra* note 30, at 23. In fact, while Anglo-Saxon laws fixed the scale in terms of money, the actual payments ordinarily, because of the scarcity of coined money, were made by delivering cattle or other goods. See *id.*

61. *Id.* at 24.

62. *Id.* (emphasis in original).

63. See *Bright v. Eynon*, 1 Burr 390, 394, 97 Eng. Rep. 367, 371 (1757) (Mansfield, J.).

64. *Ash v. Lady Ash*, 90 Eng. Rep. 526 (1695).

65. MCCORMICK, *supra* note 30, at 27.

66. See *id.* at 29. Frederic W. Maitland’s remark is apt: “The forms of action we have buried, but they still rule us from their graves.” 1 THE FORMS OF ACTION AT COMMON LAW (1st ed. 1909).

67. McCormick, however, makes the apt point:

Today, when the common-law forms of action have been abandoned in nearly all the states, and when the codes require only that the plaintiff state the facts upon which he relies, the plaintiff (or rather his counsel) will need to formulate in his own mind a theory of his case, but his theory will be that of a claim for breach of contract or for deceit or for negligence, as the case may be, usually without reference to the common-law forms of special assumpsit, case, or trespass in which the rules of liability on which he relies were developed. Nevertheless, even to-day, the pleader in planning the framework of his case will often find it profitable to refresh his recollection as to the forms of action which would have been available for choice under the older system. Such an exploration may be particularly helpful in enabling him to pass in review the various rules for measuring damages in the various actions, and thus enabling him to choose the most advantageous. For example, if the pleader is planning to sue for the appropriation of goods which have thereafter been sold by the wrongdoer, it is worthwhile to ascertain that he had a choice at common law of an action of trover in which the damages were the value of the goods when taken, or an action of general assumpsit; in which he could recover the price received by the wrongdoer. Again, if the claim is for timber wrongfully cut from the plaintiff’s land, it will be useful to ascertain the difference in the rules of damages in the actions of trespass to land, trespass to chattels, and trover, respectively.

MCCORMICK, *supra* note 30, at 29.

68. See, e.g., *Hadley v. Baxendale*, 9 Ex. 34 (1854) (contract damages limited to “contemplation of parties”).

age, however, was certain, the *extent* could be left to reasonable inference; if the defendant's wrong caused the difficulty, he would not be permitted to complain of the resulting uncertainty; finally, loss profits came to be recovered.<sup>69</sup>

The crucial question, however, is still outstanding. Any discussion of multiple damages must establish a base line, an integer to be multiplied. The idea is "value." Roman law<sup>70</sup> distinguished<sup>71</sup> between "true price" (*verum pretium*), the normal standard, that is, the ordinary price to people generally, not "special" value to particular people, or "market" value; "usefulness" (*utilitas*), employed where an owner was wrongfully deprived of his property, that is, value to the owner himself, and "market" value (*quanti venire potest*), what a property could be sold for. Market price was *not*, therefore, the usual measure of liability in Roman law. In England, the common law early adopted the Norman-French word "value"<sup>72</sup> for its standard for compensation, but "no doctrines as to the meaning or scope of value are developed in the decisions until the middle of the nineteenth century."<sup>73</sup> Under the influence of Adam Smith and his friends, the concept loses its "moral" roots and becomes "economic."<sup>74</sup> The test becomes by awarding money compensation to place the person in the same position as respects his pocketbook as he would have occupied if no wrong had taken place,<sup>75</sup> an "imaginary inference" at best.<sup>76</sup> The rule is a

69. MCCORMICK, *supra* note 30, at 101-04. These general rules are reflected, for example, in federal antitrust jurisprudence. *See, e.g.*, *J. Truett Payne Co. v. Chrysler Motor Corp.*, 451 U.S. 557, 561-63 (1981) (Clayton Act: actual injury); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969) (not susceptible to concrete proof); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 697-701 (1962) (inferred from circumstantial evidence); *Bigelow v. RKO Radio Pictures Inc.*, 327 U.S. 251, 264 (1946) (need not be measured with exactness); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931) (uncertainty of extent distinguished uncertain of fact); *Eastman Kodak co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927) (need not be calculated with absolute exactness).

70. McCormick reports a conflict in scholarship: Is the idea of money damages derived from Roman law or is it a native English origin? MCCORMICK, *supra* note 30, at 23. The point is a detail without consequence here.

71. *See generally* Nathan Matthews, *The Valuation of Property in Roman Law*, 34 HARV. L. REV. 229 (1920).

72. 19 OXFORD ENGLISH DICTIONARY 415 (2d ed. 1989). In fact, the dictionary devotes almost two and one half pages to the usages of the term "value" since the twelfth century.

73. MCCORMICK, *supra* note 30, at 160. During the 19th century, a shift may be seen, however, between looking at a "price," that is, a consideration, from the perspective of its "adequacy" to its "market" value, determined by the parties themselves. *See, e.g.*, *Seymour v. Delancey*, 6 John C 222 (1822) (Kent, C) (specific performance not granted as price not "fair and just"; English and Roman decisions reviewed), *rev'd*, 3 Cow 445 (1824) (Senator Sudan) ("What right have we to sport with the contracts of persons fairly and deliberately entered into and prevent them from being carried into effect?").

74. MCCORMICK, *supra* note 30, at 160-64.

75. *Id.* at 165.

76. *Id.* Holmes put it well in *Bradley v Hooker*, 55 N.E. 848, 849 (Mass. 1900) (exceptions overruled):

The question called for the market value of the converted object, and the answer was an attempt to give it. The market value is at least the highest price that a normal purchaser not under peculiar compulsion will pay at the time and place in question in order to get the thing. . . . In the stock exchange buyers and sellers are brought together in a focus, with the result that there is no danger of missing the highest price by the accident of missing the man who would give it. Even if at given moment there is no buyer of the class that would most desire a

“standard, not a shackle.”<sup>77</sup> Other standards may be used where market value cannot be used feasibly.<sup>78</sup> My point, however, is made: “Value” is a fiction of policy, not an issue of fact.<sup>79</sup> “Value” is, therefore, whatever we want to make it. So, too, are “actual” damages. Nevertheless, we ought to call them what they are: *legal* damages.

#### IV

#### ECONOMIC ANALYSIS

With an outline of the history of multiple damages set out, we can profitably turn to economic analysis,<sup>80</sup> which fully supports the wisdom of awarding

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certain stock or bond, there is an organized public ready to buy upon the anticipation that such a buyer will be found, and regulating the price which it will pay, more or less by that anticipation. There is no such focus for old furniture. The answer very properly recognized the uncertainty of encountering a purchaser who would give the reasonably possible highest price, and named an alternative sum. In a case like this market value is a criterion which oscillates within limits, because, in the absence of a balance wheel like the stock exchange, it cannot be assumed with regard to a single object and a single sale that the element of accident is eliminated, and that the most favorable purchaser will be encountered.

77. MCCORMICK, *supra* note 30, at 120.

78. *See id.*

79. Fictions are, of course, “lies” that ought not be indulged in unless they are supported by an articulate and defensible rationale. 7 JEREMY BENTHAM, WORKS 283 (J. Brown ed. 1843) (“Fiction of use to justice. Exactly as swindling is to trade”). Here, too, Holmes put it well:

The rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know. It is part of the rational study, because it is the first step toward an enlightened skepticism, that is, toward a deliberate reconsideration of the worth of those rules.

When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal. For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.

Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 83, 96-97 (1897).

80. For the purpose of this part of these thoughts, I accept the economic criterion of “allocative efficiency,” but no thoughtful person, who cares about basic human values, ought to feel compelled to accept such an amoral standard for the evaluation of public policy. *See generally* READINGS IN THE ECONOMICS OF LAW AND REGULATION 22 (1984) (A.I. Ogus & C.G. Veljanouski, eds.) (“To say that a situation is allocatively efficient is to say only that all the . . . gains from trade have been exhausted, given the initial distribution of wealth. . . . [A]llocative efficiency. . . [is] consistent with the poor starving and the economy’s productive activity channeled into the manufacture of . . . luxury items.”); Arthur Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974).

Even if justice were not the issue, those who currently possess disproportionate wealth and power in our society ought not carelessly believe that they can keep it in the face of ever-widening gaps between the rich and poor. Choice in our present market place is a function, not of demand, but effective demand; our society is, in short, moving ever closer to being—at least economically—a plutocracy, not a democracy. *See generally* Keith Bradsher, *Gaps in Wealth in U.S. Called Widest in West*, N.Y. TIMES, Apr. 17, 1995, at A1 (reporting that economic inequality is on rise in U.S. since 1970s; 10% of population holds 40% of wealth, in contrast to Great Britain; there, 1% of the population holds 18%, down from 1920 when it held 59%; the top 20% of Americans (with incomes of \$180,000 or more) hold 80% of wealth). While some progress is being made in recent years, that wealth disparity is sadly, moreover, correlated with race and ethnicity. *See generally* Richard W. Stevenson, *Back White Economic Gap is Narrowing White House Says*, N.Y. TIMES, Feb. 10, 1998, at A16 (White House says nation shows tentative signs that economic inequality between the races reduced in last few years, but reports, nonetheless, that income gaps between black and white families remain almost as large as they were

multiple damages, at least in certain classes of litigation.<sup>81</sup> If society authorizes the recovery of only actual damages for deliberate antisocial conduct engaged in for profit, it lets perpetrators know that if they are caught, they must return the misappropriated sums. If they are not caught, they may keep the money. Even if they are caught and sued, they may be able to defeat some part of the damage claim or at least compromise it. In short, single damage recovery provides insufficient economic disincentive to those who would intentionally engage in such conduct.<sup>82</sup> Studies under the antitrust statutes, for example, show

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three decades ago and that the median wealth of white families may be as much as 10 times that of blacks and hispanic families); Steve A. Holmes, *New Reports Say Minorities Benefit in Fiscal Recovery*, N.Y. TIMES, Sept. 30, 1997, at A1 (reporting economic prosperity for nearly all households up; gains for minorities at unprecedented levels; yet the growth in income for the richest 20% outpaced all other groups, and the poorest 20% had an income drop of 1.8%; and 500,000 more people were living on incomes less than half of the official poverty level in 1996). If history teaches anything, it teaches that such gaps are stuff of eventual revolutions, often of terrible proportions. Marie Antoinette probably did not say, "*Qu'ils mangent de la brioche*" ("Let them eat cake"), but she and those like her reflect in their conduct precisely these sentiments. The quotation first appears in 6 JEAN JACQUES ROUSSEAU, *LES CONFESSIONS* 180 (Walter J. Black Co. ed., undated), which was written two or three years before Antoinette arrived in France in 1770. See CAROLYN ERICKSON, *TO THE SCAFFOLD: THE LIFE OF MARIE ANTOINETTE* 47 (1991). They, too, run the risk of losing their heads. See 5 ARISTOTLE, *POLITICS* ch.7, 1307a-b ("[W]hen men are equal they are contented. But the rich, if the constitution gives them power, are apt to be insolent and avaricious. . . . The only stable principle of government is equality according to proportion, and for every man to enjoy his own.").

81. Richard A. Posner, for example, supports the concept of private enforcement for more than actual damages against deliberate antisocial conduct, particularly where the fact of concealment is present. See POSNER, *supra* note 7, at 560 (private enforcement), 194, 346 (more than actual damages for deliberate conduct), 293 (concealment) (3d ed. 1986). Judge Frank Easterbook, writing for the Seventh Circuit, agrees. See *Mosler v. SP Enterp.*, 888 F.2d 1138, 1143-44 (7th Cir. 1989):

Because frauds are concealable, trebling is important to produce proper incentives. If perpetrators pay what they took when they get caught, and keep the proceeds the rest of the time, then fraud is profitable. If victims recoup only what they lost, and face the burdens and uncertainties of the legal process plus the costs of their own counsel, then victory will not make them whole, and the shortfall may mean that victims will not vigorously investigate and litigate. Trebling addresses both halves of this equation. . . . [A]nything that makes victims less aggressive in investigating and litigating makes fraud more profitable to its perpetrators.

82. See RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 223 (1976) ("[I]f, because of concealability, the probability of being punished for a particular . . . violation is less than unity, the prospective violator will discount (*i.e.*, multiply) the punishment cost by that probability in determining the expected punishment cost for the violation.").

Transaction costs, too, must be factored into the equation. As Judge Richard Cudahy, writing for the Seventh Circuit, observed in *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 399 n.16 (7th Cir. 1984): "By adding to the settlement value of . . . valid claims in certain cases clearly involving criminal conduct[, multiple damages] may arguably promote more complete satisfaction of plaintiffs' claims without facilitating indefensible windfalls." If the concern is with frivolous litigation, the sanctions for it—frivolously brought or frivolously defended—could be strengthened. Roman law reflected efforts to curtail such litigation. See J. INST., *supra* note 14, at 143:

#### 4.16 PENALTIES FOR OVER-EAGER LITIGANTS

The main checks on the eagerness of plaintiffs and defendants are money penalties, oaths to bind the conscience, and the fear of disgrace. 1. Under our own pronouncement every defendant is put to an oath. He cannot avail himself of his defense unless he first swears that he was brought to deny the claim in the belief that he had good grounds for doing so. Next, in some actions the claim is doubled or tripled if the defendant denies liability. . . . There are also restraints against vexatiousness on the plaintiff's side. Under our pronouncement the plaintiff too must take an oath against abuse of the court's procedure. Another pronouncement obliges the advocates on both sides to take the oath. These provisions replaced the old action for vexatious litigation, which had fallen out of use. It imposed on plaintiffs a penalty of one

that most damages suits under their current treble damage provisions are now settled at close to, although less than, actual damages.<sup>83</sup> Ironically, therefore, authorizing “multiple” damages may be necessary in certain kinds of situations to assure that deserving victims receive “actual” damages.

The point may be well illustrated by turning to an analysis of typical litigation strategy and basic notions of justice.<sup>84</sup> For example, if a person is defrauded for \$100,000, the scale of “justice” would be even if the perpetrator returned the \$100,000 plus “i,” the value of the victim’s money during the period of time the perpetrator deprived him of it. The victim’s recovery ought also to include “c,” that is, any transaction costs or opportunity costs associated with the victim having to sue the perpetrator to obtain the legal redress. Otherwise, the victim would not be made whole and simple justice would not be done.<sup>85</sup> The law, however, does not work that way. “Actual” damages are not “actual,” and they are never worth their face value. The victim’s case is not worth \$100,000 plus “i” plus “c.” In fact, the case will usually fall, roughly, into one of three categories, based on the vicissitudes of litigation not the underlying merits of the plaintiff’s case on liability, causation, and damages: (1) clear winner (85-15), (2) clear loser (15-85), or (3) middle area (50-50) litigation. The clear winner is, therefore, worth \$85,000 minus the cost of litigation, etc. Neither “i” nor “c” may be recovered in the usual case. Typically, therefore, the law does not do “justice”; it does not, in fact, make victims “whole.” Accordingly, talk of “actual” damages makes little legal sense.

Moreover, inequality of wealth must be considered. If the perpetrator possesses more resources than the victim, he can raise the cost of litigation for a risk-averse victim by pursuing a “scorched earth” defense policy.<sup>86</sup> Poor perpe-

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tenth the value of their claim, but we found that this was never exacted. Instead we introduced the oath already mentioned and the rule that a vexatious litigant must pay his opponent’s costs and all the loss caused him by the suit. The beginning of every action is controlled by the part of the praetor’s edict providing for summons to court. ... The praetor there gives an assurance of respect for parents and patrons, and ascendants and descendants of patrons and patronesses. He does not allow their children and freedmen to summon them to court without first seeking and obtaining praetorian permission.

We could learn from history here, too.

83. See STAFF OF HOUSE COMM. ON THE JUDICIARY, 98TH CONG., STUDY OF THE ANTITRUST TREBLE DAMAGE REMEDY 15 (Comm. Print 1984); see also Robert H. Lande, *Are Antitrust “Treble” Damages Really Single Damages?*, 54 OHIO ST. L.J. 115, 118 (1993):

[After comparing] the sum of the damages caused by antitrust violations to the typical amounts awarded to successful plaintiffs to determine, on average, the true effective ratio of recovery to damage, [it shows] that when all the appropriate adjustments are considered together, awarded damages are, at most, probably at the single level. From either a deterrence or compensation perspective, the actual damages awarded in civil antitrust cases are therefore, on average, probably only at most equal to the actual damages caused by the violations. . . . [A]ntitrust damages generally should be substantially higher than singlefold to account for detection problems, proof problems, and risk aversion.

84. See generally ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 477-505 (1988).

85. This equation, of course, does not reflect other functions a damage aware might be designed to meet, that is, for example, a premium to encourage private enforcement.

86. See BROOKING TASK FORCE ON CIVIL JUSTICE REFORM, *JUSTICE FOR ALL: REDUCING THE COSTS AND DELAY IN CIVIL LITIGATION* 6 (1989) (“high costs of litigating . . . give [ ] an unfair advantage to ‘large interests’ . . .”) [hereinafter *JUSTICE FOR ALL*].

trators are not sued for money damages by rational actors bent on collecting their judgments.<sup>87</sup> Poor victims, too, seldom carry insurance against, say, fraud, and they have little opportunity to pool such losses.<sup>88</sup>

The assumption of the law that those who come before it are equal is, therefore, counterfactual; it is at best only formally true. The sad fact is that relatively wealthy perpetrators are usually able to buy the claim of the relatively poor victims at a substantial discount of any figure that approaches "justice."<sup>89</sup> Apparently, most victims are risk averse and willing to settle when they are made close to whole; they do not, in fact, want to litigate for the premium, even when multiple damages are authorized. Edward F. Mannino, a prominent defense attorney and a moving force in the ABA Coordinating Committee on RICO, frankly concedes that few defendants actually pay out in RICO litigation, for example, more than actual damages: "You tend to get closer to the untrebled amount because of the [potential] trebling."<sup>90</sup>

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87. Suit may, of course, be brought for symbolic purposes. *Compare* *People v. Goetz*, 497 N.E. 2d 41 (N.Y. 1986) (Bernard Goetz, the subway vigilante, may be prosecuted for murder); N.Y. TIMES, June 18, 1987, at A6 (Goetz acquitted on all charges except carrying an unlicensed weapon), with Garry Pierre-Pierre, *Red is the Dominant Color on Goetz Balance Sheet*, N.Y. TIMES, May 15, 1996, at A13 (reporting a jury verdict for \$43 million for assault and Goetz's bankruptcy petition listing assets of \$17,312 and debts, including legal bills, of \$60 million).

88. Albeit in another context, Guido Calabresi persuasively argues:

The customary—American—way to sue in torts is one in which the lawyer virtually is not paid if the injured party loses. If the injured party recovers, the lawyer gets a percentage of the recovery. This amount presumably compensates the lawyer not only for the time spent on the winning case, but also that spent on all the losing cases for which he or she got virtually nothing. While this system has been severely attacked, not only by those who are committed partisans of injurers in accident cases but by some scholars as well, it has much to be said for it. It is, essentially, a system of mutual insurance among accident victims. Short of a highly expensive, universal system of legal aid, such a private insurance-type device—though also expensive—is probably as effective as any for giving people access to justice in this kind of civil litigation.

If, however, lawyer's fees are to be recovered from cases won and if such recoveries must compensate the lawyer not just for the time spent on the successful cases but also for the time spent on cases lost, then somehow damages must be allowed in the cases won. Pain and suffering damages, because they have no set definition, and hence can be expanded beyond the requirements of the specific case, have come to serve that function. I do not mean that juries do not consider the actual suffering which a particular injury caused. I mean that victims and juries alike are aware that lawyers will be paid contingent fees and that this fact affects the way they react to the award of pain and suffering damages. So, for that matter, does the law itself. Thus, in virtually all reform proposals which would result in automatic recoveries for victims, pain and suffering damages, as such, have been eliminated. Often, what the reform proposals term "reasonable" lawyer's fees in the particular case are provided for instead. Since the chance of spending time on a losing case would be substantially done away with, the need for the expandable pain and suffering damages to cover that risk also can be abolished.

GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES AND THE LAW: PRIVATE LAW PERSPECTIVE ON A PUBLIC LAW PROBLEM 80-81 (1985).

89. JUSTICE FOR ALL, *supra* note 86, at 5 (noting that victims are "often compelled by high costs and delay to settle when they are made whole and do not want to settle early for less than satisfactory amounts"); *see also Haroco, Inc.*, 747 F.2d at 399 n.16 ("[It is also true that the delays, expenses and uncertainties of litigation often compel plaintiffs to settle completely valid claims for a mere fraction of their value.>").

90. *The Fraudulent Case Against RICO*, CAL. LAW, May 1989, at 51.

Clearly, authorizing multiple damages and attorney's fees changes the litigation equation; it raises, however, the price of settlements *appropriately*, not *inappropriately*. Clear winners will be settled quickly and for more than they would be otherwise. Trial time and other judicial resources will be saved. Clear losers may be worth more than nothing, but because they will always remain high-risk ventures, they seldom will be brought. Middle area litigation is more apt to be brought, and will be worth more, but the issue, in both cases, remains whether a higher settlement is unjust. Susan Getzendanner, a former federal judge who, at one time, had the distinction of having decided more RICO cases than any other single district court judge and now a defense counsel, although favoring the elimination of trebling under RICO, "says that in her tenure on the bench she never saw a settlement she considered unjust—nor a settlement by an innocent party."<sup>91</sup>

Where a multiple damage claim is appended to certain kinds of antisocial conduct, as, for example, in RICO, which deals with systemic patterns of violence, the provision of illegal goods and services, and intentional fraud, that conduct is the kind of conduct that should be unconditionally deterred, that is, the category of conduct prohibited by RICO does not contain, even at the margins, socially desirable conduct.<sup>92</sup> RICO is not, like some aspects of antitrust, a

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91. *Id.* For contrasting views of the economics of civil RICO, compare Paul H. Rubin & Robert Zwirb, *Opinion*, 6 RICO L. REP. 795 (1987), with G. Robert Blakey, *Opinion*, 7 RICO L. REP. 1 (1988).

92. Richard Posner makes the valid point:

[R]eason[s can be offered] for putting a ceiling on criminal punishments such that not all crimes are deterred. If there is a risk either of accidental violation of the criminal law (and there is, for any crime that involves an element of negligence or strict liability) or of legal error, a savage penalty will induce people to forgo socially desirable activities at the borderline of criminal activity. . . . True, if the category of criminal acts is limited through the concept of intentionality and through defenses such as necessity to cases where . . . the risk of either accident or error will be slight and the legal system can feel freer in setting heavy penalties. But not totally free; if the consequences of error are sufficiently enormous, even a very slight risk of error will generate avoidance measures that may be socially very costly. . . .

The obvious point [is] that criminal penalties are not costless. And since they are not costless, the potential criminal's responsiveness to them becomes critical to the determination of optimal severity.

POSNER, *supra* note 7, at 224-25.

The civil enforcement mechanism of RICO provides for injunctions, treble damages, and counsel fees. See 18 U.S.C. § 1964 (1994). Circuit court decisions are in conflict on the availability of private equity relief under RICO. See generally G. Robert Blakey & Scott D. Cessar, *Equitable Relief Under Civil RICO*, 62 NOTRE DAME L. REV. 526 (1987). Such equity relief should be available; it may be available under supplementary claims for relief. See, e.g., *Hoxworth v. Blinder Robinson & Co., Inc.*, 903 F.2d 186, 194-95 nn.13 & 14 (3d Cir. 1990).

The civil enforcement provisions of RICO were modeled on, but are not identical to, the antitrust laws. See S. REP. NO. 617 at 81 (1969); H.R. REP. NO. 1549, at 56-60 (1970). The antitrust laws have been aptly termed "the Magna Charta of free enterprise." *United States v. Toipco Assoc., Inc.*, 40-5 U.S. 596, 610 (1972). The antitrust laws "are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." A private "treble-damages remedy is needed precisely for the purpose of encouraging private challenges to antitrust violations." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) (emphasis in original). Such "private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws." *Minnesota Mining and Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 317 (1965). Private suits "provide a significant supplement to the limited resources available to the

“regulatory offense.” It does not include strict liability, as RICO and its predicate offenses are all fault-based.<sup>93</sup> Society has a general stake in seeing that this

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Department of Justice” to enforce the antitrust statutes. *Reiter*, 442 U.S. at 344. In fact, between 1960 and 1980, of the 22,585 civil and criminal cases brought under the antitrust provision by the government or private parties, 84% were instituted by private plaintiffs. See UNITED STATES DEP’T OF JUSTICE, U.S. DEPARTMENT OF JUSTICE SOURCE BOOK OF CRIMINAL JUSTICE STATISTICS 431 (1981). Like the antitrust laws, RICO creates “a private enforcement mechanism that . . . deter[s] violators and provide[s] ample compensation to the victims.” *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472 (1982); see also *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 151 (1987) (RICO) (“private attorneys general [for] a serious national problem for which public prosecutorial resources are deemed inadequate”); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 241 (1986) (“vigorous incentives for plaintiffs to pursue RICO claims”); *Sedima, S.P.R.L. v. Imrex Co. Inc.*, 473 U.S. 479, 493 (1985) (RICO) (“private attorney general provision . . . designed to fill prosecutive gaps” (citing *Reiter*, 442 U.S. at 344)). In fact, RICO and the antitrust statutes are well integrated. “There are three possible kinds of force which a firm can resort to: violence (or threat of it), deception, or market power.” CARL KAYSSEN & DONALD F. TURNER, ANTITRUST POLICY 17 (1959). RICO focuses on the first two; antitrust focuses on the third. See *American C & L Co. v. United States*, 257 U.S. 377, 414 (1921) (Brandeis, J., dissenting) (“Restraint may be exerted through force or fraud or agreement.”) See generally Note, *Treble Damages Under RICO: Characterization and Computation*, 61 NOTRE DAME L. REV. 526, 533-34 (1986) (treble damages are well designed to: “(1) encourage private citizens to bring RICO actions, (2) deter future violators, and (3) compensate victims for all accumulative harm. These multiple and convergent purposes make the treble damage provision a powerful mechanism in the effort to indicate the interests of those victimized by crime.”).

93. RICO itself neither sets out a state of mind requirement nor differentiates between its elements on the issue of state of mind. See generally William Kolen, *RICO and State of Mind*, 1 MATERIALS ON RICO 1286 (Cornell Institute on Organized Crime, G. Blakey ed. 1980); U.S. Department of Justice, *Racketeer Influenced and Corrupt Organizations (RICO): A Manual For Federal Prosecutors* 173-74 (1990). The lack of an express state of mind element led *United States v. Scotto*, 641 F.2d 47, 55-56 (2d Cir. 1980) (citing *United States v. Boylan*, 620 F.2d 359, 361-62 (2d Cir.)) to conclude that a showing of a state of mind on the RICO peculiar elements (e.g., “enterprise,” “pattern,” etc.) was not required. See also *United States v. Pepe*, 747 F.2d 632, 675-76 (11th Cir. 1984). The *Scotto-Boylan* line of decisions ought not be followed. See *United States v. Bledsoe*, 674 F.2d 647, 664-661 (8th Cir. 1982) (“grave doubts as to the propriety of these holdings”). But see *United States v. Baker*, 63 F.3d 1478, 1491-93 (9th Cir. 1995) (knowledge of law not required; *Scotto* followed). The correct approach is reflected in *United States v. Elliott*, 571 F.2d 880, 906-07 (5th Cir. 1978) (knowledge required), and *United States v. Diecidue*, 603 F.2d 535, 553-55 (5th Cir. 1979) (same). The *Scotto-Boylan* line of decisions, too, can not be squared with the recent teaching of the Supreme Court on state of mind. Congress drafts legislation against a common law background. See *United States v. X-Citement Video, Inc.*, 115 S. Ct. 464, 468 (1994); *Staples v. United States*, 114 S. Ct. 1793, 1799 (1994). Each element of an offense must be considered separately. See *X-Citement Video, Inc.*, 115 S. Ct. at 469; *United States v. Bailey*, 444 U.S. 394, 405-06 (1980). Strict liability is the exception, and silence is not enough to infer that congress intended strict liability. See *Staples*, 114 S. Ct. at 179; *X-Citement Video, Inc.*, 115 S. Ct. at 468; *Posters ‘N’ Things Ltd. v. United States*, 114 S. Ct. 1747, 1753 (1994). The general rule is knowledge is required on conduct, see *Posters ‘N’ Things, Ltd.*, 114 S. Ct. at 1753; *Bailey*, 444 U.S. at 408, as well as factual, see *Staples*, 114 S. Ct. at 1804 (character of gun as automatic weapon) and, in appropriate circumstances, legal, *United States v. O’Hagan*, 117 S. Ct. 2199, 2213 (1997) (“willful” violation of 1934 securities act); *Ratzlaf v. United States*, 114 S. Ct. 655, 659-63 (1994) (“willful” character of structuring of financial transaction act as unlawful); *Liparata v. United States*, 471 U.S. 419, 425 (1985) (“knowing” character of use of food stamps as unlawful), surrounding circumstances. Regulatory, see *Staples* 114 S. Ct. at 1797-98, and child sex, see *X-Citement Video, Inc.*, 115 S. Ct. at 469 n.2, offenses are exceptions, where strict liability is the norm on aspects of the offense, as are elements that play a grading or a jurisdiction role only. See *id.* (citing *United States v. Feola*, 420 U.S. 671 (1975)). The First Amendment, however, may require knowledge of the sexually explicit character of materials, though not that the materials themselves are legally obscene. See *X-Citement Video, Inc.*, 115 S. Ct. at 469 n.2 (citing *Smith v. California*, 361 U.S. 147, 152 (1959)). Accordingly, only RICO’s commerce elements ought to be held to be strict. See generally G. Robert Blakey & Kevin P. Roddy, *Reflections on Reves v. Ernst & Young*, 33 AM. CRIM. L. REV. 1617-26, app.D (1996) (state of mind).

sort of illicit conduct is sanctioned. From an economic point of view, that it is sanctioned in private civil litigation rather than criminal prosecutions is a detail.<sup>94</sup> Accordingly, private litigation, like RICO, that is vindicated through a multiple damage mechanism plays an important public law function. The private enforcement system that so many commentators so vociferously decry is, therefore, enforcement in the public interest.<sup>95</sup>

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RICO's predicate offenses must be "chargeable under state law," "indictable" under federal law, or "an offense" under federal law. 18 U.S.C. § 1961(1)(A)(B) (1994). That they reflect a state of mind is not seriously in question.

94. Litigation—criminal or civil—itself is not to be deplored, as the Supreme Court itself recognized in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 643 (1985):

Over the course of centuries, our society has settled upon civil litigation as a means for redressing grievances, resolving disputes, and vindicating rights when other means fail . . . . That our citizens have access to their civil courts, is not an evil to be regretted; rather it is an attribute of our system of justice in which we ought take pride.

95. See generally Marc Galanter, *Reading the legal Landscape of Disputes: What We Know and Don't Know (and Think We know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 62 (1983). Compare TORT POLICY WORKING GROUP, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATION OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY (1986) (finding that product liability cases in federal courts present a crisis and that the causes of this crisis include the movement toward no fault liability, the imposition of liability on others than who caused injury, the large size of jury awards, and excessive litigation costs), with GEN. ACCOUNTING OFFICE, PRODUCT LIABILITY: EXTENT OF "LITIGATION EXPLOSION" IN FEDERAL COURTS QUESTIONED (1988). The GAO publication found that the causes of the explosion are not legal. One product, asbestos, accounts for 60% of the growth from 1976-1986 and 75% of the growth since 1981. The growth unrelated to asbestos is, therefore, neither accelerating nor explosive.

Determining whether society is excessively litigious is complex and requires more information than the number of suits filed. The number of filings alone does not speak to equitable outcomes, deterring wrongdoing, or the effect of reforms on the current system. See *id.* at 1-3; see also Stephen Labaton, *Business and the Law: Product Liability's "Quiet Revolution"*, N.Y. TIMES, Nov. 27, 1989, at D2 (reporting that a General Accounting Office study concludes damage awards are "neither erratic nor excessive, but in general are consistent with the kind of injury suffered").

Additionally, more may be involved in the "litigation explosion crisis" than facts. For a disturbing, but enlightening analysis of the crisis, see Nancy Levit, *The Caseload Conundrum, Constitutional Restraint and the Manipulation of Jurisdiction*, 64 NOTRE DAME L. REV. 321-22 (1989), stating that:

Federal docket-clearing practices are eliminating the possibility of substantive relief and the protection of a federal forum for a spectrum of politically under represented and powerless classes. Equally important, this manipulation of jurisdiction is unprincipled and inconsistent. While conservative judges urge judicial restraint, they often practice selective activism. At times caseload concerns seem paramount to federal courts, while at other times courts ignore the access-expansive effects of their decisions.

But see Kim Murphy, *Law's Use Held Out of Control*, L.A. TIMES, Apr. 17, 1989, at A1 (reporting that most judges, including Chief Justice William Rehnquist, express concern that RICO may "jam the federal court with cases that more properly belong as simple contract disputes in state courts") (Judge Pamela Ann Rymer: "I don't think we'd even bat an eyelash if they come in and said the defendant did this act of extortion and then went out and killed somebody. That's real RICO. It's when they come in and say, somebody tried to defraud me and called up (on the telephone) two or three times, that's what gets a lot of judges upset.").

Here, too, a bit of history is enlightening. When the Sherman Act was passed in 1890, it was frustrated in the courts. 16 J. VON KALINOWSKI, BUSINESS ORGANIZATIONS: ANTITRUST LAW AND TRADE REGULATIONS § 203[1] (1983) ("The federal judiciary in 1890 was so instilled with the laissez-faire or social Darwinist theories then prevalent that they failed to see that the Sherman Act . . . could encourage a business climate closer to the model they desired."). Many judges, for example, considered its treble damage and attorney fee provisions an invitation to "racketeering." See, e.g., *Milwaukee Towne Corp. v. Loews, Inc.*, 190 F.2d 561, 570 (7th Cir. 1951) (attorney fees). Advances were

made in the 1940s and 1950s, but it was not until the Warren Court era that key decisions of the Supreme Court brought the private enforcement mechanism into its own. *See, e.g.,* *Klors, Inc. v. Broadway Hale Stores, Inc.*, 359 U.S. 207, 211 (1959) (no “public injury” limitation). Those “key decisions” are, however, still not rendered under RICO by the present Supreme Court. In fact, the lower courts, more recently uninhibited by the Supreme Court, are reading an “organized crime” limitation into the statute by excluding “white collar” crime despite the manifest intention of Congress (the issue was fully debated in the Senate and House) and the Supreme Court’s earlier decisions in *Sedima SPRL v. Imrex Co. Inc.*, 473 U.S. 479, 499 (1985) (“any person” not limited to “mobsters”) and *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 244 (1988) (not limited to organized crime; legislative history reviewed in detail). *See* Michael Goldsmith, *Judicial Immunity For White Collar Crime*, 30 HARV. J. LEG. 1, 22-38 (1992); *see, e.g.,* Emery v. American Gen. Finance Inc. et al., 1998 U.S. App. Lexis 1112, at \*5 (7th Cir. Jan. 27, 1998) (Posner, C.J.) (expansive reading of enterprise-person rule to preclude corporate liability, relying on *Fitzgerald v. Chrysler*, 116 F.3d 225, 227 (7th Cir. 1997) (Posner C.J.)). Posner reads *one* purpose of RICO (to attack gangs, *see, e.g.,* *United States v. Turkette*, 452 U.S. 576, 590-91 (1981) (illicit enterprises within statute)), as if it were the *only* purpose, that is, pure white collar crime, without the presence of a “gang,” is not within the statute. That narrowing of the plain meaning of the statute as well as its legislative history cannot be justified as “interpretation”; it is, in short, illicit “legislation.” Cicero put it aptly:

[L]aw is the bond which secures these our privileges in the commonwealth, the foundation of our liberty, the fountain-head of justice. Within the law are reposed the mind and heart, the judgement and the conviction of the state. The state without law would be like the human body without mind—unable to employ the parts which are to it as sinews, blood, and limbs. The magistrates who administer the law, the jurors who interpret it—all of us in short—obey the law to the end that we may be free.

LII CICERO, IN DEFENSE OF CLUENTIS 146 (H. Grose Hodge trans., 1927). More than 100 years ago, too, the Supreme Court noted that “[i]t is easy, by very ingenious and astute construction, to evade the force of almost any statute, where a court is so disposed. . . . [By] such a construction [it is possible to] annul [the statute] and [render] it superfluous and useless.” *Pillow v. Roberts*, 54 U.S. (13 How.) 472, 476 (1851) (Grier, J.). Roscoe Pound concluded that such “ingenious and astute” constructions (1) “tend[ed] to bring law into disrespect; (2) . . . subject[ed] the courts to political pressure.” POUND, *supra* note 12, at 488. It also “(3) invite[d] an arbitrary personal element in judicial administration.” *Id.* It threatened, he found, to make “laws . . . worth little” and to “break down” the “legal order” itself. *Id.* at 490. Posner, however, preaches, not “personal” interpretations, but “imaginative reconstruction.” POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 287 (1983) (“how would [the] legislators have wanted the statute applied to the case before him”). He does not, therefore, practice what he preaches. As Pound did, Hand argues that legislation rests on compromises and that such interpretations threaten our democratic system. *See* Learned Hand, *The Contribution of an Independent Judiciary to Civilization*, in *SPIRIT OF LIBERTY* 79-85 (Dilliard ed. 1959) (“That is the presupposition upon which the compromises were originally accepted; to disturb them by surreptitious, irresponsible and anonymous intervention (to make them broader or narrower than the legislators drafted them) imperils the possibility of any future settlements and *pro tanto* upsets the whole system.”). Each such interpretation, moreover, tends to reproduce itself, not only by right wing judges, but also by left wing judges. The threat to our democracy from either perspective is substantial. *See* MICHAEL STOLLEIS, *THE LAW UNDER THE SWASTIKA* 15 (1998) (arguing that contrary to myth, conservative judges in Germany under the Weimar Republic undermined formal law just as much as Nazi judges during the National Socialist’s period did from their perspective; neither followed the law). Stolleis states:

Disregard of original legislative intent by ideologically guided judges became far more significant in the everyday legal life of National Socialism than injustice directly commanded by the lawmaker. And that is why the thesis disseminated in the 1950s—that the judiciary, because of its positivist orientation, had been helpless in the face of a legislator liberated from all constraints—contained only part of the truth, and why as a sweeping explanation it is downright misleading. Already during the Weimar Republic, wide segments of the judiciary had chosen to oppose the democratically legitimized legislative body. That is why the Nazis’ call to “overcome narrow normatism” (sic) through legal interpretation—using the slogans “concrete thinking about order and organization,” “will of the Fuhrer,” “needs of the Volk community,” “common weal,” “loyalty and faith,” “immorality,” or “healthy popular sentiment”—no longer posed any problems of method.

## V

## CONCLUSION

History and economic analysis show that monetary awards of varying amounts, including “nominal” awards, in civil litigation serve a variety of purposes, none of which is necessarily mutually exclusive. They compensate for losses, “actual” insofar as they can be measured by a particular standard, and whether set beforehand (liquidated), or added afterwards, for difficult to measure or prove losses (accumulative). Awards, too, may compensate for “insult” or “outrage” to the victim (added or accumulative) and, on the flip side of the coin, to take the due measure of the perpetrator’s malice (punitive).<sup>96</sup> Such awards may also compensate for transaction costs (attorney fees and costs) as well as opportunity costs (multiple damages), and they award the plaintiff a premium for engaging in litigation in the public interest (multiple damages). Finally, depending on the amount of the award, they serve, in varying degrees, as a deterrent to wrongful conduct by the wrongdoer (actual, multiple, and punitive). Such awards may serve, therefore, the ends of economic efficiency *and* justice to varying degrees.<sup>97</sup> Those who make the law in courts or in legisla-

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*Id.*

96. The two sides of the “coin” are not entirely symmetrical. Multiple damages are *only* multiple damages; they must be a multiple of the victim’s loss. Punitive damages are not, at least in principle, so limited, though they cannot, consistent with the due process clause, be “grossly excessive,” *see* *BMW of N. America v. Gore*, 517 U.S. 559, 575 (1996), and they must be subject to judicial review, *see* *Honda Motor Co. Ltd., v. Oberg*, 512 U.S. 415, 418 (1994). Unlike punitive damages, multiple damage awards are also typically mandatory, not discretionary. *Compare* *Locklin v. Day-Glo Color Corp.*, 429 F.2d 873, 878 (7th Cir. 1970) (antitrust treble: mandatory), *with* *Travelers Indemnity Co. v. Armstrong*, 442 N.E. 2d 349, 362 (Ind. 1982) (punitive: discretionary). Multiple damages awards also typically relate only to the damage done to the victim, not to the conduct or the wealth of the defendant. *See, e.g.*, *Smith v. Milikin*, 276 S.E.2d 35, 37-38 (Ga. 1981) (purpose of exemplary damage award regulates amount; for compensation, it must bear relation to injury; for deterrence, it must be sufficient to deter future acts); *Shahrokhfar v. State Farm Mut. Auto. Ins. Co.*, 634 P.2d 653, 658-59 (Mont. 1981) (punitive damages may not be reduced by comparative negligence, since their purpose is to punish, not compensate). Indeed, actual damages may not always be a prerequisite to an award of punitive damages, *see* *Anderson v. United Finance Co.*, 666 F.2d 1274, 1278 (9th Cir. 1982) (Equal Credit Opportunity Act), and multiple damages and punitive damages may both be awarded, *see, e.g.*, *Neibel v. Trans World Assurance Co.*, 108 F.3d 1123, 1130 (9th Cir. 1997) (under federal RICO and state law); *Banderas v. Banco Central del Ecuador*, 461 So. 2d 265 (Fla. Dist. Ct. App. 1985) (under state RICO); *see also* *Contra, Fineman v. Armstrong World Indus.*, 980 F.2d 171, 218 (3d Cir. 1992) (not under federal antitrust and state law for same “course of conduct”).

97. A final point must be made about economic analysis and its central concepts, including the “rational actor” and the “market.” In fact, the “market” is made, not found, and the “rational actor” participates in the “market” in various fashions, not all of which reflect equal, or even relatively equal market power. NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 105-06 (1995) (citations omitted) makes the valid point:

Supreme Court decisions such as *Lochner v. New York* and *Coppage v. Kansas* [earlier] had the effect of legitimizing “the fiction of the so-called labour contract as a free bargain, when not only is there actually little freedom to bargain on the part of the steel worker or miner who needs a job, but in some cases the medieval subject had as much power to bargain when he accepted the sovereignty of his lord.” There is, in fact, no real bargaining between the modern large employer . . . and its individual employees. The working-man has no real power to negotiate or confer with the corporation as to the terms under which he will agree to work.

He either decides to work under the conditions and schedule of wages fixed by the employer or else he is out of a job. ...

For all that it had been cherished by the Supreme Court, the free market . . . [is] not a natural phenomenon, guided by the invisible hand of natural selection; rather it . . . [is] a social construct, an ideology. Economic freedom—the freedom to choose—conceals economic duress; coercion is an integral feature of the free market. The advent of [legal] realism marked the demise—if only temporary—of a pervasive legal-economic myth: the myth, that is, of unimpeded voluntary action, of the free economic agent situated in a realm of pure choice and motivated by competitive Darwinist instinct. By the late 1930s and 1940s, as the Supreme Court—beginning with *West Coast Hotel Co. v. Parrish*—gradually outgrew the formalism of *Lochner* and *Coppage*, . . . lawyers began to wonder how any court could ever have taken seriously the late nineteenth-century liberty of contract model.

If human beings make the “market”—it is not a “real” entity—then they have a duty to make it consistent with basic notions of justice. Aristotle distinguishes between various kinds of justice, that is, distributive justice (assembly to citizen) and rectificatory and exchange justice (involuntary and voluntary between citizens). See 5 ARISTOTLE, NICOMACHEAN ETHICS 1129a-1134b. He ought to have recognized another: social justice. We are not merely “rational actors” seeking to “maximize self interest.” We are also members of a human community in which others are also members. We share, therefore, a “common interest.” Each of us possesses—and ought to recognize—a duty to work to achieve social justice in our society through each of its manmade institutions, including “markets,” “legislatures,” and “courts.” Traditionally, an exhortation to social justice could be put in terms of the Judeo-Christian heritage. See *Amos 2:6-16* (“Thus say the Lord: . . . [t]hey sell the just man for silver, and the poor man for a pair of sandals. They trample the heads of the weak into the dirt of the earth, and force the lowly out of the way. . . . Beware, I will crush you into the ground as a wagon crushes when loaded with sheaves . . . and the most stouthearted of warriors shall flee naked on that day, says the Lord.”); *James 5:1-4* (“Come now, you rich, weep and wail over your impending miseries. Your wealth has rotted away, your clothes have become moth-eaten, your gold and silver have corroded, and that corrosion will be a testimony against you; it will devour your flesh like a fire. You have stored up treasure for the last days. Behold, the wages you withheld from the workers who harvested your fields are crying aloud, and the cries of the harvesters have reached the ears of the Lord of Hosts.”). It ought now at least to be made as a matter of enlightened self-interest. That it will is doubtful. The Enlightenment, of course, sought to distinguish between public (science) and private (religion or, more properly, “superstition”) judgments. See generally ALASDAIR MACINTYRE, THREE RIVAL VERSIONS OF MORAL ENQUIRY: ENCYCLOPEDIA, GENEALOGY AND TRADITION (1990). That distinction is, most post modern thinkers would argue, now thoroughly “deconstructed.” See, e.g., FRIEDERICH NIETZSCHE, BEYOND GOOD & EVIL: PRELUDE TO A PHILOSOPHY OF THE FUTURE 85 (Vintage 1989) (“There are no moral phenomena at all, but only a moral interpretation of phenomena.”). If nothing has value, everything possesses at least equal value; a religious exhortation is, therefore, as valuable as any other, scientific included. More insights—religious or ethical—could, of course, give us better insight, that is, perspective, even if it were subjective and relative. Post modern thinkers have no ground, therefore, to reject any insight. Nevertheless, Hans Kung aptly describes the post modern world:

In the second half of the twentieth century, [Nietzsche’s new man, rooted in the will to power] has become only too well known: men without God, whose relationships with one another are concretized even into the private sphere, determined by functional and practical values, guided by power interests, the weak everywhere being the victim of the stronger, superior, less scrupulous. The horizon of meaning is in fact effaced, there are no longer any supreme values, reliable guiding principles, absolute truth. In practice, does this not mean that a nihilism of values is determining human behavior? Has that not come to pass which Nietzsche foresaw—more clear-sightedly than many before him? But it is often a mild, concealed, unemotional nihilism, without the passion of a Zarathustra but no less dangerous. Many today are distrustful toward a loud, public nihilism, and no politician, anyway, could afford to indulge in it. But people permit themselves a mild, private nihilism, often guilelessly, innocently, perceiving the consequences only at a very late stage. For, after so many taboos were broken in the war years and subsequently, so many traditions disappeared, conventions were dropped, humanism emptied of meaning, despite all the prosperity and better education, in many families parents no longer know to which values, guiding principles, ideals, norms, to which truth, they should cling and to which they should educate their children: devaluation (often without any revaluation) of values, the loss of which can then be noted, but can be can-

tures, at the state level or at the national level, need to give due attention to *all* aspects of monetary awards, as they are now in the law.

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celed only with difficulty. In education, culture, economy, science, politics, “an incomplete nihilism” lived in a middle- or upper-class style, feeble and only half affirmed: “we live in the midst of it.”

Sometimes, however, more is involved. Nihilism presents many faces, from bored, intellectual skepticism to brutal political anarchism. Undoubtedly it is not only because of a whole packet of social factors but in the last resort also because of a nihilistic lack of orientation and lack of norms, that there has been an alarming increase in the number of thefts, robberies, crimes of violence, murders, by children, young people, students (more and more of them female), that the number of drug addicts, dropouts, suicides has risen tremendously in the past decade, that susceptibility to ideologies has often amounted to mania. The “meaning deficit” and “meaning vacuum” in the Western affluent society, for a long time now, has not only provided the middle classes with intellectual titillation in the “theater of the absurd” of an Ionesco or a Beckett, has not only been diagnosed and deplored by psychotherapists and psychiatrists; it is beginning to be a political fact.

HANS KUNG, DOES GOD EXIST? AN ANSWER FOR TODAY 411 (1980).

The prospect for change in viewpoint is not bright. We only need to look to Washington, D.C., where “truth” is a question of what helps us “cope.” See RICHARD RORTY, CONSEQUENCES OF PRAGMATISM xvi-iii (1982). That perspective also obtained in other countries—with horrific results. See JOHN LUKAS, THE HITLER OF HISTORY 115 (1997) (Hitler: “There can be only one dogma, in brief, what is useful is right.”)