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WHAT'S ALL THE RACKET?: THE USE OF RICO DISGORGEMENT, THE CIRCUIT SPLIT IT CAUSED, AND ITS IMPROPRIETY

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INTRODUCTION

The news is constantly saturated with reports of corporate fraud and the damage each instance leaves in its wake. Since the recent large scandals of Enron, Tyco, and WorldCom, among others, the federal government, in a desperate effort to gain control, has employed several innovative methods of fighting such corporate misconduct.[1] Some of these strategies have included new federal legislation, criminal sanctions for corporate board members, and various other prosecutorial statutes.[2] As

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1 For an overview of the various measures employed by the federal government in the wake of Enron, WorldCom, Tyco, and other major corporate financial scandals, see John Paul Lucci, *Enron – The Bankruptcy Heard Around the World and the International Ricochet of Sarbanes-Oxley*, 67 ALB. L. REV. 211, 212–18 (2003). The actions of Enron, WorldCom, Qwest Global Crossing, and Tyco cost shareholders a total of $460 billion dollars. Such tremendous loss led Congress and the Securities and Exchange Commission ("SEC") to promulgate several new rules and regulations to keep a tighter leash on America's corporations. One such reactionary rule required the chief executive officers of the 947 largest American corporations to certify their financial statements. *See* Paul Beckett, *Executives Face Harsh Sanctions in Corporate-Governance Law*, WALL ST. J., July 31, 2002, at C7. In addition, Congress enacted the Sarbanes-Oxley Act of 2002 (Pub. L. No. 107–204, 116 Stat. 745 (2002) ("Sarbanes-Oxley"), in an effort to further control America's financial giants. *See* David Kaplan, *Landmark Act Imposes Controversial Measures on Accounting Industry*, 4 LAW. J. 7, 7 (2002). Sarbanes-Oxley ushered in many new recordkeeping requirements, and was "primarily designed to restore financial confidence in American securities markets." Lucci, *supra* at 216.

2 *See, e.g.*, 18 U.S.C. § 1350(c) (2003) Failure of Corporate Officers to Certify Financial Reports:

(c) Criminal Penalties. Whoever —

(1) certifies any statement as set forth in subsections (a) and (b) of this section knowing that the periodic report accompanying the statement does not comport with all the requirements set forth in this section shall be fined not more than $ 1,000,000 or imprisoned not more than 10 years, or both; or

(2) willfully certifies any statement as set forth in subsections (a) and (b) of this section

each method has its own unique limitations, the federal government has turned to an older statute, the Racketeer Influenced Corrupt Organizations Act ("RICO").[3] Specifically the government has employed RICO's seldom used civil provision.[4] Controversially, the government has attempted to disgorge corporate profits using this civil provision.

RICO disgorgement has been met with varying responses. Most recently, a split among the federal circuits has occurred, which the Supreme Court has since denied certiorari.[5] Thus, an interesting divide remains regarding the use of this unique legislation. The split is specifically between the Second Circuit and the D.C. Circuit with *United States v. Carson*[6] and *United States v. Philip Morris*[7] respectively. This split has raised questions regarding its legality and its usefulness. Due to the bitter divide with no apparent mediating entity, this note will examine the jurisprudential, practical, and policy uses of the

knowing that the periodic report accompanying the statement does not comport with all the requirements set forth in this section shall be fined not more than $ 5,000,000, or imprisoned not more than 20 years, or both.

Indeed, under Sarbanes-Oxley, the knowing falsification of corporate records subjects executives to "fines of as much as $5 million or as many as 20 years in prison, or both." Beckett, *supra* note 1, at C7.

3 18 U.S.C. §§ 1961–1968 (1970).

4 *See* 18 U.S.C. § 1964(c):

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter [18 USCS § 1962] may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962 [18 USCS § 1962]. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

This section "allows civil claims to be brought by any person injured in their business or property by reason of a RICO violation." A person who successfully establishes a civil RICO claim will automatically receive judgment "in the amount of three times their actual damages and would be awarded their costs and attorneys' fees." Jeff Grell, *Rico Act*, http://www.ricoact.com (last visited February 11, 2007).

5 The Supreme Court denied certiorari. 126 S.Ct. 478 (2005). In *United States v. Carson*, the Court of Appeals for the Second Circuit interpreted the language of 18 United States Code ("U.S.C.") section 1964(a) to limit disgorgement to cases where there was a finding "that the gains [were] being used to fund or promote the illegal conduct, or constitute capital available for that purpose." 52 F.3d 1173, 1182 (2d Cir. 1995). However, in *United States v. Philip Morris*, the Court of Appeals for the District of Columbia refused to follow that conclusion, finding that there was "no justification for considering any order of disgorgement to be forward-looking as required by Section 1964(a)." 396 F.3d 1190, 1201 (D.C. Cir. 2005).

6 52 F.3d 1173.

7 396 F.3d 1190.

provision. Ultimately, this note will conclude that disgorgement by the government under the civil provision of RICO is improper.

A. Background, RICO

RICO was enacted under Title IX of the Organized Crime Act of 1970.[8] This legislation was the conclusory result of an effort to penetrate criminal organizations that had plagued the United States for many years.[9] Many of these organizations, most notably the "Mafia," (specifically "La Cosa Nostra"), were able to evade authorities because of their complex and non-conventional operations.[10] Furthermore, there was concern that these criminal organizations had infiltrated the high ranks of legitimate associations such as labor unions.[11] In response, committees to investigate these operations and ways to penetrate them were established as far back as the 1950s in both the House of Representatives and the Senate.[12]

[8] 18 U.S.C. §§ 1961–1968 (1970). For a detailed history of RICO's enactment and its difficulties in becoming federal law, see Brian Slocum, *RICO and the Legislative Supremacy Approach to Federal Criminal Lawmaking*, 31 LOY. U. CHI. L.J. 639, 639–46 (2000).

[9] Introducing RICO, Senator John L. McClellan, then-Chairman of the Criminal Law and Procedures Subcommittee of the Senate Judiciary Committee, stated that "Title IX of this act is designed to remove the influence of organized crime from legitimate business by attacking its property interests and by removing its members from control of legitimate businesses which have been acquired or operated by unlawful racketeering methods." *See* 116 CONG. REC. 591, 602 (1970). The controversy over RICO derives, in part, "from those who view RICO's legislative history as indicating a more limited purpose for RICO than has occurred." Slocum, *supra* note 8, at 646–48.

[10] *See* G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 249–54 (1982) (examining proliferation of organized crime in 1960s and 1970s and various efforts of U.S. Senate and Department of Justice to move against racketeer infiltration of labor unions, government, and business); *see also* Deborah A. Ramirez et al., *Defining Racial Profiling in a Post-September 11 World*, 40 AM. CRIM. L. REV. 1195, 1227 n.114 (2003) (noting "La Cosa Nostra is an organization of Italian families who work together in ongoing criminal enterprises such as gambling, murder for hire, drug trafficking, and extortion.").

[11] *See* Nicholas Berg & Christopher Kelly, *Racketeer Influenced and Corrupt Organizations*, 41 AM. CRIM. L. REV. 1027, 1074 (2004) (noting "Congress originally intended for RICO to be used by the government to combat the infiltration of organized crime into labor unions"); *see also* Blakey, *supra* note 10, at 251–53 (stressing Department of Justice's special concern with corruption of labor unions).

[12] *See* Blakey, *supra* note 10, at 249.

In 1951, the Special Committee to Investigate Organized Crime in Interstate Commerce disclosed that there was an ongoing problem of organized crime infiltrating legitimate business, state, and local government. In response to a request by the Chairman of the Special Committee, Senator Estes Kefauver, the American Bar Association ("ABA") established the ABA Commission on Organized Crime. In addition, the problem of criminal infiltration into labor unions was fully documented over the next decade by the

The RICO section of the Organized Crime Act involves both a criminal and civil portion. The criminal portion[13] requires proof of an "enterprise" engaging in two separate predicate acts defined under the statute.[14] Generally, this was a more elastic standard than previously demanded for prosecution under rigid criminal statutes.[15] Among its language, in response, the statute itself called for a liberal construal.[16]

Senate Select Committee on Improper Activities in the Labor or Management Field (the McClellan Committee). By 1960, the McClellan Committee had revealed the corruption of labor unions by criminal elements.

See Basil J. Musnuff, Note, *Concurrent Jurisdiction over Civil Rico Claims*, 73 CORNELL L. REV. 1047, 1062 (1988). It was also able to later expose the Mafia's (La Cosa Nostra's) national structure.

13 *See* 18 U.S.C. § 1962 (2006). The criminal portion of the RICO section of the Organized Crime Act provides:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

14 *See* 18 U.S.C. § 1961(5) (2006) (stating, "'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity"); *see also* Slocum, *supra* note 8, at 642 (noting how under RICO "'pattern of racketeering activity' is established when the accused commits at least two acts of racketeering activity within ten years of one another").

15 *See* Carole Golinski, *Recent Decisions: In Protest of NOW v. Scheidler*, 46 ALA. L. REV. 163, 169 (1994) (discussing use of "broad and unambiguous language of the RICO statute"); *see also* Slocum, *supra* note 8, at 644–45 (noting broad nature of terms in RICO statutes).

16 *See* Organized Crime Control Act of 1970, Pub. L. No. 91–452, 84 Stat. 923 (1970) (exclaiming intention for liberal construal of RICO statute); *see also* Slocum, *supra* note 8, at 645 (commenting on liberal construction clause Congress inserted into RICO statutory

In addition to the criminal provisions, RICO provides for civil recourse, including prosecutorial remedies,[17] both through the Attorney General on behalf of the public,[18] as well as personal remedies.[19] This section of the act has been the troublesome portion. Specifically, the contention arises within the government's prosecutorial role in the civil section of RICO.[20] The government has seldom used this provision to combat legitimate organizations, especially for disgorgement purposes.[21] It has, however, increasingly begun to use it with hopes for effectiveness in fighting corporate fraud.[22] This utilization prompted the circuit split being examined by this note.

B. The Split

Though not the only cases where the government attempted to

scheme).

17 RICO statute's civil provisions vest district courts with authority to offer civil remedies:

The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter [18 USCS § 1962] by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

18 U.S.C. § 1964(a) (2006).

18 *See* 18 U.S.C. § 1964(b) (2006) (stating "[The] Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper").

19 *See* 18 U.S.C. § 1964(c) (2006) (providing "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter [18 USCS § 1962] may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee").

20 *See* U.S. v. Philip Morris, 396 F.3d 1190, 1215 (D.C. Cir. 2005) (Tatel, J., Dissenting) (arguing that under 18 U.S.C. § 1964 "district courts may impose any equitable remedy for RICO violations"); *see also* U.S. v. Carson, 52 F.3d 1173, 1181–82 (2d Cir. 1995) (interpreting language of 18 U.S.C. § 1964 "to prevent and restrain violations of section 1962").

21 *See* Teresa Bryan et al., *Racketeering Influenced and Corrupt Organizations*, 40 AM. CRIM. L. REV. 987, 1035–36 (2003) (noting government traditionally used civil RICO provision to keep corruption out of legitimate organizations such as labor unions, more recently though, it has used civil RICO against general practices of legitimate organizations); *see also* Raymond P. Green, *The Application of RICO to Labor-Management and Employment Disputes*, 7 ST. THOMAS L. REV. 309, 312–25 (1995) (describing RICO prosecutions involving labor officials and unions).

22 *See Philip Morris*, 396 F.3d at 1192–93 (discussing government's attempt at disgorgement); *see also* Bryan et al., *supra* note 21, at 1037–38 (commenting on federal government's RICO claim against tobacco industry).

use the civil provision of RICO for disgorgement purposes, the two that are discussed are the highest authority on this method to date. The Second Circuit, through *United States v. Carson*,[23] has allowed disgorgement in limited circumstances.[24] By contrast, the D.C. Circuit, through *United States v. Philip Morris*,[25] has categorically denied this ability to the government.[26]

In *Carson*, the federal government prosecuted a past secretary-treasurer of the labor union, Local 1588 of the International Longshoremen's Association of New York City.[27] The government alleged that Carson had engaged in racketeering methods including embezzlement, kickbacks, extortion, and acceptation of illegal gifts, which harmed the union's finances, and ultimately the member's wages.[28] Various charges and reciprocal defenses ensued, but the major question remaining was whether civil RICO could be used to disgorge profits for his racketeering actions.[29] The government sought, and the lower court awarded, more than $60,000 from Carson's profits earned while in his position.[30] Carson defended against the claim stating that civil RICO disgorgement was improper and beyond the scope of the statute.[31] Ultimately, the court rejected this defense and ruled that the civil portion of RICO allows for government disgorgement.[32] Its decision was founded primarily upon principles of equitable discretion.[33] The court described the

23 *See generally* 52 F.3d 1173 (2d Cir. 1995).

24 *See id.* at 1181 (finding federal government's disgorgement remedies proper where needed for equitable purposes).

25 *See generally* 396 F.3d 1190 (D.C. Cir. 2005).

26 *Id.* at 1201–02 (rejecting assertions that RICO disgorgement is proper due to limited suggestions by legislative history).

27 *See Carson*, at 1176 (reciting relevant facts district court concluded upon).

28 *Id.* at 1177–78 (alleging misconduct subjecting defendant to RICO prosecution).

29 *Id.* at 1181 (acknowledging disgorgement through civil RICO was issue of first impression for court, and thus, required close analysis).

30 *See id.* at 1180–81 (analyzing whether funds district court ordered disgorged were consistent with what circuit court wished to accomplish).

31 *Id.* at 1181 (arguing for circuit court to interpret civil RICO provision narrowly and reject disgorgement as available remedy).

32 *See id.* at 1181 (relying on guise of U.S. v. Bonanno Organized Crime Family of La Cosa Nostra, 683 F. Supp. 1411, 1442–49 (E.D.N.Y. 1988), *aff'd on other grounds*, 879 F.2d 20 (2d Cir. 1989) (determining that RICO's legislative history allowed broad equitable discretion from courts, accordingly finding disgorgement proper)).

33 *See id.* (claiming § 1964 confers equitable discretion on courts to enforce RICO judgments).

statute as allotting broad power to decide what sort of remedy will carry out the fundamental goals of RICO.[34] According to the court, the only limitation was that disgorgement must be limited to that which will "prevent and restrain" future RICO misconduct as stated in the Act.[35]

Between *Carson* and *Philip Morris*, the notion of disgorgement under civil RICO was only tested in private litigation purposes.[36] In 2005, however, *Philip Morris*, provided a biting rejection of *Carson's* interpretation of government initiated disgorgement under Section 1964(a) of RICO.[37] Beginning in 1999, the United States brought suit against several cigarette manufacturers and distributors alleging that they used fraudulent marketing tactics to induce smoking among minors.[38] The original suit sought recovery under three separate statutes including the Medicare Recovery Act ("MCRA"),[39] the Medicare Secondary Payer Provision of the Social Security Act ("MSP"),[40] and under the civil provision of RICO.[41] The government asked for more than $280 billion dollars to offset healthcare costs and compensate other costs allegedly traced to smoking harms.[42] The MCRA and MSP

34 *Id.* (discussing general concepts of disgorgement and equitable discretion).

35 *Id.* at 1182 (limiting breadth of civil RICO provision by allowing disgorgement only to extent of preventing and restraining future RICO violations).

36 *See* Richard v. Hoechst Celanese Chem., Inc., 355 F.3d 345, 354 (5th Cir. 2003) (examining whether equitable remedy of disgorgement was proper for private litigation according to RICO's civil provision, 18 U.S.C. § 1964(c)); *see also Carson*, 52 F.3d at 1181 (considering statute's conditions for disgorgement).

37 *See* U.S. v. Philip Morris, 396 F.3d 1190, 1192–1202 (D.C. Cir. 2005) (rejecting *Carson's* interpretation of government disgorgement); *see also Current Circuit Split: Civil Matters*, 1 SETON HALL CIR. REV. 147, 157 (2005) (discussing *Phillip Morris's* preclusion of disgorging profits).

38 *See Philip Morris*, 396 F.3d at 1192 (reviewing case's background and reasons for allegations); *see also Current Circuit Split: Civil Matters*, *supra* note 37, at 157 (explaining suit was brought to recover health care expenditures for tobacco related illnesses).

39 42 U.S.C. §§ 2651–2653 (2006).

40 42 U.S.C. § 1395 (2006).

41 *See Philip Morris*, 396 F.3d at 1192 (listing statutes used in government allegations for recovery); *see also Current Circuit Split: Civil Matters*, *supra* note 37, at 157 (discussing *Phillip Morris* and the government's seeking disgorgement of profits pursuant RICO).

42 *See Philip Morris*, 396 F.3d at 1193 (summarizing aggregate costs asserted by government prosecutors allegedly traced back to smoking harms caused by tobacco companies); *see also* Alan E. Scott, *The Continuing Tobacco War: State and Local Tobacco Control in Washington*, 23 SEATTLE U. L. REV. 1097, 1102 (2000) (finding "the suit alleges a long-standing conspiracy to defraud and mislead the American public about the health effects of smoking, and seeks to recover the billions of dollars the federal government spends each year on smoking-related health care costs").

portions of the suit were dismissed during the first stage of pleadings, which was affirmed by the circuit court.[43]

The only remaining pre-trial question brought before the circuit court involved the use of disgorgement by the government under RICO if the case went to trial, which the government sought to uphold.[44] The appellants, *Philip Morris*, first asserted that disgorgement under civil RICO was antithetical to the legislative purpose, and alternatively, if allowed, then should be limited to an amount only necessary to "prevent and restrain" future racketeering activities.[45] Ultimately, the D.C. circuit agreed with the first argument established by the appellees.[46] Though the court regretted causing a split, it believed the issue lacked any justification requiring it to follow *Carson's* precedent.[47]

Most troubling, perhaps, for the circuit court in *Philip Morris* was the lack of foundation upon which the allowance of disgorgement was based.[48] The court found little solace in arguments by the government regarding such a broad use of equitable discretion.[49] In fact, the court relied upon the limited jurisdiction of federal courts to find an opposite conclusion.[50] It

[43] *See Philip Morris*, 396 F.3d at 1192 (noting "District Court did dismiss the MCRA and MSP claims, but allowed the RICO claim to stand"); *see also* U.S. v. Philip Morris, 116 F. Supp. 2d 131, 134 (D. D.C. 2000) (dismissing MRCA and MSP claims, but refusing to dismiss RICO action, which was eventually brought before D.C. Circuit).

[44] *See Philip Morris*, 396 F.3d at 1192 (discussing lower court's unresolved questions before circuit court regarding use of RICO for disgorgement); *see also Philip Morris*, 116 F. Supp. 2d at 155 (denying defendants' motion to dismiss RICO claims).

[45] *See Philip Morris*, 396 F.3d at 1193 (arguing that in case of trial, disgorgement should either not be allowed or at least be constrained to what *Carson* had advocated); *see also* U.S. v. Carson, 52 F.3d 1173, 1182 (2d Cir. 1995) (disallowing disgorgement too far in past to be part of effort to "prevent and restrain" any future racketeering activities).

[46] *See Philip Morris*, 396 F.3d at 1201–02 (agreeing with appellants' argument against use of disgorgement under RICO's civil provision); *see also Current Circuit Split: Civil Matters*, *supra* note 37, at 157 (declaring "court held 'that the language of § 1964(a) and the comprehensive remedial scheme of RICO preclude disgorgement [of profits] as a possible remedy.'").

[47] *See Philip Morris*, 396 F.3d at 1201 (finding little foundation for *Carson* despite expressing reluctance to cause circuit split); *see also Current Circle Split: Civil Matters*, *supra* note 37, at 157 (commenting "[b]y contrast, the court noted that the 2nd Circuit holds that disgorgement is available under § 1964(a).").

[48] *See Philip Morris* 396 F.3d at 1197 (finding text and structure of RICO provide restrictions on remedies available).

[49] *Id.* (distinguishing Porter v. Warner Holding Co., 328 U.S. 395 (1946), which government used in its argument, in effort to expand equitable discretion in cases regarding civil disgorgement under RICO).

[50] *Id.* (following assertions from Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377 (1994), which asserted boundaries from which federal courts can draw their

stated that their power is derived solely from the Constitution and from federal statutes.[51] A textual look at the language under the civil provision of RICO mentions nothing regarding disgorgement, nor anything suggestive of retroactive punishment.[52] Accordingly, the court found that it was inappropriate to create an unintended method of action, which it decided was against the wishes of Congress.[53]

I. JURISPRUDENTIAL LIMITATIONS

The first limiting factors for the use of disgorgement by the government under the auspices of civil RICO are jurisprudential under the rule of law. Within this category there are three different factors afflicting the legality of disgorgement, which are: A) textual and structural; B) canonical; and C) causational.[54]

A. Textual and Structural Limitations

This Comment is not concerned with the disputed harms regarding tobacco; rather, it is concerned with the illegal acts that any company may engage in, specific to each individual trade. The civil portion of RICO, as stated in *Philip Morris*, does not textually support the use of disgorgement as a remedy.[55] Foremost, the use of disgorgement is not mentioned as a remedy, so the only textual support it may garner is by inference.[56]

power).

51 *Id.* (using language from *Kokkonen* to support foundations of judicial power).

52 *See id.* at 1198 (interpreting civil RICO's language to mean that only forward-looking remedies were justified).

53 *See id.* at 1202 (concluding appellee's arguments were without merit and disgorgement was not available remedy under 18 U.S.C. § 1964(a)).

54 *See* Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 268 (1992) (stating right to sue under RICO requires demonstrating both that without defendant's violation, harm would not have occurred, and defendant's violation was proximate cause of injury); *see also* R. Randall Kelso, *Statutory Interpretation Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-making*, 25 PEPP. L. REV. 37, 52 (1997) (explaining different views among formalists regarding which canons of statutory construction are appropriate to adopt); David Kurzweil, *Article, Criminal and Civil Rico: Traditional Canons of Statutory Interpretation and the Liberal Construction Clause*, 30 COLUM. J.L. & SOC. PROBS. 41, 48 (1996) (discussing plain meaning rule).

55 *See Philip Morris*, 396 F.3d at 1198 (finding civil RICO's vague language does not suggest manipulation of construction for unspecified remedies).

56 *See generally* 18 U.S.C. § 1964 (lacking any explicit mention of disgorgement as remedy); *see also Philip Morris*, 396 F.3d at 1200 (noting plain meaning and comprehensive scheme of statute leads to inescapable inference that Congress intended to

Generally, the statute has been construed as vague and amorphous.[57] The drafting of the statute was purposely left vague so that prosecutors could adapt it to their individual cases.[58] This construction was in an effort to thwart the evasive organized crime epidemic, which had found ways to outmaneuver rigid laws.[59] Indeed, within the statute there was a call for a liberal construal of its language.[60] However, this call for liberal construal has been refused when courts have been faced with the extension of RICO remedies.[61] Courts, like the D.C. circuit in *Philip Morris*, have denied such lenity in their approach to civil RICO.[62] The liberal construal, according to courts and scholars, was not intended to reach beyond enumerated and originally intended remedies.[63] Rather, it was established to prohibit narrow construal that would enable outsmarting of the criminal justice system.[64]

rule out disgorgement).

57 *See* Slocum, *supra* note 8, at 643–44 (construing RICO's background and construction as vague and controversial); *see also* Jeffrey Standen, *An Economic Perspective on Federal Criminal Law Reform*, 2 BUFF. CRIM. L. REV. 249, 289 (1998) (using RICO as example of statute requiring greater precision).

58 *See* U.S. v. Morris, 532 F.2d 436, 441–42 (5th Cir. 1976) (illustrating broad allowance for criminal prosecution under RICO even when criminal prosecution had generally been left to states); *see also* Slocum, *supra* note 8, at 645 (commenting on RICO's liberal construal clause adopted by Congress at RICO's inception).

59 *See* Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970) (stating "[I]t is the purpose of this act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime"); *see also* Standen, *supra* note 57, at 288 (explaining different methods used by Congress in Code reform).

60 *See* Organized Crime Control Act of 1970, (explaining provisions of title); *see also Philip Morris*, at 1201 (discussing breadth of liberal construal clause).

61 *See* Reves v. Ernst & Young, 507 U.S. 170, 183 (1993) (rejecting broad extension of RICO using liberal construal clause); *see also Philip Morris*, 396 F.3d at 1201–06 (prohibiting disgorgement despite liberal construal clause).

62 *See Reves*, 507 U.S. at 183 (noting "[t]his clause obviously seeks to ensure that Congress' intent is not frustrated by an overly narrow reading of the statute, but it is not an invitation to apply RICO to new purposes that Congress never intended"); *see also Philip Morris*, 396 F.3d at 1201 (refusing to extend liberal construal of RICO beyond what has been previously advocated, thwarting attempts to fuel further statutory ambiguity with civil disgorgement).

63 *See Reves*, 507 U.S. at 183 (ensuring liberal construal clause appropriately implemented); *see also Philip Morris*, 396 F.3d at 1201 (reiterating *Reves*'s discussion regarding breadth of liberal construal clause).

64 *See Reves*, 507 U.S. at 183 (lamenting liberal construal clause is for deterring overly narrow interpretation and was not added as invitation for creating new methods and purposes); *see also Philip Morris*, 396 F.3d at 1201 (stating there is no need to alter language of statute to create new remedies).

The civil portion of RICO, as a general method, has not been vigorously disputed as a matter of recourse.[65] In fact, the Supreme Court has considered this provision an important remedial tool in cases where the criminal portion was inapplicable or its burden impossible to meet.[66] The Supreme Court in *Sedima v. Imrex* allowed a trial to go forth with a civil charge under RICO, which may allot treble damages to a private plaintiff.[67] Increasingly, both the government and private plaintiffs against legitimate businesses have used the civil portions within RICO.[68] The general use has been lauded,[69] however, the specific attempt at disgorgement by the government has remained unpopular among most courts.[70]

Bolstering the reluctance toward implying new methods of remedy is the structural argument of RICO. The RICO statute is comprised of several sections.[71] Aside from the definitions portion, RICO begins with the criminal elements necessary for a conviction.[72] The criminal portion prohibits a "pattern of

65 *See* H. J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 236 (1989) (following language from *Sedima* regarding civil redress under RICO); Sedima v. Imrex Co., 473 U.S. 479, 488 (1985) (ruling RICO does not require criminal conviction prior to civil remedy).

66 *See Sedima*, 473 U.S. at 493 (reversing appellate decision against civil RICO damages for private plaintiffs, deciding civil damages may be awarded despite lack of criminal convictions under its predicate acts); *see also H. J. Inc.*, 492 U.S. at 236 (discussing *Sedima*'s results).

67 *See Sedima*, 473 U.S. at 493 (acquiescing to RICO's language allowing treble damages to private plaintiffs who prove predicate acts).

68 *See* Diane Marie Amann, *RICO Thirty Years Later: A Comparative Perspective: Spotting Money Launderers: A Better Way to Fight Organized Crime?*, 27 SYRACUSE J. INT'L L. & COM. 199, 202 (2000) (recognizing myriad of newer cases brought under RICO, especially applying to legitimate business rather than traditional criminal organizations); *see also* U.S. v. Turkette, 452 U.S. 576, 583 (1981) (elaborating on term "enterprise" and its connection to RICO conviction).

69 *See Sedima*, 473 U.S. at 491 (recognizing civil RICO may be asserted when acts alleged fall short of burden required in RICO's criminal provisions); *see also* One Lot Emerald Cut Stones & One Ring v. U.S., 409 U.S. 232, 235 (1972) (distinguishing between burden requirements in criminal and civil actions).

70 *See* U.S. v. Philip Morris, 396 F.3d 1190, 1202 (D.C. Cir. 2005) (refusing to extend civil RICO beyond remedies clearly intended); *see also* Richard v. Hoechst Celanese Chem. Group, Inc., 355 F.3d 345, 355 (5th Cir.2003) (limiting remedies to specified circumstances).

71 *See* 18 U.S.C. §§ 1961–1968 (2006) (codifying RICO provisions); *see also* Richard L. Bourgeois, Jr. et al., *Racketeer Influenced and Corrupt Organizations*, 37 AM. CRIM. L. REV. 879, 880–82 (2000) (discussing criminal and civil provisions of RICO).

72 *See* 18 U.S.C. §§ 1962–1963 (2006) (explaining criminal elements and resulting sanctions); *see also* Leslie G. Kanter, *The Second Circuit Review—1984-1985 Term: Rico: Rico's Unlawful Debt Collection Provision. Durante Bros. & Sons v. Flushing National Bank.*, 52 BROOK. L. REV. 957, 959 (1986) (stating § 1962 "prohibits acquiring, maintaining, controlling, conducting or participating in the affairs of an enterprise when

racketeering activity"[73] occurring to further the interest of an enterprise.[74] The civil provisions follow after both the criminal elements and the resulting sanctions left to the courts' disposal.[75] Though RICO is often considered a less elementally strict approach at criminal law, the civil remedies have not been received as openly.[76] This approach has been founded upon the structure of the RICO statute.[77] Because the criminal portion of RICO has its own limited disgorgement provision, any civil violation that would warrant disgorgement should thus be held to similar burdens as criminal violations are held.[78] By explicitly mentioning disgorgement as a remedy for criminal violation, Congress did not intend for a similar remedy under the civil portion, where the burden of proof is substantially lower.[79] The structural distinction is comparable to other statutes, such as

accomplished through either a 'pattern of racketeering activity' *or* the 'collection of an unlawful debt.'"); Terrance J. Reed & Joseph P. Gill, *RICO Forfeitures, Forfeitable "Interests," and Procedural Due Process.*, 62 N.C. L. REV. 57, 69 (1983) (noting penalties under § 1963 are severe, including $25,000 fines [not adjusted for inflation], twenty year imprisonments, and forfeitures).

73 *See* 18 U.S.C. § 1961(5) (2006) (stating "'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity").

74 *See* 18 U.S.C. § 1962 (2006) (spelling out prohibited activities under RICO, notably those furthering enterprise interests); *see also* 18 U.S.C. § 1961(4) (2006) (defining "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity").

75 *See* 18 U.S.C. § 1964 (following §§ 1962–1963, which address civil elements and procedure for RICO); *see also* Blakey, *supra* note 10, at 241 (discussing right to sue pursuant to § 1964).

76 *See* Amann, *supra* note 68, at 204 (documenting criticism of civil RICO for fear of frivolous and uncontrollable litigation); *see also* Sedima v. Imrex Co., 473 U.S. 479, 500–01 (1985) (Marshall, J., dissenting) (warning path of civil RICO is gaining too much momentum and getting far from its original intentions).

77 *See* Richard C. Ausness, *Public Tort Litigation: Public Benefit or Public Nuisance?*, 77 TEMP. L. REV. 825, 869 (2004) (analyzing idea that other sections of RICO contain explicit sanctions and thus unremunerated ones are not meant for addition); *see also* U.S. v. Philip Morris, 396 F.3d 1190, 1200 (D.C. Cir. 2005) (noting when Congress crafts comprehensive and detailed remedial scheme like RICO, courts are reluctant to enforce additional remedies).

78 *See* Ausness, *supra* note 77, at 869 (reiterating structural argument of RICO); *see also* 18 U.S.C. § 1963(a) (2006) (placing strict procedural guidelines on RICO criminal sanctions unlike under civil sections); 18 U.S.C. § 1963(l) (2006) (calling for notice requirements before any RICO criminal disgorgement can occur).

79 *See* 18 U.S.C. § 1963 (2006) (discussing criminal sanctions, including stipulations for criminal forfeiture if convicted of predicate acts under § 1962); *see also* Ausness, *supra* note 77, at 869 (noting higher standard of proof required for criminal convictions and "permitting disgorgement under section 1964(a) would therefore thwart Congress's intent").

those regulating securities violations where any use of disgorgement is an explicitly mentioned sanction.[80] Ultimately, tangible evidence of congressional intent for disgorgement under civil RICO is sparse, and using canonical methods of interpretation reaches similar conclusions.[81]

B. Canonical Limitations

Canonical paradigms are utilized to interpret construction of statutes or holdings from cases, especially when there is no clear textual reference. Two such paradigms are prevalent to the topic: *esjudem generis* and equitable norms.[82] The first is used when a few purposes of a statute or methods of remedy are listed as examples and a questionable remedy such as disgorgement arises.[83] This method suggests that a list within a statute defines the breadth of allowance for inferential interpretations.[84] Here, there are a few suggested sanctions for appropriate civil remedies, which have been surmised as: divesting interests, imposing prohibitive restrictions on future activities, and

[80] *See* 15 U.S.C. § 7246(a) (2006) (stating that civil penalties will be added to disgorgement fund); *see also* Robert B. Thompson & Hillary A. Sale, *Securities Fraud as Corporate Governance: Reflections upon Federalism*, 56 VAND. L. REV. 859, 875–76 (2003) (explaining changes within Securities and Exchange Act promulgated by Sarbanes-Oxley after large corporate scandals made disgorgement an explicit remedial application and mandated express purposes for its use).

[81] *See* U.S. v. Carson, 52 F.3d 1173, 1182 (2d Cir. 1995) (declining to enforce equitable remedy of disgorgement under civil RICO because "jurisdictional powers in § 1964(a) serve the goal of foreclosing future violations, and do not afford broader redress."); *see also Philip Morris*, 396 F.3d at 1199 (refusing to interpret § 1964(a) as plenary grant of equitable jurisdiction because would violate canons of statutory construction).

[82] *See* Bowen v. Mass., 487 U.S. 879, 893 (1988) (describing types of equitable remedies); *see also* White Mem'l Med. Ctr. v. Schweiker, 640 F.2d 1126, 1129 (9th Cir. 1981) (explaining standard rule of construction for *esjudem generis* statute is that "general language refers only to objects similar in nature to those objects enumerated by the specific words").

[83] *See* Kelso, *supra* note 54, at 52 (admonishing maxim of *esjudem generis* "where general words follow an enumeration of specific words, the general words are to be held as applying only to the same general kind or class as the specific words"); *see also* R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 VAL. U. L. REV. 121, 131–32 (1994) [hereinafter *Styles of Constitutional Interpretation*] (explaining verbal maxims).

[84] *See* Kelso, *supra* note 54, at 52 (discussing use of *esjudem generis*); *see also Styles of Constitutional Interpretation*, *supra* note 83, at 132 (explaining that at its broadest level, contextual interpretation can involve "totality of relevant factors in the general cultural environment external to the specific language being interpreted that are shared by the users of the language in the particular speech community and taken account of by the particular communication").

reorganizing the RICO enterprise.[85]

Though the available listed remedies are left open for courts to fill in any loopholes, the opportunity for them to do so is limited.[86] The remedies listed all share similar goals, which are to "prevent and restrain" future RICO acts by the enterprise as enumerated in the act.[87] The goals here differ from those in statutes that are more clearly understood to allow for disgorgement.[88] For example, many securities violations statutes explicitly call for disgorgement and have frequently been understood as a proper method for deterring that category of crimes.[89] Even though *Carson* ultimately allowed for disgorgement, it too limited the allowance to amounts measured to prevent and restrain future acts.[90] For that reason, the circuit court remanded the case back to the district court.[91] The remand was to ensure that the disgorgement of profits was a careful orchestration, not taking anything further than necessary to

[85] *See* 18 U.S.C. § 1964(a) (stating remedies available when statute is violated); *see also Bowen*, 487 U.S. at 893 (listing possible equitable remedies, which can take variety of forms).

[86] *See* Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 383–84 (2003) (following *esjudem generis*, meaning similar methods confine itself, as a maxim that cannot be ignored when interpreting statutory language); *see also* Jarecki v. G. D. Searle & Co., 367 U.S. 303, 307 (1961) (explaining canons of *noscitur a sociis* that terms should be understood in context).

[87] *See* 18 U.S.C. § 1964(a) (stating that "[t]he district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter . . ."); *see also* Richard v. Hoechst Celanese Chem., Inc., 355 F.3d 345, 354 (5th Cir. 2003) (quoting RICO's language limiting remedies to methods preventing and restraining violations).

[88] *See* SEC v. First City Fin., Corp., 890 F.2d 1215, 1230 (D.C. Cir. 1989) (assimilating violations of § 13(d) of Securities Act of 1934, requiring filing from anyone owning more than 5% of company equity, with insider trading violations, which clearly support disgorgement as penalty); *see also* SEC v. Tome, 833 F.2d 1086, 1096 (2d Cir. 1987) (explaining, "'primary purpose of disgorgement is not to compensate investors. Unlike damages, it is a method of forcing a defendant to give up the amount by which he was unjustly enriched.'").

[89] *See First City*, 890 F.2d at 1230 (declaring, "[d]isgorgement is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating the securities laws."); *see also* SEC v. Blavin, 760 F.2d 706, 713 (6th Cir. 1985) (noting, "[o]nce the Commission has established that a defendant has violated the securities laws, the district court possesses the equitable power to grant disgorgement without inquiring whether, or to what extent, identifiable private parties have been damaged by . . . fraud").

[90] *See* U.S. v. Carson, 52 F.3d 1173, 1181–82 (2d Cir. 1995) (limiting equitable remedies to preventing and restraining RICO violations).

[91] *See id.* at 1182, 1190 (remanding back to trial court for final judgment on damages).

accomplish this goal.[92] Even *Carson* recognized that broad allowance of disgorgement for any ill-gotten gains under the statute would require another word added on, making it "prevent, restrain, and discourage."[93] Other courts following the *Carson* precedent have done so to limit disgorgement to specific profits that will prevent and restrain future acts.[94]

Emboldening this category of possible remedies are canons of equitable remedies.[95] Axiomatically, equitable remedies are limited to orders where both legally sanctioned damages are inadequate and equity has commonly been utilized.[96] Equity generally embodies injunctions, reorganization, specific performance, and accounting. These remedies are designed to prevent the continuation of harmful actions.[97] On the other hand, restitution type equity, like disgorgement, is usually only awarded in cases where the intention is to return affected parties to the status quo.[98] Civil RICO is intended for private suits for those personally affected by such activity, and civil relief for the government where criminal sanctions are either unattainable or incompatible with the acts committed.[99] Disgorgement and

92 *See id.* at 1182 (explaining court was seeking "determination as to which disgorgement amounts . . . were intended solely to "prevent and restrain" future RICO violations").

93 *Id.* (noting extension of applicable phrase "would allow any remedy that inflicts pain").

94 *See* Richard v. Hoechst Celanese Chem., Inc., 355 F.3d 345, 354–55 (5th Cir. 2003) (following *Carson* precedent regarding limits on ability to disgorge profits); *see also* U.S. v. Private Sanitation Indus. Ass'n, 914 F. Supp. 895, 900–01 (E.D.N.Y 1996) (analyzing effect of *Carson* and following its limits on disgorging only profits calculated to prevent and restrain future Racketeering acts).

95 *See* Tull v. U.S., 481 U.S. 412, 424 (1987) (claiming restitutional equity is limited to returning parties to status quo); *see also* Porter v. Warner Holding Co., 328 U.S. 395, 402 (1946) (creating canons of equity including limits on restitutional remedies). *But see Porter*, 328 U.S. at 398–99 (interpreting equitable discretion broadly and allowing disgorgement as remedy).

96 *See* Grupo Mexicano de Desarrollo v. Alliance Bond Fund, 527 U.S. 308, 321–22 (1999) (following general practice of equitable remedies and further requiring that remedies at law must first be exhausted); *see also* Atlas Life Ins. Co. v. W.I. S., Inc., 306 U.S. 563, 568 (1939) (noting that principals of equity arise from the English Court of Chancery).

97 *See* Bowen v. Mass., 487 U.S. 879, 893 (1988) (defining equitable remedies as those with specific relief for returning victims to status quo); *see also* Polanco v. U.S. DEA, 158 F.3d 647, 652 (2d Cir. 1998) (distinguishing present claim from legal remedy despite being monetary claim).

98 *See Tull*, 481 U.S. at 424 (quoting *Porter*, 328 U.S. at 402, and noting disgorgement is only for restitution); *see also Porter*, 328 U.S. at 402 (explaining restitution lies in equity).

99 *See* Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964

restitution may be awarded within the confines of some statutes as an equitable remedy to establish the status quo, but only when no other legal or sanctioned civil remedy is available.[100] With RICO, by contrast, there are specific, forward looking, equitable sanctions available, such as divestment,[101] when appropriate.[102]

Moreover, it is well-founded that the language of civil RICO is meant to restrain racketeering activities from occurring in the future.[103] Disgorgement by its nature, however, is a backward looking remedy, and is thus incompatible with the statutory intentions.[104] Likewise, disgorgement is awarded regardless of whether it will prevent and restrain. The goal of disgorgement is rooted in returning to the status quo.[105] By structuring RICO with the criminal section first and then specifically mentioning equitable options, equitable norms suggest that Congress did not intend for disgorgement under the civil relief section.[106]

Furthermore, equitable remedies are limited because federal

(2006) (providing civil remedy for injured parties); *see also* Ausness, *supra* note 77, at 865 (deciphering civil RICO as limited to its explicit text).

100 *See Tull*, 481 U.S. at 422–23 (separating monetary damages awards from equitable claims meant to establish status quo); *see also* Kelly v. U.S. EPA, 203 F.3d 519, 523 (7th Cir. 2000) (explaining civil sanctions are meant to punish, rather than return to status quo).

101 The RICO statute specifically states that a court may order a person to divest himself. 42 U.S.C. § 1964(a). Divestment, by nature, is a method by which one's control over property may be reduced. This is an action used to "prevent and restrain" future RICO action because it reduces control over a racketeering enterprise. Contrastingly, disgorgement is aimed at replenishing funds lost by retroactively taking back profits. *See* U.S. v. Philip Morris, 396 F.3d 1190, 1201 (D.C. Cir. 2005).

102 *See Tull*, 481 U.S. at 422 (citing Clean Water Act, 33 U.S.C. § 1319(d)) (providing listed civil remedies sufficient to quell broader equitable remedies); *see also* Christopher Paul Dean, Comment, *Davidson v. Microsoft Corporation: Reexamining Maryland's Illinois Brick Bar Against Indirect Private Purchasers*, 33 U. BALT. L. REV. 69, 84 (2003) (examining case holding that disgorgement could not be used absent statute's express permission).

103 *See* Richard v. Hoechst Celanese Chem. Group, Inc., 355 F.3d 345, 354 (5th Cir. 2003) (noting RICO is meant to prevent future conduct); *see also* U.S. v. Carson, 52 F.3d 1173, 1181–82 (2d Cir. 1995) (confining equitable remedies to preventing and restraining RICO violations).

104 *See Philip Morris*, 396 F.3d at 1192 (noting disgorgement is aimed at past violations); *see also* Ausness, *supra* note 77, at 869 (exploring dichotomy between forward-looking and backward-looking remedies).

105 *See Philip Morris*, 396 F.3d at 1198 (stating disgorgement is quintessentially backward-looking); *see also* Ausness, *supra* note 77, at 869 (explaining disgorgement is awarded regardless of intent to prevent and restrain, rendering such relief an equitable remedy incompatible with RICO's plain meaning).

106 *See Philip Morris*, 396 F.3d at 1198–99 (examining goals of RICO); *see also* Ausness, *supra* note 77, at 869 (commenting on aggregation of RICO disgorgement cases).

courts are of limited jurisdiction.[107] Accordingly, cases that are brought under a federal statute in the federal court system may not be approached broadly; instead, they must be approached with deference to the statute's language and with canonical norms.[108] It is understood that federal courts may utilize broad equitable discretion, but it must be founded upon specific language granted to it within statutory language.[109] In *Carson*, much of the equitable discretion was founded upon *Porter v. Warner Holding Co.*,[110] which called for a large allocation of equitable discretion to courts.[111] However, the *Porter* holding was based upon the Emergency Price Control Act of 1942 ("ECPA"), which used more acquiescent language than RICO.[112] The language of ECPA mentions few remedies and specifically defers broad judgment to district courts, while RICO lists specific remedial possibilities. Although RICO does not explicitly limit

107 *See* Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994) (noticing federal courts' limited jurisdiction and how they are bound by power authorized to them in Constitution and other statutes); *see also* In re Al Fayed, 91 F. Supp. 2d 137, 140 (D. D.C. 2000) (highlighting rebuttable presumption that cause of action lies outside federal courts' power, and burden of rebutting presumption rests upon party asserting jurisdiction).

108 *See Kokkonen*, 511 U.S. at 377 (discussing federal courts' power may not be "expanded by judicial decree"); *see also* Citibank v. Swiatkoski, 395 F. Supp. 2d 5, 8 (E.D.N.Y. 2005) (suggesting unconstitutionality of federal courts hearing cases outside their jurisdictions).

109 *See Kokkonen*, 511 U.S. at 377 (stating breadth of use for court's equitable discretion); *see also Citibank*, 395 F. Supp. 2d at 8 (noting limited jurisdiction of United States Court for the Eastern District of New York in light of powers granted to it by Constitution and other statutes).

110 328 U.S. 395 (1946).

111 *See id.* at 398 (calling for federal courts' broad and absolute discretion to fashion appropriate equitable remedies to create full justice).

112 *See* Emergency Control Price Act of 1942 ("ECPA"), 50 U.S.C. § 205(a) (1946) which states in pertinent part:

Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

Cf. 18 U.S.C. § 1964(a) (2006), which declares:

The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter [18 USCS § 1962] by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

itself to those remedies, it does call for a common theme of specified categories.[113] *Carson* itself admits the lack of support from the statute regarding its interpretation of equitable powers.[114] The broad interpretation in *Carson* was thus incompatible with the power granted in *Porter* and beyond the legal limits of the Second Circuit Court of Appeals.[115]

C. Causational Limitations

The last moor of jurisprudential interpretation is that there must be a firm causal link between the party being sued and the injury for an award of damages.[116] Although there have been arguments to the contrary, there is no causal link to the government in these disgorgement cases like there are in the criminal ones.

Foremost, a party suing must have proper standing for a suit to exist and proceed.[117] Plaintiffs are granted standing in some civil suits as their role is clearly mentioned within the statutory

[113] *See* 18 U.S.C. § 1964(a) (allowing remedial measures such as "ordering a person to divest himself of any interest, direct or indirect, in any enterprise . . . imposing reasonable restrictions on the future activities or investments of any person [and] . . . ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons"); *see also* Elizabeth D. De Armond, *A Uniform Limitations Period for Civil RICO*, 61 NOTRE DAME L. REV. 495, 510–11 (discussing how courts have characterized RICO claims in three ways: underlying predicate acts, remedy, and statutory origin).

[114] *See* U.S. v. Carson, 52 F.3d 1173, 1181 (2d Cir. 1995) (declaring, "plain reading of the statute does not support the broad interpretation adopted by the district court and urged by the government").

[115] *See* 18 U.S.C. § 1964(a) (providing for limited equitable discretion under civil RICO allowing methods for preventing and restraining future conduct); *cf.* ECPA, 50 U.S.C. § 205 (granting broader authority for equitable remedies, which was foundation for *Porter*'s ruling); *see also* U.S. v. Philip Morris, 396 F.3d 1190, 1198 (D.C. Cir. 2005) (distinguishing allowance of equitable discretion in *Porter* from what is allotted under civil RICO).

[116] *See* Local 17 Health and Benefit Fund v. Philip Morris, Inc., 191 F.3d 229, 234 (2d Cir. 1999) (declaring there must be "but for" and "proximate" causation to sue under RICO); *see also* In re Gas Reclamation, Inc. Sec. Litig., 663 F. Supp. 1123, 1125 (S.D.N.Y. 1987) (noting plaintiffs can only recover if "'compensable injury necessarily is the harm caused by the predicate acts'").

[117] *See* John L. Koenig, *What Have They Done to Civil RICO: The Supreme Court Takes The Racketeering Requirement out of Racketeering*, 35 AM. U. L. REV. 821, 824–25 (showing many courts have held standing requirements for private civil RICO suits requiring racketeering injuries, rather than just injuries from predicate acts); *see also* N. Barrington Dev., Inc. v. Fanslow, 547 F. Supp. 207, 211 (N.D. Ill. 1980) (requiring plaintiff to show RICO injury).

language of civil RICO.[118] RICO was purposely made flexible in regards to proof of causation so that the government and private plaintiffs are able to disrupt stalwart racketeer groups.[119] However, plaintiffs do not have a legal right under the language of civil RICO to pursue any claim they feel is proper simply because there has been an injury.[120] Similarly, the government may not use RICO as a pretext to pursue broad quests for repayment in the name of public service.[121] Though RICO was extended beyond just criminal sanctions, they were the root of its creation; thus, the civil portion was intended to mimic the criminal portion by requiring a civil plaintiff to at least show they suffered a racketeering injury rather than normal harm from a predicate act.[122]

For the government to recover for injuries there must be a

118 *See* 18 U.S.C. § 1964(b) (allowing Attorney General to sue on public's behalf); *see also* United Energy Owners Comm., Inc. v. U.S. Energy Mgmt. Sys., Inc., 837 F.2d 356, 362 (9th Cir. 1988) (noting how plaintiffs may assert that "they or one of their members is a RICO enterprise or part of a RICO enterprise" and thus are not prohibited from "including themselves in a legitimate, albeit infiltrated, enterprise and has not been interpreted to limit RICO enterprises to those persons engaged in the illegal conduct").

119 *See* Pub. L. No. 91–452, 84 Stat. 947 (codified as amended at 18 U.S.C. §§ 1961–1968) (1970) (codifying liberal intention of act in order to keep criminals from further circumventing judicial enforcement); *see also* Michelle Sacks et al., *Twentieth Survey of White Collar Crime: Article: Racketeer Influenced and Corrupt Organizations*, 42 AM. CRIM. L. REV. 825, 827 n.7 (2005) (citing two Supreme Court cases asserting liberal construction of RICO).

120 *See* Reves v. Ernst & Young, 507 U.S. 170, 183 (1993) (asserting RICO causes of action are limited to those that reflect Congress's intent when enacting statute, by stating liberal construction clause of RICO was "not an invitation to apply RICO to new purposes that Congress never intended."); *see also* Kendel Drew & Kyle A. Clark, *Corporate Criminal Liability*, 42 AM. CRIM. L. REV. 277, 279 (2005) (asserting absent showing of elemental prerequisites for corporate criminal law of "acts, omissions, or failures of an agent acting within the scope of his employment," may inculpate innocent parties); Adam J. Homicz, Note, *Private Enforcement of Immigration Law: Expanded Definitions Under RICO and the Immigration and Nationality Act*, 38 SUFFOLK U. L. REV. 621, 626 (2005) (emphasizing that injury alone is insufficient because three elements of RICO standing include not only injury to business or property, but also violation of RICO predicate act through pattern of racketeering and proximate causation of alleged injury by defendant).

121 *See* Bennett v. Berg, 685 F.2d 1053, 1063 (8th Cir. 1982) (stating RICO is primarily aimed at organized criminal activity); *see also* Koenig, *supra* note 117, at 831 (necessitating proper predicate acts characteristic of organized crime to ensure causation is sought in proper organized racketeering cases rather than just ordinary fraud).

122 *See* Homicz, *supra* note 120, at 626 (proffering in order to have standing, plaintiff may act under 18 U.S.C. § 1964 by meeting 18 U.S.C. § 1962 requirement of a violation of a RICO predicate act through a pattern of racketeering); *see also* Koenig, *supra* note 117, at 866–68 (suggesting plaintiffs under 18 U.S.C. § 1964, that is, civil RICO, must show racketeering acts that further an enterprise like that in criminal RICO, and showing only pure injury from a single predicate act does not establish causal links to civil RICO).

causal link established to the injuries.[123] The criminal portions of RICO were created to enable the government to act as an agent of the public to disrupt criminal organizations, and occasionally, legitimate industries infiltrated by racketeering acts.[124] Meanwhile, the civil portion of RICO allotted to the government is meant to relax some of the burden for the government as a plaintiff, and is thus limited in its allowance of remedies.[125] Criminal disgorgement requires the burden of beyond a reasonable doubt for each element.[126] For any type of divestment to take place under civil RICO, burdens of proof are lower, as are causation requirements.[127] Understanding the possibility for uncontrolled civil prosecution, Congress limited the remedies so that the government did not have the ability to disgorge funds, but could still "prevent and restrain" illegal activities.[128]

The government often attempts to sue as an agent of the public for events it believes have drained public money and created harms.[129] This motive, however admirable, was not what was

123 *See* Labors Local 17 Health and Benefit Fund v. Philip Morris, Inc., 191 F.3d 229, 234 (2d Cir. 1999) (highlighting RICO's intent regarding proximate causation between party and harm); *see also* Homicz, *supra* note 120, at 626–27 (stating plaintiff in RICO suit, whether government or private party, must establish proximate cause of alleged injury).

124 *See* Todd Barnet, *Legal Fiction and Forfeiture: An Historical Analysis of the Civil Asset Forfeiture Reform Act*, 40 DUQ. L. REV. 77, 92 (2001) (recognizing civil forfeiture is methodology for private rights and remedies, or government regulation unlike criminal forfeiture used on behalf of society by government); *see also* Michael A. DiMedio, Note, *A Deterrence Theory Analysis of Corporate RICO Liability for "Fraud in the Sale of Securities"*, 1 GEO. MASON L. REV. 135, 140–41 (1994) (noting Congress enacted criminal RICO to address problem of organized crime and added civil RICO as compliment to protect legitimate businesses).

125 *See* Ryan C. Morris, *Proximate Cause and Civil RICO Standing: The Narrowly Restrictive and Mechanical Approach in Lerner v. Fleet Bank and Baisch v. Gallina*, 2004 BYU L. REV. 739, 754 (2004) (explicating general understanding that RICO was designed as "expansive and sweeping" tool for criminal justice); *see also* Sacks et al., *supra* note 119, at 864 (remarking on Supreme Court's assertion that Congress intended civil RICO to be construed broadly).

126 *See* Barnet, *supra* note 124, at 94 (differentiating burdens of criminal forfeiture and civil forfeiture); *see also* Wesley M. Oliver, *A Round Peg in a Square Hole: Federal Forfeiture of State Professional Licenses*, 28 AM. J. CRIM. L. 179, 205 (2001) (indicating that criminal forfeiture requires proof beyond a reasonable doubt that defendant committed crime in question).

127 *See* Barnet, *supra* note 124, at 94 (referring to civil forfeiture as "quick and easy" because of its low burden of proof); *see also* Morris, *supra* note 125, at 791 (commenting on how civil provisions of RICO provide a very broad standard for many plaintiffs to redress racketeering claims).

128 18 U.S.C. § 1964(a) (2006).

129 *See* Ausness, *supra* note 77, at 864 (discussing government suits on behalf of public); *see also* Moin A. Yahya, *Can I Sue Without Being Injured?: Why the Benefit of the*

intended under RICO.[130] Due to the fact that RICO requires only relaxed elements, it does not mandate the government to establish what harms are attributable to each individual act.[131] Recognizing this, Congress has instead established statutes specifically creating a causal link requiring specific elements from the government.[132] Among these statutes are the Medicare Recovery Act ("MCRA")[133] and the False Claims Act.[134] These statutes, among others, are specific to each type of injury that the government may sue under for disgorgement.[135] The purpose of these enactments was to make sure that proper burdens of causation were met rather than using blanket attempts at recovery under statutes like RICO, which are remedially limited.[136]

An additional limitation is the requirement of a causal link to the property upon which disgorgement is asserted.[137] Even when

Bargain Theory for Product Liability is Bad Law and Bad Economics, 3 GEO. J.L. & PUB. POL'Y 83, 84–85 (2005) (reviewing large tort claims founded upon public interest).

130 *See* U.S. v. Turkette, 452 U.S. 576, 589 (1981) (stating RICO was designed to "seek the eradication of organized crime in the United States by . . . establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime"); *see also* Ausness, *supra* note 77, at 864 (commenting on how RICO was enacted to combat infiltration of organized crime into legitimate business enterprises).

131 *See* Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc., 191 F.3d 229, 239–40 (2d Cir. 1999) (understanding damages should not be awarded without specific causal links); *see also* Robert L. Rabin, *The Tobacco Litigation: A Tentative Assessment*, 51 DEPAUL L. REV. 331, 335 (2001) (noting issue of whether "epidemiological evidence established a causal link between smoking and a variety of diseases from which members of the class suffered" in Engle v. R.J. Reynolds Tobacco Co).

132 *See* Ausness, *supra* note 77, at 837–38 (listing statutes with explicit statutory causal link under which government can sue and collect damages); *see also* Morris, *supra* note 125, at 740 (analyzing strict test courts use to establish proximate causation under RICO).

133 42 U.S.C. § 2651 (2006); *see* Ausness, *supra* note 77, at 864 (showing MCRA's explicitly established causal link between government and those defrauding Medicare).

134 18 U.S.C. § 287 (2006); *see* Aaron M. Altschuler et al., *Health Care Fraud*, 35 AM. CRIM L. REV. 841, 845 (1998) (explaining federal False Claims Act and its ability of damage collection because of statutorily created causal link).

135 *See* Ausness, *supra* note 77, at 864 (declaring acts with explicitly allowed use for government disgorgement); Barnet, *supra* note 124, at 97–98 (clarifying that there are over 150 federal acts explicitly allowing forfeiture and disgorgement); *see also* Altschuler, *supra* note 134, at 842–46 (explicating each individual element within federal acts and describing their specificity).

136 *See* 18 U.S.C. § 1964 (2006) (casting wide approaches used to disrupt organizations involved in racketeering acts); *see also* Altschuler, *supra* note 134, at 842–46 (connecting each health care statute to its causal links and how they may be used in connection with illegal acts).

137 *See* Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 268–69 (1992) (establishing standard of proximate causation necessary to attach compensation for an injury to RICO

a civil remedy is allowed, it must be limited to what will prevent and restrain future acts.[138] Otherwise, the government could easily assert unjustified claims simply to get as much damages as possible.[139] If unfettered, the government would be allowed to use loose connections to establish large rewards, which precedence would cause to spiral out of control; thus there must be minimum standards like in the criminal portions.[140] Even a private party suing under RICO, or any average tort claim, must show cause for the damages pursued.[141]

Emblematic of the call for specificity in such a large-scale suit was the holding in *Blue Cross & Blue Shield of NJ v. Philip Morris USA Inc.* [142] That case involved an appeal of a suit by a large health insurance group suing tobacco manufacturers for misleading the public as to the health risks involved with smoking.[143] The plaintiff, Blue Cross, sued to recover money allegedly lost from paying for complications resulting from their clients smoking.[144] The suit was brought under various legal theories including civil RICO.[145] To establish a causal connection, the plaintiff sued by subrogation on behalf of their members.[146]

defendant); *see also* SEC v. Unioil, 951 F.2d 1304, 1306 (D.C. Cir. 1991) (Edwards, J., concurring) (emphasizing "touchstone of a disgorgement calculation is identifying a causal link between the illegal activity and the profit sought to be disgorged").

138 *See* 18 U.S.C. § 1964(a) (2006) (providing "district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter"); *see also* Richard v. Hoechst Celanese Chem. Group, Inc., 355 F.3d 345, 354 (5th Cir. 2003) (quoting language from RICO statute limiting remedies to methods that prevent and restrain violations).

139 *See Holmes*, 503 U.S. at 268–69 (using axiom of law that there must be proximate causation to prevent abuse, and prosecution for general misfortune); *see also* Senah Elizabeth Green, Note, *Judicial Efforts to Redirect an Errant Statute: Civil RICO and the Misapplication of Vicarious Corporate Liability*, 65 B.U. L. REV. 561, 598–605 (1985) (discussing dangers of excessive damages under RICO in corporate setting).

140 *See* Drew & Clark, *supra* note 120, at 278 (factoring minimum requirements needed for criminal conviction of corporations); *see also* Green, *supra* note 139, at 604–05 (arguing treble damages under RICO is unnecessary for deterrence and courts should reject application of vicarious liability against corporations under the statute).

141 *See Holmes*, 503 U.S. at 268 (holding plaintiff's right to sue under the Clayton Act "required a showing that the defendant's violation not only was a 'but for' cause of his injury, but was the proximate cause as well"); *see also* Drew & Clark, *supra* note 120, at 298 n.160 (quoting Delaware Chancery ruling that directors may be liable for "losses caused by non-compliance with applicable legal standards").

142 344 F.3d 211 (2d Cir. 2003).

143 *See id.* at 216–17 (reviewing plaintiff's reasons for bringing original suit).

144 *See id.* at 216 (briefing factual background for suit).

145 *See id.* (listing suit's legal foundations).

146 *See id.* at 216–17 (outlining subrogation method used as suit's foundation).

The district and circuit court both held that a health insurance company could bring a civil RICO claim by subrogation.[147] However, the damages awarded by the district court were significantly reduced at the appellate level because the plaintiff did not show with specificity the names or any individualized information regarding the subrogors.[148] The decision of the circuit court thus hinged on the need for specific causal links in order to recover.[149] Due to fear of abuse, the standard of causation is rather strict even for a private plaintiff.[150]

Though the government's intentions are often in pursuit of justice, the RICO statute has limitations that were meant for following.[151] RICO was specifically designed to disrupt criminal organizations and not as a chance for the government to replenish funds improperly taken or swindled from them.[152] The civil portion was only intended to allow disruptive practices on corrupt organizations rather than full disassembly.[153] The intended limits were not created abstractly; these reasons are both policy and practically oriented and shall be explained in the forthcoming sections.

II. POLICY LIMITATIONS

RICO's absence of civil disgorgement was not abstractly meant to limit the government. Policy considerations, as in all legislation, were considered before enactment. With RICO, using

147 *Id.* at 217 (allowing, generally, for subrogation use in RICO suits if there is proper foundation).

148 *Id.* at 217–18 (reducing damages for remoteness of causal connection).

149 *See id.* (necessitating stronger causal connections for award of damages).

150 *See id.* at 217–18 (emboldening necessity of strong causal connection); *see also* Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc., 191 F.3d 229, 240–41 (2d Cir. 1999) (outlining policy reasons demanding strict causation requirement).

151 *See* U.S. v. Philip Morris, 396 F.3d 1190, 1200 (D.C. Cir. 2005) (stating "structure of RICO . . . limits courts' ability to fashion equitable remedies"); *see also* Ausness, *supra* note 77, at 869–70 (discussing RICO's inherent limitations).

152 *See Philip Morris*, 396 F.3d at 1200 (explaining civil RICO was implemented to thwart future conduct which in no way entails separating criminals from their previous ill-gotten gains); *see also* Barnet, *supra* note 124, at 86–87 (reviewing problems associated with too much government power to forfeit assets).

153 *See* Slocum, *supra* note 8, at 643–45 (analyzing unclear language of civil RICO and its possibility for government abuse); *see also* Robert K. Rasmussen, *Introductory Remarks and a Comment on Civil RICO's Remedial Provisions.*, 43 VAND. L. REV. 623, 627 (1990) (explaining how RICO civil remedy combined with lawyers' ingenuity has lead to its use in unintended situations).

civil disgorgement as an enforcement tactic, though arguably a deterrent, causes more harm than good.[154] The three policy reasons for limitation are: A) it harms innocent third parties; B) it is too penalizing; and C) there are better deterrents.

A. Innocent Parties

The first policy interest for barring civil disgorgement under RICO is to keep third parties from undue harm.[155] Third parties include workers, investors, creditors, and consumers, among others.[156] Legitimate businesses continue to exist because they depend on others as others depend on them for their "going concern."[157] Certainly, in every industry there are ordinary risks involved, which can be knowingly factored by a third party.[158] However, when outside parties are unaware of misconduct, they are harmed automatically even before devastating events like a stock-value plummet.[159]

If the government was to come in and simply disgorge funds,

154 *See* Dan K. Webb & Scott F. Turow, *White Collar Crime: RICO Forfeiture Practice: A Prosecutorial Perspective*, 52 U. CIN. L. REV. 404, 419 (1983) (remarking that some RICO forfeitures are "disconcerting"); *see also* Rasmussen, *supra* note 153, at 623 (detailing calls for RICO's change).

155 *See* Ausness, *supra* note 77, at 908–09 (arguing large public litigation causes economic harms to corporations being pursued, as well as, others); *see also* Larry DiMatteo, *A Theory of Efficient Penalty: Eliminating the Law of Liquidated Damages*, 38 AM. BUS. L.J. 633, 679–80 (2001) (explaining some economists feel penalty clauses are inefficient).

156 *See* Ausness, *supra* note 77, at 908–09 (describing where much of burden of public litigation falls); *see also* DiMatteo, *supra* note 155, at 679 (stating litigation and penalties affect third parties).

157 *See* Richard A. Booth, *Theory Informs Business Practice: Who Owns a Corporation and Who Cares?*, 77 CHI.-KENT L. REV. 147, 175 (2001) (identifying "going concern" as fundamental to business practice); *see also* Shu-Yi Oei, *Rethinking the Jurisdiction of Bankruptcy Courts Over Post-Confirmation Federal Tax Liabilities: Towards a New Jurisprudence of 11 U.S.C. 505*, 19 AKRON TAX J. 49, 64 (2004) (stating "ultimate viability" of a business is "going concern").

158 *See* Booth, *supra* note 157, at 154–56 (discussing regular risks involved with business decisions); *see generally* Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts.*, 100 YALE L.J. 1879 (1991) (noting shareholders' allocation of risk of corporate torts).

159 *See* Andre Douglas Pond Cummings, *"Ain't No Glory in Pain": How the 1994 Republican Revolution and the Private Securities Litigation Reform Act Contributed to the Collapse of the United States Capital Markets*, 83 NEB. L. REV. 979, 990 (2005) (reviewing fallout harms from major market collapses); *see also* Andre Douglas Pond Cummings, *The Integration Conundrum: Debilitating Failures of the Securities and Exchange Commission Must Be Addressed as U.S. Corporate Malfeasance is "Getting Serious, So Serious"*, 48 WAYNE L. REV. 1305, 1384 (2003) (concluding corporate malfeasance harms unwitting investors, leaving investors "stunned").

not only would the business itself likely collapse, but all those tangentially involved would be harmed as well.[160] A business entity may gain money by misconduct of its officers, but that money ultimately becomes part of the corporation, which is comprised of many co-tangled facets.[161] Creditors await money from corporations, while investors expect that what they invested will still exist or at least have a fair chance to gain.[162] When misconduct occurs within a board or select people, those who are not involved cannot handle loss beyond the fallout of a scandal.[163] When the government disgorges money for misconduct, it is in turn disgorging from those creditors and investors.[164] Subsequently, the inextricably linked corporations all suffer.[165]

For the very concern of innocent third parties, Congress passed the long awaited Civil Assent Forfeiture Reform Act ("CAFRA") in 2000.[166] This statute codified the confusing realm of civil forfeiture, but provided for a robust innocent owner defense.[167] The government does not want to give up the possibility of

160 *See* Larry DiMatteo, *supra* note 155, at 679–80 (arguing excessive penalties affect many more than just wrongful acting corporations); *see also* Paul H. Rubin, *Unenforceable Contracts: Penalty Clauses and Specific Performance*, 10 J. LEGAL STUD. 237, 243 (1981) (arguing penalties in general may not be justified because of effects on third parties).

161 *See* Ausness, *supra* note 77, at 908–09 (discussing effects of public tort litigation upon society); *see also* DiMatteo, *supra* note 155, at 683–84 (reviewing general economic theory and how excessive penalties harm society and industry).

162 *See* DiMatteo *supra* note 155, at 680–81 (discussing externalities of enforcement); *see also* John Paul Lucci, Note, *New York Revises Ethics Rules to Permit Limited MDPS: A Critical Analysis of the New York Approach, the Future of the MDP Debate After Enron, and Recommendations for Other Jurisdictions*; 8 FORDHAM J. CORP. & FIN L. 151, 192 (2003) (citing Enron as example where investors lost significant portions of savings because they depended on company's "growth potential").

163 *See* DiMatteo, *supra* note 155, at 680–81 (understanding enforcement may cause unnecessary harm); *see also* Rubin, *supra* note 160, at 243 (arguing that penalties are unduly harmful to third parties).

164 *See* DiMatteo, *supra* note 155, at 680–81 (acknowledging extent of enforcement and fallout of harm); *see also* Rubin, *supra* note 160, at 243 (arguing penalties may injure non-parties to litigation).

165 *See* Ausness, *supra* note 77, at 908–09 (arguing that public enforcement of corporate malfeasance has unintended negative consequences upon, among others, manufacturers and consumers); *see also* DiMatteo, *supra* note 155, at 680–81 (noting extent of externalities).

166 18 U.S.C. § 981 (2000).

167 *See* 18 U.S.C. § 983(d) (establishing rules governing civil forfeiture, including innocent owner defense); *see also* Judge Spatt, *Decision of Interest; Eastern District; $21 Million Forfeiture Entered for Fraud, Money Laundering Facilitated by Building Housing Business*, 234 N.Y. L.J. 22, Oct. 14, 2005 (enumerating areas of civil forfeiture CAFRA was intended to address).

forfeiture and disgorgement, but it strives to keep innocent third parties from being harmed.[168] The statute thus provides for special adjudication to collect property before the government may forfeit it.[169]

Moreover, even when ordinary damages are awarded, companies need to make up for those expenses. Ultimately, the costs burden the everyday consumers, which include lower-class and indigent people.[170] For example, after a large settlement with gun manufacturers, consumers began having to pay much higher prices so that the gun manufacturers could continue to exist.[171] Sometimes this is an intended strategy because the government wants to keep people from buying certain items; however, as explained, corporations do not exist in a vacuum, and prices go up with interrelated products, services, and goods.[172]

B. Harsh Penalties

Just as third parties will be harmed in the event of disgorgement, those involved within the company are also harmed. Among those are regular stockholders and employees.[173] Disgorgement under RICO is overly harsh and

168 *See* Barnet, *supra* note 124, at 106–07 (explaining CAFRA, unlike other statutes, guards against injury to innocent third parties); *see also* United States v. 392 Lexington Pkwys, 386 F. Supp.2d 1062, 1071 (D. Minn. 2005) (stating, "[u]nder CAFRA, [c]laimants may . . . prov[e] that they are innocent owners of the property and, in that case, the property is not subject to forfeiture").

169 *See* 18 U.S.C. § 983(d) (providing procedure for government to attempt to preserve its property); *see also* Barnet, *supra* note 124, at 104–05 (highlighting historical background for providing innocent owner defense).

170 *See* Ausness, *supra* note 77, at 900 (demonstrating how litigation costs are passed on to consumers through example where cigarette smokers were compelled to pay forty-five cents more per pack due to tobacco industry's settlement); *see also* Scott H. Jenkins, *Letters*, THE AUSTIN AM.–STATESMAN, June 7, 1996, at Editorial (asserting litigation costs consumers billions of dollars).

171 *See* Ausness, *supra* note 77, at 909 (explaining where manufacturers cannot afford to pay settlement costs, consumers are charged higher prices); *see also* Thomas E. Nugent, *Rear-End Realities*, NAT'L REV., Mar. 3, 2006, at Nat'l Rev. Online (stating just as gun litigation affected costs to consumers, public torts litigation against automobile manufacturers will likely have similar results).

172 *See* Barnet, *supra* note 124, at 100 (showing while forfeiture law was intended to target Mafiosi and drug-lords, such legislation instead adversely affected innocent individuals); *see also* Malcolm B. Coate & Jeffrey H. Fischer, *Can Post-Chicago Economics Survive Daubert?*, 34 AKRON L. REV. 795, 809 (2001) (explaining when goods are tied to each other sales drop).

173 *See* Barnet, *supra* note 124, at 99–100 (lamenting that forfeiture and

punitive because it harms the corporate entity, which itself has not done harm.[174] The majority of instances involve smaller scale problems than are seen in cases like *Enron*; mainlydiscrete occurrences by conniving officers.[175] The business entity, in the United States, is fungible and can be fundamentally changed with minimal damage to innocent workers, stockholders, and the basic capital.[176] Board members may be removed, or voted out and replaced by people with completely different philosophies.[177] Thus, when board members engage in misconduct, they can be removed and replaced with honest, law-abiding members who can change the company policy.[178]

The ability for a company to change and redeem itself becomes difficult when the government forces forfeiture of large quantities

disgorgement burden third parties because legal fiction focuses on property rather than individuals); *see also* Leslie Bender, *Frontier of Legal Thought III: Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities.*, 1990 DUKE L.J. 848, 894 n.126 (1990) (stating in mass torts employee benefits plans might be cut to compensate victims).

174 *See* Barnet, *supra* note 124, at 95 (asserting inanimate objects cannot be culpable); *see also* Cynthia A. Williams, *Corporate Compliance with the law in the era of Efficiency*, 76 N.C. L. REV. 1265, 1377 (1998) (opining attribution of social or moral responsibility on corporations is fundamentally erroneous, as corporations are nothing more than contractual relationships among various individuals).

175 *See* John Clemency & Legrande Smith, *Corporate Fraud: Where Should the Buck Really Stop? Corporate Fraud Perspective 2002*, 21–Nov. AM. BANKR. INST. J. 20, 20 (2002) (writing that corporations' controlling officers are responsible for fraud, and despite many instances of fraud in smaller corporations, such information rarely makes national headlines); *see also* Carolyn Said, *Stock Fraud Lawsuits Down; Stanford Study Finds Fewer Class Actions in '05, Less Focus on Tech*, THE SAN FRANCISCO CHRON., Jan. 4, 2006, at C1 (explaining numerous frauds are so minor they have not drawn media attention).

176 *See* George Ponds Kobler, *Shareholder Voting Over the Internet: A Proposal for Increasing Shareholder Participation in Corporate Governance*, 49 ALA L. REV. 673, 674–76 (1998) (discussing history of shareholder voting, and explaining that Rule 14(a) of SEC enables shareholders to take control back from management); *see also* Harvey R. Miller & Shai Y. Waisman, *Does Chapter 11 Reorganization Remain a Viable Option for Distressed Businesses for the Twenty-First Century?*, 78 AM. BANKR. L.J. 153, 182 (2004) (describing corporate assets as fungible).

177 *See* Kobler, *supra* note 176, at 687 (providing arguments for shareholder participation and ability to remove board members); *see also* Marcel Kahan & Edward B. Rock, *Symposium: Management and Control of the Modern Business Corporation: Executive Compensation & Takeovers: How I Learned to Stop Worrying and Love the Pill: Adaptive Responses to Takeover Law*, 69 U. CHI. L. REV. 871, 880 (2002) (giving particular example of how ability to replace board members affects corporations).

178 *See* Kobler, *supra* note 176, at 687 (explaining stockholder participation will deter board members from unethical and lawless conduct, such as giving themselves excessive compensation increases); *see also* Carol Goforth, *Proxy Reform as a Means of Increasing Shareholder Participation in Corporate Governance: Too Little, but not too Late.*, 43 AM. U.L. REV. 379, 432–33 (1994) (enumerating various positive outcomes of board accountability to shareholders).

of the company's assets.[179] In some situations, forfeiture is proper and thus statutes like RICO call for divestment as long as it conforms to the statutes' standards.[180] Moreover, heightened demonization jeopardizes future performance.[181] Large scale disgorgement provides crippling blows to a corporation. Accordingly, businesses develop an extra stigma as a RICO "enterprise" and less as one that committed a few nefarious acts.[182] Under RICO, if criminally pursued, it would be a double penalty, the first coming from criminal disgorgement, followed by civil.[183] Also, there is the possibility of facing state sanctions as well as federal.[184] Essentially, disgorgement is penalizing, a feature unintended in RICO's civil provision.[185]

Fundamentally, disgorgement causes greater externalities than it solves problems. In fact, in many instances, large orders of forfeiture ultimately cause a reverse effect: companies continue illegal acts to meet the mounting court order.[186] Once

179 *See* Sara Sun Beale, *The Many Faces of Overcriminalization: Essays: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 769–71 (2005) (objecting to federal forfeiture in addition to state forfeiture for crimes because it causes too much harm to defendants); *see also* Sacks et al., *supra* note 119, at 853–54 (2005) (stating RICO actions traditionally do not violate double jeopardy clause of 5th Amendment).

180 *See* 18 U.S.C. § 1964(a) (1995) (suggesting divestment as possible penalty in proper circumstances); *see also* Sacks et al., *supra* note 119, at 863–64 (stating such penalties are appropriate to halt activities that may lead to future violations, but courts must be mindful of how penalties will affect innocent parties).

181 *See* Ausness, *supra* note 77, at 908–09 (discussing adverse economic effects of costs to corporations above just disgorgement including legal fees, image salvaging, and stock deflation); *see also* Timothy Stoltzfus Jost & Sharon L. Davies, *The Empire Strikes Back: A Critique of the Backlash Against Fraud and Abuse Enforcement*, 51 ALA. L. REV. 239, 291 n.276 (1999) (stating that stigma attached to companies involved in crime may lead consumers to steer away from its products).

182 *See* Ausness, *supra* note 77, at 909 (noting that high profile cases can negatively effect companies' sales, profits and stock prices); *see also* Jost & Davies, *supra* note 181, at 291 n.276 (discussing possible consumer tendency to stay away from products produced by companies involved in criminal action).

183 *See* 18 U.S.C. § 1963(a) (2006) (requiring criminal forfeiture of property obtained by criminal transactions); *see also* 18 U.S.C. § 1964(a) (2006) (providing divestment of any personal interest one has in the enterprise).

184 *See* 18 U.S.C. § 1963(a) (granting forfeiture to federal government "irrespective of any provision of state law"); *see also* Beale, *supra* note 179, at 770–71 (commenting that double penalty occurs when both state and federal disgorgement are allowed).

185 *See* Barnet, *supra* note 124, at 104–05 (stating that forfeiture law can be unfair and that CAFRA does away with archaic legal fictions); *see also* John J. O'Donnell, *RICO Forfeiture and Obscenity: Prior Restraint or Subsequent Punishment?*, 56 FORDHAM L. REV. 1101, 1111 (1988) (describing procedural advantages in RICO civil actions, over criminal actions, including lesser burden of proof and more generous discovery disclosure, for reaching defendant's property).

186 The RICO civil portion was not authored as a penalizing method of law enforcement. It was enacted to prevent and restrain future acts of racketeering. *See* U.S.

the disgorgement orders are made, states will become reluctant to enforce them properly because they depend on tax revenue from corporations, especially tobacco, alcohol, and gun distributors.[187] As a result, because the lawsuits are government sponsored, the payment agreements, which are set up like excise taxes, will depend on more sales instead of less.[188]

Though attractive to disgorge large amounts from major corporations, the focus is better spent on prosecuting individuals at the helm of the scandals. Corporations, though considered a person for purposes of law and taxes, are merely a fictitious entity controlled by people.[189] There is thus a need to harshly prosecute the individuals, including any rank and file members that were involved.[190] When the corporate chain is pursued, the corporate veil can be pierced, and will no longer be regarded as a comforting shield.[191] Once criminal proceedings have been brought against individuals, and funds forfeited against them, there should be no reprieve including debt relief.[192] Criminal

v. Private Sanitation Indus. Ass'n, 914 F. Supp. 895, 900–01 (E.D.N.Y. 1996). In fact, section 1964 does not even authorize the government to recover all of the losses incurred by the wronged parties, reaffirming RICO's purpose: to "prevent and restrain" future bad acts. *See* U.S. v. Carson, 52 F.3d 1173, 1182 (1995).

187 *See* Ausness, *supra* note 77, at 903 (finding settlements often create unforeseen externalities); *see also* Margaret A. Little, *Symposium: A Most Dangerous Indiscretion: The Legal, Economic, and Political Legacy of the Governments' Tobacco Litigation*, 33 CONN. L. REV. 1143, 1144 (2001) (summarizing in-depth studies of Master Settlement Agreements between states and tobacco industries, finding them "collusive and anti-competitive").

188 *See* Ausness, *supra* note 77, at 903 (referencing "master settlement agreement" of 1998 with tobacco companies and their ineffective structure); *see also* Little, *supra* note 187, at 1169 (noting payment of tobacco settlements with states come from raised prices, which is essentially a hidden tax imposed by government).

189 *See* Clemency & Smith, *supra* note 175, at 20 (personifying corporate entity); *see also* Thompson & Sale, *supra* note 80, at 864 (emphasizing importance of officer roles in daily conduct of corporations, despite lack of mention of these roles in corporate statutes).

190 *See* 18 U.S.C. § 1962 (1988) (describing prohibited conduct under RICO, which covers a multitude of acts and can apply to all persons involved in conspiracy); *see also* Clemency & Smith, *supra* note 175, at 20 (tracking prosecution down corporate chains).

191 *See* Clemency & Smith, *supra* note 175, at 25 (positing new "scienter-actus" test for imposition of liability of down corporate hierarchy for fraud); *see also* Kellye Y. Testy, *Case Studies in Conservative and Progressive Legal Orders: Capitalism and Freedom – For Whom?: Feminist Legal Theory and Progressive Corporate Law*, 67 LAW & CONTEMP. PROBS. 87, 105–06 (2004) (decrying lack of corporate accountability occasioned by limited liability concept of corporations).

192 *See* 11 U.S.C. § 523(a)(19) (2006) (excepting from discharge in bankruptcy any debt incurred in violation of securities fraud laws, or incurred as result of common law fraud, deceit or manipulation attendant to purchase or sale of any security); *see also* Amy Shapiro, *Who Pays the Auditor Calls the Tune?: Auditing Regulation and Clients' Incentives*, 35 SETON HALL L. REV. 1029, 1090 (2005) (noting non-dischargeability of debts

suits and suits for tortuous conduct should be brought against the individual actors even when their acts were benefiting the entire corporation.[193] However, going after corporate funds instead of individuals' funds will prolong the individual provocateurs' sense of immunity.[194]

C. Better Policy

Though both criminal and civil RICO have been important tools for fighting organized crime, there are much better policies that can be utilized against corporate misconduct than civil disgorgement. The first group involves private actions, mainly corroborative ones.[195] Derivative lawsuits have long been a tactful way to ensure that a company is being run properly.[196] Because those that bring the suits are shareholders, they are more likely to have a grasp on the contours of the corporation than government prosecutors.[197] Furthermore, when a

incurred as result of violations of securities fraud laws).

193 *See* Clemency & Smith, *supra* note 175, at 20–21 (delineating occasions for imposition of personal liability on corporate officers, directors, and employees for frauds of the corporation); *see also* Gary W. Marsh & Petrina Hall, *The Many Faces of Directors' Fiduciary Duties*, 22–Sept. AM. BANKR. INST. J. 14, 54 (2003) (noting recent precedent suggesting willingness of courts to impose personal liability for breach of fiduciary duty even absent suggestion of self-dealing); Keith A. Rowley, *The Sky is Still Blue in Texas: State Law Alternatives to Federal Securities Remedies*, 50 BAYLOR L. REV. 99, 192–93 (1998) (categorizing when officers and directors may have suit brought against them for wrongs committed within course of duty).

194 *See* Jill E. Fisch & Caroline M. Gentile, *The Qualified Legal Compliance Committee: Using the Attorney Conduct Rules to Restructure the Board of Directors*, 53 DUKE L.J. 517, 567 (2003) (noting "prospect of significant personal liability for corporate failures would create strong incentives for directors to monitor management closely."); *see also* Gregory Walker, Note, *The Personal Liability of Corporate Officers in Private Actions Under the Sherman Act: Murphy Tugboat in Distress.*, 55 FORDHAM L. REV. 909, 912 (1987) (noting in context of federal antitrust law that officer immunity from personal liability for adverse judgments would occasion the view of such judgments as mere business expense).

195 *See* John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215, 226–27 (1983) (noting efficiency and fairness advantages of private law enforcement); *see also* Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 107 (2005) (enumerating arguments as to why private suits against corporate misbehavior are a better enforcement mechanism).

196 *See* Thompson & Sale, *supra* note 80, at 888–89 (emphasizing significance of private shareholder derivative suits allowed generally under state corporation laws); *see also* Robert B. Thompson & Randall S. Thomas, *The Public and Private Face of Derivative Lawsuits*, 57 VAND. L. REV. 1747, 1749–50 (2004) (extolling virtue of derivative suits).

197 *See* Reinier Kraakman, et al., *When are Shareholder Suits in Shareholder Interests?*, 82 GEO. L.J. 1733, 1733–34 (1994) [hereinafter *Shareholder Interests?*] (explaining shareholder suits); *see also* Stephenson, *supra* note 195, at 107 (arguing that

shareholder suit is won, money awarded is used to spread the wealth among the corporation, maintaining its steadiness.[198] Largely important as well is that these suits serve as deterrents to corporate officers against improper action.[199] This deters individuals more strongly than the thought of RICO disgorgement because they know that shareholders are constantly watching and are vigilant to protect their holdings.[200] Meanwhile, the derivative suit often increases general corporate wealth, while disgorgement simply drains it.[201]

Further, there are more appropriate statutes that provide issue specific remedies, including fines and forfeiture, but carefully pinpoint what is targeted and where the retrieved funds vest. MCRA, fraud acts, and other related legislation are specific and proven ways to help pay for harmed public entities as a result of corporate misconduct in the health care industry.[202] Likewise, statutes, such as insider trading statutes and disclosure acts, specifically aim to prevent insider trading.[203] Securities exchanges are closely monitored by the Securities and

private suits are often more efficient and innovative with litigation strategies than most public prosecutions).

198 *See Shareholder Interests?*, *supra* note 197, at 1736 (analyzing how shareholder suit can affect corporation); *see also* Peter V. Letsou, *The Role of Appraisal in Corporate Law*, 39 B.C. L. REV. 1121, 1156 n.131 (1998) (noting beneficial effect on share value as result of successful derivative suit).

199 *See* James D. Cox, *American Law Institute's Corporate Governance Project: Remedies: Compensation, Deterrence, and the Market as Boundaries for Derivative Suit Procedures.*, 52 GEO. WASH. L. REV. 745, 749 (1984) (noting deterrent effect of derivate suits); *see also Shareholder Interests?*, *supra* note 197, at 1736 (prophesizing that derivative suits can act as strong deterrent to corporate misconduct).

200 *See Shareholder Interests?*, *supra* note 197, at 1735–36 (establishing incentives of shareholders to increase corporate wealth and deter officers from harming their investment); *see also* Mary Elizabeth Matthews, *The Shareholder Derivative Suit in Arkansas*, 52 ARK. L. REV. 353, 354 (1999) (extolling "watchdog function" of shareholder derivative suits).

201 *See* Cox, *supra* note 199, at 749 (positing theory that derivative suits may be economically justified inasmuch as they reduce corporation's agency costs); *see also Shareholder Interests?*, *supra* note 197, at 1739 (determining when derivative suits increase corporate wealth).

202 *See* Altschuler, *supra* note 134, at 844–45 (reviewing usefulness of various statutes for their prosecutorial options); *see also* Pamela H. Bucy, *Crimes by Health Care Providers*, 1996 U. ILL. L. REV. 589, 591–630 (1996) (canvassing federal legislation directed at curbing health care fraud).

203 *See* 15 U.S.C. § 78m(d) (1995) (requiring strict disclosure of any change in ownership of five or more percent of corporation within ten days of exchange); *see also* SEC v First City Fin., Corp., 890 F.2d 1215, 1230–31 (D.C. Cir. 1989) (stating disgorging profits obtained in violation of disclosure statutes is regular practice and seeks to relieve violators of unjust enrichment).

Exchange Commission ("SEC"), which is specifically capable of targeting ill-gotten profits, and does so with small margins of error.[204] RICO, meanwhile, is a broad and vague statute.[205] It is asserted that if disgorgement is allowed, there will inevitably be many mistakes regarding how the funds are calculated and where they will go. Meanwhile, due to the lack of specific limitations, it would result in unplanned externalities harming unintended people.

III. PRACTICAL

RICO has been effective for the purposes it was created to battle with; but for practical reasons, it should be limited as far as civil penalties are concerned. Beyond jurisprudential and policy based reasons, disgorgement without specific intent to do so is an impractical approach.[206] Primarily, civil RICO was set up with proactive provisions to "prevent and restrain" organizations from any further illegal acts.[207] Although anger at corruption in business stirs public sentiment to punish the corporation that is responsible, there are more practical methods with fewer externalities.[208] These two methods include: A) proactive involvement; and B) a shift in responsibility.

204 *See First City*, 890 F.2d at 1231–32 (lamenting SEC's ability to proactively investigate disclosure violations and efficiently trace unjustly gained profits); *see also* William C. Tyson & Andrew A. August, *The Williams Act After RICO: Has the Balance Tipped in Favor of Incumbent Management?*, 35 HASTINGS L.J. 53, 76–77 (1983) (noting that Securities Act of 1933 and Securities Exchange Act of 1934 contain antifraud provisions and reporting disclosure provisions).

205 *See* Slocum, *supra* note 8, at 643–44 (describing RICO as vague); *see also* Edward S.G. Dennis, Jr., *Current RICO Policies of the Department of Justice.*, 43 VAND. L. REV. 651, 661 (1990) (commenting on broad operation of RICO).

206 *See generally First City*, 890 F.2d at 1230 (questioning practicality of using RICO disgorgement); *see also* Stephenson, *supra* note 195, at 126–29 (offering more practical solutions to keeping corporate misconduct quelled).

207 *See* U.S. v. Philip Morris, 396 F.3d 1190, 1201 (D.C. Cir. 2005) (reiterating limitations of using civil RICO methods); *see also* Geoffrey F. Aronow, *In Defense of Sausage Reform: Legislative Changes to Civil RICO*, 65 NOTRE DAME L. REV. 964, 974–75 (1990) (noting targets under RICO extend to variety of white collar crimes, including fraud).

208 *See* Slocum, *supra* note 8, 645–46 (explaining some negative effects of a broad RICO interpretation); *see also* Stephenson, *supra* note 195, at 126–29 (suggesting that delegation to executive agencies is more practical than using broad equitable solutions).

A. Proactive Measures

Often, government suits seeking large-scale retribution mimic misinformed, unfounded public sentiment.[209] Most corporate scandals are small and receive little public attention.[210] The ones that do, however, gather much momentum in the media.[211] The constant coverage heightens public ire, and from this angst comes politics.[212] An ideal example is the *Philip Morris* case.[213] There has been a lot of political charge and, therefore, pressure from lobbying groups, Congress, and some presidential administrations to fight the tobacco companies.[214] Within this public campaign, however, the proper policy reasons become lost.[215] Disgorgement, though seemingly victorious, often creates many externalities created with political chits.[216] Thus, retroactive civil retribution is often an impractical matter.[217]

209 *See* Tyson & August, *supra* note 204, at 972–73 (suggesting reason Congress enacted RICO was due to pressure from Justice Department); *see also* Aronow, *supra* note 207 (exemplifying Congressional intent for civil RICO and how that contrasts to public's use of statute).

210 *See* Clemency & Smith, *supra* note 175, at 20 (showing most corporate scandals occur with little spotlight and large fallout); *see also* Paul E. Coffey, *The Selection, Analysis, and Approval of Federal RICO Prosecutions*, 65 NOTRE DAME L. REV. 1035, 1039–42 (1990) (suggesting in many corporate cases RICO charge is not used until late in investigation so as not to draw much public attention).

211 *See* Arthur B. LaFrance, *Tobacco Litigation: Smoke, Mirrors and Public Policy*, 26 AM. J.L. & MED. 187, 199–201 (2000) (discussing momentous lawsuit brought against tobacco manufacturers by government); *see also* Aronow, *supra* note 207, at 964–65 (commenting on public attention focused on defendants indicted under RICO).

212 *See* LaFrance, *supra* note 211, at 199–200 (noting political involvement in liability issues regarding tobacco companies); *see also* Aronow, *supra* note 207, at 965 (explaining initial cases brought under civil RICO were in center of controversy).

213 396 F.3d 1190 (D.C. Cir. 2005)

214 *See* Michael V. Ciresi et al., *Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation*, 25 WM. MITCHELL L. REV. 477, 483–89 (1999) (outlining three waves of tobacco litigation); *see also* LaFrance, *supra* note 211, at 200 (commenting on source of government decision to prosecute tobacco companies for fraudulent marketing methods).

215 *See* LaFrance, *supra* note 211, at 202–03 (questioning whether motives for lawsuits against tobacco companies are rooted in policy or monetary gain); *see also* Donald W. Garner, *Tobacco Wars and the New Minority*, 2 J. HEALTH CARE L. & POL'Y 15, 31 (1998) (suggesting policy alternatives to penalty-producing litigations merely result in tobacco companies passing penalty costs on to tobacco consumers).

216 *See* LaFrance, *supra* note 211, at 200 (claiming suits against tobacco companies wrongly utilized disgorgement as insurance for items paid for by federal government); *see also* Robert A. Levy, *Tobacco Wars: Will the Rule of Law Survive?*, 2 J. HEALTH CARE L. & POL'Y 45, 49 (1998) (calling federal litigation against tobacco industry perversion of rule of law in order to "tap the deep pockets of a feckless and friendless industry").

217 *See* LaFrance, *supra* note 211, at 201 (examining three obstacles to just results from tobacco litigation undertaken at federal level: "political clout of the Congressional delegations from the tobacco growing states, the lobbying expertise of the companies and

Proactive measures, therefore, often work better because they are undertaken by entities, such as administrative agencies, that have more experience within a particular field.[218] Moreover, there is less political sentiment intermingled with regulatory agencies than with elected officials publicly calling for corporate rebuke.[219] Agencies, such as the SEC, have utilized their regulatory tools for over seventy years.[220] Their efforts at disclosure have prevented widespread corruption.[221] As a result, many improper corporate activities have been isolated incidents or smaller scale problems.[222] Indeed, corrupt individuals will always find a way to manipulate laws, which is why deferential legislation to promote proactive regulation is more appropriate.[223] In contrast, wide-scale, retroactive disgorgement usually proceeds when certain methods of corruption are no longer in use.[224] Furthermore, in the wake of a scandal, it is

the subsidy self–interests of the tobacco growers"); *see also* Ausness, *supra* note 77, at 900–201 (observing settlement payments and divestments often become entangled in political gain and are thus counterproductive).

218 *See* Stephenson, *supra* note 195, at 171–72 (arguing executive agencies should have greater authority to allow private rights of action for violation of federal laws); *see also* Steven D. Shermer, Article, *The Efficiency of Private Participation in Regulating and Enforcing the Federal Pollution Control Laws: A Model for Citizen Involvement*, 14 J. ENVTL. L. & LITIG. 461, 463 (1999) (asserting, "[I]deally, involving citizens in the regulatory process would actually reduce the need for enforcement actions by either the government or citizens").

219 *See* Stephenson, *supra* note 195, at 97–98 (arguing executive agencies are better suited to grant private rights of action because they possess superior information, can alter policies, and adapt more readily); *see also* Joel P. Trachtman & Philip M. Moremen, *Costs and Benefits of Private Participation in WTO Dispute Settlement: Whose Right Is It Anyway?*, 44 HARV. INT'L L.J. 221, 241 (2003) (noting that placing cause of action in hands of private individuals acts to hold government accountable for its commitments).

220 *See, e.g.*, SEC v. First City Fin., Corp., 890 F.2d 1215, 1230–31 (D.C. Cir. 1989) (reviewing SEC's substantial task and giving general deference to its wisdom and congressionally granted power); *see also* Shermer, *supra* note 218, at 467 (noting that once Supreme Court allowed private right of action for environmental claims, environmental legislation flourished).

221 *See* Joel Seligman, *The SEC at 70: A Modest Revolution in Corporate Governance*, 80 NOTRE DAME L. REV. 1159, 1162 (2005) (discussing SEC requirements implemented to promote corporate disclosure); *see also* Thompson & Sale, *supra* note 80, at 872–75 (noting SEC's disclosure requirements).

222 *See* Seligman, *supra* note 221, at 1159–60 (positioning Enron as isolated example of impetus for greater SEC regulating corporate governance); *see also* Thompson & Sale, *supra* note 80, at 887–90 (highlighting results of corporate governance litigation).

223 *See* Thompson & Sale, *supra* note 80, at 861–62 (discussing positive future for securities regulation with federalization of corporate regulation); *see also* Seligman, *supra* note 221, at 1164 (recounting SEC response to Enron, WorldCom, and other corporate scandals).

224 *See* Daniel J. H. Greenwood, *Discussing Corporate Misbehavior: The Conflicting Norms of Market, Agency, Profit and Loyalty*, 70 BROOK. L. REV. 1213, 1233 (2005)

likely that there is no longer any money to disgorge; rather the effort is a political stunt.[225]

Another reason that retroactive punishment is futile is that judicial economy is often inadequate.[226] Courts are ill-equipped to figure out exactly what funds were part of the racketeering scandal.[227] Even if the funds could be perfectly traced, it is even more difficult to figure out which funds will "prevent and restrain" further activities.[228] Communication with every third party that will be affected is impossible and thus judges may, though unintentionally, create further harm.[229] Though some who lost money may be compensated with the disgorged funds, many will end up harmed because of limits on judicial remedies.[230] A further difficulty with judicial economy is the inadequacy of jurisdiction.[231] Most large-scale scandals come

(positing that to extent upper management's influence is responsible for corporate misdeeds, upper management should bear penalty of corporate wrongdoing); *see also* LaFrance, *supra* note 211, at 200 (discussing disgorgement as penalty imposed against tobacco company over period of years).

225 *See* Greenwood, *supra* note 224, at 1233–34 (arguing desirability of punishing corporate management for corporate misconduct rather than punishing lower level corporate wrongdoers merely carrying out orders); *see also* LaFrance, *supra* note 211, at 203 (proposing broad new tobacco policy as superior solution to monetarily penalizing tobacco companies through awards won in litigation).

226 *See* Laborers Local 17 Health & Benefit Fund v. Philip Morris, 191 F.3d 229, 240–41 (2d Cir. 1999) (recognizing court's own limits and inability to properly calculate disgorgement that would address proper policy concerns); *see also* Berg & Kelly, *supra* note 11, at 1075 (2004) (discussing tobacco related RICO claims).

227 *See Laborers Local 17,* 191 F.3d at 241–42 (acknowledging court's own limitations in properly awarding damages while avoiding externalities); *see also* R.I. Laborers' Health & Welfare Fund v. Philip Morris, 99 F. Supp. 2d 174, 178 (D. R.I. 2000) (acknowledging difficulty in ascertaining damages).

228 *See* U.S. v. Carson, 52 F.3d 1173, 1182 (2d Cir. 1995) (reiterating need for punishment to prevent and restrain further activities); *see also* Bourgeois, *supra* note 71, at 940 (stating disgorgement was meant "solely to 'prevent and restrain' future RICO violations").

229 *See* Holmes v Sec. Investor Prot. Corp. 503 U.S. 258, 273 (1992) (noting difficulty in fashioning remedy for an indirect claim); *Laborers Local 17,* 191 F.3d at 239–40 (realizing claims for disgorgement were entirely speculative, and thus court with limited capacity could not implement effective policy).

230 *See* Barnet, *supra* note 124, at 103–05 (cautioning use of forfeiture because of ability to harm third parties if they are not given proper process under innocent owner defense); *see also* Jonathon Turley, *A Crisis of Faith: Tobacco and the Madisonian Democracy,* 37 HARV. J. ON LEGIS. 433, 463 (2000) (suggesting difficulty in predicting future implications from civil RICO applications).

231 *See* Ausness, *supra* note 77, at 839 (commenting on circuit court's holding that disgorgement is not within RICO's grant of jurisdiction); *see also* Kyle Rex Jacobson, *Doing Business With the Devil: The Challenges of Prosecuting Corporate Officials Whose Business Transactions Facilitate War Crimes and Crimes Against Humanity,* 56 A.F. L. REV. 167, 200–01 (2005) (noting difficulty in bringing foreign-based companies to justice when they have committed wrongful acts).

from multi-national corporations who have spread their assets worldwide.[232] Not only does this add to the difficulty of forensic accounting, it keeps much of the ill-gained profits out of reach of United States' Courts.[233] Instead, it is important to allow agencies with the capital, manpower, and expertise to handle corporations before the chance for scandal occurs.[234] The agencies, furthermore, often have strong relationships with international organizations, which can help prevent surreptitious transfers of funds.[235]

Tantamount to proactive involvement is the need to create and manage a different corporate atmosphere.[236] Instead of waiting for scandals to occur and then trying to set an example, the example should be set earlier.[237] Currently, corporate law is generally followed because it is on the books,[238] but compliance is as narrow as legally permissible.[239] This mindset is known as

232 *See* Keith Aoki, *Symposium, Surveying Law and Borders: (Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 STAN. L. REV. 1293, 1346 (1996) (discussing transnational influence held by multinational corporations through global wealth); *see also* Jacobson, *supra* note 231, at 200–01 (noting that most large multinational corporations have immense global influence).

233 *See* Aoki, *supra* note 232, at 1346 (suggesting corporations selectively choose which laws to comply with based on corporate interests); *see also* Jacobson, *supra* note 231, at 210–11 (noting difficulty for prosecuting individuals not subject to jurisdiction because of lack of actual knowledge).

234 *See* Jacobson, *supra* note 231, at 227–28 (acknowledging that much of international cooperation is achieved through comity); *see also* Wendy W. Wolfe, Note: *Holmes v Securities Investor Protection Corporation: A Warning to Legitimate Business*, 65 U. COLO. L. REV. 659, 679 n.163 (1994) (noting multiple non-governmental organizations who have taken an interest in the civil RICO statute).

235 *See* Helesa K. Lahey, *Twentieth Survey of White Collar Crime: Article: Money Laundering*, 42 AM. CRIM. L. REV. 699, 703–04 (2005) (reviewing statutory standards in tracing illegal transfers of funds); *see also* Walter Perkel, Note, *Money Laundering and Terrorism: Informal Value Transfer Systems*, 41 AM. CRIM. L. REV. 183, 186 (2004) (discussing attempts to curb money laundering through international cooperation).

236 *See* Daniel T. Ostas, *Cooperate, Comply, or Evade? A Corporate Executive's Social Responsibilities with Regard to Law*, 41 AM. BUS. L.J. 559, 561 (2004) (explaining "Corporate Social Responsibility" and its mere normative status); *see also* C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 KAN. L. REV. 77, 80 (2002) (suggesting need for reform of corporate power schemes).

237 *See* Ostas, *supra* note 236, at 564–65 (calling for corporate behavior to follow standards of cooperation with spirit of public policy); *see also* Wells, *supra* note 236, at 122 (favoring focus on public policy over private interests).

238 *See* Ostas, *supra* note 236, at 566–67 (arguing many corporate policies are set up to comply with regulations simply because they are legally compelled to do so); *see also* Williams, *supra* note 174, at 1317 (suggesting it may be permissible as normative concept of law for corporations to violate law and simply pay regulatory fee).

239 *See* Ostas, *supra* note 236, at 566 (asserting most organizations follow laws with literal interpretation, construing them narrowly); *see also* Williams, *supra* note 174, at

malum prohibitum, which means that people find something wrong only because a law says it is wrong.[240] By contrast, *malum in se* is a belief that something is inherently evil and followed because society views it this way.[241] There needs to be a proactive measure aimed at shifting the paradigm of compliance from *malum prohibitum* to *malum in se*.[242] Without this, disgorgement is merely a temporary and poorly executed solution.[243]

Though a giant shift in thinking may take time, agencies and legislation aimed at such do alter the spirit of corporate norms.[244] It is largely important to create a web of stability in corporate society that encourages respect for the law rather than reluctant compliance.[245] Some companies have voluntarily followed this positive ideology.[246] Also, fear of public and government threats has influenced the stock exchanges to engage in more self-regulation.[247] They have created internal standards aimed at

1295 (stating, "some law prices behavior).

240 *See* Stuart P. Green, *Why It's a Crime to Tear Off the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1571 (1997) (defining *malum prohibitum*); *see also* Ostas, *supra* note 236, at 575–76 (describing *malum prohibitum* as corporate standard for following regulations, merely following text of laws).

241 *See* Green, *supra* note 240, at 1571 (defining *malum in se*); *see also* Ostas, *supra* note 236, at 571–77 (urging corporate atmosphere to change and adopt *malum in se* policies, which would transform culture into following spirit of regulation).

242 *See* Ostas, *supra* note 236, at 575–76 (asserting businesspersons have duty to examine moral basis of laws); *see also* Williams, *supra* note 174, at 1276 (arguing that corporations should comply with substantive standards of behavior and law).

243 Unless organizations begin following the spirit of laws, disgorgement will not cure problems. Instead it will simply delay further problems. *See* Ostas, *supra* note 236, at 561–62. Disgorgement, may not affect underlying behaviors. *See* Anish Vashista et al., *Twentieth Survey of White Collar Crime: Article: Securities Fraud*, 42 AM. CRIM. L. REV. 877, 929 (2005).

244 *See* Ostas, *supra* note 236, at 565 (urging paradigmatic shift for compliance); *see also* Williams, *supra* note 174, at 1300 (stating "clear societal consensus" over morality of particular behavior should dictate corporate action).

245 *See* Ostas, *supra* note 236, at 562 (explaining view that businesspersons should accept general ethical ideas as guide for behavior); *see also* Drew & Clark, *supra* note 120, at 278–79 (noting federal attempt to effect changes in corporate governance).

246 *See* Drew & Clark, *supra* note 120, at 297 (arguing incentives are given to those corporations who diligently follow internal policies aimed at rooting out corruption, which some have followed); *see also* Lucci, *supra* note 1, at 212–13 (giving examples of companies that have made internal efforts to root out improper corporate behavior).

247 *See* Seligman, *supra* note 221 at, 1178 (describing Boston Stock Exchange as exchange that has taken internal, proactive methods to change corporate industry in order to impede misbehavior); *see also* Takayuki Usui, *Corporate Governance of Banking Organizations in the United States and in Japan*, 28 DEL. J. CORP. L. 563, 581 (2003) (remarking that much legislation could have been avoided had institutions adopted meaningful self-regulation and standards of corporate governance prior to government

changing mindsets so that there is a general respect for corporate law.[248] Importantly, by doing so, the corporate climate works to comply with the spirit of law instead of working to outmaneuver it.[249] RICO disgorgement instead pays little attention to teaching lessons.[250] Because it is so vague, much of what is disgorged has little to do with the actors who created the scandals.[251] Instead, the corporations and all who rely on it are harmed; thus, beyond fear, few lessons are learned.[252]

Similarly, proactive measures need strength both through more legislation or stronger endorsement from law enforcement.[253] None of the aforementioned measures are productive without robust legislation and manpower needed to enforce them.[254] Much of the problem in the past was the antiquated thought that past enforcement measures were

involvement).

248 *See* Seligman, *supra* note 221, at 1177 (speaking of meaningful dialogue necessary to fund healthy governance); *see also* Corporate Governance Bulletin, *Devil is in the Details of Post-Enron Legislation, Recommendations*, INVESTOR RESPONSIBILITY RESEARCH CENTER INC., May 2002 (reflecting on need to align management and shareholder interests so that corporate law is followed).

249 *See* Ostas, *supra* note 236, at 567 (alleging that to abate all corporate misbehavior, there must be shift in internal corporate policy aimed at working cooperatively); *see also* Williams, *supra* note 174, at 1325 (arguing companies must comply with regulatory law precisely because it aims at covering situations not generally seen as intrinsically evil).

250 *See* Amann, *supra* note 68, at 204 (enumerating criticisms of RICO, including attraction of treble damages that "has spawned frivolous and inappropriate civil suits" and blending of civil and criminal RICO which permits civil defendants to be branded with stigma of criminal behavior); *see also* Ausness, *supra* note 77, at 908–09 (reviewing adverse economic effects of overly eager prosecution and how such prosecution inevitably harm wrong people).

251 *See* Amann, *supra* note 68, at 202 (maintaining that RICO has been called elusive and unconstitutionally vague); *see also* Ausness, *supra* note 77, at 908–09 (positing that though manufacturers being sued by the government face most immediate economic burden, ultimately that burden will be disseminated to consumers through price increases and to the public as a whole who will be required to pay more to finance government services).

252 *See* Amann, *supra* note 68, at 199 (explaining that three decades after its birth, RICO's efficacy remains in question); *see also* Ausness, *supra* note 77, at 908 (noting public tort litigation imposes economic costs "upon manufacturers and their shareholders, as well as upon employees, suppliers, retail sellers, consumers, and the general public.").

253 *See* Karl E. Stauss, *Indemnification in Delaware: Balancing Policy Goals and Liabilities*, 29 DEL. J. CORP. L. 143, 167 (2004) (positing that Sarbanes-Oxley is illustrative of current state of federal law which is headed in direction of proactive approaches to governance); *see also* Thompson & Sale, *supra* note 80, at 861–62 (acknowledging need for strong proactive legislation in wake of corporate scandals).

254 *See* Lucci, *supra* note 1, at 231–33 (reviewing recent major changes in federal corporate regulation with advent of Sarbanes-Oxley Act); *see also* Stauss, *supra* note 253, at 167 (citing major shift in federal enactments towards more proactive measures, as highlighted by Sarbanes-Oxley).

adequate.[255] The allowance for prosecuting misconduct is not the problem; rather, methods of stopping it earlier need strengthening and enacting.[256] An example of bolstering enforcement methods is to fervently prosecute acts used to conceal misconduct such as document shredding and altering.[257] Traditionally, corporate regulation has been a state issue.[258] Thus, RICO disgorgement has recently been attempted when state enforcement has failed and the federal government is suddenly desperate to get back lost money.[259] With the spread of corporate influence country-wide, and in some cases internationally, federal agencies must be allotted power to take more proactive measures.[260] Because much of the proactive legislation is rather infantile, it needs time to develop and prove itself.[261] There has already been a shift in corporate practice and

255 *See* Lucci, *supra* note 1, at 244–45 (discussing shifts to incorporate American government into corporate regulation and concluding that such shifts were necessary to fill regulatory gap that emerged between professional responsibilities of auditors and lawyers worldwide); *see also* Stauss, *supra* note 253, at 171 (predicting federal legislators will continue to seek proactive approaches to dealing with corporate governance because such approaches are necessary to police corporations effectively).

256 *See* Christopher R. Chase, *To Shred or Not to Shred: Document Retention Policies and Federal Obstruction of Justice Statutes*, 8 FORDHAM J. CORP. & FIN. L. 721, 729 (2003) (citing need for federal obstruction of justice statutes as necessary to protect honor and integrity of federal proceedings); *see also* Gary G. Grindler & Jason A. Jones, *Please Step Away from the Shredder and the "Delete" Key: §§ 802 and 1102 of the Sarbanes-Oxley Act*, 41 AM. CRIM. L. REV. 67, 68–69 (2004) (discussing need for legislation concerning acts used for concealment, trickery, and "obstruction of justice").

257 *See* Chase, *supra* note 256, at 729 (explaining creation of new obstruction of justice provisions through Sarbanes-Oxley, including general anti-shredding law and retention of audit work papers law); *see also* Grindler & Jones, *supra* note 256, at 68–69 (describing provisions within Sarbanes-Oxley Act that call for stricter punishment for those concealing documents and engaging in other forms of illegal conduct).

258 *See* Sante Fe Indus. v. Green, 430 U.S. 462, 479 (1977) (holding that corporations are "creatures of state law"); *see also* Seligman, *supra* note 221, at 1169 (stating that traditionally, corporate governance was considered to be within province of state legislation).

259 *See* U.S. v. Philip Morris, 396 F.3d 1190, 1192 (D.C. Cir. 2005) (exemplifying government's use of RICO as last effort for relief); *see also* G. Robert Blakey, *Symposium Law and the Continuing Enterprise: Perspectives on RICO: Foreward*, 65 NOTRE DAME L. REV. 873, 876 (1990) (commenting that RICO was meant to be liberally construed but was not meant to displace other bodies of law and can also supplement penalties imposed by state law).

260 *See* Lucci, *supra* note 1, at 244–45 (highlighting need for government regulation with worldwide corporate influence); *see also* Stauss, *supra* note 253, at 167 (describing passage of Sarbanes-Oxley in 2002 as illustrative of new proactive approach within government).

261 *See* Lucci, *supra* note 1, at 214–15 (describing amount of government legislation that was not enacted until 2002, after Enron scandal); *see also* Thompson & Sale, *supra* note 80, at 861–62 (describing outpour of suggested reforms and legislation, targeted at expanding role of federal law, that followed in wake of Enron and WorldCom scandals).

more shall come along.[262] Thus, power must be acquiesced to these proactive measures away from those seeking retroactive punishment.[263]

The advent of corporate legislation has recently begun to shift towards greater federal regulation.[264] The first great change is that federal agencies such as the SEC have been given a role in regulating corporate governance; a role traditionally left to states.[265] Accordingly, they have a greater role in deciding how much power shall be concentrated in a single CEO or board of directors.[266] The last major area of policy change has been the shift of responsibility to people running corporations and stripping away the protective veil that allowed so many to go unpunished.[267]

B. Responsibility Shift

Broad disgorgement from a legitimate organization demonizes that organization rather than holding the individuals running the organization accountable.[268] Instead of holding those

262 *See* Edward S. Adams, *Corporate Governance after Enron and Global Crossing: Comparative Lessons for Cross-National Improvement*, 78 IND. L.J. 723, 737 (2003) (describing new corporate governance schemes focusing on the increased role of the board of directors); Lucci, *supra* note 1, at 221 (discussing regulatory "changes in the corporate arena.").

263 *See* Stauss, *supra* note 253, at 167 (recognizing current trend towards proactive federal regulation as evidenced by Sarbanes-Oxley); *see also* Stephenson, *supra* note 195, at 121 (arguing for explicit congressional delegation to reduce inconsistencies).

264 *See* Lucci, *supra* note 1, at 221 (recognizing fundamental shift of power); *see also* Thompson & Sale, *supra* note 80, at 861–62 (discussing recent innovative shifts of power to regulate corporations).

265 *See* Robert B. Ahdieh, *From "Federalization" to "Mixed Governance" in Corporate Law: A Defense of Sarbanes-Oxley*, 53 BUFF. L. REV. 721, 725 (2005) (recognizing expansion of federal regulation of corporate governance under Sarbanes-Oxley); *see also* Lucci, *supra* note 1, at 221 (emphasizing shift of corporate governance from state to federal regulation in many important areas).

266 *See* Roberta S. Karmel, *Realizing the Dream of William O.Douglas – The Securities and Exchange Commission Takes Charge of Corporate Governance*, 30 DEL. J. CORP. L. 79, 80–81 (2005) (recognizing SEC's increased power to regulate the structure of corporate boards); *see also* Seligman, *supra* note 221, at 1177 (considering separation of powers between CEO and corporate board in order to maintain positive regulation).

267 *See* Colin P.A. Jones, *Sarbanes-Oxley and the Inch-Thick Contract*, 5 RICH. J. GLOBAL L. & BUS. 1, 5 (2005) (recognizing new legal obligations on CEO and CFO); *see also* Lucci, *supra* note 1, at 216 (recognizing necessity of strengthening punishment against individual actors).

268 *See* Ausness, *supra* note 77, at 908–09 (arguing broad disgorgement causes demonization of corporate entity, causing irreparable harm); *see also* John S. Baker, Jr., *Reforming Corporations Through Threats of Federal Prosecution*, 89 CORNELL L. REV. 310, 353 (2004) (stating "[w]hatever theory or approach one adopts to justify corporate

responsible for racketeering acts, the entire entity suffers including those who were completely unaware of any wrongdoing and relied on the organization's stability.[269] For this reason, in the wake of *Enron* and other similar scandals, Congress passed the *Sarbanes-Oxley Act*.[270] This legislation was the first major attempt at removing the corporate veil that had shielded wrongdoers for a long time.[271]

The new legislation requires, among other things, that a publicly traded corporation's Chief Executive Officer and Chief Financial Officer personally endorse a professional audit in the company's annual reports.[272] Consequently, this requirement places a much larger legal burden on those officers to review reports and make sure that everything is stated correctly.[273] This effort lifts away the hackneyed defense of ignorance.[274] When all parties claim that they were unaware of the improper accounting, the criminal mens rea falls apart and forces prosecutors to use broad civil measures.[275] When this measure is

criminal liability, one cannot escape from the reality that corporations are being punished without regard for culpability.").

269 *See* Ausness, *supra* note 77, at 908–09 (recognizing adverse economic effects of disgorgement); *see also* Baker, *supra* note 268, at 353 (arguing that claiming corporation is culpable "for the acts or omissions of its officers, directors, or employees dispenses with mens rea").

270 *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 745 (2002) codified in 15 U.S.C. §7201, et seq. (stating purpose of Act "[t]o protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes"); *see also* Lucci, *supra* note 1, at 214–15 (reviewing birth of Sarbanes-Oxley as a reaction to corporate scandals like *Enron*).

271 *See* Jeffrey R. Escobar, Note, *Holding Corporate Officers Criminally Responsible for Environmental Crimes: Collapsing the Doctrines of Piercing the Corporate Veil and the Responsible Corporate Officer.*, 30 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT. 305, 334 (2004) (describing Sarbanes-Oxley as "statutory codification" of piercing corporate veil); *see also* Lucci, *supra* note 1, at 217 (noting new securities regulations could subject previously immune people to harsh criminal sanctions).

272 15 USC § 7241 (2006) (imposing corporate responsibility for financial reports); *see* Thompson & Sale, *supra* note 80, at 878 (explaining new mandated disclosures and endorsements required by senior executives to place greater liability upon them).

273 *See* Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 WASH. L. REV. 1029, 1060 (2004) (stating although Sarbanes-Oxley represents no major departure from previous law, it makes it easier to establish requisite state of mind for a criminal conviction); *see also* Thompson & Sale, *supra* note 80, at 877 (recognizing greater legal burdens placed directly on officers because of Sarbanes-Oxley).

274 *See* 15 U.S.C. § 7241(a) (requiring CEO and CFO of publicly traded corporations to personally endorse independent auditing reports); *see also* Thompson & Sale, *supra* note 80, at 878 (showing how Sarbanes-Oxley requires officers to make greater efforts to prevent fraud).

275 *See* Robert C. Brighton, Jr., *Sarbanes-Oxley: A Primer for Public Companies, and*

used, especially disgorgement, the corporation and all of its dependants suffer rather than those that created the debacle.[276] In response, newer, more stringent criminal statutes have proven to be effective in deterring corporate officers from engaging in illegal behavior.[277] Ensuring that liability is placed directly on the top officers forces them to take care in keeping their organization out of scandalous activities.[278]

Further expanding liability on individuals is the increasing use of "tortuous conduct" as a method of recovery from corporate officers.[279] This civil cause of action not only targets corporate executives, but has been used on employees lower down the corporate structure that either propagated or abetted any illegal activity.[280] By shifting the responsibility onto the individuals, officers and employees strive to ensure that they are not responsible for any wrongdoing.[281] To further ensure that individuals are not shielded from liability, legislation exists that

Their Officers and Directors, and Audit Firms, 28 NOVA L. REV. 605, 612–13 (2004) (acknowledging officers are only criminally liable when they have knowledge of corporate fraud, and that Sarbanes-Oxley provides incentive for officers to avail themselves of information that could cause criminal liability if they do nothing to stop or mitigate it); *see also* Lisa M. Fairfax, *Spare the Rod, Spoil the Director? Revitalizing Directors' Fiduciary Liability Through Legal Liability*, 42 HOUS. L. REV. 393, 394 (2005) (recognizing deference given to corporate directors essentially sparing them from liability despite their fiduciary duties to shareholders prior to Sarbanes-Oxley when there was less specified legal accountability).

276 *See* Ausness, *supra* note 77, at 908–09 (raising concern about wide-scale disgorgement and damage awards against corporations and their externalities); *see also* U.S. v. Philip Morris, 396 F.3d 1190, 1201 (D.C. Cir. 2005) (discussing argument regarding excessive civil punishment and its potential adverse economic effects).

277 *See* 15 U.S.C. § 7241(2006) (imposing new requirements on corporate officers); *see also* Lucci, *supra* note 1, at 215–16 (fleshing out Sarbanes-Oxley and its provisions).

278 *See* 15 U.S.C. § 7241(2006) (creating more accountability upon corporate officers); *see also* Fairfax, *supra* note 275, at 395 (arguing that increased accountability and liability upon officers is key to establishing avoidance of fraudulent activity).

279 *See* Clemency & Smith, *supra* note 175, at 24–25 (suggesting alternative methods used to hold corporate officials and their subordinates responsible for their actions); *see also* AGA Aktiebolag v. ABA Optical Corp., 441 F. Supp. 747, 754 (E.D.N.Y. 1977) (utilizing general legal concepts of agency law to hold non-fiduciary level employees liable for fraudulent activities).

280 *See* Clemency & Smith, *supra* note 175, at 24–25 (considering deeper prosecution into corporate scandals to root out everyone that had roles in illegal acts); *see also* Gemstar Ltd. v. Ernst & Young, 917 P.2d 222, 227 (Ariz. 1996) (upholding damage award against corporate defendant for breach of fiduciary duty based upon "aiding and abetting" by lower level employees).

281 *See* Clemency & Smith, *supra* note 175, at 24–25 (underscoring individual liability through "aiding and abetting" theories); *see also* Monsen v. Consol. Dressed Beef Co., 579 F.2d 793, 799–800 (3d Cir. 1978) (outlining legal standard for "aiding and abetting" fiduciaries in corporate settings).

disallows the discharge of liability for tortuous action when that individual goes into debt.[282] Specifically, bankruptcy laws have caught on and barred this type of debt from release.[283] Essentially, placing the burden onto those responsible for violating laws abrogates the protective shield that forces prosecutors to use RICO.[284] By doing so, justice is served without resorting to last ditch effort measures such as RICO disgorgement that do little to quell the problem.[285]

CONCLUSION

Though founded as an innovative and flexible means to fight organized crime, RICO has prudential limitations. Taking advantage of RICO's broad language, though seemingly advantageous, has counter-intuitive effects. The drafters never intended for prosecutors to infer new punitive methods onto civilly deemed racketeering enterprises. If such methods are utilized, legitimate industry will be dramatically harmed. Thus, civil disgorgement frustrates the original intentions of RICO: keeping racketeering harm from infiltrating legitimate organizations. Using non-discriminatory, instead of careful, surgical punishment, prosecution efforts unintentionally hampers useful entities. Therefore, carefully precise, proactive measures are more fitting for rooting out corporate misconduct. Those measures are able to infiltrate the misbehaving few while sparing law-abiding organizations.

282 *See* Clemency & Smith, *supra* note 175, at 20–21 (arguing for strict bankruptcy laws to keep those complicit in fraud from benefiting from their actions); *see also*, 11 U.S.C. § 523(a)(2) (2006) (precluding discharge from debt if accrued on fraudulent bases).

283 *See* Clemency & Smith, *supra* note 175, at 20–21 n.10 (reviewing changes to debt relief laws against illegal actors); *see also* 11 U.S.C. §523(a)(2) (2006) (creating new standards and threshold questions impeding discharge of debt for fraudulent activity).

284 *See* Clemency & Smith, *supra* note 175, at 20 n.10 (urging more personal responsibility be placed upon corporate actors including those complicit with fiduciary actors); *see also Monsen*, 579 F.2d. at 799–800 (setting up basis for personal liability against all those involved with fraudulent activity).

285 *See* Dana M. Muir & Cindy A. Schipani, *The Intersection of State Corporation Law and Employee Compensation Programs: Is it Curtains for Veil Piercing?*, 1996 U. ILL. L. REV. 1059, 1077–82 (1996) (discussing when state law generally allows those harmed to "pierce the veil" and hold individual actors accountable despite general corporate shields to liability); *see also* Clemency & Smith, *supra* note 175, at 20–21 (exploring mechanisms to hold actors, both fiduciary and non–fiduciary, personally liable for misconduct).