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1990]

## HOW USEFUL IS CIVIL RICO IN THE ENFORCEMENT OF CRIMINAL LAW?

GERARD E. LYNCH\*

### I. INTRODUCTION

**T**HE title of this paper asks what appears to be a simple and important question: Just how much does the availability of extensive private civil remedies for violation of the RICO statute add to the effort to ensure compliance with the norms of criminal law? These remarks address only civil RICO actions by private plaintiffs. The once-rare, but increasingly frequent, civil RICO actions brought by the United States present very different issues. This question is, of course, only a part of any assessment of the value of civil RICO. One may conclude that civil RICO is of little or no value to the deterrent or punitive goals of the criminal law, and still find civil RICO lawsuits valuable for their role in compensating crime victims. Or one might find civil RICO of some value to law enforcement, but find that value outweighed by other costs of the remedy — the encouragement of burdensome, frivolous lawsuits or the upset of some appropriate balance between plaintiffs and defendants. But if the inquiry would be only part of an attempt to assess the costs and benefits of civil RICO, it would still be an important part of such an assessment.

The question seems a simple one. No terribly controversial assumptions appear to lie behind it. Obviously, the norms of criminal law represent important social policies. We can, of course, argue about the desirability of any particular criminal statute, but taken as a whole, what the law defines as criminal behavior must be taken to be behavior that society wishes deeply to repress. There are various, necessarily fallible, procedures for enforcing these norms, in order to deter and/or punish their violation. Civil lawsuits of a particular kind have been authorized, in part for the purpose of supplementing those procedures. An evaluation of the utility and fairness of the law permitting such suits should plainly include a discussion of whether the law has

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served that task. And so we should proceed to ask what civil RICO has contributed to the deterrence and punishment of offenders.

The reader of a paper with this title naturally expects one of two answers to the question posed — or, perhaps more likely in an academic context, some rather judicious middle position blending aspects of both. One possible answer is that civil RICO has vindicated the hopes of its authors and sponsors. Their notion was that far more crimes are committed than the overburdened criminal justice system can possibly handle. Why not provide an incentive for the victims of (at least the more serious, more planned, more continuous) crimes to supplement the efforts of the Justice Department by filing private lawsuits? The victims would be compensated and the wrongdoers punished, all in a single action without the expenditure of state resources or the enhancement of state power. A favorable assessment of civil RICO would claim that this is exactly what has happened. Perhaps a few, or even many, frivolous claims have been made, attracted by the possibility of treble damage recoveries, but this problem will sort itself out: the courts will reject invalid suits, and, at least in cases where recovery is allowed, the private plaintiff has, by definition, succeeded in punishing criminal conduct that often would otherwise have gone unadjudicated.

On the other hand, the answer might be that civil RICO contributes little or nothing to criminal law enforcement. The outlines of such a position would probably go something like this: Take a random sample of reported civil RICO cases. The vast bulk of the sample will consist of what the courts like to call “ordinary commercial disputes.” Two businesses have engaged in a transaction or series of transactions that have left one party feeling aggrieved; the aggrieved party claims to have been defrauded by some alleged behavior of its erstwhile associate, now adversary; a lawsuit results in which the aggrieved party demands compensation. Under pre-RICO forms of action, this dispute might be formulated as a breach of contract or a tort of fraud or deceit; today, the plaintiff is likely to assert that the defendant committed a pattern of violations of the federal mail fraud statute in the course of operating his business enterprise and, therefore, violated RICO.

What, the RICO critic would ask, does any of this have to do with law enforcement? What we have here is a regular civil suit, tricked out in criminal law terminology to take advantage of the

jurisdictional, procedural and remedial benefits of RICO to the plaintiff. The ordinary citizen, fearful for his life on the mean streets and dirty boulevards of America's cities, feels no whit safer that this "racketeer" has been brought to book and forced to pay treble damages and attorneys' fees. Nor — perhaps a fairer and more interesting standard — does the law enforcement professional feel that her job has been lightened or her project advanced by the timely intervention of a private attorney general. Walk one of those "ordinary commercial disputes" into the local outpost of the Justice Department and ask that the defendant be prosecuted for mail fraud and see what happens. Most likely, the United States Attorney will not say (unless perhaps out of politeness), "Gee, this is a great case for prosecution — if only I had the resources, I would seek an indictment posthaste." Rather, the professional prosecutor would size up the dispute as not representing genuine criminal wrongdoing. From this, the RICO critic would argue, we can conclude that whatever its other virtues or defects, civil RICO is a net zero for law enforcement. Most of the cases brought — even most of those that are found by the courts to have some merit — do not represent what prosecutors would regard as "real" crimes.

A paper about the utility of civil RICO to the goals of crime prevention and punishment might be expected to adjudicate between these views. My guess would be that most readers would expect the questions addressed to be largely empirical. What sorts of cases have been brought under civil RICO, and do they correspond more to the hopes of its proponents or to the derision of its critics?

If this were to be that kind of paper, I would argue the second, more critical view. And, as we will see, I will eventually make an argument that points in that direction. But on closer consideration, it seems to me that the two views outlined above are divided more by conceptual than by empirical differences. It will perhaps be fruitful to examine their differing assumptions about the nature of criminal law enforcement and the relationship between public law enforcement and private civil lawsuits.

## II. MEASURING LAW ENFORCEMENT: SOME HIDDEN ASSUMPTIONS

If we examine more carefully the hypothetical statements of the RICO advocates and critics set out above, we will notice that they differ in their implicit and explicit assumptions about the ef-

fectiveness of professional law enforcement. The case for enlisting private attorneys general in the war on crime explicitly begins with the premise that the criminal laws are under-enforced, and that the public prosecutor needs help to perform her duties. The political resonance of the argument for private actions against crime stems from general public agreement with this basic premise. There is indeed far more crime than the resources of the criminal justice system can cope with, and we daily hear urgent requests by all sectors of the criminal justice system for more resources.

The premise of the RICO critic is less explicit. Understandably, in light of the political potency of the underenforcement thesis, the argument does not begin by explicitly taking issue with it. At least with respect to the kinds of cases it treats, however, the argument implicitly makes a very different assumption.

The critical hinge of the argument against civil RICO is a comparison of the kinds of cases brought by private plaintiffs with those brought by prosecutors, a comparison in which the civil cases are determined not to be the sort of cases brought by prosecutors. The RICO critic concludes that the cases brought by civil RICO plaintiffs do not involve “real” crimes and, therefore, do little to advance the goal of criminal law enforcement. The implicit assumption behind this comparison is that “real” criminal cases are determined not by the definitions established in the penal code — after all, any RICO complaint that survives a motion to dismiss by definition must successfully allege at least two “real” criminal acts as defined in state or federal penal codes — but by the kinds of cases brought by prosecutors in the exercise of their discretion.

When this assumption is brought to the surface, the argument of the RICO critics may appear considerably less forceful. Why should we assume that prosecutorial discretion is being correctly exercised, or that the standard decisions being made by current prosecutors set an appropriate standard against which to measure civil actions? If plaintiffs are successfully alleging that defendants’ conduct violates norms set out in the criminal law, why should they be prevented from bringing suit because a prosecutor — her views perhaps corrupted by longstanding tradeoffs necessitated by endemic shortages of resources, and no doubt tempered as well by the severe consequences of criminal prosecution — would be reluctant to bring the case? Perhaps the prosecutors have got it wrong, and private lawsuits are necessary to

bring to book perpetrators of crimes who ought to be punished, but who escape prosecution due to incorrect allocations of resources or other exercises of discretionary authority by prosecutors. Or perhaps prosecutors are correctly making the decisions that face *them*, but nevertheless would or should welcome additional non-criminal enforcement even in cases where they would not responsibly seek criminal penalties.

Critics of civil RICO, it seems to me, must defend this step in their argument. Is there a reason to assume that the measure of appropriate criminal enforcement is not the penal code defined by the legislature, but is instead the more amorphous "code" consisting of the sorts of cases in which prosecutors regard criminal prosecution as appropriate?

The argument that civil RICO is necessary because of under-enforcement of criminal laws, however, has its own hidden assumptions to defend. As noted earlier, the political strength of this claim derives from the widespread agreement on the part of ordinary Americans that criminal law enforcement is insufficiently effective. The proposition that the norms of the criminal law are underenforced thus has considerable intuitive appeal to the public.

The hidden question here, however, is whether civil RICO suits respond to the same problem perceived by popular critics of law enforcement. Two issues are implicated in this question. First, which criminal laws are underenforced? And second, why are they underenforced? The relevance of the first question is obvious when we consider the disparity between the kinds of civil cases brought under RICO and the kinds of crimes that fuel public belief that law enforcement professionals are failing. Widespread acceptance of the proposition that public law enforcement is inadequate is almost certainly based on public fear of crimes of violence and simple property crimes. Civil RICO suits, however, are most commonly predicated on violations of the federal mail fraud and securities fraud laws. The proposition that these statutes are being underenforced by public authorities is certainly defensible, but it is by no means intuitively obvious, widely accepted by ordinary citizens or politically energizing. Even within the general category of "white collar crime," further distinctions might need to be made. One could agree with the general proposition that white collar crime is a serious social problem to which the law enforcement system responds inadequately, without nec-

essarily believing that the cases brought by RICO plaintiffs constitute the cases most in need of additional attention.

Closely related is the question *why* various criminal law norms may be underenforced. Resource constraints are part of the answer, of course, but by no means all of it, for at least three reasons. First, the decision not to prosecute a particular case or category of case is never a *pure* problem of lack of resources. So long as *some* resources are provided for law enforcement, the allocation of those resources is a policy question. The decision to devote the resources to the pursuit of one type of crime rather than another is implicitly or explicitly based on a ranking of priorities. Thus, the conclusion that public law enforcement resources are not available to enforce a particular criminal statute effectively is only partly a question of the level of funding, and is also importantly a question of the importance attached to that particular prohibition.

Second, the overall level of law enforcement funding is itself a political decision. It almost certainly is not true that the public gets the level of criminal law enforcement that it wants — indeed, one possible argument for private attorneys general might be that the public is reluctant to entrust more funds to government in general or to law enforcement professionals in particular, and so chronically underfunds law enforcement, creating a need for a private supplement that might be all the more efficient because directly responsive to consumer preference. Still, when the public is in fact deeply concerned about particular types of crimes, the level of law enforcement spending is likely to increase, along with pressure to allocate funds to the type of crime causing the concern. Recent increases in federal funding for enforcement of the narcotics laws illustrate this process. In some rough way, the political choice to fund law enforcement institutions at a particular level may suggest that, despite a persistent fantasy of the total abolition of all crime that produces discontent with the mundane reality of law enforcement, the public does not desire to end the “underenforcement” of which it sometimes complains.

Indeed, any sophisticated theory of the nature and purpose of criminal law enforcement must recognize that the total eradication of crime is not a plausible goal of the system in any case. Eliminating all crime may not be *conceptually* possible. The definition of some categories of offense and offender may be necessary for social cohesion — perhaps if the happy day arrived at which no act currently prohibited by the criminal law ever occurred, we

would have to redefine other acts, now regarded as minor nuisances, as felonies. But we need not worry about how society would respond to such an unlikely achievement. Elimination of all acts now treated as criminal may not be *biologically* possible, whether because normal human drives and instincts may in some situations lead to acts of violence or greed, or because human populations always contain extreme or aberrant individuals.

But even putting such speculation to one side, it is evident that the sort of significant reduction in anti-social behavior that could plausibly be imagined in our existing societies is likely to be achieved, not through more extensive enforcement, but through broader social or economic changes.<sup>1</sup> If this is so, then law enforcement must have more limited goals than deterring or punishing all offenders. For if crime is always going to be with us, the primary goal of the criminal law must be to shore up society's most basic norms of behavior with enough symbolic denunciation and a sufficient measure of fear to keep most citizens honest by preventing them from concluding that crime pays and that the good citizen is a patsy or dupe. That objective can be met without attempting to detect, solve, try and punish all violations of criminal law. Perhaps our society has a problem of underenforcement even on this limited standard, and no doubt we could benefit from additional efforts to enforce basic criminal laws. Still, it is worth remembering that public complaints that criminal laws are radically underenforced may result in part from unrealistic expectations about what an effective criminal law enforcement program would look like.

Third, some criminal violations might not be actively prosecuted because the officials charged with prosecuting them would not do so regardless of the amount of resources devoted to general law enforcement purposes. Sometimes, this is a product of political controversy over particular crimes. Some norms that are formally part of the criminal law might go relatively unenforced because of deliberate police and prosecutorial decisions that the legal norms were unjust, unpopular or merely symbolic, with lack of resources serving more as an excuse than as a reason for inaction. One imagines, for example, that prohibitions against gam-

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1. This is not necessarily a politically "liberal" point. The social changes might be cultural as well as economic, and might involve greater respect for authority rather than economic redistribution. But whether the solution is "liberal" or "conservative," my point is that significant reductions in crime are more likely to result from deeper social change rather than from changes in levels or strategies of law enforcement.



bling, marijuana possession and violations of the selective service laws have at times been underenforced for these reasons.

In the case of white collar crime, decisions to forego legally applicable criminal sanctions are more often case-specific rather than categorical, but the very existence of prosecutorial discretion suggests some spread, at least in the minds of prosecutors, between the demands of justice and the literal sweep of the laws. Indeed, this spread may be particularly broad in the area of the federal mail fraud statute. Federal prosecutors, armed only with a broadly-worded prohibition of fraud, have pressed hard to expand the theoretical limits of the statutory prohibition, in order to convict defendants guilty of shabby practices not covered by more specific criminal statutes. The expanded bounds of the statute, largely the result of prosecutorial initiative in the first place, may now encompass behavior that neither the prosecutors nor the Congress that passed the statute believed should be the subject of criminal sanctions.

Thus, at least some part of the spread between the number of acts that violate the literal language of criminal statutes as interpreted by the courts and the number of cases of actual prosecution may not be a simple product of lack of resources that could be remedied by an infusion of additional public or private resources. Even where resource constraints do prevent enforcement that is broadly seen as desirable, however, the nature of the resources needed may not match those made available by authorizing private civil actions. A lack of public law enforcement resources is not easily remedied by an infusion of private plaintiffs. Much criminal conduct is difficult to detect and prove. While discovery in civil cases provides potent access to a variety of sources of evidence, the investigative resources of private plaintiffs are simply no match for the prosecutor's arsenal of grand jury subpoenas, police investigations and wiretaps, not to mention the possibility of undercover operations or the development of "turned" insider witnesses. And some crimes may go underreported, undersolved and underpunished for reasons that often frustrate even law enforcement professionals. There may not be many "perfect" crimes, but there are surely enough crimes that are cleverly concealed — particularly where the criminal conduct is consensual or "victimless" or involves only remote victims — that neither public nor private enforcement resources, in any desirable amount, would help significantly increase levels of apprehension and punishment.

The defender of private civil suits as an adjunct to law enforcement, then, must answer several questions that go beyond the general proposition that criminal laws are inadequately enforced. Are the laws to which a civil remedy is proposed to be assigned ones that are generally regarded as underenforced? If so, are the reasons for their underenforcement ones that are amenable to correction by encouraging the filing of civil suits? And, closely related to these questions, the converse of the question asked of opponents of civil RICO above: to the extent that the underenforcement of certain statutes represents a deliberate policy choice by prosecutors or other law enforcement authorities, is there a basis for concluding that the letter of the statute, rather than the outcome of the myriad exercises of judgment and discretion throughout the law enforcement system, represents the final public policy preference regarding the appropriate level of enforcement?

### III. EXAMINING THE ASSUMPTIONS: LAW ENFORCEMENT OFFICIALS AS LAW-MAKERS

At first blush, exposure of the premise of the anti-civil RICO argument seems to considerably weaken the argument. It is noteworthy that Congress is seriously considering a substantial weakening of the position of civil RICO plaintiffs, without any real opposition from the law enforcement community.<sup>2</sup> The failure of police and prosecutors to rally around civil RICO speaks silent volumes about the view taken by law enforcement professionals of the value of civil RICO suits to their enterprise, and this position, I am sure, carries significant weight in the legislature. It is the practical political equivalent of the abstract argument that civil RICO suits must not be valuable to law enforcement because professional prosecutors do not regard the complaints in such suits as involving genuine crimes.

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2. House Bill 1046 proposes to eliminate attorney's fees and treble damages for most private civil RICO plaintiffs. H.R. 1046, 101st Cong., 1st Sess. (1989); see Lynch, *A Conceptual, Practical, and Political Guide to RICO Reform*, 43 VAND. L. REV. 769, 797-99 (1990). In addition, the Hughes-Boucher Bill would curtail private civil RICO suits by: 1) requiring that the two or more acts of racketeering required by the statute to form a "pattern of racketeering" be related to one another or to a common external organizing principle; 2) requiring particularity in pleading in every RICO case; and 3) requiring that judges be instructed to dismiss all RICO suits unless they find there is a public interest rationale for bringing the action as a RICO suit. H.R. 5111, 101st Cong., 2d Sess. (1990); see Hughes, *RICO Reform: How Much Is Needed?*, 43 VAND. L. REV. 639, 646-49 (1990). For a report on the current status of the Hughes-Boucher Bill, see N.Y. Times, Sept. 14, 1990, at B18, col. 3.

When, however, we ask, “Why should the narrowly professional, possibly idiosyncratic or self-serving views of police and prosecutors be the test of what is criminal?,” this apparently potent argument against civil RICO suddenly seems devoid of theoretical power. If the legislature has defined criminal conduct, why should the fact that prosecutors and police have come to tolerate it, control, or even influence, our judgment of the value of private efforts to punish it?

There is, I believe, an answer, and it is one that goes to the heart of our understanding of the criminal law. Academic criminal law theorists tend to radically separate the substantive criminal law from the procedures used to implement it. It is imagined that the penal code defines our substantive moral values — what sorts of behavior are so bad as to merit the formal infliction of pain and the society’s ultimate moral condemnation. Criminal procedure, meanwhile, is implicitly conceptualized as a rather separate system of rules that aims at devising a rational system of fact-finding and restraint on government power with the goal of separating those who have from those who have not committed such behavior. Matters such as prosecutorial discretion, allocation of police resources, diversion of cases away from the criminal justice system, street interventions by the police short of arrest and decisions by administrative agencies whether to proceed criminally or civilly, are usually not treated as part of “law” at all, but are considered to be matters of discretion, technique, logistics, or practice — or even aberrations from an ideal model.

I would like to suggest, however, that a more accurate description of a society’s “law” — and perhaps especially of those of its basic moral norms that constitute its criminal law — must factor in precisely these elements of practice and discretion. The rules embodied in the criminal law do not spring in full form from the mind of an ideal lawgiver with privileged access to the moral values of the entire society. Rather, they are often the product of conflict and compromise among different groups with different values. Sometimes this compromise is reflected on the face of the norm itself — behavior is penalized only in certain circumstances. A statute, criminalizing abortion except in cases of rape or incest, may not reflect a social consensus that abortion is privileged in those circumstances and a grievous offense in others, but rather a political agreement that attempts to mediate between bitterly opposed factions believing that abortion should never be punished or that it should always be punished.

At other times, the vehicle of compromise is in the adjective law, concerning the degree of punishment or the applicable rules of procedure and proof, or the actual practice of police and prosecutors. The faction favoring a moral norm "wins," in that the norm is enshrined in the penal code, but only because of an explicit or implicit concession to the side opposing the norm that only nominal or infrequent sanctions will be imposed, that resources will not be devoted to enforcement of the norm, or that procedural rules will restrict convictions to cases that are extreme or blatant. Rape may be made a crime, but special rules of evidence may nevertheless insulate from effective sanction various forms of male behavior that fit the legal definition. Possession of marijuana may be criminalized, but the penalty may be reduced to a nominal fine. Gambling may be illegal, but police agencies may devote few resources to detecting violations, and prosecutors may ignore or immunize bettors and small-time bookmakers, and enforce the prohibition selectively against larger operators or offenders associated with organized crime.

In such situations, an anthropologist, attempting to describe the "criminal law" of the society, would not know everything she needed to know if she mastered the conduct rules formally set out in the criminal code, and learned that gambling or paying off restaurant inspectors or profiting on inside information about upcoming takeover bids were violations of criminal law. Further, I would say that an ordinary citizen does not really know what society expects of him if he only knows the contents of the statute book. This is both an empirical and a conceptual claim. I believe it to be true as a matter of empirical fact that most citizens know little about what is in the statute books, and that, in attempting to conform their behavior to the law, they derive their understanding of legal rules from a general sense of what "the authorities" demand that is based on the behavior of the entire legal system, including the cop on the beat as well as the state legislature. I would also claim, as a matter of philosophical theory, that we properly classify as "law-abiding" a person who intuitively includes in his calculations not only the formal strictures of the law but also the political and social indicators of how strongly (if at all) society really demands compliance.<sup>3</sup> On this view of "the

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3. This is not to say that someone who believes he can get away with a crime because he knows that no one is looking is properly regarded as law-abiding. But there is an important difference between a person who knows she is violating a genuine norm, but calculates the odds of avoiding detection, and someone who believes an act is not "really" viewed as criminal. Many offenders

law," law enforcement officials must be regarded as actors charged with law-making, as well as law-administering, responsibilities. The discretionary decisions of such officials participate in shaping the universe of criminal law rules.

It is not only conceptually legitimate to regard these decisions as part of criminal law, it is also politically legitimate. As elected officials, or as appointed officials responsible to elected officials, prosecutors and police commissioners are politically responsive. At least on the local level (different considerations may apply to federal officials), such officers may be more politically responsive than legislators. After all, they are more likely to be held accountable by the voters and by their superiors for the government's actual level of success in meeting public expectations about law enforcement. At the legislative level, one could well argue, the debate and its outcome are particularly likely to be shaped by considerations of symbolism. The abstract moral sentiment condemning a practice or behavior is more likely to prevail, and to be satisfied with prevailing, at the symbolic level of legislation, while those who would be affected by full enforcement of the prohibition may find their embarrassment about opposing the conventional norm outweighs the pain that might not occur in any case if the law is not fully enforced. The decision of the law enforcement official to put muscle behind the prohibition — particularly in competition with other law enforcement priorities — is much more likely to generate resistance that will measure the actual balance of social forces.

The underlying assumption of the civil RICO critics, then, is more defensible than it might at first appear. Measuring the additional enforcement of criminal law statutes secured by civil RICO against the established policies of police agencies and prosecutors, rather than against an ideal of total enforcement of all norms of the criminal law, does not, on its face, seem illegitimate. At least where the spread between the law on the books and the law as enforced is the product of conscious or implicit administrative decisions based on politically responsible readings of social val-

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rationalize, or genuinely believe, that their acts are not "really" criminal, and while we may be properly skeptical of such claims, it seems to me that there are some cases where the claim is correct. Must the person who wishes to respect the law always drive within the speed limit, or is conforming to the actual average speed of the other drivers sufficient compliance? My hunch is that someone who deliberately chooses the latter course, while legally deserving a citation, will not feel like a law-breaker, or be regarded as such by most people, and may actually feel unjustly treated if ticketed for the violation.

ues by those legally charged with enforcing the criminal law, it is not automatically clear that more enforcement of the formal criminal norms is better, or more in keeping with society's values.

#### IV. EXAMINING THE ASSUMPTIONS: THE UTILITY OF PRIVATE SUPPLEMENTS TO LAW ENFORCEMENT

Even if accepted, these arguments only establish that the decisions of law enforcement officials about resource allocation or discretionary limits on prosecution which they establish are politically legitimate, and may be cautiously taken as representing, at least presumptively, correct readings of the level of enforcement of particular statutes that the society desires. They do not establish, however, that all instances of "underenforcement" of penal norms result from such conscious and responsible decisions. Some underenforcement results not from choice at all, but from the intrinsic difficulties of detection and prosecution of criminal violations; some result from reluctant choices that would be made differently if more resources, or more resources of a particular type, were available; and some result from deliberate policy choices that are substantively wrong, or that misread the popular will in ways that for one reason or another go uncorrected by the political process.

Thus, while the instinct of the civil RICO critic to assess the public benefits of civil RICO suits by comparing them to the sorts of cases brought criminally is sound, the argument remains incomplete. It is still possible that providing for private attorneys general to supplement the efforts of law enforcement in some particular category of cases might well be desirable. It is desirable if the reason for underenforcement by public agencies, in that category of cases, is a resource constraint that can efficiently be solved by enlisting private enforcers or an incorrect political decision by law enforcement officials that is more effectively corrected by permitting private decisions to seek sanctions than by political action to reverse the officials' policy. The mere fact that most civil RICO suits would not have been treated as criminal cases by federal prosecutors discredits the public value of those suits only presumptively and not definitively.

On the other hand, even if the value of any particular suit or category of suits can be successfully defended on this basis, it would be hard to defend the civil RICO cause of action this way. Civil RICO does not represent a focused decision that some particular category of criminal statutes is going underenforced be-

cause of a lack of resources that could be supplied by private attorneys general, or because police officials are making incorrect or self-interested discretionary decisions in that area that Congress wished to control or reverse by removing those officials' monopoly control over instituting actions to enforce the criminal law. Because of the extraordinary breadth of RICO's coverage,<sup>4</sup> civil RICO gives private plaintiffs the ability to institute actions based on virtually any substantive category of crime. To defend such a broad extension of the private attorney general power, one would have to establish that the criminal law *generally* is under-enforced for reasons that are suitably addressed by placing the decision to initiate enforcement in private hands. But, it is precisely against this general claim that the analysis above is designed to prevail; the presumption is more appropriately made that the public generally gets the level of enforcement of any particular set of norms that it demands.

What sort of case would need to be made to justify supplementing public enforcement with civil suits? The question is of theoretical interest, and it may also be of practical importance to civil RICO reform. For whatever the theoretical sweep of civil RICO, civil RICO is, in practice, largely a private action for fraud, and if a case could be made for a strong implied civil cause of action under the mail fraud statute, that would go a long way toward establishing that civil RICO is, in practice, a good thing, even if (as is often true of RICO) the statute sweeps much more broadly than is necessary to accomplish the good it does. How, then, would we go about deciding whether private attorneys general would contribute significantly to the enforcement of a criminal statute?

I think the case of antitrust enforcement has much to offer us in this regard. The level of antitrust enforcement that is desirable for society, and the selection of particular practices for attack, are highly controversial questions upon which Congress and any particular administration might be expected to differ. This might well make the legislature suspicious that its preferred antitrust policies could be undermined by a hostile executive that failed to bring necessary enforcement actions. Moreover, there are reasons to expect that the ordinary political controls on executive discretion will be less effective in this area. Antitrust enforcement

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4. See Lynch, *RICO: The Crime of Being A Criminal Parts I & II*, 87 COLUM. L. REV. 661 (1987); Lynch, *RICO: The Crime of Being A Criminal, Parts III & IV*, 87 COLUM. L. REV. 920 (1987).

involves highly technical legal and economic issues; antitrust issues are of great political and economic concern to powerful and politically active special interests, while the public interest in vigorous enforcement is diffuse; the enforcement authority is concentrated in a central federal bureaucracy with considerably less visibility and responsiveness than local police and district attorneys.

One could argue, moreover, that private decisionmakers might be preferable in several ways to public officials in selecting cases to prosecute. Antitrust violations are not, in the ancient language of the criminal law, *malum in se*. Conviction carries little stigma, and the social interest is less in reaching official determinations concerning the boundaries of acceptable behavior under the culture's fundamental moral norms and more in assessing the economic costs and benefits of particular types of business organizations or practices. The purposes of the criminal law are closer to those of civil law in such an area, and economic, rather than moral, analysis seems especially appropriate.

In these circumstances, Congress might reasonably conclude<sup>5</sup> that the criminal sanction should be supplemented by encouraging private enforcement. In addition to a fear that a hostile executive might underutilize the criminal sanction, the legislature might well conclude that "underenforcement" of the *criminal* antitrust laws was actually desirable. The antitrust laws sweep broadly, and criminal sanctions might well be thought excessive for most violations. Antitrust enforcement is a weak competitor for the law enforcement dollar, and in any case requires specialized enforcers. An accommodation in which public criminal enforcement is weakened, but private civil actions are facilitated, might suitably compromise these conflicting goals. There is little need to worry that private plaintiffs will underenforce the law; since the antitrust laws lack a significant moral dimension, there is arguably little need to assure the moral condemnation even of "victimless" offenses or of wrongs that have been fully compensated. So long as some public decisionmaker will be available to

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5. I am of course not even sketching an argument that such a conclusion would be correct. Such an argument would depend on an economic and political analysis of the policies underlying the antitrust laws, and of the consequences of judicial review of business practices under those laws. My point here is the more limited one that a legislature that believed in the value of fairly vigorous antitrust enforcement might reasonably conclude that a limited role for public prosecution and an expanded one for private civil suits would be a desirable way of achieving that goal.



challenge violations whose harm to society is too diffuse to attract private plaintiffs even with treble damages, leaving it to the aggrieved parties to decide when to seek vindication of society's interests should be sufficient. The resources of private plaintiffs, moreover, should be equal to the task of enforcement in many cases. The techniques and resources of civil plaintiffs — document discovery, depositions of witnesses, expert economic analysis — are analogous or identical to those utilized by criminal prosecutors in these cases.<sup>6</sup> Providing incentives to those who feel themselves directly aggrieved to trigger judicial review of the antitrust consequences of challenged transactions by raising the stakes of ordinary civil lawsuits may make for a sensible balance of forces.

At the other extreme stand organized crime violations. There is little or no reason to think — except where law enforcement officers have been corrupted — that police agencies do not share the legislature's priorities in prosecuting organized crime. Any underenforcement of norms relating to violent crimes or narcotics is not the result of wrong discretionary decisions by law enforcement professionals. Law enforcement failure, in these areas, more likely stems from the intrinsic difficulties of detection and proof than from misallocation of priorities.

To the extent that additional resources would help, moreover, private plaintiffs do not bring the appropriate types of resources. The standard argument of RICO critics that nobody sues a real mobster for acts of extortion or violence is true, and it is true for a reason. It is hard enough to get the victims of mob extortion to testify in prosecutions brought by the government, with the promise of some protection by the police — it is ridiculous to expect that where the police and prosecutors cannot act, the victims themselves will fill the gap. Only the state itself has the power to act where, by definition, the criminal has put his victim too much in fear to assert his legal rights. And only the state properly wields the evidence-gathering weapons — wiretaps, search warrants, promises of leniency to informers, professional

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6. There may be more to fear from overenforcement of the law by private parties. But this problem is largely a question of the substantive level of enforcement that is desired. The stigma of antitrust action is sufficiently low that the risk of unjust condemnation of defendants is not a major cost of encouraging private enforcement. The real question is the underlying policy issue of the appropriate level of antitrust enforcement, and as noted above, I am sketching this example on the hypothesis that the legislature has determined that relatively vigorous antitrust enforcement is desirable.

undercover officers — necessary to uncover proof of such violations.

Thus, large parts of the vast areas of criminal law covered by RICO, including the narcotics and violent offenses most feared by the public and most commonly regarded as underenforced, are not particularly promising candidates for supplementing law enforcement through private suits. Once again, this is not to deny that even in those areas, civil suits, to the extent any are ever filed, might have a value in obtaining compensation for victims. Even here, however, efforts to achieve greater compensation for victims of violent crime have tended to focus more on state programs such as insurance reimbursements and restitutionary sentences through the criminal process than on expanded private damage remedies. The point is simply that there is little or no criminal law enforcement value to such remedies.

Of course, private civil RICO actions are most commonly filed in white collar cases of allegedly criminal fraud. Here again, I want to distinguish fairly sharply between compensatory and law enforcement rationales for civil RICO. To the extent that the rationale for civil RICO fraud actions is to compensate victims of wrongs, I have no particular insight to offer, and I will leave the discussion to experts in torts.

But, to the extent that private civil RICO actions are intended to deter genuinely criminal conduct, I have considerable doubts about its utility. White collar offenses do seem to me to be underprosecuted and underpunished, and resource constraints are a part of the problem. Given the pressing need to deal with epidemics of drugs and violent crime, few prosecutorial agencies can devote much attention to sophisticated business crime. My experience, in a prosecutor's office that specializes to some degree in pursuing such cases, convinced me that, even in such an office, every prosecutor has far more cases worthy of investigation than she would ever have time for. And many of these are cases in which the techniques of civil litigation might well be sufficient to uncover the relevant facts. Surely the private plaintiff is a better substitute for the public prosecutor in such cases than in organized crime matters.

But in business fraud cases, a considerable portion of the disparity between the law on the books and actual prosecution is the product of deliberately-exercised prosecutorial discretion, and a substantial part of the prosecutor's function is deciding whether the invocation of criminal sanctions is appropriate. When prose-

cutors disparage the cases brought by civil RICO plaintiffs as not involving genuine crimes, they are expressing a substantive political and moral view that, even if these cases fall within the letter of the criminal laws passed by Congress, the defendants do not merit the moral opprobrium and tangible sanctions of the criminal law. They are saying, in effect, that they would not prosecute these cases even if they had the resources.

Civil plaintiffs and their attorneys, however, have no obligation, and little or no incentive, to make this judgment. And in comparison to antitrust violations, the accusation of fraud, particularly when enhanced by the terminology of racketeering, carries a more significant stigma that makes the RICO civil action a more distinctly quasi-criminal sanction.<sup>7</sup> The practical effect of civil RICO has been to accuse a wide range of people of violating criminal laws of a moral, rather than purely economic nature, in situations where the functional criminal law, as applied by the official administrators of the criminal statutes, would not treat them as criminals.

Of course, as I have noted all along, the professional prosecutors could be quite mistaken in their judgments of what kinds of fraud are worthy of criminal punishment. Perhaps the people and their representatives in Congress believe that the defendants in valid civil RICO actions should be treated as criminals, as the broad reading of the federal fraud laws by the courts would suggest, and fear that law enforcement officers are corrupt, inept, or just plain wrong in failing to pursue more cases of business fraud criminally. If this is their judgment, then civil RICO fraud suits make eminently good sense as a law enforcement mechanism, because it takes the judgment of what cases to pursue away from prosecutors and places it in the more aggressive hands of private plaintiffs.

But the breadth of the civil RICO remedy suggests that its authors did not focus specifically on the need for private attorneys general in enforcing the fraud statutes. Nor is it likely that Congress would conclude that private plaintiffs would make judgments about the moral guilt of potential fraud defendants that are

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7. Unlike private causes of action under the antitrust or securities laws, the basic fraud actions being brought under RICO tend not to be regarded as merely technical, or as essentially civil in nature. Rather, the RICO label tends to emphasize the criminal stigma of the action. If the antitrust criminal action may appear quasi-civil or quasi-administrative, the typical civil RICO mail fraud or securities fraud case seems designed to emphasize, as much as possible, the quasi-criminal nature of the civil suit.

more in keeping with public values than those to be expected of politically responsible officials. Private individuals with grievances have less incentive to make fine moral distinctions in the enforcement of laws that are deliberately written broadly. They have, indeed, a financial interest in inflating the moral guilt of their adversaries. Just as a self-interested prosecutor should be disqualified, a person who has been aggrieved is not likely to be the best person to decide what cases of wrongdoing go over the line separating those cases that merit moral condemnation from those that merit merely forced compensation.

#### V. CONCLUSION

We are now, at last, in a position to suggest what we must believe in order to think that civil RICO suits are valuable to the criminal law enforcement enterprise. To reach such a conclusion, we must evaluate whether the types of civil RICO suits we have seen, and are most likely to continue to see in the future, involve categories of criminal acts that are underprosecuted and underpunished, and whether the civil actions most likely to be brought under civil RICO are responsive to reasons why those criminal laws are inadequately enforced.

I think the first condition is plainly satisfied — business fraud is chronically underpunished. But the second question is more complicated. To ensure coverage of the infinitely various types of frauds, the federal mail fraud statute is drafted and interpreted extremely broadly. There is room for an enormous spread between the law on the books and what society actually regards as criminal. If I am correct that the judgment of prosecutors and law enforcement officials about what cases genuinely merit criminal punishment is most often sound and in keeping with public values, and that private plaintiffs will make different and less sensitive judgments of what cases are worth pursuing, then it may be that civil RICO suits do more harm than good for the basic purposes of criminal law, by blurring rather than sharpening the boundary between conduct that merely requires compensation and conduct that merits society's urgent condemnation.

