

Criminal RICO Forfeitures and the Eighth Amendment: "Rough" Justice Is Not Enough

Introduction

The Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO),¹ as amended by the Comprehensive Crime Control Act of 1984,² provides for the forfeiture³ of "interests" connected with a RICO violation. "Interests" has been broadly defined by the amended statute⁴ and broadly interpreted by the Supreme Court: "Every property interest, including a right to profits or proceeds, may be described as an interest."⁵ The legitimate interests of a RICO enterprise⁶ are indivisible from its "tainted" interests.⁷ "Tainted" interests are those that afford a source of influence over a RICO enterprise,⁸ or that are derived from or generated by RICO violations.⁹

1. Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, 84 Stat. 941 (1970) (current version at 18 U.S.C. §§ 1961-1968 (1982 & Supp. III 1985)).

2. Comprehensive Crime Control Act, Pub. L. No. 98-473, 98 Stat. 1976 (1984). In addition, the Act amended the Continuing Criminal Enterprise (CCE) Statute, Pub. L. No. 91-513, 84 Stat. 1265 (current version at 21 U.S.C. § 848 (1982 & Supp. III 1985)), which also provides for the penalty of forfeiture in personam. For the legislative history and purpose of the Comprehensive Crime Control Act, see 1984 U.S. CODE CONG. & AD. NEWS 3182.

Although addressing only the RICO statute, this Note's principles and analyses also apply to the CCE statute. See *United States v. Rogers*, 602 F. Supp. 1332 (D. Col. 1985) (in personam forfeiture provisions of RICO and the drug (CCE) statute are almost identical and have the same objectives).

3. Forfeiture is "[s]omething to which the right is lost by the commission of a crime or fault or the losing of something by way of a penalty." BLACK'S LAW DICTIONARY 584 (5th ed. 1979). Criminal forfeiture is the "post-conviction divestiture of the defendant's property or financial interest that has an association with his criminal activities." Note, *Criminal Forfeiture: Attacking the Economic Dimension of Organized Narcotics Trafficking*, 32 AM. U.L. REV. 227, 229 (1982).

4. The amended provisions of section 1963 provide in subsection (a)(3) for the forfeiture of property constituting or derived from proceeds obtained directly or indirectly from violations of section 1962. See 18 U.S.C. § 1963(a)(1)-(3) (Supp. III 1985).

5. *Russello v. United States*, 464 U.S. 16, 22 (1983).

6. See *infra* note 23 for a definition of "enterprise."

7. See, e.g., *United States v. Cauble*, 706 F.2d 1322, 1349 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984); *United States v. Walsh*, 700 F.2d 846, 857 (2d Cir.), *cert. denied*, 464 U.S. 825 (1983).

8. 18 U.S.C. § 1963(a)(1)-(2) (Supp. III 1985).

9. *Id.* at § 1963(a)(3). See also *Russello v. United States*, 464 U.S. 16 (1983) (insurance proceeds from arson fraud held forfeitable); *United States v. Rogers*, 602 F. Supp. 1332, 1341

To what extent must tainted interests be present in a RICO enterprise before a RICO forfeiture satisfies the Eighth Amendment's prohibition against cruel and unusual punishment?¹⁰ One court has suggested that "at least where the provision for forfeiture is keyed to the magnitude of a defendant's criminal enterprise . . . the punishment is at least in some rough way proportional to the crime."¹¹

What are the limits of such "rough" justice? This Note explores that question, and concludes that "rough" justice is not enough to satisfy the requirements of the Eighth Amendment. Part I analyzes the RICO statute: its purposes, the elements of a RICO violation, and the interests that are subject to forfeiture. Part II examines the history of forfeitures in America. Part III examines the history, purpose, and scope of the Eighth Amendment. Part IV proposes and applies an eighth amendment analytical framework to criminal RICO forfeitures, and examines and critiques the lower federal courts' treatment of the eighth amendment issue. Finally, Part V recommends that the statute be amended to comport with the Eighth Amendment.

I. The RICO Statute

A. The Statute's Purposes

Congress designed the RICO statute to address the growing problem of organized crime.¹² The statute provides for forfeiture in per-

(D. Col. 1985) (suggesting that "the government could seize new buildings legitimately acquired with the insurance proceeds [referred to in *Russello*] as well as the rents derived from those buildings.").

10. The Eighth Amendment provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

11. *United States v. Huber*, 603 F.2d 387, 397 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980).

12. Congress found that:

[O]rganized crime in the United States is a highly sophisticated, diversified, and widespread . . . [influence that controls vast sums of money and power] increasingly used to infiltrate and corrupt legitimate business and labor unions[.]. . . to subvert and corrupt our democratic processes . . . [and to] weaken the stability of the Nation's economic system.

Statement of Findings and Purpose, Pub. L. No. 91-452, 84 Stat. 922, 922-23 (1970). For an exhaustive legislative history of RICO, see Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME LAW. 237, 249-80 (1982); see also Weiner, *Crime Must Not Pay: RICO Criminal Forfeiture in Perspective*, 1 N. ILL. U.L. REV. 225, 234-40 (1981). Congress had, prior to the enactment of RICO, considered the problem of organized crime, see, e.g., Pollner, *Attorney General Robert F. Kennedy's Legislative Program to Curb Organized Crime and Racketeering*, 28 BROOKLYN L. REV. 37 (1961) (summarizing the 1961 federal legislation aimed at organized crime), but RICO was the first federal statute punishing organized crime with forfeiture in personam. See *infra* note 55 and accompanying text.

sonam—forfeiture imposed upon the defendant personally¹³—an “extraordinary”¹⁴ criminal sanction of “unprecedented scope.”¹⁵ Congress intended that the forfeiture provisions penalize and deter,¹⁶ as well as enable law enforcement authorities to punish individual criminals and separate corrupt interstate enterprises from their criminal organizations.¹⁷ Congress intended RICO’s forfeiture penalties to do more than merely provide a “compulsory retirement and promotion system [in organized crime] as new people step forward to take the place of those convicted.”¹⁸ The statute’s attack on organized crime is thus two-pronged: first, it removes profits gained from criminal activity;¹⁹ and second, through forfeiture of assets involved in criminal activity, it prevents criminal enterprises from continuing and violators from exercising control over the enterprise’s affairs *in absentia*, while in jail.²⁰

B. The Elements of a Criminal RICO Violation

Title 18, section 1962 of the United States Code defines criminal RICO activity.²¹ The elements of a criminal RICO offense are:²² (1)

13. S. REP. NO. 225, 98th Cong., 2d Sess. 191, 193, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 3182, 3376. Traditional forfeiture is in rem, by which the punishment is imposed against the property. *See id.*; *see also infra* notes 56-68 and accompanying text.

14. Hughes & O’Connell, *In Personam (Criminal) Forfeiture and Federal Drug Felonies: An Expansion of a Harsh English Tradition into a Modern Dilemma*, 11 PEPPERDINE L. REV. 613, 620 (1984).

15. *Russello v. United States*, 464 U.S. 16, 26 (1983).

16. *Id.* at 27-28.

17. *United States v. Ambrosio*, 575 F. Supp. 546, 548 (E.D.N.Y. 1983) (citing S. REP. NO. 617, 91st Cong., 1st Sess. 78 (1969)).

18. *Id.*

19. *United States v. Rogers*, 602 F. Supp. 1332, 1347 (D. Col. 1985).

20. *United States v. Cauble*, 706 F.2d 1322, 1350 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1985).

21. Section 1962 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 of 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 indi-

that an enterprise exists;²³ (2) that the enterprise affects interstate commerce; (3) that the defendant was employed by or associated with the enterprise; (4) that the defendant participated, either directly or indirectly, in the conduct or the affairs of the enterprise; and (5) that the defendant participated through a pattern of racketeering activity.²⁴

Proof of only a criminal enterprise or a pattern of racketeering activity does not establish a RICO violation: both must be proven²⁵ and shown to be connected or to have some nexus.²⁶ The prosecution must also prove a connection or nexus between the defendant's conduct and the property interest the government seeks to have forfeited.²⁷ That

rectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

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

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

18 U.S.C. § 1962(a)-(d) (1982).

22. *United States v. Sinito*, 723 F.2d 1250, 1260 (6th Cir. 1983), *cert. denied*, 469 U.S. 817 (1984); *United States v. Kopituk*, 690 F.2d 1289, 1323 (11th Cir. 1982), *cert. denied*, 463 U.S. 1209 (1983).

23. "Enterprise" is defined 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." 18 U.S.C. § 1961(4) (1982). *See generally* Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 *FORDHAM L. REV.* 165, 199-208 (1980); Tarlow, *RICO Revisited*, 17 *GA. L. REV.* 291, 324-46 (1983); Note, *Racketeer Influenced and Corrupt Organizations: Distinguishing the "Enterprise" Issues*, 59 *WASH. U.L.Q.* 1343 (1982).

24. Racketeering activity includes "any of a wide variety of serious criminal acts under state and federal law," *United States v. Huber*, 603 F.2d 387, 393 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980), and is defined as "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matters, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year," or any act indictable under a wide variety of federal statutes. 18 U.S.C. § 1961(1)(A)-(D) (Supp. III 1985). A "pattern of racketeering activity" requires at least two predicate acts of racketeering. *Id.* at § 1961(5). To prove a violation of section 1962(d) (conspiracy), the government must additionally establish the existence of an illicit agreement to violate a substantive RICO provision. *United States v. Phillips*, 664 F.2d 971, 1012 (5th Cir. 1981), *cert. denied*, 459 U.S. 906 (1982).

25. *United States v. Sinito*, 723 F.2d 1250, 1261 (6th Cir. 1983), *cert. denied*, 469 U.S. 817 (1984); *Kimmel v. Peterson*, 565 F. Supp. 476, 495-96 (E.D. Pa. 1983).

26. *United States v. Conner*, 752 F.2d 566, 577 (11th Cir.), *cert. denied*, 106 S. Ct. 72 (1985). There is some disagreement as to what constitutes a "nexus" in this context. *See generally* Note, *The RICO Nexus Requirement: A "Flexible" Linkage*, 83 *MICH. L. REV.* 571 (1984) (discussing five different tests courts use to define "nexus" in this context, and proposing an alternative).

27. Courts are in closer agreement as to what constitutes a nexus between the defendant's conduct and the property. *See, e.g., Cauble*, 706 F.2d at 1348 (forfeiture is allowed if, beyond a reasonable doubt, there is evidence "linking" the defendant's conduct to the property interest); *United States v. Ragonese*, 607 F. Supp. 649, 650-51 (S.D. Fla. 1985), *aff'd*, 784 F.2d 403 (11th Cir. 1986) (forfeiture allowed if the property "afforded [the defendant] a source of influ-

nexus exists when the defendant participates in criminal acts with the intent that they further the enterprise's affairs, even if the acts relate to different parts of the enterprise.²⁸

C. Interests Subject to Forfeiture

Section 1963 broadly defines the reach of RICO criminal forfeiture.²⁹ Forfeiture is mandatory upon conviction.³⁰ Forfeiture in per-

ence over the enterprise"). *But cf.* United States v. Conner, 752 F.2d 566, 577 (11th Cir.), *cert. denied*, 106 S. Ct. 72 (1985) (nexus is established as alleged in the indictment if the jury finds for forfeiture). The nexus between the property interest and the defendant's conduct is important because it provides a safety valve against possible eighth amendment violations. *See infra* notes 141-142 and accompanying text.

28. *Phillips*, 664 F.2d at 1012; *Sinito*, 723 F.2d at 1261.

29. Title 18, section 1963 of the United States Code provides:

(a) Whoever violates any provision of section 1962 of this chapter [*see supra* note 21] shall be fined not more than \$25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States, irrespective of any provision of State law—

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any—

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over; any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of in violation of section 1962;

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962. The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (m) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

18 U.S.C. § 1963(a)-(c) (Supp. III 1985).

30. *Id.* at § 1963(a). *See also* United States v. Kravitz, 738 F.2d 102, 104 (3d Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985); United States v. Cauble, 706 F.2d 1322, 1349 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984); United States v. Godoy, 678 F.2d 84, 88 (9th Cir. 1982), *cert. denied*, 464 U.S. 959 (1984).

sonam as used in the RICO statute extends to all of a convicted defendant's interests in the enterprise, regardless whether those assets are "tainted" by racketeering activity.³¹ The interests subject to forfeiture are limited to those set forth in the government's information or indictment.³² The indictment is sufficient if it enumerates the legal associations or associations-in-fact and alleges that all of a defendant's control and ownership in each of the enumerated associations is subject to forfeiture.³³ Thus, a prudent indictment will "cover the waterfront" by alleging that all of the defendant's interests in specific properties or enterprises are subject to forfeiture;³⁴ the government is under no obligation to present evidence of the degree to which potentially forfeitable interests are "tainted" by illegal activities.³⁵ The burden to reduce the potential harshness of a forfeiture verdict rests on the defendant.³⁶

II. Forfeiture in American History

Forfeiture³⁷ as a sanction or penalty can be divided into two categories: (1) forfeiture in personam, a criminal proceeding, or (2) forfeiture in rem, a civil proceeding.³⁸ Forfeitures in personam operate against the guilty person, and can be imposed only after the defendant has been found guilty.³⁹ Forfeitures in rem operate against a specific res⁴⁰ that has been used for an unlawful purpose, and, being civil in nature, operate without regard to the culpability of its owner.⁴¹

31. *Cauble*, 706 F.2d at 1349.

32. FED. R. CRIM. P. 7(c)(2).

33. *United States v. Boffa*, 688 F.2d 919, 939 (3d Cir. 1982), *cert. denied*, 465 U.S. 1066 (1984); *United States v. Grammatikos*, 633 F.2d 1013, 1024 (2d Cir. 1980).

34. Such an indictment satisfies the requirements of Rule 7(c)(2) of the Federal Rules of Criminal Procedure. *See infra* note 55.

35. *United States v. Walsh*, 700 F.2d 846, 857 (2d Cir.), *cert. denied*, 464 U.S. 825 (1983). This, however, is entirely consonant with the conceptual underpinnings of forfeiture in personam: it is a punishment imposed directly upon the person; the defendant, rather than the property, is adjudged guilty. *See infra* notes 37-41 and accompanying text.

36. *Walsh*, 700 F.2d at 857.

37. Forfeitures did not originate in American history. Forfeiture provisions in English law can be traced as far back as the late seventh century. *See* T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 442-62 (1929); 2 F. POLLACK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 462-511 (2d ed. 1898 & photo. reprint 1968); *see also* Note, *Bane of American Forfeiture Law—Banished at Last?*, 62 CORNELL L. REV. 768, 770 n.15 (1977) [hereinafter Note, *American Forfeiture Law*]. For a review of forfeiture in English common law, *see id.* at 770-76.

38. *See* H.R. REP. NO. 1030, 98th Cong., 2d Sess. 193-197, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 3182, 3376-80. "[T]he proceeding *in rem* stands independent of, and wholly unaffected by any criminal proceeding *in personam*." *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14 (1827). *See generally* Hughes & O'Connell, *supra* note 14, at 617-18.

39. H.R. REP. NO. 1030, *supra* note 38, at 3376-77.

40. "[A] thing; an object." BLACK'S LAW DICTIONARY 1172 (5th ed. 1979).

41. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-81 (1974). *See also* *The Palmyra*, 25 U.S. at 14-15 (forfeiture in rem does not require a finding that the owner is

A. Forfeiture In Personam

Forfeiture in personam in American law has its historical roots in the English common law, and dates back nearly 1300 years.⁴² At English common law a felony conviction automatically escheated⁴³ all of the defendant's realty to his lord and forfeited all personalty to the Crown, and a convicted traitor forfeited both to the Crown.⁴⁴ Such forfeitures were justified on the theory that all land and property were thought ultimately to be held by the Crown as part of the bond of allegiance between the King and society,⁴⁵ and that a breach of the criminal law was an offense against the King's peace—justifying denial of the right to own property.⁴⁶ In addition, conviction of a felony resulted in the "corruption" of the defendant's blood, depriving the defendant's ancestors and heirs of certain property rights.⁴⁷ A felon who had broken the social contract no longer had any right to social advantages, including transfer of property, and people believed that punishing the felon as well as his ancestors and heirs would serve as a more effective deterrent than would personal punishment alone.⁴⁸

The concept of common-law forfeiture crossed the Atlantic with the colonists.⁴⁹ Forfeiture law varied substantially from colony to colony,⁵⁰ but did not long survive in the new republic. The colonists and the

guilty). The language of a statute can be indicative of whether its forfeiture provisions are in personam or in rem. *See* Comment, *RICO Forfeitures and the Rights of Innocent Third Parties*, 18 CAL. W.L. REV. 345, 350 n.62 (1982) (RICO statute is set forth in terms of violations committed by *defendants*; forfeiture in rem statutes are couched in terms of property, e.g., "property used in the commission of a violation . . .").

42. *See* Note, *American Forfeiture Law*, *supra* note 37, at 770 n.15.

43. Escheat is an obstruction in the normal course of the descent of property whereby the property reverts to the original grantor. *See* BLACK'S LAW DICTIONARY 488 (5th ed. 1979).

44. 3 W. HOLDSWORTH, *HISTORY OF ENGLISH LAW* 68-71 (5th ed. 1942); 1 F. POLLACK & F. MAITLAND, *supra* note 37, at 351. A felony at early English common law was defined as a crime punished by forfeiture. *Kurtz v. Moffitt*, 115 U.S. 487, 499 (1885).

45. *See* 2 J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 177-79 (4th ed. 1873).

46. 1 W. BLACKSTONE, *COMMENTARIES* *299.

47. *See* 1 J. BISHOP, *COMMENTARIES ON THE CRIMINAL LAW* 583-84 (8th ed. 1892); 2 J. KENT, *COMMENTARIES ON AMERICAN LAW* *385-87.

Corruption of blood was the English law concept, now abandoned, that the blood of the convicted person was corrupted and therefore that person could neither inherit lands or other hereditaments from his ancestor, nor retain those he already had, nor transmit them by descent to any heir. BLACK'S LAW DICTIONARY 311 (5th ed. 1979). *See also infra* note 52 and accompanying text.

48. *See* 4 W. BLACKSTONE, *supra* note 46, at 381-83.

49. Adoption of the English common law in the colonies was not automatic; their criminal law depended upon local adoption, except as Parliament specifically directed. *See* Smith, *The English Criminal Law in Early American History*, in J. SMITH & T. BARNES, *THE ENGLISH LEGAL SYSTEM: CARRYOVER TO THE COLONIES* 16-21, 41 (1975); *see generally* 1 J. BISHOP, *supra* note 47, at 585-86.

50. *See* Note, *American Forfeiture Law*, *supra* note 37, at 776-77.

Framers particularly disfavored forfeiture as a consequence of criminal conviction.⁵¹ The Constitution forbids corruption of blood and the forfeiture of a traitor's estate, except during the life of the person attainted.⁵² It also forbids bills of attainder of any kind.⁵³ The first Congress abolished forfeiture of estate and corruption of blood for felonies.⁵⁴ Forfeiture in personam was thus almost completely absent from American law until RICO's enactment in 1971.⁵⁵

51. Cf. 2 J. KENT, *supra* note 47, at 385-87 ("tendency of public opinion has been to condemn forfeiture of property; at least in the cases of felony . . ."; several states abolished forfeiture).

52. U.S. CONST. art. III, § 3, cl. 2.

53. U.S. CONST. art. I, § 9, cl. 3. A bill of attainder is a special legislative act that inflicts capital punishment upon a person allegedly guilty of high offenses, such as treason and felony, without trial or conviction according to the recognized rules of procedure. 2 J. STORY, *supra* note 45, at 209-10. If such a legislative act inflicts a milder degree of punishment, it is called a bill of pains and penalties. *Id.* The phrase "bill of attainder" as used in the Constitution includes bills of pain and penalties as well as the traditional bills of attainder. *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323 (1866).

54. Act of April 30, 1790, 1 Stat. 112, 117, ch. 9, § 24 (current version at 18 U.S.C. § 3563 (Supp. III 1985)). The Act expired on November 1, 1986. Many states also have constitutional or statutory prohibitions similar to the 1790 Act. *See* Hughes & O'Connell, *supra* note 14, at 619 n.38 (listing numerous state constitutions prohibiting forfeiture of estate); *see also* 2 J. KENT, *supra* note 47, at 386.

According to then-Deputy Attorney General Richard Kleindienst, the enactment in 1970 of section 1963(a) constituted by implication a partial repeal of 18 U.S.C. § 3563. S. REP. NO. 617, 91st Cong., 1st Sess. 79-80 (1969). This view has been criticized as being "without legal or historical support." *United States v. Grande*, 620 F.2d 1026, 1039 (4th Cir.), *cert. denied*, 449 U.S. 830 (1980). The *Grande* court felt that the 1970 statute was directed at total disinheritance and forfeiture of all of one's property and estate, and that RICO's more limited forfeiture provisions thus did not fall within the prohibitions. *Id.* at 1038-39. *See also* *United States v. Tynen*, 78 U.S. (11 Wall.) 88, 92-93 (1870) (to constitute an implied repeal, the later-enacted statute must cover the entire field occupied by the earlier one).

55. S. REP. NO. 617, 91st Cong., 1st Sess. 80 (1969). The single federal exception was the Confiscation Act of 1862, ch. 195, § 5, 12 Stat. 589, enacted "to suppress Insurrection, to punish Treason and Rebellion, [and] to seize and confiscate the Property of rebels. . . ." *Id.* at 590. The Act authorized the President to forfeit the life estates of Confederate soldiers, politicians, or sympathizers. *Id.* The Act was upheld by the Supreme Court in *Bigelow v. Forrest*, 76 U.S. (9 Wall.) 339 (1869), and *Miller v. United States*, 78 U.S. (11 Wall.) 268 (1870). The author has been unable to find any reported state criminal forfeiture proceedings prior to RICO. *Accord*, Note, *American Forfeiture Law*, *supra* note 37, at 778 n.15; *see also* Hughes & O'Connell, *supra* note 14, at 619 n.38 (listing numerous state constitutions prohibiting forfeiture of estate).

The introduction of RICO's forfeiture in personam required that Congress amend some of the Federal Rules of Criminal Procedure in order to provide procedures for RICO's criminal forfeiture provisions. FED. R. CRIM. P. 31 advisory committee note (1972). For example, Rule 7(c)(2) presently provides that "[n]o judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information shall allege the extent of the interest or property subject to forfeiture." *Id.* at Rule 7(c)(2). However, the Rule requires only that the indictment describe the interests or property that may be subject to forfeiture; there is no requirement that the government be correct in its assertion that the interests are subject to

B. Forfeiture In Rem

Forfeiture in rem does not require that a defendant be guilty;⁵⁶ rather, the property (or res) is determined to be "guilty."⁵⁷ The concept of forfeiture in rem can be traced back to the Bible: "If an ox gore a man or woman, and they die, he shall be stoned; and his flesh shall not be eaten."⁵⁸ In English law, forfeiture in rem was often enforced in the Court of Exchequer⁵⁹ and in the admiralty courts.⁶⁰ Unlike forfeiture in personam, forfeiture in rem was not viewed so disproportionately in early American history.⁶¹ "Long before the adoption of the constitution the common law courts of the colonies—and later the states during the period of Confederation—were exercising jurisdiction in rem in the enforcement of forfeiture statutes."⁶² Forfeiture in rem later appeared in the American Navigation Acts.⁶³ Today, numerous examples of forfeiture in rem abound.⁶⁴

In *United States v. Brig Malek Adhel*,⁶⁵ the United States Supreme

forfeiture. *United States v. Meyers*, 432 F. Supp. 456, 461 (W.D. Pa. 1977) (citing *United States v. Hall*, 521 F.2d 406, 407-08 (9th Cir. 1975)).

Rule 31(e) was amended in 1972 to provide that "[i]f the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any." FED. R. CRIM. P. 31(e). However, parties waive their right to a special verdict by failing to make a timely request. *United States v. Zang*, 703 F.2d 1186, 1193-95 (10th Cir. 1982), *cert. denied*, 464 U.S. 828 (1983). In the absence of such a request a general verdict will suffice. *Id.* at 1194-95.

56. See *supra* note 41 and accompanying text.

57. "The thing [in a forfeiture in rem proceeding] is here primarily considered as the offender, or rather the offense is attached primarily to the thing; and this, whether the offense be *malum prohibitum*, or *malum in se*." *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14 (1827).

The terminology in this area of the law—deeming property "guilty"—can be misleading. Even though the property in a proceeding in rem is "guilty," the forfeiture takes place within a civil, not criminal, proceeding. See 1984 U.S. CODE CONG. & AD. NEWS 3376.

58. *Exodus* 21:28. The ox was considered to be forfeited to God for its offense against Him. See Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Forfeiture*, 46 *TEMPLE L.Q.* 169, 180-81 (1973).

59. 3 *W. BLACKSTONE*, *supra* note 46, at 261-62.

60. *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 137 (1943).

61. See 2 *J. BOUVIER*, *INSTITUTES OF AMERICAN LAW* 147 (Philadelphia 1854); see also *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827) (upholding the use of forfeiture in rem).

62. *C.J. Hendry Co.*, 318 U.S. at 139.

63. See Act of July 31, 1789, ch. 5, §§ 12, 36, 1 *Stat.* 29, 39, 47-48.

64. See, e.g., *Hughes & O'Connell*, *supra* note 14, at 618 n.30 (collecting numerous federal forfeiture in rem statutes). For further discussion of forfeiture in rem, see Reed & Gill, *RICO Forfeitures, Forfeitable "Interests," and Procedural Due Process*, 62 *N.C.L. REV.* 57, 62-66 (1983).

65. 43 U.S. (2 How.) 209 (1844). *Brig Malek Adhel* involved the forfeiture of an armed merchantman whose captain, shortly after the voyage began, became mentally unbalanced and fired on several ships that crossed the brig's course. The owner was innocent of any wrongdoing. Nevertheless, the Court upheld the forfeiture of the ship "without any reference whatsoever to the character or conduct of the owner." *Id.* See also 1984 U.S. CODE CONG. & AD.

Court established the personification fiction used today⁶⁶ to justify forfeiture in rem.⁶⁷ "Personification" is a legal fiction "ascribing to the property a certain personality, a power of complicity and guilt in the wrong."⁶⁸ Once the property is determined to be guilty, it is "punished" by forfeiture.

III. The Eighth Amendment

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."⁶⁹ The Supreme Court has consistently held that the Eighth Amendment "was designed to protect [only] those [persons] convicted of crimes."⁷⁰ Criminal RICO forfeitures are in personam—imposed against the guilty person—and are thus a punishment subject to the Eighth Amendment. If the forfeitures were in rem—imposed against the property in a civil proceeding—the Eighth Amendment would not apply.⁷¹ To date, the Supreme Court has not applied the Eighth Amendment to the RICO statute's criminal forfeiture provisions.⁷²

A. Origins of the Eighth Amendment

The phrase "cruel and unusual punishment" has its origins in the English Bill of Rights of 1689,⁷³ which provided "excessive Baile ought not be required nor excessive Fines imposed nor cruell and unusuall Pun-

NEWS 3376 n.12 (generally the guilt or innocence of the owner of the asset is irrelevant, but some more recently enacted forfeiture statutes provide that property of an innocent owner cannot be forfeited). The Court justified treating the ship as the guilty thing or instrument to which the forfeiture attached on "the necessity of the case, as the only adequate means of suppressing the offense or wrong, or insuring indemnity to the injured party." *Brig Malek Adhel*, 43 U.S. (2 How.) at 233.

66. See, e.g., *Goldsmith-Grant Co. v. United States*, 254 U.S. 505 (1921).

67. *Brig Malek Adhel*, 43 U.S. (2 How.) at 212-19.

68. *Goldsmith-Grant*, 254 U.S. at 510. The fiction is a curious one, for "goods cannot offend, forfeit, unlade, pay duties, or the like, but men whose goods they are [can]." *Boyd v. United States*, 116 U.S. 616, 637 (1886). However, it is nevertheless a fiction "firmly fixed" in American jurisprudence. *Goldsmith-Grant*, 254 U.S. at 511.

69. U.S. CONST. amend. VIII.

70. *Ingraham v. Wright*, 430 U.S. 651, 664 (1977). See also *infra* notes 81-85 and accompanying text. Further, the Amendment does not apply to the government's treatment of a defendant prior to an adjudication of the defendant's guilt. *Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983).

71. This is because the Eighth Amendment applies only to criminal sanctions. See *infra* notes 81-85 and accompanying text.

72. The RICO statute was passed in 1970. See *supra* note 1 and accompanying text. The idea that the Eighth Amendment limits criminal RICO forfeitures was judicially proposed relatively recently, in *United States v. Huber*, 603 F.2d 387 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980).

73. *Ingraham*, 430 U.S. at 664.

ishments inflicted.”⁷⁴ There are two interpretations of the English use of the phrase. The first is that it was a reaction to the conduct of Lord Chief Justice Jeffreys and the barbarous forms of punishment he imposed during the treason trials in 1685.⁷⁵ The second interpretation, based on the legislative history of the English Bill of Rights and the seventeenth century meaning of the word “cruel,” is that the phrase was directed at the punishments imposed upon Titus Oates for his perjury in connection with the infamous “Popish Plot” of 1678-79.⁷⁶ The historian propounding the latter interpretation concluded the phrase was an objection to the imposition of punishments unauthorized by statute and outside the jurisdiction of the sentencing court, and was a reiteration of the English policy against disproportionate penalties.⁷⁷

Regardless which interpretation is more accurate, the colonists borrowed the phrase and it first appeared in America on June 12, 1776, in Virginia’s “Declaration of Rights.”⁷⁸ The federal government inserted the phrase into the Northwest Ordinance of 1787, and in 1791 it became the Eighth Amendment.⁷⁹

74. 1 Wm. & Mary, Sess. 2, ch. 2 (1689). The principle underlying the prohibition can be traced in English law to as early as 1042 in the laws of Edward the Confessor. *See* Commentary, *Constitutional Law: Cruel and Unusual Punishment Provision of Eighth Amendment as Restriction Upon State Action Through the Due Process Clause*, 34 MINN. L. REV. 134, 135 (1950). “Illegal” punishments were prohibited in what eventually became the English Bill of Rights of 1689, but the final draft referred to “cruel and unusual” punishments. The legislative history of the English Bill of Rights offers no insight as to how the phrase is to be interpreted, and the inclusion of the word “unusual” has been attributed to inadvertence, *Furman v. Georgia*, 408 U.S. 238, 318 (1972) (Marshall, J., concurring), and to “chance and sloppy draftsmanship.” Granucci, “*Nor Cruel and Unusual Punishments Inflicted*”: *The Original Meaning*, 57 CALIF. L. REV. 839, 855 (1969).

75. *See* I. BRANDT, *THE BILL OF RIGHTS* 155 (1965); 2 J. STORY, *supra* note 45, at 623-24. On Lord Chief Justice Jeffrey’s conduct at the trials, see H. IRVING, *THE LIFE OF JUDGE JEFFREYS* 258-308 (1898).

76. *See* Granucci, *supra* note 74, at 852-60. The “Popish Plot” refers to the proclamation in 1678 by Titus Oates, a minister in the Church of England, of the existence of a plot to assassinate Charles II. Fifteen Catholics were executed in the hysteria that followed. Oates’s perjury was eventually disclosed and he was sentenced to (1) a fine of 2,000 marks; (2) life imprisonment; (3) whippings; (4) pillorying; and (5) defrocking. A minority of the House of Lords dissented from the rejection of Oates’s petition for release from the judgment, primarily on the grounds that the King’s Bench, a temporal court, had no power to defrock Oates and that there was no precedent for the other punishments imposed, given that the crime was perjury. *See id.* at 858.

77. *Id.* at 860.

78. *Cf.* 1 B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 231-35 (1971). The phrase, however, was slightly different from what ultimately became the Eighth Amendment. Virginia’s phrase read: “That excessive bail ought not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” *Id.* at 278. Other states also adopted similar provisions. *See generally* R. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS 1776-1791* (1955).

79. Granucci, *supra* note 74, at 840. Congressional debate on the Eighth Amendment sheds little light on its meaning. The debate was minimal:

B. Judicial Interpretation of "Cruel and Unusual Punishment"

Most of the current understanding of the scope of the Eighth Amendment has come from Supreme Court opinions. Although the legislative history of the Amendment is sparse,⁸⁰ the Court has over the last century fleshed out the principles contained in the phrase. These principles, which derive from the holdings and the language of the Court's opinions, are discussed below.

1. *The Sanction Must Be Criminal*

The Eighth Amendment applies only to criminal sanctions; it has no application outside the criminal process. The Court revealed the strictness of this requirement in *Ingraham v. Wright*.⁸¹ *Ingraham* concerned a Florida statute that authorized corporal punishment provided the

Mr. Smith, of South Carolina, objected to the words "nor cruel and unusual punishments;" the import of them being too indefinite.

Mr. Livermore: The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. . . . No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.

1 ANNALS OF CONG. 754 (J. Gales ed. 1789).

It is thus unclear precisely what the Framers intended the clause to mean. Perhaps the Framers' intent is indiscernible and thus irrelevant to modern interpretations of the phrase. *Cf. Granucci, supra* note 74, at 840-41 n.8:

The history of the writing of the first American bills of rights and constitutions simply does not bear out the presupposition that the process was a diligent or systematic one. Those documents, which we uncritically exalt, were imitative, deficient, and irrationally selective. In the glorious act of framing a social compact expressive of the supreme law, Americans tended simply to draw up a random catalogue of rights that seemed to satisfy their urge for a statement of first principles—or for some of them. That task was executed in a disordered fashion that verged on ineptness.

(citations omitted).

Whatever their intent, it is clear that the meaning of the phrase has over time evolved beyond that given by the Framers. *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 171 (1976) (citing *Weems v. United States*, 217 U.S. 349, 373 (1910)) (the Amendment is flexible and "must be capable of wider application than the mischief which gave it birth"); *see also* Tribe, *Seven Deadly Sins of Straining the Constitution Through a Pseudo-Scientific Sieve*, 36 HASTINGS L.J. 155, 168 (1984) (the Founders, through their unexpressed intentions, should not rule from their graves on modern constitutional interpretation). *But cf. Woodson v. North Carolina*, 428 U.S. 280, 308 (1976) (Rehnquist, J., dissenting) ("[I]t is by no means clear that the prohibition against cruel and unusual punishments embodied in the Eighth Amendment . . . was not limited to those punishments deemed cruel and unusual at the time of the adoption of the Bill of Rights.").

80. *See supra* note 79. In any event, the Framers' intent should not be relevant to the scope of the phrase today. Tribe, *supra* note 79, at 168.

81. 430 U.S. 651 (1977).

teacher had consulted with the principal or teacher in charge of the school and the punishment was not "degrading or unduly severe."⁸² The school board regulations authorized the paddling of recalcitrant students' buttocks with a flat wooden paddle. The evidence showed that the punishments were "exceptionally harsh."⁸³ For example, on one occasion a student was subjected to twenty paddle blows while being held over a table; the student suffered a hematoma that required medical attention and kept him out of school for several days. Another student was struck so hard on his arm that he lost the full use of it for a week.

The Court was unmoved by these compelling facts. The majority held that the history and judicial interpretation of the Eighth Amendment showed that it "was designed to protect [only] those convicted of crimes. We adhere to this longstanding limitation and hold that the Eighth Amendment does not apply to the paddling of children as a means of maintaining discipline in public schools."⁸⁴

The majority's analysis demonstrates that if a punishment is not a criminal sanction, it is not "punishment" within the meaning of the Eighth Amendment.⁸⁵ Only after the sanction is deemed a criminal "punishment" will the question whether it is "cruel and unusual" be reached.

2. *Legislative Power to Impose the Sanction*

The legislature must have the power both (1) to make criminal the proscribed conduct, and (2) to impose that form of punishment. If the legislature does not have such power, that punishment is proscribed by the Eighth Amendment. The Court illustrated the first principle in *Robinson v. California*.⁸⁶ The defendant was convicted under a California statute making it a misdemeanor, punishable by imprisonment, to be

82. *Id.* at 655.

83. *Id.* at 657. Justice White noted in dissent that "the record reveals beatings so severe that if they were inflicted on a hardened criminal for the commission of a serious crime, they might not pass constitutional muster." *Id.* at 684-85 (White, J., dissenting).

84. 430 U.S. at 664.

85. Justice White, joined by Justices Brennan, Marshall, and Stevens, dissented vigorously:

[T]he constitutional prohibition is against cruel and unusual *punishments*; nowhere is that prohibition limited or modified by the language of the Constitution. Certainly, the fact that the Framers did not choose to insert the word "criminal" into the language of the Eighth Amendment is strong evidence that the Amendment was designed to prohibit all inhumane or barbaric punishments, no matter what the nature of the offense for which the punishment is imposed.

Id. at 685 (White, J., dissenting) (emphasis in original). See also Rosenberg, Ingraham v. Wright: *The Supreme Court's Whipping Boy*, 78 COLUM. L. REV. 75, 76-89 (1978) (neither precedent, history, nor policy suggests that the Eighth Amendment should be limited to criminal punishments).

86. 370 U.S. 660 (1962).

“addicted to the use of narcotics.”⁸⁷ The Court struck down the punishment, holding that:

In the light of contemporary human knowledge, a law which made a criminal offense of such a disease [insanity, for example,] would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. . . .

We cannot but consider the statute before us as of the same category.⁸⁸

The Court illustrated the second principle, that the legislature have the power to impose that form of punishment, in *Trop v. Dulles*.⁸⁹ Trop’s application for a passport had been denied on the ground that under a federal statute he had lost his citizenship because of his dishonorable discharge for desertion of the army.⁹⁰ He sought a declaratory judgment that he was a citizen, but the Second Circuit affirmed the district court’s grant of the government’s motion for summary judgment.⁹¹ The Supreme Court reversed, holding that the Eighth Amendment acts as a substantive limitation on legislative discretion as to the form and magnitude of a sanction:

[U]se of denationalization as a punishment is barred by the Eighth Amendment. There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual’s status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development.⁹²

87. The statute provided: “No person shall use, or be under the influence of, or be addicted to the use of narcotics, excepting when administered by or under the direction of a person licensed by the State to prescribe and administer narcotics.” Act of June 13, 1957, ch. 1064, § 1, 1957 Cal. Stat. 2343. The 1963 California Legislature deleted the clause “or be addicted to the use of.” Act of June 13, 1963, ch. 913, § 1, 1963 Cal. Stat. 2162. In 1972, the California Legislature reorganized the relevant codes; the current version of the statute can be found in CAL. HEALTH & SAFETY CODE § 11550 (West Supp. 1987).

88. *Robinson*, 370 U.S. at 666-67.

89. 356 U.S. 86 (1958) (plurality opinion). Chief Justice Warren authored the judgment of the Court and was joined by Justices Black, Douglas, and Whittaker.

90. The statute was then-section 401(g) of the Nationality Act of 1940, Pub. L. No. 76-853, 54 Stat. 1137, 1168-69, 8 U.S.C. § 1481(a)(8) (1958). The dishonorable discharge arose as follows: Trop, a native born citizen of the United States, was a private in the United States Army and was serving in French Morocco. He escaped from the stockade at Casablanca, where he had been confined following a previous breach of discipline. After being gone less than a day he surrendered to an officer on an army truck while he was walking back towards his base. He was subsequently court-martialed and dishonorably discharged. 356 U.S. at 87-88.

91. *Trop v. Dulles*, 239 F.2d 527 (2d Cir. 1956), *rev’d*, 356 U.S. 86 (1958).

92. 356 U.S. at 101-04. Justice Brennan concurred, concluding that the punishment exceeded Congress’ legislative powers. *Id.* at 114 (Brennan, J., concurring).

3. *Novel Methods of Punishment*

Trop v. Dulles demonstrated that nontraditional methods of punishment are subject to more searching eighth amendment scrutiny than traditional methods of punishment:⁹³ "Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect."⁹⁴ As Professor Tribe has noted, "[a]s a further criterion of offense [against the Eighth Amendment], the element of novelty provides useful guidance, for lack of routine use in a broad range of situations deprives us of confidence that a technique [of punishment] represents no great affront to human dignity."⁹⁵ Further, Professor Wheeler has noted:

If . . . administrators are permitted to create new punishments and modify statutory ones, many different punishments will exist, and incommensurability will result. As Bentham observed, it is virtually impossible to judge the relative severity of different amounts of different punishments. The more punishments we employ, therefore, the more certain we can be that some significant disproportionality will result and go undetected.⁹⁶

Trop v. Dulles also indicates that nontraditional methods of punishment may come within the express prohibitions of the Eighth Amendment. As Chief Justice Warren wrote:

On the few occasions this Court has had to consider the meaning of the [Eighth Amendment], precise distinctions between cruelty and unusualness do not seem to have been drawn. . . . [However, if] the word "unusual" is to have any meaning apart from the word "cruel," . . . the meaning should be the ordinary one, signifying something different from that which is generally done.⁹⁷

Moreover, since forfeiture in personam was disfavored in early American law,⁹⁸ perhaps the Framers intended to include such forfeiture within the constitutional proscription against "cruel and unusual punishment." Although not dispositive, such an intent on the part of the Framers is additional evidence that novel punishments are inherently constitutionally suspect.

93. In other words, *Trop* illustrated that nontraditional methods of punishment have a weaker presumption of constitutionality than that generally accorded to statutes. Generally, statutes are presumptively constitutional. See, e.g., *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249, 3254 (1985).

94. 356 U.S. at 100. *But cf. In re Kemmler*, 136 U.S. 436 (1890) (punishment can be constitutional even though unusual).

95. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 917 (1978) (footnote omitted).

96. Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 *STAN. L. REV.* 838, 855-56 (1972) (footnote omitted).

97. *Trop*, 356 U.S. at 100 n.32.

98. See *supra* notes 49-55 and accompanying text.

4. *Legislative Purpose*

The Eighth Amendment requires that the legislature have a humane purpose in prescribing the criminal penalty. This principle underlies the decisions in *In re Kemmler*⁹⁹ and *Louisiana ex rel. Francis v. Resweber*.¹⁰⁰ Both cases involved the use of electrocution as a method of punishment. In *Kemmler*, an eighth amendment challenge was made to a statute authorizing electrocution as a method of punishment. The Court upheld the statute, reasoning that the "act was passed in the effort to devise a more humane method of reaching the result,"¹⁰¹ and was therefore permissible.¹⁰²

In *Louisiana ex rel. Francis v. Resweber*, the defendant was sentenced to death by electrocution but the initial attempt to do so failed because of a mechanical error in the electric chair. He appealed the state's second attempt to electrocute him, claiming the psychological preparation for a second electrocution was a "lingering or cruel and unusual punishment."¹⁰³ The Court rejected his claim, holding:

The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution. There is no purpose to inflict unnecessary pain nor [is] any unnecessary pain involved in the proposed execution. The situation of the unfortunate victim of this accident is just as though he had suffered the identical amount of mental anguish and physical pain in any other occurrence, such as, for example, a fire in the cell block. We cannot agree that the hardship imposed upon the petitioner rises to that level of hardship denounced as [cruel and unusual].¹⁰⁴

5. *Frequency of Imposition*

The Eighth Amendment proscribes the infrequent imposition of criminal sanctions. This principle was dramatically illustrated in *Furman v. Georgia*,¹⁰⁵ in which the Court examined the imposition of the

99. 136 U.S. 436 (1890).

100. 329 U.S. 459 (1947).

101. *Kemmler*, 136 U.S. at 447. The statute was passed because the state legislature felt electrocution to be more "humane and practical" than hanging. *Id.* at 444. The Eighth Amendment had not yet been held to apply to the states by reason of the Due Process Clause of the Fourteenth Amendment, however "it is very apparent that the nature of the punishment involved was examined under the Due Process Clause of the Fourteenth Amendment," *Furman v. Georgia*, 408 U.S. 238, 323 (1972) (Marshall, J., concurring), through which the Eighth Amendment now applies to the States. See, e.g., *Robinson v. California*, 370 U.S. 660, 667 (1962).

102. The Court also rejected the idea that capital punishment was cruel and unusual. *Kemmler*, 136 U.S. at 447.

103. *Resweber*, 329 U.S. at 464.

104. *Id.*

105. 408 U.S. 238 (1972).

death penalty in three cases—one murder conviction and two rape convictions. In each case a state statute left to the discretion of the judge or jury the determination whether the penalty should be death or a lighter punishment. All three defendants were black, and all three victims were white.

The Court, in a per curiam opinion, held that “the imposition and carrying out of the death penalty in [these cases] constitute[s] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.”¹⁰⁶

Each Justice filed a separate opinion.¹⁰⁷ But Justices Douglas, Brennan, Stewart, and White each developed in a separate concurring opinion the notion that the Eighth Amendment proscribes punishment of a criminal defendant if large numbers of other, equally culpable and convicted defendants are not similarly punished.¹⁰⁸

Such logic yields an anomalous result: courts may not constitutionally punish only *some* criminal defendants of similar guilt, but courts may constitutionally punish those same defendants if *most* of the same class of defendants are similarly punished. The punishment of additional defendants thus has the curious effect of legitimizing the punishment of a smaller percentage of similarly situated defendants. But the anomaly points out the problem: if one defendant is punished while a large number of similarly situated defendants receive a less severe punishment, then (1) there is no equality of punishment;¹⁰⁹ (2) infliction of the punishment is arbitrary and unusual;¹¹⁰ and (3) by reason of its infrequency, the infliction of the punishment does not serve the societal need for retribution, does not provide a credible threat so as to be effective as a deterrent, and does not provide any discernible social or public purpose.¹¹¹ For these reasons, a punishment must not be imposed randomly or infrequently.

A related but distinct principle is that there must be a meaningful basis for distinguishing those cases in which the penalty is imposed from those in which it is not.¹¹² Without a meaningful basis for such a distinction, the same objections that condemn infrequent imposition of the punishment condemn disparate treatment of two similar cases. For example,

106. *Id.* at 239-40.

107. A 5-4 majority struck down the various laws. The nine opinions total 230 pages. *Id.* at 240-470.

108. *Id.* at 249-55 (Douglas, J., concurring); *id.* at 291-93 (Brennan, J., concurring); *id.* at 309 (Stewart, J., concurring); *id.* at 311-13 (White, J., concurring).

109. *Id.* at 255 (Douglas, J., concurring).

110. *Id.* at 309 (Stewart, J., concurring).

111. *Id.* at 311-12 (White, J., concurring).

112. *Cf. id.* at 313; *id.* at 274 (Brennan, J., concurring) (“the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others”).

as between two equally culpable, similarly situated co-conspirators, disparate punishment is inequitable and arbitrary; it does not, with respect to the less severe penalty, serve the public need for retribution; it is an ineffective deterrent because imposition of a harsh penalty is seen as essentially the luck of the draw; and it undercuts public confidence in the impartiality of the legal system.

6. Proportionality

The Eighth Amendment requires that a punishment be proportionate to the crime. The principle of proportionality has strong roots in the common law. The Magna Carta contained several paragraphs devoted to the principle.¹¹³ The English Bill of Rights, upon which the Eighth Amendment is based, repeated the principle.¹¹⁴ Further, proportionality is the central principle of the Eighth Amendment as developed in the Supreme Court.¹¹⁵

Proportionality protects several important values. First, it protects against the state's abuse of its power to punish the defendant. Although the state has the right to punish,¹¹⁶ that right extends only as far as is justified by the seriousness of the defendant's crime.¹¹⁷ Further punishment by the state is therefore a wrong against the defendant. Second, it affirms the dignity of the criminal defendant. Since "an autonomous person has the right that his punishment be addressed to . . . those unique

113. J. HOLT, *MAGNA CARTA* 322 (1965).

114. 1 Wm. & Mary, Sess. 2, ch. 2 (1689). *See supra* text accompanying note 74.

115. *See, e.g.,* *Solem v. Helm*, 463 U.S. 277, 285-86 (1983); *Enmund v. Florida*, 458 U.S. 782 (1982); *Hutto v. Davis*, 454 U.S. 370, 374 & n.3 (1982) (per curiam); *Hutto v. Finney*, 437 U.S. 678, 685 (1978); *Coker v. Georgia*, 433 U.S. 584, 592 (1977); *Ingraham v. Wright*, 430 U.S. 651, 657 (1977); *Gregg v. Georgia*, 428 U.S. 153, 171-72 (1976) (plurality opinion); *Robinson v. California*, 370 U.S. 660, 667 (1962); *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion); *Weems v. United States*, 217 U.S. 349, 367 (1910); *O'Neil v. Vermont*, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting). *But see Solem*, 463 U.S. at 311 n.3 (Burger, C.J., dissenting) ("the Cruel and Unusual Punishments clause might apply to those rare cases where reasonable men cannot differ as to the inappropriateness of a punishment. In all other cases, [the Court] should defer to the legislature's line-drawing.").

Proportionality analysis "should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Solem*, 463 U.S. at 292. However, since the Amendment is flexible and "must be capable of wider application than the mischief which gave it birth," *Weems*, 217 U.S. at 373, the objective criteria should not ossify: as a society becomes more "enlightened by a humane justice," *id.* at 378, the process and result of the objective inquiry should be similarly enlightened. The proportionality analysis in this Note therefore differs from that used in *Solem*.

116. *Trop*, 356 U.S. at 100.

117. *Cf. Enmund v. Florida*, 458 U.S. 782, 800 (1982) ("American criminal law has long considered a defendant's . . . moral guilty . . . to be critical to the degree of [his] criminal culpability.") (citation omitted); *see also* H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 231 (1982).

features of his individual, responsible conduct which occasioned the punishment,"¹¹⁸ a defendant punished out of proportion to the seriousness of his offense is being used—treated as nonhuman—when the punishment is addressed to something other than the defendant's blameworthiness.¹¹⁹ Third, proportionality helps preserve the general deterrent effect of punishment. Disproportionate punishments encourage the commission of more serious crimes, because the criminal risks nothing by committing a more serious crime.¹²⁰ Proportionality thus serves to deter the commission of more serious crimes.

7. *Human Dignity*

Closely related to the principle of proportionality is the idea, first articulated in *Trop v. Dulles*, that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society,"¹²¹ which must be evaluated "in the light of contemporary human knowledge."¹²²

By including the concept of human dignity within the constitutional protections of the Eighth Amendment, the Court preserves several important values. First, the principle protects convicted criminals from punishments with effects that are too harsh. For example, the Court in *Trop v. Dulles* struck down the use of denationalization as a punishment. The effects of the punishment were simply too severe:

[The punishment] destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. . . . It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, . . . and for what cause his existence in his native land may be terminated. He may be subject to banishment, a fate universally decried by civilized people. He is stateless, a condition deplored in the international

118. J. MURPHY, *RETRIBUTION, JUSTICE, AND THERAPY: ESSAYS IN THE PHILOSOPHY OF LAW* 234 (1979).

119. *Id.* See also *Furman v. Georgia*, 408 U.S. 238, 272-73 (Brennan, J., concurring) (punishments are condemned when "they treat members of the human race as nonhumans, as objects to be toyed with and discarded").

120. Cf. Beccaria, *On Crimes and Punishments*, in *THEORIES OF PUNISHMENT* 127 (S. Grupp, ed. 1971) ("The severity of the punishment of itself emboldens men to commit the very wrongs it is supposed to prevent; they are driven to commit additional crimes to avoid the punishment for the single one."); see also 1984 U.S. CODE CONG. & AD. NEWS 3229 ("sentences that are disproportionate to the seriousness of the offense create a disrespect for the law").

121. 356 U.S. at 101. See also *Estelle v. Gamble*, 429 U.S. 97, 102 (1976); *Gregg v. Georgia*, 428 U.S. 153, 173, 182 (1976).

122. *Robinson v. California*, 370 U.S. 660, 666 (1962).

communities.¹²³

Second, by forcing the government to treat the convicted defendant as an individual rather than merely as the object of punishment, and by requiring the government to justify the punishment, convicted criminals are protected from punishments that do not measurably contribute towards the punishment's goal.¹²⁴ For example, the principle protects a criminal from the gratuitous infliction of punishment, because that does not measurably contribute towards the goal of punishment.

Third, inclusion of the concept of human dignity reaffirms that we are "a government of laws and not men,"¹²⁵ and that the Constitution sets limits beyond which the legislature may not proceed.

IV. The Eighth Amendment and Criminal RICO Forfeitures

A. The Analytical Framework

Courts that have applied the Eighth Amendment to RICO criminal forfeitures have not used a consistent analytical framework; rather, the courts have considered the issue on a case-by-case basis.¹²⁶ The dangers of a case-by-case approach are twofold. First, in the absence of a consistently applied model, the eighth amendment analysis becomes so fact specific that it provides little useful precedential guidance, and results in outcomes that turn on subtle factual distinctions that are impossible to defend rationally.¹²⁷ The second, more insidious danger is that as the body of case law finding no eighth amendment violation grows, it becomes easier for a court to analogize the facts of the case before it to a

123. 356 U.S. at 101-02.

124. *Cf. Furman*, 408 U.S. at 312 (White, J., concurring) (punishment with negligible social or public purposes is "patently excessive cruel and unusual punishment violative of the Eighth Amendment"); *see also id.* at 270 (Brennan, J., concurring) ("The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings.").

125. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

126. The lower courts that have considered the question have done so by looking at the facts and concluding, with little analysis, that no violation has occurred. *See, e.g., United States v. Lizza Indus., Inc.*, 775 F.2d 492, 498 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 1459 (1986) (use of gross profits rather than net profits to determine the amount subject to forfeiture under RICO "is keyed to the magnitude of a defendant's criminal enterprise. . . . [It] does not destroy this rough proportionality" of crime to punishment); *United States v. Kravitz*, 738 F.2d 102, 106-07 (3d Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985) (it is not clear that the Eighth Amendment imposes limitations on RICO forfeitures, but even if it did, forfeiture here was as proportionate and integral to the racketeering scheme as in other cases); *United States v. Walsh*, 700 F.2d 846, 857 (2d Cir.), *cert. denied*, 464 U.S. 825 (1983) (held no violation of the Eighth Amendment, as the defendant did not raise the issue at the trial level and the jury's consideration of the degree to which the assets were tainted inured to the defendant's benefit); *United States v. Tunnell*, 667 F.2d 1182, 1188 (5th Cir. 1982) (operation of a motel as a place of prostitution, and the corruption of local officials, demonstrates the magnitude of the offense; no violation of the Eighth Amendment to forfeit the entire motel).

127. *Cf. Solem v. Helm*, 463 U.S. 277, 314 (1983) (Burger, C.J., dissenting) (factual permutations in the eighth amendment context are endless).

case in which no constitutional violation was found.¹²⁸ This invites a "tyranny of small decisions":¹²⁹ since the step from the forfeiture in the precedential case to the forfeiture before the court will be a small one, the court can, without realizing it, step over the line separating what is constitutional from what is not.

A consistent eighth amendment analytical framework needs to be applied to the RICO statute. The principles of previous Supreme Court opinions discussed above¹³⁰ provide the framework within which to analyze criminal RICO forfeitures. An eighth amendment analysis¹³¹ should address whether:

(1) the sanction is criminal; if not, the Eighth Amendment has no application;¹³²

(2) the legislature had the power to impose the sanction for that offense; if not, the sanction violates the Eighth Amendment;¹³³

(3) the type of punishment is novel and whether, despite such novelty, the type of punishment is nonetheless constitutionally valid;¹³⁴

(4) the legislature had a humane purpose in prescribing the penalty; if not, the penalty is constitutionally invalid;¹³⁵

(5) as between convicted defendants, the sanction is imposed only infrequently and whether, if it is infrequently imposed, there is a meaningful basis for distinguishing between the cases; if it is imposed infrequently and there is no meaningful basis for distinguishing the cases, it is

128. See, e.g., *United States v. Kravitz*, 738 F.2d 102, 106-07 (3d Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985).

129. The phrase is economist Alfred Kahn's. See Tribe, *supra* note 79, at 162 (quoting Kahn, 19 *Kylos: Int'l Rev. of Soc. Sci.* 23 (Fasc. 1, 1966)).

130. See *supra* notes 69-125 and accompanying text.

131. The Supreme Court does not currently follow this approach. See, e.g., *Solem v. Helm*, 463 U.S. 277, 284-92 (1983). Three reasons justify the departure. First, the Supreme Court is not infallible. L. TRIBE, *supra* note 95, at iii (quoting Justice Robert Jackson). Just because the Court "may have the last word in any particular case about what the law is, the last word is not for that reason alone the right word." R. DWORKIN, *A MATTER OF PRINCIPLE* 116 (1985). Second, the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958). An eighth amendment analysis therefore cannot be fixed or rigid; it must be sufficiently fluid to capture "evolving standards of decency." *Id.* at 101. Finally, there are competing normative theories of the content of the Eighth Amendment. See, e.g., *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam opinion with each of the nine Justices writing separate opinions). Indeed, many eighth amendment opinions approach the Jeffersonian ideal of seriatim opinions by the judges deciding a case. The strength of the reasons advanced for inclusion of a principle within the Eighth Amendment should therefore determine whether it is so included; and the principles in the following framework should be included because they protect important values and are based either on the Court's holdings or on language consistently used by the Court.

132. See *supra* notes 81-85 and accompanying text.

133. See *supra* notes 86-92 and accompanying text.

134. See *supra* notes 93-98 and accompanying text.

135. See *supra* notes 99-104 and accompanying text.

constitutionally invalid;¹³⁶

(6) the punishment is proportionate to the severity of the crime; if not, the punishment is constitutionally invalid;¹³⁷ and

(7) the punishment comports with basic human dignity as evaluated in the light of present human knowledge; if not, the punishment is constitutionally invalid.¹³⁸

B. The Application of the Eighth Amendment to Criminal RICO Forfeitures

Under the RICO statute, eighth amendment questions arise in two types of fact situations: first, when the interests of a predominantly legitimate enterprise have over time become commingled with interests involved in a RICO violation,¹³⁹ and second, when the interests of an otherwise legitimate enterprise are involved in a RICO violation but the violation is minor as compared to the magnitude of the forfeiture.¹⁴⁰

A nonconstitutional safeguard against eighth amendment violations is the requirement that the government prove a "nexus" between the defendant's conduct and the interest sought to be forfeited.¹⁴¹ "Nexus" has been judicially defined as a connection between the two such that the interest sought to be forfeited is linked to the defendant or affords him a source of influence over the criminal enterprise.¹⁴² If nexus is construed narrowly, a criminal RICO forfeiture should not extend beyond that allowable by a forfeiture in rem, because the forfeitable interests will be limited to those that clearly afforded the defendant a source of influence over the criminal enterprise, and thus will be, to use in rem terminology, "tainted." But if construed broadly, as Congress apparently intended,¹⁴³

136. See *supra* notes 105-112 and accompanying text.

137. See *supra* notes 113-120 and accompanying text.

138. See *supra* notes 121-125 and accompanying text.

139. This possibility was noted in *United States v. Huber*, 603 F.2d 387, 397 (2d Cir.), *cert. denied*, 445 U.S. 927 (1980).

140. See *infra* notes 147-168 and accompanying text.

141. See, e.g., *United States v. Cauble*, 706 F.2d 1322, 1348 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984); *United States v. Ragonese*, 607 F. Supp. 649, 650-51 (S.D. Fla. 1985), *aff'd*, 784 F.2d 403 (11th Cir. 1986).

142. See *supra* note 27 and accompanying text.

143. Statement of Findings and Purpose, The Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970).

This is the only substantive federal criminal statute that contains a directive to interpret the statute broadly, but a similar provision appears in the Criminal Appeals Act, 18 U.S.C. § 3731 (1982). See *Russello v. United States*, 464 U.S. 16, 27 (1983).

The directive conflicts with the traditional canon of interpretation, known as the "rule of lenity," that ambiguities in a criminal statute be strictly construed. See *Bifulco v. United States*, 447 U.S. 381, 386-87 (1980). At least one court has noted, "it is a different thing entirely [from strict construction of a statute designed to give notice of what is criminal] to apply that same canon of strict construction to a definitional concept the limits of which do not determine criminal liability." *United States v. Thevis*, 474 F. Supp. 134, 138 n.4 (N.D. Ga.

the nexus between the interest sought to be forfeited and the defendant's conduct may include interests which are not directly involved in the violation, and may thereby violate the Eighth Amendment.

Presently there are no statutory safeguards against a broad interpretation of "nexus."¹⁴⁴ Courts have cautioned against prosecutorial zeal in invoking RICO.¹⁴⁵ But should that safeguard fail, and a conviction follow, the resulting mandatory forfeiture¹⁴⁶ may violate the Eighth Amendment. This can best be illustrated by example.¹⁴⁷ Suppose a shopkeeper spends forty honest years building up his retail business. He has no criminal record and is loved by his customers. In a moment of weakness he commits two acts of mail fraud. Both acts are the result of an advertisement and involve the use of the business telephones, address, and inventory. His mail fraud profit is only a small percentage of the profits that year, and an infinitesimal percentage of the profits made over the course of his business.

Under the RICO statute, his entire business could be subject to forfeiture.¹⁴⁸ The forfeiture in these circumstances, however, would violate

1979), *aff'd*, 665 F.2d 616 (5th Cir.), *cert. denied*, 459 U.S. 825 (1982). This is wrong: the same fairness which requires that adequate notice be given, and that statutes giving notice of criminal liability be strictly construed, also requires that notice of the possible consequences of judgment be given. That is, fairness requires that notice of both the breadth of criminal liability, as well as the depth of criminal liability, be given. *See Bifulco*, 447 U.S. at 387 (the rule of lenity "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose").

When the statutory language is ambiguous, the rule of lenity does not apply. *Russello*, 464 U.S. at 29. On the strict construction rule, see generally Note, *RICO and the Liberal Construction Clause*, 66 CORNELL L. REV. 167 (1980).

144. For example, in *United States v. Conner*, 752 F.2d 566 (11th Cir.), *cert. denied*, 106 S. Ct. 72 (1985), the court's discussion of "nexus" was as follows: "The defendants next raise the claim that the government did not prove the nexus between [the assets subject to forfeiture] and the racketeering enterprise claimed in the indictment. The jury decided this issue by its verdict [of forfeiture] and [the issue] needs no further comment." *Id.* at 577. *See also* *United States v. Ragonese*, 607 F. Supp. 649, 652 (S.D. Fla. 1985) ("The 'source of influence' portion of the statute has not, however, been the topic of . . . in depth analysis by the appellate courts.").

145. *United States v. Huber*, 603 F.2d 387, 396 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980). *See also* *United States v. Ivic*, 700 F.2d 51, 64-65 (2d Cir. 1983); *United States v. Anderson*, 626 F.2d 1358, 1364 n.8 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981). The RICO statute is very broad, and the Justice Department was aware of RICO's breadth and assured Congress it would concentrate on serious cases. *See Atkinson, Racketeer Influenced and Corrupt Organizations, 18 U.S.C. §§ 1961-68: Broadest of the Federal Criminal Statutes*, 69 J. CRIM. L. & CRIMINOLOGY 1, 16 (1978). Some commentators have concluded that the Justice Department has not followed through on its promise. *See Nagel & Plager, RICO, Past and Future: Some Observations and Conclusions*, 2 U. CIN. L. REV. 456, 457-58 (1983).

146. Forfeiture is mandatory upon conviction. *See supra* note 30 and accompanying text.

147. This example is an expansion of one given by the Ninth Circuit in *United States v. Marubeni America Corp.*, 611 F.2d 763, 769-70 n.12 (9th Cir. 1980).

148. *See id.* (citing *United States v. Parness*, 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975)). But see *United States v. Ragonese*, 607 F. Supp. 649 (S.D. Fla. 1985), in

the Eighth Amendment under the seven part analytical framework discussed above.¹⁴⁹

The first principle is met because the forfeiture is a criminal punishment; the Eighth Amendment therefore applies.¹⁵⁰

Second, the Legislature had the power to impose the penalty; that is, the Legislature had the power to make criminal the proscribed conduct,¹⁵¹ and had the power to impose forfeiture as a punishment.¹⁵²

Third, because the forfeiture penalty is not a traditional criminal penalty, the presumption of constitutionality is weaker than that applied to traditional criminal penalties.¹⁵³ This suggests that courts should be careful to guard against eighth amendment violations when confronted with a RICO forfeiture, particularly when, as here, the defendant, although technically subject to criminal forfeiture, is not engaged in the "organized crime" that Congress sought to address with the RICO statute.¹⁵⁴

Fourth, the Legislature cannot be said to have had an "inhumane" purpose in prescribing the criminal RICO forfeitures.¹⁵⁵ Certainly Congress intended that the penalty be effective,¹⁵⁶ and even punitive,¹⁵⁷ but that is not evidence that Congress had an "inhumane" motive in author-

which two drug deals were conducted in an apartment building otherwise used for legitimate purposes, by one Anthony Carbonia, a partner involved in a RICO enterprise. Louis Ragonese, general partner in the entity that owned the building and the other partner in the RICO enterprise, objected to such use of the building. The court rejected the government's claim for forfeiture of the building. *Id.* at 652.

Ragonese, however, is factually distinguishable. Forfeiture of the building was not allowed because "Ragonese did not use his interest in [the building] to further the activities of the enterprise." Ragonese's partner was the one improperly using the building. *Id.* The case therefore leaves open the question whether forfeiture would have been appropriate had Ragonese, rather than his partner, made the drug deals.

149. See *supra* notes 131-138 and accompanying text.

150. See *supra* notes 13 & 81-85 and accompanying text.

151. The RICO statute does not deem criminal formerly noncriminal conduct; rather, the statute makes the commission of two or more criminal acts an independent criminal offense. See *supra* note 21. "Congress is constitutionally entitled to make such behavior an independent criminal offense." *United States v. Field*, 432 F. Supp. 55, 61 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1371 (2d Cir.), *cert. dismissed*, 439 U.S. 801 (1978).

152. Organized crime constitutes "a serious threat to the economic well-being of the Nation," S. REP. NO. 617, 91st Cong., 1st Sess. 79 (1969), so "Congress emphasized the need to fashion new remedies in order to achieve its far-reaching objectives" of the eradication of organized crime. *Russello v. United States*, 464 U.S. 16, 27 (1983). Although *Russello* decided a question of statutory construction, not whether RICO criminal forfeiture is constitutional, the implication of the opinion is that the need for new remedies confers the congressional power to fashion such remedies. See *id.* at 26-28.

153. See *supra* notes 93-98 and accompanying text.

154. See *infra* note 161.

155. See *supra* notes 99-104 and accompanying text.

156. See *supra* notes 12-20 and accompanying text.

157. *Russello*, 464 U.S. at 16, 27-28 (citing 116 CONG. REC. 18955 (1970) (remarks of Sen. McClellan)); *United States v. Lizza Indus., Inc.*, 775 F.2d 492, 498 (2d Cir. 1985).

izing forfeiture in personam. Penalizing criminals, at any rate, has long been recognized as a legitimate purpose of criminal sanctions.¹⁵⁸

Fifth, no problems arise from infrequent imposition of the punishment,¹⁵⁹ because forfeiture is mandatory upon conviction.

Sixth, the RICO method for determining the magnitude of the penalty is flawed: the magnitude of the penalty is coextensive with the magnitude of a defendant's interests in the illegal enterprise, rather than with his culpability.¹⁶⁰ Although the two may coincide, they are not necessarily coextensive. For example, forfeiture of the shopkeeper's business, as required by the statute, is not proportionate to his offense as measured by the severity of the crime. Although culpable, surely the crime—two minutely profitable acts of mail fraud committed by an otherwise honest shopkeeper unlikely ever to repeat his crime—does not merit such a draconian sanction. What measurable contribution to the goals of RICO—the eradication of organized crime¹⁶¹—does such a result make?¹⁶² The punishment is not even “in some rough way”¹⁶³ proportionate to the crime. Restitution, fines, community service: all may be adequate to deter and to punish. With more traditional penalties, the sentencing judge has some measure of discretion.¹⁶⁴ But the RICO statute gives the judge no such discretion, and the convicted RICO defendant must be punished to the fullest.

Seventh, such a penalty does not comport with the principle of “basic human dignity”¹⁶⁵ at the core of the Amendment. The penalty in this

158. See H. MORRIS, ON GUILT AND INNOCENCE 33-34 (1976).

159. See *supra* notes 105-112 and accompanying text.

160. See *supra* note 31 and accompanying text.

161. See RICO's Statement of Findings and Purpose, Pub. L. No. 91-452, 84 Stat. 922, 922-23 (1970). Admittedly, the RICO statute is not limited to “organized crime.” See *Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3275, 3287 (1985) (“Congress wanted to reach both ‘legitimate’ and ‘illegitimate’ enterprises.”); *United States v. Turkette*, 452 U.S. 576 (1981). But Congress' primary intent was application of RICO to organized crime, and application that strays too far from Congress' primary intent should be closely scrutinized. See Tarlow, *RICO Revisited*, *supra* note 23, at 294 (scope of the RICO statute has been expanded far beyond what was intended by Congress); see also *Measures Relating to Organized Crime: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 496 (1969) [hereinafter *Organized Crime Hearings*] (RICO was designed to protect the small or marginal businessman who is most easily subject to invasion by organized crime).

162. Cf. *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring):

[A penalty] has not been considered cruel and unusual punishment in the constitutional sense [when it is] thought justified by the social ends it was deemed to serve. At the moment that it ceases realistically to further these purposes, however, the emerging question is whether its imposition in such circumstances would violate the Eighth Amendment.

163. See *supra* note 11 and accompanying text.

164. See, e.g., Note, *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293, 1295 (1986).

165. See *supra* notes 121-122 and accompanying text.

example is analogous to *Trop v. Dulles*. In that case, the punishment “destroy[ed] for the individual the political existence that was centuries in the making”;¹⁶⁶ here, the punishment destroys for the individual the economic existence that was decades in the making. Surely “contemporary human knowledge”¹⁶⁷ indicates, particularly with a defendant highly unlikely ever to repeat his errors, that a punishment not go beyond that adequate to deter and to punish, for what purpose would further punishment serve? The shopkeeper is being caught in a trap designed for more dangerous game: the harsh penalty of forfeiture was designed to address the problem of organized crime, not the behavior of an otherwise honest shopkeeper who merely technically qualifies for the penalty.¹⁶⁸ Further, the effect of the punishment is too harsh: the shopkeeper is stripped of his means of support because of two minutely profitable, albeit illegal, acts. For all of these reasons, the Eighth Amendment proscribes forfeiture under these facts.

Application of the eighth amendment analytical framework to the hypothetical fact situation shows that a forfeiture under the RICO statute can produce an unconstitutional result. This is particularly true when, as noted below, no cases to date have found a criminal RICO forfeiture to violate the Eighth Amendment.

C. The Eighth Amendment and Criminal RICO Forfeitures: The Lower Federal Courts’ Analyses

The idea that the Eighth Amendment might limit RICO’s forfeiture provisions was first suggested in *United States v. Huber*,¹⁶⁹ in which the defendant was convicted of conducting the affairs of an enterprise through a pattern of racketeering activity. The court rejected his eighth amendment claim with a rather summary analysis. First, for purposes of punishment, the court reasoned that there was no substantial difference between a proceeding in rem and a proceeding in personam.¹⁷⁰ Second, noting that statutes providing for forfeiture in rem of property related to criminal activity are relatively common,¹⁷¹ the court held that “at least where the provision for forfeiture is keyed to the magnitude of a defendant’s criminal enterprise, as it is in RICO, the punishment is at least in some rough way proportional to the crime” and thus satisfies eighth

166. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

167. *Robinson v. California*, 370 U.S. 660, 666 (1962).

168. See *Organized Crime Hearings*, *supra* note 160, at 496 (RICO statute designed to protect small businesses); see also 116 CONG. REC. 35205 (1970) (remarks of Rep. Mikva) (wide “shotgun” approach taken by the statute will involve activities Congress did not intend to be covered).

169. 603 F.2d 387, 397 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980).

170. *Id.* at 396.

171. *Id.*

amendment requirements.¹⁷²

The *Huber* court's assertion that forfeiture in personam and in rem are substantially similar is incorrect. First, with forfeiture in rem the property must be properly before the court before jurisdiction is present,¹⁷³ so separate suits must be brought in each district in which property sought to be forfeited is located. Since RICO forfeitures are in personam, only one action need be brought, and jurisdiction over the property exists regardless of its location.¹⁷⁴ Second, the Eighth Amendment does not apply to forfeitures in rem, because such forfeitures are against the property and are thus not criminal.¹⁷⁵ Third, the reach of forfeiture in personam is broader than that of forfeiture in rem. Forfeiture in rem reaches only property deemed "guilty" or associated with the wrong.¹⁷⁶ Forfeiture in personam as used in the RICO statute extends to all of a convicted defendant's interests in the enterprise, regardless whether those assets themselves are "tainted" by racketeering activity.¹⁷⁷ These are three major distinctions between forfeiture in rem and in personam.

The claim that a particular RICO forfeiture violates the Eighth Amendment has yet to prevail in the federal courts. Perhaps the factual situations presented have not been sufficiently compelling; or the courts may be heeding Congress' directive that the RICO statute be interpreted broadly.¹⁷⁸ Or perhaps, because the idea that the Eighth Amendment imposes limits upon RICO criminal forfeiture is relatively new, defense counsel have not vigorously pressed the claim.

The latter may explain why post-*Huber* decisions have not developed a satisfactory eighth amendment analysis for criminal RICO forfeitures. The opinions in *United States v. Thevis*¹⁷⁹ and *United States v. Grande*¹⁸⁰ are analyzed below as examples.

172. *Id.* at 397. The court emphasized that section 1963(c) then allowed the district court some discretion in avoiding "draconian" applications of the forfeiture provision. *Id.* Section 1963(c) has since been amended, but subsection (f) now provides for similar discretion. However, the statutory language, providing for forfeiture of property "upon such terms and conditions as the courts shall deem proper," cannot protect against eighth amendment violations, because forfeiture of all "tainted" interests is mandatory. *See supra* notes 29-30 and accompanying text. The court therefore has no discretion to reduce the extent of the forfeiture.

173. *See* 1984 U.S. CODE CONG. & AD. NEWS 3376.

174. 18 U.S.C. § 1963(k) (Supp. III 1985).

175. *See supra* notes 56-57 and accompanying text.

176. *See supra* notes 30-41 and accompanying text.

177. *United States v. Cauble*, 706 F.2d 1322, 1349 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984). *See generally* Taylor, *Forfeiture Under 18 U.S.C. § 1963—RICO's Most Powerful Weapon*, 17 AM. CRIM. L. REV. 379, 380-90 (1980).

178. *See supra* note 143 and accompanying text.

179. 474 F. Supp. 134 (N.D. Ga. 1979), *aff'd*, 665 F.2d 616 (5th Cir.), *cert. denied*, 456 U.S. 1008 (1982).

180. 620 F.2d 1026 (4th Cir.), *cert. denied*, 449 U.S. 830 (1980).

In *United States v. Thevis*, the court rejected a claim that RICO forfeitures were prohibited by the Eighth Amendment. The court analyzed whether the forfeiture was "cruel and unusual" by looking to whether it was either "cruel" or "unusual." As to cruelty, the court found that: (1) RICO forfeiture is not the complete forfeiture of estate prohibited by the Constitution¹⁸¹ and by statute;¹⁸² and (2) because RICO forfeiture is limited to interests or property rights put to illegal use, it is not excessive, disproportionate, or needlessly severe.¹⁸³ The court found that the statute was not unusual, citing several federal forfeiture in rem statutes.¹⁸⁴ The court thus held that "the forfeiture prescribed by [RICO] is neither cruel nor unusual, and the Eighth Amendment does not prohibit its application."¹⁸⁵

The court's reasoning is flawed. Most importantly, a two-tiered analysis breaking down the phrase "cruel and unusual" into its component words is improper. The Supreme Court has rejected such an approach.¹⁸⁶ Further, the use of the conjunctive "and" indicates that the phrase has a connotation distinct from the meaning of the words taken by themselves.¹⁸⁷ The eighth amendment question is not whether a criminal punishment is "cruel" or "unusual"; the question is whether it is prohibited by the constitutional phrase "cruel and unusual."

But even within the *Thevis* court's framework, the analysis is flawed. First, although RICO may not revive the total disinheritance and forfeiture prohibited by the Constitution and formerly by statute, the RICO proceeding is in personam and therefore does not require the personification fiction to justify forfeiture of the interest.¹⁸⁸ RICO has a much broader potential application than forfeiture in rem statutes, which are limited to forfeiture of "guilty" property.¹⁸⁹ Therefore, to the extent that RICO reaches property that is not an instrument of a crime, it is "unusual."¹⁹⁰ Indeed, it was the view of the Ninety-first Congress, which passed RICO, that the statute constituted by implication a partial repeal

181. U.S. CONST. art. III, § 3, cl. 2.

182. 18 U.S.C. § 3563 (Supp. III 1985). The statute expired November 1, 1986.

183. *Thevis*, 474 F. Supp. at 140-41.

184. *Id.* at 141.

185. *Id.*

186. See *Furman v. Georgia*, 408 U.S. 238, 277 n.20 (1972) (Brennan, J., concurring) ("[The Supreme] Court has never attempted to explicate the meaning of the [Eighth Amendment] simply by parsing its words."). Further, the conjunctive "and" in the phrase "cruel and unusual" should not be interpreted as limiting the word "cruel." The Amendment proscribes punishments that are cruel, regardless whether the punishment is also unusual. See *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 465 (1947).

187. Cf. *FCC v. Pacifica Found.*, 438 U.S. 726, 739-40 (1978) (a phrase written in the disjunctive implies that each word in the phrase has a separate meaning).

188. See *supra* notes 65-68 and accompanying text.

189. See *supra* notes 56-57 and accompanying text.

190. See *supra* notes 49-55 and accompanying text.

of the then-existing statutory prohibition against corruption of blood or forfeiture of estate.¹⁹¹

Second, even if the RICO statute is not excessive, disproportionate, or needlessly severe as applied to the facts in *Thevis*, this does not preclude such a finding on other facts. The court did not set forth its reasons for its finding as to cruelty, so the finding thus offers little guidance beyond the *Thevis* facts.¹⁹²

Third, forfeiture in rem statutes are, for two reasons, an unsound basis for concluding the penalty is not unusual. The two types of forfeiture are different both conceptually, in the determination of what or whom is being adjudged "guilty," and practically, in that forfeiture in personam has a potentially broader grasp than forfeiture in rem.¹⁹³ Moreover, unusual means "[u]ncommon; not usual, rare."¹⁹⁴ Forfeiture in personam fits that description. Such forfeiture did not, as a practical matter, exist before RICO's passage.¹⁹⁵ The Federal Rules of Criminal Procedure were specifically amended to take account of the concept.¹⁹⁶ The analogy to forfeiture in rem as support for the idea that forfeiture in personam is not unusual must therefore be rejected.¹⁹⁷

*United States v. Grande*¹⁹⁸ is a second example of a lower federal court's eighth amendment analysis of criminal RICO forfeitures. In that case, the court also rejected the claim that the Eighth Amendment prohibited RICO forfeitures. The court in *Grande*, as in *Thevis*, broke down the phrase "cruel and unusual" into the words "cruel" or "unusual."

As to cruelty, the court found: first, that only "total" forfeiture—"total disinheritance of one's heirs . . . and forfeiture of *all* one's property and estate"—is constitutionally proscribed, and RICO is narrower and therefore outside those prohibitions;¹⁹⁹ and second, that the law has al-

191. See S. REP. NO. 617, 91st Cong., 1st Sess. 79-80, 124-25 (1969). But see *United States v. Grande*, 620 F.2d 1026, 1039 (4th Cir.), cert. denied, 449 U.S. 830 (1980).

192. *Thevis* may be treacherous guidance, as it could be one step down the "tyranny of small decisions." See Tribe, *supra* note 79, at 162. See also *supra* note 126 and accompanying text.

193. This is so because forfeiture in rem reaches only property deemed "guilty" or associated with the wrong. See *supra* notes 56-57 and accompanying text. Forfeiture in personam as used in the RICO statute extends to all of a convicted defendant's interests in the enterprise, regardless whether those assets themselves are "tainted" by racketeering activity. See *supra* note 31 and accompanying text.

194. BLACK'S LAW DICTIONARY 1380 (5th ed. 1979).

195. See *supra* note 55 and accompanying text.

196. See *supra* note 55.

197. Indeed, since the Eighth Amendment does not even apply to forfeiture in rem, see *supra* note 71 and accompanying text, it is ironic to use an analogy to forfeiture in rem as a basis for finding that forfeiture in personam does not violate that Amendment.

198. 620 F.2d 1026 (4th Cir.), cert. denied, 449 U.S. 830 (1980).

199. *Id.* at 1039 (emphasis in original).

ways recognized forfeiture of the instruments of crime,²⁰⁰ which is what RICO does.²⁰¹ Therefore, since the statute does not “revive any penalty long in disuse,” it is not “cruel.”²⁰²

As to “unusual,” the court found that: (1) both forfeiture in personam and in rem impose penalties upon persons and, apart from procedure, are functional equivalents; and (2) other federal forfeiture in rem statutes exist, so the penalty is not “unusual.”²⁰³ Finally, the court found that since “[t]he magnitude of the forfeiture is directly keyed to the magnitude of the defendant’s interest in the [illegal] enterprise . . . it is not cruel and unusual in the constitutional sense.”²⁰⁴

This analysis is also flawed. Again, the constitutional phrase “cruel and unusual” cannot properly be analyzed by breaking it down into its constituent words.²⁰⁵ Second, legal opinion differs as to whether RICO is outside the express statutory prohibitions against forfeiture of estate.²⁰⁶ Third, the law has long recognized forfeiture of the instruments of crime,²⁰⁷ but only when the property has been deemed guilty and forfeiture limited to the guilty property.²⁰⁸ RICO goes beyond this: the property need not be guilty to be forfeited.²⁰⁹ To the extent, then, that it reaches untainted property, the RICO statute does something very novel in American law. Finally, forfeiture in personam and in rem are not functional equivalents.²¹⁰ The analogy to extant federal forfeiture in rem statutes therefore fails.

V. A Recommendation

The courts’ analyses of the Eighth Amendment to RICO criminal forfeitures has suffered for two reasons. First, the lower courts have not applied a correct or even consistent eighth amendment analysis to the problem.²¹¹ The seven-part framework developed above provides such an analysis. The second problem, however, lies not with judicial analysis of the problem but with the RICO method of determining punishment. Punishment should be coextensive with culpability; that is, punishment

200. *Id.* at 1039 (citing *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974); *United States v. United States Coin & Currency*, 401 U.S. 715 (1970)).

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *See supra* note 186 and accompanying text.

206. *See supra* note 54.

207. *See, e.g.*, *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827).

208. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-85 (1974) (giving a brief history and illustrations of the forfeiture of “guilty” property).

209. *See supra* notes 38-41 and accompanying text.

210. *See supra* notes 193-196 and accompanying text.

211. *See supra* notes 169-210 and accompanying text.

should fit the crime.²¹² This is the principle of proportionality so deeply embedded in our jurisprudence. But the RICO statute provides for a different measurement: the punishment fits the defendant's interests in the enterprise.²¹³

In two types of situations a defendant's interests may not necessarily be coextensive with culpability. First, when the interests of a predominantly legitimate enterprise have over time become commingled with interests involved in a RICO violation, all of those interests could be subject to RICO criminal forfeitures.²¹⁴ Although a defendant's culpability will vary with the magnitude and seriousness of the RICO crimes he committed, RICO forfeiture depends not on culpability but on the extent of the defendant's interests having a nexus with the RICO enterprise.²¹⁵

The second situation where a defendant's interests may not necessarily be coextensive with culpability was illustrated in the above hypothetical:²¹⁶ when the interests of an otherwise legitimate business are technically involved in a RICO violation but the violation is minor as compared to the magnitude of the forfeiture.

To address the eighth amendment problems arising in the first situation, the statute should be amended so as to require that the degree of criminal taint of the assets be established by the government. A return to the forfeiture in rem idea that only guilty property can be reached²¹⁷ would solve the eighth amendment problems arising in this situation. Forfeiture of only guilty property is more proportionate—a better “fit”—to the crime, more humane, and more in accord with basic human dignity, because such forfeiture is a more accurate measure of the defendant's culpability. This is so because just as a person's business assets will grow with the extent of a business, a RICO defendant's interests in the RICO enterprise will grow with the extent of his RICO criminal activity.

One criticism of forfeiture in rem is that forfeiture can be avoided simply by transferring the tainted assets to a legitimate enterprise.²¹⁸ This criticism is easily met: the mingling of tainted and untainted interests should be deemed not to free the tainted interests of their taint, and transfer of the interests should leave the tainted interests subject to forfeiture.²¹⁹ To the extent that the transferred tainted interests are not easily separable from the tainted interests, forfeiture of a monetary

212. See *supra* notes 113-120 and accompanying text.

213. See *supra* notes 31-35 and accompanying text.

214. This possibility was noted in *Huber*, 603 F.2d at 397.

215. See *supra* notes 31-35 and accompanying text.

216. See *supra* notes 147-148 and accompanying text.

217. See *supra* notes 56-68 and accompanying text.

218. *United States v. Walsh*, 700 F.2d 846, 857 (2d Cir.), *cert. denied*, 464 U.S. 825 (1983).

219. That is, the tainted interests should be deemed traceable to the illegitimate activity and still subject to forfeiture.

equivalent to the tainted interests should be required and deemed an acceptable substitute for the forfeiture of the tainted interests themselves; that is, the mingling of tainted and untainted interests should be conceptually viewed as a "sale" of the tainted interests, with the "taint" now residing in the monetary equivalent of the now-mingled tainted interests. The monetary equivalent should then be subject to forfeiture. Such a procedure is conceptually a forfeiture in rem, because only "tainted" property is being forfeited.

But such a change alone would not leave RICO immune from an eighth amendment attack in the second situation, where the interests of an otherwise legitimate business are technically involved in a RICO violation but the violation is minor as compared to the magnitude of the potential forfeiture. The eighth amendment concern here is the disproportionality between the culpability of the defendant and the magnitude of the forfeiture. The problem is that forfeiture is mandatory upon conviction; RICO forfeitures, therefore, should not be mandatory. Discretion is needed to take account of the different factual situations that might be presented—for example, a sophisticated and organized extortion enterprise as compared to a shopkeeper engaging in relatively harmless acts of mail fraud. The trial judge should abide by the jury's determination of the defendant's guilt, but the judge should then have the discretion to mitigate the harshness of the punishment. The judge should in appropriate cases be able to provide for alternative punishments; in the shopkeeper example, perhaps restitution and a fine would be appropriate.

For two reasons courts will infrequently exercise this discretion. First, prosecutors exercise discretion in deciding whom to prosecute under the RICO statute.²²⁰ The defendants should in theory be legitimate targets for the prosecution: that is, engaged in organized crime, which was Congress' concern when it passed RICO.²²¹ Second, successful eighth amendment claims in the amended RICO forfeiture setting will be rare;²²² therefore, under an amended RICO statute, forfeiture will still be imposed in the vast majority of cases. But by allowing for discretion, punishment will be commensurate with a defendant's culpability rather than with the extent of his interests. The punishment will fit the crime—an idea fundamental to American jurisprudence.²²³ Such a procedure allows society to punish RICO felons, but no more harshly than deserved. Further, allowing discretion will not detract from RICO's goals of removing profit gained from criminal activity and preventing criminal enterprises from continuing.²²⁴ profits gained from criminal activity will be "tainted" and still subject to forfeiture, and thus the eco-

220. See Atkinson, *supra* note 145, at 16.

221. See *supra* note 12 and accompanying text.

222. See *Hutto v. Davis*, 454 U.S. 370, 374 (1982) (per curiam).

223. See *supra* notes 113-120 and accompanying text.

224. See *supra* notes 19-20 and accompanying text.

conomic base of criminal enterprises will still be attacked, preventing the enterprises from continuing.

Conclusion

The RICO statute provides for the mandatory forfeiture of a defendant's assets "affording a source of influence over" the RICO criminal enterprise. Forfeiture in American history has traditionally been in rem: imposed in a civil proceeding and against property which has been deemed "guilty." The RICO method of forfeiture, however, is unusual: it is in personam and imposed against the defendant personally as a criminal sanction.

Since RICO forfeiture is a criminal sanction, the Eighth Amendment—which applies only to criminal sanctions—limits the extent to which a convicted RICO defendant's interests in the RICO enterprise may be forfeited. To date the Supreme Court has not applied an eighth amendment analysis to RICO criminal forfeiture, but the Court's opinions provide an analytical framework for analyzing RICO criminal forfeitures. Application of the analysis to the RICO statute shows that it is constitutional but can be applied so as to yield an unconstitutional result.

Lower courts have not developed or applied a correct or consistent eighth amendment analysis to criminal RICO forfeitures. The principal problem is that the constitutional phrase "cruel and unusual punishment" has been improperly analyzed as if it read "cruel" or "unusual" punishment. In addition, courts have improperly analogized forfeiture in rem to forfeiture in personam.

Application of the analytical framework to a hypothetical fact situation reveals two problems with the RICO statute: (1) the punishment of forfeiture is coextensive with the RICO defendant's interests having a source of influence over the RICO enterprise, rather than with the defendant's culpability; and (2) because forfeiture under the RICO statute is mandatory, the judge does not have the discretion to impose a lesser penalty. An unconstitutional result can flow from either one of these flaws in the statute.

The statute needs to be changed. First, it should be amended to provide for forfeiture only of "guilty" or "tainted" interests, because the extent of such interests is a more accurate measure of the defendant's culpability. Second, the statute should be amended so as to give the trial judge the discretion to impose a different penalty. Such discretion is needed to ensure that an unconstitutional result, such as forfeiture wholly disproportionate to the seriousness of the crime, is not reached.

By amending the statute Congress can still ensure that "crime does not pay." But the aim of the statute would be more precise, and those not meriting its treatment would not be caught in its trap. The worthy

goal of eliminating organized crime could still be reached, without sacrificing the fairness so fundamental to our jurisprudence.

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