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## Rationalizing Criminal Forfeiture

David J. Fried

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# RATIONALIZING CRIMINAL FORFEITURE

DAVID J. FRIED\*

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## I. INTRODUCTION AND SUMMARY

Eighteen years have passed since the penalty of criminal forfeiture<sup>1</sup> was reintroduced into American law by the Racketeer Influenced and Corrupt Organizations Act<sup>2</sup> ("RICO") and the Continuing Criminal Enterprises Act ("CCE").<sup>3</sup> Despite early disagreement, the courts have settled most doubts about the reach of criminal forfeiture in favor of an expansive interpretation.<sup>4</sup> Congress effectively set its seal of approval on such interpretation by the Comprehensive Forfeiture Act of 1984,<sup>5</sup> ("CFA") which also expanded RICO by adding predicate offenses,<sup>6</sup> by providing for pre-

<sup>1</sup> Criminal forfeiture, also known as *in personam* forfeiture, is the taking of property by the state as an incident of conviction for crime. *United States v. Seifuddin*, 820 F.2d 1074, 1076 (9th Cir. 1987). It is thus opposed to civil or *in rem* forfeiture, the taking of property in some way connected with the commission of a crime regardless of the criminal guilt of its possessor or owner. In civil forfeitures, the owner of the property has the burden of proof once the government has shown probable cause to believe that the property is "guilty," in other words, connected with the prohibited activity. The standard of proof is a preponderance of the evidence. *United States v. \$250,000 in United States Currency*, 808 F.2d 895, 900 (1st Cir. 1987); *United States v. Brock*, 747 F.2d 761, 762 (D.C. Cir. 1984).

For centuries "forfeiture of estate," a form of criminal forfeiture, was a mandatory incident of all common law and most statutory felony convictions. Forfeiture of estate was the taking by the Crown of all of the felon's real and personal property. It went hand in hand with "corruption of blood" or "attaint," the prohibition on tracing title to property through the felon's estate, thus assuring that his descendants could inherit nothing from more remote ancestors. "[T]he Corruption of Blood stops the Course of regular Descent, as to Estates, over which the Criminal could have no Power, because he never enjoyed them." C. YORKE, *SOME CONSIDERATIONS ON THE LAW OF FORFEITURE FOR HIGH TREASON* 26 (2d ed. 1746). Forfeiture of estate was abolished in the United States in the early nineteenth century and in England by 1870, 33 & 34 Vict., ch. 23, but civil forfeiture of, for example, contraband, smuggled goods and instrumentalities of crime, has continued to the present day and indeed has been significantly expanded, *see infra* notes 239-76 and accompanying text.

<sup>2</sup> 18 U.S.C. §§ 1961-68 (1982 & Supp. III 1985).

<sup>3</sup> 21 U.S.C. § 848 (1982 & Supp. III 1985).

<sup>4</sup> *See infra* notes 57-81 and accompanying text.

<sup>5</sup> Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, § 302, 98 Stat. 2040 (codified as amended at 18 U.S.C. § 1963(a)(3) (Supp. III 1985)) ("any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection. . .").

<sup>6</sup> Including any state felony for dealing in obscene matter, Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1020(1), 98 Stat. 2143 (amending 18 U.S.C. § 1961(1)(A) (Supp. III 1985)), and any indictable violation of the Currency and Foreign Transactions Reporting Act, Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 901(g)(2), 98 Stat. 2136 (amending 18 U.S.C. § 1961(1)(B) (Supp. III 1985)).

indictment and post-indictment restraining orders on the transfer of property subject to forfeiture free of the procedural barriers erected by some courts,<sup>7</sup> and by codifying the "relation-back" theory of forfeiture,<sup>8</sup> the theory that title to forfeitable property vests in the government from the moment the criminal act is committed, potentially making voidable all later transfers.<sup>9</sup> In addition, Congress has extended the penalty of criminal forfeiture to most federal drug offenses<sup>10</sup> and to trafficking in child pornography.<sup>11</sup>

This endorsement and expansion of criminal forfeiture, which made it possible for the government to seek forfeiture more aggressively and with a greater likelihood of success, has created a scholarly and public uproar. So far commentators have focused on an important but narrow set of issues: the constitutionality and propriety of restraining orders which prevent defendants from paying their attorneys, and the threat of forfeiture of attorney's fees already paid upon conviction.<sup>12</sup> All the circuit courts of appeal which have considered the matter have agreed that Congress intended to authorize such forfeitures and that they do not violate the fifth or sixth amendment rights of defendants.<sup>13</sup>

The focus on attorneys' fees has unfortunately diverted attention from larger and more important questions. Criminal forfeiture is, in effect, the first new punishment for crime since the rise of the penitentiary in the early nineteenth century.<sup>14</sup> Why was so obvious a penalty enacted after being so long overlooked? What is its appropriate relationship to other criminal and civil penalties? To what extent can criminal forfeiture be justified in terms of such traditional

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<sup>7</sup> See *infra* notes 86-88 and accompanying text.

<sup>8</sup> 18 U.S.C. § 1963(c) (Supp. III 1985).

<sup>9</sup> *Id.*

<sup>10</sup> 21 U.S.C. § 853(a) (Supp. III 1985).

<sup>11</sup> Child Protection Act of 1984, Pub. L. No. 98-292, § 6, 98 Stat. 205 (amending 18 U.S.C. § 2253 (Supp. III 1985)).

<sup>12</sup> See, e.g., Note, *Forfeiture of Attorney's Fees: Should Defendants be Allowed to Retain the "Rolls Royce of Attorneys" with the "Fruits of the Crime"?*, 39 STAN. L. REV. 663 (1987); Cloud, *Forfeiting Defense Attorneys' Fees: Applying an Institutional Role Theory to Define Individual Constitutional Rights*, 1987 WIS. L. REV. 1; Note, *Attorneys' Fees Forfeiture under the Comprehensive Forfeiture Act of 1984: Can We Protect Against Sham Transfers to Attorneys?*, 62 NOTRE DAME L. REV. 734 (1987); Note, *Against Forfeiture of Attorneys' Fees Under RICO: Protecting the Constitutional Rights of Criminal Defendants*, 61 N.Y.U. L. REV. 124 (1986); Note, *Forfeitability of Attorney's Fees Traceable as Proceeds From a RICO Violation Under the Comprehensive Crime Control Act of 1984*, 32 WAYNE L. REV. 1499 (1986).

<sup>13</sup> See *infra* notes 118-123 and accompanying text.

<sup>14</sup> For the introduction of the penitentiary as the usual punishment for serious crime see generally M. FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (1st Am. ed. 1977).

objectives of punishment as deterrence and retribution?<sup>15</sup> Finally, should criminal forfeiture be imposed as a penalty for all crimes committed for gain?

The first step in answering these questions is to distinguish the various sorts of property subject to RICO and CCE forfeiture. These are the proceeds or gross receipts of crime,<sup>16</sup> the "instrumentalities of crime," such as property, both real and personal, employed (sometimes very tangentially) in the commission of the offense,<sup>17</sup> and "interests" in a RICO "enterprise" operated through or acquired by a "pattern of racketeering activity."<sup>18</sup> This Article begins by tracing the process of case interpretation and statutory amendment by which the proceeds of crime became a necessary object of forfeiture despite the difficulty of interpreting 1970 RICO to justify such forfeitures.<sup>19</sup> It concludes that such proceeds are in fact the only appropriate object of forfeiture.

The forfeiture of instrumentalities of crime, however, is an inappropriate criminal penalty.<sup>20</sup> Such forfeitures are closely modelled upon existing civil forfeitures. Civil forfeiture is a farrago of injustices sanctified by tradition. Its historical justifications, such as they are, have been left behind by its alarming extension in recent years, and its adoption as a criminal punishment, when its validity has always depended on its status as a civil penalty, is unprincipled.<sup>21</sup>

Finally, the Article criticizes enterprise forfeiture as a criminal penalty. Enterprise forfeiture is a central innovation of RICO. It treats the criminal's whole business as proceeds of crime or as an instrumentality thereof, with the aim of separating racketeers from their rackets. Certainly criminals should forfeit legitimate businesses which are themselves the proceeds of crime. This Article argues, however, that it is usually wrong to forfeit a legitimate business because its owner has committed a crime in the course of its operation. Such forfeitures too often result in arbitrary and dis-

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<sup>15</sup> Another traditional objective of punishment is, of course, rehabilitation. No one supposes, however, that the purpose of forfeiture is rehabilitation, and its introduction is in fact closely associated with the revival of retributivist theories of criminal jurisprudence. One motive for such revival has been loss of faith in the possibility of rehabilitation. See *infra* notes 381-86 and accompanying text.

<sup>16</sup> 18 U.S.C.S. § 1963(a)(3) (Law. Co-op. Supp. 1987); 21 U.S.C. § 848(a); 21 U.S.C. § 853(a)(1) (Law. Co-op. Supp. 1987).

<sup>17</sup> 21 U.S.C. § 853(a)(2) (Law. Co-op. Supp. 1987).

<sup>18</sup> 18 U.S.C. § 1963(a)(2) (Supp. III 1985).

<sup>19</sup> See *infra* notes 55-105 and accompanying text.

<sup>20</sup> See *infra* notes 239-79 and accompanying text.

<sup>21</sup> See *infra* notes 275-79 and accompanying text.

proportionate punishments for white-collar offenses.<sup>22</sup> Criminal control of legitimate businesses is a problem best attacked by civil divestiture.<sup>23</sup>

If, however, "enterprise" and "instrumentality" forfeiture are rejected as criminal punishments, leaving only proceeds of crime as an appropriate object of forfeiture, there is no compelling reason to limit criminal forfeiture to RICO and drug offenders. After all, no offender should be permitted to retain his ill-gotten gains. This conclusion is reinforced by the fact that RICO is not, on its face, restricted to the prosecution of activities traditionally associated with organized crime and has not been so limited in practice. The Congressional notion that organized crime has particular characteristics which make criminal forfeiture peculiarly necessary, never well-supported logically or empirically, has all but vanished.<sup>24</sup> Moreover, there are signs that both state legislatures and Congress have come to see the enactment of criminal forfeiture penalties as a popular way of demonstrating toughness on crime and as a method of supplementing appropriations for the administration of criminal justice.<sup>25</sup> Many states have passed RICO statutes,<sup>26</sup> and the Justice Department has officially recommended forfeiture as a new punishment for other crimes.<sup>27</sup> In this climate, the limitation of criminal forfeiture to RICO and drug offenses may well be an anomaly and a potential source of unfairness.<sup>28</sup>

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<sup>22</sup> See *infra* notes 280-314 and accompanying text.

<sup>23</sup> See *infra* notes 334-41 and accompanying text.

<sup>24</sup> See *infra* notes 174-88 and accompanying text.

<sup>25</sup> See *infra* notes 145-68 and accompanying text.

<sup>26</sup> ARIZ. REV. STAT. ANN. §§ 13-2301 to 2316 (1985); CAL. PENAL CODE §§ 186-186.8 (West 1985); COLO. REV. STAT. §§ 18-17-101 to 18-17-109 (1985); CONN. GEN. STAT. §§ 53-393 to 403 (1986); DEL. CODE ANN. tit. 11, §§ 1501-1511 (1986); FLA. STAT. ANN. §§ 895.01-.09 (West 1986); GA. CODE ANN. §§ 16-14-1 to -15 (1986); HAW. REV. STAT. §§ 842-1 to -12 (1972); IDAHO CODE §§ 18-7801 to -7805 (1986); IND. CODE §§ 35-45-6-1, 35-45-6-2, 34-4-30.5-1 to -6 (1986); MISS. CODE ANN. §§ 97-43-1 to -11 (1985); NEV. REV. STAT. §§ 207.350-.520 (1985); N.J. REV. STAT. §§ 2C:41-1 to 2C:41-6 (1986); N.M. STAT. ANN. §§ 30-42-1 to -6 (1986); N.C. GEN. STAT. §§ 75D-1 to -14 (1986); N.D. CENT. CODE §§ 12.1-06.1-01 to -08 (1986); OHIO REV. CODE ANN. §§ 2931.31 to -.36 (Baldwin 1986); OR. REV. STAT. §§ 166.715 to -.735 (1985); 18 PA. CONS. STAT. ANN. § 911 (Purdon 1985); R.I. GEN. LAWS §§ 7-15-1 to -11 (1985); UTAH CODE ANN. §§ 76-10-1601 to -1608 (1986); WIS. STAT. ANN. §§ 946.80-.87 (West 1986); P.R. LAWS ANN. tit. 25, §§ 971-971(p) (1985).

<sup>27</sup> See, e.g., ATT'Y. GEN. COMM. ON PORNOGRAPHY, FINAL REPORT, 433 (July, 1986) and the Child Protection and Enforcement Act of 1988, S. 2033, § 202, 134 CONG. REC. 638-39. See *infra* notes 315-16 and accompanying text.

<sup>28</sup> The prosecutor's discretion in deciding whether to seek forfeiture and, if she does, of what property is easily abused. Although forfeiture is ostensibly mandatory under RICO, see *infra* note 34 and accompanying text, the prosecutor is not obligated to identify particular property as subject to forfeiture or indeed to seek a RICO indictment. He or she may choose rather to indict only for the underlying predicate offenses. See Lynch,

This Article contends that the forfeiture of the profits of crime should be general and mandatory. It is the minimum just penalty, because it ensures that the offender shall not benefit by his wrongdoing. However, criminal forfeiture has more in common with civil restitution than with traditional punishments. Like restitution, it merely restores the *status quo ante* and, thus lacks the expressive quality of traditional punishments which have the capacity to express the moral opprobrium of the community. Therefore other punishments, such as fine and imprisonment, should ordinarily supplement criminal forfeiture.<sup>29</sup>

The penalty of forfeiture of criminal profits is closely related to civil restitution on the one hand and enforceable orders of restitution imposed as part of the sentence on the other.<sup>30</sup> All three are

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*RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 718-21 (1987)[hereinafter Lynch, *Parts I & II*].

<sup>29</sup> Throughout this Article, the forfeiture of criminal proceeds is referred to as a "penalty" rather than a "punishment." Punishments are penalties, but the reverse is not always true. Unlike penalties, punishments are intended to express moral obloquy through the public infliction of harm. They are addressed not only to the offender but also to the public, announcing to all that certain behavior deserves the stigma of punishment. Bogart, *Punishment and the Subordination of Law to Morality*, 7 OXFORD J. LEGAL STUD. 421, 426-27 (1987)(characterizing this as the "denunciatory theory" of punishment.) The harm inflicted by punishment may be roughly proportional to the wrong done, but it is not possible to demonstrate that it is in any sense equivalent.

Prison is the archetypal modern punishment because it carries the message that the convict is not fit to associate with law abiding persons, whose safety requires the convict's forcible segregation from other citizens. It is impossible, however, to demonstrate that the harm the criminal suffers from a certain amount of deprivation of liberty is commensurate with the injury the criminal inflicted by wrongs as disparate as insider trading, bank robbery, and rape. The infliction of such harm upon the criminal does not in any way remedy the injury. Therefore it is not surprising that punishments are often highly discretionary. Discretion is necessary because the criminal's deserts are not and cannot be measured by the mere classification of his offense.

Penalties, on the other hand, do not "reprove the transgression." Spjut, *Criminal Law, Punishment, and Penalties*, 5 OXFORD J. LEGAL STUD. 33, 44 (1985). The offender is usually penalized because he has breached a standard of conduct applicable to a particular relationship. Society does not draw the inference that by his or her breach the criminal has demonstrated an unwillingness to comply with the law in general. *Id.* at 44. Unlike punishments, penalties are not individuated, because they are fixed upon the assumption that the injury caused by the offense can be accurately measured and substantially remedied. This limits the expressive function of penalties, for they cannot be modified to express recognition of mitigating or aggravating circumstances.

The forfeiture of criminal profits is an archetypal penalty because it merely returns the offender to the position he occupied before committing the offense. Symbolically, therefore, it treats the offense as limited in its effects to the person or persons wronged.

<sup>30</sup> Since 1984 federal judges have had the power to order the defendant to make restitution to his victims as part of his criminal sentence. 18 U.S.C. §§ 3579, 3580 (1982). These sections have been recodified as 18 U.S.C. §§ 3663, 3664 by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212(a)(1), 98 Stat. 1987 (effective November 1, 1987). Before this restitution could only be ordered as a condition of probation. See *infra* notes 393-400 and accompanying text.

intended to effectuate the principle that criminals should not profit by their crimes. However the existing criminal forfeitures under RICO and CCE largely disregard the fatal inconsistency between restoring the proceeds of crime to the victim and forfeiting them to the state. In fact, under federal law, the proceeds of crime are automatically forfeited to the government upon conviction, whereas the judge may sentence the defendant to make restitution to his victims out of his own funds. Far from having a right to restitution, victims without legal title to forfeited property must petition the Attorney General for a discretionary remission of forfeiture.<sup>31</sup>

Any general forfeiture statute must address these contradictions. The punitive purpose of forfeiture is accomplished when the defendant is deprived of the proceeds of his or her crime; the criminal has no interest in the identity of the recipient. All individual claims against the convicted defendant, whether by victims, attorneys, general creditors, or even dependents, therefore should be prior to those of the state. In particular, the appearance of justice requires an end to the Assets Forfeiture Fund, which gives the United States Attorney and local law enforcement officials with whom he must cooperate a budgetary stake in the vindication of the government's claim to the property.<sup>32</sup> The amount of forfeiture should equal the greater of either the provable proceeds of crime, without any requirement or pretense of tracing, or the provable losses suffered by the victims. All sums collected from the offender, whether as fines or forfeitures, should be allocated in accordance with a scheme of priorities. Perhaps an independent Custodian of Forfeited Property could be appointed to receive, administer and distribute such property. Of course, victims will retain their right to bring civil actions to recover all their losses, less sums actually received.

This approach has the incidental merit of resolving the struggle over attorneys' fees. Attorneys are creditors of the defendant like

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<sup>31</sup> 18 U.S.C. § 1963(h)(1),(j) (Supp. III 1985). See, e.g., *United States v. Mageean*, 649 F. Supp. 820, 823 (D. Nev. 1986), *aff'd* 822 F.2d 62 (9th Cir. 1987). Despite the statutory authorization, the regulations for the remission or mitigation of civil and criminal forfeitures promulgated to date do not appear to address victims' claims for remission. Regulations Governing the Remission or Mitigation of Civil and Criminal Forfeitures, 28 C.F.R. §§ 9.1-9.7 (1987) [hereinafter *Forfeiture Regulations*]. Rather they concern remissions in favor of innocent third parties with a valid claim of title. See *infra* notes 429-31 and accompanying text.

<sup>32</sup> 21 U.S.C. § 881(e) (1982 & Supp. III 1985) authorizes the equitable transfer of civilly and criminally forfeited property to cooperating local law enforcement agencies. See Attorney General's Guidelines on Seized and Forfeited Property, 50 Fed. Reg. 24,052 (1985). See also 19 U.S.C. § 1613a (1982 & Supp. III 1985). See *infra* notes 149-72 and accompanying text.



any other, provided that they are not laundering the proceeds of crime through fraudulent fee arrangements. Indeed, attorneys require a special priority because of their indispensable role in the adversary system. However, it is fundamentally unfair to give an absolute preference to the attorney's claims over those of the defendant's victims, other creditors, and dependents. This Article recommends that the attorney's fee, if derived from the proceeds of the crime, be treated as a voidable preference which must be returned to the Custodian of Forfeited Property upon the defendant's conviction, and then should be distributed to claimants, of whom the attorney is one. The attorney will, however, have a claim prior to those of other creditors for reasonable compensation as determined by the court.

## II. THE EVOLUTION OF CRIMINAL FORFEITURE SINCE 1970: JUDICIAL INTERPRETATION AND CONGRESSIONAL REACTION

RICO and CCE forfeiture was, when introduced in 1970, an innovation virtually without precedent in American law. In one important respect it paralleled the nearly forgotten common law penalty of forfeiture of estate and corruption of blood.<sup>33</sup> RICO forfeiture, like forfeiture of estate, was an automatic consequence of conviction for RICO violations rather than a punishment set by the judge and discretionary with him or her within statutory limits.<sup>34</sup>

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<sup>33</sup> See *supra* note 1.

<sup>34</sup> United States v. L'Hoste, 609 F.2d 796, 810 (5th Cir. 1980), *cert. denied*, 449 U.S. 833 (1980), held that RICO forfeiture is indeed mandatory upon conviction. The trial judge has no equitable discretion to protect the interests of third parties by refusing to enter an order of forfeiture. *Accord* United States v. Godoy, 678 F.2d 84, 88 (9th Cir. 1982), *cert. denied*, 464 U.S. 959 (1983).

Of course, RICO and CCE forfeiture was and is "automatic" only when the government exercises its discretion to seek the forfeiture of property identified in the indictment or accompanying bill of particulars. The finder of fact must also determine that such property is indeed subject to forfeiture. Such limitation was not explicit in 18 U.S.C. § 1963 (1982) before its amendment by the Comprehensive Forfeiture Act of 1984. See *supra* note 5. The Federal Rules of Criminal Procedure were amended in 1972, however, requiring the government to request a special verdict establishing that the defendant had a forfeitable interest in a RICO "enterprise." FED. R. CRIM. P. 31(e). See, e.g., United States v. Hess, 691 F.2d 188 (4th Cir. 1982) (authorizing forfeiture upon stipulation as to the defendants' respective ownership interests in the enterprise, in lieu of a special verdict).

Forfeiture of estate, by contrast, the taking by the Crown of all of the felon's real and personal property, was a consequence of any common law or statutory felony conviction, although forfeited real property was restored to the defendant who enjoyed "benefit of clergy" as a first offender. 2 M. HALE, PLEAS OF THE CROWN 387-88 (London 1800). "Some Felonies are allowed the Benefit of Clergy, which saves Life, and the Inheritance of Land, tho' not the immediate Profits." C. YORKE, *supra* note 1, at 84. Many offenses were non-clerigiable. 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF

RICO forfeitures are thus in personam, but the 1970 statute simply borrowed the procedures long mandated for *in rem* customs forfeitures,<sup>35</sup> relegating third party claimants to an administrative petition for remission or mitigation.<sup>36</sup> The original statute made no attempt to answer such vexing questions as when the government's title to forfeited property first attached and how the property might be secured from dissipation or concealment before or after indictment. Perhaps more important, there was great uncertainty about the meaning of fundamental RICO concepts such as "pattern of racketeering"<sup>37</sup> and "RICO enterprise."<sup>38</sup> In the last analysis, this uncertainty derived from the more pervasive uncertainty about the objectives of RICO and whether such objectives could be achieved constitutionally.

There is little point, at this late date, in attempting to establish the true meaning and purpose of the forfeiture provisions in RICO and CCE in their 1970 form.<sup>39</sup> The pre-1984 cases embody two competing methods of resolving the uncertainties about RICO forfeiture. According to what may be called the "strict interpretation," RICO is essentially a measure of economic regulation, an anti-trust act intended to prevent the corruption of the free market by the importation of mob tactics financed by the proceeds of illegitimate crime. RICO forfeiture is therefore an instrumental penalty aimed at the establishment of a *cordon sanitaire* between the mob and legitimate businesses by forcing the divestiture of interests in such legitimate businesses acquired, maintained, or fostered by corrupt means. Its effect as punishment is real but incidental to its primary

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ENGLAND 463 (1883). All property was forfeit, without any requirement of a "nexus" between the property and the offense. Thus there was nothing for the finder of fact to determine, a basic difference between forfeiture of estate and RICO forfeiture.

<sup>35</sup> For the difference between *in rem* and *in personam* forfeitures, see *supra* note 1.

<sup>36</sup> 18 U.S.C. § 1963(c) (1970)(codified as amended at 18 U.S.C. § 1963(n) (Supp. III 1985)). For the civil forfeiture authority of the Customs Service, see 21 U.S.C. § 881 (1982 & Supp. III 1985)(controlled substances and property used to facilitate their distribution); 49 U.S.C. §§ 781-84 (1982) (vehicles carrying contraband); 19 U.S.C. § 1703 (1982)(vessels used in smuggling); 19 U.S.C. § 1595a (1982)(conveyances used to transporting contraband).

<sup>37</sup> 18 U.S.C. § 1961(5) (1982); 18 U.S.C. § 1962(a) (1982). See generally Moran, *The Meaning of Pattern in RICO*, 62 CHI.-[ ]KENT L. REV. 139 (1985); Note, *The Racketeer Influenced and Corrupt Organization Act: An Analysis of the Confusion in its Application and a Proposal for Reform*, 33 VAND. L. REV. 441, 450-53 (1980).

<sup>38</sup> 18 U.S.C. § 1961(4) (1982). See generally Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1023-28 (1982).

<sup>39</sup> For exhaustive discussions of the legislative history of the 1970 Act as a guide to Congressional intent, see Lynch, *Parts I & II*, *supra* note 28, at 664-94; REPORT OF THE AD HOC CIVIL RICO TASK FORCE OF THE ABA SECTION OF CORPORATION, BANKING AND BUSINESS LAW 70-127 (1985).

purpose.<sup>40</sup>

The "loose interpretation," on the other hand, added the forfeiture of proceeds and of substitute assets to the RICO arsenal. Its proponents did not deny, of course, that RICO provides for "enterprise forfeiture." Rather, they emphasized the independent deterrent value of forfeiture as a means of taking the profit out of crime. They argued that the broader purposes of RICO are not served by treating the profits of organized crime as sacrosanct until such profits are invested or by an insistence upon the necessity of tracing.

The strict interpretation excluding the forfeiture of profits accords better with the legislative history of 1970 RICO and with a careful reading of the text. It is not, however, the more practical interpretation and it has serious, although inchoate, theoretical difficulties.<sup>41</sup> Not surprisingly, the courts have largely rejected it. Attempts to apply the strict interpretation created the impression that RICO was full of loopholes and essentially unworkable. Once corrupt interests in legitimate business were subject to forfeiture, a ban on the forfeiture of profits and proceeds began to look like an arbitrary and unjustified restriction in the war on crime.<sup>42</sup> Congress agreed and ratified the loose interpretation in the 1984 Comprehensive Forfeitures Act and the 1986 amendments, which authorized the forfeiture of substitute assets.<sup>43</sup>

There is thus a substantial consensus that the central purpose of RICO forfeiture is to deter crime by removing the profit. If this is so, the non-application of *in personam* forfeiture to all economic and white-collar crime begins to look anomalous. It may be useful to trace the process by which this consensus developed from 1970 to the present before taking a broader and more theoretical perspective.

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<sup>40</sup> See, e.g., *United States v. L'Hoste*, 609 F.2d 796, 814 (5th Cir. 1980), *cert. denied*, 449 U.S. 833 (1980) (trial judge is without discretion to suspend forfeiture because its primary purpose is not punishment but separation of the racketeer from his economic base). The view of RICO forfeiture as predominantly a prophylactic penalty justifies the forfeiture of the assets of a tainted enterprise even if such assets were not acquired through racketeering activity or "tainted" by use in connection with such activity, see, e.g., *United States v. Anderson*, 782 F.2d 908, 917-18 (11th Cir. 1986), *reh'g denied*, 788 F.2d 1570 (1986) (forfeiture of building housing nightclub whose owner attempted to eliminate competitor through arson). Such a penalty bears no necessary relation to the profit made from the crime. See *infra* notes 280-311 and accompanying text.

<sup>41</sup> See *infra* notes 69-72 and accompanying text.

<sup>42</sup> Judge Cecil F. Poole of the Ninth Circuit complained of this very anomaly in his dissent in *United States v. Godoy*, 678 F.2d 84, 89 (9th Cir. 1982), *cert. denied*, 464 U.S. 959 (1983) (Poole, J., dissenting) ("In effect, all income except that which is kept in a mattress would be forfeitable.")

<sup>43</sup> See *infra* note 78.

A. THE RE-INTRODUCTION OF IN PERSONAM FORFEITURE:  
LEGISLATIVE HISTORY AND CONTEMPORARY COMMENT.

The legislative history and contemporary comment about the re-introduction of criminal or *in personam* forfeiture into American law are sketchy. One commentator described RICO as having its "genesis in social science theory,"<sup>44</sup> including economic theory, about the nature of organized crime and its deleterious effect on civil society. The remedy was the erection of a wall around organized crime by criminalizing the investment of proceeds from organized crime in legitimate business and providing for the forfeiture of interests so acquired. The proponents of Title IX did not advocate forfeiture as the appropriate measure of punishment<sup>45</sup> but merely as a means to this desired separation. As one commentator stated, "No suggestion appears [in the legislative history] that Congress intended to reach beyond the relevant 'enterprise,' or to forfeit fruits or profits of racketeering except when used to acquire control of an 'enterprise.' Indeed, there is much evidence to the contrary."<sup>46</sup>

The critics of the RICO bill largely aimed their attack at the impossibility of limiting RICO to this laudable purpose, especially in view of the absence and constitutional difficulty of any statutory definition of organized crime,<sup>47</sup> the possibility that unrelated convictions might make up a "pattern of racketeering activity,"<sup>48</sup> and the broad reach of the predicate offenses, which included several, such as stock fraud, not typically associated with organized crime.<sup>49</sup> No critic foresaw that RICO would or could be read to require the for-

<sup>44</sup> Baker, *Nationalizing Criminal Law: Does Organized Crime Make It Necessary Or Proper?*, 16 RUTGERS L.J. 495, 560 (1985).

<sup>45</sup> See, e.g., *Organized Crime Control, 1970: Hearings on S.30 and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 107 (1970) (statement of Sen. McClellan) [hereinafter Subcommittee Hearings]. ("[T]itle IX would punish the criminal appropriately by forfeiting to the government his ill-acquired interests in a legitimate business, and directly aid the business community by expelling him from the legitimate business he had abused."). *Id.* at 107.

<sup>46</sup> Taylor, *Forfeiture under 18 U.S.C. § 1963: RICO's Most Powerful Weapon*, 17 AM. CRIM. L. REV. 379, 384 (1980).

<sup>47</sup> H.R. REP. NO. 1549, 91st Cong., 2d Sess. (81-96), reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS 4007, 4076-91 (dissenting views of Reps. Conyers, Mikva, and Ryan on the Organized Crime Control Act of 1970) [hereinafter *Jud. Comm. Rep.*]. The difficulty comes from the necessity of avoiding the creation of a "status offense." See generally Blakey, *Definition of Organized Crime in Statutes and Law Enforcement Administration*, in PRESIDENT'S COMM'N ON ORGANIZED CRIME, THE IMPACT: ORGANIZED CRIME TODAY 511 (1986) [hereinafter THE IMPACT].

<sup>48</sup> Subcommittee Hearings, *supra* note 45, at 490, 499 (statement of Lawrence Speiser, Dir., Wash. Office, American Civil Liberties Union). This particular fear was laid to rest, at least for civil RICO, in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14, (1985) (dictum) ("pattern of racketeering" implies related acts).

<sup>49</sup> Subcommittee Hearings, *supra* note 45, at 517 (statement of Lawrence Speiser) ("theft

feiture of uninvested criminal proceeds. This possibility may have been overlooked because of the second major criticism of RICO: that it was fundamentally unworkable. No prosecutor, it was said, would take on the additional burden of proving a "pattern" of racketeering activity if he or she could prove the underlying offenses,<sup>50</sup> and the tracing of proceeds was too notoriously difficult to bother with.<sup>51</sup> If these predictions were accurate, there would be little reason for alarm about the potential scope of criminal forfeiture.<sup>52</sup> The critics instead attacked RICO forfeitures as a revival of "forfeiture of estate,"<sup>53</sup> and even as a reversal of 18 U.S.C. § 3563, which has prohibited "corruption of blood or any forfeiture of estate" since 1790.<sup>54</sup>

#### B. RICO FORFEITURES IN PRACTICE: 1970-1984.

Federal prosecutors made little use of the RICO forfeiture provisions for several years after their adoption,<sup>55</sup> as was predicted by

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from interstate shipment" regardless of value is an inappropriate predicate offense since it has no necessary connection to racketeering activity).

<sup>50</sup> Unless, of course, the underlying offenses were violations of state, not federal law.

<sup>51</sup> *Subcommittee Hearings*, *supra* note 45, at 329. *Id.* at 369-70 (testimony of Sheldon H. Elsen, Chairman, Committee on Federal Legislation, Ass'n of the Bar of the City of New York).

<sup>52</sup> The criminal law section of the American Bar Association, which opposed the passage of S. 30, did not seriously attack the forfeiture provisions. *Subcommittee Hearings*, *supra* note 45, at 552, 556 (statement of the Section of Criminal Law of the American Bar Association).

<sup>53</sup> *Jud. Comm. Rep.*, *supra* note 47, at 188; *Subcommittee Hearing*, *supra* note 45, at 402 (report of the Committee on Federal Legislation of the New York County Lawyers Association). In a letter to Senator McClellan, Deputy Attorney General Richard Kleindienst defended the constitutionality of the criminal forfeiture provision, "limited as it is . . . to one's interest in the enterprise which is the subject of the specific offense. . . ." *Jud. Comm. Rep.*, *supra* note 47, at 188.

<sup>54</sup> Former 18 U.S.C. § 3563 (1982), 62 Stat. 837, was repealed by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, §§ 212(a)(1), 235(a)(1), 98 Stat. 1987, 2031, effective November 1, 1987. The court in *United States v. Grande*, 620 F.2d 1026, 1039 (4th Cir. 1980), *cert. denied*, 449 U.S. 919 (1980), held that the statute did not prohibit anything other than forfeiture of a defendant's entire estate as imposed by the common law for conviction of a felony. The statute, supposedly derived by necessary implication from the constitutional prohibition of forfeiture of estate and corruption of blood as a punishment for treason, U.S. CONST. art. III, § 3, cl. 2, has several times been adduced as a bar to the forfeiture of substitute assets. *See, e.g.*, H.R. REP. No. 845, 98th Cong., 2d Sess. 11-12 (1984), available on Cong. Info. Service H-523-21 (1984)(microfiche)("giant step in the direction of 'forfeiture of estate'"). In other words, there is a widespread opinion that only the actual proceeds of crime may be forfeited. Tracing is therefore mandatory. This is a dubious argument. *See infra* note 76 and accompanying text.

<sup>55</sup> During the decade from 1970-1980, federal grand juries returned indictments seeking forfeiture under RICO or CCE in only 98 cases with 258 named defendants. The government sought the forfeiture of only \$2 million worth of property. GENERAL ACCOUNTING OFFICE, ASSET FORFEITURE—A SELDOM USED TOOL IN COMBATTING DRUG TRAFFICKING 10 (1981)[hereinafter *GAO Report*]. Practical and institutional difficulties,

critics. There is no doubt that during the same period, the Drug Enforcement Authority's civil forfeitures of contraband and instrumentalities of drug dealing were of far greater significance. This is particularly true after 1978, when the DEA obtained statutory authority for the civil forfeiture of assets traceable to narcotics transactions and the cash involved in narcotics dealings.<sup>56</sup>

As a result of this lag, the courts had little occasion to rule on the problems of RICO and CCE forfeitures until the late 1970s. Despite some hesitation, which aroused the annoyance of critics,<sup>57</sup> the practical problems of administering RICO forfeitures then drove the courts toward a theory of forfeiture as punishment rather than prophylactic. The key step was the determination that RICO did not apply only to the victimization of legitimate enterprises by a "pattern of racketeering." The circuit courts overwhelmingly held that a criminal conspiracy could be a RICO enterprise,<sup>58</sup> despite

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more than legal and theoretical considerations, prevented the significant use of RICO forfeitures during their first decade. Assistant United States Attorneys were, quite naturally, judged and rewarded for numbers of convictions obtained, not for the value of property forfeited. *Id.* at 23-24. Introducing a forfeiture count into an indictment vastly increased the burden of investigation and proof and thus the time spent on each case to the detriment of the conviction rate. Moreover, each delay in prosecution necessitated by the preparation of the forfeiture case increased the risk that the criminal would get away at a time when the essential facts establishing his guilt were already known. *Id.* at 58, 68. Finally, even the use of RICO might be an unnecessary complication quite apart from the difficulties of forfeiture. It might be cleaner and simpler to prosecute for the predicate offenses alone, which would have to be proved in any event. *Id.* at 60-61. See Dombrink and Meeker, *Racketeering Prosecution: The Use and Abuse of RICO*, 16 *RUTGERS L.J.* 633, 649 (1985)(illustrating difficulties added to prosecution when forfeiture is sought).

These practical and institutional considerations obviously did not vanish after 1980 and in fact to some extent survived the 1984 adoption of the Comprehensive Forfeiture Act. See PRESIDENT'S COMMISSION ON ORGANIZED CRIME, *THE EDGE: ORGANIZED CRIME, BUSINESS AND LABOR UNIONS* 307 (1986)[hereinafter *THE EDGE*].

<sup>56</sup> The Psychotropic Substances Act of 1978, Pub. L. No. 95-633, § 301(1), 92 Stat. 3777 (codified at 21 U.S.C. § 881(a)(6) (1982)).

The effectiveness of DEA civil forfeitures after 1978 is clear: in 1980, the DEA seized \$90 million in assets, of which \$42 million was forfeited. *Forfeiture in Drug Cases: Hearings on H.R. 2646, H.R. 2910, H.R. 4110, and H.R. 5371 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 97th Cong., 1st and 2d Sess. 49 (1983), available on Cong. Info. Service H-521-60 (1983)(microfiche) [hereinafter *1981-82 Hearings*] (statement of Rep. Benjamin A. Gilman).

<sup>57</sup> See, e.g., Note, *RICO: Are the Courts Construing the Legislative History Rather Than the Statute Itself?*, 55 *NOTRE DAME LAW.* 777 (1980)(questioning *United States v. Sutton*, 605 F.2d 260 (6th Cir. 1979), *vacated*, 642 F.2d 1001 (1980)(en banc)). See *infra* note 59 and accompanying text.

<sup>58</sup> See *United States v. Sutton*, 642 F.2d 1001, 1006-09 (6th Cir. 1980)(en banc), *cert. denied*, 453 U.S. 912 (1981); *United States v. Provenzano*, 620 F.2d 985, 992-93 (3rd Cir. 1980), *cert. denied*, 449 U.S. 899 (1980); *United States v. Rone*, 598 F.2d 564, 568-69 (9th Cir. 1979); *United States v. Swiderski*, 593 F.2d 1246, 1248-49 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979); *United States v. Elliot*, 571 F.2d 880, 896-98 (5th Cir. 1978),

powerful arguments to the contrary.<sup>59</sup> In *United States v. Turkette*<sup>60</sup> the Supreme Court agreed, holding that an association organized solely for criminal purposes, including the commission of the offenses charged as a predicate to RICO liability, could be a RICO "enterprise."<sup>61</sup> This interpretation, eliminating any requirement that an "enterprise" be the target or beneficiary of criminal corruption, effectively proscribed the predicate offenses directly.<sup>62</sup> One re-

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*cert. denied*, 439 U.S. 953 (1978); *United States v. Rubin*, 559 F.2d 975 (5th Cir. 1977), *vacated and rev'd on other grounds*, 439 U.S. 810 (1978), 591 F.2d 278, *cert. denied*, 444 U.S. 854 (1979). *United States v. Altese*, 542 F.2d 104 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977); *United States v. Cappetto*, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975).

<sup>59</sup> See *United States v. Turkette*, 632 F.2d 896 (1st Cir. 1980), *rev'd* 452 U.S. 576 (1981); *United States v. Sutton*, 605 F.2d 260, 264-69, n.44 (6th Cir. 1979), *vacated* 642 F.2d 1001 (1980)(en banc). The principal argument is that 18 U.S.C. § 1963(c) (1970) prohibits participating in the affairs of an "enterprise" through a pattern of racketeering activity; it would be redundant to read this as creating the independent federal crime of participating in a criminal organization by committing the very crimes the group was organized to commit. Therefore the statute must refer to an entity distinct from the cooperative criminal efforts of the defendants. This interpretation is consistent with the legislative history, which showed with "remarkable clarity" that the act was aimed at prohibiting the infiltration of legitimate business and the investment of illegally earned income therein. *Sutton*, 605 F.2d at 266. Such infiltration is supposedly a new evil, as opposed to "the age old problem of crime for crime's sake." *Sutton*, 605 F.2d at 268. The court in *Sutton* acknowledged that the RICO definition of "enterprise," 18 U.S.C. § 1961(4) (1982), is broad enough to include criminal associations which might have an identifiable existence and function apart from the particular predicate acts which go to make up the pattern of racketeering activity. But the statute does not suggest what facts would go to show the existence of such a criminal enterprise, and therefore gives no notice to potential violators of what activities would bring them within the ambit of RICO.

<sup>60</sup> 452 U.S. 576 (1981).

<sup>61</sup> *Id.* at 580-81.

<sup>62</sup> The Supreme Court did insist that the existence of the criminal enterprise as an "ongoing organization, formal or informal," was a distinct element of the offense; but it acknowledged that in many instances the proof of such element may "coalesce" with the proof of the predicate racketeering activity by the members of the organization. *Turkette*, 452 U.S. at 583. See, e.g., *United States v. Perholtz*, 842 F.2d 343, 362 (D.C. Cir. 1988) ("... the existence of the enterprise may be inferred from proof of the pattern"); *United States v. Riccobene*, 709 F.2d 214 (3rd Cir. 1983), *cert. denied* 464 U.S. 849 (1983) ("crime family" engaged in illegal gambling and loan sharking). The court in *Riccobene* stated: "The function of overseeing and coordinating the commission of several different predicate offenses and other activities on an ongoing basis is adequate to satisfy the separate existence requirement." *Id.* at 224 (footnote omitted). *Accord* *United States v. Williams*, 809 F.2d 1072, 1094 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 228 (1987) (no jury instruction required "breaking down the elements of an enterprise.")

The courts have effectively rendered the "enterprise" requirement nugatory. For example, in *United States v. Brennan*, 629 F. Supp. 283 (E.D.N.Y. 1986), *aff'd*, 798 F.2d 581 (2d Cir. 1986), a justice of the Queens Supreme Court was convicted of violating RICO by soliciting and accepting bribes. The court held the Queens Supreme Court to be the "enterprise" which the judge was conducting through a pattern of racketeering. See also *United States v. Yonan*, 800 F.2d 164, 167-68 (7th Cir. 1986)(defense attorney

sult, as the Supreme Court acknowledged,<sup>63</sup> was the expansion of federal jurisdiction over state crimes. The Supreme Court regarded such expanded jurisdiction as a deliberate response by Congress to the aggravated threat posed by organized crime to the social fabric.<sup>64</sup> Since organized crime obtains the resources with which it corrupts legitimate business from wholly criminal activities,<sup>65</sup> it would be absurd to prevent the government from using RICO directly against such activities.<sup>66</sup>

The Supreme Court's reasoning in *Turkette* has significant implications for forfeitures.<sup>67</sup> If RICO enterprises include the organized criminal activities themselves, then the criminals' "interests" therein must be forfeitable. However, organized crime rings are not formed as corporations or partnerships and the participants are not shareholders. Rather each criminal's "partnership share" is equivalent to his share of the proceeds of the criminal enterprise.<sup>68</sup> Such proceeds should be forfeitable as an "interest" acquired in violation of § 1962 whether invested in a legitimate business and real or personal property or simply banked or buried in a basement. In fact, the attack upon the resources mustered by organized crime can be most effectively carried out by their forfeiture at the earliest possible moment. Thus RICO, to be of any use, must authorize the forfeiture of criminal proceeds in whatever form they are held.

In 1983, the Supreme Court endorsed this highly pragmatic reading of RICO in *Russello v. United States*.<sup>69</sup> Curiously, two of the three Circuit Courts of Appeals which had previously considered the issue had held that forfeitable interests under RICO did not include proceeds from the crime despite the Supreme Court's earlier anticipation of this result in *Turkette*.<sup>70</sup> These courts relied heavily on the

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guilty of participating in affairs of state's attorney's office through pattern of bribing prosecutors), *cert. denied*, 107 S. Ct. 930 (1987).

<sup>63</sup> *Turkette*, 452 U.S. at 586-87.

<sup>64</sup> *Id.* at 588-89.

<sup>65</sup> *Id.* at 591-92.

<sup>66</sup> *Id.* at 590, 592-93.

<sup>67</sup> *Id.* at 585, 591-93.

<sup>68</sup> Of course, the "partnership share" of each criminal conspirator may be defined as property contributed to the enterprise in kind or its value. In reality such property will ordinarily be loaned to the enterprise, for example, a vehicle used for the transportation of contraband. Such a vehicle is subject to civil and criminal forfeiture quite apart from RICO. 21 U.S.C. § 853(a)(2) (Supp. III 1985); *cf.* 21 U.S.C. § 881(a)(4) (1982 & Supp. III 1985). See *infra* notes 236-48 and accompanying text. See Taylor, *supra* note 46, at 392 (Congress did not intend RICO forfeitures to include instrumentalities of crime).

<sup>69</sup> 464 U.S. 16 (1983).

<sup>70</sup> *Russello* affirmed the opinion of the Fifth Circuit in *United States v. Martino*, 681 F.2d 952 (5th Cir. 1982). *Contra* *United States v. Marubeni America Corp.*, 611 F.2d 763 (9th Cir. 1980)(government not entitled to forfeit all sums paid or payable under con-



fact that the CCE, enacted by Congress in the same month as RICO, authorized the forfeiture of profits from drug offenses earned through a "continuing criminal enterprise."<sup>71</sup> They argued that if Congress had intended the same result in RICO forfeitures, it would have explicitly stated this.<sup>72</sup>

Of course, if the dominant purpose of RICO is "to divest the [criminal] association of the fruits of its ill-gotten gains,"<sup>73</sup> there is no apparent reason why forfeiture should be limited to the actual proceeds and assets into which the proceeds have been provably transformed. Such a limitation only rewards the racketeer who dissipates his loot untraceably<sup>74</sup> or launders it successfully.<sup>75</sup> Rather the convicted defendant should forfeit from his total wealth property equal in value to his criminal gains, equal in value to his criminal gains—in short, "substitute assets."<sup>76</sup>

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tracts obtained by misuse of confidential bidding information obtained by bribery); *United States v. McManigal*, 708 F.2d 276, 283-87 (7th Cir. 1983), *vacated*, 464 U.S. 979 (1983)(government was denied forfeiture of legal fees paid for procuring lower tax assessments by bribery). See also *United States v. Thevis*, 474 F. Supp. 134, 142 (N.D. Ga. 1979)("the 'interest' subject to forfeiture under 18 U.S.C. § 1963(a) is limited to the interest in the enterprise and does not extend to fruits or profits generated from the enterprise"), *aff'd*, 665 F.2d 616 (5th Cir. 1982), *cert. denied*, 456 U.S. 1008 (1982); *United States v. Meyers*, 432 F. Supp. 456, 461 (W.D. Pa. 1977)(dictum)(the government did not seek forfeiture, having conceded that the defendant ceased to participate in the RICO enterprise before his indictment; but even if it had, profits or fruits received from the enterprise are not forfeitable as an interest in the enterprise or a source of influence over it).

<sup>71</sup> 21 U.S.C. § 848(a)(2) (1982), *repealed by* Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, § 305(a)(3), 98 Stat. 2050. The penalties for CCE violations, in common with other federal drug violations, now include forfeiture of proceeds. 21 U.S.C. § 853(a)(1) (Supp. III 1985).

<sup>72</sup> The Supreme Court's treatment of this objection in *Russello* was less than cogent. Besides simply denying the relevance of the CCE penalties to RICO, the Supreme Court said that the narcotics business, in contrast to organized crime, "usually generates only monetary profits. . . ." *Russello*, 464 U.S. at 25. However, illegal gambling, which is the second most important source of organized crime income, is no less a cash business. PRESIDENT'S COMMISSION ON ORGANIZED CRIME, AMERICA'S HABIT: DRUG ABUSE, DRUG TRAFFICKING, AND ORGANIZED CRIME 6-7 (1986)[hereinafter AMERICA'S HABIT] (Drug trafficking is the most lucrative organized crime activity, but accounts for less than 38 percent of all organized crime activity).

<sup>73</sup> *Turkette*, 452 U.S. at 585.

<sup>74</sup> "[A] racketeer who dissipates the profits or proceeds of his racketeering activity on wine, women and song has profited from organized crime to the same extent as if he had put the money in his bank account." *United States v. Ginsburg*, 773 F.2d 798, 802 (7th Cir. 1985).

<sup>75</sup> *United States v. Navarro-Ordas*, 770 F.2d 959, 969 (11th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986).

<sup>76</sup> Some courts and commentators were of the opinion that there is a statutory or even constitutional requirement of a "nexus" between the crime and the property forfeited. They claimed that the forfeiture of an equivalent value of substitute assets resembles "forfeiture of estate," particularly in the common case of the criminal whose

The courts endorsed these conclusions by holding that 1970 RICO permitted the forfeiture of substitute assets;<sup>77</sup> then Congress amended RICO to provide explicitly for such forfeitures.<sup>78</sup> But RICO forfeiture has still not been transformed from a method of compelling divestiture of criminal interests in legitimate business into a simple and automatic measure of retribution for specified crimes.<sup>79</sup> The "loose interpretation" of the statute has not supplanted the "strict interpretation;"<sup>80</sup> it has merely extended the reach of forfeiture. Now that substitute assets in the amount of ille-

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property is traceable to illegal activity and whose illegal gains over time exceed the value of his current assets. *United States v. Ginsburg*, 773 F.2d 798, 806 (7th Cir. 1986) (Ripple, J., dissenting), *cert. denied*, 475 U.S.1011 (1986). There is, however, a sharp distinction between the forfeiture of the value of ill-gotten gains and the forfeiture of all one's property upon conviction of any felony. If substitute assets are forfeited, they are, or should be, limited in value to the provable proceeds of the very crimes of which the defendant stands convicted. Such limitation provides a sufficient "nexus" to the crime. *GAO Report*, *supra* note 55, at 4-5, 34-35.

<sup>77</sup> See *United States v. Ginsburg*, 773 F.2d 798, 802 (7th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986) (en banc) (forfeiture of amount of legal fee received in connection with tax appeals facilitated by the payment of bribes, regardless of tracing); *United States v. Navarro-Ordas*, 770 F.2d 959, 969 (11th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986) (ordered forfeiture of proceeds of fraudulently obtained loans, only a small portion of which were traceable into specific assets). *Contra* *United States v. McManigal*, 723 F.2d 580, 581 (7th Cir. 1983) (government was denied forfeiture of legal fees paid for procuring lowered tax assessments by bribery). *Ginsburg* reversed the conclusions of a Seventh Circuit panel in *United States v. Alexander*, 741 F.2d 962, 968 (7th Cir. 1984) (If the proceeds have been dissipated on "wine, women and song," the defendant may still be adequately punished by fine and imprisonment.).

<sup>78</sup> The Department of Justice Assets Forfeiture Fund Amendments Act of 1986, Pub. L. No. 99-570, § 1153(a), 100 Stat. 3207-13 authorized the forfeiture of substitute assets by amending 18 U.S.C. § 1963 (Supp. III 1985), adding a new subsection:

(n) if any of the property described in subsection (a), as a result of any act or omission of the defendant—

- (1) cannot be located upon the exercise of due diligence;
- (2) has been transferred or sold to, or deposited with, a third party;
- (3) has been placed beyond the jurisdiction of the court;
- (4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty; the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

See also 21 U.S.C.S. § 853(p) (Law Co-op. Supp. 1988). Curiously, the Comprehensive Forfeiture Act of 1984 both adopted and repealed provisions for the forfeiture of substitute assets identical with new 18 U.S.C. § 1963(n). Compare Pub. L. No. 98-473, § 302, 98 Stat. 2040, adding new subsection 18 U.S.C. § 1963(d), and Pub. L. No. 98-473, § 303, 98 Stat. 2045, adding new subsection 21 U.S.C. § 853(d), with Pub. L. No. 473, § 2301(b), (e)(1), 98 Stat. 2192-93, deleting the same subsections. The adoption of these provisions was apparently an accident, see *United States v. Rogers*, 602 F. Supp. 1332, 1336 (D. Colo. 1985); the House-Senate Conference Committee intended to delete them from the final bill, H.R. REP. NO. 1159, 98th Cong., 2d Sess., Amend. No. 159(15), at 419 (1984), reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182.

<sup>79</sup> It is the thesis of this Article that such a transformation is desirable. See *infra* notes 376-82 and accompanying text.

<sup>80</sup> See *supra* notes 339-43 and accompanying text.

gal proceeds are subject to forfeiture, there is less need to trace the proceeds themselves. Attempting to extract the proceeds from third parties may still be easier. Of course, criminals will still try to conceal their assets, but the United States, as a judgment creditor, has the power to rescind any fraudulent conveyances and/or attach assets in the hands of third parties.<sup>81</sup>

The Comprehensive Forfeitures Act of 1984, however, did not, as finally adopted, authorize the forfeiture of substitute assets,<sup>82</sup> although it provided for a substantial equivalent by imposing an optional fine of up to twice the gross profits from the offense.<sup>83</sup> It therefore seemed necessary to provide for restraints upon the transfer of property subject to forfeiture at the earliest possible moment and to reach such property in the hands of others.<sup>84</sup> The 1970 Act, while authorizing such restraints, did not provide any standards or procedures for imposing them,<sup>85</sup> and the courts manifested extreme hesitation in developing such procedures. At least one court held, despite the statutory authorization, that a pre-conviction restraining order was incompatible with the presumption of innocence and a defendant's right not to incriminate himself.<sup>86</sup> The courts also were troubled by the seizure or attachment of the defendant's property

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<sup>81</sup> See *infra* notes 93 and 94 and accompanying text.

<sup>82</sup> See *supra* note 78.

<sup>83</sup> 18 U.S.C. § 1963(a) (Supp. III 1985); 21 U.S.C. § 855 (Supp. III 1985) states: "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."

<sup>84</sup> Comprehensive Forfeiture Act of 1984, *supra* note 5. Under subsection (e)(1), the issuance of a restraining order is discretionary with the court, but no special showing is required to restrain the transfer of forfeitable property named in the indictment or, apparently, in a bill of particulars. Some courts have held that a hearing is required and the government must show a substantial likelihood that the property is subject to forfeiture. See, e.g., *United States v. Perholtz*, 622 F. Supp. 1253, 1259 (D.D.C. 1985), *aff'd* 842 F.2d 343 (D.C. Cir. 1988).

<sup>85</sup> 18 U.S.C. § 1963(b) (1970) simply provided that "the district courts . . . shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions . . . in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper." The same language appeared in 21 U.S.C. § 848(d) (1970)(continuing criminal enterprises), *repealed by* Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, § 305, 98 Stat. 2050.

<sup>86</sup> *United States v. Mandel*, 408 F. Supp. 679, 683 (D. Md. 1976):

A finding that the government would be likely to prevail on the merits at trial, which would appear necessary to enter such an order, is equivalent to a determination that the defendants are likely to lose at trial. It constitutes a pretrial determination that the defendants are probably guilty. . . . Further, a hearing would compel the defendants to defend themselves against the government's allegations. If they choose to speak, what they say may later be used against them at trial.

The court suggested, however, that a restraining order might issue when the government met its burden of showing a likelihood that the defendants would transfer or dissipate their assets before trial. *Id.* at 683-84.

upon an ex parte application. The entry of an indictment identifying certain property as subject to forfeiture was no substitute for the immediate adversary hearing required by Rule 65 of the Federal Rules of Civil Procedure and indeed by due process.<sup>87</sup> Finally, most courts held that the United States must show by a preponderance of the evidence that it will be able to establish the guilt of the defendant and the forfeitability of the named property beyond a reasonable doubt.<sup>88</sup>

### C. THE 1984 REFORMS AND THE REACTION OF THE COURTS.

Congress attempted to reverse these results in the Comprehensive Forfeiture Act of 1984 ("CFA").<sup>89</sup> From a theoretical standpoint, the most remarkable innovation in the CFA was "relation back," the principle that the government's title to property subject to forfeiture vests at the moment of the crime.<sup>90</sup> Because the criminal cannot pass a title he does not have, the effect of "relation back" is to invalidate transfers made after the crime, with the statutory exception of transfers to "a *bona fide* purchaser for value . . . who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture. . . ."<sup>91</sup> This principle, which is

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<sup>87</sup> *United States v. Lewis*, 759 F.2d 1316, 1324-25 (8th Cir. 1985), *cert. denied*, 474 U.S. 994 (1985); *United States v. Crozier* (Crozier I), 674 F.2d 1293, 1297 (9th Cir. 1982), *vacated*, 468 U.S. 1206 (1984) (grant of interlocutory appeal from the issuance of a temporary restraining order ex parte); *United States v. Veon* (Veon I), 538 F. Supp. 237, 244-45 (E.D. Cal. 1982) ("principle of lenity" in interpreting criminal statutes requires resolution of supposed ambiguity in CCE procedures in favor of a timely post-seizure hearing).

<sup>88</sup> See *United States v. Spilotro*, 680 F.2d 612, 618 (9th Cir. 1982); *United States v. Crozier* (Crozier I), 674 F.2d 1293, 1297 (9th Cir. 1982); *United States v. Long*, 654 F.2d 911, 915 (3d Cir. 1981); *United States v. Veon* (Veon I), 538 F. Supp. 237, 246, (E.D. Cal. 1982). Cf. *United States v. Beckham*, 562 F. Supp. 488, 490 (E.D. Mich. 1983) ("clear and convincing evidence").

<sup>89</sup> See *supra* note 5.

<sup>90</sup> 18 U.S.C. § 1963(c) (Supp. III 1985); 21 U.S.C. § 853(c) (Supp. III 1985).

<sup>91</sup> 18 U.S.C. § 1963(c) (Supp. III 1985). The 1984 Act also extended the relation back principle to civil *in rem* forfeiture of controlled substances and property used in the commission of drug offenses. 21 U.S.C. § 881(h) (Supp. III 1985). This statute provides no exception for bona fide transferees for value without notice. *Id.* Presumably such a transferee is relegated to an administrative petition for remission of forfeiture, Forfeiture Regulations, *supra* note 31, in which he or she may establish his or her good faith, innocence, and lack of "knowledge of the particular violation which subjected the property to seizure and forfeiture." The standards set forth in the administrative regulations are difficult to reconcile with the "relation back" theory, because the petitioner must also establish a "valid . . . interest in the seized property," *id.* at § 9.5(c)(1), which is not possible if title was vested in the United States at the time the property was transferred to him.

"Relation back" was anticipated in *United States v. Long*, 654 F.2d 911 (3d Cir. 1981), a pre-CFA case. The Third Circuit, by upholding the issuance of a restraining

essentially without historical precedent,<sup>92</sup> provides a theoretical justification for pre-indictment restraining orders and for the seizure of property in the hands of third-party transferees for value, most notably including both retainers to defense attorneys and fees already paid for services rendered.<sup>93</sup> The statutes specifically authorize such restraining orders and seizures.<sup>94</sup> Congress also provided that

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order prohibiting the further transfer of an airplane sold by a defendant to his attorneys before indictment, impliedly treated the interest of the United States in forfeitable drug proceeds as attaching at the time of the offense. The attorneys paid \$31,000 in cash for the plane, but kept \$50,000 as a retainer, \$29,000 as an advance against the future expenses of representation, and \$30,000 to discharge the client's existing debt. At the time of the sale, the defendant was about to be indicted, as the attorneys knew. The court never addressed the fact that the sale was partially in satisfaction of past indebtedness and did not say whether the attorneys ultimately would be able to enforce a lien against the plane for \$30,000.

<sup>92</sup> Forfeitures of estate in cases of treason related back to the time of the offense as to realty but not as to chattels precisely because "chattels are of so vague and fluctuating a nature. . ." that an attempt to undo intermediate transactions with respect to them would result in confusion and injustice. 2 W. BLACKSTONE, COMMENTARIES \*421. See also *United States v. Stowell*, 133 U.S. 1, 18 (1890); *United States v. 1960 Bags of Coffee*, 12 U.S. (8 Cranch) 398, 415 (1814) (Story, J., dissenting). As Yorke stated, "As to the Forfeiture of Goods . . . before Sentence [the offender] may apply them to the Payment of Debts to the Subsistence of himself and Family, and is prevented only from a fraudulent Sale to disappoint the Forfeiture." C. YORKE, *supra* note 1, at 70-71.

An influential author who otherwise defended forfeiture of estate found the relation back of the government's title to real property to the time of the offense to be objectionable because it might result in the dispossession of "fair purchasers" and leave "honest creditors" without remedy. W. EDEN, *PRINCIPLES OF PENAL LAW* 40-41 (1771).

In 1779, the New York legislature, like that of other states, passed a bill of attainder directed against Tories who had fled the state. This bill provided for the forfeiture of all property which the Tories possessed as of July 9, 1776, unless they presented themselves by a date certain to stand trial for high treason. The New York State Council of Revision objected on the grounds, *inter alia*, that the forfeitures related back to the New York declaration of independence without making any provision for the payment of debts contracted in the interim or for the interests of *bona fide* purchasers from the traitors. *Objections of the Council of Revision to the Bill Entitled "An Act for Forfeitures and Confiscations and for Declaring the Sovereignty of the People of this State,"* 10 (March 14, 1779) (available in Harvard Law Library).

In the case of civil forfeiture, the traditional rule was "[t]hat in the absence of any express terms in the statute declaring an instantaneous forfeiture, the forfeiture relates back to the time of seizure only." *United States v. 396 Barrels Distilled Spirits*, 28 F. Cas. 121, 125 (E.D. Mo. 1866). See *Stowell*, 133 U.S. at 19 (interest of innocent mortgagee of brewery in which illegal distilling operations were carried out protected against forfeiture, but mortgagor's quitclaim deed, given in lieu of foreclosure after the offense had been committed, was ineffective); Note, *Bane of American Forfeiture Law—Banished at Last?*, 62 CORNELL L. REV. 769, 780 (1977).

<sup>93</sup> *United States v. Truglio*, 660 F. Supp. 103 (N.D. W. Va. 1987), interpreting pre-1984 RICO, upheld the validity of the defendant's assignment to his counsel, in payment of bona fide attorney's fees, of cash which the government had seized before his indictment and which was adjudged forfeit at trial. See *infra* note 111 and accompanying text.

<sup>94</sup> 18 U.S.C. § 1963(e)(2) (Supp. III 1985) and 21 U.S.C. § 853(e)(1)(B) (Supp. III 1985), in identical language, authorize the entry of 10 day *ex parte* temporary restraining

restraining orders or injunctions may be entered upon the filing of an indictment or information alleging that the identified property would be subject to forfeiture upon conviction.<sup>95</sup> This was an attempt to forestall the hearings mandated by the courts under 1970 RICO and CCE which tended to become mini-trials on the defendant's guilt of the underlying offense.<sup>96</sup> Congress further denied standing to intervene and the right to commence an independent action to any third party who asserts an interest in property subject to forfeiture, until the defendant has been convicted.<sup>97</sup>

On the whole, the courts have not been friendly to these procedural innovations. Several courts have held that, although a temporary restraining order against the transfer of the defendant's assets may issue without notice or hearing after indictment, the defendant is entitled within ten days to a new hearing, at which the government has the burden of proof.<sup>98</sup> However, the "relation-back" fic-

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orders before indictment on a showing of "probable cause to believe that the property . . . would, in the event of conviction, be subject to forfeiture . . . and that provision of notice will jeopardize the availability of the property. . . ." 18 U.S.C. § 1963(e) (2)(Supp. III 1985) and 21 U.S.C. § 853(e)(1) (Supp. III 1985) authorize the entry of temporary restraining orders for 90 days which may be extended for good cause before indictment after notice and hearing upon a determination that:

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in property being destroyed, removed from the jurisdiction of the court, or otherwise being made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered.

<sup>95</sup> 18 U.S.C. § 1963(e)(1)(A) (Supp. III 1985); 21 U.S.C. § 853(e) (1)(A) (Supp. III 1985).

<sup>96</sup> The particular problem supposedly solved by these provisions was the reluctance of federal prosecutors to tip their hands by the introduction of most or all of the evidence of the defendant's guilt at the hearing on the issuance of a post-indictment restraining order. Supposedly prosecutors were deterred from seeking such an order at all. S. REP. NO. 225, 98th Cong., 1st Sess. 191, 195-196, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3374, 3378-79. *See* United States v. Musson, 802 F.2d 384, 386 (10th Cir. 1986); United States v. Draine, 637 F. Supp. 482, 486 (S.D. Ala. 1986).

<sup>97</sup> 18 U.S.C. § 1963(j) (Supp. III 1985); 21 U.S.C. § 853(k) (Supp. III 1985). The Ninth Circuit has declared these provisions unconstitutional. United States v. Crozier (Crozier II), 777 F.2d 1376, 1383-84 (9th Cir. 1985). *See* Reed, *Criminal Forfeiture Under the Comprehensive Forfeiture Act of 1984: Raising the Stakes*, 22 AM. CRIM. L. REV. 747, 761 (1985): "Intentionally or not . . . the procedural changes enacted by the CFA reflect an unusual and unarticulated congressional judgment that the property interests of an indicted criminal defendant warrant greater procedural due process safeguards than the property interests of innocent third parties." *See also* Reed & Gill, *RICO Forfeitures, Forfeitable Interests, and Procedural Due Process*, 62 N.C.L. REV. 57, 79-80 (1983)(due process requires that third parties whose property interests are affected must be permitted to intervene and present evidence to the jury before forfeiture).

<sup>98</sup> The court in United States v. Thier, 801 F.2d 1463, 1468 (5th Cir. 1986), held that an order restraining the defendant from transferring that portion of his property allegedly subject to forfeiture may be issued after indictment without notice or hearing. The

tion has important substantive consequences as well. By

indictment supplies the necessary notice and probable cause; the likelihood that the government will suffer irreparable injury is assumed. *Id.* at 1469. Such an order, however, like any temporary restraining order under FED. R. CIV. P. 65, expires after 10 days. The government then has the burden of proof on the traditional four elements for the issuance of a preliminary injunction:

- (1) There is a substantial likelihood that the government will prevail on the merits of its claim;
- (2) The government risks irreparable harm if the injunction is not issued;
- (3) The threatened injury to the government from non-issuance must outweigh the risk of harm to the defendant from the injunction.
- (4) The entry of the injunction must be consistent with the public interest.

*Id.* at 1470.

This decision leaves unresolved the question of how the government's interest in assuring the availability of property for forfeiture is to be weighed against the interest of the defendant in having funds available for the purposes of his defense and the support of his family. *See 1981-82 Hearings, supra* note 56, at 189-190 (testimony of Jeffrey Harris, Deputy Associate Attorney General). Because forfeiture is a penalty mandated by law, it is difficult to conceive under what circumstances an injunction in aid of forfeiture, intended to preserve property of the government, might be considered inconsistent with the public interest.

*United States v. Perholtz*, 622 F. Supp. 1253 (D.D.C. 1985), *aff'd*, 842 F.2d 343 (D.C. Cir. 1988) more realistically eschewed any abstract balancing of injuries and interests. Rather, the government must show, besides a likelihood of success on the merits:

[A] substantial likelihood (1) that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court or otherwise made unavailable for forfeiture; and (2) that the need to preserve the availability of the property outweighs the hardship that the order may impose on the party against whom the order is entered.

*Id.* at 1259.

*United States v. Rogers*, 602 F. Supp. 1332, 1343 (D. Colo. 1985), endorsed the standard approved in *Thier* as one possible test. *Id.* at 1345. The court argued that because the entry of a post-indictment restraining order or injunction is not mandatory, 18 U.S.C. § 1963(e)(1)(A) (Supp. III 1985), the court must exercise its discretion with reference to some standard. The court declined to issue a restraining order on the strength of the indictment alone because the conclusory allegations in the indictment were inadequate to meet any due process standard. *Id.* at 1351. The court's understanding of what process is required, however, was inseparable from its conclusion that RICO does not mandate the forfeiture of attorney's fees paid in good faith for services rendered, *id.* at 1349, even if they are paid after the indictment has put the lawyer on notice, and that a blanket restraining order might impermissibly burden the defendant's sixth amendment right to the counsel of his choice. *Id.* at 1349-50. Therefore, the government must show at a hearing that the proposed injunction would not so burden the defendant's rights and must exempt therefrom sums reasonably necessary to pay for the defense, unless the defendant will enjoy appointed counsel of his choice.

*United States v. Monsanto*, 836 F.2d 74 (2d Cir. 1987), *reh'g granted*, (Jan. 29, 1988), on the other hand, upheld attorney fee forfeiture against constitutional challenge. *See infra* notes 110-131 and accompanying text. However, the court still agreed that the mere fact that the property is listed in the indictment does not establish with sufficient certainty that it is tainted by crime. Whenever the defendant's ability to pay attorney's fees is in question, a hearing at which the government has the burden of demonstrating the likelihood that the assets are forfeitable is constitutionally required. The court refused to take into account the injury the defendant might suffer from the restraining order, however, thus differing from *Perholtz*, 622 F. Supp. at 1259.

In *United States v. Musson*, 802 F.2d 384 (10th Cir. 1986), however, the district

invalidating most third-party transfers after the commission of the offense giving rise to forfeiture, and putting the burden on the transferee to prove, not just his good faith, but his ignorance of the transferor's criminal activities, the CFA in effect established a new class of collateral civil forfeitures.<sup>99</sup> The proceeds of crime or their traceable derivatives are now forfeitable in the hands of persons, innocent of any criminal offense, who have had knowing business dealings with criminals, although such dealings were at arm's length and for value. This result is an extension of familiar principles of civil forfeiture.<sup>100</sup> It has, until recently, been true that one who, for example, lends an automobile to a bootlegger is at risk of forfeiture if untaxed liquor is found in the car regardless of the owner's lack of guilty knowledge.<sup>101</sup> The rationale is that instrumentalities of crime, no less than contraband, are "guilty" and therefore subject to condemnation.<sup>102</sup> The innocence of the seller is beside the point.<sup>103</sup> The central innovation of the CFA is to treat the profits and proceeds of crime no differently. All law-abiding people henceforth may have commercial dealings with known criminals only at their peril. Under the CFA, the heart surgeon who performs a by-pass upon a patient widely reputed to be a mobster may forfeit his fee, because he may have reason to believe that the money used to pay him originated in crimes chargeable under RICO.<sup>104</sup> In fact, the ordinary citizen who sells his house to a known racketeer may forfeit the sales price, even though the racketeer has converted the proceeds of his crime into a traceable and attachable asset which is also

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court issued an order restraining the transfer of certain property of the defendants on the basis of allegations in their indictment for drug racketeering. The Tenth Circuit held that the defendants were not entitled to a subsequent hearing on their claims that no nexus existed between the property whose transfer was restrained and the acts of racketeering alleged. Although the indictment alleged the existence of such a nexus in merely conclusory terms, the court indulged a conclusive presumption that the grand jury had heard sufficient evidence of the connection. *Id.* at 386. For a criticism of this view, see Reed, *supra* note 97, at 764 (grand juries do not in fact pass separately on the forfeitability of each scheduled asset).

<sup>99</sup> Pub. L. No. 98-473, § 302 (1984), *codified as amended* at 18 U.S.C.A. § 1963(l)(6)(B) (West Supp. 1987).

<sup>100</sup> See *infra* notes 241-74 and accompanying text.

<sup>101</sup> See, e.g., *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505 (1921).

<sup>102</sup> *Id.* at 510-11.

<sup>103</sup> In recent years, the Supreme Court has impliedly introduced a negligence standard into civil forfeiture law, permitting an innocent owner to recover if he meets a high standard of care in his dealings. See *infra* notes 266-74 and accompanying text.

<sup>104</sup> Congressman William J. Hughes of New Jersey raised the hypothetical forfeiture of a surgeon's fee. *Forfeiture Issues: Hearings on H.R. 273 and 1193 before the Subcomm. on Crime of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 240 (1985) [hereinafter 1985 *Forfeiture Hearings*].



subject to forfeiture.<sup>105</sup>

Whatever one may think of these consequences of the CFA as policy,<sup>106</sup> they are a natural development from RICO, which seeks to drive a wedge between organized crime and the rest of society. If the attempts to effectuate this purpose by regulating the activities of criminals have largely failed, the next logical step is to penalize and criminalize dealings with criminals by those who are not otherwise wrongdoers.<sup>107</sup> There is no indication in the legislative history of the CFA that Congress understood that it was imposing a collateral civil forfeiture upon innocent persons dealing with RICO offenders,<sup>108</sup> a fact which should count for little against the clear and unambiguous language of the statute. The Justice Department apparently recognized that it could have such an collateral effect:

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<sup>105</sup> Only one court has so far recognized this possibility in dictum. *In re Caplin & Drysdale*, 837 F.2d 637, 644 (4th Cir. 1988)(en banc)("Neither restraining orders nor a merchant's refusal to sell to the defendant for fear of future forfeiture violates that defendant's rights."). The Justice Department has not sought such a forfeiture in any reported case. *Cf. United States v. Life Insurance Co. of Virginia*, 647 F. Supp. 732 (W.D.N.C. 1986) discussed *infra* at note 110.

<sup>106</sup> See *infra* notes 239-79 and accompanying text.

<sup>107</sup> Congress has taken this step more directly in the Money Laundering Control Act of 1986, Pub. L. No. 99-570, Subtitle H, 100 Stat. 3207-18 (*codified as amended at* 18 U.S.C.S. §§ 1956, 1957 (Law. Co-op. Supp. 1987)), which imposed a criminal penalty of fine or imprisonment for a term of up to ten years for knowingly engaging "in a monetary transaction in criminally derived property . . . derived from specified unlawful activity," 18 U.S.C.S. § 1957(a) (Law. Co-op. Supp. 1987). "Criminally derived property" is defined as "any property constituting, or derived from, proceeds obtained from a criminal offense," 18 U.S.C.S. § 1957(f)(2) (Law. Co-op. Supp. 1987). "Specified unlawful activity" includes all RICO and CCE predicate offenses, miscellaneous other federal offenses, and offenses against the drug control laws of foreign nations. *Compare* 18 U.S.C.S. § 1957(f)(3) (Law. Co-op. Supp. 1987) *with* 18 U.S.C.S. § 1956(c)(7) (Law. Co-op. Supp. 1987). A "monetary transaction" is "the deposit, withdrawal, transfer, or exchange . . . of funds . . . by, through, or to a financial institution." 18 U.S.C.S. § 1957(f)(1) (Law. Co-op. Supp. 1987). Arguably this would penalize, for example, the arm's length vendor of a house to a buyer who paid with the proceeds of crime, at least if a check was used to pay any portion of the purchase price. It is doubtful that Congress intended this result.

In addition to the criminal penalties mentioned above, one convicted of violating the Money Laundering Control Act forfeits "any property, real or personal, which represents the gross receipts . . . obtained . . . as a result of such offense, or which is traceable to such gross receipts." 18 U.S.C.S. § 982(a) (Law. Co-op. Supp. 1987). The Attorney General may also seize and civilly forfeit such receipts. 18 U.S.C.S. § 981(a)(1)(A) (Law. Co-op. Supp. 1987). No judicial decree of forfeiture is required if the value of the property is under \$100,000 unless the claimant files a claim stating his interest in the property and posts bond within 20 days. 19 U.S.C.S. §§ 1607-1609 (Law Co-op. Supp. 1987). The constitutionality of such administrative forfeitures, including the bond requirement, was upheld in *Faldraga v. Carnes*, 674 F. Supp. 845, 849 (S.D. Fla. 1987).

<sup>108</sup> In the 1982 hearings on predecessor bills to the CFA before the House Subcommittee on Crime, one private witness, William W. Taylor, characterized "relation back" as effectively introducing a new *in rem* forfeiture. 1981-82 *Hearings*, *supra* note 56, at 203.

"[S]ome lawyers may decline to represent a CCE or RICO defendant . . . from the natural caution that *anyone* might exercise in deciding not to deal with a defendant facing a CCE or RICO charge unless there are reasonable assurances that any money received is from a legitimate source."<sup>109</sup>

To date, however, lawyers are the only non-criminal third parties who have been threatened with this extended civil forfeiture.<sup>110</sup> As a result, every case dealing with the "relation-back" principle of the CFA has turned on the defendant's qualified sixth amendment right to counsel. Most of the district courts that have considered the question have simply denied that Congress intended for *bona fide* attorney's fees to be forfeited despite the "relation back" principle, which necessarily gives the government a title prior to that of the attorney defending the case in which forfeiture is sought.<sup>111</sup> They

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<sup>109</sup> *Forfeiture of Assets Intended for Use as Attorneys Fees, 1986: Hearing Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 27 (1987) [hereinafter *1986 Forfeiture Hearings*](statement of Stephen S. Trott, Assistant Attorney General)(emphasis added), *available at* Cong. Inf. Service S521-15 (1987).

<sup>110</sup> In *United States v. Life Insurance Co. of Virginia*, 647 F. Supp. 732 (W.D.N.C. 1986), the government seized \$10,000 from a corporation on a warrant obtained *ex parte* with a view toward civil forfeiture. The defendant in a pending criminal action had paid the money for corporate stock, apparently in a good faith arm's length transaction. The government alleged that the money was the proceeds of the sale of controlled substances. The court quashed the seizure on the ground that the procedures authorized in 21 U.S.C. § 881(b) (1982 & Supp. III 1985) violate due process because a clerk, as opposed to a "neutral magistrate," may issue the warrant without probable cause. The facts suggest no reason why the government was not content to seize the stock.

<sup>111</sup> *United States v. Figueroa*, 645 F. Supp. 453 (W.D. Pa. 1986), is the purest example. After the defendant was convicted and his property was forfeited under 21 U.S.C. § 853 (Supp. III 1985), his court-appointed counsel petitioned for payment of his fee from such property. Clearly counsel had no "legal right, title or interest in the property . . .," 21 U.S.C. § 853(n)(6)(A) (Supp. III 1985), title to which was vested in the United States government. Nor was he a *bona fide* purchaser who, at the time of purchase, was "reasonably without cause to believe that the property was subject to forfeiture. . . ." 21 U.S.C. § 853(n)(6)(B) (Supp. III 1985). Nonetheless the court granted the petition: "determining that the forfeited money provides a source of funds available for paying [counsel's] attorney's fees would not conflict with the forfeiture statute's purpose of preventing pre-conviction transactions designed to avoid forfeiture." 645 F. Supp. at 456-57.

See also *United States v. Estevez*, 645 F. Supp. 869, 872 (E.D. Wis. 1986); *United States v. Bassett*, 632 F. Supp. 1308 (D. Md. 1986); *United States v. Badalamenti*, 614 F. Supp. 194, 196 (S.D.N.Y. 1985); *United States v. Rogers*, 602 F. Supp. 1332, 1348 (D. Colo. 1985); *In re Grand Jury Subpoena Served Upon Doe*, 781 F.2d 238, 245 n.3 (2d Cir. 1985)(en banc)(dictum), *cert. denied*, 475 U.S. 1108 (1986); *contra* *Payden v. United States*, 605 F. Supp. 839 (S.D.N.Y. 1985), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985). Cf. *United States v. Long*, 654 F.2d 911 (3d Cir. 1981)(upholding an order restraining attorneys from transferring an airplane, probably proceeds of crime, which they had received from their client); *United States v. Seventy Thousand Four Hundred Seventy Six Dollars in U.S. Currency*, 677 F. Supp. 639, 643 (N.D. Cal. 1987)(dictum)(Congress did not resolve the issue whether attorney's fees are exempt from forfei-

have so held despite the manifest inability of defense counsel to qualify as good faith purchasers "reasonably without cause to believe that the property was subject to forfeiture. . .,"<sup>112</sup>

In so interpreting the statute the courts have not been rigorously analytical. Perhaps the courts have not been quite honest either. The legislative history, they have claimed, reveals that the third party forfeiture provisions were aimed only at sham transfers, money laundering, and fraudulent conveyances.<sup>113</sup> In particular, some courts have claimed that Congress did not intend to subject *bona fide* attorney's fees to forfeiture.<sup>114</sup> The threat of forfeiture upon conviction and of restraining orders preventing the payment of retainers before trial may induce defense counsel to refuse RICO cases,<sup>115</sup> and such refusal tends to deprive defendants of their qualified right to counsel of their choice.<sup>116</sup> Congress could not have intended such an unconstitutional result and any statutory ambiguities should therefore be resolved so as to save the constitutionality

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ture under 21 U.S.C. § 853). The court in *United States v. Harvey*, 814 F.2d 905, 929 (4th Cir. 1987), upheld the result in *United States v. Bassett*, 632 F. Supp. 1308 (D. Md. 1986). The court in *Harvey* held that the forfeiture of attorney's fees was indeed unconstitutional, but acknowledged that Congress had intended to provide for such forfeiture.

<sup>112</sup> 18 U.S.C. § 1963(m)(6)(B) (Supp. V 1987); 21 U.S.C. § 853(n)(6)(B) (Supp. III 1985).

<sup>113</sup> See *United States v. Rogers*, 602 F. Supp. 1332, 1342, 1347 (D. Colo. 1985).

<sup>114</sup> *Id.* at 1347.

<sup>115</sup> See *In re Grand Jury Subpoena Served upon Doe*, 781 F.2d 238, 245 n.3 (2d Cir. 1985)(en banc)(dictum)("the potential loss of attorney's fees under forfeiture provisions of RICO presents problem of retaining any lawyer."), *cert. denied*, 175 U.S. 1108 (1986); *United States v. Reckmeyer*, 631 F. Supp. 1191, 1196 (E.D. Va. 1986); *United States v. Badalamenti*, 614 F. Supp. 194, 198 (S.D.N.Y. 1985)(attorney of target of grand jury investigation subpoenaed, with intent to discover fees paid which might be subject to forfeiture).

In contrast, when the government subpoenaed the already indicted defendant's newly retained counsel, seeking to discover his fee arrangements, with a view toward forfeiture, another federal district court denied that the threat of forfeiture would have any impact on the quality of the representation, saying that the ethical attorney will represent his client zealously regardless of the risk of non-payment. *In re Grand Jury Subpoena Duces Tecum Dated January 2, 1985*, 605 F. Supp. 839, 848-50 (S.D.N.Y. 1985), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985).

There is some empirical evidence that this fear is well founded. Genego, *Reports from the Field: Prosecutorial Practices Compromising Effective Criminal Defense*, *The Champion* (May 1986), reprinted in *1986 Forfeiture Hearings*, *supra* note 109, at 163-74. Genego recounts the results of a survey of members of the National Association of Criminal Defense Lawyers with respect to a variety of government tactics allegedly intended to intimidate and harass criminal defense attorneys. Only 14% of those responding said that they had declined to take one or more cases, presumably because they feared that their fees might be forfeited. *Id.* at 12. Sixteen attorneys said that they had given up federal criminal practice completely. Three lawyers claimed that the government had promised them that fee forfeiture would not be sought if their clients pleaded guilty.

<sup>116</sup> *In re Grand Jury Subpoena Served upon Doe*, 781 F.2d 238, 245 n.3 (2d Cir. 1985)(en banc).

of RICO.<sup>117</sup>

As three circuit court of appeals have now recognized,<sup>118</sup> this is a false reading of the legislative history<sup>119</sup> and more importantly an impermissible deviation from the plain meaning of the statute. The introduction of "relation-back" was not addressed solely to sham transfers. The government has always possessed the implicit authority to set aside sham or fraudulent transfers intended to avoid *in rem* forfeitures<sup>120</sup> and enjoyed the same authority as to *in personam* forfeitures under 1970 RICO.<sup>121</sup> The "relation-back" principle is of universal application, and it is disingenuous to say that Congress cannot have intended to apply it to defense attorneys because they were not specifically mentioned. There is, in any case, no justification for relying upon legislative history when the statutory language is clear and, when applied, leads to an intelligible result.<sup>122</sup> If the

<sup>117</sup> *United States v. Bassett*, 632 F. Supp. 1308 (D. Md. 1986); *United States v. Badalamenti*, 614 F. Supp. 194, 196 (S.D.N.Y. 1985). The court in *Bassett* acknowledged that its interpretation contradicts the plain meaning of the statute, but justified its reliance on legislative history because of Congress' failure to specify under what circumstances a criminal defense lawyer will be held to have "reasonable cause to believe" that his fee came from the proceeds of crime. *Bassett*, 632 F. Supp. at 1311-12.

<sup>118</sup> In *United States v. Monsanto*, 836 F.2d 74, 84 (2d Cir. 1987), the Second Circuit followed *United States v. Harvey*, 814 F.2d 905, 922-23 (4th Cir. 1987), *rev'd on other grounds sub nom. In re Caplin & Drysdale*, 837 F.2d 637, 643-44 (4th Cir. 1988) (en banc) stating that the CFA unambiguously authorizes the forfeiture of legitimate attorney's fees and pre-trial restraints upon the transfer of property in payment of such fees. *Accord United States v. Nichols*, 841 F.2d 1485, 1492-93 (10th Cir. 1988).

<sup>119</sup> See generally Brickey, *Forfeiture of Attorneys' Fees: The Impact of RICO and CCE Forfeiture on the Right to Counsel*, 72 VA. L. REV. 493 (1986). Professor Brickey pointed out that the Colorado District Court in *United States v. Rogers*, 602 F. Supp. 1332, 1347 (D. Colo. 1985), actually *misquoted* the legislative history in support of its position by adding the word "only" to the Senate Report, S. REP. NO. 225, 98th Cong., 2d Sess. 191, 209 n.47, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3374, 3392 n.47: "The provision should be construed to deny relief [only] to third parties acting as nominees of the defendant or who have knowingly engaged in sham or fraudulent transactions." Brickey at 499-500.

<sup>120</sup> See, e.g., *United States v. 1960 Bags of Coffee*, 12 U.S. (8 Cranch) 398, 408 (1814) (Story, J., dissenting). In fact, the Crown could set aside a fraudulent conveyance of personalty to avoid forfeiture of estate, just as it could any fraudulent conveyance. 2 W. BLACKSTONE, COMMENTARIES \*421.

<sup>121</sup> See *United States v. Long*, 654 F.2d 911, 915-16 (3d Cir. 1981); Taylor, *supra* note 46, at 388.

<sup>122</sup> Leading authorities condemn the practice of treating the casual and often tendentious remarks of legislators about pending bills as "co-equal with the statute." R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 83 (1975); see *Schwegmann Bros. v. Calvert Distillers*, 341 U.S. 384, 396 (1951) (Jackson, J., concurring) ("It is the business of Congress to sum up its own debates in its legislation."). The "plain meaning" rule does not preclude the consideration of legislative materials as part of the "context" of a statute, but Professor Dickerson goes so far as to characterize the improper use of legislative history as unconstitutional, because it gives the force of statutory law to the "unenacted utterance[s]" of legislators. *Id.* at 143-44.

sixth amendment forbids the forfeiture of attorney's fees, then the statute, to the extent it authorizes such forfeiture, is unconstitutional. The presumption that Congress acted in a constitutional manner exists for the resolution of ambiguities and not for the creation of exceptions unjustified by the plain meaning of the statute.<sup>123</sup>

To be fair, Congress may have invited this ironic treatment of its intentions. Almost none of the decided cases, either before or after the CFA was enacted, deal with orders for the forfeiture of attorney's fees.<sup>124</sup> Rather these cases deal with the validity of subpoenas to attorneys seeking to discover the amount of fees paid or of restraining orders making it impossible for the defendant to pay his lawyer pending trial. The House Judiciary Committee Report stated that "Nothing in this section is intended to interfere with a person's sixth amendment right to counsel. The Committee, therefore, does not resolve the conflict in district court opinions on the use of restraining orders that impinge on a person's right to retain counsel in a criminal case."<sup>125</sup> Thus the Judiciary Committee acknowledged the existence of a constitutional difficulty and left it for resolution by the courts. The Committee may well have sought to make the courts bear the opprobrium of appearing to condone the payment of attorney's fees out of criminal proceeds.<sup>126</sup> By blandly holding that Congress merely intended to invalidate sham transfers, on the grounds that any other result would raise constitutional difficulties, the district courts cast the onus back upon the legislature.

The three circuit courts that have considered the matter, however, have held that RICO and CCE defendants have no sixth amendment right to pay their attorneys with tainted assets, and that the transfer of such assets may be restrained before trial even if the defendant is thus rendered indigent.<sup>127</sup> It is not the purpose of this

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<sup>123</sup> J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 45.11 (4th ed. 1984). In *Hynes v. Mayor and Council of Borough of Oradell*, 425 U.S. 610, 622 (1976), the Court stated: "Even assuming that a more explicit limiting interpretation of the ordinance could remedy the flaws we pointed out . . . we are without power to remedy the defects by giving the ordinance constitutionally precise content."

For a defense of the conclusion that Congress did not intend to authorize the forfeiture of attorney's fees, see Note, *Against Forfeiture of Attorney's Fees under RICO: Protecting the Constitutional Rights of Criminal Defendants*, 61 N.Y.U. L. REV. 124, 150 n.146 (1986).

<sup>124</sup> The sole reported exception is *United States v. Figueroa*, 645 F. Supp. 453 (W.D. Pa. 1986).

<sup>125</sup> H.R. REP. No. 845, 98th Cong., 2d Sess. 19 n.1 (1984), available on (Cong. Info. Service H-523-21)(1984)(microfiche).

<sup>126</sup> For a more charitable interpretation of an admittedly "cryptic" passage, see *United States v. Harvey*, 814 F.2d 905, 918 (4th Cir. 1987) ("It may merely disclaim any intention to enact legislation thought to be unconstitutional, or it may merely express a belief that the provisions as written do not violate constitutional right.").

<sup>127</sup> *United States v. Nichols*, 841 F.2d 1485, 1498-99 (10th Cir. 1988); *In re Caplin &*

Article to discuss the limits of the constitutional right to counsel of one's choice when it collides with RICO and CCE forfeiture. It will suffice to make two points: First, attorney fee forfeiture raises constitutional and policy difficulties distinct from those raised by other third party forfeitures. Society specifically licenses lawyers to provide services to suspected criminals. Lawyers have better reason than most people, by the nature of their job, to know that their clients' funds are derived from crime.<sup>128</sup> Their knowledge is often gained under the seal of the attorney-client privilege, which makes it difficult for a lawyer to establish his or her lack of knowledge in a subsequent hearing.<sup>129</sup> The legislature may wish to adopt prophylactic rules making it risky for law-abiding citizens to deal with criminals,<sup>130</sup> but society specifically licenses lawyers to have such dealings. It seems to be an open question whether the adversary system can survive the imposition of the same or greater risks upon defense attorneys.<sup>131</sup>

The second point is more germane to the subject of this Article. There may be no constitutional right to pay a defense attorney with the proceeds of crime,<sup>132</sup> but the defendant's creditors, including his or her lawyer, have a legitimate interest in the defendant's assets, subject, of course, to that of his or her victims, but adverse to that of the government. It is not self-evident that the government should

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Drysdale, 837 F.2d 637, 643 (4th Cir. 1988)(en banc); *United States v. Monsanto*, 836 F.2d 74, 83 (2d Cir. 1987).

<sup>128</sup> The Justice Department has asserted that attorneys are chargeable with "actual knowledge" that clients' assets are derived from criminal misconduct if the government has moved before indictment to restrain the transfer of such assets, apparently without regard to whether such motion is successful. *Justice Department Guidelines on Forfeiture of Attorney's Fees*, 38 CRIM. L. REP. (BNA) 3001, 3004, § 9-111.511, Oct. 2, 1985. Thus, knowledge that the government has claimed that a specific asset is subject to forfeiture is equated with reasonable grounds to believe that the asset actually was derived from criminal misconduct.

<sup>129</sup> See Note, *Forfeiture of Attorneys' Fees Traceable as Proceeds from a RICO Violation under the Comprehensive Crime Control Act of 1984*, 32 WAYNE L. REV. 1499, 1510 (1986).

<sup>130</sup> See *infra* notes 266-74 and notes 453-56 and accompanying text.

<sup>131</sup> *United States v. Monsanto*, 836 F.2d 74, 87 (2d Cir. 1987) (Oakes, J., dissenting); see generally Cloud, *Forfeiting Defense Attorneys' Fees: Applying an Institutional Role Theory to Define Individual Constitutional Rights*, 1987 WIS. L. REV. 1.

<sup>132</sup> *United States v. Bailey*, 666 F. Supp. 1275, 1277 (E.D. Ark. 1987)("[T]he Sixth Amendment does not require that a defendant in a federal criminal case be allowed to use monies made from illegal drug transactions to pay an attorney of the defendant's choice.") But a panel of the Fourth Circuit in *United States v. Harvey*, 814 F.2d 905, 924-25 (4th Cir. 1987), *rev'd sub nom. In re Caplin & Drysdale*, 837 F.2d 637 (4th Cir. 1988)(en banc) did not hesitate to say that the right to counsel was established upon the assumption that some defendants, ultimately found guilty, will in the meantime have paid their lawyers with ill-gotten gains, and that this assumption is so ingrained in our criminal justice system that many district courts found it almost impossible to believe that Congress intended to overturn it.

prevail.<sup>133</sup> Moreover, the decided cases fail entirely to recognize that RICO and CCE authorize the forfeiture of assets not traceable to crime and far in excess of criminal profits. It begs the question to assert that defendants may not pay their lawyers with assets not in fact acquired by crime, of which the government proposes to deprive them as a punishment, on the grounds that they have no title to such assets.<sup>134</sup>

It is evident that Congress should resolve these difficulties. Attorneys should have a claim against forfeited assets, including fines, prior to that of creditors and even victims, but only for the reasonable value of their services as determined by the court and only to the extent attorneys are unable to satisfy their claims from assets not subject to forfeiture.<sup>135</sup>

### III. THE PURPOSE OF CRIMINAL FORFEITURE

As often occurs in the law, the remarkable development of criminal forfeiture since 1970 has taken place without benefit of much theory. Congress, the courts and the commentators have assumed that criminal forfeiture is a broadly appropriate remedy, although they have not agreed upon the evils at which it is directed. There has been little effort in this country, however, to describe its appropriate role in the battery of available criminal remedies,<sup>136</sup> and still less to define its proper place in the jurisprudence of criminal punishment. The casual justifications scattered throughout the case law and literature have naturally evolved in tandem with the broad evolution from the "strict interpretation" to the "loose interpreta-

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<sup>133</sup> See *infra* notes 447-52 and accompanying text.

<sup>134</sup> The dissenters made this argument in both *United States v. Nichols*, 841 F.2d 1485, 1509 (10th Cir. 1988) and *In re Caplin & Drysdale*, 837 F.2d 637, 652 (4th Cir. 1988):

[T]he ultimate constitutional issue might well be framed precisely as whether Congress may use this wholly fictive device of property law [relation back] to cut off this fundamental right of the accused in a criminal case. If the right [to counsel] must yield here to countervailing governmental interests, the relation back device undoubtedly could be used to implement the governmental interests, but surely it cannot serve as a substitute for them.

*Caplin & Drysdale* concerned the forfeiture of property allegedly the proceeds of crime; Judge Phillips' point applies with still more force to, for example, the forfeiture of a legitimate enterprise allegedly conducted through a pattern of racketeering activity.

<sup>135</sup> See *infra* note 495-96 and accompanying text.

<sup>136</sup> D. HODGSON, *PROFITS OF CRIME AND THEIR RECOVERY* (1984). Hodgson conducted a comprehensive British law reform study which attempted to work out the proper relationship among fines, orders of restitution ("compensation,") forfeiture of profits ("confiscation,") forfeiture of instrumentalities of crime, and imprisonment. Hodgson recommended legislative reforms based thereon.

tion" of RICO and CCE described in the previous section.<sup>137</sup>

This Article endorses the trend toward the extension of forfeiture to additional crimes but rejects a number of the goals ostensibly served by existing forfeiture statutes. Forfeiture as a criminal penalty should be confined to the proceeds of crime narrowly defined, excluding the forfeiture of interests in an enterprise and instrumentalities of crime, which belongs on the civil side only.<sup>138</sup> Within these limits, forfeiture is a uniquely appropriate minimum penalty which should be extended to cover most criminal offenses involving economic gain. Such a minimum penalty would serve to enforce a rough proportionality between crime and punishment and would tend to eliminate the perception that existing punishments are a tariff whose payment entitles the criminal to enjoy his gains in peace. Paradoxically, criminal forfeiture lacks most of the qualities of punishment and more closely resembles a civil penalty. Criminal forfeiture, like civil restitution, only requires the criminal to pay back what he has taken, thus restoring the *status quo ante*. For this reason it carries no particular moral opprobrium. Nor does criminal forfeiture have any special rehabilitative or deterrent value, contrary to some claims. Thus forfeiture must be combined in most cases with fine or imprisonment to punish adequately.

The existing forfeiture statutes, however, did not originate in any theory of punishment, but were an *ad hoc* attack on certain perceived evils. They cannot be generalized in their present form. On the one hand, they aim at a very worthy objective: the prevention of the domination of certain businesses and labor unions by organized crime, which uses violent coercion for oligopoly power and plain theft. Congress wanted to accomplish this objective by compelling the forfeiture of the interests of organized criminals in such enterprises as an incident of their criminal convictions. However, Congress could better accomplish this essentially economic objective civilly, as indeed RICO permits, by targeting those industries and unions, few in number, which are in fact controlled by organized crime. Or failing this, the "pattern of racketeering" which may result in enterprise forfeiture should be limited to instances where the use of violence or the threat of violence accompanies the conduct of the business. The hallmark of organized crime activity in legitimate business is precisely the use of violent means to establish a monopoly or cartel. Such an approach would put an end to the imposition

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<sup>137</sup> See *supra* notes 39-43 and accompanying text.

<sup>138</sup> See *infra* notes 236-342 and accompanying text.



of the penalty of enterprise forfeiture under RICO to isolated illegalities committed by ordinary businesspersons.

Similarly, existing forfeiture statutes enlarge traditional *in rem* forfeitures, such as the forfeiture of contraband and the instruments of crime, and make them mandatory punishments for crimes. There is no theoretical justification for this extension.<sup>139</sup> Civil forfeiture is problematic enough from a due process standpoint, particularly when third parties have interests in the property.<sup>140</sup> These problems are aggravated in criminal proceedings, in which third parties have no standing to intervene.

In an attempt to justify these tentative conclusions, it is helpful to classify and review the explicit and implicit justifications for criminal forfeiture advanced to date. These are, beginning with the least plausible:

- (1) The utility of criminal forfeiture as a means of financing increased law enforcement efforts and making such efforts at least partially self-supporting;
- (2) The deterrent effect of criminal forfeiture against hardened offenders who regard the threat of imprisonment with equanimity as merely a cost of doing business;
- (3) The general deterrent effect of the possibility of disproportionate penalties, such as the loss of one's entire business, for relatively small offenses;
- (4) The usefulness of criminal forfeiture as a means of disrupting the organizational continuity of racketeering by separating racketeers from legitimate businesses which they have corrupted;
- (5) The retributive advantages of the forfeiture of criminal profits as a penalty which is and is seen to be precisely tailored to the offense.

All these justifications except number five are fatally flawed. The use of forfeiture as a source of government revenue places serious institutional temptations in the way of prosecutors and exacerbates the conflict between the government and innocent third parties such as victims, persons claiming a property interest, creditors and dependents.<sup>141</sup> Criminal forfeiture is an insignificant deterrent against racketeers and is not much more effective against ordinary white-collar criminals.<sup>142</sup> Draconian forfeitures of cars, houses, stock, salaries, and businesses as penalties for petty or first offenses are presumably more effective deterrents. Such criminal forfeitures have been established by analogy with existing civil forfeitures. Such civil forfeitures are mostly wrong in principle while

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<sup>139</sup> See *infra* notes 236-79 and accompanying text.

<sup>140</sup> See *infra* notes 266-74 and accompanying text.

<sup>141</sup> See *infra* notes 146-72 and accompanying text.

<sup>142</sup> See *infra* notes 173-94 and accompanying text.

often unjust in practice, and they are not improved by their transmission.<sup>143</sup> Finally, the separation of racketeers from their corrupt businesses is best pursued as a distinct goal through carefully limited civil actions, and not as an incident of criminal conviction.<sup>144</sup>

A. "A HUGE BUSINESS FOR THE FEDERAL GOVERNMENT."<sup>145</sup>  
FORFEITURE AS PRIVATEERING.

No one really knows, of course, how much organized crime earns from illegal gambling, loansharking, drug dealing, and other activities.<sup>146</sup> It seems that no one has even attempted to estimate the take from all the predicate offenses for which a RICO indictment

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<sup>143</sup> See *infra* notes 236-79 and accompanying text.

<sup>144</sup> See *infra* notes 280-337 and accompanying text.

<sup>145</sup> 1985 *Forfeiture Hearings*, *supra* note 104, at 72 (statement of Rep. E. Clay Shaw, Jr., of Florida). As Representative Shaw stated, "By the act that we passed one year ago, we really developed a huge business for the Federal Government."

<sup>146</sup> The most comprehensive estimates to date of the income attributable to crime were prepared for the Internal Revenue Service by outside consultants. ABT ASSOCIATES, UNREPORTED TAXABLE INCOME FROM SELECTED ILLEGAL ACTIVITIES (September 1984) [hereinafter ABT REPORT]. The report is "primarily a synthesis of previous data collection and research . . ." *Id.* at 332. The researchers acknowledged the extreme scantiness and unreliability of the data available with respect to some crimes, such as prostitution, arson for profit and fraud upon governmental programs. As the IRS is only concerned with unreported taxable income, the authors did not attempt to estimate the very substantial income derived from the illegal conduct of legitimate business, on which taxes are normally paid. Such business income includes that from insider trading and antitrust violations. *Id.* at 3-4. Much white collar crime was thus excluded. *Id.* at 304-11.

The latest estimates provided in 1982 are nonetheless of interest. The retail value of various narcotics sold was estimated: heroin sold, \$7.88 billion, *id.* at 35; cocaine sold, \$11.34 billion, *id.* at 47; and marijuana sold, \$7.42 billion. *Id.* at 55. As the authors pointed out, retail value exceeds net income, because some drugs are consumed by dealers or sold to consumers at wholesale. *Id.* at 34, 56. These estimates should be contrasted with much higher estimates bruited about by Congress (drug trafficking was described as a \$65 billion annual business in 1981. 1981-82 *Hearings*, *supra* note 56, at 13 (statement of Rep. Harold S. Sawyer)). H.R. REP. NO. 98, 845, 98th Cong., 1st Sess. 55 (1984), estimated gross receipts from the sale of illegal drugs at \$54 billion in 1979, and \$100 billion in 1984.

The ABT Report estimated illegal income from the numbers racket of \$1.636 billion in 1982, ABT REPORT at 91; from illegal betting on horses, \$348 million, *id.* at 98; and from illegal betting on sports, \$430 million. *Id.* at 105. The report's estimate for total unreported illegal income from gambling for 1982 was \$2.392 billion. *Id.* at 108. This includes illegal casino gambling, which amounted to \$19 million in proceeds, as well as numbers, horses, and sports, but it excludes illegal gambling income reported to the IRS under another rubric. All of these figures are merely extrapolations from a comprehensive household survey of gambling habits done in 1974. M. KALLICK, D. SUITS, T. DIELMAN, & J. HYBELS, A SURVEY OF AMERICAN GAMBLING ATTITUDES AND BEHAVIOR (1979).

The ABT Report estimated 1982 net income of thieves and fences at \$3.888 billion, ABT REPORT at 169; from employee theft and shoplifting at \$5.301 billion, *id.* at 186; from thefts of trucking cargo at \$528 million, *id.* at 194; from air cargo thefts at \$3

would lie. It is probably safe to assume that the gross receipts, in a four trillion dollar economy,<sup>147</sup> are not less than \$200 billion or five percent, largely untaxed, and they could run far higher.<sup>148</sup> Much of

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million, *id.* at 199; and from rail cargo thefts in the United States, Canada, and Mexico at \$31.5 million, *id.* at 202.

Other 1982 estimates of income from crime include: robbery and burglary from business, \$617 million, *id.* at 214; insurance company payouts for damage or destruction caused by arson for profit, \$440 million, *id.* at 234; reported losses to banks from embezzlement, \$281.8 million, *id.* at 238; and cigarette smuggling, \$202 million. *Id.* at 252.

Government benefit programs are apparently defrauded of very large sums, although such losses are extremely difficult to estimate. The ABT Report provided some admittedly speculative estimates for fiscal year 1982: fraud by recipients of Aid to Families with Dependent Children, \$222 million, *id.* at 263; by recipients of food stamps, \$454 million, *id.* at 266; by recipients of unemployment insurance payments, \$451 million, *id.* at 280; by recipients of Supplemental Security Income payments, \$20 million, *id.* at 272; by beneficiaries of Medicaid, \$1.181 billion, *id.* at 284; by Medicaid health care providers, \$715 million, *id.* at 293; and by Medicare health care providers, \$1.469 billion. *Id.* at 303.

The President's Commission on Organized Crime also commissioned an estimate of the income from organized crime, as opposed to crime in general, from Wharton Econometric Forecasting Associates. A survey of law enforcement agencies conducted by the Law Enforcement Assistance Administration estimated the number of members of organized crime. A study of closed IRS prosecutions determined the average income of such members. The product of these numbers is the income attributable to organized crime. *THE IMPACT*, *supra* note 47, at 413, 422, 465, 471-72. This method is apparently unique to the Wharton study. Its peculiar merit is that it necessarily includes all income earned by the participation of organized criminals in legitimate business, largely using racketeering methods.

The method's demerit is the extreme uncertainty of the data. For example, the Wharton study used an estimate of 9,787 for the number of members of La Cosa Nostra, and 40,440 for associates, *id.* at 476, 478; but the Director of the FBI testified that La Cosa Nostra has only 1,700 members and 17,000 associates. *Id.* at 36, 488. The Wharton study provided an alternative estimate of total income based in part on this figure, but otherwise hewing to the LEAA survey results for non-traditional organized crime. *Id.* at 489. This disparity may render the survey utterly unreliable. Similarly, the Wharton study estimated the 1981 average income of each member of organized crime, including such "non-traditional" groups as the Hell's Angels, the Pagans, the Chinese tongs and triads, and the Aryan Nation, as \$296,699 in 1986 dollars, with each associate supposedly earning \$80,999. *Id.* at 478. The IRS study on which these estimates are based, however, concentrated on La Cosa Nostra members and on income earned from the sale of narcotics. *Id.* at 480. In any case, these estimates yield a total mean income in 1986 dollars of \$55.4 billion. *Id.* at 479.

<sup>147</sup> Wharton Econometric Forecasting Associates estimated that the 1986 gross national product would reach \$4.123 trillion. *THE IMPACT*, *supra* note 47, at 423.

<sup>148</sup> The yearly income of white collar criminals alone has been recently estimated at \$35.9 to \$43.48 billion. *The Mob on Trial: The Cost of Organized Crime*, "Mobsters Feel at Home in Pin Stripes," *Newsday* (September 8, 1986).

Unfortunately, the ABT REPORT, *supra* note 146, provides no estimates of net income earned from insurance fraud, consumer fraud, mail fraud, maritime cargo theft, customs violations, fraud in retirement and survivors' insurance, fraud in veterans' benefits, loansharking, business embezzlement, bribery, securities theft and counterfeiting, computer crime, alcohol and petroleum excise tax evasion, theft of pension assets, illegal firearms trading, credit card fraud, and check fraud. *Id.* at 305. These crimes are

this money is earned by the sale of illicit goods and services to willing buyers who are knowing participants in a criminal transaction, so that there is no identifiable owner or victim with a prior claim.

It is not surprising, therefore, that there has been a tendency to view forfeiture as a method of expropriating some of this wealth for the benefit of the government and specifically for the benefit of law enforcement agencies. Forfeitures, especially administrative civil forfeitures,<sup>149</sup> can become a source of fast cars, boats and planes for undercover and interdiction efforts, and of cash to supplement appropriations, to pay rewards to informants,<sup>150</sup> and to finance drug buys.<sup>151</sup> A share in the booty can be used to reward cooperation from other federal agencies and local law enforcers,<sup>152</sup> and the promise of a share may induce such cooperation. As a result, struggles for turf may be intensified as additional agencies seek statutory authorization for a share.<sup>153</sup> The dollar value of forfeited property becomes a convenient way to measure the success of enforcement efforts in general and to distinguish between the performance of individual officers. Finally, other agencies, more remotely connected to law enforcement, have begun to argue that they are entitled to a share for such purposes as drug education and rehabilitation programs, claiming that such an application of forfeited funds is a form of restitution to the victims of "victimless" crime<sup>154</sup> and a means of drying up the market by cutting demand.<sup>155</sup>

This process has been in full swing for about a decade, and it seems likely that an appetite for forfeited assets and a growing de-

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excluded either because they do not result in significant tax losses and/or because the data are too poor. *Id.* at 304.

<sup>149</sup> Vessels, vehicles and aircraft of any dollar value used for the transportation of controlled substances have been subject to administrative forfeiture since 1984. 19 U.S.C. § 1607(a)(2) (Supp. III 1985), *amended by* Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, § 311, 98 Stat. 2053.

<sup>150</sup> 28 U.S.C.S. § 524(c)(1)(B),(C) (Law. Co-op. Supp. 1987).

<sup>151</sup> 28 U.S.C.S. § 524(c)(1)(G) (Law. Co-op. Supp. 1987).

<sup>152</sup> 28 U.S.C.S. § 524(c)(1)(A) (Law. Co-op. Supp. 1987); Attorney General's Guidelines on Seized and Forfeited Property III.D, 50 Fed. Reg. 24,052, 24,053 (1985). In fiscal year 1986, \$17,127,972 was so shared with state and local law enforcement agencies. 1986 DEP. JUST. ASSETS FORFEITURE FUND ANN. REP. 3, [hereinafter 1986 ANN. REP.].

<sup>153</sup> See *infra* note 163.

<sup>154</sup> 1985 *Forfeiture Hearings*, *supra* note 104 at 242 (testimony of Matthew Gissen, president of Therapeutic Communities of America, an organization of 300 drug treatment programs). Not surprisingly, the FBI opposed the "dilution" of the Asset Forfeiture Fund by using it for drug rehabilitation. *Id.* at 63 (testimony of Joseph V. Corless).

<sup>155</sup> AMERICA'S HABIT, *supra* note 72, at 464. "The cost of this Nation's antidrug efforts can be subsidized to a great extent by the seizure and forfeiture of drug traffickers' assets. That portion of the Federal government's asset forfeiture fund derived from drug cases should be devoted exclusively to anti-drug programs."

pendence upon them in an age of budgetary cutbacks and deficits<sup>156</sup> has helped drive the substantive changes previously discussed. The 1981 Report of the Comptroller General on the failure of asset forfeiture to limit drug trafficking<sup>157</sup> tended to measure the success of RICO forfeiture by the dollar value of property criminally forfeited. The Comptroller General justified his proposal to subject criminal proceeds and substitute assets to forfeiture simply as a means to "increase the amount of assets subject to forfeiture,"<sup>158</sup> without any appeal to theoretical considerations. The substantive expansion of civil forfeiture during this period and its administrative simplification have been still more significant factors in increasing the take.<sup>159</sup> The CFA in 1984 created the Assets Forfeiture Fund to collect, administer, and distribute the proceeds of both civil and criminal forfeitures.<sup>160</sup> The principal purpose of the Fund was to enable the Justice Department and the Customs Bureau to defray incidental costs of forfeiture such as the repair, storage and sale of forfeited property.<sup>161</sup> Congress has amended the statutory provisions governing the Fund to increase the number of agencies entitled to share in the spoils<sup>162</sup> and the objects for which they may be paid out.<sup>163</sup>

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<sup>156</sup> 1985 *Forfeiture Hearings*, *supra* note 104 at 30 (details the 1981-82 funding cuts for the Drug Enforcement Agency and the Bureau of Tobacco, Alcohol and Firearms); 1981-82 *Hearings*, *supra* note 56, at 20 (Coast Guard interdiction efforts halted for lack of fuel), 233-34 (testimony of Irvin B. Nathan) ("many priority enforcement programs . . . do not presently have adequate funding."). The following exchange is perhaps worth reproducing:

Mr. HARRIS. The potential in this area is really unlimited. My guess is that, with adequate forfeiture laws, we could—

Senator DENTON. We could balance the budget.

Mr. HARRIS. . . .

There clearly would be millions and hundreds of millions of dollars available. This would inure to the benefit of the Treasury generally.

*Drug Enforcement Administration Oversight and Authorization: Hearings on S. 2320 Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 37 (1982)(available on Cong. Info. Service S-521-67 (1982)(microfiche))(testimony of Jeffrey Harris, Deputy Associate Attorney General).

<sup>157</sup> *GAO Report*, *supra* note 55.

<sup>158</sup> *Id.* at 43.

<sup>159</sup> See *supra* note 56 and accompanying text.

<sup>160</sup> Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, §§ 310, 2303, 98 Stat. 2052, 2193, adding 28 U.S.C. § 524(c)(1)(Supp. III 1985).

<sup>161</sup> 1986 ANN. REP., *supra* note 152, at 1.

<sup>162</sup> Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. No. 99-646, § 27(a), 100 Stat. 3597 (1986)(codified as amended at 28 U.S.C.S. § 524(c)(1)(F) (Law. Co-op. Supp. 1987)), added the Federal Bureau of Investigation and the United States Marshals Service to the list of agencies whose vehicles could be equipped for drug law enforcement functions with Asset Forfeiture Fund monies.

<sup>163</sup> The proceeds of the sale of forfeited assets may now be applied "for equipping for drug law enforcement functions any government owned or leased vessels, vehicles, and aircraft available for official use by the Drug Enforcement Administration, the Federal

Potentially more significant, however, is the removal of the interim ceiling on the sums retained in the Assets Forfeiture Fund and Customs Forfeiture Fund from year to year after all authorized payments. Originally all sums in the Assets Forfeiture Fund in excess of \$5 million were to be deposited in the general fund of the Treasury each year.<sup>164</sup> Congress has now followed the recommendation of the President's Commission on Organized Crime<sup>165</sup> and removed the ceiling.<sup>166</sup> The change will make up to \$500 million in unappro-

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Bureau of Investigation, the Immigration and Naturalization Service, or the United States Marshals Service." 28 U.S.C.S. § 524(c)(1)(F) (Law. Co-op. Supp. 1987), *as amended by* Department of Justice Assets Forfeiture Fund Amendments Act of 1986, Pub. L. No. 99-570, § 1152(a)(4)(3), 100 Stat. 3207-12. The United States Customs Service is likewise authorized to equip its vessels with the proceeds of forfeiture sales, 19 U.S.C.S. § 1613(a)(3)(Law. Co-op. Supp. 1987), *as amended by* Department of Justice Assets Forfeiture Fund Amendments Act of 1986, Pub. L. No. 99-570, § 1152(b)(1), 100 Stat. 3207-12.

A favorite use for Forfeiture Fund monies is the payment of informers. Department of Justice Assets Forfeiture Fund Amendments Act of 1986, Pub. L. No. 99-570, § 1152(a)(3), 100 Stat. 3207-12 ("awards for information or assistance directly relating to violations of the criminal drug laws. . ."). Contraband under the Endangered Species Act, 16 U.S.C.S. §§ 1531-1543 (Law. Co-op. 1984 & Supp. 1987), and instrumentalities for violating the Act are subject to civil forfeiture. 16 U.S.C. §§ 1540(d)-(e) (1982 & Supp. III 1985). Since 1981, Congress has authorized the Treasury to pay rewards for information out of the proceeds of such forfeitures. 16 U.S.C. § 1540(d)-(e)(1982 & Supp. III 1985), *as amended by* Act of June 25, 1984, Pub. L. No. 98-327, § 4, 98 Stat. 271. By a 1986 amendment, although forfeitures are effected by the Justice Department, the proceeds are to be paid over to the Treasury for such purpose, 28 U.S.C.S. § 524(c)(4) (Law. Co-op. Supp. 1987), *as amended by* the Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. No. 99-646, § 27(b), 100 Stat. 3597, and thus do not count against the \$5 million statutory ceiling of the Assets Forfeiture Fund. 28 U.S.C.S. § 524(c)(8) (Law. Co-op. Supp. 1987).

Similarly, the proceeds of Lacey Act forfeitures (illegally taken wildlife and the means used to take it), 16 U.S.C. § 3374(a) (1982), have been applied to pay rewards under the Act since 1983. 16 U.S.C. § 3375(d) (Supp. III 1985), *as amended by* Act of June 25, 1984, Pub. L. No. 98-327, § 4, 98 Stat. 271. Such proceeds are also withheld from the Assets Forfeiture Fund. 28 U.S.C.S. § 524(c)(4) (Law. Co-op. Supp. 1987), *as amended by* the Criminal Law and Procedure Technical Amendments Act of 1986 Pub. L. No. 99-646, § 27(b), 100 Stat. 3597.

<sup>164</sup> Comprehensive Forfeiture Act of 1984, *supra* note 5; Attorney General's Guidelines on Seized and Forfeited Property, IV.B.2.g., 50 Fed. Reg. 24,052, 24,054 (1985).

The enactment of both 19 U.S.C. § 1613a(h) (Supp. III 1985), Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, §§ 316, 2304, 98 Stat. 2054, 2193, and 19 U.S.C. § 1613b(f) (Supp. III 1985), Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 213, 98 Stat. 2986, left the Customs Forfeiture Fund ceiling in confusion. According to the former, the ceiling was supposed to increase to \$20 million by fiscal year 1987; according to the latter, the limit was \$10 million. The limit has now been stricken from 19 U.S.C. § 1613a, Department of Justice Assets Forfeiture Fund Amendments Act of 1986, Pub. L. No. 99-570, § 1152(b)(1)(C), 100 Stat. 3207-12, and 19 U.S.C. § 1613b has been repealed, Department of Justice Assets Forfeiture Fund Amendments Act of 1986, Pub. L. No. 99-570, § 1152(b)(2), 100 Stat. 3207-12.

<sup>165</sup> AMERICA'S HABIT, *supra* note 72, at 464.

<sup>166</sup> 28 U.S.C.S. § 524(c)(4)(Law. Co-op. Supp. 1987), *as amended by* Department of Jus-

priated funds, not derived from general revenues, available for criminal law enforcement.<sup>167</sup> The Commission sought to have all such funds derived from drug forfeitures devoted exclusively to anti-drug programs;<sup>168</sup> this proposal has not been implemented.

These are, on the whole, disquieting trends. There is an abiding contradiction in the United States between public concern about the inroads of crime, which ebbs and flows, and the public unwillingness to finance law enforcement at appropriate levels, which is more or less constant. Of course each wave of concern leaves a high water mark in the United States Code in the form of new crimes,<sup>169</sup> so that the gap between the tasks with which the Justice Department is entrusted and its resources tends to widen over time. This gap should not be filled, however, by making the Justice Department dependent on forfeited assets. The prosecutor's charging decisions may be distorted by considerations of the most profitable course.<sup>170</sup> Even the appearance of such distortion is intolerable.<sup>171</sup> Similarly, the conflict between the federal government and third party claim-

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Assets Forfeiture Fund Amendments Act of 1986, Pub. L. No. 99-570, §§ 1152(a)(5), 100 Stat. 3207-12.

<sup>167</sup> AMERICA'S HABIT, *supra* note 72, at 445. As of January 31, 1986, the United States Marshals Service had 3,851 properties under seizure with a total value of \$327.1 million, including \$113.4 million in cash and negotiable instruments. *Budget Appropriations: Hearings Before the Subcomm. of the House Comm. on Appropriations*, 99th Cong., 2d Sess. 80 (1986), (available on Cong. Info. Service H-181-24 (1986) (microfiche)) [hereinafter *1987 Appropriations Hearings*]. Assets Forfeiture Fund income for fiscal year 1986 totalled \$93,711,430. 1986 ANN REP., *supra* note 152, at 3. The Marshals Service expects total receipts of \$150 million to the Assets Forfeiture Fund in fiscal year 1987. *1987 Appropriations Hearings* at 114.

These sums must be weighed against the \$6.6 billion budgeted for all federal law enforcement efforts in fiscal year 1986, including aid to state and local governments and the operation of federal prisons. *Budget Appropriations: Hearings on H.R. 2695 Before the Subcomm. of the Senate Comm. on Appropriations*, 99th Cong., 1st Sess. 236 (1986), (available on Cong. Info. Service S-181-16 (1986) (microfiche)). Perhaps a more appropriate comparison is the \$4.2 billion appropriation requested by the Justice Department for fiscal year 1987. *1987 Appropriations Hearings* at 1.

<sup>168</sup> See *supra* note 154.

<sup>169</sup> See Bradley, *Racketeering and the Federalization of Crime*, 22 AM. CRIM. L. REV. 213, 263 (1984) (anti-racketeering statutes, once enacted, are never repealed).

<sup>170</sup> "The duty of the prosecutor is to seek justice. . .", AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE § 3.1.1(c) (ABA 2d Ed. 1979). "The prosecutor should not make the severity of sentences the index of his or her effectiveness." *Id.* at 3.6.1(a).

<sup>171</sup> See, e.g., *Tumey v. Ohio*, 273 U.S. 510 (1927). Half of the fine for the unlawful possession of intoxicating liquor went to the State of Ohio and half to the township, municipality or county. The mayor of the town in which the defendant was convicted, apparently acting as Justice of the Peace, was to receive his costs from the town's share. This scheme was declared a violation of the due process rights of defendants because of the appearance of partiality created, without evidence of actual bias. A judge may not be paid only when he convicts.

ants to forfeited assets should not be exacerbated by giving the Justice Department an institutional stake in defeating private claims.<sup>172</sup> Finally, the "privatization" of the funding of law enforcement is a retrograde step reminiscent of the payment of naval officers in the eighteenth century largely out of the proceeds of the sale of captured ships. It is late in the day to begin issuing letters of marque to United States Attorneys.

#### B. FORFEITURE AS SPECIFIC DETERRENT: THE HEROIC FALLACY

Forfeiture, like any penalty or punishment, deters criminals from repeating their offenses and deters the law abiding from taking up a career of crime. "Specific deterrence" is a name which has been given to the first of these effects, the discouragement of recidivism; the name "general deterrence" has been applied to the second, the discouragement of crime in general by the exemplary effect of punishment.<sup>173</sup>

The courts, legislative committees and presidential commissions have periodically advanced the idea that criminal forfeiture is an effective specific deterrent—perhaps more effective than imprisonment.<sup>174</sup> The notion is that there is a subset of hardened criminals, particularly participants in organized crime, who view crime as a business and make rational calculations of profit and loss. Such criminals, supported by the ethos of their profession, supposedly regard the threat and fact of imprisonment as a "cost of doing business." They are willing to pay this price if, upon release, they may freely enjoy the fruits of their crimes. Therefore, they will only be deterred by the forfeiture of their profits.<sup>175</sup> This idea was par-

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<sup>172</sup> An example is *In re Metmore Financial, Inc.*, 819 F.2d 446 (4th Cir. 1987). This case concerned a civil forfeiture under 21 U.S.C. § 881(a)(6) of real property supposedly used in connection with illegal drug activities. The drug dealer purchased it subject to a mortgage. The mortgage lien therefore attached before the criminal activity. The Justice Department nonetheless contended that the mortgagee was entitled to recover its principal only, and not interest on the lien from the time of seizure. The court held that the government succeeded to the drug dealer's rights. *Id.* at 450. The lender was, therefore, entitled to its accrued interest to the time of sale. *Id.* at 448, 451. The government's legal argument to the contrary seems frivolous.

<sup>173</sup> H. PACKER, *THE LIMITS OF CRIMINAL SANCTION* 39 (1968); Van den Haag, *The Criminal Law as a Threat System*, 73 J. CRIM. L. & CRIMINOLOGY 769, 770 (1982) ("specific deterrence" is scarcely distinguishable from rehabilitation).

<sup>174</sup> See, e.g., *United States v. Walsh*, 700 F.2d 846, 857 (2d Cir. 1983) ("a more potent weapon than fines or prison terms. . ."), *cert. denied*, 464 U.S. 825 (1983).

<sup>175</sup> This is the rationale behind the recommendation of the Attorney General's Commission on Pornography that the "proceeds and instruments of any offense committed under federal obscenity laws . . ." should be forfeited. ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT 433 (1986). The deterrent effect of forfeiture is greater than that of a "modest period of incarceration, which the offender may see as



ticularly popular when the fines available as punishment for hugely profitable felonies were disproportionately small.<sup>176</sup>

The idea that criminal forfeiture is efficacious as a specific deterrent is probably a fallacy even when limited to the paradigmatic "organized criminal," the Mafioso soldier or capo. It is more fallacious when applied to white collar criminals like corrupt public officials and those who corrupt them. Still less will it help to justify a generalization of criminal forfeiture beyond the limits of RICO and drug offenses. It may nonetheless serve as a starting point for an exploration of the relationship between criminal forfeiture and theories of punishment.

First, it is not true that the deterrent effect of imprisonment upon the Mafia has been tried and failed, so that some more powerful deterrent is needed. Until recently, the government has made no sustained effort at breaking up the Mob and imprisoning its leaders.<sup>177</sup> Now that an effort has been made, it has proved remarkably successful.<sup>178</sup> Moreover, the conviction of Mob leaders in the major

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merely another cost of doing business". *Id.* at 465. But the report supplies no evidence to show that the pornography business is controlled by organized crime and that traffickers in pornography are indifferent to imprisonment. Indeed, the report states that "our lack of investigative resources has made it impossible to investigate these matters directly." *Id.* at 296. The author is not aware of any study of the activities of organized crime which even mentions the distribution of pornography. The Commission acknowledged that federal authorities in the important centers for the production and distribution of pornography do not give any priority to prosecuting the participants. *Id.* at 372-73. President Reagan has stated, however, in support of legislation implementing the Commission's recommendation, that "[o]rganized crime controls the majority of the obscenity market. According to law enforcement estimates, organized crime's revenues in these areas exceed seven to ten billion dollars per year." 23 Weekly Compilation of Presidential Documents 1310, 1311 (November 10, 1987).

<sup>176</sup> See, e.g., 1981-82 *Hearings*, *supra* note 56, at 153 (statement of Rep. William J. Hughes: "The sad truth is that the financial penalties for drug dealing are frequently only seen by dealers as a cost of doing business."). Maximum fines were raised substantially by the Sentencing Reform Act of 1984, *see infra* note 473 and accompanying text.

<sup>177</sup> J. Edgar Hoover was notorious for his failure to use the resources of the Federal Bureau of Investigation to pursue organized criminals; he did not acknowledge the existence of such an organization as the Mafia until 1960. R. POWERS, *SECRECY AND POWER: THE LIFE OF J. EDGAR HOOVER* 335 (1987). Commissioner Eugene H. Methvin of the President's Commission on Organized Crime has complained about the failure of the Justice Department to seek long jail sentences for mobsters under the Dangerous Special Drug Offender Act, 21 U.S.C. § 849 (1982 & Supp. III 1985). *THE EDGE*, *supra* note 55, Appendix at 10-11.

<sup>178</sup> "In the last four years, the leadership in 17 of 24 *La Cosa Nostra* families has been indicted or convicted. In 1984 organized crime indictments totalled 2,194, involving predominantly *La Cosa Nostra* members and associates." *THE IMPACT*, *supra* note 47, at 47. The FBI reported that 1601 organized criminals were convicted during 1985, including two bosses, one underboss, one *consigliere*, six *capodecinas*, ten "soldiers," and 105 associates of "traditional organized crime" such as *La Cosa Nostra*. In addition, 151 members and associates of "non-traditional organized crime" groups were convicted.

trials of the last two years, such as the heads of the five families in New York,<sup>179</sup> has been possible in large measure because ranking mobsters have informed on their fellows under the threat of long prison terms.<sup>180</sup> What has occurred has vindicated the conclusion of most criminal law thinkers that our statutory punishments lack deterrent effect primarily because of low levels of enforcement, so that the requisite certainty of punishment is missing.<sup>181</sup> As law en-

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1985 Appropriations Hearings, *supra* note 104, at 153. See also McFadden, *The Mafia of the 1980's: Divided and Under Siege*, N.Y. Times, March 11, 1987, at A1, col. 1.

<sup>179</sup> La Cosa Nostra is organized in 24 "families" or *borgate*. The five New York families, however, include half of all members, and their bosses dominate the "national commission" which supposedly has authority over all but the New Orleans family. THE IMPACT, *supra* note 47, at 36-37. Eight members of the commission were recently convicted of RICO offenses; seven were sentenced to 100 years imprisonment each. N.Y. Times, January 14, 1987, at A1, col. 2.

<sup>180</sup> The most striking example is Angelo Lonardo, the underboss who ran the Cleveland family in place of the imprisoned don, James Licavoli, and was supposedly instrumental in installing Jackie Presser as head of the Teamsters Union. Lonardo identified all "made men" in the family to the Justice Department, including the perpetrators of several unsolved crimes. Lonardo was "turned" after he was sentenced to life imprisonment plus 103 years for CCE violations. His own conviction was obtained largely through the testimony of informers. He was 72 and did not wish to die in prison. Sawicki, *A Mafia Family Legacy*, CLEVELAND MAG., December 1985, at 125.

The conviction of the Mafia National Commission, *supra* note 179, was made possible by the testimony of important mob turncoats, including Angelo Lonardo, Joseph Cantalupo, Joseph Iannuzzi, Aladena James Frattiano, and Fred DeChristopher. *The Mob on Trial: Raising the Cost of Organized Crime*, NEWSDAY, September 7, 1986, at 4.

<sup>181</sup> Most researchers have concluded that criminals are not deterred by the remote chance of a severe penalty. They have therefore stressed the necessity for probable apprehension and punishment. See, e.g., Williams and Hawkins, *Perceptual Research on General Deterrence: A Critical Review*, 20 L. & SOC'Y. REV. 545, 550 n.3 (1986) (there is a threshold of certainty of punishment below which no increase in the severity of penalties has a deterrent effect); Cook, *Research in Criminal Deterrence: Laying the Groundwork for the Second Decade*, in 2 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 211, 230-33 (1980). Their arguments have gained force as the savage punishments of the past have fallen into disuse and disrepute.

A strict utilitarian model, however, tends to imply that it is more efficient to increase the deterrent effect of the laws by increasing their severity, which costs little or nothing, rather than by increasing our efforts at law enforcement, which produce decreasing results at the margin. R. POSNER, *ECONOMIC ANALYSIS OF LAW* 207-08 (3d ed. 1986); Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 YALE L.J. 315, 321 (1984). At present levels of enforcement, however, large numbers of criminals think that the risk of discovery and punishment is well worth taking, despite the fact that the United States has a rate of imprisonment per 100,000 population twice that of the United Kingdom, which in turn is the highest in Western Europe. G. Cole, *United States of America*, and J. Freeman, *England*, in *MAJOR CRIMINAL JUSTICE SYSTEMS: A COMPARATIVE SURVEY* 46, 60 (G. Cole, S. Frankowski, M. Gertz, eds. 2d ed. 1987). History and experience demonstrate, as well, that the public, in the form of judges and juries, is reluctant to enforce severe punishments if the occasions for enforcing them are so infrequent that it seems inequitable to single out the defendant. See Note, *Daring the Courts: Trial and Bargaining Consequences of Minimum Penalties*, 90 YALE L.J. 597, 600-05 (1981).

forcement has dissipated the practical immunity to punishment of high-level mobsters, the latter have begun to act from the same motives as other criminals, with fear of imprisonment high among such motives. This point is worth emphasizing, because the view that criminal forfeiture is a stronger deterrent than prison is probably traceable to a romantic myth about organized crime. The public views the Mafia with moral ambivalence and a degree of admiration. The Mob is seen as supplying goods and services which, though illegal, are much in demand. As such, it is a shadow version of big business, and its leaders are difficult to distinguish morally from the predatory "robber barons" who founded great American fortunes. The Mafia is also the last repository of Old World values of family and feudal loyalty, known as the code of *omerta*.<sup>182</sup> At the same time the public attributes an unlikely consistency of purpose and effectiveness of means to the Mob as a secret outlaw group. Thus the public supposes that Mafia members combine a hardheaded calculation of costs and benefits with a romantic indifference to the threat of prison. The "wise guys" know how to do time if they must, and they would never violate their oath and betray their fellows for mere leniency. Hence law enforcement must "hit them where they hurt,"<sup>183</sup> in the pocketbook.

The behavior of the mob under the pressure of sustained investigation shows up this popular view as a romantic fantasy.<sup>184</sup> Interestingly, in the eighteenth and early nineteenth century defenders of forfeiture of estate and corruption of blood argued that these penalties were indispensably necessary deterrents to treason, probably because they held a similarly romantic view of traitors.<sup>185</sup> One

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<sup>182</sup> For an account of American attitudes toward organized crime, see Saney, *In Praise of Organized Crime*, 16 *RUTGERS L.J.* 853, 858-59 (1985) (American respect for material success through hard work motivates criminals as well as honest people and accounts in part for the moral ambiguity with which Americans regard "Godfathers.")

<sup>183</sup> *United States v. Martino*, 681 F.2d 952, 957 n.17 (5th Cir. 1982) (en banc rehearing) (Congress intended to make proceeds of crime forfeitable by 1970 RICO).

<sup>184</sup> It is possible that the older leaders of *La Cosa Nostra* conformed more closely to the stereotype, and their death, retirement or imprisonment has brought to the fore more Americanized and individualistic leaders, inexperienced, less steeped in the traditional culture, and less bound by group loyalties. *THE IMPACT*, *supra* note 47, at 50. In any event, it is likely that *La Cosa Nostra* is in a long term decline only partly attributable to successful prosecution, *id.* at 36; see also Bradley, *supra* note 169, at 262 n.338 ("the traditional Mafia families . . . are breaking down as the new generation becomes more Americanized. . .").

<sup>185</sup> See generally C. YORKE, *supra* note 1; W. EDEN, *supra* note 92.

In 1814, the famous law reformer Sir Samuel Romilly made a major effort to abolish forfeiture of estate and corruption of blood, on the ground that their deterrent effect was purchased by punishing the felon's innocent relations. See 28 *Parl. Deb.* (1st ser.) 164 (1814) ("You choose for the instrument of your moral tortures the best feelings of

might think that in an age when the penalty for treason was death by prolonged public torture<sup>186</sup> no additional deterrent was necessary. However, as William Eden, the First Baron Auckland, argued in 1771, "[t]he mere execution of the criminal is a fleeting example; but the forfeiture of lands leaves a permanent impression: It is indeed one of our best constitutional safeguards . . ."<sup>187</sup> This improbable argument held sway for a long time. One may guess that a realistic, rationalizing age felt a secret but powerful attraction to the romantic conspirator and his cause.<sup>188</sup> The notion that a man would willingly risk his life for his political ambitions but might be deterred by fear for his family betrays a deep admiration. It may be that our lawmakers have similar feelings about *La Cosa Nostra*.

Despite these considerations, there probably are some professional criminals who are relatively undeterred by the possibility of prison, because they have discounted the threat in advance, because they know how to do time, and above all because they do not fear the shame and obloquy of imprisonment as might, for example, a corrupt public official. The criminal subculture is immune to such sentiments. If possible, these criminals should not find their criminal gains waiting for them when they leave prison. The forfeiture of such gains may have a marginal deterrent effect; it is an appropriate penalty regardless of such effect.<sup>189</sup>

The threat of imprisonment, however, is probably the strongest possible deterrent to white-collar and economic crime, at which RICO prosecutions are in practice largely aimed. In fact, the rela-

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the human heart. . ."). It was opposed by the government, however. See 27 PARL. DEB. (1st ser.) 533-34 (1814)(statement of Mr. Serjeant Shepherd, the Solicitor General). The result was a compromise in which corruption of blood was retained as a penalty for treason and murder only. An Act to Take Away Corruption of Blood save in Certain Cases, 1814, 54 Geo. 3, ch. 145.

<sup>186</sup> Under the common law penalty for treason, the criminal was dragged to the place of execution on a hurdle to be hanged by the neck until half-dead. Then the prisoner was cut down, disembowelled and castrated. His genitals were burned before his eyes before he was beheaded and his body quartered. 1 J. STEPHEN, *supra* note 34, at 476. The full rigors of this sentence were more or less commuted after the punishment of the regicides at the Restoration in 1660. 1 L. RADZINOWICZ, *A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750*, 220-27 (1948).

<sup>187</sup> W. EDEN, *supra* note 92 at 49.

<sup>188</sup> In fact, the long retention of the punishment of forfeiture and corruption of blood as penalties for treason was motivated in part by fear of the Stuart pretenders, including Bonnie Prince Charlie. Compare An Act for Improving the Union of the Two Kingdoms, 1708, 7 Anne, ch. 21 (abolishing corruption of blood effective three years after the death of Queen Anne or the then Stuart pretender, whichever should later occur), with An Act to Make it High Treason to Hold Correspondence With the Sons of the Pretender to His Majesty's Crown, 1744, 17 Geo. 2 ch. 39 (extending the penalty indefinitely on the eve of the '45—the failed Stuart invasion and Highland revolt).

<sup>189</sup> See *infra* notes 377-82 and accompanying text.

tionship of forfeiture and imprisonment as deterrents to white-collar crime may be paradoxical. It is probably easier to trace and locate the proceeds of crime earned by the inside trader, the price fixer, and the corrupt public official than those earned by the traditional organized criminal, particularly if substitute assets may be forfeited. The successful white collar criminal is likely to have substantial assets legitimately acquired, particularly because, in our society, the really grand prospects for theft are open only to the already successful. Such a criminal has a house, vacation property, stocks and bonds, bank accounts, paintings and antiques readily available for seizure. In this he differs from the prototypical drug smuggler, for example, who if smart travels light, keeps his assets portable, and deals almost entirely in readily concealable cash. However, even if the white-collar criminal has successfully laundered and concealed his ill-gotten gains, they may be mostly recovered if he or she cooperates. The task of collection is not fundamentally different from that of a trustee in bankruptcy, who also depends on the debtor's more or less willing cooperation.

As the Ivan Boesky affair suggests, such cooperation is most effectively induced by the threat of a long prison term. As part of a plea bargain, Boesky forfeited \$100 million.<sup>190</sup> For the Boeskys of this world, prison seems to be the truly formidable deterrent. To avoid it, they will pay enormous sums.<sup>191</sup> Here is the paradox of forfeiture as a deterrent to crime: not only is it a less effective deterrent than the threat of prison against economic criminals whose assets are most available to forfeiture, but it also is probable that the threat of prison is the most effective way to enforce forfeitures.<sup>192</sup>

There is a more fundamental reason why forfeiture cannot be a really significant deterrent to crime. In itself, forfeiture only requires the criminal to disgorge his ill-gotten gains if caught and con-

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<sup>190</sup> *Big Trader to Pay U.S. \$100 Million for Insider Abuses*, N.Y. Times, Nov. 15, 1986, at A1, col. 1.

<sup>191</sup> See generally Coffee, *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, 17 AM. CRIM. L. REV. 419, 432 (1980). Professor Coffee argues that "the costs of imprisonment are 'front-loaded.'" A white-collar defendant who has enjoyed a position of wealth and privilege most fears the degradation associated with entering prison: the strip search; the head shaving; and assignment to a cell. For this reason, among others, the marginal deterrent effect of additional time in prison decreases rapidly.

<sup>192</sup> The enforcement of forfeitures through the threat of prison may create serious due process difficulties to the extent that the proceeds of forfeiture are intended to be restitution for victims. It is axiomatic that criminal process should not be used to enforce civil liabilities, although criminal process is in fact constantly so used, for example, to collect bad checks and to enforce wage claims. See *infra* notes 443-46 and accompanying text.

victed, thus restoring the *status quo ante*. Yet no child will be deterred from stealing cookies if the penalty is limited to putting the cookies back in the jar. The child may reason that he or she may not be caught. If caught he or she cannot be made to disgorge cookies already consumed. At worst the child will be no worse off than before the theft.<sup>193</sup> It may be just to require the child to restore the cookies, but for deterrence something more is necessary. The punishment must, in order to deter, be disproportionate to the benefit the criminal expects to get from the crime in order to compensate for the likelihood that the crime will go undetected or unpunished.<sup>194</sup>

So far the deterrent effect of forfeiture has been discussed on the supposition that the value of the property forfeited is equal to the criminal's ill-gotten gains. If the value of the property forfeited exceeds the gain from the crime, the deterrent effect of forfeiture will obviously be enhanced. That is precisely the current situation under RICO and other federal forfeiture statutes. The difficult question is whether these deviations from a principle of equivalence between the value of property subject to forfeiture and the criminal's gross profits are an appropriate means of increasing the deterrent effect of forfeiture, or are they too illogical in principle and unfair in result to defend?

C. DISPROPORTIONATE FORFEITURES AS A DETERRENT:  
EFFICACY AND FAIRNESS

In 1986, the New York City police, concerned about the increasing street trade in "crack," a purified form of cocaine, teamed up with the Drug Enforcement Administration to attack it. They chose to seize and civilly forfeit under federal law the cars of suburban visitors who were caught buying five or ten dollars' worth of drugs.<sup>195</sup> The purchase of so small an amount was of course a misdemeanor.<sup>196</sup> Mayor Koch set as a goal the forfeiture of 5,000

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<sup>193</sup> In reality, the immediate restoration of goods converted and consumed over time, for example, the forfeiture of substitute assets, may be experienced as a loss more severe than the original gain. This may have an incidental deterrent effect.

<sup>194</sup> R. POSNER, *supra* note 181, at 203-04.

<sup>195</sup> Purdum, *New York Police Now Seizing Cars In Arrests for Possession of "Crack"*, N.Y. Times, August 5, 1986, at A1, col. 1.

<sup>196</sup> The newspaper account is less than clear, but in most cases the police must have arrested the buyers for simple possession in violation of state law, while DEA agents seized their cars for administrative forfeiture *in rem* pursuant to 49 U.S.C.S. app. § 782 (Law. Co-op. 1981 & Supp. 1987), which essentially authorizes the forfeiture of any vehicle in which "contraband," defined in 49 U.S.C.S. app. § 781(b) (Law. Co-op. 1981 & Supp. 1987), to include "any narcotic drug," is found. The courts have upheld forfeitures of vehicles under such statutes when minute amounts of drugs were found therein.

automobiles.<sup>197</sup> Many of those arrested were teenagers driving their parents' cars. As a special state narcotics prosecutor remarked, "When they come home without momma's car or without daddy's car, the criminal justice system is going to be the least of their worries."<sup>198</sup>

It seems safe to assume that these forfeitures, like any publicized penalty grossly disproportionate to the offense, had a strong if temporary deterrent effect. The peculiar piquancy of the deterrent is found in the fact that the owners of the cars, the people actually punished, were often innocent of any crime, as were the lenders who had a security interest in the cars seized.<sup>199</sup> Although this Article is only incidentally concerned with civil forfeitures,<sup>200</sup> the tactics adopted by the New York police may serve to illustrate an important point: under current federal criminal statutes, which provide forfeiture as a penalty for offenses against RICO with all its predicate offenses,<sup>201</sup> the CCE,<sup>202</sup> nearly all federal drug offenses,<sup>203</sup> and the

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*See, e.g.,* United States v. One 1976 Porsche, 670 F.2d 810, 812 (9th Cir. 1979) (.226 grams of marijuana). The cars might be "conveyances . . . used . . . to transport . . . property described in paragraph (1). . . ." viz. "controlled substances . . . distributed . . . in violation of this title," 21 U.S.C. § 881(a)(1) (1982), and thus subject to civil forfeiture. The drivers of the cars seized had not, however, violated 21 U.S.C.S. § 841(a) (1982), or any other federal law, because no federal law then penalized the act of buying a controlled substance or simple possession thereof without an intent to distribute. *See* 21 U.S.C. § 841(a) (1982). The news story makes it clear that they were buying small amounts for personal use only. Guilt or innocence of the state crime was thus irrelevant to the validity of the forfeiture. Congress has since criminalized the simple possession of controlled substances with the Drug Possession Penalty Act of 1986, Pub. L. No. 99-570, § 1052, 100 Stat. 3207-81 (amending 21 U.S.C. § 844(a) (1982)).

<sup>197</sup> In fact 211 cars were seized in ten weeks. N.Y. Times, October 14, 1986, at B1, col. 1.

<sup>198</sup> Purdum, *supra* note 195.

<sup>199</sup> The parents' innocence of any wrongdoing and probable ignorance of their offspring's activities are not a sufficient defense to a civil forfeiture. *See infra* notes 263-74 and accompanying text. Effective August 31, 1987, however, gratuitous bailors are for the first time entitled to administrative remission of forfeiture if they can demonstrate that they had no knowledge of the particular offense, no knowledge that the property would be involved in any violation of law, and no knowledge that the user had any record of convictions for a related crime. They also must show that they took all reasonable steps to prevent the illegal use of the property. *See* Forfeiture Regulations §§ 9.5(b), 9.6(e), *supra* note 31.

<sup>200</sup> *See infra* notes 240-74 and accompanying text.

<sup>201</sup> 18 U.S.C. § 1963(a) (Supp. III 1985).

<sup>202</sup> 21 U.S.C.S. § 848(a) (Law. Co-op. Supp. 1987).

<sup>203</sup> 21 U.S.C. § 853(a) (Supp. III 1985) provides for criminal forfeitures of enumerated property belonging to "any persons convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year. . . ." The reference is to titles II and III of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970). S. REP. No. 225, 98th Cong., 2d Sess. 211 n.51, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3394 n.51. Thus the § 853 forfeiture does not apply, for example, to violations of the Mail

sexual exploitation of minors,<sup>204</sup> the value of property forfeited as a penalty is not necessarily equivalent to the criminal's ill-gotten gains, and may exceed them in four respects:

- (1) The "proceeds" of crime, rather than the "profits" of crime, are forfeit.<sup>205</sup> Depending upon the definition of "proceeds," forfeitures may exceed criminal profits many-fold;
- (2) The instrumentalities of crime are forfeit, such as lab equipment, cars, boats, planes, cameras and real estate, apart from and in addition to criminal gains;<sup>206</sup>
- (3) A criminal's interest in an "enterprise" acquired, maintained, or operated by racketeering activities is forfeit, even though the value of such interest bears no necessary relationship to the profits earned by such racketeering activity.<sup>207</sup>
- (4) The presumption that income not accounted for by legitimate means was earned by criminal activity<sup>208</sup> may result in the forfeiture of property acquired by crimes other than the one for which the defendant has been convicted.

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Order Drug Paraphernalia Control Act, Pub. L. No. 99-570, §§ 1821-23, 100 Stat. 3207-51, 52 (1986) (*codified as amended at* 21 U.S.C.S. § 857 (Law. Co-op. Supp. 1987)), even though the offense of importing, exporting, or selling drug paraphernalia such as cigarette papers, roach clips and bongs is punishable by imprisonment for a term as long as three years, 21 U.S.C.S. § 857(b) (Law. Co-op. Supp. 1987), because the Act is not an amendment of the 1970 Act. The paraphernalia itself, however, is forfeit upon conviction. 21 U.S.C.S. § 857(c) (Law. Co-op. Supp. 1987). Thus a candy store owner does not forfeit his store upon conviction for selling a "roach clip".

Nearly all federal drug offenses are punishable by imprisonment for more than one year and thus subject the offender to forfeiture. The exceptions are the unlicensed manufacture, distribution or sale of small quantities of so-called Schedule V substances, which are cough medicine and the like, 21 U.S.C.S. § 841(b)(3) (Law. Co-op. Supp. 1987), and a first offense of simple possession of small quantities of controlled substances. 21 U.S.C.S. § 844(a) (Law. Co-op. Supp. 1987).

Note, too, that the offense of manufacturing, distributing, or possessing with intent to manufacture or distribute controlled substances on board vessels, formerly a Title III offense codified at 21 U.S.C. §§ 955a, 955c (1982), has been transferred to the Maritime Drug Law Enforcement Act, 46 U.S.C.S. app. § 1903 (Law. Co-op. Supp. 1987), by the Maritime Drug Law Enforcement Prosecution Improvements Act of 1986, Pub. L. No. 99-570, § 3202, 100 Stat. 3207-95 (1986). Criminal forfeitures upon conviction for such offenses equivalent to those found in 21 U.S.C.S. § 853 (Law. Co-op. Supp. 1987) are now authorized by 46 U.S.C.S. app. § 1904 (Law. Co-op. 1987).

<sup>204</sup> 18 U.S.C. § 2253(a) (Supp. III 1985).

<sup>205</sup> Controlled Substances Penalties Amendments Act of 1984, 21 U.S.C. § 853, 970 (Supp. III 1985); Child Protection Act of 1984, 18 U.S.C. § 2253(a) (Supp. III 1985) ("property constituting or derived from gross profits or other proceeds obtained from any such offense.").

<sup>206</sup> Any property "used, or intended to be used, in any manner or part, to commit, or facilitate the commission" of a drug violation is now criminally as well as civilly forfeitable. 21 U.S.C. § 853(a)(2) (Supp. III 1985). Similarly, "property used, or intended to be used" for the sexual exploitation of children is forfeit. 18 U.S.C. § 2253(a) (Supp. III 1985). There is no parallel RICO forfeiture.

<sup>207</sup> 18 U.S.C. § 1963(a) (Supp. III 1985); 21 U.S.C. § 853(a)-(3) (Supp. III 1985) (CCE violations).

<sup>208</sup> 21 U.S.C. § 853(d) (Supp. III 1985).



In practice these deviations from the forfeiture of criminal profits are highly arbitrary and unsystematic. Their application raises serious due process difficulties. The problems ultimately stem from the application of a common penalty to very different crimes. The result is to vitiate the added deterrent effect of disproportionate forfeitures.

1. *"Proceeds" or "Profits": May Criminals Deduct their Expenses?*

The CCE originally provided for the forfeiture of the profits of drug enterprises, whereas RICO merely required the forfeiture of the defendant's "interest" in the criminal "enterprise." This distinction proved unsupportable, and now the statutes provide for the forfeiture of "proceeds" in every case which they cover.<sup>209</sup> "Proceeds," of course, is not a term which any accountant would use. It has no fixed meaning. Congress probably chose it, in contrast to "profits", to make clear that all property purchased with and traceable to criminal profits is forfeit, including appreciation in value attributable to the criminal's skill or luck as an investor and not to any criminal activity.<sup>210</sup> This result is parallel to familiar principles of

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<sup>209</sup> See *supra* notes 33-81 and accompanying text. Curiously, 18 U.S.C.S. § 981(a)(1)(A) (Law. Co-op. Supp. 1987), enacted by the Money Laundering Control Act of 1986, Pub. L. No. 99-570, § 1352(a), 100 Stat. 3207-18 to 21 (1986), provides for the *civil* forfeiture of "[a]ny property, real or personal, which represents the gross receipts a person obtains, directly or indirectly, as a result of a violation of section 1956 or 1957 of this title, or which is traceable to such gross receipts." The cited sections refer to the offense of "money laundering," which is dealing in any way with the proceeds of "specified unlawful activity," 18 U.S.C.S. § 1956(a)(1), (c)(7) (Law. Co-op. Supp. 1987), either to promote such activity, to conceal the source of the proceeds, or "to avoid a transaction reporting requirement under state or federal law." 18 U.S.C.S. § 1956(a)(2)(B)(ii) (Law. Co-op. Supp. 1987).

Congress apparently chose the term "gross receipts" to indicate the payment or "commission" received by the person guilty of money laundering as distinguished from the "proceeds" laundered, without deduction of "expenses or overhead." H.R. REP. NO. 855, 99th Cong., 2d Sess. 17 (1986), (available on Cong. Info. Service H-523-40 (1986)(microfiche)). In addition to the forfeiture of such payments, however, 18 U.S.C.S. § 1956 (a)(1) (Law. Co-op. Supp. 1987) provides for a mandatory fine of "\$500,000 or twice the value of the property involved in the transaction, whichever is greater." Thus a person convicted of "laundering" \$1 million for a fee of 10% would be fined \$2 million and would forfeit \$100,000 in a separate civil proceeding.

<sup>210</sup> The legislative history contains only one comment on the change: "In paragraph (3), the term 'proceeds' has been used in lieu of the term 'profits' in order to alleviate the unreasonable burden on the government of proving net profits. It should not be necessary for the government to prove what the defendant's overhead expenses were." S. REP. NO. 225, 98th Cong., 1st Sess. 199, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3382. However, this is a *non sequitur*, because the burden of proving expenses logically rests on the defendant once the government has proven the existence and amount of gross receipts.

civil restitution<sup>211</sup> and is unexceptionable. A more difficult question is whether Congress meant "proceeds" to equal gross receipts, or every dollar received in the course of the criminal activity, without deduction or allowance for expenses or the payment of taxes.<sup>212</sup> Not only is this a heavy penalty, it is doubtful whether it is the appropriate measure of forfeiture for the white-collar offenses which are the subject of at least a substantial percentage of RICO prosecutions.<sup>213</sup>

Let us consider in more detail the application of the "proceeds" measure to different categories of crime. The drug business is very profitable, and apparently the more dangerous the drug the more profitable it is.<sup>214</sup> How the net income of a typical drug kingpin compares with his gross receipts is unknown,<sup>215</sup> but it appears that the rate of return is very high. There is no room to argue that the forfeiture of a drug trafficker's gross receipts is an "unfair" penalty

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<sup>211</sup> 1 G. PALMER, *THE LAW OF RESTITUTION* § 2.12 (1978) ("general considerations of fairness" must control in deciding to what extent a profit is attributable to wrongdoing and to what extent to contributions made by the defendant).

<sup>212</sup> For the statutory use of "gross receipts" in 18 U.S.C. § 1956, 1957 (Law. Co-op. Supp. 1987), see *supra* note 209.

<sup>213</sup> One study of all reported RICO cases as of 1985 found that 16% involved "fairly ordinary business frauds." Lynch, *Parts I & II*, *supra* note 28, at 748. It found that 94 involved "concerted criminal activity"; seventy-one involved "government corruption"; forty-two involved "business crime", which were mostly frauds; and twenty-nine involved labor corruption. *Id.* at 735. The study noted that very few of the government corruption cases involved "penetration of law enforcement by organized criminal groups." *Id.* at 736. Rather, they were mostly cases involving bribes and kickbacks paid by businesses in exchange for special treatment, and are thus little different in kind from such white-collar crimes as bid rigging among competitors.

<sup>214</sup> This is assuming that heroin is more dangerous than cocaine and cocaine is more dangerous than marijuana and hashish. The federal government concentrates its enforcement efforts on heroin and cocaine. These drugs may be purchased cheaply abroad; their price is driven up by law enforcement, which is really quite successful, especially in the case of heroin. See Reuter & Kleiman, *Risks and Prices: An Economic Analysis of Drug Enforcement*, 7 *CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH* 289 (1986). Because the demand for addictive drugs is relatively inelastic, the paradoxical result of successful enforcement is to increase the income of successful drug dealers. *Id.* at 335-37.

<sup>215</sup> The ABT REPORT, *supra* note 146, at 34-35, provides an estimate of the difference between the retail value of heroin consumed in the United States in 1982, totalling \$7.88 billion, and the resulting unreported illegal income to traffickers totalling \$6.12 billion. This differential, however, is based on the assumption that some of the income is reported but attributed to other sources. *Id.* at 36. The adjustments for consumption at wholesale prices, foreign payments and legitimate business deductions total only 15%. The Internal Revenue Service, which commissioned the report, was interested in the total unreported income of all those engaged in the drug business, at every level. The ABT Report therefore provides no facts from which to arrive at an estimate for the ratio of sales to expenses for any given trafficker, since his expenditure for wages and commissions, probably his major expense, is illegal taxable income to some other person engaged in the business.

in the absence of evidence that it is grossly disproportionate to the offense. The task of fixing a punishment is not the same as precisely calculating civil restitution. Such forfeitures may be unfair to third persons, creditors and dependents of the defendant, whose claims are more likely to go unsatisfied if more of the defendant's resources are taken by the federal government.<sup>216</sup> This problem does not arise from the forfeiture of proceeds, however. It is intrinsic in a system of forfeitures which makes inadequate provision for third party claims through the workings of the "relation back" doctrine.<sup>217</sup> The solution is to provide better for such claims.<sup>218</sup>

On the other hand, there would be no harm in limiting forfeitures in drug cases to net profits. It might appear unseemly to give a drug trafficker a chance to prove his ordinary business expenses,<sup>219</sup> but criminals may deduct their "legal" business expenses in computing their net income for tax purposes,<sup>220</sup> and a British law reform commission did not shrink from just such a proposal.<sup>221</sup> The chief difficulty with the offer of such proof is that it is fundamentally incompatible with the defense of innocence. Of course, contesting the government's evidence as to the amount of one's gross receipts from crime is almost equally incompatible with a vigorous defense.

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<sup>216</sup> Some courts have adopted the principle, in cases with multiple defendants, that each is jointly and severally liable for the proceeds of the whole enterprise. *United States v. Benevento*, 836 F.2d 129 (2d Cir. 1988); *United States v. Caporale*, 806 F.2d 1487, 1506-08 (11th Cir. 1986) *cert. denied*, 107 S. Ct. 3265 (1987) (defendants' eighth amendment claims, raised for the first time on appeal, not considered). This only makes matters worse. Presumably each defendant only received a share of the proceeds. Joint and several liability will cause the disproportionate forfeiture of substitute assets belonging to the more solvent defendants or those whose assets are more readily accessible, to the detriment of their legitimate creditors.

<sup>217</sup> See *supra* notes 90-93 and accompanying text.

<sup>218</sup> See *infra* notes 447-69 and accompanying text.

<sup>219</sup> The trafficker would certainly have the burden of proof on such an issue.

<sup>220</sup> See generally Bittker, *Taxing Income from Unlawful Activities*, 25 CASE W. RES. 130 (1974). In 1982, Congress provided that none of the ordinary business expenses incurred by drug dealers, except for the cost of the drugs themselves, could be deducted from their gross income for tax purposes, in contradistinction to the ordinary rule that such expenses of an illegal business as salaries and rent are deductible from gross income for tax purposes. Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 351, 96 Stat. 640 (1982) (codified at I.R.C. § 280E (1987)).

There is a sharply defined public policy against drug dealing. To allow drug dealers the benefit of business expense deductions at the same time that the U.S. and its citizens are losing billions of dollars per year to such persons is not compelled by the fact that such deductions are allowed to other, legal enterprises. Such deductions must be disallowed on public policy grounds.

S. REP. NO. 494, 97th Cong., 2d Sess. 309, *reprinted in* 1982 CODE CONG. & ADMIN. NEWS 781, 1050. This hardly furnishes a reason for treating drug dealers differently from other criminals.

Illegal bribes and kickbacks are not deductible. Treas. Reg. § 1.162-21 (1987).

<sup>221</sup> D. Hodgson, *supra* note 136, at 74.

These difficulties are again essentially procedural. RICO and CCE forfeitures are an automatic incident of conviction, and the jury is required to give a special verdict as to the amount.<sup>222</sup> The solution is at least a bifurcation of the issues at trial,<sup>223</sup> and possibly the postponement of the forfeiture issue until sentencing.

Illegal gambling is also a prototypical activity of traditional organized crime. Here, however, there is a large and well-defined gap between gross receipts, equal to total bets placed (the "handle") and net receipts, equal to the handle less payoff of winning bets. In the numbers, net receipts are forty percent of gross wagers; in illegal betting on horseracing, the "takeout" is about sixteen percent; in betting on a single football game, net receipts are only 4.55% of the handle.<sup>224</sup> Whether or not bookies should forfeit their relatively minimal expenses of operation, it seems curious to adopt a definition of proceeds under which the bookie ostensibly forfeits the total value of all wagers ever to pass through his hands, with the peculiar result that forfeitures are higher when the odds most favor the bettor. No reported decision has yet dealt with this issue.

The forfeiture of gross receipts as a punishment for white collar crime is a different matter. These crimes are characteristically the use of illegal means, such as insider trading, rigged bidding, and the payment of bribes, in the operation of legitimate business. If an illegally obtained contract has been performed in full, it may not be appropriate to make the return of the contract price in full a mandatory part of the criminal sentence, in addition to all other punishments, and without regard for the expense of performance.<sup>225</sup>

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<sup>222</sup> FED. R. CRIM. P. 31(e). See *supra* note 34.

<sup>223</sup> See Markus, *Procedural Implications of Forfeiture under RICO, the CCE, and the Comprehensive Forfeiture Act of 1984: Reforming the Trial Structure*, 59 TEMP. L.Q. 1097 (1986)(constitutional necessity of "pure" bifurcation).

In several reported cases defendants have waived jury determination of forfeitures. See, e.g., *United States v. Caporale*, 806 F.2d 1487, 1506 (11th Cir. 1986)(rejected claim that defendants had been misled into waiving jury); *United States v. Garrett*, 727 F.2d 1003, 1012-13 (11th Cir. 1984)(waiver must be in writing); *United States v. Schmalfeldt*, 657 F. Supp. 385, 396 (W.D. Mich. 1987)(waiver precluded argument that acquittal by jury on certain counts was an implicit finding of fact on forfeiture issues); *United States v. Horak*, 633 F. Supp. 190, 197 (N.D. Ill. 1986)(defendant waived jury and stipulated to facts concerning forfeitable assets). They were probably impelled by the desire to avoid prejudice arising in the jury's mind by the proof of unexplained income in large amounts. See *infra* notes 371-73 and accompanying text.

<sup>224</sup> The ABT REPORT, *supra* note 146, at 78, 98-99.

<sup>225</sup> Under RICO as it now stands, this question tends not to arise. RICO provides the more draconian penalty of forfeiture of the defendant's interest in the business itself. See *infra* notes 281-84 and accompanying text. Forfeiture of the proceeds and of the enterprise are not mutually exclusive, although there is no reported case in which both

Only one case has explicitly considered this issue, and it is of limited interpretive value because the offense occurred before the adoption of the Comprehensive Forfeiture Act of 1984. In *United States v. Lizza Industries, Inc.*,<sup>226</sup> the defendants were charged with thirty-two counts of mail fraud, a predicate RICO offense, for obtaining contracts for the building and repair of public roads through collusive bidding. Applying *Russello v. United States*,<sup>227</sup> which held that criminal proceeds can constitute an interest in a RICO enterprise and are therefore subject to forfeiture, the Second Circuit ordered the forfeiture of the gross receipts from the contracts less the direct costs of performance, but the court refused to permit the defendants to allocate a share of the receipts to the overhead of the business and deduct them.<sup>228</sup> The majority similarly refused to permit the deduction of taxes already paid.<sup>229</sup> This mode of calculating forfeiture clearly preserves a rough proportionality between the offense and the punishment, and due process requires nothing more.<sup>230</sup> "RICO does not require the prosecution to prove or the trial court to resolve complex computations, so as to ensure that a convicted racketeer is not deprived of a single farthing more than his criminal acts produced."<sup>231</sup> The court, however, went on to say that forfeiture of profits net of allocated overhead and taxes would have an insufficient deterrent effect. "Using net profits as the measure for forfeiture could tip such business decisions in favor of illegal conduct."<sup>232</sup> This is difficult to credit. The court apparently imagined that a businessperson undeterred from bid rigging by the prospect of disgrace, high fines, legal expense and the threat of prison will refrain when he realizes that upon conviction he will have to surrender the allocated overhead from the illegal contract.

Furthermore, the court overlooked the perverse effect of forfeiting proceeds already paid to the federal government as taxes,

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have been sought. See, e.g., *United States v. Horak*, 633 F. Supp. 190 (N.D. Ill. 1986)(government sought forfeiture of defendant's stock interest, salary, bonuses and pension rights, but not the proceeds of contracts obtained by bribery). In *United States v. Brennan*, 629 F. Supp. 283 (E.D.N.Y. 1983), the prosecution of a corrupt judge under RICO, the government voluntarily excluded from its request for forfeiture sums which the judge paid to a go-between.

<sup>226</sup> 775 F.2d 492 (2d Cir. 1985), *cert. denied*, 475 U.S. 1082, (1986).

<sup>227</sup> 464 U.S. 16 (1983). See *supra* note 69 and accompanying text.

<sup>228</sup> *Lizza Inds.*, 775 F.2d at 498.

<sup>229</sup> In a concurring opinion, Judge Van Graafeiland objected that to the extent the criminal has paid taxes he has already been separated from his dishonest profit, which is the chief purpose of RICO forfeiture. *Id.* at 499.

<sup>230</sup> *Id.* at 498.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

thus penalizing the criminal who pays his taxes more severely than the criminal who does not.<sup>233</sup> This could be dismissed as trivial, but one must consider which criminals ordinarily pay their taxes and which do not. Offenders whose criminal violations are incidental to the management of a legitimate enterprise usually pay taxes on their earnings. Such offenders are the quintessential white-collar criminals, and their offenses, including bribery, insider trading, and SEC violations, all involve bending the rules of the free market. Professional criminals, on the other hand, whose enterprises are intrinsically illegitimate, declare as little income as they can.<sup>234</sup> Therefore the measure of profits adopted in *Lizza Industries* seems to punish the white-collar and occasional lawbreaker more severely than the professional criminal.<sup>235</sup>

## 2. *The Forfeiture of the "Instrumentalities" of Crime as a Punishment*

Congress has recently expanded existing criminal forfeitures in nearly all drug cases<sup>236</sup> to include property of the defendant "used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation . . ." <sup>237</sup> the so-called "instrumentalities of crime." Real as well as personal property may be forfeited.<sup>238</sup> In addition to the proceeds of the crime, houses, stores, planes, ships and trucks, if used in committing the offense, are thus all automatically forfeited upon conviction. It is possible, indeed likely, that in many cases the value of the property forfeited

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<sup>233</sup> Judge Van Graafeiland's concurrence at least implied that this disparity is a deprivation of equal protection. *Id.* at 499. The criminal who forfeits proceeds already paid in taxes cannot deduct the amount thus forfeited as a business expense. Treas. Reg. § 1.162-21 (1987).

<sup>234</sup> Professional gamblers, however, are supposedly careful to declare substantial income, on the theory that the IRS is more likely to prosecute them for tax evasion than their local police for gambling. Bittker, *supra* note 220, at 141.

<sup>235</sup> The fault of failing to distinguish properly between traditional organized crime and traditional white-collar crime is intrinsic to RICO. The essence of RICO is that, by its hugger-mugger definition of "racketeering activity," 18 U.S.C.S. § 1961(1) (Law. Co-op. Supp. 1987), it makes one federal offense of such disparate offenses as arson, kidnapping, murder, hijacking, bid rigging, welfare cheating, currency smuggling, counterfeiting, bribing public officials and accepting bribes, and the breach of all manner of private fiduciary duties through the mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343 (1982). RICO thus carries out the essential program of Edwin Sutherland, who coined the term "white-collar crime," and the other Progressive reformers: the treatment of all deviations from social and economic responsibility as crimes. Geis & Goff, *Introduction*, E. H. SUTHERLAND, WHITE COLLAR CRIME at ix-x (1983).

<sup>236</sup> See *supra* note 203.

<sup>237</sup> Comprehensive Forfeiture Act of 1984. Pub. L. No. 98-473, § 303, 98 Stat. 2044 (codified at 21 U.S.C. § 853(a)(2) (Supp. III 1985)).

<sup>238</sup> 21 U.S.C. § 853(b)(1) (Supp. III 1985).

because of its involvement in the offense, may vastly exceed the proceeds thereof or any fine the court may choose to impose.

This new mandatory penalty may have a deterrent effect on those contemplating offenses against the federal drug laws. Its origin, however, casts considerable doubt on its fairness and workability. Congress borrowed the remedy from traditional *in rem* civil forfeitures, apparently with no consideration of its appropriateness as a criminal penalty.<sup>239</sup> Rather the forfeiture of instrumentalities was made a criminal penalty for the convenience of avoiding two separate actions, a criminal trial and a civil forfeiture.<sup>240</sup> The very same property may be forfeited civilly, without evidence of criminal guilt on the part of the user or owner, or criminally, as a mandatory penalty upon conviction. A closer look at the history and policy of *in rem* forfeiture is therefore necessary.

The customs and impost laws of the United States, like the British Navigation Acts which served as their model,<sup>241</sup> have always been enforced by summary forfeitures of contraband<sup>242</sup> and of the vehicles in which such contraband was transported. Congress has extended such forfeitures in recent times to such "contraband" as adulterated and misbranded products,<sup>243</sup> cars whose vehicle identification numbers have been tampered with,<sup>244</sup> and controlled substances.<sup>245</sup> In fact such forfeitures are a pervasive mode of regulatory enforcement, as is perhaps best illustrated by the provisions for the forfeiture of "any property intended for use in violating the provisions of the internal revenue law. . . ."<sup>246</sup> The same

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<sup>239</sup> S. REP. NO. 225, 98th Cong., 2d Sess. 209-14, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3392-97.

<sup>240</sup> S. REP. NO. 225, 98th Cong., 2d Sess. 196, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3379; S. REP. NO. 520, 97th Cong., 2d Sess. 5 (1982), (available on Cong. Info. Service S-523-16 (1982)(microfiche))(precursor bill); *United States v. Sandini*, 816 F.2d 869, 872 (3d Cir. 1987).

<sup>241</sup> Reed and Gill, *RICO Forfeitures, Forfeitable "Interests," and Procedural Due Process*, 62 N.C.L. REV. 57, 66 (1983); Note, *Bane of American Forfeiture Law—Banished at Last?*, 62 CORNELL L. REV. 769, 774 (1977). See also *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 209, 235 (1844)(Story, J.)(seizure of brig used for acts of piracy by mentally unbalanced captain, despite innocence of owner, in accordance with "the maritime law and the law of nations").

<sup>242</sup> See *supra* note 36.

<sup>243</sup> 21 U.S.C. § 334(a) (1982).

<sup>244</sup> 18 U.S.C. § 512(a) (Supp. III 1985). The owner of the car has the burden of showing that he did not know that the number had been altered. *Id.* at § 512(a)(1).

<sup>245</sup> 49 U.S.C.S. app. §§ 781, 782 (Law. Co-op. 1982 & Supp. 1987)(transportation, concealment or possession of any "contraband" article, including narcotic drugs, counterfeit money and illegal firearms in any vessel, vehicle or aircraft, subjects such vessels to civil forfeiture).

<sup>246</sup> I.R.C. § 7302 (1986). The seizure and civil forfeiture of such property is mandated by I.R.C. §§ 7321 and 7323.

statutes ordinarily mandate the forfeiture of property used to produce contraband.<sup>247</sup> Such property, together with the means of transporting contraband, has often been called "instrumentalities" of crime.<sup>248</sup>

Contraband and instrumentalities have always been forfeit regardless of the criminal guilt of their users or owners, and have been condemned without any of the protections of criminal due process.<sup>249</sup> The traditional justification for this mode of proceeding has been that the property is "guilty," or, less metaphorically, that the property itself or the circumstances in which it was seized furnished all the evidence necessary for its condemnation.<sup>250</sup> Such justification has no real application to many of the *in rem* forfeitures enacted in recent years. A common feature of such forfeitures is that they depend upon proof that a crime has been committed and the property to be forfeited is traceable to or was used in the commission of such crime. An example is the 1986 provision for the civil forfeiture of the proceeds of drug offenses, including offenses committed in foreign countries against foreign law.<sup>251</sup> Similarly, Congress re-

<sup>247</sup> See e.g., 18 U.S.C. § 2253(a) (Supp. III 1985)(property used or intended to be used to produce depictions of minors engaged in sexual conduct).

<sup>248</sup> The term "instrumentalities" is traditional but misleading, since under both 21 U.S.C.S. § 881 (Law. Co-op. 1984 & Supp. 1987), and 49 U.S.C.S. app. § 782 (Law. Co-op. Supp. 1987), the mere presence of contraband in a vehicle justifies the forfeiture of such vehicle, regardless of any evidence that the vehicle was used to transport the contraband. *United States v. M/V Christy Lee*, 640 F. Supp. 667, 672 (S.D. Fla. 1986)(21 U.S.C. § 881(a)(4) (1982)); *United States v. One 1971 Porsche Coupe Automobile*, 364 F. Supp. 745, 749 (E.D. Pa. 1973)(former 49 U.S.C. § 782 (1982)). For this reason the term "derivative contraband" has been suggested. It is, of course, possible to forfeit a vehicle as an instrumentality of crime even if it has not been used to transport contraband. *United States v. \$39,000 in Canadian Currency*, 801 F.2d 1210, 1221 n.10 (10th Cir. 1986).

<sup>249</sup> *United States v. One 1970 Pontiac GTO, 2-Door Hardtop*, 529 F.2d 65, 66 (9th Cir. 1976).

<sup>250</sup> Note, *Bane of American Forfeiture Law—Banished at Last?*, 62 CORNELL L. REV. 769, 784 (1977).

Another justification commonly advanced is essentially one of exigent circumstances: seizure and forfeiture are necessary, as in the case of piracy on the high seas, because the United States has no jurisdiction over the offender or the locus of the offense. See *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827)(dictum). The Supreme Court in 1974 apparently endorsed this principle when it upheld the seizure of a leased yacht without warrant, notice or hearing under a Puerto Rican statute; a single marijuana cigarette had been discovered on board. "[Such] [s]eizure permits Puerto Rico to assert *in rem* jurisdiction over the property in order to conduct forfeiture hearings . . ." *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 670 (1974).

<sup>251</sup> Any property . . . which represents the proceeds of an offense against a foreign nation involving the manufacture, importation, sale or distribution of a controlled substance . . . within whose jurisdiction such offense . . . would be punishable by . . . imprisonment for a term exceeding one year and which would be punishable by imprisonment for a term exceeding one year if such act or activity had occurred within . . . the United States [is subject to civil forfeiture].



cently provided for the civil forfeiture of a vehicle in which an illegal alien has been knowingly transported, including travels entirely within the United States such as a lift to work,<sup>252</sup> in violation of a criminal statute.<sup>253</sup> A third example is the civil forfeiture of "monetary instruments," including cash, in excess of \$10,000, knowingly imported or exported without declaring the same to Customs.<sup>254</sup>

It seems difficult to maintain that such forfeitures are anything other than a punishment for crime. The constitutionality of these forfeitures from a due process standpoint seems suspect, insofar as they impose a penalty for criminal conduct without a criminal conviction and indeed without a jury trial.<sup>255</sup>

These penalties bear an added sting in the form of a statutory novelty: real property used in any way to facilitate the commission

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Money Laundering Control Act of 1986, Pub. L. No. 99-570, § 1351, 100 Stat. 3207-18 (codified at 18 U.S.C.S. § 981(a)(1)(B) (Law. Co-op. Supp. 1987)). The statute does not require that the offender be convicted or even charged in a foreign country. The effect is to give American courts jurisdiction to determine whether American citizens and resident aliens have committed crimes in foreign countries, without benefit of trial by jury, in a proceeding in which the owner of the property has the burden of proof but does not have the benefit of process to compel the testimony of foreign witnesses.

<sup>252</sup> See, e.g., *United States v. One 1982 Chevrolet Crew-Cab Truck*, 810 F.2d 178 (8th Cir. 1987)(owner loaned truck to illegal alien who was driving it when arrested); *but cf. United States v. One 1984 Ford Van*, 826 F.2d 918 (9th Cir. 1987)(contractor's transportation of workers to and from job site in Washington State did not further their illegal presence in the United States.).

<sup>253</sup> Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, § 12, 95 Stat. 1617. It is a predicate to civil forfeiture that the vehicle have been used in violation of 8 U.S.C. § 1324(a) (1982), making such knowing transportation of an illegal alien within the country a felony. It is, of course, not a precondition to the civil forfeiture that the owner of the vehicle be convicted or even indicted for the criminal offense.

<sup>254</sup> 31 U.S.C.S. §§ 5316, 5317(c) (Law. Co-op. 1983 & Supp. 1987). Most courts agree that the money is subject to forfeiture if the traveler knew that he was transporting monetary instruments with a value in excess of \$10,000, whether or not he knew of the reporting requirement. *United States v. \$47,980 in Canadian Currency*, 804 F.2d 1085, 1090 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 2469 (1987). *Contra United States v. One (1) Lot of \$24,900 in United States Currency*, 770 F.2d 1530 (11th Cir. 1985).

<sup>255</sup> The Warren Court seems to have recognized the force of this argument in *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965), in which it invalidated the forfeiture of untaxed liquor and the vehicle in which it was being transported on the grounds that the search and seizure were invalid without a warrant. The exclusionary rule applied because the forfeiture of the car necessarily depended upon a finding that the owner had committed the crime of illegally transporting untaxed liquor. *Id.* at 701 (citing *Boyd v. United States*, 116 U.S. 616 (1886)(compulsory production of the owner's private papers in a civil forfeiture action violates the fourth and fifth amendments)). The court noted that the value of the car exceeded the fine that could be imposed for the same offense. It is doubtful that anything remains of *One 1958 Plymouth Sedan* after *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). See *infra* notes 266-76 and accompanying text. See generally Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379, 493 (1976).

of a drug offense is now also subject to forfeiture.<sup>256</sup> Such forfeitures are a nearly unprecedented extension of the forfeiture of the "instrumentalities" of crime, hitherto limited to personalty such as tools, equipment and vehicles.<sup>257</sup> Congress specifically authorized the forfeiture of real property, because, until recently, it has been considered too daringly metaphorical to call the premises where a crime was planned or contraband stored an "instrumentality" of such crime.<sup>258</sup> All drug offenses must be planned and carried out somewhere; if the house, office or store of the defendant, as well as a vehicle, when so used, is forfeit, the potential for grossly excessive penalties is multiplied.<sup>259</sup> Such penalties may be "disproportionate" in the sense that they are out of proportion to commonly accepted opinions about the gravity of the offense.<sup>260</sup> In addition, if the property is leased, every such forfeiture will implicate the interests of a putatively innocent owner.<sup>261</sup> Finally, such forfeitures pres-

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<sup>256</sup> 21 U.S.C. § 881(a)(7) (Supp. III 1985).

<sup>257</sup> There are two statutes which provide for the civil forfeiture of land: land upon which an illegal still is found, 26 U.S.C. § 5615(3) (1982); and land of a brewery from which taxable beer has been removed for consumption or sale "with intent to defraud the United States of the tax thereon." 26 U.S.C. § 5673 (1982). There is no reported case of *in rem* forfeiture of real property under either of these statutes more recent than *United States v. About 151.682 Acres of Land*, 99 F.2d 716 (7th Cir. 1938).

<sup>258</sup> [I]f [a drug dealer] uses a secluded barn to store tons of marijuana or uses his house as a manufacturing laboratory for amphetamines, there is no provision [in current law] to subject his real property to civil forfeiture, even though its use [was] indispensable to the commission of a major drug offense and the prospect of the forfeiture of the property would have been a powerful deterrent.

S. REP. NO. 225, 98th Cong., 2d Sess. 195, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3378.

In fact, there are cases in which real property used by drug dealers was forfeit, not as an instrumentality of crime, but as property which afforded its owner a source of influence over a RICO enterprise in violation of 18 U.S.C. § 1963(a)(2) (Supp. III 1983), see *United States v. Zielie*, 734 F.2d 1447, 1459 (11th Cir. 1984), cert. denied, 469 U.S. 1189 (1985), or over a continuing criminal enterprise in violation of 21 U.S.C. § 848(a)(2)(B) (1982), *United States v. McKeithen*, 822 F.2d 310 (2d Cir. 1987).

<sup>259</sup> It must be remembered that a potential penalty of imprisonment for more than one year is prescribed for nearly all federal drug offenses. See *supra* note 203.

<sup>260</sup> This is one element of the test for disproportionality adopted by the Supreme Court in *Solem v. Helm*, 463 U.S. 277, 294 (1983) ("[T]here are generally accepted criteria for comparing the severity of crimes on a broad scale . . ."). In *Solem*, the Supreme Court invalidated the defendant's sentence of life without parole under a recidivist statute for uttering a "no account" check for \$100 after six earlier convictions for minor non-violent crimes. The court held that the sentence violated the eighth amendment prohibition of "cruel and unusual punishments." *In rem* forfeitures are not constitutionally "punishments;" therefore, they cannot be disproportionate within the *Solem* definition, however severe. See *infra* notes 275-76 and accompanying text.

<sup>261</sup> There is no reported case concerning the criminal forfeiture of a leasehold. *United States v. Various Parcels of Real Property*, 650 F. Supp. 62 (N.D. Ind. 1986), concerned the civil forfeiture of a leased house because of its supposed use by the tenant in narcotics violations, but the true owner did not appear and the court denied the government's motion for summary judgment for lack of probable cause. It would appear

ent unresolved problems about the degree of involvement in the criminal business necessary before the property is forfeit.<sup>262</sup>

It has already been noted that civil forfeitures imposed for the knowing use of property in violation of criminal statutes have the effect of punishing crime without criminal process.<sup>263</sup> Such forfeitures may also punish the innocent, because the user and the owner may be different persons. Until 1974 it was clear that the owner's innocence of crime, ignorance of the user's activities, and inability to control such activities were legally irrelevant.<sup>264</sup> At least one commentator has decried the unfairness of this result.<sup>265</sup>

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that the fee is not forfeit if a lessee commits a crime, like the sale of drug paraphernalia, upon leased premises, without the knowledge or consent of the owner; the innocent owner is at least entitled to remission under Justice Department regulations, Forfeiture Regulations § 9.5(c)(2) *supra* note 31 (claimant "at no time had any knowledge or reason to believe that the property in which he claims an interest was being or would be used in a violation of the law . . ."). However, "[a] lessor who leases property on a long term basis with the right to sublease shall not be entitled to remission or mitigation of such forfeiture unless his lessee would be entitled to such relief." *Id.* at § 9.6(c)(2).

Presumably once a leasehold has been forfeited to the government it is held subject to an obligation to pay rent. An interesting question is whether the lessor would have the right to terminate the leasehold if the lessee performs an act subjecting the leasehold to forfeiture, perhaps on the ground that such forfeiture was equivalent to an assignment contrary to the terms of the lease. Perhaps lessors will begin to include boilerplate in their leases providing that the lease shall terminate automatically if the lessee does anything upon the premises which gives rise to a civil or criminal forfeiture under state or federal law.

<sup>262</sup> In *United States v. Various Parcels of Real Property*, 650 F. Supp. 62 (N.D. Ind. 1986), the government sought the civil forfeiture of a leased house on the grounds that it had been used to facilitate illegal exchanges of money for controlled substances. The sole evidence offered, by affidavit, was that the tenant had made eight telephone calls to and from the house allegedly in furtherance of such exchanges. *Id.* at 65. The court rejected this evidence as insufficient to show probable cause for forfeiture. *Id.*

The Drug Enforcement Agency attorney in charge of forfeiture matters has testified: "We can seize a house for almost any use, but we are trying, for instance, to avoid a deal done in a hallway you could forfeit the house technically . . ." *1985 Forfeiture Hearings, supra* note 104, at 47 (testimony of William M. Lenck).

<sup>263</sup> See *supra* notes 249-55 and accompanying text.

<sup>264</sup> See, e.g., *J. W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505 (1921) (upholding forfeiture of a taxicab used in transporting untaxed spirits against conditional vendor); *United States v. One 1957 Oldsmobile Automobile*, 256 F.2d 931 (5th Cir. 1958) (forfeiture of car owned jointly by driver and his mother, in which lender had significant security interest, when passenger was found to have a few grams of marijuana on his person, unknown to driver).

<sup>265</sup> [T]he doctrine that the sovereign is authorized to impose forfeitures and confiscations of "guilty things" without regard to the interests of the innocent owners of those things is about as irrational and unjust a proposition as a sober mind can concoct, for all that it has a history of thousands of years behind it, and has been solemnized by the United States Supreme Court.

Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L.Q. 169, 257-58 (1973). See also Clark, *supra* note 255, at 481 (lessor or installment seller made a guarantor or surety for the good behavior of the lessee or buyer).

In 1974, however, the Supreme Court upheld the civil forfeiture under a Puerto Rican statute of a yacht on a long-term lease because a single marijuana cigarette was found on board, despite the innocence of the owner/lessor and its inability to control the lessee's activities.<sup>266</sup> Although the Court insisted that such forfeitures are justified from a due process standpoint by their sheer antiquity,<sup>267</sup> it in fact abandoned the "guilty property" fiction. Instead, it characterized the forfeiture of property belonging to innocents as having "punitive and deterrent purposes."<sup>268</sup> The Court did not explain how innocent persons can constitutionally be punished nor why the state would wish to do so.<sup>269</sup> As for deterrence, the court said that "confiscation may have the desirable effect of inducing [lessors, bailors, or secured creditors] to exercise greater care in transferring possession of their property."<sup>270</sup> The claimant in *Calero-Toledo*, although undoubtedly guiltless of any offense, had offered no evidence as to its degree of care in leasing the yacht.<sup>271</sup> In dictum, the Court stated that

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<sup>266</sup> *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

<sup>267</sup> *Id.* at 680-81. The Court traced such civil forfeitures to the Anglo-Saxon institution of deodand, under which an inanimate object such as a falling tree which accidentally killed a person was forfeit to the Crown, and even to the Biblical law concerning an ox that killed a person by goring. The ox was to be stoned to death but no one might partake of its flesh or otherwise use the carcass. *Exodus* 21:28. The connection is supposed to be the metaphorical guilt and punishment of the offending property in each case, but there is no historical link among the institutions. The underlying concepts are also very different. Finkelstein, *supra* note 246, at 229-30 (stoning of the goring ox is not a forfeiture; the Old Testament is devoid of any concept of the guilt of inanimate objects); Note, *Bane of American Forfeiture Law—Banished at Last?*, 62 CORNELL L. REV. 769, 770-71 (1977).

<sup>268</sup> *Calero-Toledo*, 416 U.S. at 686.

<sup>269</sup> From a utilitarian point of view, punishment of innocent persons is perfectly justified for its deterrent effect, at least if the suffering prevented by the deterrence of future crime outweighs the suffering inflicted by present punishment. The merely negligent may be punished to deter negligence; the insane may be punished to deter others from falsely claiming insanity; even the innocent relatives of a convicted criminal may usefully be punished if more crime may be deterred thereby. H. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 6 (2d Ed. 1970) (deterrent effect of punishing an entire family).

However, it is likely that the Supreme Court characterized such civil forfeitures as "punitive" merely to avoid the fifth amendment claim that they constitute a "taking" for which compensation is due. Clark, *supra* note 255, at 427.

<sup>270</sup> 416 U.S. at 688.

<sup>271</sup> *Id.* at 690. Presumably it failed to do so because the settled law until *Calero-Toledo* was that such evidence was irrelevant and would be unavailing. In fact the lease specifically forbade any illegal use. Note, *Forfeiture—Due Process—Supreme Court Upholds Forfeiture of Innocent Owner's Property Without Prior Notice and Hearing*, 60 CORNELL L. REV. 467, 476 n.54 (1976). The claimant's main line of attack was against the state seizure without notice, hearing, or independent judicial determination of probable cause. This attack was upheld by a three judge district court. *Calero-Toledo*, 416 U.S. at 669.

It would be difficult to reject the constitutional claim of an owner . . . who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.<sup>272</sup>

Although later courts took up this dictum, they generally have judged the behavior of innocent owners with invidious strictness, suggesting, for example, that it is a breach of one's duty of reasonable care to allow one's son to use one's car if he has a minor criminal record. If he misuses it to transport any quantity of drugs, it is forfeit.<sup>273</sup> Thus, the peculiar tendency of the *Calero-Toledo* rule is to make both commercial dealings, such as the installment sale of an automobile, and relations of friendship with ex-convicts, extremely risky, thereby validating discrimination against them.<sup>274</sup>

If *in rem* forfeitures after *Calero-Toledo* can no longer be justified by the "guilty property" fiction, but by their punitive and deterrent effects, then the extreme and arbitrary disproportion between offense and remedy in many cases seems to violate both fundamental fairness<sup>275</sup> and the eighth amendment requirement that punishment be in proportion to the crime.<sup>276</sup> The Court, however, rejected this apparent consequence of the change in rationale, and no court has refused to order an *in rem* forfeiture on the grounds of disproportionality.

Apart from this objection, it seems that criminal punishments should not depend upon accidental and irrelevant details in the manner in which the crime was carried out. For example, one might imagine six participants in a continuing criminal enterprise who meet in the house of one participant and store drugs in the base-

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<sup>272</sup> 416 U.S. at 689-90.

<sup>273</sup> *United States v. One 1978 Chrysler Le Baron Station Wagon*, 648 F. Supp. 1048, 1051 (E.D.N.Y. 1986). A similar father and son case with the same result is *United States v. One 1976 Lincoln Continental Mark IV*, 578 F. Supp. 402 (S.D. W. Va. 1984). See generally *United States v. One Single Family Residence*, 683 F. Supp. 783, 786, (S.D. Fla. 1988)(dictum)(courts routinely uphold the civil forfeiture of a loaned vehicle used to facilitate a drug transaction against the innocent owner exemption); *United States v. One Rockwell Int'l Commander* 690 C/840, 594 F. Supp. 133, 139 (D.N.D. 1984)(civil forfeiture proper when innocent owner of airplane leased it without any "plan or procedures for detecting smuggling.").

<sup>274</sup> The Justice Department has explicitly adopted a requirement that all petitioners for remission show their ignorance of the criminal record of their vendees as a precondition for administrative remission of forfeiture. Forfeiture Regulations, *supra*, note 31, at § 9.5(b)(4).

<sup>275</sup> Justice Douglas based his dissent on this point. *Calero-Toledo*, 416 U.S. at 695 (Douglas, J., dissenting).

<sup>276</sup> See *supra* note 260.

ment of another. These two participants would be subject to the mandatory forfeiture of their houses in addition to all other penalties prescribed by law; their co-conspirators would suffer no such penalty.

Another objection is procedural. The forfeiture of instrumentalities is more likely than any other forfeiture to involve the interests of innocent third parties, especially when the government seeks to forfeit real property. Such third parties have standing to intervene in civil *in rem* forfeitures, in which they may litigate all issues, including whether their property was in fact used to facilitate a crime. After their property is identified as subject to forfeiture in a criminal indictment, however, they have no right to intervene<sup>277</sup> and have, in fact, no legal remedy until the conclusion of criminal proceedings. They are then relegated to an independent action, without the right to a jury trial,<sup>278</sup> in which the fundamental issue of whether their property has been used to facilitate crime may be barred by *res judicata*.<sup>279</sup>

Finally, there is simply no principled justification for making the forfeiture of the instrumentalities of crime into a mandatory criminal punishment. The forfeiture of proceeds is precisely retributive, effectuating the principle that the criminal shall not profit by his crime. The added penalties of fine and imprisonment are defined by the legislature in rough proportion to society's view of the seriousness of the offense in the abstract. The judge fixes them after considering the character of the criminal and the circumstances attending his particular offense. But the forfeiture of instrumentalities of crime in general and of real property in particular, as an automatic consequence of conviction, is perfectly arbitrary and even smacks of superstition. In effect, the injustice of massive civil forfeitures for often trivial offenses has been grafted onto the criminal statutes.

### 3. *The Forfeiture of Interests in an Enterprise as a Punishment*

The great originality of RICO as an anti-racketeering statute lies in its concept of enterprise forfeiture. *La Cosa Nostra* and newer branches of organized crime have gained a footholds in a few industries and especially in a number of important trade unions. They

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<sup>277</sup> 21 U.S.C.S. § 853(k)(1) (Law. Co-op. Supp. 1987).

<sup>278</sup> See *Schwarz v. United States*, 582 F. Supp. 224, 227 (D. Md. 1984).

<sup>279</sup> There are no reported decisions on this point. But see *United States v. Raimondo*, 721 F.2d 476, 478 (4th Cir. 1983), *cert. denied*, 469 U.S. 837 (1984)(dictum)(determination at criminal trial that certain property constituted profits of CCE violations not binding upon defendants' attorneys, as they were not parties.).

have purchased such foothold with the proceeds of wholly illegal businesses like drug dealing, gambling and loansharking, perhaps originally to provide a cover for the continuation of such businesses, to "launder" such proceeds, and to provide an apparent source for declared income. From the first, however, mobsters conducted their legitimate businesses with the same methods of violence smoothed over by political corruption that have served them in their rackets.<sup>280</sup>

The insight of the RICO draftsmen was that the Mob's hold on legitimate businesses would be substantially unaffected by targeting individuals, even those at the head of their enterprises, and convicting them for particular crimes. The problem was the conduct of legitimate businesses by a pattern of criminal means. The chosen remedy was to criminalize both the acquisition<sup>281</sup> and management<sup>282</sup> of the businesses through racketeering activity. The ultimate aim was the liberation of such businesses and their honest competitors from predatory control.<sup>283</sup> With this in mind, the criminal penalty for racketeering should be forfeiture of the defendant's interest in the business to the federal government, preventing the succession of new mobsters to replace those convicted.<sup>284</sup>

This was a worthy, and remains an essentially workable, idea. It has been tainted, however, by the fact that RICO has not been directed primarily against organized crime activity of the sort described above, but against political corruption, ordinary fraud, bid-rigging, fraud in the sale of securities, and breaches of private fiduciary duty. Such prosecutions flow naturally from the broad variety of predicate offenses listed in 18 U.S.C. § 1961(1) and particularly from the inclusion of mail and wire fraud.<sup>285</sup> These latter statutes

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<sup>280</sup> The infiltration of legitimate business by organized crime has been a common theme of Congressional hearings and legislative reports over the years. See, e.g., S. REP. No. 2370, 81st Cong., 2d Sess. 16 (1950); S. REP. No. 307, 82nd Cong., 1st Sess. 170 (1951)(Kefauver Committee); S. REP. No. 617, 91st Cong., 1st Sess. 76-78 (1969).

<sup>281</sup> 18 U.S.C. § 1962(b) (1982).

<sup>282</sup> 18 U.S.C. § 1962(c) (1982).

<sup>283</sup> "If we take back the labor unions, the legitimate businesses, eventually they [the Mafia] become just another street gang." McFadden, *The Mafia of the 1980's: Divided and Under Siege*, N.Y. Times, March 11, 1987, at A1, col. 1 (quoting United States Attorney Rudolph Giuliani).

<sup>284</sup> See Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 245 n.25 (1982)(Professor Blakey was a principal draftsman of RICO).

<sup>285</sup> 18 U.S.C. §§ 1341, 1343 (1982). The statutes make it a felony to use the mails, wire, radio, or television communications in interstate commerce for the purpose of executing a scheme or artifice to defraud or for obtaining money or property by false pretenses. Such use is a prerequisite for federal criminal jurisdiction under the commerce clause, U.S. CONST. art. I, § 8, cl. 3, but any use of the telephone or of the mails incident-

have been described by one court as "seemingly limitless" in their reach.<sup>286</sup> They make federal crimes of such local concerns as filing false state income tax returns.<sup>287</sup> They have been used to criminalize torts<sup>288</sup> and offenses against professional ethics,<sup>289</sup> a result which has roused the passionate opposition of critics.<sup>290</sup> They have also provided federal prosecutors with a roving commission against local political corruption which they have not hesitated to employ.<sup>291</sup>

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tal to an essential part of the scheme is sufficient to confer jurisdiction. *See, e.g.,* United States v. Vardell, 760 F.2d 189, 191 (8th Cir. 1985)(mail fraud); United States v. Curry, 681 F.2d 406, 411-12 (5th Cir. 1982)(mail fraud); United States v. Johnson, 713 F.2d 633, 644-45 (11th Cir. 1983)(wire fraud), *cert. denied*, 465 U.S. 1081 (1984); United States v. Hammond, 598 F.2d 1008, 1010, *rehearing denied* 605 F.2d 862 (5th Cir. 1979)(wire fraud)(sufficient that the defendant intended the communication to further the scheme or fraud; no proof of actual furtherance required).

<sup>286</sup> United States v. Standard Drywall Corp., 617 F. Supp. 1283, 1290 (E.D.N.Y. 1985)(mail fraud statute "applies to an employer's scheme to defraud employee benefit funds of workers with whom he has a collective bargaining agreement of contractually mandated benefit contributions.").

<sup>287</sup> United States v. Miller, 545 F.2d 1204, 1216 n.17 (9th Cir. 1976), *cert. denied*, 430 U.S. 930 (1977).

<sup>288</sup> *See, e.g.,* Carpenter v. United States, 108 S. Ct. 316, 320 (1987)(reporter's use of advance knowledge of contents of Wall Street Journal column for personal profit by trading on his own account was mail fraud); United States v. Conner, 752 F.2d 566 (11th Cir. 1985)(self-dealing by officer of agricultural co-operative in phosphate holdings), *cert. denied*, 474 U.S. 821 (1985); United States v. Newman, 664 F.2d 12 (2d Cir. 1981), *cert. denied*, 464 U.S. 863 (1983)(breach of duty to disclose material information to an employer).

<sup>289</sup> *See, e.g.,* United States v. Bronston, 658 F.2d 920 (2d Cir. 1981)(despite absence of any evidence that client was harmed, attorney was convicted for personally representing a client in a known conflict of interest with another client of his firm, without disclosing such conflict), *cert. denied*, 456 U.S. 915 (1982).

<sup>290</sup> *See* Coffee, *The Metastasis of Mail Fraud: The Continuing Story of the "Evolution" of a White-Collar Crime*, 21 AM. CRIM. L. REV. 1 (1983); Coffee, *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line between Law and Ethics*, 19 AM. CRIM. L. REV. 117 (1981); Comment, *The Intangible Rights Doctrine and Political Corruption Prosecutions under the Federal Mail-Fraud Statute*, 47 U. CHI. L. REV. 562 (1980)(legislative history of mail-fraud statute reveals that it was intended to proscribe only the use of the mail to obtain property by false pretenses).

<sup>291</sup> *See* McNally v. United States, 107 S. Ct. 2875, 2883 n.1 (1987). McNally has called into question the continued use of the mail and wire fraud acts in the prosecution of public officials by striking down the "intangible rights" doctrine. Under this interpretation, the statutes criminalized the deprivation of the citizens of a state or local government of their "right to have the affairs of [the defendant's office] conducted honestly, fairly, and free from corruption, dishonesty, fraud, and conflicts of interest." United States v. Best, 657 F. Supp. 1179, 1181 (N.D. Ill. 1987)(quoting from the indictment). The prosecution was thus relieved of the necessity of proving any financial benefit to the defendant or injury to the state. The Hobbs Act, 18 U.S.C. § 1951 (1982), whose violation is also a predicate offense under RICO, 18 U.S.C.S. § 1961(1) (Law. Co-op. Supp. 1987), has been expansively interpreted in just the same way. The Act prohibits the extortion of property, but "property" has been extended to include, for example, the right of union members to have the affairs of their union conducted democratically in accordance with the Labor-Management Reporting and Disclosure Act, 29 U.S.C.



Mail and wire fraud have become so elastic that they are the most common predicate offenses under RICO,<sup>292</sup> while the addition of RICO counts has made enterprise forfeiture a common penalty in mail fraud cases.<sup>293</sup> Such forfeiture, however, is nearly always an excessive and inappropriate punishment. An example is *United States v. Horak*.<sup>294</sup> Horak owned a garbage disposal business, which he sold to a large corporation in exchange for valuable stock and a contract retaining his services as manager. Without the knowledge or participation of anyone in the parent company, he bribed the mayor of a village to award his division a contract even though it was not the low bidder. Horak was indicted for mail fraud; the jurisdictional predicate was the fact that contract payments were mailed. Apparently his payment of the bribe in successive installments furnished the pattern of racketeering necessary to support a RICO indictment.

The bribe paid was \$12,000.<sup>295</sup> The gross revenues under the contract totalled \$483,000.<sup>296</sup> The reported facts unfortunately do not include the division's net profits from performing the contract or the loss suffered by the village from its failure to accept the lowest bid. The government did not seek to forfeit gross receipts or net profits; rather, it demanded Horak's stock in the parent company, purchased 10 years before, and valued at \$8.5 million, as well as the forfeiture of his employment contract, his vested pension and profit sharing rights, and his entire salary and bonuses totalling \$305,000 over five years.<sup>297</sup> Horak had not acquired the stock with the proceeds of his wrongdoing. Rather, the government claimed that the stock was an "interest" in an "enterprise which [the defendant has]

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§ 411(a) (1982). See *United States v. Local 560 of Int'l Bhd. of Teamsters*, 780 F.2d 267, 281 (3d. Cir. 1985).

In *McNally*, however, the Supreme Court invalidated the mail fraud convictions of a Kentucky state official and the chairman of the state Democratic party who conspired "to place the State's workmen's compensation insurance with a particular agency in exchange for that company's agreement to share a major portion of its commissions with a list of agents provided by the officials, including sham agencies under the control of the officials themselves." 107 S. Ct. at 2882 (Stevens, J., dissenting). The gravamen of their offense was the concealment of this arrangement from "other persons in the state government whose actions could have been affected by the disclosure," 107 S. Ct. at 2882 n.9, and not any financial loss to the state.

A bill reversing the result in *McNally* is presently before the Congress. H.R. 3089, 100th Cong., 1st Sess. (1987).

<sup>292</sup> PRACTISING LAW INSTITUTE, CIVIL RICO 1986, at 52 (1986).

<sup>293</sup> See Lynch, (*Parts I & II*), *supra* note 28, at 750-55.

<sup>294</sup> 833 F.2d 1235 (7th Cir. 1987).

<sup>295</sup> *Id.* at 1238.

<sup>296</sup> 633 F. Supp. at 201 (N.D. Ill. 1986).

<sup>297</sup> *Id.* at 200.

. . . participated in the conduct of, in violation of § 1962(c)."<sup>298</sup>

If one assumes that the parent company was the RICO enterprise, the government was undoubtedly right as a matter of statutory construction.<sup>299</sup> But the district court refused to forfeit Horak's shares in the parent company, while forfeiting the other listed property.<sup>300</sup> The district court held that an "interest" must "afford . . . a source of influence over" an enterprise for it to be forfeit, whereas Horak's shares, fewer than one percent of those outstanding, afforded him no such influence. The Seventh Circuit agreed with the government that this result was "probably incorrect,"<sup>301</sup> and that the statute does not require such influence,<sup>302</sup> but declined to vacate the district court's sentence on the grounds that it was not appealable under 18 U.S.C. § 3731.<sup>303</sup> The court acknowledged that it had the power to issue a writ in the nature of mandamus ordering correction of the sentence<sup>304</sup> but declined to do so because the government's argument was not "indisputable."<sup>305</sup>

Thus both the district court, by a strained construction of the statute, and the appeals court, by refusing to exercise its authority, avoided ordering the forfeiture of Horak's stock. In this way they both avoided dealing with the constitutional questions posed by interest forfeiture. The district court questioned whether Congress could constitutionally require the forfeiture of assets which have no

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<sup>298</sup> *Id.* at 190, 198 (quoting 18 U.S.C. § 1963(a)(2) (1982)).

<sup>299</sup> See *infra* note 302.

<sup>300</sup> 633 F. Supp. at 199-200. The district court held that an "interest" must "afford . . . a source of influence over" an enterprise for it to be forfeit, *id.* at 197, whereas Horak's shares, less than one percent of those outstanding, afforded him no such influence, *id.* at 200. The court characterized Horak's investment in the parent as a "fortuity" essentially unconnected with his wrongdoing, *id.* at 199.

<sup>301</sup> 833 F.2d at 1250.

<sup>302</sup> The statute provides in the alternative for the forfeiture of "any interest in . . . any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1968" or, *inter alia*, "any property or contractual right of any kind affording a source of influence over . . . any enterprise. . .," 18 U.S.C. § 963(a)(2)(A), (D) (Supp. III 1985). The implication is that all ownership interests are forfeit, but a contractual right is only forfeit if it is a source of influence over the enterprise—a contract for employment as vice-president, for example, as opposed to a vested interest in a pension fund.

The district court's principal argument was that unless an interest, to be forfeitable, must afford a source of influence over the enterprise, it is impossible to distinguish the property described in § 1963(a)(2) from that described in § 1963(a)(1). The latter subsection makes forfeitable an interest "acquired or maintained in violation of section 1962," 18 U.S.C. § 1963(a)(1) (Supp. III 1985). But § 1963(a)(1) refers to the mode of acquisition of the interest, whereas § 1963(a)(2) refers to the mode of operation of the enterprise—a perfectly intelligible distinction.

<sup>303</sup> *Horak*, 833 F.2d at 1246-48.

<sup>304</sup> *Id.* at 1248.

<sup>305</sup> *Id.* at 1250.

connection to the underlying racketeering activity and, if it could, whether such forfeiture might not raise a serious danger of disproportionate punishment.<sup>306</sup> The appeals court said that a construction of the statute which makes mandatory the forfeiture of a defendant's entire interest in the enterprise for any RICO offense, constrained only by the eighth amendment, "gives us pause."<sup>307</sup> The appeals court was also troubled by the element of "prosecutorial caprice"<sup>308</sup> involved in defining the parent company as the "RICO enterprise."

Other courts have been troubled by the risk of disproportionate punishment posed by enterprise forfeiture.<sup>309</sup> But apart from the limits imposed by the eighth amendment, there is simply no argument, on policy grounds, for providing that any corporate officer who wrongfully diverts a corporate opportunity, takes improper advantage of inside knowledge, rigs a bid or pays a bribe should be punished by forfeiture of his entire business or interest therein, built up over many years of hard and presumably honest labor. Enterprise forfeiture seems even more inappropriate for the violation of an administrative regulation such as disposing of hazardous wastes without a permit, but the government is now seeking such a forfeiture.<sup>310</sup> The statute already provides that a defendant entrepreneur shall forfeit the profit derived from his or her wrongdoing; enterprise forfeiture is by statute an additional penalty, only accidentally correlated to the seriousness of the offense and the magnitude of the profits.<sup>311</sup> In fact, enterprise forfeiture for ordinary

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<sup>306</sup> *Horak*, 633 F. Supp. at 199.

<sup>307</sup> 833 F.2d at 1251.

<sup>308</sup> *Id.*

<sup>309</sup> Similar doubts were expressed in *United States v. Marubeni America Corp.*, 611 F.2d 763, 769 n.12 (9th Cir. 1980), and in *United States v. Huber*, 603 F.2d 387 (2d Cir. 1979)(forfeiture of defendant's interest in medical supply business for inflated bills), *cert. denied*, 445 U.S. 927 (1980):

We further note that where the forfeiture threatens disproportionately to reach untainted property of a defendant, for example, if the criminal and legitimate aspects of the "enterprise" have been commingled over time, section 1963 permits the district court a certain amount of discretion in avoiding draconian (and perhaps potentially unconstitutional) applications of the forfeiture provision.

*Huber*, 603 F.2d at 397. Unfortunately, nothing in the text of the statute suggests the existence of any such discretion.

<sup>310</sup> *Shabecoff*, *U.S. Brings Racketeering Charge in a Waste Case*, N.Y. Times, April 29, 1988, at A11. Of course, disposing of hazardous waste without a permit is not a predicate offense under RICO. The defendant, president of a waste disposal company, was charged with mail fraud—assuring a customer that it could dispose of contaminated soils legally without a permit and then advising an employee to give false testimony before the grand jury. The indictment sought forfeiture of the defendant's entire interest in the company and all sums he had received from the company from 1983-86.

<sup>311</sup> This objection is directed to forfeiture under 18 U.S.C. § 1963(a)(2) (Supp. III

white-collar crime will necessarily fall most heavily upon one who has been scrupulously honest in building up his business until the time of his lapse<sup>312</sup> and upon the corporate officer who has been well rewarded with stock options for his faithful services. This objection is in principle no different from the one already advanced against the forfeiture of instrumentalities of crime as a criminal punishment.<sup>313</sup> This is not surprising, because a common feeling (one hesitates to call it an *idea*) underlies both punishments. The criminal used his car when he went to buy drugs; he deserves to lose his car. The businessman committed a crime in the management of his business; he deserves to lose his business. This is retribution of a particularly crass and irrational kind. It is justifiable, if at all, only if the apparently legitimate business is a mere facade for a criminal enterprise, as in the case of a motel which is really a brothel.<sup>314</sup>

One class of enterprise forfeitures authorized by RICO—the potential forfeiture of such businesses as publishing houses, movie studios, radio or television stations, or chains of bookstores or convenience stores, for the violation of state or federal obscenity laws.<sup>315</sup>—is objectionable for additional reasons. The prospect of enterprise forfeiture may chill the assertion of first amendment

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1985), of property in or rights against any enterprise operated or managed in violation of 18 U.S.C. § 1962 (1982). The forfeiture of an interest "maintained in violation of section 1962," 18 U.S.C. § 1963(a)(1) (Supp. III 1985), is similarly objectionable. Many white-collar crimes are for the benefit of an enterprise, and thus serve indirectly to "maintain" the perpetrator's interest in the enterprise by enhancing its value.

On the other hand, forfeitures of interests in an enterprise acquired in violation of § 1962, 18 U.S.C. § 1963(a)(1) (Supp. III 1985) are appropriate. Section 1963(a)(1) makes criminal the acquisition of a business interest "through a pattern of racketeering activity or through collection of an unlawful debt." The drafters had in mind such traditional practices as taking title to a business in payment for a grossly usurious loan or gambling debt. The wrongdoer should forfeit such illegal acquisitions, which are, in fact, proceeds of crime.

<sup>312</sup> *United States v. Weatherspoon*, 581 F.2d 595 (7th Cir. 1978), illustrates this type of forfeiture. The government originally sought forfeiture of all assets of a beauty college whose proprietor falsely certified to the Veterans Administration the hours of attendance of the students and enrolled numbers of students in excess of the authorized limit. Clearly the proprietor should restore all funds gained by her misrepresentations to the government in addition to other statutory penalties, but loss of the business is an arbitrary and draconian punishment.

<sup>313</sup> See *supra* notes 276-79 and accompanying text.

<sup>314</sup> *United States v. Tunnell*, 667 F.2d 1182 (5th Cir. 1982) (forfeiture of motel upheld when defendant corrupted public officials over several years to purchase immunity from prosecution for his prostitution business).

<sup>315</sup> RICO defines "racketeering activity" to include acts chargeable under state criminal statutes concerning "dealing in obscene matter and punishable by imprisonment for more than one year," 18 U.S.C.A. § 1961(1)(A) (West Supp. 1987), as well as acts indictable under 18 U.S.C. §§ 1461-65, concerning the mailing and transporting of obscene matter and the broadcasting of obscene or profane language, 18 U.S.C.A. § 1961(1)(B) (West Supp. 1987). As always, the government would be required to show that the af-

rights. A businessperson might run the risk of a fine as the price of obtaining a judicial determination whether certain material was legally obscene. He or she will hesitate to run the risk of forfeiture of the business, or even of the premises where the sale took place. The result will certainly be self-censorship. What is more, such enterprise forfeitures will result in the confiscation of, for example, a bookstore's entire stock in trade, much of which may not be legally obscene, without any determination of obscenity for each individual item. However persuasive these arguments may seem, they have been emphatically rejected by several courts.<sup>316</sup>

Thus RICO enterprise forfeiture is an often disproportionate

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fairs of the enterprise were conducted through a pattern of racketeering activity, in this case two or more obscenity offenses. 18 U.S.C. §§ 1962(c), 1963(a)(2) (Supp. III 1985).

The Reagan administration has proposed the inclusion of child pornography offenses, 18 U.S.C. § 2251-52 (Supp. III 1985), in the definition of racketeering activity, President's Message to Congress Transmitting the Protection and Obscenity Enforcement Act of 1987, 133 CONG. REC. S16093 (daily ed. Nov. 10, 1987).

<sup>316</sup> See generally *United States v. Pryba*, 674 F. Supp. 1504 (E.D. Va. 1987). The defendants owned and operated several video stores that allegedly sold obscene materials. They were indicted under RICO for conducting an enterprise through a pattern of racketeering activity, *viz.* dealing in obscene matter, but the government apparently sought to forfeit, not the enterprise itself, but assets (including a business) allegedly acquired with the proceeds of the sale of obscene material. On the day the indictment was handed down, the government obtained an *ex parte* restraining order, later modified, prohibiting the defendants from selling all "video tapes, magazines, and other printed material." *Id.* at 1508.

The defendants moved to dismiss the indictment on the grounds that the prospect of draconian punishment by RICO forfeitures will have a chilling effect on the willingness of persons desiring to engage in questionable but protected speech to do so, and thus functions as a constitutionally impermissible prior restraint. *Id.* at 1512. The court gave this argument short shrift, holding that the "chilling effect" doctrine refers only to obscenity statutes which give insufficient notice of what speech is prohibited, unlike the Virginia statute whose violation was the predicate RICO offense. *Id.* at 1511. Nor can the threat of a subsequent punishment, however severe, be a prior restraint. *Id.* at 1513. The court distinguished the case before it from *Arizona v. Feld*, No. 148389 (Ariz. App. 1987), which involved the forfeiture of a business conducted in violation of state RICO, and thus of much property "essentially unconnected with the racketeering activity." *Id.* at 1514. The thrust of the opinion, however, is that RICO enterprise forfeiture is constitutional as a punishment for the sale of obscene material, limited only by the general proportionality requirements of the Eighth Amendment. *Id.* at 1516-17.

The Indiana Supreme Court has upheld the constitutionality of a similar forfeiture in *4447 Corporation v. Goldsmith*, 504 N.E.2d 559, *rehearing denied*, 509 N.E.2d 174 (Ind. 1987), *cert. granted* 108 S. Ct. 1106 (1988), concerning two civil forfeiture actions brought by local prosecutors under the Civil Remedies for Racketeering Activity Statute, IND. CODE ANN. §§ 34-4-30.5-1 to 35-45-6-2 (West 1987), each alleging that several bookstores owned by a corporation constituted an enterprise intentionally conducted through a pattern of racketeering activity in violation of Indiana RICO, IND. CODE ANN. § 35-45-6-2(a)(3) (West 1987). The predicate offense was the distribution of obscene matter in violation of Indiana law. IND. CODE ANN. § 35-45-6-1 (West 1987). The prosecutors sought to enjoin the RICO violations and to seize assets of the corporations allegedly subject to forfeiture as "property used in the course of, intended for use in the

punishment which may in some circumstances threaten first amendment rights. However, such forfeitures were not conceived of as retribution or even as punishment, except incidentally. They were intended as a weapon against the corruption of legitimate business by criminal methods. As such they are potentially very useful. At first glance, the problem with RICO seems to be that the predicate offenses listed are too extensive; perhaps mail and wire fraud in particular should be deleted. Yet the breadth of the list of predicate offenses was deliberate, and is based upon the sound insight that the categories of the criminal statutes do not correspond, and cannot be made to correspond to the distinction between the activities of organized crime when it goes into business and white-collar crime.<sup>317</sup>

It is more useful to ask whether organized crime has an identifiable "fingerprint" the presence of which might trigger the remedy of enterprise forfeiture. Coercion, usually involving at least an implied threat of violence, is the hallmark of the mobster in legitimate business or in control of a trade union and might serve as such a "fingerprint." A thumbnail sketch of the aims and methods of organized crime involvement in commerce will serve to demonstrate this fact. A major aim of racketeers, as well as their most consistent source of profit, is the organization of some target industry, whether vending machines, laundry services, beer distribution, or the supply

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course of, derived from, or realized through, conduct in violation of [state RICO]." *Goldsmith*, 504 N.E.2d at 561 (citing IND. CODE ANN. § 34-4-30.5-3(a) (West 1987)).

In one case, the trial court issued an injunction *ex parte* ordering the Indianapolis Police Department to seal the premises where a third bookstore operated by the same company was due to open, on the strength of an affidavit that a police officer had purchased sexually explicit movies in the two other stores and saw similar materials exhibited for sale. *Id.* at 562. In the other case, persons involved with the enterprise, which also operated three bookstores, had been convicted 39 times of obscenity offenses in less than three years. The police seized the contents of the three bookstores under an *ex parte* order. *Id.*

The Indiana Court of Appeals held that this mode of proceeding violated the first amendment prohibition on prior restraint of speech and the fourteenth amendment due process clause. *Id.* at 560. The Indiana Supreme Court, however, held that the suppression of obscene materials was neither the purpose nor effect of the forfeiture. The trial court was not judging the content of any books seized, but the activities of the enterprises. All the assets of the enterprises, whether obscene or not, were seized because they were "the proceeds of racketeering activity." *Id.* at 566-67.

No evidence was introduced before the trial court, however, that any of the assets of the corporations were the proceeds of the sale of obscene matter. Arguably the property seized was "used in the course of, [or] intended for use in the course of . . . [RICO violations]." IND. CODE ANN. § 34-4-30.5-3(a) (West 1987). But it is difficult to see how the non-obscene materials seized fit into this category. The Indiana Supreme Court, in effect, upheld an enterprise forfeiture not expressly authorized by the state statute.

<sup>317</sup> It may be that offenses against the mail and wire fraud statutes have been too broadly defined, but that is an independent policy problem.

of concrete, into a cartel.<sup>318</sup> The market is then divided among cartel members through collusive bidding or more directly, for example, by enforcing the use of members' services as subcontractors. Apart from the prospect of oligopoly profits there are other avenues of profit such as hijacking, pilferage, and insurance fraud, all of which members may be compelled to tolerate.

Not every industry is susceptible to mob domination, however. Ideal candidates are usually untechnological, labor-intensive, inherently local, and often, but not always, service-oriented businesses. These characteristics make them particularly subject to coercion. The small firms in the industry, often operating close to the margin, are easily threatened and easily bought. Sometimes an ethnic tradition in an industry can be exploited. Businesspersons already in the industry do not necessarily find it objectionable to be organized into cartels, as they see a prospect of security and certain profits. This fact does not negate the importance of coercion in policing the ranks and excluding new entrants.<sup>319</sup>

This coercion takes many forms. It can, of course, be crude and direct, such as arson, attacks on workers, and the like. However, the most sophisticated and successful coercion lies in the manipulation of the labor force, both the employees of the business and those of crucial outside suppliers. In easily dominated industries, the work force is relatively low-paid, ill-educated, and often drawn from vulnerable fringe groups like illegal aliens. Such an industry, in fact, is best organized and dominated through control of its major union, because labor laws actually create and enforce a quasi-monopoly of the most significant productive input.<sup>320</sup> Strikes, slow-downs, and picket lines, or the threat thereof, may easily induce the recalcitrant to pay "strike insurance," while their mob owned or mob dominated

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<sup>318</sup> P. REUTER, *DISORGANIZED CRIME: THE ECONOMICS OF THE VISIBLE HAND* 114-31 (1983). Reuter applied industrial organization analysis to demonstrate why illegal rackets such as sports gambling, numbers, and loansharking are necessarily small and ill-organized, and drew upon sociological, rather than anecdotal, research to show that nationwide or even local domination of such rackets by the Mafia is a myth. Reuter's analysis at least demonstrates the decisive advantages that organized crime enjoys in penetrating and dominating legitimate commerce.

<sup>319</sup> This description of the conditions of organized crime penetration of legitimate business is drawn from a variety of sources, including A. ANDERSON, *THE BUSINESS OF ORGANIZED CRIME* (1979); D. CRESSEY, *THEFT OF THE NATION* (1969); and Reuter, *Racketeers as Cartel Organizers*, reprinted in *THE POLITICS AND ECONOMICS OF ORGANIZED CRIME* 49 (H. Alexander & G. Caiden, eds. 1985).

<sup>320</sup> The FBI has determined that the International Longshoremen's Association, the Hotel Employees and Restaurant Employees International Union, the International Brotherhood of Teamsters and the Laborers International Union of North America are dominated by organized crime. *THE EDGE*, *supra* note 55, at xvi.

competitors enjoy labor peace in the form of "sweetheart" contracts. Mob owned businesses may also benefit from cheap capital either borrowed directly from union benefit funds or from the banks in which such funds are deposited.<sup>321</sup> Of course control of such a union provides significant independent opportunities for profit through pension fund manipulations, no-show jobs,<sup>322</sup> exorbitantly expensive or phony contracts with service providers,<sup>323</sup> and kickbacks of all sorts.<sup>324</sup> Inside the union the simplest method of coercion is exclusion from work, but violence against troublemakers and dissidents is an old tradition.<sup>325</sup>

Such cartel organized industries in the New York area are reported to include private garbage disposal, concrete and cement supply, and fish and meat distribution.<sup>326</sup> Corrupt national unions like the Teamsters and Laborers, through their control of production "chokepoints" like the delivery of materials, assist organized crime in its domination of these industries.<sup>327</sup> Organized crime domination of such industries injures the economy because it stifles competition and raises prices, and it demoralizes owners and workers alike who find themselves living perforce within a criminal subculture.<sup>328</sup>

Enterprise forfeiture or forced divestiture may well be the most effective weapon against such organized crime activities, which have

<sup>321</sup> Blakey & Goldstock, "On the Waterfront": *RICO and Labor Racketeering*, 17 AM. CRIM. L. REV. 341-46 (1980). Blakey and Goldstock provide an excellent overview of the methods of labor racketeering.

<sup>322</sup> Organized crime members find highly-paid union sinecures very useful in providing a reportable source of income, making prosecution for tax evasion more difficult. R. RHODES, ORGANIZED CRIME: CRIME CONTROL VS. CIVIL LIBERTIES 231 (1984).

<sup>323</sup> See, e.g., *United States v. Caporale*, 806 F.2d 1487 (11th Cir. 1986) (health care providers to the Laborers International Union of North America paid kickbacks to union officers disguised as payments for clerical and other services to straw corporations), *cert. denied*, 107 S. Ct. 3265 (1987).

<sup>324</sup> R. RHODES, *supra* note 322, at 209-231.

<sup>325</sup> The memory of the murders of two dissidents in Local 560, International Brotherhood of Teamsters in 1961 and 1963 was still a powerful check on dissent in 1985. PRESIDENT'S COMMISSION ON ORGANIZED CRIME, HEARING VI: ORGANIZED CRIME AND LABOR-MANAGEMENT RACKETEERING IN THE UNITED STATES 733, 740-44 (1985) [hereinafter HEARING VI] (statement of Robert C. Stewart, Newark Strike Force).

<sup>326</sup> *Id.* at 745. For organized crime domination of fish distribution, see Lubasch, *Mafia Runs Fulton Fish Market, U.S. Says in Suit to Take Control*, N.Y. Times, October 16, 1987, at A1, col. 3.

<sup>327</sup> Hearing VI, *supra* note 325 at 21, 23. See, e.g., *United States v. Robilotto*, 828 F.2d 940 (2d Cir. 1987) (teamsters local compelled movie studio through strike threats to hire "cover drivers who did not work").

<sup>328</sup> "The persistence of racketeering in certain segments of the economy . . . advertises an apparent structural flaw in our political institutions . . .," Blakey & Goldstock, *supra* note 321, at 342.



remarkable powers of self-perpetuation.<sup>329</sup> However, enterprise forfeiture as a criminal punishment under RICO, if it is retained at all, might be limited to cases in which the defendant is charged with the commission of at least one predicate offense which necessarily involves violence or the threat of violence.<sup>330</sup> Enterprise forfeiture might also be permitted if the prosecution proved that the defendant used violence or intimidation in connection with any one predicate offense, because a number of offenses, like tampering with witnesses or obstruction of justice, may or may not involve violence in any given case. In this way a demonstration of the "fingerprints" of organized crime becomes, not an element of the offense, but a precondition for the application of one out of a several remedies.<sup>331</sup> It should be noted that the prosecution may prove intimidation by indirect means, for example, by showing that the defendant had a reputation for violence and exploited such reputation, thereby putting the victim in fear without saying a word.<sup>332</sup> Courts could add a question about the occurrence of such intimidation to the special verdict form already used by the jury in RICO forfeiture cases.<sup>333</sup>

Another possibility would be to abolish enterprise forfeiture as a criminal punishment. There is no evidence that the government has made any progress toward the goal of expelling organized crime from legitimate business through criminal forfeiture.<sup>334</sup> Making any one person, no matter how powerful, forfeit his interest in a crimi-

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<sup>329</sup> The most notorious example is probably the 30-year reign of elements of the Provenzano organized crime family over Local 560 of the International Brotherhood of Teamsters in New Jersey. HEARING VI, *supra* note 325, at 739.

<sup>330</sup> Such offenses include murder, kidnapping, arson, robbery, and extortionate credit transactions, 18 U.S.C. § 891(b) (1982)(loans wherein "it is the understanding of the creditor and the debtor" that delay or failure in repayment "could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person."), retaliating against a witness, victim, or informant, 18 U.S.C. § 1513 (1982), and possibly theft from interstate shipment, 18 U.S.C. § 659 (1982). Because an important purpose of RICO is to stop the Mob's infiltration and control of unions, it is perhaps surprising that violation of 29 U.S.C. § 530 (1982) is not a predicate offense. Section 530 criminalizes the coercion or intimidation of a union member through force and violence or the threat of violence, depriving him of his statutory rights. Apparently, it has mostly been invoked to punish simple battery. See *United States v. Local 560 of Int'l Bhd. of Teamsters*, 780 F.2d 267, 282 (3d Cir. 1986).

<sup>331</sup> It is of course true that this test may result in enterprise forfeiture against defendants who have no connection with traditional organized crime. Enterprise forfeiture seems an appropriate penalty when a defendant firebombs the competing nightclub of a former partner, as in *United States v. Anderson*, 782 F.2d 908, 917-18 (11th Cir. 1986).

<sup>332</sup> *United States v. Local 560 of Int'l Bhd. of Teamsters*, 780 F.2d 267, 275-77 (3d Cir. 1986).

<sup>333</sup> FED. R. CRIM. P. 31(e).

<sup>334</sup> See *Lynch, (Parts I & II)*, *supra* note 28, at 724-29 (survey of all reported RICO prosecutions reveals only a "handful" of cases concerning infiltration or acquisition of legitimate businesses by organized crime, and those were trivial).

nally managed enterprise does not disturb the continuity of mob control any more than does his imprisonment. What is needed is a means of taking the enterprise as a whole away from the racketeering group without the necessity of identifying and convicting each member of the group of specific RICO offenses. Curiously, the means are at hand, though scarcely ever used, in the form of civil proceedings under 18 U.S.C. § 1964,<sup>335</sup> perhaps amended to include a "violent means" test as outlined above. This statute confers power upon the Justice Department to seek to divest RICO offenders of their interest in an enterprise, to bar them from further activities in the same field, and to reorganize or dissolve the enterprise if necessary.

The best feature of this approach is that divestiture is not forfeiture, for presumably the defendant may sell his interest to approved buyers. The racketeer will lose his opportunity for future profits from that particular investment, but a prohibition on future activities in the same field is not a criminal punishment and requires no higher standard of due process than any form of delicensing.<sup>336</sup> Furthermore, the government may target the entire controlling group through a civil divestiture action without the necessity of proving that each member is personally guilty of RICO offenses beyond a reasonable doubt. Finally, it seems likely that injunctive relief, divestiture, or dissolution will rarely be sought except after one or more participants in the enterprise have been criminally convicted of RICO offenses, because such a conviction works an estoppel, making the government's task far easier.<sup>337</sup>

The government did not bring a civil RICO action seeking divestiture until 1982,<sup>338</sup> and has rarely sought to enjoin the continued participation of a violator in a business or industry.<sup>339</sup> The Newark Organized Crime Strike Force has now successfully peti-

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<sup>335</sup> 18 U.S.C. § 1964 (1982 & Supp. III 1985).

<sup>336</sup> See *United States v. Cappetto*, 502 F.2d 1351 (7th Cir. 1974) (RICO civil divestiture is not punishment), *cert. denied*, 420 U.S. 925 (1975); *cf.* 28 U.S.C. § 3563(b)(6) (Supp. III 1986) (discretionary conditions of probation may include a requirement that the defendant refrain from engaging in certain occupations, businesses or professions "bearing a reasonably direct relationship to the conduct constituting the offense. . .").

<sup>337</sup> 18 U.S.C. § 1964(d) (1982).

<sup>338</sup> HEARING VI, *supra* note 325, at 734 (statement of Robert C. Stewart, Newark Strike Force).

<sup>339</sup> The only successful example known to the author is *United States v. Cappetto*, 502 F.2d 1351 (7th Cir. 1974) (injunction against continued participation in gambling enterprise and divestiture of building in which business was operated), *cert. denied*, 420 U.S. 925 (1975). *Cf.* *United States v. Winstead*, 421 F. Supp. 295, 296 (N.D. Ill. 1976) (crime may not be enjoined under 18 U.S.C. § 1964 (1982 & Supp. III 1985) without a showing that the defendants are likely to commit wrongful acts in the future).

tioned to place Teamsters Local 560 under a civil trusteeship,<sup>340</sup> and it is reported that the Justice Department is considering the same sort of action against the national union.<sup>341</sup>

Thus the forfeiture of an interest in a business as a punishment for criminal offenses in the conduct of such business is an arbitrary and disproportionate punishment in the great majority of cases of ordinary white-collar crime, especially in view of the broad scope of such predicate offenses as mail and wire frauds. On the other hand, criminal forfeiture is certainly appropriate where the business interest was acquired with the proceeds of crime,<sup>342</sup> and is probably appropriate when the interest was acquired illegally and coercively. To be fair, enterprise forfeiture must be confined to businesses and unions run by racketeering methods strictly understood. The goal is to stop and prevent the corruption of entire markets by violence and coercion, whether express or implied. This is best done civilly, making divestiture the objective of the action rather than the incidental by-product of a criminal conviction.

#### 4. *The Presumption of Forfeitability of Income from an Unknown Source*

One of the innovations of the Comprehensive Forfeiture Act of 1984 is the rebuttable presumption that property acquired at the time of a drug violation is subject to forfeiture if the government establishes that there was no likely source for the property other than through the violation.<sup>343</sup> This presumption is modeled after the "net worth" method of proving income often used by the Internal Revenue Service in both civil and criminal cases in the absence of accurate records.<sup>344</sup> The purposes of the presumption are to es-

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<sup>340</sup> See *United States v. Local 560 of Int'l Bhd of Teamsters*, 780 F.2d 267 (3d Cir. 1986).

<sup>341</sup> *Prial, U.S. Court Runs a Jersey Union in Test*, N.Y. Times, March 28, 1987, at A29, col. 2. The New York District Council of Cement and Concrete Workers consented to the court appointment of a trustee.

<sup>342</sup> Only one such case has actually been reported. *United States v. Williams*, 809 F.2d 1072, 1078-79 (5th Cir. 1987) (proceeds of drug sales used to purchase a printing company facing bankruptcy, which employed certain drug smugglers).

<sup>343</sup> 21 U.S.C.S. § 853(d) (Law Co-op Supp. 1987).

There is a rebuttable presumption at trial that any property of a person convicted of a felony under this title or title III is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that—

(1) Such property was acquired by such person during the period of the violation of this title or title III or within a reasonable time after such period; and  
(2) there was no likely source for such property other than the violation of this title or title III.

*Id.* See *supra* note 203 for an explanation of what offenses are covered "under this title or title III."

<sup>344</sup> I.R.C. § 446(b) (1986) authorizes the secretary to compute taxable income according to any appropriate method, if the taxpayer has kept no records or false ones or has

tablish the amount of proceeds of a drug offense and to assist in tracing them to particular property. These aims seem unexceptionable and the inference commonsensical. However, it is easy to imagine circumstances in which the use of the presumption will result in the forfeiture, not of the proceeds of the offense charged and proven, but of the proceeds of all crimes committed by the defendant around that time, including crimes for which the defendant was never indicted and which do not carry the penalty of criminal forfeiture. The statute does not authorize such forfeitures and probably could not constitutionally authorize them,<sup>345</sup> even if their application did not result in the imposition of a disproportionate forfeiture.<sup>346</sup> Moreover, in some cases the evidence required to invoke the presumption tends to prejudice the jury, and the defendant will be unable to rebut it without incriminating himself as to other offenses.

First consider the presumption as a rule of tracing. Suppose that the state has charged the defendant with the importation of a stated quantity of heroin with a wholesale value of \$50,000. Shortly after the commission of the offense, the defendant bought a house, paying \$50,000 down. If the government can show that there is no other likely source for the down payment, the defendant's interest in the house is forfeit. However, if the government cannot show this, or if the defendant rebuts the presumption by demonstrating another source for the down payment, even though the proceeds of

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used inaccurate accounting methods. "Net worth" reconstruction is only one such method approved by the courts. See Fed. Tax Guide Rep. (CCH) para. 2767.01 (Apr. 1, 1987).

<sup>345</sup> Congress probably could, despite long tradition, constitutionally revive forfeiture of estate, which amounts to the loss of all property, as a punishment for crime within the limits of the eighth amendment, see *supra* note 260, and certainly can and does impose fines many times in excess of the value of criminal gains. Congress has seen fit to make criminal forfeiture a penalty imposed only upon criminal conviction of specific offenses. It would, therefore, violate due process to forfeit the proceeds of other offenses, of which the defendant has not been convicted, as a punishment for such specific offenses.

Only a few cases have limited forfeitures to satisfy the requirement of a nexus between the crime and the forfeit property. In *United States v. Horak*, 833 F.2d 1235 (7th Cir. 1987), discussed *supra* at notes 294-308, the required nexus was causal. The district court had sentenced Horak to forfeit his "gross income and bonuses from January, 1981 until his conviction, and all corporate contributions to his pension and profit-sharing plans for the same time period," *id.* at 1241. The appellate court reversed and remanded for a factual determination of what portion of these benefits Horak would not have received "but for" his racketeering activities. *Id.* at 1243. In *United States v. McKeeithen*, 822 F.2d 310 (2d Cir. 1987), a duplex used in the drug business was forfeit. A six-unit apartment building not so used was not, even though it stood on the same lot. Since the lot could not be legally subdivided, the court ordered it to be sold and the proceeds apportioned between the defendant and the government.

<sup>346</sup> See *supra* note 260 and accompanying text.

the drug sale remain untraceable, the house is still forfeit as a substitute asset. The 1986 amendments to the Comprehensive Forfeiture Act, which introduced the forfeiture of substitute assets have rendered the presumption nugatory as a mode of tracing.<sup>347</sup>

The more important purpose of the presumption is to justify an inference of the value of criminal proceeds when such value is unknown. The government is not required to introduce any direct evidence of the earnings of a major drug dealer with no visible means of support. His or her property is presumed to come from drug dealings unless he or she shows otherwise.

Such a presumption would be highly useful, but the statutory language literally understood promulgates a much narrower presumption, and for good reason. The statute says that the government must show that the property at issue has no source other than "the violation" with which the defendant is charged. So stated, the inference dictated by the presumption is a tautology. If the government can establish that the defendant has property, acquired after the offense charged, with no other likely source, the property must have proceeded from the offense and is therefore subject to forfeiture. The judge could probably so charge the jury in the absence of a statute.<sup>348</sup> So interpreted, however, the presumption is of little practical use. To prove that "there was no likely source for such property other than the violation of this title," the government must demonstrate that the property did not originate from some other crime.<sup>349</sup> It is impossible to prove such a negative, no matter how inclusively the indictment is drawn. Even if the defendant is

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<sup>347</sup> See *supra* note 78. One might imagine that the "tracing presumption" remains useful as a basis for seizing or enjoining the transfer of property before trial pursuant to 21 U.S.C.S. § 853(e)(1) (Law. Co-op. Supp. 1987). However, the § 853(d) presumption may only be invoked "at trial," and for good reason. First, it is obviously inappropriate to defeat the interests of third party claimants and the defendant's other creditors by thus piling an inference which amounts to a tracing fiction upon the fiction of "relation-back." Second, the defendant should not be required to rebut the presumption at a pre-trial hearing by showing himself guilty of other crimes or by giving a full accounting of the sources of his property before the government has introduced any evidence at trial. See *infra* notes 365-73 and accompanying text.

In at least one CCE case tried before the passage of the CFA, however, the "net worth" method was used to identify assets potentially subject to forfeiture whose transfer was then enjoined *pendente lite*. *United States v. Harvey*, 560 F. Supp. 1040, 1089-90 (S.D. Fla. 1982).

<sup>348</sup> See, e.g., *Barnes v. United States*, 412 U.S. 837 (1973) (judge may validly charge a jury, without specific statutory warrant, that the unexplained possession of recently stolen property authorizes an inference that the possessor knew it was stolen).

<sup>349</sup> This assumes that "the violation of this title" means the same violation with which the defendant is charged. The defendant may not constitutionally be punished by the forfeiture of proceeds from crimes other than those for which he is convicted. See *supra* note 76.

charged with operating a continuing criminal enterprise,<sup>350</sup> thus sweeping in all his drug offenses for a stated period, there is no way to demonstrate that he was not carrying on other unrelated criminal activities at the same time.

Congress, however, may have intended a broader inference: all property not traceable to legitimate earnings is forfeitable proceeds of the very offense charged, without the necessity of demonstrating that it has no likely source other than the offense charged.<sup>351</sup> Setting aside the fact that this interpretation is directly counter to the statutory language, as a general inference it is insupportable. For one thing, the property may be the proceeds of some other crime.<sup>352</sup> A related reason is that the inference is unjustified if the value of the criminal proceeds is provably incommensurate with the value of later acquired property. If the defendant imported heroin with a retail value of \$50,000, obviously a house he purchased afterwards for \$500,000 in cash is not attributable solely to the crime charged. On such facts either the presumption does not apply,<sup>353</sup> or the defendant may rebut its application. The difficult question, assuming *arguendo* that the presumption has the broader meaning described, is whether the government may employ the presumption if it has no

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<sup>350</sup> 21 U.S.C.S. § 848 (Law. Co-op. Supp. 1987).

<sup>351</sup> This is unquestionably the meaning of the presumption adopted by the House and Senate in the Comprehensive Forfeiture Act of 1982, H.R. 3963, which was never signed into law:

Any property of the defendant may be presumed to be property subject to forfeiture under subsection (a) [of 21 U.S.C. § 853] if the trier of fact finds that—

- (1) the defendant acquired the property during, or within a reasonable time after, the period during which he committed the violation for which he was convicted; and
- (2) the defendant's apparent sources of legal income during such period were substantially insufficient to account for his acquisition of the property.

SEN. REP. NO. 520, 97th Cong., 2d Sess. 30 (1982)(available on Cong. Info. Service S-523-16 (1982)(text of S. 2320, § 201)). The 1984 Senate Report, which is largely identical to SEN. REP. NO. 520, describes the 1984 provision, now law, as essentially the same. SEN. REP. NO. 225, 98th Cong., 2d Sess. 212 (1984), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3395. However, the current § 853(d) is not at all the same, and the change strongly supports the idea that Congress intended the narrower inference, which also follows more naturally from the literal language of § 853(d). Thus it is probable that some draftsman recognized the logical *non sequiturs* in the original language and corrected it, making the presumption more reasonable but less useful.

<sup>352</sup> In fact, once Congress has eliminated the tracing function, it is difficult to see why the statutory presumption should include all serious drug offenses. There seems to be no reason to invoke the presumption if the defendant is charged with specific and identifiable drug transactions as opposed to a course of dealing. The facts of such transactions—the amount of dope imported or the price for which it was purchased or sold—are better and more direct evidence of the amount of the defendant's gain than his subsequent acquisitions of property.

<sup>353</sup> There must be another source for the property other than the crime charged. 21 U.S.C. § 853(d)(2) (Supp. III 1985).

direct evidence as to the amount of the defendant's ill-gotten gains, to prove such amount.

In answering this question, the first issue is what standards to apply in evaluating the rationality and, ultimately, the constitutionality of such a presumption. This, in turn, requires certain preliminary determinations as to the character and effect of the presumption. Is it mandatory or permissive?<sup>354</sup> Once made out, does the presumption shift the burden of persuasion to the defendant or merely the burden of production?

The § 853(d) presumption, like most statutory presumptions, is silent about these key issues of interpretation, which the judge must necessarily resolve in his or her jury charge. The legislative history, however, clearly characterizes the presumption as "permissive." Thus the judge must charge the jury that it may refuse to draw the inference, even in the absence of countervailing evidence, lest he or she usurp their function.<sup>355</sup> The Third Circuit has so interpreted the presumption.<sup>356</sup>

There is also little doubt that the presumption, once made out, shifts the burden of production to the defendant but not the burden of proof.<sup>357</sup> The Supreme Court has held that the effect of an evidentiary presumption must be so limited in criminal cases.<sup>358</sup> It may be objected that the § 853(d) presumption, unlike those considered by the court, does not go to the existence of an element of the offense but only to the penalty. This difference is not significant because the government has the burden of proof beyond a reasonable doubt on the forfeiture issue<sup>359</sup> just as it does as to each element of the offense.<sup>360</sup> It may not shift this burden through a presumption.<sup>361</sup>

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<sup>354</sup> See *County Court of Ulster County, New York v. Allen*, 442 U.S. 140, 156 (1979) (distinction between permissive inference and mandatory presumption).

<sup>355</sup> "Once these factors are established, the trier of fact may reject . . . the inference . . . if it is not merited under the facts of the case or in light of evidence produced by the defendant. . . ." S. REP. NO. 225, 98th Cong., 2d Sess. 212, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3395 (emphasis added).

<sup>356</sup> *United States v. Sandini*, 816 F.2d 869 (3d Cir. 1987).

<sup>357</sup> For this distinction, see *County Court of Ulster County, New York v. Allen*, 442 U.S. 140, 157 n.16 (1979).

<sup>358</sup> *Id.* at 157; see also *Zan v. Stephens*, 456 U.S. 410, 425 (1982) (Marshall, J., dissenting).

<sup>359</sup> *United States v. Cauble*, 706 F.2d 1322, 1348 (5th Cir. 1983); *United States v. Pryba*, 674 F. Supp. 1504 (E.D. Va. 1987); *contra United States v. Sandini*, 816 F.2d 869, 875 (3d Cir. 1987).

<sup>360</sup> *Sandstrom v. Montana*, 442 U.S. 510, 512 (1979).

<sup>361</sup> However, the government can use a statutory presumption to meet its burden of proof in a criminal case, by proving the "evidentiary" fact, or premise of the presumption, beyond a reasonable doubt. *United States v. Gainey*, 380 U.S. 63, 70 (1965). The

To have these effects the § 853(d) presumption must command an empirically valid inference in general as well as in each case where it is applied. There is obviously a "rational connection"<sup>362</sup> between ill-gotten gains and the subsequent acquisition of property, once the government has demonstrated that the defendant had no apparent legitimate means of acquiring them. The difficult question is whether the inference is appropriate if it is "more likely than not" to be true, or the "ultimate fact" must follow from the "evidentiary fact" beyond a reasonable doubt. The Supreme Court has so far managed to avoid choosing between these standards of inferential reliability for presumptions in criminal cases.<sup>363</sup> The standard by which to judge the § 853(d) presumption should be the same as that applied to other criminal presumptions, however, because the government's burden of proof is the same.

To make an empirical evaluation of the § 853(d) presumption,<sup>364</sup> suppose that the defendant is charged with being the king-

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late Justice Hugo Black consistently attacked this conclusion over three decades, insisting that Congress does not have the power to determine as a matter of law what facts will support what jury inferences. Statutory presumptions in criminal cases infringe upon the defendant's right to a jury trial and are always unconstitutional. *Leary v. United States*, 395 U.S. 6, 55 (1969) (Black, J., concurring in the result); *Gainey*, 380 U.S. at 74 (Black, J., dissenting); *Tot v. United States*, 319 U.S. 463, 473 (1943) (Black, J., concurring).

The terms "evidentiary" and "ultimate" fact, used throughout this section to denote respectively the fact proven and the fact to be inferred, are drawn from *County Court of Ulster County, New York v. Allen*, 442 U.S. 140, 156 (1979).

<sup>362</sup> *Gainey*, 380 U.S. 63, 66 (1965); *Tot*, 319 U.S. 463, 466 (1943).

<sup>363</sup> Compare *Barnes v. United States*, 412 U.S. 837, 846 (1973) (when inference was clearly justified beyond a reasonable doubt it is unnecessary to fix a minimum standard) with *United States v. Leary*, 395 U.S. 6, 36 (1969) (when inference is factually unsupported, it is unnecessary to fix a minimum standard).

<sup>364</sup> The courts cannot escape making their own empirical judgments as to the reasonableness of the inference and have often struck down criminal presumptions on the basis of such analysis. See, e.g., *Leary v. United States*, 395 U.S. 6 (1969) (invalidates statutory presumption that possession of marijuana is sufficient evidence of the defendant's knowledge that marijuana was illegally imported); *United States v. Romano*, 382 U.S. 136 (1965) (invalidates former statutory presumption that defendant's unexplained presence at an illegal still shows his possession, custody, or control thereof); *United States v. Moore*, 571 F.2d 76 (2d Cir. 1978) (invalidates statutory presumption that a kidnapped person held more than 24 hours whose whereabouts are unknown has been transported in interstate commerce).

*Leary* is particularly interesting because the Supreme Court made its own review of facts not on the record concerning the origin of marijuana smoked in the United States and users' knowledge of such origin. The Court determined that there is no basis for the inference that possessors of marijuana know that it was illegally imported. Cf. *United States v. Moore*, 607 F. Supp. 489 (N.D. Cal. 1985), in which the court held that it was obligated to pay great deference to the determination of Congress that serious drug offenders are likely to skip bail, embodied as a mandatory statutory presumption in the Bail Reform Act of 1984, 18 U.S.C. § 3142(e) (Supp. III 1985). The court did not discuss the empirical validity of the presumption at all. *Moore*, 607 F. Supp. at 496.



pin of a CCE conspiracy. The government has shown that the defendant is a drug dealer, that he has no source of income apart from crime, and that he owns substantial property acquired during or after the period of the conspiracy. It is surely "more likely than not" that the property is proceeds of the conspiracy; therefore, the inference commanded by the presumption is constitutionally valid. On the other hand, it cannot be said "beyond a reasonable doubt" that the property is not the fruit of some other crime not charged in the indictment. Upon these facts, the choice of standard would seem to be crucial.

However, if the defendant is charged with a particular and identifiable criminal transaction, or indeed several transactions, it is not "more likely than not" that specific later acquired property is the fruit of such transactions. There is simply no way to assess the probability of the inference without knowing the relationship between the offenses charged and all of the defendant's criminal activity. In other words, the inference is only valid when the defendant is charged, not with particular offenses, but with a continuing course of conduct, and the statute should probably be amended accordingly.

This does not end the matter, however. The defendant has a right to rebut the presumption. He will be exceedingly reluctant to do so, however, if the inference is false because, for example, he actually received \$50,000 for committing a murder to which the government has not yet linked him. Under these facts, has his fifth amendment right not to incriminate himself been violated?

At first glance the answer is "no." After all, a criminal defendant is often put under severe pressure by the weight of the evidence against him to explain his activities, with a concomitant risk that he will betray his guilt of some other crime. Such a situation may even come about as the result of a presumption. A good example is the statutory presumption that the defendant's presence at the site of an illegal liquor still gives rise to the inference that he or she is carrying on the business of a distiller without giving bond.<sup>365</sup> A defendant caught at the still might have to rebut the presumption by proving that he or she was a mere customer or had come to the still for the purpose of stealing some moonshine or burning it to the ground as part of a vendetta.<sup>366</sup> The defendant's position, however uncomfortable, is no different from that of any accused whose true alibi

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<sup>365</sup> 26 U.S.C. § 5601(a)(4) (1982), upheld by *United States v. Gainey*, 380 U.S. 63 (1965).

<sup>366</sup> Similarly, Dr. Timothy Leary admitted to the purchase and illegal possession of marijuana in New York to rebut the presumption that he had transported marijuana

unfortunately implicates him or her in another crime.<sup>367</sup>

This hypothetical, however, is different. The defendant is induced to testify not to rebut evidence tending to show that he or she is guilty of the crime charged, such as defendant's unexplained presence at an illegal still, but evidence introduced during trial which is perfectly irrelevant to the issue of guilt or innocence. The defendant's dilemma, far from being unavoidable, arises from the peculiarity of entrusting criminal forfeiture to the jury and thus validating the introduction of evidence that has no bearing on the offense charged. The judge may prevent this difficulty, in part, by ordering the complete bifurcation of the trial between the presentation of and verdict upon evidence going to the defendant's guilt and evidence going to the forfeitability of specific property.<sup>368</sup> Such a division is desirable and common practice even in trials in which the presumption is not invoked.<sup>369</sup> The prosecutor may even be ethically required to seek such bifurcation.<sup>370</sup>

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illegally imported from Mexico with knowledge of such importation. *Leary v. United States*, 395 U.S. 6 (1969).

<sup>367</sup> In *United States v. \$250,000 in United States Currency*, 808 F.2d 895 (1st Cir. 1987), the government sought the civil forfeiture under 21 U.S.C. § 881(a)(6), as drug proceeds, of money posted by a convicted defendant as an appeal bond. Apparently, the government developed its prima facie case for forfeiture from the evidence presented at a *Nebbia* hearing—"an inquiry into those who provided the defendant's bail and their motives for the purpose of assessing the likelihood of flight." *Id.* at 898, n.7. See *United States v. Nebbia*, 357 F.2d 303 (2d Cir. 1966). Judge Wisdom rejected the argument that the claimant was unconstitutionally deprived of his enjoyment of the privilege against self-incrimination by having to meet the burden of rebutting the government's forfeiture case. The court acknowledged that if the defendant testified, for example, that "the money was proceeds from jewel thefts, it would not be subject to forfeiture, but [the claimant] would have subjected himself to prosecution for theft" *Id.* at 901, n.22.

<sup>368</sup> In *United States v. Sandini*, 816 F.2d 869 (3d Cir. 1987), the trial judge held that the defendant could not testify on his own behalf in the forfeiture phase after electing not to testify in the liability phase. The court of appeals reversed and ordered a new trial confined to the forfeiture issues, holding that the trial court's refusal to allow the defendant to testify on such issue unduly burdened his exercise of the fifth amendment privilege against self-incrimination. *Id.* at 874. In dictum, the court added that "[e]vidence received in the forfeiture phase, and therefore not before the jury when it determined guilt, may not be used in post-trial motion proceedings or on appeal to sustain the conviction itself." *Id.*

<sup>369</sup> See, e.g., *United States v. Conner*, 752 F.2d 566, 575 (11th Cir. 1985) (jury not informed of the forfeiture counts in the indictment until they had found the defendants guilty of racketeering), *cert. denied*, 474 U.S. 821 (1985); *United States v. Cauble*, 706 F.2d 1322, 1348 (5th Cir. 1983) (dictum) (bifurcation is the better procedure); *United States v. Draine*, 637 F. Supp. 482, 486 (S.D. Ala. 1986); *United States v. Ragonese*, 607 F. Supp. 649, 650 (S.D. Fla. 1985) (defendant waived jury on forfeiture issue), *aff'd*, 784 F.2d 403 (11th Cir. 1986). See generally Markus, *supra* note 206 (constitutional necessity of bifurcation). But cf. *United States v. Perholtz*, 842 F.2d 343 (D.C. Cir. 1988) (upheld denial of bifurcated trial, in part because defendant failed to allege actual prejudice.).

<sup>370</sup> "The prosecutor should avoid introducing evidence bearing on sentence which

The § 853(d) presumption raises general issues of due process quite apart from the self-incrimination problem. To establish the presumption, the government will commonly show that the defendant is living in luxury which cannot be accounted for by legitimate sources of income. The jury cannot be restrained from drawing the inference that the defendant is guilty of serious crimes,<sup>371</sup> and the further inference that he must therefore be guilty of the crime charged, or, what is worse, that he should be convicted on the indictment to punish him for the crimes that he has gotten away with hitherto, whatever they may have been and regardless of the evidence.<sup>372</sup> In other words, allowing the government to prove the defendant's possession of unexplained wealth is not essentially different from allowing the government to prove the defendant's history of crime. The fact that a defendant is a professional armed robber, as shown by his history of convictions, is certainly relevant in considering whether he has committed armed robbery in a given case, but our system excludes it nonetheless for its prejudicial effect. The § 853(d) presumption presents the identical risk. The risk can only be avoided by strict bifurcation.<sup>373</sup>

The § 853(d) presumption may also have due process implications for third parties. Property acquired by the defendant during the period of his or her criminal activities may be traceable to a third person who nonetheless has no standing to contest the forfeiture order, because such person has no legal interest in the property and cannot claim to be a *bona fide* purchaser thereof.<sup>374</sup> For example, the defendant may have funds in the bank traceable to an unsecured loan. The defendant has little or no incentive to assert the superior right of a creditor, especially in the context of a plea bargain in which forfeited property is implicitly exchanged for a shorter prison sentence or smaller fine.<sup>375</sup>

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will prejudice the jury's determination of the issue of guilt." STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE § 3-6.1 (ABA 2d ed. 1979).

<sup>371</sup> The Justice Department thinks it desirable to be able to demonstrate to the jury the vast wealth that the defendant has accumulated from drug transactions generally in a prosecution for a single drug transaction, so that the jury will recognize what is at stake. Smith & Weiner, *Criminal Forfeitures under the RICO and Continuing Criminal Enterprise Statutes* (November 1980) (Manual prepared for the Criminal Division), reprinted in 1981-82 *Hearings*, *supra* note 56, at 256, 273.

<sup>372</sup> *Id.* at 1120.

<sup>373</sup> Another solution is to make the factual determinations relating to forfeiture a part of the sentencing process and entrust them to the judge alone. See *infra* notes 485-91 and accompanying text.

<sup>374</sup> See 21 U.S.C. § 853(n)(6)(A),(B) (Supp. III 1985); see *infra* notes 447-54 and accompanying text.

<sup>375</sup> This point is made in the opinion in *United States v. Reckmeyer* (Reckmeyer I), 628 F. Supp. 616 (E.D. Va. 1986), which concerned *inter alia* an unsecured loan from a

In summary, the § 853(d) presumption, interpreted narrowly and correctly, is of little real use. Interpreted broadly, it is an attempt to work the forfeiture of all of a drug offender's property by substituting an inference for adequate proof that such property is the proceeds of the crime charged. The inference is unjustified in most cases, particularly those involving single transactions. Even if justified, its employment tends to deprive the defendant of procedural due process.

#### IV. THE FORFEITURE OF PROFITS AS THE USUAL PENALTY FOR CRIME

This Article has traced how criminal forfeiture was first revived as a means of reversing the infiltration of racketeers into legitimate business. Because the profits of crime, especially the very great profits realized by the sale of narcotics, facilitate such infiltration, such profits became forfeit through a process of statutory construction and amendment. This Article has shown, however, that forfeiture of profits, originally an afterthought, is in fact the only form of criminal forfeiture which is justifiable in theory and practice. The proof thus far has proceeded by exclusion. The Article has demonstrated the impropriety of the forfeiture of derivative contraband and of interests in a legitimate enterprise as a criminal punishment in the large majority of cases. It has also shown the folly of expecting criminal forfeiture to do too much: to deter offenders who are not deterred by the fear of exposure, trial and imprisonment;<sup>376</sup> to strip defendants in advance of trial of the means with which they

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father to his son. The son pleaded guilty to engaging in a continuing criminal enterprise. The father was permitted to recover the amount of the past due principal from the funds forfeited to the government, on the broad ground that the existence of a *bona fide* obligation to a creditor overcomes the presumption of forfeitability. *Id.* at 622. However, the court did not require any evidence, nor was there any, that the funds in question were traceable to the loan. Rather, it implicitly indulged the opposite presumption or tracing fiction that, as the defendant's net worth was increased by the amount of the loan, such amount must be exempted from forfeiture. Even if this alternative presumption is appropriate, it does not follow that the government must turn the amount due on the loan over to the father, as the court ordered. The father had neither legal nor equitable title to such funds. He therefore had no standing under 21 U.S.C. § 853(n)(6)(A), (B) (Supp. III 1985), but only possessed a contract right to be repaid. The court conferred such standing upon him, however, explicitly holding that due process requires the claims of innocent creditors to prevail over criminal forfeiture, and that Congress must have so intended, notwithstanding clear statutory language to the contrary. *Id.* at 620-21. However desirable this result may be, this is not a legitimate mode of statutory interpretation, as we have already had occasion to note. *See supra* notes 118-23 and accompanying text.

<sup>376</sup> *See supra* notes 173-94 and accompanying text.

may defend themselves;<sup>377</sup> to deprive them of the proceeds of crimes with which they have not been charged;<sup>378</sup> and to stop all relationships of friendship and commerce between criminals and others.<sup>379</sup>

In contrast, the forfeiture of profits from all crimes committed for the sake of economic gain seems to effectuate the old common law principle that no one may benefit by his or her own wrong.<sup>380</sup> Such forfeitures would seem to be an ideal minimum penalty, because they are necessarily proportional to the severity of the offense, they restore the status *quo ante* as far as possible, and they assure, in conjunction with appropriate fines, that the criminal will not find his loot waiting for him when he leaves prison. If the amount of profit can be determined with even rough accuracy, it should be taken from the defendant's available property without the necessity of tracing. Of course, the defendant should still forfeit any assets which are in fact traceable to crime, although they may have appreciated since their acquisition.

Finally, whatever property is extracted from the defendant, whether under the rubric of forfeiture, fine or restitution, must be made available to his victims, creditors, including defense counsel, and even to a certain extent to his innocent dependents. This may seem inconsistent with punishment and deterrence, because the defendant will to some degree realize real and psychic benefit from such a distribution of his property. As previously shown, however, the forfeiture of profits is not a punishment and even under the present state of affairs is not a very effective deterrent. The limited benefit to the defendant may be offset by other punishments, chiefly imprisonment, while the state must in fairness carry out its purpose of punishing him or her with as little cost to the victims and innocent bystanders as possible.

Far from being revolutionary, this proposal is an attempt to rationalize existing trends, which from several distinct starting points are converging upon the surrender of criminal gains as an indispensable minimum penalty. These trends include: the rise of white-collar crime, or to be more precise the criminalization of administrative violations and civil wrongs, making crime far more profitable than ever before; a concomitant increased interest in restitution as a

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<sup>377</sup> See *supra* notes 89-131 and accompanying text.

<sup>378</sup> See *supra* notes 343-75 and accompanying text.

<sup>379</sup> See *supra* notes 266-74 and accompanying text.

<sup>380</sup> *Riggs v. Palmer*, 115 N.Y. 506, 511-12, 22 N.E. 188, 190 (1889), is supposedly the first application of this maxim, which was used to prevent a murderer from inheriting from his victim.

supplementary penalty; a new concern for "victim's rights," commonly defined to include the right of state compensation for immediate injuries; and the extraordinary triumph since about 1970 of "just deserts" as the only broadly accepted justification for punishment, supplanting a long-lived liberal consensus that punishment must be tailored to the circumstances of the offender and not the offense.

These trends are of course interrelated. White-collar criminals often inflict substantial quantifiable injury, usually have funds available for restitution, and are not in need of or are not good candidates for rehabilitative punishment. More broadly, however, each of these trends is symptomatic of the breakup of the public/private distinction.<sup>381</sup> The tripartite division between criminal offenses, which are punishable by the state, civil wrongs, which are actionable by private persons, and sins, which are left in a liberal regime mostly to God, has broken down, as snorting cocaine and trading on inside information come to be defined as equally serious offenses against public order.<sup>382</sup> As this has occurred, however, the interest of the state in punishing the offender has come more and more pointedly into conflict with the interests of his victims in compensation. Under these circumstances, it is no longer satisfying to repeat bromides about the impropriety of using the criminal justice system to collect private obligations. A new system is needed which harmonizes these conflicting interests as far as possible.

#### A. THE GROWTH OF RESTITUTION AS A CRIMINAL PENALTY

The idea that criminals should compensate those whom they have injured was, of course, dominant during the long centuries during which criminal law had no existence as an entity distinguishable from tort law.<sup>383</sup> However, the developed common law included rules which barred the victims of criminal offenses from civil

<sup>381</sup> See, e.g., *The Public-Private Distinction*, 130 U. PA. L. REV. 1289 (1982).

<sup>382</sup> See generally Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391 (1963) (possible violation of due process and the establishment clause for the government to prosecute breaches of traditional morality without a reasonable public purpose distinct from the mere preservation of such morality).

<sup>383</sup> J. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 412 (2d ed. 1979).

The purpose of monetary compensation [in the Anglo-Saxon period] is overtly retributive, but it is also compensatory; in modern language, it is both a fine and damages at the same time. In so far as feuds and their settlements were governed by rules, there was a law of wrongs. But there was no division of wrongs into crimes and torts. And the main purpose of introducing law into the matter was to protect the wrongdoer against excessive vengeance, rather than to punish him or deter others.

*Id.*

recovery or at least made such recovery unavailing.<sup>384</sup>

The American common law courts rejected these rules, adopting restitution not as a punishment, but only as a condition of probation or as part of an informal settlement.<sup>385</sup> In recent years, however, many writers have advocated enforceable orders of restitution as the primary punishment for crime. Restitution, they claim, is retributive, because the penalty is precisely equivalent to the gravity of the offense measured by the harm done. It rehabilitates, because the offender is forced to confront and make good the damage he has done to an identifiable human being. For most crimes, and indeed all nonviolent crime, it is thus far superior to imprisonment, given the harm that prisons do to prisoners and to society at great public expense. Finally, its advocates argue openly that in a criminal system where punishment is based upon restitution there is no place for so-called "victimless" crimes, those without an identifiable victim or quantifiable injury.<sup>386</sup>

These arguments are generally made in a liberal and reformist spirit, and have in fact often been criticized as utopian.<sup>387</sup> At least in

<sup>384</sup> The original rule was that the victim's civil claims against the offender were merged in the Crown plea; this rule was later modified to a suspension until after the trial. See generally *Shaul v. Fidelity & Deposit Co.*, 131 Misc. 401, 405-06, 227 N.Y.S. 163, 169-70 (N.Y. Sup. Ct. 1928), *aff'd mem.*, 224 A.D. 773, 230 N.Y.S. 910 (1928). If the defendant was convicted, however, his goods were forfeit, making the further pursuit of a civil remedy pointless. 1 J. STEPHEN, *supra* note 34, at 502-03. The victim was thus naturally tempted to promise not to prosecute the offender as part of a civil settlement, especially since criminal prosecution, though in the name of the Crown, was originally a private affair. See generally Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEGAL HIST. 313 (1973). Such a deal, however, was itself the crime of compounding a felony. See Laster, *Criminal Restitution: A Survey of its Past History and an Analysis of its Present Usefulness*, 5 U. RICH. L. REV. 71, 76 (1970).

To make matters worse, even stolen goods to which the victim had good title were forfeit to the Crown. Originally the victim only recovered his goods if he promptly brought an "appeal of felony;" if the Crown proceeded by indictment, he obtained nothing. Later, when the appeal of felony fell into disuse, the remedy of a writ of restitution was authorized by statute. At which time restitution would be made of goods stolen, 21 Hen. 8, ch. 11 (1529), if the victim was instrumental in helping to obtain the conviction by his testimony or otherwise. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 400-01 (2d ed. 1936).

<sup>385</sup> Laster, *supra* note 384, at 83-85.

<sup>386</sup> These arguments are worked out in detail in C. ABEL & F. MARSH, *PUNISHMENT AND RESTITUTION* (1984) (the state has no ethical foundation for punishing private conduct that does not harm others). See also Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 931, 939 (1984).

<sup>387</sup> See generally J. HUDSON & B. GALAWAY, *Restitution and the Justice Model*, in JUSTICE AS FAIRNESS: PERSPECTIVES ON THE JUSTICE MODEL 52, 60 (D. Fogel & J. Hudson eds. 1981) (many of those sentenced to restitution would escape jail terms in the absence of restitution; hence restitution increases punishment); Klein, *Revitalizing Restitution: Flogging A Horse That May Have Been Killed for Just Cause*, 20 CRIM. L.Q. 383, 400-01 (1978) (in the real world restitution is not likely to rehabilitate anyone); Scutt, *Victims, Offenders and*

tone, they seem difficult to reconcile with the theory of "just deserts."<sup>388</sup> Restitution as an authorized criminal punishment has made its greatest gains, however, on both the state and federal levels during just that period, roughly since 1970, during which the retributivists were routing the utilitarians and social scientists from the field.<sup>389</sup> In fact, retributivism is perfectly consistent with restitution. Retributivists mean to make the offender give up the unfair advantage he or she has obtained over his or her fellows by crime, an emphasis which is supposed to distinguish retribution from retaliation.<sup>390</sup> Restitution is a natural way of effecting this result.<sup>391</sup> However, because criminal restitution has been widely adopted as a punishment during the heyday of "just deserts" with its emphasis on determinate sentencing, it has not received the primary role desired by its most ardent advocates.<sup>392</sup>

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*Restitution: Real Alternative or Panacea?*, 56 AUSTL. L.J. 156, 163-65 (1982)(probation departments, which usually administer restitution orders, are not institutionally concerned with victim compensation).

<sup>388</sup> "Just deserts" or "retributivism" are essentially the idea that punishment should be retributive—graded to the public consensus as to the seriousness of the offense. See Pugsley, *Retributivism: A Just Basis for Criminal Sentences*, 7 HOFSTRA L. REV. 379, 397-404 (1979).

<sup>389</sup> For the current status of restitution in the 50 states, see generally Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts*, 30 UCLA L. REV. 52 (1982). For the triumph of the "just deserts" theory, see Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 486-91 (1980)(convergence of liberals and conservatives on retributivism); Plattner, *The Rehabilitation of Punishment*, in N. GLAZER, *THE PUBLIC INTEREST ON CRIME AND PUNISHMENT* (1984).

<sup>390</sup> Professor Packer has cogently attacked the validity of the distinction:

Each theory rests on a figure of speech. Revenge means that the criminal is paid back; expiation means that he pays back. The revenge theory treats all crimes as if they were certain crimes of physical violence: you hurt X; we will hurt you. The expiation theory treats all crimes as if they were financial transactions: you got something from X; you must give equivalent value. . . . This familiar version of the retributive position, which I shall call the affirmative version, has no useful place in a theory of justification for punishment, because what it expresses is nothing more than dogma, unverifiable and on its face implausible.

H. PACKER, *supra* note 173, at 38-39.

<sup>391</sup> Note, *Retribution: New York's Answer to the Multiple Felony Offender*, 12 FORDHAM URB. L.J. 897, 919-20 (1984).

<sup>392</sup> In fairness, it should be said that the theoreticians of retribution generally agree that prison terms in America are too long. Pugsley, *supra* note 388, at 401 n.93, 403 ("Retributivism . . . is honest about punishment-as-pain, and therefore it seeks to limit punishment."). Cf. 18 U.S.C.S. § 3582(a) (Law. Co-op. Supp. 1987)("imprisonment is not an appropriate means of promoting correction and rehabilitation"). The "vulgar retributivism" of legislators, however, has significantly lengthened average sentences and enormously increased the prison population since 1970. In 1973, American courts were already meting out the longest sentences of any industrialized nation by a wide margin. M. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 58 (1973). By 1983, American prisons held 455,000 convicts, more than double the number imprisoned in 1970 expressed as a percentage of the population. Henderson, *The Wrongs of Victim's*



Until the passage of the Victim and Witness Protection Act in 1982, Congress had not authorized the federal courts to impose an order of restitution as part of a sentence, but only as a condition of probation.<sup>393</sup> The restitution provisions of the Act, read together with the Sentencing Reform Act of 1984,<sup>394</sup> go a long way toward making restitution the usual punishment whenever the victim suffered a quantifiable injury. A fine, public service work, or sentence of restitution is now mandatory when a defendant is placed on probation.<sup>395</sup> The payment of restitution takes precedence over the payment of any fine.<sup>396</sup> The courts must give reasons whenever they refuse to order restitution.<sup>397</sup> Most significantly, whereas restitution as a condition of probation may be limited to "actual damages or loss caused by the offense for which conviction was had,"<sup>398</sup> a defendant may be sentenced to make restitution to a victim of [his] . . . offense."<sup>399</sup> The courts have interpreted this difference to authorize sentences, but not probation orders, requiring restitution of the full losses of the victims, although such losses exceed those charged in the indictment and indeed are not attributable to the counts upon which the defendant was convicted.<sup>400</sup>

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*Rights*, 37 STAN. L. REV. 937, 947 n.63 (1985). It is not clear what will be the effect of the new sentencing guidelines, but some trials of the proposed guidelines against actual cases resulted almost uniformly in harsher sentences than those actually imposed. *Sentencing Commission's First Effort Receives Outpouring of Criticism*, 40 Crim. L. Rep. 2223, 2225 (BNA)(Dec. 17, 1986)(account of hearings held December 2-3, 1986). The constitutionality of the Sentencing Commission, and therefore of the guidelines, is in doubt, however. *United States v. Arnold*, 678 F. Supp. 1463, 1465, (S.D. Cal. 1988)(use of article III judges for legislative task of fixing sentence guidelines violates separation of powers).

<sup>393</sup> The Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 5(a) 96 Stat. 1253, (*codified at* 18 U.S.C. § 3579 (1982)), prospectively redesignated as 18 U.S.C. § 3663 effective November 1, 1987, *see* Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212(a)(1), 98 Stat. 1987 (1984). The Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212(a)(2), 98 Stat. 1987 (1984), also prospectively repealed former 18 U.S.C. § 3651 (1982), authorizing restitution as a condition of probation, and replaced it with new 18 U.S.C. § 3563(b)(3) (Supp. III 1985), Pub. L. No. 98-473, § 212(a)(2), 98 Stat. 1987 (1984).

<sup>394</sup> Sentencing Reform Act of 1984, Pub. L. No. 98-473, §§ 211-37, 98 Stat. 1987-2034 (1984).

<sup>395</sup> 18 U.S.C. § 3563(a) (Supp. III 1985).

<sup>396</sup> *U.S. Sentencing Commission Guidelines Revised Draft* § A541(c) (revised draft), 40 CRIM. L. REP. 3201, 3262 (BNA)(Feb. 18, 1987).

<sup>397</sup> 18 U.S.C.S. § 3553(c) (Law. Co-op. Supp. 1987).

<sup>398</sup> 18 U.S.C. § 3651 (1982). The quoted language does not mean that the fact of such loss must be an element of the offense, *United States v. Sleight*, 808 F.2d 1012, 1015 (3d Cir. 1987)(mail fraud; violation of employer's "intangible right" to faithful service). In *Sleight*, however, the court held that the employer had suffered a real loss, the amount of which was proved at trial. *Id.* at 1017-18.

<sup>399</sup> 18 U.S.C. § 3563(b)(3) (Supp. III 1985).

<sup>400</sup> *See, e.g., United States v. Hawthorne*, 806 F.2d 493, 499 (3d Cir. 1986)(full restitution of value of falsely obtained food stamps was appropriate after defendant pleaded

This Article concluded in Section III.4 that it is inappropriate for a court to require the criminal forfeiture of criminal proceeds in excess of those provably derived from the very crime charged.<sup>401</sup> The objections there stated do not apply with equal force to restitution orders. Because restitution is by definition limited to making good the actual injuries of specific victims it cannot be a constitutionally disproportionate punishment. The same is not true of criminal forfeiture under current law, as the offender may be punished by loss of the instrumentalities of crime<sup>402</sup> or his or her interest in a legitimate business legitimately acquired,<sup>403</sup> both unrelated to his or her criminal profits. From the standpoint of due process, however, an order imposing restitution for crimes of which the defendant has not been convicted might seem worse than an excessive forfeiture order which, due to difficulties of proof, sweeps in profits from other crimes by a misapplication of the statutory presumption. In fact, such "overcharging" is a systematic feature of restitution orders, as the reported cases reveal,<sup>404</sup> and the amount of restitution is fixed by the judge at a sentencing hearing based upon the presentencing report.<sup>405</sup> In contrast, the defendant in a forfeiture case is entitled to present evidence before a jury.

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guilty to only three of 63 counts, but defendant was not informed that full restitution was a possible consequence of her plea, which was therefore not "knowing and voluntary"); *United States v. Hill*, 798 F.2d 402, 406 (10th Cir. 1986)(after defendant was convicted of the last of a series of thefts forming a common scheme, he might be ordered to make full restitution); *United States v. Martin*, 788 F.2d 184, 188-89 (3d Cir. 1986)(upheld restitution for all losses caused by defendant's scheme to defraud furthered by separate mailings even though he pleaded guilty to only one count of mail fraud, alleging one use of the mails); *United States v. Anglian*, 784 F.2d 765, 766-68 (6th Cir. 1986)(defendant, convicted of conspiracy to receive stolen postal money orders, ordered to make restitution based upon the proceeds of the conspiracy, although he was convicted on only two substantive counts), *cert. denied*, 107 S. Ct. 148 (1986), *contra* *United States v. Barnette*, 800 F.2d 1558, 1571 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 1578 (1986)(dictum)("The amount of restitution under [the VWPA] . . . may not exceed the actual losses flowing from the offense for which the defendant has been convicted.").

Even under the Probation Act, it has been held that the amount of restitution may exceed the loss alleged in the indictment if it conforms to the amount of loss actually proved at trial. *Sleight*, 808 F.2d at 1018-19

<sup>401</sup> See *supra* notes 343-75 and accompanying text.

<sup>402</sup> See *supra* notes 236-39 and accompanying text.

<sup>403</sup> See *supra* notes 281-84 and accompanying text.

<sup>404</sup> Most reported cases concern plea bargains, in which restitution for the entire loss is a condition of accepting a plea to one or a few "sample counts." In many such cases the amount of loss is stipulated in the plea agreement. See generally *United States v. Paul*, 783 F.2d 84, 88-89 (7th Cir. 1986)(plea bargain impliedly limited restitution order to amount which defendant admitted embezzling).

<sup>405</sup> The report of the presentence investigation shall contain, "(D) verified information stated in a nonargumentative style containing an assessment of the financial, social, psychological, and medical impact upon, and cost to, any individual against whom the offense has been committed." FED. R. CRIM. P. 32(c)(2).

These apparently weighty objections have little force in practice, however. Restitution, unlike criminal forfeiture, is integrated into the system of federal criminal punishment. Despite the statutory bias toward compensating victims, restitution is not mandatory. A restitution order must conform to the statutory purposes of criminal sentencing which explicitly take into account the good of society, the offender, and the victim.<sup>406</sup> The sentencing judge must give his or her reasons,<sup>407</sup> providing a basis for appellate review.<sup>408</sup> Moreover, the judge must consider the offender's earning ability, financial resources, and needs, as well as those of his or her dependents, adjusting the order accordingly.<sup>409</sup> Although courts have ordered an indigent defendant to make restitution,<sup>410</sup> they are agreed that probation or parole may not be revoked if the offender cannot pay in good faith.<sup>411</sup> Because a restitution order is essentially a punish-

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<sup>406</sup> 18 U.S.C.S. § 3553(a) (Law. Co-op. Supp. 1987).

Although restitution does resemble a judgment "for the benefit of" the victim . . . [t]he victim has no control over the amount of restitution awarded or over the decision to award restitution. Moreover, the decision to impose restitution generally does not turn on the victim's injury, but on the penal goals of the State and the situation of the defendant.

Kelly v. Robinson, 107 S. Ct. 353, 362 (1986).

<sup>407</sup> 18 U.S.C.S. § 3553(c) (Law. Co-op. Supp. 1987).

<sup>408</sup> 18 U.S.C.S. § 3742(a) (Law. Co-op. Supp. 1987).

<sup>409</sup> 18 U.S.C. § 3580(a) (Supp. III 1985), (prospectively redesignated as 18 U.S.C. § 3664(a) (Supp. III 1985), Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212(a)(1), 98 Stat. 1987 (1986)). See *United States v. Gomer*, 764 F.2d 1221, 1222 (7th Cir. 1985)(plain error for the trial court not to consider the financial needs and earning ability of the defendant's dependents). Opinions are divided as to whether the court must make specific findings of fact as to the defendant's ability to pay. Compare *United States v. Hill*, 798 F.2d 402, 406 (10th Cir. 1986)(findings required), with *United States v. Atkinson*, 788 F.2d 900, 902 (2d Cir. 1986)(findings not required).

<sup>410</sup> *United States v. Purther*, 823 F.2d 965 (6th Cir. 1987); *United States v. Mounts*, 793 F.2d 125, 128 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 673 (1986).

<sup>411</sup> The sentencing court may make probation conditional upon satisfaction of a restitution order, 18 U.S.C. § 3563(b)(3) (Supp. III 1985), and may revoke probation and imprison the defendant for violation of such order. 18 U.S.C. § 3565(a) (Supp. III 1985). Under the Sentencing Reform Act of 1984, *supra* note 394, parole has been replaced by a term of "supervised release" fixed as part of the original sentence. 18 U.S.C.S. § 3583(a) (Law. Co-op. Supp. 1987). Payment of restitution may be a condition of supervised release. 18 U.S.C. § 3583(d) (Supp. III 1985). A term of supervised release may be revoked for a violation of a condition of such release. 18 U.S.C.S. § 3583(e)(4) (Law. Co-op. Supp. 1987).

Despite these statutory provisions, the courts agree that the decision to revoke parole is governed by *Bearden v. Georgia*, 461 U.S. 660, 668-69 (1983)(fundamentally unfair to revoke probation for failure to make restitution through no fault of the defendant "without considering whether adequate alternative methods of punishing the defendant are available."). See, e.g., *United States v. Palma*, 760 F.2d 475, 479 (3d Cir. 1985)(the Victim and Witness Protection Act is constitutional because the trial court has discretion to revoke probation for failure to make restitution, and will assumedly exercise such discretion in accordance with constitutional standards); *United States v. Ciambrone*, 602 F. Supp. 563, 568-69 (S.D.N.Y. 1984). See *Harland*, *supra* note 389, at 112

ment and only incidentally a means of compensation,<sup>412</sup> the process constitutionally due the defendant is not significantly different from that required in imposing a fine or term of imprisonment: essentially the right not to be sentenced on the basis of materially false information, which implies the right to review and contest such information.<sup>413</sup> Current statutes provide such opportunity.<sup>414</sup> Neither is a restitution order invalid as a substitute for a civil judgment, denying the defendant the jury trial to which he would otherwise be entitled, because it is not functionally equivalent to such civil judgment.<sup>415</sup> The order may not include incidental and consequential damages<sup>416</sup> and such unliquidated items of loss as recovery for pain and suffering.<sup>417</sup> The relatives of a deceased victim have no standing to recover.<sup>418</sup> The criminal conviction giving rise to resti-

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("[W]here issues of contempt are not involved, revocation of probation for failure to pay restitution is analogous to imprisonment for failure to pay a fine or debt.").

<sup>412</sup> See generally *United States v. Carson*, 669 F.2d 216, 217-18 (5th Cir. 1982) (because restitution is primarily a rehabilitative punishment, rather than a means of compensating a victim, an offender may be ordered to make restitution of a debt, induced through criminal fraud, previously discharged in bankruptcy).

<sup>413</sup> *Townsend v. Burke*, 334 U.S. 736, 740-41 (1948). See generally Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 931 (1984).

<sup>414</sup> See 18 U.S.C. § 3552(d) (Supp. III 1985) (ten day advance disclosure of presentence reports); FED. R. CRIM. P. 32(a)(1)(C) (defendant's right to present information in mitigation of sentence); 18 U.S.C. § 3742(c)(3) (Supp. III 1985) (certification of record on appeal, including "the information submitted during the sentencing proceeding").

<sup>415</sup> Several courts have rejected the argument that defendants are entitled to a jury determination of the amount of the victim's losses for purposes of a restitution order. *United States v. Palma*, 760 F.2d 475, 479 (3d Cir. 1985); *United States v. Satterfield*, 743 F.2d 827, 836-39 (11th Cir. 1984), cert. denied, 471 U.S. 1117 (1985); *United States v. Florence*, 741 F.2d 1066, 1067-68 (8th Cir. 1984).

<sup>416</sup> See generally *United States v. Kenney*, 789 F.2d 783, 784 (9th Cir. 1986) (improper to require restitution for the wages of employees of the robbed bank who testified at trial), cert. denied, 107 S. Ct. 586 (1986); *United States v. Trettenaro*, 601 F. Supp. 183, 185 (D. Colo. 1985) (Eastman Kodak Company, victim of theft of silver-bearing sludge, may not recover through a sentence of criminal restitution such incidental and consequential damages as the costs of its internal investigation, a reward it paid for information leading to the defendants' arrest, the cost of actually recovering the silver from the plant to which the sludge had been sold, and attorneys' fees).

<sup>417</sup> Under the Victim and Witness Protection Act, restitution is limited to the return of property or payment of the value of property damaged, lost, or destroyed. 18 U.S.C. § 3663(b)(1) (1982 & Supp. III 1985). The offender may be required to make restitution for medical expenses, physical therapy, and lost income only if the offense resulted in bodily injury to the victim. 18 U.S.C. § 3663(b)(2) (1982 & Supp. III 1985). See *United States v. Anglian*, 784 F.2d 765, 770 (6th Cir. 1986) (Merritt, J., concurring) (tort damages "do not fit within general principles of restitution"), cert. denied, 107 S. Ct. 148 (1986). Contrary to the ordinary "collateral source" rule, compensation paid to the victim by third parties is deducted from the restitution order. 18 U.S.C. § 3663(e)(1) (1982 & Supp. III 1985). The court may order the offender to make restitution to such third parties, but only after all other victims have been compensated. *Id.*

<sup>418</sup> The victim's estate may recover "necessary funeral and related services" as well as

tution does "estop the defendant from denying the essential allegations of that offense"<sup>419</sup> in a later civil action brought by the victim. There is no estoppel, however, as to facts determined by the judge at the sentencing hearing upon which the restitution order is based.<sup>420</sup>

Restitution does raise other potentially troublesome issues. Chief among these is that the defendant's ability and willingness to make voluntary restitution are inevitably taken into account when the court decides whether to impose a fine, probation, or term of imprisonment.<sup>421</sup> As a practical matter, this puts the wealthy defendant at an advantage.<sup>422</sup> Such advantage is heightened if the defendant decides to plead guilty. The defendant's willingness to consent to the entry of a restitution order in a specific amount is a chip which he or she may barter for the opportunity to plead to a limited number of counts, a lesser charge, or a recommendation of a shorter sentence.<sup>423</sup> When an offender pleads guilty, he or she knows the maximum sentence and fine that may be imposed, but the amount of restitution ordered depends on the judge's findings of fact at the sentencing hearing.<sup>424</sup> The offender is therefore under

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medical costs incurred while the victim was alive. 18 U.S.C. § 3663(b)(2), (3) (1982 & Supp. III 1985).

<sup>419</sup> 18 U.S.C. § 3664(e) (1982 & Supp. III 1985).

<sup>420</sup> *United States v. Satterfield*, 743 F.2d 827, 838 (11th Cir. 1984), *cert. denied*, 471 U.S. 1117 (1985); *United States v. Ciambone*, 602 F. Supp. 563, 566-67 (S.D.N.Y. 1984).

<sup>421</sup> See 18 U.S.C. § 3572 (Supp. III 1985) ("The court, in determining whether to impose a fine, [and its amount] . . . shall consider . . . (3) any restitution or reparation made by the defendant to the victim of the offense. . ."). In its draft guidelines, the new Sentencing Commission has provided that the court may reduce the "offense level" and consequently the punishment if the defendant demonstrates that he has accepted personal responsibility for his crime by, *inter alia*, "voluntary payment of restitution to victim(s) prior to adjudication of guilt." *U.S. Sentencing Commission Guidelines Revised Draft § 321*, 40 CRIM. L. REP. 3201 (BNA) (Feb. 18, 1987). Such restitution may take the form of a binding agreement between offender and victim. Such an agreement is itself restitution, foreclosing the court from ordering further payment. *United States v. Bruchey*, 810 F.2d 456, 460 (4th Cir. 1987). In contrast, the court, in deciding whether to put the defendant on probation or imprison him or her, is supposed to consider merely "the need to provide restitution to any victims of the offense." 18 U.S.C. § 3553(a)(7) (Law. Co-op. Supp. 1987). 18 U.S.C. §§ 3562(a), 3582(a) (Supp. III 1985).

<sup>422</sup> Schafer, *The Correctional Rejuvenation of Restitution to Victims of Crime*, reprinted in CRITICAL ISSUES IN THE STUDY OF CRIME 214, 217 (S. Dinitz & W. Reckless eds. 1968); Klein, *supra* note 387, at 397 (mitigating sentences on account of "voluntary" restitution agreements discriminates against poor defendants under Canadian law).

<sup>423</sup> See Project, *Congress Opens a Pandora's Box—The Restitution Provisions of the Victim and Witness Protection Act of 1982*, 52 FORDHAM L. REV. 507, 566-67 (1984).

<sup>424</sup> For the defendant's plea to be knowing and voluntary, he or she must be informed of the maximum possible penalty. FED. R. CRIM. P. 11(c)(1). Courts have held that the defendant must be aware of the judge's power to determine the victims' losses and order retribution accordingly, but the defendant need not, and indeed cannot, know in advance how much the judge may order. *United States v. Hawthorne*, 806 F.2d 493, 498-

pressure to limit his or her risk by stipulating the amount of the victim's losses.

#### B. THE CONFLICT BETWEEN RESTITUTION AND FORFEITURE

The proceeds of crime cannot simultaneously be forfeited to the government and remain available to satisfy either an order of restitution or the victim's civil claim for damages. This conflict between the government and the victim, to the extent it arises, is now resolved in an *ad hoc* manner, generally through administrative remission in favor of the victim/claimant.<sup>425</sup> However, forfeiture of the proceeds of crime cannot become a general penalty for economic wrongdoing without reforms that grant legal standing and explicit priority over the government to victims who claim restitution whenever forfeiture will interfere with their ability to collect.

First, it may be useful to examine the conflict as it might arise under current statutes. Under RICO, a judge *must* order the forfeiture of the proceeds of the offense and of the assets of the enterprise conducted through a pattern of racketeering activity.<sup>426</sup> He or she *may* order the offender to make restitution.<sup>427</sup> In fact, the court

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99 (3d Cir. 1986). See also *United States v. Palma*, 760 F.2d 475 (3d Cir. 1985) (judge informed defendant of possibility of restitution order and gave him opportunity to withdraw plea). It has been suggested that the defendant must be permitted to see the Victim Impact Statement before he or she can plead intelligently. Project, *supra* note 423, at 566.

<sup>425</sup> Private communication with Paul Coffey, Deputy Chief of the Organized Crime and Racketeering Section, Criminal Division, Justice Department.

<sup>426</sup> 18 U.S.C.S. § 1963(a)(3),(b) (Law. Co-op. Supp. 1987).

<sup>427</sup> 18 U.S.C. § 3663(a)(1) (1982 & Supp. III 1985), authorizes restitution orders for any violation of Title 18, presumably including 18 U.S.C. § 1962(a) (1982). A peculiar result, and one possibly unintended by Congress, is that restitution may be ordered when the "pattern of racketeering activity" through which the offender conducted his or her enterprise, 18 U.S.C. § 1962(c) (1982), consisted of bankruptcy fraud in violation of Title 11 or fraud in the sale of securities in violation of § 10(b) of the Securities Exchange Act of 1935, 15 U.S.C. § 78j(b) (1982), and Rule 10b-5, 17 C.F.R. § 240.10b.5 (1982). Congress, however, did not intend to confer the power to order restitution for such offenses when it enacted the VWPA. S. REP. NO. 532, 97th Cong., 2nd Sess., reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 2515, 2539 ("restitution may not be ordered in cases arising under the antitrust laws, the securities laws, or certain other regulatory statutes"). Formally, of course, there is no conflict, because the RICO offense is independent, but Congress was certainly correct in recognizing that a sentencing hearing is the wrong forum for determining what damages resulted from securities or bankruptcy fraud, given the legal and factual complexity of such determination. See Thompson, *The Measure of Recovery Under Rule 10b-5: A Restitution Alternative to Tort Damages*, 37 VAND. L. REV. 349 (1984). These considerations are no less applicable in a RICO case. Faced with a request to order restitution in a case in which the underlying offense is a violation of securities law, a court might invoke 18 U.S.C. § 3663(d) (1982 & Supp. III 1985), authorizing it to decline to order restitution "[t]o the extent that . . . the complication and prolongation of the sentencing process . . . outweighs [sic] the need to provide restitution to any victims . . . ."

is presumptively obligated to order restitution in a RICO criminal forfeiture case, just as in any other case.<sup>428</sup> Yet there is only one reported instance of this occurring,<sup>429</sup> and RICO has never been revised to reflect the enactment of the restitutionary provisions of the VWPA. At a minimum, RICO should permit the satisfaction of a restitution order from the forfeited property. Because the validity of the victim's claim and the amount of his or her injury have already been litigated, the victim should be permitted to assert his claim against the forfeited property by way of motion or petition.

What claim does a victim have against property criminally forfeited under RICO in the absence of a restitution order? Such victims are relegated to administrative petitions for the remission of forfeiture. They have no standing to assert their equitable claims as victims of fraud before the court which ordered the forfeiture. Only third parties with a legal interest in forfeited property or who qualify as *bona fide* purchasers without reasonable cause to believe that the property was subject to forfeiture may intervene as of right after entry of the forfeiture order.<sup>430</sup> Taken literally, this language excludes all victims with equitable claims, including victims of garden-variety frauds and most white-collar crimes. It also excludes all creditors without a security interest in identifiable property, and defense counsel in particular.

As already noted in the context of attorney's fees,<sup>431</sup> however, the courts have not literally enforced the limitation of standing to persons with a legal interest in forfeited property. Rather, courts have held that such a limitation would deprive *bona fide* creditors of due process. Therefore, Congress could not have intended to impose it.<sup>432</sup> This mode of interpreting legislative intent is illegitimate;<sup>433</sup> moreover, the courts have provided no convincing reason why an unsecured creditor has a due process right in property which his or her debtor earned through criminal means, superior to that of

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<sup>428</sup> See *supra* notes 393-96 and accompanying text.

<sup>429</sup> *United States v. Robilotto*, 828 F.2d 940, 944 (2d Cir. 1987) (separate forfeiture and restitution orders against one defendant; money forfeited by another was ordered paid to victims as restitution.). In *United States v. Horak*, 833 F.2d 1235, 1238 (7th Cir. 1987), the defendant was ordered to pay restitution in the amount of \$80,000 in connection with the predicate offense of mail fraud, apart from the RICO forfeitures.

<sup>430</sup> 18 U.S.C.S. § 1963(1)(2),(6) (Law. Co-op. Supp. 1987).

<sup>431</sup> See *supra* notes 111-12 and accompanying text.

<sup>432</sup> See *United States v. Mageean*, 649 F. Supp. 820, 825, 829 (D. Nev. 1986) (unsecured trade creditors have cognizable interests as *bona fide* purchasers under 18 U.S.C.S. § 1963(1)(6)(B) (Law. Co-op. Supp. 1987)); *United States v. Reckmeyer* (Reckmeyer I), 628 F. Supp. 616, 621 (E.D. Va. 1986) (due process requires that lender on unsecured promissory note have standing to assert claim).

<sup>433</sup> See *supra* notes 118-23 and accompanying text.

the government.<sup>434</sup> Having gone so far on behalf of creditors with a mere contract right, however, the courts might readily grant standing under § 1963(m) to a victim who claimed "equitable title" in the forfeited property. In a civil action, such a victim would be able to demand the ordinary remedies of equitable lien or constructive trust. The government, therefore, should hold the forfeited property subject to the same equities.<sup>435</sup>

RICO does provide for administrative petitions for mitigation or remission of forfeiture and for the restoration of "forfeited property to victims of a violation of this chapter."<sup>436</sup> Unfortunately, the Justice Department has not promulgated any regulations governing such petitions despite specific statutory authority.<sup>437</sup> The only regulations now in effect govern civil and criminal forfeitures alike and, like the statutory provisions for third-party intervention, are clearly not directed toward the relief of victims but toward other innocent third parties with interests in the forfeited property.<sup>438</sup> The regulations do not provide for a hearing and thus in many cases are ill-adapted to the proof of damages.<sup>439</sup>

Congress should fill this gap by amending RICO to give victims, like owners and transferees, standing to advance their claims against forfeited property. Such an amendment, however, would raise difficult issues as to the appropriate measure of such claims, in particular whether they should be co-extensive with any remedy which a civil court might grant in equity. The current provisions for sentences of criminal restitution cautiously limit the victim's claims to actual damages narrowly defined.<sup>440</sup> This limitation contrasts strongly with restitution as a civil remedy, which is often measured

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<sup>434</sup> The attorney's fee cases are different, of course, because the defendant's qualified right to counsel of his or her choice is affected by fee forfeiture. See *supra* notes 110-35 and accompanying text. The creditor's case is stronger, both on due process and policy grounds, if the forfeited property is the assets of a business conducted through a pattern of racketeering activity and, thus, is only metaphorically tainted. See *supra* notes 293-314 and accompanying text.

<sup>435</sup> One court has given effect to a constructive trust arising simultaneously with the commission of the act giving rise to forfeiture, without discussing the difficulty that 21 U.S.C. § 853(n)(2) does not on its face give standing to such a claimant. *United States v. Marx*, 844 F.2d 1303 (7th Cir.) (shares in husband's name allegedly held in oral trust for wife; his breach of fiduciary duty by criminal activity gave rise to a constructive trust in her favor).

<sup>436</sup> 18 U.S.C.S. § 1963(g)(1) (Law. Co-op. Supp. 1987).

<sup>437</sup> 18 U.S.C.S. § 1963(h)(3) (Law. Co-op. Supp. 1987).

<sup>438</sup> Forfeiture Regulations, *supra* note 31. The Regulations do provide that the claims of general creditors, to the extent allowed, are subject to "[t]he recognized claims of victims of the related criminal activity." *Id.* § 9.6(a)(2)(iii).

<sup>439</sup> Forfeiture Regulations § 9.3(d), *supra* note 31.

<sup>440</sup> See *supra* notes 415-18 and accompanying text.



by the defendant's profits traceable to his or her breach of duty without reference to the plaintiff's provable losses, which may indeed be nonexistent.<sup>441</sup> Thus, the measure of civil restitution is closely related to the most appropriate measure of criminal forfeiture: the profits of crime. This is not surprising, because the rationale for permitting civil plaintiffs to recover more than their actual losses is precisely to punish the defendants by depriving them of the fruits of their wrongdoing.<sup>442</sup>

In theory, then, when a court determines the amount of restitution due to a victim after it enters an order of criminal forfeiture, it should be free of the constraints now imposed upon sentences of restitution in the absence of a forfeiture order. In the latter case the court's goal is to impose an appropriate punishment without allowing itself to be misused as an agency for the collection of civil debts.<sup>443</sup> Once the court has ordered a mandatory proceeds forfeiture, however, it has the more ministerial task of allocating property between the government and the victim. If the victim were limited to the recovery of his or her actual losses, in many cases the victim's chances of collection in a subsequent action for civil restitution would be frustrated, as the forfeiture would leave the offender without sufficient resources to pay the judgment. Clearly forfeiture should not have this effect.

There are other cogent reasons, however, why the victim should not be permitted to litigate his or her civil claim to restitutionary damages in a § 1963(m) hearing. If the victim's potential

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<sup>441</sup> "When a fiduciary profits through breach of a fiduciary obligation, he will be held accountable to his principal without regard to whether or not the profit is at the expense of the principal." 1 G. PALMER, *supra* note 199, at § 2.11. "Fiduciary" clearly includes anyone, such as an ordinary employee, who owes a duty of loyalty to another. The fiduciary's profits need not have been diverted from the business of the principal. *See, e.g.,* Snapp v. United States, 444 U.S. 507 (1980) (defendant author, a former CIA agent, held accountable for profits of book published in violation of CIA's contractual right of prior approval); Securities and Exch. Comm'n v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969) (corporation may recover profits earned by corporate insiders who abuse confidential information by selling personal stock holdings). Indeed, the agent may have gained such profits through a wholly illegal abuse of his or her position. *See, e.g.,* Reading v. Attorney General, [1951] A.C. 507 (British Army sergeant obligated to account to government for money he made by assisting in the smuggling of whiskey in Army trucks).

<sup>442</sup> 1 G. PALMER, *supra* note 211, at 141.

<sup>443</sup> Sentences of restitution are not discharged in bankruptcy. *See Kelly v. Robinson*, 107 S. Ct. 353 (1986). *See generally* Hennigan, *Criminal Restitution and Bankruptcy Law in the Federal System*, 19 CONN. L. REV. 89, 91 (1986) ("Robinson effectively permits each state to manufacture its own exceptions to discharge in federal bankruptcy proceedings by enacting criminal statutes and then authorizing their enforcement by restitution orders."); Kratsch & Young, *Criminal Prosecutions and Manipulative Restitution: The Use of State Criminal Courts for Contravention of Debtor Relief*, 1984 ANN. SURV. BANKR. L. 107.

claims should exceed the value of the forfeited property, as they might, the hearing would no longer be concerned solely with allocation. The defendant would surely have a due process right to dispute the victim's claim in such a case. In any event, a criminal court is not an appropriate forum to determine the measure and amount of civil restitution due in, for example, a private securities fraud action.<sup>444</sup>

In practice, then, it would be well to confine the victim to proof of his or her actual damages measured just as they are for the purpose of a sentence of criminal restitution. The victim would still be free to bring a civil action in state or federal court for the full measure of equitable restitution. Once the criminal court judge has determined that the victim's losses were causally related to the offense, the conviction would have collateral estoppel effect in the subsequent civil action.<sup>445</sup> Most importantly, once the victim has been "certified" at the § 1963(m) hearing as actually or potentially entitled to restitution, all property forfeited by the offender should remain available to satisfy a future civil judgment for a period of years.<sup>446</sup>

#### C. CRIMINAL FORFEITURE AND THE JUST CLAIMS OF THIRD PARTY CREDITORS

The preceding section concluded that victims with claims growing out of an offense should be able to reach property criminally forfeited in connection with such offense. In a handful of cases the courts have extended the same right to the defendant's unsecured creditors.<sup>447</sup> These cases concern the standing of creditors to intervene. The Justice Department, while rejecting such standing, has recently recognized for the first time a right of trade creditors to administrative remission of forfeiture, but the Department requires that they demonstrate "a reasonable, good faith connection between the debt and the property subjected to forfeiture other than the ownership of such property by the debtor."<sup>448</sup> Moreover, the debt must be for "services or goods provided within four months

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<sup>444</sup> For an idea of the theoretical difficulties involved, see Thompson, *supra* note 427.

<sup>445</sup> A sentence of restitution has just this effect under current law. 18 U.S.C. § 3664 (1982 & Supp. III 1985). See *supra* notes 418-19 and accompanying text.

<sup>446</sup> As a practical matter, the victim, upon winning civil judgment, might merely acquire a statutory lien upon the Assets Forfeiture Fund equal to the value of the property forfeited plus interest. There is no reason to segregate or preserve the specific property forfeited.

<sup>447</sup> See *supra* notes 431-34 and accompanying text.

<sup>448</sup> Forfeiture Regulations § 9.6(a)(1)(ii), *supra* note 31.

prior to the seizure. . . ."<sup>449</sup> In practice only suppliers and repairers of identifiable goods will be able to make the required showing. Unsecured lenders will not unless they can trace the proceeds of their loan into the forfeited assets. Defense attorneys will certainly have no claim to remission, as their services are not connected to particular property. Neither, of course, will tort creditors.

In effect, the new regulations impose a tracing requirement upon creditors while establishing a presumption in favor of the government. The property seized is presumed to be the proceeds of crime or otherwise forfeitable unless the creditor can trace his or her goods or advances into the forfeited property. At first glance this seems appropriate. Without such a tracing requirement, if creditors were given priority over the government, the defendant would benefit because his or her pre-seizure expenditures would be treated as having come from forfeitable assets while the defendant's just debts would be discharged out of property otherwise subject to forfeiture.

One can make, however, a strong case against the current requirement that creditors trace their property into the forfeited assets. After all, the government is no longer required to trace the proceeds of crime into the defendant's property before the latter may be forfeited, but may seize and forfeit substitute assets.<sup>450</sup> It seems far less objectionable to give creditors priority in such substitute assets than in property which is provably traceable to crime. Moreover, the objection to letting the criminal benefit by settling debts with forfeited funds is easily met. All such creditors should be required to resort first to the defendant's non-forfeited assets.<sup>451</sup> After these are exhausted, however, the criminal will hardly care how his or her forfeited assets are distributed, for they are lost to him or her. The government should not reap a windfall while innocent creditors go unpaid.

There remains the issue of the claims of those tort creditors whose injury was not caused by the crime which resulted in forfeiture.<sup>452</sup> There is no justification for leaving their claims unsatisfied

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<sup>449</sup> *Id.* at § 9.6(a)(1)(iii).

<sup>450</sup> See *supra* notes 78-81 and accompanying text.

<sup>451</sup> This is precisely what the new Regulations require. Forfeiture Regulations § 9.6, *supra* note 31.

<sup>452</sup> There is only one reported case in which such creditors attempted to assert an interest in forfeited property. *United States v. Mageean*, 649 F. Supp. 820 (D. Nev. 1986). In *Mageean*, the defendant was convicted of RICO violations and ordered to forfeit his shares, 100 of those outstanding, in a company determined to have been engaged in racketeering activities. The company, Ark Distributing, had an interest in a plane which crashed, killing several people. Persons with tort claims arising from the

while the defendant has forfeitable assets. Yet an innocent trade creditor or lender has made an uncompensated contribution to the net wealth of the defendant and therefore has a claim to priority over the government, but not over any victims, when the defendant's assets are distributed. A tort claimant has made no such contribution. Once the government has stripped defendant of his or her property, however, there is no more reason to give the government priority over tort claimants than there is to give it priority over trade creditors. Moreover, tort claimants, or at least those whose claims do not arise from any commercial dealings with the defendant, arguably have a stronger claim of priority than contract claimants, because they are not subject to suspicions about their good faith or the reasonableness or propriety of their dealing with criminals.

This last point raises the important issue of the standard of care to which a creditor must have conformed in his or her dealings with a criminal before such a creditor is entitled to priority over the government in forfeited assets. Obviously, persons who consciously assist criminals in laundering their criminal proceeds or who engage in sham transactions are not entitled to such priority. The difficult question is whether it is wise to use the possibility of forfeiture to enforce an inchoate duty not to deal, even legally and at arm's length, with persons who are or might be criminals. In effect, existing statutes do this, by requiring that *bona fide* purchasers be without reasonable cause to believe that the property was subject to forfeiture<sup>453</sup> and by permitting the civil forfeiture of instrumentalities of crime from the true owner unless such owner meets a stringent standard of care.<sup>454</sup>

As already noted in the discussion of such civil forfeitures, it is unfair and impractical to make a lender or seller a surety for the good behavior of a borrower or buyer.<sup>455</sup> In general, if society wishes to establish rules governing dealings of commerce and friendship between ordinary citizens and known or suspected

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crash moved that the forfeited property be held intact pending a judgment against Ark for negligence. Their claim against Ark's assets, of course, would ordinarily be unaffected by the forfeiture of Mageean's shares to the government. The government, however, claimed, and the court agreed, that the assets of Ark were also forfeit as proceeds of racketeering activity. *Id.* at 825-27. Because Ark was not charged with RICO violations, this seems a dubious conclusion. Having held that the assets were forfeit, the court applied the statute literally and concluded that the crash victims had no interest in the property and were not *bona fide* purchasers thereof. *Id.*

<sup>453</sup> 18 U.S.C.S. § 1963(e)(6)(B) (Law. Co-op. Supp. 1987).

<sup>454</sup> See *supra* notes 266-74 and accompanying text.

<sup>455</sup> See *supra* notes 273-74 and accompanying text.

criminals, such rules should be explicit and directly enforced, such as the statute penalizing money laundering.<sup>456</sup> If such rules are not legislatively enacted and are invoked and defined only in the context of third party losses through criminal and civil forfeiture, serious unfairness is bound to result. Law-abiding citizens will have insufficient notice of the standard of behavior expected. The rules will invite or demand discrimination against persons with criminal records or reputations, extending their punishment capriciously and making their reintegration into society more difficult. Perhaps the most common result, however, is that reasonable businesspersons will take no precautions at all, given the high level of care required to avoid all risk of forfeiture and the extreme smallness of the risk in any given case. Thus, the possibility that a trade creditor may suffer a loss because his or her debtor's assets have been criminally forfeited will deter either too broadly or not at all. In either case the justification for giving the government priority in the forfeited assets disappears.

This discussion has constantly weighed the government's interest in forfeitable proceeds of crime against that of various sorts of creditors. If the property forfeited under RICO is the defendant's entire interest in an enterprise, the priority of the creditors' interest is even clearer. While one can argue that creditors have no reasonable expectation of repayment out of the proceeds of crime, the government should not enrich itself by disproportionate and punitive forfeitures at the expense of the defendant's creditors. It may be objected that the government is free to punish by means of heavy fines, which reduce the defendant's capacity to pay his debts and which are not dischargeable in bankruptcy.<sup>457</sup> In setting fines, however, the court takes into account the defendant's financial situation, including his or her debts and obligations. Moreover the government collects fines by civil means and criminal contempt.<sup>458</sup> It may not seize the defendant's assets or restrain their transfer before trial so that such assets will be available to satisfy a fine.<sup>459</sup> The govern-

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<sup>456</sup> See Money Laundering Control Act of 1986, 18 U.S.C.S. §§ 1956-57 (Law. Co-op. Supp. 1987).

<sup>457</sup> 11 U.S.C. § 523(a)(7) (1982).

<sup>458</sup> See 18 U.S.C. §§ 3611-3615 (Supp. III 1985).

<sup>459</sup> *United States ex rel. Ferenc v. Brierley*, 320 F. Supp. 406, 409 (E.D. Pa. 1970). In *Ferenc*, the court granted a writ of habeas corpus to a state prisoner who was unable to retain counsel of his choice because the Commonwealth refused to release cash which was in his possession when he was arrested. The money was substantially in excess of the sum which he was accused of stealing.

After the relator was convicted, the Commonwealth returned his money after deducting his fine. The court rejected the argument that so little was left that it would not have sufficed to retain counsel. *Id.* at 408. "This assumes that the amount of money

ment is thus on a more equal footing with the defendant's other creditors, who may have attached the defendant's assets long before the fine was levied. Finally, one commentator has advocated treating fines and forfeitures as one fund against which both victims and creditors may claim.<sup>460</sup>

Curiously, a statutory model already exists for a system of orderly redistribution of the forfeited proceeds of crime. The states and the federal government have already enacted many statutes authorizing victims, creditors, tort claimants, and dependents to claim the "collateral profits" of crime in accordance with a scheme of priorities. These statutes are the literary or collateral profits acts, more popularly known as "Son-of-Sam" acts after David Berkowitz, the "Son of Sam", whose serial murders were an important impetus for their passage.<sup>461</sup>

Literary profits statutes, now enacted in thirty-three states,<sup>462</sup> generally provide for the forfeiture of sums paid to a convicted criminal for the rights to his or her story and royalties earned by the criminal's own writings concerning his or her offenses. One important motive for their adoption, of course, is abhorrence at the sight of perpetrators of heinous or infamous crimes making profitable deals for the rights to their story. The legislature wishes to deter such deals by making them unprofitable.<sup>463</sup> Yet, this motive is not entirely consistent with the desire to secure the profits of such contracts for the benefit of the offender's victims, which logically requires their encouragement.<sup>464</sup> The matter is further complicated by the indubitable free speech rights even of criminals, which might

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used to pay the fine was *always* so earmarked by the Commonwealth, even *before* the trial, when it should have been available to retain counsel. Such an argument has no basis in law or logic." *Id.* at 408-09 (emphasis in original).

<sup>460</sup> D. HODGSON, *supra* note 136, at 63, 130-31.

<sup>461</sup> See *In re Johnsen*, 103 Misc. 2d 823, 430 N.Y.S.2d 904, 906 (N.Y. Sup. Ct. 1979) (held the New York statute constitutional against the attack of David Berkowitz's conservator).

<sup>462</sup> For a current list of statutes, see Comment, *The Expansion of Victim Compensation Programs: Today's "Son of Sam" Legislation and its Susceptibility to Constitutional Challenge*, 18 U. Tol. L. Rev. 155, 163 n.51, 164 n.54 (1986). The federal statute was enacted by the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1406(a), 98 Stat. 2175 (codified at 18 U.S.C. §§ 3681-82 (Supp. III 1985)).

<sup>463</sup> "These sections may serve as a deterrent to any contract ever being entered into between a defendant and another party [for the depiction of the crime]. . . . As a result, no funds may ever be deposited in the [Crime Victims' Assistance] Fund from this source." OFFICE OF THE ATTORNEY GENERAL, SUMMARY OF VICTIMS OF CRIME ASSISTANCE ACT OF 1984, reprinted in 130 CONG. REC. S2635, 2637 (daily ed. March 13, 1984).

<sup>464</sup> See Comment, *supra* note 462, at 194 ("The vagueness of the statutes may well be the result of the legislatures' vacillating focus between punishment of the criminal and compensation of the victim.").

be impermissibly burdened by simple forfeiture of all their earnings,<sup>465</sup> and by the problem of distinguishing between the reprehensible exploitation of the defendant's notoriety and literary productions unrelated to the defendant's crimes.<sup>466</sup>

In their effort to resolve these tensions, the statutes generally provide for the escrowing of all rights and royalty payments in the hands of a Victim Compensation Board, which holds them for a time subject to the claims of victims and creditors in accordance with an explicit scheme of priority. The statutes differ as to whether any surplus, at the end of the escrow period, is payable to the offender or forfeit to the state.<sup>467</sup> They also differ as to whether they make provision for the claims of creditors who are not victims of the crime of which the defendant was convicted. Some, like the federal statute, provide for the optional or mandatory payment of part of the forfeited funds to the defense attorney, thus preferring him or her to other creditors.<sup>468</sup> A few states further provide for the payment

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<sup>465</sup> See Comment, *In Cold Type: Statutory Approaches to the Problem of Offender as Author*, 71 J. CRIM. L. & CRIMINOLOGY 255 (1980) (the New York literary profits act and its imitators are unconstitutional to the extent that they create a net disincentive for the offender to tell his story); Comment, *Compensating the Victim from the Proceeds of the Criminal's Story—The Constitutionality of the New York Approach*, 14 COLUM. J.L. & SOC. PROBS. 93 (1978).

<sup>466</sup> The constitutional problem is that this is discrimination based on content. From a broader perspective, there is an ancient and honorable tradition of prison literature, or at least literature written in prison, ranging from Wilde's "Ballad of Reading Gaol" to Dostoevsky's *THE HOUSE OF THE DEAD*. Sometimes criminals write self-serving apologetics; sometimes they write cautionary tales. Such literature is at least clinically interesting, even if its sales are due in part to the notoriety of the author and his or her crime. See generally Note, *The Son-of-Sam Laws: When the Lunatic, the Criminal, and the Poet Are of Imagination All Compact*, 27 ST. LOUIS U.L.J. 207 (1983).

<sup>467</sup> See, e.g., the New Jersey Criminal Injuries Compensation Act of 1971, N.J. STAT. ANN. 52:4B-26, (West 1986) (balance of forfeited funds held in compensation fund to pay reparations to other crime victims); Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts*, 30 UCLA L. REV. 52, 67 (1982).

When any surplus is payable to the offender after a certain period, the chief substantive effect of the statute is to avoid the statute of limitations, because victims may claim against the escrowed funds even though the statute has run on their civil claims. See *Barrett v. Wojtowicz*, 94 Misc. 2d 379, 404 N.Y.S.2d 829 (Sup. Ct. 1978), *aff'd*, 66 A.D.2d 604, 414 N.Y.S.2d 350 (1979) (sums paid to one of the "Dog Day Afternoon" hostage takers for the rights to his story could be escrowed for victims although the statute of limitations had run on any civil claim).

<sup>468</sup> [I]f ordered by the court in the interest of justice, [proceeds may] be used to—  
(ii) pay for legal representation of the defendant in matters arising from the offense for which such defendant has been convicted, but no more than 20 percent of the total proceeds may be so used.

18 U.S.C. § 3681(c)(1)(B) (Supp. III 1985). See, e.g., COLO. REV. STAT. § 24-4.1-201(5) (Supp. 1987) (release of funds to accused from escrow to pay attorney's fees only if the accused does not have other funds sufficient to the purpose); CONN. GEN. STAT. ANN. § 54-218(a) (West 1985) (proceeds deposited with clerk payable to defendant for the expenses of his defense); DEL. CODE ANN. tit. 11, § 9103(h) (1987) (not more than one-fifth of literary proceeds to be paid for the expenses of the accused's defense); ILL. ANN.

of a percentage of the forfeited funds to the criminal's dependents.<sup>469</sup> The experience thus gained in the allocation of collateral criminal profits may serve as a guide if current forfeiture laws are reformed to give legal standing to victims and creditors to claim against forfeited proceeds.

D. THE REPLACEMENT OF CRIMINAL FORFEITURES  
BY PROCEEDS FINES

Criminal forfeitures under RICO and CCE are mandatory in that they are removed from the discretion of judges and are not dependent on findings of fact. Substantial and automatic punishment for serious crime, independent of the vagaries of individual judgment and free from considerations of rehabilitation, has a powerful appeal, but the complete separation of criminal forfeiture from the traditional sentencing process and the dual role of the jury in determining guilt and fixing the punishment of criminal forfeiture give rise to serious problems of due process.<sup>470</sup> One might guess that when Congress originally reintroduced criminal forfeiture it deliberately wished to take punishment out of the hands of judges, perhaps seeing them as unduly lenient to organized crime.<sup>471</sup> Congress was also motivated by the inadequate and even nominal fines then available under federal law.<sup>472</sup> However, since RICO and CCE were adopted, Congress has significantly toughened criminal punishments, constrained judicial discretion in sentencing, and abolished parole.<sup>473</sup>

At the same time, as already described, the evolution of RICO and CCE have made the forfeiture of criminal proceeds a central remedy.<sup>474</sup> A further convergence has occurred between

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STAT. ch. 70, par. 407-7(a) (Smith-Hurd Supp. 1987)(state treasurer may make payments from literary profits escrow account for legal representation).

<sup>469</sup> See, e.g., FLA. STAT. ANN. § 944.512(2)(a) (West 1985)(25% of the literary profits account to be distributed to the dependents of the convicted felon.).

<sup>470</sup> See *supra* notes 364-73 and accompanying text.

<sup>471</sup> There does not, in fairness, seem to be any contemporaneous expression of this motive, perhaps for reasons of discretion. Proponents of criminal forfeiture may have wished to disguise the extent to which they were motivated by distrust of and even hostility toward the federal judiciary, based on the belief that judges were "soft on crime" and could not be trusted to impose severe enough sentences, especially upon white-collar criminals. Justice Department representatives have stated before Congress that they prefer the subjection of substitute assets to forfeiture to the imposition of very large fines, because fines are discretionary with the judge. H.R. REP. NO. 845, 98th Cong., 2d Sess. 10-11 (1984)(available at Cong. Inf. Serv. H523-21 (1984)(microfiche)).

<sup>472</sup> For example, in 1978 the maximum fine for a first offense of distributing a schedule I narcotic drug was \$25,000. 21 U.S.C. § 841(b)(1)(A) (1976).

<sup>473</sup> Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212(a)(2), 98 Stat. 1987-92.

<sup>474</sup> See *supra* notes 33-88 and accompanying text.



RICO/CCE and the penalties for other crimes. Congress has prescribed a fine equal to up to twice the criminal proceeds as an alternative fine for RICO and CCE offenses.<sup>475</sup> It has also prescribed a similar alternative fine as a transitional punishment for all crimes involving pecuniary harm to the victim or benefit to the perpetrator.<sup>476</sup> The question arises, therefore, whether there remains any justification for retaining the forfeiture of criminal proceeds as an independent remedy in RICO and CCE. Is its function adequately performed by very large fines, in conjunction with restitution? Should the criminal justice system replace forfeiture with a mandatory general fine equal to criminal proceeds?

Fines, which by general agreement were both too small and too rarely imposed,<sup>477</sup> have been increased to a maximum for each count of \$250,000 if the offender is an individual, \$500,000 if the offender is an organization.<sup>478</sup> In 1986, Congress enacted maximum fines of up to \$8 million for a recidivist drug dealer and \$20 million for an organization.<sup>479</sup> At such levels fines may in many

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<sup>475</sup> See *supra* note 83. Such fine is optional, and is in addition to the forfeiture of proceeds, which remains mandatory.

<sup>476</sup> Criminal Fine Enforcement Act of 1984, Pub. L. No. 98-596, § 6(a), 98 Stat. 3136 (codified at 18 U.S.C. § 3623 (c)(1) (Supp. III 1985)), *prospectively repealed effective November 1, 1987* by Sentencing Reform Act of 1984, Pub. L. No. 98-473, §§ 212(a)(2), 235(a)(1), 98 Stat. 1987, 98 Stat. 2031:

If the defendant derives pecuniary gain from the offense, or if the offense results in pecuniary loss to another person, the defendant may be fined no more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

Curiously, Congress rejected the same provision as a permanent part of the Sentencing Reform Act of 1984, on the grounds that it would virtually require a trial on the issue of damages at the time of sentencing. S. REP. NO. 225, 98th Cong., 2d Sess. 106, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3289. Of course, the judge has discretion to avoid this problem under § 3263, and one commentator has suggested that judges will usually shy away from proceeds fines for just this reason. Rezneck, *The New Federal Criminal Sentencing Provisions*, 22 AM. CRIM. L. REV. 785, 799-800 (1985).

<sup>477</sup> See, e.g., 21 U.S.C. § 841(b)(1)(A) (1982) (*amended by* 21 U.S.C. § 841(b)(1)(A) (Supp. III 1985)) (maximum pre-1984 fine of \$25,000 for a first offense of distributing a schedule I narcotic drug); S. REP. NO. 225, 98th Cong., 2d Sess. 103, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3286 ("fines generally have been an inappropriately under-used penalty in American criminal law . . .").

<sup>478</sup> 18 U.S.C. § 3571(b) (Supp. III 1985). Perhaps by an oversight, the Sentencing Reform Act, while recognizing RICO/CCE forfeiture, 18 U.S.C. § 3554 (Supp. III 1985), did not specifically authorize the alternative fine of twice the gross profits or other proceeds permitted by 18 U.S.C. § 1963(a) (Supp. III 1985), and 21 U.S.C. § 853(a) (Supp. III 1985), which may exceed the statutory maximum.

<sup>479</sup> 21 U.S.C.S. § 841(b)(1)(A) (Law. Co-op. Supp. 1987) (for distribution or possession with intent to distribute very large quantities of specified drugs). These fines supersede the Sentencing Reform Act maxima. *Id.*

The statute 21 U.S.C.S. § 841(b)(5) (Law. Co-op. Supp. 1987) imposes the remarkable penalty of a maximum fine of \$500,000 upon any individual who cultivates any quantity of a controlled substance on federal property, and \$1,000,000 upon a defendant

cases be equivalent, or nearly so, to the forfeiture of proceeds,<sup>480</sup> without the evidentiary difficulties of tracing<sup>481</sup> or a showing of inability to trace.<sup>482</sup> It remains to be seen how far the federal courts will employ their new authority. A fine, a sentence of restitution, or community service work is now mandatory, however, when a defendant is placed on probation.<sup>483</sup> Fines have also been made far more readily collectible by the Criminal Fine Enforcement Act of 1984.<sup>484</sup> As the courts gain experience with reformed sentencing, prosecutors may come to see real advantages in asking for high fines rather than forfeiture even in RICO and CCE cases.

The fact that criminal forfeiture is mandatory in those cases in which it is a prescribed penalty is distinct from the fact that its imposition is a jury function. The statute could ensure that the defendant would be deprived of his or her criminal profits through a mandatory fine, without involving the jury in determining the amount. There is no hint in the legislative history, however, that the draftsmen considered such a fine. Rather, they seem to have assumed that a special jury verdict is constitutionally necessary for the forfeiture of the defendant's interests in an enterprise either criminally acquired or criminally maintained and operated.<sup>485</sup> The facts underlying such a forfeiture, involving the manner in which the offense was carried out, are perhaps too closely intertwined with the offense for fair determination at a post-conviction sentencing hearing.

Once, however, the courts had decided that 1970 RICO did authorize the forfeiture of proceeds, Congress recognized the utility of

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"other than . . . an individual." Presumably Congress supposed that a substantial deterrent was necessary because of the attractions of cultivating marijuana on non-forfeitable land.

<sup>480</sup> The legislative history cited such substantial equivalence as a reason for rejecting an optional fine measured by the defendant's gains. Thus "The Committee concluded that an increase in the maximum fine levels for serious offenses would assure that a fine could be imposed that would usually reach the defendant's ill-gotten gains while avoiding undue complexity in the sentencing hearing." SEN. REP. NO. 225, 98th Cong., 2d Sess. 106, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3289. In cases where the defendant made millions, restitution orders might compensate for any inadequacy in the maximum permitted fines. *Id.*

<sup>481</sup> See *supra* notes 343-47 and accompanying text.

<sup>482</sup> 18 U.S.C.S. § 1963(n) (Law. Co-op. Supp. 1987); 21 U.S.C.S. § 853(p) (Law. Co-op. Supp. 1987). See *supra* note 78.

<sup>483</sup> 18 U.S.C. § 3563(a)(2) (Supp. III 1985).

<sup>484</sup> The Criminal Fine Enforcement Act of 1984, Pub. L. No. 98-596, § 12 98 Stat. 3139 (*codified at* 18 U.S.C. § 3565 (Supp. III 1986)), *repealed effective November 1, 1987 by* the Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212(2), 98 Stat., 1987. Superseding provisions are to be found at 18 U.S.C. § 3611-3615 (Supp. III 1985).

<sup>485</sup> Private communication of Professor G. Robert Blakey, Notre Dame Law School. Professor Blakey was one of the RICO draftsmen.

imposing a fine measured by the amount of criminal proceeds.<sup>486</sup> Such fine of up to twice the proceeds is an optional substitute for other fines, but it could as easily be mandatory after a special hearing to determine the amount of proceeds. Is a jury determination of such amount, which does not go to the defendant's guilt or innocence, constitutionally required? Under the Sentencing Reform Act, the judge will in many cases determine the amount of the victim's loss or the defendant's gain in a sentencing hearing, because such amount is relevant in fixing the amount of the fine<sup>487</sup> and must be determined before the judge enters a sentence of restitution.<sup>488</sup> The new requirement that the court shall "state in open court the reasons . . . for the particular sentence"<sup>489</sup> and the availability of appellate review<sup>490</sup> seem to remove all due process objections to "proceeds fines." The constitutional question may be resolved in the near future, because such fines are already prescribed by federal law in some instances.<sup>491</sup>

Thus far it appears that very little turns on the distinction between proceeds fines and proceeds forfeitures. There is, however, one important procedural difference: the possibility under current law of attaching a defendant's assets or enjoining him or her from transferring them before trial and even before indictment.<sup>492</sup> The government's right to do this is obviously a consequence of conceptualizing forfeiture as the recapture of property which the government already has title, in other words the "relation-back" fiction.<sup>493</sup> It seems difficult to imagine the government asserting such a right with respect to something called a "fine." By definition a fine is a punishment imposed after conviction. Intuitively, the government

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<sup>486</sup> 18 U.S.C. § 1963(a)(e)(Supp. III 1985); 21 U.S.C. § 853(a) (Supp. III 1985).

<sup>487</sup> In determining the sentence to be imposed, 18 U.S.C. § 3572(a)(1) e(Supp. III 1985) requires the court to consider "the nature and circumstances of the offense," 18 U.S.C. § 3553(a)(1) (Supp. III 1985), and "the need for the sentence imposed (A) to reflect the seriousness of the offense . . . and to provide just punishment. . . ." 18 U.S.C. § 3553(a)(2) (Supp. III 1985).

<sup>488</sup> 18 U.S.C.S. § 3556 (Law. Co-op. Supp. 1987)(authorizing restitution in accordance with 18 U.S.C. §§ 3663-64). The constitutionality of making such a determination in a sentencing hearing without a jury is settled. *United States v. Fountain*, 768 F.2d 790, 801 (7th Cir. 1985)("restitution is not some newfangled effort to get around the seventh amendment, but a traditional criminal remedy."); *United States v. Durham*, 755 F.2d 511, 514 (6th Cir. 1985)(dictum); *United States v. Brown*, 744 F.2d 905 (2d Cir. 1984), *cert. denied*, 469 U.S. 1089 (1984). But see Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 931, 942 n.85 (1984).

<sup>489</sup> 18 U.S.C.S. § 3553(c) (Law. Co-op. Supp. 1987).

<sup>490</sup> 18 U.S.C.S. § 3557, 3742 (Law. Co-op. Supp. 1987).

<sup>491</sup> See *supra* notes 475-76 and accompanying text.

<sup>492</sup> See *supra* notes 89-97 and accompanying text.

<sup>493</sup> *Id.*

cannot have title to the funds needed to pay a fine even before indictment. However, the availability of pre-trial restraining orders need not and should not depend on making the jury the finder of fact with respect to the amount of proceeds and calling the resultant penalty a "forfeiture," if it is desirable for other reasons to lodge this function with the judge at a post-conviction hearing. The due process difficulties with pre-trial restraining orders were considered earlier;<sup>494</sup> in this connection it suffices to say that they are far less objectionable if the funds are being sequestered ultimately to satisfy the claims of victims, defense counsel, and creditors rather than to remove the funds permanently from their reach.

The above argument presupposes, of course, that the government will hold the fruits of a mandatory proceeds fine, no less than the fruits of a mandatory forfeiture, subject to the prior claims of victims and creditors. It is customary, however, to think of a fine as a penalty paid to the government as the representative of a wronged society. Once again the only difficulty is definitional. However, formal categories should not prevent the just modification of the system of criminal penalties.

## V. CONCLUSION

Criminal forfeiture re-entered American law in a manner characteristic of legal innovations. Its inventors saw criminal forfeiture as a remedy for a peculiar problem: the infiltration of legitimate business by organized crime. They did not foresee its revolutionary implications. It was entangled at its birth in procedures drawn from the inappropriate model of civil forfeiture. A principle of universal appeal and applicability has quickly emerged to justify criminal forfeiture: wrongdoers shall not profit from their crimes. This principle, once recognized, demanded that forfeiture should be extended to criminal proceeds without a requirement of tracing, and so it was, but only in the context of RICO and drug offenses. There is no principled reason, however, for confining the remedy of proceeds forfeiture to this context. It should be extended to all crimes committed for gain as a mandatory minimum penalty.

The forfeiture of interests in a RICO enterprise and of instrumentalities of crime appears to be a grave error. It leads to capricious and disproportionate punishments and is capable of dangerously discriminatory application. Even when particular interest forfeitures are not constitutionally disproportionate, it is wrong for the criminal justice system to surrender control over the deter-

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<sup>494</sup> See *supra* notes 98-105 and accompanying text.

mination of punishment, replacing legislative penalties graded in accordance with the seriousness of the offense with penalties fixed by accidents of circumstance. Any added deterrent effect attributable to such penalties is purchased at too high a price. Forfeitures should be generalized, but they should not be made to do work appropriately reserved for traditional punishments such as fine and imprisonment.

The imposition of criminal penalties always and inevitably injures the innocent friends, associates and creditors of the guilty defendant, and even his victims, because their interests are not identical with those of society or of the state. The existing system of criminal forfeitures tends to magnify these effects. At best, it largely ignores the legitimate competing interests of such third parties, relegating them to administrative remission available not as a matter of right but of grace. Attorney fee forfeiture is only a special instance of this general problem, which requires general rules of priority. Defense attorneys should not have priority over victims, but should have priority over other creditors of the defendant to the extent of a reasonable fee for the services performed. "Reasonableness" in this context must take into account the special complexities of criminal defense under such statutes as RICO.<sup>495</sup> The courts must not limit defense lawyers to the notoriously inadequate statutory fees paid to appointed counsel.<sup>496</sup>

The crisis in criminal forfeiture is, of course, related to larger trends in the development of criminal law, especially federal criminal law. Legislators multiply crimes and multiply punishments for such crimes. They scarcely ever repeal criminal statutes once enacted; they rarely make punishments less severe. At the same time, wrongdoing in the semi-official and wholly private spheres, relegated in the classic liberal state to the civil law or left entirely unreg-

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<sup>495</sup> In *United States v. Seventy Thousand Four Hundred Seventy Six Dollars in U.S. Currency*, 677 F. Supp. 639 (N.D. Cal. 1987), the court held valid the assignment to his defense attorney by a state criminal defendant of assets seized by the federal government for civil forfeiture under 21 U.S.C. § 881(a)(6). The government's interest in the forfeiture did not outweigh the defendant's right to counsel of his choice. *Id.* at 645-46. However, the court reserved the power to make an independent determination of the reasonableness of the attorney's fees in view of the complexity of the case, the counsel's level of experience, and the work which the attorney had already done.

<sup>496</sup> See 18 U.S.C.A. § 3006A(d)(1) (West Supp. 1987) (maximum hourly rate for appointed counsel \$60 per hour, and Judicial Conference may raise rate to \$75 per hour for particular circuit or district therein). Judge Murnaghan, concurring in *In re Caplin & Drysdale*, 837 F.2d 637, 650 (4th Cir. 1988) (Murnaghan, J., concurring) said that "the rate scale for appointees under the Criminal Justice Act tends to linger . . . behind the going rate," its increasing inadequacy may in the future give rise to "constitutional inquiry."

ulated, is criminalized by statutes of broad scope and uncertain limits. Since government resources devoted to enforcement do not expand in step, prosecution, always an inherently selective business, becomes more selective over time. The likelihood of discrimination and persecution increases, or, at least, the appearance of discrimination, which is almost as bad.

The existing system of forfeitures exacerbates this problem. It has an odor of state self-interest about it, if not, indeed, of statism. The forfeiture of criminal proceeds for the government's benefit at the expense of victims and creditors makes the state a metaphorical partner in crime. The forfeiture of a car for the purchase of ten dollars' worth of drugs or of a private school for the filing of a false report about class enrollments<sup>497</sup> shocks the conscience. The substantive content of the criminal law and its prescribed punishments are a civil liberties issue just as are the forms of criminal procedure. The limitation of criminal forfeiture to its proper place advocated in this Article is intended not only to rationalize the system of criminal penalties but to make it more just.

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<sup>497</sup> See *supra* note 312.