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RICO FORFEITURES, FORFEITABLE "INTERESTS," AND PROCEDURAL DUE PROCESS

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The Racketeer Influenced and Corrupt Organization Act (RICO) includes sweeping provisions for in personam forfeiture. Federal prosecutors have begun to employ these provisions with increasing frequency. The authors maintain that RICO forfeitures must comply with the due process requirements of the fifth amendment, but that current procedures, based on congressionally-approved in rem practices, are constitutionally inadequate. The Article focuses particularly on pretrial restraining orders and post-verdict forfeiture procedures and examines in depth the due process requirements at each of these stages. The authors conclude that although Congress specified tough forfeiture penalties under RICO, the procedural means it provided for enforcing the forfeiture provisions do not sufficiently protect the due process rights of either defendants or third parties.

On February 22, 1982, Rex Cauble stood in a Texas federal court before a jury of his peers.[1] The jury returned a verdict finding the 69 year-old Texas oilman guilty of racketeering under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. section 1962[2] and entered a special verdict for the criminal forfeiture of Cauble's interest in a Texas partnership. With a stroke of the judge's pen, the United States became one-third owner of a vast Texas business enterprise worth over 80,000,000 dollars. Included in the government's booty was a one-third interest in over 10,000 acres of Texas real estate, substantial ownership of three Texas banks, majority ownership of several Texas corporations, and over 450,000 shares of blue chip stock. Almost overnight, Cauble's business associates and partners found themselves co-venturers with Uncle Sam, not the Texas rancher who had spent all of his life amassing a large fortune. If this were not strange enough, their new partner

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1. *See* United States v. Cauble, 706 F.2d 1322 (5th Cir. 1983). The Fifth Circuit affirmed Cauble's conviction and hailed it as the "verdict of the country." *Id.* at 1356. For a general discussion of the *Cauble* case, see Lauter, *U.S. Seizures of Assets Accelerates*, The Nat'l L.J., Sept. 6, 1982, at 1, col. 4.

2. 18 U.S.C. § 1962 (1976) is part of the Racketeer Influenced and Corrupt Organizations Act (RICO). The substantive racketeering offenses are defined in § 1962, while the criminal penalties for violating RICO are found at 18 U.S.C. § 1963(a) (1976). For a discussion of the racketeering statute, see Project, *White-Collar Crime: A Second Annual Survey of Law*, 19 AM. CRIM. L. REV. 173, 351-70 (1981).

had a statutory duty under RICO to liquidate its holdings.[3] Stranger still, neither the jury nor the judge in Cauble's case ever had the opportunity to hear from these third parties. In fact, during the short two-week criminal trial, the defendant also had no meaningful opportunity to address the trier-of-fact concerning the extent of the forfeiture that would be entered. More importantly, while Cauble was stripped of his life's possessions on the basis of a finding of criminal guilt, the persons associated with his sprawling business ventures saw their property rights disappear without even the benefit of notice.

This Article addresses the diverse procedural problems presented by the increasing use of the criminal forfeiture provisions of RICO.[4] In particular, the Article focuses on the application of these complex provisions[5] to legitimate business enterprises.[6] The Article first contends that the current procedures for criminal forfeiture under RICO violate the fifth amendment because the statute fails to provide procedural safeguards against erroneous property deprivations to either the RICO defendant or third parties. The Article then proposes minimal procedures both before and after the RICO trial that would meet the demands of the fifth amendment.

The Article begins by depicting the statutory character of the in personam forfeiture sanctions under RICO. Section I describes the historical and legal

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3. *See* 18 U.S.C. § 1963(c) (1976) (government must "dispose" of all forfeited property "as soon as commercially feasible").

4. *See* Lauter, *supra* note 1, at 8, col. 3 (Justice Department officials "have been pursuing forfeiture with vigor"). The *Cauble* court emphatically noted that "[a]lthough it suffered initially from limited use, RICO is now a frequently-employed arrow in the federal prosecutor's crime fighting quiver." United States v. Cauble, 706 F.2d 1322 (5th Cir. 1983). There are signs, however, that the rush to use RICO may be slowed by the constitutional concerns that this Article addresses. Shortly after the *Cauble* judgment, a Justice Department official testified to a congressional committee as follows:

> It is now our position that . . . claimant[s] . . . asserting a legal interest in forfeited property that cannot be co-extensive with the order of forfeiture, are entitled to a judicial resolution of their claims, and that it is improper and arguably even unconstitutional for a remission and mitigation process, which has traditionally been viewed as solely a matter of executive discretion, to be used as the forum for resolution of their asserted interest.

The Comprehensive Drug Penalty Act of 1983: Hearing on H.R. 3299 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 98th Cong., 1st Sess. 16 (1983) (statement of James Knapp, Deputy Assistant Attorney General, Criminal Division).

5. Numerous commentators have addressed the substantive questions posed by the complicated racketeering statute. *See* Atkinson, *Racketeer Influenced and Corrupt Organizations, 18 U.S.C. § 1961-68 . . . Broadest of the Federal Criminal Statutes*, 69 J. CRIM. L. & CRIMINOLOGY 1 (1978); Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Penalities*, 53 TEMP. L.Q. 1009 (1980); Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837 (1980); McClellan, *The Organized Crime Act (S. 30) or Its Critics: Which Threatens Civil Liberties?*, 46 NOTRE DAME LAW. 55 (1970); Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 FORDHAM L. REV. 165 (1980); Note, *Aiding and Abetting the Investment of Dirty Money: Mens Rea and the Non-Racketeer Under RICO Section 1962(a)*, 82 COLUM. L. REV. 574 (1982); Note, Elliott v. United States: *Conspiracy Law and the Judicial Pursuit of Organized Crime Through RICO*, 65 VA. L. REV. 109 (1979).

6. RICO can be used to forfeit the assets of both a legitimate and illegitimate "enterprise." *See* United States v. Turkette, 452 U.S. 576 (1981). When the prosecution attempts to forfeit the assets of legitimate businesses, the valid proprietary rights of third parties and defendants are significantly implicated. If the enterprise theory invoked by the prosecution involves an illegitimate enterprise, the defendant and third parties have a considerably less colorable proprietary claim to the alleged forfeitable interests.

differences between forfeitures in personam and in rem and concludes that in rem procedures may not be applied to in personam forfeitures. Section II discusses the in personam nature of a RICO forfeitures and introduces the central issue: reconciling congressionally provided in rem procedures with the in personam nature of a RICO forfeiture. It identifies possible means of reconciling this conflict and concludes that RICO forfeitures must be consistent with the demand of both procedural due process and the in personam nature of the racketeering statute.

Section III discusses the general requirements of procedural due process: notice and the opportunity to be heard. Section IV applies these broad mandates in the specific context of a pretrial restraining order provided under RICO to prevent transfer of assets prior to trial on the merits. Section V considers procedural due process requirements at the post-verdict stage, at which a finding of forfeitability is entered. Each section presents the substantive questions raised at these proceedings and then discusses the various procedural trappings particularly required by the due process clause. The issues addressed include the timing of the hearing, notice, neutrality of the factfinder and the formality of the proceedings. The Article concludes that notwithstanding the significant goals that Congress sought to further by providing forfeiture penalties under RICO, the means it provided are constitutionally inadequate. Federal courts must realize these procedural due process deficiencies and begin to apply the due process requirements of the Constitution to RICO forfeitures.

I. FORFEITURE IN GENERAL

A. A Preliminary Framework

In order to evaluate the adequacy of the procedures currently employed to effectuate a RICO forfeiture, it is necessary before examining the racketeering statute itself to understand something about forfeitures. Not all forfeitures are alike.[7] As a criminal penalty, forfeiture operates in personam, or against the person. At early common law, in personam forfeitures wrested from the defendant the entirety of his property rights upon conviction.[8] Imposed to punish, in personam forfeiture before RICO was virtually unknown to federal criminal law.[9] Civil forfeiture, on the other hand, is in rem, a penalty against

7. *See, e.g.*, The Palmyra, 25 U.S. (12 Wheat) 1 (1827); Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379, 476 (1976); Note, *Bane of American Forfeiture Law—Banished at Last?*, 62 CORNELL L. REV. 768, 800 (1977).

8. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 682 (1974); United States v. Grande, 620 F.2d 1026, 1038 (4th Cir.), *cert. denied*, 449 U.S. 919 (1980). *See also* 3 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 68-71 (5th ed. 1942); 1 F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW 351 (2d ed. 1899).

9. *See* United States v. Martino, 681 F.2d 952, 959 (5th Cir. 1982) (en banc), *cert. granted sub nom.* Ruselo v. United States, 103 S. Ct. 721 (1983); United States v. Huber, 603 F.2d 387, 396 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980); United States v. Rubin, 559 F.2d 975, 991 (5th Cir. 1977), *vacated*, 439 U.S. 810 (1978), *aff'd in part, rev'd in part*, 591 F.2d 278 (5th Cir.), *cert. denied*, 444 U.S. 861 (1979); United States v. Thevis, 474 F. Supp. 134, 140 (N.D. Ga. 1979); United States v. Mandel, 408 F. Supp. 679, 682 (D. Md. 1976).

a specific res that has been used for an unlawful purpose regardless of the owner's culpability.[10] "Long before adoption of the constitution," the common law courts "were exercising jurisdiction in rem in the enforcement of forfeiture statutes."[11] Contemporary in rem statutes forfeit property employed in numerous types of wrongful conduct.[12] In contrast to the clear punitive purpose of in personam forfeiture, forfeiture in rem draws legal justification from diverse archaic rationales long rehearsed in constitutional litigation.[13]

A RICO forfeiture requires a finding of personal guilt in a criminal prosecution; it is in personam and is imposed as punishment.[14] Unlike in personam forfeiture at common law, however, RICO does not forfeit a defendant's entire estate, but instead a specific property interest in a criminal enterprise.[15] Sometimes in scope, but never in theory, RICO resembles in rem forfeitures.

Nevertheless, the only laws even arguably applicable to determining what procedures to apply to a RICO forfeiture are those applied to in rem proceedings. Moreover, courts have tended to apply in rem case law in construing RICO's substantive forfeiture provisions.[16] Whether forfeiture in rem analogies may successfully carry over to an in personam forfeiture such as RICO is a question properly resolved by closely looking at the legal and historical differences between in rem and in personam forfeiture. To place the specific provisions of a RICO forfeiture in perspective, the Article begins by setting forth this framework.

B. In Personam Forfeiture

In personam forfeiture follows an adjudication of guilt. At common law, conviction of felony automatically forfeited a defendant's personalty to the Crown and escheated all realty to his lord; a convicted traitor forfeited both to the Crown.[17] In medieval England the Crown ultimately held all land and property as part of the bond of allegiance between the King, as feudal lord,

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10. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680-81 (1974); Goldsmith-Grant Co. v. United States, 254 U.S. 505, 511 (1920); Vance v. United States, 676 F.2d 183, 186 (5th Cir. 1982); United States v. One 1976 Mercedes Benz 280S, 618 F.2d 453, 456 (7th Cir. 1980). *See also* Clark, *supra* note 7, at 476.

11. C.J. Hendry Co. v. Moore, 318 U.S. 133, 139 (1943).

12. *See, e.g.*, 18 U.S.C. § 3617 (1976) (liquor violations); 18 U.S.C. § 3612 (1976) (illegal bribes); 18 U.S.C. § 1082 (1976) (gambling); 49 U.S.C. § 782 (1976) (narcotics violations); 19 U.S.C. § 1594, 1595(a) (1976) (customs-revenue laws); 26 U.S.C. §§ 7301-7303 (1976) (internal revenue laws).

13. *See, e.g.*, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680-81 (1974); United States v. United States Coin & Currency, 401 U.S. 715, 719-21 (1971); Goldsmith-Grant Co. v. United States, 254 U.S. 505, 510-13 (1921); The Palmyra, 25 U.S. (12 Wheat.) 1, 14-15 (1827); Gelston v. Hoyt, 16 U.S. (3 Wheat.) 246, 291, 312-20 (1818).

14. *See infra* notes 96-116 and accompanying text (discussing theory of RICO forfeiture).

15. United States v. Martino, 681 F.2d 952, 964 (5th Cir. 1982) (Politz, J., dissenting), *cert. granted sub nom.* Russello v. United States, 103 S. Ct. 721 (1983); United States v. Rubin, 559 F.2d 975, 991 n.15 (5th Cir. 1977); United States v. Thevis, 474 F. Supp. 134, 140 (N.D. Ga. 1979).

16. *See infra* notes 109-16 and accompanying text.

17. 3 W. HOLDSWORTH, *supra* note 8, at 68-71; 1 F. POLLOCK & F. MAITLAND, *supra* note 8, at 351 (2d ed. 1899).

and society.[18] Breach of the law offended the King's peace;[19] the worst transgressions, deemed felonies, gave rise to the most severe sanctions. Indeed, early English law defined felony as any offense occasioning forfeiture of either lands or goods or both.[20] In addition to forfeiture, conviction of felony "corrupted" the defendant's blood, preventing property from passing by inheritance through him, and thereby depriving persons "kindred to felons" of their normal property rights.[21] "He who has thus violated the fundamental principles of government, and broken his part of the original contract between King and people . . . has no longer any right to . . . social advantages. . . . Transferring or transmitting property to others is one of the chief."[22]

The American colonies did not welcome forfeiture of estate for conviction of a felony.[23] The severe consequences for innocent descendants[24] and the failure of colonial governments to benefit from goods escheated to the crown[25] eventually led to virtually wholesale prohibition of the practice. In 1787, the framers of the Constitution, with little debate,[26] banned imposition of forfeiture of estate and corruption of blood for the offense of treason;[27] three years later the first Congress abolished forfeiture of estate for all convictions and judgments.[28] Since then,[29] and until RICO, in personam forfeiture has not resurfaced in American jurisprudence.

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18. *See* United States v. Grande, 620 F.2d 1026, 1038 (4th Cir.), *cert. denied*, 449 U.S. 919 (1980); 2 L. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, §§ 1299-1300 at 178-80 (3d ed. 1858).

19. *See* Taylor, *Forfeiture under 18 U.S.C. § 1963—RICO's Most Powerful Weapon*, 17 AM. CRIM. L. REV. 379, 381-82 (1980).

20. 1 J. BISHOP, COMMENTARIES ON THE CRIMINAL LAW 583-84 (8th ed. Boston 1892) (listed Boston 1856).

21. *See* 1 J. BISHOP, *supra* note 20, at 584; 2 J. STORY, *supra* note 18, § 1300, at 179-80; 2 J. KENT, COMMENTARIES ON AMERICAN LAW 385-87 (5th ed. 1844).

22. 4 W. BLACKSTONE, COMMENTARIES *382. "Such forfeitures, moreover, whereby his posterity must suffer as well as himself, will help to restrain a man, not only by the sense of his duty and dread of personal punishment, but also by his passions and natural affections." *Id.*

23. Forfeiture practices varied from colony to colony, but were never as harsh as in England. *See* Note, *supra* note 7, at 776-77; *see generally*, 1 J. BISHOP, *supra* note 20, at 585-86.

24. 1 J. BISHOP, *supra* note 20, at 584; J. KENT, *supra* note 21, at 385; Note, *supra* note 7, at 779.

25. *See* F. DOYLE, CRIMINAL FORFEITURE 11 (Library of Congress Congressional Research Service (1971).

26. *Id.* at 14 n.52.

27. "The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted." U.S. CONST. art. III, § 3, cl. 2. For judicial recognition of this legal history, *see* Wallach v. Van Riswick, 92 U.S. 202, 208-11 (1875).

28. "Provided always, and be it enacted, that no conviction or judgment for any of the offences aforesaid, shall work corruption of blood, or any forfeiture of estate." Act of Apr. 30, 1790, § 24, 1 Stat. 117. England abolished most forfeitures of estate for convictions of felony or treason in 1870. *See* The Forfeiture Act, 1870, 33 & 34 Vict., ch. 23. *See also* 1 J. BISHOP, *supra* note 20, at 585; 3 W. HOLDSWORTH, *supra* note 8, at 63.

29. The ban on forfeiture of estate has remained intact in American jurisprudence. *See* 18 U.S.C. § 3563 (1976) (based upon 18 U.S.C. § 544 (1940)). Both statutory and constitutional prohibitions envision complete forfeiture—"total disinheritance of one's heirs or those who would be one's heirs and forfeiture of *all* of one's property and estate." United States v. Grande, 620 F.2d 1026, 1039 (4th Cir.) *cert. denied*, 449 U.S. 919 (1980). The only other federal criminal statute providing for in personam forfeiture is 21 U.S.C. § 848 (1976), the "kingpin" narcotics statute. Enacted on the heels of RICO, the Continuing Criminal Enterprise (CCE) statute has also been

C. *In Rem Forfeiture*

A suit in rem civilly determines rights to property against all the world.[30] Forfeiture in rem establishes the government's superior right to the res upon proof of the property's "guilt" in violating customs, revenue or narcotics laws, regardless of the owner's culpability.[31] Thus, a vehicle used to transport a passenger carrying one-thirtieth of an ounce of marijuana had "guilt in the wrong" and was forfeit, despite lack of knowledge on the part of the driver, or of the owner (his mother).[32] Numerous similar examples abound.[33] The government's right to the property vests at the moment of illegal use.[34] Hence, in rem forfeitures effectively extinguish rights of unwitting secured parties[35] and subsequent purchasers of the guilty res.[36] In these civil proceedings the claimant has the burden of proof to show lack of probable cause for the seizure.[37] The property owner's innocence is irrelevant.[38] Only in later administrative proceedings as provided by the customs laws[39] may the property owner appeal to government discretion, largely unreviewable,[40] to remit or mitigate forfeit-

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the subject of recent judicial inquiry in the procedural due process area. This Article cites to pertinent CCE precedent when based upon the in personam nature of that statute.

30. C.J. Hendry Co. v. Moore, 318 U.S. 133, 136 (1943).

31. *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14-15 (1827) contains the classical statement explaining the difference between in rem and in personam forfeiture:

> It is well known, that at the common law, in many cases of felonies, the party forfeited his goods and chattels to the crown. The forfeiture did not, strictly speaking, attach *in rem*; but it was a part, or at least a consequence, of the judgment of conviction. . . . The crown's right to the goods and chattels attached only by the conviction of the offender. . . . But this doctrine never was applied to seizures and forfeitures, created by the statute, *in rem*, cognizable on the revenue side of the Exchequer. The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing; and this, whether the offence be *malum prohibitum*, or *malum in se*. . . . The practice has been, and so this Court understand [sic] the law to be, that the proceeding *in rem* stands independent of, and wholly unaffected by any criminal proceeding *in personam*.

See supra note 13 and accompanying text.

32. United States v. One 1957 Oldsmobile Auto, 256 F.2d 931 (5th Cir. 1958).

33. See J.W. Goldsmith-Grant Co. v. United States, 254 U.S. 505 (1920) (forfeiture of automobile used to transport tax-unpaid distilled spirits over objection of secured party); United States v. Edwards, 368 F.2d 722 (4th Cir. 1966) (forfeiture of coin-operated gaming devices when taxpayer merely misinterpreted the appropriate tax form). *See generally* Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L.Q. 169, 213-22 (1973).

34. Florida Dealers & Growers Bank v. United States, 279 F.2d 673, 676 (5th Cir. 1960).

35. Goldsmith-Grant Co. v. United States, 254 U.S. 505 (1921).

36. *See* Note, *supra* note 7, at 773 n.37; *see generally* United States v. 1960 Bags of Coffee, 12 U.S. (8 Cranch) 398, 416 (1814) (Story, J., dissenting).

37. 19 U.S.C. § 1615 (1976). This rule has been the law since the Act of July 31, 1789, 1 Stat. 29, 43-44. *See* United States v. One 1976 Mercedes Benz 280S, 618 F.2d 453, 456 (1980).

38. *See* United States v. Brig Malek Adhel, 43 U.S. (2 How.) 210, 238 (1844) (forfeiture upheld despite "fully established" innocence of shipowner). Indeed, the in rem forfeiture proceedings had no concern for the criminal culpability of the property owner. Instead, "there must be proof that the thing proceeded against was subjected to some unlawful use, or was found in some unlawful condition." Miller v. United States, 78 U.S. (11 Wall.) 268, 321-22 (1870) (Field, J., dissenting).

39. 19 U.S.C. §§ 1613, 1618 (1976).

40. United States v. L'Hoste, 609 F.2d 796, 811 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980); United States v. One 1970 Buick Riviera, 463 F.2d 1168 (5th Cir.), *cert. denied*, 409 U.S. 980

ures for lack of culpability.[41]

"Ancient rules maintain themselves," said Holmes, when "new reasons more fitted to the time have been found for them."[42] Ascribing to property a "certain personality" and finding that it has "guilt in the wrong"[43] is a curious fiction.[44] Furthermore, dispensing with the property owner's innocence yet putting the claimant to his proof—and narrowly restricting judicial review—is a procedural anomaly, recalling "old, forgotten, far-off things and battles long ago."[45] How and why forfeiture in rem became "firmly fixed"[46] in American jurisprudence is an inquiry that begins with the Bible, advances to eighteenth century admiralty and ends with Supreme Court precedent.

(1) Deodand

Common law forfeited to the Crown as a deodand[47] the value of an object causing tortious death of a King's subject.[48] The tree from which a person fell, the well in which he drowned, the sword that "killeth" him and the horse or steam engine that struck him[49]—all were subject to forfeiture and sale, with proceeds due the Crown. Biblical and pre-Christian traditions describe the doctrine's origin; medieval and modern England explain its growth.

The Biblical beginning is Exodus 2:28: "If an ox gore a man or woman, and they die, he shall be stoned; and his flesh shall not be eaten." According to early Judeo-Christian belief, an ordained hierarchy of creation established the human race as lord of life; an ox that gores a person to death offends the terrestial order and commits "high treason" against God.[50] Appeasement of the sovereign required a communal remedy of expiation attained by stoning the ox, analogically a limited form of forfeiture.[51] Similarly, a pre-Christian,

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(1972); United States v. One 1961 Cadillac, 337 F.2d 730, 732 (6th Cir. 1964); Jary Leasing Corp. v. United States, 254 F. Supp. 157 (E.D.N.Y. 1966).

41. 19 U.S.C. § 1613 (1976) provides for mitigation or remission of forfeiture for violations incurred "without any willful negligence or intention to defraud." Regulations implementing the customs laws procedures explain that mitigation or remission of forfeiture applies if the property owner did not know or have reason to know that his property would be used by another to violate the law. 19 C.F.R. § 171.13(a) (1982). *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689 n.27 (1974); Smith, *Modern Forfeiture Law and Policy: A Proposal for Reform*, 19 WM. & MARY L. REV. 661, 671 (1978).

42. O. HOLMES, THE COMMON LAW 36 (1881).

43. Goldsmith-Grant Co. v. United States, 254 U.S. 505, 510 (1921).

44. Indeed, the Supreme Court has itself recognized the illogic of in rem forfeiture despite consistently upholding its use. *See* Boyd v. United States, 116 U.S. 616, 637 (1886) ("In the words of a great judge, Goods, cannot offend, forfeit, unlade, pay duties, or the like, but men whose goods they are' ").

45. United States v. One 1976 Mercedes Benz 280S, 618 F.2d 453, 461 (1980).

46. Goldsmith-Grant Co. v. United States, 254 U.S. 505, 511 (1921).

47. The term comes from the latin *Deo dandum*, "a thing to be given to God." Black's Law Dictionary 523 (4th ed. 1968).

48. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680-81 (1974).

49. *See* O. HOLMES, *supra* note 42, at 24-25.

50. Finkelstein, *supra* note 33, at 180-81.

51. *Id.* Professor Finkelstein points out that stoning the ox was not precisely a forfeiture because the ox was not "given to God" or returned to society, but rather put to death. Nonetheless, commentators uniformly traced the origin of the deodand doctrine back to the Biblical example. *See* 1 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 85 (7th ed. 1956); 2 F. POLLOCK & F.

secular practice in Europe, Rome, and Africa known as "noxal surrender" required surrender to the victim or to his kin the instrument causing accidental damage or death.[52] Noxal surrender was intended to provide a type of ransom to forestall an injured party's resort to civil action.[53]

Religious expiation and noxal surrender merged in medieval England, in the personage of the King. The religious climate and papal-state conflicts of the thirteenth century encouraged the Crown to assume the role of the transcendent power to whom expiation was due.[54] Ostensibly, the Crown sought the deodand to redress loss of human life by procuring Masses for the soul of the deceased;[55] not surprisingly, forfeiture also provided a steady source of Crown revenue.[56]

Nineteenth-century, post-Enlightenment England eschewed the law of deodand as "extremely absurd and inconvenient."[57] The institution, however, survived, as new content sustained the old form:[58] forfeiture came to be viewed as a deterrent to negligence. Because a remedy for wrongful death never existed at common law,[59] the threat of forfeiture may have established a higher degree of care by exacting a penalty for carelessness.[60] Punishment of

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MAITLAND, HISTORY OF ENGLISH LAW 472-74 (2d ed. 1899); O. HOLMES, *supra* note 42, at 23. One reason the example of the ox may be appropriate is the depiction of vengence it embodies, commonly felt, for example, in the desire to strike at an object that accidentally causes one harm. See 2 F. POLLOCK & F. MAITLAND, *supra* at 274 (concept of deodand not different from the instinct to curse the chair over which one stumbles); O. HOLMES, *supra* note 42, at 11 (forfeiture of inanimate objects results from the "hatred for anything giving us pain, which wreaks itself on the manifest cause, and which leads even civilized man to kick a door when it pinches his finger").

52. Finkelstein, *supra* note 33, at 181.

53. *Id.*

54. *Id.* at 181-83.

55. 1 W. BLACKSTONE, COMMENTARIES *300; 2 F. POLLOCK & F. MAITLAND, *supra* note 51, at 474.

56. *See* LAW OF DEODANDS, 34 *Law Mag.* 188, 198 (1845). *Cf.* 77 J. HANSARD, PARLIAMENTARY DEBATES 1027 (1845) (Lord Campbell) ("the law of deodands was called into action almost weekly").

57. 77 J. HANSARD, *supra* note 56, at 1027.

58. O. HOLMES, *supra* note 42, at 5 ("the rule adapts itself to the new reasons which have been found for it. . . . The old form receives a new content").

59. Baker v. Bolston, 170 Eng. Rep. 1033 (Nisi Prius 1808) ("In a civil court, the death of a human being cannot be complained of as an injury. . . ."). Explanation of the rule reflects the religious tenor of a time that witnesses the growth of the deodand doctrine. "To the cultivated and enlightened mind, looking at human life in the light of the Christian religion as sacred, the idea of compensating its loss in money is revolting. . . ." Hyatt v. Adams, 16 Mich. 180, 192 (1867).

60. M. HALE, PLEAS OF THE CROWN 424 (1st Am. ed. 1847). Although common law forfeiture was applied to various types of tortuous death or injury, *see* Finkelstein, *supra* note 33, at 183-90, Hale argues that deodands were properly applied only when death resulted from negligence. History lends support to this view. Abolition of deodands occurred at the same time as passage of the first wrongful death statute. The bill that eventually became the Act for Compensating Families of Persons Killed by Accidents, 1846, 9 & 10 Vict. ch. 93, was initially introduced with the proposal to abolish deodands. The tort bills were brought together because "objectionable as the system of deodands was . . . [Lord Campbell] would not abolish it, having regard to public safety, unless the right action was given, in order to make railroad directors and stage coach proprietors cautious of the lives and limbs of her Majesty's subjects." 77 J. HANSARD, *supra* note 56, at 1031. *See generally* Finkelstein, *supra* note 33, at 170-74; Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 681 n.19 (1974).

the property owner whose negligence had caused "death by misadventure"[61] triggered forfeiture of the offending res. Nonetheless, even after the abolition of deodands in 1846[62] and simultaneous passage of the Act for Compensating Families of Persons Killed by Accidents,[63] the Crown continued to confiscate guilty property solely as a source of Crown revenue.[64]

Deodands did not become part of the American common law tradition.[65] Nevertheless, the Supreme Court has referred to them as one of the forebears of federal forfeiture laws.[66]

(2) Admiralty

Violation of seventeenth century Navigation Acts[67] that required shipping of commodities in English built, owned, and manned vessels caused forfeiture of not only illegally transported goods, but also the ship that carried them.[68] Vicarious liability also attached: a sailor's single act could forfeit an entire ship even if committed contrary to the express wishes of master or owner.[69] The claimant bore the burden of proving statutory compliance.[70] In the American colonies, moreover, the shipowner proceeded before newly established vice-admiralty courts, not a jury.[71]

Severe in effect, in rem forfeiture under the Navigation Acts embodied a unique principle, unrelated to deodand or noxal surrender.[72] With no sovereign on the high seas to enforce laws of admiralty against foreign sailors, forfeiture provided a means, and probably the only means, of exacting statutory

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61. Finkelstein, *supra* note 33, at 229 n.194. In cases of intentional homicide, the provisions of in personam, criminal forfeiture applied, not deodands. *See* 15 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 164 (1965).

62. An Act to Abolish Deodands, 1846, 9 & 10 Vict. ch. 62.

63. An Act for Compensating the Families of Persons Killed by Accidents, 1846, 9 & 10 V. ch. 93.

64. *See* Regina v. Woodrow, 15 M. & W. 404, 153 Eng. Rep. 907 (Ex. 1846).

65. *See, e.g.*, Parker-Harris Co. v. Tate, 135 Tenn. 509, 188 S.W. 54 (1916).

66. Goldsmith-Grant Co. v. United States, 254 U.S. 505, 510 (1921); *see generally* Finkelstein, *supra* note 33, at 215 (current Supreme Court in rem interpretation is "hardly more than an attempt to put an ostensibly respectable disguise on an action which is at bottom nothing else than the deodand 'updated' ").

67. *See* L. HARPER, THE ENGLISH NAVIGATION LAWS: A SEVENTEENTH-CENTURY EXPERIMENT IN SOCIAL ENGINEERING 387-414 (1964) (digest of Acts).

68. *Id.* at 109-11. *See generally* Note, *supra* note 7, at 774 ("[t]he Navigation Acts were the major component of English policy to promote national seapower").

69. Mitchell qui tam v. Torup, 145 Eng. Rep. 764 (Ex 1766).

70. 12 Geo. 1, ch. 28, § 8 (1725).

71. The Crown established these new courts to ensure preservation of its Navigation Acts revenue from the "obstinate resistance of American juries." C.J. Hendry Co. v. Moore, 318 U.S. 133, 141 (1943); *see generally* Worth, *The Massachusetts Vice Admiralty Court and the Federal Admiralty Jurisdiction*, 6 AM. J. LEGAL HIST. 250 (1962); Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923). In a recent thoughtful opinion, the Seventh Circuit analyzed English and American history and concluded that because in rem forfeiture cases were triable to a jury in common law English courts, the seventh amendment right to a jury trial for in rem forfeitures has been preserved. United States v. One 1976 Mercedes Benz 280S, 618 F.2d 453 (7th Cir. 1980).

72. Finkelstein, *supra* note 33, at 231. *But see* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 682 (1974).

compliance. "[T]he ship was not only the source, but the limit, of liability."[73] The strength of this rationale insured its survival. In contrast to statutory abolition of criminal in personam forfeiture,[74] the first Congress statutorily subjected to in rem forfeiture vessels and cargoes violating customs laws.[75] Early in the nineteenth century the Supreme Court upheld these procedures, modeled after the Navigation Acts,[76] in deciding that a conviction of piracy was not essential to the forfeiture of a ship.[77] The Court distinguished in personam forfeiture imposed as a consequence of conviction from forfeiture in rem, where "[t]he thing is here primarily considered as the offender."[78] In a later decision the Court sustained forfeiture despite the shipowner's "fully established" innocence,[79] approving this remedy as "the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party."[80] The unspoken but underlying rationale of both opinions, however, may well have been a strong desire to preserve customs revenues.[81]

(3) Modern Rationales

No one explanation sustains the continuing validity of forfeiture in rem except, perhaps, the passage of time. In *Gold-smith-Grand Co. v. United States*[82] a car dealer sold an automobile but retained title as security for the unpaid purchase price. The purchaser transported distilled spirits in violation of revenue laws and the government sought forfeiture of the car. Rejecting the vendor's fifth amendment objections, the Court first underscored the importance of revenue enforcement. It then proceeded to adopt the offending res fiction, draw analogies to religious purposes of deodand, acknowledge application of forfeiture as a punishment for a property owner's negligence, and cite the Bible.[83] Without further discussion or analysis, the Court concluded,

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73. O. HOLMES, *supra* note 42, at 27.

74. *See supra* notes 23-29 and accompanying text.

75. Act of July 31, 1789, §§ 12, 36, 1 Stat. 39, 47.

76. *See generally* Note, *supra* note 7, at 780.

77. The Palmyra, 25 U.S. (12 Wheat.) 1 (1827).

78. *Id.* at 14.

79. United States v. Brig Malek Adhel, 43 U.S. (2 How.) 210 (1844).

80. *Id.* at 233.

81. Justice Story authored both of these opinions. During his lifetime, customs duties provided no less than 70% to 80% of federal revenues. BUREAU OF THE CENSUS, DEP'T. OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES, H.R. DOC. NO. 33, 86TH CONG., 1ST SESS. 712 (1960).

82. 254 U.S. 505 (1921).

83. The Court stated:

> Congress must have taken into account the necessities of the Government, its revenues and policies, and was faced with the necessity of making provision against their violation or evasion. In breaches of revenue provisions, some forms of property are facilities, and therefore it may be said, that Congress interposes the care and responsibility of their owners in aid of the prohibitions of the law and its punitive provisions, by ascribing to the property a certain personality, a power of complicity and guilt in wrong. In such case there is some analogy to the law of *deodand* by which a personal chattel that was the immediate cause of the death of any reasonable creature was forfeited. To the superstitious reason to which the rule was ascribed, Blackstone adds "that such misfortunes are in part owing to the negligence of the owner, and therefore he is properly punished by such forfeiture." And he observed, "A like punishment is in like cases in-

"whether the reason for the [forfeiture] be artificial or real, it is too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced."[84]

The Supreme Court recently reaffirmed each of the historical rationales of in rem forfeiture.[85] Yet the Court also expressed willingness to curtail application of the harsh effects of forfeiture in rem to innocent third parties.[86] The federal courts in similar fashion have begun to recognize significant procedural rights in the in rem setting.[87] Although embedded in over a century and a half of American jurisprudence, the "fictive rule"[88] that in rem forfeitures are not subject to constitutional protections in the criminal field is perhaps beginning to weaken.

D. Judicial Comparison

Comparison of in rem and in personam forfeiture procedures occurred in a short but important series of late nineteenth century Supreme Court decisions. In *Boyd v. United States*[89] the Court held that a property owner could claim the privilege against self-incrimination in an in rem proceeding when the pertinent statute required a showing of criminal culpability prior to forfeiture. The procedure, regardless of name, was one in personam: "Proceedings instituted for the purpose of declaring the forfeiture of a man's property by reasons of offences committed by him, though they may be civil in form, are in their nature criminal."[90] Similarly, when a statute imposed forfeiture "as a consequence of guilt and as a punishment therefor," the Court held that ac-

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flicted by the Mosaical law: If an ox gore a man that he die, the ox shall be stoned, and his flesh shall not be eaten."

Id. at 510-11.

84. *Id.* at 511.

85. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680-86 (1974).

86. *Id.* at 689-90 ("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."). *See* United States v. One Tintoretto Painting, 691 F.2d 603, 607 (2d Cir. 1982) (discussing and applying *Calero-Toledo* forfeiture exception).

87. Vance v. United States, 676 F.2d 183, 186 (5th Cir. 1982) (The "civil nature of forfeiture proceedings will not be permitted to provide an avenue through which the fundamental rights of protection against unreasonable searches and seizures and self-incrimination can be frustrated.") (quoting Bramble v. Richardson, 498 F.2d 968, 973 (10th Cir.), *cert. denied*, 419 U.S. 1069 (1974)); United States v. One Mercedes Benz 280S, 618 F.2d 453 (7th Cir. 1980) (seventh amendment jury trial right applies to in rem forfeiture proceedings); Wiren v. Eide, 542 F.2d 757, 762 (9th Cir. 1979) (due process right to notice); United States v. Spetz, 705 F.2d 1155, 1166 (9th Cir. 1983) (no "forfeiture" exception to fourth amendment). *See generally* Kandaras, *Due Process and Federal Property Forfeiture Statutes; The Need for Immediate Post-Seizure Hearing*, 34 Sw. L.J. 925 (1980), [hereinafter cited as Kandaras]; Smith, *supra* note 41, at 691.

88. Vance v. United States, 676 F.2d 183, at 186 (5th Cir. 1982).

89. 116 U.S. 616 (1886).

90. *Id.* at 634. Although *Boyd* arguably has been overruled today for its interpretation of the self-incrimination privilege, *see* Fisher v. United States, 425 U.S. 391, 405-08 (1976); Note, *The Rights of Criminal Defendants and the Subpoena Duces Tecum: The Aftermath of Fisher v. United States*, 95 HARV. L. REV. 683 (1982), it is still good forfeiture law. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 700 (1965).

quittal in the criminal prosecution barred a subsequent in rem suit.[91] A later decision held that a pardon remits any forfeiture incurred.[92] At the turn of the century the Court again indicated that when forfeiture necessitates a showing of "criminal intent" and commission of "prohibited acts" (as opposed to proof of "guilty property"), the full panoply of procedural rights afforded criminal defendants must come into play.[93] These cases, in short, hold that if forfeiture requires a showing of personal guilt, and is thus in personam, then in rem procedural rules may not constitutionally suffice. Rather, the property owner must be afforded rights historically provided to criminal defendants, in personam. The Court recently reiterated this principle in *United States v. United States Coin and Currency*,[94] an in rem proceeding to forfeit money used in an illegal bookmaking operation. The government argued, over the property owner's objections, that the privilege against self-incrimination should not be available. The Court disagreed, reading the statute as manifesting an intent "to impose a penalty only upon those who were significantly involved in a criminal enterprise."[95] Thus, the Court found that in personam procedures, which provide greater due process protections than in rem procedures, should apply.

E. Retrospect

A number of observations may be gleaned from this short historical and legal sketch. Foremost is the different rationales distinguishing in personam from in rem forfeiture. The sole purpose of in personam forfeiture is, and always has been, punishment. Forfeiture in rem, however, is neither singular in purpose nor consistent of theory. Arising out of pre-Christian traditions, the institution of deodands provided expiation to the sovereign and reparation to the victim; from medieval England forfeiture arose as punishment for carelessness and a source of revenue for the Crown; admiralty law, out of necessity, viewed the ship as the only source of liability in attempting to ensure collection of revenue and indemnify the government for enforcement costs. The Supreme Court recognized but did not actually adopt any of these theories, preferring instead to uphold the in rem procedure only because "firmly fixed."

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91. Coffey v. United States, 116 U.S. 436, 443 (1886).

92. Osborn v. United States, 91 U.S. 474, 477 (1875).

93. *See* Stone v. United States, 167 U.S. 178, 188 (1897). This line of Supreme Court decisions is aptly discussed in Note, *supra* note 7, at 788 n.114. The statutes upon which the cases were based were passed subsequent to the Civil War Confiscation Acts. *See* Act of July 17, 1862, 12 Stat. 589 (cited in Note, *supra* note 7, at 788 n.144). The Confiscation Acts employed in rem proceedings to impose forfeiture as punishment. The Supreme Court upheld the constitutionality of the Confiscation Acts as an exercise of the war power in obtaining enemy property. Tyler v. Defees, 78 U.S. (11 Wall.) 331 (1870). As a result, after the Civil War Congress began to provide in rem proceedings to effectuate forfeiture, regardless of whether the underlying theory was in personam (based upon a finding of personal guilt) or in rem (based upon a finding of guilty property). *See* Note, *supra* note 7, at 785-88. The aforementioned Supreme Court decisions served to draw a theoretical boundary between in rem and in personam forfeiture that has remained to this day.

94. 401 U.S. 715 (1971).

95. *Id.* at 721-22.

A second observation is the distinct legal theories supporting in rem and in personam forfeitures. A proceeding in which the claimant must prove his property "not guilty," and in which innocence is not a defense even to third parties, and in which judicial review is narrowly circumscribed is constitutionally sufficient only if the action is in fact against property. If forfeiture depends upon a showing of the property owner's criminal intent, familiar principles of criminal procedure apply. The government assuredly bears the burden of proof, a defendant's innocence is critical, third party rights are not before the court, and constitutional procedures must apply. We conclude from these observations that the historical and legal differences between in rem and in personam forfeiture make inapplicable the body of in rem forfeiture case law to an in personam setting, such as RICO.

II. RICO

A. Nature and Purpose of Forfeiture

The Racketeer Influenced and Corrupt Organizations Act imposes stringent criminal sanctions on persons who, through a pattern of racketeering activity, acquire an interest in or conduct the affairs of an "enterprise."[96] "Racketeering activity" is involvement in two or more acts proscribed by twenty-four existing federal statutes[97] and eight generic state offenses; the term "enterprise" is defined to include partnerships, corporations, and other legal entities.[98] The penalties for RICO violations are severe,[99] including twenty-five thousand dollar fines, twenty year imprisonments, and forfeitures.[100]

A RICO forfeiture requires an adjudication of guilt for the government to obtain superior rights to the defendant's property.[101] This in personam forfeiture is a powerful, innovative measure[102] that furthers two purposes.[103] As a prophylactic, forfeiture acts to purge organized crime from the affairs of legitimate businesses and labor organizations through separation of the racketeer from the enterprise.[104] Primarily, however, a RICO forfeiture punishes.[105] Its application thus recalls the doctrine of forfeiture of estate, abolished constitutionally for the offense of treason in 1787 and statutorily for all other judg-

96. *See* 18 U.S.C. § 1962 (1976).

97. *See* 18 U.S.C. § 1961(1) (1976); *see* United States v. Bagaric, 707 F.2d 42 (2d Cir. 1983).

98. *See* 18 U.S.C. § 1961(4) (1976).

99. *See* Project, *White-Collar Crime: Second Annual Survey of Law*, 19 AM. CRIM. L. REV. 173, 357 n.1446 (1981).

100. *See* 18 U.S.C. § 1963(a) (1976).

101. *See* 18 U.S.C. § 1963(c) (1976).

102. Taylor, *supra* note 19, at 379.

103. *See* United States v. Rubin, 559 F.2d 975, 992 (5th Cir. 1977); *vacated and remanded*, 439 U.S. 810 (1978), *reinstated in relevant part*, 591 F.2d 278 (5th Cir.), *cert. denied*, 444 U.S. 864 (1979); *Organized Crime Control: Hearings on S. 30 and Related Proposals Before Subcomm. No. 5 of the House Judiciary Comm.*, 91st Cong., 2d Sess. 107 (1970) (statement of Sen. McClellan) [hereinafter cited as *House Hearings*].

104. United States v. Martino, 681 F.2d 952, 957 (5th Cir. 1982) (en banc), *cert. granted sub nom.* Russello v. United States, 457 U.S. 1108 (1983).

105. *See House Hearings, supra* note 103, at 107.

ments in 1790.[106] Courts have disagreed whether RICO in fact imposes "forfeiture of estate" as a matter of constitutional or statutory interpretation.[107] Undisputed, however, is the nature of a RICO forfeiture. As the Justice Department explained in testimony supporting the 1970 enactment of RICO:

> The concept of forfeiture as a criminal penalty which is embodied in this provision differs from other presently existing forfeiture provisions under Federal statutes where the proceeding is in rem against the property and the thing which is declared unlawful under the statute, or which is used for an unlawful purpose, or in connection with the prohibited property or transaction, is considered the offender, and the forfeiture is not part of the punishment for the criminal offense. . . .
>
> Under the criminal forfeiture provision of [RICO], the proceeding is in personam against the defendant who is the party to be punished upon conviction of violation of any provision of the section, not only by fine and/or imprisonment, but also by forfeiture. . . .[108]

Notwithstanding legislative recognition of a RICO forfeiture as in personam in character and contrary to the historical distinction between in personam and in rem forfeiture, a number of courts have failed to differentiate between the two types of proceedings in reviewing RICO's forfeiture provisions.[109] The Fourth Circuit recently stated that because in rem proceedings also impose penalties upon persons, "the fact that the proceeding is in personam rather than in rem seems of little significance."[110] The court, however, erroneously relied upon *United States v. United States Coin and Currency*,[111] which, as noted earlier,[112] involved an ostensibly in rem statute with a plainly in personam effect. Moreover, the so-called "punitive" aspect of in rem forfeiture, to the extent it has survived historically, derives not from a finding of personal guilt but from deodand, an institution traditionally thought to deter carelessness through punishment of negligent property owners rather than felons.[113] Hence, the Second Circuit was incorrect when it stated that for penal purposes, "there is no substantial difference between an in rem proceeding

106. *See supra* notes 23-29 and accompanying text.

107. *Compare* United States v. Rubin, 559 F.2d 975, 991 n.15 (5th Cir. 1977) (use of § 1963 is based on statutory interpretation but requires "interpretive caution"), *vacated and remanded*, 439 U.S. 810 (1978), *reinstated in relevant part*, 591 F.2d 278 (5th Cir.), *cert. denied*, 444 U.S. 864 (1979) *with* United States v. Grande, 620 F.2d 1026, 1039 (4th Cir. 1980) (§ 1963 is not invalid based on constitutional interpretation), *cert. denied*, 449 U.S. 830 (1980).

108. *S. Rep. No.* 617, 91st Cong., 1st Sess. 124 (1969); *see* United States v. Veon, 549 F. Supp. 274, 280 (E.D. Cal. 1982) (Veon II); H.R. 1549, 91st Cong., 2d Sess., 116 CONG. REC. 35, 193 (1970) (remarks of Rep. Poff); S. 30, 91st Cong., 2d Sess., 116 CONG. REC. 18, 929 (1970) (remarks of Sen. McClellan).

109. *See, e.g.*, United States v. Veon, 538 F. Supp. 237, 242 (E.D. Cal. 1982) (Veon II).

110. United States v. Grande, 620 F.2d 1026, 1039 (4th Cir. 1980).

111. 401 U.S. 715 (1970).

112. *See supra* text accompanying note 94.

113. *See supra* notes 58-61 and accompanying text.

and a forfeiture proceeding brought directly against the owner."[114] Finally, one district court inaccurately intertwined the different underlying theories of in rem and in personam forfeiture in finding, without further analysis, "neither a constitutional nor a statutory barrier to the limited forfeiture of property used to violate the criminal law."[115]

The results of these decisions are less important than their reasoning. Legal history and theory dictate that courts should take heed of the qualitative differences between in rem and in personam forfeiture in deciding what procedures a RICO forfeiture requires. As one district court remarked in reflecting upon the history of forfeiture: "These distinctions between proceedings in rem and in personam make resort to civil forfeiture cases as guidance in criminal forfeiture cases, highly dubious."[116]

B. Effect of Forfeiture

According to some courts, a RICO forfeiture is not that severe, for it is "limited" to the defendant's interest in the enterprise and takes effect only after criminal conviction.[117] To the contrary, a RICO forfeiture may: (1) dissolve a defendant's entire business and thereby destroy "a substantial portion of his livelihood;"[118] (2) extinguish or severely impair third party interest in the same property;[119] and (3) cut short alienability and enjoyment of all potentially forfeitable property before trial to the economic detriment of both defendant and third party.[120]

A convicted racketeer forfeits any "interest" in an enterprise acquired or maintained in violation of RICO.[121] Forfeitable interests undoubtably encompass all types of proprietary rights,[122] including business,[123] partnership or stock ownership,[124] and any elected offices affording influence over the enter-

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

115. United States v. Thevis, 474 F. Supp. 134, 140 (N.D. Ga. 1979), *aff'd*, 665 F.2d 616 (5th Cir.), *cert. denied*, 102 S. Ct. 2300 (1982).

116. United States v. Veon, 538 F. Supp. 237, 242 (E.D. Cal. 1982).

117. *See* United States v. Grande, 620 F.2d 1026, 1029 (4th Cir.) ("effect of a forfeiture under § 1963 is the functional equivalent of a forfeiture in rem"), *cert. denied*, 449 U.S. 830 (1980); United States v. Thevis, 474 F. Supp. at 134, 141 (N.D. Ga. 1979) (RICO involves "limited forfeiture of property utilized to violate the criminal law"), *aff'd*, 665 F.2d 616 (5th Cir.), *cert. denied*, 102 S. Ct. 2300 (1982); *see also* United States v. Martino, 681 F.2d at 952, 964 (5th Cir. 1982) (en banc) (Politz, J., dissenting) (Congress has frequently used the onus of specific forfeitures in combatting legal activities; RICO is so restricted), *cert. granted sub nom.* Rusello v. United States, 103 S. Ct. 721 (1983).

118. United States v. L'Hoste, 615 F.2d 383, 386 (5th Cir.) (Tate, J., dissenting) (RICO may forfeit "a lifetime's legitimate earnings"), *cert. denied*, 449 U.S. 833 (1980).

119. *See* United States v. Veon, 549 F. Supp. 274, 280-81 (E.D. Cal. 1982) (Veon II).

120. *Id.* at 281-82; *see infra* note 179 and accompanying text.

121. *See* United States v. Marubeni Am. Corp., 611 F.2d 975, 990-92 (5th Cir. 1977); 18 U.S.C. § 1963(a) (1976).

122. United States v. Meyers, 432 F. Supp. 456, 461 (W.D. Pa. 1977).

123. United States v. Godoy, 678 F.2d 84, 86-88 (9th Cir. 1982) (market/pharmacy and nightclub forfeit); United States v. Smaldone, 583 F.2d 1129, 1133 (10th Cir. 1978) (restaurant forfeit), *cert. denied*, 439 U.S. 1073 (1979).

124. United States v. Meyers, 432 F. Supp. 456, 461 (W.D. Pa. 1977).

prise, such as union executive positions.[125] Virtually any of the various common-law and state-created forms of property may be forfeited, including joint tenancies and community property.[126] The Ninth Circuit aptly described the potentially draconian dimensions of a RICO forfeiture: "A shopkeeper who over many years and with much honest labor establishes a valuable business could forfeit it all if, in the course of his business, he is mixed up in a single fraudulent scheme."[127] In no sense is this forfeiture "limited."

The severity of the forfeiture sanction affects not only defendants but especially third parties who have interests in the forfeited property. Partners may not welcome the United States as a new partner; secured parties will not particularly appreciate forfeiture of their secured interests; and shareholders cannot be said to happily suffer economic loss when a substantial part or all of their corporation is forfeited upon a defendant/co-owner's conviction. Under RICO, a convicted racketeer forfeits directly, but a third party, whose interest is never before the court, forfeits inadvertently.

Finally, long before conviction both defendant and third party property interests may sustain significant loss. To prevent post-indictment pre-conviction transfers of potentially forfeitable property, Congress authorized district courts to enter pretrial restraining orders.[128] From the time of the order, and arguably from return of the indictment,[129] until conviction, substantial economic consequences result simply from inability to use property.[130] Restraints on sale or transfer of stock shares or partnership interests, depreciating asset value and lost market opportunities are readily cognizable financial losses; no less detrimental is impairment of credit rating, goodwill or market position merely because of the pendency of racketeering proceedings. Moreover, in a complex RICO prosecution the period between indictment and conviction may well exceed a year; following appeal, two years.[131] Regardless of conviction, a pretrial restraining order substantially impairs both defendant and third party property interests.

C. RICO Forfeiture Procedure

Review of RICO's procedural provisions is a relatively short exercise.[132] The indictment or information must describe any potentially forfeitable prop-

125. United States v. Rubin, 559 F.2d 975, 990-93 (5th Cir. 1977), *vacated and remanded*, 439 U.S. 810 (1978), *reinstated in relevant part*, 591 F.2d 278 (5th Cir.), *cert. denied*, 444 U.S. 864 (1979).

126. United States v. L'Hoste, 609 F.2d 796, 809-10, *reh'g. denied*, 615 F.2d 383 (5th Cir.) (en banc), *cert. denied*, 449 U.S. 833 (1980).

127. United States v. Marubeni Corp., 611 F.2d 763, 769 n.12 (9th Cir. 1980).

128. 18 U.S.C. § 1963(b) (1976).

129. *See infra* discussion at Section IV(D).

130. United States v. Crozier, 674 F.2d 1293, 1296-97 (9th Cir. 1982); United States v. Spilotro, 680 F.2d 612, 617 (9th Cir. 1982) (restraining order "flatly prevented [defendant] from disposing of his property or engaging in his business").

131. *See, e.g.*, United States v. Crozier, 674 F.2d 1293, 1297 (9th Cir. 1982) (defendant's property restrained more than one year and likely to be restrained more than two years before final verdict).

132. There are no procedural provisions within the text of the RICO statute. The only two

erty interest[133] and the jury must return a special verdict detailing the extent of or interest in property subject to forfeiture.[134] These two procedures represent all that Congress provided. There are no statutorily mandated procedures to protect defendant and third party property interests prior to trial. While providing for issuance of pretrial restraining orders, Congress failed to require a hearing, and did not set forth standards to determine the propriety of these orders. After trial the jury is required to consider in the same deliberation the guilt of the defendant and the scope of a special forfeiture verdict. At no time is the defendant afforded an opportunity, aside from his defense on the merits, to protect his assets from ultimate deprivation. More importantly, third parties currently have no right to intervene prior to the forfeiture verdict to defend their property interests from wrongful deprivation. Rather, Congress simply set forth two catch-all provisions: 18 U.S.C. section 1963(c) states: (1) "All provisions of law relating to the disposition of property . . . for violation of the customs laws . . . shall be applied to forfeitures incurred, or alleged to have been incurred, under the provisions of [RICO], insofar as applicable and not inconsistent with the provisions hereof"; and (2) "The United States shall dispose of all property as soon as commercially feasible, making due provision for the rights of innocent persons."[135]

This, then, is the problem: contemporary customs laws derive from the same English Navigation Acts and federal admiralty laws earlier discussed.[136] Customs procedures are in rem, not in personam—forfeiture stems from the guilt of the property, not the person; and third parties, or "innocent persons," have no substantive rights.[137] Indeed, for third parties the only arguable recourse provides no remedy at all: an unreviewable administrative plea to an apparently unmerciful Attorney General[138] for remission and mitigation of forfeiture. In rem and in personam procedures, legally and historically, are strangers; in rem procedures cannot be applied to effectuate an in personam forfeiture.

Exacerbating the confusion is the silence of the legislative history, a somewhat surprising occurrence given the high likelihood that property sought by the government may be owned jointly by innocent nonparticipants to the criminal proceedings.[139] A formidable preliminary consideration in determin-

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forfeiture procedures are contained in subsequent amendments to the Federal Rules of Criminal Procedure.

133. *See* FED. R. CRIM. P. 7(c)(2).

134. *See* FED. R. CRIM. P. 31(e).

135. 18 U.S.C. § 1963(c) (1976).

136. *See supra* notes 30-41, 74-77 and accompanying text.

137. *See supra* notes 30-95 and accompanying text.

138. *See* United States v. Edwards, 368 F.2d 722, 724 (4th Cir. 1966) ("It is the invariable policy of the Treasury Secretary to deny such claims for remission of forfeiture and . . . such policy is formalized in a procedural manual which is said to be accessible to neither counsel for taxpayer nor to the United States Attorney.").

139. The legislative history of the forfeiture statute also fails to disclose any concern on the part of the 91st Congress for third party property interests sufficient to identify procedures for protecting their interests. The only colloquy concerning the negative consequences that might befall "innocent parties—that is, members or partners of a legitimate business," *House Hearings*,

ing procedural rights under RICO is the extent to which in rem customs procedures may be applied to an in personam, criminal forfeiture under the racketeering statute.

There are four possible approaches to implement congressional intent to integrate customs laws with RICO forfeiture procedures. One approach, supported by some legislative history, relegates the defendant and third parties to the administrative customs laws remedies only after forfeiture of the property; that is, after a final judgment of forfeiture is entered.[140] This view, however, renders the customs laws irrelevant to the key issue of the appropriate forfeiture procedures prior to entry of judgment. A second approach, adopted by one court,[141] focuses on the in personam character of the racketeering proceedings and reasons that absent a finding of guilt, the customs laws cannot authorize any property deprivation. Again, however, the customs laws remain procedurally irrelevant until entry of a final finding of forfeitability.

A third approach resolves the issue of the role of the customs laws by resort to recent precedent in the in rem forfeiture area.[142] The Second Circuit recently announced that exhaustion of the customs law remedy of mitigation and remission is not essential to acquiring judicial relief: "We do not believe that the district court's jurisdiction to review a Fifth Amendment claim of constitutional deprivation may be entirely precluded regardless of the fact that an administrative remedy does exist."[143] If the presence of customs law administrative remedies does not prevent judicial relief for in rem forfeitures, then certainly the customs laws should not bar pursuit of judicial review for in personam forfeitures. This approach, nonetheless, does not help clarify when judicial review applies to a RICO forfeiture proceeding.

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supra note 103, at 665, arose in relation to 18 U.S.C. § 1967 (1976). Section 1967 simply leaves it to the discretion of the trial court whether to close from the public "any proceeding ancillary to or in any civil action instituted by the United States under this Chapter." 18 U.S.C. § 1967 (1976). During the House Hearings on RICO, the Justice Department came out in favor of an amendment to Section 1967 that would leave it to the discretion of the trial court whether to open or close the ancillary proceedings to the public. *House Hearings, supra* note 103, at 665-66. Thus, when the general counsel of the House Judiciary Subcommittee expressed concern over the ill effects that public disclosure would have on innocent associates of the defendant during RICO proceedings, the Justice Department supported the amendment that would leave closure to the "common sense" of the judiciary on a case-by-case basis. *House Hearings, supra* note 103, at 665-66. Beyond this bow to the "commonsense" use of court discretion in determining whether innocent parties' interests should be protected by closing RICO proceedings from the public, the 91st Congress failed to specify adequately what procedures were to be followed in effecting a forfeiture under the racketeering statute.

140. *S. Rep. No.* 617, 91st Cong. 1st Sess. 160 (1970) ("Sub-section c provides rules governing *forfeited* property. In general, it incorporates by reference the long-tested customs law provisions." [emphasis added]). Support for this view can be found in the provision of 18 U.S.C. § 1963 (1976), which requires the United States to make "due provision for the rights of innocent persons." Until the defendant is convicted he is presumed innocent, and "due provision" must be made for him. Upon conviction, he is no longer "innocent," and the customs laws then arguably apply.

141. United States v. Veon, 549 F. Supp. 274, 280 (E.D. Cal. 1982) (Veon II).

142. United States v. One Tintoretto Painting, Etc., 691 F.2d 603 (2d Cir. 1982).

143. *Id.* at 609. *See also* United States v. $8,850, 103 S. Ct. 2005 (1983) (court stated in dicta that "[a] claimant need not waive his right to a prompt judicial hearing simply because he seeks the additional remedy of an administrative petition for mitigation"); Kandaras, *supra* note 87, at 936-38.

A final approach—offered by this Article—recognizes that regardless of the applicability of the customs laws, the Constitution provides certain guarantees that must be accorded property owners, whether third parties or defendants. On the other hand, the racketeering statute embodies a specific theory of forfeiture that must be afforded meaning. To the degree that customs laws are inconsistent with the Constitution, the Constitution obviously prevails; to the extent that customs laws are irreconcilable with the in personam nature of a RICO forfeiture, the statutory, in personam rationale prevails. This is not to say, however, that the customs laws are of no value in identifying appropriate procedures for RICO forfeitures. Rather, when these laws do not tread upon accepted constitutional standards and are consistent with the basic features of in personam forfeiture, they should be viewed not only as a potential guide for interpretation but also as legislative choices.

The next section deals with the procedures demanded by the Constitution to protect defendants and third parties from wrongful deprivation of property under RICO's forfeiture provisions.

III. Procedural Due Process in General

Identifying the demands of procedural due process in the context of in personam forfeitures is no more difficult than in other areas of application. Generally speaking, two familiar issues characterize due process jurisprudence. The first question asks whether "life, liberty, or property" is affected by government action.[144] The second inquiry determines the form of process due.[145]

A. Deprivation of Property

RICO forfeits a defendant's interest in property. "Property" is defined by state common law and state statutes;[146] there is no federal law of property.[147] State statutory law, for example, charters corporations and partnerships, while state common law enforces tenancies, liens and the like. State law may also recognize particularly novel types of assets as enforceable property rights subject to the due process clause. Old or new, if the particular interest sought to be forfeited is an enforceable right under state law, these assets are accorded constitutional protection.[148]

144. U.S. Const. amend. V.

145. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

146. Board of Regents v. Roth, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such are state law.").

147. On the other hand, there is a growing recognition of property interests in federally-created entitlements. *See* Goldberg v. Kelly, 397 U.S. 254 (1970).

148. Because there is no federal common law of property, if a particular asset comes within the purview of the racketeering statute, the government cannot fail to recognize state enforced property attributes. *See* Mitchell v. W.T. Grant Co., 416 U.S. 600, 604 (1974) ("the definition of property rights is a matter of state law"). If, for example, the government acquires a defendant's majority interest in a state-created corporation, the government cannot fail to recognize and assume the state-enforced fiduciary obligations incident to property ownership.

Obviously, forfeiture "deprives" a defendant, a third party, and perhaps even a racketeering victim[149] of property. Equally significant, however, is the government's attempt to restrain potentially forfeitable property in advance of trial.[150] Pretrial restrictions not only cut off the traditional property rights of alienability and enjoyment but also cause significant economic damage, including depreciation, lost investment opportunities, and impairment of goodwill and credit. A pretrial restraining order thus deprives both a defendant and third parties of "continued possession and use of the goods."[151] Hence, due process protections apply here as well. Moreover, the temporary nature of the pretrial interference with the use of property in no way diminishes the necessity to observe due process:[152] "The Court's view has been that as long as a property deprivation is not de minimus, its gravity is irrelevant to whether account must be taken of the Due Process Clause."[153]

One further matter must be addressed before considering the general contours of what process is "due" property rights deprived in RICO forfeiture proceedings. An argument can be made that "property" rights traditionally have been accorded second class status in the hierarchy of procedural due process protections. While the fifth and fourteenth amendments fail to differentiate among the terms "life, liberty, or property," under some circumstances the judiciary has afforded fewer due process guarantees to "mere" property rights as opposed to personal rights.[154] Moreover, some Supreme Court decisions imply that certain categories of "traditional" property deserve more due process protection than others.[155]

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149. RICO's statutory scheme provides treble damages recovery to racketeering victims against defendants. 18 U.S.C. § 1964(c) (1976). *See generally*, Strafer, Massumi, & Skolnick, *Civil RICO in the Public Interest: "Everybody's Darling,"* 19 AM. CRIM. L. REV. 655 (1982) (arguing that the judicial limitations on the applicability of civil RICO are contrary to congressional intent). In fact, Congress specifically stipulated that racketeering victims can collaterally estop a convicted defendant's denial of civil liability. 18 U.S.C. § 1964(d) (1976). To the extent that a defendant forfeits his property to the government, a racketeering victim can be denied this civil statutory remedy.

150. *See* 18 U.S.C. § 1963(b) (1976).

151. United States v. Spilotro, 680 F.2d 612, 617 (9th Cir. 1982) (quoting Fuentes v. Shevin, 407 U.S. 67, 86 (1972)).

152. North Ga. Finishing Inc. v. Di-Chem. Inc., 419 U.S. 601, 606 (1975); Fuentes v. Shevin, 407 U.S. 67, 84-85 (1972) ("But it is now well-settled that a temporary, non-final deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment"); United States v. Spilotro, 680 F.2d 612, 617 (9th Cir. 1982) (citing *North Ga. Finishing, Inc.*).

153. Goss v. Lopez, 419 U.S. 565, 576 (1975).

154. Parratt v. Taylor, 451 U.S. 527, 540 (1981); Mitchell v. W.T. Grant Co., 416 U.S. 600, 611 (1974); Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 599 (1950) ("It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination."); Phillips v. Commissioner, 283 U.S. 589, 596-97 (1931) ("where only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate.").

155. Mitchell v. W.T. Grant Co., 416 U.S. 600, at 614-15 (1974) (limiting Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) to wages). *But see* North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, at 608 (1975) ("We are no more inclined now than we have been in the past to distinguish among different kinds of property in applying the Due Process Clause."); Fuentes v. Shevin, 407 U.S. 67, 90 (1972) ("The Fourteenth Amendment speaks of 'property' generally . . . . It is not the business of a court adjudicating due process rights to make its own critical evaluation of those choices and protect only the ones that, by its own lights, are 'necessary.' "). In large part this attempt to hold some types of property, i.e., wages, out as more deserving of rigid due process

A general response to those arguments is Justice Stewart's observation in *Lynch v. Household Finance Corp.*.[156] Writing for the Court, Justice Stewart remarked:

> The dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right, whether the property in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right to property. Neither could have meaning without the other.[157]

Two categories of property historically have been accorded diminished due process protection. RICO forfeitures usually involve neither kind of property. The first category is property so inherently injurious to the public that summary government action was deemed of paramount importance.[158] Examples include impure foods,[159] and misbranded articles of commerce.[160] Underlying these decisions upholding deprivation of property prior to a hearing was a determination that the need for speedy government action to protect the public interest outweighed any private interest in obtaining the trappings of due process prior to the property infringement.[161] In addition, the property owner's interest was considered at least minimally protected against erroneous seizure and injury by the availability of a post-seizure judicial remedy of damages.[162]

The emergency rationale does not similarly support reducing the level of due process protections applicable to property seized under RICO. There is no need for swift action. The assets of a legitimate "enterprise," like the assets of any other business, are not adulterated articles of commerce.[163] Consequently, no public interest intrinsic to the property demands summary action. Moreover, a wrongfully deprived RICO property owner, either a third party or arguably the defendant, does not have even the token protection of postinfringement judicial review through an action for damages. There simply is no "protection of last resort." For a third party there is no judicial review whatsoever.

The second category of property afforded a diminished degree of due process is property for which provision of preinfringement due process is either

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protections is a reflection of a concern of certain Court members about the possible consequences of extending the principles of the early procedural due process cases beyond their facts. *See* North Ga. Finishing, Inc. v. DiChem, Inc., 419 U.S. at 615-16 (Blackmun & Rehnquist, J.J., dissenting).

156. 405 U.S. 538 (1972).

157. *Id.* at 522. *See* Shaffer v. Heitner, 433 U.S. 186, 207, 207 n.22 (1977).

158. Parratt v. Taylor, 451 U.S. 527 at 538-39 (1981).

159. North Am. Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908).

160. Ewing v. Mytinger & Casselberry, Inc., 338 U.S. 594 (1950).

161. Parratt v. Taylor, 451 U.S. 527, 538-39 (1981).

162. *Id.*

163. In fact, it is the defendant, not the enterprise assets, that the government wishes to remove from the stream of commerce. *See* United States v. Dean, 647 F.2d 779, 787 (8th Cir. 1981), *rev'd on other grounds*, 667 F.2d 729 (8th Cir.) (en banc), *cert. denied*, 102 S. Ct. 2296 (1982) (18 U.S.C. § 1963(a) "does not directly refer to any forfeiture by the corrupted enterprise").

impossible or for all purposes impractical. In *Parratt v. Taylor*[164] the Supreme Court recognized that due process could not possibly be accorded prior to the negligent deprivation of property. The impracticality of providing procedural due process has also influenced the measure of protection accorded property interests,[165] particularly in deciding the appropriate level of procedural due process prior to deprivation of government-created rights.[166] Nevertheless, the impossibility or impracticality rationales have little relevance to RICO forfeitures. To date, the number of RICO prosecutions is relatively nominal compared to the numerous cases associated with deprivation of government entitlements.[167] Furnishing due process protections to affected property owners in a RICO prosecution can hardly be considered sufficiently burdensome to warrant dilution of fifth amendment guarantees.[168]

A RICO forfeiture thus deprives property owners of enforceable property interests. The next question is what procedures are constitutionally required to protect these property rights from wrongful deprivation.

B. The Process Due

Stated simply, the fifth amendment guarantees property owners affected adversely by governmental action the right to notice[169] and an opportunity to be heard.[170] Beyond this rudimentary statement, however, the precise contours of the right to notice and hearing are currently unclear. Procedural due process generally encompasses several issues. The threshold question is one of timing:[171] whether a hearing is required before or after property deprivation. After determining when a hearing is required, other procedural trappings must

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164. 451 U.S. 527 (1981).

165. *See id.* at 539.

166. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

167. *Compare White-Collar Crime: Second Annual Survey of Law*, 19 AM. CRIM L. REV. 173, 353, 353 n.1412 (1981) (in first eleven years of RICO's existence only 152 recorded RICO cases) *with* Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 31 n.9 (1976) (over 75,400 administrative hearings on disability claims held in the year 1975 alone).

168. Protection of property rights is only one of the two aims that procedural due process seeks to achieve. Justice Frankfurter summarized this first objective in Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171-72 (1951): "No better instrument has been devised for arriving at truth than to give person in jeopardy of serious loss notice of the case against him and the opportunity to meet it." Justice Frankfurter also described a second, intrinsic aim of procedural due process: "Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done." *Id.* at 22. For further discussion of the intrinsic view of procedural due process, *see* Michelman, *Formal and Associational Aims in Procedural Due Process*, in DUE PROCESS 126 (Yearbook of the American Society for Political and Legal Philosophy, 1977); Subrin & Dykstra, *Notice and the Right to bee Heard: The Significance of Old Friends*, 9 HARV. C.R.-C.L. L. REV. 449 (1974).

169. Greene v. Lindsey, 456 U.S. 444, 449-50 (1982); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

170. Armstrong v. Manzo, 380 U.S. 545, 550 (1965); Gannis v. Ordean, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard.").

171. *Compare* Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (hearing required prior to termination of public assistance benefits) *with* Mathews v. Eldridge, 424 U.S. 319, 349 (1976) (hearing not necessary prior to termination of social security benefits).

be considered, including the neutrality of the factfinder,[172] the adequacy of notice, and the formality of the proceedings.[173] These latter issues, insofar as they deal with particularized requirements of various stages of property deprivation, will be discussed at a later point. The key question, when a hearing is required, is discussed first.

"For all its consequence," noted the Supreme Court recently, "due process has never been, and perhaps can never be, precisely defined."[174] Thus, "applying the due process clause is . . . an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation by considering any relevant precedents and then by assessing the several interests that are at stake."[175]

The leading case of *Mathews v. Eldridge*[176] provides precedent for the timing of a hearing. In *Eldridge* the Court held that a hearing was not constitutionally required prior to the termination of social security benefits. The procedure in question afforded a hearing, but not until after a subsequent step of administrative review, often occurring over a year later. The claimant argued that a post-deprivation hearing was constitutionally inadequate to ensure a fair determination of his disability. The Court disagreed, indicating a willingness to permit government deprivation of property pending final adjudication provided the process actually employed guards against erroneous deprivation in light of the competing interests at stake.[177] The standard of evaluation considers "the private interests affected by the proceeding, the risk of error created by the state's chosen procedure, and the countervailing governmental interest supporting use of the challenged procedure."[178]

The "particular situation" of a RICO forfeiture involves two property owners, the defendant and a third party. The defendant's interest in the enterprise, as set forth by the indictment, is forfeitable only upon a finding of guilt. Both the defendant and the third party, however, are deprived of property without a statutorily provided hearing at the issuance of a pretrial restraining order for which the government may apply *ex parte*. A third party is never

172. *See* Johnson v. American Credit Co., 581 F.2d 526, 533-34 (5th Cir. 1978) (Wisdom, J.) (summarizing Supreme Court due process cases as requiring judicial review of property deprivations).

173. *See* Santosky v. Kramer, 455 U.S. 745, 757 n.9 (1982) (outlining procedural issues incident to a hearing).

174. Lassiter v. Department of Social Serv., 452 U.S. 18, 24 (1981).

175. *Id.* at 24-25. *See also* Morrissey v. Brewer, 408 U.S. 471, 483-84 (1972); Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895 (1961); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162-63 (1951) (Frankfurter, J., concurring); Tumey v. Ohio, 273 U.S. 510, 523 (1927) ("In determining what due process of law is, under the Fifth or Fourteenth Amendments, the court must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, which were shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.").

176. 424 U.S. 319 (1976).

177. *See id.* at 334-35. See also Kandaras, *supra* note 87, at 930.

178. Santosky v. Kramer, 455 U.S. 745, 754 (1982) (paraphrasing Mathews v. Eldridge, 424 U.S. 319, at 335 (1976); United States v. Veon, 538 F. Supp. 237, 247 (E.D. Cal. 1982) (quoting *Santosky*).

afforded an opportunity to argue against a wrongful deprivation of his property before or after trial. Although the RICO defendant is granted some form of a hearing by virtue of prosecution, he often must restrict his energies to establishing a criminal defense. Thus, the defendant arguably is not offered a meaningful opportunity to address a trier of fact strictly as a property owner, as he might do before trial. The relevant questions that emerge are, first, whether a hearing must be constitutionally afforded to both defendant and third parties prior to issuance of a pretrial restraining order; and second, whether a third party must be allowed a pre-forfeiture verdict argument before the jury to protect property he believes is not forfeitable.

Applying the *Eldridge* requirements, it appears constitutionally inescapable that a hearing is required at both stages of prosecution. Before trial, the private interest of both defendant and third party is significant. A pretrial restraining order deprives continued use of business property for a substantial period of time. Millions of dollars may be involved, with immediate adverse economic consequences including asset depreciation, loss of investment opportunities and impairment of goodwill. Moreover, day-to-day management of business is threatened with the Damocles sword of forfeiture at some indefinite time in the future, causing financial institutions to retreat from extending credit or investors from purchasing stock in the wake of the government's uncertain claim of title. The stigma of a criminal racketeering prosecution obviously affects business expansion.[179] In the *Eldridge* calculus, then, the private interest is great with respect to pretrial restraint of property.

After conviction, both defendant and third party face impending divestiture. The jury issue, for which the defendant has his day in court, is the scope of the enterprise and the defendant's participation therein. A third party, who is not afforded a hearing, a fortiori has just as great a stake in appearing before the jury in an attempt to limit forfeiture to the defendant's, not his own, interest. If a RICO prosecution were a civil proceeding, third parties with interests in the property would be deemed necessary to just adjudication of the merits.[180] They are no less indispensable here. Thus, at the post-conviction stage private interests are strong as well.

The risk of erroneous deprivation of property is especially great in a RICO forfeiture prosecution. RICO, unlike any other provision of the criminal law, requires proof not only of substantive offenses but also of a pattern of "racketeering activity" affecting an "enterprise." The complexity of the statute alone raises the risk of error with respect to a defendant's guilt.[181] A RICO forfeiture case is "extremely 'complicated,' "[182] requiring prosecutors to have

179. *See infra* note 230 and accompanying text (discussing stigma associated with racketeering).

180. *See* United States v. Veon, 549 F. Supp. 274, 277 n.7 (E.D. Cal. 1982) (Veon II).

181. United States v. Martino, 648 F.2d 367, 378 (5th Cir. 1981) (RICO cases extremely complex, "characterized by lengthy indictments involving multiple defendants charged with diverse criminal activity") *rev'd on other grounds*, 681 F.2d 952 (5th Cir. 1982), *cert. granted sub nom.* Russello v. United States, 102 S. Ct. 721 (1983).

182. United States v. Veon, 538 F. Supp. 237, 248 (E.D. Cal. 1982) (Veon I) (quoting *Report of*

"a degree of financial expertise which is in general not available."[183] In fashioning the indictment, the prosecutor undertakes a complex economic calculation in alleging the extent of the defendant's interest in the enterprise subject to forfeiture. Needless to say, neither third party nor defendant provides input into this determination.

Specifically, pretrial restraining orders currently are issued without reference to statutory standards; the determination "literally breathes the spirit of discretion."[184] A proper exercise of discretion necessarily depends upon the sufficiency of the information before the court.[185] The only representation statutorily required, however, is the government's. Moreover, the government's representations frequently consist of no more than the unproven allegations in a grand jury indictment. Defendant and third party without doubt possess a different perspective with regard to the RICO charges, the alleged scope of forfeiture, and the need for pretrial restraint of property. Both may be able to provide information to rebut as legally overbroad the scope of the restraining order or show that the chance of asset dissipation is too low to warrant restraint of property. Without their participation, however, the court is left to decide the propriety of pretrial restraint based only upon the government's point of view, in a highly complicated RICO forfeiture prosecution.[186] The risk of an erroneous order is evident.

Similarly, after conviction the chance that the jury will incorrectly determine the defendant's interest in the enterprise is multiplied without third party participation. A secured party, shareholder, partner, joint venturer or co-tenant could provide the jury with information particularly within that person's purview delimiting property interests belonging to them, not the defendant. Without this evidence, the risk of wrongful forfeiture to the government of property owned by a third party is great.

The third criterion of *Eldridge* is the government interest at stake. A pretrial restraining order prevents the defendant from frustrating the effectiveness of forfeiture by disposing of property before conviction.[187] This goal is unquestionably important. Nonetheless, its accommodation does not mean that a hearing cannot be granted before trial. In particular cases in which the danger of swift asset dissipation is great, the government may obtain an *ex parte* restraining order, and then provide defendant and third party a prompt hearing to challenge its propriety.[188] In this way, the government's interest is satis-

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the Comptroller General of the United States, "Asset Forfeiture—Seldom Used Tool in Combating Drug Trafficking" 23 (April 10, 1981)).

183. United States v. Veon, 538 F. Supp. 237, 248 (E.D. Cal. 1982) (Veon I).

184. *Id.* at 243.

185. *See id.* at 243 n.3. The court stated: "A judicial exercise of discretion is ex consulto. That is, it should be an informed decision, reached after consultation and in conformance with the general principles of applicable law." *Id.*

186. Even if the court were to base its decision solely on the government's unchallenged allegations, the government is itself in a poor position to know the extent of the defendant's property interests because of the applicability of the restricted rules of criminal discovery. *Cf. Id.* at 248.

187. United States v. Mandel, 408 F. Supp. 679, 683 (D. Md. 1976).

188. *See infra* notes 195-205 and accompanying text (discussion of *ex parte* orders).

fied and, at the same time, the risk of an erroneous pretrial order is reduced. Given the obvious efficacy of this simple procedural alternative, the government's interest cannot be termed overriding.

After conviction, the government's interest is twofold. First, the government seeks to further the purposes of RICO forfeiture: punishment and separation of the racketeer from the enterprise. As to these purposes, the government "registers no gain toward its declared goals"[189] when it punishes a third party through erroneous forfeiture. Second, the government has an affirmative statutory obligation to "make due provision for the rights of innocent person."[190] This responsibility is, of course, antithetical to use of procedures that might deprive a third party of property.[191] Hence, one government objective is in fact served by permitting a third party to protect his assets though post-conviction argument before the jury. Post-conviction, the government's interest in not affording third parties an opportunity to be heard is weak.

On balance, the private interests of defendant and third party in preventing erroneous forfeiture, either from pretrial restraint or jury verdict, is great. Both before and after trial the risk of error, given the racketeering statute's complexity and the complicated process of effectuating the forfeiture, is significant. In contrast, the government's interest is slight, given the availability of *ex parte* orders and its obligation to protect the rights of third parties. Moreover, the "probable value" of "additional procedural safeguards"[192] (*e.g.,* a hearing) immeasurably strengthens the assurance that a pretrial restraining order is properly entered and jury verdict properly rendered. Thus, a pretrial hearing, either before[193] or immediately following[194] issuance of a restraining order, is constitutionally required. Affected third parties must also be allowed to participate in the post-conviction determination of forfeiture.

This Article proposes, therefore, that a hearing is constitutionally required at two points prior to a final verdict of forfeiture. First, a hearing must be held before issuance of any pretrial restraining order, to provide both the defendant and affected third parties an opportunity to prevent constraints on their assets pending the ultimate forfeiture determination, if any. Second, after a finding of guilt, a separate hearing is required to provide third parties the right to intervene and present evidence and argument regarding the proposed

189. Santosky v. Kramer, 455 U.S. 745, 767 (1982) (quoting Stanley v. Illinois, 405 U.S. 645, 652 (1972).

190. 18 U.S.C. § 1963(c) (1976). Although the government's statutory obligation to "innocent persons" does not arise until after conviction, were the government to wait until forfeiture in order to protect these parties the post-conviction remedy would be substantially impaired.

191. *See* United States v. Mandel, 505 F. Supp. 189, 191 (D. Md. 1981) ("Attorney General has the express statutory responsibility to provide for the rights of innocent persons effected by a forfeiture order as well as the more general obligation to insure that the laws of the United States are enforced in a constitutional manner"), *aff'd mem. and remanded*, 705 F.2d 445, 445, 446 (4th Cir. 1983).

192. Mathews v. Eldridge, 424 U.S. 319, at 335 (1976).

193. *See* United States v. Long, 654 F.2d 911, 915 (3d Cir. 1981).

194. *See* United States v. Spilotro, 680 F.2d 612, 617 (9th Cir. 1982); United States v. Crozier, 674 F.2d 1293, 1297 (9th Cir. 1982).

forfeiture verdict and the extent to which their assets lie outside its scope. This separate hearing also affords the defendant his first meaningful opportunity to protect his assets from wrongful deprivation. A discussion of the procedural trappings of these hearings must wait until their substantive content is considered.

IV. PRETRIAL PROCEEDINGS

A. Ex Parte *Restraining Orders*

The government in RICO prosecutions frequently applies *ex parte* for pretrial restraining orders. The lack of notice and hearing for both the defendant and the third parties has troubled several courts.[195] Balanced against the property interests of the defendant and third parties, however, is the government's legitimate objective in blocking dissipation of forfeitable assets prior to judgment. Absent a restraining order, the defendant may concoct numerous means to deprive the government of its spoils.[196] RICO's legislative history indicates that Congress drafted section 1963(b) to prevent just such behavior.[197] Manifestly, any procedures employed to accommodate rights of property owners also must consider the government's interest in preservation of a property judgment, to the extent permitted by the Constitution. Mindful of these concerns, this Article attempts to place four corners on constitutionally mandated procedures for entrance of restraining orders prior to a RICO trial on the merits.

Whether a court should entertain *ex parte* applications for pretrial restraining orders at all is the first question. Neither the statute nor the legislative history offers guidance. The statute simply grants to federal courts jurisdiction to enter restraining orders "or take such other actions . . . as it shall deem proper,"[198] and the legislative history is silent. Generally speaking, although *ex parte* restraining orders are no stranger to the law,[199] they are disfavored absent a clear showing of exigencies that make the provision of adversarial proceedings infeasible.[200] Even then, courts usually promptly grant an opportunity for affected parties to challenge the applicant's representations.[201] Drawing upon established *ex parte* motions practice, courts have looked to the Federal Rules of Civil Procedure in addressing the showing nec-

195. *See, e.g.*, United States v. Veon, 549 F. Supp. 274, 280 (E.D. Cal. 1982) (Veon II); United States v. Mandel, 408 F. Supp. 679, 683 (D. Md. 1976). *But see* United States v. Long, 654 F.2d 911, 916-17 (3d Cir. 1981) (illegal proceeds transferred to knowing third party).

196. One court has also stated erroneously that the court itself has an interest in restraining the assets in order to preserve its jurisdiction over the assets for possible inclusion in a final judgment. *See* United States v. Veon, 538 F. Supp. 237, 243 (E.D. Cal. 1982) (Veon I). Jurisdiction over the assets in an in personam forfeiture proceeding is unnecessary because the court plainly has personal jurisdiction over the defendant.

197. H.R. REP. NO. 1549, 91st Cong., 2d Sess. 57 (1970); S. REP. NO. 617, 91st Cong., 1st Sess. 160 (1969).

198. 18 U.S.C. § 1963(b) (1976).

199. *See* FED. R. CIV. P. 65(b).

200. *See* FED. R. CIV. P. 65 advisory committee notes (1966 amendment).

201. *See* FED. R. CIV. P. 65(b) (ten days).

essary to obtain an *ex parte* RICO restraining order.[202] In particular, courts have compared the government's *ex parte* application to a request for a temporary restraining order under Federal Rule of Civil Procedure 65(b).[203] Going further, these courts have also required that a prompt hearing follow issuance of an *ex parte* order, similar to the hearing afforded after a motion for a temporary restraining order.[204]

Although adoption of these civil procedural rules has helped to resolve a number of ambiguities in the forfeiture statute, more fundamental constitutional questions are at stake. Regardless of these procedural provisions, a RICO defendant's rights to a prompt hearing after entry of an *ex parte* restraining order is required by the due process clause.[205] Indeed, a more forceful constitutional argument can be found for affording an immediate hearing to affected third parties who, after all, have not been accorded even the minimal protections of a probable cause determination by a grand jury. In short, as a constitutional matter, the government must, at a hearing, make a prima facie showing that the defendant will attempt to spirit away assets in the absence of a court-enforced restraining order.

B. Content of the Hearing

Whether held before or after issuance of the *ex parte* restraining order, the purpose of the pretrial hearing is largely the same: to force the government to proffer evidence supporting pretrial restrictions on the use and alienability of property. Equally important, the hearing affords the defendant and affected third parties the opportunity to challenge the government's contentions through legal arguments and evidence. Of course, there is a chance that the pretrial hearing may turn into a minitrial.[206] This risk is diminished, however, if the court confines the parties to the limited issues they are in a position to address.[207] The government must introduce evidence that (a) the defendant's conviction is likely, (b) the assets listed in the indictment are subject to forfeiture upon conviction,[208] and (c) absent a restraining order the defendant is likely to dissipate these assets.[209] Only the defendant is in a position to

202. *See, e.g.*, United States v. Spilotro, 680 F.2d 612, 617 (9th Cir. 1982) (quoting United States v. Crozier, 674 F.2d 1293, 1297 (9th Cir. 1982)).

203. *See, e.g.*, United States v. States v. Crozier, 674 F.2d 1293, 1297 (9th Cir. 1982); United States v. Veon, 538 F. Supp. 237, 240-41 (E.D. Cal. 1982) (Veon I); United States v. Mandel, 408 F. Supp. 679, 682 (D. Md. 1976).

204. *See supra* note 203.

205. *Cf.* Kandaras, *supra* note 87.

206. *See* United States v. Spilotro, 680 F.2d 612, 618 (9th Cir. 1982); United States v. Veon, 538 F. Supp. 237, 245 (E.D. Cal. 1982) (Veon I).

207. Limiting the parties to narrow issues is not an unusual procedure. *See generally* FED. R. CRIM. P. 17.1; FED. R. CIV. P. 16. Parties have traditionally made limited appearances before courts prior to trial solely to discuss, for example, questions of personal jurisdiction. *See* Metzger v. Turner, 195 Okla. 406, 158 P.2d 701 (1945); Bridges v. Wyandotte Worsted Co., 243 S.C. 1, 132 S.E.2d 18 (1963).

208. United States v. Spilotro, 680 F.2d 612, 618 (9th Cir. 1982); United States v. Crozier, 674 F.2d 1293, at 1298 (9th Cir. 1982); United States v. Long, 654 F.2d 911, 915 (3d Cir. 1981).

209. United States v. Mandel, 408 F. Supp. 679, 683 (D. Md. 1976). *Contra* United States v. Spilotro, 680 F.2d 612, 618 n.3 (9th Cir. 1982) (government need not make independent showing

rebut the government's evidence on the likelihood of a guilty verdict.[210] Third parties must relegate their arguments to the discrete property issues before the court. As a result, a third party as well as the defendant could dispute the government's allegations whether a particular asset is legally or factually subject to forfeiture.[211] Both parties could also address the dissipation question, providing input regarding the relative fungibility of the assets, significant market conditions substantially influencing preservation of asset value, and third party control rendering preconviction transfer unlikely.[212] If the court confines the individual parties to these separable issues, expenditure of pretrial hearing time can be kept to a minimum.

The government bears the initial burden of production in justifying pretrial restraints, for several reasons. Before a jury verdict the government has no legal interest in the property,[213] and can hardly claim a right of restraint subject only to rebuttal by the party in fact possessing legal title. Rather, the government analogically stands in the shoes of a civil party seeking injunctive relief who, as the movant, shoulders the burden of justifying changes from the status quo.[214] In meeting this burden, the government cannot rely solely on the unproven allegations in the indictment.[215] A grand jury finding of probable cause is no substitute for an affirmative proffer of evidence of guilt beyond a reasonable doubt. Nor is the mere listing of assets in an indictment sufficient to show substantive forfeitability or probable dissipation. On these issues as well the government must present not charges, but evidence. Discerning the quantum of evidence required is a different question discussed later.

In the eyes of a third party, the primary purpose of a pretrial hearing is to present factual or legal arguments for excluding his property interests from any restraining order that may issue in the criminal prosecution. A legal defense might be that a particular asset is not part of the enterprise alleged in the

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regarding likely transfer of assets by defendant where property such as jewels are readily "concealed, removed, or disposed of through licit or illicit means.").

210. Third parties lack standing to make arguments concerning the defendant's likely guilt. For a brief discussion of standing, see United States v. Veon, 549 F. Supp. 274, 276 (E.D. Cal. 1982) (Veon II).

211. *See infra* notes 266-299 and accompanying text (discussing substantive restrictions on forfeiture).

212. One court noted the problems inherent in not having the affected parties on record:

> Persons other than those named as defendants in this case apparently own property or other interests in the enterprises listed in the indictment, but it does not appear from the record whether a court order restraining the transfer or other disposition of the defendant's alleged interests would impair the value or use of other parties' interests. The Court thus cannot say from the record whether or not third parties would be harmed.

United States v. Mandel, 408 F. Supp. 679, 683 (D. Md. 1976). After all, if market conditions impair the value of the frozen assets, all parties, including the government, suffer economic injury.

213. United States v. Veon, 549 F. Supp. 274 (E.D. Cal. 1982) (Veon II).

214. *See* Canal Auth. of State of Fla. v. Callay, 489 F.2d 567 (5th Cir. 1974).

215. United States v. Spilotro, 680 F.2d 612, 618 (9th Cir. 1982); United States v. Crozier, 674 F.2d 1293, 1297 (9th Cir. 1982) ("A grand jury determination is not an adequate substitute for an adversary proceeding because a defendant has no opportunity to cross-examine witnesses and the government does not assume the burden of proof."); United States v. Long, 654 F.2d 911, 915 (3d Cir. 1981).

indictment. A factual defense could be made by showing that the asset in question was transferred pre-indictment from the defendant to the third party. In general, a third party rebuts the government's evidence of potentially forfeitable third party property by furnishing proof that specific assets are not within the substantive reach of RICO or cannot be forfeited in light of factual evidence not previously presented to the grand jury or the court.[216] The third party's contentions can then be considered by the trial judge in fashioning the scope of the restraining order.

In addition, a third party may wish to produce evidence concerning the likelihood that the defendant will transfer or waste assets before an adjudication of guilt. Although lacking an interest in either the defendant's property or his guilt, a third party may be in a position to control or limit the possibility of asset dissipation by the defendant. If so, unnecessary and disadvantageous restrictions should not saddle the use of third party property. Other considerations, including the impossibility or impracticality of dissipation on the part of the defendant, could also be argued by third parties. Finally, ranking as a crucial third party concern is the making of an adequate record of their interests in property identified by the government as potentially forfeitable.[217] By so doing, a third party preserves claims for future argument to the judge or jury regarding the scope of any forfeiture ultimately entered.

The defendant is interested not only in presenting evidence of property rights improperly listed in the indictment but also in rebutting the government's contention that a guilty verdict is likely. Although challenges to guilt pose the greatest risk of unduly expanding the pretrial hearing, carefully restricting the defendant to specific responses to the government's allegations should reduce the length of argument. More importantly, as will be seen, the quantum of evidence the government must produce to obtain a restraining order is lower than that which is necessary to obtain a verdict of guilty.[218] Furthermore, as the moving party the government determines the amount of evidence used to seek a pretrial restraining order. As a practical matter, the government's desire to obtain pretrial property restraints will be tempered by an analysis of the strengths of its case. The weaker the prosecution, the greater will be the quantity of evidence necessary to support application for an order. Should the government prefer not to produce the required evidence, it can always forego seeking a restraining order. At any rate, carefully restricting the defendant to rebuttal of the government's proof on the probabilities of guilt, forfeiture, and dissipation will keep the pretrial hearing within reasonable bounds. Whether a defendant chooses to present evidence in this regard may depend upon the admissibility of his testimony at trial, a question of constitutional implication.[219]

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216. For a more specific discussion of "asset defense," see *infra* notes 266-295 and accompanying text.

217. *See supra* note 212 (court concerned with making adequate record of third party property).

218. *See infra* notes 221-245 and accompanying text.

219. An argument can be made that when a defendant testifies to prevent the government

C. *Burden of Proof: The Standard of Persuasion*

> The Supreme Court recently stated that:
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> Notice, summons, right to counsel, rules of evidence, and evidentiary hearing are all procedures to place information before the fact-finder. But only the standard of proof "instructs the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions he draws from that information.[220]

Establishing the burden of persuasion determines how the "risk of error will be allocated."[221] In the context of a pretrial restraining order application the court must, without statutory guidance, determine the standard of proof the government is to meet. Although the burden of proof can be divided into the burdens of production and persuasion, for reasons already mentioned the government necessarily bears the burden of production in seeking a pretrial re-

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from restraining his property before trial, use immunity is constitutionally required. In Simmons v. United States, 390 U.S. 377 (1968), the Supreme Court held that when a defendant testifies at a pretrial hearing in order to assert a fourth amendment claim, the government may not use his testimony against him at trial. Recognizing the "obvious" fact that "a defendant who knows that his testimony may be admissible against him at trial will sometimes be deterred" from asserting his fourth amendment claim, *id.* at 392, the Court was unwilling to countenance the "undeniable tension" between a defendant's fifth amendment right to remain silent and his fourth amendment right to contest the validity of an illegal search or seizure. The Court therefore held that when a defendant surrenders his privilege against self-incrimination and testifies at a pretrial proceeding to obtain a benefit afforded by a provision of the Bill of Rights, "his testimony may not thereafter be admitted against him at trial on the issue of guilt. . . . *Id.* at 394.

One court has considered, in passing, the applicability of *Simmons* to a pretrial RICO proceeding. In United States v. Veon, 549 F. Supp. 274, 276-77 (E.D. Cal. 1982) (Veon II), defendant moved to contest a *lis pendens* the government had filed on his property prior to trial. At oral argument his counsel asserted defendant's ownership in the property in order to rebut the government's contention that defendant lacked standing to object. In holding that defendant did have standing to object to pretrial restraint of his property, the court noted that defendant's reluctance to admit an ownership interest was "understandable." Citing *Simmons*, the court stated that it seemed "clear" that counsel's statements on behalf of the defendant "were made only for the purposes of the motion now under consideration." *Id.* at 277 n.8.

The *Veon II* court's dictum in construing *Simmons* is supported by considering the practical effect of a pretrial restraining order. The government, through a RICO prosecution, may unjustly deprive a defendant of property for years. United States v. Crozier, 674 F.2d 1293, 1297 (9th Cir. 1982). Preventing its alienation and restricting its use, the government effectively "seizes" the defendant's property. When the government lacks sufficient evidence of the defendant's guilt or when specific assets are not within the substance of RICO, the government's seizure is "unreasonable." Against these governmental actions the defendant has recourse under the fourth amendment: either a motion to suppress or a motion for return of property. *See* Imperial Distribs., Inc. v. United States, 617 F.2d 892, 895 (1st Cir. 1980), *cert. denied*, 449 U.S. 891 (1981) (no difference between the two motions under Fed. R. Crim. P. 41(e)). Under *Simmons*, a defendant's testimony at a hearing on a motion to suppress is inadmissible at trial. *E.g.*, United States v. Boston, 510 F.2d 35 (9th Cir. 1974), *cert. denied*, 421 U.S. 990 (1975); *see generally*, Note, *Resolving Tensions Between Constitutional Rights: Use Immunity in Concurrent or Related Proceedings*, 76 COLUM. L. REV. 674, 694, 696 (1976) (lower courts "have accepted and applied *Simmons* enthusiastically in the context of pretrial hearings"). In a RICO prosecution where a defendant must assert a possessory interest in potentially forfeitable property in order to oppose the government's motion to seize his property through a pretrial restraining order, the result is no different. *Veon II*, 549 F. Supp. at 277 n.8; *see generally* United States v. Dohm, 597 F.2d 535, 545-46 (5th Cir. 1979) (Goldberg, J., dissenting) (reviewing "vast body" of law broadly construing *Simmons*), *rev'd on other grounds*, 618 F.2d 1169 (1st Cir. 1980) (en banc).

220. Santosky v. Kramer, 455 U.S. 745, 758 n.9 (1982) (citing *In re* Winship, 397 U.S. 358, 370 (1970).

221. Santosky v. Kramer, 455 U.S. 745, 758 (1982).

straining order; the question is the appropriate standard attached to burden of persuasion. According to recent Supreme Court precedent,[222] this analysis follows the three part test set forth in *Mathews v. Eldridge*.[223]

Generally speaking, three separate standards are used to characterize the burden of persuasion: proof beyond a reasonable doubt, by clear and convincing evidence, and by a preponderance of the evidence.[224] Three courts have determined the appropriate standard necessary to issue a restraining order for in personam forfeiture cases. Two circuit courts have endorsed the beyond a reasonable doubt standard[225] and one district court recently adopted the preponderance of the evidence test.[226] A more thorough examination of the three *Eldridge* factors, indicates that the intermediate standard of clear and convincing evidence is constitutionally appropriate.

The Supreme Court adopted the *Eldridge* test for establishing the standard of proof required by the due process clause in *Addington v. Texas*.[227] *Addington* involved the question of the measure of proof constitutionally required "in a civil proceeding brought under state law to commit an individual involuntarily for an indefinite period to a state mental hospital."[228] Before balancing the *Eldridge* factors, the *Addington* Court noted generally that because "society has a minimal concern over the outcome" of suits involving monetary damages, "plaintiff's burden is a mere preponderance of the evidence."[229] Taken at face value, this observation indicates that the burden of proof in a pretrial proceeding regarding the status of property rights should also be a "mere preponderance." Careful attention to the reasoning of *Addington*, as placed in the context of the three *Eldridge* factors, counsels for a higher burden of proof.

The first *Eldridge* factor, the private interest affected, is indeed significant when a pretrial restraining order is used. Of course, mere property loss normally does not demand more than a preponderance standard. In assessing the private interest of individuals at involuntary civil commitment proceedings, however, the *Addington* Court accorded significance to the social "stigma" associated with such a factual finding.[230] Similarly, because pretrial property restraints in a RICO prosecution *de facto* establish a nexus to "racketeering activity," a considerable stigma attaches to the defendant and third party alike.[231] Moreover, one of the reasons the *Addington* Court opted for a stan-

222. *Id.* at 757; *see* Addington v. Texas, 441 U.S. 418, 425 (1979) ("We must be mindful that the function of legal process is to minimize the risk of erroneous decisions.").

223. 424 U.S. 319, 335 (1976). *See supra* text accompanying note 178.

224. Addington v. Texas, 441 U.S. 418, 423-24 (1979).

225. United States v. Spilotro, 680 F.2d 612, 618 (9th Cir. 1982); United States v. Crozier, 674 F.2d 1293, 1298 (9th Cir. 1982); United States v. Long, 654 F.2d 911, 915 (3rd Cir. 1981).

226. United States v. Veon, 538 F. Supp. 237, 248 (E.D. Cal. 1982) (Veon I).

227. 441 U.S. 418, 425 (1979).

228. *Id.* at 419-20.

229. *Id.* at 423.

230. *Id.* at 426.

231. *Cf.* Jenkins v. McKeithen, 395 U.S. 411, 426-28 (1969); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 160-61 (1951) ("Petitioners are organizations which, on the face of the record, are engaged solely in charitable or insurance activities. They have been designated

dard lower than beyond reasonable doubt was that civil commitment is in no sense a "punitive" exercise of government power.[232] Imposition of a pretrial restraining order, in contrast, is a necessary prelude to forfeiture, and forfeiture is clearly a punitive sanction. In short, the pretrial order not only affects property interests, but judicially links the property of both the defendant and third parties to racketeering, and represents, albeit prematurely, a punitive sanction. The private interest of a defendant and a third party thereby rises substantially above the mere pecuniary.

Even more relevant is the *Addington* Court's reasoning with respect to the second *Eldridge* factor, the risk of erroneous deprivation. The Court held that the beyond a reasonable doubt standard is not required for civil commitment proceedings because "continuous opportunities for an erroneous commitment to be corrected" are available at various stages of review.[233] Under RICO, there is no such parallel. Hence, it is the risk of erroneous deprivation, "as applied to the generality of cases, not the rare exceptions,"[234] and as tempered by a candid assessment whether a higher standard would increase the accuracy of the factfinding process,[235] that is most compelling in establishing the appropriate burden of proof for issuance of a pretrial restraining order.

The risk of error differs for a third party and a defendant. A third party runs the risk that the scope of a restraining order will exceed the property finally obtained after conviction. Although a third party cannot be shielded from the defendant's losses, at least he can be protected form unnecessary infringements upon his own property rights. The procedure currently provided, however, invites error. The scope of the restraining order is determined by the terms of the indictment.[236] In returning RICO indictments that often approach Rube Goldberg proportions, grand juries adopt unchallenged allegations of the extent of the defendant's property interests. The government seeks a restraining order based only upon the fact of the indictment or in conjunction with unchallenged supporting evidence. Given the complexity of the substantive and factual issues of a RICO prosecution, the risk that third parties will be erroneously deprived of their interests must be considered substantial.

A second risk of error implicating third party interests results from an erroneous finding of likely asset dissipation during the pendency of the criminal litigation. Restraints on property not transferable by the defendant are not

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'communist' by the Attorney General of the United States . . . . It would be blindness . . . not to recognize that in the conditions of our time such designation drastically restricts the organization, if it does not proscribe them. Potential members, contributors or beneficiaries of listed organizations may well be influenced by use of the designation. . . ."); R. CARO, THE YEARS OF LYNDON JOHNSON: THE PATH TO POWER 703 (1982) (term "Communist labor leader racketeers" coined by successful 1940 Texas candidate for U.S. Senate).

232. *Addington,* 441 U.S. at 428.

233. *Id.* at 428-29.

234. Santosky v. Kramer, 455 U.S. 745, 757 (1982) (quoting Mathews v. Eldridge, 424 U.S. 319, 344 (1976). Therefore, the risk of erroneous deprivation in ordering pretrial restrictions upon property must be viewed in light of the complexity of RICO cases in general.

235. Santosky v. Kramer, 455 U.S. 745, 761 (1982) (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

236. *See* FED. R. CRIM. P. 7(c); *cf.* United States v. Hall, 521 F.2d 406, 408 (9th Cir. 1975).

only unnecessary, but also have adverse economic consequences for third parties. On findings of both forfeitability and dissipation, then, a court imposing pretrial restrictions runs a higher risk of causing injuries to third party property interests.

As for the defendant, entry of a pretrial restraining order poses three possible risks of error. Along with the probability of error inherent in the complex determination of forfeitability and the calculation of asset dissipation is the enhanced opportunity for mistaken predictions concerning successful prosecution under the sophisticated RICO statute. The chance for error in fashioning pretrial restrictions of the defendant's property must also be considered extreme.

Raising the government's burden of proof reduces the likelihood of erroneous pretrial restraints.[237] Moving from a preponderance to a clear and convincing evidence standard forces the government to adduce a greater quantity of evidence to support a restraining order, and thus provides a more solid foundation for an accurate judicial determination.

The third *Eldridge* factor in discerning the constitutionally appropriate burden of persuasion is an assessment of the government's interests. In pretrial forfeiture proceedings, these interests are preserving potentially forfeitable assets and minimizing costs associated with resolving property issues collateral to the criminal prosecution. Preservation of forfeitable property is indeed a substantial government interest, reflecting the intent of the 91st Congress in enacting section 1963(b). The higher the government's burden of proof, the greater the risk of impairing this objective. The second government interest, minimizing costs of property adjudication, deserves little or no weight. As the Supreme Court recently stated, "[u]nlike a constitutional requirement of hearings, or court-appointed counsel, a stricter standard of proof would reduce factual error without imposing substantial fiscal burdens on the State. . . ."[238] Similarly, "[n]or would an elevated standard of proof create any real administrative burdens for the [judicial] factfinders."[239] The pretrial triers of fact are federal judges, considerably familiar with elevated evidentiary standards. In short, then, the sole compelling government interest at stake in setting the burden of proof for issuance of a pretrial restraining order is avoiding asset dissipation. This objective, moreover, is obviously irrelevant with respect to third party assets.

In balancing the three *Eldridge* factors to determine the constitutionally appropriate burden of persuasion, the overriding issue is what party shall ultimately bear the risk of error. "The individual," the Supreme Court has said, "should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state."[240] The private interest affected by RICO pretrial property re-

237. *See* Santosky v. Kramer, 455 U.S. 745, at 764 (1982).
238. *Id.* at 767.
239. *Id.*
240. *Addington*, 441 U.S. at 427 (1979).

straints is, on the one hand, substantial, including direct economic harm, the stigma of a racketeering prosecution, and imposition of punitive sanctions. On the other hand, pretrial property infringement is temporary.[241] As for the risk of error, a RICO prosecution and forfeiture determination is undoubtedly complex. While the defendant has at least some protection from unfounded government action through the office of the grand jury, a third party has none, save a pretrial hearing. Given this high risk of erroneous deprivation and the greater than pecuniary interests at stake, the preponderance standard does not adequately accommodate society's interest in preserving property from unwarranted government restraint. The beyond a reasonable doubt standard, however, may be too high. Reflecting society's qualitative judgment regarding the evidence produced, this standard has been confined to final determinations and further reserved for decisions for which "the social cost of even occasional error is sizable."[242] Moreover, the decision to enter a pretrial restraining order can only be based upon probabilities, a criteria not generally susceptible to proof beyond a reasonable doubt.[243] Additionally, the beyond a reasonable doubt standard significantly increases the quantity of evidence the government must disclose. To the extent the government is forced to forego pretrial restraining orders because of tactical concerns over discovery, its interest in avoiding dissipation is denied.

A standard of clear and convincing evidence provides a more appropriate constitutional equilibrium for these competing interests.[244] This middle tier measure of persuasion is frequently associated with civil fraud allegations,[245] proceedings more analogous to the stigma of racketeering and the property infringements of a pretrial restraining order than is a simple damages dispute between private parties. Finally, the clear and convincing evidence standard places the risk of error on the government, which accordingly must proffer

241. Goss v. Lopez, 419 U.S. 565, 576 (1975); North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 606 (1975) ("the length or severity of a deprivation of use or possession would be another factor to weigh in determining the appropriate form of hearing"); Fuentes v. Shevin, 407 U.S. 67, 86 (1972).

242. Santosky v. Kramer, 455 U.S. 745, at 766 (1982).

243. *Cf. Addington,* 441 U.S. at 429 (1979).

244. *See* United States v. Beckham, 562 F. Supp. 488 (E.D. Mich. 1983) (adopting a clear and convincing standard for pretrial restraining orders in RICO cases). The clear and convincing standard has become even more compelling in the wake of the Seventh Circuit's decision in United States v. McManigal, 708 F.2d 276, 289 n.6 (7th Cir. 1983), in which the court indicated that the government's title to forfeit assets would relate back from the date of verdict to the date a pretrial restraining order was entered. Apparently the *McManigal* court considered that a judge's pretrial assessment of the likely guilt of the defendant was sufficient to support the relation back of the government's title from the date of judgement to the date the pretrial restraining order was entered. While this dicta is undoubtedly incorrect the fact remains that if courts follow this dicta the stakes are sufficiently increased to warrant shifting the burden of proof to the clear and convincing standard. Ironically, the district court in *Beckham*, while adopting the clear and convincing standard, went on to hold that it could and should not make a pretrial guess on the likelihood of any particular defendant's chances of conviction for purposes of issuing pretrial restraining orders.

245. DeBry v. Transamerica Corp., 601 F.2d 480 (10th Cir. 1979); Merit Ins. Co. v. Colao, 603 F.2d 654 (7th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980); Ajax Hardware Mfg. Corp. v. Industrial Plants Corp., 569 F.2d 181 (2d Cir. 1977).

enough evidence to reduce the risk of an erroneous determination without having to try its case at the pretrial hearing.

D. Judicial Relief

Having determined the issues to be resolved along with appropriate standard of proof, the question remains what the court may do at the pretrial hearing to protect defendant and third party property interests. A court addressing the propriety of a restraining order must, by definition, employ discretion in fashioning equitable relief. Beyond outright denial of the government's application, the court could formulate various orders to accommodate the factual findings made at the pretrial hearing. The court could, for example, amend the indictment to exclude property belonging to third parties or otherwise improperly listed as owned by the defendant himself.[246] The court could also appoint a receiver, acceptable to the parties, to minimize the risk of interim economic injury posed by direct restraints. Another possible safeguard might entail judicial acceptance of an agreement by third party co-owners to hold the defendant's property in trust until the criminal trial is completed. Other property management options also may be selected in the exercise of the court's equitable discretion.

The final issue is the constitutionally required procedural safeguards necessary to facilitate full and fair judicial resolution of these issues. Before addressing these procedures, one preliminary observation is necessary. Even prior to the government's application for a pretrial restraining order, both the defendant and a third party incur a measurable injury to their property rights from the mere return of the indictment. An indictment is a public record informing all the world, and specifically the business community, that the property described is considered subject to forfeiture. Significant economic consequences may result swiftly. Secured parties may feel sufficiently insecure to claim default, professional associates may presume derailment of the ordinary course of business signaling the end of commercial dealings, and the good will once garnered by the defendant and third party as property owners in the financial community may evaporate. Constitutional protections accorded property owners in a RICO prosecution therefore must attach prior to the government's application for a pretrial restraining order. Upon issuance of an indictment, the Constitution requires that notice and a hearing be provided to all affected property owners, even if the government does not seek a pretrial restraining order. The defendant and the third party may then at least challenge the legal sufficiency of forfeiture as set forth in the indictment. Additionally, third parties may reserve with the court a seat at jury argument in post-conviction proceedings.

246. A trial court always has authority to strike defects in an indictment. *See* FED. R. CRIM. P. 12(b)(1) & (2).

E. Procedural Due Process Application to Pretrial Proceedings

(1) Notice

Under the guidance of *Mullane v. Central Hanover Bank & Trust Co.*,[247] adequate notice for due process purposes is "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action."[248] A key factor is timing. Notice must not only be reasonably tendered but also provided at a point calculated to afford a meaningful opportunity to respond.[249] In the context of RICO in personam forfeitures, this standard signifies that notice to affected property owners should be tendered at indictment, when official notice is afforded to the defendant.

Before trial, notice must not only inform affected property owners that their property may be subject to government confiscation but more importantly should indicate any governmental intent to restrain its use during the pendency of the litigation. Notice thus allows affected property owners the opportunity to assess any possible injury that may result regardless of the eventual outcome of the criminal trial. Finally, notice preserves the property owner's ability to persuade the court to curb the breadth of the pretrial restraining order as well as to impose possible interim property management mechanisms. Adequate notice is therefore crucial if property owners are to act either to preserve valid property claims or take measures to minimize economic risks within the framework of applicable court orders.

In addition to timeliness, notice must be broad enough reasonably to apprise persons with significant assets of the possibility of loss.[250] At some point, of course, the property interests involved may approach the de minimus level. Due process does not compel burdensome efforts to notify all conceivable property owners whose interests may be touched. Rather, *Mullane* posits no greater requirement than use of reasonable efforts to notify property owners reasonably susceptible of identification. Certain types of realty and chattel, for example, may have become matters of public record through various title recording requirements.[251] If so, the government reasonably would be required to give notice to record title owners prior to pretrial restraint of their property. Other types of property, such as money, are not as susceptible to the identification of possible true owners. Again, due process only requires that the government take reasonable steps to afford notice to reasonably identifiable property owners.[252]

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247. 339 U.S. 306 (1950).

248. *Id.* at 314.

249. *See* Armstrong v. Manzo, U.S. 545, 552 (1965). Notice must be timely to provide opportunity to be heard "at meaningful time and in a meaningful manner." *Id. See also Mullane,* 339 U.S. at 313-14.

250. *Mullane*, 339 U.S. at 317-20.

251. *See* Jaekal v. United States, 304 F. Supp. 993 (S.D.N.Y. 1969) (discovery of car owner's name through title of automobile confiscated); Smith, *supra* note 41, at 693.

252. The notice provided to third parties should include adequate notice of the inclusion of their assets in the properties sought to be forfeited by the governments and, assuming no *ex parte* order has already been entered, notice of any attempt by the government to have pretrial restraints placed on the property. The notice should state the time and place where the two separate types of

(2) Formality of the Proceedings

Determining the degree of formality necessary to address defendant and third-party claims requires assessing the need for an adversarial setting, the requisite burdens of production and persuasion, the applicability of evidentiary rules, and the right to counsel. The first two issues have been addressed and are now simply refocused. Conflicting claims between the defendant, third party and the government to property potentially forfeitable are competing, adversary interests that constitutionally require an adversary hearing for determination.[253] As the moving party, the government bears the burden of production and also carries the burden of persuasion, constitutionally established by the standard of clear and convincing evidence. As for evidentiary rules, two courts have held applicable the Federal Rules of Evidence at pretrial hearings adjudicating restraining orders for in personam forfeiture cases.[254] Although courts decided the issue on statutory grounds, observing that federal evidentiary rules apply to all criminal proceedings, arguably a more fundamental due process rationale would reach the same result. Regardless of the basis, it seems clear that the rules of evidence should aid the truth-seeking function of the adversary hearing: "to place information before the factfinder."[255] This is especially true when discretion is the watchword of a pretrial restraining order determination.

The rights to appear and be represented by retained counsel should be accorded property owners. Because of obvious conflict of interest problems, counsel for the defendant cannot adequately represent third party property owners when they may have potentially adverse claims. Although a third party's right to an attorney has a constitutional foundation, it is unlikely that the Constitution requires appointment of counsel at the government's

property infringements will take place, and clearly state the consequences of any failure of third parties to appear. *See* FED. R. CRIM. P. 12(c) (court sets date for pretrial motions). The failure of a third party to appear at the hearing after adequate notice has been issued should operate to waive its right to object to either pretrial restraints or to any subsequent forfeiture hearing. *See* FED. R. CRIM. P. 12(f) (failure to raise defense or objections which must be made pretrial constitutes waiver unless court grants relief for good cause shown); United States v. Veon, 549 F. Supp. 274, 277 n.7 (E.D. Cal. 1982) (Veon II) (failure of defendant's brother to appear to defend assets possibly owned by him constitutes waiver of right to challenge government request for pretrial restraint).

253. *Cf.* United States v. Veon, 538 F. Supp. 237, 245 n.7 (E.D. Cal. 1982) (Veon I). Although the *Veon I* court ostensibly based its ruling on statutory grounds, attention to the wording of the opinion indicates a constitutional ruling. The *Veon I* court, in an attempt to avoid a constitutional ruling, noted the troublesome due process issues implicated by not granting an adversarial hearing to the defendant before the imposition of pretrial restraints. The *Veon I* court attempted to avoid the constitutional question "by finding that implicit in the statutory scheme is a requirement for a timely adversary hearing." *Id.* at 245. While the court's attempt to avoid a constitutional ruling is praiseworthy, a court cannot simply read provisions into a statute from whole cloth in order to sidestep constitutional issues. The constitutional basis of the *Veon I* court's holding is further evidenced by the court's statement in footnote seven that Mathews v. Eldridge, 424 U.S. 319 (1976), would require an identical conclusion were the question framed as a constitutional issue. *Veon I*, 538 F. Supp. at 245 n.7.

254. *See* United States v. Spilotro, 680 F.2d 612, at 614 n.4 (9th Cir. 1982); United States v. Veon, 538 F. Supp. 237, 248-49 (E.D. Cal. 1982) (Veon I).

255. Santosky v. Kramer, 455 U.S. 745, 758 n.9 (1982).

expense.[256]

V. Post-Conviction Proceedings

Upon conviction, the defendant "shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over"[257] the racketeering enterprise proven at trial. Having passed on the defendant's guilt, the same trier of fact must determine the scope of the forfeiture, if any. To date, however, this procedure has been given only perfunctory attention. In fact, only two aspects of the trier of fact's deliberations are well settled. First, the Federal Rules of Criminal Procedure establish that "a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any."[258] Second, the government shoulders the burden of production and persuasion on the scope of forfeiture.[259] Beyond these two propositions, commentators and courts have not discussed the procedural apparatus necessary to enter a valid RICO forfeiture judgment. Because the government's title to the property "vests" at this juncture, compliance with the demands of procedural due process is most compelling. This section addresses the dictates of due process at the post-conviction stage of a RICO proceeding.

A. Content of the Hearing: Asset Defenses

The substantive questions surrounding the scope of a RICO forfeiture have not been definitively answered in the early case law generated under the 1970 statute. Hence, largely unresolved issues confront the trier of fact in determining the scope of a forfeiture. Without attempting to resolve these substantive questions, this Article notes the significant issues presently affecting the decision of a properly instructed trier of fact. Two mutually reinforcing principles, however, must be brought to bear on the inquiries at hand. The first is the cardinal principle that the law abhors forfeiture.[260] The second is the rule of lenity, "of particular application"[261] in construing ambiguities in the terms of the forfeiture statute. "Such a penal foray bespeaks a need for

256. *See* Lassiter v. Department of Social Servs., 452 U.S. 18, 26-27 (1981) (only when deprivation of "physical liberty" is at stake need a court balance the *Eldridge* factors to determine if counsel must be appointed for indigents).

257. 18 U.S.C. § 1963(a) (1976).

258. Fed. R. Crim. P. 31(e).

259. *See* Fed. R. Crim. P. 31(e) advisory committee notes (1972 amendment). "The assumption of the draft is that the amount of the interest or property subject to criminal forfeiture is an element of the offense to be alleged and proved." *Id.*

260. *See* United States v. McManigal, 708 F.2d 276, 286 (7th Cir. 1983) (quoting United States v. Martino, 681 F.2d 952, 962) (5th Cir. 1982) (Politz, J., dissenting); Henderson v. Carbondale Coal & Coke Co., 140 U.S. 25 (1891); United States v. Rubin, 559 F.2d 975, 991 (5th Cir. 1977), *cert. denied*, 444 U.S. 864 (1979).

261. United States v. Rubin, 559 F.2d 975, 991 (5th Cir. 1977), *cert. denied*, 444 U.S. 864 (1979).

circumspection."[262] Although the rule of lenity governs only where the terms of a criminal statute are ambiguous,[263] the language and divergent case law interpreting the scope of section 1963 leads to the conclusion that lenity must apply.[264]

The substantive limits of a RICO forfeiture must be extrapolated from the ambiguous wording of the racketeering statute. The operative term is "interest." Broadly speaking, there are two distinct types of "interests" subject to forfeiture. Section 1963(a)(1) declares that any "interest . . . acquired or maintained" by the defendant *"in violation of section 1962"* shall be forfeited. Section 1963(2) declares forfeitable "any interest in, security of, claim against, or property or contractual right of any kind *affording a source of influence over*" the racketeering "enterprise." Courts generally have avoided defining what constitutes a forfeitable "interest" under these provisions. This is not surprising, given the task of not only relating the two separate forfeitable interests to one another but also construing them in the context of the four separate racketeering offenses.[265] Rather than retrace arcane judicial efforts to reconcile these statutory provisions, a more practical exercise is merely to list the outstanding litigable issues.

(1) Profits

Perhaps the most litigated question is whether "profits" of racketeering activity are forfeitable under section 1963, though the Supreme Court has recently ended all speculation by holding that profits are subject to RICO forfeiture.[266] Initially, most courts said no, reasoning that because profits are

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262. *Id.*

263. *See* Bifulco v. United States, 447 U.S. 381, 387 (1980) (lenity applicable to criminal sanctions); United States v. Emmons, 410 U.S. 396, 411 (1973); Callanan v. United States, 364 U.S. 587, 596 (1961); United States v. Martino, 681 F.2d 952, 956 n.16 (5th Cir. 1982) (en banc) (finding "no ambiguity" in § 1963(a)(1), language "plain"), *cert. granted sub nom.* Russello v. United States, 103 S. Ct. 721 (1973).

264. United States v. Long, 654 F.2d 911, 914 (3d Cir. 1981); United States v. Rubin, 559 F.2d 975, 991 (5th Cir. 1977), *cert. denied*, 444 U.S. 864 (1979). The holding of the *Martino* court that the substantive forfeiture provisions of RICO are without ambiguity is patently wrong. *See* United States v. McManigal, 708 F.2d 276 (7th Cir. 1983) (*Martino* wrong; term "interest" is ambiguous). Despite the obvious ambiguities inherent in defining a forfeitable "interest" under 18 U.S.C. § 1963(a) (1976), the *Martino* court failed to explain how a predecessor panel of the same circuit, *see* United States v. Rubin, 559 F.2d 975 (5th Cir. 1977), *cert. denied*, 444 U.S. 864 (1979), could have concluded that RICO's forfeiture provisions are ambiguous.

265. *See, e.g.*, United States v. Marubeni Am. Corp., 611 F.2d 763, 766-67 (9th Cir. 1980); United States v. Romano, 523 F. Supp. 1209, 1212-15 (S.D. Fla. 1981). For example, even assuming that the respective contours of the two separate forfeiture provisions are established, applying these two distinct definitions of "interests" to the discrete types of racketeering activities—investing under 18 U.S.C. § 1962(a) (1976), maintaining the enterprise under 18 U.S.C. § 1962(b) (1976), conducting the enterprise under 18 U.S.C. § 1962(c) (1976), and conspiring to do any of the above under 18 U.S.C. § 1962(d) (1976)—contemplate four different types of *actus reus*. Relating the two separate types of "interests" forfeitable under § 1963(a) to the gravamen of each separate racketeering offense in order to determine the scope of a forfeiture is no easy task. *See* United States v. McManigal, 708 F.2d 276 (7th Cir. 1983); United States v. Thevis, 474 F. Supp. 134 (N.D. Ga. 1979) (relating § 1963(a)(1) to § 1962(c)), *aff'd*, 665 F.2d 616 (5th Cir.), *cert. denied*, 103 S. Ct. 57 (1982).

266. *See* Russello v. United States, 104 S. Ct. 296 (1983). For pre-*Russello* opinions, see United States v. McManigal, 708 F.2d 276 (7th Cir. 1983); United States v. Martino, 681 F.2d 952

specifically forfeitable under the in personam provisions of the Continuing Criminal Enterprise statute[267] enacted only a week after RICO (which fails to mention profits), Congress did not intend to include profits in the racketeering statute.[268] Buttressing this rationale, courts determined that the forfeitability of a defendant's property must be circumscribed by the "enterprise" element of the racketeering offense.[269] Courts reached this latter conclusion by considering RICO's legislative history as well as looking to the purgative purposes of the statute.[270] Subsequently, however, some courts have retreated from the "enterprise" limitation on the scope of a RICO forfeiture.[271] In a sharply divided en banc decision effectively overruling two previous panel decisions, the Fifth Circuit in *United States v. Martino*,[272] recently held that racketeering profits are forfeitable because there is no "enterprise" restriction on the scope of forfeiture under section 1963(a)(1).[273] The dissenters in the Fifth Circuit en banc decision argued that the majority's holding does not simplify the distinction between 1963(a)(1) and (2) but instead complicates delineation of a defendant's forfeitable interest.[274] The Supreme Court has affirmed the en banc *Martino* decision, thereby resolving the question.[275] Nevertheless, certain practical consequences result from the Supreme Court's holding.

The government's evidence during the criminal trial serves to adjudicate both the scope of the enterprise and the extent of the defendant's criminal participation in furtherance of that enterprise. After the Supreme Court's decision in *Russello*, the scope of the enterprise becomes relevant under section 1963(a)(2).[276] Because section 1963(a)(2) "is restricted to an interest in an enterprise"[277] the government need only prove the defendant's proportional ownership or control rights in the enterprise. In contrast, the extent of the defendant's criminal racketeering conduct becomes relevant under section 1963(a)(1). Because section 1963(a)(1), according to the Supreme Court, applies in literal terms only to property "illegally"[278] acquired or maintained, the government shoulders a higher evidentiary obligation.

Without the aid of the "enterprise" guidepost, the extent of forfeiture

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(5th Cir. 1982) (reversing a panel that held profits not within RICO forfeiture provisions), *cert granted sub nom.* Russello v. United States, 103 S. Ct. 721 (1983); United States v. Godoy, 678 F.2d 84 (9th Cir. 1982) (limiting *Marubeni* holding to liquid, uninvested assets); United States v. Peacock, 654 F.2d 339, 351 (5th Cir. 1982); United States v. Marubeni Am. Corp., 611 F.2d 763 (9th Cir. 1980); United States v. Thevis, 474 F. Supp. 134 (N.D. Ga. 1979), *aff'd*, 665 F.2d 616 (5th Cir.), *cert. denied*, 103 S. Ct. 57 (1982).

267. 21 U.S.C. § 848(a)(2) (1976).

268. *See* United States v. Marubeni Am. Corp., 611 F.2d 763, 766 n.7 (9th Cir. 1980).

269. *Id.* at 769.

270. *See id.*

271. United States v. Martino, 681 F.2d 952 (5th Cir. 1982) (en banc), *cert. granted sub nom.* Russello v. United States, 103 S. Ct. 721 (1983).

272. *Id.*

273. *Id.* at 955-56.

274. *Id.* at 965 (Politz, J., dissenting).

275. *See* Russello v. United States, 104 S. Ct. 296 (1983).

276. *Id.* at 301.

277. *Id.* at 300.

278. *Id.*

under section 1963(a)(1) must be determined by linking the property to racketeering conduct. Thus, the government must present evidence of an "interest . . . acquired or maintained in violation of section 1962."[279] Rather than merely pointing to the defendant's property interest in the alleged enterprise, the government has an affirmative duty under 1963(a)(1) to prove both defendant's ownership and a culpable connection between the defendant's criminal conduct and the property. In accordance with section 1963(a)(1)'s own terms and the interpretation the Supreme Court has given them, the government assumes a tracing obligation to link the forfeitable property to a criminal racketeering violation. Several circuits already may have adopted this approach by requiring that the government establish a nexus between specific forfeitable assets and some culpable conduct by the defendant.[280]

Moreover, even under section 1963(a)(2), questions remain regarding the precise scope of the "enterprise" limitation. Assuming that forfeiture of a defendant's interest in an enterprise without any proof of a culpable nexus between the property and the defendant can survive constitutional challenge,[281] the statute also requires that the property "afford a source of influence" over the enterprise.[282]

(2) Post-Indictment Developments

Given the length of time involved in prosecuting complex RICO cases, the property eventually forfeited most likely will have undergone some changes since the return of the indictment regardless of whether a pretrial restraining order has been entered in the interim. One constitutional issue is whether the government is entitled to any post-indictment changes in the form or value of the property. Because the indictment specifically lists and thereby limits the assets subject to forfeiture, post-indictment changes arguably are not forfeitable. Moreover, whether the government is entitled to go beyond the

279. 18 U.S.C. § 1963(a)(1) (1976).

280. United States v. Cauble, 706 F.2d 1322 (5th Cir. 1983) (holding that court should instruct jury that government must prove nexus between property and criminal conduct beyond a reasonable doubt); United States v. Zang, 703 F.2d 1186, 1195 (10th Cir. 1982) (remanding forfeiture for determination of "untainted interests" and "interests of innocent third parties").

281. By its own terms, the "enterprise" limitation forfeits the defendant's interest in the enterprise and no more. *Id.* at 963-65. While this may be an accurate statutory construction of § 1963(a)(1), the constitutional validity of this position is subject to doubt. Put simply, this position holds the mere ownership by the defendant of "enterprise" property will trigger forfeiture of that property. Whether the Constitution permits the forfeiture of property without even a showing of a criminal connection between the property and the owner, other than ligitimate ownership, is a valid issue. *Cf.* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689 (1974) (dicta) (forfeiture of property improper without some criminal nexus between property and in rem claimant); United States v. One Tintoretto Painting, 691 F.2d 603, 607 (1982) (*Calero-Toledo* forfeiture exception must be given effect).

282. 18 U.S.C. § 1963(a)(2) (1976) speaks of "interest" affording a source of influence. Defining what constitutes a right that affords such influence has never been addressed by courts. The 91st Congress, however, has made what appears to be a legislative finding of fact on the issue. 18 U.S.C. § 1962(a) (1976) has a one-percent exception for investing money in stocks. The legislative history indicates that Congress believed that one-percent ownership of stock could not afford a source of influence over an "enterprise." *See infra* note 292. Surely other examples could be found of property rights that do not provide significant control over "enterprises."

terms contained in the indictment to reach assets under section 1963 is an issue posing greater difficulties than simply lack of notice[283] to the defendant. Rather, bringing post-indictment property developments within the forfeiture constructively amends the indictment. The Constitution, of course, permits neither the prosecutor nor the court to expand the indictment through constructive amendments.[284]

Even if post-indictment property developments are not constitutionally immune from forfeiture, a statutory question remains whether the RICO statute purports to make them subject to forfeiture. Courts recently have alluded to, but not squarely addressed, this inquiry.[285] This issue is reducible to whether the government enjoys a constructive trust or a equitable lien on the property listed in the indictment.[286]

(3) Pre-Indictment Property Transfers

If property no longer belongs to the defendant on the day of the indictment, it is not an "interest" of the defendant subject to forfeiture.[287] The purgative purpose of the forfeiture statute is achieved if the defendant disassociates himself from the enterprise assets before the prosecution ever begins.[288] If the government proves a sham transaction, however, the defendant arguably still retains a sufficient "interest" to support a finding of forfeiture.[289]

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283. *See* United States v. Hall, 521 F.2d 406, 407-08 (9th Cir. 1975) (per curiam); United States v. Meyers, 432 F. Supp. 456, 461 (W.D. Pa. 1977); FED. R. CRIM. P. 7(c)(2).

284. Stirone v. United States, 361 U.S. 212 (1960); United States v. Salinas, 601 F.2d 1279 (5th Cir. 1979); Gaither v. United States, 413 F.2d 1061 (D.C. Cir. 1969); *see Ex parte* Bain, 121 U.S. 1 (1887); United States v. Figueroa, 666 F.2d 1375 (11th Cir. 1982). In the related context of a prosecution under 21 U.S.C. § 848 (1976), the Second Circuit has erroneously reached the conclusion, that there can be no constructive amendment of the indictment with respect to the scope of in personam forfeitures because the grand jury need not pass the quantity of assets subject to forfeiture. United States v. Grammatikos, 633 F.2d 1013, 1025 (2d Cir. 1980). The Second Circuit based its dicta on the ground that the scope of the forfeiture is not an essential element of the offense. *Id.* The *Grammatikos* court failed to address or distinguish the unequivocal language of the Advisory Committee, which stated: "the amount of the interest of property subject to criminal forfeiture is an element of the offense to be alleged and approved." FED. R. CRIM. P. 31(e) advisory committee note (1972 amendment).

285. United States v. Martino, 681 F.2d 952, 961 (5th Cir. 1982) (en banc), *cert. granted sub nom.* Russello v. United States, 103 S. Ct. 721 (1983).

286. *Id.* In simple terms, a constructive trust would allow the government to reap whatever appreciation in value had accrued to the forfeited assets since the date of indictment. An equitable lien, on the other hand, would limit the government to the value of the assets as of the date of indictment.

287. This obvious proposition is nothing more than a function of the defendant's status as owner. If the defendant does not own an asset, he cannot forfeit it. Ownership is a factual matter that the government must prove to the trier of fact. More importantly, upon forfeiture of an asset the government can only step into the shoes of the defendant. Thus, the United States only acquires the type of title owned by the defendant, nothing more. *See* United States v. McManigal, 708 F.2d 276, 289 (7th Cir. 1983).

288. United States v. Marubeni Am. Corp., 611 F.2d 763, 769 n.11 (9th Cir. 1980) ("The government loses sight of [Congress's purpose in enacting RICO] when it argues that a 'loophole' would be created if racketeers were allowed to divest themselves of interests in an enterprise and thereby avoid forfeiture. Divestiture is not exploitation of a 'loophole'. It is the action Congress intended to induce.").

289. *See* United States v. Mandel, 505 F. Supp. 189 (D. Md. 1981), *aff'd and remanded*, 705 F.2d 446 (4th Cir. 1983). In *Mandel* the jury had made a finding that the defendant in fact owned certain assets despite the record ownership of a third party, Irwin Schwartz. The jury found that

If property remains in the defendant's possession from the time of the offense until the day of the indictment, one question is whether, upon conviction and judgment of forfeiture, the government's title "relates back" to the time of the offense. In *United States v. McManigal*[290] the government attempted to apply the so-called "relation back" doctrine to the defendant's interest at the time of the offense, in certain accounts receivable that had since been paid. In a thoughtful opinion, the Seventh Circuit rejected this argument. The court correctly recognized that the relation back doctrine derives from in rem proceedings based upon the "guilt" of property "independent of the innocence or guilt of the owner," whereas a RICO forfeiture can occur only upon proof of the defendant's guilt.[291]

(4) Non-Exercisable Interests

One of the two express exceptions[292] to RICO's forfeiture provisions covers property rights "or other interest[s] . . . not exercisable or transferable for value by the United States. . . .[293] These interests "shall expire and shall not revert to the convicted person."[294] Unfortunately, the statute does not define this type of property, and no court has attempted to give content to this explicit exception.[295] Possible candidates for the category of non-exercisable

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the defendant owned the assets "through Irving Schwartz, as nominee." *Id.* at 190. *See also* United States v. Veon, 549 F. Supp. 274, 280 n.13 (E.D. 1982) (Veon II) (noting possible applicability of doctrine of fraudulent conveyances to question of sham transfers); United States v. McManigal, 708 F.2d 276, 279 n.7 (7th Cir. 1983) (government should be allowed to show sham transfers).

290. 708 F.2d 276 (7th Cir. 1983).

291. *Id.* at 287-88. Unfortunately, the *McManigal* court did not apply the distinction between in rem and in personam forfeitures completely because the *McManigal* court stated that the government's title may attach at either conviction or the entrance of a pretrial restraining order. Obviously, a judge's decision to enter a pretrial restraining order should not affect the time that the government's title attaches for in personam forfeitures. A judge's decision to enter a pretrial restraining order is emphatically not a judgment of guilt and may, in fact, be motivated by numerous considerations unrelated to the defendant's guilt. Most importantly, as the *McManigal* court implicitly acknowledge through its citation of United States v. Veon, 549 F. Supp. 274 (E.D. Cal. 1982) (Veon II), until a guilty verdict is rendered in an in personam forfeiture the government has no title or equitable interest in the defendant's property. *See McManigal*, 708 F.2d at 289.

292. The other explicit exception to the RICO forfeiture provisions relates to 18 U.S.C. § 1963(a)(2) (1976). That section requires forfeiture of defendant's interests "affording a source of influence" over the enterprise in violation of 18 U.S.C. § 1962(a) (1976). Section 1962(a), however, makes an explicit exception for one percent of outstanding securities in the "enterprise". The legislative history indicates quite clearly that this one percent exception was intended to allow even racketeers the opportunity to make investments as long as the investment did not provide a source of control over the legitimate enterprise. *See House Hearings, supra* note 103, at 170 (Department of Justice comments) ("The title seeks to prohibit investments which permit the racketeer to exercise some degree of control over the business in which he invests."); *Measures Relating to Organized Crime: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 406 (1969) (Department of Justice offers 1% amendment to § 1962(a) because it would only afford investment opportunity to racketeers; racketeer could exercise no control with such a small interest in enterprise).

293. 18 U.S.C. § 1963(c) (1976).

294. *Id.*

295. There are only two reported constructions of this provision in 18 U.S.C. § 1963(c) (1976). *See* United States v. Rubin, 559 F.2d 975, 992 n.18 (5th Cir. 1977) *cert. denied* 444 U.S. 864 (1979); United States v. Cauble, 706 F.2d 1322 (5th Cir. 1983). The *Rubin* court held that a defendant union official could forfeit his elected union office. In so doing, the court noted that this

property interests include the voting and management rights attached to forfeited property. The Fifth Circuit, for example, has held that a convicted union official could forfeit his elected union office under RICO.[296] Because the government cannot transfer or sell an elected union office, this property interest should simply expire.[297] There is, however, some obscure legislative history indicating that the government may exercise the interim management and voting rights incident to the ownership of forfeited property.[298]

A possible reconciliation of these two positions could occur by reference to the alienability restrictions under state law of the property right in question.[299] For example, voting rights in stock are freely transferable to other parties unless explicitly restricted. Conversely, limited partnership voting rights generally are non-assignable absent consent of the partnership. In the first case, stock voting rights are "exercisable" property interests. In the second case, partnership voting rights are "nonexercisable," subject only to expiration of the defendant's interest. In short, to determine whether certain property interests are "not exercisable or transferable" by the federal government, courts should look to the state law restrictions already placed upon the property. Regardless of whether courts adopt this particular interpretation, however, this explicit exception to a RICO forfeiture must be given substantive meaning.

B. Purpose of Post-Trial Hearing

The foregoing legal and factual issues currently are considered by the jury at the same time that it determines the defendant's guilt. Failure to address these questions at a separate hearing after a finding of guilt presents several

result would be obtained even though the United States could not assume the elected office. Citing § 1963(c) the *Rubin* court stated that the defendant's elected position would simply terminate. *Rubin*, 559 F.2d at 992. The *Cauble* court subsequently attempted to elaborate on the meaning of this provision by way of dicta. Initially the *Cauble* court had apparently held that the defendant's general partnership position in the legitimate "enterprise" was transferable to the United States. *Cauble*, 706 F.2d at 1350. After determining that the defendant's partnership position was "exercisable or transferable," by the United States, there was no reason for the *Cauble* court to consider the meaning of this provision of § 1963(c). Nevertheless, the *Cauble* court's construction of the provision is not completely satisfying. Briefly, the *Cauble* court distinguished the defendant's situation in *Rubin* from that in *Cauble* by stating that Cauble's general partnership office did not constitute a "position" whereas Rubin's elected union office did. *Id.* It is respectfully submitted that this is a distinction without a difference. Cauble's office as a general partner, like the offices of most corporate directors, is a "position" requiring the continuous consent of the other partners. The tenure of the defendant as a corporate official may have little if anything to do with the defendant's property interests in the underlying "enterprise."

296. United States v. Rubin, 559 F.2d 975 (5th Cir. 1977), *cert. denied*, 444 U.S. 864 (1979).

297. *Id.* at 992 n.18.

298. S. REP. No. 617, 91st Cong., 1st Sess. 160 (1969) ("The United States is required to dispose of property as promptly as it is practical, with due regard for the rights of innocent persons, and shall have voting or management rights in the interim as provided by the court.").

299. *Cf.* United States v. Rubin, 559 F.2d 975, 991 (5th Cir. 1977) (forfeiture of elected office under RICO may be controlled by separate statutory restraints on voting rights), *cert. denied*, 444 U.S. 864 (1979). *See also* United States v. Rogers, 103 S. Ct. 2132 (1983) (majority holding that state homestead exemption may fall to federal tax lien based on equitable considerations; four dissenters argue that government steps into shoes of tax debtor). For a discussion of federal law incorporation of state law, see H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 489-94 (2d ed. 1873).

difficulties.[300] Inherent in the criminal defense of a racketeering charge is a denial of the government's right to forfeiture. The defendant cannot very easily proffer particular asset defenses for specific property during trial because his criminal defense is necessarily a complete property defense. Indeed, forcing a defendant to make a particular asset defense before the trier of fact reaches a guilty verdict places the defendant in the unenviable position of conceding the government's charges of criminal involvement with respect to assets for which he can muster no legal or factual defense.[301] A separate hearing is not only constitutionally required but is practically indispensible to fair effectuation of a RICO forfeiture.[302]

For third parties whose property rights are affected by a possible forfeiture judgment, the post-trial hearing is not only the first opportunity to defend their assets against the backdrop of the government's evidence at trial but also the last opportunity to assert asset defenses before the government acquires superior title to the property.

The purpose of the post-trial hearing is thus fairly simple. In determining the defendant's guilt, the trier of fact necessarily has reached some conclusions regarding the breadth of the "enterprise"[303] and the extent of the defendant's participation in the enterprise.[304] Against the evidence proffered at trial, both defendant and third parties address their arguments to the trier of fact on the scope of the forfeiture. While the reasons for the hearing are straightforward, the substantive issues are complex. If the trial court concludes that profits are forfeitable, the government must proffer evidence tracing these profits from

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300. In one case, failure to hold a hearing to determine conclusively the rights of all parties to property the government claimed as forfeitable resulted in a third party coming into court years after trial to allege a stake in property within the forfeiture verdict. United States v. Mandel, 505 F. Supp. 189 (D. Md. 1981), *aff'd mem. and remanded*, 705 F.2d 445, 446 (4th Cir. 1983).

301. Indeed, forcing the defendant to assert specific property defenses may run afoul of the fifth amendment's self-incrimination privilege.

302. The Fifth Circuit has recognized that bifurcated proceedings are necessary to effectuate a RICO forfeiture. United States v. Cauble, 706 F.2d 1322 (5th Cir. 1983). The *Cauble* court stated:

> To ease the juror's task in determining guilt or innocence, the forfeiture issue should be withheld from them until after they have returned a general verdict. At that time the trial judge can instruct the jurors fully about forfeiture and submit the special verdict to them. Such a bifurcated trial—using, of course, only one jury—is only convenient for the judge and fairer to the defendant.

Id. at 1348. The *Cauble* court did not pause to explain from whence it fashioned this "fairer" procedure. Presumably, reasons of practicality suggested bifurcation to the *Cauble* court. Whether the *Cauble* court's admonition stemmed from constitutional or supervisory power considerations cannot be determined from the opinion itself. It should be evident, however, that the Court's authority to order bifucation of all future Fifth Circuit forfeiture trials for fairness reasons did not stem from the *Cauble* panel's authority as an arbitration board.

303. *See* United States v. Huber, 603 F.2d 387, 394-95 (2d Cir. 1979) (if defendant owns various business associations, the jury must find that each specific entity is involved in racketeering activity before including it in an "enterprise" to support a forfeiture).

304. *See House Hearings, supra* note 103, at 107 (statement of Senator McClellan) (RICO "would punish the criminal appropriately by forfeiting to the government his *ill-acquired* interests in a legitimate business") (emphasis added); *Id.* at 171 (Justice Department comments on S.30) (RICO provides "for the forfeiture of any interest which has been *attained in violation* of the criminal provisions of the statute"); 116 CONG. REC. 592 (1970) (remarks of Senator McClellan) (RICO "would forfeit the *ill-gotten gains* of criminals where they enter or operate an organization through a pattern racketeering activity").

the racketeering activity or, at least, the enterprise. Post-indictment changes in and pre-indictment transfer of the property may have to be removed from the scope of the forfeiture. Interests "not exercisable or transferable" may be exempted from forfeiture. The complexity of these issues serves to introduce the next question: What should be the nature of the hearing at which these arguments may be raised.

C. Procedural Due Process—Application to Post-Conviction Proceedings

(1) Notice

As earlier discussed, notice is a flexible concept. Constitutionally, notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action."[305] Hence, if notice is sufficiently broad at the pretrial stage, a property owner who has not appeared earlier may be deemed to have waived receipt of further notice and the opportunity to be heard at the post-conviction proceedings.[306] Similarly, a property owner who has had his property interest adjudicated adversely before trial may not have any right to notice of subsequent proceedings against the property.

(2) The Neutrality of the Hearing

The racketeering statute specifically affords third parties a forum of entreaty for return of property by way of an unreviewable plea to the Attorney General, the successful adverse litigant in the criminal proceedings. The question is whether a hearing only before a government official is constitutionally sufficient.

A significant line of procedural due process precedent strongly suggests that the neutrality of the proceedings at which infringements on protected interests are reviewed is a key inquiry used to assess the adequacy of the process afforded.[307] Beyond the obvious issue of a direct[308] or indirect[309] interest of

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305. Mullane v. Central Hanover Bank & Trust, 339 U.S. 306, 314 (1949).

306. *See, e.g.*, United States v. Mandel, 505 F. Supp. 189, 190 (D. Md. 1981) (court order requiring notice to be sent to all affected parties prior to forfeiture judgment), *aff'd mem. and remanded*, 705 F.2d 446 (4th Cir. 1983). The harshness of a rule that closes the doors to the court after adequate notice has been given is mitigated by allowing affected parties to show good cause why they failed to appear. *See* FED. R. CRIM. P. 12(f). Nevertheless, once a properly instructed jury has entered an appropriate forfeiture verdict, all parties should be prohibited from challenging any aspect of that verdict directly related to the jury's factual findings of guilt.

307. *See* Johnson v. American Credit Co. of Ga., 581 F.2d 525, 533-34 (5th Cir. 1978) (summarizing Supreme Court due process cases as requiring judicial participation in property deprivations). *Cf.* United States v. Mandel, 505 F. Supp. 189, 191 (D. Md. 1981) ("Our system would not tolerate a statutory scheme which could be effectuated in such a way as to deny constitutional rights, yet evade any type of judicial review."), *aff'd mem. and remanded*, 705 F.2d 446 (4th Cir. 1983).

308. *See, e.g.*, Gibson v. Berryhill, 411 U.S. 564, 579 (1973) ("It is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes."); Tumey v. Ohio, 273 U.S. 510, 523 (1927) ("It certainly violates the fourteenth amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.").

309. *See, e.g.*, Ward v. Village of Monroeville, 409 U.S. 57, 60-61 (1972) (mayor's executive

the trier of fact in the outcome of a hearing, the Supreme Court recently has indicated that due process concerns may require that a judicial officer pass on summary property infringements even between private parties.[310] In a RICO prosecution in which the government, rather than a private party, seeks property deprivation, the presumption of judicial review is strong.[311] Thus, a plea to the Attorney General does not suffice to protect third party interests. Rather, due process demands a neutral, disinterested mechanism of review—a hearing before judge and jury—prior to forfeiture of third party property rights.

(3) The Formality of the Proceedings

At the post-conviction stage, the government's interest in the property subject to forfeiture has traveled a considerable distance from the speculative allegations of the indictment. Nevertheless, the racketeering statute envisions that the burden of production and persuasion remain with the government in a manner identical to the factual determination of guilt. Rule 31(e) of the Federal Rules of Criminal Procedure provides for the return of a special verdict detailing the scope of the forfeiture. This verdict is currently returned with the guilty verdict. The Advisory Committee Notes to the Rule explain that "the amount of the interest or property subject to forfeiture is an element of the offense to be proved."[312] Thus, as part of the criminal offense itself, forfeiture requires an adversary proceeding placing the burden of proof upon the government to establish beyond a reasonable doubt the particular property that may be forfeited.

The question whether the Federal Rules of Evidence apply at the post-conviction proceeding has not been litigated, although the answer seems obvious. Because the post-trial hearing concerning the extent of forfeiture is an integral part of the RICO prosecution, the federal rules apply to the same degree as applied to the evidence of substantive guilt brought before the jury. Other procedural trappings also required include the rights to appear and to retain counsel.[313]

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responsibilities for village finances subjects him to a "possible temptation" to levy fees and costs, which deprives a defendant of the neutrality required by due process even though the mayor has no direct interest in the funds); *In re* Murchison, 349 U.S. 133, 134-36 (1955) (a contempt proceeding violates the due process requirement of an impartial tribunal when the judge who presided over the proceeding out of which the contempt charge arose also presides over the contempt proceeding.).

310. *See* North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 606 (1975) (Georgia attachment statute is unconstitutional because it allows issuance of a writ of garnishment "by a court clerk without notice or opportunity for an early hearing and without participation by a judicial officer."); Mitchell v. W.T. Grant Co., 416 U.S. 600, 617 (1974) (Louisiana sequestration statute passes constitutional muster partly because the creditor is required to make a clear showing of necessity to, and receive authorization from, a judge); Guzman v. Western State Bank, 516 F.2d 125, 130-31 (8th Cir. 1975) (a North Dakota statute does not pass muster because it fails to provide "meaningful judicial supervision of the prejudgement attachment process").

311. *See generally* Weinberger v. Salfi, 422 U.S. 749, 762 (1975) (presumption of review when Social Security benefits are removed).

312. FED. R. CRIM. P. 31(e) advisory committee notes (1972 amendment).

313. *See* Mempa v. Rhay, 389 U.S. 128 (1967).

D. Judicial Modification

A current controversy is whether the trial court has the authority to modify a jury determination of forfeiture.[314] The unprecedented severity of the forfeiture sanction not only to the defendant but possibly to "innocent persons" and the enormous economic complexities in determining the scope of forfeiture demand special circumspection before permitting unbridled jury discretion on the issue of forfeiture. A RICO forfeiture secures only the defendant's interest in the enterprise, not any other property "untainted" by criminal activity.[315] An incorrect calculation of forfeiture could result in loss of "a lifetime's legitimate earnings or an inherited estate invested in a legitimate business enterprise . . . to the prejudice of [spouse] and child as well as the accused."[316] The question is whether Congress intended to place in the hands of a jury sole responsibility for such a result.

There are three issues to be considered. The first is a question of statutory interpretation. RICO provides that, "Upon conviction of a person under this section, the court *shall* authorize the Attorney General to seize all property or other interest declared forfeited under the section *upon such terms and conditions as the court shall deem proper*."[317] The question is whether this language mandates forfeiture through use of the term "shall," or permits discretion through use of the phrase "as the court shall deem proper." The Fifth Circuit, focusing on the phrase "the court shall authorize," dismissed the "terms and conditions" clause as merely governing administrative details, and held that a trial court is without authority to modify a jury determination.[318] The Second Circuit interpreted the same language to permit the district court "a certain amount of discretion in avoiding draconian . . . applications of the forfeiture provision."[319] Without elaboration, the Tenth Circuit in *United States v. Zang*[320] held that the "terms and conditions" language of section 1963(3) bestowed "authority" on district courts to mitigate forfeiture verdicts to protect third party property interests.[321]

Moreover, a forfeiture fits into the traditional concept of a sentence. As the Fifth Circuit recognized, "A sentence in a criminal case is the action of the Court fixing and declaring the legal consequences of predetermined guilt of a criminal offense."[322] After adjudication of guilt by the jury, the court, not the jury, enters the forfeiture judgment. In so doing, a court can exercise only that

314. United States v. Mandel, 505 F. Supp. 189, 190 (D. Md. 1981), *aff'd mem. and remanded*, 705 F.2d 446 (4th Cir. 1983).

315. *See* United States v. Huber, 603 F.2d 387, 390 (2d Cir. 1979).

316. United States v. L'Hoste, 615 F.2d 383, 386 (5th Cir.) (Tate, J., dissenting from denial of petition for rehearing en banc), *cert. denied*, 449 U.S. 833 (1980).

317. 18 U.S.C. § 1963(c) (1976) (emphasis added).

318. United States v. L'Hoste, 609 F.2d 796, 811-13 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980).

319. United States v. Huber, 603 F.2d 387, 397 (2d Cir. 1979).

320. 703 F.2d 1186 (10th Cir. 1982).

321. *Id.* at 1195.

322. United States v. Henry, 709 F.2d 298, 310 (5th Cir. 1983) (quoting Barnes v. United States, 223 F.2d 891, 892 (5th Cir. 1955)).

amount of statutory or constitutional authority entrusted to it. Consequently, if the court determines that the scope of the forfeiture is unlawful, there can be little doubt that it has the authority to confine the judgment of forfeiture to its statutory or constitutional limits. Obviously, if the jury determines that the defendant must forfeit the Eiffel Tower to the government, the court would recognize its lack of authority to tender this to the government. Therefore, the question whether a judge has the discretion to modify the forfeiture verdict is misplaced. *A fortiori*, if the court has the power to correct an illegal sentence at any time (because it had no power to enter it),[323] it can act to correct a jury's determination before judgment is entered.

The second argument is related to the nature of a RICO forfeiture. The Fifth Circuit stated that it derived "insight" into the scope of a trial court's discretion to amend a finding of forfeiture from the customs laws,[324] incorporated by reference in the racketeering statute. These laws, as earlier discussed, afford courts "very little control over actions taken by those charged with the power to grant remission and mitigation."[325] In like fashion, the Fifth Circuit reasoned that the trial court has no control over the actions taken by a jury in determining a forfeiture.

The customs laws, however, properly apply to in rem forfeitures, which are largely remedial in effect and quite different from in personam forfeitures applied primarily to punish. While Congress noted the prophylactic aspects of a RICO forfeiture in severing the convicted defendant's connection to legitimate business, RICO's legislative history indicates the supremacy of the punitive rationale.[326] Hence, the Fifth Circuit's reliance on the in rem customs laws to preclude the trial court from exercising discretion to remit or mitigate the forfeiture sanction erroneously disregards the in personam nature of a RICO forfeiture.

A final argument considers mandatory forfeiture pursuant to a jury determination to be contrary to the traditionally broad discretion accorded judges to impose punishment at sentencing.[327] Three circuits have recognized that forfeiture, as a form of punishment, is a sentence.[328] Moreover, Congress statutorily provided broad sentencing authority to trial courts in 18 U.S.C. section 3651, which permits suspension of imprisonment when the judge is "satisfied that the ends of justice and the best interest of the public will be served

323. *Id.* at 308.

324. United States v. L'Hoste, 609 F.2d 796, 811-12 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980); *cf.* United States v. Mandel, 505 F. Supp. 189, 192 n.2 (D. Md. 1981) (questioning scope of judicial review after exhaustion of administrative appeal), *aff'd mem. and remanded*, 705 F.2d 446 (4th Cir. 1983).

325. United States v. L'Hoste, 609 F.2d 786, 811 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980).

326. *See supra* note 108 and accompanying text.

327. *See* Roberts v. United States, 445 U.S. 552, 556 (1980) (judge may conduct wide inquiry without limit to type or source of information); 18 U.S.C. § 3577 (1976).

328. *See* United States v. Hess, 691 F.2d 188, 191 (4th Cir. 1982); United States v. Godoy, 678 F.2d 84, 88 (9th Cir. 1982); United States v. Huber, 603 F.2d 387, 397 (2d Cir. 1979); *Cf.*, United States v. Sheeran, 699 F.2d 112, 120 (3d Cir. 1983) (when RICO predicates vacated, action remanded to trial court "for resentencing and reconsideration of the judgment of forfeiture"); United States v. Murillo, 709 F.2d 1298, 1300 (9th Cir. 1983) (under CCE statute).

thereby." Section 3651 is silent about forfeitures, as well as about fines, yet courts have interpreted it to permit suspension of financial penalties.[329] Forfeiture is no different.

Nonetheless, RICO has been held to embody a legislative mandate to remove judicial discretion by imposing a specific penalty for violation of the racketeering statute.[330] On the other hand, one Fifth Circuit judge, joined by three others, argues: "In light of the usual discretion of the sentencing judge in the imposition of any sentence, I would not infer any Congressional intent, unless much more clearly stated, to deprive the judge of discretion in the imposition of the forfeiture penalty."[331]

The better argument affords the sentencing judge his usual discretion with regard to forfeiture. The term "shall" in the racketeering statute is not only sometimes construed as the equivalent of "may,"[332] but is used "in pro forma drafting style . . . in virtually all the statutory sentencing provisions."[333] Judicial deference to those charged with modification of forfeiture is not applicable to an in personam proceeding. A forfeiture is a sentence, imposition of which traditionally looks to the wisdom of trial court judges. Finally, the risk of erroneous deprivation of property in a complicated RICO prosecution harbors such untoward economic consequences to both the defendant and third parties that judicial review is a constitutional,[334] if not a statutory necessity.

After a forfeiture judgment becomes final through affirmance on appeal or through the defendant's failure to note an appeal,[335] the government is entitled to execute its judgment of forfeiture. Of course, the ease of execution may well depend on the complexity of the property interests involved.[336] A problem quickly ensues, however, when there remains some dispute as to the extent

329. United States v. L'Hoste, 615 F.2d 383, 384 (5th Cir.) (Tate, J., dissenting from denial of petition for rehearing en banc), *cert. denied*, 449 U.S. 833 (1980).

330. *See* United States v. L'Hoste, 609 F.2d 796, 813 n.15 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980).

331. United States v. L'Hoste, 615 F.2d 383, 385 (5th Cir.) (Tate, J., dissenting from denial of petition for rehearing en banc), *cert. denied*, 449 U.S. 833 (1980).

332. *See* Richbourge Motor Co. v. United States, 281 U.S. 528, 534 (1930) ("shall is sometimes the equivalent of 'may' when used in a statute prospectively affecting government action").

333. United States v. L'Hoste, 615 F.2d 383, 385 (5th Cir.) (Tate, J., dissenting form denial of petition for rehearing en banc), *cert. denied*, 449 U.S. 833 (1980).

334. *See* United States v. Mandel, 505 F. Supp. 189, 191 (D. Md. 1981) ("some exercise of judicial discretion might prove proper in order to avoid the unconstitutional application of this statute"), *aff'd mem. and remanded*, 705 F.2d 446 (4th Cir. 1983).

335. In a disturbing development, two circuit courts have held that failure to file a separate notice of appeal from the forfeiture judgment deprives the appellate court of appellate jurisdiction. United States v. Kopituk, 690 F.2d 1289, 1343 (11th Cir. 1982); United States v. Martino, 681 F.2d 952, 953 n.10 (5th Cir. 1982), *cert. granted sub nom.* Russello v. United States, 103 S. Ct. 721 (1983). Given the ambiguity surrounding the character of a forfeiture order—be it a sentence or a judgment—requiring a separate notice of appeal should not be necessary. *See* Sanabria v. United States, 437 U.S. 54, 67 n.21 (1978) ("A mistake in designating the judgment appealed from is not always fatal, so long as the intent to appeal from a specific ruling can fairly be inferred by probing the notice and the other party was not misled or prejudiced.").

336. *Cf.* United States v. Huber, 603 F.2d 387, 394-95 (2d Cir. 1970) (for complex cases no error in jury charge if elements of RICO violation are included and jury is made aware of the business-violation nexus).

of the government's title. There may be considerable disagreement among the affected parties relating to the scope of the forfeiture order, either on its face or as applied. For example, if the forfeited property is now co-owned or shared by the government and a third party, disputes may arise about the government's duties to the third party. Tensions may arise between the government's statutory goal of swiftly liquidating its judgment[337] and a property owner's legal obligation to protect particular assets. In addition, a property owner may have a valid claim that his property was erroneously included within the list of assets in the forfeiture judgment.[338] The issue then is what remedy is available either to the defendant or to third parties in the face of an improper government construction of its property interest.

The availability of collateral attacks on in personam forfeiture judgments is a formidable question in itself. In general, it is safe to say that the position of the government is that there are no collateral avenues for reviewing a RICO forfeiture judgment other than that afforded by the administrative remedy of a petition for remission or mitigation.[339] Nevertheless, at least two courts have addressed collateral challenges to a RICO forfeiture, albeit without detailed analysis of what constitutes an appropriate vehicle for asserting collateral attacks on a RICO forfeiture judgment. In *United States v. Hess*[340] the Fourth Circuit addressed a challenge to a forfeiture judgment by two convicted RICO defendants when the defendants appealed from the trial court's denial of a motion for correction of an illegal sentence under rule 35(a) of the Federal Rules of Criminal Procedure.[341] The only other reported case in which a fed-

337. 18 U.S.C. § 1963(c) (1976) requires that the Attorney General "shall dispose of all such [forfeiture] property as soon as commercially feasible . . ." *Id.* Beyond this general mandate to liquidate forfeiture judgments in a swift manner, the statute fails to clarify from whose perspective the "commercial feasibility" of liquidation is to be viewed.

338. *See* United States v. Mandel, 505 F. Supp. 189, 190-91 (D. Md. 1981) (third party contends property within forfeiture order properly belongs to third party, not defendant, and thus not subject to forfeiture), *aff'd mem. and remanded*, 705 F.2d 446 (4th Cir. 1983). The *Mandel* case is also a perfect example of the need to have judicial scrutiny of the actual forfeiture judgment. The *Mandel* court noted that the government had petitioned for the forfeiture of 236,250 shares of stock and the jury returned a special verdict for 240,765 shares of stock. *Mandel*, 505 F. Supp. at 180 n.1. Whether the 4,000 share discrepancy was within the terms of the forfeiture judgment is a valid question for disagreement and litigation.

339. *See* United States v. Mandel, 505 F. Supp. 189, 190-91 (D. Md. 1981) (quoting government brief espousing view that RICO permits "judge only to take some steps to preserve the enterprise so that the Government's interest is not destroyed prior to forfeiture"), *aff'd mem. and remanded*, 705 F.2d 446 (4th Cir. 1983).

340. 691 F.2d 188 (4th Cir. 1982).

341. *Id.* at 190. The underlying contention in *Hess* was that the trial court had entered a forfeiture order without requiring the jury to make specific findings on the scope of forfeiture in a special verdict. Apparently, the parties had previously stipulated "in lieu of a [s]pecial [v]erdict" about the respective "interests" of the defendants in various stock subject to possible forfeiture. According to the Fourth Circuit, the failure to abide by FED. R. CRIM. P. 31(e)'s requirement for a special verdict did not render the sentence illegal within the meaning of FED. R. CRIM. P. 35(a). *Hess*, 691 F.2d at 190. Although the *Hess* court did not indicate whether the defendant's claim went to the manner in which sentence was imposed or to the illegality of the sentence itself, the outcome in *Hess* appears reasonable enough: defendants should not be allowed to sandbag trial courts by waiving rights under rule 31(e) and then to complain that no special verdict was used.

The unfortunate aspect of *Hess*, however, is that it amplifies and compounds the confusion that pervades judicial attempts to grapple with forfeiture judgments. For example, the *Hess* court inexplicably relied on the Fifth Circuit's decision in United States v. L'Hoste, 609 F.2d 796, 813

eral court confronted a post-final judgment attack on a RICO forfeiture was in *United States v. Mandel*.[342] In *Mandel*, a third party challenged the government's title to stock that had been forfeited in a criminal RICO prosecution.[343] The challenge in *Mandel* was based on a third party claim of ownership "as nominee" of the convicted RICO defendant.[344] While the holdings of these two decisions are not significant in and of themselves, the fact that at least two courts have entertained challenges to forfeiture judgments other than by way of direct appeal from a criminal conviction is significant. Nevertheless, identifying appropriate avenues for asserting post-judgment petitions for judicial review of RICO forfeitures is a task that no court has squarely undertaken. Third parties, on the other hand, face greater difficulties in trying to assert their property rights under the auspices of a final criminal judgment.

This Article will attempt to offer an abbreviated list of possible candidates for obtaining postjudgment review. From a broad perspective, there are two fundamentally different routes that an aggrieved party, either defendant or third party, may choose to take in challenging a forfeiture judgment. The first possibility would be to seek relief in the same cause of action that contains the forfeiture judgment. Thus, an aggrieved property owner could file an appropriate motion in the criminal case. The only other method for challenging a forfeiture judgment would be to pursue an independent cause of action against the government, or individual government officials. Because these two different methods would necessarily invoke radically different substantive and procedural considerations, they will be discussed separately below.

(1) Proceeding by Motion Within the Same Cause of Action

A convicted RICO defendant will probably have the easiest time raising a challenge to the forfeiture judgment by motion within the same cause of action. Under rule 35 of the Federal Rules of Criminal Procedure a convicted defendant can seek a reduction of his sentence or seek relief from an illegal or illegally imposed sentence.[345] It is well established that rule 35 motions are

(5th Cir.), *cert. denied*, 449 U.S. 833 (1980), for the proposition that entrance of a forfeiture judgment is mandatory upon a jury finding of a 18 U.S.C. § 1962 (1976) violation. *Hess*, 691 F.2d at 190. The *Hess* court failed to consider that the basis for the *L'Hoste* court's narrow view of the trial court's role in entering a forfeiture judgment stemmed from the fact that the *L'Hoste* court did not consider that a forfeiture judgment was a "sentence" within the sentencing authority of a trial judge. United States v. L'Hoste, 609 F.2d 796, 813 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980). What the *Hess* court failed to perceive was that by adopting the *L'Hoste* court's reasoning that a forfeiture judgement is beyond a court's sentencing power, the *Hess* court itself did not have the power to address a rule 35(a) motion. Stated more clearly, a forfeiture judgment either is or is not a criminal "sentence" within the traditional meaning of that term. For some unexplained reason, the *Hess* court chose to review a forfeiture judgment as both a sentence under rule 35 and as a non-sentence under the *L'Hoste* decision.

342. 505 F. Supp. 189 (D. Md. 1981). Both the *Hess* opinion and the *Mandel* opinion represent the final throes of the criminal litigation begun in 1975 with the prosecution of Maryland governor Marvin Mandel and his associates.

343. *Mandel*, 505 F. Supp. at 190. The third party claimed that the forfeited stock belonged to him and not the defendant.

344. *Id.*

345. FED. R. CRIM. P. 35.

pleadings "made in the original case."[346] At least two circuit courts have reviewed in personam forfeiture challenges made by way of a motion pursuant to rule 35(a).[347] Although courts have passed on rule 35(a) motions, there may remain some doubt whether an in personam forfeiture judgment under RICO constitutes a "sentence" within the meaning of rule 35(a).[348] If it can be said that a RICO forfeiture is a sentence within the ambit of rule 35, several consequences immediately follow.

Initially, precedent under rule 35 indicates that a court is always empowered to pass upon a claim that a sentence is "illegal."[349] This authority is "not a real power in anything like the normal sense; rather, it is more in the nature of a duty to confess error and acknowledge that the imposition of the original sentence exceeded the court's statutory authority and was therefore a legal nullity."[350] As a result, the sentencing or reviewing court always will have the authority to correct legal errors in the imposition of an in personam order. The second major consequence of using a rule 35 motion to obtain judicial review of the legality of a forfeiture judgment stems from the fact that a rule 35 motion is considered made in the original action. Because a rule 35(a) motion is "made in the original case,"[351] a reviewing court may take into account new precedent that was unavailable at the time of sentencing.[352] With the unsettled nature of judicial constructions of the substantive reach of RICO's forfeiture provisions, the use of rule 35 may allow both the government and defendant to benefit from subsequent favorable precedent.

The exhaustion issue is relevant regardless of whether an aggrieved property owner seeks relief within the confines of the criminal case or by way of an independent cause of action. The benefit of requiring that an aggrieved property owner seek relief initially through an administrative plea for remission is obvious—preservation of judicial resources. The only difficulty with imposing an exhaustion requirement is that the availability of judicial review *after* exhaustion of administrative channels is very much in doubt. In the past, courts have held that the judiciary has no authority to review the Attorney General's discretionary decision to remit or mitigate in rem forfeitures under the customs laws.[353] Courts have reached this conclusion despite the familiar doctrine that preclusion of judicial review over constitutional claims will not be lightly inferred for administrative proceedings.[354] Assuming, however, that

346. Heflin v. United States, 358 U.S. 415, 418 n.7 (1950).

347. United States v. Murillo, 709 F.2d 1298 (9th Cir. 1983) (government motion sought reversal of trial court mitigation of in personam forfeiture in CCE prosecution); United States v. Hess, 691 F.2d 188 (4th Cir. 1982).

348. *See supra* note 341.

349. FED. R. CRIM. P. 35(a); *see* United States v. Henry, 709 F.2d 298, 307 (5th Cir. 1983) (plurality).

350. United States v. Henry, 709 F.2d 298, 308 (5th Cir. 1983) (plurality).

351. Heflin v. United States, 358 U.S. 415, 418 n.7 (1950).

352. United States v. Shillingford, 586 F.2d 372, 375 (5th Cir. 1978) (citing *Heflin*).

353. *See* United States v. One 1970 Buick Riviera, 463 F.2d 1168, 1170 (5th Cir.), *cert. denied sub nom.* National Am. Bank of New Orleans v. United States, 409 U.S. 980 (1972).

354. *See* Abbott Labs. v. Garder, 387 U.S. 136, 140 (1967); Johnson v. Robison, 415 U.S. 361, 366-68 (1974).

some type of judicial review of the Attorney General's mitigation decision can be invoked, a substantial question remains as to the precise scope of judicial review available.[355] In other words, assuming some sort of judicial review is available, what standards should govern the reviewing court? This latter question is made all the more difficult by the absence of discrete standards for the exercise of the Attorney General's remission authority. Mitigation decisions need not be based on findings of culpability but rather are entrusted to the unfettered discretion of the Attorney General. Placed in this context, for example, the substantial evidence standard of review would appear to be inapplicable to mitigation decisions because the Attorney General's decision is decidedly not made in an adjudicative setting. In conclusion, while there are a host of unanswered questions that should be resolved before courts impose any type of exhaustion requirement prior to challenging RICO forfeiture judgments, some avenue for judicial review should be inferred in the absence of clear congressional intent to the contrary.[356]

Another obvious tack that an aggrieved property owner may attempt to pursue within the same criminal cause of action is a motion for return of property under rule 41(e) of the Federal Rules of Criminal Procedure. The substantive basis for such a motion, of course, would have to be under the fourth amendment's proscription of unreasonable seizures by the government.[357] Although this type of motion has traditionally been confined to the pretrial stages of a criminal prosecution,[358] in an in personam forfeiture under RICO the government technically does not have any vested property rights in forfeiture assets until a forfeiture verdict is entered. Hence, until a verdict of forfeiture has been duly entered, an aggrieved property owner cannot assert a return of property motion. Consequently, an aggrieved property owner should be entitled to assert a postjudgment motion for return of his property.

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355. The uncertainty over the scope of any type of judicial review of the Attorney General's administrative decision was lucidly pointed out in the *Mandel* opinion. *See* United States v. Mandel, 505 F. Supp. 189, 192 n.2 (D. Md. 1981), *aff'd mem. and remanded*, 705 F.2d 446 (4th Cir. 1983). While the *Mandel* court required exhaustion, it did so under the assumption that subsequent review was available.

356. *See supra* notes 354-355. A forceful argument can be made that exhaustion is not required at all. In an in rem setting the Second Circuit has held that the availability of administrative relief was irrelevant to the ability of an in rem claimant to seek direct judicial review over an in rem forfeiture in an independent suit. United States v. One Tintoretto Painting, 691 F.2d 603, 609 (2d Cir. 1982) (availability of administrative remedies under customs laws is no bar to independent constitutional challenge of in rem forfeiture in district court). If exhaustion of administrative remedies under the customs laws is not required prior to challenging in rem forfeitures, a fortiorari, exhaustion of in rem administrative procedures should not be required in the in personam RICO context. *See also* United States v. $8,850, 103 S. Ct. 2005 (1983) (in an in rem forfeiture "claimant" need not waive his right to a prompt judicial hearing because he seeks the additional remedy of an administrative petition for mitigation").

357. U.S. CONST., amend. IV.

358. FED. R. CRIM. P. 41(e) requires that motions for return of property "if . . . made . . . in the district of trial . . . shall be treated . . . as a motion to suppress under Rule 12." FED. R. CRIM. P. 12 requires that suppression motions be made before trial under pain of waiver. *But see* United States v. $8,850, 103 S. Ct. 2005 (1983) (noting that in rem claimant could file a rule 41(e) motion for return of property). The Court refrained from indicating when this motion would be ripe for judicial attention, but the chances of any court entertaining a motion seeking an order compelling the filing of an in rem forfeiture action or return of the property are remote.

(2) Pursuing Independent Causes of Action

Identifying all possible independent causes of action that an aggrieved party may bring against the government is a task far beyond the competence of this Article. Nevertheless, several of the more obvious possibilities will be sketched below. Before outlining the more salient candidates, however, a preliminary observation must be made. Although declaratory and injunctive relief may be the most accessible types of relief available under current legal doctrines, the availability of an award of damages is probably of paramount importance to an aggrieved property owner because of the high likelihood that the sovereign has "disposed"[359] of the contested assets at the earliest possible opportunity. Therefore, aggrieved property owners should focus their attention on identifying those causes of action for which either (1) the doctrine of sovereign immunity is inapplicable, or (2) a specific consent to sue statute can be found.

Under standard constitutional tort theory, a cause of action will lie against individual federal officials for infringements of constitutional, *not* statutory, rights.[360] Although the full play of private damage suits against federal officials has yet to be fully articulated by the Supreme Court, it is clear that constitutional tort actions will lie under the fourth,[361] fifth,[362] and eighth[363] amendments. As previously mentioned, a fourth amendment claim may be pressed under an unreasonable seizure theory. Alternatively, a fifth amendment claim could be argued under either a taking theory[364] or under a denial of procedural due process argument.[365] Finally, an eighth amendment proportionality claim may form the foundation for a constitutional tort case if the scope of forfeiture greatly exceeds the degree of the defendant's culpability.[366]

In the category of consent to sue statutes, the availability of relief may well depend on the type of property involved. The Quiet Title Act of 1972[367]

359. 18 U.S.C. § 1963(c) (1976) (requiring disposal of forfeited goods as soon as commercially feasible).

360. *See generally* Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5 (1980). Because a *Bivens*-type private action lies only for constitutional torts, challenges based on RICO's statutory provisions cannot be brought on a constitutional tort theory.

361. Bivens v. Six Unknown Fed. Marcotics Agents, 403 U.S. 388 (1971).

362. Davis v. Passman, 442 U.S. 228 (1979).

363. Carlson v. Green, 446 U.S. 14 (1980).

364. *See* U.S. CONST. amend. V.

365. *See id.* A procedural due process claim can be pressed under the fifth amendment, under premise that the property was not properly before the court that entered the forfeiture judgment.

366. *See also* United States v. Walsh, 700 F.2d 846, 857 (2d Cir. 1983) (citing *Huber*, eighth amendment limits scope of RICO forfeiture); United States v. Huber, 603 F.2d 387, 397 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980). The Second Circuit's decision in *Walsh* provides a new low-water mark in the judiciary attempt to grapple with RICO's forfeiture provisions. Although noting that a RICO defendant has an eighth amendment challenge to the scope of forfeiture, the *Walsh* court held that the defendant waived this constitutional challenge by failing to present his eight amendment claims to the trial court. The *Walsh* court failed to explain how a RICO defendant is suppose to make simultaneous arguments of innocence and disproportionate punishment to the same trier of fact. This omission was further compounded by the *Walsh* court's insistence that the defendant bear the burden of "moving to ameliorate the harshness of a forfeiture verdict." It is safe to say that *Walsh* stood *Huber* on its head.

367. 28 U.S.C. § 2409a (1976); *see also* § 1346(f), 1402(d) (1976).

may provide one means of challenging government title over realty. Conversely, an action for conversion under the Federal Tort Claims Act[368] probably will not be available because of its exception for claims "arising in respect of . . . . the detention of any goods or merchandise by . . . any other law enforcement officer."[369] Of course, the remedies of declarative and injunctive relief will always be available.[370]

In conclusion, the exercise and scope of post-judgment relief from erroneous forfeiture judgments is an area of considerable uncertainty. To date very few litigants have tested the murky waters which envelop an in personam forfeiture judgment. Perhaps this is partly because of the general confusion about the juridical character of the in personam forfeiture judgment itself. Once the courts have conclusively defined their own role in entering, delimiting, and modifying forfeiture judgments, perhaps the task of fashioning methods of judicial review will become less treacherous .

CONCLUSION

Congress reintroduced in personam forfeitures into American criminal jurisprudence in 1970 with a salutary intent. No one can dissent from RICO's goal of divesting racketeers from their means of corrupting the economic order. Nevertheless, the vehicle chosen to achieve this worthwhile end has proven inadequate from both a substantive and a procedural perspective. By adopting a functional, quantitative definition of "organized crime," the substantive RICO offenses are susceptible to application in contexts far removed from the perceptions motivating the 91st Congress. Accepting, however, the broad reach of the substantive offense, the criminal forfeiture of an ensnared defendant's "interest" suggests a need for a more precise definition of the property interests which can be forfeited. Only affected parties can elaborate adequately upon the contours of the property legally or factually subject to inclusion within the forfeitable "interest." This Article has attempted to outline constitutionally sufficient procedures to meet this challenge. Several courts have already responded to this obvious lacuna in the law. It is our hope that more will follow.

368. 28 U.S.C. § 1346(b), 2671-2680 (1976).

369. 28 U.S.C. § 2680(c) (1976).

370. United States v. Mandel, 505 F. Supp. 189, 192 (D. Md. 1982) (declaratory and injunctive relief available for aggrieved property owner if dissatisfied with results obtained through administrative channels), *aff'd mem. and remanded*, 705 F.2d 446 (4th Cir. 1983). See 28 U.S.C. §§ 2201-2202 (1976) (Declaratory Judgment Act); Fed R. Civ. P. 57.