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1990]

RICO FORFEITURES AS "EXCESSIVE FINES" OR "CRUEL AND UNUSUAL PUNISHMENTS"

KATHLEEN F. BRICKEY*

TABLE OF CONTENTS

I. INTRODUCTION	905
II. THE BREADTH OF THE FORFEITURE STATUTE	906
III. THE SOURCE OF SCOPE CONCERNS	911
A. <i>Forfeiture as Punishment</i>	912
B. <i>The Proportionality Analysis</i>	913
1. <i>RICO Applications</i>	914
a. Fruits of Crime	914
b. Instrumentalities of Crime	915
2. <i>Civil Forfeitures Contrasted</i>	918
IV. CONCLUSION	926

I. INTRODUCTION

WHEN Congress enacted the Racketeer Influenced and Corrupt Organizations Act (RICO)¹ in 1970, it provided enhanced penalties and innovative sanctions designed to separate racketeers from the economic power base through which they conduct ongoing criminal activity. Principal among the new remedies is the sanction of forfeiture. Unlike its in rem counterparts in other federal statutes, the RICO forfeiture provision creates in personam forfeitures that deprive criminal defendants of assets tainted by the illegality of their conduct.

RICO forfeitures are mandatory. The statute provides that, upon conviction, the defendant *shall* forfeit three categories of property. These include (1) "any interest . . . acquired or maintained in violation" of RICO; (2) "any interest in . . . or property or contractual right . . . affording a source of influence over" an enterprise that the defendant has established, operated, or otherwise used in violation of RICO; and (3) *any* proceeds, or property derived from proceeds, of a RICO violation.² To make it emphat-

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1. 18 U.S.C. §§ 1961-1968 (1988).

2. *Id.* § 1963(a) (emphasis added).

ically clear, the statute expressly requires the court to order *all* such property forfeited.³

Despite the apparent clarity of its language, this provision has been a source of continuing controversy. At the outset, the issues were qualitative. Courts anguished long and hard over what property is potentially forfeitable and when it is subject to forfeiture.⁴ In contrast, the newly emerging issue is quantitative. That is, just how much did Congress intend to be forfeitable, and how much is too much? Stated differently, when an arguably de minimis violation leads to forfeiture of vast amounts of assets, did Congress really mean that *all* of the assets must be forfeited?⁵ And if so, are RICO forfeitures subject to eighth amendment scrutiny as excessive fines or as cruel and unusual punishments? It is these intertwined questions that I will address in this article.

II. THE BREADTH OF THE FORFEITURE STATUTE

To illustrate the context within which the “how much” question arises, I offer the following examples:

(1) A junk bond king employed by a securities firm is accused of violating RICO through widespread securities fraud. During the three year period in question, the defendant’s salary rose from \$123.8 million to \$550 million. The government claims that his compensation is equivalent to somewhere between 28% and 44% of the junk bond department’s gross revenues. The forfeiture count in the indictment seeks, among other things, \$1.1

3. *Id.* § 1963(a)(3).

4. These issues most frequently arose in the context of cases in which the government sought forfeiture of assets that the defendant intended to use to pay attorneys’ fees. The Supreme Court ultimately held that attorneys’ fees are subject to forfeiture. *United States v. Monsanto*, 109 S. Ct. 2657 (1989). For a discussion of forfeiture of attorneys’ fees, see *infra* notes 41-44 and accompanying text.

5. In response to growing criticism generated by some highly publicized cases, the Justice Department revised its forfeiture guidelines. Although the revision primarily addressed the use of pre-trial temporary restraining orders to freeze potentially forfeitable assets, it also addressed the need to consider the nature and severity of the offense before deciding to seek forfeiture. Significantly, it stated that “the government’s policy is not to seek the fullest forfeiture permissible under the law where that forfeiture would be disproportionate to the defendant’s crime.” U.S. DEPT. OF JUSTICE, UNITED STATES ATTORNEY’S MANUAL § 9-110.414 (Supp. June 30, 1989). Whether this signifies a real change in Department policy remains to be seen. See DeBenedictis, *RICO Guidelines*, A.B.A. J., Feb. 1990, at 16 (noting that Justice Department officials are playing down the revision).

billion in salaries earned over the three years.⁶

(2) A landowner grows eighty marijuana plants on three different fields on an eighteen acre plot of land. The marijuana is dried on a rack inside a home and a machinery shed on the same plot. Upon the owner's conviction, the entire eighteen acres, the house and the shed are ordered forfeited.⁷

(3) A gambler uses the first floor of a building as an illegal casino. The basement of the building is leased to legitimate businesses for storage. Upon the gambler's conviction, the entire building is ordered forfeited.⁸

(4) A drug dealer uses his horse breeding business as a front for his drug business. The code words he uses to make drug sales are the same words he uses to conduct the horse business. The evidence warrants a finding that the horse business is used as a device to help him avoid detection. Upon his conviction, all of the horses are ordered forfeited.⁹

Cases like these raise two distinct scope questions, both of which relate to the role of discretion in the RICO forfeiture scheme.

First, does the jury have discretion to find less than the full amount of the assets forfeitable? The Federal Rules of Criminal Procedure require the jury to return a special verdict "as to the extent of the interest or property subject to forfeiture, if any."¹⁰ Although it has been argued that this language permits the jury to find only a proportional amount subject to forfeiture, this interpretation is plainly at odds with the statute's mandate that *all* property derived from or used in connection with a RICO violation shall be forfeited.¹¹

6. See Indictment, *United States v. Milken*, S589 Cr. 41 (KBW) (S.D.N.Y. Mar. 29, 1989).

7. See *United States v. A Parcel of Land*, 884 F.2d 41 (1st Cir. 1989) (holding forfeiture of entire tract of land is proper regardless of magnitude of infraction).

8. See *United States v. Anderson*, 782 F.2d 908 (11th Cir. 1986) (holding forfeiture of entire property is proper regardless of whether part of property not used in connection with racketeering activity).

9. See *United States v. Rivera*, 884 F.2d 544 (11th Cir. 1989) (upholding forfeiture of 27 quarter horses).

10. FED. R. CRIM. P. 31(e).

11. See *United States v. Hess*, 691 F.2d 188, 190 (4th Cir. 1982); see also *United States v. Acosta*, 881 F.2d 1039, 1041 n.4 (11th Cir. 1989). No support for this interpretation can be found in the legislative history of Rule 31(e) either.

A second, more substantial scope question relates to what discretion a court may exercise to mitigate the harshness of a forfeiture. Some courts profess to find discretionary authority in the text of the statute itself. The statute provides that, upon conviction, the court “shall enter a judgment of forfeiture . . . upon such terms and conditions as the court shall deem proper.”¹² Relying on this language, some courts conclude that when a forfeiture is disproportionate to the offense, the court may—by way of imposing appropriate terms and conditions—enter an order forfeiting less than the full amount, or an order that conditions forfeiture upon payment of a sum of money or relinquishment of other property.

By way of example, a court ordered forfeited a defendant/owner’s interest in seven medical supply corporations he used in a pervasive medicare fraud scheme. But under the terms and conditions of the order, the defendant was allowed a period of six months during which he could pay \$100,000 (an amount more proportional to the crime) to redeem the companies.¹³

That this approach to construing the forfeiture statute is driven by the desire to avoid harsh results does not make it any less problematic. The “terms and conditions” approach is troublesome because it fails to divest the defendant of what the statute clearly requires to be forfeited—*any* interest in *any* enterprise that has been used to facilitate the RICO violation, and *any* interest affording a source of influence over the enterprise.

Not only is this approach at odds with the text of the statute, it flies in the face of clear legislative history. Congress intended this species of forfeiture to separate the racketeer from the enterprise. In so doing, the forfeiture divests him of the economic power base he used to facilitate the racketeering activity. To permit the defendant to redeem a forfeited enterprise by paying a sum of money is to substitute an unauthorized sanction—an augmented fine—for the statutory sanction of forfeiture.

But Congress included forfeiture in the arsenal of RICO sanctions precisely because fines and imprisonment were deemed inadequate. If a defendant is permitted to retain the interest or to transfer economic leverage over the organization, that enables him to continue to rule by proxy or to promote a junior member

12. 18 U.S.C. § 1963(e) (1988).

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

of the criminal enterprise.¹⁴ The payment of cash simply does not accomplish the same objective as the surrender of stock—i.e., expulsion from the legitimate business the defendant abused.¹⁵

Courts may reach a similar result when the forfeiture order divests the defendant not of his interest in the enterprise, but of property that affords “a source of influence” over an enterprise conducted in violation of RICO.¹⁶ Consider the following example.

A drug dealer owns a parcel of real estate containing a two-family dwelling and a six-family apartment building. The dealer uses the house, but not the apartment building, in the operation of the narcotics enterprise. It is legally impossible to subdivide the tract. What interest in the realty is forfeitable?

For courts inclined to the view that the “source of influence” proviso is less than a model of clarity, this case cries out for a “sensible construction” of the statute.¹⁷ Rather than read the statute literally to reach *any* property, then, we might construe it to mean that only the *portion* of the property affording a source of influence over the enterprise—i.e., the part that is actually used to conduct it—is forfeitable.¹⁸ Because the realty cannot be subdivided, an order forfeiting the house, but not the apartment, can be implemented only by selling the land and apportioning the proceeds.¹⁹

The “source of influence” approach is troublesome because it, too, departs from the text of the statute, which requires forfeiture of *any property*—not *any part* of any property—affording a source of control over a RICO enterprise. The legislative history informs us that RICO forfeitures serve “directly to remove the corrupting influence from the channels of commerce.”²⁰ Violations are punished by forfeiture “of *all* property and interests, as broadly described, which are related to the violations.”²¹

Beyond that, these approaches are objectionable because

14. See *United States v. Rubin*, 559 F.2d 975, 991-92 (5th Cir. 1977), *vacated*, 439 U.S. 810 (1978).

15. *Id.* at 992 & n.17 (citing *Organized Crime Control: Hearings on S.30 and Related Proposals Before Subcomm. No. 5 of the House Judiciary Comm.*, 91st Cong., 1st Sess. 107 (1969) (statement of Sen. McClellan)).

16. See 18 U.S.C. § 1963(a)(2)(D) (1988).

17. See *United States v. McKeithen*, 822 F.2d 310, 315 (2d Cir. 1987).

18. *Id.*

19. *Id.* at 313.

20. 116 CONG. REC. 18,955 (1970) (remarks of Sen. McClellan).

21. H.R. Rep. No. 1549, 91st Cong., 2nd Sess. 57 (1970), *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 4007, 4033 (emphasis added).

they introduce a taint theory. Courts find that forfeiture of the full amount of a defendant's interest is unwarranted because only part of the property is tainted. The medical supplies corporations were legitimate businesses that were tainted—but not thoroughly corrupted—by the owner's fraud. Similarly, the two-family dwelling was tainted by the narcotics enterprise, but the apartment building was not. Thus, the proffered solution is to separate the clean assets from the corrupted, and to forfeit only the tainted property.²²

The taint theory borrows the long-established fiction in civil in rem forfeiture law that the property is the guilty offender.²³ But the borrowed concept is inconsistent with the RICO forfeiture statute, which broadly reaches all property that is related to the violation. The statute does not say that the defendant shall forfeit property only to the extent that it was actually used to engage in racketeering activity. Worse still, only a fragment of the fiction is borrowed. The very purpose of proceeding against the fictive offender (i.e., the object), instead of its owner, is to remove the offending object from the channels of commerce and prevent its further illicit use.²⁴ Thus, almost all in rem forfeiture decisions flatly reject the notion that the de minimis nature of a violation should defeat the forfeiture of a disproportionately substantial asset.²⁵

If the taint theory were to be developed as fully as it might in the RICO context, the owner of the medical supplies corporations could successfully argue that only the corporations' accounting departments were used to further the medicare fraud and that the amount forfeited (i.e., the augmented fine) should

22. With respect to a corporate enterprise, the taint theory might enable a RICO defendant to circumvent forfeiture by transferring assets of the tainted part to the untainted part. *United States v. Walsh*, 700 F.2d 846, 857 (2d Cir. 1983) (citing *United States v. Huber*, 603 F.2d 387, 394 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980)), *cert. denied*, 464 U.S. 825 (1983).

23. In rem forfeiture proceedings are instituted against the offending object, not its owner. It is the illegal use of the property that triggers the in rem forfeiture, and the guilt or innocence of the owner is largely fortuitous. In contrast, RICO forfeitures are in personam and wholly dependent upon the guilt of the owner. RICO forfeitures are criminal sanctions.

24. For a discussion of civil forfeitures, see *infra* notes 58-83 and accompanying text.

25. See, e.g., *United States v. One (1) 1982 28' Int'l Vessel*, 741 F.2d 1319 (11th Cir. 1984); *United States v. One 1976 Porsche 911S*, 670 F.2d 810 (9th Cir. 1979); *United States v. One 1975 Mercedes 280S*, 590 F.2d 196 (6th Cir. 1978); *United States v. One Clipper Bow Ketch Nisku*, 548 F.2d 8 (1st Cir. 1977); *United States v. One 1988 Ford Mustang*, 728 F. Supp. 495 (N.D. Ill. 1989); *United States v. 26.075 Acres*, 687 F. Supp. 1005 (E.D.N.C. 1988).

likewise be limited accordingly. The drug dealer could successfully argue that drugs were dispensed only in the kitchen of the house and that the amount forfeited (i.e., the apportioned amount of the proceeds of sale) should also be limited accordingly.

And what would happen if the interest to be forfeited were the corporate president's contract rights, which provided him a source of influence over the corporations? If he had done "good work" during his tenure and had devoted less than half of his regular work week to perpetuating the fraudulent scheme, would that mean that forfeiture of his entire office would be disproportionate? If so, how could the forfeiture be made proportional? Should he be deprived of only part of his influence over corporate governance matters? Or should he be permitted to buy back his office by payment of a proportional amount?

Whatever the outcome, this hardly seems a satisfactory way to proceed. To construe the statute to allow this mode of analysis is to invite considerable mischief.

III. THE SOURCE OF SCOPE CONCERNS

The scope problem discussed above is, in part, a problem of statutory construction. But it is equally a function of judicial concern that disproportionately large forfeitures may be unconstitutional. Hence, the courts couch their consideration of this problem in eighth amendment proportionality language.

The eighth amendment prohibits imposition of excessive bail, excessive fines, and cruel and unusual punishments.²⁶ These constitutional limits on punishment perform three distinct functions. They limit the kinds of punishment that may be imposed, forbid imposition of punishment that is disproportionate to the severity of the crime and, in rare cases, limit what can be criminalized.²⁷

The route to resolving excessive punishment issues outside the context of death penalty litigation is a relatively uncharted course. There is no definitive case law on the subject of what constitutes an excessive fine, and the Supreme Court has provided us with a small but incoherent body of decisions applying the cruel and unusual punishments clause to resolve eighth amendment challenges to arguably disproportionate prison terms.²⁸ It is out

26. U.S. CONST. amend. VIII.

27. *Ingraham v. Wright*, 430 U.S. 651, 667 (1977).

28. *See Solem v. Helm*, 463 U.S. 277 (1983) (invalidating, on eighth amend-

of that cluster of cases that the proportionality analysis evolves.

A. Forfeiture as Punishment

Although not all forfeitures are deemed punishment, it seems reasonably clear that RICO forfeitures are a form of punishment.²⁹ The forfeiture sanction is created in RICO's criminal penalty provision, may be imposed only upon conviction and must be imposed in conjunction with a sentence of a fine and/or imprisonment.³⁰ It is a sanction against the defendant, not a judgment against the property.³¹

We do not know, however, whether forfeiture should be characterized as a "fine" or as a "punishment" for eighth amendment purposes. The Supreme Court has yet to consider criminal forfeitures within the context of eighth amendment jurisprudence, and the lower courts have neglected to articulate which clause of the eighth amendment prompts their evolving proportionality concerns.

Nor, for that matter, do we know whether it makes any difference as to which of the two clauses applies to forfeitures. We lack clear guidance regarding whether the Court's proportionality analysis should address the content of what is an "excessive" fine, or whether a different standard or analytical mode should control.

The problem is least daunting when pecuniary assets are sought to be forfeited. When the eighth amendment was adopted, the term "fine" was understood to mean a pecuniary

ment grounds, sentence of life imprisonment under recidivist statute for uttering "no account" check in amount of \$100 when prior felonies were nonviolent and relatively minor); *Hutto v. Davis*, 454 U.S. 370 (1982) (rejecting eighth amendment challenge to 40 year term of imprisonment for possession of nine ounces of marijuana and drug paraphernalia; interpreting *Rummel* as standing for proposition that courts should defer to legislative judgment about appropriate length of prison terms and should rarely find them unconstitutional); *Rummel v. Estelle*, 445 U.S. 263, 272 (1980) (rejecting claim of constitutional disproportionality of mandatory life imprisonment under recidivist statute for commission of third, relatively minor fraud; Court should be reluctant to review legislatively mandated terms of imprisonment, and successful challenges to particular sentences should be "exceedingly rare").

The Court has also found the type of punishment imposed to violate the eighth amendment. See *Weems v. United States*, 217 U.S. 349 (1910) (holding penalty of *cadena temporal* cruel and unusual).

29. This does not mean that the *only* purpose served by RICO forfeitures is punitive. RICO forfeitures also have a remedial component. For a discussion of the various purposes of RICO forfeitures, see *infra* notes 75-77 and accompanying text.

30. 18 U.S.C. § 1963(a) (1988).

31. *United States v. Ginsburg*, 773 F.2d 798, 800-01 (7th Cir. 1985) (citations omitted), *cert. denied*, 475 U.S. 1011 (1986).

punishment paid to the sovereign.³² Justice O'Connor recently suggested that the current understanding of the term "fine" also includes forfeitures and penalties recoverable in a civil action.³³ While recognizing that the task of determining what is excessive is no easy matter, she further suggested that the Court's proportionality analysis should provide some guidance for measuring the excessiveness of a fine.³⁴ Indeed, the Court has cited the text of the excessive bail and fines clauses as evidence that the proportionality analysis used in cruel and unusual punishment cases has deep historical roots.³⁵ Hence, for present purposes we proceed on the assumption that the proper analytical mode for examining the excessiveness of a fine is similar to that used in reviewing the proportionality of a punishment.

B. *The Proportionality Analysis*

The Court relies upon what it calls objective criteria to determine whether a sentence is proportional. It weighs the relative gravity of the offense and the harshness of the penalty, compares sentences imposed on other defendants in the same jurisdiction and compares sentences imposed for the same crime in other jurisdictions.³⁶ But the Court cautions that reviewing courts must give "substantial deference" to legislative authority to define the limits of criminal punishments.³⁷ Because courts should defer to legislative judgments, according to the Court, extended analysis will rarely be needed to determine that a particular sentence is constitutionally valid.³⁸

It bears observing that, on the latter point, the Court stands firm. Adhering to its admonition that successful challenges to particular sentences should be "exceedingly rare,"³⁹ only once

32. See *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2915 & n.6 (1989).

33. *Id.* at 2932 (O'Connor, J., dissenting); see also *United States v. Premises Known as 3639-2nd St., N.E.*, 869 F.2d 1093, 1098 (8th Cir. 1989) (Arnold, J., concurring) (court is not "foreclosing the possibility that a given use of the forfeiture statutes may violate the Excessive Fines Clause of the Eighth Amendment").

34. *Browning-Ferris*, 109 S. Ct. at 2993 (O'Connor, J., dissenting).

35. *Solem v. Helm*, 463 U.S. 277, 289 (1983).

36. *Id.* at 290-95.

37. *Id.* at 290 & n.16.

38. *Id.*; cf. *United States v. Rhodes*, 779 F.2d 1019 (4th Cir. 1985) (sentence of 50-75 years does not require extensive proportionality analysis even though in view of defendant's advanced years, sentence was arguably equivalent to life without parole), *cert. denied*, 476 U.S. 1182 (1986).

39. *Rummel v. Estelle*, 445 U.S. 263, 272 (1980). See *supra* note 28.

has the Court invalidated a harsh prison term on the ground that it was disproportionate to the crime.⁴⁰

1. RICO Applications

As was noted in Part II, RICO's forfeiture provision is directed at several discrete types of interests. To forward the eighth amendment analysis, forfeitable interests are categorized below as either "fruits" or "instrumentalities" of crime.

a. Fruits of Crime

"Fruits of crime" assets that are subject to forfeiture include: (1) any interest the defendant acquires through a RICO violation; and (2) proceeds of racketeering activity and property derived therefrom. These assets are forfeitable because they are illicitly obtained.

Fruits of crime assets should be the least problematic for eighth amendment purposes, particularly in view of two recent Supreme Court forfeiture decisions. In *United States v. Monsanto*,⁴¹ the Court held that assets earmarked to pay attorneys' fees are "property" within the meaning of the forfeiture statute. Because the statute does not expressly exempt them, attorneys' fees are subject to forfeiture if they constitute proceeds of the defendant's crimes. In a companion case, *Caplin & Drysdale, Chartered v. United States*,⁴² the Court considered the related question of whether application of the forfeiture statute to attorneys' fees unconstitutionally infringes the defendant's sixth amendment right to counsel. The Court held it did not.

Monsanto and *Caplin & Drysdale* validated the relation back doctrine contained in the RICO forfeiture statute. Under this doctrine, the forfeiture "relates back" to the commission of the act giving rise to the forfeiture in the sense that all right, title and interest in the property vests in the United States at that moment.⁴³ Only a party who at that time has vested rights in the property or who is an innocent bona fide purchaser may claim

40. *Solem*, 463 U.S. at 289-90, 303 (1983). See *supra* note 28.

41. 109 S. Ct. 2657 (1989).

42. 109 S. Ct. 2646 (1989). Although the statute the Court construed in *Monsanto* and *Caplin & Drysdale* was a drug forfeiture statute, 21 U.S.C. § 853, it is identical to the RICO forfeiture provision in all relevant respects. See 21 U.S.C. § 853 (1988).

43. 18 U.S.C. § 1963(c) (1988).

rights superior to those of the government.⁴⁴

With respect to property acquired through RICO violations and to proceeds of racketeering activity, the Court's validation of the relation back doctrine removes any need for a proportionality review. Within the fruits of crime context, attorneys' fee forfeitures do not violate the defendant's right to counsel because the sixth amendment does not guarantee the right to pay counsel with assets the defendant never owned. If the assets were never his, it would seem that to require their forfeiture could never inflict a disproportionate or excessive punishment.⁴⁵

b. Instrumentalities of Crime

But not all forfeitable assets are fruits of crime. Some may be legitimate assets—that is, assets that the defendant acquired lawfully, but that are otherwise related to the RICO violation. Hence, legitimately acquired interests in an enterprise, property or contract rights that afford a source of influence over the enterprise and interests maintained in violation of RICO all fit within this category. These legitimate assets become subject to forfeiture by reason of their relationship to the RICO violation.

It is the forfeiture of this category of interests that prompts the greatest eighth amendment concerns. Consider the following example:

A defense contractor is accused of violating RICO through government contract fraud and tax fraud. Upon his conviction, he is ordered to forfeit his entire interest in two companies (one of which is allegedly worth \$3 million) and in real estate that was purchased through one of them. The contractor claims that the business activity of the principal company is mostly legitimate; that the company performed fourteen defense contracts worth \$27 million; that the indictment only challenged three of those contracts; and that the total dollar amount of the fraud was only \$335,000.⁴⁶

Because forfeiture is mandatory and the statute grants no ju-

44. Innocent bona fide purchasers are provided a post-forfeiture hearing to establish their claims. *See id.* § 1963(l)(2).

45. *Cf. United States v. Feldman*, 853 F.2d 648, 663 (9th Cir. 1988) (stating forfeiture subject to eighth amendment limitations but finding it "hard to imagine" forfeiture of illegal gains could constitute cruel and unusual punishment), *cert. denied*, 109 S. Ct. 1164 (1989).

46. *United States v. Busher*, 817 F.2d 1409 (9th Cir. 1987).

dicial discretion to mitigate, courts are concerned that—as in the example—vast amounts of property may be forfeited because of a relatively trivial crime.⁴⁷ Because the breadth and inflexibility of the statute could result in excessively harsh or fortuitous punishment, the argument continues, criminal forfeitures are subject to eighth amendment proportionality review.⁴⁸

Although several courts have acknowledged in passing that the eighth amendment may limit RICO forfeitures,⁴⁹ only the Ninth Circuit has squarely addressed the question.⁵⁰

In the Ninth Circuit's view, courts should consider the objective factors used to review eighth amendment challenges to sentencing if, as in the government contract example, the defendant makes a prima facie showing that the forfeiture may be excessive.⁵¹ But in addition to these factors, the Ninth Circuit suggested that the circumstances surrounding the violation, the

47. *Id.* at 1414 n.9.

48. *United States v. Littlefield*, 821 F.2d 1365, 1368 (9th Cir. 1987).

49. *United States v. Harris*, 903 F.2d 770, 778 (10th Cir. 1990) (noting that, when measured against factors in *Solem*, the forfeiture was not disproportionate); *United States v. Walsh*, 700 F.2d 846, 857 (2d Cir.) (if enterprise is substantially legitimate, eighth amendment may prohibit forfeiture of entire enterprise), *cert. denied*, 464 U.S. 825 (1983); *United States v. Huber*, 603 F.2d 387, 397 (2d Cir. 1979) (recognizing potential eighth amendment problem but stating that a forfeiture "keyed to the magnitude of defendant's criminal enterprise is at least in some rough way proportional to the crime"), *cert. denied*, 445 U.S. 927 (1980); *United States v. Anderson*, 637 F. Supp. 632, 637 (N.D. Cal. 1986) (recognizing possible eighth amendment implications), *rev'd*, *United States v. Littlefield*, 821 F.2d 1365 (9th Cir. 1987); *United States v. Mandel*, 505 F. Supp. 189, 191 (D. Md. 1981) (if application of forfeiture statute violates Constitution, court may have power to avoid unconstitutional result), *aff'd sub nom. Appeal of Schwartz*, 705 F.2d 445 (4th Cir. 1983); *cf. United States v. Pryba*, 900 F.2d 748, 757 (4th Cir. 1990) (even if court thought proportionality analysis applies to forfeitures, defendant's sentence was not severe enough to trigger eighth amendment review); *United States v. Horak*, 833 F.2d 1235, 1251 (7th Cir. 1987) (not insensitive to concern, but *Busher*, while "certainly defensible, gives us pause"); *United States v. Kravitz*, 738 F.2d 102, 106-07 (3d Cir. 1984) (disproportionality problems may usually be avoided by remission and mitigation, but constitutional problem might arise if property was only incidentally used to promote racketeering), *cert. denied*, 470 U.S. 1052 (1985); *United States v. Grande*, 620 F.2d 1026, 1039 (4th Cir. 1980) (holding eighth amendment not violated where instruments of crime subject to forfeiture and magnitude of forfeiture reflects magnitude of defendant's interest in enterprise conducted in violation of law), *cert. denied*, 449 U.S. 830 (1980); *United States v. Thevis*, 474 F. Supp. 134, 141 (N.D. Ga.) (forfeiture is not cruel—i.e., not excessive or disproportionate and does not involve needless severity—nor unusual), *aff'd*, 665 F.2d 616 (5th Cir.), *cert. denied*, 456 U.S. 1008 (1979).

50. *See United States v. Feldman*, 853 F.2d 648, 663-64 (9th Cir. 1988); *United States v. Busher*, 817 F.2d 1409 (9th Cir. 1987); *see also United States v. Regan*, 726 F. Supp. 447, 456-60 (S.D.N.Y. 1989); *United States v. Robinson*, 721 F. Supp. 1541 (D.R.I. 1989).

51. *Busher*, 817 F.2d at 1415.

magnitude and type of harm, the defendant's state of mind and motive and the degree to which the enterprise is infected should be factored into the equation as well.⁵² And if the asset sought to be forfeited is realty, the Ninth Circuit is willing to consider—among other things—the nexus between the specific part on which the criminal conduct occurred and the rest of the land.⁵³

To find an eighth amendment violation, the Ninth Circuit reminds us, the forfeiture must be *grossly* disproportionate, not just punitive.⁵⁴ If the court concludes that a particular penalty rises to that level, it may limit the amount of the forfeiture, condition the forfeiture upon the payment of a sum of money or upon the relinquishment of other property, or limit or eliminate other punishment imposed.⁵⁵ Stated differently, the Ninth Circuit's proportionality review enables a court to either limit the forfeiture or to supplant it altogether.

In summary, then, the Ninth Circuit's mandate to measure relative degrees of taint derives from its view that the eighth amendment forbids glaring disparities between the magnitude of the crime (i.e., a RICO violation) and that of its punishment (i.e., the forfeiture). But perhaps the focus is wrong. Consider the following application.

Suppose that the defendant is the owner of a rare and valuable gun. Would it be constitutional to declare the gun forfeitable if it was used to commit murder, but unconstitutional to declare the same gun forfeitable if it was only used to frighten? To kill an endangered species? To vandalize? The gun is, after all, the defendant's legitimate asset. But in each of the examples, the gun is also an instrumentality of crime, and instrumentalities of crime have always been supposed to be forfeitable. Is a corporation that is used to defraud the government any less an instrumentality of crime than the gun? If not, why would the magnitude of the fraud be relevant to the forfeitability of the defendant's interest?

The Ninth Circuit's view has not been unanimously adopted by other federal courts. The Seventh Circuit, for example, observed that it is not insensitive to the excessive punishment issue, but that the Ninth Circuit's position, while "certainly defensible, gives us pause."⁵⁶ Other courts have concluded that because for-

52. *Id.* at 1415-16.

53. *Littlefield*, 821 F.2d at 1368.

54. *Busher*, 817 F.2d at 1415.

55. *Id.* at 1416.

56. *United States v. Horak*, 833 F.2d 1235, 1251 (7th Cir. 1987); *see also*

feiture is tied to the magnitude of the defendant's interest in the criminal enterprise, it is *per se* constitutional.⁵⁷

2. *Civil Forfeitures Contrasted*

To forward the analysis, let us approach the problem from a somewhat different perspective. Under civil forfeiture law, the action is instituted against the guilty object and is, thus, an *in rem* proceeding. The owner of the property is not a party to the suit and may be entirely innocent of any wrongdoing. Yet the owner's innocence is almost always irrelevant.⁵⁸ Property that has been put to illicit use—for example, a leased yacht that is used to transport contraband—may be ordered forfeited even if the owner/lessor had no clue that it had been used for that purpose. Even though the connection between the property and the offense must be more than fortuitous, “the property need not be indispensable to the commission of” the offense to become forfeitable.⁵⁹

When raised in the civil context, arguments that the de minimis nature of a violation makes forfeiture of substantial assets impermissibly excessive are invariably dismissed.⁶⁰ Courts uni-

United States v. Kravitz, 738 F.2d 102, 106-07 (3d Cir. 1984) (raising, but not deciding, eighth amendment issue), *cert. denied*, 470 U.S. 1052 (1985).

57. See United States v. Tunnell, 667 F.2d 1182, 1188 (5th Cir. 1982); United States v. Grande, 620 F.2d 1026, 1039 (4th Cir. 1980); see also United States v. Lizza Indus., 775 F.2d 492, 498 (2d Cir. 1985) (forfeiture best fits crime when keyed to magnitude of criminal enterprise), *cert. denied*, 475 U.S. 1082 (1986); United States v. Thevis, 474 F. Supp. 134, 141 (N.D. Ga.) (forfeiture is not cruel in sense of being excessive or disproportionate or involving needless severity, nor is it unusual), *aff'd*, 665 F.2d 616 (5th Cir.), *cert. denied*, 456 U.S. 1008 (1979).

58. The Supreme Court has suggested two situations in which the owner's innocence may be relevant. If the owner's property has been taken without privity or consent, or if the owner has done all he reasonably could to prevent the illicit use, forfeiture may raise serious constitutional concerns. See Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689 (1974). But see United States v. One 1988 Ford Mustang, 728 F. Supp. 495, 498 n.2 (N.D. Ill. 1989) (“The logic of these exceptions is not readily apparent. If the *res* really is the offender, then there is no reason to consider the conduct of the property owner. This would indicate that at the edges, at least, the *in rem* fiction begins to break down.”).

59. United States v. Premises Known as 3639-2nd St., N.E., 869 F.2d 1093, 1096 (8th Cir. 1989).

60. See, e.g., United States v. One (1) 1982 28' Int'l Vessel, 741 F.2d 1319 (11th Cir. 1984); United States v. One 1976 Porsche 911S, 670 F.2d 810 (9th Cir. 1979); United States v. One 1975 Mercedes 280S, 590 F.2d 196 (6th Cir. 1978); United States v. One Clipper Bow Ketch Nisku, 548 F.2d 8 (1st Cir. 1977); United States v. One 1988 Ford Mustang, 728 F. Supp. 495 (N.D. Ill. 1989); United States v. 26.075 Acres, 687 F. Supp. 1005 (E.D.N.C. 1988).

formly insist that it is not their role to mitigate the harshness of statutory forfeitures.⁶¹ Thus, for example, a boat could be forfeited because marijuana residue consisting of two leaves and a twig were found in a concealed compartment;⁶² a Porsche could be forfeited because it was used to transport 226 grams of marijuana;⁶³ a \$25,000 ketch could be forfeited for transporting $\frac{3}{4}$ of a pound of marijuana for personal use;⁶⁴ a Mercedes could be forfeited upon the discovery of four marijuana cigarette butts in the car;⁶⁵ and more than \$4 million dollars could be forfeited for importing money into the United States without properly reporting that fact, as required by law.⁶⁶

Thus, in the civil context, "the proportionality between the value of the forfeitable property and the severity of the injury inflicted by its use [is] irrelevant."⁶⁷ Indeed, even the Supreme Court has upheld seemingly disproportionate civil forfeitures without a hint that the disparity between the gravity of the (property's) offense and the punitive effect on the innocent owner creates a constitutional problem.⁶⁸

That being true, what of the guilty owner who contests a civil

61. See, e.g., *United States v. Tax Lot 1500*, 861 F.2d 232, 233-34 (9th Cir. 1988) (noting absence of case law holding the eighth amendment applicable to civil forfeiture actions), cert. denied, 110 S. Ct. 364 (1989); *Int'l Vessel*, 741 F.2d at 1322 (harshness of forfeiture not part of court's analysis of whether forfeiture properly invoked); *Porsche 911S*, 670 F.2d at 812 (same); *Mercedes 280S*, 590 F.2d at 198 (same); *Clipper Bow Ketch Nisku*, 548 F.2d at 11-12 (noting it is not role of courts to mitigate harshness of forfeiture statutes); *26.075 Acres*, 687 F. Supp. at 1012-14 (noting that "de minimis" defense to application of forfeiture statute has been rejected by numerous courts).

62. *Int'l Vessel*, 741 F.2d at 1320, 1322.

63. *Porsche 911S*, 670 F.2d at 812.

64. *Clipper Bow Ketch Nisku*, 548 F.2d at 11-12.

65. *Mercedes 280S*, 590 F.2d at 197.

66. *United States v. Four Million Two Hundred Fifty Five Thousand Six Hundred and Twenty Five Dollars and Thirty Nine Cents (\$4,255,265.39)*, 528 F. Supp. 969 (S.D. Fla. 1981).

67. *United States v. Premises Known as 3639-2nd St., N.E.*, 869 F.2d 1093, 1096 (8th Cir. 1989).

68. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 668 n.4, 693 (1974) (majority upheld forfeiture of \$19,800 yacht upon which one marijuana cigarette was found; dissent thought this reason enough for Court to intervene, although not on eighth amendment grounds). But on at least one occasion, the Court has reserved opinion on the issue of proportionality in civil cases, using as an example subjecting a Pullman car to forfeiture because a passenger carried a bottle of liquor on it. See *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 512 (1921). This example seems consistent with the example of an owner whose property was taken without privity or consent, used in *Calero-Toledo*. For a discussion of the two circumstances under which the Supreme Court has suggested that the property owner's innocence may be relevant when considering forfeiture, see *supra* note 58.

forfeiture? To quote the Ninth Circuit: "If the constitution allows *in rem* forfeiture to be visited upon innocent owners who were imprudent in choosing bailees, the constitution hardly requires proportionality review of forfeitures imposed on the guilty who assumed the risk of forfeiture."⁶⁹

Let us now pause and reflect. If the law allows arguably disproportionate civil forfeitures to be visited upon the guilty and innocent alike, why should a proportionality review be required for criminal forfeitures?

The obvious answer is this. The eighth amendment has historically been applied only to criminal punishments.⁷⁰ *In rem* forfeitures are civil and are not, strictly speaking, punishments.⁷¹ But perhaps this answer is all too obvious, because it assumes meaningful differences between civil and criminal forfeiture law. Perhaps we should inquire further. How, if at all, do civil and criminal forfeitures differ in purpose and effect?

We may begin with a fundamental threshold question about civil forfeiture law. Recall that civil forfeitures are premised on the fiction that the property is the guilty offender. The guilt or innocence of the property owner is, therefore, irrelevant. Thus, we need to know what purpose is served by forfeiting an innocent owner's goods.

Civil forfeitures are remedial in two respects. First, as the Supreme Court has observed, *in rem* forfeitures serve the public interest by preventing the continued illicit use of the property.⁷² Second, the prospect of civil forfeiture may also induce the lessors, bailors, and secured creditors of the world to exercise greater care in selecting those to whom they will entrust possession of their property, thereby preventing illicit use of other property by lessees, bailees, and debtors.⁷³ In the fortuitous event that the owner happens not to be innocent, the forfeiture makes his wrongful conduct unprofitable by imposing an economic sanc-

69. *United States v. Tax Lot 1500*, 861 F.2d 232, 234 (9th Cir. 1988), *cert. denied*, 110 S. Ct. 364 (1989).

70. The Supreme Court has deliberately left open the question whether the eighth amendment may apply to civil actions instituted by the government. For a discussion of this issue, see *infra* notes 85-99 and accompanying text.

71. The Supreme Court has called into question whether the distinction between civil and criminal punishments is meaningful for eighth amendment purposes. For a discussion of the distinction between civil and criminal punishments in the context of the eighth amendment, see *infra* notes 85-99 and accompanying text.

72. *Calero-Toledo*, 416 U.S. at 686-87.

73. *Id.* at 687-88.

tion that may be fortuitously harsh.⁷⁴

Just how, if at all, does the purpose served by in personam forfeitures differ? Congress made clear that RICO forfeitures are intended to serve all of the purposes of the Act itself—to “punish, deter, [and] incapacitate.”⁷⁵ They remove the profit from crime by separating the defendant from his dishonest gains—a.k.a. an economic sanction.⁷⁶ But RICO forfeitures also serve another purpose. They “remove the corrupting influence from the channels of commerce” by separating the defendant from the enterprise—that is, they prevent further illicit use.⁷⁷

Thus, it appears that civil forfeitures are remedial in nature and punitive in effect, while criminal forfeitures are punitive in nature and remedial in effect. Simply put, civil and criminal forfeitures are functional equivalents of one another.

That civil forfeitures are kindred to criminal punishments is further illustrated by the constitutional procedural protections the Supreme Court has accorded to property owners in in rem forfeiture proceedings. In applying the fourth amendment exclusionary rule to in rem forfeitures, for example, the Court has characterized them as quasi-criminal proceedings whose object is to penalize for the commission of a crime.⁷⁸ Because the forfeiture is “a penalty for the criminal offense and can result in even greater punishment than the criminal prosecution,” according to the Court, it would be “anomalous” to hold that the fourth amendment requires the exclusion of illegally seized evidence from a criminal proceeding but to permit the same evidence to be used in a civil forfeiture proceeding whose central goal is a determination that the criminal law has been broken.⁷⁹

Similarly, the Court has extended the fifth amendment privilege against self-incrimination to civil forfeiture proceedings. In *United States v. United States Coin & Currency*,⁸⁰ the forfeited property consisted of gambling proceeds a gambler had in his possession when he was arrested. After he was convicted for failing to

74. *Id.* at 686-87; *see also* *United States v. Tax Lot 1500*, 861 F.2d 232, 233-34 (9th Cir. 1988), *cert. denied*, 110 S. Ct. 364 (1989); *United States v. 26.075 Acres*, 687 F. Supp. 1005, 1012 (E.D.N.C. 1988).

75. *Russello v. United States*, 464 U.S. 16, 27-28 (1983) (quoting 116 CONG. REC. 18,955 (1970) (remarks of Sen. McClellan)).

76. *Id.* at 28.

77. *Id.* at 27-28 (quoting 116 CONG. REC. 18,955 (1970) (remarks of Sen. McClellan)).

78. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700 (1965).

79. *Id.* at 701.

80. 401 U.S. 715 (1971).

register as a gambler and to pay the required gambling tax, forfeiture proceedings were instituted against the proceeds. The forfeiture statute at issue provided that one who possessed property intended for use in violating the internal revenue laws could not obtain any property rights therein. The statute did not require that the possessor must have been the wrongdoer or that he must have been privy to the intended violation. Thus, the statute reached property in the hands of purely innocent parties.

But the Court observed that another statute authorized administrative remission of a forfeiture, if the owner could prove that he acted neither with "willful negligence" nor intent to violate the law.⁸¹ When read together, the Court concluded, "[I]t is manifest that [the statutes] are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise."⁸² Hence, the gambler could invoke the fifth amendment privilege against self-incrimination in the "civil" forfeiture proceeding.

Given the admittedly punitive traits with which civil forfeitures are imbued, something seems amiss when forfeiture of substantial property following a de minimis violation is constitutional in one context, but not in the other.⁸³ That raises another, kindred, concern.⁸⁴ In our quest for the contours of eighth

81. *Id.* at 721 (quoting 19 U.S.C. § 1618 (1970)).

82. *Id.* at 721-22.

83. Although civil and criminal forfeitures are functionally equivalent, forfeiture is, in the criminal context, in addition to a fine and/or imprisonment and hence is more punitive. If, as the Ninth Circuit has said, consideration of the appropriateness of a forfeiture order must take into account the "total punishment imposed," that would cast a different light on the problem. *United States v. Busher*, 817 F.2d 1409, 1415 n.10 (9th Cir. 1987). There is at present, however, little articulated support for this approach in eighth amendment jurisprudence.

84. If the eighth amendment proportionality requirement minimizes the punitive effect of criminal, but not civil forfeitures, and if criminal and civil forfeitures are functionally equivalent, the law appears to have due regard for the rights of the guilty but no regard for the rights of the innocent. But that can scarcely be right.

It is at this point that we may profit from considering what happens *after* property is ordered forfeited. On the civil side, the owner may (under most statutes) petition for remission of the forfeiture. As a matter of administrative grace, the government may permit claimants with clean hands to recover the property. The remission procedure protects only the innocent. Thus, the civil remission hearing accomplishes roughly the same objective as a criminal RICO trial. It determines both the extent of the claimant's interest in the property (as in the criminal trial) and his guilt or innocence (as in the remission proceeding). RICO has due regard for the rights of innocent third parties by providing a judicial hearing to determine the issues that are resolved through civil administrative remission procedures in other contexts.

amendment protections, we have proceeded on the assumption that the eighth amendment acts only as a limit on the criminal process. Perhaps this assumption is unwise, however, for the Supreme Court recently hinted that the excessive fines clause might be given wider berth. Somewhat surprisingly, that suggestion originated in a fifth, not an eighth, amendment context.

In *United States v. Halper*,⁸⁵ the high Court held that the double jeopardy clause limits successive criminal and civil actions brought by the government, when the amount sought in the civil action is so disproportionate to the damage caused as to be punitive.⁸⁶ Halper was criminally prosecuted for submitting sixty-five false Medicare claims that resulted in a \$585 overpayment by the government. Upon his conviction, he was fined \$5,000 and sentenced to two years in prison. The government then filed a civil suit under the False Claims Act, which authorized: (1) recovery of \$2,000 for each false claim; (2) recovery of twice the amount of damages suffered by the government; and (3) recovery of the costs of the suit. Thus, in this case, the government could exact a statutory penalty exceeding \$130,000 for a \$585 fraud. To add insult to injury, the government relied solely on the facts that established guilt in Halper's criminal trial to establish liability in the civil case.

Did the civil penalty, sought by the government, amount to a second punishment? Yes, according to the Court. A civil sanction constitutes punishment when, under the facts of the case, it serves the goals of punishment.⁸⁷ Thus, if in addition to a remedial purpose a civil sanction also serves a retributive or deterrent function, it constitutes punishment for double jeopardy purposes.⁸⁸ That being true, when the government seeks a civil penalty based on conduct that previously led to a criminal conviction, the relief sought in the civil action must be rationally related to

85. 109 S. Ct. 1892 (1989).

86. *Id.* at 1903-04.

87. *Id.* at 1901-02.

88. Although the rule is limited to "the rare case . . . where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused," when the civil penalty sought in the second proceeding is not rationally related to the goal of compensation, it constitutes "punishment." *Id.* at 1902.

The Court observed, however, that nothing would preclude the imposition of multiple punishments (*i.e.*, the criminal sanction and the punitive civil penalty) in a single proceeding. Nor would imposition of the full civil penalty be objectionable if the defendant has not previously been punished for the same conduct, even if the civil sanction were punitive. *Id.* at 1903.

making the government whole.⁸⁹ Translated into the forfeiture context, in rem forfeiture proceedings based upon conduct that has been criminally prosecuted are not barred unless they, too, are “essentially criminal in character.”⁹⁰ Forfeiture actions that are “civil and remedial” rather than “criminal and punitive” do not implicate double jeopardy issues.⁹¹

In a subsequent eighth amendment case, *Browning-Ferris Industries v. Kelco Disposal*,⁹² the Court held that punitive damages awarded in civil suits between purely private parties are not fines for eighth amendment purposes.⁹³ Using an original intent mode

89. *Id.* at 1903.

[I]t would be difficult if not impossible in many cases for a court to determine the precise dollar figure at which a civil sanction has accomplished its remedial purpose of making the Government whole, but beyond which the sanction takes on the quality of punishment. In other words, . . . the process of affixing a sanction that compensates the Government for all its costs inevitably involves an element of rough justice.

Id. at 1902.

90. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362 (1984).

91. *Id.*; see also *United States v. A Parcel of Land with a Building Located Thereon*, 884 F.2d 41 (1st Cir. 1989).

92. 109 S. Ct. 2909 (1989).

93. *Id.* at 2914-16.

In addition to the eighth amendment claim, the petitioners asked the Court to consider whether the damage award was excessive under the due process clause of the fourteenth amendment. In raising this issue, the petitioners sought substantive due process protections that derive directly from the size of the award. *Id.* at 2921. The Court acknowledged that language in some earlier opinions could be viewed as supporting the position that the due process clause limits the amount of civil damages that may be awarded pursuant to a statutory scheme. But the Court had never addressed the precise question raised here—whether due process limits the exercise of jury discretion in a punitive damages case in which no statutory limit is imposed. Because the petitioners had failed to preserve this question for review, however, the Court declined to consider it on this occasion.

Justice Brennan, joined by Justice Marshall, concurred on the understanding that the majority opinion “leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties.” *Id.* at 2923 (Brennan, J., concurring). Unlike the majority, which suggested that “there is some authority” in the Court’s opinions for the view that the due process clause imposes substantive limits on punitive damages awards, *id.* at 2921. Justice Brennan’s concurrence stated that “[s]everal of our decisions indicate . . . the Due Process Clause forbids damages awards that are ‘grossly excessive.’” *Id.* at 2923 (Brennan, J., concurring). Justice O’Connor, who dissented in *Browning-Ferris*, had earlier expressed the view that when juries are given unfettered discretion to award punitive damages, “there is reason to think that this may violate the Due Process Clause.” *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 87 (1988) (O’Connor, J., concurring). Thus, it is possible that the Court may ultimately reach a consensus that the Constitution limits excessive damage awards. See Schwartz, *Browning-Ferris: The Supreme Court’s Emerging Majorities*, 40 ALA. L. REV. 1237, 1256-57 (1989).

of analysis, the Court found it significant that when the eighth amendment was drafted and ratified, the term "fine" connoted a payment to the government as punishment for an offense. The primary concern underlying eighth amendment protections was abuse of prosecutorial power, according to the Court.⁹⁴ Thus, the framers sought only to limit excessive monetary penalties imposed by the government.⁹⁵ It is that concern, rather than "the extent or purposes of civil damages," that the eighth amendment sought to address.⁹⁶

When read together, *Halper* and *Browning-Ferris* portend continued uncertainty. If disproportionate government-imposed civil penalties constitute "punishment" for double jeopardy purposes, and if the eighth amendment protects against excessive government-imposed punishment, then it stands to reason that "*Halper* implies that punitive damages awarded to the Government in a civil action may raise Eighth Amendment concerns."⁹⁷ The critical distinction between *Halper* and *Browning-Ferris*, the Court tells us, is that the punitive civil monetary award in *Halper* was exacted by the government, not by a private party.⁹⁸ But to confound us further, the Court in *Browning-Ferris* obliquely observed that its decisions have long reflected the understanding that the eighth amendment applies "primarily, and *perhaps* exclusively, to criminal prosecutions and punishments."⁹⁹

What if the Court should chart a different course and subject civil punitive damages awarded to the government to eighth amendment scrutiny? Would that resolve our forfeiture dilemma? Perhaps, but not necessarily so. Although such a move would suggest that in rem forfeitures might be subject to a proportionality review, we must await that day before we will know whether the Court would also signal a clue about the comparability of punitive damages and in rem forfeitures.

Unlike punitive damages, civil forfeitures have a distinct remedial component. But even if that remedial component did not sufficiently distinguish the two sanctions, it would nonetheless be

If the Court were to hold that the due process clause imposes limitations on the size of punitive damages awards, that development could have profound implications for the set of problems addressed in this article.

94. *Browning-Ferris*, 109 S. Ct. at 2915.

95. *Id.* at 2920.

96. *Id.* at 2915.

97. *Id.* at 2920 n.21.

98. *Id.*

99. *Id.* at 2913 (emphasis added).

necessary to put in rem forfeitures in historical context. In rem forfeiture law is “firmly fixed in the punitive and remedial jurisprudence of the country,”¹⁰⁰ and the statutes through which it became part of the legal landscape are sweeping.

Consider, for example, an 1866 statute that required forfeiture of *all* taxable goods or commodities removed or concealed to avoid the tax; and of *all* packages, vessels, containers, boats or other conveyances in which such goods or commodities had been contained; and of *all* things used to remove or conceal the offending goods and commodities.¹⁰¹ Given the historical practice of pursuing forfeitures under potentially unlimited laws like this with only scant attention paid to proportionality,¹⁰² the prospect of an abrupt change of course seems less likely. And if we stay the course on the civil side, much would be needed to explain a burgeoning eighth amendment theory on the criminal side.

IV. CONCLUSION

In response to the questions posed at the outset, it seems likely that the answer to the “how much” question is that Congress meant what it said. The RICO forfeiture provision, like its historical in rem antecedents, is deliberately broad. It is intended to strip RICO defendants of the fruits and instrumentalities of their crimes. Congress fashioned this sweeping sanction to make crime unprofitable and to “sanitize” enterprises and property that have been used as means to further the defendants’ criminal ends.¹⁰³ It seems unlikely that Congress contemplated that forfeitures should be judicially mitigated or circumvented by measuring relative degrees of taint.

Further it seems likely that, under the present state of the

100. *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 511 (1921).

101. *Id.* at 508 (quoting Act of July 13, 1866, ch. 184, 14 Stat. 98, 151 (1868)).

102. According to the *Goldsmith-Grant Court*:

It is said that a Pullman sleeper can be forfeited if a bottle of illicit liquor be taken upon it by a passenger, and that an ocean steamer can be condemned to confiscation if a package of like liquor be innocently received and transported by it. Whether the indicated possibilities under the law are justified we are not called upon to consider. It has been in existence since 1866, and has not yet received such amplitude of application. When such application shall be made it will be time enough to pronounce upon it.

Id. at 512. The time to pronounce upon it has yet to come.

103. *United States v. Thevis*, 474 F. Supp. 134, 143 (N.D. Ga.), *aff'd*, 665 F.2d 616 (5th Cir.), *cert. denied*, 456 U.S. 1008 (1979).

law, RICO forfeitures should rarely—if ever—be scrutinized through an eighth amendment proportionality review. Substantial deference must be given to the will and authority of Congress to fashion appropriate criminal sanctions, and courts historically have deferred to legislative judgments that fruits and instrumentalities of crime are forfeitable.

Recognition of proportionality limits on criminal, but not civil, forfeitures leads to the anomalous result that more severe punishment may be imposed in a civil in rem proceeding than in a criminal in personam proceeding, solely because of the civil law fiction that the property is the offender. Yet civil and criminal forfeitures have parallel remedial and punitive purposes and effects.

Perhaps the Supreme Court will have an opportunity to directly consider what, if any, eighth amendment ramifications are implicit in RICO's in personam forfeiture scheme. Until the Court declares its intentions more clearly, however, the lower courts should think twice before intruding into the "basic line-drawing process"¹⁰⁴ that belongs to Congress in fashioning the "criminal" sanction of in personam forfeiture, while at the same time according absolute deference to legislative judgments about "civil" in rem forfeitures.

104. *Hutto v. Davis*, 454 U.S. 370, 374 (1982).

