



6-1-1999

Problem of Proportionality in RICO Forfeitures

William W. Taylor III

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

William W. Taylor III, *Problem of Proportionality in RICO Forfeitures*, 65 Notre Dame L. Rev. 885 (1990).

Available at: <http://scholarship.law.nd.edu/ndlr/vol65/iss5/2>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

The Problem of Proportionality in RICO Forfeitures

William W. Taylor, III*

I. Introduction

When Congress enacted the Racketeer Influenced and Corrupt Organizations statute (RICO),¹ government-mandated forfeitures of proceeds, instrumentalities of crime, and contraband were familiar. They were actions against the property itself, called forfeitures in rem, based upon the fiction that the property itself was guilty.² What was new about RICO's forfeiture provision³ was that it was intended to be directed against persons, depriving them of property because they committed a crime. The property subject to forfeiture includes, but is not limited to, criminal proceeds and instrumentalities. The statute subjects certain types of property owned by a defendant to forfeiture regardless of whether the property is tainted by criminal conduct.⁴

The statute does require that there be some, albeit very little, relationship between the property and the crime: it must be an interest in an "enterprise." Enterprise is a practically limitless concept which includes familiar forms of business organizations as well as less specific amalgams of organizations and people.⁵ The conduct need not benefit the enterprise; indeed, nowhere does the statute define the nature of the relationship required between the conduct and the enterprise.⁶ Thus, although Congress did not foresee it in the drafting process, if a businessman makes an improper payment to obtain one contract, he may forfeit the entire business he has spent his life developing, and which is otherwise entirely legitimate. Indeed, if sought, such a forfeiture is automatic.⁷

* Partner, Zuckerman, Spaeder, Goldstein, Taylor & Kolker, Washington, D.C..

1 RICO is Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 941, 947-48 (1971).

2 *Calero Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

3 As codified at 18 U.S.C. § 1963(a) (1988).

4 In some RICO forfeitures, the business can be fairly characterized as entirely corrupt, or its assets placed at the disposal of the criminal for his evil purpose. *See, e.g.*, *United States v. Thevis*, 474 F. Supp. 134 (N.D. Ga. 1979), *aff'd*, 665 F.2d 616 (5th Cir.), *cert. denied*, 456 U.S. 1005 (1982). These cases are different, this Article argues, from those in which the crime occurs in the course of carrying on an otherwise legitimate business. *See, e.g.*, *United States v. Regan*, 726 F. Supp. 447 (S.D.N.Y. 1989).

5 "Enterprise" gets its content from 18 U.S.C. § 1961(4) (1988), but as one commentator has noted, "enterprise allegations are limited only by the ingenuity of prosecuting counsel . . ." Reed, *The Defense Case for RICO Reform*, 43 VAND. L. REV. 691, 700 (1990).

6 Courts have contributed the unhelpful notion that the predicate offenses must be "related to the activities of [the] enterprise." *United States v. Scotto*, 641 F.2d 47, 54 (2d Cir. 1980), *cert. denied*, 452 U.S. 1005 (1984). *See also* *United States v. Cauble*, 706 F.2d 1322 (5th Cir. 1982), (defendant's position must facilitate his commission of the racketeering acts and the acts must have "some effect" on the enterprise), *cert. denied*, 465 U.S. 1005 (1984); *United States v. Ellison*, 793 F.2d 492 (8th Cir. 1986) (government need not prove that racketeering acts benefited the enterprise but only that they "affected" it).

7 RICO forfeitures are not discretionary. *United States v. L'Hoste*, 609 F.2d 796 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980).

Courts did not confront such a case for many years after the statute's passage, because the Department of Justice did not seek forfeitures so extreme. A few courts observed that the statute might one day pose a proportionality problem,⁸ but held that it did not do so in the cases before them. In 1987, however, the Ninth Circuit in *United States v. Busher*⁹ remanded a forfeiture order for the district court to consider whether it violated the eighth amendment. The First, Second and Seventh Circuits have since limited forfeitures by applying causation tests, sometimes observing that principles of "proportionality" require causation tests.¹⁰ The Seventh Circuit in *United States v. Horak*¹¹ implied forcefully, albeit in dicta, that if the rationale for limiting the forfeiture were wrong, it would have to confront the same Eighth Amendment issue as had the Ninth Circuit. Not until the controversial *Princeton/Newport* case, *United States v. Regan*,¹² however, did a district court reject a forfeiture solely on Eighth Amendment grounds.

In *Regan*, Judge Robert Carter confronted what he believed to be an excessive forfeiture. He noted the decisions discussing eighth amendment limitations on forfeitures, and with more than a hint of frustration, observed that "[w]hat those limitations are has not been clearly established,"¹³ and that "there has been very little guidance given to trial courts in determining what yardsticks to apply to meet eighth amendment strictures in RICO forfeiture situations."¹⁴

Judge Carter was correct. Although his opinion is a yeoman-like effort to explain, in objective terms, why the punishment did not fit the crime, it suffers ultimately from the same difficulty in drawing bright lines as does most eighth amendment jurisprudence.¹⁵

It need not be so. Judge Carter, and other judges, should have observed that there is a substantial distinction between requiring a defendant to forfeit property obtained by crime or the value of which was increased by crime, and requiring him to forfeit other property. Forfeiture of proceeds is no more cruel or unusual than the familiar and well-accepted in rem forfeitures, no matter how trivial the criminality. How-

8 See, e.g., *United States v. Marubeni Am. Corp.*, 611 F.2d 763, 769 n.12 (9th Cir. 1980) (hypothetizing that a hardworking, honest shopkeeper could lose a carefully established business after involvement in a "single fraudulent scheme"); *United States v. Walsh*, 700 F.2d 846, 847 (2d Cir.), cert. denied, 464 U.S. 825 (1983); *United States v. Huber*, 603 F.2d 387, 397 (2d Cir. 1979) (court intervention may be appropriate "where the forfeiture threatens disproportionately to reach untainted property"), cert. denied, 445 U.S. 927 (1980); *United States v. Thevis*, 474 F. Supp. 174 (N.D. Ga. 1979) (order of forfeiture).

9 817 F.2d 1409 (9th Cir. 1987). *Busher* was followed shortly by *United States v. Littlefield*, 821 F.2d 1365 (9th Cir. 1987).

10 *United States v. Angiulo*, 897 F.2d 1169, 1211-12 (1st Cir. 1990); *United States v. Porcelli*, 865 F.2d 1352, 1364-65 (2d Cir.), cert. denied, 110 S. Ct. 53 (1989); *United States v. Horak*, 833 F.2d 1236, 1242-43 (7th Cir. 1987). The "proportionality" phrase is misleading in *Angiulo* and *Porcelli*. The courts are really referring to causation.

11 833 F.2d at 1251.

12 *Princeton/Newport* produced four reported district court opinions, each entitled *United States v. Regan*. The citations are: 726 F. Supp. 447 (S.D.N.Y. 1989); 713 F. Supp. 629 (S.D.N.Y. 1989); 706 F. Supp. 1102 (S.D.N.Y. 1989); and 699 F. Supp. 36 (S.D.N.Y. 1988).

13 *United States v. Regan*, 726 F. Supp. 447, 456 (S.D.N.Y. 1989).

14 *Id.*

15 E.g., *Solem v. Helm*, 463 U.S. 284 (1983); *Trop v. Dulles*, 356 U.S. 86 (1958).

ever, there are constitutional prohibitions to forfeitures on nontainted property quite distinct from the eighth amendment. Forfeiture of untainted property as punishment for crime is forfeiture of estate, a punishment whose rejection by England and the United States since before 1789 is not a matter of dispute.¹⁶

The thesis of this Article is that the correct limitation upon forfeiture penalties, and indeed the only workable one, is whether the property was obtained by or directly used in the criminal conduct. If it was not, its forfeiture is prohibited not only by the eighth amendment but also by the constitutional prohibition against forfeiture of estate described below.

Courts have rejected this argument in the past, but those courts did not address forfeitures of untainted property. It is appropriate, and timely, to recognize that the framers wrote a clear, if implicit, prohibition against the government's punishing a criminal by taking his property. Even if this prohibition is not offended by all in personam forfeitures, it certainly proscribes the government's taking from a convicted defendant property not tainted by his crime.

II. The Problem: RICO's Forfeiture Provisions, as Drafted and Applied

In this discussion, as in others, RICO's breadth is an important reality. Because the statute is not limited to the group of individuals known as organized crime, as it could not be, other limiting principles are hard to identify. The statute covers a wide- and widening-range of misbehavior, from murder for hire¹⁷ to tax offenses charged as mail fraud.¹⁸ It does not limit itself to "serious criminality," and its penalties do not adjust qualitatively to the moral blameworthiness of the conduct. The number and variety of predicate offenses, which can include *malum prohibitum* as well as *malum in se*, might suggest that the statute should provide some internal way for modulating its sanctions, but the statute provides no such method. The penalty provisions do not make any distinction between punishment for the hit man and punishment for the bag man.

On the other hand, Congress never contemplated forfeitures like those confronted by the *Busher*, *Regan* and *Horak* courts. The legislative history of the Organized Crime Control Act of 1970 demonstrates that Congress' principal objective in enacting the forfeiture provisions was to provide a means of separating the racketeer from the legislative business which he corrupted with his money or his methods.¹⁹ There is no evidence in any of the debates or the committee reports of any legislative intent to beggar a defendant who does not substantially corrupt an entire business. There is evidence to the contrary.²⁰ In any event, it is hardly debatable today that Congress' attention in 1969 was not upon that

16 See *infra* notes 41-45 and accompanying text.

17 *United States v. Thevis*, 665 F.2d 616 (5th Cir. Unit B 1982), *cert. denied*, 456 U.S. 1008 (1983).

18 *United States v. Porcelli*, 865 F.2d 1352 (2d Cir.), *cert. denied*, 110 S. Ct. 53 (1989).

19 See Taylor, *Forfeiture Under 18 U.S.C. § 1963—RICO's Most Powerful Weapon*, 17 AM. CRIM. L. REV. 379, 383-85 (1980) (giving legislative history).

20 *Id.* at 384-85.

brand of misbehavior which we now refer to as "white collar" crime. Whether the forfeiture provisions might deprive businessmen of the results of lifetimes of legitimate and productive activity was not a subject of interest.

Times have changed. Public attention and prosecutorial priorities are different. RICO's breadth has enabled the Department of Justice to use the statute often and effectively in combatting commercial criminal misbehavior. The fact that Congress did not contemplate cases like *Busher*, *Horak* and *Regan* does not mean, of course, that the statute cannot be applied to them. On the other hand, if RICO's forfeiture provisions are as broad as the government says they are, they are limited only by the prosecutor's ingenuity or, as the case may be, his restraint.

A. *The Statutory Language*

In the comprehensive Forfeiture Act of 1984,²¹ Congress made it clear, if it was not already, that RICO forfeitures extend to any interest a defendant has in the relevant enterprise, even if the interest is neither a product of the criminal activity, nor a source of influence over the enterprise which enabled the defendant to commit the conduct.

Before the amendment, there was uncertainty whether the words "affording a source of influence over" modified the word "interest" in subsection (2) or whether, because of its position in the sentence, it modified only "property" or "contractual right of any kind."²² There is no doubt now, however, that under § 1963(a)(2)(A) the government need not prove that the interest was acquired, or its value increased, as a result of the illegal conduct, or even that the interest was a means of committing the crime. The government takes the interest solely because the defendant owns it.

²¹ 18 U.S.C. § 1963 (1988). The relevant part of § 1963 is:

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned for not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law—

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

(2) any —

(A) interest in;

(B) security of;

(C) claim against; or

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

(3) any property constituting, or derived from, any proceeds which the person obtained directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by his section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

²² See *United States v. Horak*, 833 F.2d 1235, 1249 (7th Cir. 1987)(addressing that question). The Court in *Horak* was construing the statute in its pre-1984 incarnation. See also *United States v. Porcelli*, 865 F.2d 1352 (2d Cir.), cert. denied, 110 S. Ct. 53 (1989).

B. *The Princeton/Newport Problem: A Big Business Commits a Little Fraud*

The proportionality problem in RICO forfeitures appears most acutely when prosecutors bring RICO charges for conduct committed in the course of operating an otherwise legitimate business, and then seek to take the entire business. The greater the relationship of the illegal conduct to the economic success of the business, of course, the less unfair this seems. But, as in some notable recent cases,²³ the economic impact of the criminal activity on the value of the business can be small; in these cases, pauperizing the defendant appears excessive.

The *Princeton/Newport* case created a stir for just this reason. Although the government convicted the defendants, it took a public relations shellacking the likes of which it has rarely endured.²⁴ Before the case was over, the Department of Justice had publicly announced new internal guidelines to assure the public (and perhaps Congress) that the excesses for which the prosecutors were criticized would never be repeated.²⁵

The defendants in the case were four officers and employees of Princeton/Newport Partnership, a multi-billion dollar arbitrage business located in Princeton, New Jersey, and Newport Beach, California, and one trader in the high-yield and convertible bond department of Drexel, Burnham, Lambert, Inc. The indictment contained a variety of charges: conspiracy to commit securities, mail and wire fraud, to maintain false books and records, and to file fraudulent tax returns, as well as substantive securities, mail and wire fraud, tax violations, substantive RICO violations, and RICO conspiracy.

Central to all the charges, however, were a series of securities trades conducted between June 1984 and February 1985. The question was whether the defendants' portrayal of these transactions as sales was fraudulent because of their agreement that the securities would be repurchased with little or no market risk.

No one seriously disputed that the trades made up less than one percent of the partnership's total transactions since it began business. The economic consequences in terms of taxes evaded or deferred as a

²³ *E.g.*, the *Princeton/Newport* case, which produced four reported district court opinions. See *supra* note 12.

²⁴ See, *e.g.*, *RICO, What a Racket*, Wall St. J., Aug. 23, 1988, at A26, col. 1 (prosecutor "has made RICO the modern rubber hose"); Safire, *The End of RICO*, N.Y. Times, Jan. 30, 1989 at A17, col. 5 ("we are dealing with a legal monstrosity").

²⁵ Reed, *supra* note 5, at 714-20. Specifically, the Department circulated amendments to its Manual for U.S. Attorneys which dealt with two aspects of the *Princeton/Newport* prosecution. The first was the use of tax offenses as predicates for RICO charges. The Assistant Attorney General for Tax Division promulgated a modification to the guidelines for that division which had the effect of prohibiting future uses of the mail fraud statute to charge tax offenses in order to avoid Congress' specific refusal to include tax fraud as a RICO predicate. CRIMINAL DIV., U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 6-4.211(1) (supplemented by blue sheet Memorandum of July 14, 1989 from Shirley D. Peterson, Assistant Attorney General, Tax Division). The second was the aggressive use of the pretrial restraining order which destroyed the unindicted business entity. The new guideline, issued by Assistant Attorney General Edward G. Dennis, purports to require careful consideration of the effect of restraining orders on third parties. It also says that the Department will not seek forfeitures as broadly as permitted by statute if there are proportionality problems. *Id.* at § 9-110.414 (supplemented by blue sheet Memorandum of June 30, 1989 from Edward G. Dennis, Assistant Attorney General, Criminal Division).

result of the transactions were also very small. Nevertheless, the prosecutors sought forfeiture of each defendant's entire partnership interest, bringing into dramatic focus the value of the proposed punishment compared to the gain or loss associated with the conduct. For example, the lead defendant, James Regan, would have been required to forfeit some \$15 million in assets on account of \$96,717 in tax benefits illegally obtained.²⁶

Although the jury convicted the defendants on the RICO counts, it refused to return verdicts of forfeiture in the amount the government sought. Before the same jury in a separate proceeding on forfeiture, the defendants argued that the forfeitures sought by the government would be grossly unfair. The jury apparently agreed; it returned verdicts requiring forfeitures of substantially lesser amounts.²⁷ The government urged the court to enter forfeitures of the defendants' entire interests in the enterprise notwithstanding the verdict. The court agreed, holding that the jury was required to order forfeiture of the defendants' entire interests, and that any other result would be inconsistent with the evidence. Since the parties had earlier stipulated to the value of the property the government contended was forfeitable, all that remained was to enter an order forfeiting that amount.

The court then set aside the verdict it had entered as to four defendants. It held that, with respect to the four defendants convicted only of RICO charges relating to tax fraud, forfeiture of their salaries, partnership interests and fees earned from those interests would violate the eighth amendment.²⁸

In reaching this decision, the court specifically applied the rationale of the Ninth Circuit in *United States v. Busher*.²⁹ *Busher* held that the Supreme Court's framework for analysis of disproportionality in criminal penalties, set out in *Solem v. Helm*,³⁰ is to be applied to criminal forfeitures. *Busher* had been tried and convicted of a RICO violation for submitting fictitious subcontractor charges to the Department of Defense. The government sought and obtained a verdict forfeiting all of *Busher's* interest in his companies. As in *Regan*, *Busher's* company had been in operation for several years, and his ill-gotten gains were a minimal factor in the company's economic condition at the time of his conviction.

The Ninth Circuit remanded the forfeiture with instructions to measure it against the factors which the Supreme Court set out in *Solem*: (1) the harshness of the penalty in light of the gravity of the offense, (2) sentences imposed for other offenses in the federal system and

²⁶ *Regan*, 726 F. Supp. at 459. Other defendants faced equally dramatic punishments: Rabinowitz could have forfeited \$1.245 million for \$4,291 in illegal tax benefits; Berman, \$1.32 million for \$129,725; and Smotrich, who received no tax benefits from the illegal activity, could have forfeited some \$125,000. *Id.*

²⁷ Under the jury verdict, Regan was to forfeit \$3 million; Rabinowitz, Berkman, and Newberg, \$200,000 each; and Smotrich, \$1,245.85. *Id.* at 450.

²⁸ *Id.*

²⁹ 817 F.2d 1409 (9th Cir. 1987).

³⁰ 463 U.S. 277 (1983). The Court also held that the eighth amendment "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed." *Id.* at 284.

(3) sentences imposed for the same or similar offenses in other jurisdictions.³¹ The court expanded on the first *Solem* factor, and instructed the district court on remand that in measuring the harshness of the penalty against the gravity of the offense, it should consider the circumstances surrounding the criminal conduct. Specifically, the district court was to examine the harm suffered by the victims and the gain to the defendant, the defendant's state of mind and motive and most importantly, the degree to which the enterprise was infected by illegal conduct. The opinion instructs that the district court should be "reluctant to order forfeiture of a defendant's entire interest in an enterprise that is essentially legitimate when he has committed relatively minor RICO violations not central to the conduct of the business and resulting in relatively little illegal gain in proportion to its size and legitimate income."³²

The district court applied these factors in *Regan* and held that the forfeitures the government sought would be "grossly disproportionate" and grossly out of line, in light of the negligible impact of the criminality upon the value of the partnership interests.³³ It was also impressed by the recent pronouncement from the Department of Justice that RICO cases based solely upon tax frauds would require the specific approval of the Tax Division.³⁴ The court considered the new guideline relevant to whether massive forfeitures, disproportionate to the value of the gain or loss, would be unusual, specifically in tax cases.³⁵ If there are to be no more tax cases dressed up as RICO cases, then the government's request that the Princeton/Newport defendants forfeit their interests in the partnership would appear uniquely cruel and therefore violate the eighth amendment.

From the bench, Judge Carter noted specifically that Leona Helmsley was being tried in the same courthouse at about the same time as the Princeton/Newport defendants. Mrs. Helmsley was convicted of tax fraud in which the unpaid taxes were apparently over \$1 million, yet no forfeitures were sought from her.

C. *The Eighth Amendment Analysis*

It appears that the Second Circuit will not review Judge Carter's decision because the defendants and the prosecutors have settled the forfeiture issue. It is unfortunate, in a general sense, that the case will not produce an appellate decision because it squarely presents the issue. Judge Carter noted that the Court of Appeals had observed that in some circumstances forfeitures might be so disproportionate as to violate the eighth amendment,³⁶ but that "[t]he Second Circuit . . . has yet to give

31 817 F.2d at 1415 (citing *Solem v. Helm*, 463 U.S. at 292).

32 *United States v. Busher*, 817 F.2d at 1415-16.

33 *United States v. Regan*, 726 F. Supp. 447, 459 (S.D.N.Y. 1989).

34 *Id.* at 454-55.

35 *Id.* at 457.

36 *Id.* at 457 (citing *United States v. Porcelli*, 865 F.2d 1352, 1364 (2d Cir. 1989)(eighth amendment may limit forfeiture) and *United States v. Huber*, 603 F.2d 387, 397 (2d Cir. 1979)(forfeiture may "threaten disproportionately to reach untainted property")).

shape and contour to Eighth Amendment restrictions applicable to . . . forfeitures."³⁷

The problem with the eighth amendment analysis, and its defect as a predictive principle, is that it has no real shape and contour. It prompts a court to measure the severity of the sanction against the blameworthiness of the conduct, a calculus upon which reasonable people may disagree. The court noted in *Busher* the very reality which troubled Judge Carter: because the eighth amendment "embodies fluid concepts that vary in application with the circumstances of each case," it said apologetically, "there is relatively little guidance we can give the district court."³⁸

That is little comfort to lawyers, judges and defendants dealing with the dramatic impact of RICO forfeitures. For example, it is not immediately apparent that it is cruel to subject white-collar criminals to the loss of their businesses if they engage in illegal conduct. Some might say that is what Congress should have done a long time ago. What, for example, would have been the result if Judge Carter had imposed a \$15 million fine upon the principal defendant? Would that be cruel merely because the gain or loss caused by criminality was dramatically less than the amount of the fine? The *Busher* court specifically observed that RICO forfeitures are indeed to be punitive and are not unconstitutional merely because they exceed the harm to the victim or benefit to the defendant.

On the other hand, the forfeitures sought in *Regan*, *Busher* and *Horak* seem disproportionate. In each case, the defendants received short terms of incarceration.³⁹ And in setting aside forfeitures in *Regan*, in remanding with instructions in *Busher*, and in affirming the district court's decision in *Horak*, the courts expressed an almost identical concern.⁴⁰ The property at issue was neither derived from criminal activity nor was it an instrumentality of crime, and the disparity between the value of the asset and the benefit of the criminal conduct to the defendant was, for want of a better word, enormous. Even though the courts found no limiting principle in the statutory language, they felt compelled to look for one in the eighth amendment. They should not have stopped there.

III. The Solution

What makes the defendants in *Busher*, *Regan* and *Horak* seem to be the victims of cruel and unusual forfeitures is that the properties sought to be forfeited were not tainted. The economic significance of the crimi-

³⁷ 726 F. Supp. at 457.

³⁸ *United States v. Busher*, 817 F.2d 1409, 1415 (9th Cir. 1987).

³⁹ The Princeton/Newport defendants, in *Regan*, were required to serve from three to six months. *United States v. Regan*, No. 88 Cr. 571 [RLC] (order dated Nov. 6, 1989). *Busher* was sentenced to four years on the RICO counts, to run concurrently with two years on tax charges and two years on other charges. *Busher*, 817 F.2d at 1411. The trial court gave *Horak* "a package of sentences which had in it six months in jail." *United States v. Horak*, 833 F.2d 1235, 1252 n.15 (7th Cir. 1987).

⁴⁰ *Regan*, 726 F. Supp. at 457 ("forfeiture raises acute Eighth Amendment concerns"); *Busher*, 817 F.2d at 1415 (counseling that trial court be "reluctant" to order total forfeiture of "essentially legitimate enterprise" for "relatively minor" violations); *Horak*, 833 F.2d at 1251 (court wary that "vast prosecutorial discretion in combination with potentially enormous forfeiture orders might in some circumstances threaten Eighth Amendment rights").

nality to the business was clear, objectively measurable and irrelevant, or nearly so, to the value of the interest. Those courts observed that fact and considered it relevant to the proportionality analysis. They did not apparently consider it an independent basis upon which to conclude that the forfeiture was improper. That the property was untainted should have been not only significant, but conclusive; its relevance was established more than thirteen hundred years ago.

Those forfeitures would have been forfeitures of estate, and as discussed more fully below, are forbidden by our Constitution.⁴¹ Even if the Constitution did not forbid such forfeitures on this independent basis, the fact that our society long ago rejected forfeiture of a defendant's goods and chattels upon his conviction of a crime gives content to the eighth amendment analysis. It establishes that our society views forfeiture as cruel and unusual punishment unless the property is the proceeds of crime or related to criminal activity in some clearly demonstrable way.

Article III, section 3, clause 2 of the Constitution provides: "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." The drafters of that language were writing against a substantial history.⁴² Before the Magna Carta, conviction for felony carried with it forfeiture of all real property to the lord and all personal property to the Crown.⁴³ A traitor forfeited both to the Crown.⁴⁴ By the time the framers of our Constitution assembled in Philadelphia, however, forfeitures for any offense other than treason had been eliminated from English common law.⁴⁵

Thus the framers went further than the English law at the time by prohibiting forfeiture in the case of treason except during the lifetime of the defendant. The explicit rejection of forfeiture upon conviction of treason implies a clear recognition in the mind of the lawyers drafting the document that it was not necessary to prohibit forfeiture as punishment for other offenses.

The Act of April 30, 1790, spelled out the negative implication of the non-forfeiture provision in the Constitution. Section 24 of that Act stated: "*Provided always, and be it enacted*, That no conviction or judgment for any of the offenses aforesaid, shall work corruption of blood, or any forfeiture of estate."⁴⁶ Forfeiture of estate as punishment for crime did

41 *But see* D. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES (1989) (this argument has been "rejected by every court that has considered the issue," citing *Grande, Huber, and L'Hoste*).

42 *See* Taylor, *supra* note 19, at 381-82 (1980). *See also* Note, *Criminal RICO Forfeitures and the Eighth Amendment: Rough Justice is Not Enough*, 14 HASTINGS CONST. L.Q. 451, 456-60 (1987) (tracing forfeiture in American history, and roots in English history).

43 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 68-71 (5th ed. 1942). A felony at English Common law was defined as a crime punished by forfeiture. *Kurtz v. Moffitt*, 115 U.S. 487, 499 (1885).

44 3 W. HOLDSWORTH, *supra* note 43, at 69.

45 *See* Taylor, *supra* note 19, at 381-82 and Note, *supra* note 42.

46 Act of April 30, 1790, ch. 9, § 24, 1 Stat. 112, 117 (1790) (codified at 18 U.S.C. § 3563 (1982)). Although that statute expired on Nov. 1, 1987, *see* Pub. L. 98-473, tit II, § 212(a), 98 Stat. 1987, 2031 (1984), many states have similar statutes or constitutional provisions. *See* Note, *supra* note 42, at 458 n.54.

not reappear in our jurisprudence until Congress enacted it into the penalty provisions of RICO.

Arguments that RICO forfeitures are unconstitutional forfeitures of estate were made in early cases, but were not successful, and regrettably were not renewed. Those cases did not present the disproportionality problem and provided no reason for a court to reflect upon *Regan*-type forfeitures. In *United States v. Huber*,⁴⁷ the court held that, for purposes of punishment, there was no substantial difference between forfeitures in rem and forfeitures in personam. The court noted that statutes providing for forfeitures in rem are common, and therefore not unusual in the eighth amendment sense.⁴⁸ The court also stated that "at least where the provision for forfeiture is keyed to the magnitude of a defendant's criminal enterprise, as it is in RICO, the punishment is at least in some way proportional to the crime."⁴⁹ In *United States v. Thevis*,⁵⁰ the court held that the in personam forfeiture provisions of RICO were not unconstitutional because the forfeiture was not the complete forfeiture of estate prohibited by the Constitution.⁵¹ It held further that, because RICO forfeitures were limited to interests or property rights put to illegal use, they were not excessive, disproportionate or needlessly severe.⁵² In *United States v. Grande*,⁵³ the Fourth Circuit held that RICO forfeitures were not forbidden by the eighth amendment because the Constitution prohibited only "total" forfeiture—that is, "total disinheritance of one's heirs . . . and forfeiture of *all* of one's property and estate."⁵⁴ It observed that RICO does only what in rem statutes had long permitted, forfeiture of the instruments of crime.⁵⁵

Perhaps because the argument met with such disdain in the early cases, it does not appear to have been pursued in *Busher*, *Horak* and *Regan*, or in more recent cases, such as *United States v. Porcelli*⁵⁶ and *United States v. Angiulo*.⁵⁷ The decisions in those cases do not suggest that it was raised.

While the *Busher*, *Horak* and *Regan* courts may not refer to that argument, they are drawing from its essence. Mandatory forfeiture of property not connected to criminal activity offends our long-standing tradition that the state cannot take property from its citizens, except when the property is the product or the means of crime. Economic sanctions based on blameworthiness ought to be within the discretion of the court, as they are in the case of fines. Economic sanctions based only on the fact that the defendant owns an asset are unconstitutional.

47 603 F.2d 387 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980).

48 *Id.* at 396-97.

49 *Id.* at 397.

50 474 F. Supp. 134 (N.D. Ga. 1979), *aff'd*, 665 F.2d 616 (5th Cir.), *cert. denied*, 456 U.S. 1008 (1982).

51 *Thevis*, 474 F. Supp. at 141.

52 *Id.*

53 620 F.2d 1026 (4th Cir.), *cert. denied*, 449 U.S. 830 (1980).

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

55 *Id.*

56 865 F.2d 1352 (2d Cir.), *cert. denied*, 110 S. Ct. 53 (1989).

57 897 F.2d 1169 (1st Cir. 1990).

This does not require the uncertain proportionality analysis described in *Busher* and which the court sought to apply in *Regan*. Instead it provides clear guidance to prosecutor, judge and defendant alike that if the defendant is convicted, he will lose the results of his criminal conduct and the means used to commit it, but not the legitimate product of a life's work. This may be another way of saying that in rem forfeitures which occur in the context of a criminal proceeding ought to be permitted. This is a workable concept, however, and the only one which provides for objective decision-making.