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Letting the Punishment Fit the Crime: Proportional Forfeiture under Criminal RICO's Source of Influence Provision

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Noting the passage of the Racketeer Influenced and Corrupt Organizations Act (RICO),[1] critics assailed the Act as "another dreary episode in the ponderous assault on freedom."[2] The ever expanding breadth[3] and scope[4] of RICO lends considerable support to the critics' admonitions. The current construction of RICO section 1963(a)(2)'s source of influence forfeiture provision[5] is particularly controversial.[6]

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1. RICO was originally passed as Title IX of the Organized Crime Control Act. It was subsequently codified at 18 U.S.C. §§ 1961-1968 (1988).

2. H.R. REP. NO. 1549, 91st Cong., 2d Sess. (dissenting views of Rep. Conyers, Rep. Mikva, and Rep. Ryan), *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 4076.

3. Although RICO originally dealt primarily with organized crime, *see infra* note 36 and accompanying text, the justice department has subsequently used it to prosecute a large number of white collar defendants. Note, *The Eighth Amendment as Applied to RICO Criminal Forfeiture*, 10 W. NEW ENG. L. REV. 393, 398 (1988). One Congressman recently acknowledged that "the RICO statute brought us much more than we bargained for." 135 CONG. REC S14119 (daily ed. Oct. 25, 1989) (statement of Sen. Humphrey); *see also infra* notes 36-38.

4. The Supreme Court recently expanded RICO forfeiture to include profits and proceeds acquired legitimately from RICO tainted funds. Russello v. United States, 464 U.S. 16, 29 (1983). *Russello* construed § 1963(a)(1), which requires forfeiture of any interest acquired or maintained in violation of § 1962, to include profits and proceeds obtained through racketeering activity. *Id.* at 20-21.

5. 18 U.S.C. § 1963(a) (1988). The statute provides:

> (a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned 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 —
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> (1) any interest the person has acquired or maintained in violation of section 1962;
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> (2) any —
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> (A) interest in;
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> (B) security of;
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> (C) claim against; or
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> (D) property or contractual right of any kind affording a source of influence over;
>
> any enterprise which the person has established, oper-

Section 1963(a)(2) divests RICO defendants of interests in the racketeering enterprise[7] and sources of influence over the enterprise[8] — properties owned and used by the RICO defendant to further the interests of the enterprise.[9] According to several circuit courts of appeal, RICO mandates complete surrender of a RICO defendant's sources of influence over the RICO enterprise.[10] Other courts, however, have adopted a rule of proportionality for source of influence forfeiture.[11] Thus, while the Fourth and Seventh Circuits hold that defendants must forfeit their entire interest in the source of influence,[12] the Ninth and Second Circuits require the defendant to forfeit only a percentage of that interest, insisting that forfeiture should be commensurate with the defendant's culpability.[13]

This Note argues that in extending total forfeiture analysis to the source of influence provision, courts not only extend RICO beyond the bounds Congress originally contemplated, but also violate the longstanding legal principle of proportional punishment. Part I of this Note explores the history of criminal forfeiture mechanisms in western legal thought, focuses on RICO's legislative history, and discusses the mechanics of RICO's application. Part II examines conflicting judicial interpretations of RICO forfeiture under section 1963(a). Part III maintains that a proportional forfeiture scheme under section 1963(a)(2)'s source of influence forfeiture requirement better fulfills Congress's original purpose in passing the Act and upholds traditional principles. Part IV then outlines a reasonable model for applying a proportional forfeiture scheme.

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ated, 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.

6. Circuit courts are split over the interpretation of § 1963(a)(2)'s source of influence provision. *See infra* note 75 and accompanying text.

7. 18 U.S.C. § 1963(a)(2)(A) (1988).

8. 18 U.S.C. § 1963(a)(2)(D) (1988).

9. United States v. Ragonese, 607 F. Supp. 649, 652 (S.D. Fla. 1985), *aff'd*, 784 F.2d 403 (1986).

10. *See, e.g.*, United States v. Pryba, 900 F.2d 748, 756-57 (4th Cir.), *cert. denied*, 111 S. Ct. 305 (1990); United States v. Stern, 858 F.2d 1241, 1250 (7th Cir. 1988); United States v. Horak, 833 F.2d 1235, 1243 (7th Cir. 1987).

11. United States v. Angiulo, 897 F.2d 1169, 1211-12 (1st Cir.), *cert. denied*, 111 S. Ct. 130 (1990); United States v. Porcelli, 865 F.2d 1352, 1365 (2d Cir.), *cert. denied*, 110 S. Ct. 53 (1989).

12. *See supra* note 10.

13. *See supra* note 11.

I. SECTION 1963: BACKGROUND AND SCOPE

A. HISTORY OF CRIMINAL FORFEITURE

Criminal forfeiture has deep roots in legal thought.[14] English common law required a convicted felon to forfeit all personal property to the Crown.[15] Additionally, felons were stripped of all rights of station,[16] in effect punishing the felon's issue by depriving them of birth rights.[17] The rationale for such treatment was that feudal English society considered an individual convicted of criminal acts to be in society's debt.[18] Legal theorists regarded forfeiture merely as a method of collecting this debt and of compensating the Crown for injuries inflicted upon society.[19]

The architects of American legal history did not view forfeiture favorably. United States lawmakers have been particularly skeptical of in personam forfeiture, a penal measure that requires a defendant to surrender personal property as a penalty for conviction of a criminal offense. This skepticism is reflected in article III of the Constitution, which proscribes "Corruption of Blood," an English penalty that divested convicted felons of all property and rights of station.[20] Again reflecting distaste for in personam forfeiture, the First Congress outlawed both criminal forfeiture and corruption of blood in 1790.[21] Congress did not pass an in personam forfeiture statute until 1970, when section 1963 was enacted.[22]

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14. 116 CONG. REC. 591-92 (1970) (comment of Sen. McClellan); *see also* Note, *The Forfeiture of Profits Under the Racketeer Influenced and Corrupt Organizations Act: Enabling Courts to Realize RICO's Potential*, 33 AM. U.L. REV. 747, 751-60 (1984) (a more complete account of the history of criminal forfeiture in rem and in personam).

15. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 682 (1974); E. JENKS, A SHORT HISTORY OF ENGLISH LAW 41 (1913).

16. 3 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 67-73 (4th ed. 1927); 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 464-66 (2d ed. 1959).

17. Because inheritance rights were of utmost importance in a feudal society, punitive forfeiture had the drastic effect of punishing a felon's family for generations to come. *See generally* 2 W. BLACKSTONE, COMMENTARIES *253.

18. 1 W. BLACKSTONE, COMMENTARIES *299.

19. *Id.*

20. U.S. CONST. art. III, § 3, cl. 2.

21. H.R. REP. NO. 1459, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 4083.

22. United States v. Grammatikos, 633 F.2d 1013, 1024 (2d Cir. 1980).

B. THE IMPORTANCE OF PROPORTIONALITY IN AMERICAN LEGAL HISTORY

Since the adoption of the Magna Carta, the English legal system has guaranteed that criminal sanctions be proportionate to the severity of the crime committed.[23] The American legal system incorporated the traditional notion of proportionality into the eighth amendment to the Constitution.[24] American courts have consistently emphasized that the eighth amendment serves as a vehicle for the protection of proportional punishment.[25]

Similarly, the rule of lenity ensures that a criminal's punishment reflects her guilty conduct. According to this rule, criminal statutes must be construed strictly in cases of ambiguity in the statute, and any dispute must be resolved in favor of lenience in punishment.[26] In *Russello v. United States*, the Supreme Court refused to apply the rule of lenity to a RICO forfeiture order, holding that profits of racketeering activity were clearly forfeitable under the unambiguous language of section 1963(a)(1), which requires forfeiture of interests "acquired or maintained" in violation of RICO's substantive provisions.[27] Nonetheless, the Court did suggest that the rule of lenity would apply to RICO forfeiture cases in which the statutory language is unclear.[28]

C. PURPOSE OF THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT

The primary objective of RICO is to provide prosecutors with a powerful weapon to combat organized crime.[29] When Congress enacted RICO, legislative concern about the effect of

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23. Note, *Criminal RICO Forfeitures and the Eighth Amendment: "Rough" Justice is not Enough*, 14 HASTINGS CONST. L.Q. 451, 468 (1987). The concept of proportionality was later featured in the English Bill of Rights. *Id.*

24. U.S. CONST. amend. VIII. The eighth amendment's prohibition of cruel and unusual punishment embodies the notion that punishment should be proportionate to culpability. "When the Framers of the Eighth amendment adopted the language of the English Bill of Rights, they also adopted the English principle of proportionality." Solem v. Helm, 463 U.S. 277, 285-86 (1983).

25. *See, e.g., id.*; Ingraham v. Wright, 430 U.S. 651, 666-67 (1977); Robinson v. California, 370 U.S. 660, 667 (1962); Weems v. United States, 217 U.S. 349, 376-77 (1910).

26. W. ESKRIDGE & P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 658 (1988).

27. Russello v. United States, 464 U.S. 16, 29 (1983).

28. *Id.*

29. STATEMENT OF FINDINGS AND PURPOSE, ORGANIZED CRIME CONTROL

organized crime, and racketeering enterprises in particular, was running high.[30] Congress justified RICO's tough new enforcement provisions[31] on the basis of organized crime's adverse effect on both America's society and economy.[32] To combat the adverse effects of organized crime, RICO provided new criminal categories,[33] investigatory processes,[34] and punitive measures.[35]

For its first ten years, RICO functioned as originally designed, and prosecutors used the Act primarily against destructive mob activity.[36] More recently, however, governmental charges brought under RICO have expanded in both breadth and scope.[37] While prosecutors once used RICO mainly as a weapon against organized crime, they now focus largely on white collar crime.[38]

ACT OF 1970, *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 1073 [hereinafter STATEMENT OF FINDINGS AND PURPOSE].

30. 116 CONG. REC. 591 (1970) (statement of Sen. McClellan).

31. *See supra* notes 21-22 and accompanying text. Section 1963 provides for incarceration, fines and forfeiture not previously contemplated. 18 U.S.C. § 1963 (1988).

32. STATEMENT OF FINDINGS AND PURPOSE, *supra* note 29, at 1073. Congress found that "organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens." *Id.*

33. 18 U.S.C. § 1962 makes it unlawful to invest proceeds derived from a pattern of racketeering activity or to maintain control of an enterprise through racketeering activity. 18 U.S.C. § 1962 (1988).

34. 18 U.S.C. § 1968 (1988).

35. 18 U.S.C. § 1963 provides both additional fines and jail time for convicted racketeers. The most important new criminal penalty, however, is the reinstitution of in personam forfeiture in § 1963(a). 18 U.S.C. § 1963(a) (1988).

36. Prosecutorial use of RICO was quite limited until 1980. Between 1970 and 1980, criminal RICO was used sparingly. 136 CONG. REC. E2086 (daily ed. June 21, 1990) (statement of Rep. Hughes).

37. RICO has been used recently against a wide variety of crimes not originally emphasized by the drafters of the statute. *See infra* note 38 and accompanying text. The statute has also experienced an expansion in the extent of criminal forfeiture penalties. *See supra* note 4.

38. Chi. Tribune, Aug. 3, 1989, at A23, col. 1. Some critics insist: "It seems it's impossible [for the courts] to draw any boundaries for RICO. As one judge put it . . ., 'It's the monster that ate jurisprudence.' " Newsday, July 6, 1990, at 17, col. 1 (quoting American Civil Liberties Union national legislative counsel Antonio Califa). Many RICO cases in the last decade have dealt with mail and securities fraud committed by white collar criminals with no demonstrable mob ties. *See, e.g.*, United States v. Porcelli, 865 F.2d 1352 (2d Cir.) (mail fraud), *cert. denied*, 110 S. Ct. 53 (1989); United States v. Horak, 833 F.2d 1235 (7th Cir. 1987) (mail fraud); United States v. Stern, 858 F.2d 1241, 1242 (7th Cir. 1988) (tax fraud). Some commentators, noting the shift of emphasis in

D. PURPOSE OF RICO'S FORFEITURE MECHANISMS

RICO sponsors spurred support for the Act by noting increasing concern about the effects of racketeering activity on legitimate business.[39] Racketeering corruption of American business was widespread[40] and was viewed by Congress as a clear danger to the economic health of the nation.[41] Consequently, lawmakers enacted RICO's forfeiture provision both to remedy this problem[42] and to satisfy their desire for retributive justice by separating criminals from the fruits of their illicit labor.[43] Congress designed RICO, at least in part, to remove racketeering profits from legitimate businesses, profits that mob figures placed in those businesses to generate additional profits and to conceal their tainted nature.[44]

Thus, Congress sought to punish the criminal offender by adding penal provisions intended to separate racketeers from their ill-gotten gains.[45] Congressional leaders believed the new penalties would have a greater deterrent effect than previous enforcement mechanisms.[46] In addition, by turning over investments tainted by criminal activity to government control, RICO would theoretically make it more difficult for racketeers to continue to reap the rewards of their crimes after conviction.[47]

RICO prosecution, have embraced the use of RICO as a weapon against white collar crime. Chi. Tribune, Aug. 23, 1989, at A23, col. 1.

39. 116 CONG. REC. 591 (1970) (statement of Sen. McClellan).

40. *Id.*

41. *See supra* note 32.

42. 116 CONG. REC. 591 (1970) (statement of Sen. McClellan); *see also* STATEMENT OF FINDINGS AND PURPOSE, *supra* note 29, at 1073 ("[i]t is the purpose of this Act to seek the eradication of organized crime in the United States by . . . providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime").

43. 116 CONG. REC. 591 (1970) (statement of Sen. McClellan).

44. *Id.*

45. *Id.* at 592.

46. Senator McClellan argued: "[e]xperience has shown that it is insufficient to merely remove and imprison individual mob members. [RICO] attacks the problem by providing a means of wholesale removal of organized crime from our organizations, prevention of their return and, where possible, forfeiture of their ill-gotten gains." *Id.*; *see also* STATEMENT OF FINDINGS AND PURPOSE, *supra* note 29, at 1073 ("sanctions and remedies available to the Government are unnecessarily limited in scope and impact").

47. Congress recognized that the mob was difficult to break through random prosecutions, in part because of the ability of leaders to turn over control of the enterprise to friends or family members during the time they were in prison. *Hearings on S. 30 Before Subcomm. No. Five of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 107 (1970) (statement of Sen. McClellan).

E. MECHANICS AND SCOPE OF FORFEITURE UNDER RICO SECTION 1963

The unique in personam forfeiture provisions of RICO provide some of the most potent weapons against organized crime in the prosecutorial arsenal. When convicted of underlying predicate offenses,[48] and of the RICO violation itself,[49] a criminal defendant forfeits certain interests in property to the United States. A defendant must surrender any interest acquired or maintained in violation of the RICO statute under section 1963(a)(1), any interest in the enterprise under subsection 1963(a)(2)(A), and any source of influence over the RICO enterprise under subsection 1963(a)(2)(D).[50] Each of these independent mechanisms for confiscation of "guilty" property operates in a slightly different manner.[51]

1. Forfeiture of Interests Illegally Acquired or Maintained

Section 1963(a)(1) confiscates any interest that a RICO defendant has acquired or maintained in violation of the substantive provisions of the Act.[52] This section divests racketeers of illegally obtained property[53] and profits[54] accrued through illegal activities.[55]

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48. RICO itself adds no new legal prohibitions of conduct. It acts merely to provide additional federal penalties for repeated violations of already existing criminal statutes through an enterprise. "Violation of section 1962 [RICO's substantive provision] can result from the commission of two predicate acts of racketeering within a ten year period." United States v. Busher, 817 F.2d 1409, 1413 n.6 (9th Cir. 1987).

49. The Eleventh Circuit articulated the elements of a RICO violation in *United States v. Zielie*. "[T]here must be (1) an enterprise which affects interstate or foreign commerce, (2) a defendant associated with the enterprise, (3) who participated in the conduct of the enterprise's affairs (4) through a pattern of racketeering activity." 734 F.2d 1447, 1458 (11th Cir. 1984), *cert. denied*, 469 U.S. 1169 (1985).

50. 18 U.S.C. § 1963(a) (1988); *see supra* note 5.

51. United States v. Horak, 833 F.2d 1235, 1243 (7th Cir. 1987). The court in *Horak* argues that § (a)(1) operates on the racketeering activity whereas § (a)(2) operates on the enterprise. *Id.* In fact, only one subsection of (a)(2) focuses on the enterprise. Being external to the enterprise itself, the source of influence forfeiture provision in § (a)(2) also deals with racketeering activity. *See infra* notes 167-68 and accompanying text.

52. 18 U.S.C. § 1963(a)(1) (1988).

53. *See infra* note 55.

54. *Russello* held that § 1963(a)(1) allowed confiscation of profits accrued from fraudulent receipt of insurance proceeds in an arson conspiracy. Russello v. United States, 464 U.S. 16, 22 (1983).

55. *See* United States v. Feldman, 853 F.2d 648, 660 (9th Cir. 1988) (seizure of cash obtained through insurance fraud), *cert. denied*, 489 U.S. 1030 (1989); United States v. Kravitz, 738 F.2d 102, 103 (3d Cir. 1984) (forfeiture of owner-

Under the "acquired or maintained" provision, the government may seize only property directly related to the racketeering activity.[56] Because the statutory language focuses on interests obtained or maintained through illegal contact, interests outside the RICO enterprise itself,[57] the government can seize only interests in a defendant's property that have a nexus to the illegal conduct.[58] Consequently, every court to directly consider the issue has held that forfeiture under the "acquired or maintained" provision is proportional to the racketeering influence over the property.[59]

2. Forfeiture of Interests in the Enterprise

RICO subsection 1963(a)(2)(A) allows the government to confiscate any property interest in the RICO enterprise itself.[60] Section 1963(a)(2), in general, independently provides for confiscation of interests in property somehow related to the RICO enterprise.[61] Courts and commentators have struggled to pro-

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ship of a health care corporation maintained through illegal kickbacks from the Fraternal Order of Police), *cert. denied*, 470 U.S. 1052 (1985).

56. United States v. Horak, 833 F.2d 1235, 1243 (7th Cir. 1987) (in requiring forfeiture of acquisitions, § 1963(a)(1) "focuses on the *racketeering activity*") (emphasis in original). The distinction between the racketeering activity and the racketeering enterprise is the primary operational difference between § 1963(a)(1) and § 1963(a)(2). *Id.*

57. The *Angiulo* court drew a sharp distinction between interests in property that were part of the racketeering enterprise and those that were external to the enterprise itself. United States v. Angiulo, 897 F.2d 1169, 1211 (1st Cir.), *cert. denied*, 111 S. Ct. 130 (1990). Because § 1963(a)(1) interests are created by the enterprise, rather than part of the enterprise, they are classified as outside interests. *Id.* "Such outside interests include proceeds or profits forfeitable under 1963(a)(1) . . . ." *Id.*

58. *See, e.g., id.* at 1211-12; United States v. Porcelli, 865 F.2d 1352, 1365 (2d Cir.), *cert. denied*, 110 S. Ct. 53 (1989); *Horak*, 833 F.2d at 1243; *see also* Russello v. United States, 464 U.S. 16, 24 (1983) (although the Supreme Court does not address proportionality explicitly, it identifies § 1963(a)(2) as being distinct from § 1963(a)(1) because it forfeits property that might have been legitimately acquired, thus implying § 1963(a)(1) forfeiture would apply only to tainted property).

59. In an effort to ensure that punishment is proportional to culpability, one court has required that RICO activity be the cause in fact of the defendant's interest in the property. *Horak*, 833 F.2d at 1243. Another court instructed the jury to determine the percentage of the property acquired or maintained through racketeering activity. *Angiulo*, 897 F.2d at 1211; *see also Porcelli*, 865 F.2d 1365 (properties purchased in part with racketeering funds and in part with legitimate funds forfeitable only "to the extent of the contribution from the offending companies, . . . not necessarily in their entirety").

60. 18 U.S.C. § 1963(a)(2)(A) (1988); *see supra* note 5.

61. *Id.* Several different types of a racketeer's interest are forfeitable pursuant to § 1963(a)(2). *See supra* note 50 and accompanying text. The most

duce an operable definition of the RICO enterprise.[62] The conflict concerning the definition of an enterprise is beyond the scope of this Note, which assumes that the different types of forfeitable interests can be adequately categorized under the existing wording of section 1963.

Unlike forfeiture of interests illegally acquired or maintained, the "in the enterprise" subsection provides that interests in the enterprise are forfeitable in their entirety.[63] Consequently, the government can seize even legitimately acquired and maintained interests in corporations forming the RICO enterprise.[64] For example, prosecutors can obtain a judicial forfeiture order on a defendant's entire interest in a company used for racketeering purposes even if the company engages in legitimate business most of the time.[65]

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broad reaching forfeiture provision in the entire statute reaches any interest a defendant holds in the enterprise itself. 18 U.S.C. § 1963(a)(2)(A) (1988).

62. *See generally* Note, *Functions of the RICO Enterprise Concept*, 64 NOTRE DAME L. REV. 646, 647 (1989) (reviewing statutory definition and explaining function of enterprise concept); Comment, *The RICO Enterprise as Distinct from the Pattern of Racketeering Activity: Clarifying the Minority View*, 62 TUL. L. REV. 1419 (1988) (describing different interpretations of enterprise and clarifying minority interpretation). Generally, an enterprise is an ongoing, continuing organization with a nexus to racketeering activity. United States v. Turkette, 452 U.S. 576, 583 (1980) (the enterprise is distinct from the pattern of racketeering and evidence of the pattern does not necessarily demonstrate the existence of an enterprise); United States v. Cauble, 706 F.2d 1322, 1331-33 (5th Cir. 1983) (articulation of the nexus requirement), *cert. denied*, 465 U.S. 1005 (1984).

The enterprise itself can serve one of four roles in the racketeering activity. To establish a RICO violation, the enterprise must function as the perpetrator, the victim, the prize or the instrument of the racketeering activity. Note, *supra*, at 674-76.

The RICO statute provides that the ongoing enterprise concept includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (1988). In confiscating interests in the RICO enterprise, the government is obviously primarily concerned with interests in corporations or associations. *See* United States v. Horak, 833 F.2d 1235, 1245 (7th Cir. 1987) (defendant's stock in corporation forfeitable under § 1963(a)(2)'s "in the enterprise" provision).

63. The statute's language does not indicate that courts should consider a defendant's culpability when applying subsection 1963(a)(2)(A) to seize interests in the enterprise. Section 1963 forfeits "any . . . interest in . . . any enterprise" in violation of the RICO's substantive provisions. 18 U.S.C. § 1963(a)(2) (1988).

64. The Supreme Court noted in dicta that "Subsection (a)(2) . . . is restricted to an interest in an enterprise, but that interest itself need not have been illegally acquired." Russello v. United States, 464 U.S. 16, 24 (1983).

65. Courts have uniformly held that this section requires forfeiture of the entire RICO enterprise, without regard for the proportion of racketeering

3. Forfeiture of Interests in a Source of Influence Over the RICO Enterprise

Subsection 1963(a)(2)(D) allows the government to seize any interest in property affording the defendant a source of influence over the RICO enterprise.[66] Courts have labored over the precise definition of the term "source of influence,"[67] in part because few courts have considered the issue.[68] Courts have defined "source of influence" as "[p]roperties that are owned by a RICO defendant and used by him to further the affairs of a RICO enterprise."[69] Because a source of influence is, by definition, outside of the enterprise,[70] it operates as an external stimulus for the racketeering activity.[71]

Federal courts of appeal are split,[72] and in some cases quite

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taint. *See, e.g., id.*; United States v. Angiulo, 897 F.2d 1169, 1211 (1st Cir.), *cert. denied*, 111 S. Ct. 130 (1990); *Horak*, 833 F.2d at 1251; United States v. Busher, 817 F.2d 1409, 1413 (9th Cir. 1987); United States v. Anderson, 782 F.2d 908, 918 (11th Cir. 1986); *Cauble*, 706 F.2d at 1349; United States v. Walsh, 700 F.2d 846, 857 (2d Cir.), *cert. denied*, 464 U.S. 825 (1983). There exists, arguably, a constitutional limit on the extent of forfeiture under subsection 1963(a)(2)(A). Some courts have set forfeiture aside on the basis that its scope is grossly disproportionate to the offence charged and therefore violative of eighth amendment proscriptions on cruel and unusual punishment. *See, e.g., Busher*, 817 F.2d at 1415; *see also infra* note 99 and accompanying text.

66. 18 U.S.C. § 1963(a)(2)(D) (1988).

67. United States v. Ragonese, 607 F. Supp. 649, 652 (S.D. Fla. 1985), *aff'd*, 784 F.2d 403 (1986).

68. "[T]here is a dearth of law on the question of what constitutes a 'source of influence.' . . . The 'source of influence' portion of the statute has not . . . been the topic of . . . in depth analysis by the appellate courts." *Id.*

69. United States v. Zielie, 734 F.2d 1447, 1459 (11th Cir. 1984), *cert. denied*, 469 U.S. 1169 (1985); *Ragonese*, 607 F. Supp. at 652 (quoting *Zielie*, 734 F.2d at 1459).

70. United States v. Angiulo, 897 F.2d 1169, 1211 (1st Cir.), *cert. denied*, 111 S. Ct. 130 (1990).

71. *Id.*; *see also Ragonese*, 607 F. Supp. at 652 (forfeiting an airplane used to further drug transactions); United States v. Stern, 858 F.2d 1241, 1250 (7th Cir. 1988) (allowing confiscation of an entire condominium used as a telephone call transfer location in a prostitution business); United States v. McKeithen, 822 F.2d 310, 315 (2d Cir. 1987) (forfeiting three apartment buildings under a statute analogous to RICO); *Zielie*, 734 F.2d at 1458-59 (upholding forfeiture of two parcels of property used as stash houses).

72. *Compare Angiulo*, 897 F.2d at 1211 (proportionality instructions to jury are required for source of influence forfeiture verdicts); United States v. Porcelli, 865 F.2d 1352, 1365 (2d Cir.) (applying *McKeithen*'s proportionality rule to RICO source of influence forfeiture), *cert. denied*, 110 S. Ct. 53 (1989) *and McKeithen*, 822 F.2d at 315 (sources of influence only forfeitable to the extent that they were tainted by RICO activity) *with* United States v. Pryba, 900 F.2d 748, 757 (4th Cir.) (refusal to grant proportionality review for sentences less than life imprisonment), *cert. denied*, 111 S. Ct. 305 (1990) *and Stern*, 858 F.2d at 1250 (source of influence forfeit order can only be reduced where it is

confused,[73] about how to apply the "source of influence" provision. Some courts refuse to acknowledge the distinction between subsection 1963(a)(2)(A) and subsection 1963(a)(2)(D).[74] Courts have differed about whether to allow the government to seize property under the "source of influence" clause on a proportional basis, similar to the "acquired or maintained" provision, or in its entirety, similar to the current construction of section 1963(a)(2)'s "in the enterprise" provision.[75]

F. APPLICATION OF CONCEPTUAL JUDICIAL ANALYSIS

To illustrate how the RICO forfeiture provisions operate, imagine that Meg, a producer and dealer of LSD, is indicted on a RICO charge. Meg was the sole owner of Good Trips Pharmaceuticals, Inc., a company that produced LSD for commercial sale, and the Front Sales Company, a business that distributed the drug and laundered incoming proceeds. Meg was also the sole owner of an expensive antique velvet Elvis portrait [hereinafter Velvis]. Business records indicate that Meg purchased the Velvis in part with drug sale revenues (fifty percent) and in part with her salary received as an aide to the William Bennett for Congress campaign (fifty percent). Meg's only other property interest was a mansion, purchased with legitimate income in 1970, and used as a legitimate dwelling place ever since, except for a two-year period in which Meg rented one brightly colored, well-padded room to her drug customers to provide a clean, entertaining environment in which to enjoy their hallucinations.

In the indictment, the prosecution requests that Meg for-

"grossly disproportionate" to racketeering activity) *and* United States v. Horak, 833 F.2d 1235, 1245, 1251 (7th Cir. 1987) (court says in dicta that source of influence forfeiture can extend to the highest level the eighth amendment allows).

73. *See infra* note 105 and accompanying text (discussing the *Pryba* court's misanalysis of the proportionality issue).

74. *See Horak*, 833 F.2d at 1243-51.

75. The court in *United States v. Ofchinick* identified a circuit split between the *Horak* and *Porcelli* courts over whether forfeiture under § 1963(a)(2) should be total or proportional. 883 F.2d 1172, 1179 n.4 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 753 (1990). *Horak* and *Porcelli* both hold that interests in the enterprise must always be forfeitable under § 1963(a)(2) in their entirety. *Porcelli*, however, takes the additional step of holding that forfeiture of sources of influence (a second type of property forfeitable under § 1963(a)(2)) are outside the enterprise and thus should be forfeited proportionally. 865 F.2d at 1365. The *Porcelli* court's analysis is also inconsistent with the holdings in *Stern* and *Pryba*. *See supra* note 72.

feit her property interests to the United States.[76] The government asks the court to divest Meg of her interest in the two companies, because it is part of the RICO enterprise;[77] the Velvis, because proceeds of the racketeering activity are forfeitable;[78] and the mansion, because a source of influence over the enterprise is forfeitable.[79]

As the preceding analysis suggests, federal courts would uniformly order Meg to forfeit her interest in the enterprise companies in the entirety, regardless of any legitimate business that they may have conducted.[80] Courts also agree that Meg must forfeit value equal to fifty percent of the Velvis's worth.[81] The circuit courts are split, however, as to whether Meg must forfeit the source of influence — the mansion — in its entirety, or in proportion to the extent of its illegal use.[82] The following section sets forth the different approaches courts have taken to resolve this issue.

II. JUDICIAL CONSTRUCTION OF THE "SOURCE OF INFLUENCE" PROVISION

A. TOTAL FORFEITURE UNDER THE SOURCE OF INFLUENCE PROVISION

Several courts, relying on differing legal theories, have mandated that defendants surrender interests in sources of influence in their entirety, regardless of legitimate uses of the property.[83] The Seventh Circuit argued that because section 1963(a)(2) interests relate to the enterprise, they are forfeitable in their entirety.[84] Reaching a similar result, the Fourth Cir-

76. The government has some latitude in choosing the provision under which to bring the forfeiture request. *See* Note, *supra* note 62, at 697.

77. 18 U.S.C. § 1963(a)(2)(A) (1988); *cf. Porcelli*, 865 F.2d at 1364 (30 corporations forfeited as interests in Porcelli's RICO enterprise).

78. 18 U.S.C. § 1963(a)(1) (1988); *cf.* Russello v. United States, 464 U.S. 16, 22 (1983) (proceeds of insurance fraud forfeit under § 1963(a)(1)).

79. 18 U.S.C. § 1963(a)(2)(D) (1988); *cf.* United States v. McKeithen, 822 F.2d 310, 312, 315 (2d Cir. 1987) (dwelling unit used in enterprise forfeit under source of influence clause of analogous statute).

80. *See supra* notes 60-65 and accompanying text.

81. *See supra* notes 52-59 and accompanying text.

82. *See supra* notes 66-75 and accompanying text.

83. *See* United States v. Pryba, 900 F.2d 748, 757 (4th Cir.), *cert. denied*, 111 S. Ct. 305 (1990); United States v. Stern, 858 F.2d 1241, 1250 (7th Cir. 1988); United States v. Horak, 833 F.2d 1235, 1251 (7th Cir. 1987); *see supra* discussion at note 72; *see also* Russello v. United States, 464 U.S. 16, 24 (1983) (holding that the government can seize § 1963(a)(2) interests without regard for whether they have been legitimately acquired).

84. *Stern*, 858 F.2d at 1250; *Horak*, 833 F.2d at 1243, 1251.

cuit refused to apply proportionality review on archaic eighth amendment grounds.[85]

1. *United States v. Horak*: The Roots of Total Forfeiture Under RICO's "Source of Influence" Provision

Horak was convicted of mail fraud[86] and conducting affairs of an enterprise through a pattern of racketeering activity.[87] The trial court held that Horak did not have to forfeit his interest in Waste Management, Inc., the corporation that bought his corrupt enterprise.[88]

The Seventh Circuit refused to grant a writ of mandamus to allow the government to reach Horak's interest in the stock.[89] Nonetheless, the court said that any section 1963(a)(2) interest, presumably including sources of influence, should be forfeitable in its entirety.[90] The *Horak* court confined its section 1963(a)(2) reasoning to interests within the RICO enterprise itself and therefore concluded that interests in the

85. *Pryba*, 900 F.2d at 756-57 (the court, following the Supreme Court decision in Solem v. Helm, 463 U.S. 277 (1983), held that proportionality review is not required for any sentence carrying less than life imprisonment).

86. The government frequently uses white collar crimes, such as mail fraud, as the predicate offenses for RICO indictments. *See supra* note 38 and accompanying text.

87. 833 F.2d at 1237. Horak, the owner of H.O.D. Disposal Service, a garbage removal company, sold his company to Waste Management, Inc. (Waste) in 1972. Following the sale, Horak retained stock in Waste. In 1981, Horak bribed Fox Lake, Wisconsin officials in an effort to receive the city's waste management contract. *Id.* at 1237.

88. *Id.* at 1247. The court considered this interest in the Waste stock to be a source of influence, although it is difficult to ascertain the precise reason for this holding. The Seventh Circuit, in fact, seems to treat the property as an interest in the enterprise itself. *Id.* at 1251. Moreover, Waste was listed in the government's complaint as a part of the enterprise itself. United States v. Horak, 633 F. Supp. 190, 192 (N.D. Ill. 1986), *aff'd in part, vacated and remanded in part*, 833 F.2d 1235 (7th Cir. 1987).

89. 833 F.2d at 1237. The court reasoned that the district court's decision was probably incorrect, but not indisputably improper, and therefore did not necessitate a writ of mandamus. *Id.* at 1249-51. *Horak*'s analysis of § 1963(a)(2) is dictum because the court only needed to discuss the writ of mandamus on the issue.

90. *Id.* at 1251. Although the government's request for attachment of Horak's interest in the stock was predicated on source of influence grounds, the *Horak* court's analysis of total forfeiture does not focus on the source of influence provision. Rather, the dicta is couched in general reference to the entire § 1963(a)(2) provision. *Id.* Moreover, *Horak* justifies total forfeiture under § (a)(2) because the stock is an interest "*in* the enterprise." *Id.* (emphasis added).

enterprise are subject to total divestment.[91] Yet, because the court did not distinguish the "source of influence" subsection from the "in the enterprise" subsection,[92] *Horak* set a precedent for total forfeiture under the "source of influence" requirement.[93]

2. *United States v. Stern*: Extending the *Horak* Analysis

In *United States v. Stern*, the Seventh Circuit implicitly extended total forfeiture to the "source of influence" subsection.[94] Stern was convicted for violating RICO following his participation in a prostitute escort service.[95] As part of his sentence, Panno, Stern's partner in crime, was ordered to forfeit a condominium that provided a source of influence over his RICO enterprise.[96]

Relying on the *Horak* analysis,[97] *Stern* required total forfeiture of Panno's interest in the condominium.[98] The *Stern* court offered only eighth amendment protection for governmental confiscation of sources of influence,[99] holding that a for-

91. *Horak*, 833 F.2d at 1251. This conclusion was in line with the weight of judicial opinion. *See supra* notes 60-65 and accompanying text.

92. All of the courts to construe the source of influence provision proportionally have distinguished subsection 1963(a)(2)(A) (covering interests in the enterprise) from subsection 1963(a)(2)(D) (the source of influence provision). *See supra* note 75 and accompanying text. *Horak* ignores the distinction entirely.

93. *Horak* read § 1963(a)(2) as a whole, and held that the stock was forfeitable in its entirety. Other courts have construed this reasoning as applying to the "source of influence" provision. *See* United States v. Stern, 858 F.2d 1241, 1250 (7th Cir. 1988).

94. 858 F.2d at 1250.

95. *Id.* at 1242.

96. The condominium's telephone and mailbox were used to further the escort service's activities. The court found that the telephone and mail drop were, in fact, instrumental to the prostitution operation. Moreover, the defendants never used the condominium for any legitimate purpose. *Id.* at 1250.

97. The *Horak* court did not expressly apply its analysis to source of influence forfeiture, but concentrated on § 1963(a)(2) as a single forfeiture mechanism. *See supra* note 93.

98. *Stern*, 858 F.2d at 1250.

99. Challenges to RICO's intrinsic constitutionality have been brought, and rejected, on eighth amendment grounds. *See, e.g.*, United States v. Grande, 620 F.2d 1026, 1037-39 (4th Cir.), *cert. denied sub nom.* Castagna v. United States, 449 U.S. 830 (1980); United States v. Huber, 603 F.2d 387, 397 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980). Despite rejecting arguments that RICO, by its very nature, violates the eighth amendment, some courts have held that the Constitution can require that a forfeit order be set aside where it is grossly disproportionate to the offense charged. *See, e.g.*, United States v. Feldman, 853 F.2d 648, 663 (9th Cir. 1988), *cert. denied*, 489 U.S. 1030 (1989); *Horak*, 833 F.2d at 1251. *But see* United States v. Kravitz, 738 F.2d 102, 106 (3d

feiture order must be "grossly disproportionate" to trigger relaxation of the order.[100]

3. *United States v. Pryba*: Departing from the Beaten Path

Barbara Pryba and her husband, Dennis, were convicted on several counts of sale of obscene material, the predicate offenses for one RICO violation.[101] Following their conviction, the court ordered them to forfeit interests in book stores that afforded them a source of influence over the RICO enterprise.[102]

The trial court ordered the Prybas to forfeit a business which made two million dollars in one year, as a result of the sale of $105.30 in obscene material.[103] Nonetheless, the Fourth Circuit denied the Prybas proportionality review. The court noted that the eighth amendment did not require setting aside disproportionate sentences less severe than life imprisonment, and consequently denied proportionality review.[104] The court completely ignored precedent that provided statutory limits on section 1963, focusing instead on eighth amendment issues.[105]

B. PROPORTIONAL FORFEITURE OF SOURCES OF INFLUENCE

Beginning in 1987, several circuit courts held that the government should confiscate sources of influence on a proportional basis.[106] These courts justified their holdings on textual

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Cir. 1984) (refusing to decide whether a forfeit order could be disproportionate enough to implicate eighth amendment concerns), *cert. denied*, 470 U.S. 1052 (1985). United States v. Busher is the only case to actually set aside a forfeit order on eighth amendment grounds. 817 F.2d 1409, 1415 (9th Cir. 1987).

100. *Stern*, 858 F.2d at 1250.

101. United States v. Pryba, 900 F.2d 748, 750 (4th Cir.), *cert. denied*, 111 S. Ct. 305 (1990).

102. The defendants' book stores were confiscated pursuant to § 1963(a)(1). *Id.* at 752. Clearly, however, the forfeiture of the interests, as sources of influence, should have been conducted under § 1963(a)(2). 18 U.S.C. § 1963(a)(2)(D) (1988).

103. 900 F.2d at 753.

104. *Id.* at 757.

105. The court does not even consider *Angiulo*, *Porcelli*, *Horak*, or *McKeithen*, the leading decisions on proportionality in RICO forfeiture. Even a cursory examination of relevant case law would have revealed that source of influence forfeiture should not be conducted under § 1963(a)(1). *Id.*

106. *See, e.g.*, United States v. Angiulo, 897 F.2d 1169, 1212 (1st Cir.), *cert. denied*, 111 S. Ct. 130 (1990); United States v. Porcelli, 865 F.2d 1352, 1365 (2d Cir.), *cert. denied*, 110 S. Ct. 53 (1989); United States v. McKeithen, 822 F.2d 310, 315 (2d Cir. 1987) (proportional forfeiture required in statutory provision analogous to RICO).

considerations[107] and functional arguments.[108]

1. *United States v. Porcelli*: Applying the Rule of Proportionality

In *United States v. Porcelli*, the district court convicted Porcelli on sixty-one counts of mail fraud and one RICO violation.[109] As a result of his conviction, the court required Porcelli to forfeit interests acquired and maintained in violation of RICO, his illicit enterprise, and sources of influence over that enterprise.[110]

The *Porcelli* court upheld forfeiture of thirty companies in Porcelli's enterprise, but remanded the forfeiture of four others to the district court for proportionality review.[111] In so doing, *Porcelli* applied the rule in *United States v. McKeithen*,[112] a decision under a statute analogous to RICO.[113] *McKeithen*'s rule requires a jury to determine what portion of the defendant's interest afforded him a source of influence over the racketeering enterprise.[114] Consequently, the government may seize only value commensurate with the percentage of the interest that the defendant used as a source of influence.[115] In *McKeithen*, for example, the jury found that only forty-three percent of the defendant's interest in one parcel of property was used as a source of influence.[116] Thus, the defendant was required to sur-

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107. *Angiulo*, 897 F.2d at 1212.

108. *McKeithen*, 822 F.2d at 315.

109. Porcelli was involved in an extensive sales tax fraud scheme. *Porcelli*, 865 F.2d at 1355.

110. Porcelli was required to surrender over four million dollars in unpaid sales tax and his interest in 34 corporations. *Id.* The appellate court held that thirty of the companies were part of the enterprise itself. The court remanded the forfeiture order for the other four to determine whether they were illegally acquired or maintained or sources of influence over the racketeering enterprise. *Id.* at 1364 (statement that "[t]hose four companies might well be forfeitable, in whole or in part, but they are not part of Porcelli's RICO enterprise").

111. *Id.* at 1364-65.

112. McKeithen was convicted on drug charges and required to forfeit three parcels of property under a statute analogous to RICO section 1963. 822 F.2d at 311-12; *see also infra* notes 114-17 and accompanying text.

113. *Porcelli*, 865 F.2d at 1365. The Second Circuit assumed that the extent of forfeiture under the source of influence provision would be a consideration for the district court on remand. *Id.*

114. 822 F.2d at 315.

115. The court argued that allowing the government to confiscate an entire interest where only a portion of it was actually used for illicit purposes would lead to bizarre results and was contrary to the rule of lenity. *Id.*

116. *Id.*

render only forty-three percent of the property's value.[117]

2. *United States v. Angiulo*: Textual Justification for Proportional Forfeiture

In *Angiulo*, the defendants were convicted of RICO violations, predicate gambling and loansharking offenses.[118] The jury found that cash located in the defendants' establishments constituted a source of influence over their illegal enterprise.[119] Although the trial court instructed the jury to determine the proportion of racketeering taint in forfeiting the interests Angiulo acquired or maintained through the operation of his RICO enterprise,[120] it insisted that sources of influence be confiscated in their entirety.[121]

The First Circuit reversed, requiring a proportionality instruction[122] when divesting defendants of their interests that provided a source of influence.[123] In reaching its decision, the court distinguished between sources of influence external to the racketeering enterprise and the enterprise itself.[124] Because the cash was not part of the enterprise itself, the court reasoned that the source of influence forfeiture mechanism more closely resembled the "acquired or maintained" provision, which allows the government to confiscate proceeds illegally

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117. *Id.*

118. 897 F.2d at 1175.

119. *Id.* at 1211. The jury determined that half of the money was acquired through defendant's gambling and loansharking operation. Additionally, the jury determined that the money was a source of influence over the operation, presumably because it served as either house money for the gambling operation or as principle for the loans. *Id.* at 1211. The jury did not determine the proportion of the money that afforded defendants a source of influence because the trial court did not ask them to do so. *See infra* note 121 and accompanying text.

120. The trial court also allowed the government to seize, on a proportional basis, defendants' interests in property acquired and maintained through their RICO enterprise. *Id.* at 1211.

121. "[T]he jury found that 50% of the cash . . . constituted proceeds or profits under § 1963(a)(1). It also found that the cash afforded a source of influence over the [RICO] enterprise under § 1963(a)(2). Due to the latter determination, 100% of the cash was ordered forfeited." *Id.*

122. Proportionality instructions tell the jury to determine what percentage of the property constituted a source of influence. *See id.* (describing the trial court's proportionality instruction for § 1963(a)(1) forfeiture).

123. *Id.* at 1212.

124. *Id.* at 1211. The cash, for example, was not a part of the RICO enterprise as charged in the indictment. Rather, it was an independent property right that made it easier to run the gambling operation.

acquired, than the "in the enterprise" provision.[125] Consequently, the court held that source of influence forfeiture should proceed proportionally, similar to forfeiture under the "acquired or maintained" provision, rather than in its entirety, similar to the "in the enterprise" provision.[126]

III. JUSTIFICATION FOR PROPORTIONAL FORFEITURE UNDER RICO's "SOURCE OF INFLUENCE" CONFISCATION REQUIREMENT

The courts that require defendants to forfeit sources of influence in their entirety offer no compelling justification for doing so.[127] A rule of proportionality, on the other hand, is justified by the text and legislative history of section 1963 and by policy considerations.[128]

A. THE INADEQUACY OF THE TOTAL FORFEITURE DECISIONS

The *Horak*, *Stern*, and *Pryba* courts provide little analysis to justify their total forfeiture schemes.[129] Moreover, both the *Horak* and *Stern* courts fallaciously equate the "source of influence" provision with its section 1963(a)(2) counterpart, the "in the enterprise" forfeiture requirement.[130] The *Pryba* court produced a bold, new, but unfortunately, poorly-reasoned decision that cites neither case law nor statutory history to justify its conclusion.[131]

1. *Horak*: A Lack of Thorough Attention to the Source of Influence Issue

The *Horak* decision, although remarkably well-reasoned in other respects,[132] offers little analysis relating specifically to

125. *Id.* at 1211-12.

126. *Id.* at 1212.

127. *See infra* notes 132-59 and accompanying text. Few of the decisions even attempt to offer any reason at all to construe § 1963(a)(2)'s source of influence provision in the same manner as the "in the enterprise" subsection.

128. *See infra* notes 164-99 and accompanying text.

129. *See infra* notes 132-59 and accompanying text.

130. *See infra* notes 132-52 and accompanying text.

131. *See infra* notes 153-59 and accompanying text.

132. The *Horak* court explains in detail why the government can confiscate interests in the enterprise in their entirety regardless of the proportion of racketeering taint, offers an extensive list of authority on the matter, and explains eighth amendment limits on § 1963(a)(2) forfeiture. United States v. Horak, 833 F.2d 1235, 1249-52 (7th Cir. 1987). The decision also reasons, quite appropriately, that § 1963(a)(1) forfeiture orders must be construed propor-

the "source of influence" provision.[133] The court states that because the statutory language of section 1963(a)(2) is mandatory, the entire section may extend as far as the eighth amendment allows.[134] Although presumably applying this analysis to defendant's interest in a source of influence,[135] the court focuses on the "in the enterprise" language of section 1963(a)(2).[136] Thus, the Seventh Circuit fails to consider that the "in the enterprise" and "source of influence" subsections relate to different types of interest, as noted by other courts,[137] and consequently does not apply them differently.[138] Because the *Horak* court does not consider this distinction, its analysis is incomplete.

The text of section 1963(a)(2) justifies separate analysis of the "source of influence" and "in the enterprise" subsections.[139] A careful reading of the statute indicates that section 1963(a)(2) creates this distinction by listing the types of forfeitable interests in different subsections, separated by commas.[140] Furthermore, a source of influence is not an interest in the enterprise,[141] and the reasons that justify total forfeiture for in-

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tionally because they are outside the enterprise itself and focus instead on the racketeering activity. *Id.* at 1243.

133. The *Horak* decision deals with § 1963(a)(2) as an indivisible unit. *Id.* at 1243. The court assumes, without expressly stating, that all forfeiture under § (a)(2) operates in the same manner. *Id.* at 1251-52.

134. *Id.* at 1251.

135. *Horak* was only discussing § 1963(a)(2) in response to the government's request for a writ of mandamus to allow prosecutors to confiscate defendant's interest in a source of influence. *See supra* note 89. Despite denying the writ, the *Horak* court chastised the district court for refusing to forfeit the interest in its entirety. 833 F.2d at 1248-52.

136. *See Horak*, 833 F.2d at 1243 ("Section (a)(2) [as opposed to (a)(1)] focuses on the *enterprise*") (emphasis in original); *id.* at 1251 ("section (a)(2) . . . require[s] forfeiture of a defendant's entire interest in the enterprise") (citing United States v. Busher, 817 F.2d 1409, 1415 (9th Cir. 1987)); *see also supra* note 93.

137. *See, e.g.*, United States v. Angiulo, 897 F.2d 1169, 1211-12 (1st Cir.), *cert. denied*, 111 S. Ct. 130 (1990); United States v. Porcelli, 865 F.2d 1352, 1362-63 (2d Cir.), *cert. denied*, 110 S. Ct. 53 (1989); United States v. McKeithen, 822 F.2d 310, 314-15 (2d Cir. 1987).

138. Nowhere in the opinion does the *Horak* court analyze the different subsections of 1963(a)(2) independently. *See supra* note 93.

139. *See Angiulo*, 897 F.2d at 1212 ("Interpreted in a manner consistent with its punctuation, this provision first provides for the forfeiture of any interest in an enterprise . . . . The provision also *separately* provides for the forfeiture of property affording a source of influence over an enterprise.") (emphasis in original).

140. 18 U.S.C. § 1963(a)(2) (1988).

141. A source of influence is an interest external to the enterprise itself. *See infra* note 172 and accompanying text.

terests in the enterprise[142] do not necessarily extend to interests in a source of influence.[143]

2. *Stern*: Application of the *Horak* Doctrine

In *Stern*, the Seventh Circuit allowed total government seizure of a source of influence. The court cited to dicta from the *Horak* decision[144] but failed to provide additional, meaningful analysis.[145] The *Stern* court, like the *Horak* court, provided little explanation for requiring a defendant to forfeit her entire interest in a source of influence regardless of the degree of the interest's involvement in the RICO enterprise.[146]

The *Stern* court required total forfeiture of a defendant's condominium which was never used for any legitimate purpose.[147] In reaching its decision, the court cited to *Horak's* total forfeiture analysis.[148] The decision also indicated a reluctance to overturn any forfeiture order which was not "*grossly* dispro-

142. Although a long and lustrous line of case law supports total forfeiture of the "in the enterprise" subsection, the same cannot be said for the source of influence provision. *See supra* note 68 and accompanying text.

143. There are compelling textual, historical and functional reasons for treating the subsections differently. *See infra* notes 164-99 and accompanying text.

144. The *Stern* court refused to reverse the district court's decision to allow confiscation of defendant's condominium under the source of influence provision of § 1963(a)(2) because the sentence was not "*grossly* disproportionate to the offense committed." 858 F.2d at 1250 (emphasis in original). In establishing the gross disproportion standard, *Stern* cites *Horak*'s analysis that § 1963(a)(2) forfeiture extends as far as the eighth amendment allows. *Id.* *Stern*'s gross disproportion standard is the same as *Horak*'s eighth amendment test. The eighth amendment gross disproportion standard is inconsistent with the strict proportionality rule emphasized by *McKeithen*, *Angiulo* and *Porcelli*. *See supra* notes 106-26 and accompanying text.

145. Although *Stern*, unlike *Horak*, dealt explicitly with subsection 1963(a)(2)(D)'s source of influence forfeiture requirement, it did not attempt to justify total forfeiture beyond an appeal to *Horak*'s analysis. 858 F.2d at 1250. The *Stern* court did not question *Horak*'s incomplete analysis. *Id.*

146. *Id.* Perhaps the reason the court declined to provide in-depth justification for its conclusion that defendants must forfeit sources of influence up to the outer limits of the eighth amendment was that the extent of the forfeiture in this case probably would have been the same in a proportional forfeiture jurisdiction. In *Stern*, the defendants used the condominium exclusively for illicit purposes. 858 F.2d at 1250. Moreover, the condominium's phone center and mail drop was of tremendous importance to the prostitution ring. *Id.* Because defendants used the property as a source of influence over their illicit enterprise 100% of the time, the condominium would have been forfeitable in its entirety even in a proportional forfeiture jurisdiction.

147. *Id.*

148. *Id.*

portionate,"[149] a term of art implying total forfeiture.[150] The court thus relied on *Horak*'s rule but failed to defend it.[151] Apparently, the *Stern* court did not realize that its decision significantly extended *Horak*.[152]

3. *Pryba*: The Fourth Circuit's Anachronistic Approach

The *Pryba* court apparently was concerned far more with deciding a first amendment issue[153] than with offering a reasoned justification for total forfeiture under the "source of influence" provision. When a court permits the government to close down a two million dollar per year business and seize its inventory because of the sale of $105.30 of obscene material,[154] the court should consider whether the sentence is disproportionate.

The *Pryba* court did offer cursory eighth amendment analysis of the proportionality issue.[155] This analysis, however, did not consider the important eighth amendment cases relating

149. *Id.* (emphasis in original).

150. In *Busher*, the court held that interests in a RICO enterprise were forfeitable, in their entirety, up to the limits of the eighth amendment. United States v. Busher, 817 F.2d 1409, 1414-15 (9th Cir. 1987). In reaching its decision, the court insisted on a number of occasions that the eighth amendment protected only against forfeiture which was "grossly disproportionate" to the offense charged. *Id.* "The eighth amendment prohibits only those forfeitures that, in light of all the relevant circumstances, are *grossly* disproportionate to the offense committed." *Id.* at 1415; *see also* United States v. Huber, 603 F.2d 387, 397 (2d Cir. 1979) (the eighth amendment is not implicated where "punishment is at least in some rough way proportional to the crime"), *cert. denied*, 445 U.S. 927 (1980). By accepting the gross disproportion standard, therefore, the *Stern* court adhered to the philosophy that allows forfeiture to extend as far as the eighth amendment allows.

151. The *Stern* court offered little independent analysis. The entire discussion of the government's confiscation of the condominium occupied only four paragraphs of the court's opinion. *Id.*

152. The *Horak* opinion on source of influence forfeiture was offered in dicta and not thoroughly reasoned. *See supra* notes 89, 93 and accompanying text. *Stern*, however, apparently considered the *Horak* analysis to be the unquestionable state of the law on source of influence forfeiture. *Stern*, 858 F.2d at 1250.

153. Because *Pryba* was an obscenity case, there was a question as to whether the court could require defendants to forfeit presumptively protected material at all. *Pryba*, 900 F.2d at 753. In addition to discussing the weighty first amendment issue, the court also felt compelled to pontificate, in graphic detail, on the obscene contents of the Prybas' bookstore. For an amusing description of the state of the art in adult reading material, see *id.* at 750-52.

154. *Id.*

155. The court refused to acknowledge that a review of disproportionate sentences was required in a case resulting in less than life imprisonment. *Id.* at 757.

specifically to the RICO forfeiture provision.[156] Instead, the *Pryba* court justified its decision by citing sentence review cases wholly divorced from the issue of whether the government may seize a RICO defendant's property.[157]

Moreover, the court ignored the issue raised by *Angiulio* and *Porcelli*: whether, independent of eighth amendment analysis, proportional forfeiture is mandated by the wording and history of the RICO statute.[158] Rather, the court was blissfully unaware that a controversy about governmental seizure of sources of influence even existed.[159]

B. THE MERITS OF A PROPORTIONAL APPROACH TO FORFEITURE UNDER THE SOURCE OF INFLUENCE PROVISION

When a defendant is forced to surrender her entire interest in a parcel of property because it was a source of influence over the RICO enterprise, she is forced to part with property only tangentially related to the enterprise.[160] In such situations, the government seizes interests far beyond the scope of the racketeering enterprise itself. The legislative intent, as reflected in the statutory language[161] and legislative history,[162] are better served, and functional dilemmas better resolved,[163] by applying

156. *Pryba*'s view of the eighth amendment is completely at odds with the weight of authority, which suggests that proportional review of sentences should be measured against the offense itself and not considered in a vacuum. United States v. Busher, 817 F.2d 1409, 1414 (9th Cir. 1987); *see also* Weems v. United States, 217 U.S. 349, 351 (1909) (15 years at hard labor for falsifying a public document was cruel in relation to the offense charged); Robinson v. California, 370 U.S. 660, 661 (1961) (90 day sentence for the crime of being a drug addict was cruel and unusual). "[I]mprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual . . . the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Id.* at 667.

157. The court considered three decisions only: United States v. Whitehead, 849 F.2d 849 (4th Cir.), *cert. denied*, 488 U.S. 983 (1988); United States v. Rhodes, 779 F.2d 1019 (4th Cir. 1985), *cert. denied*, 476 U.S. 1182 (1986); Solem v. Helm, 463 U.S. 277 (1983).

158. *Angiulo*, *Porcelli* and *McKeithen* base their justification of proportional analysis on statutory, historical and functional grounds, not on the eighth amendment. *See supra* notes 106-17 and accompanying text.

159. Remarkably, the *Pryba* court did not even take notice of the cases arguing *in favor* of applying total forfeiture to interests in sources of influence over a racketeering enterprise. United States v. Pryba, 900 F.2d 748, 757 (4th Cir.), *cert. denied*, 111 S. Ct. 305 (1990).

160. *See supra* note 69 and accompanying text.

161. *See infra* notes 164-79 and accompanying text.

162. *See infra* notes 180-91 and accompanying text.

163. *See infra* notes 192-99 and accompanying text.

a system of proportional review.

1. *Angiulo*: Textual Justification for Proportional Forfeiture

The *Angiulo* decision, in effect, turns the *Horak* decision on its head. In *Horak*, the Seventh Circuit noted a distinction in the scope of forfeiture under RICO's "in the enterprise" and "acquired or maintained" provisions. The decision offered compelling support for allowing the government to confiscate a defendant's entire interest in a RICO enterprise, while only allowing seizure of interests illegally acquired or maintained on a basis proportional with the defendant's racketeering activity.[164] Unlike the *Horak* court, the *Angiulo* court recognized that the same justification for restricting the government's ability to seize property under the "acquired or maintained" provision[165] applies to the "source of influence" provision.[166] The text of the RICO forfeiture provisions support the *Angiulo* court's conclusion.

Section 1963 created two distinct categories of interests that a court can require a defendant to forfeit. The government can seize interests *in* a RICO enterprise,[167] as well as interests tangentially related to the racketeering activity.[168]

Because of the unequivocal statutory language of the "in the enterprise" subsection,[169] courts uniformly construe the first category of interests, those *in* the enterprise, to allow the government to take the entire interest regardless of whether it relates to the racketeering activity.[170] The second category, interests *outside* the enterprise, may be taken from a defendant only on a showing of relation to the racketeering activity, because it is only the interest's relationship to that activity that

164. United States v. Horak, 833 F.2d 1235, 1243 (7th Cir. 1987); *see also supra* notes 56, 58, 65 and accompanying text (explaining *Horak*'s description of the state of the law on forfeiture under § 1963(a)(1) and § 1963(a)(2)'s "in the enterprise" provision).

165. *Horak* notes, quite correctly, that because § 1963(a)(1)'s acquired or maintained clause focuses on the racketeering activity, and consequently interests outside the enterprise itself, forfeiture under that section should be restricted to interests tainted with illegal activity. *See supra* note 56.

166. United States v. Angiulo, 897 F.2d 1169, 1211 (1st Cir.), *cert. denied*, 111 S. Ct. 130 (1990).

167. 18 U.S.C. § 1963(a)(2)(A) (1988).

168. 18 U.S.C. § 1963(a)(1) (1988); 18 U.S.C. § 1963(a)(2)(D) (1988).

169. Subsection 1963(a)(2)(A) makes it clear that *any* interest *in* the enterprise is forfeited upon conviction. 18 U.S.C. § 1963(a)(2)(A) (1988) (emphasis added).

170. *See supra* notes 63-65 and accompanying text.

renders it forfeitable.[171]

Because of their tangential relation to the racketeering enterprise,[172] sources of influence should be interpreted as interests in the second category — interests *outside* the enterprise.[173] Courts that have recognized the dichotomy between interests in the enterprise and those outside of it have taken the logical step of holding that sources of influence are forfeitable only to the extent they contribute to the illegal operations.[174] For example, when only forty-three percent of a defendant's interest in a parcel of property is found to be a source of influence over a RICO enterprise,[175] only forty-three percent of that interest should be seized.[176] If the government can force the defendant to surrender the entire parcel, the government thereby takes property that has no relation to either the racketeering enterprise or the racketeering activity.[177] As noted above, such a result is not consistent with either the weight of judicial opinion[178] or the statute's mandate.[179]

2. Justification for Proportional Forfeiture from Legislative History

The *McKeithen* and *Porcelli* courts both insist that proportional source of influence forfeiture is consistent with the statu-

171. The *Horak* court makes this argument in its discussion of § 1963(a)(1) confiscation of interests acquired or maintained in violation of RICO. United States v. Horak, 833 F.2d 1235, 1243 (7th Cir. 1987); *see also supra* notes 56-59 and accompanying text (discussion of forfeiture under § 1963(a)(1)).

172. Sources of influence are not a part of the enterprise; rather, they are an outside interest that defendants use to further the illegal operation of the enterprise. *Angiulo*, 897 F.2d at 1211.

173. *Id.*

174. *Id.*; United States v. Porcelli, 865 F.2d 1352, 1365 (2d Cir.), *cert. denied*, 110 S. Ct. 53 (1989).

175. These facts are based on the facts in United States v. McKeithen, 822 F.2d 310, 315 (2d Cir. 1987).

176. In order to justify governmental confiscation, the finder of fact must link the property either to the enterprise or the activity. *See Horak*, 833 F.2d at 1243.

177. To the extent that the property is not a source of influence, 57% in the *McKeithen* example, the property has no connection with either racketeering activity or the RICO enterprise.

178. *See, e.g.*, United States v. Angiulo, 897 F.2d 1169, 1212 (1st Cir.) (proportionality instruction required for interests outside the RICO enterprise), *cert. denied*, 111 S. Ct. 130 (1990); *Horak*, 833 F.2d at 1243 (the enterprise is forfeited in its totality, but interests related to the racketeering activity are forfeited proportionally).

179. If the property cannot be linked to either the activity or the enterprise, the statute provides no authority for confiscation. 18 U.S.C. § 1963 (1988).

tory goals of section 1963.[180] Analysis of legislative history supports the courts' conclusions. The history of section 1963 demonstrates that Congress was sensitive to the hardships that disproportional forfeiture would impose on defendants and consequently sought to limit forfeiture to property involved in the criminal enterprise or activity.[181] Although the statute expressly states that RICO as a whole should be "liberally construed to effectuate its remedial purposes,"[182] and the Senate Report indicates that Congress intended section 1963 to cover a broad range of interests tainted by criminal activity,[183] support nevertheless exists for proportional review.

An intent for a broad construction is by no means equivalent to an intent for total forfeiture of all interests outside a RICO enterprise owned by a convicted defendant.[184] As Congress expresses throughout the legislative history of section 1963, it intended criminal defendants to forfeit only those "ill-gotten" funds that were "related to" the racketeering activity.[185]

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180. United States v. Porcelli, 865 F.2d 1352, 1365 (2d Cir.) ("Congressional aim guiding these forfeitures is to recover all of the racketeer's ill-gotten gains but not to seize legitimately acquired property."), *cert. denied*, 110 S. Ct. 53 (1989); United States v. McKeithen, 822 F.2d 310, 315 (2d Cir. 1987) (proportional forfeiture "is consistent with the legislative aims of deterrence, and destruction of economic power bases, of criminal profiteers").

181. *See infra* notes 184-89 and accompanying text.

182. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 947 (1970). RICO is apparently the only statute that has such a mandate of broad construction. Russello v. United States, 464 U.S. 16, 27 (1983). There is, however, a great deal of controversy over whether the statute should be construed broadly. *See, e.g.*, Note, *RICO — Criminal Forfeiture of Proceeds of Racketeering Activity Under RICO*, 75 J. CRIM. L. & CRIMINOLOGY 893, 918-23 (1984); Note, *Profits Derived from Racketeering Activity are Forfeitable Interests Under 18 U.S.C. Section 1963*, 14 ST. MARY'S L.J. 811, 825 (1983).

183. S. REP. NO. 617, 91st Cong., 1st Sess., *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 4007, 4033 ("violations shall be punished by forfeiture to the United States of all property and interests, as broadly described, which are related to the violations"). In upholding forfeiture of profits and proceeds obtained through racketeering activities, the Supreme Court recognized the intention of Congress that RICO be broadly construed. *Russello*, 464 U.S. at 21.

184. *Cf.* United States v. McKeithen, 822 F.2d 310, 312, 315 (2d Cir. 1987) (recognizing the intent for broad construction, but nonetheless holding that Congress also intended the punishment to be proportional to the crime).

185. *See, e.g.*, 116 CONG. REC. 591-92 (1970) (statement of Sen. McClellan); STATEMENT OF FINDINGS AND PURPOSE, *supra* note 29, at 1073. Forfeiture was only intended to apply to an "interest in the enterprise which is the subject of the specific offense involved here, and not extending to any other property of the convicted offender." *Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 66 (1969).

A forfeiture scheme that requires a defendant to surrender the enterprise in its entirety, while forfeiting a source of influence to the extent that it was used in racketeering activity, is consistent with legislative intent.[186] Congress recognized that the racketeering enterprise itself is inexorably tied up with the racketeering activity.[187] Moreover, the primary motivation for Congressional action was to rid otherwise legitimate businesses of racketeering influence.[188] Consequently, to insist that a defendant surrender only her interest in the portion of the enterprise directly related to illegitimate behavior would fail to accomplish a key legislative goal.[189]

Conversely, a source of influence affects the racketeering activity only to the extent that the source performed an influential function. For instance, in the above example,[190] only forty-three percent of the property was a source of influence over the RICO enterprise. The remaining fifty-seven percent was not related to the illegal conduct. A requirement that the property be surrendered in its entirety would be inconsistent with a legislative desire to confiscate only ill-gotten gains or property related to the racketeering activity.[191]

3. Policy Justification for Proportional Forfeiture

In addition to textual and historical justification, proportional forfeiture also furthers important social values. Due to the importance of proportionality in the history of criminal law in this country,[192] courts should require that defendants forfeit property commensurate with their culpability.[193] Moreover,

186. Every court to consider the issue recognizes that Congress intended to provide total forfeiture for some interests (§ 1963(a)(2)(A)), and proportional forfeiture for others (§ 1963(a)(1)). *See supra* notes 56-59, 63-65 and accompanying text. The only question is whether sources of influence more closely resemble § 1963(a)(1) interests "acquired or maintained" or subsection 1963(a)(2)(A) interests "in the enterprise."

187. 116 CONG. REC. 591 (1970) (statement of Sen. McClellan).

188. *See supra* note 30 and accompanying text.

189. Courts agree, with unanimity, that Congress intended "interests in the enterprise" to be forfeited in their entirety. *See supra* notes 63-65 and accompanying text.

190. *See supra* note 175 and accompanying text.

191. *See supra* note 185.

192. *See supra* notes 23-25 and accompanying text.

193. Given the constitutional importance of proportional punishment, *see supra* note 24, forfeiture orders should be construed proportionally wherever the statutory language will bear such a reading. In construing source of influence forfeiture as proportional, the *McKeithen* court relied on United States v. About 151.682 Acres of Land, 99 F.2d 716, 721 (7th Cir. 1938) (holding that

legislation, and penal statutes in particular,[194] should be construed in a manner consistent with constitutional values.[195]

The rule of lenity also justifies implementing source of influence forfeiture on a proportional basis.[196] In *Russello*, the court acknowledged that the rule of lenity may have application in RICO cases where the statutory language is unclear.[197] Because the statutory language and legislative history of section 1963 provide no clear justification for total forfeiture under the source of influence subsection, lenity requires adoption of a proportional forfeiture scheme.[198] A RICO defendant would have no basis to believe, after analyzing section 1963's text or history, that a court would require forfeiture of a source of influence in its entirety.[199] Given the lack of notice in the statute, statutory interpretation should be resolved in favor of the defendant.

IV. A PROPOSED MODEL FOR THE IMPLEMENTATION OF A PROPORTIONAL FORFEITURE SCHEME

The above analysis suggests several factors courts should consider in ordering a defendant to forfeit sources of influence over the RICO enterprise. Courts should weigh the degree of illicit use against the defendant's legitimate uses of the property and consider the importance of the interest to the successful functioning of the racketeering enterprise.

A. FACTORS THAT MITIGATE FORFEITURE VERDICTS

The extent to which a particular interest in property afforded the defendant a source of influence, and consequently the extent to which the interest should be forfeited, is indispu-

"laws are to be given a sensible construction"). United States v. McKeithen, 822 F.2d 310, 314 n.8 (2d Cir. 1987). The *Busher* court also noted that forfeiture orders should be fashioned to stay within constitutional bounds. United States v. Busher, 817 F.2d 1409, 1415 (9th Cir. 1987); *see also* United States v. Certain Piece of Land, 25 F. Cas. 366, 366-67 (D.Cal. 1870) (No. 14,767) (excessive forfeiture award set aside due to disproportionality).

194. W. ESKRIDGE & P. FRICKEY, *supra* note 26, at 658.

195. *See generally* National Labor Relations Bd. v. Catholic Bishop of Chicago, 440 U.S. 490, 501, 507 (1979) (statutes are to be construed so as to avoid consitutional questions).

196. *McKeithen*, 822 F.2d at 315.

197. *See supra* notes 27-28 and accompanying text.

198. *McKeithen*, 822 F.2d at 315.

199. In fact, the text and history of § 1963(a)(2)'s source of influence provision suggest that courts should use proportional analysis. *See supra* notes 164-91 and accompanying text.

tably a question of fact.[200] Depending on the particular circumstances surrounding the offense and the nature of the defendant's property interest, the factfinder should consider the following factors in its analysis.[201]

The factfinder should evaluate the percentage of the physical property interest subject to forfeiture that was actually used as a source of influence.[202] The legitimate uses of the property should be weighed against the illegal use.[203] If a defendant only used part of the property illegally, or used the whole property illegally for a short period of time, a proportional forfeiture scheme would allow the government to seize only value commensurate with the illicit use of the property.

Consider the earlier hypothetical set forth in Section I,[204] in which Meg only used one room out of an entire mansion for illicit purposes, and even then only for a two year period. In this situation, in which the rest of building was operated legally, the entire building should not be forfeited.[205] Rather, the factfinder should estimate the value of that room, compare it to the value of the rest of the mansion, and forfeit only a proportional amount.[206]

B. WEIGHING THE IMPORTANCE TO THE ENTERPRISE

In addition, in fashioning a forfeit order, the factfinder should consider the importance of the property to the functioning of the enterprise.[207] A source of influence that was indis-

200. *Cf.* United States v. Angiulo, 897 F.2d 1169, 1211 (1st Cir.) (instructions to jury were not adequate because they did not include a proportionality instruction), *cert. denied*, 111 S. Ct. 130 (1990); *McKeithen*, 822 F.2d at 313 (jury "allocate[d] the taint").

201. Some considerations will obviously not be important in certain cases. For example, in *Angiulo*, where cash was the source of influence, the length of time as a source of influence was obviously not an important factor which either the jury or the appellate court considered. 897 F.2d at 1211.

202. *Cf. McKeithen*, 822 F.2d at 315 (jury determined one parcel of property should only be forfeited up to 43% of its value because only 43% of the property was used as a source of influence).

203. In *United States v. Stern*, for example, where there was no legitimate use of a condominium, the factfinder could reasonably find that the entire interest was forfeitable even under a proportional scheme. *See supra* note 146 and accompanying text.

204. *See supra* note 76 and accompanying text.

205. *See supra* notes 164-99 and accompanying text.

206. In this instance, the jury should calculate what percentage of the property was used as a source of influence over the entire period.

207. *Cf.* United States v. Horak, 833 F.2d 1235, 1243 (7th Cir. 1987) (test of cause in fact used for determining proportional forfeiture under § 1963(a)(1)). A cause in fact test for the source of influence provision would also be reason-

pensable to the operation of the enterprise should be subject to more extensive forfeiture than one that was only tangentially related.

Exactly how much weight this consideration deserves will necessarily vary from case to case. In a case in which the source of influence played a significant role, the factfinder may increase the forfeiture award in proportion to the role played. Conversely, in cases in which the interest in property did not have an especially significant role, the forfeiture order should decrease accordingly. In Meg's case, for example, it is clear that the mansion was not indispensable to the running of the enterprise, and in fact played an extremely small role in her operation. Consequently, the extent to which Meg must forfeit her interest in the mansion should be based almost exclusively on the percentage of illicit use of the mansion, the percentage of legitimate use, and the amount of time during which Meg used the mansion as a source of influence.

C. APPLICATION OF THE MODEL

Applying the above analysis, the district court should instruct the jury that they have the option of finding a portion of a defendant's source of influence to be forfeitable.[208] An appropriate instruction would resemble the following:

> Members of the jury, should you decide that defendant is guilty of operating a racketeering enterprise in violation of 18 U.S.C. § 1962, you must declare forfeit to the United States any interest in property, identified by the government as a source of influence, that you determine actually affords defendant a source of influence over the enterprise. You should determine what percentage of the aforementioned property was used as a source of influence, considering the proportion of the physical property that accommodated the illicit activity, the extent of legitimate use of the property, the period of time that the illicit activity covered, and the role that the source of influence played in furthering the activities of the enterprise. You should find forfeit a percentage of the property value commensurate to the percentage of the property used as a source of influence over the enterprise.

D. IMPRECISION IN PROPORTIONAL FORFEITURE: COMPARATIVE ADVANTAGE TO ALTERNATE FORFEITURE MECHANISMS

Obviously, when determining the percentage of the prop-

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able. In other words, a source of influence should only be forfeited if the enterprise would not have been continued but for the source of influence.

208. United States v. Angiulo, 897 F.2d 1169, 1211 (1st Cir.), *cert. denied*, 111 S. Ct. 130 (1990).

erty that afforded the defendant a source of influence, the factfinder will have to base its evaluation on subjective factors. In some cases, it will have to resort to a "best guess" about the extent of illegal use.

Imprecision, however, does not delegitimize efforts to forfeit interests on a proportional basis.[209] Nor is subjectivity new to judicial factfinding. Proportional forfeiture of proceeds under the "acquired or maintained" provision, for example, involves a significant degree of guesswork,[210] yet courts uniformly recognize that subjective, proportional forfeiture is preferable to an all or nothing approach.[211] Similarly, the preceding criteria, though far from providing a concrete determination of the percentage to which a source of influence is tainted by racketeering activity, allow for forfeiture orders more consistent with the language, history and policy behind section 1963.

CONCLUSION

RICO subsection 1963(a)(2)(D) allows the government to seize a defendant's interests in property that afford a source of influence over the enterprise. Federal courts disagree about whether source of influence forfeiture should take the entire interest under any circumstances or only take property proportional to the interest's racketeering influence. Under the *Stern* and *Horak* approach, criminal RICO defendants may be stripped of vast quantities of legitimately owned and operated property.

This Note argues that proportional forfeiture, rather than total forfeiture, is consistent with the language, history, and policies of section 1963. Courts that uphold total forfeiture under the "source of influence" subsection ignore the language of the statute and the intent of Congress. Proportional forfeiture, on the other hand, ensures punishment commensurate with culpability.

In fashioning forfeiture orders pursuant to the "source of influence" provision, courts should consider the degree of illicit use of the property, the extent of legitimate use, and the degree to which the property functioned to enhance the racketeering enterprise. Adherence to these factors will ensure proportional

209. *See* United States v. Busher, 817 F.2d 1409, 1416 (9th Cir. 1987) (ambiguity does not justify a lack of proportionality).

210. *Id.*

211. *See supra* notes 56-59 and accompanying text.

punishment and accurate implementation of RICO forfeiture mechanisms.

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