THE CONSTITUTIONAL RETRENCHMENT IN THE USE OF FORFEITURE: ARE ATTORNEY FEE FORFEITURES DESTINED TO GO THE WAY OF THE HORSE AND BUGGY?

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I. INTRODUCTION

Bills of rights give assurance to the individual of the preservation of his liberty. They do not define the liberty they promise.[1]

Many Americans today are willing to trade personal freedoms protected by the Bill of Rights for law and order.[2] From the perspective of the

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[1]BENJAMIN N. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 97 (1956).

[2]Richard Lacayo, *Lock "Em Up!,"* TIME, Feb. 7, 1994, at 50. As stated by Charles Colson, former White House Counsel to Richard Nixon and current prison reform activist: "People will gladly trade freedom for law and order." *Id.* at 53.

Four polls conducted for Time/CNN in January 1994 also indicate the extent of American outrage over crime. When asked about the main concern facing the country today, 19% of the American adults in the survey responded that crime was their primary concern. *Id.* at 52. Lack of morals (12%) was second among the problems facing the country, followed by concerns about the economy (11%), unemployment (10%), government (nine percent) and the budget deficit (five percent). *Id.* Thus, crime ranked ahead of a number of serious problems currently affecting the well-being of the United States.

Another Time/CNN poll asked whether American citizens would allow local police to stop and search a person for weapons if the person fit a criminal profile. *Id.* at 53. Forty-seven percent of the people surveyed said they would favor such searches. *Id.* Additionally, 81% of the respondents favored the passage of a law mandating life imprisonment for anyone convicted of three serious crimes, while 65% favored the imposition of a ten o'clock curfew on local children under the age of eighteen. *Id.*

The result of a recent poll conducted in New Jersey suggests that many citizens are also willing to sacrifice the privacy protection afforded to juvenile offenders — even if the juvenile were their own child. *See* Jean Rimbach, *Most Want Teens' Crime Records Open*, REC., March 21, 1994 at A1. When asked whether the criminal records of juveniles should be kept secret, 67% of the respondents said "no." *Id.* This sentiment did not change significantly when the hypothetical situation was posed where the juvenile in question was their own child. *Id.* It should be noted, however, that this poll was conducted shortly after local residents remained uninformed about Kevin Aquino's juvenile record of molesting three children prior to his being charged with the sexual assault and murder of six-year old Amanda Wengert. *Id.* at A11.

American public and the politicians held accountable to their constituents, the statistics demonstrating an increase in violent crime[3] and drug trafficking[4] often justify favoring law and order over individual rights. In response to strong public opposition toward criminality, Congress previously enacted legislation aimed at incapacitating and deterring criminals from further profiting from their criminal enterprises.[5]

Americans are especially intolerant of drug-related crime and are willing to accept intrusions into their personal liberty to combat the drug problem. T.J. Hiles, Comment, *Civil Forfeiture of Property for Drug Offenders Under Illinois and Federal Statute: Zero Tolerance, Zero Exceptions*, 25 J. MARSHALL L. REV. 389, 390 n.11 (1992). Two such intrusions that have gained acceptance include mandatory drug testing and random searches of cars and luggage. *Id.*

[3]According to statistics compiled by the Federal Bureau of Investigation, over 1.9 million violent crimes were reported to law enforcement agencies in 1993. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES 1993, at 11 (1994). This annual estimated total of violent crime was 17% above the 1989 level and 51% above the level of violent crimes recorded in 1984. *Id.* at 12. In 1993, the F.B.I. also estimated that over 24,000 murders occurred in the United States; forcible rapes exceeded 104,000; and over 659,000 robberies took place. *Id.* at 13-27. Each of these index crimes indicated an increase from the 1989 and 1984 levels.

One commentator noted that over the past three decades, the annual murder rate in the United States has doubled. Lacayo, *supra* note 2, at 52. *See also* B.A. Glesner, *Landlords as Cops: Tort, Nuisance & Forfeiture Standards Imposing Liability on Landlords For Crime on the Premises*, 42 CASE W. RES. L. REV. 679, 681 (1992) ("Notwithstanding the devotion of time and resources to the problem of urban crime, the statistics continue to worsen and the fear continues to grow."). In response to this fear, which according to Glesner has reached "epidemic proportions," the United States has distributed the burden of fighting crime to its citizenry. *Id.* at 679-81.

[4]According to the figures compiled by the Bureau of Justice Statistics, over 920,000 drug-related arrests occurred in 1992. BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS — 1993, at 420 (1994).

In addition to the high level of drug-related crime in the United States, the drug trade and its illegal revenues have an adverse effect on the national economy because lawful business enterprises have been infiltrated by organized crime. William J. Hughes & Edward H. O'Connell, Jr., *In Personam (Criminal) Forfeiture and Federal Drug Felonies: An Expansion of a Harsh English Tradition Into a Modern Dilemma*, 11 PEPP. L. REV. 613, 615 (1984).

[5]Morgan Cloud, *Forfeiting Defense Attorneys' Fees: Applying an Institutional Role Theory to Define Individual Constitutional Rights*, 1987 WIS. L. REV. 1, 16 (1987) ("The fundamental premise underlying these provisions is that recovering the profits generated by crime will remove the incentive to engage in this conduct. Criminals will lose the economic benefits of their illicit behavior and eventually organized crime, deprived of its *raison d'etre*, should simply wither away."). For a look at the legislative intent underlying

The Racketeer Influenced and Corrupt Organizations Act ("RICO"),[6] Continuing Criminal Enterprise Act ("CCE"),[7] and Criminal Forfeiture Act ("CFA")[8] are aimed at deterring criminality by preventing criminals from profiting from their criminal acts and participating in criminal enterprises. One method by which these statutes attempt to accomplish this goal is to subject the proceeds derived from a defendant's criminal acts to forfeiture.[9] In the companion cases of *Caplin & Drysdale, Chartered v. United States*[10] and *United States v. Monsanto*,[11] the United States Supreme Court held that criminally derived proceeds used to pay defense attorneys are subject to forfeiture.[12]

This Comment will focus on whether the Supreme Court of the United States met its obligation to uphold the United States Constitution, specifically the Sixth Amendment[13] right to the assistance of counsel, and the Fifth

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the enactment of RICO and CCE, see *infra* notes 54-62 and accompanying text.

[6]The formal codification of RICO is contained in the Organized Crime Control Act of 1970, Pub. L. No. 91-452, Title IX, 84 Stat. 922 § 901(a) (codified as amended at 18 U.S.C. § 1961-1968 (1988 & Supp. V 1993)).

[7]The formal codification of the Continuing Criminal Enterprise statute ("CCE"), commonly referred to as the "drug kingpin" statute, see Sharon C. Lynch, Comment, *Drug Kingpins and Their Helpers: Accomplice Liability Under 21 USC Section 848*, 58 U. CHI. L. REV. 391 (1991), is contained in the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 408, 84 Stat. 1265 (codified as amended at 21 U.S.C. §§ 848, 853 (1988 & Supp. V 1993)).

[8]Comprehensive Criminal Forfeiture Act of 1984, Pub. L. No. 98-473, § 301, 98 Stat. 1837, 2040 (1984).

[9]For the text of the criminal penalties section of RICO and CCE, as amended by CFA, see *infra* notes 61-62 and accompanying text.

[10]491 U.S. 617 (1989).

[11]491 U.S. 600 (1989).

[12]*See Caplin & Drysdale*, 491 U.S. at 631; *Monsanto*, 491 U.S. at 614.

[13]The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

Amendment[14] right to due process of law, when it held that attorney fees were not exempt from the scope of statutory forfeiture provisions.[15] Such a discussion of attorney fee forfeiture is especially ripe for debate in light of four recent Supreme Court cases concerning criminal and civil forfeitures, all of which have been decided against the government and suggest a trend toward limiting the scope of forfeiture.[16] Accordingly, this Comment will anticipate whether the Supreme Court will reinterpret the application of forfeiture law to attorney fees if presented with a clearly distinguishable set of facts.[17]

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[14]The Fifth Amendment provides, in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of . . . ." U.S. CONST. amend. V.

[15]*See generally* Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989); United States v. Monsanto, 491 U.S. 600 (1989). The *Monsanto* and *Caplin & Drysdale* cases were decided by the Supreme Court on the same day and have several factual similarities. *See* Alan J. Jacobs, Note, *Indirect Deprivation of the Effective Assistance of Counsel: The Prospective Prosecution of Criminal Defense Attorneys "For Money Laundering,"* 34 N.Y.L. SCH. L. REV. 303, 336 (1989). One commentator noted that *Monsanto* and *Caplin & Drysdale* should be read together as the "single definitive opinion on the issue of pre-conviction restraint or postconviction forfeiture of funds that deprives defendants of the ability to pay counsel." *Id.*

[16]These cases, which will be discussed *infra* at Part V, include: United States v. 92 Buena Vista Ave., 113 S. Ct. 1126 (1993); Alexander v. United States, 113 S. Ct. 2766 (1993); Austin v. United States, 113 S. Ct. 2801 (1993); and United States v. James Daniel Good Real Property, 114 S. Ct. 492 (1993).

[17]One example of how the Supreme Court has reinterpreted the scope of forfeiture based upon similar but distinguishable facts occurred in United States v. James Daniel Good Real Property, 114 S. Ct. 492 (1993). In *James Daniel Good*, the Court ruled that the Government may not seize real property, including a house suspected of having been used in furtherance of a drug transaction, until the owner was given notice and an opportunity to contest the seizure at a hearing. *Id.* at 505. On its face, the *James Daniel Good* decision runs counter to the Court's prior decision, rendered nearly twenty years earlier, holding that postponement of notice and a hearing until after seizure did not deny the defendant due process of law. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (where the pre-trial seizure of a yacht involved an extraordinary situation such that the postponement of notice and a hearing until after the seizure did not deny due process). *See also*, Linda Greenhouse, *Justices Insist Notice Be Given in Drug-Case Property Seizures*, N.Y. TIMES, Dec. 14, 1993, at A20.

While conceding that the real property in *James Daniel Good* is less likely to abscond, as compared to the yacht in the *Calero-Toledo* case, the question begging an answer is whether the *James Daniel Good* decision simply represents a factually distinguishable case or a change in the Court's attitude toward forfeiture.

To understand the modern application of attorney fee forfeitures, Part II of this Comment will provide a historical overview of forfeiture and its origins as derived from the English common law and the ancient concept of deodand.[18] This section will also briefly look at America's acceptance of forfeiture and the distinctions between *in rem*[19] civil forfeiture and *in personam*[20] criminal forfeiture. Part III will review the federal RICO, CCE, and CFA statutes which provide the basis for attorney fee forfeitures.[21] Part IV will analyze the Court's decisions in the companion cases of *Caplin & Drysdale, Chartered v. United States* and *United States v. Monsanto* which held that attorney fees are subject to forfeiture. Part V will analyze Justice Blackmun's dissent and will survey the recent Supreme Court cases interpreting forfeiture which have significantly restricted the immense scope of criminal and civil forfeiture statutes. Finally, Part VI will evaluate whether these recent decisions foreshadow a reevaluation of the Court's current attorney fee forfeiture interpretations. Specifically, this Comment will argue that the Supreme Court's recent trend in actively limiting the use of forfeiture will result in the institution of similar restrictions on the frequently criticized practice of forfeiting attorney fees.

II. THE ORIGINS OF FORFEITURE

The modern practice of forfeiture, whereby the government divests an individual of specific real or personal property without compensation,[22] can be traced to the Biblical and English common law tradition of deodand. The religious application of deodand, whose Latin root *Deo dandum* literally

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[18]Deodands were personal chattels that caused the death of any living creature and were forfeited to a higher authority as a form of atonement for the sin. *See* BLACK'S LAW DICTIONARY 436 (6th ed. 1990). Under English Law, the offending chattel was forfeited to the crown to be applied for pious causes. *Id.* For a more detailed discussion of deodand, see *infra* notes 22-45 and accompanying text.

[19]For a discussion of *in rem* actions, see *infra* notes 34-45 and accompanying text.

[20]For a discussion of *in personam* criminal forfeiture, see *infra* notes 46-48 and accompanying text.

[21]*See infra* notes 49-79 and accompanying text.

[22]BLACK'S LAW DICTIONARY 650 (6th ed. 1990). Forfeiture has also been defined as the "[l]oss of some right or property as a penalty for some illegal act." *Id.* For a discussion of the modern practice of forfeiture under RICO, CCE, and CFA, see *infra* notes 49-79 and accompanying text.

means "a thing to be given to God,"[23] called for the offending instrument of death to be turned over to God.[24] Under the pre-Judeo-Christian practice of deodand, moral blame was placed directly upon the instrument of death, which was then given to God in atonement for the sin.[25]

This "institution of the deodands" was subsequently incorporated into the English common law system as a proceeding against the offending object which caused the death of any living creature.[26] The proceedings were instituted against the inanimate object as the "guilty" party,[27] and the value of the object responsible for the death of the King's subject was forfeited to the Crown as a deodand.[28] The King was then supposed to use the money derived from the deodand to either pay for Masses said for the soul of the deceased subject or to utilize the money for charitable purposes.[29] As the

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[23]BLACK'S LAW DICTIONARY 436 (6th ed. 1990).

[24]*See Exodus* 21:28 ("When an ox gores a man or a woman to death, the ox must be stoned; its flesh may not be eaten.").

[25]Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 681 (1974).

[26]John Brew, Comment, *State and Federal Forfeiture of Property Involved in Drug Transactions*, 92 DICK. L. REV. 461, 463 (1988) (citation omitted).

[27]*Id.* (citation omitted). The practice of proceeding directly against the object as the guilty party, which was referred to as "the institution of the deodands" under the early English common law, is currently referred to as an *in rem* proceeding. *Id.* For further discussion of *in rem* forfeiture proceedings, *see infra* notes 34-45 and accompanying text.

[28]*Calero-Toledo*, 416 U.S. at 680-81. Even if the offending object or person was morally blameless in causing the accidental death of one of the King's subjects, the Crown considered the offending party objectively guilty simply because the King had lost a subject. *See* Hiles, *supra* note 2, at 396.

Justice Holmes quoted one medieval writer who also acknowledged the guilt of the inanimate object:

> Where a man killeth another with the sword of John at the Stile, the sword shall forfeit as deodand, and yet no default is in the owner.

See Oliver Wendell Holmes, COMMON LAW 23 (M. Howe ed. 1963) (*quoted in* Steven S. Biss, Note, *Substantial Connection and the Illusive Facilitation Element for Civil Forfeiture of Narcoband in Drug Felony Cases*, 25 U. RICH. L. REV. 171, 174 (1990)).

[29]*Calero-Toledo*, 416 U.S. at 681. Underlying the Crown's practice of applying the proceeds of the forfeiture to religious purposes was the belief that utilizing the deodand for saying masses for the deceased allowed his soul to finally rest in peace. Damon Garrett Saltzburg, Note, *Real Property Forfeitures as a Weapon in the Government's War on*

religious and charitable justifications for the application of deodand began to dissipate, the institution was perpetuated to deter carelessness and to continue the flow of revenue into the Crown treasury.[30] The English common law extended the scope of deodand forfeitures to convicted felons,[31] traitors,[32] and eventually to objects used in violation of customs and revenue statutes.[33]

Common law tradition and statutory provisions sustained the concept of deodand in England.[34] The English forfeiture laws, however, received uneven support in colonial America.[35] Some of the American colonial courts did not strictly adhere to the concept of deodand, and several colonies evidenced their disapproval of the deodand concept by refusing to adopt forfeiture provisions.[36] Other colonial courts more readily accepted the use

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Drugs: A Failure to Protect Innocent Ownership Rights, 72 B.U. L. REV. 217, 220 n.16 (1992).

[30]*Calero-Toledo*, 416 U.S. at 681. In deterring carelessness, one commentator felt that deodand evolved into a form of civil punitive damages. Biss, *supra* note 28, at 175.

[31]*Calero-Toledo*, 416 U.S. at 682. The convicted felon's personal property was forfeited to the Crown while his real property escheated to the feudal lord. *Id.* A breach of the criminal law was considered a breach of the King's peace and justified denying the felon's right to own property. *Id.*

[32]*Id.* Both real and personal property of a convicted traitor forfeited directly to the Crown. *Id.* (citations omitted).

[33]*Id.* The forfeiture provisions included in various English customs and revenue laws allowed the Government to divest the offending party of objects used in violation of these statutes. These forfeiture provisions merged the deodand tradition with the belief that wrongdoers could be denied the right to own property. *Id.* *See also* C.J. Hendry Co. v. Moore, 318 U.S. 133, 138 (1943) ("Proceedings *in rem* . . . were also entertained by justices of the peace in many forfeiture cases arising under the customs laws . . . .").

[34]Brew, *supra* note 26, at 463.

[35]In United States v. Martino, 681 F.2d 952, 962 (5th Cir. 1982) (Politz, J., dissenting), Judge Politz noted in a dissenting opinion that: "[H]istorically our society has abhorred forfeitures." *Id.*

[36]Brew, *supra* note 26, at 464. Federal criminal forfeitures have been frowned upon since the origins of the republic. Cloud, *supra* note 5, at 17 ("Forfeiture was abolished by statute in 1790 during the first Congress . . . . Criminal forfeiture was not reinstated until 1970 . . . . " (*citing* United States v. Bassett, 632 F. Supp. 1308, 1311 n.2 (D. Md. 1986) (citations omitted))). The vestiges of this early colonial refusal to sanction forfeiture still exists today as some states retain constitutional provisions prohibiting specific types

of forfeiture by enforcing their own local forfeiture laws.[37] The Crown, however, usually brought about compliance by demanding colonial enforcement of the forfeiture provisions included in the Navigation Acts.[38] Thus, prior to the adoption of the United States Constitution, colonial courts exercised *in rem* jurisdiction by enforcing forfeiture laws directly against the offending commodities and vessels that were used in violation of customs laws.[39]

Since colonial times, *in rem* civil forfeiture proceedings have been available to obtain virtually any property used in a criminal enterprise, and this type of action continues to be widely used in the United States.[40] An

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of forfeiture. Brew, *supra* note 26, at 464. *See, e.g.*, ALA. CONST. art. 1, § 19; ALASKA CONST. art. 1, § 15; ARIZ. CONST. art. 2, § 16; ARK. CONST. art. 2, § 17; COLO. CONST. art. 2, § 9; GA. CONST. art. 1, § 2-203; ILL. CONST. art. 1, § 11; IND. CONST. art. 2, § 30; KAN. CONST. Bill of Rights § 12; MD. CONST. Decl. of Rights art. 27; MINN. CONST. art. 1, § 11; MO. CONST. art. 1, § 30; MONT. CONST. art. 3, § 9; NEB. CONST. art. 1, § 15; OHIO CONST. art. 1, § 12; ORE. CONST. art. 1, § 25; S.C. CONST. art. 1, § 8; TENN. CONST. art. 1, § 12; TEX. CONST. art. 1, § 21; WASH. CONST. art. 1, § 15; W.VA. CONST. art. 3, § 18; WIS. CONST. art. 1, § 12.

[37]Hiles, *supra* note 2, at 397. The English model of statutory forfeiture carried over to the United States where "the First Congress passed laws subjecting ships and cargos involved in customs offenses to forfeiture." Austin v. United States, 113 S. Ct. 2801, 2807 (1993).

[38]Hiles, *supra* note 2, at 396-97. The Navigation Acts of 1660 required the shipping of most commodities in English vessels. *See Austin*, 113 S. Ct. at 2807. Any violation of the Navigation Acts resulted in the forfeiture of the illegally carried goods and the ship that transported the cargo. *Id.* (citing L. HARPER, THE ENGLISH NAVIGATION LAWS (1939)). Thus, under English law, any vessels found to be in violation of the Navigation Acts were subject to forfeiture upon a finding of guilt by the court of the King's Exchequer. Hiles, *supra* note 2, at 397.

For a more detailed analysis of the Navigation Acts, see generally C.J. Hendry Co. v. Moore, 318 U.S. 133 (1943).

[39]Hiles, *supra* note 2, at 397. *See also* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683 (1974) ("[A]lmost immediately after adoption of the Constitution, ships and cargoes involved in customs offenses were made subject to forfeiture under federal law . . . ." (footnotes omitted)).

[40]United States v. Nichols, 841 F.2d 1485, 1486-87 (10th Cir. 1988) (citations omitted). In most cases, the government seeks forfeiture of contraband that is either illegal contraband or an instrumentality employed in an illegal activity. *Id.* at 1486. *See, e.g.*, United States v. Mandel, 408 F. Supp. 679, 682 (D. Md. 1976) (noting that cars and guns are commonly forfeited as the instrumentalities of a crime).

in rem forfeiture occurs directly against the property[41] under the legal fiction that the property itself,[42] rather than the person, is the offender.[43] By proceeding against the property as the defendant, the government does not have to prove that the owner committed the violation justifying the forfeiture.[44] Thus, the element of individual fault is not required in an *in rem* civil forfeiture action.[45]

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[41]The theory underlying an *in rem* forfeiture is that the criminal act tarnishes the property as soon as the owner involves the property in the criminal activity. Hiles, *supra* note 2, at 395-96.

[42]Saltzburg, *supra* note 29, at 221. Under this legal fiction, the property is deemed guilty of violating an existing law. *Id.* In adopting the theory that an inanimate object is at fault, the United States Supreme Court stated: "Traditionally, forfeiture actions have proceeded upon the fiction that inanimate objects themselves can be guilty of wrongdoing. Simply put, the theory has been that if the object is 'guilty,' it should be held to forfeit." United States v. United States Coin & Currency, 401 U.S. 715, 719 (1971) (citation omitted).

[43]Glesner, *supra* note 3, at 768-69.

[44]Tamara R. Piety, Comment, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. MIAMI L. REV. 911, 916 (1991). As noted by Piety: "[The property] . . . is proceeded against . . . held guilty and condemned as though it were conscious instead of inanimate and insentient." *Id.* (quoting In re Various Items of Personal Property, 282 U.S. 577 (1931)).

Various rationales have been advanced for proceeding *in rem* against the property. One justification supporting *in rem* civil forfeiture is that the remedial aspects of these proceedings necessitate less constitutional scrutiny as compared to analogous criminal laws having an underlying deterrent purpose. *Id.* at 947. Another justification supporting *in rem* civil forfeiture is the strong public interest in preventing continued illicit use of the property and in enforcing criminal sanctions. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 679 (1974). As stated by Justice Brennan, writing for the majority in *Calero-Toledo*, the public interest supporting forfeiture is strong enough to justify the seizure of assets prior to notice or a hearing. *Id.* *See also Nichols*, 841 F.2d at 1486 ("The guilt or innocence of the property owner is irrelevant in a civil action because the theory is that the property itself has committed the wrong."). A third rationale supporting *in rem* civil forfeiture is that the court's jurisdiction over property is more easily obtained than jurisdiction over a person who may move about freely from one place to another. Glesner, *supra* note 3, at 768-69.

[45]Hiles, *supra* note 2, at 396. *See also*, William R. Cowden, Note, *Attorney Fee Forfeiture Under the Comprehensive Forfeiture Act of 1984: If It Works, Don't Fix It*, 63 NOTRE DAME L. REV. 535, 536 n.6 (1988) (observing that civil forfeiture takes "no cognizance of owners or their culpability."); Piety, *supra* note 44, at 973 (noting that civil forfeiture is a utilitarian form of punishment in light of its disregard of personal guilt).

Conversely, individual fault is required in an *in personam* criminal forfeiture, whereby the government proceeds directly against the convicted criminal defendant.[46] An *in personam* criminal forfeiture action, which was originally limited as a punishment for treason in the United States,[47]

This disregard in respect to the owner's conduct was also present in the *Calero-Toledo* decision. In *Calero-Toledo*, Puerto Rican authorities discovered marihuana on board a pleasure yacht that had been leased by two residents. *Calero-Toledo*, 416 U.S. at 665. The authorities later seized the yacht without prior notice to the owner pursuant to Puerto Rican forfeiture laws which provide that vessels used to transport controlled substances are subject to forfeiture. *Id.* at 665-67. This forfeiture was upheld despite the Government's concession that the owner was not involved in the criminal enterprise carried on by the lessee and had no knowledge that its property was being used in violation of the law. *Id.* at 668. The Court reasoned that the vessel carrying the illegal drugs was treated as the offender and was therefore subject to forfeiture. *Id.* at 684 (citing United States v. Brig Malek Adhel, 2 How. 210, 238 (1844)). Treating the vessel as the offender, without regard to the owner's conduct, allegedly served as a means of suppressing the offense and "insuring indemnity to the injured party." *Id.*

[46]United States v. Nichols, 841 F.2d 1485, 1486 (10th Cir. 1988); Biss, Note, *supra* note 28, at 174.

Some courts have, however, held that there is no legal difference between criminal and civil forfeiture proceedings even though each provides a separate remedy. *See* United States v. United States Coin & Currency, 401 U.S. 715 (1971) (noting that regardless of whether assets are forfeited or paid as part of a criminal fine, liability is predicated upon a finding of the owner's wrongful conduct). Other courts view civil forfeiture as being quasi-criminal in character due to the punitive and deterrent purposes underlying the proceedings. Brew, Comment, *supra* note 26, at 468. This quasi-criminal characterization enables the court to extend the same rights enjoyed by criminal defendants to claimants in civil forfeiture actions. *Id.*

The identity of the plaintiff bringing the action is one important distinction between criminal and civil forfeitures. Glesner, *supra* note 3, at 770. A representative of the government usually initiates a criminal action while civil actions are usually brought by a private individual injured by the defendant's actions. *Id.*

[47]The United States 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 attained." U.S. CONST. art. III, § 3, cl.2.

According to one commentator, the American aversion to the harsh English tradition of criminal forfeiture was manifested when the Founding Fathers limited criminal forfeiture in scope and duration. Hughes & O'Connell, *supra* note 4, at 614. Under Article III, section 3, clause 2 of the U.S. Constitution, criminal forfeiture was used only in the limited case of treason, wherein assets were seized for the duration of the defendant's life. *Id.* Since the drafters of the Constitution prohibited the permanent forfeiture of real property for treason, it has been argued that forfeiture of real property is also prohibited from application to lesser crimes. *Id.*

requires proof of the defendant's personal guilt and allows the government to seize specific real or personal property alleged to be the fruit of a crime or used as an instrumentality in the commission of a criminal act.[48]

III. THE APPLICATION OF STATUTORY FORFEITURES TO ATTORNEY FEES

Prior to 1970, members of organized crime families and those affiliated with similar criminal networks were prosecuted for specific federal offenses, but often avoided punishment for their association with such criminal enterprises.[49] As the American public grew increasingly alarmed about the activities of organized crime and the flow of illegal drugs into the United States,[50] Congress attacked these problems by enacting the RICO and CCE statutes. These statutes provided law enforcement officials with the expansive statutory support needed to attack individuals, not only for their

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The English also utilized statutory and common law *in personam* forfeiture proceedings against convicted traitors and felons. Brew, Comment, *supra* note 26, at 463. While the forfeiture was dependant upon a conviction, the English law went further than modern forfeiture provisions by holding that even property that was not connected with the criminal enterprise was also subject to forfeiture. *Id.*

[48]Hughes & O'Connell, *supra* note 4, at 617. Prior to the passage of CFA in 1984, which enabled the government to obtain a pre-conviction divestiture of assets, one commentator stated: "Criminal forfeiture is the post-conviction divestiture of the defendant's property or financial interest that has an association with his criminal activities." Irving A. Pianin, Comment, *Criminal Forfeiture: Attacking the Economic Dimension of Organized Narcotics Trafficking*, 32 AM. U. L. REV. 227, 229 (1982).

[49]Cowden, *supra* note 45, at 538. Cowden observed that before the enactment of RICO and CCE in 1970, "specific federal offenses such as theft, extortion, loan sharking, union racketeering, interstate gambling, [and] trafficking in drugs" were used to prosecute organized crime figures. *Id.* There was, however, no statutory punishment for one's affiliation with an organized criminal enterprise. *Id.* Prior to 1970, law enforcement agencies were frequently frustrated in their efforts to combat organized crime due to the absence of comprehensive legislation attacking the criminal enterprise as a unit. *Id.* The common law felonies concentrated on a single criminal act, thereby enabling racketeers to avoid prosecution for their involvement in a criminal enterprise. *Id. See also* Russello v. United States, 464 U.S. 16, 25 (1983) ("The legislative history clearly demonstrates that RICO was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots.").

[50]United States v. Nichols, 841 F.2d 1485, 1487 (10th Cir. 1988) ("The 1970 statutes were enacted in response to widespread concern about the flow of illegal drugs and the activities of organized crime.").

particular offense, but also for their affiliation with a criminal enterprise.[51] Both RICO and CCE contain the customary criminal penalties of fines and imprisonment.[52] Additionally, these statutes reintroduced forfeiture into federal law.[53]

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[51]Cowden, *supra* note 45, at 535. The broad scope of RICO has not only enabled the federal government to prosecute sophisticated criminal enterprises such as the Mafia, it has also provided the expansive authority needed to attack members of street gangs for their affiliation with a criminal enterprise. *See* Matthew Purdy, *Using the Racketeering Law to Bring Down Street Gangs*, N.Y. TIMES, Oct. 19, 1994, at A1, B5.

[52]An individual convicted under RICO "shall be fined . . . or imprisoned not more than 20 years (or for life if the violation is based upon racketeering activity for which the maximum penalty includes life imprisonment) . . . ." 18 U.S.C. § 1963(a) (1988 & Supp. V 1993). Similarly, CCE provides that:

> (a) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual . . . .

21 U.S.C. § 848(a) (1988 & Supp. V 1993). For an interesting discussion of mandatory minimum sentences imposed on felons convicted of engaging in a continuing criminal enterprise, see generally William J. Skalitzky, Comment, *Aider and Abettor Liability, The Continuing Criminal Enterprise, and Street Gangs: A New Twist in an Old War on Drugs*, 81 J. CRIM. L. & CRIMINOLOGY 348 (1990); Stephen J. Schulhofer, *A Decade of Sentencing Guidelines: Revisiting the Role of the Legislature*, 28 WAKE FOREST L. REV. 199 (1993).

[53]As originally enacted in 1970, the forfeiture provision under CCE provided that:

> (a)(2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States —
>
> (A) the profits obtained by him in such enterprise, and
>
> (B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

21 U.S.C. § 848 (1970).

Similarly, the original forfeiture provision of RICO provided that:

> (a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a

The legislative history underlying these statutes evidenced a conscious effort by Congress to dismantle organized crime through an assault on its economic foundations.[54] This assault, however, never took place because the government's inability to preserve assets prior to the forfeiture proceedings limited the success of these statutes.[55] To remedy the perceived flaws of RICO and CCE, whereby defendants either concealed or disposed of their assets prior to trial,[56] Congress enacted CFA in 1984.[57] Through

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> source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

18 U.S.C. § 1963 (1970).

[54]*See generally* S. REP. NO. 617, 91st Cong., 1st Sess. 76 (1969). As evidenced by the following statement, Congress clearly intended that RICO strike at the core of a criminal enterprise:

> What is needed here . . . are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. In short, an attack must be made on their sources of economic power . . . .

Id. at 79.

[55]Hughes & O'Connell, *supra* note 4, at 623-24. At the time of their enactment, RICO and CCE were considered to be an novel method of reaching the financial resources that perpetuated criminal activity. *Id.* at 621. The statistical reality, however, showed the ineffectiveness of these statutes when over the course of a ten year period, only ninety-eight prosecutions for drug violations were brought under these statutes. *Id.* at 621 & n.51.

Preserving the assets which might be subject to forfeiture proved to be especially difficult under RICO and CCE. *Id.* at 624. Prior to the enactment of CFA in 1984, any person anticipating the possibility of a criminal forfeiture proceeding against his property had both incentive and opportunity to transfer his assets and effectively shield them from forfeiture. *Id.* This inability to preserve assets was particularly acute in drug-related cases where criminal defendants developed ways of concealing assets, laundering the profits, and reinvesting the proceeds of the criminal activity. *Id.* at 623-24.

[56]S. REP. NO. 225, 98th Cong., 1st Sess. 196 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182. The Senate Committee stated:

> [P]resent criminal forfeiture statutes do not adequately address the serious problem of a defendant's pretrial disposition of his assets. Changes are necessary both to preserve the availability of a defendant's assets for criminal forfeiture, and, in those cases in which he does transfer, deplete, or conceal his property, to assure that he cannot . . . avoid the economic impact of

the amendment, Congress sought to eliminate the limitations and ambiguities that had frustrated government efforts in combatting racketeering and drug trafficking[58] and to encourage the use of forfeiture as a means of attacking the economic foundations of a criminal enterprise.[59] With the passage of CFA in 1984,[60] Congress broadened the scope of forfeiture when it revived

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forfeiture.

S. REP. NO. 225, at 196.

[57]Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, Title II, §§ 302-03, 2301, 98 Stat. 2040, 2044, 2192-93 (codified as amended at 18 U.S.C. § 1963 (1988 & Supp. V 1993) and 21 U.S.C. § 853 (1988 & Supp. V 1993)). CFA, amending RICO and CCE, was part of the Comprehensive Crime Control Act of 1984.

Congressional dissatisfaction with the application of criminal forfeiture provisions under RICO and CCE led to the enactment of the Comprehensive Forfeiture Act. Cowden, *supra* note 45, at 540.

[58]S.REP. NO. 225, 98th Cong., 1st Sess. 192 (1983).

[59]*Id.* at 191. In regard to encouraging the use of forfeiture, the Senate Judiciary Committee stated:

> Title III of the [CFA] is designed to enhance the use of forfeiture, and in particular, the sanction of criminal forfeiture, as a law enforcement tool in combatting . . . racketeering and drug trafficking.
>
> . . . [I]f law enforcement efforts to combat racketeering and drug trafficking are to be successful, they must include an attack on the economic aspects of these crimes. Forfeiture is the mechanism through which such an attack may be made.

Id.

Not only is forfeiture intended to strike directly at the members of organized crime, it is also aimed at discouraging legitimate businessmen from dealing with suspected racketeers. United States v. Badalamenti, 614 F. Supp. 194, 196 (S.D.N.Y. 1985) ("[O]ne who accepts dirty money in payment for goods and services may forfeit [the money]."). *See also* United States v. Conner, 752 F.2d 566, 576 (11th Cir. 1985) ("[T]he forfeiture provisions are meant to reach the ill-gotten gains of criminals where they enter or operate an organization through a pattern of racketeering activities.") (citations omitted).

[60]Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, § 301, 98 Stat. 1837, 2040 (1984).

the concept of *in personam* criminal forfeiture by adding this penalty to both RICO[61] and CCE.[62]

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[61]CFA amended the criminal penalties section of RICO to provide:

> (a) Whoever violates any provision of [the prohibited activities included in § 1962] shall be fined under this title or imprisoned . . . or both, and shall forfeit to the United States, irrespective of any provision of State law —
>
> . . . .
>
> (2) any —
> (A) interest in;
> (B) security of;
> (C) claim against; or
> (D) 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 a person shall order, in addition to any other sentence imposed . . . that the person forfeit to the United States all property described in this subsection.

See 18 U.S.C. § 1963 (1988 & Supp. V 1993).

[62]CFA amended the criminal forfeiture provision of CCE to provide, in pertinent part:

> (a) Property subject to criminal forfeiture —
> Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law —
> (1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;
> (2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and
> (3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

See 21 U.S.C. § 853(a) (1988 & Supp. 1993).

To prevent the dissipation of assets prior to trial, Congress amended the forfeiture provisions of RICO and CCE by including a "relation back" provision and a restraining order provision which adjusted the timing of a forfeiture order.[63] Under the "relation back" provision,[64] a doctrine adopted from *in rem* civil forfeitures,[65] title to the property vests in the government immediately upon commission of the illegal act.[66]

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[63]Cowden, *supra* note 45, at 542-43. After the enactment of the 1984 Amendments, RICO and CCE forfeitures were enforced through *in personam* proceedings where "the question of defendants' property interests in allegedly forfeitable assets [was] intimately connected with the question of their guilt." *Id.* at 543. Under the initial application of both RICO and CCE, forfeiture occurred only when a criminal trial resulted in a conviction. *Id. See also* United States v. Nichols, 841 F.2d at 1488-89 (noting that under the 1984 Amendments, the government interest "in the property to be forfeited vests at the time the crime is committed, rather than upon conviction," as previously determined under CCE and RICO guidelines).

[64]*See* 18 U.S.C. § 1963(c) and 21 U.S.C. § 853(c). The substantive text of these two statutes is nearly identical and states:

> (c) All right, title and interest in property . . . vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing . . . that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

18 U.S.C. § 1963(c) (1988 & Supp. V 1993); 21 U.S.C. § 853(c) (1988 & Supp. V 1993).

[65]Cowden, *supra* note 45, at 541-42. *See also* Saltzburg, *supra* note 29, at 221 (noting that the relation back doctrine "provides that all right, title and interest in property . . . subject to civil forfeiture vests" in the government upon the commission of the activities initiating the forfeiture).

[66]The relation back doctrine first appeared in United States v. Sowell, 133 U.S. 1 (1890), wherein the Supreme Court held that property interests of illegal distillers were forfeited upon the commission of the criminal acts. The Government interest in receiving title to the property, which vested upon commission of the criminal act, but did not become perfected until a judicial declaration of forfeiture, enabled the Government to avoid claims of alleged good faith purchasers. *Id.* at 16-20.

Since the government obtains title to the property immediately upon its illegal use, any interests obtained thereafter become inferior to the government's interest even if the third party recipient is an innocent owner of the property. Brew, *supra* note 26, at 473. *See also* Jacobs, *supra* note 15, at 337.

Additionally, under CFA's amendments to RICO and CCE, the property or cash proceeds derived from the criminal act are considered "tainted" and become subject to forfeiture,[67] even before a final determination of guilt has been rendered.[68] Despite the absence of express legislative authority,[69] the

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The mere existence of an illegal act will not be enough to achieve an *in personam* forfeiture. The government must show a nexus between the unlawful act and the property forfeited. Hughes & O'Connell, *supra* note 4, at 623. Even before the adoption of CFA, one commentator noted four classes of property subject to forfeiture, including: contraband; derivative contraband (items which facilitate the illegal transaction); direct proceeds (assets received during an illegal transaction); and derivative proceeds (property purchased with the proceeds of the unlawful transaction). *Id.*

[67]Piety, *supra* note 44, at 951. According to the legal fiction of "taint," cars, boats, homes, and cash proceeds are tainted by the presence of an unlawful substance or through the commission of an illegal act, and are consequently subject to forfeiture. *Id. See also* United States v. Nichols, 841 F.2d at 1486 ("[B]ecause the property is considered tainted upon commission of the wrongful act, the interest of the government vests at the time of the act.").

Piety opined that the elements of taint and relation back, borrowed from the civil forfeiture law, have been incorporated into criminal forfeiture law with negative results. Piety, *supra* note 44, at 951.

Under the relation back provision, the government may not presume guilt. *Nichols*, 841 F.2d at 1500. Instead, the government must prove the defendant's guilt and show a nexus between the illegal acts and the property to establish the guilt of the property. *Id.*

[68]Paul G. Wolfteich, Note, *Making Criminal Defense a Crime Under 18 U.S.C. Section 1957*, 41 VAND. L. REV. 843, 851 (1988) ("Title vests at the time of the offense, not at the time of conviction."). *Id.*

[69]Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 636 (1989) (Blackmun, J., dissenting). Justice Blackmun noted that CFA did not expressly provide for the forfeiture of attorney fees nor did the legislative history contain any substantive discussion of the question regarding attorney fees. *Id. See also* In re Forfeiture Hearing as to Caplin & Drysdale, 837 F.2d 637, 641 (4th Cir. 1988) ("The language of the forfeiture statute makes no mention of attorney fees, either in its definition of property that is subject to forfeiture in sections 853(a) and (b) or in its provision for third party claims of exemption in § 853(n)."); United States v. Monsanto, 491 U.S. 600, 608 (1989) (where the majority implicitly acknowledged the absence of legislative discussions on the issue of attorney fee forfeiture, stating that silence by the House and Senate on the issue of attorney fees forfeiture "proves nothing.").

Additionally, it must be noted that Congress adopted a forfeiture provision expressly exempting payments for legal representation of the defendant in matters directly related to the criminal conviction. *Monsanto*, 491 U.S. at 610 (citing the Victims Crime Act of 1984, 98 Stat. 2175-76 (codified at 18 U.S.C. §§ 3681-82 (1988 & Supp. V 1993)). This provision allowed up to twenty percent of the total forfeited profits to be used for payment of attorney fees. *Id.* Thus, Congress clearly contemplated a provision that would allow

government has used this provision, which voids all property transfers subsequent to a criminal act,[70] to subject attorney fees, paid after the commission of a crime, to forfeiture.[71]

Second, Congress included a restraining order provision to allow the government to preserve the availability of forfeitable property before the issuance of an indictment.[72] Prior to the enactment of CFA, the

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the exemption of attorney fees from forfeiture since it concurrently enacted such an express provision at the same time it enacted CFA. *Id.*

Other courts and commentators have viewed the legislative history from a completely different perspective, suggesting that the absence of an express exemption for attorney fees establishes that Congress did not want assets earmarked for attorneys to be treated differently from any other assets subject to forfeiture. Cowden, *supra* note 45, at 545. *See also Monsanto* 491 U.S. at 606 ("In the case before us, the language of § 853 is plain and unambiguous: all assets falling within its scope are to be forfeited upon conviction, with no exception existing for the assets used to pay attorney's fees . . . .").

[70]Cowden, *supra* note 45, at 541-42. As noted by one commentator, the condemnation of the subject property or cash assets relates back to the moment when the government sought the forfeiture and, therefore, voids all intermediate alienations of the property even if sold to a good faith purchaser. Hughes & O'Connell, *supra* note 4, at 617-18.

[71]Cowden, *supra* note 45, at 541 n.41. *See also* Jacobs *supra* note 15, at 337 (noting that under the relation back theory, assets that a criminal defendant would use to pay his attorney belong to the government from the inception of the criminal act).

In the legislative history of the Comprehensive Drug Penalty Act of 1984, a bill related to CFA, the House Judiciary Committee stated, "nothing in this section is intended to interfere with a person's Sixth Amendment right to counsel." H.R. REP. NO. 845, 98th Cong., 2d. Sess., pt. 1, at 19 n.1 (1984). This sentence, however, should not be relied upon to support the position that attorney fees are exempt from the reach of forfeiture because later in the same report, Congress stated, "[t]he Committee . . . does not resolve the conflict in District Court opinions on the use of restraining orders that impinge on a person's right to retain counsel in a criminal case." *Id.*

[72]Under the identical restraining order provisions contained in RICO and CCE:

> (d) [(e)](1) Upon application of the United States, the court may enter a restraining order or injunction . . . or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section —
>
> . . . :
>
> (B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that —

government had no effective means of preventing a defendant from dissipating or transferring assets in anticipation of trial.[73] In fact, when these pre-amendment courts relied upon civil procedures to grant restraining orders, the government was disadvantaged by having to prove the merits of its underlying case well in advance of trial.[74] Thus, to protect the

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

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

. . . .

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture . . . .

18 U.S.C. § 1963(d) (1988 & Supp. V 1993); 21 U.S.C. § 853(e) (1988 & Supp. V 1993).

[73]United States v. Nichols, 841 F.2d 1485, 1501 ("Without a restraining order, the government is powerless if a defendant 'dissipates his property on wine, women and song before his conviction . . . .'").

[74]In United States v. Mandel, 408 F. Supp. 679, 682 (D. Md. 1976), the court focused on four factors in deciding whether a preliminary injunction should be issued in a civil case. Those four factors were: "(1) Has the [government] made a strong showing that [it] is likely to prevail on the merits at trial? (2) Has irreparable harm in the absence of relief been shown? (3) Would the issuance of the injunction substantially harm other parties interested in the proceedings? and (4) Where does the public interest lie?" *Id.* at 682. Thus, a government entity seeking to obtain a preliminary injunction or restraining order to prevent the dissipation of forfeitable assets prior to trial had a difficult task.

See also Cowden, *supra* note 45, at 543 (noting that the government, which was often unprepared to prove the merits of the underlying case several months before trial, seldom sought forfeiture under these civil procedures).

government's interest in the assets[75] and to prevent the dissipation of property[76] and sham transfers,[77] Congress eased the government's burden by liberalizing the standards needed to obtain a restraining order. Congress did so by allowing the probable cause established by an indictment to suffice for the entry of a restraining order.[78] Alternatively, Congress provided a provision in CFA allowing the government to place a restraint upon the disposition of assets, even before the filing of an indictment, if the government shows "substantial probability" that it will prevail on the issue of forfeiture at trial.[79]

IV. THE SUPREME COURT SPEAKS . . . BUT THE DEBATE CONTINUES: ATTORNEY FEES SUBJECT TO FORFEITURE

A. JUSTICE WHITE'S MAJORITY OPINION IN *CAPLIN & DRYSDALE* AND *MONSANTO*

Following the passage of CFA, the federal courts were unable to resolve the issue of whether Congress intended, or even had the capability under the United States Constitution, to subject attorney fees to forfeiture.[80]

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[75]*Nichols*, 841 F.2d at 1500. In justifying the expanded scope of restraining orders, the *Nichols* court held that the government can act in ways that adversely affect criminal defendants prior to trial "when it is necessary to protect an important public interest." *Id.*

[76]Wolfteich, *supra* note 68, at 851.

[77]United States v. Rogers, 602 F. Supp. 1332, 1342 (D. Colo. 1985).

[78]*See* 21 U.S.C.A. § 853(e)(1)(A), 18 U.S.C.A. § 1963(d)(1); *Rogers*, 602 F. Supp. at 1343 ("The probable cause of an indictment is sufficient to allow the entry of a restraining order on a temporary emergency basis . . . .").

Prior to the enactment of CFA liberalizing the use of restraining orders, courts allowed defendants to challenge any indictment that suggested intent of the government to seek a forfeiture of the assets. Cowden, *supra* note 45, at 543.

[79]21 U.S.C. § 853(e)(1)(B)(i) (1988 & Supp. V 1993); 18 U.S.C. § 1963(d)(1)(B)(i) (1988 & Supp. V 1993).

[80]The federal district courts and several circuit courts of appeal presented diametrically opposed decisions regarding the constitutionality of including attorney fees within the scope of fee forfeiture provisions. For cases that upheld the constitutionality of such an interpretation, see generally United States v. Monsanto, 836 F.2d 74 (2d Cir. 1987); United States v. Bailey, 666 F. Supp. 1275 (E.D.Ark. 1987); *In re* Grand Jury Subpoena Duces Tecum Dated January 2, 1985, 605 F. Supp. 839 (S.D.N.Y. 1985) [hereinafter Payden v. United States], *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985); *In re*

The fees paid to lawyers were neither expressly exempted nor included in the coverage of CFA. Consequently, the courts were forced to decide whether Congress intended attorney fees to be excepted from forfeiture, and alternatively, whether the Sixth Amendment right to counsel precluded the government from seizing assets allocated for the payment of defense counsel.[81] Several federal courts held that CFA must be read to exempt assets used to retain a defense attorney from the reach of the forfeiture provisions.[82] Alternatively, other courts interpreted CFA as including

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Forfeiture Hearing as to Caplin & Drysdale, Chartered, 837 F.2d 637 (4th Cir. 1988); United States v. Nichols, 841 F.2d 1485 (10th Cir. 1988).

Conversely, the following cases held that the exercise of attorney fee forfeitures would have a devastating, negative effect on the adversarial system of justice: United States v. Rogers, 602 F. Supp. 1332 (D.Colo. 1985); United States v. Badalamenti, 614 F. Supp. 194 (S.D.N.Y. 1985); United States v. Reckmeyer, 631 F. Supp. 1191 (E.D. Va. 1986), *aff'd on other grounds sub nom.*; United States v. Harvey, 814 F.2d 905 (4th Cir. 1987), *rev'd sub nom.*; In re Forfeiture Hearing as to Caplin & Drysdale, Chartered, 837 F.2d 637 (4th Cir. 1988) (en banc); United States v. Bassett, 632 F. Supp. 1308 (D. Md. 1986), *aff'd on other grounds sub nom.*; United States v. Ianniello, 644 F. Supp. 452 (S.D.N.Y. 1985); United States v. Estevez, 645 F. Supp. 869 (E.D. Wis. 1986), *appeal dismissed*, 852 F.2d 239 (7th Cir. 1988).

[81] *Estevez*, 645 F. Supp. at 870 ("Fees paid to lawyers are not expressly exempted from the coverage of the statute. Thus it can and has been argued that fees paid to an attorney are subject to forfeiture unless counsel was 'reasonably without cause to believe' the fees were subject to forfeiture . . . .").

[82] *See* United States v. Truglio, 660 F. Supp. 103 (N.D.W.Va. 1987) (concluding that a fair reading of the RICO and CCE forfeiture provisions allowed for the exception of legitimate attorney fees when considering the defendant's right to counsel and the more limited right to be represented by counsel of choice); United States v. Estevez, 645 F. Supp. 869 (E.D.Wis. 1986) (concluding that Congress intended legitimate attorney fees be excepted from the forfeiture provisions because of the constitutional questions raised by the statute, and because the spirit of the statute allows for exceptions); United States v. Figueroa, 645 F. Supp. 453 (W.D.Pa. 1986) (holding that court-appointed defense counsel was a good faith provider of legal services and was therefore excepted from the scope of forfeiture); United States v. Ianniello, 644 F. Supp. 452 (S.D.N.Y. 1985) (concluding that it would be improper to bar defendants from utilizing funds to hire counsel of choice during the period of time in which they are presumed innocent); United States v. Jones, 837 F.2d 1332 (5th Cir. 1988), *rehearing granted*, 844 F.2d 215 (5th Cir. 1988) (holding that an attorney may demonstrate in a post-conviction hearing that he rendered legitimate services and is entitled to payment from the forfeited assets); United States v. Rogers, 602 F. Supp. 1332 (D. Colo. 1985) (holding that an attorney is entitled to compensation for legitimate legal services. Furthermore, the *Rogers* court found that the forfeiture provisions of CFA were intended to void transactions where the attorney failed to act at arm's length and accepted fees as part of "an artifice or sham to avoid forfeiture."); United States v. Badalamenti, 614 F. Supp. 194 (S.D.N.Y. 1985) (concluding that bona fide legal

within the scope of forfeiture assets allocated for the payment of a defense attorney.[83] Accordingly, in the companion cases of *Monsanto* and *Caplin & Drysdale*, the Supreme Court granted *certiorari* to resolve the statutory and constitutional questions of whether attorney fees were exempt from forfeiture.[84]

Due to the similarities in the facts underlying the *Caplin & Drysdale* and *Monsanto* prosecutions, Justice White, writing for the majority in both cases,[85] analyzed the statutory language of CCE in *Monsanto* and the

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fees paid to a defense attorney were not encompassed by the forfeiture provisions of CFA. In the words of Judge Leval, "[T]he liability to forfeiture of bona fide legal fees paid to the indicted defendant's trial attorney would raise such constitutional and ethical problems, I cannot conceive that this was intended by Congress, absent some indication in statute or legislative history. And if it had been intended, such application would in all likelihood violate the Sixth Amendment.").

[83]*See* United States v. Monsanto, 836 F.2d 74 (2d Cir. 1987) (concluding that there is no Sixth Amendment requirement that restrained property be made available for attorney fees because a post-restraining order adversarial hearing provides sufficient safeguards against abuse of prosecutorial discretion); United States v. Bailey, 666 F. Supp. 1275 (E.D. Ark. 1987) (holding that the Sixth Amendment does not require that a criminal defendant be allowed to use monies from illegal drug transactions to pay an attorney of the defendant's choice); Payden v. United States, 605 F. Supp. 839 (S.D.N.Y. 1985) (noting that fees paid to attorneys cannot become a safe harbor from forfeiture of the profits of illegal enterprises), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985); In re Forfeiture Hearing as to Caplin & Drysdale, Chartered, 837 F.2d 637 (4th Cir. 1988) (holding that the government may restrain property to prevent the flight of forfeitable assets in the same way that it may restrain liberty to prevent the flight of a suspect because the presumption of innocence does not immunize suspects from pre-trial inconvenience); United States v. Nichols, 841 F.2d 1485 (10th Cir. 1988) (holding that the unambiguous language of CCE does not exempt attorney fees from forfeiture).

In holding that the unambiguous language of CFA did not exempt attorney fees from forfeiture, the *Nichols* court asserted that, "Property is not exempted because a defendant wants to use it to pay an attorney any more than property is exempted because a defendant wants to purchase a house or employ a financial advisor." 841 F.2d at 1492.

The Fourth Circuit, in its *In re Forfeiture Hearing as to Caplin & Drysdale* opinion, noted that CFA, "generally expanded the type of property that is subject to forfeiture, the crimes that can give rise to forfeiture, and prosecutors' ability to restrain property transfers by defendants both before and after an indictment." 837 F.2d at 640.

[84]United States v. Monsanto, 488 U.S. 941 (1988); Caplin & Drysdale, Chartered v. United States, 488 U.S. 940 (1988).

[85]Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 618 (1989); United States v. Monsanto, 491 U.S. 600, 601 (1989). Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy joined in the majority opinion delivered by Justice White. *Caplin & Drysdale*, 491 U.S. at 618; *Monsanto*, 491 U.S. at 601. Justice Blackmun filed

constitutional issues in *Caplin & Drysdale* to determine whether attorney fees should be subject to forfeiture under CCE. In *Monsanto*, an indictment was entered charging the defendant with operating a large-scale heroine distribution enterprise.[86] Contained within the multi-count indictment were charges of violating the racketeering laws and creating a continuing criminal enterprise in violation of CCE.[87] The indictment further alleged that three assets, including a home, an apartment, and $35,000 in cash, had been accumulated by Defendant as a result of narcotics trafficking.[88] The Government claimed that these assets were all subject to forfeiture under CFA of 1984.[89] After a restraining order was placed upon these assets, Defendant moved to vacate this order so that he could use the frozen assets to retain an attorney.[90]

Focusing initially on the express language of CCE, Justice White concluded that Congress intended forfeiture to be mandatory in all cases where the statute applied.[91] Additionally, Justice White noted that "property" in the CCE statute was defined broadly when describing the assets that are within the scope of forfeiture.[92] Justice White reasoned that the "plain and unambiguous" language of CCE mandated that all assets

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a strong dissenting opinion in which Justices Brennan, Marshall, and Stevens joined. *Caplin & Drysdale*, 491 U.S. at 618 (Blackmun, J., dissenting); *Monsanto*, 491 U.S. at 601 (Blackmun, J., dissenting).

[86]*Monsanto*, 491 U.S. at 602.

[87]*Id.*

[88]*Id.*

[89]*Id.* at 602-03.

[90]*Id.* at 603-04.

[91]*Id.* at 607. By focusing on the plain language of the statute, which Justice White suggested was broad and unambiguous, the Court concluded it was unnecessary to evaluate the legislative history underlying the enactment of the forfeiture provisions. *Id.* at 609.

[92]*Id.* at 607. Justice White noted that CCE provides a broad definition of "property" when describing what types of assets were within the scope of forfeiture. *Id.* The Justice further stated that "'tangible and intangible personal property, including rights, privileges, interests, claims, and securities,'" as well as real property were within the CCE forfeiture provisions. *Id.* As Justice White explained: "Nothing in [the CCE's] all-inclusive listing even hints at the idea that assets to be used to pay an attorney are not 'property' within the statute's meaning." *Id.*

within the scope of the statute be subject to forfeiture.[93] Accordingly, Justice White concluded that Congress, by expressly including all assets within the scope of forfeiture under CCE, must have intended attorney fees to be within the scope of forfeiture in the absence of any express exemption to the contrary.[94] In supporting this conclusion, Justice White compared CCE with the Victims of Crime Act,[95] which expressly exempted attorney

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[93]*Id.* at 606. In the words of Justice White: "In the case before us, the language of [CCE] is plain and unambiguous: all assets falling within its scope are to be forfeited upon conviction, with no exception existing for the assets used to pay attorney's fees — or anything else, for that matter." *Id.*

Justice White further noted that the words "shall forfeit," which were expressly included in the CCE statute, evidenced a clear Congressional intent that forfeiture apply in all cases where CCE could be applied. *Id.* For the relevant text of CCE, *see supra*, note 62.

The same reasoning can be applied in cases that rely upon the RICO provisions which contains nearly identical language as the statutory sections in question in the *Monsanto* and *Caplin & Drysdale* cases. *See supra*, note 61 for the relevant text of RICO.

[94]*Monsanto*, 491 U.S. at 609.

[95]Victims of Crime Act of 1984 ("VCA"), 98 Stat. 2175-76 (codified at 18 U.S.C. §§ 3681-82 (1988)). The VCA provides, in pertinent part:

> (a) Upon the motion of the United States attorney made at any time after conviction of a defendant for an offense under section 794 of this title or for an offense against the United States resulting in physical harm to an individual, and after notice to any interested party, the court shall . . . order such defendant to forfeit all or any part of the proceeds received or to be received by that defendant . . . from a contract relating to a depiction of such crime in a movie, book, newspaper, magazine, radio or television production of any kind . . .
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> . . . .
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> (c)(1) Proceeds paid to the Attorney General under this section shall be retained in escrow in the Crime Victims Fund in the Treasury by the Attorney General for five years after the date of an order under this section, but during that five year period may —
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> . . . .
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> (B) if ordered by the court in the interest of justice, be used to —
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> . . . .

fees from the scope of its forfeiture provisions.[96] As Congress did not specifically include such an exemption in CCE, Justice White proffered that a reasonable inference could be made that Congress clearly intended to include attorney fees within the scope of CCE's forfeiture provisions.[97]

In *Caplin & Drysdale*,[98] a multi-count indictment was filed against the defendant, Christopher Reckmeyer, for operating a large drug distribution enterprise.[99] It was alleged that the operation violated CCE, thus, the Government sought and received a pre-trial restraining order forbidding the transfer of any of Defendant's assets that were potentially forfeitable.[100] Defendant paid the law firm of Caplin & Drysdale a $25,000 fee for pre-indictment legal services, notwithstanding the restraining order.[101] Defendant later entered into a guilty plea as part of a plea agreement, but his law firm sought to exempt its legal fees from the scope of the forfeiture.[102]

The district court held that the attorney fees were not subject to forfeiture.[103] The Fourth Circuit Court of Appeals, hearing the case *en*

> (ii) pay for legal representation of the defendant in matters arising from the offense for which such defendant has been convicted, but no more than 20 percent of the total proceeds may be so used.

18 U.S.C. §3681 (1988).

[96]*Monsanto*, 491 U.S. at 610. Justice White compared the amended CCE statute to the VCA, noting that the forfeiture provision contained in the VCA expressly exempted "'payments for legal representation of the defendant in matters arising from the offense for which such defendant has been convicted, but no more than 20 percent of the total [forfeited collateral profits] may be used.'" *Id.* (quoting 18 U.S.C.A. § 3681(c)(1)(B)(ii)).

[97]*Monsanto*, 491 U.S. at 610-11.

[98]Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989).

[99]*Id.* at 619.

[100]*Id.* at 619-20.

[101]*Id.* at 620.

[102]*Id.* at 621.

[103]*Id.* The district court initially entered an order forfeiting virtually all of the assets in Reckmeyer's possession. *Id.* After this order was entered, the law firm filed a petition in the district court under § 853(n) which permits third parties with an interest in the property to ask the sentencing court for an adjudication of their rights to the forfeitable property. *Id.* The district court then granted the law firm's claim for a share of the

banc, reversed and agreed that the language of CCE did not acknowledge any exception to its forfeiture requirement that would recognize a law firm's claim to the forfeited assets.[104] The petitioning law firm challenged subjecting attorney fees to forfeiture on two constitutional grounds. First, the petitioner argued that CCE infringed upon its client's Sixth Amendment right to counsel of choice.[105] Second, the petitioner contended that forfeiting attorney fees upsets the balance of power between the government and the accused in a manner that violated the Due Process Clause of the Fifth Amendment.[106]

Noting that many of the petitioner's Fifth Amendment[107] arguments were encompassed by its more specific Sixth Amendment claims,[108] Justice White focused on the petitioner's Sixth Amendment arguments.[109] Justice White held that a defendant did not have a Sixth Amendment right to counsel of choice if the monetary assets, which may or may not have been derived from criminal activity, were the only means by which the defendant could afford such representation.[110] Justice White found that the Government's

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forfeited assets when it recognized its bona fide third party interest. *Id.*

[104]Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 622 (1989). While all of the Fourth Circuit judges agreed that the language of CCE did not exempt assets earmarked for attorney fees, several dissenting judges concluded that the absence of such an exception violated the Sixth Amendment. *Id.*

[105]*Id.* at 624.

[106]*Id.*

[107]For the relevant text of the Fifth Amendment, see *supra* note 14.

[108]For the relevant text of the Sixth Amendment, see *supra* note 13.

[109]*Caplin & Drysdale*, 491 U.S. at 633. According to Justice White, due process claims in the context of attorney fee forfeitures were "cognizable only in specific cases of prosecutorial misconduct . . . or when directed to a rule that is inherently unconstitutional." *Id.* at 634. The Court found that because the defendant made no allegation of prosecutorial misconduct, the mere potential for abuse of the forfeiture laws did not require an invalidation. *Id.*

[110]*Id.* at 626. To illustrate this point, Justice White drew an analogy between racketeering and robbery suspects. Justice White elaborated:

> A robbery suspect . . . has no Sixth Amendment right to use funds he has stolen from a bank to retain an attorney to defend him if he is apprehended. The money, though in his possession, is not rightfully his; the Government

desire to reduce the economic power of organized crime,[111] its pecuniary interest in forfeiture,[112] and the ability of "rightful owners" to claim a

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does not violate the Sixth Amendment if it seizes the robbery proceeds and refuses to permit the defendant to use them to pay for his defense.

Id. Justice White then concluded that the Government could similarly prevent members of a criminal enterprise from using the proceeds of their crime under the "relation-back" provision, which vests the Government's interest in the property upon the commission of the crime. *Id.* at 627.

[111]*Id.* at 630 ("[A] major purpose motivating congressional adoption and continued refinement of the [RICO] and CCE forfeiture provisions has been the desire to lessen the economic power of organized crime and drug enterprises."). *See also supra* notes 55-63 and accompanying text.

[112]*Id.* at 629. Under 28 U.S.C. § 524(c), which established the Department of Justice Assets Forfeiture Fund, all forfeitable assets are deposited in a fund that supports law enforcement efforts in a variety of ways. *Caplin & Drysdale*, 491 U.S. at 629. For a more detailed analysis of the pecuniary interest of law enforcement agencies in such funds, see *infra* notes 164-66 and accompanying text.

statutory interest in the assets[113] effectively outweighed any argument that a defendant must be afforded counsel of choice.[114]

At least three additional reasons exist to justify the non-exemption of attorney fees from the scope of forfeiture. First, a plain language interpretation of the Sixth Amendment, which guarantees the right of an accused to enjoy the assistance of counsel for his defense,[115] merely provides criminal defendants with the qualified right to be represented by

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[113]*Caplin & Drysdale*, 491 U.S. at 629-30. "Rightful owners," which consist of titleholders and bona fide purchasers of the property, can request a hearing to determine whether the court should amend its forfeiture order. Under 21 U.S.C. § 853 (n)(6), the court shall amend its order for forfeiture:

> (n)(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that -
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> (A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or
>
> (B) The petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section . . . .

See 21 U.S.C. § 853(n)(6)(A),(B) (1988 & Supp. V 1993); 18 U.S.C. § 1963(l)(6)(A),(B) (1988 & Supp. V 1993).

[114]Justice White noted that forfeiture imposed a limited burden on defendants who can use any assets that are not subject to forfeiture to hire an attorney of choice. *Caplin & Drysdale*, 491 U.S. at 625. Justice White concluded, however, that this limited burden did not outweigh the strong governmental interest in obtaining full recovery of all forfeitable assets that can be used to finance various law enforcement activities. *Id.* at 629-30.

[115]For the relevant text of the Sixth Amendment, *see supra* note 13. In United States v. Brown, 591 F.2d 307, 310 (5th Cir. 1979), the court acknowledged this unconditional guarantee to the assistance of counsel in a criminal prosecution by stating that "[i]t is beyond peradventure that the Sixth Amendment grants an accused an absolute and unqualified right to have the effective assistance of counsel for his defense."

One commentator has suggested that the right to counsel embodies three distinct but related rights. Cowden, *supra* note 45, at 546. These rights include: "the absolute right to representation by counsel in criminal proceedings[;] the qualified right of nonindigent defendants to counsel of . . . choice[;] and the right to effective assistance of counsel." *Id.*

counsel of choice.[116] While extension of the Sixth Amendment to secure the effective assistance of *competent* counsel has been approved by some courts,[117] the further extension of the Sixth Amendment to include counsel of choice among the fundamental guarantees would do an injustice to a plain language reading of the Constitution.[118]

Second, the limitations that already exist on the right to select an attorney provide another justification for limiting the right to counsel by including attorney fees within the scope of forfeiture. A criminal defendant does not have an absolute right to counsel of choice if the chosen individual

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[116]United States v. Rogers, 471 F. Supp. 847, 851 (E.D.N.Y. 1979) (noting that a criminal defendant has an absolute right to the effective assistance of counsel).

Some courts have emphasized that the right to retain counsel of choice is not absolute if it will result in an obstruction of the orderly administration of justice. *See* United States v. Burton, 584 F.2d 485, 489 (D.C. Cir. 1978) ("The public has a strong interest in the prompt, effective, and efficient administration of justice . . . ."); United States v. Brown, 591 F.2d 307, 310 (5th Cir. 1979) ("The right to particular counsel, however, is not absolute and unqualified."). One commentator added that a defendant has the right use his own private resources, that are not subject to forfeiture, to procure service of preferred counsel, but this right is qualified by the "public interest in the fair, orderly and efficient administration of justice." Wolfteich, *supra* note 68, at 855.

In deciding In re Forfeiture Hearing as to Caplin & Drysdale, 837 F.2d 637, 643 (4th Cir. 1988), the Fourth Circuit emphasized that the forfeiture of attorney fees did not "threaten the absolute right to be represented by counsel." This court interpreted the Sixth Amendment to mean that the absolute right to representation included either retained or appointed counsel. *Id.*

[117]*See* Powell v. Alabama, 287 U.S. 45, 53 (1932) ("[T]he right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice."); United States v. Rogers, 471 F. Supp. 847, 851 (E.D.N.Y. 1979) ("Although a criminal defendant's [S]ixth [A]mendment right to the effective assistance of competent counsel is absolute . . . his concomitant right to counsel of his choice, while entitled to great respect, is qualified . . . ." (citations omitted)). *See also* Cowden *supra* note 45, at 554 ("Recognizing that the Constitution grants to all the right to competent representation is quite different than arguments that constitutionally everyone deserves the finest lawyer.").

[118]The Supreme Court decision in *Powell* established that the Fifth and Fourteenth Amendments grant defendants a right to have effective counsel. Cowden, *supra* note 45, at 547. Some courts have interpreted *Powell* to mean that the right to counsel of choice is a fundamental guarantee of the Sixth Amendment. *Id.* This ability to *choose* a defense attorney has, however, never been as sacred as the right to *have* an attorney. *Id.*

is not admitted to the bar,[119] has been disbarred,[120] has a conflict of interest that precludes an ethical representation of the defendant,[121] is licensed to practice law exclusively in another state,[122] or is an attorney who refuses to take the case.[123] Additional restraints on a criminal defendant's right to select counsel of choice include the defendant's limited financial capability of hiring an attorney,[124] the diversion of a criminal

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[119]*See* United States v. Gigax, 605 F.2d 507 (10th Cir. 1979) (holding that the Sixth Amendment does not afford an accused the right to be represented by lay counsel); United States v. Tedder, 787 F.2d 540 (10th Cir. 1986) (reiterating its holding that the trial court properly denied the defendant's motion to be represented by his counsel of choice because that lay person was not admitted to practice and was therefore not qualified).

[120]*See* United States v. Grismore, 546 F.2d 844 (10th Cir. 1976) (holding that a criminal defendant was not entitled to be represented by an attorney who had been disbarred from the practice of law by the Minnesota Supreme Court).

[121]*See* United States v. Ditommaso, 817 F.2d 201 (2d Cir. 1987) (holding that the trial court properly disqualified the original attorney selected by the defendant because the attorney had previously defended a co-defendant in a case that ended two years earlier); Davis v. Stamler, 650 F.2d 477 (3d Cir. 1981) (holding that disqualifying the former counsel of a corporate victim from representing a criminal defendant who had allegedly converted corporate assets was not arbitrary); United States v. Kitchin, 592 F.2d 900 (5th Cir.) *cert. denied* 444 U.S. 843 (1979) (citing Canon 4 of the ABA Code of Professional Responsibility for the proposition that a lawyer may not accept employment representing interests adverse to those of a prior client).

[122]*See* Williams v. Nix, 751 F.2d 956 (8th Cir.) *cert. denied* 471 U.S. 1138 (1985) ("That the presence of out-of-state counsel might hinder the orderly processing of the case is a sufficient countervailing state interest to justify the court's decision not to grant counsel of the defendant's choice."); Ford v. Israel, 701 F.2d 689 (7th Cir.) *cert. denied* 464 U.S. 832 (1983) (holding that while a rule requiring counsel to be admitted by the state of Wisconsin may be provincial or protectionist, the application of such a rule does not deprive a defendant of any Sixth Amendment rights); *In re* Rappaport, 558 F.2d 87 (2d Cir. 1977) (holding that the trial court had discretion to deny permission for an attorney admitted to practice in Florida from representing a criminal defendant being tried in New York).

[123]Wolfteich, *supra* note 68, at 856 ("[D]efendants may not receive counsel of choice if an attorney is unwilling to take the case . . . .").

[124]*See In re Forfeiture Hearing as to Caplin & Drysdale*, 837 F.2d at 645 ("Those with their own funds must be given the fair opportunity to secure counsel up to the limit of their funds; those without assets of their own must be satisfied with appointed counsel, over whose selection they have little influence." (citations omitted)); Wheat v. United States, 486 U.S. 153, 159 (1983) ("[A] defendant may not insist on representation by an attorney he cannot afford . . . ."); United States v. Nichols, 841 F.2d at 1504 ("[A] defendant's

defendant's assets to post bail to secure his presence at trial,[125] and court prohibitions on the retainer of a specific attorney who might interfere with the orderly administration of justice.[126]

Third, the inclusion of attorney fees within the scope of forfeiture deters the expansion of exemptions to other interest groups,[127] and thereby supports the congressional goal of increasing the forfeiture of criminally

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right to choice of counsel is limited by the financial ability of the defendant to retain the desired attorney.").

[125]Cowden, *supra* note 45, at 550-51. Cowden observed that assets used by a defendant to post bail are no longer available to pay for counsel, and thus, the government's exercise of control over those funds affects criminal defendants' pre-trial rights. *Id.* While bail, forfeiture, and other forms of pre-trial deprivations are problematic in that they "interfere with the use of property that is merely alleged to be illicit," some courts have warned against assigning such a high value to the presumption of innocence and argued that the government "should not be powerless to protect the public interest." *In re Forfeiture Hearing as to Caplin & Drysdale*, 837 F.2d at 643. A restraining order on the use of assets in a forfeiture proceeding "only freezes those assets to prevent dissipation pending a determination of guilt or innocence" and does not strip a defendant of the presumption of innocence any more than the bail requirement. United States v. Bello, 470 F. Supp. 723, 725 (S.D. Cal. 1979).

[126]United States v. Rogers, 471 F. Supp. 847, 851 (E.D.N.Y. 1979). The *Rogers* court further noted that the court can bar the appearance of an attorney who persistently disrupts court proceedings and refuses to comply with the court's instructions. *Id.* at 853. A criminal defendant simply cannot use the Sixth Amendment as a means of manipulating his choice of attorney in order to interfere with the orderly operation of justice. *See id. See also* Linton v. Perini, 656 F.2d 207, 209 (6th Cir. 1981) ("[T]he right to counsel of choice may not be used to unreasonably delay trial."); *Nichols*, 841 F.2d at 1504 ("A defendant's choice of counsel may be denied by a court's refusal to grant a continuance necessary to allow the chosen attorney to participate in the case."); *but cf.* United States v. Gipson, 693 F.2d 109, 112 (10th Cir. 1982) (where the court found that in spite of the defendant's "cat and mouse game with the court[,]" the trial judge's failure to fully examine the defendant's purported waiver was an error.).

[127]*See* Wolfteich, *supra* note 68, at 867 n.168. Congress did not include a statutory exemption for attorney conduct because of the potential ramifications whereby one exemption might lead to an infinite number of exceptions for similar fees paid to other interest groups. *Id.* (citing 132 CONG. REC. E3821, E3828 (daily ed. Nov. 6, 1986) (statements of Reps. McCollum and Hughes)). For example, the concern that doctors paid with tainted money would be potentially liable, as would religious organizations who received tainted donations, and colleges who accepted tainted tuition money, merely hinted at the possibility of an endless expansion of exemptions to forfeiture. *Id.*

obtained assets.[128] The refusal of courts to insulate attorney fees from forfeiture eliminates the temptation for lawyers to become involved in money laundering[129] or other improprieties,[130] and maintains public confidence in a system that prevents defendants from hiring high-priced legal talent with the proceeds allegedly derived from the criminal activity.[131]

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[128]*Nichols*, 841 F.2d at 1495 ("[A]n exemption for attorneys' fees undermines the congressional goal of increasing the forfeiture of criminally obtained assets.").

Another goal of the government is to assist law enforcement in combatting the drug problem. *See* Saltzburg, *supra* note 29, at 237. By increasing the forfeiture of criminally obtained assets and thereby stripping drug dealers of their economic strength, the "logical" consequence is the overall reduction of drug trafficking. *Id.*

[129]Payden v. United States, 605 F. Supp. 839, 849 n.14 (S.D.N.Y. 1985). The *Payden* court recognized the potential to use lawyers to launder money in the context of the attorney-client privilege. *Id.* (citations omitted). The same reasoning can be applied to attorney fees which, if shielded from forfeiture, might immunize the assets of a defendant who launderers money to other members of a criminal enterprise through an attorney.

[130]*In re* Forfeiture Hearing as to Caplin & Drysdale, 837 F.2d 637, 649 (4th Cir. 1988) ("Insulation of legal fees from forfeiture could also make it far easier for attorneys to become involved in organized crime as ongoing legal advisors, rendering legal advice to help drug violators thwart investigations and avoid indictments.").

[131]As noted by the *Payden* court:

> Fees paid to attorneys cannot become a safe harbor from forfeiture of the profits of illegal enterprises. In the same manner that a defendant cannot obtain a Rolls-Royce with the fruits of a crime, he cannot be permitted to obtain the services of the Rolls-Royce of attorneys from these same tainted funds.

605 F. Supp. at 850 n.14.

In many respects, it would be counterproductive for Congress to enact legislation aimed at stripping defendants of their economic power while simultaneously enacting legislation allowing some defendants to hire the most expensive defense attorneys with the proceeds of the alleged criminal activity. Cowden, *supra* note 45, at 536. *See also*, *Nichols*, 841 F.2d at 1495 ("If the defendant is convicted, an effect of such an [attorney fee] exemption is that the defendant has been allowed to purchase a range of defense services that would have been unavailable if the defendant had only used legally obtained assets."); Wolfteich, *supra* note 68, at 857 ("Forfeiture prevents criminals from enjoying the fruits of their illegal activity, including the services of an expensive private attorney.").

Through the expansive use of forfeiture, drug kingpins and racketeers may become more apprehensive about continuing a criminal enterprise if they can no longer afford the legal fees of some high priced defense attorneys. *In re Forfeiture Hearing as to Caplin & Drysdale*, 837 F.2d at 649; Cowden, *supra* note 45, at 546.

B. JUSTICE BLACKMUN'S DISSENTING OPINION IN *CAPLIN & DRYSDALE* AND *MONSANTO*

In opposition to the inclusion of attorney fees within the scope of forfeiture, Justice Blackmun, joined by three other justices, wrote a strongly-worded dissenting opinion in *Caplin & Drysdale* and *Monsanto*.[132] Justice Blackmun disagreed with the majority's interpretation of CFA in *Monsanto*, which included attorney fees within the scope of forfeiture, and with the majority's conclusion in *Caplin & Drysdale* that forfeiture of attorneys fees does not violate the Sixth Amendment right to counsel.[133]

First, Justice Blackmun posited that the majority in *Monsanto* should have interpreted CFA in a manner that avoided the constitutional problems of the Sixth Amendment.[134] Justice Blackmun refuted the majority's contention that CFA's lack of an express exemption for attorney fees in section 853(a) made the act as a whole unambiguous,[135] and therefore, concluded that the majority should not have deviated from the traditional practice of construing a statute in a manner that avoids constitutional

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The maintenance of public confidence in the legal system provides another reason to include attorney fees within the scope of forfeiture. If attorneys claim that their fees are constitutionally privileged from forfeiture and become rich by accepting the profits of illegal drug trafficking, an erosion of public confidence in the legal system will be the inevitable consequence. Wolfteich, *supra* note 68, at 863.

[132]Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 635 (1989) (Blackmun, J., dissenting). Justice Blackmun was joined by Justices Brennan, Marshall, and Stevens. *Id.*

[133]As stated by Justice Blackmun:

> The criminal forfeiture statute we consider today could have been interpreted to avoid depriving defendants of the ability to retain private counsel — and should have been so interpreted . . . . But even if Congress in fact required this substantial incursion on the defendant's choice of counsel, the Court should have recognized that the Framers stripped Congress of the power to do so when they added the Sixth Amendment to our Constitution.

Id. at 636 (Blackmun, J., dissenting).

[134]*Id.* at 636-43 (Blackmun, J., dissenting).

[135]*Id.* at 637 (Blackmun, J., dissenting).

implications.[136] Justice Blackmun agreed with the majority's conclusions regarding the broadness and mandatory nature of section 853(a).[137] Justice Blackmun, however, stressed the other relevant provisions of CFA, namely sections 853(c) and 853(e)(1), that were downplayed by the majority, but which gave the district courts significant discretion to limit forfeiture.[138]

According to Justice Blackmun, the majority in *Monsanto* downplayed these discretionary provisions of CFA by concealing them under an erroneous interpretation of CFA's purposes.[139] Although agreeing with the

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[136]*Id.* The majority concluded that it did not have to construe CFA to avoid constitutional problems because the statute contained unambiguous language in section 853(a) mandating the forfeiture of all property derived from the proceeds of a crime or used to facilitate a crime. *Monsanto*, 491 U.S. at 611. *See supra* note 62 for the text of 853(a).

[137]Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 637 (1989) (Blackmun, J., dissenting).

[138]*Id.* at 637-39 (Blackmun, J., dissenting). Noting the discretion in sections 853(c), Justice Blackmun stated:

> [Section] 853(c) does not, like § 853(a), provide that all property defined as forfeitable under § 853 "must" or " shall" be forfeited: forfeitable property held by a third party presumptively "shall be ordered forfeited" only if it is included in the special verdict, and its inclusion in the verdict is discretionary.

Id. at 637-38 (Blackmun, J., dissenting) (quoting 21 U.S.C. § 853(c) (1988 & Supp. V 1993)). For the text of section 853(c), see *supra* note 64. Justice Blackmun, in explaining the discretionary language of section 853(e)(1) commented:

> There is also considerable room for discretion in the language of § 853(e)(1), which controls the Government's use of post indictment protective orders to prevent the preconviction transfer of potentially forfeitable assets to third parties . . . . The Senate Report makes clear that a district court may hold a hearing to "consider factors bearing on the reasonableness of the order sought". Even if the court chooses to enter an order *ex parte* at the Government's request, it may "modify the order" if it later proves to be unreasonable. In the course of this process, the court may also consider the circumstances of any third party whose interests are implicated by the restraining order.

Id. at 638-39 (Blackmun, J., dissenting) (quoting S.REP. NO. 225, 98th Cong., 1st Sess. 202-03, 206 n.42 (1983), *reprinted in* U.S.C.C.A.N. 3182, 3385-86, 3389 n.42.) For the relevant text of section 853(e)(1), see *supra* note 72.

[139]*Id.* at 639 (Blackmun, J., dissenting).

majority that the discretionary provisions of CFA cannot be used to defeat the statute's purposes, Justice Blackmun disagreed with the majority's conclusion that CFA's underlying goals were to preserve the availability of all potentially forfeitable property during the preconviction period, and to achieve the forfeiture of all such property upon conviction.[140] Justice Blackmun reasoned that such an interpretation was erroneous because it virtually eliminated all discretion from CFA, as any exercise of discretion would "diminish the Government's take."[141]

Justice Blackmun opined that Congress enacted CFA: to prevent criminals from using profits to fund further criminal activity;[142] to divest criminals of assets acquired with the proceeds of their criminal activities;[143] and to prevent criminals under section 853(c) from thwarting the purposes of CFA by transferring their assets, acquired with criminally-derived proceeds, to third parties for their own future use in criminal activities.[144] Justice Blackmun reasoned that exercising the discretion to exempt forfeiture

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[140]*Id.* (citing *Monsanto*, 491 U.S. at 613).

[141]*Id.*

[142]*Id.* at 640 (Blackmun, J., dissenting). Justice Blackmun stated that "Congress'[s] most systematic goal for criminal forfeiture was to prevent the profits of criminal activity from being poured into future such activity, for 'it is through economic power that [criminal activity] is sustained and grows.'" *Id.* (quoting S. REP. NO. 225, 98th Cong., 1st Sess. 191 (1983)) (second alteration in original).

[143]*Id.* at 641 (Blackmun, J., dissenting). Justice Blackmun noted that:

> Congress also had a more . . . punitive goal in mind [when it enacted CFA] . . . . Particularly in the area of drug trafficking, Congress concluded that crime had become too lucrative for criminals to be deterred by conventional punishments. . . . "The sad truth is that the financial penalties for drug dealing are frequently only seen by dealers as a cost of doing business." The image of convicted drug dealers returning home from their prison terms to all the comforts their criminal activity can buy is one Congress could not abide.

Id. (quoting H.R. REP. NO. 845, 98th Cong., 2d Sess., pt. 1, at 2 (1984)).

[144]Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 641 (1989) (Blackmun, J., dissenting). Justice Blackmun explained that Congress intended section 853(c) "'to permit the voiding of certain pre-conviction transfers and so close a potential loophole in current law whereby the criminal forfeiture sanction could be avoided by transfers that were not 'arms length' transactions.'" *Id.* (quoting S. REP. NO. 225, 98th Cong., 1st Sess. 200-01 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3383-84).

of attorney fees, as provided by CFA, would not defeat the purposes of the statute because the assets used to compensate a defendant's private counsel would no longer be available to the defendant.[145] Justice Blackmun, therefore, concluded that the government's interests in preventing a defendant's use of criminally-derived proceeds would be preserved by having the district courts monitor a defendant's transfers to his attorney to ensure that they were made in good faith.[146] As the ambiguity of CFA allowed for two differing interpretations, Justice Blackmun posited that the majority should have construed the statute to prevent forfeiture of attorney fees because this construction avoided the constitutional implications of the Sixth Amendment.[147]

Second, Justice Blackmun disagreed with the majority's conclusion in *Caplin & Drysdale* that the forfeiture of attorney fees under CFA does not violate the Sixth Amendment right to counsel.[148] According to Justice Blackmun, the right to private counsel is "'the primary, preferred component of the basic right' protected by the Sixth Amendment" because it sustains the judicial system's integrity by: furthering the trust between a client and his attorney;[149] assuring the equality of representation between the government

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[145]*Id.* at 641-42 (Blackmun, J., dissenting).

[146]*Id.* at 642 (Blackmun, J., dissenting). Justice Blackmun concluded:

> Thus, no important and legitimate purpose is served by employing § 853(c) to require postconviction forfeiture of funds used for legitimate attorney's fees or by employing § 853(e)(1) to bar preconviction payment of fees. The Government's interests are adequately protected so long as the district court supervises transfers to the attorney to make sure they are made in good faith. All that is lost is the Government's power to punish the defendant before he is convicted. That power is not one the Act intended to grant.

Id.

[147]*Id.* at 643 (Blackmun, J., dissenting) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932); United States v. Monsanto, 852 F.2d 1400, 1409 (2d Cir. 1988) (en banc)).

[148]*Id.* at 644-56 (Blackmun, J., dissenting).

[149]*Id.* at 645 (Blackmun, J., dissenting). Justice Blackmun explained:

> The right to retain private counsel serves to foster the trust between attorney and client that is necessary for the attorney to be a truly effective advocate. Not only are decisions crucial to the defendant's liberty placed in counsel's hands, but the defendant's perception of the fairness of the process, and his willingness to acquiesce in its results, depend upon his confidence in his

and the accused;[150] and preserving the necessary, independent criminal defense bar.[151] Justice Blackmun posited that allowing forfeiture of

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> counsel's dedication, loyalty, and ability. When the government insists upon the right to choose the defendant's counsel for him, that relationship of trust is undermined: counsel is too readily perceived as the government's agent rather than his own.

Id. (citations omitted).

[150]*Id.* at 646-47 (Blackmun, J., dissenting). Justice Blackmun stated that the Government can spend immense amounts of money to prosecute defendants while defendants must either accept less-qualified attorneys willing to take cases under the possibility of under-compensation or accept underfunded, undermotivated Government-appointed counsel. *Id.* Justice Blackmun cautioned that "[w]ithout the defendant's right to retain private counsel, the Government too readily could defeat its adversaries simply by outspending them." *Id.* at 647 (Blackmun, J., dissenting).

Justice Blackmun was also troubled by the "intolerable degree of power" and discretion that forfeiture statutes place in the hands of the Government. *Id.* at 650 (Blackmun, J., dissenting). According to Justice Blackmun, the specter of the Government selectively excluding the most talented and aggressive defense attorneys posed "a serious threat to the equality of forces necessary for the adversarial system to perform at its best." *Id.*

In United States v. Brodson, 241 F.2d 107, 115 (9th Cir. 1957) (Finnegan, J., dissenting), Judge Finnegan further expounded on the impropriety of beggaring suspects (in a tax evasion case) when he stated: "If society merely wants automatic convictions then a hamstrung defense will facilitate achievement of that shabby aim, but if society desires that courts engage in a search for truth, before punishing, then I would avoid being stingy with defense materials."

[151]Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 647-48 (1989) (Blackmun, J., dissenting). Justice Blackmun opined:

> The "virtual socialization of criminal defense work in this country" that would be the result of a widespread abandonment of the right to retain chosen counsel, too readily would standardize the provision of criminal-defense services and diminish defense counsel's independence . . . . Only a healthy, independent defense bar can be expected to meet the demands of the varied circumstances faced by criminal defendants, and assure that the interests of the individual defendant are not unduly "subordinat[ed] . . . to the needs of the system."

Id. (citations omitted); David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 6-7 (1973)). Justice Blackmun felt that if defense counsel is not independent of the Government, then our system of criminal justice founded upon an equal and adversarial presentation of the case would be imperiled. *Id.* at 648 (Blackmun, J., dissenting).

attorney fees under CFA would defeat the purposes of the Sixth Amendment right to counsel by preventing a defendant from retaining an independent, private defense attorney whom he has chosen and trusts.[152] Justice Blackmun reasoned that the pre-trial restraint of assets and the post-trial possibility of forfeiture would deter competent, independent criminal defense attorneys from taking these cases because of the possibility of losing their fees.[153] Even if the defendant were able to retain a private attorney, Justice Blackmun cautioned that these attorneys would nonetheless be tempted to sacrifice the client's best interests in order to avoid forfeiture of the assets used to pay their fees.[154] In addition, Justice Blackmun feared that the government would use the forfeiture provisions of CFA to deny defendants competent counsel.[155] Consequently, Justice Blackmun proffered that the

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[152]*Caplin & Drysdale*, 491 U.S. at 648 (Blackmun, J., dissenting).

[153]*Id.* at 648-49 (Blackmun, J., dissenting) (quoting United States v. Badalamenti, 614 F. Supp. 194, 196 (S.D.N.Y. 1985)).

[154]*Id.* at 649-50 (Blackmun, J., dissenting). Noting some of the ethical problems that may result from forfeiting attorney fees under CFA, Justice Blackmun stated:

> Perhaps the attorney will be willing to violate ethical norms by working on a contingent-fee basis in a criminal case . . . . [Additionally, t]he less an attorney knows, the greater the likelihood that he can claim to have been an"innocent" third party [under § 853(c)]. The attorney's interests in knowing nothing is directly adverse to his client's interests in full disclosure. The result of the conflict may be a less vigorous investigation of the defendant's circumstances, leading in turn to a failure to recognize or pursue avenues of inquiry necessary to the defense. . . . [Moreover, t]he attorney who fears for his fee will be tempted to make the Government's waiver of fee forfeiture the *sine qua non* for any plea agreement, a position which conflicts with his client's best interests.

Id. (citations omitted).

[155]*Id.* at 650-51 (Blackmun, J., dissenting). Justice Blackmun reasoned that "[t]he Government will be ever tempted to use the forfeiture weapon against a defense attorney who is particularly talented or aggressive on the client's behalf . . . ." *Id.* at 650 (Blackmun, J., dissenting).

In United States v. Rogers, 602 F. Supp. 1332, 1344 (D. Colo. 1985) (citing Armstrong v. Manzo, 380 U.S. 545 (1965); Northern Georgia Fishing, Inc. v. Di-Chem Inc., 419 U.S. 601 (1975)), the District Court for the District of Colorado noted that an interpretation of CFA allowing for the forfeiture of attorney fees would effectively eliminate the adversary from the adversary process. The district court ultimately concluded that such an interpretation would be inconsistent with due process because the government could achieve a significant tactical advantage when choosing to exclude competent defense

long-term effects of attorney fee forfeiture would be to limit the criminal defense bar to idealistic, less-qualified attorneys, and thereby deny defendants their right to choose effective private counsel.[156]

Justice Blackmun did recognize that some substantial and legitimate government interests may limit a defendant's right to counsel of choice under the Sixth Amendment.[157] Justice Blackmun, however, opined that the government's asserted interests in defendants' assets, derived from the proceeds of criminal activity, were not substantial enough to overcome the presumption of allowing defendants their counsel of choice.[158]

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counsel. *Id.*

[156]Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 651 (1989) (Blackmun, J., dissenting); Jacobs, *supra* note 15, at 346. This depletion of the criminal defense bar could lead to the unavailability of defense attorneys' who have the skills required to effectively defend a client in a complex RICO or CCE prosecution. Jacobs, *supra* note 15, at 346. *See also*, United States v. Badalamenti, 614 F. Supp. 194, 196 (1985) (noting that RICO and CCE prosecutions usually entail months of preparation, thus making it unlikely that a defense attorney would take such a case based upon the chance of the assets escaping forfeiture).

Arguably, the practical effects of a threatened forfeiture are felt long before the trial or hearings used to determine the forfeitability of the assets. *See Caplin & Drysdale*, 491 U.S. at 654 (Blackmun, J., dissenting). An attorney who is approached by the target of a drug or racketeering investigation may be more reluctant to accept the case since the assets intended to pay legal fees may be subject to forfeiture. *Id.* Thus, the mere threat of forfeiture may have the practical effect of dissuading qualified attorneys from accepting cases in which a forfeiture is anticipated. Cowden, *supra* note 45, at 546.

[157]*Caplin & Drysdale*, 491 U.S. at 651 (Blackmun, J., dissenting). Justice Blackmun noted that a court may disturb a defendant's choice of counsel in situations where the selection "gravely imperils the prospect of a fair trial . . . or threatens to undermine the orderly disposition of the case . . . ." *Id.* (citations omitted). Justice Blackmun cautioned, however, that "never before today has the Court suggested that the Government's naked desire to deprive a defendant of 'the best counsel money can buy' . . . is itself a legitimate Government interest that can justify the Government's interference with the right to chosen counsel . . . ." *Id.* at 651 (Blackmun, J., dissenting) (citations omitted).

[158]*Id.* at 652 (Blackmun, J., dissenting). Justice Blackmun reasoned that under the relation-back provision of § 853(c), the Government's property interests in the defendant's preconviction forfeitable assets was merely a legal fiction that did not outweigh the defendant's formidable Sixth Amendment right to retain counsel for his defense. *Id.* at 652-53 (Blackmun, J., dissenting).

V. THE FUTURE OF ATTORNEY FEES: WHAT WOULD THE CURRENT COURT DECIDE?

A. THE COURT CAN ADOPT JUSTICE BLACKMUN'S DISSENT BECAUSE ATTORNEY FEE FORFEITURES CONTINUE TO THREATEN THE ADVERSARY SYSTEM

Six years after the Supreme Court rendered its five to four decision in *Caplin & Drysdale* and *Monsanto*,[159] Justices Marshall, White, and Blackmun have retired from the bench and have been replaced by Justices Thomas, Ginsburg, and Breyer. Under this new composition, it is uncertain whether the Supreme Court would uphold the practice of forfeiting attorney fees or adopt Justice Blackmun's dissent proffering that attorney fees should be exempt from forfeiture based upon the heightened protection afforded criminal defendants by the Sixth Amendment. The current Supreme Court should adopt Justice Blackmun's dissent in *Caplin & Drysdale* and *Monsanto* because attorney fee forfeitures continue to undermine the interests served by the Sixth Amendment.[160] Even if attorney fee forfeitures do not patently violate the Sixth Amendment right to counsel, the effect of rendering a criminal defendant indigent makes the constitutionality of this practice dubious.

As Justice Blackmun feared, the distortion in the equality of representation between the government and the accused, created by attorney fee forfeitures, constantly threatens the adversary system.[161] Furthermore, the forfeiture of attorney fees continues to have a chilling effect on the attorney-client relationship because the limited application of the bona fide

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[159]*Caplin & Drysdale*, 491 U.S. at 618; United States v. Monsanto, 491 U.S. 600, 601 (1989).

[160]*Caplin & Drysdale*, 491 U.S. at 651. (Blackmun, J., dissenting) ("In short, attorney's-fee forfeiture substantially undermines every interest served by the Sixth Amendment right to chosen counsel, on the individual and institutional levels, over the short term and the long haul.") *Id.*

[161]Allowing forfeiture of fees paid to defense counsel has often been thought to "disrupt the balance of power necessary for the proper operation of the adversary system." *See* Cloud, *supra* note 5, at 8. When the government exercises an excessive level of authority over the selection of defense attorneys, the ultimate result is an interruption of the adversary process. *Id.* at 7.

purchaser exemption encourages lawyers to avoid learning about the possible criminal activities that generated their fees.[162]

In addition to these Sixth Amendment concerns, the current members of the Supreme Court could reasonably question whether attorney fee forfeitures have achieved their underlying purpose,[163] and whether these forfeitures effectively deter future criminal activity. As local law enforcement agencies grow more dependent upon revenues derived from forfeitures to fund various law enforcement activities,[164] the government's selfish pecuniary interest in forfeiture frequently overrides the selfless governmental interest of separating a criminal from the proceeds of his crime.[165] In some instances, local law enforcement agencies assume the role of bounty hunters, knowing that a large percentage of forfeiture can be

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[162]Jacobs, *supra* note 15, at 322; Cowden, *supra* note 45, at 557. This failure to fully investigate the activities of a criminal defendant will likely result in less than the effective assistance of counsel required by many courts. Jacobs, *supra* note 15, at 345. *See also*, Payden v. United States, 605 F. Supp. 839, 847 (noting that full disclosure between the defendant and his attorney is required for an attorney to effectively represent a criminal defendant at trial); United States v. Badalamenti, 614 F. Supp. 194, 196 ("[A lawyer's] obligation to be well informed on the subject of his client's case would conflict with his interest in not learning facts that would endanger his fee . . . .").

[163]Forfeiture statutes facilitate the removal of items classified as contraband *per se*, punish present wrongdoers, deter future lawbreakers, and provide revenue for the Government. Dennis R. Hewitt, Comment, *Civil Forfeiture and Innocent Third Parties*, 1983 N. ILL. U. L. REV. 323, 354. When the forfeiture is applied to an innocent party, only the revenue generating purpose is satisfied. *Id.*

[164]Piety, *supra* note 44, at 975 ("The current law allocates up to ninety percent of the proceeds from drug-related forfeitures to be returned to local law enforcement agencies.") While these local law enforcement agencies have become dependent upon the revenue derived from forfeitures, it has been suggested that this monetary incentive will promote the unyielding enforcement of forfeiture laws without regard to the relative innocence or guilt of the parties. Hiles, *supra* note 2, at 417. *See also* Lisa Belkin, *The Booty of Drugs Enriches Agencies*, N.Y. TIMES, Jan. 7, 1990, § 1, at 18.

[165]Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 629 (1989). Justice White candidly acknowledged that the Government has a legitimate pecuniary interest in the recovery of all forfeitable assets because the proceeds derived from these assets are placed in the Department of Justice Assets Forfeiture Fund, which supports various law enforcement activities "in a variety of important and useful ways." *Id.* (citing 28 U.S.C. § 524(c) which establishes the Department of Justice Asset Forfeiture Fund).

used to fund various law enforcement activities.[166] When forfeiture of attorney fees is abused by law enforcement agencies to obtain revenue rather than deter crime, the purpose of forfeiture is not advanced. In addition, little evidence has been shown to suggest that forfeiture is having a sufficient deterrent effect on crime to justify its imposition.[167]

Four recent Supreme Court decisions limiting forfeiture provide additional arguments for exempting attorney fees from forfeiture.

B. UNDER THE COURT'S RECENT TREND LIMITING FORFEITURES, ATTORNEY FEES SHOULD BE EXEMPTED

1. EXPANDING THE INNOCENT OWNER DEFENSE BEYOND BONA FIDE PURCHASERS

The United States Supreme Court addressed the limits of forfeiture in four decisions that it rendered within a single year.[168] By expanding a defendant's right to contest forfeitures, these decisions suggest a possible retrenchment in the previously unrestricted use of forfeiture proceedings. In *United States v. 92 Buena Vista Avenue*,[169] the Government filed an *in rem* forfeiture action against a parcel of land, alleging that the property had been

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[166]*See* 21 U.S.C. § 881(e) (1988 & Supp. V 1993), which provides, in pertinent part, that:

> (e)(1) Whenever property is civilly or criminally forfeited under this subchapter the Attorney General may —
>
> (A) retain the property for official use or . . . transfer the property to any Federal agency or to any State or local law enforcement agency which participated directly in the seizure or forfeiture of the property;

Id. If, however, the proceeds of forfeiture were instead used to foster the rehabilitation of these racketeers, the severe punishment of forfeiture would appear less offensive. Piety, *supra* note 44, at 974.

[167]Piety, *supra* note 44, at 974.

[168]The Supreme Court rendered its decision in United States v. 92 Buena Vista Ave., 113 S. Ct. 1126 (1993), on February 24, 1993, and later decided United States v. James Daniel Good Real Property, 114 S. Ct. 492 (1993), on December 14, 1993. The Court decided the companion cases of Austin v. United States, 113 S. Ct. 2801 (1993), and Alexander v. United States, 113 S. Ct. 2766 (1993), on June 28, 1993.

[169]113 S. Ct. 1126 (1993).

purchased with funds traceable to illegal drug trafficking.[170] Thereupon, the district court authorized the United States Marshal to take possession of the premises after determining that probable cause existed to subject the property to forfeiture.[171]

During the pre-trial proceedings, the respondent revealed that the money used to purchase her home came from a $240,000 "gift" that she had received from a man suspected of participating in illegal drug trafficking.[172] The respondent contended, however, that she did not have any knowledge regarding the origins of this "gift" and that she should qualify for innocent owner status under the provisions of CCE.[173]

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[170]*Id.* at 1130. At an *ex parte* proceeding, the District Court of New Jersey determined that probable cause existed to believe the premises were subject to forfeiture and, therefore, authorized the United States Marshal to take possession of the premises. *Id.* The respondent then asserted her claim to the property and was granted the right to be heard in the action. *Id.*

[171]*Id.*

[172]*Id.* The respondent maintained an intimate personal relationship with the criminal suspect, Joseph Brenna, for approximately six years. *Id.* Based upon the possible impropriety of this intimate relationship, the district court concluded that there was probable cause to believe that the funds used to buy the house were proceeds from the sale of narcotics. *Id.*

[173]*Id.* The innocent owner defense to forfeiture is contained in section 881 (a)(6) of the CCE statute, and states in pertinent part:

> (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> . . . .
>
> (6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of [21 U.S.C. § 801-904] . . . except that no property shall be forfeited under this paragraph, to the extent of the interest of the owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

21 U.S.C. § 881(a)(6) (1988 & Supp. V 1993).

The district court rejected the respondent's "innocent owner" defense, holding that this defense can only be used when the individual showed that they were bona fide purchasers for value and by those individuals who obtained their interest in the property prior to the acts that gave rise to the forfeiture. *92 Buena Vista Avenue*, 113 S. Ct. at

Writing for the plurality,[174] Justice Stevens initially noted that laws providing for the seizure and forfeiture of tangible property used during the commission of a crime have had a significant function in the history of the United States.[175] Justice Stevens, however, cautioned that the amendment of CCE, allowing for the seizure and forfeiture of *proceeds* from illegal drug transactions, marked an important and unprecedented expansion of governmental power.[176] Because the statute authorized the forfeiture of

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1130. The Third Circuit Court of Appeals refused to limit the innocent owner defense to bona fide purchasers and remanded the case to determine whether the respondent landowner was an innocent owner. *Id.* at 1131. In the absence of any plain language in the statute restricting the innocent owner defense to bona fide purchasers for value, the Third Circuit declined to adopt such a limitation proposed by the Government. *Id.* The Government's argument, that respondent qualified for innocent owner status only if she acquired the property prior to the unlawful drug transaction, was also rejected by the Third Circuit. *Id.* Thereafter, the Supreme Court granted *certiorari* to determine whether an innocent owner defense in a forfeiture proceeding could be extended to persons other than bona fide purchasers for value. United States v. 92 Buena Vista Ave., 112 S. Ct. 1260 (1992).

[174]*92 Buena Vista Avenue*, 113 S. Ct. at 1129 (Stevens, J., plurality). Justice Stevens announced the judgment of the Court and delivered an opinion in which Justices Blackmun, O'Connor, and Souter joined. *Id.* Justice Scalia filed a concurring opinion which was joined by Justice Thomas. *Id.* (Scalia, J., concurring). Justice Kennedy filed a dissenting opinion in which Chief Justice Rehnquist and Justice White joined. *Id.* (Kennedy, J., dissenting).

[175]*Id.* at 1131 (Stevens, J., plurality). As noted by Justice Stevens, "colonial courts regularly exercised jurisdiction to enforce English and local statutes authorizing the seizure of ships and goods used in violation of customs and revenue laws." *Id.* (footnote omitted). In addition to legislation enacted by the first Congress authorizing the forfeiture of ships and cargos involved in customs offenses, "[o]ther statutes authorized the seizure of ships engaged in piracy." *Id.* at 1132 (Stevens, J., plurality) (footnotes omitted). Later statutes allowed for the forfeiture of illegal distilleries that produced moonshine and thereby defrauded the United States of tax revenues that could have been derived from the licensed sale of alcoholic beverages. *Id.* (citations omitted). "In these cases, as in the piracy cases, the innocence of the owner of the premises leased to a distiller would not defeat the decree of condemnation based upon the fraudulent conduct of the lessee." *Id.* at 1132-33 (Stevens, J., plurality) (footnote omitted).

[176]*Id.* at 1134 (Stevens, J., plurality) (emphasis added). Prior to its amendment, CCE resembled the antecedent customs, piracy, and revenue laws because it authorized the forfeiture of property used to facilitate a crime, but it did not contain an innocent owner defense. *Id.* CCE thus authorized forfeiture of the illegal substances themselves and the instruments by which they were manufactured and distributed. *Id.* at 1133 (Stevens, J., plurality). After the amendment, the statute authorized the forfeiture of both the illegal substances, its manufacturing instruments, and the proceeds derived from the illegal goods.

such proceeds and contained a "novel protection for innocent owners," Justice Stevens carefully approached the task of construing the statute.[177]

Justice Stevens ultimately concluded that the protection afforded to innocent owners was not limited to bona fide purchasers and, therefore, allowed the respondent to avail herself of the innocent owner defense even though the funds used to purchase her home were traceable to illegal narcotics trafficking.[178] In addition, Justice Stevens curtailed the use of the relation back doctrine[179] and concluded that this doctrine did not allow the Government to claim ownership of the property before forfeiture had been decreed.[180] Justice Stevens acknowledged that a decree of forfeiture, under the relation back doctrine, had the effect of vesting title to the *offending res*

Id. at 1134 (Stevens, J., plurality). For the text of CCE pertaining to the forfeiture of proceeds that a defendant derived from violating the statute, see *supra* note 62.

[177]*92 Buena Vista Avenue*, 113 S. Ct. at 1134 (Stevens, J., plurality).

[178]*Id.* The Court reasoned that the text of 21 U.S.C. § 881 (a)(6) was "sufficiently unambiguous to foreclose any contention that it applied only to bona fide purchasers." *Id.* According to the interpretation of the statute rendered by Justice Stevens, the status of the respondent would be precisely the same regardless of whether she had received a $240,000 gift from a felon and used it to purchase her home, or if she had sold the felon her house for $240,000 and claimed innocent owner status. *Id.*

Conversely, Justice Kennedy's dissenting opinion noted that "the donee of drug trafficking proceeds has no valid claim to the proceeds, not because [the donee did] anything wrong, but because [the donee] stands in the shoes of [the wrongdoer]." *Id.* at 1144 (Kennedy, J., dissenting). Justice Kennedy further opined that "the plurality's opinion leaves the forfeiture scheme that is the centerpiece of the Nation's drug enforcement laws in quite a mess." *Id.* at 1145 (Kennedy, J., dissenting).

[179]*Id.* at 1134 (Stevens, J., plurality). The Government argued that the respondent was never the "owner" of this parcel of land based upon the relation back doctrine which allegedly "vested ownership in the United States at the moment when the proceeds of [the] illegal drug transaction were used to pay the purchase price." *Id.* Under § 881(h), the relation back provision allows title and interest in the disputed property to vest in the United States upon commission of the act giving rise to forfeiture. *See* 21 U.S.C. § 881(h) (1988 & Supp. V 1993). For the relation back provisions of RICO and CCE, see *supra* note 64.

[180]*92 Buena Vista Avenue*, 113 S. Ct. at 1134 (Stevens, J., plurality). Supporting this argument, Justice Scalia, in a concurring opinion, stated that "[the relation back provision] is a doctrine of *retroactive* vesting of title that operates only upon entry of the judicial order of forfeiture or condemnation . . . ." *Id.* at 1138 (Scalia, J., concurring) (emphasis in original).

in the Government on the precise day of the criminal activity.[181] Justice Stevens, however, refused to treat "the *proceeds* traceable to an unlawful exchange as a fictional wrongdoer subject to forfeiture."[182] Justice Stevens reasoned that prior to the decree of forfeiture, the Government was not the owner of the property purchased with the proceeds of an illegal drug transaction.[183] Finally, Justice Stevens noted that the Government's interest in the property does not automatically vest merely by initiating a forfeiture proceeding.[184] Rather, Justice Stevens argued that some legal step must be taken by the Government before asserting its right to the property.[185]

Under *92 Buena Vista Avenue*, criminal defense attorneys should be able to avail themselves of the Court's liberal interpretation of the innocent owner defense. First, the innocent owner defense was significantly expanded when the Court allowed the respondent in *92 Buena Vista Avenue* to avail herself of this defense, despite an allegation that the funds used to purchase her home were traceable to illegal drug trafficking. This expansive interpretation of the innocent owner defense conflicts with the government's desire to lessen the economic power of organized crime.[186] Criminal suspects will now be able to impart illegally acquired wealth upon their associates and shelter these assets from forfeiture by transferring the proceeds of a criminal transaction to another person without receiving anything of

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[181]*Id.* at 1135 (Stevens, J., plurality).

[182]*Id.* (emphasis added).

[183]*Id.*

[184]*Id.* (footnote omitted) (plurality) (citing United States v. Grundy, 3 Cranch 337, 350-51 (1806)).

[185]*Id.* According to Justice Stevens:

> If the Government wins a judgment of forfeiture under the common-law rule . . . the vesting of its title in the property relates back to the moment when the property became forfeitable. Until the Government does win such a judgment, however, someone else owns the property. That person may therefore invoke any defense available to the owner of the property before the forfeiture is decreed.

Id. at 1136 (plurality).

[186]*Id.* at 1145 (Kennedy, J., dissenting) (citing Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 630 (1989)).

value in return.[187] By allowing the respondent in *92 Buena Vista Avenue* to avail herself of innocent owner status, despite the fact that she maintained an intimate personal relationship with her drug dealing benefactor, it would be logical to extend innocent owner status to defense attorneys who render detached legal services in accord with a code of professional responsibility. Therefore, defense attorneys who have already been paid by a criminal suspect have a strong claim to innocent owner status because they, at least, exchanged valuable legal services.

Second, under the Court's holding in *92 Buena Vista Avenue*, the government may find it increasingly difficult to use the relation back doctrine to obtain a special verdict of forfeiture over fees previously transferred to a criminal defense attorney.[188] Under the holding in *92 Buena Vista Avenue*, the government can no longer claim ownership of property before forfeiture has been decreed.[189] This language suggests that the defect in title does not necessarily originate with the criminal act and requires the government to take some assertive action before it can claim the forfeitable property. It follows that assets transferred to a criminal defense attorney prior to the government's assertion of its claim, therefore, would fall outside the scope of the relation back doctrine.

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[187]The consequence of this curtailment in the scope of forfeiture as prescribed in *92 Buena Vista Avenue* may have the adverse effect of enabling criminal suspects to shelter the proceeds of their crimes from forfeiture. According to Justice Kennedy, it can be assumed that a criminal who transfers the proceeds of a narcotics transaction to another without receiving value in return performs this transfer to benefit an associate or to shelter the proceeds from forfeiture. *92 Buena Vista Avenue*, 113 S. Ct. at 1145 (Kennedy, J., dissenting). Subsequently, the criminal will reacquire the proceeds once he is clear from law enforcement authorities. *Id.* Justice Kennedy further opined that:

> If the Government is to drain the criminal's economic power, it must be able to pierce donative transfers and recapture the property given in the exchange.
>
> . . . .
>
> . . . By denying [the principle that a donee has no more than the ownership rights of the donor], the plurality rips out the most effective enforcement provisions in all of the drug forfeiture laws.

Id. at 1145-46 (Kennedy, J., dissenting).

[188]For the relevant text of the third party transfer provisions contained in 21 U.S.C. § 853(c) and 18 U.S.C. § 1963(c), see *supra* note 64.

[189]*See supra* note 178 and accompanying text.

Furthermore, Justice Stevens suggested that the relation back doctrine should not be used if it resulted in the forfeiture of property or assets innocently acquired by persons who had provided services to drug traffickers.[190] It is often unavoidable for defense attorneys, who are blameless for the prior acts of their clients, to be paid with tainted assets as payment for their legal services to drug traffickers and members of other criminal enterprises. Therefore, criminal defense attorneys should be able to avoid the forfeiture of fees paid for legitimate legal services because of the limited application of the relation back doctrine.

2. FORFEITURES LIMITED BY THE EXCESSIVE FINES CLAUSE

Shortly after its decision in *92 Buena Vista Avenue*, the Supreme Court announced in *Alexander v. United States*[191] and *Austin v. United States*[192] that the Eighth Amendment's prohibition against excessive fines[193] must be considered in both criminal and civil forfeiture proceedings.[194] In *Alexander*, the petitioner, an "adult entertainment" enterprise operator,[195] was charged with thirty-four obscenity counts and three RICO counts.[196] The District Court for the District of Minnesota convicted the petitioner of

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[190]*92 Buena Vista Avenue*, 113 S. Ct. at 1135.

[191]113 S. Ct. 2766 (1993).

[192]113 S. Ct. 2801 (1993). The *Alexander* and *Austin* cases, which addressed the question of whether the Excessive Fines Clause of the Eighth Amendment should be applied in forfeiture proceedings, were both decided on June 28, 1993. *See Alexander*, 113 S. Ct. at 2766; *Austin*, 113 S. Ct. at 2801.

[193]The Eighth Amendment of the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

[194]*Alexander*, 113 S. Ct. at 2775-76; *Austin*, 113 S. Ct. at 2803.

[195]*Alexander*, 113 S. Ct. at 2769. Chief Justice Rehnquist emphasized that the petitioner was convicted of creating and managing what had been described as "'an enormous racketeering enterprise,'" and therefore, it was misleading to characterize these racketeering crimes as involving a minimal amount of obscene materials. *Id.* at 2776.

[196]*Id.* at 2769. The three racketeering counts were predicated on the obscenity charges. *Id.*

seventeen substantive obscenity offenses and all three RICO counts.[197] The petitioner was initially sentenced to six years in prison and ordered to pay a fine of $100,000 plus costs of suit.[198] In addition, the district court, pursuant to the jury finding at a forfeiture proceeding, ordered the forfeiture of nearly nine million dollars in cash and the petitioner's wholesale and retail businesses.[199]

The Court of Appeals for the Eighth Circuit, without considering whether the forfeiture was disproportionate or excessive, affirmed the district court's decision, reasoning that proportionality review was not required of any sentence less than life imprisonment without parole.[200] The petitioner's argument that RICO's forfeiture provisions constituted a prior restraint on speech, as applied to these allegedly obscene materials, was also rejected by the Eighth Circuit.[201]

Chief Justice Rehnquist, writing the opinion for the majority in *Alexander*,[202] distinguished *Alexander* from a litany of cases dealing with unconstitutional prior restraints on speech[203] and affirmed the Eighth

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[197]*Id.* at 2769-70. In support of the obscenity and RICO convictions, the jury found that four magazines and three videotapes graphically depicted a variety of "hard core" sexual acts. *Id.* at 2770. The distribution of multiple copies of these magazines and videotapes throughout the petitioner's expansive adult entertainment empire lead to the multiple count indictment. *Id.*

[198]*Id.* at 2770.

[199]*Id.*

[200]*Id.*

[201]*Id.*

[202]*Id.* at 2769. Chief Justice Rehnquist delivered the opinion of the Court and was joined by Justices White, O'Connor, Scalia, and Thomas. *Id.* Justice Souter filed an opinion concurring in the judgment in part and dissenting in part. *Id.* (Souter, J., concurring in part and dissenting in part). Justice Kennedy filed a dissenting opinion which was joined in its entirety by Justices Blackmun and Stevens, and in part by Justice Souter. *Id.* (Kennedy, J., dissenting).

[203]*See e.g.*, Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931) (invalidating a court order that perpetually enjoined a party from producing any "malicious, scandalous and defamatory" publication in the future); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) (vacating an order enjoining the petitioners from distributing leaflets anywhere in an Illinois town); Vance v. Universal Amusement Co., 445 U.S. 308 (1980) (per curium) (striking down a Texas statute allowing courts to issue an injunction of indefinite duration prohibiting the future exhibition of films that have not yet been found to be

Circuit's opinion in part. Chief Justice Rehnquist held that the First Amendment[204] does not prohibit the forfeiture of expressive materials as punishment for criminal conduct.[205] Chief Justice Rehnquist, however, disagreed with the court of appeal's analysis of the Eighth Amendment issue.[206] Chief Justice Rehnquist opined that the *in personam* criminal forfeiture at issue was a form of monetary punishment equivalent to a traditional fine.[207] Accordingly, Chief Justice Rehnquist reasoned that the forfeiture of the defendant's property should be examined under the Excessive Fines Clause.[208] Subsequently, Chief Justice Rehnquist remanded the case to the lower courts, allowing them to consider whether RICO's forfeiture provisions resulted in the imposition of an "excessive" penalty upon the defendant within the meaning of the Excessive Fines Clause.[209]

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obscene).

[204]The First Amendment states in pertinent part that: "Congress shall make no law . . . abridging the freedom of speech or of the press . . . ." U.S. CONST. amend. I.

A recent article written by Professor G. Robert Blakey, the draftsman of RICO, addressed several First Amendment questions that arise when persons engaging in political or social protest are prosecuted under RICO. *See* G. Robert Blakey, *Protesters as Racketeers?*, 137 N.J.L.J. 1740 (Aug. 22, 1994). While an analysis of a First Amendment challenge to forfeiture is beyond the scope of this Comment, the potential expansion of RICO to social protesters raises the possibility that such activists may be deprived of assets to pay for chosen counsel.

[205]Alexander v. United States, 113 S. Ct. 2766, 2773 (1993). The Court distinguished *Alexander* from these prior restraint cases by noting that the RICO forfeiture order did not prohibit the petitioner from engaging in prospective expressive activities. *Id.* at 2771. The Court further noted that the First Amendment does not prohibit stringent criminal sanctions for obscenity offenses. *Id.* at 2773.

[206]*Id.* at 2769.

[207]*Id.* at 2775-76.

[208]*Id.* For the complete text of the Excessive Fines Clause of the Eighth Amendment, *see supra* note 193.

[209]*Alexander*, 113 S. Ct. at 2776. The constitutional prohibition against excessive fines is therefore applicable in the context of criminal forfeiture and requires the courts to subjectively analyze whether the forfeiture of a convicted felon's assets is disproportionate to the gravity of his offense. *Id.* at 2775.

In a dissenting opinion, Justice Kennedy opined that the majority's "failure to reverse this flagrant violation of the right of free speech" was patently inconsistent with established First Amendment principles. *Id.* at 2786 (Kennedy, J., dissenting). Thus, Justice Kennedy felt it was unnecessary to reach the Eighth Amendment question. *Id.*

In *Austin v. United States*,[210] the petitioner plead guilty to one count of possessing cocaine with intent to distribute and was sentenced to seven years imprisonment by the state court.[211] Shortly thereafter, the Government filed an *in rem* action in the United States District Court for the District of South Dakota, seeking the forfeiture of the petitioner's mobile home and auto body shop pursuant to 21 U.S.C. section 881 (a)(4) and (a)(7).[212] The Government asserted that the petitioner sold cocaine at his auto body shop after retrieving the narcotics from his mobile home and, thus, sought the forfeiture of these items.[213]

Petitioner argued that the forfeiture of these properties violated the Eighth Amendment prohibition against the Government's imposition of excessive fines.[214] The district court rejected this argument, holding that the auto body shop and the mobile home were subject to forfeiture.[215] The Eighth Circuit Court of Appeals agreed with the Government and affirmed the forfeiture, noting that proportionality review should be utilized in civil

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[210]113 S. Ct. 2801 (1993).

[211]*Id.* at 2803.

[212]*Id.* Under the provisions of 21 U.S.C. § 881(a)(7):

> (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:
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> . . . .
>
> (7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used or intended to be used in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment . . . .

21 U.S.C. § 881(a)(7) (1988 & Supp. V 1993).

[213]*Austin*, 113 S. Ct. at 2803.

[214]*Id.*

[215]*Id.* The district court relied upon 21 U.S.C. sections 881(a)(4) and (a)(7) which allow for the forfeiture of vehicles and real property used to facilitate the commission of drug-related crimes. *Id.* at 2801-02.

actions that result in harsh penalties.[216] The Supreme Court then granted *certiorari* to resolve the conflict over the applicability of the Eighth Amendment to *in rem* civil forfeitures.[217]

Justice Blackmun, writing for the majority,[218] noted preliminarily that the purpose of the Eighth Amendment was to limit the government's power to punish.[219] As it was understood that civil proceedings frequently advanced punitive goals, Justice Blackmun then asked whether forfeiture under CFA constituted punishment.[220] The Court ultimately concluded that statutory *in rem* forfeiture not only served remedial purposes,[221] but that it also served as a form of punishment and, therefore, was subject to the limitations of the Eighth Amendment's Excessive Fines Clause.[222]

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[216]*Id.* at 2803 (citing United States v. One Parcel of Property, 964 F.2d 814, 817 (1992)).

[217]Austin v. United States, 113 S. Ct. 1036 (1993). For a court of appeals decision providing for a limited interpretation of the Excessive Fines Clause, see United States v. Certain Real Property, 954 F.2d 29 (2nd Cir.), *cert. denied*, 113 S. Ct. 55 (1992) (holding that the forfeiture of an apartment worth $145,000, in which the defendant made two sales of cocaine for a total of $250, did not violate the Excessive Fines Clause).

[218]Austin v. United States, 113 S. Ct. 2801, 2802 (1993). Justices White, Stevens, O'Connor and Souter joined in the opinion rendered by Justice Blackmun. *Id.* Justice Scalia filed an opinion concurring in part and concurring in the judgment. *Id.* (Scalia, J., concurring in part and concurring in the judgment). Justice Kennedy filed an opinion concurring in part and concurring in the judgment in which Chief Justice Rehnquist and Justice Thomas joined. *Id.* (Kennedy, J., concurring in part and concurring in the judgment).

[219]*Id.* at 2805. Justice Blackmun noted that the Cruel and Unusual Punishments Clause is concerned with punishment while the Excessive Fines Clause limits the Government's power to derive payments as punishment for an offense. *Id.*

[220]*Id.* at 2806. Justice Blackmun also acknowledged that forfeiture could simultaneously serve punitive and remedial objectives. *Id.* According to Justice Blackmun, "the question is not . . . whether forfeiture under §§ 881(a)(4) and (a)(7) is civil or criminal, but rather whether it is punishment." *Id.*

[221]*Id.* at 2812. The Court conceded that in cases where the forfeiture of contraband removes illegal items from society, the remedial purposes of forfeiture are satisfied. *Id.* at 2811.

[222]*Id.* at 2812. Justice Scalia, in a concurring opinion, disagreed with the majority's analysis. *Id.* at 2812 (Scalia, J., concurring in part and concurring in the judgment). Justice Scalia posited that the relevant inquiry should not be "*how much* the confiscated property [was] worth, but *whether* the confiscated property has a close enough relationship

In *Alexander* and *Austin*, the Court, by holding that the forfeiture of a criminal suspect's property can be analyzed under the Excessive Fines Clause, limited the government's power to extract payments as punishment for some offenses. As applied in the context of attorney fee forfeitures, cash earmarked for legal services, if classified as a suspect's property, should also face scrutiny under the Excessive Fines Clause. The purpose of the Excessive Fines Clause, which seeks to limit the government's power to punish,[223] can only be satisfied when the government is deprived of all punitive mechanisms. Unlike tangible objects such as cash or real property, whose value can be measured in dollars, the value of private legal services is more difficult to quantify. In some instances, deprivation of chosen counsel becomes more punitive in its effect than the assessment of a substantial fine. Consequently, a suspect who is charged with operating a relatively small criminal enterprise, but who is deprived of valuable legal services through forfeiture, may challenge this forfeiture as an excessive fine.

3. DUE PROCESS PROTECTION FOR OWNERS OF FORFEITABLE REAL PROPERTY

The most recent decision suggesting a shift in the Court's interpretation of the forfeiture laws was rendered in *United States v. James Daniel Good Real Property*.[224] In *James Daniel Good*, police officers, upon execution of a search warrant,[225] uncovered a significant quantity of drugs in the

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to the offense." *Id.* at 2815 (Scalia, J., concurring in part and concurring in the judgment). As noted by Justice Scalia:

> But an *in rem* forfeiture goes beyond the traditional limits that the Eighth Amendment permits if it applies to property that cannot properly be regarded as an instrumentality of the offense — the building, for example, in which an isolated drug sale happens to occur. Such a confiscation would be an excessive fine.

Id. Justice Scalia reasoned that such a distinction would require a showing by the Government of a sufficient nexus between the property and the offense. *Id.* Justice Scalia would then ask whether the relationship of the property to the offense was close enough to render the property "guilty" and therefore forfeitable. *Id.*

[223]For Justice Blackmun's opinion that the Eighth Amendment was designed to limit the government's power to punish, *see supra* note 219 and accompanying text.

[224]114 S. Ct. 492 (1993).

[225]*Id.* at 497.

home of the defendant, James Good.[226] Defendant plead guilty and was sentenced to one year in jail, five years probation, and a $1,000 fine.[227] Additionally, Defendant forfeited $3,187 in cash found on the premises.[228] Four and one-half years after the drugs were found, the Government sought to forfeit Defendant's house and accompanying lot and filed an *in rem* action in the United States District Court for the District of Hawaii.[229] The Government pursued this forfeiture under the theory that Defendant's home had been used to assist in the commission of a federal narcotics offense.[230] At the *ex parte* proceeding, a United States Magistrate Judge, after finding that the Government had established probable cause to believe that Defendant's property was subject to forfeiture,[231] issued a warrant authorizing the seizure of the property.[232] Shortly thereafter, the Government seized the property without affording prior notice or an adversary hearing to Defendant.[233] Justice Kennedy, writing for a

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[226]*Id.* Eighty-nine pounds of marijuana, marijuana seeds, vials containing hashish oil, and drug paraphernalia were uncovered upon execution of the search warrant. *Id.*

[227]*Id.*

[228]*Id.*

[229]*Id.*

[230]*Id.* The Government pursued this forfeiture under 21 U.S.C. section 881(a)(7) (1988 & Supp. V 1993). For the text of 21 U.S.C. section 881(a)(7), *see supra* note 212.

[231]United States v. James Daniel Good, 114 S. Ct. 492, 497 (1993).

[232]*Id.*

[233]*Id.* at 498. The Court of Appeals for the Ninth Circuit reversed the district court's decision based upon its determination that the seizure of Defendant's property, without prior notice and an adversary hearing, violated the Due Process Clause of the Fifth Amendment. *Id.* The Supreme Court then granted *certiorari* to resolve the conflict among the courts of appeals regarding the due process issues raised by such *ex parte* forfeitures. United States v. James Daniel Good Real Property, 113 S.Ct 1576 (1993). For court of appeals decisions analyzing the due process issues raised by *ex parte* forfeitures, *compare* United States v. 4492 South Livonia Road, 889 F.2d 1258 (2nd Cir. 1989) (holding that an *ex parte* seizure of land and a house without prior notice violated due process), *with* United States v. 900 Rio Vista Blvd., 803 F.2d 625 (11th Cir. 1986) (holding that a forfeiture proceeding against a residence pursuant to section 881(a)(6) did not deny a criminal defendant his due process rights when a government agent made an initial determination to seize property prior to a judicial hearing).

unanimous Court,[234] noted that when the government seeks to deprive criminal defendants of property, the rights to prior notice and a hearing remain essential components of the Due Process Clause.[235] Justice Kennedy reasoned that exceptions to this predeprivation notice and hearing requirement arise only in "extraordinary situations" in which valid governmental interests are at stake and, therefore, justify the postponement of the hearing until after the event.[236] Justice Kennedy held that the forfeiture of Defendant's property was not such an "extraordinary situation" that justified the postponement of notice and a hearing.[237]

In reaching his conclusion, Justice Kennedy distinguished the Court's decision in *Calero-Toledo*. In *Calero-Toledo*, the Court held that the Government could seize a yacht, upon which marihuana had been discovered, without advance notice or a hearing, because the owner's ability to frustrate the government interest by removing the property from the jurisdiction created a need for prompt action.[238] Noting that Defendant Good's real property cannot abscond, Justice Kennedy stated that the district court's jurisdiction over the property could have been preserved without prior seizure.[239] Unlike more transient property, Justice Kennedy reasoned that the Government's legitimate interests in preventing the defendant's real property from being sold, destroyed, or used for further illegal activity could

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[234]United States v. James Daniel Good Real Property, 114 S. Ct. 492, 497 (1993). Justice Kennedy delivered the opinion for a unanimous Court in which Justices Blackmun, Stevens, Souter, and Ginsburg joined. *Id.* Chief Justice Rehnquist filed an opinion concurring in part and dissenting in part, which Justices Scalia and O'Connor joined. *Id.* (Rehnquist, C.J., concurring in part and dissenting in part). Justices O'Connor and Thomas also filed opinions concurring in part and dissenting in part. (O'Connor, J., concurring in part and dissenting in part; Thomas, J., concurring in part and dissenting in part).

[235]*Id.* at 500.

[236]*Id.* at 501. One example of such an "extraordinary situation" occurred in Calero-Toledo v. Pearson Yacht Co., 416 U.S. 663 (1974) where the Government sought the forfeiture of a yacht "'that could be removed to another jurisdiction, destroyed, or concealed if advance warning of the confiscation were given.'" *James Daniel Good*, 114 S. Ct. at 500 (quoting *Calero-Toledo*, 416 U.S. at 679 (1974)).

[237]*James Daniel Good*, 114 S. Ct. at 505.

[238]*Calero-Toledo*, 416 U.S. at 663.

[239]United States v. James Daniel Good Real Property, 114 S. Ct. 492, 500-03 (1993).

have been secured without resorting to a pre-notice seizure of the property.[240] Thus, the Court, while observing that "fair procedures are not confined to the innocent," held that the seizure of Defendant's real property did not qualify as one of those exigent circumstances that justify the postponement of notice and a hearing.[241]

The decision to afford such substantial due process protection for owners of forfeitable real property may also open the door for similar arguments in attorney fee forfeiture cases. Justice White's opinion in *Caplin & Drysdale* dealt with the petitioner's Fifth Amendment claims tangentially, opining that these due process arguments were encompassed by the more specific Sixth Amendment claims.[242] By failing to fully address this issue, attorney fee forfeitures remain susceptible to such procedural due process arguments.[243] Due process requires that individuals receive notice and an

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[240]*Id.* at 503. As noted by Justice Kennedy, sale of real property subject to forfeiture can be prevented by filing a notice of *lis pendis* to prevent alienation of the property. *Id.* Destruction of the subject property can be prevented if the government obtains an *ex parte* restraining order on the property when evidence suggests that an owner is likely to destroy his property when advised of the pending action. *Id.* Furthermore, the government can avert further illegal activity on the property by obtaining arrest or search warrants. *Id.* at 504.

[241]*Id.* at 505. The Court further held that in order to show exigent circumstances, "the Government must demonstrate that less restrictive measures, [such as] a *lis pendis*, restraining order, or a bond would not suffice to protect the Government's continued interests in preventing the sale, destruction, or continued unlawful use of the real property." *Id.*

In a dissenting opinion, Chief Justice Rehnquist highlighted the paradox that exists when a criminal defendant can be temporarily deprived of liberty on the basis of an *ex parte* probable cause determination, yet the same defendant cannot be deprived of property on the same basis. *Id.* at 508 (Rehnquist, C.J., concurring in part and dissenting in part) (quoting United States v. Monsanto, 491 U.S. 600, 615-16 (1989)).

In a separate dissent, Justice Thomas questioned whether the legal fiction regarding the object as the offender can fully justify the immense scope of current forfeiture statutes. *Id.* at 515 (Thomas, J., concurring in part and dissenting in part). Justice Thomas further noted that it may be necessary to consider whether the Court's deference to Congress in the area of forfeiture is proper. *Id.*

[242]Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 633 (1989). *See also supra* note 109 and accompanying text (providing an analysis of Justice White's cursory treatment of the Fifth Amendment claims in *Caplin & Drysdale*).

[243]In noting the importance of due process in the American legal system, the Supreme Court, in Argersinger v. Hamlin, 407 U.S. 25, 49 (1972), stated that "[d]ue process, perhaps the most fundamental concept in our law, embodies principles of fairness rather than immutable line drawing as to every aspect of a criminal trial." *Id.* As the standards

opportunity to be heard before the government deprives them of property.[244] It logically follows that similar notice requirements are required before the government can deprive a criminal defendant of the *use* of his property. In some cases, the issuance of a pre-trial restraining order over a defendant's assets may be incompatible with procedural due process because such an order determines that the defendant is probably guilty prior to a jury determination of guilt or innocence.[245] While recognizing that attorneys are more mobile than real property, the government could still protect its interests in the property by holding a pre-trial hearing[246] regarding the forfeitability of the assets, rather than a post-trial hearing in which there may be no way to remedy the deprivation of one's right to effective assistance of counsel.

VI. CONCLUSION

Much has changed since the Supreme Court held in *Caplin & Drysdale* and *Monsanto* that attorney fees could be forfeited without violating a criminal defendant's Sixth Amendment rights. Justice White, the author of the majority opinion, has retired from the bench. So too has Justice

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of conduct encompassing procedural due process in a criminal case cannot be easily defined, it may be stated generally that "'convictions cannot be brought about by methods that offend a sense of justice.'" United States v. Brodson, 241 F.2d 107, 116 (7th Cir. 1957) (Finnegan, J., dissenting) (quoting Rochin v. California, 342 U.S. 165, 173 (1952)).

[244]United States v. James Daniel Good Real Property, 114 S. Ct. 492, 498 (1993).

[245]In United States v. Mandel, 408 F. Supp 679, 683 (D. Md. 1976), a case predating the amendments included in CFA, the district court concluded that a pre-trial restraining order placed on the defendant's assets was incompatible with the presumption of innocence. Such a restraining order, which could only have been issued upon a finding that the Government would probably prevail at trial, was equivalent to a finding that the defendants would probably lose at trial. *Id.* Thus, rendering a restraining order over the assets "constitutes a pre-trial determination that the defendants are probably guilty, a determination which the defendants might conclude would render a fair trial less likely." *Id.*

The American Bar Association also advocated the position that the government should be able to obtain title to the assets only after a conviction has been rendered. *See* Wolfteich, *supra* note 68, at 851 n.46. The ABA reasoned that criminal forfeiture is a form of punishment, and the government should not be able to punish a defendant until it receives a conviction. *Id.*

[246]*See generally* Frank McCay, *Forfeiture of Attorneys' Fees Under RICO and CCE*, 54 FORDHAM L. REV. 1171, 1184 (1986) (advocating the use of a pre-trial hearing to avoid the constitutional problems brought about by attorney fee forfeitures).

Blackmun, who concluded his *Caplin & Drysdale* dissent by expressing his hope that Congress clarify its intent to exclude attorney fees from the scope of forfeiture.[247] Six years later, Congress still has not responded to Justice Blackmun's suggestion to adopt language exempting attorney fees from forfeiture. The current Supreme Court has, however, initiated a trend retrenching the scope of the government's use of forfeiture. One of the recently appointed Justices, Justice Thomas, alluded to his views on forfeiture when he suggested that civil forfeiture may be an outdated practice in need of reevaluation.[248]

The Court may also find it appropriate to reevaluate the practice of attorney fee forfeitures. Justice Blackmun's Sixth Amendment concerns regarding attorney fee forfeitures remain valid criticisms. In addition, the innocent owner, excessive fines, and due process arguments may provide alternative constitutional challenges to this practice.

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[247]Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 656 (Blackmun, J., dissenting) ("That a majority of this Court has upheld the constitutionality of the [CFA] as so interpreted will not deter Congress, I hope, from amending the [CFA] to make clear that Congress did not intend this result.").

[248]As stated by Justice Thomas:

> Given that current practice under § 881(a)(7) appears to be far removed from the legal fiction upon which the civil forfeiture doctrine is based, it may be necessary — in an appropriate case — to reevaluate our generally deferential approach to legislative judgments in this area of civil forfeiture.

James Daniel Good, 114 S. Ct. at 515 (Thomas, J., concurring in part and dissenting in part).