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FORFEITING DEFENSE ATTORNEYS' FEES: APPLYING AN INSTITUTIONAL ROLE THEORY TO DEFINE INDIVIDUAL CONSTITUTIONAL RIGHTS

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Two federal laws, the Racketeering Influenced and Corrupt Organizations Statute (RICO) and the Continuing Criminal Enterprise Statute (CCE), authorize criminal forfeiture of the proceeds of drug trafficking and racketeering activities. Both statutes permit forfeiture not only of property actually held by RICO and CCE defendants, but also may reach assets that these defendants owe or have transferred to third parties. The United States Department of Justice maintains that lawyers fall into this category of third parties, and the Department has sought the forfeiture of fees paid or owed to defense attorneys for professional services rendered on behalf of their clients.

In this Article, Professor Morgan Cloud argues that forfeiture of defense attorneys' fees under RICO and CCE would violate a defendant's right to counsel under the sixth amendment. To reach this analysis, Professor Cloud employs a dualistic model that serutinizes the impact of government conduct both upon the rights of individual defendants and upon the activities of defense counsel as a class. He finds that fee forfeitures would restrict the ability of defense attorneys to perform their institutional role of guaranteeing that the adversary system of justice operates properly. Cloud thus concludes that courts should reject the Justice Department's broad interpretations of the RICO and CCE forfeiture provisions.

The right to have the assistance of counsel is too fundamental and absolute to allow the courts to indulge in nice calculations as to the amount of prejudice arising from its denial.[1]

The Constitution makes a curious yet profound distinction among attorneys. It treats one group, lawyers representing defendants in criminal cases, differently from those representing other clients. The Constitution does not require that litigants in civil cases be afforded attorneys, nor even require that attorneys prosecute criminal cases for the state.[2]

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1. Glasser v. United States, 315 U.S. 60, 76 (1942) (referring to conflict of interest arising out of representation of co-defendants by appointed counsel).

2. Attorneys representing the state as prosecutors are, nonetheless, essential to the effective operation of the criminal justice system. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 344 (1963) ("Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed

Yet it commands that no person can be tried for a felony,[3] or imprisoned for a petty offense,[4] unless he is represented by an attorney defending his interests.[5] Concomitantly, it requires that defense counsel satisfy performance standards not imposed by the Constitution on other lawyers.[6]

This constitutional distinction among attorneys flows indirectly from the right to counsel guaranteed to defendants in criminal cases by the sixth amendment.[7] The Constitution is directly solicitous of the rights of criminal defendants, not of the interests of their legal representatives. Criminal defense counsel receive special treatment to ensure that their clients' rights are protected. As a result, analysis of sixth amendment issues has typically emphasized the rights of individual defendants.[8]

The "atomistic" approach to defining the right to counsel, which focuses upon the client's interests, is consistent with the sixth amendment's language as well as with judicial construction of other constitutional rights related to the investigation and prosecution of criminal activity.[9] Yet the theoretical underpinnings of the right to counsel suggest that another approach—based upon the institutional role of crimi-

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essential to protect the public's interest in an orderly society."); STANDARDS FOR CRIMINAL JUSTICE, Chapter 3, 3-2.1 (1980) ("The prosecution function should be performed by a public prosecutor who is a lawyer subject to the standards of professional conduct and discipline.").

3. Gideon v. Wainwright, 372 U.S. 335 (1963).

4. Argersinger v. Hamlin, 407 U.S. 25 (1972); Scott v. Illinois, 440 U.S. 367 (1979).

5. The exceptional situations in which a defendant waives the right to counsel in favor of self-representation are beyond the scope of this Article. *See* Faretta v. California, 422 U.S. 806 (1975). The role of defense counsel is favored so strongly by the sixth amendment, however, that the Constitution often requires the appointment of standby counsel to assist defendants attempting self-representation. *See* McKaskle v. Wiggins, 465 U.S. 168 (1984).

6. *See infra* notes 14, 37-40, 46 and accompanying text. All attorneys must, of course, satisfy professional performance standards in representing their clients. These standards are imposed by state law and professional organizations, however, and generally are constitutionalized only when a lawyer is representing a defendant in a criminal case. *See infra* notes 29-63 and accompanying text.

7. The sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence." U.S. CONST. amend. VI.

8. *See* Nix v. Whiteside, 106 S. Ct. 988 (1986); Strickland v. Washington, 466 U.S. 668 (1984); United States v. Cronic, 466 U.S. 648 (1984); Faretta v. California, 422 U.S. 806 (1975).

9. The Supreme Court has concluded that the rights protected by the fourth and fifth amendments belong to each person individually. *See, e.g.*, Wong Sun v. United States, 371 U.S. 471 (1963). The "personal rights" approach recently adopted by the Court for determining which individuals have standing to contest government searches and seizures accentuates this constitutional theory. *See* Rakas v. Illinois, 439 U.S. 128 (1978); Rawlings v. Kentucky, 448 U.S. 98 (1980). *See also* Gutterman, *Fourth Amendment Privacy and Standing: 'Wherever the Twain Shall Meet,'* 60 N.C.L. Rev. 1 (1981).

This personal rights approach to defining interests protected by the Bill of Rights is not without its critics. *See, e.g.*, Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349 (1974) (proposing a "regulatory" model for fourth amendment analysis); Gutterman, *supra* (criticizing use of personal rights approach in standing analysis).

nal defense counsel—is useful, and perhaps necessary, to explore fully the nature and scope of this constitutional privilege. For although the right to counsel is held by individual defendants, as a class their attorneys perform fundamental institutional functions essential to the proper functioning of the adversary system of criminal justice,[10] and necessary for the vindication of the values embodied in the Bill of Rights and the fourteenth amendment.[11]

Simply put, the Constitution treats the activities of criminal defense attorneys differently precisely because they are different, from an institutional perspective, from other members of the profession. As the primary advocates of their clients' constitutional rights, defense attorneys are essential if criminal defendants are to receive fair trials, and if the adversary system of criminal justice is to operate properly.[12] When these institutional roles are considered, it appears that government conduct which interferes with the capacity of attorneys as a class to represent criminal defendants violates the sixth amendment as surely as government actions that directly affect the rights of individual clients. It may, therefore, be necessary to define sixth amendment interests by applying a theoretical model which protects the institutional role of defense counsel as well as the rights of individual defendants.

Interpreting the right to counsel from an institutional needs perspective is consistent with sixth amendment jurisprudence, which long has recognized defense attorneys' fundamental place in the criminal justice system. During the past half century the Supreme Court has steadily expanded the parameters of the right to counsel in criminal cases.[13]

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10. *See* United States v. Cronic, 466 U.S. 648, 653 (1984) ("An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases 'are necessities, not luxuries.' Their presence is essential because they are the means through which the other rights of the person on trial are secured.") (citations omitted); Strickland v. Washington, 466 U.S. 668, 685 (1984) ("The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled.") (citations omitted); STANDARDS FOR CRIMINAL JUSTICE, Chapter 4, 4-1.1(a) (1980) ("Counsel for the accused is an essential component of the administration of criminal justice.").

11. Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

12. *Id.*; United States v. Cronic, 466 U.S. 648, 655 (1984) (" 'The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.' ") (citations omitted). *See also* Polk County v. Dodson, 454 U.S. 312, 318 (1981) ("The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness."); Argersinger v. Hamlin, 407 U.S. 25, 31 (1972). *See also* G. HAZARD, JR., ETHICS IN THE PRACTICE OF LAW, 122 (1978).

13. The Court first recognized that due process requires the presence of counsel in capital cases in Powell v. Alabama, 287 U.S. 45 (1932) (opinion based upon the fourteenth amendment). The right to appointed counsel was extended to indigents charged with felonies by the "liberal" Warren Court. Gideon v. Wainwright, 372 U.S. 335 (1963). The non-ideological nature of the Gideon decision is demonstrated by the fact that the attorneys general for 22 states joined in

The Court's decisions demonstrate that defense counsel serve dual functions. They must provide effective representation[14] to protect their clients' interests. By discharging that duty, counsel also fulfill central institutional functions in the adversary system.[15]

Despite these decisions, defense counsel's role in the justice system currently is being tested by the Justice Department's interpretation of recent legislation authorizing the criminal forfeiture of the proceeds of drug trafficking and "racketeering" activities.[16] Defense attorneys are affected because the statutes permit forfeiture not only of the property held by convicted defendants, but also reach assets transferred or owing by them to third parties. The Justice Department argues that everyone, including attorneys, falls into the class of third parties encompassed by the statutes, and has relied upon these provisions to seek the forfeiture of fees paid or owed to defense attorneys for legitimate professional services rendered on behalf of their clients.[17]

Defendants and their lawyers have vigorously opposed government attempts to obtain forfeiture of legitimate attorneys' fees. Although the arguments made by both sides in the debate include statutory interpretation,[18] resolution of the dispute ultimately turns upon the nature of defendants' right to counsel under the sixth amendment—

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amicus briefs supporting the right of indigents to appointed counsel, while only three joined Florida in opposition. *Id.* Sixth amendment rights were confirmed or expanded by the ostensibly "conservative" Burger Court. For example, that Court extended the right to appointed counsel to indigents charged with petty offenses as a predicate to imprisonment upon conviction. Argersinger v. Hamlin, 407 U.S. 25 (1972); Scott v. Illinois, 440 U.S. 367 (1979). Similarly, the right to counsel was initially granted to defendants at pretrial "critical stages" of the criminal process during the Warren era, United States v. Wade, 388 U.S. 218 (1967) (post-indictment lineups), but survived, and was expanded during the Burger years. Moore v. Illinois, 434 U.S. 220 (1977) (preliminary hearing). *But cf.* Kirby v. Illinois, 406 U.S. 682 (1972) (pre-charge stationhouse show-up not a critical stage).

The Court has frequently relied upon the sixth amendment to enforce rights seemingly arising under other provisions of the Constitution. *See, e.g.*, Massiah v. United States, 377 U.S. 201 (1964) (post-indictment interrogation of defendant in absence of counsel violated sixth amendment); *accord* Brewer v. Williams, 430 U.S. 387 (1977); United States v. Henry, 447 U.S. 264 (1980) (government informer's conversations with imprisoned defendant amounted to interrogation without presence of defense counsel).

14. The Court has recognized that the right to counsel encompasses the right to effective assistance of counsel throughout the adversary process. *See* Strickland v. Washington, 466 U.S. 668 (1984) (at trial); United States v. Cronic, 466 U.S. 648 (1984) (at trial); Evitts v. Lucey, 105 S. Ct. 830 (1985) (on appeal). The right to effective assistance of counsel also prohibits representation of multiple clients, when such representation interferes with a defendant's fundamental interests. *See* Cuyler v. Sullivan, 446 U.S. 335 (1980).

15. *See infra* Part I.

16. *See infra* Part II, III.

17. The Justice Department has made this argument in the courts and in its Guidelines on Forfeiture of Attorneys' Fees. *See* DEPT. OF JUSTICE, U.S. ATTORNEYS' MANUAL, § 9-111.000-.700, *reprinted in* 38 Crim. L. Rep. (BNA) 3001-08 (Oct. 2, 1985) [hereinafter U.S. ATTORNEYS' MANUAL].

18. *See infra* Part III.

and upon the role of defense attorneys in implementing that right. Ultimately, it may be necessary to determine whether this group of lawyers should be treated differently from other third parties who trade with accused racketeers.

Application of the traditional "atomistic" model of sixth amendment rights to the problem has failed to provide a satisfactory solution. Indeed, this approach frequently has generated more heat than light. Government arguments that the forfeiture of legitimate attorneys' fees does not jeopardize defendants' sixth amendment rights, and that defense counsel are no different from other affected third parties, have prompted many within the profession to accuse the Justice Department of waging an improper attack on the defense bar.[19] The government, in turn, seems to question the basic integrity of many members of the legal profession and the role of criminal defense attorneys in the adversary justice system. The proponents of fee forfeitures seem to envision the defense bar as an ad hoc legal department for organized crime,[20] oper-

19. *See, e.g.*, Tarlow, *Federal Prosecutors Step Up Attack On Defense Lawyers*, Forum, July-Aug., 1985; *Targeting Lawyers*, Nat'l L. J., Jan. 21, 1985, at 1; *A Bar Under Fire*, Nat'l L. J., Dec. 30, 1985-Jan. 6, 1986, at 3, col. 1; *Has U.S. Put Lawyers On The Defensive?*, L. A. Times, June 14, 1985, at 1, col. 1.

See also Genego, *Reports from the Field: Prosecutorial Practices Compromising Effective Criminal Defense*, Champion, May, 1986, at 7, 12 (80% of the defense attorneys responding believed that the Department of Justice has intentionally adopted these practices for the purpose of "inhibiting and discouraging zealous representation of criminal defendants"). These accusations seem to be a direct result of recent changes in Justice Department practices. Professor Genego's questionnaire was answered by 1,648 members of the National Association of Criminal Defense Lawyers in 1985. Of the 348 attorneys who indicated that the government had sought to obtain forfeiture of fees or to prevent defendants from using their assets to pay attorney's fees, 84% of those events occurred in 1983-85, 11% from 1980-82, and only 5% in 1979 or earlier. *Id.* at 12.

See also, The Association of the Bar of the City of New York, *Public Hearing on Subpoenas to Lawyers: The Affect on The Attorney-Client Relationship and on the Adversarial Process*. 105-09 (1985) (testimony of Shaw); *Id.* at 126-29 (testimony of Meshbesher).

20. *See, e.g.*, Staff of the President's Commission on Organized Crime, *Materials on Ethical Issues for Lawyers Involved With Organized Crime Cases* (1985) (unpublished). These materials were prepared as a staff study for the President's Commission on Organized Crime. The staff report disavowed the belief that the overwhelming majority of defense counsel behaves unethically, but concluded that a small group of attorneys "advance the criminal purposes of these criminal organizations. It is clear that traditional organized crime and narcotics traffickers depend upon, and could not effeetively operate without, these attorneys." *Id.* at 3. The staff report then presented its profile of the "Mob Lawyers," arguing that these renegades engage in a variety of mob promoting activities, including efforts to avoid forfeiture of racketeering proceeds, active efforts in orchestrating perjury and obstruction of justice, fixing cases, and money laundering. All of those activities were attributed to a "fraternity" of LaCosa Nostra attorneys. *See id.* at 3-10. This critique was based upon the cases of only four lawyers, three of whom remained unidentified. The staff attempted to use Justice Department data concerning federal prosccutions of attorneys to support its theory of the "mob lawyer" as a widespread problem, but were unable, at that time, to develop a reliable statistical base of information. *Id.* at 27-28. In spite of the tenuous statistical support for its theory, the report concluded that the small number of renegade attorneys "represent a disproportionate threat to the criminal justice system and to the current self-regulation of the legal profession." *Id.* at 29. This language seems a thinly veiled call for federal regulation of the

ating as an unacceptable hindrance to the government's "war" with the forces of evil.[21]

Both sides of the debate have struggled within the analytical limits of the atomistic model of constitutional rights. This Article proposes that a different theoretical approach applying a "dualistic" model may well provide the most satisfactory solution to the fee forfeiture debate. This dualistic model posits that the sixth amendment regulates certain government conduct which intrudes upon the rights of individual defendants, or which infringes upon the activities of defense attorneys which are essential to the operation of the institution of the criminal justice system. This model defines sixth amendment interests both in terms of individual rights and by reference to the institutional roles played by defense counsel. By analyzing both sets of interests to determine the nature and scope of the rights protected by the sixth amendment, this dualistic approach should provide a more comprehensive and useful model for interpreting constitutional privileges than does a narrow atomistic model.

For example, one need not accept the jeremiads of forfeiture opponents to recognize that allowing the government to seize defense attorneys' earned compensation affects the ability of defendants to obtain legal representation, and perhaps the quality of that representation as well. Whether or not this violates the sixth amendment rights of defendants arguably may vary in individual cases. Yet it seems clear that permitting fee forfeitures would affect the willingness of private attorneys as a class to represent defendants in organized crime prosecutions. Indeed, even the Justice Department has recognized these problems,

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legal profession, and was coupled with questions about the future of the attorney-client privilege. *Id.* at 29-31.

While this staff report is not an official statement of the Justice Department, it appears the government has relied upon it to justify attempts to subpoena defense attorneys for information about their clients—a method of discovery often intended to assist in later fee forfeiture efforts. *See, e.g., In re* Grand Jury Subpoena Dated Jan. 2, 1985 (Payden), 605 F. Supp 839, 849-50 n.14 (S.D.N.Y. 1985).

21. The government's assumption that defense attorneys frequently act as cohorts in their clients' organized criminal activities apparently underlies the effort to obtain forfeiture of fees. The Justice Department's official spokesperson has testified, for example, that attorneys' fees must be forfeitable because "[i]t would not be difficult for a defendant to act in concert with his attorney to inflate the fees, pay them with ill-gotten assets, and thus protect a substantial amount of assets from forfeiture which could later be routed back to the defendant." *Forfeiture of Assets Intended for Use as Attorneys' Fees: Hearing Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 25 (1986) (statement of Stephen S. Trott, Ass't Attorney General, Crim. Div.) [hereinafter *Committee on the Judiciary*]. Two things are striking about this testimony. First, the speaker does not cite any instances of such improprieties actually occurring. Proposing a rule which would penalize all defendants and their counsel based upon the conjectural crimes of a few is questionable policy. Second, and more important, if such transfers occur, they would be subject to forfeiture as sham or fraudulent transactions encompassed by the forfeiture statutes. *See infra* notes 138-45 and accompanying text.

and has promulgated departmental guidelines to ameliorate them.[22] Nonetheless, the Justice Department's interpretation of the forfeiture statutes, far from accommodating the special constitutional role played by defense counsel, fails even to accord defense attorneys parity with other members of society. The Department has advocated a "notice" theory which makes private sector defense attorneys the least protected third party group because they are the class most likely to be on notice of the possible forfeitability of their clients' assets.[23] Although the Department has recognized this inevitable result, and its potential harm to the ability of defense lawyers to represent their clients, it contends that this does not intrude upon individual defendants' constitutional rights.[24] Were the Department to incorporate the institutional role of defense counsel into its analysis, it might reach a very different conclusion.[25]

Fee forfeiture opponents, on the other hand, have failed to articulate effectively the institutional role theory which seems implicit in their arguments. They contend that allowing fee forfeitures would impose unconstitutional burdens upon defendants' sixth amendment rights by denying them effective assistance of counsel, or perhaps any counsel at all.[26] These claims are consistent with the atomistic rights approach. Opponents frequently argue, however, that allowing fee forfeitures also would distort the adversary system itself, by providing the government with impermissible influence over the selection of the defense attorneys who can or will appear in these cases.[27] This argument contains the seeds of a different theoretical approach to the sixth amendment, one encompassing the institutional roles played by defense counsel in the criminal justice system as well as the rights of individual defendants.

This Article presents such a dualistic analysis. It begins by examining the institutional roles played by defense counsel in the criminal jus-

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22. *See* U.S. ATTORNEYS' MANUAL, *supra* note 17, at § 9-111.000-.700.

23. *See infra* notes 114-29 and accompanying text.

24. The Justice Department has acknowledged that private defense attorneys "who among all third parties uniquely may be aware of the possibility of forfeiture, may not be able to meet the requirements for equitable relief without hampering their ability to represent their clients." U.S. ATTORNEYS' MANUAL, *supra* note 17, at § 9-111.230. *But see id.*, § 9-111.210 (impact of forfeiture provisions "does not amount to constitutional interference.").

25. The Justice Department argues that fee forfeitures only affect the individual defendant's qualified right to choose counsel. Since appointed counsel are generally available for indigents unable to retain private counsel, the rights of individual defendants are not transgressed. U.S. ATTORNEYS' MANUAL, *supra* note 17, at § 9-111.210. *See infra* Part IV for an analysis of the effect of fee forfeitures upon sixth amendment interests.

26. *See infra* Part IV.

27. *See, e.g.*, United States v. Rogers, 602 F. Supp. 1332, 1350 (D. Colo. 1985) (allowing forfeiture of legitimate defense attorneys' fees would pose "a serious threat to the adversary process"); *accord* United States v. Bassett, 632 F. Supp. 1308, 1317 (D. Md. 1986), *aff'd*, United States v. Harvey, No. 86-5025, slip op. at 55-56 (4th Cir. Mar. 6, 1987) (available on LEXIS, Genfed library, USAPP file).

tice system, and demonstrates how the institutional role model is consistent with contemporary constitutional theory. It then provides a necessary overview of the new criminal forfeiture provisions in federal law and examines the recent series of opinions construing those statutes. Finally, it explores the impact of fee forfeitures upon sixth amendment interests by applying both the atomistic and institutional role models. The conclusion ultimately drawn from this analysis is that allowing forfeiture of criminal defense counsel's legitimate fees would disrupt the balance of power necessary for the proper operation of the adversary justice system, and inevitably would infringe upon the interests protected by the sixth amendment. In the end it is argued that even the salutory goals embodied in this anti-crime legislation must be tempered by the values embodied in the Bill of Rights—and by respect for the collective role of the legal profession in insuring the survival of those values and the institutional processes which protect them.

I. Defense Counsel's Dual Roles: Serving Institutional Functions By Representing Individual Clients

The sixth amendment commands that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence."[28] While the amendment's language specifically creates an individual privilege, it is the central premise of this Article that the right to counsel also serves institutional functions deserving independent protection. To determine whether government actions, such as attempts to obtain forfeiture of criminal defense lawyers' fees, violate the sixth amendment may require use of a two-part analysis. This dualistic model would prohibit government actions infringing upon the rights of individual defendants, as well as any which prevent defense attorneys, individually and as a class, from performing their fundamental institutional functions.

This dualistic model is consistent with evolving sixth amendment theory. The Supreme Court has recognized that the defendant's right to counsel is among the most fundamental of constitutional privileges because defense attorneys serve two purposes: to ensure that the other rights of the accused are protected,[29] and to guarantee that the criminal

28. U.S. Const. amend. VI.

29. *See* United States v. Cronic, 466 U.S. 648, 653-54 (1984):

> An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases 'are necessities, not luxuries.' Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to a fair trial itself would be 'of little avail,' as this Court has recognized repeatedly. (citations omitted).

See also Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 8 (1956), *quoted in* United States v. Cronic, 466 U.S. 648, 654 (1984). ("Of all the rights that an accused

justice system operates properly so the defendant receives a fair trial.[30] While protecting the individual client's rights, defense attorneys help drive the adversary mechanisms of the justice system.

The Supreme Court's decisions implementing the right to counsel include an inescapable institutional component which establishes that the adversary system cannot operate properly if defendants do not receive legal representation. The basic presumption of the adversary system, that partisan advocacy produces the correct result—conviction of the guilty and acquittal of the innocent—is "the 'very premise' that underlies and gives meaning to the Sixth Amendment."[31] The structure of the adversary system requires counsel for criminal defendants[32] because "[t]he assistance of counsel is often a requisite to the very existence of a fair trial."[33] While greatest deference traditionally has been paid to the sixth amendment rights of defendants represented by privately retained counsel,[34] the Court has concluded that indigents unable to employ attorneys are entitled to have counsel appointed at gov-

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person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other right he may have.").

30. Powell v. Alabama, 287 U.S. 45, 68-69 (1932). ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman. . . lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one.").

31. United States v. Cronic, 466 U.S. 648, 655 (1984) (" 'The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.' ") (citations omitted). *See also* Polk County v. Dodson, 454 U.S. 312, 318 (1981) ("The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness.").

32. *See* Strickland v. Washington, 466 U.S. 668, 685 (1984).

> Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal. . . . The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled. (citations omitted).

33. Argersinger v. Hamlin, 407 U.S. 25, 31 (1972). *See also* G. HAZARD, JR., *supra* note 12, at 122 ("In recent years, the Supreme Court has substantially equated adversarial trial with due process in the determination of legal rights.").

34. *Powell*, 287 U.S. at 69 ("If in any case . . . a . . . court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of . . . due process in the constitutional sense."). For a general discussion of the rights relating to retained counsel, see also W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE §§ 11.1, 11.4(c), and 11.7(b) (1985). The sixth amendment guarantees defendants who can afford to do so the qualified right to retain private counsel of their own choice. *See* United States v. Curcio, 694 F.2d 14, 22-23 (2d Cir. 1982); United States v. Cunningham, 672 F.2d 1064, 1070 (2d Cir. 1982). Although qualified, the right to counsel of defendant's choice cannot be denied without a showing of a compelling need to ensure the "prompt, effective and efficient administration of justice." United States v. Burton, 584 F.2d 485, 489 (D.C. Cir. 1978).

See also United States v. Harvey, No. 86-5025 (4th Cir. Mar. 6, 1987), slip op. at 40 (available on LEXIS, Genfed Library, USAPP file) (right to counsel based on "assumption that the primary right being secured against government encroachment was the right to be represented by counsel freely chosen and paid under private contract.").

ernment expense in large categories of criminal cases.[35] Without this rule, defendants' rights would be jeopardized and the institutional mechanisms of the criminal justice system would falter.[36]

Defining the scope of sixth amendment interests to encompass the institutional roles of defendants' attorneys comports with current judicial theory. For example, the Supreme Court's recent decisions holding

35. Gideon v. Wainwright, 372 U.S. 335 (1963) (all felonies); Argersinger v. Hamlin, 407 U.S. 25 (1972) (any misdemeanor or felony where imprisonment actually imposed as punishment); *accord* Scott v. Illinois, 440 U.S. 367 (1979).

36. The unique protection provided defense attorneys under the sixth amendment, which requires appointment of counsel at government expense for indigents, contrasts with the Supreme Court's recent treatment of attorneys representing clients in civil actions under the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641, *codified as amended* at 42 U.S.C. § 1988. In Evans v. Jeff D., 106 S. Ct. 1531 (1986), the Supreme Court held that this statute grants district courts the discretionary power to refuse to award attorneys' fees where the parties have entered into a stipulated settlement and a consent decree providing the plaintiff class with substantive relief and agreeing that each party would pay its own attorneys' fees and costs. *Id.* at 1534-35. As a result, in *Evans v. Jeff D.*, the government was not required to pay plaintiffs' attorney's fees.

One forfeiture proponent has proposed that this opinion provides support for fee forfeitures under the RICO and CCE statutes, because the Court allowed attorneys' fees to be the subject of negotiation. *See* Brickey, *Forfeiture of Attorneys' Fees: The Impact of RICO and CCE Forfeitures on the Right to Counsel*, 72 VA. L. REV. 493, 540-41 (1986). This argument misperceives both the fact and policy issues at stake in *Evans v. Jeff D.*, which are inapposite to the sixth amendment issues arising under the RICO and CCE statutes. The facts are readily distinguishable. The outcome rested upon the Court's interpretation of a statute concerning civil litigation, and upon the terms of a written stipulation and consent order intentionally entered into by civil litigants. On its facts the case has no relevance to government attempts to compel forfeiture of defense attorneys' fees in criminal cases. The underlying policies and sources of the controlling law are also distinguishable. In a civil rights action, plaintiffs voluntarily act against the government. They and their counsel typically sue in the hope of prevailing and obtaining an award of costs and fees from the government. *See generally* E.R. LARSON, FEDERAL COURT AWARDS OF ATTORNEY'S FEES (1981). These may constitute the major economic issue in the litigation, and the government may wish to enter into a settlement specifically to avoid these expenses. Evans v. Jeff D., 106 S. Ct. at 1538-43. Surely no one would argue that a government offer to enter into a plea bargain could be conditioned on defense counsel's waiver of earned fees, whether paid by the client or the government. By creating such a blatant conflict of interest between attorney and client, the government would transgress upon rights protected by the sixth amendment. *See Strickland*, 466 U.S. at 692 (quoting Cuyler v. Sullivan, 446 U.S. 335, 345-50 (1980)) (Supreme Court recognized limited presumption of prejudice when counsel burdened by actual conflict of interest that adversely affects his performance). While professional ethics prohibit all lawyers from forsaking client interests for their own gain, MODEL CODE OF PROFESSIONAL RESPONSIBILITY, [hereinafter MODEL CODE] EC 5-1, 5-2 (1985); MODEL RULES OF PROFESSIONAL CONDUCT [hereinafter MODEL RULES] Rule 1.7(b), 2.1; Nix v. Whiteside, 106 S. Ct. at 1002, civil litigants are not afforded the added protection of a constitutional right to effective assistance of counsel. This is because the fundamental nature and purposes of civil and criminal litigation are different. *See* MODEL CODE Canon 7; EC 7-21 ("The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of society as a whole."). Finally, in the fee forfeiture setting the government is acting against the defendant, and privately retained defense counsel does not undertake representation in the hopes of compelling the government to pay fees and costs, nor is the defendant seeking money from the government to pay his attorneys' fees. Typically he is protesting government attempts to prevent him from using as yet unforfeited assets to pay his attorneys. If there is any lesson to be learned from this case, it is that criminal defense counsel are properly treated differently from other attorneys when sixth amendment interests are at stake.

that defendants are entitled to receive effective assistance of counsel[37] recognize that sixth amendment interests encompass defense attorneys' institutional functions as well as the rights of individual defendants. In these opinions, the Court has emphasized that the right to counsel is not just a form of words, satisfied by the physical presence of a warm body possessing a license to practice law. Rather, the sixth amendment imposes a duty of performance upon criminal defense attorneys. While the sixth amendment requires competent representation to ensure that a defendant's individual rights are protected,[38] effective assistance by defense counsel also is necessary for the adversary process to operate properly.[39] The Court emphasizes:

> That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.[40]

Sixth amendment claims necessarily are raised in individual cases in which specific defendants complain that their rights are being denied. Logically, however, courts reviewing these claims should consider the impact of government practices upon the ability of defense attorneys, individually and collectively, to provide defendants with effective assistance. In some cases, a sixth amendment violation can exist even if the individual defendant fails to demonstrate that the government conduct actually harmed his defense. It is well-established that "various kinds of state interference with counsel's assistance"[41] require a presumption of prejudice.[42] "Prejudice in these circumstances is so likely that case by

37. The Court recently explored the nature and scope of the right in United States v. Cronic, 466 U.S. 648 (1984) and Strickland v. Washington, 466 U.S. 668 (1984). The Court has addressed effectiveness issues in other recent opinions as well. *See, e.g.*, Nix v. Whiteside, 106 S. Ct. 988 (1986); Evitts v. Lucey, 105 S. Ct. 830 (1985); and Hill v. Lockhart, 106 S. Ct. 366 (1985). In *Strickland*, the Court determined that for a defendant to prevail on a constitutional claim of ineffective assistance of counsel resulting from counsel's own errors, the defendant must demonstrate that the attorney committed error which caused him prejudice. Both prongs of the definition have an institutional role component. The first is established only where "counsel made errors so serious that counsel was not functioning as 'counsel guaranteed the defendant by the Sixth Amendment.' " *Strickland*, 466 U.S. at 687. The second is even more explicit. Prejudice arising to constitutional stature exists where counsel's errors were sufficient to "undermine confidence in the outcome" of defendant's trial. *Id.* at 694. *See also* Nix v. Whiteside, 106 S. Ct. at 993-4.

38. *See Cronic*, 466 U.S. at 653-54.

39. *See Strickland*, 466 U.S. at 685-86.

40. *Id.* at 685.

41. *Strickland*, 466 U.S. at 692; *see also Cronic*, 466 U.S. at 658-59.

42. *Cronic*, 466 U.S. at 658-59.

case inquiry into prejudice is not worth the cost."[43] To determine whether the forfeiture of attorneys' fees would generate such a presumption, it is necessary to examine some of the relevant attributes of defense counsel's role in the criminal justice system.

The dual nature of defense attorneys' sixth amendment functions—to serve the adversary system by representing the legal interests of individual clients—is illuminated by the constitutional and ethical rules governing that representation. For example, to satisfy the sixth amendment's performance standards, a defense attorney must vigorously pursue the client's interests.[44] This requires that he remain free from any conflict of interest[45] or government influence[46] which might interfere with the loyal rendering of that service in the adverse struggle of litigants.[47] These strictures embody institutional values greater than the general professional duty of zealous representation all attorneys owe to their clients.[48] In the context of the criminal justice system, the defendant's attorney must utilize the adversary system to accomplish an additional function—to exercise the systemic restraints placed upon the power of government in our society of liberties.[49]

This is an essential institutional duty of defense counsel—to utilize an intricate system of checks and limits on behalf of his client and against the government. The Constitution even provides a specialized set of tools to assist in that endeavor, the Bill of Rights, which "represent the maximum restrictions upon the power of organized society over the individual that are compatible with the maintenance of organ-

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43. *Strickland*, 466 U.S. at 692; *see also Cronic*, 466 U.S. at 658.

44. *Strickland*, 466 U.S. at 688 (noting that among the duties owed by defense counsel to the criminal defendant client are a duty of loyalty and an "overarching duty to advocate the defendant's cause").

45. Cuyler v. Sullivan, 446 U.S. 335 (1980).

46. *See Strickland*, 466 U.S. at 686.

> For that reason, the Court has recognized that 'the right to counsel is the right to the effective assistance of counsel.' Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. Counsel, however, can also deprive a defendant of the right to effective assistance, simply by failing to render 'adequate legal assistance,'. . . (citations omitted).

See also id. at 689.

47. Herring v. New York, 422 U.S. 853, 857 (1975), *cited in Cronic*, 466 U.S. at 655 n.14; ("restrictions upon the function of counsel in defending a criminal prosecution [not] in accord with the traditions of the adversary factfinding process that has been constitutionalized in the Sixth and Fourteenth Amendments."). *See also Strickland*, 466 U.S. at 688-89.

48. MODEL CODE Canon 7; DR 7-101 (1985); MODEL RULES Rule 1.3 (duty of diligence) (1983).

49. G. HAZARD, JR., *supra* note 12, at 120-21 ("[t]he key elements of the adversary system—the right to present evidence and the right to assistance of counsel—evolved as legal controls on government absolutism. . . . Thus, the adversary system is not only a theory of adjudication but a constituent of our history of political liberty.").

ized society itself."[50] The adversary model in general, and the Bill of Rights in particular, sacrifice government efficiency in gathering and presenting evidence in favor of individual liberty. Effective assistance of counsel is guaranteed to criminal defendants precisely because it is necessary to vindicate these structural limits on government power.[51]

Although the Supreme Court has rejected any specific set of guidelines for judging whether a lawyer's performance measures up to sixth amendment standards,[52] it has turned to the ethical rules of the profession for guidance in making that decision in particular cases.[53] Even without the Court's guidance, however, it would be necessary to examine these rules to understand attorneys' duties to clients in general, and to criminal defendants in particular.[54] The primary contemporary sources of those rules are the Model Code of Professional Responsibility (Model Code) and the Model Rules of Professional Conduct (Model Rules), promulgated by the American Bar Association (ABA).[55] In addition, the ABA has produced specific standards for attorneys operating as prosecutors and criminal defense lawyers.[56]

These professional rules describe a system in which the "advocate's relationship to his client's cause is much more dependent and intimate"[57] than in the English or Continental systems. This intimate relationship can function only where there is trust between attorney and client, a trust which is promoted by the lawyer's duty to preserve the confidences and secrets of the client.[58] The importance of fostering

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50. Watts v. Indiana, 338 U.S. 49, 61 (1949) (Jackson, J., concurring and dissenting).

51. *See* United States v. Cronic, 466 U.S. 648; Strickland v. Washington, 466 U.S. 668; Evitts v. Lucey, 105 S. Ct. 830 (1985).

52. *See Strickland,* 466 U.S. at 689 ("Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause.") (citations omitted).

53. *Strickland,* 466 U.S. at 688 ("The Sixth Amendment . . . relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.") (citations omitted). *See also* Nix v. Whiteside, 106 S.Ct. 988 (1986).

54. *See* Nix v. Whiteside, 106 S. Ct. at 995 (Model Code and Model Rules "confirm that the legal profession has accepted that an attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and the standards of professional conduct. . . .").

55. The Model Code is currently in force, in various forms, in a majority of the states. The Model Rules were first adopted by the ABA in 1983. Since then they have been adopted in various forms by a growing minority of states. *See, e.g.,* 2 LAWYERS' MANUAL ON PROFESSIONAL CONDUCT (ABA/BNA) 261-62 (1986).

56. *See* STANDARDS FOR CRIMINAL JUSTICE (1979).

57. G. HAZARD, *supra* note 12, at 132.

58. MODEL CODE Canon 4; DR 4-101; *see also* MODEL RULES Rule 1.6 (1983); ABA Comm. on Professional Ethics and Grievances, Formal Op. 155 (1936) ("It is the duty of an attor-

a relationship of trust based upon the confidentiality of communications is underscored by the attorney-client evidentiary privilege, recognized in every United States jurisdiction.[59] The premise underlying this privilege is that proper legal representation can occur only when the client is able to freely and fully confer and confide with the attorney, without fear of subsequent disclosure of that information to third parties.[60]

In addition to this passive obligation to maintain the client's confidences and secrets, the attorney has a duty of loyalty which incorporates an active duty to pursue the client's interests "zealously within the bounds of the law."[61] The profession recognizes that the attorney owes this latter duty "to his client and to the legal system,"[62] for the duty serves both. The lawyer's duty of zealous representation, therefore, is not unlimited. The attorney must observe the various professional rules of ethics, and cannot assist the client in criminal or fraudulent behavior even to achieve a favorable outcome.[63]

Within those limits, however, the attorney has an "ethical duty to advance the interests of his client."[64] While there may be reasonable disagreement concerning the degree to which defense attorneys should place client interests above those of the larger society,[65] it is not surpris-

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ney to maintain the confidence and preserve inviolate the secrets of his client. . . ."); ABA Comm. on Professional Ethics and Grievances, Formal Op. 154 (1936) (citing former Canon 37).

59. *See, e.g.*, FED. R. EVID. 501; 8 J. WIGMORE, WIGMORE ON EVIDENCE, §§ 2290-2329 (J. McNaughton rev. 1961) (communications between lawyer and client are privileged).

60. Statements of authority supporting this proposition are legion. *See, e.g.*, Ellis-Foster Co. v. Union Carbide & Carbon Corp., 159 F. Supp. 917, 919 (D.N.J. 1958) ("There must be freedom from fear of revealment of matters disclosed to an attorney because of the peculiarly intimate relationship existing."); Baird v. Koerner, 279 F.2d 623, 629 (9th Cir. 1960) ("While it is the great purpose of law to ascertain the truth, there is the countervailing necessity of insuring the right of every person to freely and fully confer and confide in one having knowledge of the law . . . ."); *see also* MODEL RULES Rule 1.6.

Both the Model Rules and Model Code protect information passed between attorneys and clients. The Model Code protects from disclosure information within the attorney-client privilege ("confidences") and certain "other information gained in the professional relationship" ("secrets"). DR 4-101(A). Model Rule 1.6 generally forbids disclosure of "information relating to representation of a client." Both the Model Code and the Model Rules permit certain exceptions. *See, e.g.*, MODEL CODE DR 4-101; EC 4-2, EC 4-3, EC 4-4; DR 7-102(A), (B); MODEL RULES Rule 1.6 and 3.3(a)(2); ABA Formal Opinion 341 (1975).

61. MODEL CODE Canon 7; EC 7-1; DR 7-101 & DR 7-102.

62. *Id.* at EC 7-1.

63. *Id.* at DR 7-102 (requiring that representation must remain within the bounds of the law); MODEL RULES Rule 1.2. The Supreme Court has affirmed this principle within the framework of the sixth amendment command that counsel be effective. *See* Nix v. Whiteside, 106 S. Ct. 988, 994-97 (1986).

64. Nix v. Whiteside, 106 S. Ct. at 995.

65. *Compare* Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 5 (1975-76) ("All of this is significant just because to be a professional is to be enmeshed in role-differentiated behavior. . . . And that means that the role of the professional . . . is to prefer in a variety of ways the interests of the client . . . over those of individuals generally.") *with* Nix v.

ing that defense lawyers often must suspend their personal moral beliefs about their clients' conduct. Otherwise, guilty defendants might never receive representation.[66] If criminal defense attorneys are to fulfill their necessary institutional functions in the adversary justice system, neither ethical rules nor the criminal laws can preclude lawyers from representing guilty clients. This would be unacceptable, for in the adversary system partisan advocacy on both sides is essential to protect "the very nature of a trial as a search for truth."[67] It follows that if allowing forfeiture of legitimate fees prevents attorneys from representing criminal defendants, or from providing effective assistance based upon confidential communications, vigorous advocacy, and independence from conflicts of interest, this mechanism surely violates the commands of the sixth amendment. This is true whether fee forfeitures affect the rights of individual defendants or the capacity of the class of attorneys representing criminal defendants to perform their institutional tasks.

II. Disorganizing Crime by Eliminating the Profits: The New Criminal Forfeiture Statutes

Forfeiture of property as a penalty for both civil and criminal[68] wrongs is rooted in our legal traditions, bearing the imprimatur of religious[69] as well as secular authority. Congress' recent inventions in the criminal forfeiture area, however, create punitive mechanisms unprecedented in American law.[70] Proponents argue that these new statutes enact necessary law enforcement tools. Critics, on the other hand, complain that the new forfeiture statutes embody more than innovative solutions to old problems. If applied incautiously, they argue, these statutes could wreak havoc in the criminal justice system by permitting the

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Whiteside, 106 S. Ct. at 995 (lawyer's duty to advance client's interests counterbalanced by rules of professional ethics).

66. *See* Wasserstrom, *supra* note 65, at 6 ("[I]t is at least clear that it is thought both appropriate and obligatory for the attorney to put on as vigorous and persuasive a defense of a client believed to be guilty as would have been mounted by the lawyer thoroughly convinced of the client's innocence."). *See also* United States v. Wade, 388 U.S. 218, 256-57 (1967) (White, J., dissenting in part and concurring in part) ("we also insist that [defense counsel] defend his client whether he is innocent or guilty."); United States v. Harvey, No. 86-5025, slip op. at 44 (4th Cir. Mar. 6, 1987) (right to counsel created to protect guilty and innocent alike).

67. Nix v. Whiteside, 106 S. Ct. at 994.

68. *See, e.g.*, Smith, *Modern Forfeiture Law and Policy: A Proposal for Reform*, 19 Wm. & Mary L. Rev. 661 (1978); Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 Temp. L. Q. 169 (1973); O.W. Holmes, The Common Law, 2-12 (1881).

69. The following passage is often cited as an example of biblical authorization of forfeitures: "But if the ox has been accustomed to gore in the past, and its owner has been warned but has not kept it in, and it kills a man or a woman, the ox shall be stoned, and its owner shall also be put to death." *Exodus* 21:28-29 (Revised Standard Edition).

70. *See infra* notes 72-104 and accompanying text.

government to intrude directly into the relationship between criminal defendants and their attorneys.

The new criminal forfeiture laws are contained in the 1984 amendments to the Racketeer Influenced and Corrupt Organizations (RICO) and the Continuing Criminal Enterprise (CCE) Statutes.[71] These amendments are the product of congressional efforts to create "a powerful weapon in the fight against drug trafficking and racketeering."[72] 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.[73]

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71. The modern criminal forfeiture laws first were enacted in 1970 with the passage of the Racketeer Influenced and Corrupt Organizations (RICO) Statute, 18 U.S.C. §§ 1961-68 (1982), and the Continuing Criminal Enterprise Statute (CCE), 21 U.S.C. § 848 (1982). RICO was enacted as Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901(a), 84 Stat. 941 (1970). CCE was contained within the Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 408, 84 Stat. 1265 (1970). The criminal forfeiture provisions of both the RICO and CCE statutes were clarified and expanded by the Comprehensive Forfeiture Act (CFA), enacted as Chapter III of the Comprehensive Crime Control Act of 1984 (CCCA), Pub. L. No. 98-473, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 1837, 2040. The CFA amended various provisions of RICO § 1963, and added a new CCE § 853 to Title 21, U.S.C.

Because the language and legislative histories of the 1984 RICO and CCE forfeiture amendments are virtually identical, the courts have construed the statutes together. *See* United States v. Reckmeyer, 631 F. Supp. 1191, 1195 n. 2 (E.D. Va. 1986) ("18 U.S.C. § 1963 is the RICO forfeiture provision which was included in the Comprehensive Forfeiture Act of 1984 and is a mirror of 21 U.S.C. § 853. The cases discussing forfeiture of attorneys' fees under 18 U.S.C. § 1963 are therefore fully applicable to forfeitures under 21 U.S.C. § 853."); United States v. Rogers, 602 F. Supp. 1332, 1347 (D. Colo. 1985).

72. S. REP. No. 225, 98th Cong., 1st Sess. 194, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 3374.

73. *See* S. REP. No. 224, 98th Cong., 1st Sess. 13 (1983) ("Profit is the motivation for this criminal activity, and it is through economic power that it is sustained and grows. . . . [T]he conviction of individual racketeers and drug dealers would be of only limited effectiveness if the economic power bases of criminal organizations or enterprises were left intact. . . ."). *See also* Russello v. United States, 464 U.S. 16, 28 (1983) ("[t]he broader goal was to remove the profit from organized crime by separating the racketeer from his dishonest gains.") (construing the RICO statute).

The legislative history of RICO echoes this interpretation, providing, for example, that "an attack must be made on their source of economic power itself, and the attack must take place on all available fronts." S. REP. No. 617, 91st Cong., 1st Sess. 79 (1969). The legislative history of a related statute, the Comprehensive Drug Penalty Act of 1984, which amended 21 U.S.C. § 881, echoes this purpose. *See* H.R. REP. No. 845, 98th Cong., 2d Sess., pt. I, at I (1984) ("The thrust of this legislation is to increase the use of forfeiture and criminal fines to attack the phenomenal increase of profits in drug trafficking. . . .").

Traditional economic theory suggests, on the other hand, that as long as demand for the goods and services traded in the black market survives, enhancing penalties may actually provide incentives for these criminal enterprises. By increasing the "costs" of conducting business, the legislature inadvertently imposes a "crime tariff" ultimately paid by the consumers serviced by the black market industry. This "crime tariff" includes charges for non-pecuniary costs attributable to the criminalization of this conduct. For example, distributors require compensation for their subjective fear of possible future capture and imprisonment. As a result, they charge customers amounts exceeding the actual pecuniary expense of doing business to compensate them for these

Congress created a system of criminal, or in personam, forfeitures, to pursue this goal, and in the process knowingly worked a radical change in our federal criminal law. As used in this legislative scheme, a forfeiture is defined as criminal because it is part of the "in personam proceeding against a defendant in a criminal case and is imposed as a sanction against the defendant upon his conviction."[74] Congress intended that criminal forfeitures encompass the "proceeds"[75] of these activities and not be limited to contraband or the instrumentalities of the crime.[76]

Both the nature and scope of these new statutes are novel in federal criminal law. They are unusual in nature because criminal forfeitures, a staple of medieval law, have been a rarity in this nation's statutes. Traditional scholarship has concluded that federal law has prohibited criminal forfeitures since the beginning of the republic.[77] Criminal forfeitures were abolished by the first Congress for federal offenses[78] to avoid the odious practices under the traditional English theories of deodand and "forfeiture of estate," which permitted the crown to take the

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additional costs. One by-product is that the "crime tariff" generates exceptional financial rewards for those willing to take the risks involved in conducting an illegal business. Ironically, enacting more severe penalties may actually encourage the unscrupulous to carry on these activities by increasing the amount of this "crime tariff," thereby providing unmatched opportunities for pecuniary gain. *See* Wisotsky, *Exposing The War On Cocaine: The Futility and Destructiveness of Prohibition*, 1983 WIS. L. REV. 1305.

74. S. REP. NO. 224, *supra* note 73, at 16.

75. Russello v. United States, 464 U.S. 16 (1983). *Russello* resolved a conflict among circuits concerning the scope of the property subject to forfeiture under RICO. Two circuits had held that only direct interests in a racketeering enterprise were subject to forfeiture, and not the proceeds of that activity. *See* United States v. McManigal, 708 F.2d 276, 283-87 (7th Cir.), *vacated*, 464 U.S. 979 (1983) and United States v. Marubeni America Corp., 611 F.2d 763, 766-67 (9th Cir. 1980). Another circuit, however, interpreted the statute to authorize the forfeiture of proceeds as well. United States v. Martino, 681 F.2d 952, 954-61 (5th Cir. 1982). In *Russello*, the Supreme Court agreed with the Fifth Circuit interpretation, and found Congress intended the RICO statute to have such an expansive effect.

76. Congress enunciated this purpose in the legislative history of the 1984 amendments to the forfeiture laws. *See* S. REP. NO. 224, *supra* note 73, at 17; S. REP. NO. 225, *supra* note 72, at 191-92.

77. *See, e.g.*, S. REP. NO. 225, *supra* note 72, at 81-82; United States v. Bassett, 632 F. Supp. 1308, 1311 n. 2 (D. Md. 1986) ("Forfeiture was abolished by statute in 1790 during the first Congress [citations omitted] . . . Criminal forfeiture was not reinstated until 1970. . . ."); Finkelstein, *supra* note 68; O.W. HOLMES, *supra* note 68, at 2-12; 4 W. BLACKSTONE, COMMENTARIES 380-89; Brickey, *supra* note 36, at 493; Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1036 (1980). The federal courts have decided countless in rem forfeiture cases. The best known is undoubtedly The Palmyra, 25 U.S. (12 Wheat.) 1 (1827).

78. Act of Apr. 30, 1790, § 24, 1 Stat. 117, 18 U.S.C. § 3563 (1982) ("Provided always, and be it enacted, that no conviction for any of the offenses aforesaid, shall work corruption of blood, or any forfeiture of estate."). Criminal forfeiture, in its broadest sense, arguably surfaced during the Civil War, when the wartime Congress authorized the President to seize the property of Confederate soldiers. Act of July 17, 1862, ch. 195, § 5, 12 Stat. 589, 590. *See* Miller v. United States, 78 U.S. (11 Wall.) 268 (1870); Bigelow v. Forrest, 76 U.S. (9 Wall.) 339 (1869).

property of those who committed offenses against the "King's Peace."[79] The Constitution also prohibits certain abuses associated with those English procedures.[80] Even the recent "revisionist" scholarship, which posits that criminal forfeiture provisons occasionally can be found in earlier statutes, demonstrates that, at most, this device was rarely and narrowly used.[81] In contrast, in rem forfeitures remained available for a variety of purposes, including civil forfeiture of the instrumentalities and contraband involved in certain crimes.[82]

The scope of the new criminal forfeitures is much broader than the traditional civil, or in rem, forfeitures. Civil forfeitures only reach "tainted" property, narrowly defined as contraband, such as prohibited drugs,[83] or the instruments used in the conduct of crimes for which forfeiture is authorized, such as boats, airplanes, automobiles, and manufacturing equipment used in the illegal drug industry.[84] The "tainted" property, the res, is the defendant in these forfeiture proceedings,[85] which are civil—and often administrative—in nature. Generally the guilt or innocence of the property owner is irrelevant in determining the forfeitability of the defendant property,[86] and the government benefits from the lesser burden of proof imposed in noncriminal proceedings.[87]

Conviction of the defendant is, on the other hand, a prerequisite to a criminal forfeiture, for it is the defendant's conviction that justifies forfeiture of the proceeds of these same illegal acts.[88] Logically, there-

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79. *See, e.g.*, Finkelstein, supra note 68; O.W. HOLMES, *supra* note 68, at 2-12.

80. Article III, § 3(2) provides: "The Congress shall have Power to declare the punishment of Treason, but no Attainder of Treason shall work Corruption of Blood or Forfeiture except during the Life of the Person attainted."

81. *See* Brickey, *supra* note 36, at 494 n.4; Note, *Bane of American Forfeiture Law—Banished at Last?*, 62 CORN. L. REV. 768 (1977).

82. H.R. REP. NO. 845, *supra* note 73, pt. 1, at 5.

83. *See, e.g.*, 21 U.S.C. § 881 (1982).

84. *Id.* Other federal statutes authorize civil forfeiture of crime-related property. *See, e.g.*, 18 U.S.C. § 1082(c) (1982) (gambling ships). *See also* Brickey, *supra* note 36, at 493 n.1.

85. *See, e.g.*, United States v. One 1952 Buick Special Riviera Auto., 136 F. Supp. 253 (D. Minn. 1955); People v. One 1948 Chevrolet Convertible Coupe, 45 Cal. 2d 613, 290 P.2d 538 (1955).

86. *See* S. REP. NO. 224, *supra* note 73, at 15 n.12. *See also* 21 U.S.C. § 881 (1982). The civil forfeiture procedures arguably have been rife with procedural abuse of the rights of those with interests in the defendant property. *See* Note, *supra* note 81. Some recent statutes, however, provide certain procedural safeguards for the interests of innocent property owners. *Id.* n.12. The new criminal forfeiture statutes include some provisions which, if interpreted carefully, avoid some of these inequities. *See, e.g.*, 18 U.S.C. § 1963 (Supp. III 1985). *See also* United States v. Rogers, 602 F. Supp. 1332 (D. Colo. 1985).

87. For example, the minimal "preponderance of the evidence" standard applies to civil forfeiture actions for property allegedly used in drug violations under 21 U.S.C. § 881 (1982). Criminal convictions and the resulting criminal forfeitures must, of course, be established beyond a reasonable doubt. *See infra* notes 95-96 and accompanying text.

88. *See* 18 U.S.C. § 1963(f) (Supp. III 1985) ("Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall

fore, property is criminally forfeitable only after a verdict of guilt has been returned. It is here, in the timing of criminal forfeitures, that Congress worked the greatest changes in the criminal law and created the most difficult problems for the justice system. To provide the government with maximum leverage, it engrafted the "relation back" concept previously restricted to civil forfeitures onto the criminal forfeiture statutes, and onto a new class of property: the proceeds of criminal activity.[89]

The relation back doctrine common to civil forfeiture proceedings provides that the target property becomes tainted, and thus forfeitable, at the time of its illegal use. The government's interest relates back to that time and takes precedence over the interests subsequently obtained by third parties.[90] This doctrine can be applied in civil proceedings in part because no criminal conviction is necessary to establish the government's interest in the property. Indeed, since in rem forfeitures are separate and independent judicial proceedings, some courts have permitted civil forfeiture of property notwithstanding the defendant's acquittal or dismissal of the charges in the criminal cases based on the same transactions.[91]

Congress readily accepted proposals incorporating the civil relation back doctrine into the criminal forfeiture scheme, recognizing the powerful leverage this provided in pursuing the property of suspected criminals.[92] But transposing theories from civil to criminal settings can be a messy business. Criminal prosecutions always involve issues of constitutional significance absent in civil proceedings.[93] The most fun-

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also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper."); 18 U.S.C. § 1963(a) (Supp. III 1985) provides, for example: "Whoever violates any provision of section 1962 . . . shall forfeit to the United States . . . (3) any property. . . ." FED. R. CRIM. P. 31(e) emphasizes the need for a proper charge and verdict of forfeiture: "If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any." 21 U.S.C. § 848(a)(1) (1982) ("Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment . . ., to a fine . . ., and to the forfeiture prescribed. . . ."); 21 U.S.C. § 853(a) (Supp. III 1985) ("Any person convicted . . . shall forfeit to the United States, . . . (1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation. . . .).

89. *See* S. REP. NO. 225, *supra* note 72, at 200-01.

90. *See, e.g.*, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

91. *See* One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972); Doherty v. United States, 500 F.2d 540 (Ct. Cl. 1974); United States v. One 1969 Buick Riviera, 493 F.2d 553 (5th Cir. 1974); United States v. One 1971 Mercedes Benz, 542 F.2d 912 (4th Cir. 1976); United States v. One 1975 Pontiac Lemans, 621 F.2d 444 (1st Cir. 1980).

92. *See* S. REP. NO. 225, *supra* note 72, at 195-97, 200-01, 209-12.

93. Certain constitutional rules apply to civil as well as criminal forfeiture proceedings. *See, e.g.*, United States v. United States Coin & Currency, 401 U.S. 715, 722 (1971) (fifth amendment privilege against self-incrimination cognizable at in rem forfeiture proceeding); One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 702 (1965) (exclusionary rule applied to civil forfeiture proceeding); United States v. A Quantity of Gold Jewelry, 379 F. Supp. 283, 288 (C.D. Cal.

damental are the presumption of innocence which operates until conviction,[94] and the prosecution's evidentiary burden, requiring proof beyond a reasonable doubt of every element of the offense, a standard which has constitutional stature.[95] Like the right to counsel, these tenets are fundamental to the operation of the criminal justice system because they foster the equilibrium of power necessary for the adversary process to work. Each of these bedrock principles of our criminal justice system is affected by several interrelated mechanisms, including the relation back theory, which have been incorporated into the structure of the criminal forfeiture statutes.

First, the property subject to criminal forfeiture is broadly defined, encompassing not only criminal contraband and instrumentalities, but also "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation."[96] Intangible as well as tangible property is included.[97] As a result, even property only remotely connected to criminal activities, such as the profits of legitimate enterprises originally purchased with the proceeds of racketeering, may be forfeitable.

Second, the relation back doctrine vests title to property in the government simultaneously with the "commission of the act giving rise to forfeiture,"[98] and grants priority to the government interest over "[a]ny such property that is subsequently transferred to a person other than the defendant."[99] This allows the government to attempt to void

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1974) (delay in forfeiture proceedings is a denial of due process). *But cf.* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 678-80 (1974) (failure to provide pre-seizure notice did not deny procedural due process); United States v. Bush, 647 F.2d 357, 370 (3d Cir. 1981) (recognizing "forfeiture exception" to warrant requirement for seizures governed by the fourth amendment); *accord* United States v. One 1975 Pontiac Lemans, 621 F.2d 444, 450 (1st Cir. 1980); United States v. Milham, 590 F.2d 717, 720 (8th Cir. 1979). *Contra* United States v. Pappas, 613 F.2d 324, 330 (1st Cir. 1979); United States v. McCormick, 502 F.2d 281, 285-89 (9th Cir. 1974).

94. C. MCCORMICK, MCCORMICK ON EVIDENCE § 342 (E. Cleary 3d ed. 1984).

95. Mullaney v. Wilbur, 421 U.S. 684 (1975) (prosecution has burden of proving every element of offense beyond reasonable doubt); *In re* Winship, 397 U.S. 358, 364 (1970) ("the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). Other differences come readily to mind. *See* W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE 17 (1985) (listing as features distinguishing criminal from civil trials: the presumption of innocence, the requirement of proof beyond a reasonable doubt, the defendant's right to refuse to testify, the exclusion of evidence obtained illegally by the state, and the more frequent use of incriminating statements made by defendants).

96. 21 U.S.C. § 853(a)(1) (Supp. III 1985); *see also* 18 U.S.C. § 1963(a)(3) (Supp. III 1985). This definition is consistent with the Supreme Court's statutory analysis of the original RICO statute in Russello v. United States, 464 U.S. 16 (1983). Although Congress enacted the new statutory langugage after the *Russello* decision, the amendments had already been drafted at the time of the Court's opinion. *See* United States v. Rogers, 602 F. Supp. 1332, 1340 (D. Colo. 1985).

97. 18 U.S.C. § 1963(b) (Supp. III 1985); 21 U.S.C. § 853(b) (Supp. III 1985).

98. 18 U.S.C. § 1963(c) (Supp. III 1985); 21 U.S.C. § 853(c) (Supp. III 1985).

99. 18 U.S.C. § 1963(c) (Supp. III 1985); 21 U.S.C. § 853(c) (Supp. III 1985).

third party transactions and to deprive both the defendant and the third party of the benefits of the transaction—even if it occurred years before the defendant's conviction, or even indictment. A judgment of forfeiture of specified property vests title in the government effective from the earlier time.[100]

Third, the government can seek pre-conviction and even pre-indictment restraining orders and injunctions to prevent the transfer of property for which it seeks forfeiture.[101] As a result, a defendant's or third party's property can be frozen for months or even years before the trial—although the defendant is presumed innocent and the government has yet to prove its case beyond a reasonable doubt.

Finally, this scheme places burdens upon third party transferees claiming an interest in property for which the government seeks forfeiture. Generally non-defendant third parties must wait until after a judgment of forfeiture is rendered against the defendant and the property[102] to assert their interests. To overcome the government's forfeiture verdict, each third party petitioner bears the burden of proving by a preponderance of the evidence that his right, title or interest vested before the defendant committed the acts giving rise to the forfeiture, or that he was a bona fide purchaser for value who was reasonably without cause to believe that the property was subject to forfeiture at the time of purchase.[103]

Taken together, these additions to the prosecutor's arsenal create an unprecedented opportunity for the government to disrupt the eco-

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100. The temporal reach of the RICO statute also is expansive. One of its essential concepts is the "pattern of racketeering activity" necessary for a violation of the statute. This "pattern" is satisfied by as few as "two acts . . ., one of which occurred after the effective date of this chapter and the last of which occurred within ten years . . . after the commission of a prior act. . . ." 18 U.S.C. § 1961(5) (1982). The effective date of the statute was October 15, 1970. The RICO statute applies the relevant federal, not state, statute of limitations period for the crime in question, and the period of limitations does not begin to run until the last offense was committed. *See* United States v. Forsythe, 560 F.2d 1127 (1977) (in prosecution for RICO act, applicable period of limitations was governed by federal rather than state law); United States v. Brown, 555 F.2d 407, 416, 418 n.22 (1977) (reference to state law is for purpose of defining conduct prohibited and not meant to incorporate state statute of limitations or procedural rules); United States v. Davis, 576 F.2d 1065 (1978) (the words "chargeable under state law" in Section 1961(1)(A) mean chargeable under state law at the time the offense was committed, not presently chargeable under state law.); United States v. Field, 432 F. Supp. 55, 59 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1371 (2d. Cir.), *cert. dismissed* 439 U.S. 801 (1978).

101. 18 U.S.C. § 1963(e) (Supp. III. 1985); 21 U.S.C. § 853(e) (Supp. III. 1985). Although these statutes provide mechanisms permitting the defendant to challenge pre-conviction restraining orders, affected third parties cannot intervene to protect their interests until after completion of defendant's criminal trial. *See* 18 U.S.C. § 1963(j),(m) (Supp. III. 1985); 21 U.S.C. § 853(k),(n) (Supp. III. 1985); United States v. Thier, 801 F.2d 1463 (5th Cir. 1986); United States v. Rogers, 602 F. Supp. 1332 (D. Colo. 1985).

102. *See* 18 U.S.C. § 1963(j),(m) (Supp. III. 1985); 21 U.S.C. § 853(k),(n) (Supp. III. 1985). *See also* FED. R. CRIM. P. 31(e).

103. *See* 18 U.S.C. § 1963(m)(6) (Supp. III. 1985); 21 U.S.C. § 853(n)(6) (Supp. III. 1985).

nomic lives of both suspected gangsters and those who engage in business transactions with them. Since passage of the 1984 amendments, the government has sought forfeiture of the property interests of third parties, including the fees of attorneys representing criminal defendants. Although these efforts have already generated a number of cases, the full impact of the criminal forfeiture laws upon our justice system has yet to be felt. We can expect both an increase in the frequency of their use and an expansion of the activities to which they apply in the near future. The number of cases will increase because active prosecution of the criminal forfeiture statutes is a new phenomenon, resulting from passage of the Comprehensive Forfeiture Act of 1984.[104] The cases now being reported represent only the first to reach the courts, and surely will be followed by many more.[105]

The use of criminal forfeitures as a form of punishment and social control is likely to mushroom for another reason as well. It is reasonable to anticipate that forfeiture will be applied to an expanding number of activities. At present, criminal forfeitures apply only to individuals charged under the RICO and CCE statutes, and to third parties who have engaged in business with them.[106] While these statutes encompass various forms of criminal conduct, ranging from drug trafficking to specific types of white-collar crime,[107] there is every reason to anticipate that future legislation might apply criminal forfeitures to a wide range of other activities.[108] As lawmakers and law enforcers grasp

104. The 1984 amendments were prompted in part by a General Accounting Office (GAO) report. *See* COMPTROLLER GENERAL, U.S. GENERAL ACCOUNTING OFFICE, ASSET FORFEITURE—A SELDOM USED TOOL IN COMBATTING DRUG TRAFFICKING (1981) (emphasizing the negligible impact of the original forfeiture provisions contained in the 1970 RICO and CCE statutes). *See* S. REP. NO. 225, *supra* note 72, at 191. Since 1984, the use of these practices has increased dramatically. *See* Genego, *supra* note 19.

105. *See Committee on the Judiciary, supra* note 21, at 22-25, 29, 31-33 (statement of Stephen S. Trott, Ass't Attorney General, Crim. Div.); PRESIDENT'S COMMISSION ON ORGANIZED CRIME, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL, AMERICA'S HABIT: DRUG ABUSE, DRUG TRAFFICKING, AND ORGANIZED CRIME 386 (1986) (proposing law enforcement goal of increasing the "arrests and successful prosecutions of drug traffickers . . . and those who assist them, including . . . attorneys, and the forfeiture of their properties accumulated from criminal activity."); *see also id.* at 476.

106. *See, e.g.*, S. REP. NO. 224, *supra* note 73, at 16.

107. Although Congress focused its attention upon drug traffickers and racketeers, the reach of the forfeiture statutes is potentially much greater. RICO, for example, encompasses many other types of activities, including numerous types of white-collar crime. *See* 18 U.S.C. § 1961(1) (Supp. III 1985) (defining the racketeering activity encompassed by the statute); *id.* at § 1963(a)(3) (forfeitures applicable to any direct or indirect proceeds of racketeering activity as expansively defined in the statute).

108. *See, e.g.*, U.S. DEPT. OF JUSTICE, ATTY. GENERAL'S COMM'N ON PORNOGRAPHY, FINAL REPORT 369 n. 53 (1986) (forfeiture of proceeds of pornography industry recommended). The expansion of subject conduct has already commenced. For example, the 1984 amendments to the RICO statute added new categories of behavior constituting "racketeering activity" which can serve as the basis for forfeiture actions. *See* 18 U.S.C. § 1961(1) (Supp. III 1985), *amended by* Pub. L. 98-473, § 1020(1) (which added "dealing in obscene matter"); § 1020(2) (which added "sections

for quick solutions to society's many intractable problems, there will be inevitable temptations to apply this potent device in other areas. As a result, criminal forfeiture is a legal theory likely to expand "to the limit of its logic."[109] This eventuality would, of course, affect citizens other than RICO and CCE defendants—and their lawyers as well.

III. Defining Statutory Boundaries: Do RICO and CCE Authorize Fee Forfeitures?

A. The Department of Justice Notice Theory

Defendants' sixth amendment rights are implicated only if the criminal forfeiture statutes reach fees paid to defense attorneys for legitimate services rendered. The Comprehensive Forfeiture Act (CFA) does not expressly exempt attorneys' fees, nor does it even refer to them. The language of the statute could, therefore, encompass legitimate attorneys' fees,[110] and the Justice Department has argued that it does.[111] The statute provides that the property interests of a third party transferee render a forfeiture order invalid when "the petitioner is a bona fide purchaser for value of the right, title or interest in the property and was at the time of the purchase reasonably without cause to believe that the property was subject to forfeiture under this section. . . ."[112]

The Justice Department contends that this language contains a "notice" concept which is dispositive of third party interests. The Department argues that Congress intended to define a third party's bona fide purchaser status by his "notice" of certain relevant facts. A third party transferee is not a bona fide purchaser under this theory when he is aware either of certain government actions relating to the property,

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1461-1465 (relating to obscene matter)"); § 901(g)(2) (which added "(E) any act which is indictable under the Currency and Foreign Transactions Reporting Act"), as well as provisions relating to the theft of motor vehicles and parts.

109. B. Cardozo, The Nature of the Judicial Process 51 (1921).

110. *See* United States v. Harvey, No. 86-5025, slip op. at 14-27 (4th Cir. Mar. 6, 1987) (available on LEXIS, Genfed Library, USAPP file); United States v. Bassett, 632 F. Supp. 1308, 1311 (D.Md. 1986), *aff'd, Harvey*, slip op. at 55-56; United States v. Reckmeyer, 631 F. Supp. 1191, 1195 (E.D.Va. 1986), *aff'd, Harvey*, slip op. at 56-57; United States v. Ianniello, 644 F. Supp. 452, 455 (S.D.N.Y. 1985).

111. *See* U.S. Attorneys' Manual, *supra* note 17, at § 9-111.430 ("Forfeiture of an asset transferred to an attorney as payment for legal fees for representation in a criminal matter may be pursued, notwithstanding the fact that the asset may have been transferred for legitimate services actually rendered. . . .").

112. 18 U.S.C. § 1963(m)(6)(B) (Supp. III 1985). Identical language was added to the CCE statute by the 1984 CFA amendments. *See* 21 U.S.C. § 853(n)(6)(B) (Supp. III 1985).

or of the underlying facts allegedly justifying conviction.[113] Under either concept defense attorneys comprise the identifiable class of third parties least likely to sustain a claim of bona fide purchaser status, and the class most likely to be harmed by the statute.[114]

The Justice Department applies this theory specifically to criminal defense attorneys, arguing that they are placed on such notice when they have knowledge that a particular asset is "subject to forfeiture."[115] Since conviction is a prerequisite to criminal forfeiture,[116] one might reasonably assume that a third party has notice of property's forfeitability only after that condition is satisfied. The Justice Department, however, takes a much more expansive view.

The Department proposes that a defense lawyer has actual knowledge of an asset's forfeitability sufficient to deprive him of bona fide status when he knows at the time of the asset's transfer that the government asserts it is subject to forfeiture.[117] The Justice Department contends that an attorney is put on such actual notice when the government has: (1) initiated civil forfeiture proceedings against the asset,[118] (2) "appl[ied] for pre-indictment or pre-conviction restraining orders,"[119] or (3) obtained an "indictment containing a forfeiture count."[120]

One need not oppose fee forfeitures to recognize that this definition of notice provides the government with significant power to determine when a defense attorney has bona fide status. An attorney hired to provide a defense will surely be aware of any of these litigation actions. Yet the Justice Department has discretion to undertake these predicate acts. It can seek civil forfeiture or apply for a restraining order[121] whenever it chooses. Although an indictment can only be issued by a grand jury, history teaches that this requirement imposes few limits on prosecutors. A grand jury indictment is generated by an ex parte process, subject to prosecutorial control and even abuse.[122] Thus, in any of these settings the notice theory supplies the government with the power

113. U.S. ATTORNEYS' MANUAL, *supra* note 17, at § 9-111.520; *Rogers*, 602 F.Supp. 1332; United States v. Raimondo, 721 F.2d 476 (4th Cir. 1983), *cert. denied*, United States v. Bello, 105 S. Ct. 133 (1984); United States v. Long, 654 F.2d 911 (3d Cir. 1981).

114. *See* United States v. Badalamenti, 614 F. Supp. 194, 196 (S.D.N.Y. 1985) ("No one is more on notice of likelihood that the money may come from such prohibited activity than the lawyer who is asked to represent the defendant in the trial of the indictment.").

115. U.S. ATTORNEYS' MANUAL, *supra* note 17, at § 9-111.510-.511.

116. *See supra* notes 74 and 88 and accompanying text.

117. U.S. ATTORNEYS' MANUAL, *supra* note 17, at § 9-111.510.

118. *Id.* at § 9-111.511.

119. *Id.*

120. *Id.*

121. *See* 18 U.S.C. § 1963 (Supp. III 1985) and 21 U.S.C. § 853 (Supp. III 1985).

122. *See infra* note 211 and accompanying text; *see also Thier*, 801 F.2d 1463, 1476 (5th Cir. 1986) (Rubin, J., concurring) ("Indictments are notoriously easy to obtain, and grand juries offer little protection against unwarranted prosecution.").

to place defense attorneys on actual notice, thereby depriving them of bona fide status. Since the Justice Department generally will take these actions early in the history of a case, defense counsel will be among the first to be placed on notice of the government's forfeiture goals, and thereafter could not assert a bona fide status for the named assets. Any subsequent payment of fees from these assets would, as a result, be subject to forfeiture.

This analysis applies only to property for which the government seeks forfeiture.[123] To the extent that the government agrees that property has a legitimate source or is otherwise nonforfeitable under the statutes, it will remain available to the defendant for any use, including payment of litigation costs. The broad definition of forfeitable property pushed by the Justice Department suggests, however, that often the government will pursue virtually all of a defendant's assets, or sufficient assets to preclude the payment of attorneys' fees, and even will attempt to recover fees already paid where the Department believes counsel was on notice of the assets' forfeitability.[124]

The Justice Department also proposes that an attorney is on notice when he has "actual knowledge that an asset in fact is from criminal misconduct,"[125] even when the government has not instituted forfeiture proceedings.[126] This theory raises sixth amendment issues which will be explored more fully in Part IV of the Article. It is sufficient at this point to note that under the Department's theory, an attorney who learns incriminating facts from a guilty client's disclosures would have actual notice of the facts giving rise to the government's forfeiture claims, and any fees paid subsequently from illicit sources would be forfeitable.[127] Under the statutory procedures, defense counsel would have to appear at a post-trial hearing and communicate information

123. *See Committee on the Judiciary, supra* note 21, at 33 (statement of Stephen S. Trott, Ass't Attorney General, Crim. Div.) ("the only fees in jeopardy are those that are paid from drug and racketeering money and that the attorney knows are paid from such sources.").

124. *See Bassett*, 632 F. Supp. at 1309; *Badalamenti*, 614 F. Supp. at 195-96. *See* U.S. ATTORNEYS' MANUAL, *supra* note 17, at § 9-111.530 ("There may be cases where there are reasonable grounds to believe that all of a defendant's assets are subject to forfeiture."); *see also Thier*, 801 F.2d at 1465-66 (government sought and obtained a pretrial order restraining various assets including "[a]ll monies in the possession, custody or control" of the defendant); *Reckmeyer*, 631 F. Supp. at 1193 (forfeiture order listed "virtually all assets possessed by Reekmeyer. . . ."); *and see* United States v. Reckmeyer, 628 F. Supp. 616 (E.D.Va. 1986) (Reckmeyer I).

125. U.S. ATTORNEYS' MANUAL, *supra* note 17, at § 9-111.512; *see also id.* 9-111.510.

126. *Id.* § 9-111.512.

127. *See, e.g., Bassett*, 632 F. Supp. at 1315 ("The attorney representing a client under indictment for a RICO violation or a continuing criminal enterprise drug-related offense is certainly not 'innocent' of knowledge that the money with which he is paid might be tainted."); *Rogers*, 602 F. Supp. at 1346-50.

learned from the client—or commit perjury about his knowledge of facts—to avoid forfeiture of fees.[128]

Under both aspects of the notice theory, criminal defense counsel are the class of third parties most likely to lose bona fide status. Doctors' fees may be exempt, because rendering medical services does not require physicians to know whether their patients have been indicted, or if they are in fact guilty. The same is true of those who sell homes, cars, boats, planes, groceries, utilities, or other standard articles of commerce to defendants. Defense counsel, on the other hand, will automatically be placed on notice—and thus in financial jeopardy—simply by virtue of accepting employment and attempting to protect the defendant's sixth amendment interests.

B. The Judicial Analysis: Limiting Fee Forfeitures to Sham or Fraudulent Transactions

In the fee forfeiture cases arising after passage of the 1984 Comprehensive Forfeiture Act, the federal courts generally have rejected the Justice Department's notice theory.[129] They have concluded that allowing fee forfeitures would violate the sixth amendment,[130] and often have attempted to construe the statutes in a manner that comports with the Constitution.[131] The courts have turned to the legislative history of the criminal forfeiture statutes for guidance. The legislative history of the CFA amendments is sparse,[132] however, and any fair reader must conclude that it provides ammunition for both sides of the fee forfeiture debate.[133] Nonetheless, the majority of federal decisions to date con-

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128. Because the forfeiture statutes require that third parties bear the burden of proving their bona fide status, counsel would be required to disclose information learned from the client about the client's activities to contest forfeiture of fees. *See infra* notes 277-301 and accompanying text.

129. *See* United States v. Thier, 801 F.2d 1463, 1474 (5th Cir. 1986) ("We agree with the *Bassett, Ianniello, Reckmeyer, Badalamenti* and *Rogers* courts that the defense attorney's necessary knowledge of the charges against his client cannot defeat his interest in reeeiving payment out of the defendant's forfeited assets for legitimate legal scrvices.").

130. *Harvey*, No. 86-5025, slip op. at 49 (4th Cir. Mar. 6, 1987); *Thier*, 801 F.2d at 1474-75; *Ianniello*, 644 F. Supp. at 455-58; *Bassett*, 632 F. Supp. at 1317; *Reckmeyer*, 631 F. Supp. at 1195; *Badalamenti*, 614 F. Supp. at 196, 198; *Rogers*, 602 F. Supp. at 1348-51; United States v. Marx, No. 85-Cr-110 (E.D. Wis. Aug. 6, 1986).

131. United States v. Estevez, 645 F. Supp. 869, 870-72 (E.D. Wis. 1986); *Ianniello*, 644 F. Supp. at 455-58; *Bassett*, 632 F. Supp. at 1316; *Rogers*, 602 F. Supp. at 1348.

132. *See Thier*, 801 F.2d at 1471 ("The legislative history as to whether the government's forfeiture powers under CCE and RICO extend to defense attorneys fees is meager."); *Rogers*, 602 F. Supp. at 1336 ("Despite the sparseness of the legislative history. . . ."); *Id.* at 1346 ("The statutory language and legislative history provide little help in deciding what type of notice is sufficient."); *Ianniello*, 644 F. Supp. at 455-56; *Bassett*, 632 F. Supp. at I311, 1315; *Reckmeyer*, 631 F. Supp. at 1195; *Badalamenti*, 614 F. Supp. at 197.

133. The clearest reference to attorneys' fees can be found in the legislative history of House bill H.R. 4901, a proposal to amend the CCE, which was part of the Congressional activity

cludes that Congress' intent was to reach only sham or fraudulent transactions and not to allow forfeiture of legitimate attorneys' fees.[134]

Congress' purpose was to punish racketeers and drug dealers by depriving them of the fruits of their criminal behavior.[135] Congress did not—and could not—intend to punish innocent third parties for the crimes of others. As a result "Congress intended different treatment of assets transferred to third parties and assets in the hands of the defendant."[136] The latter are forfeitable if they consist of the proceeds of relevant crimes. But something more is required by the statutes before the property interests of third parties can be nullified under the criminal forfeiture statutes.

In determining what constitutes that additional factor allowing forfeiture of third party assets, the courts have generally concluded that the statutes' focus is upon the nature of the transaction by which the property was transferred to the third party rather than upon the type of notice available to non-defendant transferees. That is, the third party forfeiture mechanism emphasizes the legitimacy of the transaction in which otherwise forfeitable property was transferred by the defendant, and not the quantum of information concerning the defendant and his activities possessed by the third party transferee. The nature of the transaction—whether it is bona fide or illegitimate—determines the forfeitability of third party assets.[137] Legitimate arms' length transactions are exempt, including bona fide payments of lawyers' fees.

The CFA's legislative history supports this analysis. In spite of its ambiguities, that record indicates that the only assets held by third parties which are forfeitable are "those which the defendant has trans-

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ultimately resulting in passage of the 1984 CFA. The House Judiciary Committee unequivocally stated its intention to avoid any sixth amendment violation, while revealing its own confusion as to what statutory changes would lead to such a violation. *See* H.R. REP. 845, *supra* note 73, at 19 n. 1 (1984) ("Nothing in this section is intended to interfere with a person's Sixth Amendment right to counsel. The Committee, therefore, 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."). *See also Thier*, 801 F.2d at 1471 (citing H.R. REP. 845).

The courts have appropriately construed the RICO and CCE statutes together in interpreting the forfeiture provisions of the Comprehensive Forfeiture Act of 1984 (CFA). Both statutes were amended in virtually identical terms as Title III of the Comprehensive Crime Control Act of 1984. *See* S. REP. NO. 225, *supra* note 72, at 197-98 (1983). *See also Bassett*, 632 F. Supp. at 1309 (CCE prosecution); *Reckmeyer*, 631 F. Supp. at 1193 (CCE); *Badalamenti*, 614 F. Supp. at 195 (RICO and CCE); *Rogers*, 602 F. Supp. at 1334 (RICO). *See* Brickey, *supra* note 36, at 499-503 for an argument that Congress intended to make attorneys' fees forfeitable. *See also Harvey*, slip op. at 14-27.

134. *See Ianniello*, 644 F. Supp. at 455-56; *Bassett*, 632 F. Supp. at 1312-15; *Rogers*, 602 F. Supp. at 1348. *But see Harvey*, slip op. at 14-15, 18 (disagreeing with "majority" view of Congressional intent).

135. *See supra* notes 74-76 and accompanying text.

136. *Rogers*, 602 F. Supp. at 1347.

137. *Id.*

ferred as some type of sham or artifice."[138] Various statements of congressional purpose suggest this rule. For example, the Senate Judiciary Committee provided the following rationale for adding the relation back mechanism to the criminal forfeiture statutes:

> The purpose of this provision is 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. On the other hand, this provision should not operate to the detriment of innocent bona fide purchasers of the defendant's property.[139]

The courts generally have concluded that this language demonstrates Congress' intent only to reach assets transferred to third parties as part of sham and fraudulent transactions.[140] Other portions of the legislative record reinforce this interpretation. For example, another passage justifies adoption of the relation back doctrine because "[a]bsent application of this principle a defendant could attempt to avoid criminal forfeiture by transferring his property to another person prior to conviction."[141] Pre-indictment orders restraining the transfer of assets are similarly necessary because:

> It is not infrequent that a defendant becomes aware that he is the target of a criminal investigation before the time he is formally charged. . . .[a]nd as a consequence [defendants] have both the incentive and opportunity to move to transfer or conceal forfeitable assets before the current jurisdiction of the courts to enter appropriate restraining orders may be invoked.[142]

This language supports the argument that Congress adopted these procedural mechanisms solely to prevent defendants and their unscrupulous confederates from structuring sham transactions divesting defendants of title to property and thus immunizing it from forfeiture. Other portions of the legislative history also lead to this conclusion.[143]

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138. *Id.*

139. S. REP. No. 225, *supra* note 72 at 200-01.

140. United States v. Figueroa, 645 F. Supp. 453 (W. D. Pa. 1986); *Ianniello*, 644 F. Supp. at 458; *Bassett*, 632 F. Supp. at 1312-14, 1315; *Rogers*, 602 F. Supp. at 1348.

141. S. REP. No. 225, *supra* note 72, at 200 (citations omitted).

142. *Id.* at 202.

143. *See id.* at 209 ("This will allow the court to quickly dispense with claims that have already been considered at trial, as for example, where the jury has already determined that the third party held the property only as a nominee of the defendant or that a transfer to the third partry was a sham transaction."); *id.*, n. 47 ("The provision should be construed to deny relief to

The majority of federal courts have adopted this interpretation, concluding that to the extent Congress stretched the criminal forfeiture tentacles to reach property held by third parties, it intended only to claim property included in schemes designed to frustrate law enforcement. As a result, these courts have generally agreed that "it is evident that bona fide attorneys' fees paid to defense counsel . . . were not intended to be forfeitable by Congress, for it cannot be said that such fees were paid as part of an artifice or sham to avoid forfeiture."[144]

This statutory interpretation is consistent with the legitimate congressional goal of depriving racketeers and drug dealers of their illicit profits.[145] Government investigations and prosecutions which force de-

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third parties acting as nominees of the defendant or who have knowingly engaged in sham or fraudulent transactions.").

144. *Ianniello*, 644 F. Supp. at 455-56. *See also Rogers*, 602 F. Supp. at 1346-48 ("[a]n attorney who receives fees for services rendered pays value."); *Thier*, 801 F.2d at 1474; *Bassett*, 632 F. Supp. at 1316-17; *Reckmeyer*, 631 F. Supp. at 1195-96. This analysis is also supported by constructive trust concepts which make it possible for the government to claim that its title arose at the time of the earlier illegal activity. *See Rogers*, 602 F. Supp. at 1342, *citing* 76 AM. JUR. 2D TRUSTS § 221 (1975); RESTATEMENT (SECOND) OF TRUSTS § 1(e) (1959).

The recent decision in United States v. Harvey, No. 86-5025 (4th Cir. Mar. 6, 1987), rejects the majority of federal decisions and concludes that Congress intended to reach legitimate defense attorneys' fees with the forfeiture statutes. *Id.*, slip op. at 14-15, 18. The *Harvey* court ultimately held, however, that the sixth amendment prohibits the forfeiture of legitimate fees, and adopted the majority position that only sham or fraudulent fee payments are constitutionally forfeitable. *Id.* at 43, 51-52.

Because the weight of judicial opinion to date is that the 1984 CFA amendments do not authorize forfeiture of legitimate fees, the Justice Department has virtually ignored these recent cases and has relied instead on other case law. The Department has placed greatest reliance on pre-1984 opinions which, it contends, permit fee forfeitures. *See* U.S. ATTORNEYS' MANUAL, *supra* note 17, at § 9-111.220. Careful reading of these opinions indicates that they are consistent with the post-CFA cases forbidding fee forfeitures. For example, in United States v. Long, 654 F.2d 911, 917 (3d Cir. 1981), the court would have permitted forfeiture of an airplane transferred to a CCE defendant's attorney. The facts of *Long* strongly suggest, however, that this was precisely the type of sham pre-conviction transaction the 1984 amendments were intended to make voidable. *See also Bassett*, 632 F. Supp. at 1317-18; *Rogers*, 602 F. Supp. at 1350.

In United States v. Raimondo, 721 F.2d 476, 478 (4th Cir. 1983), sixth amendment issues were not argued and the court expressly ruled that defense counsel remained free to oppose any attempt to forfeit attorneys' fees. ("Neither Rosen nor his law firm is a party to this criminal action, and our decision is not res judicata with respect to them." *Id.* at 478.) *See also Ianniello*, 644 F. Supp. at 458; *Bassett*, 632 F. Supp. at 1315; *Rogers*, 602 F. Supp. at 1350-51.

Finally, the Justice Department has inexplicably placed great weight on the dictum supporting fee forfeitures contained in a footnote in *In re* Grand Jury Subpoena Duces Tecum Dated January 2, 1985 (Payden), 605 F. Supp. 839, 849-50 n.14 (S.D.N.Y. 1985), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985). This opinion seems to have almost no value as precedent concerning fee forfeitures. Its relevant language is mere dictum. The trial court's opinion has been reversed on other grounds. Numerous other federal courts have reached a contrary conclusion. *See, e.g., Thier*, 801 F.2d at 1463; *Ianniello*, 644 F. Supp. at 457-58; *Bassett*, 632 F. Supp. at 1314-18; *Reckmeyer*, 631 F. Supp. at 1195-96; *Badalamenti*, 614 F. Supp. at 197-98; *Rogers*, 602 F. Supp. at 1332.

145. The primary economic purpose of these amendments is emphasized by the legislative history of S. 948, which was largely incorporated as Title III of the Comprehensive Crime Control Act. The Judiciary Committee wrote: "Changes are necessary both to preserve the availability of a

fendants to pay large legal fees succeed, as a practical matter, in denying suspected racketeers of the personal use of these assets. So long as the assets transferred to defense counsel represent bona fide fees, the prosecution has functionally deprived defendants of that specific property as effectively as if forfeiture were ordered. Simply put, the property now belongs to the lawyer instead of the defendant. The process has simply distributed income within the private sector rather than from the private to the public sector. In either event, the statutory goal of removing the profits of crime from criminals is achieved. The net economic effect on the defendant is the same in either circumstance.[146]

Effective mechanisms are available to prevent unscrupulous defendants from abusing a statutory interpretation protecting legitimate attorneys' fees from forfeiture. For example, the courts can issue "set aside" orders specifically identifying and segregating those funds of the defendant to be made available for attorneys' fees. Other assets could

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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 as a result avoid the economic impact of forfeiture." S. REP. NO. 224, *supra* note 73, at 18. In general, S. REP. NO. 225 incorporated the analysis and language of S. REP. NO. 224. For a review of the history of the Comprehensive Forfeiture Act, see S. REP. NO. 225, 98th Cong. 1st Sess. 192 ("In large measure the forfeiture improvements in title III of this bill are the same as those contained in S. 829 and S. 948.").

146. Indeed, a defendant who spends large sums for attorney's fees is more certain to be deprived of the fruits of any illicit activity than is a defendant who is represented by appointed counsel. If the latter defendant is acquitted he will retain all use of and title to the property. This will be true even if he is convicted of some crimes, but the government fails to obtain a verdict ordering forfeiture of the assets. Under these circumstances, the convicted defendant might still retain the sums which would otherwise have been paid as attorneys' fees. On the other hand, it is certain that any sums paid as legitimate attorneys' fees are lost to that defendant. For a discussion of the "value" received by the client in exchange for payment, see *infra* notes 218-21 and accompanying text.

One recent court opinion that implicitly aceepts this analysis is United States v. Figueroa, 645 F. Supp. 453 (W.D. Pa. 1986). There the defendant was convicted of a CCE violation under 21 U.S.C. § 853. The court ordered forfeiture of money seized when he was arrested. Figueroa's court-appointed attorney petitioned the court for an amended order allowing payment of his fees from these seized funds. The court concluded that only sham or fraudulent third party transactions were encompassed by the criminal forfeiture provisions of the CCE statute and ordered payment from the seized assets because the attorney had rendered legitimate services. The court held that use of the forfeited money to provide a source of funds available for paying attorney's fees would not conflict with the forfeiture statute's purpose of preventing preconviction transactions designed to avoid forfeiture. As a practical matter, so long as the forfeitable funds are not returned to the defendant, the statutory purpose is accomplished by conveying the property to his defense counsel instead of to the government.

See also Thier, 801 F.2d at 1474-75:

> [T]he government errs when it contends that exempting from restraint sufficient assets to pay reasonable attorneys fees . . . allows the defendant to benefit economically from criminal proceeds. . . (citations omitted). Expenditures the defendant must make . . . to secure competent counsel to prove innocence or protect his procedural rights should not be considered incentives to crime. The notion that a defendant would commit criminal acts to accumulate monies or properties . . . to pay a reasonable fee to the attorney he chooses to assist in his defense is sophistry.

remain under restraint, and unavailable for personal use by the defendant. Similar results could be achieved by consent of the parties.

The courts inevitably will be forced to develop procedures for determining whether fees are "legitimate." Special procedural problems may arise in RICO and CCE forfeiture cases, where transfer of the assets from which fees are to be paid may be restrained by court order throughout the proceedings. In those cases the courts must determine when to disburse attorneys' fees,[147] as well as the amount of the fee allowed. In the context of criminal prosecutions, in which the government bears the burden of proof beyond a reasonable doubt, the courts may simply resolve this latter dilemma by placing the burden of proving that fees are fraudulent upon the prosecution.[148]

This analysis presumes that asset transfers to defense counsel consist solely of legitimate payments for professional services. If the government can prove that payments allegedly made for attorneys' fees were in fact illicit fund transfers for fraudulent purposes, neither the defendant nor defense counsel can claim a legitimate interest in the transaction, nor is there any sixth amendment interest deserving protection. In such cases the transferred property is subject to forfeiture, and the parties to the transaction, including the attorneys, may well be subject to prosecution.[149]

Paradoxically, the result is less clear for legitimate transfers of assets. While it appears that Congress intended to exempt from forfeiture assets transferred to third parties in bona fide transactions, analysis cannot end with statutory interpretation. The language of the statutes and their ambiguous legislative history permit a contrary interpretation

147. *See, e.g.*, United States v. Marx, No. 86-Cr-110 (E.D. Wis. Aug. 6, 1986). The *Marx* court held that the CCE criminal forfeiture provisions did not reach sums owed to defense counsel for legitimate services rendered. Because the funds from which fees would be paid were seized prior to payment, however, the federal magistrate decided that the property would remain under restraint until conclusion of the case, and denied defense counsel's motion for an immediate disbursement of a $50,000 retainer. The magistrate reasoned that if defendant were acquitted the property would revert to him, and, if he were convicted, defense counsel could simply submit a claim to the court for post-conviction payment based upon the value of actual services rendered.

148. *See, e.g., Harvey*, slip op. at 50-52 (government bears burden of proving that fee contracted for is a sham or a fraud, but the order and means of proof are to be determined by the district courts in particular cases); *cf.* United States v. Estevez, 645 F. Supp. 869, 872 (E.D. Wis. 1986) (court concluded that "legitimate" means "reasonable" fees, and determined prior to trial that a $40,000 fee was reasonable in that case).

Calculating what is a "reasonable" fee in particular cases can prove difficult for the courts, even in the context of civil cases. *See, e.g.*, Dobbs, *The Market Test for Attorney Fee Awards: Is the Hourly Test Mandatory?*, 28 ARIZ. L. REV. 1 (1986).

149. *See* U.S. ATTORNEYS' MANUAL, *supra* note 17, at § 9-111.410 (presenting Justice Department's position that forfeiture of assets transferred to attorney may be pursued if "reasonable grounds" exist to belicve the transaction was a sham or fraud.). *See also Harvey*, slip op. at 52 (government has burden of proving that transfer of assets as fee payment is a sham or fraud).

authorizing forfeiture of legitimate attorneys' fees.[150] Moreover, a future Congress might amend the statutes to expressly authorize such forfeitures.[151] These possibilites require that the constitutionality of fee forfeitures be resolved. In short, it is necessary to determine whether allowing forfeiture of criminal defense attorneys' fees[152] violates the commands of the sixth amendment by denying defendants their individual rights and by precluding defense counsel from performing their institutional roles in our adversary justice system.

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150. *See* Brickey, *supra* note 36 at 499-503; *Harvey*, slip op. at 12-27.

151. *See, e.g.*, Note, *Attorney Fee Forfeiture*, 86 COLUM. L. REV. 1021 (1986) (arguing unconstitutionality of present RICO and CCE forfeiture provisions if applied to legitimate defense fees, but proposing that a constitutional statute could be enacted).

152. A special rule exempting defense attorneys' fees provides no protection for other third party transferees. The interests of third parties could receive some protection from a narrow definition of the concept of "notice" in this context. Under the government notice theory it appears that if the transaction occurred in a small town or rural area, third party transferees presumptively could be on notice of the forfeitability of assets from transferors whom "everyone" knows to be drug dealers. Surely the same rule would apply to individuals notorious as mobsters in their home cities. Similarly, acceptance of such an unrestricted "notice" theory suggests that in locations infamous for drug traffieking, like Miami, large cash transactions alone are sufficient to put third parties on notice that their transferors may be drug dealers, and the transferred property potentially forfeitable. Such a rule is unacceptable. In the "real world" of economic life, it is unrealistic to expect that independent third parties will inquire into the legitimacy of the source of funds in the hands of their customers, suppliers, and clients. Are we to presume that any purehaser of luxury automobiles who does not require a loan is a racketeer? Are we to assume that use of cash—the legal tender of the realm—for expensive purchases denotes criminality—and not flamboyance, eccentricity, or simply Gatsbyesque bad taste? Should surgeons refuse to operate if their fees will be substantial and the Justice Department has widely publicized an indictment seeking forfeiture of all of the patient's assets? One would hope not, but this could follow from acceptance of a notice theory in this area.

Under the government's notice theory, most third parties would receive no protection from a limited bright line rule, based upon the sixth amendment, exempting only defense attorneys' fees from forfeiture. Recognizing that the forfeiture statutes only reach assets transferred to third parties in sham transactions provides protection for all. On the other hand, even if the statutes were interpreted to reach legitimate transfers, third party interests could receive limited protection from a narrow deflnition of the events that supply notice to third parties that specific property is subject to forfeiture. Most obviously, the law could require specific descriptions of affected property in the forfeiture counts of indictments. Vague or general references to "all property" or "all currency" should not suffice. *But see* U.S. ATTORNEYS' MANUAL, *supra* note 17, at § 9-111.511.

Since an asset is not forfeited until after a verdict of guilt, arguably third parties are not on notice of its forfeitability until after receiving actual notice of such a verdict. Third parties might well argue that absent such a rule, application of criminal forfeiture penalties to them violates their rights under the due proccss commands of the fifth and fourteenth amendments. Mere knowledge of a defendant's activities—which may or may not be obvious in their criminality—or even knowledge of an investigation, indictment, or trial, arguably cannot serve as sufficient notice because the accused is presumed innocent until a verdict of guilt is entered. Prior to judgment, the outcome in any litigation, let alone a criminal prosecution, is nothing more than eonjecture. *See supra* notes 94-95 and *infra* note 252 and accompanying text.

IV. Fee Forfeitures and the Sixth Amendment: An Institutional Analysis of Individual Constitutional Rights

Government actions divesting innocent third parties of property arguably implicate a variety of constitutional provisions, including the due process and takings clauses of the fifth amendment.[153] A discrete set of issues arises, however, when the innocent third party is criminal defense counsel for the accused, and the property consists of legitimate legal fees and costs paid by the client. In this setting, third party forfeitures can affect both the suspect's constitutional right to receive effective legal representation and the balance of power between adversaries in the criminal justice system.

Recognition of the potential harm resulting from even the threat of fee forfeitures is now widespread. The federal courts generally have concluded that allowing forfeiture of defendants' attorneys' fees under the 1984 CFA amendments would violate the sixth amendment.[154] Bar associations and other lawyers' organizations have roundly condemned

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153. The fifth amendment provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

154. Research for this Article uncovered a number of published opinions and unpublished orders in which courts have ruled upon fee forfeiture issues raised by the 1984 CFA amendments. All but one prohibited fee forfeitures, either holding that they violate the sixth amendment or construing the statutes to exempt these fees, in order to preserve the statutes from constitutional challenge. *See Harvey*, slip op. at 49; *Estevez*, 645 F. Supp. at 870-72; *Ianniello*, 644 F. Supp. at 456. *See also Bassett*, 632 F. Supp. 1308; *Reckmeyer*, 631 F. Supp. 1191; *Badalamenti*, 614 F. Supp 194; *Rogers*, 602 F. Supp. 1332; United States v. Sobczak, S-Cr. 85-00033 (N.D. Ind. Sept. 6, 1985); United States v. Figueroa, 645 F. Supp. 453 (W.D. Pa. 1986); United States v. Marx, No. 86-Cr-110 (E.D. Wis. Aug. 6, 1986).

The special status accorded defendants' sixth amendment rights is emphasized by the different treatment given other third parties in these criminal proceedings. The District Courts have authorized forfeiture of assets held by non-attorney third parties during the course of prosecutions in which fee forfeitures were not allowed. *See, e.g., Reckmeyer*, 628 F.Supp. 616; United States v. Ianniello, 621 F. Supp 1455, 1476-77 (S.D.N.Y. 1985).

United States v. Thier, Cr. No. 84-60055-23 (W.D. La. 1985), *rev'd*, 801 F.2d 1463 (5th Cir. 1986), is the only case located in this research in which a court has held that fees were not exempted from forfeiture under the 1984 amendments. Even that court did not authorize recovery of fees already paid, but merely refused to exempt future or potential attorneys' fees from a pretrial order restraining defendant's assets. The ruling was based explicitly upon the availability of appointed counsel, because the defendant was functionally indigent as a result of the restraint of his assets. *Id.* at 3-5. This analysis was apparently rejected by the fifth circuit. Although the fifth circuit did not rule directly on the constitutionality of fee forfeitures, the court's language indicates it would have held that they would violate the sixth amendment. *See Thier*, 801 F.2d at 1474.

Another district court, in language that it acknowledged was mere dictum, rejected the analysis of the court in *Rogers*. *See In re* Grand Jury Subpoena Dated January 2, 1985 (Payden), 605 F. Supp. 839 (S.D.N.Y. 1985), *rev'd on other grounds*, 767 F.2d 26 (2d. Cir. 1985).

Prior to the 1984 amendments at least two federal courts had suggested that they might permit forfeiture of attorneys' fees. The current vitality of these opinions is questionable in light of the subsequent judicial analysis of the post-amendment statutes. *See Raimondo*, 721 F.2d at 478, *cert. denied*, 469 U.S. 837 (1984); *Long*, 654 F.2d at 915-17. Curiously, the Justice Department relies almost exclusively on these pre-amendment cases in its Fee Forfeiture Guidelines, virtually

fee forfeitures on constitutional grounds.[155] Even the Justice Department has issued guidelines intended to ameliorate some of the problems generated by its fee forfeiture attempts.[156] Nonetheless, the government persists in its enforcement efforts against attorneys,[157] so the need for analysis of the problem continues.[158] Although the debate has emphasized the impact of fee forfeitures upon defendants' individual sixth amendment rights, this approach is too narrow. A more complete analysis must also take into account the impact of fee forfeiture upon the collective institutional role played by defense counsel.

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ignoring the growing body of more recent case law prohibiting fee forfeitures. *See* U.S. ATTORNEYS' MANUAL, *supra* note 17, at § 9-111.000-.700.

155. The American Bar Association and other professional organizations have condemned fee forfeitures and have called for strong rules limiting the use of prosecutors' subpoenas seeking related fee information from defense attorneys. *See Committee On The Judiciary, supra* note 21 (statcment of Elliot Richardson and William Taylor on Behalf of the Amer. Bar Assoc.); *id.* (statement of Neal Sonnett, Third Vice-President and Legislature Chairperson National Assoc. of Criminal Defense Lawyers); *id.* (Statement of Edward Marek, Federal Public Defender, N.D. Ohio, on behalf of The Federal Public Defenders and Federal Community Defenders); *see also* THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, PUBLIC HEARING ON SUBPOENAS TO LAWYERS: THE AFFECT ON THE ATTORNEY-CLIENT RELATIONSHIP AND ON THE ADVERSARIAL PROCESS (1985) (testimony of various witnesses condemning both fee forfeiture attempts and subpoenas); THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, COMMITTEE ON CRIMINAL ADVOCACY, COMMITTEE REPORT, THE FORFEITURE OF ATTORNEYS' FEES IN CRIMINAL CASES: A CALL FOR IMMEDIATE REMEDIAL ACTION (1986).

See also United States v. Klubock, 639 F. Supp. 117 (D. Mass. 1986), *aff'd*, No. 86-1413 (1st Cir. Mar. 25, 1987) (upholding Massachusetts Supreme Judicial Council Rule 3:08, Prosecutor Function 15, requiring prior judicial approval of grand jury subpoenas seeking client information from attorneys); State Bar of Georgia, Advisory Op. No. 41, Client Confidentiality, (1984) (attorney cannot voluntarily reveal client fee information in response to state's notice to produce without client's consent); 28 STATE BAR NEWS, Feb., 1986 at 1, col.1 (reporting adoption by New York State Bar Association House of Delegates of resolution limiting use of subpoenas sceking client information from defense attorneys).

156. *See* U.S. ATTORNEYS' MANUAL, *supra* note 17, at § 9-111.400 (first purpose of Guidelines is "to insure that any forfeiture of assets transferred to attorneys as fees for legal services has becn reviewed carefully."); *see also Committee on the Judiciary, supra* note 21, at 29 (statement of Stephen S. Trott, Ass't Attorney General, Crim. Div.) ("But perhaps more important is the fact that we recognize the potential for such abuse, and we have implemented guidelines that insure our prosecutorial discretion is exercised prudently.").

157. *See Committee on the Judiciary, supra* note 21, at 25-29, 31-33 (statement of Stephen Trott, Ass't Attorney General, Crim. Div.) (discussing cases in which the government has actively pursued fee forfeitures since the Guidelines were issued).

158. The Justice Department disagrees with the courts concerning the extent of the danger posed by fee forfeitures to sixth amendment interests. *See* U.S. ATTORNEYS' MANUAL, *supra* note 17, at § 9-111.210 (acknowledging that some district courts, ruling directly on the forfeiture of fees under the 1984 CFA amendments, have prohibited such practices); *but cf. id.* ("The Department believes, however, that these decisions are incorrect); *and see Bassett*, 632 F. Supp. at 1314 ("The government contends that 'these decisions are incorrect.' "). The Department's recognition of the impact of forfeitures on the attorney-client relationship and these recent cases is grudging. *See* U.S. ATTORNEYS' MANUAL, *supra* note 17, at § 9-111.210 ("The impact of the third party forfeiture provisions upon the ability to obtain counsel of choice in any event has been severely overstated and does not amount to an unconstitutional interference."); *id.* at § 9-111.630 ("It should be noted that since these statutory proceedings will occur after trial, the likelihood of any adverse impact upon the attorney-client relationship will be diminished substantially.").

Critics argue that allowing the forfeiture of legitimate attorneys' fees would infringe upon sixth amendment rights in three ways. First, the criminal forfeiture mechanisms would allow the government to prevent a defendant from obtaining any legal representation at all.[159] Second, the government would be able to exert substantial power over defendants' ability to choose defense counsel, allowing the government to prevent the most capable lawyers from representing these defendants. By driving these attorneys from the market, the government would weaken the collective strength of the defense bar in the process. This would inevitably distort the adversary system by skewing the balance of power in favor of the government in these—and perhaps most—criminal prosecutions.[160] Third, the threat of fee forfeitures would impede attorney-client communication and interfere with defense lawyers' independence of action so substantially that they could not deliver effective assistance of counsel.[161]

The government disputes each of these theories, claiming that the justice system can provide defendants with legal representation satisfying the sixth amendment even if forfeiture of fees were permitted. The remaining sections of this Article will examine each of these arguments in turn, and will demonstrate how an analytical model based upon defense counsel's institutional roles can be utilized to resolve them.

A. Disrupting the Adversary System by Denying Defendants Any Legal Representation

The structure of the RICO and CCE criminal forfeiture mechanisms empowers the government to whipsaw defendants whose assets may be subject to forfeiture. The end result could be to deny these defendants any legal representation. This is possible because of the Justice Department's discretionary power to use the statutory forfeiture and pre-conviction restraining order mechanisms to ensure that private sector attorneys will refuse to represent affected defendants, while these same defendants might not qualify for appointed counsel as indigents. The following analysis suggests how this could occur.

Private sector attorneys may refuse to represent clients in RICO and CCE cases if their fees are subject to forfeiture. From the attorneys' perspective, the potential loss of their earned compensation makes it financially impossible to represent clients in complex and lengthy[162]

159. *See infra* notes 162-206 and accompanying text.

160. *See infra* notes 207-73 and accompanying text.

161. *See infra* notes 274-317 and accompanying text.

162. *See Rogers*, 602 F. Supp. at 1349-50:

> Ignoring the complexity of the legal issues involved, the defense of RICO accusations requires the marshalling of facts and information of vast quantities perhaps constituting

RICO and CCE organized crime prosecutions.[163] The impact of even threatened fee forfeitures on defendants' ability to retain private counsel is direct and immediate. It sends this unmistakable message to counsel:

> 'Do not represent this defendant or you will lose your fee.' That being the kind of message lawyers are likely to take seriously, the defendant will find it difficult or impossible to secure representation. By the Sixth Amendment we guarantee the defendant the right of counsel, but by the forfeiture provisions of the RICO and CCE statute (if they apply to the fee of the defense attorney), we insure that no lawyer will accept the business.[164]

The financial stakes for defense counsel are great. The length and complexity[165] of these cases coupled with the severe sanctions imposed upon convicted defendants[166] generate substantial fees.[167] Yet the

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the whole of several worldwide business enterprises. . . . Adequate defense of RICO cases generally requires representation during grand jury investigations lasting as long as two or three years.

163. *See id.*:

This view ignores the exigencies of RICO cases. The costs of mounting a defense of an indictment under RICO are far beyond the resources or expertise of the average federal public defender's office. . . . The government brings to bear significant resources to prosecute these cases. . . . Counsel appointed ninety or one hundred and twenty days before trial is patently inadequate.

See also Reckmeyer, 631 F. Supp. at 1197 ("It is further doubtful that any member of the private bar could afford to take on a complex RICO or CCE case under the Criminal Justice Act, since that Act places limits on the amount which can be paid as attorney's fees."); *Badalamenti*, 614 F. Supp. at 196 ("I note in addition that the RICO and CCE indictments to which the forfeiture provisions apply are generally big cases requiring months to prepare and try, making it all the less likely that the attorney might take a chance on escaping forfeiture.").

164. *Badalamenti*, 614 F. Supp. at 196. *See also Bassett*, 632 F. Supp. at 1316-17.

165. The length and complexity of RICO and CCE entity cases is reflected by the facts of *Rogers*, 602 F. Supp. at 1334, the first and to date most important judicial opinion construing the impact of the 1984 CFA amendments on attorneys' fees. Following an eighteen-month investigation the grand jury issued a thirty count indictment charging nine defendants with various crimes, including mail fraud, racketeering, and perjury, and sought criminal forfeiture of various assets pursuant to the 1984 CFA amendments to the RICO statute. *See also Ianniello*, 644 F. Supp. at 459 (defendants retained counsel prior to indictment and after indictment they engaged in months of trial preparation); *Reckmeyer*, 631 F. Supp. at 1193 (26 defendants charged).

166. The RICO statute authorizes imprisonment for up to twenty years, fines not exceeding $25,000, as well as forfeiture of assets. 18 U.S.C. § 1963(a) (1982 & Supp. III 1985). In lieu of this statutory fine, the fine imposed may be in an amount "not more than twice the gross profits or other proceeds" derived from an offense. *Id.* The CCE statute is even more punitive. Imprisonment may be up to life and a mandatory minimum prison term of ten years is required. Fines may be up to $100,000. Subsequent convictions carry a minimum prison term of 20 years and fines not exceeding $200,000. 21 U.S.C. § 848(a) (1982 & Supp III. 1985).

167. *See Reckmeyer*, 631 F. Supp. at 1193 ($170,512.99 in expenses and time charges for representation through conviction); *Badalamenti*, 614 F. Supp. at 195 (government allegation that defense counsel's fee in vicinity of $500,000.); *In re* Grand Jury Subpoena Dated Jan. 2, 1985 (Payden), 605 F. Supp. 839, 844 n. 2 (1985) (United States' Attorney's office alleged that defense

same factors which make these cases so lucrative also make it economically infeasible for counsel to donate their time. As a result, counsel retained in these cases now typically make only conditional appearances, so they may withdraw if the court fails to exempt fees from forfeiture.[168]

This suggests that in any case where the government threatens to seek a forfeiture of fees paid or owing to defense counsel, private sector attorneys are unlikely to be willing to represent RICO or CCE defendants.[169] This will not necessarily deny defense counsel for all RICO and CCE defendants. Counsel can be appointed to represent indigent defendants. In RICO and CCE forfeiture cases this may be necessary even for wealthy defendants. If the government obtains an order restraining defendants' assets, they may be entitled to appointed counsel as "constructive" or "functional" indigents,[170] although they possess title to the property unless and until a conviction is entered.[171]

Conversely, if the government seeks forfeiture but chooses not to apply for a pretrial restraining order, defendants' endangered but technically unfettered assets may disqualify them as indigents entitled to appointed counsel.[172] Yet the threat of forfeiture of these unrestrained assets will preclude private sector attorneys from undertaking representation.[173] The net result is that defendants may be unable to find any

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counsel's fee for the case would be $250,000 and concluded that "in light of the complexity of this case, 'such a substantial fee for experienced and highly regarded trial counsel is not unlikely.' ").

168. *See Ianniello*, 644 F. Supp. at 454; *Bassett*, 632 F. Supp at 1309; *Rogers*, 602 F. Supp. at 1334; United States v. Thier, 801 F.2d at 1475 (trial court simultaneously denied defendants' motions to exempt attorneys' fees from pre-trial restraining order and granted defense counsel's resulting motion to withdraw).

169. *See Bassett*, 632 F. Supp. at 1316 ("Despite the legal profession's commitment to pro bono work, it is doubtful that attorneys would be willing to invest the many hours of legal work necessary to defend against these serious charges. . . ."). *See supra* notes 162-68 and accompanying text. Practices which discourage attorneys from representing criminal defendants are suspect under the sixth amendment. For example, the Supreme Court rejected "categorical" rules or guidelines for measuring the effectiveness of defense representation in part because of the Court's concern that "[c]ounsel's performance and even willingness to serve could be adversely affected." *Strickland*, 466 U.S. at 690.

170. *See Badalamenti*, 614 F. Supp. at 197 (when assets of accused are seized by restaining order "he can make out an affidavit of indigency and obtain appointed counsel under the Criminal Justice Act. His right to counsel is not threatened."); United States v. Harvey, No. 86-5025, slip op. at 35 (4th Cir. Mar. 6, 1987) ("Forced indigency, the ultimate consequence of freeze orders, may entitle the defendant to appointed counsel, but this is no answer.").

171. *See supra* notes 74 and 88 and accompanying text.

172. The Criminal Justice Act requires every United States district court to adopt "a plan for furnishing representation for any person financially unable to obtain adequate representation. . .," 18 U.S.C. § 3006A(a) (1982 & Supp. III 1985), and expressly authorizes the use of appointed private counsel and public defender organizations. *Id.* United States v. Deutsch, 599 F.2d 46 (5th Cir. 1979); United States v. Kelly, 467 F.2d 262, 266 (7th Cir. 1972), *cert. denied* 411 U.S. 933, *reh'g denied* 412 U.S. 923.

173. *See Bassett*, 632 F. Supp. at 1316 (if attorneys' fees forfeitable, defendants "for all intents and purposes, despite their current wealth . . . will be unable to hire counsel of choice.");

counsel, public or private, to represent them.[174] This result obviously would violate the sixth amendment and automatically entitles affected defendants to pretrial relief, for "[a]ctual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice."[175]

The Justice Department has failed to offer any satisfactory solutions to this problem,[176] focusing instead upon the impact of fee forfeitures upon defendants' choice of counsel.[177] In its Fee Forfeiture Guidelines, for example, the Department postulates that a "defendant who is effectively rendered indigent by their potential application is entitled to appointed counsel."[178] While this statement of general principle is correct, it sidesteps the problem of defendants whipsawed by the threat of forfeiture when their assets remain unrestrained. This omission is emphasized by the Department's reliance upon a case in which the court specifically referred to the functional indigency created when a defendant is subject to a restraining order, but did not address the whipsawing problem.[179] In other statements, the Department simply ignores the issue.[180]

At most, fee forfeiture proponents seem to assume that this problem is unlikely to arise, in part because of the Department's own actions. One can infer that proponents believe the Justice Department's own internal Fee Forfeiture Guidelines are sufficient to prevent abuse of defendants' rights.[181] Such a theory is facially inadequate to resolve a conflict among adversaries in our justice system. Although the De-

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Badalamenti, 614 F. Supp. at 196 ("by the forfeiture provisions of the RICO and CCE statute (if they apply to the fee of the defense attorney), we insure that no lawyer will accept the business.").

174. *Badalamenti*, 614 F.Supp. at 197 ("The wealthy defendant eannot claim poverty and apply for appointed counsel. His problem is not inability to pay a legal fee but that lawyers will refuse to accept his retainer and will refuse to represent him. He can get neither a paid lawyer, nor a free one."). *See also Ianniello*, 644 F. Supp. at 457; *Harvey*, slip op. at 35.

175. *Strickland*, 466 U.S. at 692.

176. Indeed, the Department's Guidelines simply assert that the threat of fee forfeitures does not infringe upon protected sixth amendment interests. *See* U.S. ATTORNEYS' MANUAL, *supra* note 17, at § 9-111.210 n.7.

177. *See id.* at § 9-111.210; *see infra* PART IV.B.

178. U.S. ATTORNEYS' MANUAL, *supra* note 17, at § 9-111.210.

179. *See id.* at § 9-111.210, *citing Bello*, 470 F. Supp. 723, 725 ("the . . . restraining order does not deprive [the defendant] of counsel, but only of the attorney of his choice. [He] will still be entitled to court-appointed counsel if he has no means to hire an attorney.").

180. *See e.g., Committee on the Judiciary, supra* note 27, at 10 (statement of Stephen S. Trott, Ass't Attorney General, Crim. Div.) ("In the absence of a restraining order, the restrictions placed upon a defendant's use of assets to pay an attorney are less restrictive. . . .all that is done is to warn an attorney that if he takes such assets they may be taken away after conviction. . . .).

181. U.S. ATTORNEYS' MANUAL, *supra* note 17, at § 9-111.230 (disputing the existence of any constitutional or statutory prohibitions of fec forfeitures, relying instead on proper exercise of prosecutorial discretion); *see also* Brickey, *supra* note 36 at 537 ("Adherence to the Justice Department guidelines should reduce the number of forfeiture cases in which conflicts of interest arise.").

partment has a duty to seek justice for all,[182] defendants in prosecutions where the government seeks to convict them of major felonies, and thereby deprive them of their freedom and property, cannot reasonably be expected to rely upon the discretion of the prosecuting agency to protect their fundamental interests.[183] Their suspicions would be justified by the essential premise upon which the right to counsel rests—that defendants require the assistance of counsel to oppose hostile government action.

The government also proposes that defendants will receive appointed counsel where possible fee forfeitures cause private sector attorneys to refuse representation, even where there is no pretrial restraint of defendants' assets, because the Justice Department asserts it would not contest such appointments.[184] This argument misconstrues the manner in which courts appoint counsel under the Criminal Justice Act, and once again the Justice Department overestimates its ability to protect defendants' interests by the exercise of its institutional discretion. The Justice Department simply does not have the power to assure appointment of counsel for anyone. "The duty rests upon a judicial officer to determine whether a person is financially eligible for the appointment of counsel and not the United States Attorney's Office."[185]

A judicial officer might reasonably determine that unconvicted defendants with substantial unrestrained assets simply cannot be considered indigents under the statute's standards. The inability of individual defendants to retain private counsel could well be attributed to the avarice of attorneys, and not to a deprivation of constitutional rights. Such a conclusion might well be reached by any judge, but particularly by those who believe that even in lengthy and complex organized crime prosecutions, private attorneys should be willing to serve without compensation.[186] In short, the government has offered no reason to believe that the statutory mechanisms and procedures do not permit the government to whipsaw defendants—either intentionally or inadvertently—and ultimately to deny them any counsel at all.

One fee forfeiture proponent has suggested that defendants' interests can be protected by deferring consideration of sixth amendment

182. *See infra* note 272 and accompanying text.

183. *See, e.g.*, Kastigar v. United States, 406 U.S. 441, 460 (1972) ("A person accorded this immunity under 18 U.S.C. Sec. 6002, and subsequently prosecuted, is not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities."); *cf. id.* at 469 (Marshall, J., dissenting).

184. *Ianniello*, 644 F. Supp. at 457.

185. *Id.*

186. *See, e.g., In Re* Grand Jury Subpoena Dated Jan. 2, 1985 (Payden), 605 F. Supp. 839, 848-49 ("The canons of professional responsibility, however, require Simels to represent Payden zealously despite the risk that he will not receive compensation for his work.").

issues until after the conclusion of the defendants' trials.[187] This theory posits that the impact of a possible fee forfeiture "cannot realistically be determined before trial."[188] Unfortunately, this approach resolves none of the constitutional problems raised by the practice.[189] For example, it ignores the whipsawing problem raised by the statutes, and merely assumes that "[a]t the very least, the defendant would be repre-

187. Brickey, *supra* note 36, at 529-38.

188. *Id.* at 529.

189. Even the authority relied upon is inapposite. This proposal posits that RICO and CCE fee forfeitures should be treated like termination and jeopardy assessments under the Internal Revenue Code. *See* Brickey, *supra* note 36, at 525-32. The analogy is misplaced because the statutes have different purposes which require different procedures. Most obviously, the purpose of the Internal Revenue Code is to raise revenues, Blumenfield v. United States, 306 F.2d 892, 900 (1962), and not to punish criminals. As a result, the enforcing agencies have powers not ceded criminal law enforcers. The Code expressly empowers the Internal Revenue Service (IRS) to make summary assessments, and to demand immediate payment of the tax deficiency assessed when it makes a termination or jeopardy assessment. 26 U.S.C. §§ 6851(a), 6861(a) (1982). The assessments are presumed to be valid. Avco Delta Corp. Canada Ltd. v. United States, 540 F.2d 258, 262 (7th Cir. 1976); Estate of Upshaw v. Commissioner, 416 F.2d 737, 740 (7th Cir. 1969), *cert. denied,* 347 U.S. 962 (1970). If the taxpayer fails or refuses to pay the tax assessment, the IRS has the power to collect the deficiency immediately. 26 U.S.C. § 6331(a) (1982). If the taxpayer challenges a jeopardy assessment he must first seek administrative review by the IRS, 26 U.S.C. § 7429(a)(2) (1982), before he can get judicial review of his case. Rosenblum v. United States, 549 F.2d 1140, 1146 (8th Cir. 1977); Nichols v. United States, 633 F.2d 829, 830 (9th Cir. 1980). If the taxpayer appeals the IRS determination to the District Court, he has the burden of proving that the amount of the assessment is unreasonable. Freistak v. Egger, 551 F. Supp. 238, 243-44 (M.D. Pa. 1982); 26 U.S.C. § 7429(g)(2) (1982). Once the District Court has held that the assessment is reasonable there is no appeal from this determination even for questions of constitutional violation. *Nichols,* 633 F.2d at 830-31; 26 U.S.C. § 7429(f) (1982). The criminal forfeiture statutes, in contrast, are designed to punish criminal activity, and they provide the Justice Department with no authority to order payment of amounts allegedly forfeitable. Only the courts can issue pre-conviction restraining orders and assets are forfeited to the government only upon a verdict of guilt. *See supra* notes 74 and 88 and accompanying text. Similarly, the Justice Department must prove, beyond a reasonable doubt, an asset's forfeitability. In short, special rules govern the resolution of issues in the context of assessment proceedings which make them poor authority for criminal prosecutions.

Another problem with this analysis is that relies upon questionable authority. In some instances civil tax cases are cited to support this theory affecting sixth amendment rights in criminal cases. *See e.g.* Brickey, *supra* note 36, at 532 n. 167 (citing Rosenblum v. United States, 549 F.2d 1140 (8th Cir.), *cert. denied,* 434 U.S. 818 (1977)). In other places the criminal cases relied upon are distinguishable on their facts. *See* Freistak v. Egger, 551 F. Supp. 238, 244 (M.D. Pa. 1982) (right to counsel not denied where record showed defendant represented by counsel in criminal proceedings); United States v. Allied Stevedoring Corp., 138 F. Supp. 555, 557-59 (S.D.N.Y. 1956) (corporation actually represented by competent counsel whose fee was paid by others, would be entitled to appointed counsel if necessary, and lawyer acknowledged he would continue representation; individual co-defendants also represented by same counsel). Moreover, these cases demonstrate how postponing sixth amendment review until completion of a case may fail to protect sixth amendment interests. For instance, where a plea of nolo contendere makes sixth amendment claims moot, prior rights violations may be ignored. Lloyd v. Patterson, 242 F.2d 742, 744 (5th Cir. 1957) (claim of unavailability of counsel moot where taxpayer pleaded nolo contendere). *See also* Note, *Against Forfeiture of Attorneys' Fees Under RICO: Protecting the Constitutional Rights of Criminal Defendants,* 61 N.Y.U. L. REV. 124, 138 n.77 (1986) (criticizing reliance on tax lien cases and questioning the theoretical validity of those decisions).

sented by appointed counsel. . . ."[190] As we have seen, this outcome is far from certain.

This proposal suffers from other theoretical defects as well. This theory assumes that it will "become unnecessary to resolve the defendant's sixth amendment claim if he pleads guilty . . ., if the jury acquits, or if the government dismisses the charges against him."[191] This approach is constitutionally inadequate because it fails to accommodate or protect sixth amendment interests during critical pretrial stages of a prosecution when they are most significant. The sixth amendment right to counsel attaches "during perhaps the most critical period of the proceedings . . . from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation [are] vitally important, the defendants [are] as much entitled to such aid . . . as at the trial itself."[192] Yet postponing determination of a defendant's right to counsel claims may affect the outcome of individual defendants' cases in ways that escape meaningful later review. It is not difficult to imagine cases in which a defendant who is denied any counsel, or the effective assistance of counsel, pleads guilty, even though the result would have differed if counsel—or effective representation—had been available. Nonetheless, subsequent judicial review might fail to discern the violations,[193] or conclude that the defendant effectively waived them, and any claims based upon prior rights violations would be lost. Anyone familiar with the workings of the criminal justice system appreciates that this scenario is far from fanciful. Yet it demonstrates that to await the outcome of the litigation misses the point of the sixth amendment. Its guarantees attach at the beginning, not the end, of a case. This is precisely why the sixth amendment guarantee of counsel is afforded all felony defendants,[194] and why the Supreme Court ultimately jettisoned a case-by-case approach in defining that right.[195]

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190. Brickey, *supra* note 36, at 531.

191. *Id.* at 530.

192. Powell v. Alabama, 287 U.S. at 57. *See also* Brewer v. Williams, 430 U.S. 387, 398 (1977) ("Whatever else it may mean, the right to counsel . . . means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him. . ."); *accord* United States v. Wade, 388 U.S. 218 (1967) (post-indictment line-up); Maine v. Moulton, 106 S. Ct. 477, 484 (1985) (post-indictment surreptitious interrogation of defendant); United States v. Henry, 447 U.S. 264 (1980); Massiah v. United States, 377 U.S. 201 (1964).

193. *See* Holloway v. Arkansas, 435 U.S. 475, 491 (1978) ("And to assess the impact of a conflict of interest on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible.").

194. Gideon v. Wainwright, 372 U.S. 335 (1963).

195. *Id. See also* Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253, 294-95 (1982). While a retrospective analysis may be necessary to determine whether a defendant received ineffective assistance in a completed case, the right to counsel is awarded prospectively in both felony and misdemeanor cases. *See* Gideon v. Wainwright, 372 U.S. 335 (1963); Argersinger v. Hamlin, 407

The Supreme Court's recent decisions concerning presumptions of prejudice in sixth amendment cases suggest that, at least for some issues, a bright line rule prohibiting forfeiture of attorneys' fees could be applied to all criminal cases. The Court has treated cases in which the alleged sixth amendment violation is ineffective representation caused by defense counsel's independent failings differently from cases in which the disputed government conduct deprived defendants of counsel altogether or impermissibly interfered with defense counsel's representation. In the former cases, counsel's performance must be reviewed retrospectively to determine whether it was both professionally unreasonable and prejudicial to the defendant. Both prongs of this test must be satisfied to establish a claim of ineffective assistance resulting from counsel's errors.[196] For these cases, post-trial review is not merely appropriate, it is necessary.

On the other hand, where the violation arises from an "[a]ctual or constructive denial of assistance of counsel altogether,"[197] or from "various kinds of state interference with counsel's assistance,"[198] prejudice is presumed.[199] In these circumstances a defendant need not make a specific showing of prejudice. Instead, "prejudice is presumed regardless of whether it was independently shown."[200]

If prejudice can be presumed, it seems a bright line rule applying to all cases is warranted. For example, if allowing fee forfeitures whipsaws defendants and attorneys, ultimately leading to the denial of counsel altogether, or interfering with the right to choose counsel, the courts should provide defendants with automatic relief. This relief is often most appropriate at the beginning of the prosecution.[201]

U.S. 25 (1972); Scott v. Illinois, 440 U.S. 367 (1979). Denial of the right creates a presumption of prejudice. *Holloway*, 435 U.S. at 489; *Cronic*, 466 U.S. at 658-59.

196. *Strickland*, 466 U.S. at 691-92; *see also* Nix v. Whiteside, 106 S. Ct. 988 (1986).

197. *Strickland*, 466 U.S. at 692.

198. *Id.*

199. *Id.; accord Cronic*, 466 U.S. at 658-60, 662 ("Thus, only when surrounding circumstances justify a presumption of ineffectiveness can a Sixth Amendment claim be sufficient without inquiry into counsel's perormance at trial.").

200. *Holloway*, 435 U.S. at 489; *Cronic*, 466 U.S. at 659.

201. *See Harvey*, slip op. at 49, 52 (pretrial order exempting fees from forfeiture); *accord Ianniello*, 644 F. Supp. at 452 (pretrial order exempting assets from forfeiture); *Badalamenti*, 614 F. Supp. at 196-98. Failing to grant relief prospectively in these cases would create unnecessary costs. Arguably, the final judgment rule precludes interlocutory appeals of the denial of the right to counsel, even if prejudice is presumed. Flanagan v. United States, 465 U.S. 259, 268 (1984). A denial of the right to counsel, or other rights where prejudice can be presumed, leads inevitably to a reversal of verdicts unfavorable to these defendants. The result is a needless repetition of the prior action, if prosecution is even pursued after the reversal.

Conversely, the final judgment rule has not prevented appeals of pretrial orders in fee forfeiture cases. *See Thier*, 801 F.2d at 1465 (defendant appealed pretrial order restraining disposition of his assets, including those to be used to pay attorney fees); *Harvey*, slip op. at 49 n.10, 55 (government appealed pretrial order granting motion of defendants in *Bassett* exempting from forfeiture property sufficient to pay fees). Delaying determination of defendants' sixth amendment

It appears that the selective use of the statutes' forfeiture and restraining order provisions[202] supplies the government with the discretionary leverage to determine whether defendants can obtain any legal representation at all.[203] That the government could exercise this power to treat specific lawyers and defendants differently is far from fanciful, for the government has claimed it possesses the authority to make choices which could produce that result.[204] This suggests the government could utilize the forfeiture procedures to exclude only the "best" defense attorneys from RICO and CCE cases. Although we should generally assume prosecutorial good faith in the exercise of discretion, we must also remain alert to the very real dangers of its abuse.[205] The adversary system of criminal justice simply does not permit prosecutorial discretion to be the only protection of defendants' rights and interests. This task lies primarily in the hands of the judiciary—and defense counsel performing their institutional functions within that system.

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rights until the conclusion of the litigation also jeopardizes some of a suspect's other rights. For example, if the threat of fee forfeiture deters private counsel from taking a case, even defendants entitled to appointed counsel will be affected during significant pre-indictment stages—while they are still presumed innocent.

Counsel generally will not be appointed until after indictment, so suspects will not be represented during important investigatory stages and proceedings where other constitutional rights are at stake. For example, defendants typically are not entitled to appointed counsel during grand jury investigations, when fourth and fifth amendment interests may be at stake. *See Reckmeyer*, 631 F. Supp. at 1197 n.3; People v. Ianniello, 235 N.E.2d 439 (N.Y. 1968), *cert. denied*, 393 U.S. 827 (1968). In this context, delaying determination of sixth amendment issues simply fails to protect any interests except the government's.

202. The government regularly employs tactics which place defense counsel and their clients in an untenable limbo, uncertain of whether or not the government will even seek forfeiture in the event of a conviction. *See Badalamenti*, 614 F. Supp. at 195 (government served defense attorney with subpoena seeking information about his client's fees and asserted "it may seek to seize those funds" in the future.); *Ianniello*, 644 F. Supp. at 454 ("The United States Attorney has advised defendants and their counsel that should defendants be convicted of the RICO counts and judgments of forfeiture be obtained against them, the Government might seek to obtain attorneys' fees paid to counsel to satisfy the judgments."). *See also Bassett*, 632 F. Supp. at 1309; *id.* at 1310 ("Although the government has not actually instituted forfeiture proceedings against these lawyers, it has made it clear that it intends to do so.").

203. *See, e.g., Rogers*, 602 F. Supp. at 1350 ("The government would possess the ultimate tactical advantage of being able to exclude competent defense counsel as it chooses.").

204. The Department of Justice undoubtedly has discretion to select the cases in which to seek forfeiture of third party assets and restraining orders. *See* 18 U.S.C. § 1963(m) (1982 & Supp. III 1985) and 21 U.S.C. § 853(m) (1982 & Supp. III 1985). The Department has announced its intention to negotiate the question of exempting fees from forfeiture with defense attorneys on a case-by-case basis, *see* U.S. ATTORNEYS' MANUAL, *supra* note 17, at § 9-111.700, and does in fact enter into agreements in some cases to allow defendants to use property possibly subject to forfeiture. *See, e.g., Ianniello*, 644 F. Supp. at 454.

205. *See* Reckmeyer, 631 F. Supp. at 1197 ("Given the potential for prosecutorial abuse or manipulation, such a veto power over the defendant's choice of counsel in clearly intolerable.").

Government practices that deny individual defendants any legal counsel violate the sixth amendment.[206] This is apparent whether the atomistic model or institutional role theory is applied. While the former prohibits a deprivation of individual rights, the latter also considers the impact of the practice on the ability of defense counsel to perform their institutional functions in the adversary system. Obviously, if defense counsel are absent, they are incapable of performing any role.

The two models may, however, suggest different remedies for problems like the whipsawing of defendants whose assets are not restrained. If our concern is limited to providing counsel for individual defendants, this purpose arguably can be accomplished by appointing a defense lawyer at public expense even where the defendant is technically not indigent. An institutional needs approach suggests, however, that we should also protect other interests, such as the balance of power between the adversaries in the criminal justice system. This latter interest requires the availability of counsel competent to try difficult cases. If allowing fee forfeitures denies defendants any lawyer, the adversary balance is destroyed. To the extent government practices disrupt the balance of adversary power, an institutional needs approach suggests that practices like fee forfeitures must be prohibited in all cases, and not merely accommodated in some.

B. Disrupting the Adversary System By Limiting Defendants' Choice of Counsel

Much of the fee forfeiture debate has focused upon defendants' right to choose their counsel. Nowhere are the two sides in greater disagreement. Often they seem unable even to agree upon the issues in dispute. Nonetheless, the courts ruling directly upon the question have generally accepted the claims of forfeiture opponents. These arguments will, therefore, be presented first.

Critics claim that permitting forfeiture of legitimate attorneys' fees provides the government with a negative and improper power to influence the defendants' choice of counsel. The power is negative because it allows the government to exclude the "best" private sector attorneys from RICO and CCE cases by "channeling" defendants away from them. In its rawest form, the channeling power would allow the government to prevent the most competent defense attorneys from handling these complex cases. "By appending a charge of forfeiture to an indictment under RICO, the prosecutor could exclude those defense counsel

206. Gideon v. Wainwright, 372 U.S. 335 (1963); Argersinger v. Hamlin, 407 U.S. 25 (1972).

which he felt to be skilled adversaries."[207] In many cases the government would have the ability to deprive a defendant, not of some attorney,[208] but of the lawyer the defendant wants most (and perhaps the one the government most fears).

This channeling power could be exercised in a variety of situations. For example, prosecutors might attempt to exclude specific attorneys. If a suspect hires a lawyer to represent him during a grand jury investigation,[209] prosecutors are likely to learn defense counsel's identity prior to indictment, permitting them to weigh the attorney's quality in deciding whether or not to seek an expansive forfeiture of third party assets.[210] Because of the secrecy surrounding grand jury proceedings, and the prosecutors' significant influence over the outcome of these non-adversary proceedings, such an abuse is far from impossible.[211] Similar opportunities for abuse exist even when defense counsel are retained after indictment. Prosecutors would have available to them alternative means of attempting to drive specific defense attorneys from a case. If the wording of the initial indictment is too narrow to encompass the property used to pay fees, prosecutors could return to the grand jury and seek amended or superseding indictments expanding the forfeiture allegations.[212] If a broad forfeiture indictment has already been issued, prosecutors could advise the defense camp of their intention to seek fee forfeiture if conviction is obtained.[213] In each situation, prose-

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207. *Rogers*, 602 F. Supp. at 1350. *See also Reckmeyer*, 631 F. Supp. at 1197 ("Finally, subjecting attorney's fees to forfeiture would give the government the power to decide whether a defendant will be represented by a particular counsel of his own choice.").

208. *See, e.g., Badalamenti*, 614 F. Supp. at 197 ("His right to counsel is not threatened. Like any other defendant without funds, he receives counsel although not counsel of his choice.").

209. *See, e.g., Ianniello*, 644 F. Supp. at 459 (defendants retained counsel prior to indictment, and after indictment defense attorneys spent months in trial preparation); *Rogers*, 602 F. Supp. at 1349-50 (adequate defense of RICO prosecution usually requires representation during the grand jury investigation).

210. The grand jury investigations in complex organized crime cases can be lengthy, "lasting as long as two or three years." *Rogers*, 602 F. Supp. at 1349-50. In many instances targets of these investigations will retain counsel during this pre-indictment period, providing the government with advance notice of the identity of defense counsel. *Id.*

211. *See Rogers*, 602 F. Supp. at 1350, *citing* United States v. Kilpatrick, 594 F. Supp. 1324 (D. Colo. 1984); United States v. Anderson, 577 F. Supp. 223 (D. Wyo. 1983). *See also* Vaira, *The Role of the Prosecutor Inside the Grand Jury Room: Where is the Foul Line?*, 75 J. CRIM. L. & CRIMINOLOGY 1129 (1984); United States v. Samango, 607 F.2d 877 (9th Cir. 1979); United States v. Hogan, 712 F.2d 757 (2d Cir. 1983).

212. *See Reckmeyer*, 631 F. Supp. at 1197 (Improper government power over selection of defense counsel "would follow from its power to add a RICO or drug charge, include a broad list of assets allegedly subject to forfeiture, and inform defense counsel that he is 'on notice.' "); *Rogers*, 602 F. Supp. at 1334.

213. *See Badalamenti*, 614 F. Supp. at 195 (government asserted "it may seek to seize those funds" in the future); Ianniello, 644 F. Supp. at 454 (government advised defendant and defense counsel that in event of forfeiture conviction government might pursue forfeiture of funds paid for fees). *See also Bassett*, 632 F. Supp. at 1309-10 (government announced intent to seek forfeiture upon conviction). *But cf.* U.S. ATTORNEYS' MANUAL, *supra* note 17, at § 9-111.530 (Jus-

cutors possess the discretion to decide whether to exempt fees from forfeiture—and could base the decision upon defense counsel's identity.[214]

As a result of this discretionary power, the government could drive away competent[215] and ethical private counsel,[216] leaving defendants in these cases to seek counsel from one of two unsatisfactory sources. They will be represented either by public defender offices and appointed attorneys[217] lacking the resources necessary to mount a proper defense to a complex RICO or CCE prosecution, or by private counsel undeterred by the threat of financial disaster and the professional proscription against contingency fees in criminal cases. In either scenario the government will have created a significant and unwarranted professional advantage for itself. If our purpose were to assure conviction of those selected by the government for prosecution, this method would be praiseworthy, for such an imbalance of forces makes a successful defense improbable. Of course this is not permissible in our adversary system, and no responsible member of the profession—certainly not the Justice Department—would propose this as a valid goal.

The government's analysis leaves it vulnerable, however, to charges that this is precisely what it intends—to obtain the discretionary power to exclude the "best" lawyers from RICO and CCE cases. This follows from the right of indigent defendants to have counsel appointed. While it is true that the defendant receives something of value, legal representation, in exchange for the payment of fees, the government postulates that defendants will receive comparable value in the form of appointed counsel even if fee forfeitures prevent him from hiring an attorney.[218] According to this argument, forfeiture of fees simply means that a defendant will not be able to select his attorney. Instead, a judge or federal defender's office will make the choice.[219] If this is true, a defendant will receive the "value" of legal representation whether fee forfeitures are allowed or prohibited.[220]

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tice Department has halted prior practice of sending "Notification Letters" to attorneys as means of attempting to establish attorneys' actual notice of forfeitability of assets).

214. *See* U.S. ATTORNEYS' MANUAL, *supra* note 17, at § 9-111.700.

215. *See supra* notes 203, 204 and 213 and *infra* notes 222-30 and accompanying text.

216. *See infra* notes 231-33, 302-12 and accompanying text.

217. *See, e.g., Badalamenti*, 614 F. Supp. at 197 (defendant whose money has been seized "can make out an affidavit of indigency and obtain appointed counsel under the Criminal Justice Act.")

218. U.S. ATTORNEYS' MANUAL, *supra* note 17, at § 9-111.210, *citing* United States v. Bello, 470 F. Supp. 723, 725 (S.D.Cal. 1979) ("the . . . restraining order does not deprive [the defendant] of counsel, but only of the attorney of his choice. [He] will still be entitled to court-appointed counsel, if he has no means to hire an attorney.").

219. *See supra* note 172 and accompanying text.

220. The Justice Department contends that exempting defense attorneys' fees from forfeiture would defeat Congress' intent by allowing defendants to "shelter" their assets by transfer-

In either case the result for the convicted defendant is the same. He receives legal representation, and someone else, either defense counsel or the government, gets the assets. This is perhaps most apparent in cases where the courts allow the transfer of forfeitable assets to the public coffers, from which the fees of defendants' appointed counsel are paid.[221] In either situation defendants are deprived of their assets yet receive an attorney. This suggests that the government should be indifferent to the identity of the recipient of the assets, unless it wishes to have the power to exclude the "best" advocates from representing these defendants. This possibility deserves attention because of the questionable adequacy of the alternative sources of representation available to RICO and CCE defendants.

Even if there are no improper government attempts to exclude specific attorneys from these cases, fee forfeitures may still preclude the "best" attorneys from undertaking representation. If legitimate attorneys' fees are forfeitable, arguably the threat of forfeiture creates a functional (if not literal) indigency which could force defendants[222] to attempt to obtain, and to rely upon, appointed counsel.[223] The harsh reality is that appointed counsel is probably inadequate for lengthy and complex RICO and CCE cases. Public defender offices already lack the human and material resources necessary to battle the Justice Department in these cases,[224] and these resources are certain to become even

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ring them to their lawyers. This argument seems persuasive only if one presumes that all such transactions are shams and the assets will ultimately be returned to the client. *See Committee on the Judiciary, supra* note 21, at 25 (statement of Stephen S. Trott, Ass't Attorney General, Crim. Div.). *See also* U.S. ATTORNEYS' MANUAL, *supra* note 17, at § 9-111.220. To the extent a racketeer is deprived of the fruits of his crimes whether by an asset forfeiture or payment of defense fees and costs, the statutory purpose is accomplished.

221. *See* United States v. Figueroa, 645 F. Supp. 453 (W.D. Pa. 1986) (court held that court-appointed counsel could be compensated from defendant's assets under CCE restraining order).

222. *See Ianniello*, 644 F. Supp. at 456 ("defendants in RICO actions would find it difficult, if not impossible, to seeure representation if attorneys' fees were forfeitable."); *Bassett*, 632 F. Supp. at 1316 (practical effect of relation-back doctrine is felt prior to conviction, deterring private counsel from undertaking representation); *Reckmeyer*, 631 F. Supp. at 1196 (government view of relation-back mechanism "will deprive a defendant of counsel of choice no less effectively than if the government simply prohibited a defendant from hiring a lawyer.")

223. The Criminal Justicc Act authorizes appointment of counsel for a person "financially unable to obtain adequate representation." 18 U.S.C. § 3006A(a) (1982 & Supp. III 1985). To apply for appointed counsel as an indigent, a defendant must swear under oath, by affidavit or oral testimony, that she or he is financially unable to obtain counsel. *Id.*

224. *See Rogers*, 602 F. Supp. at 1349 ("The costs of mounting a defense of an indictment under RICO are far beyond the resources or expertise of the average federal public defender's office which is already over taxed."). It appears that federal defenders agree with the conclusion that they lack the resources to represent RICO and CCE defendants. *See Committee on Judiciary, supra* note 21, at 228 (1986) (statement of Edward Marek, Federal Defender N.D. Ohio and Federal Legislative Subeommittee, on Behalf of the Federal Public Defenders and Federal Community Defenders).

scarcer as the Gramm-Rudman budget restraints[225] are implemented.[226] Federal defenders' offices simply cannot marshal the wherewithal required to counter the human and financial resources the Justice Department devotes to these complex cases.

A more complex set of problems arises when federal defenders are unavailable and private counsel is appointed under the Criminal Justice Act.[227] This may be necessary because the judicial district lacks a defenders' office, or because real or potential conflicts of interest among multiple defendants require that a single public defenders' office may not represent them all.[228] Unfortunately, appointed counsel may be even less capable than full-time defenders' offices at mounting a defense in these difficult cases.

The minimal compensation awarded appointed counsel under the Criminal Justice Act[229] virtually guarantees that the most competent attorneys will refuse appointment in complex criminal entity prosecutions brought under the RICO and CCE statutes. The penurious funds paid to appointed counsel will be insufficient to induce sophisticated and experienced attorneys, who command much greater fees, to undertake representation in these cases, let alone to fund the additional expenses of hiring investigators and experts, and of undertaking pre-trial discovery. As a result, the only private sector attorneys willing to accept appointment in lengthy RICO and CCE cases likely will be those of

225. The Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. 99-177, 99 Stat. 1038 2 U.S.C. § 901 et. seq. (Supp. 1986), seems likely to survive the Supreme Court's decision in Bowsher v. Synar, 106 S. Ct. 3181 (1986). *See, e.g.*, N.Y. Times, Aug. 13, 1986, at A20, col. 1.

226. *See Committee on the Judiciary, supra* note 21, at 91 (statement of Elliott Richardson and William Taylor on behalf of the Amer. Bar Assoc.); *see also id.* at 235-38 (statement of Edward Marek on behalf of the Federal Public Defenders and Federal Community Defenders).

227. 18 U.S.C. § 3006A (1982) (1982 & Supp. III 1985).

228. *See* Cuyler v. Sullivan, 446 U.S. 335 (1980) (conflicts produced by representation of multiple defendants); Holloway v. Arkansas, 435 U.S. 475 (1978); Dukes v. Warden, 406 U.S. 250 (1972).

229. The Criminal Justice Act, 18 U.S.C. § 3006A(d) (1982) establishes ceilings for fees paid to appointed counsel, ceilings far below the amounts typically earned by skilled defense attorneys. The statute commands that compensation shall not exceed $60 per hour for time in court and $40 per hour for time "reasonably expended out of court." 18 U.S.C. § 3006A(d)(1) (Supp. III 1985). The statute also limits the total compensation per attorney in a case to $2,000 for felony cases and $800 for misdemeanors. 18 U.S.C. § 3006A(d)(2) (Supp. III 1985). The hourly fees and maximum compensation allowable under this statute were doubled in 1984. Pub. L. 98-473, Title II, § 1901, 98 Stat. 2067, 2185, 2186 (1984). Additional increases in the near future therefore are unlikely. The statute permits waiver of these maximum amounts in complex cases. 18 U.S.C. § 3006A(d)(3) (1982). It also authorizes the court to authorize payment for "investigative, expert, or other services necessary for an adequate defense," 18 U.S.C. § 3006A(e)(1), but limits the maximum of any payment to $300. 18 U.S.C. § 3006A(e)(1) and (3) (1982). These amounts are facially inadequate to pay the costs of the defense of a complex case. *See Estevez*, 645 F. Supp. at 871 ("fees above the statutory limit can be paid; realistically, however, the hourly rates paid are low, and the fee paid under the Act will in all probability not be adequate compensation for the defense.").

such limited experience or ability that they are willing to work for fees which are niggardly for complicated cases.[230] It is questionable whether these members of the profession will be able to mount the adequate defense the Constitution promises defendants.

The other possible source of representation for RICO and CCE defendants are those attorneys willing to represent defendants in criminal cases even if fees are forfeitable upon conviction. These are lawyers willing to wager a potentially large fee against the outcome of the case. In other words, they are lawyers willing to ignore the profession's rules proscribing contingent fees in criminal cases.[231] Critics argue it is doubtful that these attorneys, whatever their motivations, can ultimately fulfill the constitutional duties owed to their clients. As one court has noted, any "lawyer who was so foolish, ignorant, beholden or idealistic as to take the business would find himself in inevitable positions of conflict"[232] with the clients' rights and interests. Conflicting pressures generated by contingent fees may prevent adequate representation, and help explain the rule prohibiting such fees.[233] Society is poorly served if we turn the defense of the most complex criminal cases over to those so lacking in common sense or scruples they are undeterred by the ethical rules of the profession.

In summary, forfeiture opponents have argued, and the federal trial courts generally have agreed, that this channeling power could allow the government to force the most competent attorneys out of RICO and CCE cases, and often deprive defendants of the assets necessary to maintain an effective defense.[234] As a result, permitting fee forfeitures would supply the government with leverage sufficient to disrupt the balance of power between adversaries in the criminal justice system. The government would be able to insure—at its discretion—that the defense of these cases will be left in the hands of those lacking the resources, ability, experience, or the ethics to do an adequate job. This would be simply intolerable, for it would ultimately "undermine the

230. *See Reckmeyer*, 631 F. Supp. at 1197 ("It is further doubtful that any member of the private bar could afford to take on a complex RICO or CCE case under the Criminal Justice Aet, since the Act places limits on the amount which can be paid in attorney's fees." (footnote omitted)).

231. *See infra* notes 302-12 and accompanying text.

232. *Badalamenti*, 614 F. Supp. at 196.

233. *See infra* notes 302-12 and accompanying text.

234. When the issues are viewed from an institutional needs perspective, it becomes apparent that the government's argument that a defendant should not be able to "shelter his ill-gotten gains by paying them to his lawyer," *Rogers*, 602 F. Supp. at 1349, misperceives the issue. The controlling principle is the defendant's right to effective assistance of counsel, independent of government influence, which is guaranteed by the sixth amendment. *See Committee on the Judiciary, supra* note 21, at 91 (statement of Elliott Richardson and William Taylor on behalf of the Amer. Bar Assoc.) (representing defendants in complex RICO and CCE cases "usually requires a level of experience not available among appointed counsel.").

adversary system itself, by producing an imbalance of powers[235] that would violate the due process clause of the Fifth Amendment"[236] and the right to counsel guarantee of the sixth amendment. The adversary criminal justice system simply cannot function properly if the government can exercise such power over defendants' choice of counsel.[237]

This analysis is consistent with a theoretical approach utilizing an institutional model for determining the scope of sixth amendment rights. If fee forfeitures permit the government to exclude the "best" lawyers from representing these defendants, and thereby disrupt the necessary processes of the criminal justice system, the forfeiture system is unconstitutional although the rights of some defendants arguably could be protected in individual cases by appointment of counsel.

The government, on the other hand, champions a much narrower view of the interests at stake and the rights protected by the sixth amendment. It contends that the channeling theory rests on a presumption of rights greater than the sixth amendment provides. The Justice Department begins by defining the issues differently, disagreeing with the courts which have ruled that fee forfeitures threaten improper government influence over defendants' choice of counsel and a resulting disruption of the balance of power in the adversary system.[238] The government claims that the issues are resolved by the rule that defendants

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235. *See Bassett*, 632 F. Supp. at 1317, *quoting Rogers*, 602 F. Supp. at 1350 (fee forfeitures would pose "a serious threat to the adversary process" by providing the government with the "ultimate tactical advantage of being able to exclude competent defense counsel as it chooses.").

236. *Reckmeyer*, 631 F. Supp. at 1197, *citing* Wardius v. Oregon, 412 U.S. 470, 474 (1973) (due process requires "balance of forces between the accused and the accuser") *and* Grandy v. Alabama, 569 F. 2d 1318, 1321 (5th Cir. 1978) (due process protects defendant's "fair opportunity to be represented by counsel of his own choice").

237. Due process concepts provide an alternative model for exploring this problem. *See, e.g.*, Thier, 801 F.2d at 1475-77 (Rubin, J., concurring) (suggesting that due process forbids forfeiture of legitimate defense attorney's fees and limits the scope of pre-conviction restraining orders). An inescapable linkage exists between due process concepts and the right to counsel. *See* Powell v. Alabama, 287 U.S. 45 (1932) (defendants' right to counsel guaranteed by due process); Gideon v. Wainwright, 372 U.S. 335 (1963) (sixth amendment right to counsel a fundamental right imposed upon the states by the due process clause of the fourteenth amendment); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (due process may require counsel in parole and probation revocation proceedings); *Cronic*, 466 U.S. at 658 (right to counsel protected because of effect on right to a fair trial). It is equally clear that although these constitutional provisions may overlap, due process and sixth amendment rights are distinct. The scope of due process protections encompasses values and rights separate from the right to counsel. *See Strickland*, 466 U.S. at 684-85 ("The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause. . . ."). The fee forfeiture case law and the institutional role model presented in this Article demonstrate that sixth amendment principles, standing alone, are sufficient to resolve these issues.

238. For example, the Department claims that the decisions of the courts in *Rogers, Badalamenti* and *Ianniello* "are incorrect." U.S. ATTORNEYS' MANUAL, *supra* note 17, at § 9-111.210. One can reasonably assume that it would argue the same about the results in the more recent court opinions, such as *Bassett* and *Reckmeyer*, handed down since publication of the Guidelines.

only have a qualified right to choose defense counsel,[239] which should not permit them to shelter forfeitable assets by paying attorneys' fees.[240]

The Justice Department is correct in its initial premise. Although it is guaranteed by the sixth amendment, defendants possess only a qualified right to select either retained or appointed counsel.[241] They have no absolute right to select their attorneys, and this qualified right can be infringed upon to satisfy a compelling need to assure the "prompt, effective and efficient administration of justice."[242] Once the government applies these general rules to the forfeiture of legitimate attorneys' fees, however, its arguments seem less compelling than those of its critics.

For example, the government asserts that since the right to choose counsel is only a qualified one, when the threat of forfeiture prevents defendants from hiring the lawyers of their choice some counsel will be appointed, which is all the sixth amendment requires.[243] Even if we ignore the cases in which the whipsawing principle might preclude appointment of counsel,[244] this does nothing to assuage fears that the channeling power will be used to exclude the best attorneys from these cases, leaving the defense to attorneys lacking the resources, ability, experience, and perhaps the professional ethics necessary for effective representation. The government must address this problem, for although the right to choose counsel is a qualified one, defendants cannot be

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239. U.S. ATTORNEYS' MANUAL, *supra* note 17, at § 9-111.210.

240. *See Committee on the Judiciary, supra* note 21, at 24-25 (statement of Stephen S. Trott, Ass't Attorney General, Crim. Div.).

241. United States v. Thier, 801 F.2d 1463, 1471 (5th Cir. 1986); Urquhart v. Lockhart, 726 F.2d 1316, 1319 (8th Cir. 1984); Linton v. Perini, 656 F.2d 207, 209 (6th Cir. 1981), *cert. denied*, 454 U.S. 1162 (1982); United States v. LaMonte, 684 F.2d 673, 673 (10th Cir. 1982); United States v. Cicale, 691 F.2d 95, 106-07 (2d Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983); United States v. Curcio, 694 F.2d 14, 22-23 (2d Cir. 1982); United States v. Cunningham, 672 F.2d 1069, 1070 (2d Cir. 1979); United States v. Burton, 584 F.2d 485, 488-89 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979); United States v. Inman, 483 F.2d 738, 739-40 (4th Cir. 1973), *cert. denied*, 416 U.S. 988 (1974); *Ianniello*, 644 F. Supp. at 456; *Bassett*, 632 F. Supp. at 1316; *Rogers*, 602 F. Supp. at 1348. *See also*, Note, *Attorney Fee Forfeiture*, 86 COLUM. L. REV. 1021, 1036-37 (1986) (discussing balancing of factors method utilized by some courts in choice of counsel cases involving requests for continuances).

242. United States v. Burton, 584 F.2d 485, 489 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979); United States v. Phillips, 699 F.2d 798, 801-02 (6th Cir. 1983); *Ianniello*, 644 F. Supp. at 456. It is noteworthy that the issue of a "qualified" right to choose counsel typically arises in cases in which the defendant is seeking a continuance, a circumstance which involves interests very different from those arising in the fee forfeiture context. *See Harvey*, slip op. at 41. Improper interference with the right to choose counsel may generate a presumption of prejudice, entitling defendants to automatic relief. *See id.* at 49 n.10, and cases cited therein.

243. U.S. ATTORNEYS' MANUAL, *supra* note 17, at § 9-111.210 ("A defendant who is effectively rendered indigent . . . is entitled to appointed counsel.").

244. *See supra* notes 163-207 and aecompanying text.

forced to accept inadequate representation,[245] which critics claim would be the result if fee forfeitures were allowed.[246]

Similarly, although the right to select counsel is not absolute, it is guaranteed to defendants who can afford it,[247] and cannot be infringed except where necessary to ensure the "prompt, effective and efficient administration of justice."[248] This assumes the defendant possesses sufficient assets to retain counsel, but if he does, the right to make that choice may be infringed only to advance the needs of justice. The fee forfeiture cases raise both issues.

For example, the Justice Department argues that under these statutes defendants have no right to utilize the assets for which it seeks forfeiture to hire defense counsel. Since title to forfeited assets passes to the government upon conviction,[249] and relates back to the time of the illegal acts justifying the forfeiture, the defendants could not convey title they did not possess.[250] Although the threat of forfeiture may well preclude defendants from using their assets to hire defense attorneys, no violation of their rights has occurred.[251]

The defect in this analysis is apparent. It allows the potential forfeiture of assets to interfere with defendants' sixth amendment right to choose counsel prior to conviction while innocence is still presumed.[252]

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245. Strickland v. Washington, 466 U.S. 668 (1984); United States v. Cronic, 466 U.S. 648 (1984).

246. *See, e.g.*, United States v. Thier, 801 F.2d at 1476 (Rubin, J., concurring):

> Due process also requires the appointment of counsel for every indigent person accused of a crime, but courts appoint lawyers of average competence who typically have little experience in complex cases. No one would wish to be represented by appointed counsel in a case of this nature. Preparation for trial can be expected to require months of work. This defendant, made indigent by government action, should not be dependent on the list of those available for routine cases. The tool of the restraining order . . . gives the Government the power to exclude vigorous and specialized defense counsel.

247. *See* United States v. Inman, 483 F. 2d 738 (4th Cir. 1973), *cert. denied*, 416 U.S. 988 (1974) (sixth amendment protects defendant's right to have reasonable opportunity to obtain and choose counsel where defendant has resources to do so); United States v. Curcio, 694 F.2d 14, 22-23 (2d Cir. 1982); United States v. Cunningham, 672 F.2d 1069, 1070 (2d Cir. 1979); *Bassett*, 632 F. Supp. at 1316; *Reckmeyer*, 631 F. Supp. at 1196.

248. United States v. Burton, 584 F.2d 485, 489 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979); United States v. Phillips, 699 F.2d 798, 801-02 (6th Cir. 1983); *Ianniello*, 644 F. Supp. at 456.

249. *See Committee on the Judiciary, supra* note 21, at 26 (statement of Stephen S. Trott, Ass't Attorney General, Crim. Div.) ("The fact is that a defendant is divested of any title he may have to forfeitable assets when he is convicted and title passes to the government.").

250. *See id.* ("the relation-back doctrine means that a defendant is not just divested of his interest, but that he never acquires any interest in such property.").

251. *See id.* at 27 ("It is true that this warning may cause some lawyers to decline to represent a CCE or RICO defendant. But this does not result from any unfounded government action since the fee cannot be forfeited absent proof that it is in fact from tainted funds."); *see also, Harvey*, slip op. at 48 (preceding government argument "borders on sophistry").

252. *See Thier*, 801 F.2d at 1476 (Rubin, J., concurring) ("The government, however, has no right to the property to which Thier now has legal title unless it establishes both his guilt . . . and

The government argues that this is acceptable for three reasons. First, a person without a legitimate source of income is not entitled to retain counsel of his choice.[253] Second, the relation back device vests title in the government at the time of the criminal act, so technically it is not even the defendant's property. Third, disallowing fee forfeitures would permit a defendant to "shelter his ill-gotten gains by paying them to his lawyer."[254]

Each of these government arguments is based upon a fallacious premise. Each ignores the fact that prior to a conviction defendants' funds:

> cannot be ineluctably considered proceeds of criminal activity, because they have not yet been convicted of this crime. Although the 'relation back' aspect of the forfeiture statute is only triggered by conviction, the practical effect is that if forfeiture is applied to attorneys' fees the true impact is felt prior to conviction.[255]

The government simply ignores this problem, arguing instead "that forfeiture will be denied if the money is clean."[256] This approach would authorize intrusion upon sixth amendment rights, as well as the interests of third parties, by jettisoning the most basic premise of our adversary system: that a person is presumed innocent until proven guilty.[257]

It appears that even under an "atomistic" approach to defining sixth amendment rights, the government's argument that the assets of an innocent defendant will ultimately remain free from forfeiture "is true, but irrelevant. The right to counsel belongs to guilty defendants as well as innocent ones."[258] Statutory fictions that make a prior title to property vanish upon conviction arguably should not be used to deny defendants the right to use those assets (to which they still own title) to hire the lawyers of their choice.

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the fact that the property it seeks to forfeit has been derived from criminal activity. Whether it can do so remains to be seen." (footnote omitted)).

253. U.S. ATTORNEYS' MANUAL, *supra* note 17, at § 9-111.210 (qualified right to choose counsel does not include "the right to use the proceeds of criminal activity to obtain counsel to defend against charges arising from that very criminal activity."); *see also Bassett*, 632 F. Supp. at 1316.

254. *Rogers*, 602 F. Supp. at 1349; *see also*, U.S. ATTORNEYS' MANUAL, *supra* note 17, at § 9-111.220. It appears that permitting forfeiture of attorneys' fees is not necessary to effectuate the statutory purpose of depriving convicted racketeers and drug dealers of the profits of their crimes. *See supra* notes 145-49, 220 and accompanying text.

255. *Bassett*, 632 F. Supp. at 1316.

256. *Badalamenti*, 614 F. Supp. at 198.

257. *See supra* notes 94-95 and accompanying text.

258. *Badalamenti*, 614 F. Supp. at 198. *See also Harvey*, slip op. at 48 ("the sixth amendment guarantee applies equally to the guilty and the innocent.").

Once again the institutional role model provides an even clearer answer to this dilemma. It demonstrates that allowing the government to deny defendants the use of their assets to retain counsel prior to conviction leads to a distortion of the "balance of forces between the accused and his accuser"[259] essential to due process. This would violate the commands of the sixth amendment as well, for it would allow the government to influence one of an accused's most fundamental choices—the selection of the person to defend him against the state. At the same time, the use of fee forfeitures would distort the interests protected by the sixth amendment by allowing the government to exclude the most competent attorneys from performing their institutional roles in these cases.

Allowing fee forfeitures also would not promote the prompt and efficient administration of justice. Government attempts to obtain the forfeiture of legitimate fees produces the opposite result. Forfeiture attempts generate additional motions, hearings, and delays as defendants, their attorneys, and the government argue the forfeiture issues before, during and after trial. Allowing fee forfeitures only burdens the courts with a new universe of litigation issues distinct from the substantive merits of each case. The net result is that "[s]ubjecting attorney's fees to forfeiture is more likely to impede, rather than advance, the orderly administration of justice."[260] In short, permitting fee forfeitures serves none of the values embodied in the qualified right to choose counsel.

The Justice Department supplements its statutory analysis of the impact of forfeitures on the right to choose counsel by arguing that moral concepts preclude defense attorneys from accepting fees produced by illegal conduct. It argues that exempting attorneys' fees from the criminal forfeiture statutes "amounts to arguing that the qualified right to counsel of choice includes the right to use the proceeds of criminal activity to obtain counsel to defend against charges arising from that very criminal activity."[261] The Department has argued that "it is important to emphasize why, from moral and practical standpoints,"[262] attorneys' fees should not be exempted. In explaining its position, the Department asserts that "[t]he idea that an attorney can knowingly accept and keep drug proceeds also affronts our basic concept of what is right and just."[263]

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259. Wardius v. Oregon, 412 U.S. 470, 474 (1973).

260. *Reckmeyer*, 631 F. Supp. at 1196.

261. U.S. ATTORNEYS' MANUAL, *supra* note 17, at § 9-111.210.

262. *Committee on the Judiciary, supra* note 21, at 23 (statement of Stephen S. Trott, Ass't Attorney General, Crim. Div.).

263. *Id. But see Harvey*, slip op. at 44 (guilty defendants' use of proceeds of crimes to pay defense attorneys' fees "is a traditional working assumption within the legal profession").

This argument seems persuasive at first glance. Certainly many of us might be morally offended by the thought of others enriching themselves with the proceeds of illegal activities. But this formulation misapprehends the issues at stake. Constitutional rights are not properly defined by the moral views of the executive branch.[264] The correct question is whether forfeiture of legitimate attorneys' fees interferes with defendants' qualified but protected right to choose and hire attorneys, and intrudes upon the ability of these lawyers to represent their clients.

Even so, the ethical issues are much more complex than the Justice Department's analysis suggests. To date, even the ethical arbiters of the profession have failed to reach a conclusive answer to this question.[265] This does not mean, however, that answers consistent with the ethical rules of the profession are unavailable. Attorneys who accept fees knowing or believing that they are the proceeds of criminal activity may indeed be morally insensitive. Although some in that position may justify accepting such payments by arguing that they cannot "know" the source of property, particularly in the face of client denials, this "moral" perspective misconstrues the issue. When the attorney represents a criminal defendant, the institutional commands of the sixth amendment and the ethical rules of the profession legitimize representation even in this difficult moral situation. This follows because even guilty defendants are entitled to a lawyer.[266] To argue that an attorney's knowledge of criminality precludes acceptance of a fee would mean that only attorney philanthropists or publicly appointed and compensated lawyers could ever represent those who earn a living at crime. Such a rule is unprecedented, and has little to recommend it, either from an institutional or a practical view.

The Justice Department poses a hypothetical to reinforce its position. It argues that a defendant accused of car theft could not pay attorney's fees with the stolen car because the rightful owner is entitled to its return. The Department argues that "[t]he only difference" in a RICO or CCE fee forfeiture setting is that "the recovered money goes to the government rather than the particular victim."[267] The differences are, in fact, significant. Title to the car belongs to the legal owner at all times. She is entitled to possession of it. In the forfeiture setting title can

264. This verity is most obvious in the issues arising under the first amendment. The moral views of the executive branch cannot be used to deny rights protected by the first amendment. *See, e.g.*, Stanley v. Georgia, 394 U.S. 557, 565-66 (1969).

265. *See* ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT, at 55:905 (1986).

266. Gideon v. Wainwright, 372 U.S. 335 (1963); Argersinger v. Hamlin, 407 U.S. 25 (1972); *Badalamenti*, 614 F. Supp. at 198.

267. *Committee on the Judiciary, supra* note 21, at 24 (statement of Stephen S. Trott, Ass't Attorney General, Crim. Div.).

pass to the government only at the end of the litigation and if there is a conviction. Therefore, entitlement to possession and ownership of the property is more ambiguous in fee forfeiture settings where the government is pursuing the alleged proceeds of criminality, such as cash.

Similarly, ambiguity attaches to the nature of the property used to pay the fee. Since the automobile constitutes—in unmistakable form—both the direct fruits and direct evidence of the robbery, the attorney likely has an ethical duty to convey it, along with any instrumentalities of the crime, to the authorities.[268] Assets not bearing unmistakable indicia which mark them as the direct fruits or instrumentalities of a crime may deserve different treatment when conveyed to an attorney to pay fees. This is particularly true if client assurances of the legitimacy of an asset are sufficient to ensure that an attorney lacks notice that it derives from a criminal source.[269]

Although an attorney can never ethically use his position to assist a client in committing future crimes, the profession imposes different duties concerning past crimes.[270] Thus, even where an attorney learns of his client's past criminality, he must generally preserve that information as confidential and is entitled to provide representation, so long as he does not thereby knowingly assist in future crimes.[271] If he does the latter, the government is entitled to investigate, prosecute and convict the attorney along with the client. The profession's ethical rules suggest, however, that within these limits, an attorney may properly defend that client. In fact, pursuing fee forfeitures may present greater professional ethics problems for prosecutors than for defense counsel.[272]

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268. *See, e.g.*, State v. Green, No. 86-K-0197 (La. Sup. Ct. Sept. 8, 1986) (citing MODEL CODE DR 1-102(A)(5) and DR 7-102(A)(3),(7) for the rule that an attorney has an ethical duty to turn over to authorities pistol which was instrumentality of murder, but source of attorney's information about evidence protected within attorney-client privilege and inadmissible to link defendant to gun); *In re* January 1976 Grand Jury, 534 F.2d 719 (7th Cir. 1976); *In re* Ryder, 381 F.2d 713 (4th Cir. 1967).

269. *See infra* notes 283-92 and accompanying text.

270. *See, e.g.*, MODEL CODE DR 4-101; DR 7-102(7); MODEL RULES Rule 1.2(d),(e); Rule 1.6.

271. MODEL CODE DR 4-101; DR 7-102(7); MODEL RULES Rule 1.2(d), (e); Rule 1.6.

272. Unlike defense attorneys, who fulfill their dual duties to client and justice system by advancing the client's individual cause, *see* STANDARDS FOR CRIMINAL JUSTICE, Chapter 4, 4-1.1(b) (1979) ("The basic duty the lawyer for the accused owes to the administration of justice is to serve as the accused's counselor and advocate. . . ."), prosecutors have a different but equally complex set of institutional roles. While serving as the legal representatives of an adverse party in criminal cases—the state—the prosecutor's special burden is to seek justice, not merely to convict. *See* Berger v. United States, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative . . . of a Sovereignty whose . . . interest . . . is . . . that justice shall be done."); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 ("The responsibility of a public prosecutor differs from that of the ususal advocate; his duty is to seek justice, not merely to convict."); *see also* MODEL RULES Canon 5. This requires prosecutors to avoid any abuse of government power which would weaken the adversary system or the ability of defense attorneys to represent their clients. *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1218 (1958). For example, only

Nonetheless, a substantial moral dilemma may face a defense attorney who learns facts indicating both the client's guilt and that fees are to be paid from the proceeds of illegal behavior. Ultimately, the only answer to this difficult problem may be that everyone, including the guilty, is entitled to a defense, and counsel has a duty to maintain client confidences and pursue zealous representation concerning past crimes.[273] After all, it is the function of the jury and judge, not the attorney, to decide issues of guilt and innocence. It is precisely defense counsel's institutional role in the justice system which may allow counsel to undertake this representation and to accept compensation possibly derived from illegal activity.

In spite of the ethical issues raised by these cases, the institutional role model suggests a clear answer to the choice of counsel problem. By providing the government with unprecedented power to deprive defendants of retained counsel of their choice, the forfeiture of legitimate attorneys' fees would disrupt the essential balance of power between adversaries in the criminal justice system. This would violate the fundamental values and commands of the sixth amendment.

C. Disrupting the Adversary System by Depriving Defendants of Effective Legal Representation

Even if a RICO or CCE defendant is able to hire a private attorney,[274] critics claim that the onus of a potential fee forfeiture can poison the attorney-client relationship and prevent defendants from receiving the effective representation which is their unqualified right. The threat of forfeiture accomplishes this largely by creating pecuniary conflicts of interest between the attorney and client.[275]

This argument postulates that the economic and evidentiary impact of the third party forfeiture procedures produces a "chilling effect" upon communications between the parties to the attorney-client rela-

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the prosecutor has a constitutional duty to disclose to the adverse party information that will help the adversary's cause. Brady v. Maryland, 373 U.S. 83 (1963); *see also* 18 U.S.C. § 3500 (1982). Prosecutors arguably would violate this public trust by advocating policies which would interfere with defense attorneys' independence from government influence. If allowing fee forfeitures would provide prosecutors undue influence over defense attorneys, they should not advocate this policy.

273. *Cf.* MODEL CODE DR 4-101, DR 7-101, DR 7-102, EC 7-5.

274. A RICO or CCE defendant may retain sufficient assets to hire counsel. This would occur in cases where the government does not pursue forfeiture at all, or only for some of a defendant's assets. *See, e.g.*, U.S. ATTORNEYS' MANUAL, *supra* note 17, at § 9-111.210; *Harvey*, slip op. at 50-52.

275. *See Reckmeyer*, 631 F. Supp. at 1197 ("As the court stated in *Badalamenti*, the denial of choice of counsel is only the beginning of the problems that the government's position would raise."). *Id.* ("The many conflicts of interest created by the attorney having a pecuniary interest in the outcome of a criminal case would almost certainly deny the defendant his unqualified right to effective assistance of counsel.") (citations omitted).

tionship.[276] This chilling effect occurs because statutory procedures may force defense attorneys to become witnesses and divulge information confided by their clients. Both the RICO and CCE statutes require third parties to demonstrate by a preponderance of the evidence that their interests take priority over the government's to avoid forfeiture verdicts against the defendant.[277] Forfeiture opponents argue that fear of disclosures compelled by these procedures will inevitably restrict the flow of information between attorneys and clients.

The Justice Department apparently does not dispute the possibility of such a chilling effect. Rather, it argues that the policies it has adopted will minimize the dangers of this occurring and that the information it seeks is not privileged, and therefore is discoverable. It stresses that "we will not rely upon any compelled disclosures of confidential communications made during the representation in order to meet the actual knowledge requirement. In this regard, our guidelines also alleviate the likelihood that an attorney will face any dilemma between maintaining confidences and protecting his fee."[278] Questions remain, however, about the effectiveness of these mechanisms at protecting the necessary flow of information between attorney and client.

For example, the Justice Department does not consider certain important information learned by attorneys about client finances as privileged. Under the Guidelines, therefore, this information would be discoverable—and arguably could be compelled from attorneys seeking to establish their right to fees otherwise forfeited to the government.[279] As a general rule, the attorney-client privilege does not encompass information relating solely to payment of fees,[280] although some courts have devised exceptions to this rule to accommodate the needs of the attorney-client relationship.[281] Regardless of the scope of the attorney-cli-

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276. *See, e.g., Rogers*, 602 F. Supp. at 1348-49.

277. Both statutes force third parties to await a post-conviction hearing to assert their interests. *See* 18 U.S.C. § 1963(m) (Supp. III 1985); 21 U.S.C. § 853(n) (Supp. III 1985).

278. *Committee on the Judiciary, supra* note 21, at 30 (statement of Stephen S. Trott, Ass't Attorney General, Crim. Div.); *see also* U.S. ATTORNEYS' MANUAL, *supra* note 17, at § 9-111.610.

279. *See* U.S. ATTORNEYS' MANUAL, *supra* note 17, at § 9-111.620 ("The requirements that the information be non-privileged and relevant can be satisfied when the subpoena calls for fee information.").

280. *See, e.g., In re* Shargel, 742 F.2d 61 (2d Cir. 1984); *In re* Jan. 1976 Grand Jury (Genson), 534 F.2d 719 (7th Cir. 1976); United States v. Haddad, 527 F.2d 537 (6th Cir. 1975), *cert. denied*, 425 U.S. 974 (1976); *see also* U.S. ATTORNEYS' MANUAL, *supra* note 17, at § 9-111.620 and cases cited therein.

281. *See, e.g.*, United States v. Hodge & Zweig, 548 F.2d 1347, 1353 (9th Cir. 1977) (exception applies where strong probability that disclosure of such information would implicate client in the very criminal activity for which legal advice sought); *accord In re* Special Grand Jury (Harvey), 676 F.2d 1005, 1009 (4th Cir. 1982), *vacated & withdrawn*, 697 F.2d 112 (4th Cir. 1982 (en banc); Peirce and Colamarino, *Defense Counsel as a Witness for the Prosecution; Curbing the Practice of Issuing Grand Jury Subpoenas to Counsel for Targets of Investigations*, 36 HASTINGS L.J. 821, 854-56 (1985).

ent privilege concerning fee information, it appears that in the context of RICO and CCE forfeiture actions, sixth amendment interests are implicated by forced disclosure of such information by attorneys seeking to preserve their earned fees.

The nature of the disclosure required "would provide for inquiry into the attorney's knowledge about the scope and source of the defendant's assets."[282] Since these are facts which the government must discover and prove to prevail in RICO and CCE prosecutions, arguably both clients and attorneys will be concerned that this information might be obtained from the attorney and used against the defendant in the instant or subsequent proceedings.[283] Defendants may justifiably fear that their lawyers will be forced to reveal confidential communications concerning the defendants' activities and assets, and therefore will not confide important information to their attorneys.[284]

The Justice Department position would force attorneys to make precisely those disclosures. The Department contends that the RICO statute permits forfeiture of attorneys' fees "unless an attorney has specific knowledge that his fees are derived from assets separate and distinct from assets identified in the indictment as potentially forfeitable,"[285] and can avoid forfeiture only where he can "demonstrate that the fees were derived from isolated assets unrelated to the criminal ac-

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282. *Rogers*, 602 F. Supp. at 1349.

283. *See id.* The general rule is that information relating only to client identity and the payment of fees is not privileged, although such information may be protected by the attorney-client privilege where disclosure would implicate the client in criminal activity. *See supra* notes 279-82; *see also In re* Grand Jury Investigation, 631 F.2d 17, 19 (3d Cir. 1980), *cert. denied*, 449 U.S. 1083 (1981); *Rogers*, 602 F.Supp. at 1349; Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960); Tillotson v. Boughner, 350 F.2d 663 (7th Cir. 1965); *In re* Grand Jury Proceedings (Jones), 517 F.2d 666 (5th Cir. 1975).

Such a disclosure may also intrude upon issues protected by the attorney-client privilege. Although the profession explicitly authorizes lawyers to forsake the privilege where necessary to provide evidence in proceedings where fees are in dispute, *see* MODEL CODE DR 4-101(c)(4); MODEL RULES Rule 1.6(b)(2), this exception to the privilege typically applies to fee disputes between attorney and client. Whether this exemption applies to fee forfeiture proceedings where the attorney must provide evidence against a client who is not disputing the fee is unclear. Even if the attorney can make such a disclosure without violating professional norms, the stresses such disclosure places on the trust between attorney and client are obvious.

284. *See Reckmeyer*, 644 F. Supp. at 457; *Ianniello*, 644 F. Supp. at 457 ("For if the attorney were to represent the defendant and defendant were convicted, defense counsel, in challenging the forfeiture of the legal fee, would be required to establish that he had no reasonable cause to believe that the property was subject to forfeiture. . . . Such disclosure would necessitate the disclosure of privileged matter confided to counsel by his client."); *Badalamenti*, 614 F. Supp. at 196 ("If he made efforts to fight the forfeiture claiming he was 'reasonably without cause to believe that the property was subject to forfeiture,' the evidence on this issue would consist primarily of privileged matter confided to him by his client."); *Rogers*, 602 F. Supp. at 1349 ("the information which a defense lawyer need disclose at a subsection (m) hearing goes beyond rates and hours expended. A . . . hearing . . . would provide for inquiry into the attorney's knowledge about the scope and source of the defendant's assets.").

285. *Rogers*, 602 F. Supp. at 1346.

tivity."[286] The Department does not, however, suggest any standards that would inform attorneys and clients what quantum of information would satisfy that test. This is a critical problem, for if defense attorneys must establish specific knowledge that an asset has legitimate sources to avoid fee forfeiture, apparently they must inquire of their clients about the sources of the assets from which fees will be paid and obtain assurances that they are legitimate. No standards exist, however, for ascertaining the level of information sufficient to justify counsel's reliance on the client's answers. If the client's mere assertion that a legitimate source exists satisfies counsel's burden, then the Department's rule is meaningless, for surely those willing to engage in drug trafficking and racketeering will not be above telling lies to obtain the lawyer of their choice. Nonetheless, it appears that this is precisely what the Justice Department proposes. During recent congressional hearings concerning fee forfeitures, the Department defended its notice theory by arguing that "the only restriction upon a defendant's use of funds prior to conviction to hire counsel is that the defendant must assure his attorney, to the attorney's satisfaction, that the fee comes from a safe source."[287] If the Department intends to allow individual attorneys to establish the standards, this duty of inquiry has no objective parameters. As a regulatory model it would reward the evil and slovenly, who could simply declare that any client assurances satisfied them. This approach seems to protect attorney autonomy, but has little else to recommend it.

If, on the other hand, the Department proposes that counsel must conduct some independent investigation to verify that the client's financial affairs are legitimate, this may impose an oppressive burden upon private defense counsel. They are unlikely to maintain the sophisticated human and technical resources necessary to undertake a financial and accounting investigation of a prospective client's business operations.[288] Defense counsel's limited resource problems will often be exacerbated by the need to respond quickly to the client's request for representation. Even if counsel were to make such an inquiry, no standards define when the information obtained is sufficient to preclude forfeiture. The government's occasional examples of legitimate fee sources offer little help. Its most specific proposal is that defense counsel can satisfy this requirement if their fees are paid with assets taken from a trust fund established by the defendant's parents prior to the criminal

286. *Rogers*, 602 F. Supp. at 1349.

287. *Committee on the Judiciary, supra* note 21, at 27 (statement of Stephen S. Trott, Ass't Attorney General, Crim. Div.).

288. *See Rogers*, 602 F. Supp. at 1349 ("the defense of RICO accusations requires the marshalling of facts and information of vast quantities perhaps constituting the whole of several worldwide business enterprises.").

violation.[289] One must wonder how many individuals in our society possess parental trust funds generous enough to pay legal fees of the size generated in these complex cases.[290] Even this hypothetical fails to establish any standards for measuring the quality or quantity of information required. Ultimately, the Justice Department seems to arrogate this power to itself by retaining discretion to determine whether to pursue forfeiture of fees paid to defense counsel in individual cases.[291]

Attorneys' communications to their clients could be chilled by the same economic and evidentiary pressures. Lawyers would be discouraged from fully exploring their clients' cases, to avoid learning facts that might justify a forfeiture of their fees or which could harm their clients when disclosed at a post-conviction hearing contesting forfeiture of fees.[292] Defense attorneys might simply fail to make inquiries necessary to learn critical facts, or fail to advise clients of the facts they need to learn to prepare an adequate defense.[293]

Either of these chilling mechanisms could affect the quality of legal representation. Full disclosure between attorney and client is essential to competent representation,[294] and it is unlikely that an attorney can develop an effective defense without it. By encouraging an information vacuum, the threat of fee forfeitures impinges on the defendants' right to effective assistance of counsel, and the ability of attorneys to accomplish their institutional functions in the justice system.[295] These communications omissions could be impossible to detect in a post-conviction review of defendants' claims of ineffective assistance of counsel.

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289. *Id.*

290. *See supra* note 167 and accompanying text for a discussion of the large fees earned by private defense counsel in these cases. In spite of its family trust fund example, in practice the Justice Department has shown little deference even for parent-child transactions. *See Reckmeyer I*, 628 F. Supp. 616 (government pursued forfeiture of real property transferred from defendant children to business executive father in arms' length transaction occurring prior to crimes serving as basis for forfeiture action).

291. *See* U.S. ATTORNEYS' MANUAL, *supra* note 17, at § 9-111.7000; *see also Committee on the Judiciary, supra* note 21, at 30 (Statement of Stephen S. Trott, Ass't Attorney General, Crim. Div.).

292. *See Reckmeyer*, 631 F. Supp. at 1197 ("the attorney's obligation to thoroughly investigate his client's case would conflict with his interest in not learning facts tending to inform him that his fee will be paid with proceeds of an illegal activity. . . ."); *Badalamenti*, 614 F. Supp. at 196 ("His 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 by telling him his fee was the proceeds of illegal activity.").

293. *See Reckmeyer*, 631 F. Supp. at 1197.

294. *See, e.g.*, Upjohn Co. v. United States, 449 U.S. 383, 389-91 (1981); United States v. Levy, 577 F.2d 200, 209 (3d Cir. 1978); *Rogers*, 602 F. Supp at 1349; MODEL CODE Canon 4; EC 4-1; MODEL RULES Rule 1.6(a); STANDARDS OF CRIMINAL JUSTICE, Standard 4-3.2 comment (client usually the attorney's "primary source of information for an effective defense.").

295. *See, e.g.*, Upjohn Co. v. United States, 449 U.S. 383, 391 (1981) (The attorney-client "privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.").

The nature of these problems, and the conflicts of interest between attorney and client which generate them, may even warrant a presumption of prejudice.[296]

The Justice Department does little to dispel these concerns. Instead, it emphasizes that the fee information sought from attorneys may be essential to proving the government's case against RICO and CCE defendants. Prosecutors may seek fee information to provide evidence of the existence of otherwise unexplained wealth used to pay fees.[297] Information obtained from defense attorneys may demonstrate that one alleged co-conspirator has paid the fees of others, thus bolstering the government's conspiracy theory of financial linkage among defendants.[298] Finally, it may assist the government in tracing the disposition of assets or "lead to the discovery of forfeitable assets which have been hidden by a defendant."[299] Even if the assets derive from legitimate sources, the Department would force attorneys to provide facts—learned from clients—to demonstrate that fees should be exempted from forfeiture.[300] While this might allow attorneys to avoid fee forfeitures in individual cases, it would still require them to serve as information gatherers from their clients on behalf of the government.[301]

While the government's interest in this information is understandable, its analysis seems to confirm the concerns of forfeiture critics. The reasons the government desires to obtain information about defen-

296. *See* Holloway v. Arkansas, 435 U.S. at 489-91 (impossibility of assessing the impact of conflict of interest where conflict causes attorney to refrain from acting justifies presumption of prejudice).

297. U.S. ATTORNEYS' MANUAL, *supra* note 17, at § 9-111.620.

298. *Id.*

299. *Id.* The government thus could use the attorney's testimony, even if not given until post-conviction hearings, to trace assets arguably described in general descriptive language in the indictment upon which the conviction is based. In this setting the attorney would be assisting the prosecution in enforcing punishment of his client in the very case he is defending.

300. *See, e.g.*, U.S. ATTORNEYS' MANUAL, *supra* note 17, at § 9-111.420-.520 (discussing Justice Department's theories as to what information an attorney must offer to prove lack of knowledge of forfeitability in general, and based on knowledge of a client's activities in particular). *See also Committee on the Judiciary, supra* note 21, at 30-31 (statement of Stephen S. Trott, Ass't Attorney General, Crim. Div.) (Department will exempt fees in individual cases from forfeiture where attorney comes forward with evidence to "demonstrate that the fee is being paid from a legitimate source.").

301. The government's arguments also suggest another variation of the whipsawing dilemma discussed earlier. *See supra* notes 162-207 and accompanying text. Here, attorneys, not clients, would be subjected to conflicting pressures. If an attorney were to wait until the conclusion of the case to produce this information, he risks financial disaster because the jury verdict might order forfeiture, and he could lose at the post-conviction hearing challenging forfeiture. If, however, he were to attempt to avoid this problem by presenting information to the Justice Department early in the case in an effort to win an agreement to exempt his fees from forfeiture, he might cause his client even greater harm. The Department might refuse to exempt his fees and use the information he has produced to build its case against the client.

dants' finances from their attorneys demonstrate why the threat of fee forfeitures would chill communications between attorney and client.

Critics also argue that defendants' right to effective assistance of counsel is harmed by the nature of the economic relationship forced upon attorneys and clients if legitimate fees are subject to forfeiture. A defendant's conviction is a necessary precondition to criminal forfeiture of any assets, including attorneys' fees.[302] Since the outcome of the case dictates whether or not the attorney is paid—payment if the defense wins, forfeiture if it loses—attorneys in these cases must agree to accept a functional contingent fee.[303] Yet the rules of the profession explicitly prohibit contingent fees for attorneys representing defendants in criminal cases.[304] This prohibition recognizes that the inevitable pressures imposed upon the attorney by a contingent fee may deter him from presenting the independent and vigorous advocacy to which the defendant is entitled.[305] For the same reasons, contingent fees in criminal cases could lead to a denial of a defendant's right to effective legal assistance.

Contingent fees in criminal cases violate public policy[306] because they subject defense counsel to powerful pressures to bargain away their clients' rights in exchange for a guarantee that their fees will be paid. On the one hand, defense counsel may be pressured by the government to enter into a plea bargain in which a defendant's guilty plea is exchanged for a government agreement not to seek forfeiture of assets used to pay attorneys' fees.[307] The Justice Department has done little to ease fears of this possibility. In fact, the Department has announced its intention to negotiate fee forfeitures with defense counsel in individual cases[308] and to exercise its discretion in deciding when a specific attorney's fees should be exempted from forfeiture.[309] It takes little imagination to recognize that once the prosecution controls the purse

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302. 18 U.S.C. § 1963(a),(f) (Supp. III 1985); 21 U.S.C. § 853(a) (Supp. III 1985).

303. *See Ianniello*, 644 F. Supp. at 457; *Bassett*, 632 F. Supp. at 1316 n. 5; *Reckmeyer*, 631 F. Supp. at 1197; *Badalamenti*, 614 F. Supp. at 196-97.

304. The MODEL CODE commands: "A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case." DR 2-106(C). *Accord* MODEL RULES Rule 1.5(d)(2) (identical language).

305. *See Ianniello*, 644 F. Supp. at 457; *Bassett*, 632 F. Supp. at 1316 n. 5; *Reckmeyer*, 631 F. Supp. at 1197; *Badalamenti*, 614 F. Supp. at 196-97.

306. *See, e.g.*, Peyton v. Margiotti, 398 Pa. 86, 90, 156 A.2d 865, 867 (1959); Couture v. Mammoth Groceries, Inc., 117 N.H. 294, 296, 371 A.2d 1184, 1186 (1977).

307. *See Ianniello*, 644 F. Supp. at 457; *Bassett*, 632 F. Supp. at 1316-17 n. 5; *Badalamenti*, 614 F. Supp. at 196-97.

308. *See* U.S. ATTORNEYS' MANUAL, *supra* note 17, at § 9-111.700.

309. *See Committee on the Judiciary, supra* note 21, at 30-31 (statement of Stephen S. Trott, Ass't Attorney General, Crim. Div.) ("Our guidelines allow us to enter into an agreement with an attorney to exempt the fee if the attorney can demonstrate that the fee is being paid from a legitimate source."). There appear to be no limits on the exercise of the Department's discretion in determining when particular attorneys would satisfy that standard. Thus attorneys who vigor-

strings, the independence of defense counsel is jeopardized. One need not be a cynic to fear the economic leverage this could give prosecutors over defense lawyers.[310]

Conversely, defense counsel might feel constrained not to enter into a plea bargain which is in the client's best interest where that decision would inevitably lead to a forfeiture of fees.[311] In each of these situations, the financial threat posed by government efforts to seek fee forfeitures would pressure attorneys to violate their duty to give independent advice solely for the benefit of their clients.[312]

Finally, forfeiture opponents contend that the threat of forfeiture impairs defense counsel's ability to provide effective assistance because they are forced to expend significant time and effort contesting the forfeiture issues, diverting scarce resources from preparation of clients' substantive cases. The records of the reported fee forfeiture cases demonstrate that this is a very real problem,[313] and the resulting harm to the client is obvious. The government has proposed no solution to this problem.

In whatever form they appear, the pecuniary and evidentiary pressures engendered by government attempts to obtain forfeiture of legitimate fees impair defense counsel's ability to provide the effective assistance of counsel guaranteed to all defendants.[314] Once again, the atomistic and institutional role models suggest different methods for resolving this dilemma. Application of the atomistic approach might dictate that a defendant's rights must be enforced retrospectively, by reviewing defense counsel's performance after the completion of the litigation to determine if the defendant in fact received effective assistance

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ously represent their clients could be subjected to harsher standards than those who cooperate with the Department.

310. *See Rogers*, 602 F. Supp. at 1350 ("While I presume that most prosecutors act in good faith, I cannot ignore the potential for prosecutorial manipulation of a grand jury which I saw in [citations omitted]. Due process cannot tolerate even the opportunity for such abuse of the adversary system."). *See also Committee On Judiciary, supra* note 21, at 29 (1986) (statement of Stephen Trott, A'sst Attorney General, Crim. Div.) (Justice Department Fee Forfeiture Guidelines adopted to prevent prosecutorial abuse). *See also Estevez*, 645 F. Supp. at 872 ("Defense lawyers should not be made to depend on their adversary to insure that their fees are paid.").

311. *See Ianniello*, 644 F. Supp. at 457; *Reckmeyer*, 631 F. Supp. at 1197.

312. MODEL CODE DR 5-103(A); EC 5-1, 5-2, 5-3, 5-7 (1985).

313. *See Committee on Judiciary, supra* note 21, at 160 (statement of Neal Sonnett, Third Viee-President National Association of Criminal Defense Lawyers) (as defense counsel in one post-CFA case, Sonnett forced to spend seven months and 80% of effort defending fee forfeiture "side issue.").

314. Strickland v. Washington, 466 U.S. 668 (1984); United States v. Hearst, 638 F.2d 1190, 1193 (9th Cir.), *cert. denied*, 451 U.S. 938 (1981); *see also, Ianniello*, 644 F. Supp. at 457 ("even if defendant were able to retain counsel, such representation inevitably would result in conflicts between attorney and client, and deprive defendant of effective representation."); *Reckmeyer*, 631 F. Supp. at 1197.

of counsel.[315] The institutional role model leads to a different conclusion. This theory posits that where government conduct creates conflicts that interfere with defense counsel's ability to perform their proper functions, those practices violate the sixth amendment. The conflicts engendered by the statutory procedures governing criminal forfeitures could infect any relationship between a defendant and retained counsel. The nature of these conflicts may even justify a presumption of prejudice to defendants' right to effective representation.[316] This prejudice cannot be cured by retaining other counsel, for it is the structure of the law and not the relational histories of attorney and client which creates the conflicts. If fee forfeitures are permitted, these problems will exist for any retained attorney. They could be avoided only by denying counsel entirely, or by appointing counsel for all forfeiture defendants, "solutions" which themselves disrupt defense counsel's proper institutional behavior.[317] If the forfeiture of attorneys' fees produces such results, this practice transgresses the commands of the sixth amendment.

V. CONCLUSION

Attorneys representing defendants differ from other members of the profession and the general public—not because of any professional or moral superiority, but because they play a unique and essential institutional role in our criminal justice system. They serve as the necessary advocates of defendants' rights. By fulfilling that role, they vindicate limits the Constitution imposes upon government power, and assure that the adversary justice system functions correctly. Recognition of

315. *See supra* notes 187-92 and accompanying text. *See also Harvey*, slip op. at 35-37.

316. *See supra* notes 193-201 and accompanying text. *See also* Holloway v. Arkansas, 435 U.S. 475 (1978). There the Supreme Court held that prejudice could be presumed, entitling the defendant to automatic relief, in cases of compelled joint representation producing claims of conflict among multiple defendants. *Holloway*, 435 U.S. at 488-91. The factors the *Holloway* court found persuasive can be analogized to the conflicts arising between attorney and client in the fee forfeiture cases. In *Holloway*, the Court found it significant that defense counsel, an officer of the court, made timely motions advising the court of the potential conflicts arising from his representation of the defendants, and requesting appropriate relief. The trial court denied these motions, forcing the attorney to continue joint representation. *Holloway*, 435 U.S. at 484-86. On these facts, prejudice could be presumed. The fee forfeiture cases present an analogous set of problems. They present real economic and evidentiary conflicts of interest between attorney and client, affecting defense counsel's ability to provide effective representation. As in *Holloway*, the conflicts are not the product of intentional or negligent errors of omission or commission by defense counsel. Instead, government action produces the difficulty. The courts are virtually always advised of the problems generated by possible fee forfeitures in timely pretrial motions revealing the nature of the conflicts, conflicts which may affect counsel's performance in ways impossible to identify in post-conviction review. *See supra* notes 274-86, 292-96, 302-12 and accompanying text; *see also Holloway*, 435 U.S. at 490-91.

317. *See supra* Part IV.A. and B.

defense counsel's dual roles suggests that sixth amendment theory should do more than simply guarantee the right of individual defendants to a lawyer. It should also protect the ability of attorneys, individually and collectively, to provide that representation.

The recent fee forfeiture cases in the federal courts provide an example of judicial decisionmaking consistent with such a dualistic approach to defining sixth amendment interests. While often concluding that Congress did not intend to permit forfeiture of legitimate attorneys' fees, the courts have generally agreed that laws permitting such practices would violate the sixth amendment. The courts' discussion of the constitutional issues has addressed both personal rights and institutional needs.

Allowing fee forfeitures could affect individual rights by depriving defendants of any defense attorney, or of their right to choose counsel, or of effective assistance of counsel. The fee forfeiture cases demonstrate that sixth amendment interests encompass institutional values as well. The acts which could infringe upon the interests of particular defendants would also disrupt the adversary justice system by providing the government with improper influence over the selection of defense counsel, the resources available to contest government actions, and the competence of the defense presented. Ultimately, the government could utilize these procedures to exclude the most able attorneys from representing defendants in RICO and CCE prosecutions. Even if these results could be avoided in individual cases, the broader threat to the justice system posed by these practices requires that criminal forfeitures of legitimate attorneys' fees not be allowed.

Although the law enforcement goals pursued in these cases are important, they do not justify procedures which would transgress upon sixth amendment interests. We need not approve of racketeers and drug dealers to recognize that the adversary justice system works only if the worst among us are treated justly, that liberty will survive only if the rights of the guilty are protected along with those of the innocent.[318] While the most obvious danger in the criminal forfeiture scheme is that those accused of crimes will lose their fundamental rights, the most important theoretical lesson it teaches may be that the individual liberties guaranteed by the sixth amendment sometimes are defined—and protected—by the institutional roles played by lawyers for the defense.

318. *See Badalamenti*, 614 F. Supp. at 198 ("The right to counsel belongs to guilty defendants as well as innocent ones.").