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# Federal Forfeiture and Money Laundering: Undue Deference to Legal Fictions and the Canadian Crossroads

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## NOTES

### **Federal Forfeiture and Money Laundering: Undue Deference to Legal Fictions and the Canadian Crossroads**

Max M. Nelson\*

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#### I. INTRODUCTION

“We hope to make it impossible for any drug dealer to hire a

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\* Student and Articles & Comments Editor, *Inter-American Law Review*, University of Miami School of Law. B.A., University of Michigan. Thank you to Professors Ricardo J. Bascuas and Bruce J. Winick for advice regarding American law and already writing thoughtful and comprehensive articles on the general topic. Thank you also to Anthony Price, counsel for intervener, British Columbia Civil Liberties Association in the *Chatterjee* case, for guidance on the current state of Canadian law and clarifying key distinctions between American and Canadian legal systems.

lawyer.”<sup>1</sup> This sentiment was communicated to Miami defense attorney Neal Sonnett by an anonymous senior Justice Department official and should disturb those who value the presumption of innocence and the Bill of Rights. At the point he is indicted, the “drug dealer” is, of course, only a suspected drug dealer. Over the past 40 years, Congress has dutifully responded to the consequences of an expanding illegal drug trade by passing legislation aimed at hitting drug traffickers where it hurts most: the wallet. Modern federal forfeiture and money laundering statutes have enabled prosecutors to seize tainted money and other instruments of illegality before convictions are obtained, and without adversarial probable cause hearings.

In order to arm law enforcement in the war on drugs, Congress codified certain legal fictions. Legal fictions are defined as false assumptions treated as fact in the advancement of justice. They are not necessarily controversial. Treating corporations as “persons” for legal purposes is an example of a non-controversial, generally accepted and often used legal fiction. However, two legal fictions created to advance the government’s so-called war on drugs undermine the principles of the United States Constitution. The first is the “relation back” fiction: that title in all forfeitable property vests in the government the instant a crime is committed.<sup>2</sup> Both opponents and proponents of federal forfeiture law recognize relation back’s fictive status,<sup>3</sup> but its opponents have rightly noted that it contradicts core principles of American criminal justice, which deem a suspect innocent until proven guilty and require the government to prove every element of guilt beyond a reasonable doubt.<sup>4</sup> Nevertheless, in 1970, the Court narrowly

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1. Julie Kay, *Heat is on Attorneys in Drug Trafficking Cases*, MIAMI DAILY BUS. REV., May 25, 2001, available at <http://www.truthinjustice.org/drug-defenders.htm>; see also Scott Michaels, *Money-Laundering Prosecution Worries Lawyers: Rare Case Prompts Criticism That Government Is Attempting to Intimidate Counsel*, ABC NEWS, July 22, 2008, <http://abcnews.go.com/TheLaw/story?id=5421119&page=1> (“[According to former United States Attorney Kendall Coffey,] [t]here are those in the Justice Department who believe that serious drug dealers and other serious criminals should not have access to top-flight lawyers.”).

2. See, e.g., *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 627 (1989) (White, J., majority) (“[T]he so-called relation-back provision [dictates that] all right, title and interest in property obtained by criminals via the illicit means . . . vests in the United States upon the commission of the act giving rise to forfeiture.”) (internal quotation omitted).

3. Compare *United States v. Bissell*, 866 F.2d 1343, 1350-51 (11th Cir. 1989) with *Caplin & Drysdale*, 491 U.S. at 641 (1989) (Blackmun, J., dissenting) (combining a dissent for both *Monsanto* and *Caplin & Drysdale*).

4. See, e.g., *In re Winship*, 397 U.S. 358, 363 (1970) (“The reasonable-doubt

blessed the fiction by a 5-4 vote. In a well-reasoned dissent by Justice Blackmun, who observed that pre-conviction forfeiture interferes with a defendant's ability to secure counsel of choice and a fair trial, the issue was framed as "whether Congress may use this wholly fictive device of property law to cut off th[e] fundamental right[s] of the accused in a criminal case."<sup>5</sup>

The second controversial legal fiction allows anthropomorphic *in rem* forfeiture's unjust extension into criminal matters. The fiction supporting *in rem* forfeiture allows the government to seize an object on account of its illegal behavior, circumventing the criminal procedural protections that are triggered by *in personam* confrontation between the government and the object's owner, who is often punished through deprivation of property. Like corporate entity status, the fictions allowing current money laundering and forfeiture practice have been codified, but this fact does not exempt them from constitutional scrutiny by Article III courts, presently derelict in their duty.<sup>6</sup> This failure has armed prosecutors whom we cannot blame for adopting the mantra, "whatever works is alright."<sup>7</sup> Prosecutors are not at fault for using the tools at their disposal; effective litigators should use every allowable advantage to achieve a desired result. The current problem centers on the tactics allowed by the federal courts.

In the past decade, the more populous Canadian provinces have enacted civil forfeiture legislation aimed at crushing a growing criminal drug trade.<sup>8</sup> These relatively new laws emulate American federal law by adopting the relation back fiction and bypassing criminal defendant protections by fusing lax civil law

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standard plays a vital role in the American scheme of criminal procedure . . . [providing] concrete substance for the presumption of innocence . . .").

5. See *Caplin & Drysdale*, 491 U.S. at 652 (Blackmun, J., dissenting).

6. See *id.* at 644 ("That the majority implicitly finds the Sixth Amendment right to counsel of choice so insubstantial that it can be outweighed by a legal fiction demonstrates . . . its apparent unawareness of the function of the independent lawyer as the guardian of our freedom.") (internal quotation omitted).

7. See Bill Moushey, *Out of Control: Legal Rules Have Changed, Allowing Federal Agents, Prosecutors to Bypass Basic Rights*, PITT. POST-GAZETTE, Nov. 22, 1998, at A1; see also Max D. Stern & David Hoffman, *Privileged Informers: The Attorney Subpoena Problem and a Proposal for Reform*, 136 U. PA. L. REV. 1783, 1787 (1988) (depicting the prosecutorial tactics of Justice Department Officials during the Reagan administration, enabled by recently enacted prosecutor-friendly federal statutes); see also Aviva Abramovsky, Comment, *Traitors in our Midst: Attorneys who Inform on Their Clients*, 2 U. PA. J. CONST. L. 676, 686 (2000).

8. See, e.g., Ontario Remedies for Organized Crime and Other Unlawful Activities Act, 2001 S.O., ch. 28 [hereinafter Civil Remedies Act]; Alberta Victims Restitution and Compensation Payment Act, 2001 S.A., ch. V-3.5.

concepts into criminal matters.<sup>9</sup> In Canada's form of federalism, criminal law and procedure is a federal matter, while civil law is left to the provinces. The Canadian Supreme Court recently decided *Chatterjee*, a jurisdictional challenge to Canada's provincial "civil" forfeiture laws.<sup>10</sup> The appellants in *Chatterjee* argued that given the many criminal and punishment-related aspects of "civil" forfeiture laws, they are *ultra vires* of provincial legislative power, offering an interesting corollary to related American law regarding forfeiture.

What Constitutional right does a drug smuggler have to use the fruits of his illegal activity to hire a lawyer?<sup>11</sup> None according to the Supreme Court, because the relation back fiction allows the government to label him a "drug smuggler" before he is convicted. The *in rem* forfeiture fiction then allows the government to seize the alleged proceeds and instrumentalities through civil means without affording the alleged drug smuggler the ordinary procedural protections common in seizure hearings. To be faithful to the Constitution however, the question should be rephrased to ask: what Constitutional right does a *suspected* drug smuggler have to use the *alleged* fruits of his illegal activity to hire a lawyer? If the government cannot establish probable cause to seize the stolen money as evidence in the ensuing case, the presumptively innocent defendant has an absolute right to do so under the Sixth Amendment. Currently, however, courts allow the government to restrain allegedly dirty assets on the basis of "reasonable belief," a standard easier for the government to meet than probable cause. Moreover, unlike probable cause hearings, many forfeiture hearings occur *ex parte*, thereby preventing the defendant from contesting the government's attainment of this minimal burden of proof. Although the framers did not view a deprivation of property to be as serious as a deprivation of liberty, they understood that property preserves other core rights. Forfeiture itself is not as problematic as rights deprived as a result. Procedural rules must

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9. Compare Criminal Forfeitures, 21 U.S.C. § 853 (2006) with Civil Remedies Act, *supra* note 8.

10. *Chatterjee v. Att'y Gen. of Ontario*, File 32204, 2009 S.C.C. 19 (Apr. 17, 2009), available at <http://csc.lexum.umontreal.ca/en/2009/2009scc19/2009scc19.html>. Since the completion of this law review article, the Canadian Supreme Court heard the case and affirmed the Ontario Court of Appeal's decision, holding the Civil Remedies Act's forfeiture provision to be constitutional. *Id.*

11. See *Captin & Drysdale*, 491 U.S. at 626; see also Ricardo J. Bascuas, *Of Defense Lawyers and Pornographers: Pretrial Asset Seizures and the Fourth Amendment*, 62 U. MIAMI L. REV. 1159, 1164 (2008) (discussing a similar issue and collecting sources utilizing the same basic question).

be applied with an even hand and interpreted to protect the innocent and the presumption of innocence; if not, the very principals upon which our country was founded evaporate.

This article argues that the courts' undue deference to the relation back and *in rem* legal fictions, as applied in criminal-related matters, has unjustly averted fair First, Fourth, Fifth, Sixth and Eighth Amendment scrutiny. Furthermore, these fictions have had international implications by enabling similar abuses in Canada. Part II describes the historical background of federal statutes relating to forfeiture and money laundering, the Court's conception of the constitutional status of these laws, and how these prosecutorial tools are used in practice. Part III argues that the current Constitutional edifice supporting forfeiture and money laundering in circumstances that should trigger ordinary criminal defendant procedural protections is buttressed by flimsy legal fictions, violating the original intention of the First, Fourth, Fifth, Sixth and Eighth Amendments of the Constitution. Part IV compares current American law in this area with recently enacted civil forfeiture laws in Canadian provinces and the jurisdictional challenge of these laws in the *Chatterjee* case, forecasting the social and legal effects of its disposition. Part V suggests ways that Congress, the courts and law enforcement officials can achieve crime-fighting objectives within the bounds of law.

## II. HISTORY, MECHANICS, AND CURRENT STATE OF LAW

### A. *Statutory and Historical Background*

In 1970, faced with a mounting American social problem arising from organized crime and the illegal drug trade, Congress took a major step into the criminal arena, an area of the law mostly confined to the states before then, and passed the Racketeer Influenced and Corrupt Organizations Act ("RICO")<sup>12</sup> and the Continuing Criminal Enterprise Statute ("CCE").<sup>13</sup> These expansive

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12. Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901(a), 84 Stat. 922 (1970) (codified as amended at 18 U.S.C. §§ 1961-1968 (2006)) (stating that a RICO conviction requires the government to establish that the defendant has exhibited a "pattern," meaning two or more instances, of "racketeering," consisting of a broad host of violent, drug-related or white collar crimes); *see also* Russello v. United States, 464 U.S. 16, 27 (1983) (pointing out that RICO is the only federal criminal statute expressly intended to be interpreted liberally to effectuate its crucial law enforcement purpose).

13. Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 408, 84 Stat. 1265 (1970) (codified as amended at 21 U.S.C. § 848 (2006)) (requiring the government to establish that a defendant derive

federal statutes contained *in personam*, “criminal” forfeiture provisions in the attempt to paralyze the flow of dirty money.<sup>14</sup> The criminal forfeiture provision has been utilized in just one act since the Constitution was ratified.<sup>15</sup> Criminal forfeiture, not to be confused with “civil” *in rem* forfeiture, involves an interaction between the government and a defendant, and initially meant that the defendant was to forfeit profits connected with criminal activity upon conviction.<sup>16</sup> Civil forfeiture involves an interaction between the sovereign and a piece of ill-gotten property, legally distinct from its owner, who technically suffers no criminal penalty or punishment from his deprivation therefrom.<sup>17</sup>

Cognizant of the fact that RICO and CCE defendants were hiding ill-gotten gains elsewhere before their conviction, serving

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“substantial income” in the capacity of a drug-related enterprise in concert with five or more people).

14. See 21 U.S.C. § 853; see also Bruce J. Winick, *Forfeiture of Attorneys’ Fees Under RICO and CCE and the Right to Counsel of Choice: The Constitutional Dilemma and How to Avoid It*, 43 U. MIAMI L. REV. 765, 766-71 (1989) (providing a more thorough background on the advent and purpose of criminal forfeiture); see also 21 U.S.C. § 853(n)(6)(B) (stating that federal forfeiture law contains a “bona fide purchaser” provision which provides that those without reasonable cause to believe that assets were subject to forfeiture may recoup losses; however, the burden is on the defendant and an acquittal of a criminal charge does not necessarily mean that a party victimized by a civil forfeiture will be able to regain property since an acquittal only means that the government has not established guilt beyond a reasonable doubt).

15. See Confiscation Act of 1862, 12 Stat. 589 (1862) (authorizing the seizure of Confederate soldier estates); see also Winick, *supra* note 14, at 768; see also Robert G. Morvillo & Barry A. Bohrer, *Checking the Balance: Prosecutorial Power in an Age of Expansive Legislation*, 32 AM. CRIM. L. REV. 137, 145-46 (1995) (“Prior to 1970, forfeiture . . . was virtually unutilized in the federal system . . . [t]oday, forfeiture is one of the most powerful weapons in the government’s arsenal, with over 100 statutes providing for the forfeiture of property implicated in criminal activity.”).

16. See 21 U.S.C. § 848(a)(2)(A) (requiring forfeiture of “profits” in CCE cases); compare with 18 U.S.C. § 1963(a) (1970) (allowing jury determination of defendant’s forfeitable “interest” in criminal proceeds in RICO cases); see also Forfeitures, 21 U.S.C. § 881 (2002) (permitting the forfeiture of contraband).

17. The distinction between civil and criminal forfeiture under current American law is rather opaque, and it is often difficult to determine whether forfeiture constitutes a criminal penalty. Focusing on the subject matter of a particular case will not determine whether civil or criminal forfeiture is occurring. When faced with a criminal suspect in possession of ill-gained property, the government can elect to commence either civil or criminal forfeiture proceedings contingent on strategic concerns beyond the scope of this article. Adding to the complication are the various aspects of civil forfeiture that appear by common sense to be punishment or criminally related. For example, the “innocent owner” defense of civil forfeiture suggests that the alternative is a “guilty owner.” This structure is a result of the fiction that *in rem* forfeiture is purely about the property itself, independent from its owner, which is necessary for the government to prevent criminal Bill of Rights protections (which apply to human beings only) from triggering.

time and moving right back into their tacky mansions, Congress reacted. It first passed the Comprehensive Forfeiture Act (“the CFA”) in 1984.<sup>18</sup> The CFA permitted the government to seek a restraining order on a defendant’s assets before issuing an indictment, borrowing the relation back fiction that title to property vests in the sovereign at the time of illegality.<sup>19</sup> The unprecedented borrowing of a civil property fiction into the criminal law—an area with heavy Bill of Rights implications, including the reasonable doubt standard—would later have profound implications.<sup>20</sup>

Next, Congress passed the Money Laundering Control Act of 1986 (“the MLCA”) in an attempt to restrain the flow and concealment of drug trade proceeds, for the first time criminalizing activities of those who are knowingly involved in the flow of dirty money.<sup>21</sup> Section 1956 of the MLCA criminalized conduct necessarily related to concealing assets, whereas 1957 greatly expanded traditional notions of money laundering’s definition, prohibiting “knowingly engag[ing] or attempt[ing] to engage in a monetary transaction in criminally derived property . . . derived from specified unlawful activity.”<sup>22</sup> Given the connection between forfeiture and the new substantive money laundering offense, the Department of Justice created a single unit within its Criminal Division, the Asset Forfeiture & Money Laundering Section. Money laundering was added to the list of crimes constituting a RICO offense and the money laundering statute was amended in 1988, allowing the government to seek forfeiture of all property “involved in” laundering.<sup>23</sup> The circuits have split on how broadly to read the

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18. Pub. L. No. 98-473, §§ 301-323, 98 Stat. 1837 (1984) (codified as amended in scattered sections of 18, 19, 21, 26 & 28 U.S.C.); see Winick, *supra* note 14, at 769 n.21.

19. See 18 U.S.C. § 1963(c) (“All right, title and interest in property . . . vests in the United States upon the commission of the act giving rise to forfeiture under this section . . .”); 21 U.S.C. § 853(c) (same); see also *United States v. Bissell*, 866 F.2d 1343, 1349 (11th Cir. 1989) (“To preserve forfeitable assets for a possible conviction, the district court may restrain the defendant from using these assets before trial.”).

20. See David Fried, *Rationalizing Criminal Forfeiture*, 79 J. CRIM. L & CRIMINOLOGY 328, 346 (1988) (establishing that the relation back provision’s use in criminal cases is without historical or legal support).

21. See Pub. L. No. 99-570, §1352(a), 100 Stat. 3207-18, 21 (1986) (codified as amended at 18 U.S.C. §§ 1956-1957 (2009)); see also S. Rep. No. 99-433, at 4-5 (1986) (quoting Vice President and then-Ranking Member of the Senate Judiciary Committee Joe Biden, who called money laundering a “crucial financial underpinning of organized crime and narcotics trafficking.”).

22. See 18 U.S.C. § 1957(a) (1988).

23. See 18 U.S.C. § 982 (2007) (outlining criminal forfeiture mechanisms for money laundering); see also 18 U.S.C. § 981 (2006) (outlining civil forfeiture



“involved in” language. Some have adopted the “facilitation theory,” meaning that an entire bank account with one million dollars can be frozen upon the deposit of a few thousand dirty dollars, since the bulk of the account is being used to facilitate the concealment of the smaller amount.<sup>24</sup> Other circuits have adopted a narrower “substantial connection test,” meaning that only the portions of the bank account substantially connected to the underlying crime may be frozen.<sup>25</sup> It was initially feared that the expansive reach of the money laundering statutes, casting a wide net to prevent sophisticated criminals aware of the loopholes that restrictively-written legislation provided, would lead to congressionally unintended prosecutions.<sup>26</sup> The only way to limit unintended prosecutions and convictions in such a broadly worded statute is the exercise of prosecutorial discretion. Given statutory vagueness, prosecutorial power is more or less unfettered. Additionally, the judicial determination of the reach of “involved in” has an impact not only upon alleged drug peddlers, but also upon those financially connected in a facially legitimate capacity, such as bankers and lawyers. The gross lack of uniformity in the realm of federal money laundering law’s reach requires further clarification by the Supreme Court, as the current lack of guidance serves as a tacit allowance of inconsistent and abusive practices by law enforcement.

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mechanisms for money laundering). For a thorough analysis of issues resulting from the broad reach of pre-conviction forfeiture for money laundering, see also Brian Fork, *The Federal Seizure of Attorneys’ Fees in Criminal Forfeiture Actions and the Threat to the American System of Criminal Defense*, 83 N.C. L. REV. 205, 216-37 (2004).

24. See, e.g., *United States v. All Monies (\$477,048.62) in Account No. 90-3617-3*, 754 F. Supp. 1467 (D. Haw. 1991) (holding that property used to facilitate money laundering is subject to forfeiture even though money laundering forfeiture statute did not expressly use the word “facilitate”); see also George Chamberlain, *What is Considered Property “Involved In” Money Laundering Offense, and Thus Subject to Civil or Criminal Forfeiture, for Purposes of the Money Laundering Control Act*, 135 A.L.R. FED. 367 (1996).

25. See, e.g., *United States v. Schifferli*, 895 F.2d 987, 990 (1990) (holding that there must be a substantial connection between the property and crime for forfeiture to reach the property); see also Fork, *supra* note 23, at 220 n.146 (listing of cases regarding same).

26. S. Rep. No. 99-433, at 6 (1986) (stating that The National Association of Criminal Defense Lawyers [hereinafter NACDL] argued that crimes totally unrelated to money laundering and overlapping with other crimes would be touched by the new legislation, even presaging the impact a potentially low mens rea requirement would have on defense lawyers in federal money laundering prosecutions); see also Morvillo, *supra* note 15, at 143 (arguing that the federal prosecution of what would be a state misdemeanor relating to sexual activities between adults as federal money laundering was likely beyond Congress’s intent).

### B. *Attacking the System*

There is uncertainty on the issue of whether or not the federal forfeiture and money laundering statutes were intended to reach funds paid by criminal suspects to counsel for legal services. It is most likely that Congress either did not contemplate that forfeiture law would prohibit cash flow to legitimate defense services, or simply chose to defer to the federal courts.<sup>27</sup> There is a footnote in an earlier draft of the 1984 forfeiture amendments that states “[n]othing in this section is intended to interfere with a person’s sixth amendment right to counsel.”<sup>28</sup> Such intent offers little help since the Sixth Amendment is not a light switch that only Congress can turn on or off; defining the contours of the right to counsel is within the province of the federal courts, not Congress. Before passage of section 1957 of the money laundering statutes, there was much debate on whether to include a similar Sixth Amendment exemption clause.<sup>29</sup> Congress ultimately decided, however, to forego the inclusion of such an exemption clause within the legislation.<sup>30</sup> Nevertheless, at the behest of the Department of Justice, after much lobbying by the NACDL, section 1957(h) was enacted: “monetary transaction . . . does not include any transaction necessary to preserve a person’s right to representation as guaranteed by the Sixth Amendment to the Constitution.”<sup>31</sup> Section 1956, prohibiting money laundering in the traditional sense of concealment, contains no such clause.

Although the forfeiture statutes do not directly address the Sixth Amendment question, some federal courts recognized that 853(c)’s bona fide purchaser clause had the potential to protect

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27. See Winick, *supra* note 15, at 849-50 (arguing that Congress was only concerned with the flow of sham fees to attorneys).

28. H.R. Rep. No. 98-845, pt. 1, at 19 n.1 (1984); see Winick, *supra* note 14, at 849 n.411.

29. See D. Randall Johnson, *The Criminally Derived Property Statute: Constitutional and Interpretive Issues Raised by 18 U.S.C. § 1957*, 34 WM. & MARY L. REV. 1291, 1353-60 (discussing legislative history, congressional intent and effects of the Sixth Amendment exemption of § 1957).

30. *Id.*

31. See Pub. L. No. 99-570, § 1352(a), 100 Stat. 3207-18 (codified as amended at 18 U.S.C. § 1957(f) (2009)); see also Johnson, *supra* note 29, at 1355 n.238, 1356 n.239 (noting that the exception was not the result of government capitulation, the DOJ specified that the exception only extended for bona fide attorney’s fees used for actual services in connection with a criminal case and that an attorney could be prosecuted if there is clear and convincing evidence that the attorney had actual knowledge of the illegal origin of the specific property received and the knowledge was not gained through confidential communications covered by attorney-client privilege).

legitimate fees.<sup>32</sup> The bona fide purchaser provision provides that, “[a]ny person, other than the defendant, asserting a legal interest in property which has been ordered forfeited . . . may . . . petition the court for a hearing to adjudicate the validity of his alleged interest in the property.”<sup>33</sup> During criminal forfeiture’s infancy, the federal trial courts were given broad discretion to grant or deny such applications. There were also varying interpretations of how to handle the constitutionally cogent question of how to approach situations where pre-conviction criminal forfeiture restraining orders prevented defendants from hiring private defense counsel.

The Fourth Circuit opined on this matter by consolidating three cases in 1987: *Harvey, Bassett* and *Caplin & Drysdale*.<sup>34</sup> In affirming the lower court and recognizing the special expertise that trial courts have on the real-life detriments imposed on criminal suspects denied the power to hire counsel via *ex parte* forfeiture, the court held that criminal forfeiture was intended to reach pre-conviction restraints on transfers to pay legitimate attorney’s fees, but also held that this practice violated defendants’ constitutional right to counsel of choice.<sup>35</sup> Additionally, the court reasoned that when the right to counsel of choice is violated, prejudice is presumed not because public defenders are inherently incompetent, but because choice of counsel has been denied.<sup>36</sup> It was also ruled that pre-conviction forfeiture violated due process where the defendant is denied a hearing to challenge the propriety of restraints.<sup>37</sup> Faced with a similar factual setting, the Eleventh Circuit held otherwise, valuing the statutory relation back fiction above the original intent of the rights to counsel and due process.<sup>38</sup> Valuing the fiction above all else enabled the court to reason that a defendant does not have a right to use assets that no longer belong to him, and instead belong to the government, to hire coun-

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32. See, e.g., *United States v. Figueroa*, 645 F. Supp. 453 (W.D. Pa. 1986) (holding that attorney was entitled to post-conviction modification of forfeiture order as provider of good faith services); *United States v. Bassett*, 632 F. Supp. 1308 (D. Md. 1986) (holding that forfeiture of legitimate attorney’s fee would violate Sixth Amendment principles).

33. 21 U.S.C. § 853(n)(2) (2006).

34. *United States v. Harvey*, 814 F.2d 905 (4th Cir. 1987).

35. See *id.* at 909.

36. See *id.*

37. *Id.*

38. See *United States v. Bissell*, 866 F.2d 1343, 1352-55 (11th Cir. 1989); see also *Bascuas*, *supra* note 11, at 1167-72 (providing further analysis).

sel.<sup>39</sup> Adopting one interpretation of the 20th century conception of the right to counsel (right to appointed counsel for indigents) at the expense of the original meaning (right to choose counsel for those with means to do so), the court further reasoned that the Sixth Amendment sets a minimum right to appointed counsel for serious crimes<sup>40</sup> and that this protection provided defendants a modicum of fairness.<sup>41</sup> A split in the circuits and the effect of defendants' fundamental rights varying circuit-to-circuit precipitated the Supreme Court's weighing in on the effect section 853 forfeiture had on defendants' Sixth Amendment rights.<sup>42</sup>

Respondent Peter Monsanto was charged with various drug and weapon-related RICO and CCE violations. The government sought and received a section 853 restraining order from the district court on Monsanto's apartment and \$35,000 based on reasonable suspicion that they derived from criminal acts.<sup>43</sup> Defendant challenged the district court order because of his inability to hire counsel of choice, and the Second Circuit "agree[d] that any such fees paid to Monsanto's defense counsel [were] exempt from subsequent forfeiture."<sup>44</sup> On appeal, the Supreme Court rejected the argument of the Second Circuit, bowing to Congress's power to codify the relation back fiction. The Supreme Court noted there

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39. See *Bissell*, 866 F.2d at 1351; see also *In re Forfeiture Hearing as to Caplin & Drysdale, Chartered*, 837 F.2d 637, 645 (4th Cir. 1988) (utilizing the familiar bank robber hypothetical); see also *United States v. Koblitz*, 803 F.2d 1523, 1528 (11th Cir. 1986) (holding that right to counsel in this scenario only extends to counsel defendant can hire at his own expense); see also *Wheat v. United States*, 486 U.S. 153, 159 (1988) (holding that right to counsel does not extend to representation of counsel defendant cannot afford).

40. See *Bissell*, 866 F.2d at 1351; see also *Gideon v. Wainwright*, 372 U.S. 335, 339-40 (1963) (establishing the Sixth Amendment right to appointed counsel).

41. See *Bissell*, 866 F.2d at 1351; see also *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (establishing the Sixth Amendment right to counsel in terms of effective assistance of counsel and fairness).

42. These opinions were issued on the same day: June 22, 1989. *United States v. Monsanto*, 491 U.S. 600 (1989); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989). Bruce J. Winick, Professor at the University of Miami School of Law was present at oral argument and drafted a combined amicus curiae brief on behalf of the National Association of Criminal Defense Lawyers, ("NACDL"), and the American Civil Liberties Union, ("ACLU"): see Brief for NACDL, ACLU et al. as Amici Curiae Supporting Petitioner Caplin & Drysdale and Respondent Monsanto, Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989) (Nos. 87-1729 and 88-454, respectively), 1988 WL 1026330 [hereinafter NACDL Brief].

43. *United States v. Monsanto*, 924 F.2d 1186, 1189 (2d Cir. 1989).

44. *United States v. Monsanto*, 836 F.2d 74, 84-85 (2d Cir. 1987) (reversing district court order that allowed forfeiture of criminal defendant's fees intended to hire counsel of choice on interlocutory appeal from the Southern District of New York).

was no statutory exemption for attorney's fees and equated attorney's fees to "stock-brokers fees, laundry bills, or country club memberships," which were also not exempt from forfeiture given their absence from the language of section 853.<sup>45</sup> Admitting that "[t]his result may seem harsh,"<sup>46</sup> Justice White, joined by four others, held that the district court had authority to enter a pretrial restraining order on the defendant's assets, despite any frustration this precipitated on defendants' right to counsel.<sup>47</sup> The Court also held that this practice did not violate defendants' due process rights and weighing the interests at stake, the Court stated that "a pretrial restraining order does not arbitrarily interfere with a defendant's fair opportunity to retain counsel."<sup>48</sup> On remand, although not required to do so by the Supreme Court's holding, the Second Circuit held that the Fifth and Sixth Amendments required an adversarial probable cause hearing to restrain assets defendant intended to use to hire legitimate counsel of choice.<sup>49</sup>

The factual scenario in *Caplin & Drysdale* was not conducive toward an opinion singing the virtues of the Bill of Rights. First of all, the petitioner was a law firm seeking payment for representing a client facing CCE charges, not a criminal defendant with heightened procedural protections; second, the firm was seeking payment for services rendered after the client had already pled guilty and was therefore on notice that assets were forfeitable.<sup>50</sup> The circumstances of the case suggest that the Court's holding may be limited to its particular facts. Justice White, joined by the same four justices as in *Monsanto*,<sup>51</sup> held that section 853, containing a codification of the relation back fiction and providing no express Sixth Amendment exemption, did not violate defendants' constitutional right to counsel of choice.<sup>52</sup> Secondly, reasoning that the scope of due process is limited independent of the right to counsel, the Court chose not to strike down the statute via the

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45. *Monsanto*, 491 U.S. at 609.

46. *Id.* at 613.

47. *See id.* at 614.

48. *Id.* at 616. (internal quotation omitted).

49. *See United States v. Monsanto*, 924 F.2d 1186, 1203 (2d Cir. 1989).

50. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 619-24 (1989); *see also Bascuas, supra* note 11, at 1170.

51. Chief Justice Rehnquist and Justices O'Connor, Scalia and Kennedy. Interview with Bruce J. Winick, Professor, University of Miami School of Law, in Coral Gables, Fla. (Jan. 27, 2009) (discussing that this was generally thought to be the conservative bloc of the late 1980s).

52. *See Caplin & Drysdale*, 491 U.S. at 619.

Fifth Amendment.<sup>53</sup> The majority did, however, acknowledge that “[f]orfeiture provisions are powerful weapons in the war on crime; like any such weapons, their impact can be devastating when used unjustly,” and thus put lower courts on notice that due process may be violated in certain circumstances.<sup>54</sup>

As in *Monsanto*, the *Caplin & Drysdale* opinion leaned heavily on a trust in the validity of the relation back property fiction. The Court would have been unable to reason that a “defendant has no Sixth Amendment right to spend another person’s money” for legal services without the logical predicate that the defendant, although not yet convicted, lost the right to transfer his assets upon the commission of his supposed crime.<sup>55</sup> Agreeing with the Eleventh Circuit’s reasoning in *Bissell*,<sup>56</sup> appointed counsel was deemed sufficient to satisfy the defendant’s Sixth Amendment rights where forfeiture rendered the defendant a pauper.<sup>57</sup> Siding with the government, the Court declared that sophisticated private counsel is just another strong weapon the enemy holds in the war on drugs.<sup>58</sup> Adoption of such a view by the Court necessarily ignores the role private counsel hold as guardians of the criminal adversary process. The codification of the relation back fiction and the Court’s affirmance of its legal validity in *Monsanto* and *Caplin & Drysdale* have not since been called into question by the Supreme Court and should be understood to be the law of the land at present date.<sup>59</sup>

If *Caplin & Drysdale* resulted in an adverse financial impact on the criminal defense bar, the prosecution of defense attorneys for money laundering has had a downright frightening one. In order to understand the issue, it is necessary to point out that section 1957, the “criminally derived property” section, contains an express exemption that “transaction[s] necessary to preserve a

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53. *See id.* at 633 (quoting *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984)) (“[t]he Constitution guarantees a fair trial through the Due Process clause . . . it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment.”).

54. *See id.* at 634.

55. *See id.* at 626-28.

56. *United States v. Bissell*, 866 F.2d 1343, 1351 (11th Cir. 1989).

57. *Caplin & Drysdale*, 491 U.S. at 628.

58. *Id.* at 630.

59. *See Fork, supra* note 23, at 229 (“The decisions of the Supreme Court in *Monsanto* and *Caplin & Drysdale* have never been seriously questioned or limited by the Court in the fifteen years since they were handed down.”). Note that Fork’s article was written in 2004 and upon independent research conducted in 2009, the cases have not been overruled and are still good law.

person's right to representation as guaranteed by the sixth amendment to the constitution" do not constitute money laundering.<sup>60</sup> Attorneys can be convicted of 1957 money laundering if the prosecution establishes that the attorney knew that fees originated from unlawful activity and that the attorney knew the defendant was using him or her to conceal the unlawful activity, which may be accomplished through the process of representation itself.<sup>61</sup> The applicability of the 1957(f) Sixth Amendment exemption is left to the discretion of trial courts, subject to the appeals process. An allegedly corrupt attorney can also be prosecuted for "traditional" concealment (section 1956 money laundering), which can appear in tandem with a 1957 charge.<sup>62</sup>

Miami defense attorney Benedict Kuehne was indicted for, *inter alia*, sections 1956(a)(1)(B)(i), knowingly concealing the proceeds of unlawful activity, 1956(a)(2)(B)(i), importing these proceeds from a foreign country, specifically Colombia, as well as 1957, engaging in monetary transactions constituting criminally derived property.<sup>63</sup> This is the first indictment under the federal money laundering statutes of an attorney for vetting, or performing due diligence on, another lawyer's legal fees. It is also a key case for determining the extent to which *Monsanto* and *Caplin & Drysdale* can be used by prosecutors to extend liability to practitioners. Mr. Kuehne is well-respected by his colleagues, and his ethics and professionalism are regarded as sterling.<sup>64</sup> The indictment shocked much of the legal community and "re-ignited" a war between the government and the criminal defense bar that once

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60. See 18 U.S.C. § 1957(f) (2009); see also Johnson, *supra* note 29, at 1352-60 (providing further background on § 1957's Sixth Amendment exemption noting that the original MLCA contained no such provision and that the language is intentionally vague so as to leave the matter up to the courts).

61. See 18 U.S.C. § 1957 (2009); see also Adam K. Weinstein, Note, *Prosecuting Attorneys for Money Laundering: A New and Questionable Weapon in the War on Crime*, 51 LAW & CONTEMP. PROBS. 369, 369-75 (Winter 1988).

62. See 18 U.S.C. § 1956 (2009) (containing no language stating that attorneys cannot be prosecuted); see also, e.g., *United States v. Reed*, 77 F.3d 139 (6th Cir. 1996) (prosecuting an attorney under 1956); *United States v. Ferguson*, 142 F. Supp. 2d 1350, 1351-52 (S.D. Fla. 2000) (prosecuting an attorney under 1957); *United States v. Velez*, No. 1:05-cr-20770-MGC (S.D. Fla. filed May 1, 2008) [hereinafter Kuehne Indictment] (containing joint 1956 and 1957 charges against an attorney).

63. See 18 U.S.C. § 1956(a) (2006); 18 U.S.C. § 1957 (2006); see also Kuehne Indictment, *supra* note 62, at 12-16.

64. See, e.g., John Pacenti, *Miami Attorney's Indictment May Show the Difficulty of Identifying 'Clean' Money for Legal Fees*, DAILY BUS.REV., Feb. 8, 2008, available at <http://www.law.com/jsp/article.jsp?id=1202426499766> ("CNN legal commentator Jayne Weintraub . . . [stated], 'Ben Kuehne has more integrity than any lawyer I know . . . [This prosecution is] an indictment on the legal profession.'").

raged at the time of *Monsanto* and *Caplin & Drysdale* twenty years before.<sup>65</sup> According to the indictment, Roy Black, former defense attorney for drug kingpin Fabio Ochoa,<sup>66</sup> paid Mr. Kuehne nearly \$200,000 to vet about \$5,000,000 in fees originating from Colombia before Ochoa was convicted.<sup>67</sup> Mr. Black has avoided personal charges because his reliance on Mr. Kuehne's opinion letters asserting that the sources of the legal fees were clean prevented federal prosecutors from forming a good faith belief that Mr. Black "knowingly" handled tainted funds.<sup>68</sup> Specifically, it is alleged that Mr. Kuehne, along with Gloria Florez Velez and Oscar Saldarriaga Ochoa (Fabio Ochoa's former accountant and Colombian attorney, respectively), knowingly falsified documents and facilitated a series of wire transfers to the United States via the Black Market Peso Exchange, knowing that the funds were, in part, the proceeds of drug trafficking.<sup>69</sup> A portion of the funds Mr. Kuehne attributed to legitimate enterprises apparently derived from fictitious entities created by American law enforcement.<sup>70</sup> Some view the case as an unfounded, biased attack on a well-known and well-liked lawyer, part of a larger witch hunt against the criminal defense bar. Prosecutors respond that this is the blind and even-handed administration of justice at work.<sup>71</sup> What is certain is that a man's freedom is on the line, even though he claims he was just doing his job.

Nearly all federal money laundering cases involving attorneys

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65. *See id.* ("It's now official: it's a crime to be a criminal defense attorney," Miami criminal defense attorney Milton Hirsch said. . . . "They picked a guy who sleeps with wing-tipped shoes on and indicted him for going above and beyond to make sure legal fees paid to a different lawyer are clean . . . ." [Miami attorney and president of the Miami chapter of the Federal Bar Association David O. Markus also said:] "[t]he intent here is to send a message to the criminal defense bar to stay away from these cases. Unfortunately, this case may reignite the war between criminal defense bar and the government, a war many of us had thought was long dead.").

66. Kuehne Indictment, *supra* note 62, at 2 (chronicling that Fabio Ochoa, a leader of the "Medellin Cartel" was extradited in 2001 to stand trial for conspiring to smuggle about thirty tons of cocaine per month between 1997 and 1999 and was convicted in 2003).

67. Kuehne Indictment, *supra* note 62, at 7-8.

68. *See* discussion *infra* Part II.C (discussing prosecutorial practices for money laundering charges against attorneys and describing the mens rea threshold).

69. Kuehne Indictment, *supra* note 62, at 3-12.

70. *Id.*

71. *See* Julie Kay, *Laundering Charges Trouble Attorneys*, NAT'L L.J., Mar. 17, 2008, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1205491397525> ("[W]hen there is clear evidence of wrongdoing, the Department [of Justice] will honor its commitment to the pursuit of justice. Attorneys are not immune from prosecution of money laundering simply on the basis they represent criminal defendants.").



that resulted in published opinions, most originating in Florida or Michigan, involve 1956 charges against defense attorneys highly involved in their client's illegal activities.<sup>72</sup> In one salient case setting the standard for burdens of proof, the Southern District of Florida in *Ferguson* noted that "liability under § 1957 is much stricter than liability under § 1956," given the absence of a design to conceal element.<sup>73</sup> The *Ferguson* court also held that the § 1957(f) Sixth Amendment exemption is an affirmative defense, not an element of the offense that the government must prove an absence of beyond a reasonable doubt.<sup>74</sup> The court further reasoned that "[t]hrough the exception Congress created a safe harbor for legitimate criminal defense expenses; it did not alter the substantive elements of money laundering under § 1957."<sup>75</sup> *Ferguson* was a case of first impression; 1957(f)'s affirmative defense status has been confirmed by the Eleventh Circuit; and a similar conception has been adopted in other circuits.<sup>76</sup>

On December 22, 2008, District Judge Cooke granted defendant Kuehne's motion to dismiss the 1957 count, relying on 1957(f)'s Sixth Amendment exemption.<sup>77</sup> Before praising the revival of the Sixth Amendment, it should be noted that the govern-

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72. See, e.g., *United States v. Abbell*, 271 F.3d 1286 (11th Cir. 2001) (holding that evidence of concealment in 1956 prosecution was sufficient where fee payments were made on behalf of cartel to further its code of silence, and attorneys obtained affidavits from arrested conspirators stating they did not know cartel leader to whom payments could be traced and adopting broad "facilitation theory" model of money laundering); *United States v. Reed*, 167 F.3d 984 (6th Cir. 1999) (affirming attorney's conviction where defendant made law office available for drug buyer to drop off money for seller to pick up from attorney's receptionist); *United States v. Ross*, 190 F.3d 446 (6th Cir. 1999) (affirming conviction of launderer-attorney where defendant obtained drugs from client in return for legal services and provided legal advice for clients regarding the best practices for concealing tainted drug profits); *United States v. Elso*, 422 F.3d 1305 (11th Cir. 2005) (affirming attorney's money laundering conviction where attorney drove to client's home to remove \$266,800 from hiding spot after client had a suspicion that law enforcement was pursuing him).

73. See *United States v. Ferguson*, 142 F. Supp. 2d 1350, 1352 n.2 (S.D. Fla. 2000).

74. *Id.* at 1359. This favors prosecutors because to receive an affirmative defense instruction, a defendant must present prima facie evidence of its existence, and they jury must find the affirmative defense to be true by a preponderance of evidence. Affirmative defenses are easier for prosecutors to refute than having to prove the absence of a defense beyond a reasonable doubt.

75. *Id.*

76. See *id.* at 1351; see e.g., *United States v. Hoogenboom*, 209 F.3d 665, 669-71 (7th Cir. 2000).

77. See *United States v. Velez*, No. 1:05-cr-20770-MGC (S.D. Fla. Dec. 22, 2008) [hereinafter *Kuehne Order*] (order granting defendant Kuehne's motion to dismiss count one); see also Dan Slater, *Judge Dismisses Count I of Ben Kuehne's Money Laundering Indictment*, WALL STREET JOURNAL LAW BLOG, Dec. 22, 2008, available at <http://blogs.wsj.com/law/2008/12/22/judge-dismisses-count-i-of-ben-kuehnes-money->

ment has appealed, the Eleventh Circuit's Sixth Amendment is extremely narrow,<sup>78</sup> and Judge Cooke has been described by some as exhibiting pro-defendant leanings inconsistent with the more rigid federal circuit court.<sup>79</sup> Moreover, a chasm in worldview between the tightly knit Miami legal community and the Eleventh Circuit should not be underestimated.<sup>80</sup> In her written opinion, Judge Cooke relied heavily on the Ninth Circuit's opinion in the case of *United States v. Rutgard*, rather than Eleventh Circuit precedent.<sup>81</sup> Additionally, it is uncommon for a district court to grant a defendant the dismissal of a count established to be an affirmative defense. Notwithstanding the status of the 1957 dismissal, it is likely that Kuehne will stand trial for the 1956 charge. The result of the case likely hinges on mens rea, as Kuehne will argue that he did not know that the funds were tainted, since the fact that they were appears conclusive.<sup>82</sup> Nevertheless, Judge Cooke's rejection of the government's common argument that *Caplin & Drysdale* has "vitiating" the Sixth Amend-

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lauding-indicent/ ("Judge Cooke found that Kuehne could not be prosecuted because the funds were for legitimate legal services.").

78. Compare *United States v. Bissell*, 866 F.2d 1343, 1350-51 (11th Cir. 1989) (taking liberties with the Supreme Court's holding in *Gideon v. Wainwright*, 372 U.S. 355 (1963), reasoning that the Sixth Amendment only sets a minimum guarantee of appointment of counsel in cases involving serious crimes), with *Wheat v. United States*, 486 U.S. 153, 154 (1988) (reasoning that the Sixth Amendment still protects the right to counsel of choice).

79. See, e.g., *United States v. Lorenzo*, 471 F.3d 1219 (11th Cir. 2006) (determining that Judge Cooke's decision to consider a defendant's post-sentence rehabilitation progress was an improper sentencing factor); *United States v. Hassoun*, 476 F.3d 1181 (11th Cir. 2007) (reversing Judge Cooke's order that dismissed a count of the high profile Padilla-Hassoun-Jayyousi homegrown terrorism case on double jeopardy grounds); Jay Weaver, *Judge in Ben Kuehne Case Calls Charge 'Disturbing'*, MIAMI HERALD, Nov. 30, 2008 ("Cooke's bold decision to dismiss the central terror-conspiracy charge in the Padilla case was overturned last year by a federal appeals court.").

80. See, e.g., Dan Slater, *Florida Legal Community to Ante up for Indicted Lawyer*, WALL ST. J. L. BLOG, Nov. 17, 2008, <http://blogs.wsj.com/law/2008/11/17/florida-legal-community-to-ante-up-for-indicted-lawyer/> (publicizing a charity dinner for the Kuehne legal defense fund where a former Florida Supreme Court Justice, Miami criminal defense attorneys, a former Florida Bar President, a former Florida Attorney General and a former U.S. attorney would be in attendance).

81. See *Kuehne Order*, *supra* note 77, at 6; see also *United States v. Rutgard*, 116 F.3d 1270, 1291 (9th Cir. 2007) ("Without the [1957(f) exemption,] a [suspected] drug dealer's check to his lawyer may have constituted a new federal felony.").

82. See Kay, *supra* note 71 ("Jose Quinon [Fabio Ochoa's former defense attorney said that] [f]or Kuehne to travel to Colombia, where he does not speak the language, and oversee the sale of cattle was pure folly. 'Ben does not have street smarts . . . . What the hell does Ben know about cows? He's a city slicker. Ben doesn't do drug cases; he has no idea what the hell he is doing. . . . He didn't know they were phony documents.'").

ment exemption breathes new life into the issue and has resurrected a forum for meaningful debate.<sup>83</sup> Mr. Kuehne should be cloaked in the presumption of innocence like all other defendants accused of crimes until the fact-finding process unravels, but at this point, there is no convincing evidence that prosecutors have intentionally singled out, or are attempting to make an example out of him.

### C. *Prosecutorial Tactics*

To understand the origins of the Kuehne indictment, it is helpful to analyze sections of the United States Attorneys' Manual, containing the policies and procedures followed by federal prosecutors, involving forfeiture and money laundering.<sup>84</sup> Although the manual has no binding force and there is no cause of action or legal claim for the government's failure to follow its procedures, it strongly guides prosecutorial decisions. The manual outlines a variety of consultation and notification requirements between federal prosecutor branches and Washington "[i]n light of the scope of the money laundering statutes" for the sake of "the orderly development of the case law and . . . [application of] these statutes in a consistent manner."<sup>85</sup> Section 9-105.600, titled "Prosecution Standards—Bona Fide Fees Paid to Attorneys for Representation in a Criminal Matter," contains such a consultation safeguard and sheds some light on the controversial Kuehne matter.<sup>86</sup> The manual directs prosecutors to perform their duties with the understanding that 1957(f)'s Sixth Amendment exemption is "*extremely limited*."<sup>87</sup> Relying on the relation back fiction, this section cites *Caplin & Drysdale* to remind that "there is no Sixth Amendment right to use criminally derived property to retain counsel of choice in a criminal case" and that a conviction or plea is not necessary in determining which property is and is not "criminally derived."<sup>88</sup> Closely applicable to the Kuehne matter, this section also states that:

[T]he Department, as a matter of policy, will not prosecute

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83. See *Kuehne Order*, *supra* note 77, at 7.

84. See U.S. DEPT OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL [hereinafter *United States Attorneys' Manual*] §§ 9-105.000 to 118.990 (n.d.), available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/index.html](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/index.html) (last visited Oct. 5, 2009).

85. *Id.* §§ 9-105.310, 9-105.330.

86. *Id.* § 9-105.600.

87. *Id.*

88. *Id.*

attorneys under § 1957 based upon the receipt of property constituting *bona fide fees* for the legitimate representation in a criminal matter, except if (1) there is proof beyond a reasonable doubt that the attorney had *actual knowledge* of the illegal origin of the specific property received (prosecution is not permitted if the only proof of knowledge is evidence of willful blindness); and such evidence does not consist of (a) confidential communications made by the client preliminary to and with regard to undertaking representation in the criminal matter; or (b) confidential communications made during the course of representation in the criminal matter; or (c) *other information obtained by the attorney during the course of the representation and in furtherance of the obligation to effectively represent the client.*<sup>89</sup>

Taken at face value, this language appears fair and reasonable. However, the definition of “bona fide fees” excludes fees subject to forfeiture under the relation back fiction. Even if a defense attorney has a subjective belief in the innocence of his or her client or thinks that the government should bear the burden of persuasion, fees can still be not “bona fide” and are therefore subject to forfeiture. Moreover, the scope of what information can be gained from the client by a defense attorney during the course of representation without exposure to a money laundering charge and the extent of attorney-client privilege is ill-defined and open to varying interpretation, particularly with relation back in effect.

In regards to pre-indictment, pre-conviction criminal forfeiture, section 9-111.130 mandates that “the United States Attorney will ensure proper and timely pre-indictment coordination with the United States Marshals Service to prepare for and assess the property management and financial needs of those assets subject to criminal forfeiture.”<sup>90</sup> Section 9-111.600 requires that “[s]eized cash [including assets with which a defendant intends to retain counsel], except where it is to be used as evidence<sup>91</sup> is to be deposited promptly in the Seized Asset Deposit Fund (“SADF”) pending forfeiture.”<sup>92</sup> Governmental use of funds in the SADF is intended to “prevent crime, enforce Federal laws and represent the rights and interests of the American people.”<sup>93</sup> The amount of assets

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89. *See id.* (emphasis added).

90. *United States Attorneys' Manual*, *supra* note 84, § 9-111.130.

91. *Id.* § 111.600; *see* discussion *infra* Part III.C.

92. *United States Attorneys' Manual*, *supra* note 84, § 9-111.600.

93. *See* U.S. DEP'T OF JUSTICE, ASSET FORFEITURE FUND, FY 2009 PERFORMANCE

seized per year has increased recently, as “there has been significant growth in the value of deposits . . . fueled by several large fraud and economic crime forfeiture cases,” and approximately \$1,500,000 was forfeited to the government in 2007 alone.<sup>94</sup> The government converts funds from criminal activity, including pre-conviction alleged criminal activity, for use to fund the continuance of the forfeiture mechanism, implement new crime fighting programs and distribute locally through the equitable sharing program.<sup>95</sup>

Section 9-119.200 cautions prosecutors to tread lightly when applying forfeiture provisions to attorney’s fees.<sup>96</sup> The manual recognizes that the requirement that an attorney bears the burden of proving lack of reasonable cause to believe fees were subject to forfeiture may “hamper” defense attorneys from ably representing their clients, calling for a thoughtful exercise of prosecutorial discretion in this situation.<sup>97</sup> Section 9-119.203 elaborates on limiting the forfeiture mechanism on fees, specifying that such fees may be exempt from forfeiture where “(1) there are reasonable grounds to believe that the particular asset is not subject to forfeiture; and (2) the asset is transferred in payment of legitimate fees for legal services actually rendered or to be rendered.”<sup>98</sup> Again, the definition of “subject to forfeiture” is rather broad. Guideline 2307, titled “Forfeiture of Assets Transferred to an Attorney for Representation in a Criminal Matter,” directs prosecutors to seek forfeiture where “there are reasonable grounds to believe that the attorney had actual knowledge that the asset was subject to forfeiture at the time of the transfer.”<sup>99</sup> Despite the subjective federal mens rea requirement regarding “knowledge,”<sup>100</sup> a higher require-

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BUDGET 2 (n.d.), available at <http://www.usdoj.gov/jmd/2009justification/pdf/fy09-aff.pdf>.

94. See *id.* at 4, 9.

95. See generally *id.*; see also John Shanks & Kevin Morison, *Sheriffs Can Use Asset Forfeiture Funds to Support the National Law Enforcement Museum*, SHERIFF MAGAZINE, Fall 2008, at 72, available at [http://www.sheriffs.org/file.asp?F=8D99B6C9D1CE46B8B9ED0185D5D47579.pdf&N=SH08\\_6\\_Shanks\\_Morison.pdf&C=spotlights/documents](http://www.sheriffs.org/file.asp?F=8D99B6C9D1CE46B8B9ED0185D5D47579.pdf&N=SH08_6_Shanks_Morison.pdf&C=spotlights/documents) (“[W]hy not allow sheriff’s offices and other law enforcement agencies to use some of their federal asset forfeiture funds [through equitable sharing] to build the first-ever national museum dedicated to law enforcement?”).

96. See *United States Attorneys’ Manual*, *supra* note 84, § 119.200.

97. See *id.*

98. See *id.* § 9-119.203.

99. U.S. DEPT OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL: CRIMINAL RESOURCE MANUAL § 2307 (n.d.) [hereinafter *Criminal Resource Manual*], available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm02300.htm](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm02300.htm).

100. Compare, e.g., *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976) (specifying

ment than the similarly subjective “reasonable cause to believe,” prosecutors may unilaterally impose “knowledge” that assets are “forfeitable” on a defense attorney by issuing an indictment against the defense attorney’s client seeking forfeiture.<sup>101</sup> This circular provision suggests that all assets listed as such in an indictment are forfeitable (same as “subject to forfeiture”), which is logically tantamount to saying that all women on the planet Earth are datable as long as I say they are. This circumvents instances where a defense attorney holds a genuine subjective belief that his client will beat the charges and that ultimately assets will not be forfeitable through sleight of hand. This is contrary to Professor Winick’s opinion that Congress intended that the phrase “reasonably without cause to believe that the property was subject to forfeiture” would connote “bounded by reason” and that extension of this to defense attorneys in instances of legitimate attorney’s fees is out of bounds.<sup>102</sup> The United States Attorneys’ Manual on forfeiture and money laundering could be improved<sup>103</sup> if the Department of Justice is sincerely interested in restoring defendants’ constitutional rights and working within the parameters of the law;<sup>104</sup> however, the manual does put defense attorneys on notice of current prosecutorial practices and procedures, contrary to complaints of lack of notice by the defense bar.<sup>105</sup>

Whatever the government’s true goals are regarding the power to choose whether they face private or court-appointed counsel to represent a defendant, prosecutors do hold the power to render a defendant a pauper via forfeiture and may dissuade private attorneys from taking cases for fear of a money laundering indictment.<sup>106</sup> In *United States v. Cronin*, the Court stated that “an indispensable element of the effective performance of [the defense bar’s] responsibilities is the ability to act independently of the Government and oppose it in adversary litigation.”<sup>107</sup> Federal

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that knowledge means a state of mind of one who acts with an awareness of the high probability of the fact in question, such as one who does not possess positive knowledge only because he consciously avoids it), *with* MODEL PENAL CODE § 2.02(b) (2001).

101. *Criminal Resource Manual*, *supra* note 99, § 2313.

102. *See* Winick, *supra* note 14, at 845.

103. *See* discussion *infra* Part V.B.

104. *See* discussion *infra* Part III.B.

105. *See, e.g.*, Diana Digges, *How Clean is Your Client’s Money?*, *LAWYER’S WEEKLY USA*, Feb. 2004, available at <http://www.lexisone.com/balancing/articles/lw020004a.html> (“Lawyers are thirsting for guidelines to make sure they don’t cross the line.”).

106. *See* Winick, *supra* note 14, at 776-85; *see also* Kay, *supra* note 71.

107. *See* *United States v. Cronin*, 466 U.S. 648, 657 n.17 (1984).

public defenders work vigorously in representing their clients, but an appointed attorney gives a newly “indigent” defendant the sense that he is surrounded by government on both sides. Defending RICO and other complex conspiracy cases with multiple charges and defendants is time-consuming, labor-intensive and necessarily expensive. Certain federal public defender’s offices are adequately staffed and may liberally apply to receive further funding.<sup>108</sup> Federal public defenders are often skilled, energetic and hard-working, but the Supreme Court has noted that there is no substitute for experienced private defense counsel, particularly in trial work.<sup>109</sup>

Yet another grave problem is that federal pre-conviction forfeiture has enabled parallel state laws.<sup>110</sup> Florida and similarly situated states simply cannot adequately fund their public defender’s offices, causing them to turn back clients.<sup>111</sup> This researcher saw this phenomenon firsthand during the summer of 2008: the Miami public defender’s office, with a 400-felony-a-year caseload, was forced to deny clients representation while pleading to Tallahassee for more aid.<sup>112</sup> Notwithstanding arguments that forfeiture has a chilling effect on defendants’ Sixth Amendment rights to counsel of choice, many state public defender’s offices simply cannot shoulder the heavy burden that forfeiture has placed on them.

### III. CONSTITUTIONAL ISSUES

#### A. *Proper Constitutional Interpretation*

The United States Constitution is “[o]rdained in the name of

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108. Interview with Ricardo J. Bascuas, Professor, University of Miami School of Law, in Coral Gables, Fla. (Dec. 9, 2008).

109. See Caplin & Drysdale, *Chartered v. United States*, 491 U.S. 617, 647 n.12 (1989) (Blackmun, J., dissenting) (pointing out that even in the federal system, with “generous” compensation plans under the Criminal Justice Act, the majority of federal public defenders lack practical experience).

110. See *United States Attorneys’ Manual* § 9-111.120 (mentioning that federal forfeiture is “intended to encourage state and local law enforcement agencies to use state forfeiture laws”).

111. Institute of Justice, *Policing and Prosecuting for Profit: New Jersey Ex-Sheriff Fights Civil Forfeiture Abuse*, [http://ij.org/index.php?option=com\\_content&task=view&id=1008&Itemid=165](http://ij.org/index.php?option=com_content&task=view&id=1008&Itemid=165) (last visited Oct. 5, 2009) (outlining forfeiture’s profound effects on the New Jersey justice system).

112. See Maureen Dimino, *Confronting a Constitutional Crisis: Miami-Dade Chief Public Defender Stands His Ground*, CHAMPION MAGAZINE, Oct. 2008, at 24, available at <http://www.criminaljustice.org/public.nsf/01c1e7698280d20385256d0b00789923/1b4d39774ce68e73852575270064b09f?OpenDocument> (chronicling summer 2008 events and current budget challenges in Florida).

the American people, repeatedly amended by them and for them, the document also addresses itself to them.”<sup>113</sup> The Constitution is not only law, it is the supreme law of the land, sitting atop even federal statutes enacted by representatives chosen by a majority of the American people.<sup>114</sup> Like any other law, it is not static, may be amended and “its meaning, like that of all other law, is the meaning the lawmakers were understood to have intended.”<sup>115</sup> Since the time of Chief Justice John Marshall’s decision in *Marbury*,<sup>116</sup> it has been the province of the Court to exercise judicial review and strike down legislation that violates the original meaning of the Constitution. The original intent interpretation is the best among the alternatives if judges are to strive for objectivity in the blind administration of justice; indeed, “[t]he Court can act as a legal rather than a political institution only if it is neutral . . . in the way it derives and defines the principles it applies.”<sup>117</sup> The legislature operates and serves the American people through majority rule, but “[t]he only thing majorities may not do is invade the liberties the Constitution specifies.”<sup>118</sup> The most important function of the Constitution, specifically the Bill of Rights, is to serve as a check on majority abuses against the minority. A judge “must apply [the Constitution] consistently and without regard to his sympathy or lack of sympathy with the parties before him,” even if the judge perceives the party before it as a reprehensible drug smuggler or ethically questionable law firm.<sup>119</sup> The pursuit of objectivity and neutrality in principal is crucial if the law is to have any true legitimacy and if the federal courts are to be a neutral and non-political branch, as the framers intended.

Original intent critics commonly argue that the framers did not envision modern constructs, such as the growth of a massive international drug trade, which would debilitate the health, safety and economic condition of the nation, so our interpretation of the document must change with the times. However, social exigency

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113. AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY*, at xi (Random House, 2005).

114. *See* U.S. CONST. art. VI, cl. 2.

115. *See* ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 145 (Free Press, 1990).

116. *See* *Marbury v. Madison*, 5 U.S. 137 (1803).

117. *See* Bork, *supra* note 115, at 146.

118. *See id.* at 147.

119. *See id.* at 151; interview with Bruce J. Winick, Professor, University of Miami School of Law, in Coral Gables, Fla. (Jan. 17, 2009) (commenting that the *Caplin & Drysdale* and *Monsanto* holdings were heavily influenced by the social context of the late 1980s and “war on drugs” fervor).



does not enable the chief interpreters sitting on the United States Supreme Court to arrive at socially satisfying political conclusions on the premise that social policy and legal fictions trump our core values of due process and the right to counsel. To say that the Constitution constantly changes as the values surrounding it do is simplistic, non-objective and cheapens *stare decisis*. If the Constitution rewrites itself as we do, there would be over 300,000,000 Constitutions; if it progresses as our social norms do, then justices are given the power to define what is progress and what is regress, yet policy is clearly in the legislature's domain. Critics argue that original intent interpretation is often too strictly textual, narrow and inert, but this is not the case. Textual and original intent interpretations are distinct; for example, the "right to privacy" is not textually apparent in the document, yet it screams from every inch of negative space therein. Similarly, the framers did not envision the use of thermovision technology by law enforcement to look inside homes and apprehend citizens engaged in illegal activity, yet the Court in *Kyllo* correctly inferred that the framers would not have allowed such a gross invasion into the home without a warrant.<sup>120</sup> Lastly, the Constitution and the Court's duty is strongest where core rights are infringed<sup>121</sup> rather than when rights are expanded,<sup>122</sup> if the highest body of law is to be understood, as it was and should be, primarily as a safeguard for the trampled-on few.

There is a right and wrong way to interpret the Constitution. It is difficult to excuse Supreme Court decisions that have resulted in twenty years of unconstitutional violations against the minority. Future courts should not feel confined to obey the dictates of these cases. *Stare decisis* is important for consistency and the development of doctrine, but it cannot be "an ironclad rule"<sup>123</sup> unless one operates under the assumption that justices are always faithful to the Constitution: "[i]t is . . . not only [the Court's] prerogative but also [its] duty to re-examine a precedent where its reasoning or understanding of the Constitution is fairly called into

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120. See *Kyllo v. United States*, 533 U.S. 27 (2001).

121. *Contra id.*, with *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989), and *United States v. Monsanto*, 491 U.S. 600 (1989).

122. See, e.g., *Baker v. Carr*, 369 U.S. 186 (1962) (expanding original intent notions of federal power, the Court declares that states must follow the one person one vote system for state popular equality in state elections); *Roe v. Wade*, 410 U.S. 113 (1973) (expanding original intent notions of federal power via the right to privacy, the Court declares that women have a right to choose whether or not to have an abortion).

123. See *Bork*, *supra* note 115, at 155.

question.”<sup>124</sup> What is unfortunate is the possibility that the justices who held that the relation back fiction trumps the Bill of Rights decided the case without neutrality of the mind before carefully considering precedent and the true (and truly absent) origins of the relation back fiction.<sup>125</sup> When reading these cases, it becomes apparent that the Supreme Court is complicit with Congress and that the federal government is complicit with the states. Therefore, the Court’s duty to protect the minority becomes even more critical. The *Caplin & Drysdale* and *Monsanto* majority bloc was obsessed with the war on drugs, clouding their application of America’s most important legal document.<sup>126</sup> Instead of allowing temporary restraining orders on a pre-convicted party’s assets even where a defendant intends to hire a defense lawyer, there should be a permanent restraining order between politics and law.

The majority either adopted the belief that the Court is a “naked power organ”<sup>127</sup> (knowing *a priori* what is best for society) or overestimated public apathy when stating in *Caplin & Drysdale* that the codification of the relation back fiction within section 853(c) “reflects the application of the *long-recognized* and *lawful* practice of vesting title to any forfeitable assets, in the United States, at the time of the criminal act . . . .”<sup>128</sup> The lack of legal citation in this portion has less to do with trifling clerks and instead reflects the lack of legal foundation for extending the relation back fiction, and with it the concepts of *in rem* forfeiture, to the criminal arena. Justice White does rely on *Stowell*, a 1890 case in which a distillery was forfeited to the government in violation of the Internal Revenue Code. However, the forfeiture at issue in *Stowell* was not open to the same constitutional scrutiny as it related solely to taxes and property interests; the *Stowell* defendant did not, and could not, seek to invalidate the forfeiture statute at issue under an assertion of personal Bill of Rights violations since his liberty was not at stake.<sup>129</sup> Moreover, the govern-

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124. See *id.* at 156 (quoting Justice Powell).

125. Interview with Bruce J. Winick, Professor, University of Miami School of Law, in Coral Gables, Fla. (Jan. 17, 2009) (in which Professor Winick commented that the *Caplin & Drysdale* and *Monsanto* justices were heavily influenced by the social context of the late 1980s and “war on drugs” fervor). It should be noted, if not already apparent, that Professor Winick participated in these cases and in oral argument.

126. *Id.*

127. See Bork, *supra* note 115, at 149.

128. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 627 (1989) (emphasis added).

129. See generally *United States v. Stowell*, 133 U.S. 1 (1890), cited in *Caplin & Drysdale*, 491 U.S. at 627.

ment in *Stowell* had a solid possessory interest in the defendant's assets since tax payments were necessary for the defendant to comply with federal tax law. White's use of *Stowell* is an unjustified extension of the scant forfeiture precedent, not a reliance on long-established precedent. Without *Stowell*, the only leg White has to stand on is "a strong governmental interest"<sup>130</sup>—rhetoric which cannot seriously be regarded as solid constitutional analysis weighed against severe governmental intrusions.

If the relation back fiction is indeed "long-recognized," it is peculiar that Supreme Court justices could have been confused as to its true mechanics in a 1993 *in rem* forfeiture case, *92 Buena Vista*.<sup>131</sup> The case involved the civil forfeiture of real estate that was allegedly bought with drug proceeds and the Supreme Court granted *certiorari* to clarify forfeiture mechanics and property ownership.<sup>132</sup> The *92 Buena Vista* plurality could not reach a consensus on when exactly title in the forfeitable property vests in the government.<sup>133</sup> The concept is also not well-established, as courts in the past century have aimed to limit the unfair effects of the relation back theory, even in the purely civil *in rem* area, notwithstanding its extension in the criminal law where there are more procedural protections for defendants.<sup>134</sup> Other commentators have searched for instances of the utilization of relation back doctrine in criminally related cases, but to no avail; it is "an innovation virtually without precedent in American law."<sup>135</sup>

If relation back has no foundation in American law, perhaps it has some basis in British law, which heavily influenced the framers' minds. However, an investigation of British law produces no such result; the criminal relation back fiction is purely an American innovation, established circa 1984.<sup>136</sup> Decisions out of Great Britain indicate that criminals have, and have always had, at

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130. See *Caplin & Drysdale*, 491 U.S. at 631.

131. See *United States v. 92 Buena Vista Ave.*, 507 U.S. 111 (1993).

132. See *id.*

133. Compare *id.* at 129 (Stevens, J., leading plurality) (ruling that the government is not the owner of property before forfeiture is decreed), with *id.* at 134 (Scalia, J., concurring) (stating that the relation back doctrine constitutes a retroactive vesting of title in the government).

134. See *United States v. One 1936 Ford Coach*, 307 U.S. 219 (1939); see also Fork, *supra* note 24, at 211-15 (collecting cases and arguing that until the 1970 RICO and CCE laws, the Supreme Court aimed to limit the application of relation back theory in *in rem* forfeiture, particularly in relation to third parties).

135. See Fried, *supra* note 20, at 335.

136. See Money Laundering Control Act, Pub. L. No. 99-570, § 1352(a), 100 Stat. 3207-21 (1986) (codified as amended at 18 U.S.C. §§ 1956, 1957 (2009)).

least a partial possessory interest in the proceeds of their alleged crimes in our mother country.<sup>137</sup> The American relation back's feature that ill-gotten gains "vest" in the government at the instant a crime is committed, by definition, means that there is no other party with any property interest besides the government.<sup>138</sup> In *Webb v. Chief Constable*, the Royal Court of Justice held that money seized on suspicion of it being the proceeds of drug trafficking *must be returned* to the individual from which it was seized when the purpose for which it was seized no longer applies.<sup>139</sup> Although the police argued that they were holding the proceeds until the true owner was identified, the court reasoned that the alleged drug dealer was entitled to recoup his losses "if, he could establish his title without relying on his own illegality, even if it emerged that the title on which he relied was acquired in the course of carrying through an illegal transaction."<sup>140</sup> This ruling was made despite the police's strong possessory and policy-based interests, in stark contrast to the majority's reasoning in *Caplin & Drysdale*. In *Attorney General v. Blake*, a case involving an author's right to the proceeds of a biography chronicling "a self-confessed traitor's" time spent as a secret Soviet agent operating within Britain, the House of Lords relied on centuries-old common law property concepts and refused to apply the 1911 Official Secrets Act. That Act states that "the Attorney General is entitled to intervene by instituting civil proceedings, in aid of the criminal law, to uphold the public policy of ensuring that a criminal does not retain profit directly derived from the commission of his crime."<sup>141</sup> In *Blake*, the House of Lords admonished a "dearth of judicial decision" on the books on the matter of property vesting in the Crown at the time an offense is committed, even in a serious circumstance such as treason.<sup>142</sup> In the United States, the framers

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137. E-mail Interview with Anthony Price, Counsel for Intervener British Columbia Civil Liberties Association on behalf of Robin Chatterjee (Jan. 5, 2009, 15:12 EST) [*hereinafter* Price E-mail] (on file with author) ("The government in Chatterjee relied on the 'relation back' theory, but we countered that with some useful decisions from England . . . provid[ing] a strong basis to argue that at common law criminals have at least a possessory interest in the proceeds of their crime.").

138. See BLACK'S LAW DICTIONARY 758 (3d pocket ed. 2006) ("[V]est, *vb.*: 1. To confer ownership of (property) upon a person. 2. To invest (a person) with the full title to property. 3. To give (a person) an immediate, fixed right of present or future enjoyment. . . . vested, *adj.* Having become a completed, consummated right for present or future enjoyment; not contingent; unconditional; absolute.")

139. See *Webb v. Chief Constable*, [2000] 1 All E.R. 209 (Eng.).

140. *Id.* at 113.

141. *AG v. Blake*, [2001] 1 A.C. 268 (H.L.) (appeal taken from Ch.) (Eng.).

142. See *id.*

demonstrated a clear intention to break from the British common law tradition of forfeiture upon conviction for treason.<sup>143</sup> The logic of extending the practice to less serious crimes has not yet been seriously considered given the strong social policy interest of disabling the drug trade's financial base.

Without any reliable legal or historical support, the relation back fiction and § 853 forfeiture, also codified within the federal money laundering statutes, must fail. As a society committed to constitutional principles, we should be "deeply concerned about the prosecution's trailblazing use of forfeiture to cripple the accused before the trial has even started."<sup>144</sup> As Justice Blackmun pointed out in the *Caplin & Drysdale* dissent, "[t]he notion that the Government has a legitimate interest in depriving criminals—before they are convicted—of economic power . . . is more than just somewhat unsettling . . . . [it] is constitutionally suspect."<sup>145</sup> Since the relation back fiction is a fictitious toothpick supporting undue governmental power over the minority, *ipso facto*, we must proceed without recognition of it.

### B. Fifth Amendment Due Process

The Fifth Amendment to the United States Constitution requires that "[n]o 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."<sup>146</sup> Modern federal forfeiture and money laundering law violates due process on five grounds: nullifying the presumption of innocence, failing to require that prosecutors prove every element beyond a reasonable doubt given a judicial misunderstanding of subjective mens rea, failing to provide adequate hearings to defendants, unjustly tilting the overall adversarial balance of fairness in favor of the government, and inserting civil *in rem* concepts like the relation back fiction into the criminal law.

Our criminal justice system is based on the all-important presumption of innocence, but the old adage that it is better to let ten guilty people go free than to convict one innocent has been forgotten. In *Winship*, the Court clarified criminal defendants' constitu-

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143. See U.S. CONST. art. III, § 3, cl. 2 ("The Congress shall have power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture . . .").

144. NACDL Brief, *supra* note 42, at 9-10.

145. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 640 n.7 (1989) (Blackmun, J., dissenting) (internal quotation omitted).

146. U.S. CONST. amend. V.

tional procedural due process rights. In it, the Court ruled that laying within the very foundation of criminal law and due process was the presumption of innocence as well as the requirement that the prosecution bear the burden of proving every element of a crime beyond a reasonable doubt.<sup>147</sup> Pre-conviction forfeiture, by distorting civil law concepts and misplacing them within the criminal law, assumes that the defendant is presumed guilty before being assessed by a jury of his peers. What right does a bank robber have to use stolen money to hire a lawyer?<sup>148</sup> None, but before the robber is convicted, he is a suspected bank robber, and the money is only *allegedly* stolen. *Winship* and hundreds of years of the development of our law requires us to think this way. Further, the bank robber is “dissipating the actual property of others, whereas the suspected drug dealer who spends profits from allegedly illegal drug activity is not interfering with the property interests of other persons” and therefore has superior claim of title.<sup>149</sup> Lastly, the bank robber often steals bills specially marked by the bank, or has been caught red-handed outside of the bank, giving law enforcement probable cause to lawfully seize the assets as evidence with a Fourth Amendment seizure.

Shifting focus to attorneys, Justice White relied on *Laska* to argue that “[n]o lawyer, in any case, . . . has the right to . . . accept stolen property, or . . . ransom money, in payment of a fee . . . . The privilege to practice law is not a license to steal.”<sup>150</sup> This is true, but only after a judicial declaration that the money was stolen, via a plea bargain or conviction. The “privilege to practice law” involves a duty to fight vigorously on behalf of a client that is presumed innocent. The relation back fiction gave the *Caplin & Drysdale* and *Monsanto* majorities license to utilize a broader scope of cases that never violated the presumption of innocence as grossly as pre-conviction forfeiture of a criminal defendant’s assets did.

Prosecutors must, and courts must see to it that they do, prove that the defendant’s conduct has met every element of the

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147. See generally *In re Winship*, 397 U.S. 358 (1970).

148. See, e.g., *In re Forfeiture Hearing as to Caplin & Drysdale*, Chartered, 837 F.2d 637, 645 (4th Cir. 1988) (utilizing the familiar bank robber hypothetical).

149. See *Caplin & Drysdale*, 491 U.S. at 653 & n.15 (Blackmun, J., dissenting) (“The Government’s interest in the assets at the time of their restraint is no more than an interest in safeguarding fictive property rights . . . . We do not deal with contraband . . . [nor] instrumentalities of crime.”); see also Johnson, *supra* note 29, at 1331.

150. *Caplin & Drysdale*, 491 U.S. at 626 (quoting *Laska v. United States*, 82 F.2d 672, 677 (10th Cir. 1936)).

crime beyond a reasonable doubt before conviction;<sup>151</sup> judges may issue directed verdicts in favor of the defense if they do not. In order for the government to bring a money laundering charge against an attorney for accepting tainted fees from a client, prosecutors must hold reasonable belief that the attorney had subjective actual knowledge of the fees' taint.<sup>152</sup> With the foresight that absurdity may ensue given the breadth of liability that federal money laundering permits, the NACDL successfully lobbied Congress to insert the "knowing" mens rea for money laundering. Unfortunately, the courts have strayed from a proper application of the "knowing" mens rea.<sup>153</sup> The federal courts, and the United States Attorneys' Manual, claim to have adopted the definition of "knowing" as specified in the Model Penal Code<sup>154</sup> and the Ninth Circuit case *Jewell*.<sup>155</sup> Judicial misunderstanding of "knowing," particularly in 1957 money laundering prosecutions, can result in a miscarriage of justice, and such a miscarriage was present in *Campbell*, a case out of the Fourth Circuit.<sup>156</sup> In *Campbell*, a real estate agent was tried and convicted for money laundering after selling a home to a man who may have appeared to be a drug dealer: he drove a Porsche, flashed large wads of cash, used a cellular phone and drank beer during normal business hours in front of the agent.<sup>157</sup> The trial court rightly set aside the verdict, rea-

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151. See *Winship*, 397 U.S. at 358.

152. See *Criminal Resource Manual*, *supra* note 99, § 2307.

153. See S. REP. NO. 433, at 11-12 (1986); see also Johnson, *supra* note 29, at 1314 n.87 (1993) ("Congress' rejection of 'reason to know' and 'reckless disregard' standards [for 1957] came in response to testimony by representatives of the National Association of Criminal Defense Lawyers, the American Civil Liberties Union, and other groups that vigorously opposed use of these standards as a substitute for actual knowledge.").

154. MODEL PENAL CODE § 2.02(b) (1985) ("A person acts knowingly with respect to a material element of the offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is *practically certain* that his conduct will cause such a result.") (emphasis added).

155. See *United States v. Jewell*, 532 F.2d 697,703-04 (9th Cir. 1976) (ruling that the term knowingly is not limited to positive knowledge, but includes a subjective awareness of a high probability of the fact in question, such as one who does not possess positive knowledge, only because he consciously avoids it and that actual belief that the fact in question does not exist does not constitute knowing that the fact exists).

156. See *United States v. Campbell*, 977 F.2d 854 (4th Cir. 1992); see generally Johnson, *supra* note 29, at 1305-11 (arguing that misunderstanding of "knowingly" in the context of money laundering prosecutions has often encroached on Bill of Rights protections).

157. See *Campbell*, 977 F.2d at 854.

soning that the agent did not have actual knowledge, a subjective awareness of a high probability that her client was a drug dealer and was not consciously avoiding such knowledge.<sup>158</sup> The Fourth Circuit reversed, relying on a *post factum* assessment of what was in the real estate agent's head despite a lack of evidence to support a legal conviction.<sup>159</sup> Given the failure of the government to prove that the client expressly bragged about his exploits, it would have been just as reasonable for the real estate agent to think that the client was a party boy with a rich dad; a subjective awareness of the high probability of the fact in question, the client's illegal propensities and ill-gotten assets, was not satisfied. The court improperly applied its own prejudices instead of carefully examining the scant evidence of the real estate agent's knowledge at the time the offense occurred.<sup>160</sup> Should a similar broken analytical mode be employed in the Kuehne matter, or in any subsequent money laundering prosecutions of those whose job title requires contact with tainted funds (i.e. bankers, real estate agents and lawyers), due process will be violated. Lastly, it is worth recalling that, according to the United States Attorneys' Manual, prosecutors have the power to impose subjective knowledge of a client's tainted assets by issuing an indictment against the client; such an assumption also violates due process, particularly when the lawyer has a subjective actual belief that his client will beat the charges.<sup>161</sup>

Defendants facing *ex parte* pre-conviction criminal forfeiture are commonly not afforded a forum to challenge the forfeiture. This practice violates due process, particularly after we dispose of the relation back fiction.<sup>162</sup> In the seminal due process for adversarial hearings case, *Matthews v. Eldridge*, the Court ruled that due process for hearings is not technical, but is instead a flexible determination that relies on various factors.<sup>163</sup> The court must bal-

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158. See *United States v. Campbell*, 777 F. Supp. 1259, 1266 (W.D. N.C. 1991) (reasoning that appearance alone does not satisfy knowledge that a real estate client is necessarily a drug dealer at the trial court level).

159. See *Campbell*, 977 F.2d at 860.

160. See *id.* at 858-60 (conceding that the evidence of the real estate agent's knowledge of the client's illegal activities was "not overwhelming," yet reasoning that the agent objectively should have known, and thus misapplying the federal knowledge standard).

161. See *supra* Part II.C.

162. See generally *Bascuas*, *supra* note 11, at 1163 (arguing that the presumption of innocence and procedural due process requires that a defendant be afforded the opportunity to challenge the pre-conviction forfeiture of assets, particularly when such forfeiture results in a collateral deprivation of Bill of Rights guarantees).

163. See *Matthews v. Eldridge*, 424 U.S. 319 (1976).



ance the private interest affected by the restraint, the risk of an erroneous deprivation of such interest through the procedures used, the probable value of additional or substitute safeguards, and the government's police interest.<sup>164</sup> Before the Supreme Court weighed in on the topic of pre-conviction restraint hearings, the Eleventh Circuit held in *Bissell* that a narcotics defendant had no due process right to an adversarial hearing prior to an *ex parte* order freezing assets derived from narcotics offenses.<sup>165</sup> This holding rested on an assumption that the assets derived from narcotics offenses even before the defendant was convicted of the crime. To no avail, appellants in *Bissell* argued that "when pretrial restraints are imposed on assets, the Fifth Amendment requires a hearing on the merits at which the government must prove the probability that the defendant will be convicted and that his assets will be forfeited."<sup>166</sup> Such an argument is entirely reasonable and consistent with the *Eldridge* factors, yet the appellate court felt that defendant did not deserve a "full-blown hearing . . . in light of the government's compelling regulatory interest in preventing crime."<sup>167</sup> While the government does have a strong regulatory interest, the Eleventh Circuit did not put much weight on defendant's right to a "full blown hearing" during a meaningful interaction with the government with property, and by extension, liberty at stake. As to the erroneous deprivation prong, the *Bissell* court conceded that "[t]he clear danger posed by this statutory scheme [of pre-conviction forfeiture of assets connected to fundamental Bill of Rights protections] is the possibility that perfectly legitimate assets will be wrongfully restrained."<sup>168</sup> By depending on the relation back fiction, the court did not have to fully apply *Eldridge* from the viewpoint of the defendant since "when two parties [the presumptively innocent defendant and the government] have property rights in contested assets, a due process analysis must comprehend both interests."<sup>169</sup> The next year, when the Supreme Court decided *Monsanto* and *Caplin & Drysdale*, the Court offered little procedural guidance to lower federal courts, thereby endorsing draconian procedures such as those outlined by

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164. *See id.* at 335.

165. *See United States v. Bissell*, 866 F.2d 1343, 1352-54 (11th Cir. 1989).

166. *Id.* at 1352.

167. *Id.* at 1353; *contra Matthews*, 424 U.S. at 335.

168. *Bissell*, 866 F.2d. at 1354.

169. *See id.* Interestingly enough, the Eleventh Circuit relied on a civil sequestration statute in order to pull this rabbit out of a hat. *See also generally Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974).

the Eleventh Circuit in *Bissell*.<sup>170</sup> However, on remand, the Second Circuit reasoned that due process required that the defendant Monsanto be afforded an adversarial hearing to challenge forfeiture.<sup>171</sup> Discounting the circular logic of the United States Attorneys' Manual, according to federal law, an indictment cannot, on its face, conclusively establish probable cause that the listed assets were forfeitable.<sup>172</sup> Other circuits have properly connected the dots, coming to the correct conclusion that "a property owner's interest is particularly great when he or she needs the restrained assets to pay for legal defense on associated criminal charges . . . ."<sup>173</sup> There would be nothing extraordinary about allowing defense counsel to appear at forfeiture hearings; the police interest would not be injured, and in fact, public confidence in law enforcement and the criminal process would be improved through the administration of fair hearings.

Although the following has not gained vast support because of judicial deference to governmental policy interests, it is worth setting forth the argument that federal forfeiture and money laundering laws have unfairly tipped the tenuous adversarial balance in favor of the government, violating due process. Prosecutors are given considerable leeway in attaching a criminal forfeiture charge to various federal charges, influencing plea negotiations and impinging on the authority to determine who defense counsel will be, public or private.<sup>174</sup> Even the *Bissell* court recognized that section 853 forfeiture permitted prosecutorial abuses by "seek[ing] broad, sweeping restraints recklessly or intentionally encompassing legitimate, nonindictable assets."<sup>175</sup> Prosecutors are, and should be, vested with discretion and be presumed to act in good faith to issue indictments with the public's best interest in mind, but with broadly worded federal statutes at their disposal, the opportunity for abuse is heightened.<sup>176</sup>

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170. See *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989); *United States v. Monsanto*, 491 U.S. 600 (1989).

171. *United States v. Monsanto*, 924 F.2d 1186, 1193-94 (2d Cir. 1991); see also *Bascuas*, *supra* note 11, at 1172-73.

172. See *Monsanto*, 924 F.2d at 1196.

173. *United States v. Holy Land Found.*, 493 F.3d 469, 475 (5th Cir. 2007).

174. See *Fork*, *supra* note 23, at 232 (developing a similar argument regarding upsetting the adversarial balance).

175. See *United States v. Bissel*, 866 F.2d 1343, 1355 (11th Cir. 1989).

176. See *Morvillo*, *supra* note 15, at 138 ("Prosecutors have had the power to engineer this shift in priorities [towards money laundering prosecutions] because they enjoy virtually unfettered discretion in fashioning and filing accusations. [C]ourts have largely acquiesced in the government's charging practices and virtually ignored the prosecutors' increased and sometimes abusive use of the grand jury.").

The *Caplin & Drysdale* majority acknowledged petitioner's argument that section 853 forfeiture will have the effect of upsetting the "balance of forces between the accused and his accuser."<sup>177</sup> Reasoning that a power imbalance is not enough to render a federal statute unconstitutional (even when the statute is based on a dead property fiction), Justice White adopted a narrow view of procedural due process, stating that the right to a fair trial did not extend very far beyond the Sixth Amendment right to counsel.<sup>178</sup> In actuality, procedural due process does extend far beyond the right to counsel. Due process provides courts a tool to analyze the general fairness of statutes; it also requires notification of charges, an opportunity for a hearing, well-articulated and non-vague charges, charges that are credibly based, the presumption of innocence and requirement that the government prove every element of an offense beyond a reasonable doubt. These and other basic criminal procedural guarantees have little or no relation to the Sixth Amendment.

Criminal defendants' access to due process may be inhibited by conflicts of interest faced by defense attorneys given RICO and the MLCA's breadth, exacerbated through money laundering prosecutions of attorneys.<sup>179</sup> Defense attorneys are ethically obligated to vigorously represent clients, necessitating research into a client's background to be sure that no material stone is left unturned in preparing a defense.<sup>180</sup> Information gathered by defense attorneys through client interviews and possibly incriminating evidence gathered through independent investigation are private and protected by attorney-client privilege and the right to counsel.<sup>181</sup> However, this sacred privilege is abrogated by the "crime-fraud" exception to the attorney-client privilege, which

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177. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 633 (1989) (White, J., majority) (quoting *Wardius v. Oregon*, 412 U.S. 470, 474 (1973)).

178. *See id.* at 633-34 (White, J., majority) ("We are not sure that this [upset in the balance of power] contention adds anything to petitioner's Sixth Amendment claim, because, while '[t]he Constitution guarantees a fair trial through the Due Process Clauses . . . it defines the basic elements of fair trial largely through the several provisions of the Sixth Amendment.") (quoting *Strickland v. Washington* 466 U.S. 668, 684-85 (1984)).

179. *See Abramovsky, supra* note 7, at 686.

180. *See Digges, supra* note 105 ("[Defense attorney Irwin Schwartz remarked:] [t]he code of professional responsibility requires that I represent my clients zealously. When a client comes in for representation, whether that's someone on a marijuana charge or a senior corporate executive, the lawyer's first job is to build trust and confidence. If you begin by cross-examining the client, it undercuts the attorney-client relationship.").

181. *See United States v. Rosner*, 485 F.2d 1213, 1224 (2d Cir. 1997) ("[T]he essence

does not protect communications and information deemed to further misconduct.<sup>182</sup> Since the MLCA criminalizes fees for legal services flowing from the criminal defendant to his attorney, the definition of “misconduct” is substantially broadened, particularly since the Sixth Amendment “safe harbor” in 1957(f) is “extremely limited” or non-existent according to prosecutors.<sup>183</sup> As a result, fewer communications are protected, and some defense attorneys are left in the precarious position of either representing clients under the fear of possible prosecution or simply dropping cases.<sup>184</sup> The due process guarantee of an adversarial criminal justice system requires the prosecution to prove its case without improperly pressuring the defense.

Once a prosecutor believes a defense attorney has been caught in the web of liability, he or she may entice the defense attorney to inform against the client. Miami defense attorney Neal Sonnett has remarked, “[i]f a lawyer is required to file a suspicious activity report on a client . . . then the entire client relationship has been destroyed.”<sup>185</sup> When a defense attorney becomes an undercover government agent against his client, common sense dictates that the defendant has not been given access to due process; however, the federal courts have declined to extend a per se rule to this scenario.<sup>186</sup> A legal landscape that promotes secrecy and double-speak simply encourages more secrecy and sophisticated criminal schemes; additionally, it promotes ethical violations.<sup>187</sup> More importantly, it decreases a criminal defendant’s

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of the Sixth Amendment is . . . privacy of communication with counsel.”); *see also* Abramovsky, *supra* note 7, at 694.

182. *See* Abramovsky, *supra* note 7, at 694.

183. *See United States Attorneys’ Manual*, *supra* note 84, § 9-105.600; *see also* David E. Rovella, *Defense Bar Fears Jail Over Tainted Fees*, NAT’L L.J., Mar. 8, 2002, available at <http://www.law.com/jsp/article.jsp?id=1019508858211> (“Defense lawyers like Howard M. Srebnick . . . say prosecutors are now going even further, arguing that even if a defense lawyer didn’t know his fees were tainted, a showing of ‘deliberate ignorance’ on his part could be sufficient.”).

184. *See* Rovella, *supra* note 183.

185. *Id.*

186. *See United States v. Ofshe*, 817 F.2d 1508, 1515-16 (11th Cir. 1987) (holding that defendant was not prejudiced by law enforcement’s placing of a “body bug” on his attorney and monitoring inculpatory conversations and that this practice was not so outrageous as to violate the Fifth Amendment); *see generally* Abramovsky, *supra* note 7 (arguing that *Ofshe* has opened the door to similar prosecutorial tactics across the United States).

187. *See* Abramovsky, *supra* note 7, at 706 (pointing out that the ABA Model Code of Professional Conduct clearly prohibits defense attorneys from misrepresenting their government-informer status to their client and from divulging information protected by privilege to the government without the client’s consent.).

confidence that a defense lawyer is truly a zealous advocate, when in fact a defense counsel should be the guardian of due process.

Lastly, the insertion of civil law fictions into the criminal law necessarily violates due process since criminal law should be carefully crafted to prevent constitutional abuses under the due process clause. *In rem* forfeiture's mechanics have been inserted into *in personam* forfeiture via pre-conviction restraining order provisions.<sup>188</sup> *In rem* forfeiture relies on the assumption that the property itself, quite apart from its owner, is guilty and that the state must take or restrain it for the public safety and welfare.<sup>189</sup> Nearly all property in the United States and other capitalist locales are owned by individuals or corporations (legally individuals), and this deprivation in property directly punishes the owner. Just as we would cast aside a law stating: "the government shall satisfy that a criminal defendant has committed this crime by a preponderance of evidence," it is equally misguided to extend civil procedural rules relating to forfeiture extending to the criminal law. Even the United States Attorneys' Manual recognizes that human parties are connected to, and punished in conjunction with, their property.<sup>190</sup> Further, the "innocent owner" and "bona fide purchaser" provisions implicitly recognize the alternative: there is a guilty owner, or illegitimate purchaser at which the forfeiture laws are directed.<sup>191</sup> The courts have allowed a fiction that belittles basic property rights despite due process concerns to aid the government in the war on drugs and violence. The Fifth (and Fourth) Amendments were ratified because the framers and the states valued the connection between people and their property, and the importance of preventing invasive governmental intrusions on personal property rights.

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188. See *supra* Part II.A.

189. See *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 638 n.5 (1989), (Blackmun, J., dissenting) ("The theory (or, more properly, the fiction) underlying civil forfeiture is that the property subject to forfeiture is itself tainted by having been used in an unlawful manner . . . . Criminal forfeiture, in contrast, is penal in nature: it is predicated on the adjudicated guilt of the defendant, and has punishment of the defendant as its express purpose . . . . Where the purpose of forfeiture is to punish the defendant, the Government's penal interest are weakest when the punishment also burdens third parties.").

190. See *United States Attorneys' Manual*, *supra* note 84, § 9-113.106 ("The government may conclude a civil forfeiture action in conjunction with the criminal charges against the defendant *which provided the cause of action against the property.*") (emphasis added).

191. See *supra* Part II.B.

### C. *Fourth Amendment Seizure*

The Fourth Amendment to the United States Constitution requires that

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>192</sup>

Forfeiture is seizure.<sup>193</sup> Fair probable cause adversarial hearings should precede all pre-conviction forfeitures of a defendant's property in order to ensure the reasonableness that the Fourth Amendment unequivocally mandates. Professor Bascuas recently set forth that pre-conviction forfeiture should be challenged on Fourth Amendment grounds, even though the battle has previously been fought, as in *Monsanto, Caplin & Drysdale*, and *Bissell* on a Sixth Amendment field.<sup>194</sup> Bascuas's argument pinpoints the anomaly that even though "the government cannot remove an allegedly obscene book from circulation before *proving* that it is obscene, under current law it can prevent an accused from using contested assets to fund his defense with little more than an allegation."<sup>195</sup> In pre-conviction forfeiture scenarios, a defendant should at least be granted the same procedural protections uniformly offered in seizure hearings. Additionally, focusing on forfeiture as seizure limits forfeitable property to that which is evidence of a crime, thus limiting the expansive reach of forfeiture allowed under the facilitation theory. The lack of a considerable shift into this area in the law is due in large part to the error of defense attorneys who have framed the issue within the Sixth Amendment; then again, hindsight is 20/20. Courts have likely viewed this approach as a self-interested fee-grab, instead of placing attention back where it should be, on the rights of the accused.

### D. *Sixth Amendment Counsel*

The Sixth Amendment to the United States Constitution requires that "[i]n all criminal prosecutions, the accused shall

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192. U.S. CONST. amend. IV.

193. See, e.g., *Soldal v. Cook County*, 506 U.S. 56, 61 (1992) (defining seizure as a meaningful government interference with an individual's possessory interest in property).

194. See Bascuas, *supra* note 11, at 1162.

195. *Id.* at 1163.

enjoy the right to . . . have the Assistance of Counsel for his defence.”<sup>196</sup> Since the Sixth Amendment, as properly interpreted through original intent, protects the right to choice of counsel for those with means, modern forfeiture and money laundering law violates this basic right, the very backbone of the American adversarial system. Despite an obligation to interpret and carefully consider the constitutionality of federal statutes, in *Monsanto*, the majority refused to recognize the right to counsel’s special status.<sup>197</sup> Adopting a balancing test, the ultimate tool for a justice whose ultimate decision precedes impartial analysis, the majority concluded that “we find that a pretrial restraining order does not arbitrarily interfere with a defendant’s fair opportunity to retain counsel.”<sup>198</sup>

The disagreement between the five-member majority and the civil libertarians challenging the forfeiture laws in *Monsanto* and *Caplin & Drysdale* splintered on deference to the relation back fiction. In reality, pre-conviction forfeiture disrupts a presumptively innocent defendant’s right to counsel of choice by restricting access to presumptively legitimate assets. However, utilizing the fiction, the majority reasoned that a defendant has no right to use someone else’s (the government’s) assets to hire counsel.<sup>199</sup> The framers of the Constitution primarily intended to protect the right to choice of counsel: “the colonists would have been shocked at the notion that a defendant could be deprived of the right to retain his own counsel and instead ordered to stand trial with counsel appointed by the court.”<sup>200</sup> *Zenger*, a case involving a colonial publisher accused of printing and distributing libelous anti-govern-

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196. U.S. CONST. amend. VI.

197. See *United States v. Monsanto*, 491 U.S. 600, 609 (1989) (reasoning that since the text of section 853 does not contain exemptions for “stock broker’s fees, laundry bills, or country club memberships” we should not attach any special significance to the omission of “attorney’s fees” from the statutory text); but see U.S. CONST. amend. VI (containing no reference to stock broker’s fees, laundry bills, or country club memberships, yet guaranteeing the right to counsel); see also *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (“[W]e [the Court] must never forget, that it is a constitution we are expounding.”).

198. *Monsanto*, 491 U.S. at 616 (internal quotation omitted).

199. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 626 (1989) (“A defendant has no Sixth Amendment right to use another person’s money for services rendered by an attorney . . . . [T]he Government does not violate the Sixth Amendment if it seizes the . . . proceeds and refuses to permit the defendant to use them to pay for his defense.”).

200. See Winick, *supra* note 14, at 786-800 (analyzing the historical origins of the right to counsel). All further footnotes in this paragraph are derived from Winick’s article.

ment newspapers, specifically against the governor, offers an originalist glimpse into the right to counsel.<sup>201</sup> The offended governor intervened by personally appointing both a judge and Zenger's defense counsel. When Zenger's counsel of choice, Andrew Hamilton, appeared instead of the appointed lawyer, the judge was "startled" but permitted Hamilton's argument on the fundamental right to speak out against tyranny and censorship.<sup>202</sup> The judge's permission of Hamilton to represent and argue on behalf of Zenger suggests that colonists valued counsel of choice and free speech, and aimed to prevent one-sided "mock" trials.

In *Flanagan*, the Court reasoned that the right to choice of counsel "reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding."<sup>203</sup> The right to choice of counsel has needlessly receded ever since *Gideon*, which intended to supplement the right to counsel by affording certain defendants appointed counsel, not supplant the right to choice of counsel for those with means.<sup>204</sup> This confused modern conception is typified by Justice Rehnquist in *Wheat*: "the essential aim . . . is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers."<sup>205</sup> The right to appointed counsel and counsel of choice need not be mutually exclusive, but there is a danger that the right to appointed counsel will swallow the right to choice of counsel since the right to appointed counsel is more commonly discussed, exercised, and litigated. Justice Blackmun, in the *Monsanto* and *Caplin & Drysdale* dissent, struck the right chord, harkening back to the same values espoused in *Zenger*: "[t]hat the majority implicitly finds the Sixth Amendment right to counsel of choice so insubstantial that it can be outweighed by a legal fiction demonstrates . . . its apparent unawareness of the function of the

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201. See Paul Finkelman, *The Zenger Case: Prototype of a Political Trial*, in *AMERICAN POLITICAL TRIALS* 21, 22-24 (Michal R. Bellknap ed., 1981).

202. See *id.* at 30-40.

203. *Flanagan v. United States*, 465 U.S. 259, 267-68 (1984).

204. See *Gideon v. Wainwright*, 372 U.S. 335, 343-44 (1963) (holding that indigent defendants in criminal prosecutions shall be granted the right to assistance of counsel, without addressing an evisceration of the right to counsel of choice for those with means).

205. See, e.g., *Wheat v. United States*, 486 U.S. 153, 159 (1988) (holding that the courts must recognize the Sixth Amendment presumption in favor of right to counsel of choice, but the presumption may be overcome by a judicial determination of a conflict of interest). Interestingly enough, *Wheat*, issued the same year as *Caplin & Drysdale*, and *Monsanto*, contained the same exact justice split, with the four dissenters holding a more robust understanding of the Sixth Amendment.



independent lawyer as a guardian of our freedom."<sup>206</sup> Lastly, the Supreme Court's uncertainty as to the confines and history of the right to counsel leads to gross misapplication of the 1957(f) right to counsel exemption.

The Sixth Amendment right to effective assistance of counsel has two prongs: deficiency and prejudice.<sup>207</sup> To reverse a conviction, a defendant must demonstrate that counsel was deficient (that counsel was not an effective legal advocate) and that he was prejudiced (the outcome of the case was affected by deficient counsel).<sup>208</sup> Broad leeway is given to defense counsel's strategic decisions and claims are most often directed at overworked appointed counsel - ineffective assistance of counsel claims rarely prevail. Petitioner Monsanto argued that denial of counsel of choice resulted in ineffective assistance of counsel.<sup>209</sup> By applying the modern conception of the right at the expense of the original meaning, Justice White did not properly entertain defendants' argument, responding that appointed counsel is not necessarily ineffective.<sup>210</sup> An incomplete understanding of the right to counsel allowed the *Monsanto* majority to sidestep a coherent argument firmly rooted in the Sixth Amendment.

### E. First Amendment Speech

The First Amendment to the United States Constitution requires that "Congress shall make no law . . . abridging the freedom of speech."<sup>211</sup> Criminal defendants are guaranteed the right to free speech. This right is of ultimate importance to a criminal defendant trying to defend him or herself. In the critical forum of a courtroom, all criminal defendants hold a First Amendment

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206. Caplin & Drysdale, *Chartered v. United States*, 491 U.S. 617, 644 (1989) (Blackmun, J., dissenting) (internal quotation omitted).

207. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

208. *See id.*

209. *See* NACDL Brief, *supra* note 42, at 23-36 (supporting, with federal precedent, the premise that denial of counsel of choice leads to ineffective assistance of counsel, not because public defenders are ineffective, but because the choice was denied); *see also* *Wilson v. Mintzes*, 761 F.2d 275, 286 (6th Cir. 1985) (holding that when the government unreasonably denied defendant counsel of choice, prejudice is presumed and may lead to a constitutional violation).

210. *See United States v. Monsanto*, 491 U.S. 600, 614 (1989); *see also* Caplin & Drysdale, *Chartered v. United States*, 491 U.S. 617, 624-34 (1989) (avoiding Monsanto and Caplin & Drysdale's arguments that denial of counsel of choice results in ineffective counsel by arguing that this would mean indigents would have built-in ineffective assistance of counsel claims against appointed counsel, leading to absurd results).

211. U.S. CONST. amend. I.

right for their counsel to serve as a mouthpiece during this meaningful interaction with the government. When counsel of choice is deprived, the First Amendment freedoms of speech and expression should therefore apply, triggering “exacting scrutiny review.”<sup>212</sup>

### F. *Eighth Amendment Fines*

The Eighth Amendment to the United States Constitution requires that “[e]xcessive bail shall not be required, nor excessive fines imposed . . . .”<sup>213</sup> Since recent *in rem* cases have revived the long idle prohibition against excessive fines, this concept should be extended to *in personam* criminal forfeiture as well. A fine has been defined by the Court as a “payment to a sovereign as punishment for some offense.”<sup>214</sup> When assets allegedly related to a crime are transferred from a person to the government before adjudication by plea or conviction, the transfer should therefore be viewed as a “fine.” Forfeiture as a result of money laundering depends on the use of “facilitation theory” - that otherwise clean assets are used to facilitate the concealment of tainted funds and that the clean funds are therefore forfeitable.<sup>215</sup> This theory has also been used in the civil forfeiture context. For example, in *Calero-Toledo*, a case involving the forfeiture of a yacht upon law enforcement’s retrieval of trace marijuana for personal use, the Supreme Court ruled that the entire yacht was forfeitable on the ground that it was connected to drug activity.<sup>216</sup> The Eleventh Circuit has similarly ruled that “a vehicle is subject to forfeiture no matter how small the quantity of contraband found.”<sup>217</sup> The rule is “admittedly harsh,” but the Sixth Circuit also allowed the forfeiture of a new Mercedes upon the discovery of the remains of four marijuana “cigarettes” on the dashboard.<sup>218</sup> In the context of money laundering offenses, federal courts have ruled that property facilitating money laundering offenses through concealment may be forfeited, despite a lack of the word “facilitate” within the criminal forfeiture statute. What is worse, forfeiture may be

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212. See Winick, *supra* note 14, at 829-30 (pointing out that while the First Amendment protects political speech, it is also in effect in courtrooms to protect a defendant’s ability to hire counsel of choice).

213. U.S. CONST. amend. VIII.

214. *Austin v. United States*, 509 U.S. 602, 622 (1993) (citation omitted).

215. See *supra* Part II.A.

216. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 665 (1974).

217. *United States v. One 1982 28’ Int’l Vessel*, 741 F.2d 1319, 1322 (11th Cir. 1984).

218. *United States v. One 1975 Mercedes 280S*, 590 F.2d 196, 198 (6th Cir. 1978).

ordered, even in the absence of any wrongdoing by the party connected to the property.<sup>219</sup>

There has, however, been a movement by original intent justices to grant legal substance to the Eighth Amendment: that the people should be protected from a government that imposes excessive fines.<sup>220</sup> In 1990, petitioner Lyle Austin's body shop and mobile home were forfeited through an *in rem* section 881 forfeiture action because the defendant was allegedly dealing cocaine out of his body shop.<sup>221</sup> Considering Austin's challenge, the Court determined that the first relevant question was whether the forfeiture constituted "punishment."<sup>222</sup> By focusing on the real life effects of the forfeiture, the majority determined this did constitute a punishment, a term not limited to criminal cases.<sup>223</sup> The *Austin* opinion relied on historical forfeiture cases from the common law to support that forfeiture was, and has always been, intended to punish the owner, not the "property," thereby demystifying the *in rem* fiction.<sup>224</sup> Relying on legislative history, the Court opined that "Congress recognized 'that the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs.'<sup>225</sup> Since Congress explicitly stated that forfeiture was a "sanction" intended to "punish" crime, forfeiture is a fine, and defense counsel would be wise to consider creative arguments regarding "excess" to bring the Eighth Amendment to the forefront in representing a forfeiture client. After all, whether or not the fine is "excessive" is determined by a non-formulaic proportionality analysis, giving litigants ample leeway in argument.<sup>226</sup>

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219. See, e.g., *United States v. All Monies* (\$477,048.62) in Account No. 90-3617-3, 754 F. Supp. 1467, 1473 (D. Haw. 1991) ("Because the property is the wrongdoer, forfeiture can be ordered even in the absence of any wrongdoing by the claimant . . . any property . . . [that] facilitates that [illegal] activity is forfeitable.").

220. See *Austin v. United States*, 509 U.S. 602, 609 (1993).

221. *Id.* at 604-05.

222. *Id.* at 609-10.

223. See *id.* at 614-23.

224. See *id.* at 615-16 ("The fiction that 'the thing is primarily the offender,' . . . has a venerable history in our case law . . . Yet the Court has understood this fiction to rest on the notion that the owner who allows his property to become involved in an offense has been negligent.").

225. *Id.* at 620; (quoting S. REP. NO. 98-225, at 191 (1983)).

226. See *United States v. Bajakajian*, 524 U.S. 321, 334 (1998) ("The touchstone of constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense . . .").

## IV. THE CANADIAN IMPACT

A. *Background: the Canadian Legal System*

It is next appropriate to consider the deleterious effects current American forfeiture law has had on Canada. In the past ten years, Canadian provinces have adopted the many questionable features of American forfeiture law, even though the Canadian legal system is structured quite differently than its neighbor to the south. Cloaked in the common law tradition and navigating a power balance between local and federal legal powers, the Canadian legal system does have similarities with the United States.<sup>227</sup> However, in the Canadian federalism construction, the criminal law is clearly delegated to the federal government, whereas civil and property law is left exclusively to the provinces.<sup>228</sup> There exists a movement for uniformity in Canadian civil law, and Ontario has typically served as the focal point of legal change within Canada. Ontario, in turn, tends to look for guidance from and conformity with the outside world.<sup>229</sup> Unlike the closed system employed in the United States, Canadian courts often rely on international precedent, primarily from Britain and the United States, as well as international treaties.<sup>230</sup> Although still technically connected to Great Britain, The British North America Act of 1867 granted Canada leeway in crafting its own laws, and in 1982 the Canadian Charter of Rights of Freedoms (“the Charter”) was enacted, containing striking similarities with the American Bill of Rights.<sup>231</sup> The Charter enumerates guaranteed freedoms, includ-

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227. See, e.g., Price E-mail, *supra* note 137 (offering background on Canadian law).

228. See *id.*; Constitution Act, 1867, 30 & 31 Vict. Ch. 3 (U.K.), as reprinted in R.S.C., No. 5, §§ 91, 92 (Appendix II 1985) [hereinafter Canadian Division of Powers] (“(91). . . [T]he exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated . . . The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters. . . . (92). In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects hereinafter enumerated; that is to say . . . Property and Civil Rights in the Province. . . . The Administration of Justice in the Province, including the Constitution, Maintenance and Organization of Provincial Courts . . . [t]he Imposition of Punishment by Fine, Penalty or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.”).

229. See Price E-mail, *supra* note 137.

230. See, e.g., R. v. Oakes, [1986] 1 S.C.R. 103, at para. 50, 54 (Can.) (relying on American due process and presumption of innocence and on the European Convention on Human Rights on the presumption of innocence, respectively). Canadian Supreme Court cases are available, free of charge, at <http://scc.lexum.umontreal.ca/en/>.

231. See Canadian Charter of Rights and Freedoms, §7, Part I of the Constitution

ing "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" within section 7 of the Charter, similar to the Fifth Amendment's Due Process Clause.<sup>232</sup> Additionally, section 10 states that "[e]veryone has the right on arrest or detention . . . to retain and instruct counsel without delay and to be informed of that right," analogous to the Sixth Amendment right to counsel of choice.<sup>233</sup>

Although Charter Rights are guaranteed, the sovereign may put reasonable restrictions on these rights through section 1.<sup>234</sup> When a party claims that a Charter freedom has been infringed, Canadian courts apply the "Oakes Test." Oakes involved a successful challenge to a statute that stated simple possession of drugs necessarily led to a presumption of full blown trafficking. The Canadian Supreme Court ruled that this violated section 11(d), presumption of innocence; just as such a provision would likely violate American Due Process.<sup>235</sup> Once a challenger has demonstrated that the Charter has been violated, the burden shifts and the Crown must prove by a "preponderance of the probabilities" that 1) the purpose of the measure constraining the Charter right is sufficiently important and consistent with a free and democratic society; 2) the means chosen to constrain the Charter right are proportional; and 3) there is proportionality between the effects and purposes of the measure.<sup>236</sup> Since current Canadian forfeiture laws are provincial and therefore technically civil in scope, the Canadian courts have not been given the opportunity to fully consider the Charter rights implicated by forfeiture in the criminal context, which like the American Bill of Rights is heightened for criminal defendants.

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Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.) [hereinafter Canadian Charter of Rights and Freedoms]; see also Price E-mail, *supra* note 137 (offering background on Canadian law).

232. Charter of Rights and Freedoms, *supra* note 231.

233. *Id.* § 10.

234. *Id.* § 1.

235. *Compare* R. v. Oakes, [1986] 1 S.C.R. 103 (Can.) (holding that § 8 of the Narcotic Control Act violated the Charter of Rights and Freedoms), with *Sandstrom v. Montana*, 442 U.S. 510, 521 (1979) (holding that a jury instruction that the law presumes that a person intends the natural consequences of their actions is either a burden shifting or conclusive presumption, violating the due process requirement that the state prove every element of a crime beyond a reasonable doubt).

236. R. v. Oakes, [1986] 1 S.C.R. 103, para. 63-71 (Can.).

### B. *Provincial Forfeiture Law*

At the federal, criminal level, section 462.37 permits the Crown to order a forfeiture of any “proceeds of crime” after conviction as a part of sentencing, and the court is required to order forfeiture of any property involving criminal property or property “connected to” the offense by a balance of probabilities.<sup>237</sup> If the federal court is satisfied, beyond a reasonable doubt, that the contested assets are proceeds of crime, it may issue a forfeiture order notwithstanding insufficient evidence linking the property to the specific offense with which the individual has been charged. The Canadian equivalent to American federal money laundering is contained in section 462.31, punishing every one “who uses, [or] transfers the possession of . . . any property or any proceeds of the property with intent to conceal or convert that property or those proceeds, knowing or believing that all or a part of that property or of those proceeds” originate from illegal activity.<sup>238</sup> Upon examination of the language and substance of this definition, it is apparent that Canada has borrowed the American “facilitation theory” law enforcement tool and has set mens rea at “knowingly,” as in the United States.<sup>239</sup> Further, the government may seek a pre-conviction restraint on a defendant’s assets. Lastly, the Canadian money laundering statute contains no express section 10 right to counsel provision; such an exemption would have little effect as the right to counsel is substantively narrow in Canada.<sup>240</sup>

It was not until December 2001 that Ontario, following the enforcement lead of other common law countries, began utilizing “civil” forfeiture with the Civil Remedies Act of 2001 (“CRA”).<sup>241</sup> The CRA aimed to cripple organized crime, marijuana grow houses, and urban blight.<sup>242</sup> The CRA borrows heavily from Amer-

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237. Criminal Code, R.S.C., ch. C-46, § 462.37 (1985) (Can.); see also Kevin E. Davis, *The Effects of Forfeiture on Third Parties*, 48 MCGILL L.J. 183, 186-87 (2003) (offering an assessment of recent Canadian forfeiture legislation from a Canadian perspective).

238. Criminal Code, R.S.C., ch. C-46, § 462.31 (1985) (Can.).

239. See *supra* Part II.C (discussing “knowing” mens rea).

240. See, e.g., *R. v. Prosper*, [1994] 3 S.C.R. 236 (Can.) (indicating that there is no Canadian uniform right to appointed counsel and the right does not extend far beyond the requirement that police notify a person that they have a right to seek counsel after an arrest); Price E-mail, *supra* note 137 (“It is my understanding that any substantive right to counsel [in Canada] is very very limited.”).

241. Civil Remedies Act, *supra* note 8.

242. See MINISTRY OF THE ATTORNEY GENERAL OF ONTARIO, CIVIL FORFEITURE IN ONTARIO 2007: AN UPDATE ON THE CIVIL REMEDIES ACT, 2001, (2007) [hereinafter Ontario Forfeiture Update], available at [http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/20070824\\_CRIA\\_Update.pdf](http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/20070824_CRIA_Update.pdf).

ican federal forfeiture law in order to emulate American law enforcement's successes.<sup>243</sup> The stated purposes of the CRA are to compensate victims of unlawful activity, prevent violators from retaining ill-gotten property and prevent further injury arising from forfeited property.<sup>244</sup> Under the Act, "[e]xcept where it would clearly not be in the interests of justice, the court *shall* make an order [of forfeiture] if the court is satisfied that there are *reasonable grounds* to believe that the property is proceeds of unlawful activity."<sup>245</sup> Another section outlines similar forfeiture procedures for "instruments of unlawful activity," requiring that the government prove that property was "used to engage in unlawful activity that, in turn, resulted in the acquisition of other property or in serious bodily harm to any person . . . ."<sup>246</sup> Parties challenging civil forfeiture may file a motion that reasonable legal expenses are paid out of the property.<sup>247</sup> Granting a party's interlocutory motion for legal expenses is purely discretionary. Further, a "responsible owner" (similar to the American "innocent owner" or "bona fide purchaser"), may move to recoup lost property, and the court must honor that motion upon a finding of credibility.<sup>248</sup> Although Canadian civil forfeiture arguably intrudes on the federal domain, it exemplifies "double aspect" provincial law, which touches, but is not classified as, criminal law.<sup>249</sup> This arguably unconstitutional phenomenon seems to linger when the federal government is complicit with provincial intrusions into the federal, criminal domain. This feature is not so different from the greatly increased federal criminal power after RICO's passage: federalism problems are not "problems" when the federal and local governments share crime-fighting interests.

Ontario's Attorney General issued an August 2007 report

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243. *Id.*

244. Civil Remedies Act, *supra* note 8, at pt. I.

245. *Id.* pt. II, § 4, at 2 (emphasis added).

246. *Id.* pt. III, § 2.

247. *Id.* pt. III, § 10; E-mail from Melany Doherty, Ontario Ministry of the Attorney General (Jan. 29, 2009, 09:16 EST) ("The Civil Remedies Act . . . is a judicially controlled process with safeguards for legitimate and responsible owners. There are provisions in the statute permitting access to preserved assets for legal expenses.").

248. *See* Civil Remedies Act, *supra* note 8, at pt. III, § 8(3).

249. *See* Canadian Division of Powers, *supra* note 228; *see also* Press Release, Anthony Price on behalf of Farris, Vaughan, Wills & Murphy LLP, *Young Farris Associate Goes to the Supreme Court of Canada*, [http://www.farris.com/downloads/ADP-Supreme\\_Court\\_of\\_Canada.pdf](http://www.farris.com/downloads/ADP-Supreme_Court_of_Canada.pdf) (last visited Oct. 10, 2009) [hereinafter Price Press Release] (discussing "double aspect" Canadian jurisdictional law, whereby provincial property and civil rights law may touch issues relating to federal criminal law).

highlighting the successes of civil forfeiture in Canada.<sup>250</sup> Ontario has established a Civil Remedies for Illicit Activities Office (“CRIA”), enforcing and organizing the province-wide forfeiture effort.<sup>251</sup> Procedurally, the police submit a case outlining cause for forfeiture to an authority within the Ontario Attorney General’s Office who next reviews the case to determine if legal requirements are met, then forwards it to the CRIA office.<sup>252</sup> Between November 2003 and July 2007, the CRIA seized \$3,600,000 (CAD) through forfeiture and has frozen another \$11,500,000 in property.<sup>253</sup> Forfeiture in Ontario and other provinces is primarily directed at the burgeoning illegal Canadian marijuana cultivation and distribution industry, resulting in 73% of Ontario’s total forfeiture value.<sup>254</sup> The release also highlights urban blight forfeiture by mentioning the seizure of crack houses.<sup>255</sup> The Canadian provinces of British Columbia, Alberta, Manitoba, and Quebec have subsequently passed mirroring civil forfeiture legislation, virtually identical in substance to Ontario’s.<sup>256</sup>

There are striking similarities between Canadian “civil” forfeiture and American state and federal civil and pre-conviction criminal forfeiture. Both mechanisms permit asset forfeiture upon “reasonable grounds” of illegality, both aim to aid victims and compensate the government for its efforts, and both funnel allegedly ill-gotten gains to further new law enforcement objectives. As in the United States, there has been ample criticism by civil libertarians in Canada.<sup>257</sup> Canadian critics, like their American neighbors, fear that otherwise innocent third parties, such as landlords who rent to tenants who may misuse apartments to grow marijuana, will suffer financially. Critics also fear the Attorney General’s prediction of “exponential growth” in the area and

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250. See Ontario Forfeiture Update, *supra* note 242; see also MINISTRY OF PUBLIC SAFETY AND SOLICITOR GENERAL OF BRITISH COLUMBIA, CIVIL FORFEITURE OFFICE: A TWO-YEAR STATUS REPORT (2008) available at <http://www.pssg.gov.bc.ca/publications/docs/civilforfeitureoffice.pdf> (outlining similar successes with civil forfeiture in British Columbia, as in Ontario).

251. Ontario Forfeiture Update, *supra* note 242, at 3.

252. *Id.* at 9.

253. *Id.* at 10. As of the date of this publication \$1.00 USD could be exchanged for approximately \$1.03 CAD.

254. *Id.* at 11.

255. *Id.*

256. See, e.g., Criminal Property Forfeiture Act, S.M., ch. 16, § 13 (2008) (Can.).

257. See, e.g., Posting of Mark Nestmann to Asset Protection Blog, <http://nestmann.blog.sovereignsociety.com/2007/09/now-your-proper.html> (Sept. 20, 2007, 14:56 EST) (“Policing for profit is a burgeoning enterprise in Ontario, and may soon be a reality in most other provinces as well.”).



argue that “[t]his sets up an insidious bounty hunter mentality where instead of focusing on preventing crime, law enforcement agencies focus on seizing the richest, legally undefended assets they can find.”<sup>258</sup> This argument is especially persuasive in Canada, where there is supposed to be a separation between civil provincial and federal criminal law.<sup>259</sup> In Canada, instead of stopping criminals, law enforcement can take a shortcut by seizing property; meanwhile, innocent civilians fear that the true criminal instrumentality is left on the street: the flesh and blood criminal. Perhaps the most striking distinction is that Canadian law enforcement nearly always avoids civil forfeiture contemporaneous with a criminal proceeding; typically, civil forfeiture actions commence only after the criminal process has been exhausted or ignored.<sup>260</sup> This is a strategic decision by the provinces since the validity of their forfeiture rests on its “civil” aspects. If decreed criminal in nature, there is fear by the government that forfeited assets will have to be returned and the laws will be struck down as unconstitutional.<sup>261</sup>

### C. Chatterjee: *Civil Law by Contortion*

On March 27, 2003, Robin Chatterjee was driving when Ontario police pulled him over because his car was missing a front license plate.<sup>262</sup> Officers detected the odor of marijuana and searched his car, finding a light socket, light ballast, an exhaust fan (equipment commonly associated with growing marijuana), and \$29,020 CAD.<sup>263</sup> Although he was “in breach of his recognizance, which required him to reside in Ottawa,”<sup>264</sup> and there was apparent probable cause of drug activity, police did not charge Chatterjee with a criminal offense due to “lack of evidence,” but seized the grow equipment and cash as instruments of unlawful activity.<sup>265</sup> Chatterjee challenged the seizure in the Superior

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258. *Id.*

259. *See* Canadian Division of Powers, *supra* note 228.

260. *See* Price E-mail, *supra* note 137 (“[I]n enforcing civil forfeiture [the Canadian provinces] often strive to avoid concurrent civil proceeding and criminal proceedings: they will proceed with the civil forfeiture only after the criminal process is exhausted . . .”).

261. *See* Price Press Release, *supra* note 249.

262. *Ontario v. Chatterjee*, [2009] 86 O.R.3d 168, para. 2 (Can.).

263. *Id.*

264. *See Ontario v. Chatterjee*, [2009] 2009 SCC 19, para. 5 (Can.) (containing the facts of the Chatterjee case, as recited by the Canadian Supreme Court).

265. *Id.* para. 5-6.

Court<sup>266</sup> on Charter grounds; specifically sections 7 (fundamental justice, due process equivalent),<sup>267</sup> 8 (“Everyone has the right to be secure against unreasonable search or seizure”),<sup>268</sup> 9 (“Everyone has the right not to be arbitrarily detained or imprisoned”),<sup>269</sup> and 11(d) (presumption of innocence).<sup>270</sup> The Superior court roundly rejected Chatterjee’s Charter Rights claims, largely due to the civil nature of the seizure.<sup>271</sup> The jurisdictional argument that the civil forfeiture law was criminal in nature and thus *ultra vires* of provincial power won the court’s ear, but ultimately failed.<sup>272</sup>

With the support of interveners, including the British Columbia Civil Liberties Association and the Canadian Criminal Lawyers’ Association, Chatterjee appealed to Ontario’s highest court, the Court of Appeal for Ontario, on the grounds that provincial forfeiture laws were *ultra vires* of the province’s legislative powers.<sup>273</sup> The federal government made explicit that it did not question the jurisdictional oversteps evident in provincial forfeiture laws, and commentators have viewed this “cooperative federalism” as the major roadblock to the jurisdictional challenge: the Canadian federal government and the Canadian provinces are mutually motivated to raise revenue and prevent illegal activity.<sup>274</sup> The Court of Appeal for Ontario drew attention to the commonality of civil forfeiture legislation, and noted that striking down provincial forfeiture law would have profound political and administrative implications in the form of returning assets and prohibiting effective law enforcement.<sup>275</sup> Common in Canadian opinions, the court acknowledged the many successes of similar legislation in the United States and other common law countries.<sup>276</sup> The court held that “there is *no basis* on this record to support the submission that the CRA is a ‘colourable’ attempt to

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266. *Ontario v. Chatterjee*, [2005] 138 C.R.R.2d 1 (Can.).

267. *See* Canadian Charter of Rights and Freedoms, *supra* note 231, § 7.

268. *See id.* § 8.

269. *See id.* § 9.

270. *See id.* § 11(d).

271. *See Ontario v. Chatterjee*, [2005] 138 C.R.R.2d 1, para. 78 (Can.).

272. *See id.*

273. *See Ontario v. Chatterjee*, [2007] 86 O.R.3d 168, para. 3 (Can.); *see also* Canadian Division of Powers, *supra* note 228.

274. *See* Janice Tibbetts, *Proceeds-of-crime-law Challenge Could Cost Provinces Millions*, CANWEST NEWS SERVICE, Nov. 10, 2008, [http://www.canadianjusticereviewboard.ca/article-proceeds\\_of\\_crime.htm](http://www.canadianjusticereviewboard.ca/article-proceeds_of_crime.htm) (last visited Jan. 31, 2010) (quoting a British Columbia Civil Liberties Association representative for use of the term “cooperative federalism.”).

275. *See Ontario v. Chatterjee*, [2007] 86 O.R.3d 168 (Can.).

276. *See id.*

legislate in relation to criminal law.<sup>277</sup> Under Canadian law, a law can be classified as criminal if it has a “criminal purpose backed by a prohibition and a penalty.”<sup>278</sup> It is worth re-stating for the sake of thoroughly confusing the reader that the explicit purpose of provincial legislation is to stop *organized crime*.<sup>279</sup> The court further reasoned that forfeiture is not punishment since there is no deprivation of liberty or stigma attached to forfeiture; further, the CRA fell “squarely” within provincial power as related to property and civil rights.<sup>280</sup> Applying the all-important double-aspect theory, the court reasoned that civil law “may intrude into some areas that can normally be in the domain of the criminal law, namely, promoting public peace, order, security, health and morality” but that these effects are only “incidental to its purpose.”<sup>281</sup> Lastly, addressing the presumption of innocence violation argument, the court reasoned that the guilt or innocence of the owner is irrelevant, so there was no violation.<sup>282</sup>

There are compelling arguments to the contrary. Specifically, consistent with the releases by the Ontario and British Columbia Attorneys General, the legislation is aimed at stopping the drug trade and organized crime, and those who stand to lose are the class of citizens typically targeted in the criminal law. Although Canadian authorities do not typically bring concurrent civil forfeiture and criminal charges but wait until after the criminal proceedings are concluded, or, as in *Chatterjee*, bring no criminal charges at all, the very fact that they could proves that the types of behavior addressed in the civil forfeiture laws are criminal. As would be the case in most American courts unfortunately, no serious consideration was given to the fact that \$29,020 CAD was seized outside the criminal process despite the ample evidence that it originated from the criminal activity of an individual.

*Chatterjee* appealed to the Supreme Court of Canada and oral argument occurred on November 12, 2008.<sup>283</sup> Anthony Price, counsel for intervener, the British Columbia Civil Liberties Association (on behalf of *Chatterjee*), was not optimistic after oral argu-

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277. *Id.* para. 21 (emphasis added).

278. *Id.* para. 22.

279. *See, e.g.*, Civil Remedies Act, *supra* note 8; Ontario Forfeiture Update, *supra* note 242.

280. *See Ontario v. Chatterjee*, [2007] 86 O.R.3d 168, para. 21 (Can.); *see also* Canadian Division of Powers, *supra* note 228.

281. *See id.* para. 6, 31.

282. *See id.* para. 42

283. *See* Price Press Release, *supra* note 249.

ment.<sup>284</sup> Appellants were well-equipped with law, such as *Blake* and *Webb*, the aforementioned British cases that rejected the relation back fiction and instead recognized that criminals have at least some possessory interest in the fruits of their alleged crime.<sup>285</sup> Appellants also utilized the United States Supreme Court's *Austin* decision, which held that forfeiture can constitute "punishment," which is a key indicator for defining the barrier between civil and criminal law in Canada.<sup>286</sup> The Ontario government, sharing a table with the federal government, thus symbolizing the lack of a federalism conflict, heavily relied on the relation back fiction to justify the constitutionality of the provincial civil forfeiture laws.<sup>287</sup> Again, Canadian law is heavily guided by foreign law. The bleakest aspect of oral argument was that the Canadian Supreme Court Justices' questions focused on social policy aspects of the legislation; this was troubling to appellants because the federal government is in the province's corner and striking down the legislation would likely result in the administrative nightmare of a redistribution of forfeited assets, as well as halt a much needed flow of cash to provincial law enforcement.<sup>288</sup>

It was hardly a surprise when, on April 17, 2009, the Canadian Supreme Court sided with the provincial and federal government by unanimously affirming the Court of Appeal for Ontario.<sup>289</sup> Echoing the lower court, the Canadian Supreme Court discredited Chatterjee's case as based on "an exaggerated view of the immunity of federal jurisdiction in relation to matters of criminal that may, in another aspect, be the subject of provincial legislation."<sup>290</sup> By framing the issue as the provinces' power to regulate health and welfare rather than focusing on the actual forfeiture mechanism and the effects on the party punished through deprivation of property, the Canadian Supreme Court's objective to rule for the government was a simple task.<sup>291</sup> Under a literal reading of this

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284. *See id.* ("I am not that hopeful.")

285. *Webb v. Chief Constable*, [2000] 1 All E.R. 209 (Eng.); *AG v. Blake*, [2001] 1 A.C. 268 (H.L.) (appeal taken from Ch.) (Eng.).

286. *See Austin v. United States*, 509 U.S. 602, 622 (1993); *see also Price E-mail, supra* note 137 ("For the [Chatterjee] case, we reviewed and relied on some of the [United States Supreme Court] case law on the constitutionality of civil forfeiture, namely the *Ursery* and *Austin* cases, and our Supreme Court may briefly discuss them when the Chatterjee decision is released.")

287. *See Price E-mail, supra* note 137 ("The government in Chatterjee relied on the [American] 'relation back' theory . . .").

288. *See Price Press Release, supra* note 249.

289. *See Ontario v. Chatterjee*, [2009] 2009 SCC 19 (Can.).

290. *See id.* para. 2.

291. *See id.*

broad-stroke reasoning, provincial power to enact and enforce criminal law is now theoretically limitless; indeed, all criminal activity (whether it be rape, murder, burglary etc.) results in a societal impact affecting property, health and welfare.<sup>292</sup> Eerily similar to the *Monsanto* Court employing a balancing test in order to arrive at the desired result, the Canadian Supreme Court was enabled to do the same by asking whether the “dominant feature” of the CRA was to advance provincial, civil objects or whether it was more criminal-related.<sup>293</sup> Straddling two inconsistent paths of reasoning, the Canadian Supreme Court conceded that civil forfeiture has a punitive effect on individuals, yet relied on the *in rem* fiction which strictly separates person from property in upholding the CRA.<sup>294</sup> Practically speaking, counsel for Mr. Chatterjee has “predicted a spike in forfeitures following the Supreme Court’s endorsement.”<sup>295</sup>

Although the decision unexcitingly maintained the pro-enforcement status quo, *Chatterjee’s* outcome would have had sweeping implications if the Justices decided the other way. If the laws were held to be federal in nature and *ultra vires* of provincial powers, it would have opened the door to a host of various Charter challenges. The most promising challenge would have been rooted in Section 7 (the due process equivalent) because the Canadian concept of a substantive right to counsel is very limited, extending to the duty of the police to inform a suspect that he may seek assistance and halt investigation if the suspect exercises his right.<sup>296</sup> The CRA and other provincial forfeiture statutes contain forfeiture exemptions for access to forfeitable assets to pay legal expenses, but the contours of these exemptions have not been considered by the Canadian courts as there have not yet been post-forfeiture challenges to the right to counsel.<sup>297</sup> If the CRA had been struck down, such a challenge would have been likely, as criminal defense lawyers fear for their own livelihoods, just as

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292. See *id.* para. 3.

293. See *id.* para. 29.

294. See *id.* para. 17-18, 30.

295. See Janice Tibbetts, *Supreme Court OKs Confiscation by Provinces of Proceeds of Crime*, VANCOUVER SUN, Apr. 18, 2009, available at [http://www.canadianalliance.org/english/079\\_12\\_02.php](http://www.canadianalliance.org/english/079_12_02.php).

296. See *R. v. Prosper* [1994] 3 S.C.R. 236 (Can.). It also appears that the most promising future American challenges are rooted in due process.

297. E-mail Interview with Melany Doherty, Ontario Ministry of the Attorney General (Jan. 29, 2009 15:12 EST) (on file with author) (“To date there have been no challenges to right to counsel in the manner contemplated by your email.”).

American defense lawyers do.<sup>298</sup> Also, as previously stated, striking down the legislation will have retroactive effects as provinces may have to return assets to what the general public views to be an unsavory set of characters, a political and administrative “nightmare.”<sup>299</sup> The Northern Provinces were awaiting the Canadian Supreme Court’s blessing before passing similar legislation, which should be forthcoming. Perhaps American judges can take comfort in the fact that they do not hold a monopoly on making results-oriented law, while casting aside clearly established constitutional principles.

## V. IF IT’S BROKEN, FIX IT: AMERICAN SOLUTIONS

After having considered the constitutional and international implications of current forfeiture and money laundering law, there are four ways that the United States can effectively fight money-related crime without violating defendants’ fundamental rights.

### A. *Transparency and Fee Applications*

If prosecutors are genuinely concerned with the rights of criminal defendants to hire counsel, as well as the prospect of criminal defense lawyers concealing or participating in their clients’ criminal activity, there is a simple solution. Congress can amend the federal forfeiture and money laundering laws by requiring that defense attorneys apply monthly for reasonable fees and expenses, detailing time and expense records and submitting the report to a neutral government-appointed trustee. Upon the trustee’s approval and under the supervision of the judge, the defense would be allowed to secure fees and expenses from the defendant for bona fide services. Congress would not even have to expend much time or energy on such an amendment since this system has already been contemplated in Federal Rule of Bank-

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298. See Price E-mail, *supra* note 137 (“My contacts with criminal lawyers indicate that they are worried about money being available to pay them due to civil forfeiture, so perhaps a case on right to counsel will arise in the future.”).

299. See Tibbetts, *supra* note 274 (pointing out that under Canadian law, should Chatterjee be reversed, the government may have to refund those who were deprived of their property from provincial forfeiture mechanisms); see also Price Press Release, *supra* note 249 (“[Reversing the Chatterjee case] would be a political nightmare for the [Supreme Court of Canada]: it would have to invalidate several immensely popular provincial statutes . . . and it would likely have to say that criminals have a valid possessory interest in the proceeds of their crimes.”).

ruptcy Procedure 2016.<sup>300</sup> As in bankruptcy cases, the need for fee transparency is apparent in large federal drug and money laundering cases, albeit for different reasons. Whereas debtor's counsel and accounting firms are under the microscope in bankruptcy matters given the immense interest creditors have in the debtor not wasting funds on exorbitant fees or fancy dinners, defense attorneys should be examined to ensure that they are not filtering funds that may become forfeitable upon conviction. It would be reasonable in the criminal fee application context for Congress to authorize harsh penalties against attorneys if the government can establish that a client is actually paying an attorney more than

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300. Fed. R. Bankr. P. 2016 (“(a) Application for compensation or reimbursement. An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested. An application for compensation shall include a statement as to what payments have theretofore been made or promised to the applicant for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation so paid or promised, whether any compensation previously received has been shared and whether an agreement or understanding exists between the applicant and any other entity for the sharing of compensation received or to be received for services rendered in or in connection with the case, and the particulars of any sharing of compensation or agreement or understanding therefore, except that details of any agreement by the applicant for the sharing of compensation as a member or regular associate of a firm of lawyers or accountants shall not be required. The requirements of this subdivision shall apply to an application for compensation for services rendered by an attorney or accountant even though the application is filed by a creditor or other entity. Unless the case is a chapter 9 municipality case, the applicant shall transmit to the United States trustee a copy of the application. (b) Disclosure of compensation paid or promised to attorney for debtor. Every attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 15 days after the order for relief, or at another time as the court may direct, the statement required by § 329 of the Code including whether the attorney has shared or agreed to share the compensation with any other entity. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of the compensation with a member or regular associate of the attorney’s law firm shall not be required. A supplemental statement shall be filed and transmitted to the United States trustee within 15 days after any payment or agreement not previously disclosed. (c) Disclosure of compensation paid or promised to bankruptcy petition preparer. Every bankruptcy petition preparer for a debtor shall file a declaration under penalty of perjury and transmit the declaration to the United States trustee within 10 days after the date of the filing of the petition, or at another time as the court may direct, as required by § 110(h)(1). The declaration must disclose any fee, and the source of any fee, received from or on behalf of the debtor within 12 months of the filing of the case and all unpaid fees charged to the debtor. The declaration must describe the services performed and documents prepared or caused to be prepared by the bankruptcy petition preparer. A supplemental statement shall be filed within 10 days after any payment or agreement not previously disclosed.”).

the amount stated in the quarterly application. This would constitute "money laundering" in the classical section 1956 sense. Implementation of this proposal has two possible paths: the realistic option would be to keep the current laws as they are and allow the constitutionally questionable *ex parte* pre-indictment or pre-conviction restraining order on defendants' assets and deduct reasonable attorneys' fees and expenses therefrom. Option two, the ideal path, would be to prohibit any pre-conviction forfeiture, but give the government a larger role and access to financial records and transactions between defense attorney and client.

This proposal is open to the criticism that it is at odds with the traditional ideal of the defense lawyer, able to retain fees and work without big government looking over his or her shoulder. Although a government agent monitoring the private attorney client relationship so closely would limit wrongdoing, such an expansion is unprecedented and would be a tough pill for many lawyers to swallow. After all, the right to counsel in a bankruptcy setting is substantially narrower than the right that criminal defendants enjoy. However, this lost privacy (and added tedium) is a necessary tradeoff and is better than the alternative: inability to retain fees from defendants in criminal cases, leading to the extinction of the private defense bar, or worse, criminal indictments against real estate agents, bankers and lawyers working in good faith. Receiving interim approval for fees and expenses in a more non-formal, non-adversarial setting is a far more efficient process than anxiety-filled money laundering prosecution, and a tradeoff the defense bar could learn to embrace. Moreover, the defense lawyer need not divulge strategy or other private matters that would jeopardize the sacred attorney-client privilege; a rough description of the type of work and the hours spent would satisfy the disclosure requirements. As in bankruptcy proceedings, the hourly rates paid to defense attorneys would have to be commensurate with the rates charged by similarly situated defense firms or rates charged by the same firm before the bankruptcy laws are absorbed into the federal criminal law, adjusted for inflation and market realities. The fee application process's logic in this context



was hinted at by Professor Winick<sup>301</sup> and Justice Blackmun<sup>302</sup> over twenty years ago, and deserves more serious consideration.

### B. *Revise and Codify Prosecutors' Manuals*

The United States Attorneys' Manual sections regarding forfeiture and money laundering in connection with attorney's fees is far from perfect, but it is more reasonable than more constricted readings of the "bona fide purchaser" application provisions of 853(c) and the Sixth Amendment exemption of 1957(f) that certain federal courts have adopted.<sup>303</sup> Codification of a narrow set of guidelines would hold federal prosecutors accountable if a fair and impartial district court judge was given the power to independently analyze whether prosecutors were in fact following their own procedures. More importantly, codification would have prophylactic effects, deterring abusive practices by law enforcement and prosecutors.

One clearly deficient section of the manual that should be revised and then codified is the section stating that if an attorney becomes aware of an illegal source of funds during representation, those fees become forfeitable. 1957's intent requirement, as well as the manual, should be temporally adjusted to require attorney knowledge of illegality before retention. However, retention could be broadly construed to include all time after initial contact between attorney and client to prevent a co-conspirator attorney and client from transferring illegal funds post-acquaintance but before formal engagement letters are signed. Put simply, a good faith attorney should never be punished for simply doing due dili-

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301. See Winick, *supra* note 14, at 837 ("Applying the forfeiture statutes to legitimate attorneys' fees will not promote the predominant congressional interest asserted in the legislative history of the 1984 amendments—the avoidance of fraudulent transfers. So long as it can be assured that the fee paid to the attorney is a bona fide and reasonable one, rather than a sham or fraudulent transfer designed to avoid forfeiture, Congress[sic] stated purpose is not frustrated. Indeed, exempting legitimate attorneys [sic] fees from forfeiture would serve Congress' [sic] interest in stripping drug dealers and racketeers of their 'economic power bases.'").

302. See *Caplin & Drysdale*, 491 U.S. 617, 642 (Blackmun, J., dissenting) ("[N]o important and legitimate purpose is served by employing § 853(c) to require postconviction forfeiture of funds used for legitimate attorney's fees, or by employing § 853(e)(1) to bar preconviction payment of fees. The Government's interests are adequately protected so long as the *district court supervises transfers to the attorney to make sure they are made in good faith*. All that is lost is the Government's power to punish the defendant before he is convicted. That power is not one the Act intended to grant.") (emphasis added) (footnote omitted) (citation omitted).

303. See, e.g., *United States v. Bissell*, 866 F.2d 1343, 1349 (11th Cir. 1989).

gence on a client's fund source or by investigating his client's background in preparing for litigation.

In addition to the temporal adjustment of intent, which would provide a more robust and actual constitutional attorney client privilege, Congress should specifically state that the federal subjective "knowledge" mens rea should be applied and that a prosecutor can never "impose" knowledge of forfeitability upon a defense attorney by simply issuing an indictment. In *Monsanto*, the majority acknowledged that "it is highly doubtful that one who defends a client in a criminal case that results in forfeiture could prove that he was 'without cause to believe the property was subject to forfeiture.'"<sup>304</sup> For an attorney, working hard on behalf of a client in good faith and to the best of his or her ability, to risk all fees to forfeiture based on an eventual declaration of guilt is something that the framers would simply not permit. "Reasonably without cause to believe that the property was subject to forfeiture"<sup>305</sup> should mean bounded by reason; since adherence to the Constitution is reasonable, the forfeiture and money laundering laws should not prevent defense attorneys from doing their job, and part of that job is becoming privy to, but not a part of, a client's legal problems.

Admittedly, agencies need flexible internal guidelines that can be reconsidered, re-evaluated, or even disregarded in light of changed circumstances and no manual can predict everything; indeed, wholesale codification would be foolish. However, in a sensitive area of the law with such broad potential for prosecutorial abuse, codification is necessary to facilitate uniformity in different districts and put defense lawyers on notice of what they can and cannot do. While it is true that no manual can predict every contingency, enough time has passed since the beginning of the war on drugs, and enough forfeiture and money laundering proceedings have come and gone that expectations and norms have been established in this area. Perhaps a task force containing NACDL representatives and prosecutors could assemble and use the twenty years of experience since *Monsanto* and *Caplin & Drysdale* to determine best practices and suggest laws that Congress could pass to promote accountability and fair play.

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304. *United States v. Monsanto*, 491 U.S. 600, 604 (1989) (citations omitted).

305. *Criminal Resource Manual*, *supra* note 99, § 2313.

### C. *Blanket Criminalization*

If it looks like criminal law and smells like criminal law, it is probably criminal law. The source of the problem is the insertion of civil law concepts into an area that is more criminal than anything else; for example, the codification of the civil relation back fiction within sections 853, 1956 and 1957. The use of *in rem* forfeiture concepts in criminal matters is suspicious, sidestepping constitutional scrutiny. In a perfect world, the government would be given an option: require the beyond a reasonable doubt standard and trigger defendant procedural protections, and thus limit the use of forfeiture, or, keep the current system as it is but prohibit the use of forfeiture mechanisms in all cases involving a human defendant whose liberty is at stake. Again, to prevent pre-conviction and post-indictment concealment by wealthy RICO defendants, the government would still be permitted to seize a defendant's assets after a fair adversarial probable cause hearing, if there is a probable cause basis that such concealment will occur or that the assets are evidence of a crime – such an action is consistent with criminal procedure.

The chief distinction between civil and criminal law is that the former involves the deprivation of property while the latter implicates not only a potential deprivation of property, but also stigmatization and a loss of liberty, or even life. Even after shaking off the fictional aspects of *in rem* forfeiture, it could be argued, as has the government, that forfeiture is simply a civil penalty, resulting in a simple deprivation of property. However, this argument only scratches the surface. The focus must be on the injurious, real life burden pre-conviction forfeiture imposes on a defendant, suddenly deprived of a constitutional right to defend charges, through deprivation of the rights to counsel and due process. When property is forfeited and impairs a defendant's ability to mount an effective defense, the framers' conception that property is important in its power to preserve other rights becomes all too apparent. Moreover, since the stated purpose and effect of pre-conviction civil forfeiture beginning in the 1980s was to regulate drug crimes, it is more proper to group the area into the criminal category; the arguments by the British Columbia Civil Liberties Association in *Chatterjee* illustrated this point. Indeed, there is little, or no distinction between the deprivation of liberty as well as property that occurs in *in personam* forfeiture cases connected with criminal charges and the punishment inflicted on parties who lose their homes or vehicles via *in rem* proceedings. The

unfettered right of the government to concurrently utilize criminal and civil forfeiture mechanisms against the same defendant in the same matter grants prosecutors unfair leverage in negotiating plea agreements and must be curtailed. Situations where human defendants are declared not guilty beyond a reasonable doubt, but the government is allowed to retain property due to the lowered civil burden of proof should be disallowed as unlawful and illogical. Canadian forfeiture, in walking a jurisdictional tightrope, does not typically allow concurrent pre-conviction forfeiture and criminal charges upon the same defendant or in the same matter. Such a procedure, originating from Canada's jurisdictional structure, is fairer, more productive, and clearly averts double jeopardy problems. The confusion of criminal law in the United States in the federal and state domain, particularly after the passage of RICO, CCE and the MLCA has also blended the civil and criminal law in grotesque ways and it is time to fix past wrongs.

#### *D. Judicial Duty*

The previous three proposals involve Congress taking initiative to improve the current state of affairs. District Court judges play a key role in interpreting the scope and application of the Constitution when faced with bona fide fee applications or motions to dismiss based on the 1957(f) Sixth Amendment exemption. The importance of scrupulous trial court judges should not be understated. As Judge Cooke recently demonstrated, *Caplin & Drysdale* has not sounded the death knell to the Bill of Rights in forfeiture and money laundering matters, despite submissions of such logic by prosecutors. Involving fees that were sought for services rendered post-conviction, *Caplin & Drysdale* was not factually ideal and there is a great need for the courts to look at the merits of each case individually and develop a strong and fair body of precedent. *Monsanto's* facts were also far from perfect for those wishing to declare pre-conviction forfeiture unconstitutional; the petitioner was perceived as a mafioso drug peddler at a time when the war on drugs was at its peak. Perhaps it was *Monsanto's* social context, during war on drugs zealotry, rather than objective facts that were proper to fairly apply the law, that was determinative. If the Court was presented with a pre-conviction forfeiture due process or right to counsel challenge from a non-violent securities fraud defendant rather than a perceived "bad man" like Mr. Monsanto, there may have been a different result and the current

state of forfeiture and money laundering law would not be as deformed as it currently is.

With what will likely be a conservative Court for at least the next twenty years, the justices who purport to have adopted a more traditional, original intent-based interpretation of the Constitution have an opportunity to strike down unconstitutional laws, such as the relation back fiction, embedded in federal forfeiture and money laundering statutes. This would unequivocally demonstrate consistency with prior rulings, preserve the original intent of the drafters of the Constitution and achieve neutrality in principle. The move by originalist jurists to understand and apply what the framers intended by the excessive fines clause of the Eighth Amendment is a welcome example of moving in the right direction. The Supreme Court is also invited to resolve the anomaly of why the Constitution expressly forbids any forfeiture after a treason execution, but allows forfeiture of an entire vessel if marijuana for personal use is found aboard.

On February 23, 2009, the Supreme Court granted *certiorari* in *Alvarez v. Smith*.<sup>306</sup> Below, the Seventh Circuit invalidated an Illinois law that permitted law enforcement to seize money or vehicles believed to be connected to drug-related crime and retain the property for up to half a year, without even having to file a forfeiture or criminal action, based simply on probable cause.<sup>307</sup> The Seventh Circuit, in a challenge to the law involving the seizure of automobiles, held that due process requires a procedural forfeiture mechanism that tests the validity of government retention of the individual's property.<sup>308</sup> The court calls for "some sort of" pre-forfeiture mechanism and some level of notice to the property owner before seizure, but does not elaborate specific methods.<sup>309</sup> The government petitioned for *certiorari* asking whether "the Due Process Clause requires a State or local government to provide a post-seizure probable cause hearing prior to a statutory judicial forfeiture proceeding . . . ." <sup>310</sup> The Court's deci-

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306. See *Smith v. City of Chi.*, 524 F.3d 834 (7th Cir. 2008), *cert. granted sub nom. Alvarez v. Smith*, 77 U.S.L.W. 3457 (U.S. Feb. 23, 2009) (No. 08-351); see also Posting of Ilya Somin to The Volokh Conspiracy, <http://www.volokh.com/posts/1235552057.shtml> (Feb. 25, 2009, 02:36 EST) (forecasting that "this should be an easy case" under the Fourteenth Amendment Due Process clause, yet fearing that given the current Court and trends, that the Supreme Court will reverse the Seventh Circuit).

307. Illinois Drug Asset Forfeiture Procedure Act, 725 ILL. COMP. STAT. 150/1 *et seq.* (2004); see *Smith v. City of Chi.*, 524 F.3d 834, 838-39 (7th Cir. 2008).

308. See *Smith*, 524 F.3d at 838.

309. See *id.*

310. See Petition for Writ of Certiorari, *Devine v. Smith*, 129 S. Ct. 1401, pt. I (No.

sion will likely be confined to discussing the issue of whether and what type of hearings due process requires for government seizures of personal property. The Court should, however, hint as to whether the strong governmental interest that justified the deprivation of counsel and due process in cases like *Caplin & Drysdale* and *Monsanto* still exists today. Rarely weighing in on the forfeiture issue, the Court should also signal whether attacking federal forfeiture and money laundering statutes on due process grounds could be a worthwhile task for future litigants. Anyone expecting the Court to affirm the Seventh Circuit's decision should remind themselves that the Court has been steadily chipping away at constitutional property rights.

Finally, splits between the federal circuits on important constitutional issues require further clarification by the Supreme Court. The fact that a criminal defendant in the Ninth Circuit is afforded heightened protections in forfeiture proceedings compared with a defendant in the Eleventh Circuit violates basic notions of equal protection under the law and fundamental fairness. Considering inconsistencies within the circuits in regards to protections afforded defendants through forfeiture hearings (or lack thereof) and the extent of what constitutes dirty property under the facilitation theory, these issues are currently ripe and the Court will likely be given an opportunity to offer uniformity in the circuits. Given wide variance among the circuits regarding what hearings a forfeiture defendant deserves and to be consistent with the Constitution's mandates, the Supreme Court must standardize, at a minimum, an adversarial probable cause seizure hearing pre-forfeiture since forfeiture is seizure. Regarding the circuit split on facilitation theory, the prosecutor's burden to demonstrate the connection between the property and the illegal act must be heightened since a prosecutor should be forced to establish a real connection between the property and the alleged crime. Perhaps a proportionality formula can be expounded, whereby if the government can show 15% of the home or business was used to conceal illegal funds or engage in illegal activity, 15% of the property could be restrained until conviction, and this percentage could change as further facts were established before conviction. Certainly, the framers would scoff at a government that seizes legitimate property. Should the Supreme Court deny *certiorari* if such a question is presented, it would serve as an allowance of a wide

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08-351), *cert. granted sub nom.* Alvarez v. Smith, 77 U.S.L.W. 3457 (U.S. Feb. 23, 2009) (No. 08-351).

variance of practices within different jurisdictions. If the Supreme Court it to be a legal, rather than political branch, it must accept responsibility, adhere to original intent, and do what is right. Criminal law exists primarily to protect the innocent, not to punish the not-yet-guilty.