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INTRODUCTION

Beginning with the passage of the Organized Crime Control Act[1] in 1970, federal prosecutors used asset forfeiture as a criminal penalty for the violation of a variety of federal statutes. The first of these statutes was the Racketeer Influenced Corrupt Organizations[2] (RICO) statute, which upon conviction permitted prosecutors to seize any assets maintained or acquired by the defendant through a RICO violation.[3] Since then, Congress has expanded the application of criminal forfeiture penalties to violations of the Continuing Criminal Enterprise[4] statute and the criminal money laundering statute.[5] While the use of civil forfeiture through in rem proceedings

1. Pub. L. No. 91-452, 84 Stat. 922 (1970) (codified in scattered sections of 18 U.S.C.).
2. 18 U.S.C. §§ 1961–1968 (2000).
3. 18 U.S.C. § 1963(a)(1) to (2).
4. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 408, 84 Stat. 1236, 1265–66 (codified at 21 U.S.C. § 848 (2000)).
5. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1366(a), 100 Stat. 3707–39 (codified at 18 U.S.C. § 982).

against assets has a long history in the United States,[6] criminal forfeiture is largely a new concept in this country.[7]

The controversy over the application of criminal forfeiture laws is not rooted in its effect on criminal defendants, but rather the impact on third parties to whom such defendants have transferred assets before their conviction. Any assets obtained through criminal violations that are transferred to third parties are subject to forfeiture upon the conviction of the defendant transferor.[8] Only those third parties who obtain criminal assets as bona fide purchasers for value, and who were reasonably without cause to believe the assets were subject to forfeiture, are immune from losing their property.[9]

While the bona fide purchaser exemption would seem to protect innocent purchasers of criminally obtained property, the expansion of what courts define as criminal property subject to forfeiture has led to more serious problems in the context of money laundering. The federal money laundering statute provides that any funds involved in the laundering of money are subject to forfeiture.[10] The nature of money laundering is that violators attempt to hide illegally acquired money by dividing it up and depositing it in different accounts.[11] This creates a problem for prosecutors attempting to separate the illegally obtained "dirty money" from the legitimate or "clean money" with which it has been deposited. Prosecutors have persuaded many courts to remedy this situation through the application of the facilitation theory.[12] The facilitation theory argues that when illegal money is deposited with "clean money," the "clean money" is acting to hide the illegal money and the "clean money" becomes a part of the crime.[13] Therefore, if any amount of illegal money is deposited in an account, the entire account, no matter how large, is subject to forfeiture. In

6. *See* The Palmyra, 25 U.S. (12 Wheat.) 1, 14 (1827) (explaining that civil forfeiture is an in rem proceeding against the actual property to be seized by the government); United States v. Nichols, 841 F.2d 1485, 1487 (10th Cir. 1988) (explaining that civil forfeiture has been widely used to seize assets used in the commission of a crime).

7. *See* 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, 768 (1989) (explaining that criminal forfeiture, as opposed to civil or in rem, has rarely been authorized by Congress).

8. 21 U.S.C. § 853 (2000)

9. *Id.*

10. 18 U.S.C. § 982 (2000).

11. *See* Jon E. Gordon, *Prosecutors Who Seize Too Much and the Theories They Love: Money Laundering, Facilitation, and Forfeiture*, 44 DUKE L.J. 744, 752 (1995) (describing criminal attempts to launder money as well as the statutes making this activity illegal).

12. *See, e.g.*, United States v. Certain Accounts, 795 F. Supp. 391, 397 (S.D. Fla. 1992) (articulating the theory that when clean money is used in bank accounts to hide dirty money the clean money becomes part of the crime and is also subject to forfeiture).

13. *See id.*

many instances this will have the effect of subjecting all of the criminal defendant's money to forfeiture.

The most alarming consequence of such forfeiture can be seen in the Eleventh Circuit's 2003 decision in *United States v. McCorkle*.[14] In *McCorkle*, F. Lee Bailey, a criminal defense attorney, challenged the forfeiture of a two million dollar retainer a client paid him for legal services.[15] Bailey's client had been convicted of a violation of the federal money laundering statute.[16] Because the assets used to pay Bailey had been in an account that also included illegal money, the entire account was tainted. The Eleventh Circuit ruled that Bailey's retainer was paid with the proceeds of laundered money; thus, it was subject to forfeiture.[17]

As *McCorkle* illustrates, most defendants will not have any assets immune to forfeiture under the facilitation theory. Therefore, any criminal defense attorney representing a client accused of money laundering faces the risk of being denied payment if his client is convicted. This risk may greatly reduce the willingness of defense attorneys to represent such clients. In practice, the facilitation theory can have the effect of denying defendants accused of money laundering of their Sixth Amendment right to select and pay for the counsel of their choice.[18]

While defendants will still be provided an appointed attorney, they will be effectively denied their constitutional right to select who that attorney may be. This Comment argues that the courts have improperly read the ambiguous language of federal forfeiture statutes in a way that denies criminal defendants their constitutional right to counsel of choice and substantially inhibits the protections of the criminal justice system in unintended ways.

Part I of this Comment discusses the historical evolution of forfeiture laws and the expansion of criminal forfeiture penalties under the facilitation theory of money laundering statutes. Part II analyzes the effect of modern forfeiture laws on the ability of criminal defendants to hire attorneys. Part III examines the policy implications of the current criminal

14. 321 F.3d 1292 (11th Cir. 2003).

15. *Id.* at 1294.

16. *Id.*

17. *Id.*

18. *See* Wheat v. United States, 486 U.S. 153, 159 (1988) (stating that the Sixth Amendment provides for a defendant's right to choose his own counsel); Powell v. Alabama, 287 U.S. 45, 73 (1932) (holding that a defendant must be given the right to select counsel); United States v. Gallop, 838 F.2d 105, 107 (4th Cir. 1988) (explaining that an essential element of the Sixth Amendment's right to counsel is that a defendant be given a reasonable opportunity to select his own counsel); United States v. Burton, 584 F.2d 485, 489 (D.C. Cir. 1978) (stating an essential element of the Sixth Amendment is that the defendant be able to obtain counsel of his own choosing).

forfeiture laws for private defense attorneys and the fairness of the criminal justice system as a whole. Finally, Part IV suggests a solution by providing an alternate interpretation of federal criminal forfeiture statutes from the one currently espoused by the United States Supreme Court.

I. THE DEVELOPMENT OF FORFEITURE LAWS IN THE UNITED STATES

A. *Historical Evolution of Forfeiture Claims*

By the end of the eighteenth century, three different strands of forfeiture laws had developed in England.[19] The first to develop was the common law concept of deodands.[20] Under this theory, any object that directly or indirectly caused the death of one of the king's subjects was forfeited to the crown.[21] The object, or deodand, was used originally by the crown for charitable purposes, but over time it was used as a means of producing revenue.[22] The second type of forfeiture, known as forfeiture of the estate, was intended as a criminal penalty. Anytime someone was convicted of a felony or treason, all of his or her real and personal property was forfeited to the crown.[23] This practice was justified on the theory that a felon or traitor relinquished the right to own property.[24] The final type of forfeiture developed under English law was the only one to carry over to the American system.[25] It was a statutory forfeiture system based primarily on violations of customs and revenue laws.[26] The forfeiture action proceeded in rem against the property to be forfeited and was not based on the guilt or innocence of the owner of the property.[27] Under this statutory scheme, if the violation was based on the act of a third party unrelated to

19. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 682 (1974) (providing an overview of the history of common law forfeiture).

20. *See* J. William Snyder, Jr., *Reining in Civil Forfeiture and Protecting Innocent Owners from Civil Asset Forfeiture: United States v. 92 Buena Vista Avenue*, 72 N.C. L. REV. 1333, 1342 (1994). The deodands concept of forfeiture was part of the English common law until Parliament created a cause of action for wrongful death through the passage of Lord Campbell's Act in 1846. *Id.*

21. *Id.*

22. Gordon, *supra* note 11, at 746.

23. *See id.*

24. *Id.*

25. *Id.* at 747.

26. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 682 (1974).

27. An example of an English statutory forfeiture statute is the Navigation Acts of 1660 which prescribed that all goods be shipped in English vessels. The statute provided for the forfeiture of both the goods and the entire ship, without regard to whether the violation was caused by the ship's owner or a member of the crew. Gordon, *supra* note 11, at 747. *See generally* LAWRENCE A. HARPER, THE ENGLISH NAVIGATION LAWS: A SEVENTEENTH-CENTURY EXPERIMENT IN SOCIAL ENGINEERING (1939) (providing a thorough explanation of the English Navigation Laws).

the owner of the property, the property was still forfeited to the crown.[28]

The American rejection of the concepts of deodands and forfeiture of the estate was spurred largely by an open resistance to their role in the English system.[29] The deodand system was neither recognized nor prohibited by the U.S. Constitution or federal statute and has never reappeared in American statutory or common law. In *Calero-Toledo v. Pearson Yacht Leasing Co.*,[30] the U.S. Supreme Court explained the American rejection of the deodand concept by citing the Supreme Court of Tennessee, which reasoned that the deodand system was founded on superstition.[31] The Tennessee Court explained: "[A]t the base of the doctrine was superstition—the implication that the cart or the ox drawing it, for example, was morally affected from having caused the death."[32]

The colonial repudiation of English forfeiture of the estate was more directly articulated than that of the deodand. Article III of the U.S. Constitution included an express prohibition against the practice.[33] Article III states, "[T]he Congress shall have the power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture."[34] In 1790, the first Congress reaffirmed this stance by passing a law prohibiting forfeiture of estate as a punishment for any criminal violation.[35] Congress has followed this original rejection of forfeiture of the estate for nearly two hundred years, authorizing criminal forfeiture only once from 1790 to 1970.[36] The only recognition of criminal forfeiture in the United States before 1970 was the Confiscation Act of 1862,[37] which authorized the forfeiture of the life estates of Confederate soldiers.

Although American hostility towards the Crown's forfeiture policies caused a quick rejection of the concept of deodands and forfeiture of the estate, U.S. courts recognized and accepted the English model of in rem forfeiture as early as the 1780s.[38] Following the adoption of the U.S. Constitution, Congress began authorizing a variety of statutory forfeiture

28. *See* Gordon, *supra* note 11, at 747–48.

29. *See* Winick, *supra* note 7, at 768 (explaining colonial hostility to the first method of forfeiture under English law).

30. 416 U.S. 663 (1974).

31. *Id.* at 602 (citing Parker-Harris Co. v. Tate, 188 S.W. 54, 55 (Tenn. 1916)).

32. *See* Parker-Harris Co. v. Tate, 188 S.W. 54, 55 (Tenn. 1916)

33. *See* U.S. CONST. art. III, § 3, cl. 2.

34. *Id.*

35. *See* Act of April 30, 1790, ch. 9, § 24, 1 Stat. 112, 117 ("[N]o conviction or judgment . . . shall work corruption of blood, or any forfeiture of estate.")

36. *See* United States v. Nichols, 841 F.2d 1485, 1487 (10th Cir. 1988).

37. Act of July 17, 1862, ch. 190, 12 Stat. 589, 589. The constitutionality of this act was upheld by *Bigelow v. Forest*, 76 U.S. (9 Wall.) 339 (1869).

38. *See* Snyder, *supra* note 20, at 1342.

laws closely resembling those of England.[39] All such statutes authorized civil as opposed to criminal forfeiture, and like the English system, forfeiture actions proceeded in rem against the property found to be in violation.[40] No action was taken against the owner of the property or the person who brought the property into violation of law.[41]

The majority of the early American civil forfeiture statutes were for violations of customs laws. Such statutes provided that where ships were found to be carrying above a certain amount of contraband, both the ship and the illegal goods were subject to forfeiture.[42] Further statutes authorized the civil forfeiture of ships found either exporting slaves from the United States or involved in the slave trade in any way.[43] Civil forfeiture became firmly established and accepted as a means of regulating and protecting shipping. Congress expanded this practice by using forfeiture laws as a deterrent to piracy on the ocean.[44] These statutes authorized the seizure and forfeiture of vessels engaged in piracy.[45] On their face, the anti-piracy statutes of the early nineteenth century appear very similar to criminal forfeiture statutes in that they are punishing a specific illegal act. However, these statutes do not require the conviction or even a charge of piracy against the owner of the vessel.[46] In fact the guilt or innocence of the owner of the vessel has nothing to do with the forfeiture. Unlike criminal forfeiture, the anti-piracy laws were in rem proceedings operating specifically and only against the vessel used to engage in piracy.[47]

Congress further expanded the use of civil forfeiture beyond the regulation of shipping at the end of the nineteenth century in an effort to control alcohol production.[48] The federal government had struggled to find a way to collect revenues from many alcohol manufacturers.[49] In an effort to combat this situation, Congress passed laws providing for the forfeiture

39. *See id.*

40. *Id.*

41. *See id.* at 1343.

42. *See, e.g.*, Act of Aug. 4, 1790, ch. 35, § 40, 1 Stat. 145, 169–170 (repealed 1799) (stating that goods that enter by ship and are not invoiced will be forfeited along with the ship); Act of July 31, 1789, ch. 5, §§ 22, 26, 1 Stat. 29, 42–43 (repealed 1790) (same).

43. *See* Act of March 22, 1794, ch. 11, 1 Stat. 347, 349; Act of March 2, 1807, ch. 22, §§ 1–2, 2 Stat. 426, 426.

44. *See* Act of March 3, 1819, ch. 77, § 2, 3 Stat. 510, 512–13. Continued by Act of May 15, 1820, ch. 113, 3 Stat. 600, 600.

45. *See* The Palmyra, 25 U.S. (12 Wheat.) 1, 7 (1827) (stating that ships found to be engaged in sea robbery, of a piratical character, or having a general habit of piracy are subject to forfeiture under the statute).

46. *Id.*

47. *See* Snyder, *supra* note 20, at 1342.

48. *Id.* at 1342–43.

49. *Id.*

of illegal wines, stills, distilled spirits, and even the land on which the illegal goods were discovered.[50] Again, the only requirement was a violation of revenue laws in connection with the property being forfeited.[51] Even alcohol already sold to third parties was subject to forfeiture, whether or not the purchaser had any knowledge that it was produced in violation of internal revenue laws.[52]

B. *Early Organization Principles of American Forfeiture Law*

American courts heard a significant number of disputes over civil forfeiture during the course of the nineteenth century. Through the depth of nineteenth century forfeiture case law, two underlying principles can be identified.[53] The first of these is the notion that civil forfeiture actions proceed in rem against the property being forfeited.[54] The most distinguishing feature of civil forfeiture in the American system is that there is no human defendant; it is as if the property itself committed the crime.[55] Through this common law fiction, courts have been able to overcome arguments by property owners that their property could not be seized and condemned without a corresponding criminal violation.[56]

In justifying this interpretation, the *Palmyra*[57] Court recognized that as a penalty for the commission of many felonies, English courts imposed forfeiture of the assets involved in the felony to the crown.[58] However, the Court distinguished forfeitures attaching to felonies under English law from those in response to violations of revenue laws.[59] In forfeiture cases dealing with revenue violations, English law required no underlying conviction and held proceedings in rem against the property.[60] The *Palmyra* Court found the English revenue laws allowing forfeitures without a criminal conviction more comparable to the forfeiture laws developed in the United States.[61] The Court further justified the rule simply by articulating that American courts had always carried out civil forfeiture

50. Act of Feb. 18, 1875, ch. 36, § 16, 18 Stat. 307, 310.

51. *See* United States v. Stowell, 133 U.S. 1, 14 (1889) (holding that all property found on the premises of a distillery operation in violation of internal revenue laws is subject to forfeiture).

52. *See id.*

53. *See* Gordon, *supra* note 11, at 747–48, 755–64; Snyder, *supra* note 20, at 1333.

54. *See* Gordon, *supra* note 11, at 747–48.

55. *See* Snyder, *supra* note 20, at 1345.

56. *See id.* at 1345.

57. 25 U.S. (12 Wheat.) 1 (1827).

58. *See id.* at 14 (explaining that in these cases forfeiture did not attach without the conviction of an underlying criminal act).

59. *See id.* (stating that "this doctrine never was applied to seizures and forfeitures, created by statute, in rem, cognizable on the revenue side of the Exchequer").

60. *See id.*

61. *See id.* at 15.

proceedings in rem against the property.[62] The Court summarized this distinguishing principle of American forfeiture law by asserting that "[b]ut the practice has been, and so this court understand[s] the law to be, that the proceeding in rem stands independent of, and wholly unaffected by any criminal proceeding in personam."[63] This basic premise of civil forfeiture has never been seriously challenged or disputed by later American courts.[64]

The second organizing principle of civil forfeiture law coming out of nineteenth century jurisprudence can be referred to as the "relation back doctrine."[65] Under the relation back doctrine, title to property involved in a violation of law vests in the government at the time the wrong was committed.[66] The early common law rule did not give the government the authority to seize property subject to forfeiture until some judicial determination that the property has been involved in an illegal transaction.[67] However, once this judicial determination of forfeiture has been made, the government is deemed to have held title to the property since the moment the wrongful act occurred.[68] Therefore, under the common law rule, if an asset has been involved in an illegal act and is later transferred to an innocent third party, that third party may still be forced to forfeit the property if a court later finds the property in violation of law.[69] This is because under the relation back doctrine, the government took title to the

62. *See id.*

63. *Id.*

64. A thorough review of the applicable forfeiture case law and literature has revealed no challenges to this principle.

65. *See generally* Gordon, *supra* note 11, at 755–64 (explaining prosecutors' use of the relation back doctrine along with the facilitation theory to expand the number of assets subject to seizure); Snyder, *supra* note 20, at 1343–44 (summarizing the relation back doctrine as one of the three organizing principles of forfeiture law coming out of nineteenth century jurisprudence).

66. *See* United States v. 92 Buena Vista Ave., 507 U.S. 111, 126 (1993) (explaining that under common law forfeiture, vesting of title in the government relates back to the moment when the crime was committed); United States v. Stowell, 133 U.S. 1, 16–17 (1889) (stating that title to illegal alcohol vests in the government at the time of the violation of revenue laws, even if it has already been sold to a third party); United States v. Grundy & Thornburgh, 7 U.S. 337, 350–51 (1806) ("It has been proved, that in all forfeitures accruing at common law, nothing vests in the government until some legal step shall be taken for the assertion of its right, after which . . . the doctrine of relation back carries back the title to the commission of the offence.").

67. *See* Snyder, *supra* note 20, at 1346.

68. *Id.* at 1344, 1347.

69. Several civil forfeiture statutes enacted in the 1970s and 1980s provide protection for bona fide purchasers who had no reason to know the property was subject to forfeiture. *See, e.g.*, Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, § 413, *amended by* Pub. L. 98-473, § 303, 2301(d)–(f), 98 Stat. 2044, 2192, 2193 (codified at 21 U.S.C. § 853(c) (2000)) (protecting bona fide purchasers who at the time of purchase were reasonably without cause to believe the property was subject to forfeiture). However, the common law rule provides no protection for innocent parties who purchase property that has been involved in an illegal act and later becomes subject to forfeiture. *See Stowell*, 133 U.S. at 17 (reiterating that the relation back doctrine cuts off all transfers subsequent to the illegal act, even to good faith purchasers).

property before it was ever transferred to the third party.

In *United States v. Grundy*,[70] one of the first cases to recognize the relation back doctrine, the United States Supreme Court held that it is fully within congressional power to determine the time at which title to property vests in the government.[71] If the forfeiture is prescribed by statute, the common law rules no longer apply, and "the thing forfeited may either vest immediately, or on the performance of some particular act" as the legislature shall provide.[72] Where a civil forfeiture is proscribed by statute, but Congress is silent as to the time of vesting, the common law rules remain in effect.[73]

The courts continued to uphold civil forfeiture statutes through the end of the nineteenth century and up through the first half of the twentieth century.[74] However, in the process of affirming these statutes, the courts indicated a possible reluctance to extend the practice any further.[75] In *United States v. One 1936 Ford Coach*,[76] Justice McReynolds expressed concern for the potential imposition of civil forfeiture penalties on innocent parties who are not significantly involved in illegal activities.[77] He further reasoned that, "[f]orfeitures are not favored; they should be enforced only when within both letter and spirit of the law."[78] Despite the courts' indications of a desire to limit the application and expansion of civil forfeiture law, when given the opportunity, they stopped well short of declaring the technique unconstitutional.[79]

Civil forfeiture law continues to be used in the United States in its traditional fashion as a means of enforcing customs and revenue laws.[80] However, the use and impact of forfeiture laws drastically increased in 1970 when they were conscripted as a weapon in the fight against the

70. 7 U.S. 337 (1806).

71. *See id.* at 351.

72. *See id.*

73. *See id.*

74. *See* Snyder, *supra* note 20, at 1347.

75. *See* United States v. One 1936 Ford Coach, 307 U.S. 219, 226 (1939) (construing civil forfeiture statutes narrowly in an effort to protect innocent third parties); Washingtonian Publ'g Co. v. Pearson, 306 U.S. 30, 42 (1939) (stating that civil forfeiture penalties should not be inferred from unclear language); Ins. Co. v. Norton, 96 U.S. 234, 242 (1877) (stating that "the courts should be liberal in construing the transaction in favor of avoiding a forfeiture").

76. 307 U.S. 219 (1939).

77. *See id.* at 226.

78. *See id.*; *see also* Farmers' & Mechs.' Nat'l Bank v. Dearing, 91 U.S. 29, 33 (1875) (stating that forfeitures are not favored in the law).

79. *See* Snyder, *supra* note 20, at 1347–48 (arguing that civil forfeiture law is now too firmly integrated in the American jurisprudence to reject it as unconstitutional).

80. *See, e.g.*, 19 U.S.C. § 1703 (2000) (authorizing forfeiture of ocean vessels intended to be used in violations of customs laws).

growing narcotics trade.[81] Congress, taking advantage of the continued constitutionality of forfeiture laws, passed the Comprehensive Drug Abuse Prevention and Control Act of 1970.[82] The Drug Act provided for the forfeiture of "all controlled substances manufactured, distributed, dispensed or acquired,"[83] "all raw materials, products, and equipment of any kind" used in connection with controlled substances,[84] all moneys or other things of value furnished in exchange for controlled substances,[85] and all real property used in any way to facilitate a violation of the controlled substances laws.[86] This act was intended to provide prosecutors the tools necessary to substantially reduce drug trafficking in the United States.[87]

One of the principle advantages the forfeiture provisions of the Drug Act gave prosecutors was based in the civil nature of the penalty. Federal prosecutors were previously forced to follow all the constitutional protections afforded defendants in criminal trials in order to get a conviction. Under the civil forfeiture provisions of the Drug Act,[88] prosecutors need not obtain a conviction in order to impose a forfeiture penalty.[89] In fact, a civil forfeiture can take place without prosecutors charging anyone with a crime.[90] The government need only show probable cause that the asset it is seeking to seize has the required substantial connection to the illegal activity.[91] Once the government establishes probable cause, the burden shifts to the property owner to establish by a preponderance of evidence that the asset in question lacks the requisite connection to the illegal activity.[92]

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81. *See* Snyder, *supra* note 20, at 1333–34.

82. Pub. L. No. 91-513, 511, 84 Stat. 1236, 1276 (codified as amended at 21 U.S.C. § 881 (2000)).

83. *See* 21 U.S.C. § 881(a)(1) (2000).

84. *See id.* at § 881(a)(2).

85. *See id.* at § 881(a)(6).

86. *See id.* at § 881(a)(7).

87. *See, e.g.*, Mark A. Jankowski, Note, *Tempering the Relation-Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases*, 76 VA. L. REV. 165, 167 (1990) (explaining the Drug Act's purpose of providing a significant deterrent to drug trafficking through the imposition of major economic penalties).

88. *See* 21 U.S.C. § 881(a).

89. *See* Nnadi v. Richter, 976 F.2d 682, 686 (11th Cir. 1992) (holding that in civil forfeiture actions the government need only show probable cause that assets were connected to the illegal activity in order to seize them).

90. *See* Gordon, *supra* note 11, at 749–50.

91. *See Nnadi*, 976 F.2d at 686.

92. *See* United States v. Daccarett, 6 F.3d 37, 57 (2d Cir. 1993) (stating that after probable cause has been shown, claimant has burden of proving the factual predicates to the establishment of probable cause have not been met); United States v. 228 Acres of Land and Dwelling, 916 F.2d 808, 814 (2d Cir. 1990), (upholding the constitutionality of shifting the burden to the claimant to disprove probable cause in civil forfeiture actions); United States v. One 1970 Pontiac GTO, 529 F.2d 65, 66 (9th Cir. 1976) (holding that the civil forfeiture penalties of 21 U.S.C. § 881 "are not criminal enough to prevent Congress from imposing the burden of proof on the claimant").

Not only did Congress reinvigorate civil forfeiture law in the United States under the Drug Act, but it took the more drastic step of authorizing criminal forfeiture through the passage of the Organized Crime Control Act of 1970.[93] Unlike civil forfeiture, criminal forfeiture actions require an underlying criminal conviction and defendants are provided all the usual protections of the criminal justice system.[94] Over the next fifteen years, Congress passed a variety of criminal forfeiture statutes in an effort to reduce the enormous profitability of organized crime and drug trafficking.[95] Congress first attempted to directly attack organized crime through the Racketeer Influenced and Corrupt Organizations Act in 1970 (RICO).[96] Under RICO, a defendant convicted of violating a provision of the act is subject to forfeiture of all interests in enterprises in violation of the act and all assets acquired in violation of the act.[97] Congress next authorized criminal forfeiture as a penalty for violation of the Continuing Criminal Enterprise law.[98] A person convicted of a violation of the Continuing Criminal Enterprise statute may be required to forfeit all profits gained through the illegal activity.[99]

Finally, Congress enacted a criminal forfeiture penalty for violations of federal criminal money laundering statutes.[100] The federal money laundering statutes make it a crime to disperse the proceeds of specified criminal activities in an attempt to conceal the source of the funds.[101] Money laundering statutes are necessary because federal law requires banks to report all transactions of more than $10,000 to the United States Treasury Department.[102] In an effort to evade detection by Treasury officials, violators scatter the proceeds of criminal activity in different accounts to avoid making deposits in excess of $10,000.[103] The federal money laundering statutes make such acts of deception a crime and impose severe penalties including fines, imprisonment, and criminal forfeiture.[104]

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93. Pub. L. No. 91-452, 84 Stat. 922 (codified in scattered sections of 18 U.S.C.).

94. *See* Snyder, *supra* note 20, at 1363.

95. *See* Winick, *supra* note 7, at 768–69 (explaining that Congress wanted to restrict the economic bases that supported organized criminal operations).

96. 18 U.S.C. §§ 1961–1968 (2000).

97. 18 U.S.C. § 1963.

98. 21 U.S.C. § 848(a) (2000). This statute is also known as the "Drug Kingpin Statute" and was enacted as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970. Pub. L. No. 91-513, 511, 84 Stat. 1236, 1276 (codified as amended at 21 U.S.C. § 881).

99. 21 U.S.C. § 848.

100. 18 U.S.C. § 982.

101. *See* 18 U.S.C. §§ 1956–1957. For an exhaustive list of what constitutes "specific criminal activity" see 18 U.S.C. § 1956(c)(7).

102. 31 C.F.R. § 103.22(b)(1) (1994).

103. *See* Gordon, *supra* note 11, at 751–52 n.63 (explaining how criminals attempt to evade the $10,000 reporting requirement).

104. *See* 18 U.S.C. § 1956(b) (listing the various penalties for violations of the federal money

C. *The Expansion of Forfeiture Penalties for Money Laundering Through the Facilitation Theory*

The single most significant step in the unintended and unnecessary expansion of criminal forfeiture laws in the United States in the last fifteen years was the development of the facilitation theory. The facilitation theory is a judicially created concept based on a broad interpretation of the civil and criminal forfeiture provisions of the federal money laundering statutes.[105] The criminal forfeiture requirements of the money laundering statute state that, "[t]he court, in imposing sentence on a person convicted of an offense in violation of . . . section 1956, 1957, or 1960 of this title, shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property."[106] The key prong in the facilitation theory is the court's interpretation of the language, "any property . . . involved in such offense."[107] On its face this language simply means that any property involved in a convicted money launderer's commission of the offense is subject to forfeiture. However, many courts have held that when money derived from legitimate sources is deposited in an account containing the profits of illegal activity, the legitimate money is "involved in" concealing the illegal money.[108] The legitimate, clean money is said to have facilitated the concealment of the illegal, dirty money and is therefore involved in the act of laundering money. Thus, some courts, giving the broadest reach to the facilitation theory, interpret this statute to authorize the forfeiture of every dollar of clean money residing in any account that also contains dirty money.[109]

The first judicial recognition of the facilitation theory was a 1991 ruling of a federal district court in Hawaii.[110] In *United States. v. All Monies ($477,048.62) In Account No. 90-3617-3*,[111] prosecutors sought to seize the entire New York bank account of a Peruvian drug and money

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laundering statutes). The criminal forfeiture provisions for violations of the money laundering statutes are found in 18 U.S.C. § 982; the civil forfeiture provisions are found in 18 U.S.C. § 981.

105. While the actual federal money laundering statutes and their definitions are codified at 18 U.S.C. §§ 1956–1957, the criminal forfeiture provisions for violations of the money laundering statutes are found in 18 U.S.C. § 982; the civil forfeiture provisions are found in 18 U.S.C. § 981.

106. 18 U.S.C. § 982(a)(1).

107. *Id.*

108. *See generally* Gordon, *supra* note 11, at 755–68 (providing a detailed examination of the development and impact of the facilitation theory under 18 U.S.C § 981–982).

109. *Id.* at 760.

110. United States v. All Monies ($477,048.62) In Account No. 90-3617-3, 754 F. Supp. 1467 (D. Haw. 1991).

111. *Id.*

laundering organization.[112] The claimant conceded that a limited amount of money in the account was derived from illegal activity and was subject to forfeiture under the money laundering statute.[113] However, the claimant argued and the government conceded that the majority of the funds in the account were from legitimate business enterprises.[114] The government argued that although the majority of the account was made up of legitimate money, that legitimate money was being used to hide the illegal drug money also contained in the account.[115] The government contended this legitimate money was facilitating the laundering of the drug money and should be forfeited as well.[116] The court agreed with the government's theory and explained that, "Even though § 981 does not expressly include the words 'facilitate' or 'facilitating,' the statute covers property 'involved in' illegal money laundering transactions."[117] The court held the entire account forfeitable and set an example that continues to be followed today.[118]

Other courts quickly caught on to the facilitation theory established in *All Monies* and expanded its use to impose a forfeiture of all the funds in numerous accounts held by launderers.[119] In *United States v. Certain Funds on Deposit*,[120] owners of a credit union had deposited proceeds from a criminal enterprise in three separate existing accounts.[121] The court

112. *See id.* at 1469–71. The proceeding in this case was for a civil forfeiture and thus the government only needed to show probable cause. *See id.* at 1471–76. But the application of the facilitation theory after probable cause as established in civil forfeiture is exactly the same as after a conviction is obtained in a criminal forfeiture. *See id.*

113. *Id.* at 1471–72 (stating that both parties conceded that $242,012.69 of the account was the profits of illegal drug trafficking).

114. *Id.*

115. *Id.* at 1472.

116. *See id.* at 1472–73 (including the government's citation of a portion of the congressional Record which stated that the phrase "property involved" included property used to facilitate the laundering offense).

117. *Id.* at 1473.

118. *See id.* at 1482 (holding that the government showed probable cause that the entire $477,048.62 was used to facilitate money laundering and was subject to forfeiture).

119. *See* United States v. Puche, 350 F.3d 1137, 1153 (11th Cir. 2003) (quoting United States v. Bornfield, 145 F.3d 1123, 1135 (10th Cir. 1998)) (stating that "property" under the forfeiture statute includes any property used to facilitate the laundering offense); United States v. McGauley, 279 F.3d 62, 77 (1st Cir. 2002) (stating that the commingling of funds is enough to sustain a forfeiture of the entire account after a money laundering conviction if it is shown the funds were used to facilitate the laundering but vacating the lower court's forfeiture order on other grounds); United States v. Bornfield, 145 F.3d 1123, 1135 (10th Cir. 1998) (holding that the forfeiture of legitimate and illegitimate funds commingled in an account is authorized as long as the government establishes the funds were pooled to facilitate the laundering); United States v. Certain Funds on Deposit in Account No. 01-0-71417, 769 F. Supp. 80, 84 (E.D.N.Y. 1991) (holding that all the funds in five different bank accounts were forfeitable under § 981 for being used to facilitate the laundering of proceeds of a criminal act).

120. 769 F. Supp. 80 (E.D.N.Y. 1991).

121. *Id.* at 82.

recognized that only a small portion of the money in each account was the result of the criminal activity.[122] However, the court still found the entire balance of all accounts to be subject to forfeiture because the legitimate money facilitated the laundering of the criminal profits.[123]

Although the courts have expanded the facilitation theory, they have also proposed some limitations. In *United States v. Certain Accounts*,[124] money launderers deposited criminal profits in several otherwise legitimate accounts in Florida and New York.[125] Prosecutors properly attempted to seize the entirety of these accounts under the facilitation theory.[126] However, before the commencement of the forfeiture action, the violators had drawn several checks from the accounts and deposited them in twenty-seven different accounts.[127] Prosecutors attempted to seize the entirety of the twenty-seven secondary accounts as well.[128] The court refused to allow the government to seize the secondary accounts simply because checks written from the primary accounts were deposited therein.[129] The court explained, "[l]ike a contagious disease, each direct account could contaminate any account that had dealings with it. The indirect accounts could then conceivably pass on the infection to other accounts, and so forth *ad infinitum*."[130] The court refused to adopt a per se rule that accounts could be forfeited simply by receiving deposits from contaminated accounts.[131] Rather, it said that the government must reestablish probable cause that the legitimate money in each successive account is being used to facilitate laundering of the criminal proceeds.[132]

Certain Accounts demonstrates that the courts are not willing to let the facilitation theory run rampant and expand forfeiture to include assets never contemplated by Congress when enacting the forfeiture provisions of the money laundering statute. To gain a greater understanding of the proper scope of the facilitation theory, it is necessary to examine the basis for its existence. The argument behind facilitation rests predominantly on two basic assumptions. First, one must assume that the word "facilitate" is incorporated into the language of 18 U.S.C. §§ 981–982.[133] Most courts

122. *Id.* at 85.
123. *Id.* at 84–85.
124. 795 F. Supp. 391 (S.D. Fla. 1992).
125. *Id.* at 393.
126. *Id.*
127. *Id.*
128. *Id.*
129. *See id.* at 397.
130. *Id.* at 398.
131. *Id.*
132. *Id.*
133. *See, e.g.*, United States v. Eleven Vehicles, 836 F. Supp. 1147, 1153 (E.D. Pa. 1993) (stating that although § 981 does not contain the phrase "facilitating property" it is to be included

that have attempted to justify a finding of incorporation do so by referencing the legislative history of §§ 981–982.[134] As the statute was originally written, only the profits or receipts of money laundering were subject to forfeiture.[135] However, in 1988 the statute was amended to provide for forfeiture of property "involved in" money laundering.[136] Courts have made reference to the Senate Judiciary Committee's Comments on the amendment which include the forfeiture of assets used to facilitate money laundering as one of the amendment's purposes.[137]

However, a convincing argument can also be made that Congress did not intend to provide for the forfeiture of assets used to "facilitate" money laundering. The forfeiture provisions of the Drug Act[138] are very similar to those in the federal money laundering statute under 18 U.S.C. §§ 981–982.[139] However, in establishing which assets are subject to forfeiture for violations of federal drug laws, Congress included the term "facilitate."[140] The statute refers to, "[a]ll real property . . . which is used, or intended to be used, in any manner or part, to commit, or to *facilitate* the commission of a violation of this subchapter . . . ."[141] In contrast, in enacting the money laundering forfeiture laws, Congress chose not to list assets used to facilitate the laundering as subject to forfeiture. The applicable portion of the statute states, "[a]ny property, real or personal, involved in a transaction or attempted transaction in violation . . . of this title . . . ."[142] It is difficult to understand why Congress would include the facilitation theory in the language of the drug statute and not the money laundering statute if it

within the construction because of the phrase "involved in"); United States v. Swank Corp., 797 F. Supp. 497, 500 (E.D. Va. 1992) (holding that assets which facilitate the violation of the money laundering statute are subject to forfeiture under § 982); *Certain Accounts*, 795 F. Supp. at 397 (finding the facilitation of money laundering to be included under § 981); *Certain Funds on Deposit*, 769 F. Supp. 80, 84 (E.D.N.Y. 1991) (finding the phrase "involved in" in § 981 to include the act of facilitation).

134. *See, e.g., Certain Accounts*, 795 F. Supp. at 397 (stating that reading the forfeiture statutes to include facilitation "is based on a sound understanding of the crime that Congress sought to deter by enacting § 981"); United States. v. All Monies ($477,048.62) In Account No. 90-3617-3, 754 F. Supp. 1467, 1473 (D. Haw. 1991) (stating that "the legislative history makes it clear that 'property involved in' includes property used to facilitate money laundering offenses").

135. *See* Money Laundering Control Act of 1986, Pub. L. No. 99-570, § 1366(a), 100 Stat. 3207-18, 3207-35 to 39 (1986) (codified as amended at 18 U.S.C. §§ 981–982 (2000)).

136. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6463, 102 Stat. 4181, 4374 (codified as amended at 18 U.S.C. §§ 981–982).

137. *See* sources cited in note 133. *See also* 134 CONG. REC. S17365 (Nov. 10, 1988) (statement of Sen. Biden, Member, Senate Judiciary Comm.) (indicating that forfeiture would "apply to the fee retained by the launderer and to any property he or she may have used to facilitate the offense").

138. *See* 21 U.S.C. § 881(a)(6) to (7) (2000).

139. *See* 18 U.S.C. § 981(a)(1)(A); § 982(a)(1).

140. 21 U.S.C. §§ 881(a)(6) to (7).

141. *Id.* (emphasis added).

142. 18 U.S.C. § 981(a)(1)(A).

intended the facilitation theory to be applied in both.

If it is accepted that the first basic assumption of the facilitation theory is met—that Congress intended to make assets used to facilitate money laundering subject to forfeiture under §§ 981–982—then one must make a second assumption for the current understanding of the theory to have legitimacy. For the current interpretation of facilitation to go forward, it must be assumed that the mixing of dirty and clean money in the same bank account constitutes facilitation. There is little case law defining facilitation in the context of money laundering due to the fact that "facilitation" is not included in the language of the statute. Thus, most courts have looked to the ample case law interpreting the facilitation provisions of the drug forfeiture statute.[143] However, federal courts have not been able to reach a consensus on what the government must prove to show facilitation.[144]

In interpreting the forfeiture provisions of the Drug Act, several courts have adopted the substantial connection test.[145] This test requires that for property to be forfeited, the government must establish a substantial connection between the property and the underlying criminal activity.[146] Other courts have rejected the substantial connection test and maintain that only a nexus between the property and the crime is required to support a forfeiture.[147] After a thorough examination of the applicable case law, the Second Circuit arrived at the conclusion that "the government must demonstrate only a 'nexus' between the seized property and illegal drug activity, not a 'substantial connection.' "[148] Whether applying the substantial connection or nexus test, the circuits agree that the connection

143. 21 U.S.C. §§ 881(a)(6) to (7).

144. *See* Gordon, *supra* note 11, at 759 (explaining that some courts have required the forfeitable asset to have a "substantial connection" to the underlying crime while others only required a "nexus" between the asset and the crime); Sarah N. Welling, *Smurfs, Money Laundering, and the Federal Criminal Law: The Crime of Structuring Transactions*, 41 FLA. L. REV. 287, 294 (1989) (describing some of the statutory problems and judicial responses of the money laundering statutes).

145. *See* United States v. Schifferli, 895 F.2d 987, 989 (4th Cir. 1990); United States v. 1966 Beechcraft Aircraft Model King Air, 777 F.2d 947, 953 (4th Cir. 1985); United States v. 26.075 Acres, 687 F. Supp. 1005, 1016 (E.D.N.C. 1988), *aff'd sub. nom.* United States v. Santoro, 866 F.2d 1538 (4th Cir. 1989).

146. *See Schifferli*, 895 F.2d at 990 (explaining that for an action to constitute facilitation, there must be a substantial connection between the property and the crime); *1966 Beechcraft Aircraft Model King Air*, 777 F.2d at 953 (stating that for property to be forfeitable under 21 U.S.C. § 881 it must have a substantial connection to the illegal activity); *26.075 Acres*, 687 F. Supp. at 1016 (finding an entire tract of land subject to forfeiture because of its substantial connection to the drug violation).

147. *See* United States v. Daccarett, 6 F.3d 37, 56 (2d Cir. 1993); United States v. 38 Whalers Cove Drive, 954 F.2d 29, 33 (2d Cir. 1992); United States v. One 1974 Cadillac Eldorado Sedan, 548 F.2d 421, 423 (2d Cir. 1977).

148. *See Daccarett*, 6 F.3d at 56.

between the property and the criminal activity must be more than incidental.[149]

Despite the lack of clarity on the level of connection needed between the forfeitable property and the criminal act, the courts agree on the necessary amount of illegal activity to justify a forfeiture.[150] If the requisite connection is met between the asset and proscribed criminal activity, the asset is subject to forfeiture no matter how much criminal activity has taken place.[151] An extreme example of this can be found in the Supreme Court's decision in *Calero-Toledo v. Pearson Yacht Leasing Co.*[152] There the Court found the presence of one cigarette of illegal marijuana on a yacht sufficient to uphold the forfeiture of the entire vessel.[153] In another case the Eleventh Circuit accurately expressed the state of the law across the country in explaining that "a vehicle is subject to forfeiture no matter how small the quantity of contraband found."[154] Translated to the context of money laundering, one dollar of illegal money is sufficient to justify the seizure of even the largest bank account, provided the clean money has the necessary connection to the laundering of the illegal dollar.[155]

The rise of the facilitation theory has drastically changed the landscape of enforcement of the federal money laundering statute. Without the facilitation theory, only those assets that were the direct result of

149. *See Schifferli*, 895 F.2d at 990 ("At minimum, the property must have more than an incidental or fortuitous connection to criminal activity"); United States v. 916 Douglas Ave., 903 F.2d 490, 493 (7th Cir. 1990) (declining to read § 881 more leniently than requiring at least something more than an incidental connection between the property and crime).

150. *See* Gordon, *supra* note 11, at 758.

151. *See, e.g.*, United States v. One 1982 28' Int'l Vessel, 741 F.2d 1319, 1322 (11th Cir. 1984) (stating that a vehicle is subject to forfeiture even though the amount of contraband involved was "immeasurably small"); United States v. One 1976 Porsche 911S, 670 F.2d 810, 812 (9th Cir. 1979) (stating that "the relevant statutes require forfeiture without regard to the amount of the contraband found in the vehicle . . . ."); United States v. One 1975 Mercedes 280S, 590 F.2d 196, 198 (6th Cir. 1978) ("Although the law in this respect appears harsh, it is well settled that it is immaterial whether the amount of marijuana contained in the car is relatively small.").

152. 416 U.S. 663 (1974).

153. *See id.* at 680.

154. *See One 1982 28' Int'l Vessel*, 741 F.2d at 1322 (quoting *One 1976 Porshe*, 670 F.2d at 812) (finding a nearly immeasurably small amount of contraband on a yacht justifying the forfeiture of the entire boat).

155. Some commentators have suggested the rule allowing unlimited forfeitures no matter how de minimis the level of criminal activity may change in the future. *See* Gordon, *supra* note 11, at 759–60. The Supreme Court's decision in *Austin v. United States* found that forfeiture penalties were partially punitive in nature. 509 U.S. 602, 618 (1993). Punitive penalties are subject to the Excessive Fines Clause of the Eighth Amendment and may be overturned. *Id.* at 622. However, the *Austin* Court refused to adopt a standard for determining when forfeiture penalties could be considered excessive under the Eighth Amendment. *Id.* Because the Supreme Court has refrained from articulating such a standard in the eleven years since the *Austin* decision, it is unlikely it will do so in the future.

criminal activities were subject to forfeiture. With the facilitation theory, violators stand to lose not only the profits of their illegal enterprises, but also every other asset they own that is held in the same location as any amount of criminal profit. Prosecutors are given incredible latitude to go after nearly unlimited assets at their own discretion. In addition, the assets seized by prosecutors are used to partially fund the budgets of law enforcement agencies, including the Justice Department.[156] The ambiguous nature of the facilitation theory and the wide discretion yielded by prosecutors in seizing assets that will fund their own budgets, have led to an expansion of civil and criminal forfeiture under the money laundering statute that Congress could not have foreseen at the statute's passage.

II. THE EFFECT OF MODERN FORFEITURE LAWS ON THE ABILITY OF CRIMINAL DEFENDANTS TO HIRE ATTORNEYS

A. *Statutory Framework and Implications*

The first step in the criminal money laundering forfeiture process is the conviction of a defendant for committing one of the proscribed laundering acts in violation of the applicable federal law.[157] Once a conviction has been obtained, the judge then looks to the criminal forfeiture provisions for money laundering to determine what property is subject to forfeiture.[158] The applicable statute, 18 U.S.C. § 982, catalogs which assets are subject to forfeiture for their connection to money laundering.[159] It further provides that the procedures for forfeitures imposed under § 982 shall be governed by the criminal forfeiture procedures in the Drug Act.[160]

One of the most significant features of criminal forfeiture law under the Drug Act is the effect of forfeitures on assets that have been transferred to third parties. The Drug Act states that property subject to forfeiture under the act vests in the United States at the time the criminal act took place.[161] This order of vesting cannot take place until a conviction for the

156. *See* 28 U.S.C. § 524(c)(1) (2000) (establishing a special fund for the deposit of forfeiture proceeds known as the Department of Justice Assets Forfeiture Fund which is available to the Attorney General to use in the Department). The fact that proceeds of forfeiture actions are used to fund justice department budgets presents a possible conflict of interest for prosecutors.

157. *See* 18 U.S.C. §§ 1956–1957, 1960 (2000) (defining what conduct constitutes money laundering under federal law).

158. *See* 18 U.S.C. § 982(a)(1) (providing that assets "involved in" violations of §§ 1956, 1957, & 1960 are subject to forfeiture). The judge will also look at the applicable case law interpreting what constitutes being "involved in" a violation as discussed above.

159. *See id.*

160. *See* 18 U.S.C. § 982(b)(1) (stating that criminal money laundering forfeitures shall be governed by the forfeiture procedures outlined in 21 U.S.C. § 853 of the Drug Act).

161. *See* 21 U.S.C. § 853(c) (2000) ("All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise

underlying crime has been obtained, but once the conviction is obtained, the United States is said to have held the property since the time of the offense.[162] This becomes especially relevant when the property subject to forfeiture has been transferred out of the ownership of the criminal defendant. The new owner of the property could have gained ownership before the defendant was convicted or even charged with a crime. In this situation, if the property in question has already been involved in the criminal act by the time the third party takes ownership, then upon a conviction of the defendant the subject property will still be forfeitable to the United States.[163] Under the criminal forfeiture provisions of the Drug Act, the third party will be considered to have never taken ownership of the property because ownership of the property vested in the government at the time of the criminal act.[164]

This statutory embodiment of the relation back doctrine standing alone would seem to leave the innocent purchasers of criminal property with no recourse. However, in enacting the criminal forfeiture provisions of the Drug Act, Congress left innocent owners with some protection.[165] Within the same statutory sentence that codifies the relation back doctrine and its effect on third parties, Congress stated that a transferee may retain ownership of property subject to forfeiture if "the transferee establishes in a hearing pursuant to subsection (n) of this section that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section."[166]

The procedure for innocent third parties attempting to protect their ownership of property which the government is seeking to seize is outlined in part (n) of § 853.[167] After the government has obtained a conviction of the guilty party and obtained an entry of forfeiture on the property from the court, the government must publish notice of its intent to seize the property.[168] Within thirty days any third party claiming an interest in the property subject to forfeiture may petition the court for a hearing to assess the merits of their claim.[169] At the hearing, the claimant may present evidence, testify on his own behalf, and cross-examine other witnesses.[170]

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to forfeiture under this section.").

162. *See id.*
163. *See id.*
164. *See id.*
165. *See id.* (protecting "bona-fide purchasers" of criminal property).
166. *Id.*
167. *Id.* at § 853(n).
168. *See id.* at § 853(n)(1).
169. *See id.* at § 853(n)(2).
170. *See id.* at § 853(n)(5).

However, the claimant has no right to a jury trial, and the hearing will be administered by a judge alone.[171] If the claimant proves in the hearing that at the time of purchase he was a bona fide purchaser and was reasonably without cause to believe the property was subject to forfeiture, he is entitled to retain ownership.[172]

Additionally, the forfeiture provisions of the Drug Act give prosecutors the power to obtain restraining orders on property potentially subject to forfeiture even before filing an indictment.[173] The purpose of these restraining orders and injunctions are to preserve potentially forfeitable property so that a defendant may not transfer or expend it before the government takes ownership.[174] The provisions allowing prosecutors to issue preliminary restraining orders and to go after criminal assets in the hands of third parties were added to the forfeiture statutes in 1984.[175] These provisions were needed because defendants were able to transfer or conceal their forfeitable assets after charges had been filed but before prosecutors could gain a conviction.[176] The addition of these prosecutorial tools has drastically increased the breadth and effectiveness of the criminal forfeiture laws.[177]

While the 1984 amendments have been widely commended for their success in confiscating a drastically increased amount of criminal assets, they have also led to another consequence that has the potential to significantly and negatively impact the criminal justice system.[178] Because preindictment restraining orders and injunctions give prosecutors the ability to freeze assets in advance of trial, criminal defendants may not use those assets to fund their potential need for a legal defense. In the context of money laundering, this denial can be of great consequence for a defendant. Under the facilitation theory, where one dollar of dirty money subjects an entire account to forfeiture, most defendants accused of money laundering will not have any assets free from potential forfeiture.[179] Therefore, prosecutors may obtain a pretrial order freezing the money in all of a given defendant's bank accounts and thereby deny him the opportunity to hire an

171. *See id.* at § 853(n)(2).

172. *See id.* at § 853(n)(6)(B).

173. *See id.* at § 853(e).

174. *See id.*

175. *See* Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, §§ 301–323, 98 Stat. 1837, 2040–41 (codified in titles 18, 19, 21, & 28 U.S.C.).

176. *See* Winick, *supra* note 7, at 769 (explaining the hole in the forfeiture statutes before 1984 that provided defendants a method to evade serious asset forfeitures before conviction).

177. *See id.* at 770 (stating that the 1984 amendments "expanded both the number of crimes subject to criminal forfeiture and the scope of property subject to forfeiture").

178. *See id.* at 770–71 (explaining the effectiveness of tools provided to prosecutors in the 1984 amendments).

179. *See* 21 U.S.C. § 853(a)(2) (2000).

attorney of his own choosing.

This problem is not limited to the context of preindictment restraining orders. If no preliminary order to freeze assets is given, a defendant on trial for money laundering is still free to pay his attorney any amount of money he desires. However, in the event the defendant is convicted, the government will be able to force the attorney to forfeit any money he was paid out of criminally tainted funds.[180] Under the forfeiture statute, in order for the attorney to retain his fee, the attorney would have to prove he had no reasonable cause to believe his client's accounts were subject to forfeiture.[181] It would be nearly impossible for an attorney who was retained to defend a client accused of money laundering to prove that he had no cause to believe that his client's assets were subject to forfeiture.

The implications of this practice can be highlighted by a detailed examination of a 2003 Eleventh Circuit decision affirming the forfeiture of fees paid to an attorney whose client was later convicted.[182] In *United States v. McCorkle*,[183] the defendant who was on trial for a violation of the federal money laundering statute[184] paid his attorney F. Lee Bailey a two million dollar retainer fee.[185] At trial, the defendant was convicted of laundering money and the jury entered a forfeiture order which included the two million dollars paid to Bailey.[186] Bailey then filed a § 853(n) petition for a hearing in order to prove "that he had received the money as a bona fide purchaser for value without cause to believe that the money was subject to forfeiture."[187] The magistrate judge denied Bailey's § 853(n) petition and the Eleventh Circuit affirmed.[188]

Bailey further argued that the prosecution gave him several signals before trial to indicate that they would not attempt to seize his attorneys' fees after a possible conviction.[189] Bailey maintained that these signals would have inclined any reasonable lawyer to accept the funds and expend

180. *See id.* at §§ 853(c), (n)(6)(B). Prosecutors may seize these funds under the relation back doctrine.

181. *See id.*

182. *See* United States v. McCorkle, 321 F.3d 1292, 1292 (11th Cir. 2003), *cert. denied*, 125 S. Ct. 549 (U.S. 2003).

183. *Id.*

184. *See id.* at 1294, nn.1–2 (explaining that the defendant was convicted of executing a telemarketing scheme violating mail fraud (18 U.S.C. §1341) and wire fraud (§ 1343) laws and of laundering the profits in violation of 18 U.S.C. § 1956(a)(2)(B)).

185. *See id.* at 1294 (stating that the defendant placed the $2 million retainer fee in trust in the Cayman Islands and transferred the trust to his attorney).

186. *See id.* at 1294.

187. *Id.*

188. *See id.* ("It is also clear that Bailey knew from the outset that the funds were subject to forfeiture.").

189. *See id.* (stating that Bailey claimed he received seven signals from the government that he was entitled to keep the otherwise forfeitable funds).

them on his client's defense.[190] The Court quickly dispensed with Bailey's argument by pointing out that the forfeiture statute expressly grants the government discretion to use such measures.[191] Additionally, the Court stated that "a district court's exercise of discretion not to enter a pretrial restraining order does not 'immunize' nonrestrained assets from subsequent forfeiture under § 853(c), if they are transferred to an attorney to pay legal fees."[192] The decision in the *McCorkle* case was not unexpected and the Court's reasoning accurately reflects the current state of criminal forfeiture law. The importance of the decision is in providing an example to criminal defense attorneys who are contemplating defending their clients against criminal forfeiture proceedings. Because of the state of criminal forfeiture law today, few private defense attorneys will agree to take a case this far. The *McCorkle* decision provides a shining example to the defense bar of what will happen if they do.

B. Case Law Development

While the government's interpretation of the criminal forfeiture statute as authorizing the forfeiture of attorneys' fees is clearly a plausible one, the ambiguous language of the statute leaves room for defense attorneys to petition the courts for a different result. However, the real strength of the current interpretation of the doctrine is not found in the wording of the statute, but rather in the depth of federal case law supporting it. The federal courts have repeatedly upheld prosecutorial efforts to seize assets in such a way, before or after trial, so as to deny criminal defendants the means necessary to hire a private attorney of their choice.[193]

In *United States v. Monsanto*,[194] the United States Supreme Court was provided an opportunity to interpret the criminal forfeiture statute in such a

190. *See id.* at 1296–97 (stating Bailey's rationale for spending money held in the "defense fund").

191. *See id.* at 1297 (stating that the statutory scheme directly allows the government to proceed by its own discretion).

192. *See id.* at 1297 (citing Caplin & Drysdale v. United States, 491 U.S. 617, 623 (1989)).

193. *See, e.g.*, United States v. Monsanto, 491 U.S. 600, 600 (1989) (holding that there is no exemption from § 853's restraining order or forfeiture provisions for assets defendants want to use to pay an attorney); Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 623 (1989) (refusing to grant protection to attorneys' fees seized under § 853(c)); United States v. Bissell, 866 F.2d 1343, 1349 (11th Cir. 1989) ("As a consequence of the provisions in § 853, an attorney retained to defend on whose assets are subject to forfeiture and restraint may go uncompensated."); United States v. Moya-Gomez, 860 F.2d 706, 720 (7th Cir. 1988) (explaining that any property transferred to an attorney may ultimately be forfeited to the government upon conviction); United States v. Nichols, 841 F.2d 1485, 1496 (10th Cir. 1988) (holding that the language of § 853 is unambiguous and does not allow an exemption of attorneys' fees from forfeiture).

194. 491 U.S. 600 (1989).

way as to protect the defendant's ability to hire counsel.[195] The defendant was indicted for several violations of drug and racketeering laws.[196] Prosecutors also sought the forfeiture of various assets that the defendant allegedly obtained through the proceeds of illegal narcotics activities.[197] In furtherance of this effort, prosecutors obtained a postindictment restraining order preventing the sale or transfer of two of the defendant's properties.[198] The defendant filed a motion seeking to modify the restraining order to permit him to use a portion of the frozen assets to hire an attorney of his choosing.[199] The district court refused to grant this request and ruled the defendant to be de facto indigent.[200]

It is not simply the fact that the Supreme Court failed to interpret the criminal forfeiture laws as permitting a defendant to pay to defend himself that is so alarming, but rather the force of language with which Justice White dismissed the defendant's claims.[201] Justice White seemed to leave no hints that the Court may be willing to listen to other arguments on this point in the future nor did he express any concern that the law may be problematic for the criminal justice system.[202] In writing for the Court Justice White explained:

> Section 853(e) provides that a person convicted of the offenses charged in respondent's indictment "shall forfeit . . . any property" that was derived from the commission of these offenses. After setting out this rule, § 853(a) repeats later in its text that upon conviction a sentencing court "shall order" forfeiture of *all* property described in § 853(a). Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied, or broader words to define the scope of what was to be forfeited.[203]

Such a strong affirmation by the Supreme Court of the government's interpretation of the current criminal forfeiture statutes leaves little hope for potential defendants that this rule will change in the future.

Additionally, on the same day the Supreme Court handed down the

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195. *Id.* at 600.

196. *See id.*

197. *See id.*

198. *See id.* at 603 (enjoining the sale of a $30,000 apartment in the Bronx, New York and a $335,000 house in Mount Vernon, New York, both owned by the defendant).

199. *See id.* at 604.

200. *See id.* at 605.

201. *See id.* at 607 (stating that nothing in the § 853's all-inclusive statute "hints at the idea that assets to be used to pay an attorney are not 'property' within the statute's meaning.").

202. *See id.* at 615 (rejecting defendant's claims that the restraining order denied his 5th Amendment due process rights or his Sixth Amendment rights to counsel of choice).

203. *Id. at* 607.

decision in *Monsanto*, the Court released a companion decision soundly rejecting a defendant's claims that the government's reading of the statute violated his constitutional rights.[204] In *Caplin & Drysdale, Chartered v. United States*,[205] the Court echoed its interpretation of 21 U.S.C. § 853 outlined in *Monsanto* as authorizing pretrial restraining orders and postconviction forfeitures of attorneys' fees.[206] The *Caplin & Drysdale* decision has independent importance apart from reiterating the Court's decision in *Monsanto*, however. Even if one accepts the *Monsanto* Court's interpretation of the statutory language in § 853 as correct, the application of this interpretation may still be challenged on constitutional grounds.

In *Caplin & Drysdale*, the defendant was charged with running a massive drug importation and distribution scheme in violation of the Continuing Criminal Enterprise law.[207] The government obtained a preindictment restraining order freezing certain specified assets of the defendant.[208] The government later obtained a conviction and the District Court ordered the forfeiture of virtually all of the defendants assets, including those paid to his attorney.[209] The defendant argued that assets used to pay attorneys' fees are exempt from forfeiture under § 853, and if not, the failure to provide such an exception renders the statute unconstitutional.[210]

The defendant in *Caplin & Drysdale* pointed out that the restraining order prevented him from hiring an attorney of his own selection and forced him to accept one appointed by the court.[211] He argued that this practice denied his Sixth Amendment right to counsel of choice.[212] The Court rejected this claim and found that the statute in no way denies the defendant his Sixth Amendment right to select his counsel of choice.[213]

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

205. *Id.*

206. *See id.* at 623 (referring to the Court's decision in *Monsanto* handed down on the same day which denies defendants the ability to use forfeitable assets to pay attorneys' fees).

207. *See id.* at 617 (stating that the defendant was convicted of violating the CCE law 21 U.S.C. § 848).

208. *See id.* (stating that the District Court entered a preliminary restraining order under 21 U.S.C. § 853(e)(1)(A) preventing him from transferring the property).

209. *See id.*

210. *See id.*

211. *See id.*

212. *See id.*

213. *See id.* at 625 ("we observe that nothing in § 853 prevents a defendant from hiring the attorney of his choice, or disqualifies any attorney from serving as a defendant's counsel"). The Court, however, recognized that:

> [T]here will be cases where a defendant will be unable to retain the attorney of his choice, when that defendant would have been able to hire that lawyer if he had access to forfeitable assets, and if there was no risk that fees paid by the defendant to his counsel would later be recouped under § 853(c).

The Court reasoned that the criminal forfeiture statute simply provides for the seizure of assets involved in specified criminal activities.[214] It further explained that "whatever the full extent of the Sixth Amendment's protection of one's right to retain counsel of his choosing, that protection does not go beyond 'the individual's right to spend his own money to obtain the advice and assistance of . . . counsel.' "[215] Justice White, again writing for the Court, rationalized that when an order of forfeiture is obtained, ownership of the assets in question "relate back" to the time of the criminal act.[216] Thus, at the time of trial when the defendant seeks to use his assets to pay his attorney, under the relation back doctrine these assets are property of the United States government.[217] Accordingly, it is through the legal fiction of the relation back doctrine that the Supreme Court has justified the refusal to recognize a criminal defendant's Sixth Amendment right to hire the attorney of his own selection.

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. The decisions have been consistently followed by several Federal Courts of Appeals.[218] There is no serious reason for criminal defense attorneys to expect this rule to be changed by Congress or the Supreme Court. However, after a thorough examination of the rule and its implications on the fairness of the criminal justice system, a compelling argument can be made for the discontinuation of the forfeiture of attorneys' fees.

Id.

214. *Id.* at 627.

215. *See id.* at 626 (citing Walters v. Nat'l Assn. of Radiation Survivors, 473 U.S. 305, 370 (1985)).

216. *Id.* at 625.

217. *See id.* at 626.

218. *See, e.g.*, United States v. Melrose East Subdivision, 357 F.3d 493, 500 (5th Cir. 2004) (stating that neither due process nor the Sixth Amendment require that assets needed to pay an attorney be unrestrained or exempted from forfeiture (citing *Caplin & Drysdale*, 491 U.S. at 625; citing *Monsanto*, 491 U.S. at 616)); United States v. Moffitt, Zwerling & Kemler, P.C., 83 F.3d 660, 665 (4th Cir. 1996) (stating that there is no constitutional right to spend another's money to pay for attorneys' fees, and therefore forfeiture of attorneys' fees is constitutional (quoting *Caplin v. Drysdale*, 491 U.S. at 626)); United States v. Unit No. 7 & Unit No. 8 of Shop in Grove Condominium, 890 F.2d 82, 84 (8th Cir. 1989) (agreeing with *Caplin & Drysdale* and *Monsanto* that neither the Fifth nor Sixth Amendment rights of a defendant are offended by forfeiture of property which would otherwise be used to pay an attorney (citing *Caplin & Drysdale*, 491 U.S. at 622–35)).

III. POLICY IMPLICATIONS OF SEIZURE AND FORFEITURE OF ASSETS USED TO PAY ATTORNEYS' FEES

A. *The Financial and Ethical Impacts on Private Defense Attorneys*

The preindictment seizure or postconviction forfeiture of assets used to pay attorneys' fees does not leave criminal defendants entirely without the ability to be represented by counsel of their choice. Defendants may still hire any attorney they would like and can use their frozen assets to pay attorneys' fees up to the hourly rates and maximum fees provided under the Criminal Justice Act.[219] Under the Criminal Justice Act, attorneys representing criminal clients in forfeiture actions would be paid at a rate not exceeding $60 per hour for time spent in court and a rate not exceeding $40 per hour for time reasonably spent out of court.[220] No matter how many total hours an attorney spends in or out of court on the case, the Criminal Justice Act only allows a maximum payment of $5,200 per attorney.[221] However, these rates are drastically below the average rates charged by experienced criminal attorneys in private practice.[222] A 1985 study found the general hourly rates charged by private defense attorneys in large cities to be between $150 and $250 per hour.[223] In addition, the same study found the average per hour overhead costs of running a private law firm to be in excess of $39.[224] In comparison, the federal government will pay outside counsel as much as $285 per hour to represent it.[225] Especially when considering the length of time, complexity, and expenses of providing a vigorous defense in a federal criminal trial, it will be very difficult for private attorneys to take on such cases at the compensation rate allowed by the Criminal Justice Act.[226]

The financial risk incurred by private defense attorneys is not the only factor contributing to their decreased willingness to accept criminal

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219. *See* 18 U.S.C. §§ 3006A(d)(1) to (2) (2000).

220. *See id.* at § 3006A(d)(1) (the statute also provides that the Judicial Council can determine that a higher rate not in excess of $75 per hour is justified for certain circuits).

221. *See id.* at § 3006A(d)(2).

222. *See* Winick, *supra* note 7, at 773 (1989) (stating that the average rates charged by private attorneys are generally between three to seven times that allowed by the Criminal Justice Act).

223. *See id.* (citing *Criminal Justice Act Revision of 1985: Hearings Before the Subcomm. On Courts, Civil Liberties, and the Admin. of the Justice of the House Comm. on the Judiciary*, 99th Cong. 3 (1985) (testimony of U.S. District Judge Thomas J. MacBride, Chairman of the U.S. Judicial Conference Comm. to Implement the Criminal Justice Act) (reprinted in Sup. Doc. No. Y4.J89/1:99/41)).

224. *See id.*

225. *Id.* at n.39.

226. *Id.* at 774 ("In view of the complexity, duration, and intense time pressures of such cases, experienced defense counsel—even when well-paid—often find it impossible to undertake such cases and to maintain their private practices at the same time.").

forfeiture cases. The decision of whether or not to take on a criminal forfeiture case also presents significant ethical dilemmas for defense attorneys. Essentially, when a defense attorney takes on a criminal case where his fee will be subject to forfeiture upon conviction, he is working on a contingency fee basis. If the attorney can get his client cleared of all charges, or at least avoid a postconviction decree of forfeiture, the attorney will be free to retain his fee. Conversely, if the client is convicted and a decree of forfeiture is entered, the attorney will have to forfeit his fee and suffer any losses he incurred while trying the case. This presents a dilemma for the attorney in that the Model Rules of Professional Conduct prevent attorneys from representing criminal defendants on a contingency basis.[227] Contingency representation of criminal defendants is ethically banned because it makes the defense attorney an interested party in the case. Such an arrangement has the potential for creating conflicts of interest between attorney and client.[228] The United States Supreme Court has stated that when a constitutional right to counsel exists, the Sixth Amendment guarantees representation that is free from conflicts of interest.[229]

Furthermore, the asset forfeiture provisions of federal criminal law may prevent attorneys from thoroughly investigating all aspects of a client's case. If a defense attorney is reasonably without cause to know that his client's property is subject to forfeiture, then the attorney will be protected from forfeiting his fee after conviction.[230] The attorney may think his client has not engaged in behavior that will subject his property to forfeiture. If the court later finds that the property is forfeitable, the attorney's fee will be protected as long as he was not on notice of the forfeitable nature of the property at the time he received the property.[231] This protection gives defense attorneys a financial incentive to avoid learning too much information about their clients. The financial incentive also gives them a reason to advocate less zealously for their client.[232]

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227. *See* MODEL RULES OF PROF'L CONDUCT R. 1.5(d)(2) (2004) (providing that, "A lawyer shall not enter into an arrangement for, charge, or collect, a contingent fee for representing a defendant in a criminal case").

228. One example of the conflicts imposed on defense attorneys in contingent fee relationships is found in the plea bargaining process. In such plea discussions, an attorney may be tempted to recommend against a plea because it could jeopardize his fee. *See* Holloway v. Arkansas, 435 U.S. 475, 481 (1978); Winick, *supra* note 7, n.46.

229. *See* Wood v. Georgia, 450 U.S. 261, 271 (1981); Cuyler v. Sullivan, 446 U.S. 335, 349–50 (1980); *Holloway*, 435 U.S. at 481.

230. *See* 21 U.S.C. § 853(c) (2000) (stating that property otherwise forfeitable that has been transferred to bona fide purchaser for value who did not reasonably have cause to know the property was forfeitable at the time of purchase may be retained by the purchaser).

231. *See id.*

232. A defense attorney cannot zealously represent his client if he is attempting to limit the

B. *The Impact on the Fairness of the Justice System*

One of the most troubling consequences of the forfeiture of attorneys' fees is the potential for tipping the balance of the adversary system in favor of the prosecution. First, the prosecutorial discretion to add criminal forfeiture to a wide variety of federal charges gives the government a certain amount of control over which defense attorneys it will face at trial. Second, the denial of this once very lucrative area of criminal defense work may have a significant impact on the number of highly qualified attorneys willing to work their way up the criminal defense ladder. In the long run these are potentially very serious consequences that Congress likely did not intend when strengthening the federal drug laws in the 1970s and 1980s.[233]

The majority of criminal forfeiture actions are brought as additional charges on top of underlying violations of RICO,[234] the Continuing Criminal Enterprise Law,[235] or one of several federal money laundering statutes.[236] These three massive statutory schemes criminalize a multitude of different types of conduct.[237] The effect of the criminal forfeiture law is to give prosecutors the ability to tack on a forfeiture claim to any of hundreds of different underlying criminal acts.[238] Furthermore, the decision to include a forfeiture demand is under the complete discretion of the prosecutor.[239] As has been discussed, in most cases the addition of a forfeiture demand will work to remove the vast majority of private defense attorneys who cannot afford the financial or ethical risk. As one commentator correctly points out, "As a result, the government can gain the 'ultimate tactical advantage of being able to exclude competent defense counsel as it chooses merely by appending a forfeiture indictment.' "[240] Giving the prosecution any degree of veto power over the defendants' choice of counsel is clearly not a characteristic of an evenly balanced criminal justice system.

The second important impact the forfeiture of attorneys' fees will have

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amount of information he learns about his client and his client's case.

233. *See generally* Winick, *supra* note 7, at 772 (providing an overview of the impact of criminal forfeiture on the adversary system).

234. 18 U.S.C. §§ 1961–1968 (2000).

235. 21 U.S.C. § 848.

236. *See* 18 U.S.C. § 982.

237. *See* Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 663 (1987) (stating that RICO is a weapon prosecutors can use against virtually any kind of criminal behavior).

238. *See id.*

239. *See* 21 U.S.C. § 853(e)(1) (explaining that the court may enter a forfeiture decree "upon application of the United States"); *see also* United States v. McCorkle, 321 F.3d 1292, 1297 (11th Cir. 2003) (stating that the statutory scheme expressly grants the government discretion whether to use forfeiture measures).

240. *See* Winick, *supra* note 7, at 778.

on the criminal defense system is on the makeup of the defense bar as a whole. The representation of white collar criminals, wealthy drug dealers, and other organized criminal enterprises can be very lucrative business for attorneys. Whether this result is ethically desirable or not, it has the effect of bringing many bright and ambitious young lawyers into criminal defense work.[241] While these intelligent young lawyers may not desire a career representing indigent criminal defendants, they are willing to do so in order to learn and advance in the criminal defense bar. With the denial of a large percentage of the highly profitable criminal defense work, more and more young lawyers will opt for high paying corporate and civil work instead.[242] The public defenders' offices around the country are already alarmingly overworked and understaffed.[243] The further depletion of their attorney base could have serious long term consequences for the adequacy of our system of public criminal defense.[244]

IV. CREATING A SOLUTION THROUGH STATUTORY INTERPRETATION

The stated congressional purpose in enacting the criminal forfeiture provisions of 21 U.S.C. § 853 was to provide a significant deterrent to organized crime and large scale narcotics trafficking by denying violators the vast profits of their enterprise.[245] The negative effects on the procedural rights and protections of not only wealthy drug traffickers but all criminal defendants was not within Congress' intentions.[246] While the Court's current interpretation of the criminal forfeiture statute as authorizing pre- and postconviction forfeitures of attorneys' fees is plausible, it is not the only interpretation allowed by the statute's wording. The current state of the law is a result of the Supreme Court's acceptance of the Justice Department's interpretation of 21 U.S.C. § 853 in *United States v. Monsanto*[247] and *Caplin & Drysdale, Chartered v. United States*.[248] Consequently, a remedy to the present inequities in the criminal justice system caused by the forfeiture of attorneys' fees need not require any

241. *See id.* at 781.

242. *See id.*

243. *See* United States v. Rogers, 602 F. Supp. 1332, 1349 (D. Colo. 1985), *aff'd* 960 F.2d 1501 (10th Cir. 1992) (explaining that the resources and expertise needed to defend a RICO violation is beyond the ability of the average federal public defenders office that is already overworked and understaffed).

244. *See* Winick, *supra* note 7, at 783–84.

245. *See, e.g.*, H.R. REP. No. 101-427 (1990), *reprinted in* 1990 U.S.C.C.A.N. 928, 1002 (Sup. Doc. No. Y1.1/8: 169–170).

246. *See* Richard W. Mass, Note, *Forfeiture of Attorneys' Fees: Should Defendants Be Allowed to Retain the "Rolls Royce of Attorneys" with the "Fruits of the Crime"?*, 39 STAN. L. REV. 663, 687 (1987).

247. 491 U.S. 600, 616 (1989).

248. 491 U.S. 617, 635 (1989).

affirmative action from Congress. All that is necessary is a reinterpretation of the forfeiture provisions of § 853 by the Supreme Court under the appropriate standard for statutory interpretation.

In interpreting the criminal forfeiture laws the federal appellate courts have uniformly asserted that Congress made no express statement that attorneys' fees should be excluded from forfeiture.[249] However, one could make just as strong an argument that attorneys' fees should be excluded from forfeiture because Congress made no express statement including them. Congress defined property subject to forfeiture as, "(1) real property, including things growing on, affixed to, and found in land; and (2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities."[250] While this language does not clearly include or exempt assets used to pay attorneys' fees from forfeiture, it is open to interpretation.

Assets used to pay attorneys' fees are different in nature than the other assets subject to forfeiture for violations of criminal laws. The purpose behind the imposition of criminal forfeiture penalties is to deny those convicted of violating criminal laws the profits of their illegal activities.[251] The key point in this rationale is that asset forfeiture is a penalty imposed on those defendants who have been found guilty. The courts' current interpretation of criminal forfeiture law punishes those who have not yet been convicted. It not only imposes preconviction criminal sanctions on these defendants, but it unfairly increases their odds of being convicted at trial.[252] The most central premise of the American system of criminal justice is that defendants are considered innocent until proven guilty.[253] The Courts' current interpretation of § 853 ignores this principle in such a way as to give prosecutors an unfair tool against defendants who have the means to hire their own attorneys.

The language of the statutory exemption of assets transferred to third parties also leaves room for differing interpretations. Section 853(c) provides that bona fide purchasers for value of forfeitable property may retain the property if they prove that at the time of purchase they were "reasonably without cause to believe that the property was subject to

249. *See Monsanto*, 491 U.S. at 607.

250. 21 U.S.C. § 853(b) (2000).

251. *See* Gordon, *supra* note 11, at 744.

252. Postconviction forfeitures also work as a preconviction penalty. Due to the fact that defense attorneys risk losing their entire payment upon the conviction of their client, they will generally refuse to take such cases, thereby denying the defendant his choice of counsel.

253. *See, e.g.*, Estelle v. Williams, 425 U.S. 501, 503 (1976) ("The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice.").

forfeiture under this section."[254] As with § 853's definition of property subject to forfeiture, the statutory language in the bona fide purchaser exemption does not expressly mention attorneys' fees. However, as several federal circuit courts pointed out before the Supreme Court's decisions in *Monsanto* and *Caplin & Drysdale*, the language of the bona fide purchaser exemption leaves ample room to include attorneys' fees.[255] Congress made a decision to provide an exemption for bona fide purchasers who were "reasonably without cause to believe" the property was subject to forfeiture.[256] If Congress intended a hard and fast rule forfeiting every type of property a transferee had cause to know was forfeitable, they could have simply used the language "without cause to believe." There would be no need for Congress to preface it with the phrase "reasonably."[257]

The inclusion of the language "reasonably without cause" does not mandate an exemption for attorneys' fees. However, it does manifest an intent by Congress to exempt from forfeiture those assets whose seizure does not fall within the congressional purpose in passing the law. If the forfeiture of attorneys' fees does not seem to be within Congress's intent in passing § 853 and the language of the statute openly permits another interpretation, the courts should hold as much. Several courts have pointed to the legislative history of the act in searching for such a congressional purpose. In *United States v. Nichols*,[258] the Tenth Circuit explained:

> First, the Senate report contains a footnote that reads: "The provision [18 U.S.C. § 1963(m)] should be construed to deny relief to third parties acting as nominees of the defendant or who have knowingly engaged in sham or fraudulent transactions . . . . Second, the Senate report discussion of the third party transfer provision says, "The purpose of this provision is to permit the voiding of certain preconviction transfers and so close a potential loophole in current law whereby the criminal forfeiture sanction could be avoided by transfers that were not 'arms' length' [sic] transactions."[259]

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254. 21 U.S.C. § 853(c). *See also* 21 U.S.C. § 853(n)(6)(B) (providing the same standard of proof to be shown at a hearing in order for a third party transferee to retain forfeitable property). The courts have generally considered attorneys paid for legal services to be bona fide purchasers for value. *See* Winick, *supra* note 7, 844–47.

255. *See, e.g.*, United States v. Thier, 801 F.2d 1463, 1471 (5th Cir. 1986) (summarizing several district court case holdings that address requests to exempt bona fide attorneys' fees and agreeing with those district courts that rule in favor of the exemption requests), *modified* 809 F.2d 249 (5th Cir. 1987).

256. 21 U.S.C. § 853(c).

257. *See* Winick, *supra* note 7, at 845 (arguing that congressional inclusion of the phrase "reasonably" at least makes the statute ambiguous).

258. 841 F.2d 1485 (10th Cir. 1988), *rev'd* 491 U.S. 600 (1989).

259. *See id.* (quoting S. REP. No. 98-225, at 200–01 (1984), reprinted in 1984 U.S.C.C.A.N.

The Senate reports cited in *Nichols* express a congressional intent to prevent the use of fraudulent or sham transactions by defendants attempting to avoid a pending asset forfeiture. Certainly, a criminal defendant's payment of a private defense attorney to represent him and help avoid criminal charges altogether would not be considered a sham transaction.

The courts can use the leeway given them in the language of the statue to interpret § 853 in a way that will still accomplish the law enforcement goals of the act without negatively impacting criminal defendants in the way it does today. The bona fide purchaser exemption of § 853(c) should be interpreted to authorize the forfeiture of only fraudulent or sham attorneys' fees. If a defendant pays his attorney a large sum with the intent to keep that money away from the government, the money would still be forfeitable.[260] But when the defendant is only intending to obtain the best defense attorney to represent his interests in court, the fee would be exempt. Such an interpretation would still provide prosecutors the tools necessary to deny major drug traffickers and organized criminals the profits of their enterprise, without using an unfair balance in the courtroom as a means of doing so.

CONCLUSION

Congress passed the 1984 amendments to the criminal forfeiture provisions to give prosecutors the weapon necessary to make the RICO, Continuing Criminal Enterprise, and federal money laundering statutes effective. Before the amendments, violators awaiting trial would simply transfer their assets to third parties to avoid forfeiture to the government. The criminal forfeiture provisions of the Drug Act were unable to provide the economic deterrent necessary to slow down organized drug trafficking in the United States. After the relation back doctrine was applied to the act in 1984, prosecutors were able to seize criminal assets in the hands of third parties and put a significant dent in the profitability of organized crime. However, due to the ambiguous language in the amended criminal forfeiture laws, prosecutors were able to take the act further and use it in unintended ways to give themselves an unfair advantage in the courtroom.

The federal courts have agreed with the prosecutors and improperly interpreted the ambiguous language of 21 U.S.C. § 853 in such a way as to deny criminal defendants their constitutional right to counsel of choice and

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3182, 3383–84).

260. In an effort to protect their assets from forfeiture, defendants could pay their attorneys exorbitant fees with the understanding that the attorney would return the majority of the fee after the trial. The defendant would be assured that all funds paid to an attorney would be protected from forfeiture. Such a loophole could be avoided by interpreting § 853(c) as authorizing the forfeiture of such sham payments of attorneys' fees.

substantially inhibit the protections of the criminal justice system in unintended ways. This significant problem can be easily remedied without any action from Congress.[261] A simple reinterpretation of the criminal forfeiture laws as exempting legitimate attorneys' fees from forfeiture will reestablish the balance of fairness in the courtroom and continue to allow prosecutors to deny criminals the vast majority of their illegitimate profits. Such a judicial reassessment by the Supreme Court is not unprecedented in American jurisprudence and is most surely warranted in an effort to safeguard the protections of our criminal justice system.

BRIAN FORK

261. It is significant to note that Congress always has the option of simply changing the language of the law to specifically exclude attorneys' fees from inclusion in criminal asset forfeiture.