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Editor's Brief

This issue of *The Colonial Lawyer: Journal of Virginia Law and Public Policy* is my second and last as Senior Editor. I leave the journal and its future in the capable hands of Felicia Silber and her incoming editors and staff.

Public perception of the legal profession has always been ambivalent. Everyone needs attorneys, yet everyone loves to criticize them. They are accused of being dishonest, or of manipulating the system for the benefit of the wealthy and empowered. This issue of the *Lawyer* contains two articles which relate to these perceptions.

The first, by Mr. Gerbasi, discusses the use of RICO to seize attorney's fees prepaid by criminal defendants. The Federal Government seizes the fees under the broad forfeiture provisions in RICO by alleging that they are the proceeds of illegal activity and therefore can be forfeited just like a mansion or a Lear jet. The purchase of legal services is not, of course, comparable to the purchase of real estate or a consumer durable. The seizure ignores the potential violation of the defendant's Sixth Amendment right to counsel, and Mr. Gerbasi discusses the inherent tension in relation to crime families accused of involvement in drug traffic.

Little public sympathy is lost on those accused of being drug traffickers, and even less is expended on their attorneys. The public seems to feel that the attorneys who act to protect those accused of reprehensible acts are as repugnant as the perpetrators of those acts.

Mr. Raby's article discusses an attempt to regulate the profession of law to protect the public and raise the perceived quality of the industry. Virginia's new attorney-sanction provision, Virginia Code § 8.01-271.1, acts in much the same way as the existing Federal Rule 11 sanctions. Mr. Raby describes how the new code section works and discusses how it might affect the practice of law in Virginia.

Ms. Lewis comments on a case recently argued before the Supreme Court, *Kendrick v. Bowen*. Ms. Lewis discusses the history and policy of the Adolescent Family Life Act which is the basis of the suit, and suggests how the Supreme Court should address the issues raised. The issues raised are those at the core of modern political discussion: government policy toward abortion, the separation of church and state, government funding of medical services.

I hope you enjoy the spring issue, and welcome any comments or thoughts you may have.

Bruce William McDougal
Senior Editor

ABOUT THE AUTHORS

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Cheryl Ann Lewis, *Kendrick v. Bowen and the Chastity Act: On the High Wall Between Church and State,* is a second-year student at Marshall-Wythe. Ms. Lewis received a B.A. from the University of Virginia in 1984. Ms. Lewis has worked on Capitol Hill, including two years as staff assistant to Senator Warner. Ms. Lewis wishes to thank Professor Judith Ledbetter and Mr. Charles Sorensen of the Civil Division of the U.S. Department of Justice for their assistance in preparing her article.

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TOWARD A SUNNIER DAY FOR RICO: THE SIXTH AMENDMENT IMPLICATIONS OF FORFEITURE OF ATTORNEYS' FEES PAID BY A CRIME FAMILY DEFENDANT

by

Joseph S. Gerbasi

The late 1960's and early 1970's signalled the beginning of a sustained effort by the United States Government to eliminate organized crime. The executive branch established the Department of Justice Organized Crime and Racketeering Section, along with Department Strike Forces located in major cities, to address what was perceived as a pressing national concern. The legislative branch passed a series of laws intended to choke off organized crime, including the 1968 Consumer Credit Protection Act,[1] the 1968 Gun Control Act,[2] and the 1968 Omnibus Crime Control and Safe Streets Act.[3] The legislative effort culminated in 1970 when Congress passed the Organized Crime Control Act[4] and the Comprehensive Drug Abuse Prevention and Control Act.[5] The two landmark statutes enabled by this legislation are the Racketeer Influenced and Corrupt Organizations Act[6] and the Continuing Criminal Enterprise statute[7] (hereinafter referred to as RICO and CCE).

RICO is useful in attacking highly-sophisticated, organized, and diversified criminal activity. The statute prohibits: using income derived from a "pattern of racketeering activity" to acquire an interest in, establish, or operate any

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[1] 18 U.S.C. § 891-94 (1968) (contains provisions relating to extortionate credit transactions, i.e., loan-sharking).

[2] 18 U.S.C. § 921-929, 26 U.S.C. § 5861 (1968).

[3] 42 U.S.C § 3711-12 (1984) (providing in part for court-authorized interception of wire and oral communication, and protection of federal witnesses).

[4] The Act contains the Hobbs Act (18 U.S.C. § 1951) (banning interference with commerce by threats or violence), measures banning interstate and foreign travel or transportation in aid of racketeering enterprises (18 U.S.C § 1952), and the creation of special investigating grand juries (18 U.S.C. § 3331-34), in addition to the Racketeer Influenced and Corrupt Organizations statute (18 U.S.C. § 1961-68).

[5] 21 U.S.C. § 800 (1970).

[6] 18 U.S.C. § 1961-68 (1970), enabled by the Organized Crime Control Act.

[7] 21 U.S.C. § 848 (1970), enabled by the Comprehensive Drug Abuse Prevention and Control Act.

"enterprise" engaged in, or whose activities affect, interstate commerce;[8] acquiring an interest in an enterprise engaged in, or whose activities affect, interstate commerce through a "pattern of racketeering activity";[9] conducting, or participating in the conduct of, the affairs of an enterprise engaged in, or whose activities affect, interstate commerce through a "pattern of racketeering activity";[10] or conspiring to violate any of these provisions.[11]

In addition to creating an innovative framework for prosecution, Congress created strict penal provisions for RICO. The provisions allow for forfeiture to the government, upon conviction for a RICO offense, of any interest or asset gained by the defendant through unlawful activity. These forfeiture provisions, which have identical counterparts in CCE,[12] supply much of the prosecutorial firepower found in RICO. Both the original RICO and CCE provisions were amended in 1984 by the Comprehensive Forfeiture Act. The RICO provisions state that one found in violation of §1962 shall forfeit to the United States:

> [A]ny interest the person has acquired or maintained in violation of section 1962;...any interest in...any enterprise which the person has...participated in the conduct of, in violation of section 1962; and any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity...in violation of section 1962.[13]

Property subject to forfeiture includes real property and tangible and intangible personal property.[14] The provisions state that all rights to forfeitable property vest in the United States at the time of commission of the alleged crime giving rise to forfeiture. Property transferred to a third party after this time is forfeitable unless the transferee can establish (1) that he held title to the particular property over the defendant at the time defendant allegedly committed the RICO violations[15] or (2) that he is a bona fide purchaser for value of the

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[8] 18 U.S.C. § 1962(a) (1970) (an example of this violation is the laundering of "dirty" money through a legitimate business).

[9] 18 U.S.C. § 1962(b) (1970) (an example of this violation is the use of extortion, fraud, murder, etc., to take control over a legitimate business).

[10] 18 U.S.C. § 1962(c) (1970) (an example of this violation is the operation of a legitimate business through unlawful means such as bribery, threats, etc.).

[11] 18 U.S.C § 1962(d) (1970).

[12] 21 U.S.C. § 848, 853 (1984).

[13] 18 U.S.C. § 1963(a) (1984).

[14] 18 U.S.C. § 1963(b) (1984).

[15] 18 U.S.C. § 1963(m)(6)(A) (1984).

property, who at the time of transfer was reasonably without cause to believe the property was subject to forfeiture.[16] The forfeiture provisions can apply post-conviction, to assets previously transferred by the defendant to a third party, and pretrial, by the issuance of a restraining order freezing defendant's assets pending outcome of the trial.[17]

In light of organized crime's heavy reliance on legal talent,[18] a critical issue is the application of the RICO forfeiture provisions to the attorneys' fees paid by a defendant who is a member of an organized crime syndicate, or crime family. This article will examine whether applying the RICO forfeiture provisions pretrial to property or funds a crime family defendant intends to transfer to an attorney as legal fees or post-conviction to property or funds he has transferred to an attorney as legal fees deprives that defendant of the right to counsel guaranteed by the sixth amendment of the United States Constitution. The article will analyze the RICO forfeiture provisions, which are applied to the widest variety of organized crime cases, but will raise both RICO and CCE cases because the forfeiture provisions in each are identical.

Because each presents the identical issue in sixth amendment terms, post-conviction forfeiture and pretrial restraining orders are treated interchangeably. The article concludes that this application does not violate the right to counsel due to both the unique relationship between the crime family defendant and his attorney and the availability of appointed counsel. I propose a revision to the traditional method of appointing counsel in such cases in order to safeguard both the right of the crime family defendant to the assistance of counsel and the interest of the government in gaining forfeiture of illicit profits to the full extent consistent with the purposes underlying forfeiture.

My proposal is limited to crime family defendants (what most think of as "the Mafia") and their attorneys. Crime family defendants may be identified by pretrial judicial determination pursuant to an adversarial hearing. The government can present evidence of the defendant's involvement in unlawful crime family activity, with the defendant having the opportunity to present evidence in rebuttal. Virtually all crime families in major cities are well-known to law enforcement and judicial officials. If the indictment in a case alleges that the defendant is part of a larger group engaging in illegal activities, as with a RICO conspiracy charge, or if investigations reveal that he has no legitimate sources of income, this may create an inference that he is a crime family member if additional corroborating facts so indicate. Cases and commentators have

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[16] 18 U.S.C. § 1963(m)(6)(B) (1984).

[17] 18 U.S.C. § 1963(e)(1) (1984).

[18] See *infra* note 44.

frequently addressed the constitutionality of forfeiture of attorneys' fees of a RICO or CCE defendant generally, but have never focused solely on a crime family defendant. Indeed, defendant's status as a crime family "member" contributes significantly to the finding that forfeiture of attorneys' fees does not infringe on his right to counsel.

BACKGROUND

RICO

The critical terms of RICO have been broadly defined. "Racketeering activity" is defined to mean any of the eight state crimes[19] or twenty-four federal crimes[20] serving as predicate RICO offenses, and is established by proving the necessary elements of the relevant crimes. "Enterprise" is defined to mean essentially any individual or association of individuals,[21] and is established by evidence of an ongoing organization whose associates function as a continuing unit.[22] "Pattern of racketeering activity" is defined to mean a series of two or more predicate criminal acts committed within ten years of one another, at least one of which was committed after October 15, 1970. It is established by evidence of two or more of the relevant crimes committed by members of the enterprise within the requisite time frame.[23]

Purposes of RICO

The purposes of RICO are to "provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots."[24] The Statement of Findings prefacing the Organized Crime Control Act states that in prior studies and investigations, Congress had found organized crime in the United States to be a highly-sophisticated, multi-faceted activity that annually drains billions of dollars from the economy through unlawful conduct and social exploitation.[25] Congress also reported that organized crime activities weaken the U.S. economic system by cutting competition, burden commerce, threaten domestic security, and

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[19] 18 U.S.C. § 1961(1)(a) (1970).

[20] 18 U.S.C. § 1961(1)(b) (1970).

[21] 18 U.S.C. § 1961(4) (1970).

[22] United States v. Turkette, 452 U.S. 576, 583 (1981).

[23] *Id.*

[24] Russello v. United States, 464 U.S. 16, 26 (1983).

[25] Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970) (noted in United States v. Turkette, 452 U.S. 574, 588-89 (1981)).

undermine the general welfare of all citizens.[26] Congress found that organized crime continues to grow due to the limited scope and impact of traditional sanctions and remedies available to the government.[27]

In light of such findings, Congress declared its purpose "to seek the eradication of organized crime in the United States by strengthening the legal tools"[28] used against those engaged in organized crime. It sought to mount "a full-scale attack on organized crime."[29] "What is needed...are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. In short, an attack must be made on their source of economic power itself..."[30] RICO is a comprehensive statute, intended to give the federal government powerful tools with which to pursue the rampant problem of organized crime. The vague terms of the statute, together with their broad judicial interpretations, allow federal prosecutors wide range in bringing actions against a gamut of organized crime activity. Unlike CCE, which is primarily limited to individuals who manage or organize narcotics-producing or distributing enterprises, RICO is a versatile weapon in the federal prosecutorial arsenal.

Purposes of RICO Forfeiture

The unique feature of the forfeiture provisions is their in personam operation. Traditionally, all forfeiture provisions in the U.S. were civil in nature and operated in rem, against the property of defendant. The property was viewed as the offending party. Under RICO, the defendant is viewed as the offending party and forfeiture of the property is triggered only by his conviction. In personam provisions were unprecedented in the U.S. until RICO, even though they were known to the common law of England and the colonies.[31]

Congress' utilization of a revolutionary approach evidences the special legislative intent supporting the RICO forfeiture provisions. If the intent behind RICO is to eradicate organized crime, then the forfeiture provisions are intended to achieve this result by enabling the government to erode the economic base of organized crime. "[T]he forfeiture provision was intended to serve all the aims of

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[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] 116 CONG. REC. 602 (1970) (remarks of Sen. Yarborough).

[30] *Id.* at 35193 (1970) (remarks of Rep. Poff).

[31] Note, *Criminal RICO Forfeitures and the Eighth Amendment: "Rough" Justice Is Not Enough*, 14 HASTINGS CONST. L.Q. 451, 457 (1987).

the RICO statute..."[32] and represents an effort to "... develop law enforcementmeasures at least as efficient as those of organized crime."[33] During the Senate debates prior to the enactment of RICO, one supporter announced:

> While prosecutions and convictions of leaders of organized crime and their confederates are increasing each year...it is becoming increasingly apparent that such convictions alone, which simply remove the leaders from control of the syndicate-owned enterprises but do not attack the vested property interests whose control passes on to other Cosa Nostra leaders, are not adequate to demolish the structure of the surviving organizations which they run.[34]

Prior to the 1984 amendment of the RICO forfeiture provisions, the Senate Judiciary Committee remarked that the Comprehensive Forfeiture Act was "designed to enhance the use of...criminal forfeiture, as a law enforcement tool in combatting two of the most serious crime problems facing the country: racketeering and drug trafficking...it is through economic power that [racketeering] is sustained and grows."[35] The Committee went on to comment that conviction of individual racketeers under RICO would be meaningless if "the economic power bases of criminal organization or enterprises were left intact."[36] The forfeiture provisions were promulgated in order to effectuate RICO's purpose by stripping crime families of their economic power.[37] An earlier Senate Report echoes this goal by indicating that the RICO remedies seek to divest crime family kingpins of their economic sources of power in order to choke off the family and free the channels of commerce from racketeering influence.[38] The Supreme Court has joined this consensus by stating that the goal of RICO forfeiture is to remove the profit from organized crime by separating the crime family kingpin from his

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[32] 116 CONG. REC. 18955 (1970) (remarks of Sen. McClellan).

[33] *Id.* at 35199 (1970) (remarks of Rep. Rodino).

[34] *Id.* at 607 (1970) (remarks of Sen. Byrd).

[35] S. REP. NO. 225, 98th Cong., 1st Sess. 191-192, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3374.

[36] *Id.*

[37] In the early 1930's, violence between gangs of Sicilian and Neapolitan immigrants caused gang leaders to devise a plan of organization for crime in the U.S. The existing gangs became recognized as families, each with its own hierarchy of leadership and territorial limits. 116 CONG. REC. 598 (1970) (citing cover story of *Time* of August 22, 1969).

[38] S. REP. NO. 617, 91st Cong., 1st Sess. 80 (1969).

unlawful gains.[39] By taking the profit out of organized crime, the forfeiture provisions would also act as a "mighty deterrent to any further expansion of organized crime's economic power."[40] In the face of the relative impotence of the traditional sanctions of fine and imprisonment, forfeiture diversifies and strengthens federal prosecutorial weapons designed to fight organized crime by enabling the government to strip the crime family of the fruits of unlawful activities. Courts believe that forfeiture is the only effective penalty against the crime family defendant, holding that if the defendant is fined or incarcerated but his "family" is left with the economic vestiges of his unlawful acts, the defendant could manage the organization by proxy from prison, or successors could quickly climb the hierarchical ladder within the family and continue illegal activities.[41]

DISCUSSION

Scope of RICO Forfeiture and the Sixth Amendment

Judicial interpretation of the breadth of the RICO forfeiture provisions determines the scope of their effectiveness in destroying the economic base supporting crime families. The demand for high-quality legal services by crime families is intensely high. Many attribute the longevity and prosperity of crime families to their ability to command high-quality legal talent[42] and to the ability of their attorneys to repeatedly win sanctions of fines and short prison sentences. These sanctions are ineffective against organized crime because of the seemingly endless supply of cash and new managerial talent within crime families.[43] Attorneys are the "lifeblood" of organized crime and have become a "critical

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[39] Russello v. United States, 464 U.S. 16, 28 (1983).

[40] 116 CONG. REC. 607 (1970) (remarks of Sen. Byrd).

[41] *See* United States v. Rubin, 559 F.2d 975, 991 (5th Cir. 1977), *cert. denied*, 444 U.S. 864 (1979).

[42] *See* In re Forfeiture Hearing as to Caplin and Drysdale, 837 F.2d 637 (4th Cir. 1988).

[43] "...in the past five years the 25 major identified traditional organized crime groups in the country have had 75 separate changes in leadership-28 resulting from prosecutions. Yet, to our knowledge not a single one of these groups has broken up as a result of the change in leadership." *Forfeiture of Narcotics Proceeds: Hearings Before the Subcomm. on Criminal Justice of the Senate Comm. on the Judiciary*, 96th Cong., 2d Sess. 1 (1980) (statement of Irving B. Nathan, Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice). *See also* Dombrink and Meeker, *Racketeering Prosecution: The Use and Abuse of RICO*, 16 Rutgers L.J. 633, 635-636 (1985).

element in the life support system of organized crime."[44] "It is clear thattraditional organized crime...depend[s] upon, and could not effectively operate without, these attorneys."[45]

The plain language of §1963 calls for forfeiture of any interest the defendant gained in violation of the substantive section of RICO.[46] Legislative history gives an equally broad interpretation of forfeitable interests. The Senate Judiciary Committee wrote that the language of the forfeiture provisions "is designed to accomplish a forfeiture of any interest of any type in the [unlawful] enterprise..."[47] The Supreme Court has held that forfeiture applies to any interest traceable to racketeering activity, including cash profits as well as ownership interests in an enterprise.[48] The Court reasoned that a broad reading of "interest" is consistent with the pattern of RICO in using broad terms and concepts,[49] and that Congress would have expressly limited forfeitable interests in the statute if it had so intended.[50] A broad interpretation allows the government to defeat transactions where a defendant transfers assets or income gained through racketeering activity to a third party for concealment in order to avoid forfeiture. This interpretation best achieves the purposes of the forfeiture provisions to erode the economic power of organized crime by mandating forfeiture of any form such power could take.

"Any interest" is a concept broad enough to include assets or funds gained through illegal activity and paid as attorneys' fees. However, many courts and commentators claim that requiring post-conviction forfeiture of attorneys' fees or allowing the issuance of a pretrial restraining order freezing a defendant's assets infringes on the sixth amendment right to counsel.[51]

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[44] *Lawyers Called Organized Crime "Life Support"*, 193 N.Y.L.J. 1 (March 11, 1985) (quoting 1985 staff report of the President's Commission on Organized Crime).

[45] *Id.* (referring to the small group of lawyers deeply involved in representing crime family defendants).

[46] 18 U.S.C. § 1963(a)(1) (1970).

[47] S. REP. NO. 617, 91st Cong., 1st Sess., 79 (1969).

[48] Russello v. United States, 464 U.S. 16 (1983).

[49] *Id.* at 21, 27 (citing a portion of legislative history which states: "The provisions of this title shall be liberally construed to effectuate its remedial purposes." Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 947 (1970)).

[50] *Id.* at 23.

[51] United States v. Jones, 837 F.2d 1332 (5th Cir. 1988); *United States v. Harvey*, 814 F.2d 905 (4th Cir. 1987); United States v. Badalamenti, 614 F. Supp. 194 (S.D.N.Y. 1985), *aff'd on other grounds*, 794 F.2d 821 (2d Cir. 1986).

The Deterrence Theory

The federal courts are split on the sixth amendment propriety of applying the RICO forfeiture provisions to attorneys' fees. The Supreme Court has notdecided the issue. None of the cases establishes a general rule concerning a crime family defendant.

The law is clear on a single point. Property or funds transferred or contracted to be transferred to an attorney as part of a sham or fraudulent transaction, where the transfer is fraudulently disguised as a fee payment and the attorney is being used as a haven for concealing forfeitable property, must be forfeitable in order to prevent the dissipation of unlawfully-acquired assets.[52] This interpretation preserves the forfeiture goal of stripping the racketeer of his illicit economic gains. The split in the case law develops concerning the forfeitability of legitimately-paid attorneys fees.

As a first step, the nature of the sixth amendment must be briefly examined. The amendment provides: "In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense."[53] Implicit in this basic guarantee is the right of a non-indigent to retain counsel of choice,[54] out of one's private resources and free of governmental interference.[55] However, the right to counsel of choice is qualified - it must give way when required by the fair administration of justice[56] and by the purposes of the criminal forfeiture statutes.[57] Unlike the basic right to the assistance of counsel, the right is not absolute and "...cannot be used merely as a manipulative monkey wrench."[58]

One line of authority has held that the forfeiture of bona fide attorneys' fees under RICO violates the sixth amendment because the threat of fee forfeiture will deter attorneys from defending RICO cases. Allegedly, an attorney will be reluctant to take on a case if he knows that his fee will be forfeited if his client is convicted. Some courts have engaged in bootstrapping, holding that because of the deterrent potential and subsequent chill on sixth amendment rights, Congress

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[52] United States v. Monsanto, 836 F.2d 74 (2d Cir. 1987); United States v. Harvey, 814 F.2d 905 (4th Cir. 1987); United States v. Bassett, 632 F. Supp. 1308 (D. Md. 1986).

[53] U.S. CONST. amend. VI.

[54] Powell v. Alabama, 287 U.S. 45, 53 (1932).

[55] United States v. Harvey, 814 F.2d 905, 923 (4th Cir. 1987).

[56] In re Grand Jury Subpoena Served Upon Doe, 781 F.2d 238, 250 (2d Cir. 1985), *cert. denied*, 475 U.S. 1108 (1986).

[57] United States v. Nichols, 654 F. Supp. 1541, 1558 (D. Utah 1987), *rev'd on other grounds*, 841 F.2d 1485 (10th Cir. 1988).

[58] Gandy v. State of Alabama, 569 F.2d 1318, 1323 (5th Cir. 1978).

never intended the forfeiture provisions to apply to bona fide attorneys' fees.[59] Other courts have found that Congress clearly intended forfeiture to apply to attorneys' fees, but that such application violates the sixth amendment due to the deterrent factor.[60]

In *United States v. Badalamenti*, [61] the district court held that Congress never intended forfeiture to encompass attorneys' fees. However, the court considered the attorney rendering bona fide legal services to be on notice that property or funds received as fees derived from unlawful activity and were subject to forfeiture.[62] Therefore, according to §1963(m)(6)(B), the bona fide purchaser exception, the court would find attorneys' fees to be within the scope of forfeiture. In *United States v. Rogers*, the district court concluded similarly, yet conceded that the forfeiture provisions are clear in stating that all proceeds of racketeering activity traceable to that activity are potentially forfeitable. The court added that fees paid to an attorney become the property of the attorney and cease to be the property of defendant.[63] Because forfeiture can operate only against the property of defendant, the court reasoned that attorneys fees must not be subject to forfeiture. However, this logic ignores the central reason for the forfeiture provisions, which is to prevent a defendant from avoiding forfeiture by transferring property to his attorney in a sham fee payment. The court found that Congress intended forfeiture to apply exclusively to sham attorney fee payments. The court relied on a portion of the report of the Senate Judiciary Committee issued prior to the 1984 amendment of the forfeiture provisions: "The provision should be construed to deny relief [only] to third parties acting as nominees of the defendant or who have knowingly engaged in sham or fraudulent transactions."[64]

But the *Rogers* court unilaterally inserted the bracketed word of limitation, when the passage as a whole gives no indication that attorneys' fees should be

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[59] United States v. Badalamenti, 614 F. Supp. 194, 198 (S.D.N.Y. 1985), *aff'd on other grounds*, 794 F.2d 821 (2d Cir. 1986); United States v. Rogers, 602 F. Supp. 1332, 1348 (D. Colo. 1985).

[60] United States v. Harvey, 814 F.2d 905, 926 (4th Cir. 1987).

[61] United States v. Badalamenti, 614 F. Supp. 194 (S.D.N.Y. 1985), *aff'd on other grounds*, 794 F.2d 821 (2d Cir. 1986).

[62] *Id.* at 196.

[63] *Rogers*, 602 F. Supp. at 1346.

[64] S. REP. NO. 225, 98th Cong., 2d Sess. 209 n.47 (1984).

forfeitable only when paid in the course of fraud.[65] Additionally, the *Rogers* court noted that §1963 does not expressly provide for the forfeiture of assets legitimately transferred to attorneys, arguing that this interpretation does not exempt from forfeiture assets transferred to an attorney as part of a sham. But if the court is going to indulge this type of logic, it could just as easily conclude that all attorneys' fees should be subject to forfeiture, because §1963 makes no express mention of attorneys' fees at all.

In *United States v. Bassett*, [66] the district court held that the sixth amendment prevented the CCE forfeiture provisions from applying to bona fide attorneys' fees. However, this case is factually unique. CCE applies chiefly to drug-trafficking and does not encompass the wide variety of organized crime activities contemplated by RICO. Failing to apply forfeiture to legitimate attorneys' fees paid by a CCE defendant does not undermine the policy considerations present in RICO regarding the elimination of all of organized crime. Hence, it is more plausible to exempt attorneys' fees from forfeiture in a CCE case. The court did not find deterrence as the reason for the sixth amendment violation but found it in the fact that if the attorneys withdrew from the case, the defendants would be without counsel less than two months before trial. Even if new defense counsel could be secured on such short notice for a complex case, there would be insufficient time to prepare.

That Congress never intended the RICO forfeiture provisions to apply to attorneys' fees can also be rebutted by reference to the line of cases holding that Congress did in fact intend such an application but that it conflicts with the sixth amendment due to the deterrence theory.[67] The courts in *Harvey* and *Nichols* found that the plain language of §1963, which fails to mention attorneys' fees in any context, combined with the lack of contrary legislative intent, indicates that Congress intended such payments to be subject to the same conditions for exemption provided for all forfeitable property by §1963(m)(6)(A) and (B).[68] Legislative history indicates that the concept of forfeitable property in §1963 is to be broadly construed.[69] Because Congress clearly intended attorneys' fee payments to be within the concept of forfeiture, only the sixth amendment question remains unresolved.

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[65] *See* Brickey, *Forfeiture of Attorneys' Fees: The Impact of RICO and CCE Forfeitures on the Right to Counsel*, 72 VA. L. REV. 493, 501 (1986) (emphasis added).

[66] United States v. Bassett, 632 F. Supp. 1308 (D. Md. 1986).

[67] See *supra* note 59.

[68] *Harvey*, 814 F.2d at 913; *Nichols*, 841 F.2d at _____.

[69] S. REP. NO. 225, 98th Cong., 2d Sess. 200 (1984).

The courts holding that fee forfeiture violates the sixth amendment rely on the deterrence argument. In support of this, the *Rogers* court cited a statement of the House Judiciary Committee prior to the 1984 amendments to the forfeiture provisions: "[N]othing in this section...is intended to interfere with a person's Sixth Amendment right to counsel."[70] However, the next sentence of the report states: "[T]he Committee...does not resolve the conflict in District Court opinions on...a person's right to retain counsel."[71] This statement demonstrates that Congress did not intend to resolve the sixth amendment question, but intended to leave it to the courts.

The *Harvey* court found a sixth amendment violation by reasoning that fee forfeiture impedes a defendant's ability to pay an attorney and chills his access to private counsel, thereby violating the right to counsel of choice. The court explicitly found no violation of defendant's "basic" sixth amendment right not to be denied counsel.[72] The court misplaced its focus and failed to properly recognize the qualified nature of the right to counsel of choice. The court asserts that the right to be represented by private counsel is the "primary" component of the sixth amendment. However, other courts have explicitly announced that the right to counsel of choice may be permissibly infringed when required by the fair administration of justice and by the purposes underlying criminal forfeiture.[73] In the crime family context, the purposes underlying the RICO forfeiture provisions strongly justify denying the right of a crime family defendant to retain counsel of choice. In enacting RICO, Congress sought to address what two decades of investigations indicated was a major national problem requiring immediate legislative action. Congress recognized the need for a method of eroding the economic infrastructure supporting crime family growth. Forfeiture is the only effective way to divest the crime family of its economic power because it forces the family to disgorge illicit profits. Finding that bona fide attorneys' fees are subject to forfeiture is needed to fulfill the purpose of RICO of obliterating organized crime. This strongly justifies any incidental chilling effect on the ability of a crime family defendant to hire private counsel.[74] A permissible sixth amendment infringement occurs, not an unconstitutional deprivation of the basic right not to be denied counsel.

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[70] H.R. REP. NO. 845, 98th Cong., 2d Sess., pt. 1, at 19 n.1 (1984).

[71] *Id.*

[72] Johnson v. Zerbst, 304 U.S. 458 (1938).

[73] See *supra* notes 55 and 56.

[74] *See* United States v. Monsanto, 836 F.2d 74, 80-81 (2d Cir. 1987).

A violation of the right to counsel of choice, when warranted by one of these overriding considerations, is not unconstitutional. Indeed, the statement of the House Judiciary Committee cited by the *Rogers* court, together with the subsequent sentence, shows that Congress intended forfeiture to honor only the basic right to counsel. The effects on the right to counsel of choice were to be resolved by the courts. By its logic, the *Harvey* court would imply that appointed counsel is inadequate to satisfy the sixth amendment. Courts have consistently rejected this idea.[75]

The district court in *Nichols* stated that fulfilling the goals of the racketeering statutes does not justify limiting defendant's admittedly qualified right to counsel of choice because legitimate payment of attorneys' fees does not contribute to criminal activity. This is untrue in the crime family context because it is the perpetual generation of cash that allows crime families to prosper and to diversify their criminal operations.[76] The court also held that it would not undermine the racketeering laws' purpose to exempt from forfeiture funds or property reasonably necessary for defendant to pay attorneys' fees, even if defendant were found guilty on the racketeering charge and had used profits from the unlawful activity to pay his lawyer. However, if the government seeks to punish a defendant for a crime which produced "tainted" profits, it should not be willing to let him use them to hire a lawyer. This is identical to allowing him to keep the fruits of his racketeering activity.[77] The *Jones* court suggested that the fact that the attorney gives bona fide legal services should overcome any notion of fee forfeiture.[78] But the legitimacy of the services rendered is no reason to allow a crime family defendant to use the attorney as a conduit for hiding forfeitable assets. This conclusion exempts a transfer based solely on legitimacy of services rendered rather than on the transferee's knowledge of the forfeitability of the assets transferred. This creates an exception to forfeiture outside of the Bona Fide Purchaser (BFP) exception contained in the provisions themselves. It also encourages the proliferation of an intimate attorney-crime

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[75] *See* Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932); In re Forfeiture Hearing as to Caplin and Drysdale, 837 F.2d 637 (4th Cir. 1988); In re Grand Jury Subpoena Duces Tecum Dated Jan.2, 1985, 605 F. Supp. 839 (S.D.N.Y. 1985), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985).

[76] Friedman, et. al., *Fighting Organized Crime: Special Responses to a Special Problem*, 16 RUTGERS L.J. 439, 455-56 (1985).

[77] *See* United States v. Rubin, 559 F.2d 975, 991 (5th Cir. 1977), *cert. denied*, 444 U.S. 864 (1979) (equating the transfer of economic power to attorneys with the retention of economic power by the crime family).

[78] United States v. Jones, 837 F.2d 1332, 1335 (5th Cir. 1988)

family relationship already typifying many crime families.[79] This directly undermines the goal of stripping illegally-gained economic power from crime families.

The principal reason why deterrence cannot support finding a sixth amendment violation when attorneys' fees paid by a crime family defendant are subject to RICO forfeiture is revealed by the unique relationship existing, in reality, between members of a crime family and their attorneys. Any reasons why an attorney may be deterred by the prospect of losing his fees from representing an ordinary RICO defendant do not exist in the crime family context. There is a remarkable trend for crime families to depend on a very small number of lawyers for all of their legal advice and representation. In 1985, the staff report of the President's Commission on Organized Crime found that "a small group of lawyers" have become critically important to the survival of crime families.[80] The chief reason for this is because crime families are understandably secretive, and distrustful of "outsiders." They are reluctant to open their doors to those whom they do not know. The result is that this small number of lawyers comprises people who devote much, if not all, of their time to advising and representing crime families. They perform roles similar to those of house counsel in major corporations, and are rarely paid on a per-case fee basis. Compensation tends to be in the form of large annual retainers. Rarely, then, will a "crime family attorney" be deterred from representing a client in a RICO case simply by the prospect of losing what would ordinarily be viewed as a fee payment. Any payment he receives during the course of a particular case is likely no more than a bonus coming outside of his normal retainer-style compensation.

There is a line of authority offering several compelling reasons why applying the RICO forfeiture provisions to attorneys' fees, either post-conviction or pretrial, presents no sixth amendment problem. The cases uniformly indicate that nothing in either the language or legislative history of §1963 calls for an exemption of attorneys fees of any type. They emphasize that the canons of professional responsibility require an attorney to represent a criminal defendant zealously despite the risk of not receiving compensation,[81] thereby minimizing the possibility of deterrence. Additionally, courts have held that attorneys' fees forfeited to the government may be distributed back to an attorney, in the

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[79] See *supra* note 44.

[80] *Id.*

[81] *See* In re Grand Jury Subpoena Duces Tecum Dated Jan. 2, 1985, 605 F. Supp. 839 (S.D.N.Y. 1985), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985) (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(c)(1) and DR 7-101(A)(2)(1980)).

amount of a reasonable fee, upon petition to the court.[82] The existence of this avenue of relief forecloses all reasonable possibility that attorneys will be deterred from representing crime family defendants facing RICO charges.

In addition, crime families frequently use attorneys as conduits through which to launder money or as harbors for the safekeeping of illegally-obtained funds or property.[83] These sham transfers are disguised as attorneys' fee payments, and courts have emphasized that an important goal of the forfeiture provisions is to block such bogus transactions[84] and to prevent the dissipation of forfeitable assets.[85] A rule limiting forfeiture of attorneys' fees to sham transactions would require differentiation between a bona fide fee payment and a sham payment. This distinction cannot always be accurately made.

The district court in *In re Grand Jury Subpoena* added: "In the same manner that a defendant cannot obtain a Rolls Royce with the fruits of a crime, he cannot...obtain the services of the Rolls Royce of attorneys from these same tainted funds."[86] This reflects the argument that a defendant has no sixth amendment right to pay an attorney with the proceeds of illicit activity.[87] In *Monsanto* the second circuit supported this conclusion by stating that a discrimination problem would be created if an otherwise indigent defendant was allowed to use large sums of money gained through illegal activity to retain high-priced counsel, while an indigent defendant who committed a crime producing no such spoils was denied this benefit.[88]

Sections (m)(6)(A) and (B) create two exceptions to the general rule that forfeitable property or funds transferred to a third party after commission of the act giving rise to forfeiture are themselves subject to forfeiture. The third party may keep the property or funds if he can establish that at the time of commission of the allegedly unlawful acts he had title to the property or funds superior to that of defendant; or if he can establish that he is a BFP for value of

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[82] United States v. Figueroa, 645 F. Supp. 453, 456 (W.D. Pa. 1986).

[83] See *supra* note 44.

[84] *See In re Grand Jury Subpoena Duces Tecum Dated Jan. 2, 1985*, 605 F. Supp. at 850 n.4 (S.D.N.Y. 1985), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985).

[85] In re Forfeiture Hearing as to Caplin and Drysdale, 837 F.2d 637, 643 (4th Cir. 1988).

[86] See *supra* note 81.

[87] *Caplin and Drysdale*, 837 F.2d at 646 (4th Cir. 1988) (quoting Brickey, "The sixth amendment guarantees only the right to use *legitimate* assets to obtain the assistance of counsel. If the defendant has no assets, the sixth amendment requires the appointment of counsel." 72 VA. L. REV. 493, 553 (1986)).

[88] *Monsanto*, 836 F.2d at 85 (2d Cir. 1987).

the property or funds who at the time of transfer was reasonably without cause to believe the property or funds were subject to forfeiture. "Purchasers" applies to providers of legal services as well as to other transferees for value.[89]

These are the sole exceptions to forfeiture contained in the provisions. The attorney will never be able to satisfy the "superior title" exception simply because he would have to show that he had title over defendant in the funds or property which defendant gained through allegedly unlawful activity. The only party with superior title to defendant at the relevant point in time will be the victim of the allegedly unlawful activity, not defendant's attorney. Similarly, the attorney will never be able to meet the BFP exception due to the nature of his relationship with the crime family client. Courts have held that the indictment alone puts the attorney on notice of the forfeitability of defendant's assets[90] and have viewed the attorney rendering bona fide legal services as being in position to be on notice of the forfeitability of property or funds.[91] The attorney representing a crime family defendant will be on perpetual "constructive notice" of the forfeitability of his client's assets and the funds out of which his fee was paid due to the dynamics of the relationship between a crime family and the attorneys it employs. Most attorneys representing crime families do so on an ongoing and comprehensive basis and possess an intimate knowledge of the family's internal affairs.[92] It is difficult to comprehend a crime family RICO case where defense counsel is without notice that his client's assets have derived from unlawful activity and are subject to forfeiture.[93]

Because he meets neither exception, an attorney rendering bona fide legal services to a crime family defendant will always be subject to fee forfeiture, according to the terms of the statute. This means that finding a transfer of property or funds as legitimate attorneys' fees to be exempt from forfeiture, given that deterrence of representation is too tenuous a sixth amendment claim in the crime family context, is to create a new exception entirely unwarranted by the text of RICO. It creates a loophole for an attorney to avoid forfeiture which he otherwise would never be able to avoid. It also directly controverts the

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89 *See* United States v. Harvey, 814 F.2d 905, 915 (4th Cir. 1987).

90 *See In re Grand Jury Subpoena*, 605 F. Supp. at 849-50, *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985) (following United States v. Raimondo, 721 F.2d 476, 477 (4th Cir. 1983), *cert. denied*, 469 U.S. 837 (1984)).

91 See *supra* note 60.

92 See *supra* note 44.

93 *See generally* United States v. Nichols, 654 F. Supp. at 1556 n.21; United States v. Badalamenti, 614 F. Supp. at 196.

legislative intent behind forfeiture by creating a situation where a crime family is able to avoid being stripped of the economic power gained through racketeering activity.

Appointment of Counsel

Despite the weakness of the claim that fee forfeiture violates the right to counsel by deterring attorneys from defending crime family clients facing RICO charges, a solution is available to guarantee defendant's sixth amendment rights in case any potential for deterrence exists. He could simply retain an attorney with funds not gained through illicit activity and therefore not subject to forfeiture. If no untainted funds are available, the appointment of counsel will safeguard defendant's sixth amendment rights.

The Criminal Justice Act of 1964 provides that counsel shall be appointed by the court to a defendant who is "financially unable to obtain counsel" after the court has advised defendant that he has a right to be represented by counsel and that counsel may be appointed if he cannot afford it.[94] Appointed counsel may be furnished by private firms, bar associations, legal aid agencies, or defender associations.[95] The purpose of appointed counsel is to fulfill the sixth amendment rights of those financially unable to do so through private counsel.[96] The Criminal Justice Act must not be used to prevent defendants able to afford counsel from exercising that privilege.[97]

Courts have unanimously upheld appointed counsel as sufficient to satisfy the sixth amendment.[98] The Supreme Court in *Powell* held, on right to counsel and due process grounds, that a defendant in a capital case has a right to appointed counsel. The necessary implication is that appointed counsel satisfies the sixth amendment. The Court in *Gideon* held that the right to appointed counsel applies to any defendant charged with a felony; the implication is the same. In *United States v. Bello*,[99] the court found that appointment of counsel fulfills the right to counsel. Clearly, appointed and retained counsel are equivalent in sixth amendment terms.

Courts have consistently held in RICO cases that the appointment of counsel fulfills defendant's sixth amendment rights when fee forfeiture renders him unable

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94 18 U.S.C. § 3006A(b) (1982).

95 18 U.S.C § 3006A(a) (1982).

96 *See* United States v. Nichols, 654 F. Supp. at 1558-59.

97 *Id.*

98 Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932).

99 United States v. Bello, 470 F. Supp. 723 (S.D. Cal. 1979).

to retain private counsel, either due to a pretrial freeze on assets[100] or a post-conviction forfeiture order allegedly deterring future representation.[101] The *Caplin and Drysdale* court held that the sixth amendment guarantees simply the basic right to representation, which is to be represented by either retained or appointed counsel. Forfeiture therefore cannot threaten sixth amendment rights when appointed counsel is available.[102] In *Nichols*, the tenth circuit found no violation of the right to counsel in a similar situation when appointed counsel is available.[103] The fourth circuit raised an additional argument in *Harvey* by claiming that appointed counsel is no answer to the sixth amendment problem created by fee forfeiture because the "available force of public defenders...is insufficient to provide [sixth amendment] assurance."[104] However, the number of public defenders available to serve as appointed counsel is not so grave a problem as to create constitutional concerns. Neither are public defenders the sole source of appointed counsel.[105] The argument concerning the quality of appointed counsel was rejected by the fourth circuit in *Caplin and Drysdale* and by the implicit holdings of *Powell* and *Gideon*. The *Caplin and Drysdale* court rejected the notion of appointed counsel being presumptively unqualified for complex racketeering cases, claiming that such an idea would lead to "the absurd result that the government could not prosecute racketeers with no funds in their possession."[106]

Regardless, the right to counsel assures only the fact of representation and the Constitution reflects the "harsh reality that the quality of a defendant's representation frequently may turn on his ability to retain the best counsel money can buy."[107] Even if appointed counsel were of lower quality than retained counsel, no constitutional problem would exist.

The *Harvey* court argues that the availability of appointed counsel for RICO defendants is of little consolation because of the catch-22 created when a defendant does not qualify for appointed counsel because he possesses untainted

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[100] United States v. Lewis, 759 F.2d 1316 (8th Cir.), *cert. denied*, 474 U.S. 994 (1985).

[101] United States v. Monsanto, 836 F.2d 74 (2d Cir. 1987).

[102] See *supra* note 78.

[103] *Nichols*, 841 F.2d at _____.

[104] *Harvey*, 814 F.2d at 921.

[105] See *supra* note 95.

[106] *Id.* (quoting United States v. Cronic, 466 U.S. 648 (1984)).

[107] Morris v. Slappy, 461 U.S. 1, 23 (1983) (Brennan, J., concurring).

funds sufficient to hire counsel, yet cannot hire a lawyer because attorneys may be deterred from representing a client whose assets are subject to forfeiture.[108] However, this argument rests on faulty logic. Attorneys will not be deterred from representing a client when they know that the client possesses untainted assets out of which to pay legal fees. But in crime family cases an attorney may not want to take any chance at all of losing his fees. He may be deterred even if some of defendant's assets are subject to forfeiture because of his knowledge that most assets of a crime family member are likely to be tainted. The catch-22 then rests on the validity of the deterrence theory, which has been shown not to apply in the crime family context due to the nature of the attorney-crime family relationship.

However, even if any potential exists for a crime family defendant to be caught in this catch-22, where he is rendered defacto indigent by the forfeiture order but is not dejure indigent, a solution exists. Rather than resolve the question as the *Harvey* court did, which was to hold that a sixth amendment violation existed and that forfeiture could not apply to attorneys' fee payments, a solution exists whereby defendant's sixth amendment rights can be fulfilled while still applying forfeiture to the attorneys' fees and thereby eroding the crime family's tainted economic base to the maximum amount. The forfeiture provisions should be amended to allow for counsel to be appointed to an alleged crime family defendant facing these circumstances.

The catch-22 is unique to the crime family defendant because it is when representing this type of client that the attorney most likely fears losing his fee even when the defendant possesses assets not subject to forfeiture. Creating a "RICO crime family exception" to the traditional rules for appointing counsel in criminal cases according to the Criminal Justice Act specifically avoids any potential problem a crime family defendant may face in acquiring counsel, while still allowing the government to pursue attorneys' fees under RICO forfeiture. This plan accords full respect to the sixth amendment. It gives the government the greatest opportunity to erode the economic foundation of crime families and to eradicate organized crime. This is the clear purpose of forfeiture and of RICO as a whole.

Singling out crime family defendants for special treatment is justified. In an equal protection context, a crime family member does not qualify as a member of a "suspect" class, and a distinction between defendants who are members of crime families and those who are not must bear only some rational relationship to a legitimate governmental interest.[109] Allowing forfeiture of attorneys' fees paid

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[108] See *supra* note 101.

[109] McDonald v. Board of Election, 349 U.S. 802, 809 (1968).

by a crime family defendant serves the legitimate governmental interest in eradicating organized crime embodied in RICO by forcing the sacrifice of interests gained through unlawful acts. In addition, this interpretation of the RICO forfeiture provisions suffers no other constitutional infirmities.[110] The special treatment is not only constitutional, but its purpose is to guarantee constitutional rights. RICO represents a concerted effort between the executive and legislative branches to destroy organized crime, and Congress envisioned criminal forfeiture as the most efficient way to deteriorate the substantial economic bases supporting crime family empires. If Congress targets the law towards a particular group, the judiciary is justified in applying the law to that group in a unique way. Amending the RICO forfeiture provisions to provide for appointed counsel to defacto indigent crime family defendants serves both the defendant and the goals of RICO.

CONCLUSION

This article has shown that in the unique case of the crime family defendant facing RICO charges, the government is permitted by both the language and legislative history of the statute and by the Constitution to pursue forfeiture of attorneys' fee payments in both a pretrial and post-conviction posture. RICO affords no special protection from forfeiture to attorneys or to attorneys' fees. Due to the unique nature of the relationship between a crime family defendant and his attorney, the latter will not be deterred from representation by the threat of fee forfeiture. The availability of appointed counsel in such cases guarantees defendant's sixth amendment rights. Amending the RICO forfeiture provisions to allow for appointed counsel when a crime family defendant is not dejure indigent but is rendered defacto indigent by the forfeiture order eliminates any potential sixth amendment infringements associated with forfeiture of attorneys' fees. Creation of a "RICO crime family exception" serves both the sixth amendment and the purposes underlying RICO forfeiture.

While the government may incur the cost of appointing an attorney in order to be able to pursue forfeiture of attorneys' fees, this is not a question of

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[110] Post-conviction deprivation of an attorney's property interest in legitimately-paid fees presents no procedural due process violation for the attorney. The deprivation will not occur unless the government can show at the pretrial adversarial hearing that the defendant is a crime family member. This affords sufficient procedural due process to the attorney in danger of losing his fees. Mathews v. Eldridge, 424 U.S. 319, 345 (1975) (holding that procedural due process is satisfied when the petitioner has an effective means of communicating his case to the decision-maker before the deprivation). Issuance of a pretrial restraining order freezing defendant's assets and preventing him from paying an attorney presents no procedural due process violation for the attorney for the same reasons.

spending a dollar in order to earn one. By winning forfeiture of attorneys' fees, the government obtains the additional advantage of forcing a defendant to forego illicit profits, thereby helping to dissolve the foundation of economic strength supporting organized crime.

In *Caplin and Drysdale* the fourth circuit recognized the need to defer to Congressional will concerning the problems RICO seeks to address.[111] The court states that a ban on fee forfeiture, in addition to restricting the scope of Congress's efforts to solve the organized crime problem, will curtail future legislative flexibility to deal with the problem.[112] Allowing attorneys to profit from unlawfully-obtained funds may make it easier for them to become deeply-involved with crime families as ongoing advisers, a characteristic already true of most attorney-crime family relationships. This also creates the potential for increased public cynicism toward the legal system.[113]

The right to counsel "cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'"[114] That crime family defendants have as compelling a right to counsel as anyone else is not disputed. The plan for court-appointed counsel for such defendants in order to preserve the government's interest in pursuing forfeiture of attorneys' fees passes muster under the sixth amendment and is demanded by the high principles underlying RICO.

RICO was enacted in order to make progress in what some have called a national war against organized crime. One of the many Congressional investigations leading to the passage of RICO found: "The Mafia is a secret conspiracy against law and order which will ruthlessly eliminate anyone who stands in the way of...any criminal enterprise in which it is interested. It will destroy anyone...[i]t will use any means available..."[115] The special national problem of organized crime justified the creation of a statute specifically targeted towards eliminating that problem. Fulfilling the aims of that statute justifies the

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[111] Caplin and Drysdale, 837 F.2d at 648.

[112] *Id.*

[113] *Id.* at 649.

[114] Powell v. Alabama, 287 U.S. 45 (1932) (citing Hebert v. Louisiana, 272 U.S. 312 (1926)).

[115] *Senate Special Comm. to Investigate Organized Crime in Interstate Commerce, Third Interim Report*, S. REP. NO. 307, 82d Cong., 1st Sess., 150 (1951).

special scheme of treatment for the terrorist element of society represented by crime families, whose continued existence demonstrates the need for innovative application of innovative laws. Forfeiture of attorneys' fees will enhance the quality of RICO crime family convictions and will represent a significant steptoward dismantling organized crime's carefully-cultivated myth of being untouchable.

KENDRICK V. BOWEN AND THE CHASTITY ACT: ON THE HIGH WALL BETWEEN CHURCH AND STATE

by

Cheri Lewis

When Congress passed the Adolescent Family Life Act[1] (AFLA), the so-called "Chastity Act,"[2] it could hardly have intended to make bedfellows of the diverse religious denominations that have coalesced to challenge the constitutionality of the Act under the Establishment Clause. The AFLA, the constitutionality of which the Supreme Court will decide this term, was a federal grant program designed to address the social ills of adolescent pregnancy and premarital relations by allocating funds to various charitable, religious, and voluntary organizations to provide counselling and teaching of adolescents.

Suit was brought in 1983 to challenge the "Chastity Act" by the director of the Virginia American Civil Liberties Union after he learned of a program run by the Catholic Diocese of Northern Virginia in Arlington[3]. Since then, the AFLA has united such disparate groups as the American Jewish Congress, the National Organization of Women, Methodist ministries from Northern Virginia and Richmond, Planned Parenthood, and Americans for Religious Freedom in an effort to have the Act invalidated. In May of 1987, the U.S. District Court for the District of Columbia did just that in *Kendrick v. Bowen*,[4] which the Supreme Court has taken on direct appeal.[5]

Enacted in 1981, the AFLA was a $30 million-a-year grant program authorizing a variety of community organizations to counsel and teach adolescents on matters relating to premarital relations and pregnancy. The Act sought "to find effective means...of reaching adolescents before they become sexually active,"

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[1] 42 U.S.C. § 300z (1982).

[2] The original Congressional draft of the AFLA bill spoke in terms of discouraging "adolescent promiscuity" and promoting "chastity." S. 1090, 97th Cong., 1st Sess. § 1901(a) (Apr. 30, 1981).

[3] *'Chastity Act' Lawsuit is Pitting Religions Against One Another*, RICHMOND TIMES-DISPATCH, Mar. 6, 1988, at 1, col. 1.

[4] 657 F. Supp. 1547 (D.D.C. 1987), *appeal docketed*, No. 87-253 (U.S. Jan. 11, 1988).

[5] The Supreme Court has taken this case because an Act of Congress was struck down as unconstitutional. *Appeal Pending*, No. 87-253, (1988).

"to promote adoption as an alternative for adolescents" and "to establish innovative, comprehensive and integrated approaches to the delivery of care services for pregnant adolescents..."[6] Congress had concluded that "legislation, to foster alternatives to abortion, and to encourage adolescents to bring their babies to term, serves a critical national interest."[7] However, the AFLA contained a major stipulation that grant payments would be restricted to organizations that did not provide abortions or abortion counselling or referral and that did not "advocate, promote, or encourage abortion."[8]

In *Kendrick v. Bowen*, the district court found the AFLA in violation of the Establishment Clause of the first amendment[9] under the tripartite test of *Lemon v. Kurtzman*,[10] the traditional test applied in such challenges.[11] Judge Richey's opinion held that, while the Act carried a valid secular purpose of addressing problems caused by teenage pregnancy and premarital sexual relations, both on its face and as applied, the AFLA had the primary effect of advancing religion and therefore violated the Establishment Clause.[12] Moreover, because many organizations receiving benefits from the AFLA have a religious character and purpose, and the activities they were involved in were counselling and education, often provided in small groups or on a one-on-one basis, *Kendrick* concluded that the degree of government monitoring necessary to prevent grantees from advancing religion would create "excessive entanglement" between government and religion.[13]

In addition to the fact that *Kendrick* has created a schism among various religious organizations, this case is noteworthy because it presents a number of ancillary constitutional issues offering alternative grounds for invalidation of the AFLA's program scheme. Although it is not likely that the Supreme Court will examine these issues, this article will endeavor to review them after an evaluation

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[6] 42 U.S.C. § 300z(b)(1)-(3).

[7] S. Rep. 97-161, 97th Cong., 1st Sess. 1 (1981).

[8] 42 U.S.C. §300z-10(a). This section of the Act provided an exception to this restriction, stating that "any such program or project may provide referral for abortion counseling to a pregnant adolescent if such adolescent and the parents or guardians of such adolescent request such referral...." *Id.*

[9] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." U. S. CONST. amend. I.

[10] 403 U.S. 602 (1971).

[11] 657 F. Supp. at 1556.

[12] *Id.* at 1564.

[13] *Id.* at 1568.

of the district court's decision of the case under the traditional Establishment Clause analysis of *Lemon.*

A VALID SECULAR PURPOSE WITH NO FACIAL "PRIMARY EFFECT"

In determining whether a governmental statute comports with the Establishment Clause, the Supreme Court begins by inquiring whether the statute explicitly or deliberately discriminates among religious denominations. If it does, the case must be reviewed under strict scrutiny analysis.[14] This analysis has been utilized in only a limited number of Establishment Clause cases where a statute's benefits were to be allocated *only* among religious organizations and most often where an intentional, not merely an incidental disparate impact, was evident.

In *Kendrick* the plaintiffs below argued that the AFLA should have been reviewed under strict scrutiny, but the district court properly rejected this notion because the statute's plan was facially neutral and intended the inclusion of not only religious organizations, but secular organizations as well. Consequently, the district court applied the three-prong test of *Lemon v. Kurtzman.*[15]

To withstand constitutional scrutiny under the *Lemon* test, a statute 1) must contain a valid secular purpose, 2) must not have the primary effect of advancing or inhibiting religion, and 3) must not foster excessive entanglement between government and religion.[16] Failure to meet any one of these three elements may render the provision unconstitutional.[17]

Judge Richey's opinion in *Kendrick* held that while the AFLA met the valid secular purpose of providing a means of combating teenage pregnancy and educating adolescents in sexual matters, it failed the last two elements of the *Lemon* test.[18] Plaintiffs below advanced the argument that the AFLA, when compared with its predecessor, Title VI of the Public Health Service Act, was a statute motivated wholly by religious purposes and therefore did not satisfy the

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[14] Larson v. Valente, 456 U.S. 228 (1982).

[15] 657 F. Supp. at 1557.

[16] 403 U.S. at 612-13.

[17] 657 F. Supp. at 1557. Recently, though, in Lynch v. Donnelly, the Court has hinted that a regulation which fails one or more of the tests may nonetheless be held constitutional. *See* 465 U.S. 668 (1984).

[18] 657 F. Supp. at 1570.

first prong of the test.[19] Yet the district court found, based on the AFLA's abundant legislative history, that the AFLA possessed a valid secular purpose.[20]

Under the second prong of the *Lemon* test, the district court found that, on its face and as applied, the statute had the "primary effect" of advancing religion,[21] and thus, the AFLA impermissibly violated the Establishment Clause. That "primary effect" finding of facial invalidity appears to be based on only two narrow determinations: the fact that the legislative history of these provisions demonstrated that Congress clearly intended religious organizations to participate in these programs as both grantees and as unpaid participants[22], and the factthat the statute contained no explicit restriction against the teaching of religion *qua* religion.[23]

Congress' expressed intention to include religious organizations in the provision of AFLA services and counseling appears to be the primary basis for Judge Richey's decision. Relying heavily on the fact that the AFLA required applicant groups to describe how they "will, as appropriate in the provision of services...involve religious...organizations,"[24] the district court concluded that "the statutory scheme is fraught with the possibility that religious beliefs might infuse instruction ... and [t]his possibility alone amounts to an impermissible advancement of religion."[25]

As appellants argue, simply requiring such information to be provided by each applicant cannot, without more, be viewed as statutorily *compelling* religious involvement.[26] The authoritative Senate Report[27] states that "religious affiliation

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[19] *Id.* at 1559.

[20] Neither the Brief for Appellees nor any of the briefs filed by amici curiae in support of appellees before argument at the Supreme Court raise this issue of the *Lemon* test.

[21] 657 F. Supp. at 1560.

[22] *Id.* at 1562.

[23] *Id.* at 1562-63. Although the District Court took judicial notice of the fact that the Department of Health and Human Services' "Notice of Grant Award applicants to the AFLA stated that grants may not be used to "teach or promote religion," it nevertheless found this unpublished and unenforceable administrative warning inadequate to protect against the sectarian use of AFLA funds. *Id.* at 1563.

[24] 42 U.S.C. § 300z-5(a)(21)(B) (1982).

[25] 657 F. Supp. at 1563 (emphasis in original text).

[26] Appellant's Opening Brief and Appellant's Reply Brief at 7, *Kendrick v. Bowen*, *appeal docketed*, No. 87-253 (U.S. Jan. 11, 1988) [hereinafter Brief for Appellant].

is not a criterion for selection as a grantee."[28] Moreover, a number of Supreme Court cases make clear that absent an initial determination that a particular recipient is "so permeated by religion that the secular side cannot be segregated from the sectarian,"[29] religiously-affiliated organizations *may* participate fully in governmental programs.[30] Certainly, the Supreme Court has never held that theEstablishment Clause requires exclusion of religious organizations from publicly-supported social programs.[31]

Governmental funding schemes for social service programs administered by religiously-affiliated colleges and hospitals have been upheld in instances where the aid was shown to be clearly designated for other than a specifically religious purpose and where it was neutrally available to all types of groups.[32] Thus, programs authorizing non-categorical grants to private colleges,[33] state issuances of revenue bonds for construction of private college facilities,[34] and federal construction grants for private colleges[35] have been upheld by the Supreme Court, defying invalidation under the initial "primary effect" inquiry. Indeed, it can be said that a historical relationship exists between charitable factions of religious groups and government in the providing of social services. Religious organizations continue to participate in a variety of programs funded by state and federal governments including soup kitchens, drug abuse programs, orphanages, nursing homes, housing, job training, tutoring, school lunches, refugee resettlement, and foreign disaster relief.[36]

The district court opinion in *Kendrick* suffers from its failure to discuss analogous Supreme Court Establishment Clause cases involving social program

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[27] S. Rep. 97-161, 97th Cong., 1st Sess.

[28] S. Rep. 97-161, 97th Cong., 1st Sess., 15-16 (1981).

[29] *See, e.g.*, Roemer v. Maryland Pub. Works, 426 U.S. 736, 759 (1976).

[30] *See* Bradfield v. Roberts, 175 U.S. 291, 199 (1899); Walz v. Tax Comm., 397 U.S. 664 (1970); Committee for Public Educ. and Religious Liberty v. Regan, 444 U.S. 646 (1980).

[31] "[T]he proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has consistently been rejected." Hunt v. McNair, 413 U.S. 734, 742 (1973).

[32] *Roemer*, 426 U.S. at 746.

[33] *Id.* at 736.

[34] Hunt v. McNair, 413 U.S. 734 (1973).

[35] Tilton v. Richardson, 403 U.S. 672 (1971).

[36] McConnell, *Political and Religious Disestablishment,* 1986 B.Y.U.L. Rev. 405, 421.

schemes like the AFLA. More specifically, Judge Richey's decision may have been fortified by a comparison of this case to the factually similar line of SupremeCourt school prayer/moment-of-silence cases[37] or the line of cases involving federal funding of questionably religious programs in public schools.[38]

Here, *Kendrick* is distinguishable from a number of these cases as the AFLA was not directed solely at augmenting secular elements of otherwise sectarian organizations, but on its face solicits participation by "religious and charitable organizations, voluntary associations, and other groups in the private sector" as well.[39] The inclusion of religious organizations as participants in the AFLA, according to its legislative history, was aimed at the general desire to involve the whole targeted community in the programs.[40]

The AFLA's reference to religious groups as potential grantees of the Act's funds should not warrant invalidation of the statute without a more definitive showing that the statute's provisions had, under *Lemon*, the primary effect of establishing religion.[41] On this point, the district court's opinion, which applies an unconventional "direct and immediate" test to this issue, is clearly inappropriate.

The Supreme Court in *Hunt v. McNair*[42] articulated the standard for the "primary effect" prong of the *Lemon* test. "Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission.[43]

In *Kendrick*, the district court chose to apply an apparently less stringent test for "primary effect" than Supreme Court precedent dictates, asking whether the statute had a "direct and immediate effect of advancing religion."[44] This inquiry eliminates the need to determine if the purported effect is "primary," and

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[37] Such a discussion would have included Engel v. Vitale, 370 U.S. 421 (1962) and Wallace v. Jaffree, 105 S. Ct. 2479 (1985).

[38] *See, e.g.*, Bob Jones University v. United States, 461 U.S. 574 (1983); Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975); and Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973). Two other recent and very applicable school cases are Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985) and Aguilar v. Felton, 473 U.S. 402 (1985).

[39] 42 U.S.C. §300z-5(a)(21)(B) (1982).

[40] S. Rep. 97-161, 97th Cong., 1st Sess. 15-16 (1981).

[41] *See* 403 U.S. at 602.

[42] 413 U.S. 734 (1973).

[43] *Id.* at 743.

[44] 657 F. Supp. at 1560 (citing *Nyquist*, 413 U.S. at 783).

instead directs the examination to the *quality* of the effect, regardless of whether it is "primary." In an unmethodical way, the district court has reduced the test'sthreshold requirement of a showing of "primary effect" to a showing of simply *any* effect.

Perhaps because it is not obvious that the AFLA's scheme, on its face, had the primary effect of advancing or inhibiting religion, the district court felt more comfortable in applying the *Nyquist* test of "direct and immediate." On this point the district court's decision is weak inasmuch as no Supreme Court case mandates such a conclusion absent a more purposeful and discriminatory showing on the face of the statute.

AS APPLIED, THE AFLA ESTABLISHES RELIGION

Following a somewhat haphazard factual review of the case record, the district court in *Kendrick* held that the AFLA "creates an explicit connection between a state-sponsored program, a religiously identified organization, and either a religiously-inspired curriculum or a classroom replete with religious symbols"[45] and that this interrelationship amounted to a "significant symbolic benefit to religion."[46]

The touchstone of findings of "primary effect" in Establishment Clause cases has been that the law in effect supplies government funds for the teaching of religion. Where government aid amounts to a subsidy of the religious organization and the subsidy cannot be segregated from religious activity, the Supreme Court has declared the subsidy to be unconstitutional.[47] The AFLA was a statute with a few constitutional strikes against it to begin with. Although Congress generally has the authority to impose conditions in the selection of institutions receiving federal funding under its various spending programs,[48] the AFLA program is exceptional in that it contemplates a large amount ($3 million) of direct funding to religious organizations. Moreover, the nature of the social service involved, the teaching and counselling of adolescents, is thought to present particular problems if agency monitoring of the programs becomes necessary to ensure that funds are not used for religious ends.[49] In particular, the Supreme Court has noted that, in certain contexts, a danger may inhere that teachers may abuse an apparently

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[45] 657 F. Supp. at 1566.

[46] *Id.* at 116 (quoting Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982)).

[47] Grand Rapids School Dist. v. Ball, 473 U.S. 372 (1985).

[48] *See infra* pp. 22-25.

[49] *See infra* pp. 19-22; *see also* Lemon v. Kurtzman, 403 U.S. 602, 615-20.

neutral scheme to promote religion.[50] Finally, the Court has repeatedly expressed a concern that adolescents are highly impressionable and thus are likely to perceive factors such as instruction at locations replete with religious symbols, for instance, as a union between church and state.[51]

The Supreme Court has previously noted, and one of the appellees in this case persuasively advances, that there is a special concern where religion is involved, albeit incidentally, in the teaching of emotionally vulnerable adolescents.[52] Particularly in the instant case, where it was clearly contemplated that AFLA programs would target pregnant adolescent women, there is an inherent danger that religiously-affiliated groups will take this opportunity to inculcate their religion to young individuals at a vulnerable time in their lives.[53]

In essence, the AFLA is program whose purpose is to teach morals, an objective which carries with it the inherent danger that religion will be used to instill such morals in these young individuals. "The Act expressly calls upon religious organizations to convey certain religious values to minors, not to provide a service such as passing out breakfast to children."[54] Indeed, it is the unique nature of the social services provided by the AFLA that jeopardizes the doctrine of separation of church and state; the pernicious combination of religious organizations teaching morality makes the AFLA particularly suspect.

Appellants in this case sharply contest the district court's factual findings and argue that it relied selectively on a few of the appellees' assertions in holding that the statute "in effect" established religion.[55] Certainly, the district court's discussion of the various groups participating in the program was arbitrary. By selectively focusing on a few of the more hyperbolic instances found during discovery involving sectarian groups, the Court's factual findings lack any comprehensive review of *all* the participating organizations. The Court briefly concludes that the statutory scheme of the AFLA was "fraught with the possibility that religious beliefs might infuse instruction and...[that] this possibility

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[50] Wallace v. Jaffree, 105 S. Ct. 2479, 2492 (1985).

[51] Grand Rapids School Dist. V. Ball, 473 U.S. 373, 390 (1985).

[52] Lemon v. Kurtzman, 401 U.S. 602, 615-20 (1971).

[53] Brief for Appellees and Cross-Appellants at 47-49, Kendrick v. Bowen, *appeal docketed*, No. 87-253 (U.S. Jan. 11, 1988) [hereinafter Brief for Appellees].

[54] *"'Chastity Act' Lawsuit is Pitting Religions Against One Another," RICHMOND TIMES DISPATCH*, Mar. 6, 1988, at 12, col. 1.

[55] Reply Brief for Appellant at 2-5, Kendrick v. Bowen, *appeal docketed*, No. 87-253 (U.S. Jan 11, 1988).

alone amounts to an impermissible advancement of religion."[56]

Pointing to factually similar Supreme Court cases where instructional programs involving religious groups with concededly legitimate secular purposes were struck down,[57] the district court held that if the mere danger of inculcating religion, especially with adolescents, was considered to be enough in those cases, that the AFLA must also fail. *Kendrick* states, where there is a "possibility that religious organizations will exert pressure on 'matters sacred to conscience'... it renders the program invalid."[58]

The *Kendrick* decision suggests that the Supreme Court is scrutinizing more closely, and may be more willing to invalidate, programs which merely present the danger that religion may be inculcated. *Kendrick* reads the Supreme Court's cases to say that a presumption of unconstitutionality is created by programs where religiously-affiliated groups are even afforded the opportunity to proselytize and that such schemes will be invalidated without an ample factual showing that religion "in effect" was ever established under it.[59]

ESTABLISHMENT OF A RELIGION?

Neither the district court nor the Justice Department, as appellee, addressed the question of whether the AFLA tends to establish a particular religious belief or practice. This article suggests that the AFLA's conspicuous stipulation that only groups which "do not advocate, promote or encourage abortion"[60] may participate denotes a discrete governmental preference for certain religious

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[56] Kendrick V. Bowen, 657 F. Supp at 1563.

[57] 657 F. Supp. at 1563-64. *See* Grand Rapids School Dist, V. Ball, 105 S. Ct. 3216 (1985); Engel v. Vitale, 370 U.S. 421 (1962); McCollum v. Board of Educ., 333 U.S. 203 (1948); and Felton v. Secretary of Education, 739 F.2d 48 (2d Cir. 1984) *aff'd sub nom.*, Aguilar v. Felton, 473 U.S. 402 (1985).

[58] 657 F. Supp at 1563. *See also* McCollum v. Board of Educ., 333 U.S. 203, 227 (1948) (Frankfurter, J. concurring); Meek v. Pittenger, 421 U.S. 349, 366 (1975); and Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216, 3225 (1985).

[59] 657 F. Supp. at 1563.

[60] 42 U.S.C. § 300z-10(a) (1982).

denominations in violation of the Establishment Clause prohibition.[61] Perhaps the clearest precept of the first amendment's Establishment Clause is that one religion may not be favored over another.[62] A statute which endorses a particular religious belief or practice that all citizens do not share offends the Establishment Clause.[63] Yet the program benefits of the AFLA may only be awarded to groups which do not currently advocate abortion. Thus, appellees and amici curiae argue, certain denominations, specifically Catholic, are favored by the largess of the AFLA. As such, this provision creates the "specter of the preferred church."[64]

Plaintiffs originally established standing in *Kendrick* by claiming federal taxpayer status pursuant to *Flast v. Cohen*[65] clause. Under *Flast*, taxpayer standing is permitted to challenge a congressional statute's constitutionality if the plaintiff can prove that a "logical nexus" exists between their status as taxpayers and their challenge to the appropriation.[66] No tangible injury need be shown.

It is conceivable that this case would have been framed quite differently had it not been brought under taxpayer standing. Throughout the AFLA's history, only one group is reported to have been denied participation because it did not meet the requirements of the controversial abortion restriction. This statistic is perhaps attributable to the fact that the facial restriction most likely had the effect of discouraging any group "tainted" by its prior involvement in abortion counseling or referral from even applying for funding. Accordingly, none of the interested parties to the suit have plead that they had been injured by a denial of funding in order to sue on other constitutional grounds, e.g., equal protection or due process. For this reason, and because taxpayer standing was available,plaintiffs did not need to assert that the AFLA tended to establish "a

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[61] Plaintiffs in the original action, B'Nai B'Rith Defamation League, contended that the AFLA has a tendency to benefit groups affiliated with certain denominations, namely Catholic ones which oppose abortion under any circumstances, and exclude others. Members of the Jewish faith do not regard a fetus as a living person, and therefore do not necessarily oppose abortion as part of their religious beliefs. Brief for Appellees 25, Kendrick v. Bowen, *appeal docketed*, No. 87-253 (U.S. Jan. 11, 1988).

[62] "The clearest command of the Establishment Clause is that one denomination cannot be officially preferred over another," Larson v. Valente, 456 U.S. 228, 244 (1982).

[63] Wallace v. Jaffree, 472 U.S. 38, 76 (1985).

[64] *"'Chastity Act' Lawsuit is Pitting Religions One Against One Another," RICHMOND TIMES DISPATCH*, March 6, 1988, at 12, col. 1.

[65] 392 U.S. 83 (1968).

[66] *Id.* at 102-03.

religion" or a preferred group, but only that it tended to establish religion in general.

The AFLA's restriction clause is regarded as the red herring in *Kendrick* primarily because it injects the volatile issue of abortion into the case. As the district court stated, "The Court...does not decide any issue related to abortion."[67] However, the statute undeniably draws a distinction between organizations which will and will not qualify according to a criterion which deeply divides religious groups. This amounts to the establishment of a religion.

In effect, the AFLA endorses those religious organizations which embrace the religious tenets that premarital sex and abortion are forbidden and wrong.[68] Such a statute, which "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community,"[69] offends the Establishment Clause.

On this point, the government argues that abortion is an issue of public importance, the subject of both secular and theological concern, and that the Establishment Clause is not violated merely because the issue "happens to coincide with the tenets of some or all religions."[70] Although the government concedes that abortion is "a central concern of many religious faiths," it argues that abortion is equally capable of being discussed in secular terms.[71]

The Justice Department maintains that the issue is not whether abortion is *capable* of being discussed in religious terms, but whether a particular participant in the program must be presumed to be *unable* to convey that subject in lawful, secular terms.[72] Reasonable men would agree that abortion could be either a secular or a religious issue, depending on the context of discussion. However, the genuine legal issue here is whether the stipulation contained in the AFLA, presuming that abortion may be discussed by religiously-affiliated counselors under

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[67] 657 F. Supp. at 1553 n.3.

[68] *See* Brief of Council on Religious Freedom as Amicus Curiae in Support of Appellees and Cross-Appellants, Kendrick v. Bowen, *appeal docketed*, No. 87-253 (U.S. Jan. 11, 1988).

[69] Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

[70] Brief for Appellant at 36, Kendrick v. Bowen, *appeal docketed*, No. 87-253 (U.S. Jan. 11, 1988) (citing McGowan v. Maryland, 366 U.S. 420, 421 (1961).

[71] *Id.*

[72] Brief for Appellant, *supra* note 26 at 37-38.

the terms of the statute[73] in a secular manner, tends to establish a preferred religion. A purely pragmatic examination of the AFLA might also include asking whether the stated primary purpose of the statute, to address the social ills of teenage pregnancy and premarital sexual relations, can be fulfilled in the context of a program which limits discussion of abortion.[74]

Implicit in the government's argument on the abortion issue is that *Kendrick* is governed by the Supreme Court cases of *Maher v. Roe*[75] and *Harris v. McRae*,[76] which held that the states and the federal government may refuse to fund medically-necessary abortions in furtherance of an articulated policy of favoring childbirth over abortion.

The Justice Department, relying on *McRae* and *Harris* for the proposition that a women's right to choose to have an abortion is not a fundamental, free-standing right and that governmental policy preferences may permissibly govern the allocation of funds affecting this right, maintains that the restriction clause of the AFLA is permissible.

The Justice Department may be overextending the precedential value of these two cases in contexts outside the conditional spending jurisprudence, as it is unclear whether this proposition carries any weight in an Establishment Clause context.[77] Furthermore, even if Congress is accorded great deference in creating a spending scheme to address compelling social problems, if it effectually validates a preferred social agenda known to be shared by some specific religions or factions and not others, has Congress in fact established a preferred religion?[78]

The district court opinion in *Kendrick* states that "a society is only free when individuals are left free from direct or indirect pressure to abandon their own cherished religious beliefs for whatever set of beliefs currently holds government favor."[79] Clearly, the language of the lower court's opinion speaks

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[73] The condition of the grants are that they be "made only to projects or programs which do not advocate, promote or encourage abortion." 42 U.S.C. § 300z-10(a)(1982).

[74] See *infra*, text accompanying notes 92-101.

[75] 432 U.S. 464 (1977).

[76] 448 U.S. 297 (1980).

[77] *Harris* was a First Amendment/Due Process case; *McRae* was a Equal Protection Clause case. U.S. CONST. amend. I and amend. XIV, 1.

[78] *See infra* text accompanying notes 102-15.

[79] 657 F. Supp. at 1569.

not only of the danger of establishing "a" preferred religion,[80] but also alludes to the danger of institutionalizing the moral or secular beliefs of the current political majority. Not all religions, nor all people agree that premarital sex and abortion are wrong or sinful. To subordinate the will of the individual for the will of the instant majority on "matters sacred to the conscience" violates the core prohibition of the Establishment Clause.

POLITICAL ENTANGLEMENT AND DIVISIVENESS

The *Kendrick* Court determined that the third prong of the *Lemon* test, whether the statute fosters an excessive entanglement between church and state, was satisfied.[81] In appraising excessive entanglement, the Supreme Court examines three factors: 1) the character and purpose of the institutions benefitted, 2) the nature of the aid, and 3) the nature of the relationship between the governmental and religious organization.[82] The *Kendrick* Court found that because the religious organizations receiving benefits have a religious character and purpose, and because the risk of abuse with direct monetary grants was great, that the risk of institutionalization of a religious doctrine could only be overcome by government monitoring so continuous that it would rise to the level of excessive entanglement.[83]

As noted above,[84] the nature of the counseling and instructional programs under the AFLA is likely to present a danger that religious beliefs will be inculcated in those taking advantage of the programs. Based on a number of Establishment Clause cases, the Court found excessive entanglement because of the oversight which the program would require.[85] "Unlike a book, a [counselor] cannot be inspected once to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment."[86] The entanglement prong of the *Lemon* test has been the subject

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[80] "When the power, prestige, financial support of government is placed behind a particular religious belief, the indirect coercive pressure on religious minorities to conform to the prevailing officially approved religion is plain." Engel v. Vitale, 370 U.S. 421, 431 (1962).

[81] 657 F. Supp. at 1567.

[82] Lemon v. Kurtzman, 403 U.S. at 615.

[83] 657 F. Supp. at 1567.

[84] *See supra* text accompanying notes 45-59.

[85] 657 F. Supp. at 1567-68.

[86] *Lemon*, 403 U.S. at 619.

of recent criticism, though. Justice Rehnquist has called it the "Catch-22" paradox of the Court's creation, citing findings such as *Kendrick* which state that the type of program necessarily requires supervision to avoid entanglement, yet the that supervision itself would cause the entanglement.[87] Another commentator asserts that the entanglement prong of the *Lemon* test is largely responsible for the anomalous results in many Establishment Clause cases.[88]

In *Lynch v. Donnelly*, Justice O'Connor suggested that the entanglement prong be replaced by a test that asks whether the government intends to convey a message of endorsement or disapproval of religion.[89] This new test would require courts to make a broader factual examination of the history of a program such as the AFLA and would require more than a showing that a "danger of establishing religion" inhered in the program. If applied to the AFLA, this new test would affirm the district court's finding under the "effect" prong of the *Lemon* test that Congress' scheme was one under which certain religious affiliations would be benefited.

The entanglement prong has also been viewed by the Court as an inquiry into whether the program tends to create "political divisiveness."[90] Although at least one justice does not believe that this is an appropriate test for Establishment Clause purposes,[91] the "political divisiveness" that the AFLA creates is conspicuous. The Act has the effect of "religious gerrymandering" by choosing, in restricting access to federal funds, to champion one side of a highly inflammatory and polemic issue that deeply divides religions. If the AFLA works to benefit certain religions and not others because of a restriction that is very politically divisive, religion has in effect been established.

THE CHASTITY ACT AND CONDITIONAL SPENDING

Although *Kendrick* was not brought to challenge the AFLA as a

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[87] *Aguilar*, 473 U.S. at 420-21.

[88] Choper, *"The Religion Clauses of the First Amendment; Reconciling the Conflict,"* 41 U. PITT. L. Rev. 673, 681 (1980).

[89] 465 U.S. 668, 691-94 (1983).

[90] *See Nyquist*, 413 U.S. at 796; *Lemon*, 403 U.S. at 623.

[91] Justice O'Connor has stated, "In my view, political divisiveness along religious lines should not be an independent cause test of constitutionality," Lynch v. Donnelly, 465 U.S. at 689 (concurring). She has recently added that any discussion of the entanglement prong should be limited to institutional entanglement in the nature of the governmental activity, and should not review the possible political divisiveness that the program creates among partisan interest groups. *Felton*, 473 U. S. at 421-30.

congressional coercive spending case, it raises a few profound constitutional concerns about such programs. The General Welfare Clause of article I[92] confers on Congress only a power to spend; it confers no express independent power to regulate.[93] It has long been held that government may not regulate matters indirectly which it cannot regulate directly.[94]

While Congress today has the broad power to choose to subsidize or otherwise encourage certain activities, its power to discourage or penalize other activities by attaching conditions or privileges is questionable. In two very recent cases, the Supreme Court has held that unconstitutional conditions compelling the surrender of independent constitutional rights are invalid.[95]

In *FCC v. League of Women Voters*,[96] the Court invalidated a provision of the Public Broadcasting Act that prohibited any noncommercial educational station receiving public funds from endorsing candidates or editorializing. The Court held that under the scheme the stations would have to forfeit their first amendment right of freedom of expression if they wished to receive funding. The case is notable because of its treatment of the conditional spending restriction on free speech as a direct regulation.

The 1986 case of *Babbitt v. Planned Parenthood Federation*,[97] concerned a state funding program similar to the AFLA. The state of Arizona appropriated state funds to pay for family-planning services on the condition that such funds would not be made available to groups offering abortions, abortion referral or counseling for abortions. The state argued that the measure was permissible under *Maher v. Roe*[98] as an exercise of a state's right to withhold public funds from abortion-related services. The Supreme Court, in summary affirmance of the Court of Appeals for the Ninth Circuit, held that it was improper to flatly deny

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92 "The Congress shall have the Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. CONST. art. I, § 8.

93 United States v. Butler, 297 U.S. 1 (1936).

94 Sherbert v. Verner, 374 U.S. 398 (1963), held that a state may not deny unemployment benefits to a person who refuses to work on Saturday for religious reasons.

95 FCC v. League of Women Voters, 468 U.S. 364 (1984) and Babbitt v. Planned Parenthood Fed., 107 S. Ct. 391 (1986), *aff'g* Planned Parenthood of Central & Northern Arizona v. Arizona, 789 F.2d 1348 (9th Cir. 1986).

96 468 U.S. at 364.

97 107 S. Ct. at 391.

98 432 U.S. 464 (1977).

money to groups which could separate their abortion-related from their non-abortion services and thereby qualify for funding under the program.[99]

Both of these recent cases stand for the proposition that Congress may not coercively manipulate constitutionally protected rights by denying funding for certain programs. Although the Court's opinion in *Babbitt* did not address this point expressly, the fact that it struck down the state's plan in the face of *Maher v. Roe* weakens the precedential value of the *Maher* decision in this area.[100] Interestingly, these two decisions, relied upon by appellants in *Kendrick* who assert that these cases squarely stand for the proposition that federal and state governments may choose to champion childbirth and choose not to fund abortions, are in question after *Babbitt.*

Professor Laurence Tribe and other authorities have stated that at the time it was decided, *Maher* seemed to ignore all of the Court's earlier cases establishing that the government's decision to fund a program and not another may be unconstitutional if its purpose is to discourage the exercise of a constitutionally-protected right.[101] If indeed *Maher* has now been narrowed and a woman's right to an abortion, whether "fundamental" or not, may not necessarily be interfered with by the state, *Kendrick* should also be regarded as acase which confirms the notion that Congress may not regulate in areas which affect constitutionally-safeguarded rights of the individual.

If, through the AFLA, Congress has not impermissibly regulated the constitutional right of a woman's access to groups willing to offer her the constitutionally-protected right choice to abortion, it has impermissibly restricted her first amendment guarantees by a content-based regulation of her right of access to information about sexual matters and abortion.

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[99] It should be noted that the Ninth Circuit Court of Appeals rejected the State of Arizona's assertion that funding must be denied outright to groups such as Planned Parenthood which applied for funds for its non-abortion related services, but which also provided abortion-related services. The Court found that it was not "impossible," as the State contended, to monitor through a review of accounting records, where allocated funds were directed. 789 F.2d at 1351. Contrast this with the Court's trend in recent Establishment Clause cases to apply a slapdash answer to the entanglement prong of the *Lemon* tests. *See, e.g., Grand Rapids School District*, 473 U.S. at 398, where the Court treated the issue in one sentence on the last page of its opinion and *Lynch*, 465 U.S. at 683-84, where the issue was mentioned in one paragraph.

[100] *See supra* note 98.

[101] Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 332-37 (1985). *See also* Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1142-56, 1158-59 (1987).

Although *Kendrick* was never plead as a first amendment[102] free speech case, the abortion restriction clause of the AFLA can be scrutinized as a form of censorship or restraint of free speech. The language of the AFLA states that "grants may be made only to projects or programs which do not advocate, promote or encourage abortion."[103] Although this restriction primarily serves as a prerequisite that must be met by groups applying to participate in the AFLA, it may also be viewed as a prospective limitation on the activities of those groups which have already received funding.

As mentioned above,[104] the Supreme Court in *Federal Communications Commission v. League of Women Voters* recently held that federal funds cannot be denied under a restriction which has the effect of limiting free speech.[105] Likewise, the AFLA should not be able to silence grant applicants who may believe that providing information about contraception and abortion, whether or not this is regarded as "advocating" or "promoting," may be a legitimate means of preventing adolescent pregnancy, the purported purpose of the Act. The Supreme Court has stated that "where...a speaker desires to convey truthful information relevant to important social issues such as family planning and prevention of venereal disease...the first amendment interest served by such speech is paramount."[106] When viewed in this light, the restriction clause of the AFLA begins to look much like impermissible prior restraint.

The Supreme Court has held that Congress cannot discriminate in their subsidies in such a way that "aims at the suppression of [what are seen as] dangerous ideas"[107] Additionally, government may not attempt to *reduce* in any way the amount of information available to it citizens.[108] Fundamental to the first amendment is the notion that government may not forbid the suppression of ideas which may differ from the beliefs of whatever majority is currently in

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[102] U.S. CONST. amend. I.

[103] 42 U.S.C. § 300z-10(a).

[104] *See supra* text accompanying notes 95-96.

[105] FCC v. League of Women Voters, 468 U.S. 364 (1985).

[106] Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 69 (1983).

[107] Regan v. Taxation With Representation, 461 U.S. 540, 548 (1983). *See also* Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788 (1985) (government benefit designed to suppress a particular point of view with which the government disagrees is unconstitutional).

[108] Virginia State Bd. of Pharmacy v. Virginia Consumer Council, 425 U.S. 748 (1976).

power.[109] Yet, the AFLA contains a conspicuous viewpoint-based restriction on free speech in the form of a condition for federal funds.

In addition to placing a restriction on the speech and activities of the organizations participating in the AFLA, it can also be said that the Act inhibits the privacy rights and right of access to information of individuals who seek counselling through one of these organizations.[110] The Supreme Court, in *Carey v. Population Services International*[111] held that government may not interfere with this correlative right of access to information about private decisions.

This speech restriction of the AFLA should be particularly disquieting when one considers the type of individual whom the AFLA is targeting. According to the statute, the AFLA was aimed at adolescents, some pregnant, who were more likely to live in low-income communities with high rates of regnancy.[112] Because of the economic status and youth of the individuals who would benefit from the AFLA, their needs would render them more vulnerable and their decisions would be more easily influenced[113]. Additionally, they are less likely to have access, through other avenues, to accurate information about abortion and contraception. In light of these facts, free speech concerns should clearly take on heightened importance where teenage sexual education is concerned.[114]

The Supreme Court may choose to embrace the argument advanced by the Justice Department here that because government may choose not to fund a woman's abortion,[115] it may therefore permissibly choose not to fund programs which "advocate" or "promote" abortion. Even so, the proposition that government may choose not to fund a woman's abortion does not grant that government authority to restrict her access to information regarding that decision,

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[109] Abrams v. U.S., 250 U.S. 616, 630 (1919) (J. Holmes, dissenting).

[110] *See* Brief of Amici Curiae (NOW Legal Defense and Education Fund and National Abortion Rights Action League) In Support of Appellees and Cross-Appellants, Kendrick v. Bowen, *appeal docketed*, No. 87-253 (U.S. Jan. 11, 1988).

[111] 431 U.S. 678 (1977).

[112] "In approving applications for grants...the Secretary shall give priority to applicants who -- 1) serve an area where there is a high incidence of adolescent pregnancy; 2) serve an area with a high proportion of low-income families and where the availability of programs of care is low..." 42 U.S.C. § 300z-4(a) (1982).

[113] These decisions may include whether or not to carry a fetus to full term.

[114] In Bolger v. Youngs Drugs Products, 463 U.S. at 74 n.30, the Supreme Court said that "the right of privacy in matters affecting procreation applies to minors...[and] it cannot go without notice that adolescent children apparently have a pressing need for information about contraception."

[115] Under the authority of Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 448 U.S. 297 (1980).

whether that access is or is not publicly funded. In this light, the AFLA's provisions, to the extent that they jeopardize a woman's access to this information as well as the first amendment freedoms of groups participating in the program, are clearly unconstitutional.

CONCLUSION

The Supreme Court, in assessing the constitutionality of the Adolescent Family Life Act, should affirm the ultimate holding of the district court in *Kendrick*. When examined under the traditional test of *Lemon*, the AFLA should be found to contain a legitimate secular purpose and should not be held to have the facial effect of establishing religion. However, as applied, the statute tends to establish a religion.

First, because the AFLA sought to provide a social service which involves teaching and counseling of adolescents on "matters sacred to the conscience," the nature of the program itself falls into a somewhat suspect class of activity. The danger that religion will be inculcated in this setting is great, and the Court in *Kendrick* expressly states that the suspicious scheme of this program is a factor in its holding. Based on the presence of this danger, the district court, with an unsatisfactory review of the factual record of *Kendrick*, applied a less scrutinizing standard, finding that the AFLA had the "primary effect of establishing religion." However, the district court's opinion is not necessarily erroneous.

Judge Richey's opinion most likely reflects the sentiment that the AFLA, if it did not intend to establish religion, provided a program which enunciated a valid legislative purpose but was intended to be highly accommodating to religious interests. Moreover, in the imposition of an abortion-related restriction on participant groups, the AFLA further meddled in the religious sphere. In choosing to deny access to the program's funds to groups which could not guarantee that they would not promote abortion, the AFLA had the effect of "religious gerrymandering" among religious denominations, based on their particular belief on this divisive issue. In this way, the AFLA had the impact of benefitting only religious and secular organizations which shared the view that discussion of sexual relations and pregnancy must exclude any advocacy of abortion under any circumstances.

For purposes of Establishment Clause analysis, the abortion restriction clause is relevant only to the extent that it applies to the third prong of the *Lemon* test, excessive entanglement, and that it creates severe political divisiveness among religions. If the AFLA were challenged on an equal protection or first amendment basis, this controversial restriction would provide further grounds for invalidation of the Act.

The Supreme Court's disposition of *Kendrick* may elucidate the deficiencies of the *Lemon* test, in particular the "excessive entanglement" and "political divisiveness" inquiry, and will most likely refresh the Court's Establishment Clause analysis.

VIRGINIA ATTORNEY SANCTIONS: THE RIGHT STUFF, OR THE BIG CHILL?

by

Mark Raby

INTRODUCTION

In 1983, Congress radically amended Rule 11 of the Federal Rules of Civil Procedure. The new rule, referred to by some as "Rule 11 with teeth,"[1] makes the signature of an attorney or pro-se litigant a certificate that the pleading is grounded in fact, warranted by law (or a good faith argument for its extension, modification, or reversal) and not interposed for an improper purpose, such as harassment or delay.[2]

The amended Rule requires courts to impose sanctions for violations.[3] These sanctions may include a requirement to pay attorney's fees and other expenses. From its inception, the new Rule 11 created a tremendous upsurge in attorney sanction litigation.[4]

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[1]Carter, The History and Purposes of Rule 11, 54 FORDHAM L. REV. 4 (1985) (stating that the 1983 amendment to Rule 11 was "designed to put teeth into the old rule").

[2] *See* Fed R. Civ. P. 11.

[3] *Id.*

[4] *See* Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions,* 100 HARV. L. REV. 630, 631 n.5 (1987).

The new Virginia attorney sanctions rule may provide a bridge to imposition of sanctions under the federal rule in cases removed to federal court. In the fourth circuit case of Kirby v. Allegheny Beverage Corp., 811 F.2d 253, 257 the court circuit court supported the denial rule 11 sanctions in a suit filed in state court and removed to federal court. The circuit court pointed out that availability of sanctions under such circumstances may provide an incentive to remove frivolous suits to federal court.

Later, in Meadow Ltd. Partnership v. Meadow Farm Partnership, 816 F.2d 970 (4th Cir. 1987), the circuit court quoted the lower court's statement that Rule 11 sanctions are never to be imposed in a case removed from state court "until such time as the states adopt counterpart rules so that their judges can give litigants who launch non-meritorious cases the same dose." Although the circuit court held that dismissal of the Rule 11 motion was error, they did so because the district court failed to consider sanctionable conduct that occurred after the case was removed to federal court. Thus, the question of whether Rule 11 sanctions would be applied in a case filed in Virginia and removed to federal court since the adoption of § 8.01-271.1 remains open.

In 1987 a joint subcommittee of the General Assembly of Virginia brought their own version of Federal Rule 11 to the Virginia Code, as part of a comprehensive package of tort reform.[5] According to the subcommittee, it is the public perception "that frivolous suits are clogging the court system".[6] Although the subcommittee received no testimony or other evidence suggesting such congestion, they included the provision to "improve public confidence in the [court] system."[7]

While improving the public image of the judicial system is a laudable goal, attorney sanctions should be applied with caution. Overly enthusiastic application of sanctions may "chill" some legitimate advocacy. Improperly applied, the provision could also pit lawyer against client in a contest over liability for sanctions. This would erode public confidence in the lawyer-client relationship, and thus of the court system as a whole.

This article begins with a discussion of possible requirements of § 8.01-271.1 by analogy to case law and commentary under Federal Rule 11. Next, the author examines the relationship between § 8.01-271.1 and the ethical duties of a lawyer to his client, noting potential conflicts that could arise through improper application of the Virginia rule. Finally, the author concludes that must apply the provision conservatively, or risk erosion of public confidence in the court system, contrary to the rule's stated purpose.

DISCUSSION

The Certification

1. Reasonable Inquiry. Both the federal rule and § 8.01-271.1 require an attorney representing a party to sign each pleading, written motion, or other paper of the party.[8] Both rules make such a signature certification that, to the best of the attorney's "knowledge, information, and belief, *formed after reasonable*

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[5] JOINT SUBCOMMITTEE STUDYING THE LIABILITY INSURANCE CRISIS AND THE NEED FOR TORT REFORM, REPORT TO THE VIRGINIA GEN. ASSEMBLY OF 1987, Senate Document No. 11 (1987) [hereinafter SUBCOMMITTEE REPORT].

[6] *Id.* at 16.

[7] *Id.*

[8] Va. Code Ann. § 8.01-271.1 (Supp. 1987).

Unlike the federal rule, the Virginia sanctions provision also includes oral motions. *Id.* This reflects the more informal practice of Virginia district courts, where much of the practice is based on oral motions. SUBCOMMITTEE REPORT, *supra* note 5, at 16.

inquiry," it is well grounded in fact and law.[9] Before the adoption of § 8.01-271.1, a lawyer's duty to ground his pleadings in the law was contained in the Code of Professional Responsibility.[10] The provision purports to give us an objective standard to decide what constitutes a frivolous pleading or motion. It

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[9] Va. Code Ann. § 8.01-271.1 (Supp. 1987).

The full text of the provision reads:

> Every pleading, written motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, and the attorney's address shall be stated on the first pleading filed by that attorney in the action. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address.
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> The signature of an attorney or party constitutes a certificate by him that (i) he has read the pleading, motion, or other paper, (ii) to the best of his knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (iii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, written motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.
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> An oral motion made by an attorney or party in any court of the Commonwealth constitutes a representation by him that (i) to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (ii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
>
> If a pleading, motion, or other paper is signed or made in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed the paper or made the motion, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper or the making of the motion, including a reasonable attorney's fee. *Id.*

[10] Disciplinary Rule 7-102 states that a lawyer shall not "[k]nowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law." Rules of the Virginia Supreme Court, Pt. 6, § II, DR 7-102(2) (1987).

Section 8.01-271.1 includes the additional requirement that an attorney not bring a claim that with reasonable inquiry would show to be legally groundless. Disciplinary Rule 6-101(1) requires an attorney to "demonstrate the specific legal knowledge, skill, efficiency, and thoroughness in preparation employed in acceptable practice by lawyers undertaking similar matters . . . " Rules of the Virginia Supreme Court, Pt. 6, § II, DR 6-101(1) (1987). This rule, operating in tandem with DR 7-102(2), constitutes a reasonable inquiry duty like that imposed by § 8.01-271.1.

leaves us, however, searching for a standard. What constitutes a reasonable inquiry? A reasonable inquiry of law, according to some courts and commentators dealing with Rule 11, may operate on a sliding scale. In their view the requirement would vary with an attorney's expertise and access to research tools.[11]

Furthermore, Rule 11 case law suggests that counsel may have a continuing duty under § 8.01-271.1 to ensure that a pleading is well founded. In the Rule 11 case of In re Continental Securities Litigation the defendant claimed that there was no basis for joining him in the suit. The court noted that Rule 11 sanctions could be proper "if it develops that [the defendant] was included in the complaint without reasonable basis, or has been kept in this case beyond the point where his improper joinder should have been evidence [sic]."[12]

The question of what constitutes a reasonable inquiry of fact is, perhaps, even more difficult. For example, to what extent is a lawyer entitled to rely on the factual representations of his client? Some commentators analyzing the federal rule suggest that a lawyer must always seek independent verification of his client's representations.[13] This view finds some limited support in case law.[14] Other writers disagree, framing the question as whether it is reasonable to rely solely on the client's word.[15] These writers suggest several factors to use in determining whether it is reasonable to rely on the client's word, including the client's basis of knowledge, length of association with the lawyer, and cost of seeking corroboration.[16] The latter view, which focuses on the reasonableness of an attorney's actions, is more efficient. It saves the client the expense of having

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[11] *See* Golden Eagle Distrib. Corp. v. Burroughs Corp., 103 F.R.D. 124, 129 (N.D. Cal. 1984) (noted access to LEXIS), *rev'd*, 801 F.2d 1531 (9th Cir. 1986). *See also* Schwarzer, *Sanctions Under the New Rule 11 - a Closer Look*, 104 F.R.D. 181, 194 (1985).

[12] No. 82-C-4712 (N.D. Ill. April 9, 1984) (WESTLAW, DCT database, 1985 WL 3296) (emphasis added).

[13] Marcus, *Reducing Costs and Delay: The Potential Impact of The Proposed Amendments to the Federal Rules of Civil Procedure*, 66 JUDICATURE 363, 365(1983); *See also* Nelken, *Sanctions Under Amended Federal Rule 11 - Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1319 (1986) (suggesting that an attorney must make an investigation if it can prove or disprove the client's representations).

[14] *See* Coburn Optical Indus. Inc. v. Cilco, Inc., 610 F. Supp 656, 659 (M.D.N.C. 1985) (Holding that the requirements of Federal Rule 11 are not satisfied where an attorney relies on his client's assurances that facts do or do not exist, when a reasonable inquiry would reveal otherwise).

[15] *See* Rothschild, Fenton, & Swanson, *Rule 11: Stop, Think and Investigate*, 11 LITIGATION, Winter 1985 at 13, 14.

[16] *Id.* at 14.

his own representations verified when the attorney has good reason to trust their veracity.

2. *Improper purpose.* Section 8.01-271.1 imposes sanctions on an attorney who brings an action for purposes of harassment or delay.[17] Since the provision is framed in terms of motive, it calls for the courts to inquire into the state of mind of the attorney when the action was instituted. Some courts considering Rule 11 have avoided employing such a subjective standard by inferring improper purpose from a violation of the objective portion of the rule.

Thus, a court may find improper purpose if reasonable inquiry (the objective standard) would have disclosed that the action was not well grounded in fact and law. In *Hudson v. Moore Business Forms, Inc.*[18] the court employed this reasoning in imposing Rule 11 sanctions on defense counsel for groundless counterclaims. The *Hudson* court said that the lack of reasonable justification for the sanctioned firm's claims raised "a strong inference that the defendant's motive in bringing the counterclaim was to harass the plaintiff and to deter similar actions from being brought."[19]

The objective standard can also guide consideration of the "good faith argument for extension, modification, or reversal" exception to the requirement that a pleading be based on existing law. Without reasonable inquiry into existing law (under the objective standard) one cannot make a good faith argument to change it.

The sanctions provision will no doubt be attractive to lawyers, since it can be a powerful litigation tactic. Some lawyers may hope to persuade opposing counsel to nonsuit a borderline claim with the threat of a sanctions motion. Lawyers, however, must take care in employing the provision. A motion for attorney sanctions not grounded in law and fact, brought with improper motive, is itself subject to sanctions under § 8.01-271.1.

Sanctions

By increasing the range of sanctions at a judge's disposal, § 8.01-271.1 becomes a tool for more flexible docket management. For example, suppose that a Motion for Judgment[20], the pleading which initiates an action at law in Virginia, is not well grounded in fact or law. Without the sanctions provision, a judge sustaining a demurrer to such a pleading has only two options. The judge could allow amendment if the defects could be cured. If the plaintiff does not,

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[17] Va. Code Ann. § 8.01-271.1 (Supp. 1987).

[18] 609 F. Supp. 467 (N.D. Cal. 1985).

[19] *Id.* at 484.

[20] *See* Rules of Virginia Supreme Court 3:3 (1987).

or cannot, fix his pleading, the suit would be subject to dismissal.

While this system allows one with a valid claim to overcome defects of form, it leaves unpunished those who, while having a valid claim, do not make a reasonable inquiry into fact or law before filing their initial pleading. Under the new provision, sanctions may be levied on those responsible: Attorney, client, or both. Applied correctly, this flexibility would allow more efficient and fair case management. For instance, a court may punish an attorney for abuses of the system, while allowing his client's cause to proceed. As the author will argue in part II(C) of this article, improper application could result in a battle between attorney and client over liability for sanctions, which would have a deleterious effect on the system as a whole.

While the provision makes sanctions for violation mandatory,[21] the type and severity of punishment is left to judicial discretion.[22] The law allows for the award of expenses and attorney's fees, but does not mandate them. Indeed, criticism alone may prove a powerful sanction. Publication or dissemination of an unfavorable sanctions ruling may tarnish the public and professional reputation of an attorney.[23]

Some courts have shown great creativity in fashioning sanctions under the federal rule. In *Heuttig & Schromm v. Landscape Contractors Council*,[24] the court awarded $5,625 in attorney's fees to the defendant union, specifying that no part of this penalty was to be paid by the client.[25] Furthermore, the court chose to publish the highly critical opinion, and required that a copy be distributed to each lawyer in the sanctioned firm.[26]

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[21] Va. Code Ann. § 8.01-271.1 (Supp. 1987).

[22] *Id.*

[23] *See* Schwarzer, *supra* note 11, at 201 ("Judges are prone to forget the sting of public criticism delivered from the bench. Such criticism, while potentially constructive, can also damage a lawyer's reputation and career . . . There is a distinction between bad practice and lack of integrity.").

[24] 582 F. Supp. 1519 (N.D. Cal. 1984), *aff'd*, 790 F.2d 1421 (9th Cir. 1986).

[25] *Id.* at 1522.

[26] *Id.* at 1522-23; *See also* Golden Eagle Distrib. Corp. v. Burroughs Corp., 103 F.R.D. 124, 129 (N.D. Cal. 1984) (requiring decision to be shown to all attorneys in firm); Larkin v. Heckler, 584 F. Supp. 512, 514 (N.D. Cal. 1984) (requiring dissemination of decision to all Assistant United States Attorneys in the Northern District of California engaged in similar litigation).

It is interesting to note that Articles by Judge Schwarzer, caution judges about the potentially harmful effects of such dissemination, despite his own frequent use of such sanctions. *See* Schwarzer, *supra* note 23.

Ultimately, the type of sanction imposed may turn on a judge's view of the purpose of sanctions. The subcommittee report speaks only in terms of deterrence,[27] a function which is served whether the provision is applied as an economic or punitive measure.

Professor Arthur Miller, reporter to the advisory committee that fashioned the new federal rule, supports the economic justification of such a sanctions provision. Although the federal rule (like the Virginia law) speaks of sanctions, Professor Miller asserts that it is "in reality . . . more appropriately characterized as a cost-shifting technique" to redistribute the cost of litigation between the parties or their attorneys.[28] Professor Miller feels that the sanctions are merely an economic incentive for lawyers to "stop and think" before pursuing claims.[29]

Judge William W. Schwarzer of the Northern District of California views the federal rule as a punitive measure.[30] "The rule provides for sanctions, not fee shifting" writes Judge Schwarzer, "[i]t is aimed at deterring and, if necessary, punishing improper conduct rather than merely compensating the prevailing party."[31]

This latter view is more likely to be adopted by Virginia courts. If viewed as a cost shifting tool, sanctions are likely to be an effective deterrent only to the extent that they outweigh the benefit of sanctionable conduct. For instance, some lawyers may make a motion designed to cause delay if they believe it is worth the monetary cost of having to pay attorney's fees. Without the stigma of punishment, sanctions will do little to remedy the unfavorable public impression of the court system as the legislature intended.

If the sanctions are to be viewed as punitive, they should be applied with extreme caution. Overzealous implementation of § 8.01-271.1 could harm the relationship between lawyer and client, and chill zealous representation of the client's claim.

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[27] *See* SUBCOMMITTEE REPORT at 16.

[28] Miller & Culp, Litigation Costs, Delay Prompted the New Rules of Civil Procedure, Nat'l L.J., Nov. 28, 1983, at 34.

For a more complete discussion of the views of Professor Miller and Judge Schwarzer on the purpose of Rule 11 see Nelken, *supra* at n. 13.

[29] Miller & Culp, *supra* note 27, at 34.

Some writers suggest that making sanctions more palatable by portraying them as mere cost-shifting provisions will make them more likely to occur. *See* Nelken, *supra* note 13 at 1323-24.

[30] *See* Schwarzer, *supra* note 11, at 185.

[31] *Id.*

Potential for Damage

Part of the burden of enforcing the sanctions provision rests on the attorney. He is responsible for examining a client's claim before proceeding. The legislature, by deliberately including attorneys among those who can move for sanctions, made them partly responsible for detection and punishment of violations.[32] Thus, the sanctions provision reinforces the attorney's role as an officer of the court. A stringent application of the provision may bring the attorney's duty to the system into conflict with his duty as an advocate. This section compares an attorney's duty under § 8.01-271.1 to his duty as advocate (largely contained in Virginia's Code of Professional Responsibility) and argues that both should be considered in interpreting the sanctions provision.

1. *Chilling Zealous Representation.* The sanctions provision imposes a duty on the attorney to refrain from employing claims and defenses not grounded in fact and warranted by existing law.[33] Furthermore, the lawyer has an ethical duty to evaluate his client's claim, and to inform the client if the claim has a limited chance of success.[34] In some part these duties of a lawyer to client and court overlap and reinforce each other. Courts must remember, however, that today's frivolous claim is tomorrow's law. Courts must carefully weigh the possibility of squelching legitimate advocacy before applying sanctions for advancement of a legal argument.

Sanctions for incorrect legal judgment are likely to fall, as they should, on the lawyer.[35] Over-application of such sanctions may stifle legal creativity. From fear of economic loss and injury to reputation, many lawyers will decline to represent clients with novel or disfavored claims. Thus, the pressure at the boundary of existing law that is responsible for the development of legal doctrine may cease to exist.

Yet this pressure must exist if a lawyer is to properly serve his client. Although driven back from the courts by potential sanctions, lawyers are urged forward by ethical considerations. While stringent application of § 8.01-271.1 may discourage some borderline factual and legal assertions; EC 7-3 encourages a lawyer, in his role as advocate, to "resolve in favor of his client doubts as to the bounds of the law."[36] Courts must also be wary of applying the wisdom of hindsight when examining pleadings. Discovery may prove invalid a claim that

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[32] *See* SUBCOMMITTEE REPORT at 16-17.

[33] *Id.*

[34] *See, e.g.*, Rules of the Virginia Supreme Court, Pt. 6, § II, EC 7-5 (1987).

[35] *See* Blake v. National Casualty Co., 607 F. Supp. 189, 193 (C.D. Cal. 1984).

[36] Rules of the Virginia Supreme Court, Pt. 6, § II, EC 7-3 (1987).

seemed well grounded in fact when filed. An attorney in this predicament should voluntarily nonsuit,[37] but even that won't shield him from sanctions. The provision focuses on the signing of a groundless pleading, not the continuous wrong of pressing an ill-founded claim. The court should examine whether at the time of signing[38] reasonable inquiry would have shown the pleading or motion to be groundless (or that the lawyer continued to pursue it after discovering it was groundless).

This inquiry requires particular restraint on the part of judges in the context of the "grounded in fact" requirement. Neither lawyers nor judges can determine the sufficiency of alleged facts without examining the plausibility of legal arguments that organize them into a claim.[39] A set of facts, while insufficient under existing law, may be adequate when coupled with a plausible argument for a change in the law.[40] Before courts recognized the doctrine of *res ipse loquitur*, a plaintiff had to make a direct showing of causation to recover from negligence. Since the adoption of the doctrine, it is only necessary to show that the instrumentality of the harm was in the defendant's control.[41]

2. *The Lawyer-Client Relationship.* Candid, open communication between lawyer and client is in best interest of the lawyer, the client, and the system as a whole. Among the obvious benefits from a policy of candor is the reduction of frivolous litigation. As previously noted, a lawyer should advise his client when a claim stands little chance of success.[42] Conversely, a client should apprise his lawyer of all relevant facts, even if they are unfavorable to his claim. Such communication should reduce the number of groundless actions filed.

Aggressive application of sanctions can damage the lawyer-client relationship and stifle such candor. The sanction provision allows apportionment of sanctions between lawyer and client. A lawyer being sanctioned for pressing a novel, yet potentially successful claim could conceivably avoid sanctions by showing that he advised the client against proceeding. Similarly, a lawyer could likely avoid

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[37] *See* Va. Code Ann. § 8.01-380 (1984). This statute has been construed to confer upon a plaintiff the absolute right to one nonsuit. A first nonsuit under complying with this section cannot be blocked by opposing counsel nor the court. Nash v. Jewell, 227 Va. 230, 237 (1984).

[38] Or at the time of making of an oral motion, as provided for in Va. Code Ann. § 8.01-271.1 (Supp. 1987).

[39] *See Note, Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630, 637 (1987).

[40] *Id.*

[41] *Id.*

[42] *See* EC 7-5 *supra* note 34.

sanctions for a pleading not grounded in fact if it can be shown that he was misled by the client.

The preservation of client confidences and secrets is an important part of the attorney-client relationship. However, Virginia's Code of Professional Responsibility provides that a lawyer may reveal confidences or secrets necessary to defend himself against an accusation of wrongful conduct.[43] Thus, an attorney may expose client secrets or his own work product to shift sanctions to the client.

An erosion of trust will occur as clients learn about the potential use of their secrets by attorneys to avoid sanctions. As a result, they are likely to be less candid with their lawyer. Also, lawyers wishing to limit their liability for ill-founded legal arguments are likely to become more conservative in evaluating a client's claims. This may also limit client candor, encouraging clients to withhold information detrimental to their case. The tension created by over-applied sanctions would affect the relationship of attorney and client to the court as well. Courts could unwittingly discourage disfavored claims as lawyers seek to avoid sanctions. Sanctions may be deliberately employed by some courts to clear overloaded dockets, since the court may impose sanctions *sua sponte*. Courts abusing sanctions as a case management tool may effectively remove from client and attorney the decision of whether to test a claim in court, and vest it in the judge.

CONCLUSION

The stated goal of the legislature in providing for attorney sanctions is to improve public confidence in the court system.[44] With that goal in mind, courts should be wary of over-applying such sanctions. To do so would create tension between a lawyer's duty to zealously represent his client and his responsibility as an officer of the court. Many lawyers, fearing censure and economic loss, would not resolve that conflict in favor of the client. This may further erode public confidence in the attorney-client relationship, and thus of the court system as a whole.

To promote confidence in the system, courts must use sanctions as a scalpel, not as a bulldozer. Courts must use discretion in finding violations of the provision and fashioning punishment. A broad reading of the sanctions provision would create a disincentive to some legitimate advocacy and limit access to the courts. Therefore, courts must cut away frivolous claims and defenses carefully,

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[43] Rules of the Virginia Supreme Court, Pt. 6, § II, DR 4-101(C)(4) (1987).

[44] SUBCOMMITTEE REPORT, *supra note* 7, at 16.

or risk chilling the zealous representation that drives the adversary system, and ensures continued development of the law.