

May 1992

## An Attorney is Not a Rolls-Royce: The Comprehensive Forfeiture Act of 1984 and the Sixth Amendment Right to Effective Assistance of Counsel After *United States v. Monsanto*

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### Repository Citation

Karin Graham Horwatt, *An Attorney is Not a Rolls-Royce: The Comprehensive Forfeiture Act of 1984 and the Sixth Amendment Right to Effective Assistance of Counsel After United States v. Monsanto*, 1 Wm. & Mary Bill Rts. J. 145 (1992), <https://scholarship.law.wm.edu/wmborj/vol1/iss1/9>

**AN ATTORNEY IS NOT A ROLLS-ROYCE: THE COMPREHENSIVE  
FORFEITURE ACT OF 1984 AND THE SIXTH AMENDMENT RIGHT TO  
EFFECTIVE ASSISTANCE OF COUNSEL AFTER *UNITED STATES v.*  
*MONSANTO***

**I. INTRODUCTION. THE COMPREHENSIVE FORFEITURE ACT OF 1984:  
A HASTY RESPONSE TO PERSISTENT PROBLEMS**

The Comprehensive Forfeiture Act (CFA)<sup>1</sup> was intended to act as a doomsday weapon against organized criminal syndicates<sup>2</sup> and upper-level drug dealers, by permitting the Government to seize all illegally obtained assets from individuals convicted under Racketeer Influenced Criminal Organization (RICO)<sup>3</sup> or Continuing Criminal Enterprise (CCE)<sup>4</sup> and, eventually, to use those funds for further enforcement efforts. Forfeiture provisions are essential to law enforcement efforts against enterprise criminality, and the CFA as *drafted* presents no particular constitutional problem. However, as construed by *United States v. Monsanto*<sup>5</sup> and *Caplin & Drysdale, Chartered v. United States*,<sup>6</sup> the CFA is so broad as to deprive criminal defendants of core constitutional safeguards.

Although the CFA contains several provisions that are repugnant to the defense bar, the Act is more disturbing for what it does *not* contain than for what it does. On its face, the CFA makes all asset transfers between a suspect and a third party subject to forfeiture if the assets can be traced to an illegal source. No language in the CFA makes the transfer provisions more specific; consequently, whether attorneys' fees fall within the ambit of the Act cannot be discerned from any explicit language.<sup>7</sup> The scant legislative history of the statute is silent on the subject of attorneys' fees, and judicial attempts at

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<sup>1</sup> 18 U.S.C. § 1963; 21 U.S.C. § 853 (1984).

<sup>2</sup> The term "organized crime" means something specific. For example, one representative organized crime syndicate is "the Columbo Organized Crime Family of La Cosa Nostra[.] . . . a professional criminal organization which was one of the New York City constituent units of the American Mafia." Brief for the United States of America at 19, *United States v. Persico*, 832 F.2d 705 (2d Cir. 1987), *cert. denied*, 486 U.S. 1022 (1988). Operating "since at least the 1960s," the Columbo family is "a ruthless and enormously successful criminal business." *Id.* at 9. The Columbo Family operates "in New York City and other places around the country," *id.*, such as Florida and Las Vegas, *id.* at 10, and engages "in almost every imaginable sort of criminal conduct, from loansharking to dealing in narcotics to extortion to labor racketeering to theft to bribery." *Id.* at 9. The crimes run the gamut from "murder to vandalism." *Id.* The Columbo Family dominated at least eight different labor unions in New York City. Mafia Families have a "well defined organizational structure: A Boss, assisted by the Underboss and advised by the Consigliere, [leads] the Family. Below these three leaders [are] the Capos or captains, trusted and powerful officers, each of whom was in command of a 'crew' of 'soldiers.' The soldiers, often called 'made' men, were formally initiated members of the Family and of La Cosa Nostra . . . . To be eligible for initiation, a candidate was required to be Italian by ethnic background. The soldiers, in turn, presided over crews of their own, which were comprised of 'associates,' criminal colleagues who either were ineligible for, uninterested in, or still anticipating formal induction into the Mafia." *Id.* at 10-11. The information about the Columbo family was obtained through recorded conversations, testimony of former members and of victims, and surveillance photographs. *Id.* at 10. The defendants in *United States v. Persico* did not contest the existence of their organization. *Id.*

<sup>3</sup> 18 U.S.C. §§ 1962-1968 (1988).

<sup>4</sup> 21 U.S.C. § 848 (1988).

<sup>5</sup> 491 U.S. 600 (1989).

<sup>6</sup> 491 U.S. 617 (1989).

<sup>7</sup> "In determining the scope of a statute, we look first to its language." *United States v. Turkette*, 452 U.S. 576, 580 (1981).

interpretation split the circuits.<sup>8</sup> In *United States v. Monsanto*, the Supreme Court resolved the split by ruling that no asset transfers are preferred under the Act, regardless of the class of the recipient or the purpose of the transfer.<sup>9</sup>

This discussion explores the constitutional and ethical implications of the *Monsanto* decision as it relates to the CFA. Although the Court relied on legislative silence to conclude that attorneys' fees are forfeitable, legislative silence should not be interpreted as permitting forfeiture of those fees. First, legislative silence was an oversight that resulted from the political climate at the time of the CFA's drafting and cannot be regarded as demonstrative of legislative intent to encompass attorneys's fees within the terms of the CFA. Second, permitting forfeiture of attorneys' fees constitutes a direct violation of a defendant's Sixth Amendment right to effective assistance of counsel,<sup>10</sup> and is inconsistent with the constitutionality of the CFA. Furthermore, such a reading not only countermands the holdings of most of the circuit courts,<sup>11</sup> but also undermines ancient values which form the bedrock of Anglo-American criminal jurisprudence. These values include a tradition of hostility to criminal forfeitures and a policy of lenity in the case of ambiguous criminal statutes.

## II. THE LANGUAGE OF THE COMPREHENSIVE FORFEITURE ACT

### A. Political Background and Legislative Purpose

The CFA was passed when drug violence and the increasing power of professional criminal organizations were sharing national attention with shrinking domestic resources. Discussion of these issues was fed by the hot breeze of an approaching election. The resultant political climate of fear, frustration, and hysteria generated the CFA<sup>12</sup> and contributed to the sparsity of significant (recorded) legislative deliberation.

<sup>8</sup> See, e.g., *In re Forfeiture Hearing as to Caplin & Drysdale, Chartered*, 837 F.2d 637 (4th Cir. 1988) (en banc), *aff'd*, 491 U.S. 617 (1989); *United States v. Jones*, 837 F.2d 1332 (5th Cir. 1988), *rev'd on reh'g*, 877 F.2d 341 (1989); *United States v. Moya-Gomez*, 860 F.2d 706 (7th Cir. 1988); *United States v. Nichols*, 841 F.2d 1485 (10th Cir. 1988).

<sup>9</sup> *Monsanto*, 491 U.S. 600 (1989).

<sup>10</sup> That constitutional guarantee comes from the Sixth Amendment and it has two parts. The first part provides that a criminal defendant has the right to an attorney. But the guarantee goes one step further: the second part provides that the assistance of counsel must be *effective* assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). *But see* *Scott v. Illinois*, 440 U.S. 367 (1979) (the guarantee of effective assistance of counsel does not extend if the defendant is only to be fined).

<sup>11</sup> See *infra* note 25.

<sup>12</sup> The CFA was passed as part of the sprawling Comprehensive Crime Control Act of 1984. Continuing Appropriations, 1985 -- Comprehensive Crime Control Act of 1984; Joint Resolution Making Continuing Appropriations for the Fiscal Year 1985, and for Other Purposes. Pub. L. No. 98-473, 1984 U.S.C.A.N. (98 Stat.) 1976 - 2194. The Act covers bail (98 Stat. 1976), pretrial detention (98 Stat. 1985), sentencing reform (98 Stat. 1987), postsentence administration (98 Stat. 2001), miscellaneous sentencing provisions (98 Stat. 2010), establishment of the United States Sentencing Commission (98 Stat. 2017), fines (98 Stat. 2034), offenders with mental disease or defect (98 Stat. 2057), drug enforcement amendments (98 Stat. 2068), justice assistance (98 Stat. 2077), amendments to the Juvenile Justice and Delinquency Prevention Act of 1974 (98 Stat. 2107), surplus federal property used in corrections (98 Stat. 2129), labor racketeering amendments (98 Stat. 2131), Currency and Foreign Transactions Reporting Act Amendments (98 Stat. 2135), miscellaneous violent crime amendments (98 Stat. 2136), serious nonviolent offenses (98 Stat. 2143), procedural amendments (98 Stat. 2149), protection of witnesses (98 Stat. 2153), victim compensation and assistance (98 Stat. 2170), forfeiture of collateral profits of crime (98 Stat. 2175), trademark counterfeiting (98 Stat. 2178), credit card fraud (98 Stat. 2183), salaries of United States attorneys (98 Stat. 2184), armed career criminal and Criminal Justice Act revision (98 Stat. 2185), terrorism (98 Stat. 2186), and access devices and computers (98 Stat. 2190). The Act was intended to respond to "violent

Some form of a CFA is essential, and despite the hysteria in the delivery room, the CFA is a legitimate child. Experience has shown that traditional enforcement methods and sanctions have had minimal impact on CCE and RICO organizations, demonstrating a need for the CFA: "The drug trafficking laws produce unique problems at the post-conviction stage because the huge profits<sup>13</sup> resulting from these enterprises tend to dampen the prospects for general deterrence or rehabilitation."<sup>14</sup> Racketeering enterprises, like drug traffickers unassociated with organized crime, regard fines and jail sentences as just another cost of doing business.<sup>15</sup> Furthermore, jailed members of organized crime families are typically capable of running their organizations from prison<sup>16</sup> by using their virtually limitless financial resources to corrupt the necessary government officials.<sup>17</sup> The CFA broadened the scope of RICO and CCE forfeiture provisions in order to provide a more potent mechanism by which the Government could seize "all 'proceeds' of narcotics trafficking" and racketeering activity<sup>18</sup> and "begin hitting the criminal element where it really hurts — in the pocketbook."<sup>19</sup>

The rationale behind the CFA was that "the conviction of individual racketeers and drug dealers would be of only limited effectiveness if the economic power bases of criminal organizations or enterprises were left intact."<sup>20</sup> Consequently, the CFA contains controversial provisions that (1) vest title in the Government to all proceeds<sup>21</sup> that are the direct or indirect fruits of criminal conduct,<sup>22</sup> (2) void the legitimacy of transfers by defendants of illegally obtained assets, and (3) allow the Government to move for pre-trial or even pre-indictment freezing of defendants' assets. As a result of these drastic

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crime, drug-related crime, and organized crime." *Hearings before the Subcomm. on Criminal Law of the Comm. on the Judiciary, United States Senate*, 98th Cong., 1st Sess. 1 (May 4, 11, 18, 19, and 23, 1983) (opening statement of Sen. Paul Laxalt, Chairman, Subcommittee on Criminal Law).

<sup>13</sup> "Estimates indicate that over 700 lawful United States businesses have been infiltrated by organized crime. In Florida alone estimated real estate investments resulting from narcotics trafficking totalled \$1 billion in 1977 and 1978." William J. Hughes & Edward H. O'Connell, Jr., *In Personam (Criminal) Forfeiture and Federal Drug Felonies: An Expansion of a Harsh English Tradition into a Modern Dilemma*, 11 PEPP. L. REV. 613, 615 (1984). The infamous "Black Tuna" drug-smuggling organization successfully imported into the United States over "one million pounds of marijuana," *United States v. Phillips*, 664 F.2d 971, 985 (5th Cir. 1981), with gross receipts "calculated at a minimum of \$220 million [dollars] over a year and a half . . . [T]he evidence showed that numerous bank deposits going as high as one-half million dollars were made." Hughes & O'Connell, *supra*, at 616-17.

<sup>14</sup> Hughes & O'Connell, *supra* note 13, at 613.

<sup>15</sup> The CFA is necessary because "[t]he profits or proceeds which flow directly from criminal conduct should not continue to be available for criminal enterprises." *Forfeiture in Drug Cases: Hearings Before the Subcomm. on Crime of the Comm. on the Judiciary, House of Representatives on H.R. 2646, H.R. 4110, and H.R. 5371*, 97th Cong., 1st & 2d Sess. 2 (September 16, 1981 and March 9, 1982) [hereinafter *Hearings*].

<sup>16</sup> See, e.g., Brief for the United States of America at 5, *United States v. Persico*, 620 F. Supp. 836 (S.D.N.Y.), *aff'd*, 774 F.2d 30 (2d Cir. 1985) (No. 89-1204).

<sup>17</sup> See, e.g., *Persico* brief (No. 86-1468), *supra* note 2, at 90-104, and *Persico* brief (No. 89-1204), *supra* note 16, at 3.

<sup>18</sup> *Hearings*, *supra* note 15, at 26.

<sup>19</sup> *Id.* at 29.

<sup>20</sup> General Statement and Summary, Title III-Forfeiture, Pub. L. No. 98-473, 1984 U.S.C.C.A.N., (98 Stat.) 3374.

<sup>21</sup> The CFA defines "proceeds" as "Property subject to criminal forfeiture under this section includ[ing] — (1) real property, including things growing on, affixed to, and found in land; and (2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities." 21 U.S.C. § 853(b); 18 U.S.C. § 1963(b).

<sup>22</sup> Specifically, as enumerated in 21 U.S.C. § 848 and 18 U.S.C. § 1962.

provisions, the "Comprehensive Forfeiture Act of 1984 . . . will continue to result in many thorny legal issues to be considered by the courts."<sup>23</sup>

Two recent decisions by the Supreme Court further confuse the impenetrable thicket of unintended results of the CFA. In *Monsanto* and *Caplin & Drysdale*, the Court held that it was neither unconstitutional nor contrary to Congressional intent for the Government to freeze the assets of a criminal defendant prior to trial even if he intends to use those fees to pay his defense attorney.<sup>24</sup> Notably, the Court's holdings overruled those of the majority of the federal courts.<sup>25</sup>

### B. The Language of the Comprehensive Forfeiture Act

The CFA was codified in 1984 amendments to CCE<sup>26</sup>, and RICO.<sup>27</sup> The two provisions are the same and are construed identically.<sup>28</sup> Specifically, the CFA provides that "[a]ll right, title, and interest in property . . . vests in the United States upon the commission of the act giving rise to forfeiture under this section."<sup>29</sup> Not only does the CFA contain that relation-back provision, but CFA also provides:

Any [forfeitable] property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (l) [or, in the case of § 853, subsection (n) of this section] that he is a bona fide purchaser for value of such property who at the time of purchase

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<sup>23</sup> United States v. Ianniello, 644 F. Supp. 452, 453 (S.D.N.Y. 1985).

<sup>24</sup> United States v. Monsanto, 491 U.S. 600 (1989); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989).

<sup>25</sup> Morgan Cloud, *Forfeiting Defense Attorneys' Fees: Applying an Institutional Role Theory to Define Individual Constitutional Rights*, 1987 WIS. L. REV. 1, 26-27 (1987). See also *id.* at 33 n.154

Research for this Article uncovered a number of published opinions and unpublished orders in which courts have ruled upon fee forfeiture issues raised by the 1984 CFA amendments. All but one prohibited fee forfeitures, either holding that they violate the sixth amendment or construing the statutes to exempt these fees, in order to preserve the statutes from constitutional challenge. See [United States v. Harvey, 814 F.2d 905 (4th Cir. 1987); United States v. Estevez, 645 F. Supp. 869 (E.D. Wis. 1986), *aff'd sub nom.* Fontanez v. United States, 876 F.2d 106 (7th Cir. 1989); United States v. Ianniello, 644 F. Supp. 452 (S.D.N.Y. 1985). See also United States v. Bassett, 632 F. Supp. 1308 (D. Md. 1986); United States v. Reckmeyer, 631 F. Supp. 1191 (E.D. Va. 1986); United States v. Badalamenti, 614 F. Supp. 194 (S.D.N.Y. 1985); United States v. Rogers, 602 F. Supp. 1332 (D. Colo. 1985); United States v. Sobczak, S-Cr. 85-00033 (N.D. Ind. Sept. 6, 1985); United States v. Figueroa, 645 F. Supp. 453 (W.D. Pa. 1986); United States v. Marx, No. 86-Cr-110 (E.D. Wis. Aug. 6, 1986)].

*Id.*

<sup>26</sup> 21 U.S.C. §§ 848-858.

<sup>27</sup> 18 U.S.C. §§ 1961-1968.

<sup>28</sup> "18 U.S.C. § 1963 is the RICO forfeiture provision which was included in the Comprehensive Forfeiture Act of 1984 and is a mirror of 21 U.S.C. § 853. The cases discussing forfeiture of attorneys' fees under 18 U.S.C. § 1963 are therefore fully applicable to forfeitures under 21 U.S.C. § 853." United States v. Reckmeyer, 631 F. Supp. 1191, 1195 n.2 (E.D. Va. 1986). See also United States v. Rogers, 602 F. Supp. at 1347 (noting that *in personam* forfeiture provisions of RICO and the drug enforcement statute are almost identical).

<sup>29</sup> 18 U.S.C. § 1963(c); 21 U.S.C. § 853(c).

was reasonably without cause to believe that the property was subject to forfeiture under this section.<sup>30</sup>

The hearing provision mandates that, in order to defeat the forfeiture action, the third party must prove by a preponderance of the evidence that the legal interest in the property was superior to the defendant's interest upon commission of acts<sup>31</sup> or that "the petitioner is a bona fide purchaser . . . and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section."<sup>32</sup> Note that the third party has the burden of proving the legitimacy of the transfer. The Government need not prove the forfeitability of the asset.

The Government's burden is minimal.<sup>33</sup> In fact, the most controversial section of the CFA subjects an individual's assets to freezing upon or even before the filing of an indictment or information against him if the Government fears that a defendant's assets might be dissipated.<sup>34</sup> However, in this instance, the Government's burden is slightly higher: "Upon application of the United States, the court may enter a restraining order or injunction . . . or take any other action to preserve the availability of property described in subsection (a) [of both sections] for forfeiture under this section" upon "the filing of an indictment or information" as long as the Government meets its burden of proving that, upon conviction of violating RICO or CCE, defendant's assets that were derived from his drug-related offenses would be subject to forfeiture under the relevant sections of CFA.<sup>35</sup>

### III. INTERPRETING THE LANGUAGE OF THE STATUTE GIVEN THE SPARSE LEGISLATIVE HISTORY WITH WHICH TO ESTABLISH INTENT

#### A. *An Interpretation of the Language of the CFA*

The courts have developed rules for determining what statutes mean,<sup>36</sup> looking first to the language of the statute.<sup>37</sup> Should inspection of the plain language fail to resolve any "omission or ambiguity on the face of the statute, [the court] turn[s] to the legislative history."<sup>38</sup> Moreover, courts must construe criminal statutes narrowly, in favor of the defendant: "[A]mbiguities in a criminal statute should be resolved in favor of

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<sup>30</sup> 18 U.S.C. § 1963(c); 21 U.S.C. § 853(c).

<sup>31</sup> 18 U.S.C. § 1863(l)(6); 21 U.S.C. § 853(n)(6).

<sup>32</sup> 18 U.S.C. § 1963(m); 21 U.S.C. § 853(n).

<sup>33</sup> In order to freeze the assets of defendant prior to trial, the Government must make a motion to the Court "alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section." 18 U.S.C. § 1963 (d)(1)(A); 21 U.S.C. § 853 (e)(1)(A).

<sup>34</sup> To meet its burden and freeze the assets of a defendant prior to the issuance of an indictment, the Government must prove that "there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the [protective] order [freezing defendant's assets prior to the issuance of the indictment] will result" in dissipation of the assets *and* that "the need to preserve" the assets "outweighs the hardship on any party against whom the order is to be entered." 18 U.S.C. § 1963 (d)(1)(B)(i) and (ii); 21 U.S.C. § 853 (e)(1)(B)(i) and (ii).

<sup>35</sup> 18 U.S.C. § 1963(d); 21 U.S.C. § 853(e).

<sup>36</sup> *United States v. Rogers*, 602 F. Supp. 1332 (D. Colo. 1985).

<sup>37</sup> *Id.* at 1339.

<sup>38</sup> *Id.* (citing *Rocky Mountain Oil and Gas Ass'n v. Watt*, 696 F.2d 734, 745 (10th Cir. 1982); *United States v. Turkette*, 452 U.S. 576, 580 (1981)).

lenity."<sup>39</sup> Finally, "the statute should be interpreted to avoid requiring unnecessary analysis of constitutional issues."<sup>40</sup>

While the CFA does not specify how attorneys' fees should be handled and the legislative history is limited, the record does contain explicit statements that the purpose of the CFA was to take the profit out of crime.<sup>41</sup> For example, the Subcommittee on Crime indicated that it intended to "[d]evelop a piece of legislation which embodies the best of [the CFA's intended purposes] without doing violence to due process or other constitutional rights of defendants or innocent third parties."<sup>42</sup>

The third-party provisions were designed "[t]o permit forfeiture of a narcotics trafficker's assets even if he puts his illegal profits beyond the reach of domestic law enforcement."<sup>43</sup> Specifically, "the laundering of profits and proceeds to foreign depositories and through multiple front corporations was a major complaint of Federal investigators to members of the Narcotics Committee Staff,"<sup>44</sup> and so the bill was intended to extend the reach of RICO and CCE "to illegal gains that are transferred to third parties."<sup>45</sup> These concerns about money-laundering were echoed by the General Accounting Office (GAO).<sup>46</sup>

In light of the stated concerns of the sponsors of the bill, the committee members in the House, and officials of the executive branch, the legislative intent of the CFA with regard to attorneys' fees is plain. The record is full of affirmative expressions of legislative intent to prevent otherwise forfeitable assets from being subjected to sham transfers that put the funds out of the reach of the Government, but the neglect of the drafters of the CFA to put the words "attorneys' fees" somewhere in the record has caused considerable perplexity in the courts.

### *B. Judicial Interpretation of Legislative Silence.*

The circuit split was resolved during the Supreme Court's October 1988 term in *United States v. Monsanto*<sup>47</sup> and *Caplin & Drysdale, Chartered v. United States*.<sup>48</sup> In *Monsanto*, a criminal defendant raised a challenge to the CFA under two theories. First, Monsanto alleged that assets used to pay an attorney did not fall within the ambit of CFA. Second, Monsanto asserted that even if CFA *did* apply to attorneys' fees, the pretrial freezing of assets earmarked for attorneys' fees was unconstitutional under the Fifth Amendment Due Process Clause and under the Sixth Amendment right<sup>49</sup> to counsel of

<sup>39</sup> *Id.* (citing *United States v. O'Brien*, 686 F.2d 850, 853 (10th Cir. 1982); *Bifulco v. United States*, 447 U.S. 381, 387 (1980)). See also *Rewis v. United States*, 401 U.S. 808, 812 (1971); *Bell v. United States*, 349 U.S. 81, 83 (1955).

<sup>40</sup> *Rogers*, 602 F. Supp. at 1339 (citing *Siler v. Louisville & Nashville R. Co.*, 213 U.S. 175, 193 (1909)).

<sup>41</sup> "[F]undamental principles need to be kept in mind. . . . First, the profits or proceeds which flow directly from criminal conduct should not continue to be available for criminal enterprises." *Hearings, supra* note 14, at 2.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 26.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 38.

<sup>47</sup> 491 U.S. 600 (1989).

<sup>48</sup> 491 U.S. 617 (1989).

<sup>49</sup> See *Wheat v. United States*, 486 U.S. 153 (1988).

one's choice.<sup>50</sup> The *Monsanto* opinion focused on statutory analysis and only skirted the thicket of constitutional issues growing from the prospect of forfeiture of attorneys' fees. On the same day, the Court untangled (and then dismissed) those issues in *Caplin & Drysdale*.<sup>51</sup>

The Court in *Monsanto* noted the Supreme Court tradition of construing statutes so as to avoid constitutional issues.<sup>52</sup> Nevertheless, the Court ignored a fair reading of the CFA that would avoid constitutional issues and instead held that the CFA unambiguously reached attorneys' fees, noting that the purpose of CFA was to preserve the availability of property for forfeiture.<sup>53</sup> The Court dismissed the Fourth Amendment Due Process concerns, stating that "it would be odd to conclude that the Government may not restrain property . . . based on a finding of probable cause, when we have held that (under appropriate circumstances), the Government may restrain *persons* where there is a finding of probable cause to believe that the accused has committed a serious offense."<sup>54</sup>

Nevertheless, the majority of federal courts declined to allow the forfeiture of assets intended to pay defense attorneys for services rendered in criminal proceedings because they perceived untenable constitutional and ethical consequences from such a reading. These courts construed the forfeiture amendments as follows:

[The amendments apply to third-party transfers] only to claim property included in schemes designed to frustrate law enforcement. As a result, these courts have generally agreed that "it is evident that bona fide attorney's fees paid to defense counsel . . . were not intended to be forfeitable by Congress, for it cannot

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<sup>50</sup> *Monsanto*, 491 U.S. at 604, 614.

<sup>51</sup> [T]he majority pauses hardly long enough to acknowledge "the Sixth Amendment's protection of one's right to retain counsel of his choosing," let alone to explore its "full extent." Instead, it moves rapidly from the observation that "a defendant may not insist on representation by an attorney he cannot afford," to the conclusion that the Government is free to deem the defendant indigent by declaring his assets "tainted" by criminal activity the Government has yet to prove.

*Caplin & Drysdale*, 491 U.S. at 643 (Blackmun, J., dissenting) (citations omitted).

<sup>52</sup> *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979).

<sup>53</sup> *Monsanto*, 491 U.S. at 609 n.8.

<sup>54</sup> *Id.* at 616 (citing *United States v. Salerno*, 481 U.S. 739 (1987)). The Court's analysis here is a bit specious. Any court-imposed restrictions upon a criminal defendant prior to trial are reflections of the court's assessment of the defendant's innocence and present disruptions of the defendant's life; however, the difference between *Salerno* detentions and *Monsanto* asset seizures is greater than the obvious distinction between a human being and his property. They go to the nature of the available substantive and procedural safeguards, the degree of harm to the defendant, the availability of alternative measures to effectuate the Government's purpose, and the remedies available to a wronged defendant.

[Pursuant to 18 U.S.C. § 3142 (f), defendant] may request the presence of counsel at the detention hearing, he may testify and present witnesses on his behalf, as well as proffer evidence, and he may cross-examine other witnesses appearing at the hearing. If the judicial officer finds that no conditions of pretrial release can reasonably assure the safety of other persons and the community, he must state his findings of fact in writing § 3142; and support his conclusion with "clear and convincing evidence," § 3142 (f).

*United States v. Salerno*, 481 U.S. at 742.



be said that such fees were paid as part of an artifice or sham to avoid forfeiture."<sup>55</sup>

Other courts, however, reasoned that assets intended to pay attorneys' fees were no different than any other kind of assets and hence were forfeitable under CFA: "The clear terms of the statute subject a defendant's assets to forfeiture without regard to whether he intends to use them to pay an attorney."<sup>56</sup>

When interpreting the CFA, a court's ruling on whether assets earmarked to pay the fees of a defense attorney are forfeitable usually hinges on whether the court adheres to the fiction that the payment of attorneys' fees is no different from any other kind of asset transfer. For example, in *United States v. Payden*<sup>57</sup>, Judge Edelstein argued that if the CFA was intended to prevent the racketeer from obtaining "a Rolls-Royce with the fruits of a crime, he cannot be permitted to obtain the services of the Rolls-Royce of attorneys from these same tainted funds."<sup>58</sup> Similarly, the Court in *Monsanto* acknowledged respondent's contention:

[T]he legislative history is "silent" on this question, and . . . the House and Senate debates fail to discuss this prospect.<sup>59</sup> But this proves nothing: the legislative history and congressional debates are similarly silent on the use of forfeitable assets to pay stockbroker's fees, laundry bills, or country club memberships; no one could credibly argue that, as a result, assets to be used for these purposes are similarly exempt from the statute's definition of forfeitable property. The fact that the forfeiture provision reaches assets that could be used to pay attorney's fees, even though it contains no express provisions to this effect, "'does not demonstrate ambiguity'" in the statute: "'It demonstrates breadth.'"<sup>60</sup>

Those who argue that attorneys' fees do not fall within the ambit of the CFA contend that the *Monsanto* reading violates "a fundamental principle of statutory interpretation that in deciding among possible interpretations of a statute, the court must select an interpretation that appears to be consistent with the constitutionality of the statute."<sup>61</sup> These opponents of the Court's ruling argue that the contested reading results in an application of the CFA that "chills the attorney-client relationship, deprives the

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<sup>55</sup> Cloud, *supra* note 25, at 29. (quoting *United States v. Ianniello*, 644 F. Supp. 452, 455-56 (S.D.N.Y. 1985)).

<sup>56</sup> *In re Forfeiture Hearing as to Caplin & Drysdale, Chartered*, 837 F.2d 637, 641 (4th Cir. 1988), *aff'd* 491 U.S. 617 (1989).

<sup>57</sup> 605 F. Supp. 839 (S.D.N.Y. 1985), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985).

<sup>58</sup> *Payden*, 605 F. Supp. at 850 n.14.

<sup>59</sup> *I.e.*, forfeiture of attorneys' fees.

<sup>60</sup> *United States v. Monsanto*, 491 U.S. at 608-09 (1989) (citing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499, (1985) (quoting *Haroco, Inc. v. American Nat. Bank & Trust Co. of Chicago*, 747 F.2d 384, 398 (7th Cir. 1984))).

<sup>61</sup> *United States v. Ianniello*, 644 F. Supp. 452, 456 (S.D.N.Y. 1985).

accused of counsel of their choice, and forces RICO defendants to operate without a lawyer at the early stages of an investigation — all in derogation of the Sixth Amendment<sup>62</sup> right to counsel."<sup>63</sup>

On the other hand, proponents of the Court's decision in *Monsanto*, such as Professor Kathleen Brickey, argue that, "While this right-to-counsel claim may appeal to some innate sense of fairness, as a constitutional challenge it is seriously flawed."<sup>64</sup> Brickey analogizes the efforts of a RICO defendant to pay his attorney with tainted assets to those of a bank robber who attempts to pay his attorney with bait money stained red, and characterizes both transfers as money-laundering.<sup>65</sup> "Simply put, neither the client's [S]ixth Amendment right to counsel nor the attorney's privilege to practice law confers a license to steal."<sup>66</sup> Furthermore, "claims of ineffective lawyering are generally adjudicated after the attorney has had an opportunity to represent the client, not before."<sup>67</sup>

A common concern among law-enforcement agencies is that defense counsel in RICO actions are so close to the organized crime families that they themselves are *de facto* members. Hence, some policymakers favor forfeiture provisions not because they think that transactions between attorney and client are indistinguishable from all other transactions, but because they are convinced that the attorneys in RICO and CCE actions are frequently indistinguishable from the defendants. However, a reading of the CFA that did not include bona fide attorneys' fees within its ambit would still permit the invalidation of sham transfers between a defendant and his attorney; consequently, the CFA would be effective against "mouthpieces" when their representation was just an excuse to sequester assets for the defendants. The natural next step is a formulation of a standard for determining when attorneys' fees are bona fide.

Meanwhile, an analysis favoring forfeiture of bona fide attorneys' fees is "constitutionally inadequate because it fails to accommodate or protect Sixth Amendment interests during critical pretrial stages of a prosecution when they are most significant."<sup>68</sup> The Sixth Amendment right to counsel attaches "during perhaps the most critical period of the proceedings[,] . . . from the time of their arraignment until the beginning of their trial, when consultation, thorough investigation and preparation [are] vitally important, the defendants [are] . . . as much entitled to such aid . . . as at the trial itself."<sup>69</sup> "Attempting to adjudicate defendant's Sixth Amendment claims after trial 'may affect the outcome of individual defendants' cases in ways that escape meaningful later review.'"<sup>70</sup>

Even if remedies for Sixth Amendment violations could somehow be guaranteed, advocates of attorney-fee forfeiture miss the point — assets destined to pay bona fide attorneys' fees *are* different from other assets. The difference is that the relationship

<sup>62</sup> The relevant portion of the Sixth Amendment to the United States Constitution provides that: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

<sup>63</sup> Kathleen F. Brickey, *This Right-to-Counsel Claim Is Illusory*, LEGAL TIMES, Apr. 17, 1989, at 23.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> "To prevail on an ineffective-assistance claim, the defendant must show both deficient performance and prejudicial effect. Those issues cannot be resolved before the trial." *Id.*

<sup>68</sup> Cloud, *supra* note 25, at 41.

<sup>69</sup> *Powell v. Alabama*, 287 U.S. 45, 57 (1932).

<sup>70</sup> "And to assess the impact of a conflict of interest on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible." Cloud, *supra* note 25, at 41. See also *Holloway v. Arkansas*, 435 U.S. 475, 491 (1978).

between a criminal defense attorney and his client is afforded constitutional protections which are substantially eroded by the CFA's potential impact on the transactions between the parties.

Practically speaking, the relationship between an attorney and a client is not comparable to that between a consumer and a Rolls-Royce salesman; the relationship is more analogous to that between a physician and his patient.<sup>71</sup> (Indeed, the CFA has been interpreted to provide an exception for "necessities in life."<sup>72</sup>) Imagine, in that context, a situation wherein a physician reasonably fears that his fee might be subject to confiscation, or that he might trigger the operation of certain regulations that would force him to report certain illnesses to his patient's employer. We would be outraged if physicians could no longer adequately care for grievously ill patients because they legitimately feared that they might not be compensated, or if they discouraged such patients from choosing certain kinds of treatments so that costs might be kept down, or if patients could no longer communicate enough about their conditions for doctors to make accurate diagnoses because of legitimate fears that the disclosures might be available to third parties.<sup>73</sup> If our Rolls-Royce salesman complained of forced disclosures we would be nonplussed, but physicians who attempted to defend their financially motivated responses to a CFA-like provision would be accused of preserving their bankrolls at the expense of providing good care.

In *United States v. Ianniello*,<sup>74</sup> Judge Motley observed that § 1963 on its face "refers only to property or assets transferred to third parties in general" and noted that "[t]he scant legislative history is devoid of any explicit reference as to whether or not attorneys' fees are forfeitable."<sup>75</sup> Judge Motley pointed out that what legislative history exists, however, makes it clear that the third-party provisions in the CFA were intended to prevent sham transfers or money laundering:

[T]he Senate Report states that "[t]he provision [*i.e.*, § 1963(m)] should be construed to deny relief to third parties acting as nominees of the defendant or who have knowingly engaged in sham or fraudulent transactions. The standard for relief reflects the

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<sup>71</sup> Some may argue that the analogy is flawed because the patient has incurred no moral culpability, whereas the client is at least *suspected* of moral culpability. However, it can be seen that moral culpability often can be attached to a medical patient with more certainty than to a criminal defendant: Some of the worst diseases are caused or exacerbated by the conduct of the sufferer, whereas the moral culpability of a criminal defendant cannot be determined until the jury comes back. In the meantime, when encountered by a lung cancer patient who is a two-pack-a-day smoker or a heart attack victim who loves fried food, few are prepared to put those patients on a kind of "moral culpability scale" and then prescribe "permissible" levels of suffering based upon that scale. We should be just as reluctant to prescribe "permissible" levels of abuse allowed upon a criminal defendant — especially where, as here, the challenged conduct affects the outcome of the very proceeding that is to *determine the existence* of moral culpability. The analogy is sound.

<sup>72</sup> An attorney is a "necessity in life." *United States v. Ianniello*, 644 F. Supp. 452, 459 (S.D.N.Y. 1985).

<sup>73</sup> Actually, regarding a situation wherein the physician might be required to disclose details of his patient's condition to a third party, the analogy is not precise, because a prosecutor's office does not correspond to the HMO, it corresponds to the disease.

<sup>74</sup> *Ianniello*, 644 F. Supp. at 455 (citing 18 U.S.C. § 1963(c) (1988)). Judge Motley also points out that the post-conviction hearing pursuant to 18 U.S.C. § 1963(m) also makes no mention of attorneys' fees.

*Id.*

<sup>75</sup> *Id.*

principles concerning voiding of transfers set out in 18 U.S.C. § 1963(c) as amended by the Bill.<sup>76</sup>

The court focused, therefore, on the nature of the transaction between attorney and client, and concluded that "it is evident that bona fide attorneys' fees paid to defense counsel who serve the defendant's needs within our adversary system were not intended to be forfeitable by Congress, for it cannot be said that such fees were paid as part of an artifice or sham to avoid forfeiture."<sup>77</sup>

IV. REGARDLESS OF LEGISLATIVE INTENT, PERMITTING FORFEITURE OF ATTORNEY'S FEES  
PURSUANT TO THE COMPREHENSIVE FORFEITURE ACT DIRECTLY AND INDIRECTLY  
CONSTITUTES  
A VIOLATION OF THE SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF  
COUNSEL

A. Statutory Construction and the Sixth Amendment

Because of the epidemic of silence in the CFA itself and in its legislative history regarding whose services fall within its ambit, an interpretation of the CFA permitting forfeiture of assets intended to pay defense attorneys would not be facially impossible. On the other hand, such a reading would be inconsistent with what legislative intent does exist in the record and with the judicial rule that statutes must be read so as to be constitutional.<sup>78</sup>

The CFA threatens a constitutional safeguard that forms the bedrock for our adversary criminal justice system — the Sixth Amendment right to counsel.<sup>79</sup> The attorney-client relationship is accorded such deference in this context that the Supreme Court has held that the Sixth Amendment gives a qualified<sup>80</sup> right to counsel of the defendant's choice.<sup>81</sup> The right to effective assistance of counsel and of counsel of one's choice are given high degrees of protection: "[C]ourts should scrutinize infringements on [the right to counsel of choice], permitting interference"<sup>82</sup> only for "a compelling need to assure the 'prompt, effective and efficient administration of justice.'"<sup>83</sup> Meanwhile, the only governmental interest articulated in favor of forfeiture of assets intended to be transferred to third parties is in the deterrence of sham transfers.<sup>84</sup>

<sup>76</sup> *Id.* (citing S.REP. NO. 473, 98th Cong., 2d Sess. 209 n. 47 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3392).

<sup>77</sup> *Id.* at 455-56 (emphasis added).

<sup>78</sup> *See id.* at 456.

<sup>79</sup> *Id.* at 456 (citing *Powell v. Alabama*, 287 U.S. 45, 66 (1932)); *United States v. Mohabir*, 624 F.2d 1140, 1149 (2d Cir. 1980). The right to obtain assistance of counsel at *all crucial stages* is essential if both the symbol and reality of a fair trial are to be preserved. *Id.* (emphasis added).

<sup>80</sup> *See, e.g.,* *In re Grand Jury Subpoena served upon John Doe, Esq.*, 759 F.2d 968, 972 (2d Cir. 1985), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1986); *United States v. Flanagan*, 679 F.2d 1072, 1075 (3d Cir. 1982); *Davis v. Stamler*, 650 F.2d 477, 479 (3d Cir. 1981).

<sup>81</sup> *Ianniello*, 644 F. Supp. at 456 (citing *United States v. Burton*, 584 F.2d 485, 489 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979)).

<sup>82</sup> Thomas C. Viles, *Criminal Procedure IV: Attorney's Fees Forfeiture and Subpoenaing Defendants' Attorneys*, 1 ANN. SURV. AM. L. 335, 345 (1986).

<sup>83</sup> *Ianniello*, 644 F. Supp. at 456 (quoting *United States v. Burton*, 584 F.2d 485, 489 (D.C. Cir. 1978), *cert. denied* 439 U.S. 1069 (1979)).

<sup>84</sup> Viles, *supra* note 81, at 345.

The CFA was judicially interpreted for the first time in *United States v. Rogers*.<sup>85</sup> The Court ruled that "attorneys' fees received 'in return for services legitimately rendered' are transferred at 'arm's length,' and therefore of no interest to the government under the CFA."<sup>86</sup> Thus, freezing a defendant's assets when he intends to use them to pay bona fide attorneys' fees is patently unreasonable. "Statutory procedures or prosecutorial power also are not permitted to *unreasonably* abridge the right to counsel of choice. It is evident that the forfeiture of attorneys' fees would impinge upon defendant's right to counsel of choice."<sup>87</sup>

In addition to the risk of losing their fees,<sup>88</sup> attorneys face numerous and severe ethical impediments, which are discussed below. These obstacles could make attorneys reluctant to take a defendant's case, infringing on a defendant's right to counsel. The right to counsel of choice "is of constitutional dimensions. Thus, any potential infringement of this right must only be as a last resort."<sup>89</sup>

On the other hand, counsel of choice is available only if a defendant can afford him. Proponents of permitting the forfeiture of attorneys' fees under the CFA argue that a RICO defendant whose assets are frozen or forfeited under the CFA cannot afford to pick his counsel because the illegally obtained assets do not belong to the defendant in the first place.<sup>90</sup> He is in the same position as the indigent defendant. Just as an indigent defendant could not rob a bank and then pay his attorney with the money, a RICO or CCE defendant should not be permitted to sell drugs or commit extortion and then use that money to pay for his attorney's services.

But the two situations contain important differences. First, the problem in a RICO or CCE forfeiture action is in the separation of illicitly obtained funds from legitimate funds, and the fact that frequently the assets have become several times removed from their allegedly illegal sources. If the money is stained red we know it belongs to the bank, but otherwise, fungible assets are nonpossessory on their face. Furthermore, a defendant is not entitled to retain the Rolls-Royce of the criminal defense bar if the defendant lacks the necessary assets. However, the wealthy RICO or CCE defendant facing a CFA

<sup>85</sup> 602 F. Supp. 1332 (D. Colo. 1985).

<sup>86</sup> Viles, *supra* note 81, at 345 (quoting *United States v. Rogers*, 602 F. Supp. 1332, 1348-49 (D. Colo. 1985)).

<sup>87</sup> *Ianniello*, 644 F. Supp. at 456 (emphasis added).

<sup>88</sup> Considering the fact that RICO cases are often very complex and can last for several years, the fees generated in such cases are bound to be quite high. Viles, *supra* note 81, at 342 n.53.

<sup>89</sup> *In re Grand Jury Subpoena served upon John Doe, Esq.*, 759 F.2d 968, 975 (2d Cir. 1985), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1986). See also *Powell v. Alabama*, 287 U.S. 45, 53 (1932).

<sup>90</sup> Supporting this interpretation is the equitable doctrine of constructive trust.

Equitable notions of constructive trust will nullify transfers designed as an artifice or sham. As explained in Am. Jur.:

A constructive trust . . . is a trust by operation of law which arises contrary to intention and in invitum against one whom, by fraud, actual or constructive, by duress or abuse of confidence, by commission or wrong, or by any form of unconscionable conduct, artifice, concealment, or questionable means, or who in any way against equity and good conscience, either has obtained or holds the legal right to property which he ought not, in equity and good conscience, hold and enjoy.

*United States v. Rogers*, 602 F. Supp. 1332, 1342 (quoting 76 AM. JUR. 2d TRUSTS § 221 (1975)). On the other hand, this analogy applies only to sham transfers. It makes no mention of illegally obtained assets.

forfeiture proceeding lacks the funds to retain the counsel of his choice because of the *Government's* efforts.<sup>91</sup>

Such efforts, given the necessary judicial deference accorded the exercise of prosecutorial discretion,<sup>92</sup> have troubling consequences because the Government can choose which defendants to subject to forfeiture proceedings, and hence, which attorneys to target. Thus, the CFA (as interpreted in *Monsanto*) undermines the integrity of the adversary system.

Critics claim that permitting forfeiture of legitimate attorneys' fees provides the government with a negative and improper power to influence the defendant's choice of counsel. The power is negative because it allows the government to exclude the "best" private sector attorneys from RICO and CCE cases by "channeling" defendants away from them. In its rawest form, the channeling power would allow the government to prevent the most competent defense attorneys from handling these complex cases.<sup>93</sup>

In *Strickland v. Washington*,<sup>94</sup> the Supreme Court held that "the right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment."<sup>95</sup> The Court added that "'the right to counsel is the right to effective assistance of counsel.' Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense."<sup>96</sup> By holding the threat of a CFA forfeiture proceeding over the head of defense counsel, "the government would have the ability to deprive a defendant, not of some attorney, but of the lawyer the defendant wants most (and perhaps the one the government most fears)."<sup>97</sup>

In *Ianiello*, however, the court did not consider the counsel-of-choice deprivation question to be an important issue. The majority declined to discuss the right to an attorney of choice at length, because, "more importantly, forfeiture would result in an abridgement of [defendants'] right to [any] counsel,"<sup>98</sup> because under those circumstances "defendants in RICO actions would find it difficult, if not impossible, to secure representation."<sup>99</sup> The wealthy defendant would have to assert poverty in order to qualify for appointed counsel, but because he has assets, the wealthy defendant is unable to do so. "His problem is not inability to pay a legal fee but that lawyers will refuse to accept his retainer and will

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<sup>91</sup> If asset-freezing occurs before trial, conventional wisdom would have it that the presumption of innocence accorded to every defendant precludes us from assuming that the disputed funds were illegally obtained at all (this would be true of the bank robber's assets, as well). However, given *Salerno*, this presumption has been reduced to a mere standard of proof at trial. See discussion *infra* part VI.D.

<sup>92</sup> This includes the related prosecutorial imperviousness to allegations of abuse.

<sup>93</sup> Cloud, *supra* note 25, at 44.

<sup>94</sup> 466 U.S. 668 (1984).

<sup>95</sup> *Id.* at 685.

<sup>96</sup> *Id.* at 686 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)).

<sup>97</sup> Cloud, *supra* note 25, at 45.

<sup>98</sup> *United States v. Ianiello*, 644 F.Supp. 452, 456 (S.D.N.Y. 1985).

<sup>99</sup> *Id.* (citing *United States v. Badalamenti*, 614 F. Supp. 194, 197 (S.D.N.Y. 1985)).

refuse to represent him."<sup>100</sup> A fee forfeiture action would, therefore, effectively deny a RICO or CCE defendant the services of paid counsel. Furthermore, the courts in both *Ianniello* and *Badalamenti* observe that such a defendant could not lawfully obtain appointed counsel.<sup>101</sup>

Persons "financially unable to obtain adequate representation"<sup>102</sup> may be furnished appointed counsel under the Criminal Justice Act.<sup>103</sup> To obtain the services of appointed counsel under 18 U.S.C. § 3006A, a defendant must swear under oath to his financial inability to obtain counsel.<sup>104</sup> If he has funds to pay for an attorney, then he *cannot* swear that he is financially unable to obtain counsel.<sup>105</sup> Such a defendant is caught between a rock and a hard place: "He can get neither a paid lawyer, nor a free one."<sup>106</sup>

But even if our defendant somehow receives appointed counsel, he may not have won the battle; the "harsh reality is that appointed counsel is probably inadequate for lengthy and complex RICO and CCE cases. Public defender offices already lack the human and material resources necessary to battle the Justice Department in these cases."<sup>107</sup> The defense of a RICO case involves:

[T]he marshalling of facts and information of vast quantities perhaps constituting the whole of several worldwide business enterprises. The government brings to bear significant resources to prosecute these cases. Adequate defense of RICO cases generally requires representation during grand jury investigations lasting as long as two to three years. Counsel appointed ninety or one hundred and twenty days before trial is patently inadequate. It is not consistent with due process to create a situation which eliminates the adversary from the adversary process.<sup>108</sup>

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<sup>100</sup> *Badalamenti*, 614 F. Supp. at 197.

<sup>101</sup> *Ianniello*, 644 F. Supp. at 457; *Badalamenti*, 614 F. Supp. at 197.

<sup>102</sup> 18 U.S.C. § 3006A(a) (1988).

<sup>103</sup> 18 U.S.C. § 3006A (1988).

<sup>104</sup> This can be done either by affidavit or oral testimony. *Id.*

<sup>105</sup> "The Government's assertion that it would not contest such an appointment would not remedy the situation. The duty rests upon a judicial officer to determine whether a person is financially eligible for the appointment of counsel and not the United States Attorney's Office." *Ianniello*, 644 F. Supp. at 457.

<sup>106</sup> *United States v. Badalamenti*, 614 F. Supp. 194, 197 (S.D.N.Y. 1985).

<sup>107</sup> *Cloud*, *supra* note 25, at 47; *See United States v. Rogers*, 602 F. Supp. 1332, 1349 (D. Colo. 1985). The costs of mounting a defense of an indictment under RICO are far beyond the resources or expertise of the average federal public defender's office which is already over taxed. *Id.* Federal defenders agree with the conclusion that they lack the resources to represent RICO and CCE defendants. *See Forfeiture of Assets Intended for Use as Attorney's Fees: Hearing Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 228 (1986) (Statement of Edward Marek, Federal Defender N.D. Ohio and Federal Legislative Subcommittee, on Behalf of the Federal Public Defenders and Federal Community Defenders).

<sup>108</sup> *Rogers*, 602 F. Supp. at 1349-50.

Of course, it is conceivable that a RICO or CCE defendant could retain "[a] lawyer who was so foolish, ignorant, beholden or idealistic as to take the business. . . ."<sup>109</sup> Nevertheless, Sixth Amendment problems would remain.

Retained counsel confront an ethical obstacle course, but appointed counsel face a "more complex set of problems. [These arise] when federal defenders are unavailable and private counsel is appointed under the Criminal Justice Act."<sup>110</sup> In fact, appointed counsel "may be even less capable than full-time defenders' offices at mounting a defense in these difficult cases"<sup>111</sup> because the "minimal compensation awarded appointed counsel under the Criminal Justice Act"<sup>112</sup> virtually guarantees that the most competent attorneys will refuse appointment in complex criminal entity prosecutions brought under the RICO and CCE statutes.<sup>113</sup>

### *B. Ethical Impediments to Effective Assistance of Counsel*

In *Strickland v. Washington*,<sup>114</sup> the Supreme Court held that assistance of counsel for the purposes of the Sixth Amendment means *effective* assistance of counsel.<sup>115</sup> The effectiveness of counsel's representation is necessarily undermined by the countless ethical problems presented by the forfeiture action. This is true whether, at the time of counsel's retainer, the Government has already moved for pre-trial forfeiture of defendant's assets or whether the forfeiture action is merely a possibility.

To begin with, representing a CCE or RICO defendant is likely to constitute an ethical violation. Once the Government has initiated forfeiture proceedings, the attorney's retention of his fee depends on the acquittal of his client. Such an arrangement is a contingent fee for the purposes of DR 2-106(C), which provides that — regardless of the degree to which the fee *arrangements* comply with DR 2-106(C) — the *collection* of contingency fees in criminal cases violates the Model Code of Professional Responsibility (MCPR).<sup>116</sup>

<sup>109</sup> *Ianniello*, 614 F. Supp. at 196.

<sup>110</sup> "This may be necessary because the judicial district lacks a defender's office, or because real or potential conflicts of interest among multiple defendants require that a single public defenders' office may not represent them all" (citations omitted). *Cloud*, *supra* note 25, at 48.

<sup>111</sup> *Id.*

<sup>112</sup> The CJA commands that "compensation shall not exceed \$60 per hour for time in court and \$40 per hour for time 'reasonably expended out of court.'" 18 U.S.C. § 3006A(d)(1) (1988). The statute also limits the total compensation per attorney in a case to \$3,500 for felony cases and \$1,000 for misdemeanors. 18 U.S.C. § 3006A(d)(2) (1988). Concededly, the CJA permits waiver of these maximum amounts in complex cases, 18 U.S.C. § 3006A(d)(3) (1988), and also authorizes the court to authorize payment for "investigative, expert, or other services necessary for an adequate defense," 18 U.S.C. § 3006A(e)(1) (1988), but limits any payment to a maximum of \$300. 18 U.S.C. §§ 3006A(e)(1), (3). "These amounts are facially inadequate to pay the costs of the defense of a complex case." *See United States v. Estevez*, 645 F. Supp. 869, 871 (E.D. Wis. 1986). Fees above the statutory limit can be paid; realistically, however, the hourly rates paid are low, and the fee paid under the Act will in all probability not be adequate compensation for the defense. *Id.*; *Cloud*, *supra* note 25, at 48 n.229.

<sup>113</sup> *Cloud*, *supra* note 25, at 48.

<sup>114</sup> 466 U.S. 668 (1984).

<sup>115</sup> *Id.* at 686.

<sup>116</sup> The MODEL CODE OF PROFESSIONAL RESPONSIBILITY provides that "A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(C) (1981) [hereinafter *Code*].



Assuming that defense counsel ignores DR 2-106 in favor of EC 1-1,<sup>117</sup> he faces threats to the attorney-client privilege: "[I]f the attorney were to represent the defendant and the defendant were convicted, defense counsel, in challenging the forfeiture of the legal fee, would be required to establish that he had no reasonable cause to believe that the property was subject to forfeiture."<sup>118</sup> The evidence of such lack of knowledge would "necessitate the disclosure of privileged matter confided to counsel by his client."<sup>119</sup> Such disclosure would be necessary because the attorney would be required to discuss the activities of his client and to report the substance of conversations which are ordinarily privileged. The question the attorney would be required to answer is, "Where did your client get his money?" Would the attorney be expected to answer, "Well, ten percent of my fee came from a transaction wherein my client sold a kilogram of cocaine, but the rest of it is bona fide"?<sup>120</sup> An attorney who remained willfully ignorant of his client's activities would be compromising the quality of his representation. Thus, an attorney facing an 18 U.S.C. § 1963(m) proceeding would be required either to violate the attorney-client privilege<sup>121</sup> or to restrict "the free flow of information required between attorney and client for an adequate defense,"<sup>122</sup> thereby "depriving defendant of effective representation under the Sixth Amendment."<sup>123</sup>

<sup>117</sup> "A basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence. . . ." *Id.* at EC 1-1.

<sup>118</sup> *United States v. Ianniello*, 644 F. Supp. 452, 457 (S.D.N.Y. 1985), (citing 18 U.S.C. § 1963(m)).

<sup>119</sup> *Id.*

<sup>120</sup> Constitutional rights are afforded guilty defendants as well as innocent defendants. Furthermore, a defendant may disclose uncharged or undetected crimes to his attorney in the course of the representation.

<sup>121</sup> Ethical Canon 4 of the Code of Professional Responsibility provides that a "lawyer should preserve the confidences and secrets of a client." Disciplinary Rule 4-101 states in relevant part:

Preservation of Confidences and Secrets of a Client.

(A) 'Confidence' refers to information protected by the attorney-client privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the client has requested to be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

*Code, supra* note 116, at DR 4-101.

The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law . . . . Its purpose is to encourage full and frank communication between attorneys and their clients . . . . The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client."

*Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citing 8 John H. Wigmore, EVIDENCE § 2290 (McNaughton rev. 1961)). Effective representation "can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." *Id.* at 389 (citing *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888)). See also Howard J. Weintraub, *Forfeiture of Attorney's Fees Under the 1984 Comprehensive Crime Control Act*, 22 GA. ST. B.J. 67, 72 (1986).

<sup>122</sup> *Ianniello*, 644 F. Supp. at 457.

<sup>123</sup> *Id.*

Worse, the service of a subpoena on defense counsel challenging him to demonstrate the legitimacy of the source of funds might result in the use of counsel's testimony as evidence of the crimes charged against defendant. A lawyer facing such a subpoena might be forced to withdraw from representation of his client.<sup>124</sup> In *Badalamenti*, such a subpoena was served ten months after the return of the indictment "and six months after [counsel's] appearance in a case of gargantuan proportions."<sup>125</sup> In such a situation, counsel's "credibility would then be before the jury and these issues might become a distracting focus of the jury's attention."<sup>126</sup>

The attorney deciding to represent a defendant in a CCE or RICO case faces both severe economic consequences (and recall that the Government might seek forfeiture of his fee under the CFA as early as before the indictment or as late as after conviction) and potential sanctions for accepting a contingency fee in a criminal case. Meanwhile, the ethical difficulties undermining his effectiveness or his credibility<sup>127</sup> form a discouraging obstacle course.

Most of these pitfalls involve inevitable conflicts of interest between lawyer and client. Some of these traps catch only financially vulnerable or unethical counsel. For instance, "[d]efense counsel might seek to negotiate a guilty plea by his client, motivated, not by his client's best interests, but rather by his own desire to avoid forfeiture of his fee."<sup>128</sup> However, even an ethically unimpeachable attorney might attempt to minimize costs in situations where his options involve choosing between a high-risk strategy that, if successful, would serve the best interest of his client and an alternative that contained a lower risk but a less favorable outcome for the defendant. Such decisions are tough under the best of circumstances; but, the possibility of fee forfeiture presents an added pressure — to choose the most financially conservative option instead of the one best calculated to serve the client's interests, which would be a violation of the MCPR.<sup>129</sup> Furthermore, the MCPR requires counsel to exercise independent judgment on behalf of a client,<sup>130</sup> which, of course, involves avoiding acquisition of a financial interest in a criminal case.<sup>131</sup>

In *Ianniello* the court recognized:

[F]orfeiture of attorney's fees, or even the threat of such forfeiture, is of greater significance than forfeiture of one's Rolls-Royce. Forfeiture of the latter affects only one's property rights, while forfeiture, or the

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<sup>124</sup> The Disciplinary Rules require withdrawal under circumstances when "[i]t is apparent that [the attorney's] testimony is or may be prejudicial to his client." *Code, supra* note 114 DR 5-102(B). Of course, an exception provides that withdrawal is not required only if "the testimony [would] relate solely to the . . . value of legal services rendered in the case[.]" but it would not take a rocket scientist to figure out that counsel's testimony must exceed that scope. *Id.* at DR 5-102(A); DR 5-101(B)(3) (1981).

<sup>125</sup> *United States v. Badalamenti*, 614 F. Supp. 194, 198 (S.D.N.Y. 1985).

<sup>126</sup> *Id.* at 199. *See also*, *MacArthur v. Bank of New York*, 524 F. Supp. 1205, 1208 (S.D.N.Y. 1981) (noting that the bar is ill-served when an attorney's veracity becomes an issue in a case; lay observers especially might speculate whether counsel has compromised his integrity on the stand in order to prevail in the litigation).

<sup>127</sup> That is, before the jury. For instance, a jury might be tempted to believe that the attorney was motivated to secure the acquittal of his client only so as to avoid jeopardizing his fee, or "[m]embers of the jury might well resent the fee and see [defense counsel] as an unconscionable partner in the narcotics business." *Badalamenti*, 614 F. Supp. at 199.

<sup>128</sup> *United States v. Ianniello*, 644 F. Supp. 452, 457 (S.D.N.Y. 1985).

<sup>129</sup> *Code, supra* note 116 at DR 5-103(A) and EC 5-1, 2, 3, 7.

<sup>130</sup> *Id.* at DR 5-101.

<sup>131</sup> *Id.* at DR 5-103.

possibility of forfeiture, of attorney's fees affects, in a very material way, defendant's preparation of his legal defense and the determination of his guilt or innocence.<sup>132</sup>

This is especially true in complicated RICO prosecutions, in which the defendant will likely retain counsel as soon as he learns that he is under investigation, and in which counsel may spend months preparing for trial because of the massive amount of information and the number and complexity of the issues involved.<sup>133</sup>

#### V. THE POLITICAL CLIMATE PRECEDING THE COMPREHENSIVE FORFEITURE ACT CAUSED BOTH THE ADOPTION OF THE ACT AND THE PAUCITY OF ITS LEGISLATIVE HISTORY

Legitimate (and hysterical) fears of rising drug use and drug-related violence,<sup>134</sup> combined with an increasing alarm at the growing presence of organized crime, created a volatile political climate. Panic resulted in the War on Drugs and the CFA:

In the eleventh hour of the 98th Congress, the RICO forfeiture provisions were amended to add more teeth to government attacks on racketeering and to clear up legal disputes among the circuit courts. The Comprehensive Crime Control Act of 1984, which included the Comprehensive Forfeiture Act of 1984, amending RICO, was so hastily passed that not all of the Act's pages were included in the copy provided the President for his signature on October 12, 1985. The exact contents of the Act were so uncertain that portions of the bill not enacted were included in the United States Code Annotated advance sheet of the law.<sup>135</sup>

Predictably, "perhaps because of the issue of 'crime in the streets' that was given prominence during the 1984 presidential campaign . . . [the Act was] buried in an appropriations measure as a vehicle for enactment."<sup>136</sup> The hastiness with which CFA was drafted precludes us from reading too much into the sparse legislative history.

#### A. As Drug Use and Drug-Related Violence Increase, the Influence of Organized Crime Widens

"The Federal Government has been trying to do something about illegal narcotics since at least 1887, when Congress adopted restrictions on opium imports. But drug sales have climbed steadily, soaring in 1980 to an estimated \$79 billion."<sup>137</sup> Just prior to the passage of the CFA, the popular perception was that the immense profits generated by the

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<sup>132</sup> *Ianniello*, 644 F. Supp. at 457-58. See also *United States v. Ray*, 731 F.2d 1361, 1366 (9th Cir. 1984).

<sup>133</sup> *Ianniello*, 644 F. Supp. at 458.

<sup>134</sup> "Of the 438 homicides committed in the District of Columbia [in 1989], more than half were drug-related." Lloyd Shearer, *Intelligence Report*, *PARADE MAG.*, Feb. 25, 1990, at 10.

<sup>135</sup> *United States v. Rogers*, 602 F. Supp. 1332, 1336 (D. Colo. 1985).

<sup>136</sup> B. JAMES GEORGE, JR., *THE COMPREHENSIVE CRIME CONTROL ACT OF 1984* (1986).

<sup>137</sup> Michael Wright et al., *Administration Plans a Wider War on Drugs*, *N.Y. TIMES*, Oct. 17, 1982, § 4, at 4.

drug trade<sup>138</sup> had thrown drug dealing and drug abuse out of control.<sup>139</sup> In fact, a common metaphor for the drug crisis was "tidal wave."<sup>140</sup>

A related article in the *Christian Science Monitor* in 1983, reported:

A new tidal wave of illicit heroin, cocaine, marijuana, and manmade "uppers," "downers," sedative-hypnotics and hallucinatory drugs has gathered swift force in the last two years and is flooding across the United States, Western Europe, and much of the Third World.

Altogether it adds up to the worst drug crisis the world has yet faced, according to experts, doctors, diplomats, social workers, and politicians in producing and consuming countries contacted by this newspaper in the last three months.<sup>141</sup>

The perception that the drug trade was drowning the country existed at the popular level as well as in Government. Indeed, the President's 1982 "antidrug initiative was not imposed from above upon an indifferent public but drew energy from a broad base of political support."<sup>142</sup>

Furthermore, the President had the support of Congress as well as the executive branch. "[T]he Attorney General's Task Force on Violent Crime had recommended 'an unequivocal commitment to combatting international and domestic drug traffic.'"<sup>143</sup> "[T]wenty-eight Senators had banded together in the Drug Enforcement Caucus in order to 'establish drug enforcement as a Senate priority.' In addition, the House Select Committee on Narcotics Abuse and Control had urged the President to 'declare war on drugs.'"<sup>144</sup>

<sup>138</sup> Estimated by the Government in 1987 to be as high as "\$80-100 billion in yearly revenues, \$30 billion of it from cocaine alone." Steven Wisotsky, *Introduction: In Search of a Breakthrough in the War on Drugs*, 11 NOVA L.J. 891, 898 (1987).

In 1985, NORML estimated that "marijuana is [the] largest United States cash crop, worth about \$14 billion per year." *Milestones in the War on Drugs*, 11 NOVA L.J. 1041, 1048 (1987). See GENERAL ACCOUNTING OFFICE, ASSET FORFEITURE—A SELDOM USED TOOL IN COMBATTING DRUG TRAFFICKING, April 10, 1981; see also *Forfeiture in Drug Cases: Hearings on H.R. 2646, H.R. 2910, H.R. 4110 and H.R. 5371 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 97th Cong., 1st and 2d. Sess. (1981) (statement of Edward S. G. Dennis, Jr., Chief of Narcotics Section, Criminal Division, U.S. Dep't of Justice).

<sup>139</sup> Former Rep. Lester Wolff, formerly chairman of the House Select Committee on Narcotics Abuse and Control, and currently chairman of the National Association for City Drug and Alcohol Coordination, "[told a news conference that] 'There are many shooting wars around the world today, but no shooting war is more important to the people of this country than the so-called "war on drugs.'" . . . He estimated cuts in federal drug programs at \$200 million in the past year, and said if they continue, 'It means we are in for a crime wave of a magnitude never before experienced.'" D'Vera Cohn, UNITED PRESS INT'L, (Washington, D.C.) June 11, 1982. See generally THE NAT'L NARCOTICS INTELLIGENCE CONSUMERS COMM'N, NARCOTICS INTELLIGENCE ESTIMATE (1983).

<sup>140</sup> The drug crisis is described as "a rapidly rising tide of drug abuse exacerbated by the pernicious effects of a drug trafficking parasite of international dimensions." Wisotsky, *supra* note 138, at 891. The preceding quotation not only indicates the public perception of the magnitude of the drug problem in the United States, but also demonstrates one of the most ghastly effects of the drug crisis: the overwhelming proliferation of mixed metaphors. See also, In Re Grand Jury Proceedings, 680 F.2d 1026, 1034 (5th Cir.1982).

<sup>141</sup> David K. Willis, *Stemming the Drug Tide*, CHRISTIAN SCI. MONITOR, Dec. 15, 1983, at 22.

<sup>142</sup> Wisotsky, *supra* note 138, at 893.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

Anti-drug activity of state agencies mirrored their federal counterparts. The Texas legislature proposed harsher penalties for possession of more than fifty pounds of marijuana — from the original maximum penalties of ten years in prison and a \$5000 fine to life in prison and a \$250,000 fine.<sup>145</sup> Most dramatically, the national and state militia became involved in what has traditionally been considered a domestic problem under the jurisdiction of municipal police forces. For example, in December 1982, the Adjutant General Carl Wallace said that the Tennessee National Guard had "a fleet of transport planes and 90 helicopters at the disposal of the governor if called upon for use in the war on illegal drug traffic."<sup>146</sup> In addition,

The Department of Defense provided pursuit planes, helicopters and other equipment to civilian enforcement agencies, while Navy "hawkeye" radar planes patrolled the coastal skies in search of smuggling aircraft and ships. The Coast Guard, receiving new cutters and more personnel, intensified its customary task of interdicting drug-carrying vessels at sea. Finally, for the first time in American history, Naval ships, including a nuclear-powered anti-aircraft carrier, interdicted — and in one case fired upon — drug-smuggling ships in international waters.<sup>147</sup>

The Government's efforts to contain the drug industry even extended abroad. For example, in November 1982, the Federal government offered the new government of Bolivia "about \$140 million in aid to be given as the South American nation cracks down on its narcotics producers and traffickers, and turns over to American authorities a Bolivian whom U.S. officials allege is a major international cocaine dealer."<sup>148</sup> The economic aid was prompted by Reagan administration contentions that "[e]fforts at narcotics control within the United States have had almost no impact on the rapidly growing use of cocaine,"<sup>149</sup> as well as by the increasingly alarming consumption of whole nations, such as the Bahamas, Columbia, and Peru,<sup>150</sup> by drug cartels.<sup>151</sup>

In the United States, the illegal drug trade is dominated by organized crime. The link between organized criminal syndicates and the illegal drug industry has been demonstrated many times. In 1982, for instance:

The Reagan administration, as part of its war on drugs and organized crime, announced . . . the arrest of 13 members of a major heroin trafficking group linked directly to two New York crime "families." . . . [Attorney General William French] Smith described the link between

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<sup>145</sup> UNITED PRESS INT'L, (Austin, Texas) Nov. 24, 1982. The bill was declared unconstitutional by the 3rd District Court of Appeals because the Texas constitution "voids any legislative act which fails to include all the subjects of the bill in its title." *Id.*

<sup>146</sup> UNITED PRESS INT'L, (Nashville, Tennessee) Dec. 18, 1982.

<sup>147</sup> Wisotsky, *supra* note 138, at 894.

<sup>148</sup> Walter Pincus, *Aid to Bolivia Tied to Progress in Cocaine War*, WASH. POST, Nov. 8, 1982, at A1.

<sup>149</sup> *Id.*

<sup>150</sup> Wisotsky, *supra* note 138, at 898.

<sup>151</sup> Concern about the domination of foreign governments by "narcoterrorism," is more than a paternalistic exercise on the part of the United States, since often the besieged governments are friendly to the United States and so the criminal activities of syndicates abroad have the potential to affect U.S. diplomatic and national security interests. See Wisotsky, *supra* note 138, at 898.

organized crime and drug trafficking as "the most serious crime problem facing the nation today."<sup>152</sup>

A "traditional [method] the Columbo Family employed to make money illegally was the sale of narcotics and other dangerous drugs"<sup>153</sup> such as cocaine, heroin, and marijuana.<sup>154</sup>

The billion-dollar underground economy "[feeds] the growth of powerful crime syndicates willing to commit murder and to corrupt public officials in order to protect their operations. One quarter of all the homicides in Miami, Los Angeles and New York are . . . drug hits or drug rip-offs."<sup>155</sup> Not only do the drug trade and organized crime syndicates enjoy a chicken-and-the-egg relationship, but at least as early as ten years ago, organized criminal syndicates began proliferating and mutating into forms beyond the traditional, primarily northeastern La Cosa Nostra.<sup>156</sup>

For example, a New York Times article in 1982 reported the emergence of a new, sophisticated, organized criminal syndicate that some Southern law enforcement officials termed "The Dixie Mafia."<sup>157</sup> "The growth [of organized crime in the South] is marked not only by the influx of drugs, particularly marijuana and cocaine, the officials say, but also by organized car theft, prostitution and pornography rings and complex fraud and money-laundering operations."<sup>158</sup>

Southern organized crime differs from its Northern, ethnic counterpart in a frightening way:<sup>159</sup> The Southern mafia targets prosecutors and judges. In 1982 Charles Voyde Harrelson was convicted in Texas of assassinating Judge John H. Wood, Jr. under the auspices of Jamiel Chagra, a drug dealer who "'had so much money he didn't count it, he weighed it."<sup>160</sup>

Wood was the first federal judge to be assassinated in this century,<sup>161</sup> but his fate has become increasingly commonplace. "Some prosecutors and judges in Florida have learned that they are part of a frightening role reversal. . . . [T]hey are, the authorities say, being convicted and sentenced to death by gangs involved in drug sales or other organized crime."<sup>162</sup> The March 14, 1982 edition of The New York Times lists prosecutors, state attorneys, and investigators who had been assassinated or targeted for assassination by criminal enterprises.<sup>163</sup>

<sup>152</sup> Juan Walte, UNITED PRESS INT'L, at Wash. News Section, Nov. 4, 1982.

<sup>153</sup> *Persico* brief (No. 86-1468), *supra* note 2, at 44.

<sup>154</sup> *Id.* at 47.

<sup>155</sup> Wisotsky, *supra* note 138, at 898.

<sup>156</sup> New York City's mafia consists of five La Cosa Nostra families — the Bonanno, Columbo, Gambino, Genovese, and Lucchese families. La Cosa Nostra is Italian for "Our Thing."

<sup>157</sup> Wayne King, *New Criminal Class is Flourishing in Sun Belt*, N.Y. TIMES, Dec. 18, 1982, § 1, at 1.

<sup>158</sup> *Id.*

<sup>159</sup> La Cosa Nostra has operated in Miami and New Orleans for a long time, but it had never achieved the influence it enjoys in the North. *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Drug Gangs Threaten Judges and Prosecutors*, N.Y. TIMES, Mar. 14, 1982, § 1, at 31.

<sup>163</sup> Of course, law-enforcement agents were not the only targets of drug-related violence. In 1982, the murder rate in Miami was the highest in the nation. "The high number of murders per capita is largely blamed on the illicit drug industry. Law-enforcement officials have said that those involved in drug sales are playing for stakes in the billions of dollars and have a high propensity for seeking revenge." *Id.*

While the Dixie mafia was emerging in the South,<sup>164</sup> the Japanese mafia, Yakuza,<sup>165</sup> spread to the United States and was proliferating in Hawaii and California, where it not only engaged in drug trafficking but also "appeared to be buying legitimate American businesses in Hawaii or on the West Coast to use as covers for other operations."<sup>166</sup> Moreover, the Taiwanese organized crime syndicate, United Bamboo, also spread to the United States.<sup>167</sup>

### *B. The Government's Response*

The Reagan Administration responded to the explosion of drug-related violence and the widespread distribution of illegal drugs by increasingly sophisticated and ruthless associations with fanfare and force. On October 12, 1982, President Reagan unveiled Washington's latest plan of attack, a \$160 million program of special task forces in twelve cities.<sup>168</sup> This "War on Drugs" was intended to "choke the nation's drug peddling and 'cripple the power of the mob,' which law enforcement says is responsible for much of the trafficking."<sup>169</sup> Specifically, the War on Drugs called for:

(1) More personnel — 1,020 law enforcement agents for DEA, FBI and other agencies, 200 Assistant United States Attorneys, and 340 clerical staff; (2) more aggressive law enforcement — creating twelve (later thirteen) regional Organized Crime Drug Enforcement Task Forces . . . in "core cities" across the nation "to identify, investigate, and prosecute members of high-level drug trafficking enterprises, and to destroy the operations of those organizations"; (3) more money — \$127.5 million in *additional* funding, and substantial re-allocation of the existing \$7.028 million budget away from prevention, treatment, and research programs to law enforcement programs; (4) more prison bed space — addition of 1260 beds at 11 federal prisons to accommodate the increase in drug offenders to be incarcerated; (5) more stringent laws — a "legislative offensive designed to win approval of reforms" with respect to bail, sentencing, criminal forfeiture and the exclusionary rule; (6) more (better) inter-agency coordination, bringing together all federal law enforcement agencies in "a comprehensive attack on drug trafficking and organized crime" under a Cabinet level committee chaired by the

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<sup>164</sup> See, e.g., *United States v. Love*, 534 F.2d 87 (1976); *United States v. Perry*, 512 F.2d 805 (1975).

<sup>165</sup> *Japanese Smuggling Network Said to be Spreading to Coast*, N.Y. TIMES, Nov. 25, 1982, at A18.

"Yakuza" is the Japanese term for organized crime. *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> The United Bamboo was founded in Taiwan approximately three decades ago. Over the years, the enterprise has extended its activities to Hong Kong, Japan, the Philippines, Singapore, and most recently the United States. In this country, the United Bamboo has established its operations in Houston, Los Angeles, San Francisco and New York. The members and associates of the organization in the United States established the United Bamboo's presence here through involvement in various illegal activities such as prostitution, illegal gambling, assisting fugitives from justice, extortion, kidnapping, murder, and trafficking in guns and narcotics.

*United States v. Chang An-Lo*, 851 F.2d 547, 549 (2d Cir. 1988).

<sup>168</sup> Judi Hassan, *Reagan Pledges War on Drugs*, UNITED PRESS INT'L, Oct. 15, 1982, at Washington News.

<sup>169</sup> *Id.*

Attorney General; and (7) improved federal-state coordination, including federal training of State agents.<sup>170</sup>

Rhetoric about the War on Drugs was greeted with cynicism by the public, by State enforcement agents, and by people responsible for allocating resources. For example, a New York Times editorial contended:

Announcing a new White House drive against organized crime prior to a national election looks, well, political. *There are no new funds for the program. . . .*

The new plan at least recognizes a need for more manpower. . . . *Administration officials say that the program will cost between \$160 million and \$200 million [per year], all financed from available funds.*

To justify this approach, the Administration . . . point[s] to South Florida, where drug-related arrests are up 40 percent and the amounts of seized marijuana and cocaine are nearly doubled. If that project demonstrates the effect of concentrating resources in a single area, however, it also revealed the determination of drug dealers; they now avoid South Florida and use ports in the Northeast.<sup>171</sup>

The New York Times editorial did more than criticize administration policy, it also highlighted two common sources of frustration: If drug enforcement officials concentrate their resources on one place, drug dealers just move to another. In order for Government to win a war fought purely by enforcement, resources must be geographically omnipresent.<sup>172</sup>

In December 1982, the Justice Department asked a Senate Appropriations Subcommittee for \$130 million to pay for the War on Drugs. Senators retorted that \$130 million was "a drop in the bucket"<sup>173</sup> compared to the amount of money needed to achieve effective results, adding that the Reagan Administration had proposed the previous year to cut the budget of the FBI by six percent and the DEA by twelve percent and had insisted that those cuts would not be detrimental to the effectiveness of those agencies.<sup>174</sup> The expenses for the twelve (later thirteen) new task forces were to come out of existing funds — "with the tricky stipulation that none could come from the Justice Department or other law enforcement activities."<sup>175</sup> Then-Associate Attorney General Rudolph Giuliani added, "We cannot turn the tide against crime while keeping law

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<sup>170</sup> *Id.* (emphasis added); see also Wisotsky, *supra* note 138, at 892.

<sup>171</sup> *Mr. Reagan's New Tack on Crime*, N.Y. TIMES, Oct. 18, 1982, at A16 (emphasis added).

<sup>172</sup> *Id.*

<sup>173</sup> Mary Thornton, *Justice Asks \$130 Million For Drug War*, WASH. POST, Dec. 10, 1982, at A1.

<sup>174</sup> *Id.*

<sup>175</sup> Mary Thornton & Walter Pincus, *Crime Fighters at War Over Money, Turf*, WASH. POST, Oct. 29, 1982, at A27.



enforcement budgets at their current services levels.<sup>176</sup> Simply put, we need additional resources. . . ."<sup>177</sup>

In the meantime, even though convictions had been secured against organized crime figures in unprecedented numbers,<sup>178</sup> the Mafia continued to thrive — primarily because although Mafia defendants were confined in prison, the organizations remained intact:

The activities of a criminal organization such as the Genovese Family do not cease with the arrest of its principals and their release on even the most stringent of bail conditions. The illegal businesses, in place for many years, require constant attention and protection, or they will fail. Under these circumstances, this court recognizes a strong incentive on the part of its leadership to continue business as usual. . . . [B]usiness as usual involves threats, beatings, and murder.<sup>179</sup>

As was noted above, incarcerated members of these organizations are adept at corrupting prison officials or committing any other acts necessary to permit them to communicate with their associates on the outside and maintain their leadership of, or participation in, their illegal enterprises. Hence, incarceration of a few leading figures has a minimal effect on the operations of organized criminal syndicates. However, once any organization runs out of money, it begins to run out of steam.

### *C. Legislative Silence: an Unintended Result*

As we have seen, the CFA was a product of the political climate and was meant not only to help solve the problem but to help pay for the solution.<sup>180</sup> The drug crisis was the subject of national focus, and organized crime was broadening its reach. Moreover, the CFA was drafted and introduced during an election year. These circumstances resulted in a hurried legislative package and minimal legislative history.

What legislative history there is to the CFA with reference to third parties indicates that the legislature was concerned about money-laundering and sham transfers. Hence, given the circumstances surrounding the development of the CFA, we should not interpret legislative silence on the subject of attorneys' fees as anything but a sloppy mistake.

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<sup>176</sup> See, e.g., Ethan Nadelmann, *Drug Prohibition in the United States: Costs, Consequences, and Alternatives*, 245 SCIENCE 9, Sept. 1, 1989. "Law enforcement efforts have been increasingly successful in this country, but this has had little effect on the price, availability or consumption of drugs. These law enforcement efforts are costly. . . . In 1987, the government spent 10 billion dollars in the enforcement of drug laws." *Id.*

<sup>177</sup> Thornton & Pincus, *supra* note 175.

<sup>178</sup> See, e.g., *United States v. Gaggi*, 811 F.2d 47 (2d Cir.), *cert. denied*, 483 U.S. 1007 (1987).

<sup>179</sup> *United States v. Salerno*, 481 U.S. 739, 745 (1986) (citing *United States v. Salerno*, 631 F. Supp. 1364, 1375 (S.D.N.Y. 1986)).

<sup>180</sup> See *Hearings*, *supra* note 15, at 16.

## VI. TRADITIONAL AMERICAN JURISPRUDENTIAL INSTITUTIONS SHOULD SERVE AS AIDS TO THE INTERPRETATION OF THE COMPREHENSIVE FORFEITURE ACT

### A. Toward a Policy of Legislative Interpretation

Stories with morals are usually banal, but true. The story of the controversy surrounding the correct interpretation of the CFA, with its quick but unhappy ending, is no exception. The story suggests that a new rule of construction regarding legislative silence should be supported: If legislation is intended to impinge upon constitutional rights, reasonably or not, the legislature should plainly articulate in the record its intentions regarding those interests. Otherwise, in cases where the statutory language and the legislative history are silent or ambiguous, the courts should look not only to the relevant case law, but also to American jurisprudential traditions. This is especially true in the context of a criminal statute or a statutory interpretation affecting the rights of a criminal defendant.

To help us with the CFA, we not only have the line of Sixth Amendment cases descended from *Powell*, but also those descended from *Bell v. United States*<sup>181</sup> advocating a policy of lenity in the construction of criminal statutes. Furthermore, the tradition in American jurisprudence with regard to criminal forfeitures is highly illuminating.

### B. Traditions of Statutory Construction: *Godzilla versus Bambi*

Traditionally, courts have strictly construed criminal statutes and have resolved ambiguity in favor of lenity toward defendants. In *Bifulco v. United States*,<sup>182</sup> the Court articulated this policy:

In past cases the Court has made it clear that this principle of statutory construction applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose. . . . "This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended."<sup>183</sup>

The rule of lenity is only applied in the face of "statutory ambiguity."<sup>184</sup> As the Court made plain in *Bifulco*, "Where Congress has manifested its intention, we may not manufacture ambiguity in order to defeat that intent."<sup>185</sup> Of course, manufacturing ambiguity in the CFA is unnecessary.

In the meantime, Congress has instructed the courts to construe RICO broadly to effectuate its remedial purpose.<sup>186</sup>

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<sup>181</sup> 349 U.S. 81, 83 (1955); see also *Rewis v. United States*, 401 U.S. 808, 812 (1971) (noting that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity).

<sup>182</sup> 447 U.S. 381 (1980).

<sup>183</sup> *Id.* at 387 (citations omitted) (quoting *Ladner v. United States*, 358 U.S. 169, 178 (1958)).

<sup>184</sup> *Id.* See, e.g., *Lewis v. United States*, 445 U.S. 55, 65 (1980).

<sup>185</sup> *Bifulco*, 447 U.S. at 387.

<sup>186</sup> The Organized Crime Control Act of 1970, Pub. L. No. 91-452, tit. IX, § 904(a), 84 Stat. 922, 947. See also *Russello v. United States*, 464 U.S. 16, 26 (1983).

Government attorneys argue that since its purpose is to attack the roots of organized crime, and forfeiture of attorney's fees would help prosecutors to achieve that purpose by making it easier for them to obtain convictions of defendants represented by less experienced counsel, attorneys' fees should not be exempt from forfeiture.<sup>187</sup>

Such a policy constitutes an impermissible disruption of the adversary system. Meanwhile, the admonition to construe RICO broadly *so as to effectuate its remedial purpose* presents us with two issues: First, are the inevitable effects of a harsh reading of the CFA a part of the remedial purpose of RICO? Second, should the CFA be read broadly as a RICO statute, or should we consider its genesis as a separate entity and read it solely in light of *Bell*?

The CFA was incorporated into RICO, but it also amended the CCE statutes, which say nothing in the text or in the legislative history about being construed broadly. The courts have obliged themselves to "interpret statutes to avoid the 'unnecessary analysis of constitutional issues.'"<sup>188</sup> Allowing attorneys' fees to fall within the ambit of the CFA would violate that rule of statutory construction. Similarly, a reading of RICO that inferred as part of its remedial purpose an intent to so manipulate the adversary system, and the Sixth Amendment protections that inform it, would be equally violative of that rule. Furthermore, ascribing RICO broadness to the provisions of the CFA would be difficult, because the CFA was drafted as an independent provision and should be construed according to its own legislative history.<sup>189</sup>

### *C. The Hostile Treatment of In Personam Forfeiture Provisions in American Law*

Not only is an application of the CFA broad enough to encompass bona fide attorneys' fees contrary to established rules of statutory construction, but criminal forfeiture provisions as a whole run counter to American jurisprudential tradition.<sup>190</sup> Prior to 1970, when criminal forfeiture provisions were introduced into RICO and CCE,<sup>191</sup> "the only federal law with in personam forfeiture was the Confiscation Act of

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<sup>187</sup> Richard W. Mass, Note, *Forfeiture of Attorney's Fees: Should Defendants Be Allowed to Retain the "Rolls Royce of Attorneys" with the "Fruits of the Crime"?*, 39 STAN. L. REV. 663, 668 (1987).

<sup>188</sup> *Id.* at 669 (citing *United States v. Rogers*, 602 F. Supp. 1332, 1339 (D. Colo. 1985)); *see also* *Siler v. Louisville & N.R.R.*, 213 U.S. 175, 193 (1909).

<sup>189</sup> Otherwise, a necessary argument would be that a court could construe the CFA broadly in RICO cases and narrowly in CCE cases. The result of that practice would be to ignore the legislative history of the CFA and alternately substitute that of RICO or CCE. In addition to being wrong, that practice would have unintended complications. For example, here, allowing two alternative constructions of a statute results in the anomalous conclusion that its drafters had two simultaneous but opposite intentions (*i.e.*, RICO broadness and *Bell* lenity).

<sup>190</sup> *See* OLIVER WENDELL HOLMES, *THE COMMON LAW*.

<sup>191</sup> CCE was passed as part of the Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 408; RICO was passed as Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901(a).

1862 which authorized the President to seize the life estate of Confederate soldiers."<sup>192</sup> Until recently, the RICO and CCE provisions were not widely used.<sup>193</sup>

Criminal forfeiture actions under the CFA result from a conflation of *in rem* and *in personam* legal theory and a departure from traditional American notions of forfeiture. A criminal, as opposed to a civil, asset forfeiture "was a part, or at least a consequence, of the judgment of [the defendant's] conviction"<sup>194</sup> and did not turn on the question of whether the assets themselves were illegal. Instead, a forfeiture action under the CFA is an *in personam* proceeding: the CFA reaches all of a defendant's assets resulting from his criminal conduct, as characterized by a trial court. Thus, the ultimate forfeitability of defendant's assets turns on the question of guilt. However, the most controversial provisions, which permit the Government to reach assets *prior to* conviction, even after transfer to third parties, have their jurisprudential origins in a traditionally civil cause of action, namely, an *in rem* proceeding.

In a conventional civil forfeiture proceeding, "[t]he thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing; and this, whether the offence be *malum prohibitum*, or *malum in se*."<sup>195</sup> The property is considered to be the defendant and is considered to be "tainted" by its illegality. Objects seized through an *in rem* proceeding are generally "property that constitutes evidence of the commission of a criminal offense; or . . . contraband, the fruits of crime, or things otherwise criminally possessed; . . . or property designed or intended for use or which is or has been used as the means of committing a criminal offense. . . ."<sup>196</sup> The legal fiction that the thing itself is the wrongdoer permits the government to seize it even if the original owner transfers the thing to a third party, because the object is tainted regardless of who owns it. In contrast with the burden in a criminal prosecution, the burden of proof in a civil forfeiture proceeding is minimal.<sup>197</sup> Since criminal fines or forfeitures usually turn on the guilt of the defendant, the criminal forfeiture proceeding usually occurs after conviction. The relation-back and third-party provisions in the CFA amendments add an *in rem*, civil element to the criminal proceeding.

Historically, American jurisprudence has not favored *in personam* forfeiture. More accurately and pithily, United States Circuit Court of Appeals Judge Politz stated in a dissenting opinion:

[O]ur society has abhorred forfeitures. . . . [T]he framers of the Constitution demonstrated their repudiation of the harsh English tradition of criminal forfeiture, and our very first Congress forbade the

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<sup>192</sup> William J. Hughes & Edward H. O'Connell, Jr., *In Personam (Criminal) Forfeiture and Federal Drug Felonies: An Expansion of a Harsh English Tradition Into A Modern Dilemma*, 11 PEPP. L. REV. 613, 619-20 (1984) (citing Confiscation Act, 37th Cong., 2d Sess., ch. 195, § 5, 12 Stat. 589 (1862)).

<sup>193</sup> As the title of our report indicates, the Government's record in attacking crime through the forfeiture of assets is not good. And the Government's failure is not limited to drug trafficking. . . . In our April 1981 report, we recommended that the Attorney General improve forfeiture management and that the Congress clarify and broaden the scope of criminal forfeiture statutes—the Racketeer Influenced Criminal Enterprise provision (RICO) and the Continuing Criminal Enterprise provision (CCE).

*Hearings*, *supra* note 15, at 33-34 (Statement of William J. Anderson, Director General, Government Division of the General Accounting Office).

<sup>194</sup> *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14 (1827).

<sup>195</sup> *Id.*

<sup>196</sup> FED. R. CRIM. P. 41(b).

<sup>197</sup> For example, the standard of evidence in the civil drug forfeiture statute is a "preponderance of the evidence." 21 U.S.C. § 881.

forfeiture of an estate because of a criminal conviction. Further, a forfeiture with an *in personam* application, as we have before us, is to be most charily assessed."<sup>198</sup>

*In rem* forfeiture proceedings are common and accepted, and the "general antipathy in our law for *in personam* forfeiture relates primarily to forfeiture of estate."<sup>199</sup> Hence, the origin of American hostility to *in personam* forfeiture is derived: "[U]nder early English law the complete forfeiture of all real and personal property followed as a consequence of conviction for a felony or treason."<sup>200</sup> After conviction for one of those offenses, "the defendant's 'blood was corrupted' so that nothing could pass by inheritance to his line."<sup>201</sup>

Decrees of forfeiture of estate and corruption of blood for treason were banned by the Constitution in 1787. Furthermore, until 1970, *in personam* provisions were effectively absent from the criminal code, indicating the survival of legislative abhorrence to them. Prior to the passage of RICO, the only federal law with *in personam* forfeiture provisions applied to Confederate soldiers.

The miscegenation of *in rem* and *in personam* statutory elements has yielded a criminal statute with a civil standard of proof. The forfeiture action under CFA is predicated on guilt that the prosecution has yet to prove, and its ultimate effect where applied to attorneys' fees is to make a criminal defendant more vulnerable to conviction. Therefore, the CFA, as read by the Court in *Monsanto*, not only removes and weakens important safeguards, it demonstrates a judicial equation of the presumption of innocence to the reasonable doubt standard.

#### *D. The Presumption of Innocence and the Reasonable Doubt Standard*

The CFA allows the Government to seize assets of an individual merely by alleging that they would be forfeited if he were to be ultimately convicted. The Government does not even need to indict the individual before freezing his assets. The Government's burden of proof is a civil burden. These pre-trial forfeiture provisions necessarily presume that the defendant is guilty. Hence, it is necessary to discuss the impact of the CFA on the presumption of innocence. The presumption of innocence is not located in the United States Constitution. *Coffin v. United States*,<sup>202</sup> decided in 1894, is the most recent Supreme Court case to discuss the meaning of the presumption of innocence. The Court observed that the presumption "is stated as unquestioned in the textbooks, and has been referred to as a matter of course in the decisions of this court and in the courts of the several States,"<sup>203</sup> but it did not identify the source of the presumption.

"The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."<sup>204</sup> However, "[e]xactly when this presumption

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<sup>198</sup> Hughes & O'Connell, *supra* note 191, at 614 (citing *United States v. Martino*, 681 F.2d 952, 962 (5th Cir. 1982) (Politz, J., dissenting)).

<sup>199</sup> *Id.* at 619.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* (citing *United States v. Grande*, 620 F.2d 1026, 1038 (4th Cir. 1980)).

<sup>202</sup> 156 U.S. 432 (1894).

<sup>203</sup> *Id.* at 454 (citations omitted) (holding that the presumption of innocence could not be adequately conveyed by a reasonable doubt instruction). See also MCCORMICK ON EVIDENCE § 342 (1984).

<sup>204</sup> *Coffin*, 156 U.S. at 453.

was in precise words stated to be a part of the common law is involved in doubt."<sup>205</sup> The Court observed that an article in the January 1851 edition of the *North American Review* said that "no express mention of the presumption of innocence can be found in the books of the common law earlier than the date of McNally's Evidence (1802)."<sup>206</sup> The Court responded that "[w]hether this statement is correct is a matter of no moment, for there can be no doubt that, if the principle had not found formal expression in the common law writers at an earlier date, yet the practice which flowed from it has existed in the common law from the earliest time."<sup>207</sup>

Indeed, the Court observed that "Greenleaf traces this presumption to Deuteronomy, and quotes Mascardus De Probationibus to show that it was substantially embodied in the laws of Sparta and Athens."<sup>208</sup> The Court commented that "[w]hether Greenleaf is correct or not in this view, there can be no question that the Roman law was pervaded with the results of this maxim of criminal administration."<sup>209</sup>

Prior to the American Revolution, the presumption could be found in English law in crude form. The Court credited a rough articulation of the doctrine to Lord Hale in 1678.<sup>210</sup> In *McKinley's Case*,<sup>211</sup> decided in 1817, Lord Gillies stated, "I conceive that this presumption is to be found in every code of law which has reason and religion, and humanity, for a foundation."<sup>212</sup>

The presumption of innocence occurs in recognizable and codified form in Jewish law. It traces its beginnings to a section of the Old Testament that contains a kind of code for judges. In Exodus 21:1-23:9, judges are commanded to treat both sides to a dispute equally. Later Jewish law echoed and defined that command,<sup>213</sup> but also specified further obligations.<sup>214</sup> It required that criminal cases be decided by twenty-three judges instead of the ordinary three judges.<sup>215</sup> If the court was deadlocked on the question of conviction, up to forty-eight judges could be added, and if *that* court were split thirty-six to thirty-five in favor of conviction, the court was required to discuss the matter until one of those who favored conviction agreed with the opposite side.<sup>216</sup> Thus, if the accusing party had argued his case in court and sat down, and the defendant had responded with silence, it would have been possible for the defendant to be acquitted. In Jewish law, that protection was intended to keep things equal between the accuser and the defendant and to promote a merciful society that preferred to err on the side of acquitting the guilty rather than punishing the innocent.<sup>217</sup> Those policies underlie the presumption of innocence today.

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<sup>205</sup> *Id.* at 455.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 454 (citing GREENLEAF ON EVIDENCE at part 5, § 29).

<sup>209</sup> *Id.*

<sup>210</sup> "In some cases presumptive evidence goes far to prove a person guilty, though there be no express proof of the fact to be committed by him, but then it must be very warily pressed, for it is better five guilty persons should escape unpunished than one innocent person should die." *Id.* at 456 (quoting 2 Hale P.C. 290 (1678)).

<sup>211</sup> 33 St. Tr. 275 (1817).

<sup>212</sup> *Id.* at 506, quoted in *Coffin*, 156 U.S. at 456.

<sup>213</sup> ABRAHAM COHEN, EVERYMAN'S TALMUD, 309 (E.P. Dutton 1975).

<sup>214</sup> *Id.* at 300.

<sup>215</sup> *Id.* at 302.

<sup>216</sup> *Id.* at 314.

<sup>217</sup> *Id.* at 306.

The Court in *Coffin* noted the paucity of authority on the presumption of innocence<sup>218</sup> but indicated that "the presumption of innocence and the doctrine of reasonable doubt are seemingly treated as synonymous."<sup>219</sup> The issue in *Coffin* was the validity of that treatment, and the majority distinguished the two concepts by saying that the presumption of innocence was an evidentiary posture in favor of the accused, while reasonable doubt was an effect of that evidentiary posture.<sup>220</sup>

That ruling is monumentally obtuse, because a criminal defendant would not be able to predict from that holding that he could be detained prior to trial,<sup>221</sup> or that his assets could be frozen prior to indictment merely because the Government asserts that they were illegally acquired and that he will conceal or dissipate them. However, *Coffin* and the underlying natural law foundations speak only to events within the four walls of the trial court. Outside the four walls of the trial court, all interactions between the defendant and the state will be governed by other protections, and most often by a civil standard of proof. From its embryonic form, the presumption of innocence was founded on the belief that the accused begins at a disadvantage and that a civilized society must be careful to punish only the guilty. Our tradition says that those values become paramount during, and only during, the determination of guilt. Whatever else may be said of it, the CFA is consistent with the presumption of innocence as a whole.

## VII. MODIFICATIONS TO THE CFA

Congressional silence in the CFA has caused considerable perplexity in the courts. This discussion suggests two modifications. To begin with, the CFA ought to indicate unambiguously in the language of the statute that bona fide attorneys' fees do not fall within its ambit. Next, the statute ought to formulate a standard to measure the reasonableness of attorneys' fees. Fees that failed to meet such standards could be forfeitable as sham transfers. Standards for attorneys' fees already exist elsewhere. For example, 18 U.S.C. § 1988 permits payment of reasonable attorneys' fees by successful plaintiffs to an 18 U.S.C. § 1983 action against state officials who violate an individual's constitutional rights under color of law. The most common standard is the lodestar, which is a reasonable hourly rate multiplied by reasonable hours spent. The standard should be formulated with attention to the complexity of RICO and CCE defenses and with special solicitude to the rights of criminal defendants.

## VIII. CONCLUSION: NEVERTHELESS IT MOVES

The CFA was passed during a period of public and political scrutiny of the increasing crime problems and of the decreasing resources available to enforce the drug and racketeering laws. The Act was hastily drafted, and the legislative record is sparse. Unfortunately, the sparsity of the legislative history produced a result inconsistent with its stated purpose, with rules of statutory construction, and with the traditions of our criminal justice system. "[A] construction of [the CFA was] fairly possible by which the [constitutional] question may be avoided."<sup>222</sup> The Court in *Monsanto* declined to adopt

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<sup>218</sup> *Coffin v. United States*, 156 U.S. 432, 457-58 (1894).

<sup>219</sup> *Id.* at 458.

<sup>220</sup> *Id.* at 460.

<sup>221</sup> See *United States v. Salerno*, 481 U.S. 739 (1986).

<sup>222</sup> *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 643 (1989) (citing *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

criminal justice system. "[A] construction of [the CFA was] fairly possible by which the [constitutional] question may be avoided."<sup>222</sup> The Court in *Monsanto* declined to adopt that construction. As the dissent observed in *Caplin & Drysdale*, "This Court has the power to declare the Act constitutional, but it cannot thereby make it wise."<sup>223</sup>

*Karin Graham Horwatt*

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<sup>222</sup> *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 643 (1989) (citing *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

<sup>223</sup> *Id.* at 656.