

5-1990

## Drug Proceeds Forfeiture and the Right to Counsel of Choice

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### Recommended Citation

Danton A. Berube, Drug Proceeds Forfeiture and the Right to Counsel of Choice, 43 *Vanderbilt Law Review* 1377 (1990)

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# Drug Proceeds Forfeiture and the Right to Counsel of Choice

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## I. INTRODUCTION

As part of the current war on drugs, Congress enacted 21 U.S.C. section 853,<sup>1</sup> the drug proceeds forfeiture statute. The statute authorizes criminal forfeiture of assets that are used in the commission of, or constitute the proceeds from, a federal drug felony.<sup>2</sup> When prosecutors began to use the statute to seek forfeiture of defense counsel's attorney's fees, defendants and the law firms that represented them argued that the provision violated the sixth amendment right to counsel.<sup>3</sup>

The courts of appeals were divided on the question of whether the sixth amendment prohibits forfeiture of assets intended to be used to

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1. 21 U.S.C. § 853 (1988).

2. See *infra* notes 53-82 and accompanying text.

3. See, e.g., *United States v. Thier*, 801 F.2d 1463, 1466 (5th Cir. 1986).

hire an attorney.<sup>4</sup> The Supreme Court resolved this conflict in the companion cases of *Caplin & Drysdale, Chartered v. United States*<sup>5</sup> and *United States v. Monsanto*.<sup>6</sup> The Court held that the sixth amendment right to counsel did not mandate an attorney's fees exception to criminal forfeiture under 21 U.S.C. section 853.<sup>7</sup>

This Note examines the Court's decisions in *Caplin & Drysdale* and *Monsanto* in light of the history of the sixth amendment and the new drug proceeds forfeiture statute. Part II briefly surveys several relevant aspects of the sixth amendment right to counsel. Part III reviews the legislative history and key provisions of section 853. Part IV summarizes the Supreme Court's holdings in *Caplin & Drysdale* and *Monsanto*. Part V balances the conflicting interests and suggests an alternative holding. Finally, Part VI concludes that the greater significance of the Supreme Court's decision is its role in a larger erosion of constitutional protections motivated by the drug war.

## II. THE RIGHT TO COUNSEL

The sixth amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."<sup>8</sup> While a comprehensive survey of the right to counsel is beyond the scope of this Note, a brief discussion of several relevant aspects of this right is useful.<sup>9</sup>

### A. Appointed Counsel

*Powell v. Alabama*<sup>10</sup> properly may be viewed as the cornerstone of the right to counsel.<sup>11</sup> Ironically, however, the Supreme Court based its analysis in that case on the due process clause of the fourteenth amend-

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4. See, e.g., *United States v. Monsanto*, 836 F.2d 74, 80-84 (2d Cir. 1987) (holding that right to counsel does not exempt property earmarked for attorney's fees from forfeiture), *vacated on rehearing*, 852 F.2d 1400 (2d Cir. 1988), *rev'd*, 109 S. Ct. 2657 (1989); *United States v. Harvey*, 814 F.2d 905, 926 (4th Cir. 1987) (stating that forfeitures which deprive an accused of the ability to employ private counsel violate the sixth amendment), *aff'd in part and rev'd in part sub nom. on rehearing, In re Forfeiture Hearing as to Caplin & Drysdale, Chartered*, 837 F.2d 637 (4th Cir. 1988), *aff'd sub nom. Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646 (1989); *Thier*, 801 F.2d at 1471 (holding that right to counsel of choice is a factor to be considered in granting an asset-freezing injunction).

5. 109 S. Ct. 2646 (1989).

6. 109 S. Ct. 2657 (1989).

7. See *infra* notes 83-85 and accompanying text.

8. U.S. CONST. amend. VI.

9. For a more complete discussion of the sixth amendment right to counsel, see 2 W. LAFAYE & J. ISRAEL, *CRIMINAL PROCEDURE* § 11.1-10 (1984) [hereinafter LAFAYE & ISRAEL].

10. 287 U.S. 45 (1932).

11. LAFAYE & ISRAEL, *supra* note 9, § 11.1(a), at 2.

ment,<sup>12</sup> not the sixth amendment. In *Powell* the Court held that, under the unique circumstances of that case, the trial court's failure to appoint counsel to represent defendants charged with capital crimes undermined the fundamental fairness of the proceeding and constituted a denial of due process.<sup>13</sup>

In *Johnson v. Zerbst*<sup>14</sup> the Court used the basic concepts of fairness underlying *Powell* and held that criminal defendants have a sixth amendment right to appointed counsel in federal prosecutions.<sup>15</sup> The Court subsequently applied this sixth amendment right to the states via the fourteenth amendment in *Gideon v. Wainwright*.<sup>16</sup>

### B. *Effective Assistance of Counsel*

The *Powell* Court also laid the foundation for the requirement that criminal defendants must have effective assistance of counsel. The Court stated that providing counsel under circumstances that precluded effective aid at trial amounted to providing no counsel at all and violated the requirement of due process.<sup>17</sup>

The Court outlined the sixth amendment analysis for determining whether a defense attorney has rendered ineffective assistance in *Strickland v. Washington*.<sup>18</sup> To establish ineffective assistance of counsel and obtain a new trial, defendants must satisfy a two-prong test. First, it must be shown that the attorney's performance failed to satisfy an objective standard of reasonableness.<sup>19</sup> Second, the defendant must demonstrate prejudice by establishing a reasonable probability that, but for the attorney's inadequate performance, the result of the trial would have been different.<sup>20</sup>

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12. See *Powell*, 287 U.S. at 71.

13. *Id.* The Court held:

In the light of the facts outlined in the forepart of this opinion—the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives . . . the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment.

*Id.*

14. 304 U.S. 458 (1938).

15. *Id.* at 463.

16. 372 U.S. 335 (1963).

17. *Powell*, 287 U.S. at 71.

18. 466 U.S. 668 (1984).

19. *Id.* at 687.

20. *Id.*

### C. Counsel Free from Government Interference

Government interference with counsel generally falls into one of two categories.<sup>21</sup> Direct restrictions on counsel's performance constitute a complete denial of the defendant's sixth amendment right to counsel. In *Geders v. United States*,<sup>22</sup> for example, the Supreme Court held that the trial court's refusal to permit a defendant to speak with his attorney during the overnight break between his direct and cross-examination amounted to a constructive denial of the defendant's right to counsel.<sup>23</sup>

The Supreme Court evaluates indirect government interference in the attorney-client relationship, on the other hand, similarly to denials of the right to effective assistance of counsel under *Strickland*. In *Weatherford v. Bursey*<sup>24</sup> the Supreme Court held that the presence of a government agent at a meeting between the defendant and his attorney did not violate the sixth amendment.<sup>25</sup> The Court noted that the agent needed to be present at the meeting to preserve his secret identity and, because the agent did not reveal any details of the meeting to the prosecution, his presence did not interfere with the attorney's representation.<sup>26</sup> In *United States v. Morrison*<sup>27</sup> the Court held that, even if the government's intrusion into the attorney-client relationship was unjustified, a defendant is not entitled to a new trial on sixth amendment grounds unless the intrusion caused actual prejudice to the defendant.<sup>28</sup>

### D. Counsel Free from Conflicts of Interest

The right to counsel free from conflicts of interest arises from the right to effective assistance of counsel. Courts long have held that a defendant's right to the effective assistance of counsel includes the right to counsel's undivided loyalty.<sup>29</sup> Whenever an attorney represents conflicting interests, representation of each of those interests necessarily is defective.<sup>30</sup>

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21. LAFAYE & ISRAEL, *supra* note 9, § 11.8(a), at 70; *id.* § 11.8(c), at 73.

22. 425 U.S. 80 (1976).

23. *Id.* at 91.

24. 429 U.S. 545 (1977).

25. *Id.* at 558.

26. *Id.* at 554-58.

27. 449 U.S. 361 (1981).

28. *Id.* at 367.

29. See, e.g., *People v. Stoval*, 40 Ill. 2d 109, 239 N.E.2d 441 (1968), cited in LAFAYE & ISRAEL, *supra* note 9, § 11.9(a), at 76 n.1.

30. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(a) (1989) (stating that "[a] lawyer shall not represent a client if the representation of that client will be directly adverse to another client"); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(A) (1980) (providing that "[a] lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests"

The Supreme Court defined the applicable sixth amendment standard of review in *Cuyler v. Sullivan*.<sup>31</sup> Unlike *Strickland, Sullivan* held that a defendant who alleges ineffective assistance of counsel on the basis of counsel's conflict of interest does not have the burden of proving that the conflict resulted in prejudice.<sup>32</sup> Instead, the defendant simply must demonstrate that an actual conflict of interest negatively affected the attorney's performance to be entitled to a new trial on sixth amendment grounds.<sup>33</sup> A presumption of prejudice arises as a consequence of the attorney's divided loyalties.<sup>34</sup>

### *E. Counsel of Choice*

The *Powell* Court also helped define the sixth amendment right to counsel of a defendant's own choice. The Court indicated that criminal defendants must have a fair chance to secure the counsel of their own choice,<sup>35</sup> but this right is not absolute.<sup>36</sup> Indigent defendants, for example, have no right to select counsel that they cannot afford.<sup>37</sup>

Even a defendant who can afford to hire desired counsel may find that important governmental interests outweigh the sixth amendment right to counsel of choice. In *Wheat v. United States*<sup>38</sup> the Supreme Court held that a defendant's right to counsel of choice did not extend to representation by an attorney with an actual or potential conflict of interest.<sup>39</sup> The Court cited the federal courts' independent interest in the appearance of fairness as a justification for refusing to permit a defendant to waive the right to conflict-free counsel in favor of counsel of choice.<sup>40</sup>

## III. DRUG PROCEEDS FORFEITURE STATUTES

The legislature initially justified modern criminal forfeiture as giving law enforcement officials an additional weapon to combat organized crime.<sup>41</sup> While individual members of criminal syndicates could be fined or imprisoned, the "economic power bases" that were built with the

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(footnote omitted).

31. 446 U.S. 335 (1980).

32. *Id.* at 349-50.

33. *Id.* at 350.

34. *See id.* at 349.

35. *Powell v. Alabama*, 287 U.S. 45, 53 (1932).

36. *LAFAVE & ISRAEL*, *supra* note 9, § 11.4(c), at 38.

37. *Id.* § 11.4(a), at 34.

38. 486 U.S. 153 (1988).

39. *Id.* at 1697.

40. *Id.*

41. S. REP. No. 225, 98th Cong., 1st Sess. 191, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3374.

proceeds of criminal activities would remain behind. Criminal forfeiture of these assets was thought to provide the perfect mechanism for eliminating the profit incentives behind organized crime and destroying its residual economic power.<sup>42</sup>

### A. Legislative History

In 1981 the General Accounting Office released a study of the efficacy of existing federal criminal forfeiture provisions.<sup>43</sup> The report concluded that criminal forfeiture had failed to meet Congress's initial expectations for two reasons. First, federal agencies were not using the criminal forfeiture statutes as aggressively as possible. Second, the statutes themselves contained restrictions and ambiguities that limited their usefulness.<sup>44</sup>

In the wake of the General Accounting Office report, Congress initiated a bipartisan effort to improve the criminal forfeiture provisions.<sup>45</sup> As part of its effort, Congress sought to expand the applicability of criminal forfeiture to drug felonies. Reflecting its roots as a weapon against organized crime, the original criminal forfeiture statute applied only to "continuing criminal enterprises"—groups of five or more committing a series of drug felonies.<sup>46</sup> Congress extended the reach of the forfeiture law and enacted 21 U.S.C. section 853<sup>47</sup> to permit forfeiture of all property used in the commission of, or obtained as a result of, any federal drug felony.<sup>48</sup>

Prior to this expansion, the proceeds of drug felonies still were subject to civil forfeiture.<sup>49</sup> Civil forfeiture, however, has certain limitations that limit its effectiveness. First, civil forfeiture is an *in rem* action against the property itself. Because a federal court only has *in rem* jurisdiction over property within its district, civil forfeiture of an individual's property located in several different districts requires a number of separate forfeiture proceedings.<sup>50</sup> Criminal forfeiture, on the other hand, is an *in personam* proceeding in which a district court has jurisdiction over all the defendant's property.<sup>51</sup> Second, civil forfeiture ac-

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42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 192, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3375.

46. *Id.* at 209, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3392.

47. 21 U.S.C. § 853 (1988).

48. S. REP. NO. 225, *supra* note 41, at 209, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3392.

49. See 21 U.S.C. § 881 (1988).

50. S. REP. NO. 225, *supra* note 41, at 210, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3393.

51. *Id.*

tions often raise the same issues of fact as criminal prosecutions of drug defendants. Congress, therefore, concluded that a more efficient use of judicial and prosecutorial resources would result from combining the two actions by authorizing the simultaneous forfeiture of a defendant's property during a criminal prosecution.<sup>52</sup>

### B. Key Provisions of Section 853

Title 21, section 853(a) of the United States Code<sup>53</sup> provides for asset forfeiture by anyone convicted of specific federal drug felonies.<sup>54</sup> Forfeitable assets include property constituting the proceeds from the felony violation, property used in the commission of the violation, and, in the case of defendants convicted of a continuing criminal enterprise under 21 U.S.C. section 848, property associated with that criminal enterprise.<sup>55</sup> Section 853(b)<sup>56</sup> clarifies that the definition of property includes not only real property, but also tangible and intangible personal property.<sup>57</sup>

Section 853(c)<sup>58</sup> applies the "taint" theory to forfeitable property

52. *See id.*

53. 21 U.S.C. § 853(a) (1988). This section provides:

Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

*Id.*

54. S. REP. NO. 225, *supra* note 41, at 210-11, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3393-94. For a list of qualifying felony offenses under titles II and III of the Comprehensive Drug Abuse Prevention and Control Act of 1970, *see id.* at 211 n.51, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3394 n.51.

55. 21 U.S.C. § 853(a) (1988); S. REP. NO. 225, *supra* note 41, at 211, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3394.

56. 21 U.S.C. § 853(b) (1988).

57. *Id.*; *see* S. REP. NO. 225, *supra* note 41, at 211, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3394.

58. 21 U.S.C. § 853(c) (1988). This section provides:

All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may

and states that the government's title to the assets vests immediately upon the commission of the requisite felony offense.<sup>59</sup> Property that is subsequently transferred to a third party is also forfeitable unless it can be demonstrated at a special hearing that the transferee was a bona fide purchaser of the property for value and did not have reasonable cause to believe the property was subject to forfeiture.<sup>60</sup>

Section 853(d)<sup>61</sup> creates a rebuttable presumption that the property of a defendant convicted of the requisite felony is forfeitable if the property was acquired during the period of the commission of the felony and there is no likely source for the property other than the commission of the felony.<sup>62</sup> This presumption reduces the government's burden of having to produce often elusive direct evidence that any particular asset constituted the proceeds of a drug felony violation.<sup>63</sup>

Section 853(e)<sup>64</sup> authorizes district courts to enter protective orders to ensure the availability of a defendant's assets for forfeiture.<sup>65</sup> The court may issue a restraining order, require the defendant to execute a performance bond, or take whatever action necessary.<sup>66</sup> While such an order generally requires either the filing of an indictment that seeks forfeiture of the property<sup>67</sup> or notice to the defendant and the opportunity for an adversarial hearing,<sup>68</sup> section 853(e)(2)<sup>69</sup> allows a court to

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 (n) of this section that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

*Id.*

59. *Id.*; see S. REP. NO. 225, *supra* note 41, at 200-01, 211-12, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3383-84, 3394-95.

60. S. REP. NO. 225, *supra* note 41, at 200-01, 211-12, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3383-84, 3394-95.

61. 21 U.S.C. § 853(d) (1988).

62. *Id.*; see S. REP. NO. 225, *supra* note 41, at 212, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3395.

63. S. REP. NO. 225, *supra* note 41, at 212, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3395.

64. 21 U.S.C. § 853(e) (1988).

65. *Id.*; see S. REP. NO. 225, *supra* note 41, at 202, 213, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3385, 3396.

66. S. REP. NO. 225, *supra* note 41, at 202, 213, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3385, 3396.

67. See 21 U.S.C. § 853(e)(1)(A) (1988).

68. See *id.* § 853(e)(1)(B).

69. *Id.* § 853(e)(2). This section provides:

A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that

enter a temporary restraining order over property *ex parte*, without notice or a hearing, if the government can establish probable cause to believe that notice would threaten the availability of the asset.<sup>70</sup> Section 853(f)<sup>71</sup> further extends the trial court's authority by permitting actual seizure of potentially forfeitable assets prior to trial if the court concludes that protective orders under section 853(e) would be insufficient to preserve the availability of the property.<sup>72</sup>

Section 853(n)<sup>73</sup> establishes the mechanism whereby third parties may assert a legal interest or title in property that has been ordered forfeited.<sup>74</sup> After an order of forfeiture has been entered, the government must publish notice of the order and also provide direct notice to parties known to have an alleged interest in the property.<sup>75</sup> Interested parties then have thirty days to request an ancillary hearing to resolve their alleged interests in the forfeited property.<sup>76</sup> Following resolution of these claims, the United States has clear title to the remaining assets and may warrant good title to all subsequent purchasers or transferees.<sup>77</sup>

Section 853(p)<sup>78</sup> requires a defendant to forfeit substitute property

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provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

*Id.*

70. *Id.*; see S. REP. No. 225, *supra* note 41, at 202-03, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3385-86.

71. 21 U.S.C. § 853(f) (1988).

72. *Id.*; see S. REP. No. 225, *supra* note 41, at 213, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3396.

73. 21 U.S.C. § 853(n) (1988).

74. See S. REP. No. 225, *supra* note 41, at 207, 214, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3390, 3397.

75. 21 U.S.C. § 853(n)(1) (1988); see S. REP. No. 225, *supra* note 41, at 208, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3391.

76. 21 U.S.C. § 853(n)(2) (1988); see S. REP. No. 225, *supra* note 41, at 208, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3391.

77. 21 U.S.C. § 853(n)(7) (1988).

78. *Id.* § 853(p). This section provides:

If any of the property described in subsection (a) of this section, as a result of any act or omission of the defendant—

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1 through 5).

*Id.*

of equal value if the defendant transfers property that would have been forfeited under the statute to a third party or makes the property otherwise unavailable.<sup>79</sup> Congress intended this subsection to remedy a major weakness of previous criminal forfeiture statutes by preventing a defendant from frustrating the purpose of the law by giving forfeitable assets to a third party and moving the assets beyond the court's jurisdiction.<sup>80</sup>

Finally, the subsection of section 853 most relevant to the discussion in this Note is the one conspicuous by its absence. The statute makes no provision for paying defense attorney's fees or exempting them from forfeiture. While section 853(o)<sup>81</sup> states that the statute should be construed liberally to effectuate its remedial intent,<sup>82</sup> it does not definitively resolve the debate over attorney's fees. The lack of an explicit attorney's fees exception created the need for statutory interpretation by the Supreme Court and also provided the opportunity for a review of the statute's constitutionality.

#### IV. SUPREME COURT CONSIDERATION

The United States Supreme Court recognized the potential for conflict between the sixth amendment and section 853 in the companion cases of *Caplin & Drysdale, Chartered v. United States*<sup>83</sup> and *United States v. Monsanto*.<sup>84</sup> In a pair of five to four decisions written by Jus-

79. *Id.*; see S. REP. NO. 225, *supra* note 41, at 201-02, 212, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3384-85, 3395.

80. See S. REP. NO. 225, *supra* note 41, at 201, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3384. The remaining subsections of § 853 provide for the execution of forfeiture orders, see 21 U.S.C. § 853(g) (1988); S. REP. NO. 225, *supra* note 41, at 205, 213, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3388, 3396; disposition of forfeited property, see 21 U.S.C. § 853(h) (1988); S. REP. NO. 225, *supra* note 41, at 205-06, 213, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3388-89, 3396; enforcement authority of the Attorney General, see 21 U.S.C. § 853(i) (1988) (including disposition of forfeitable property, "making due provision for the rights of innocent persons"); see also S. REP. NO. 225, *supra* note 41, at 205-06, 213, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3388-89, 3396; concurrent application of civil forfeiture provisions, see 21 U.S.C. § 853(j) (1988); S. REP. NO. 225, *supra* note 41, at 214, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3397; prohibition of interference by third parties, see 21 U.S.C. § 853(k) (1988); S. REP. NO. 225, *supra* note 41, at 206-07, 214, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3389-90, 3397 (noting that once the criminal case proceeds against a defendant, third parties with an interest in potentially forfeitable property may not intervene except through an ancillary hearing pursuant to 21 U.S.C. § 853(n) after an order of forfeiture); jurisdiction of federal district courts, see 21 U.S.C. § 853(l) (1988); S. REP. NO. 225, *supra* note 41, at 207, 214, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3390, 3397; and taking of depositions, see 21 U.S.C. § 853(m) (1988); S. REP. NO. 225, *supra* note 41, at 207, 214, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3390, 3397.

81. 21 U.S.C. § 853(o) (1988).

82. *Id.*

83. 109 S. Ct. 2646 (1989).

84. 109 S. Ct. 2657 (1989). In *Caplin & Drysdale* and *Monsanto* the Supreme Court ad-

tice Byron White, however, the Court concluded that the use of the drug proceeds forfeiture statute to seize assets that a defendant intended to use to pay attorney's fees did not violate the right to counsel.<sup>85</sup>

#### A. *Caplin & Drysdale, Chartered v. United States*

In *Caplin & Drysdale* the petitioner, a law firm, sought to recover legal fees from the forfeited assets of its client, Christopher Reckmeyer.<sup>86</sup> Reckmeyer allegedly conducted a large drug importation and distribution operation that constituted a continuing criminal enterprise.<sup>87</sup> Pursuant to 21 U.S.C. section 853(a),<sup>88</sup> the indictment against Reckmeyer included a request for the forfeiture of specific assets in his possession.<sup>89</sup> The district court, relying on section 853(e),<sup>90</sup> issued a restraining order prohibiting Reckmeyer from transferring any of the potentially forfeitable assets.<sup>91</sup>

Despite the restraining order, Reckmeyer paid Caplin & Drysdale 25,000 dollars, which the firm placed in an escrow account, for legal services rendered prior to the indictment. Reckmeyer subsequently pled guilty and agreed to forfeit the specified assets.<sup>92</sup> Caplin & Drysdale then requested a hearing pursuant to section 853(n)<sup>93</sup> to resolve the firm's claim to the 25,000 dollar escrow account plus an additional 170,000 dollars of Reckmeyer's assets, which Caplin & Drysdale claimed it was owed for conducting his postindictment defense.<sup>94</sup> Caplin & Drysdale argued that the failure of section 853 to provide an exception for the payment of legal fees violated the sixth amendment.<sup>95</sup>

The district court granted Caplin & Drysdale's request for a por-

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ressed statutory, sixth amendment, and fifth amendment challenges to the application of 21 U.S.C. § 853 against assets intended to be used to pay attorney's fees. While the Court upheld the use of the statute on all three grounds, the discussion in this Note is limited to the Court's resolution of the sixth amendment claims.

85. Justice Byron White's majority opinions were joined by Chief Justice William Rehnquist, and Justices Sandra Day O'Connor, Antonin Scalia, and Anthony Kennedy. Justice Harry Blackmun's dissenting opinion in *Caplin & Drysdale*, which also applied to *Monsanto*, was joined by Justices William Brennan, Thurgood Marshall, and John Paul Stevens. See *Caplin & Drysdale*, 109 S. Ct. at 2669 (Blackmun, J., dissenting); *Monsanto*, 109 S. Ct. at 2659.

86. *Caplin & Drysdale*, 109 S. Ct. at 2649-50.

87. *Id.* at 2649.

88. See *supra* note 53.

89. *Caplin & Drysdale*, 109 S. Ct. at 2649.

90. See *supra* note 69.

91. *Caplin & Drysdale*, 109 S. Ct. at 2650.

92. *Id.* at 2650.

93. See *supra* notes 73-77 and accompanying text.

94. *Caplin & Drysdale*, 109 S. Ct. at 2650.

95. *Id.*

tion of the forfeited assets.<sup>96</sup> A panel of the United States Court of Appeals for the Fourth Circuit affirmed the trial court's award on sixth amendment grounds.<sup>97</sup> Upon a rehearing en banc, however, the court of appeals reversed itself and denied Caplin & Drysdale's claim for attorney's fees.<sup>98</sup> The firm appealed to the Supreme Court, which granted certiorari.<sup>99</sup>

The Court began its evaluation of Caplin & Drysdale's argument by noting that the firm was not claiming that a poor defendant had a right to the counsel of choice if the defendant could not afford it.<sup>100</sup> Nor was the government arguing that the sixth amendment did not guarantee a defendant's right to be represented by an attorney that the defendant could afford to hire.<sup>101</sup> The issue was whether the forfeiture of assets that the defendant intended to use to hire an attorney impermissibly burdened the exercise of sixth amendment rights.<sup>102</sup> The Court concluded that it did not.<sup>103</sup>

The Court held that, because 21 U.S.C. section 853(c)<sup>104</sup> transfers title to the assets to the United States, the defendant no longer has any claim to their use, whether to hire an attorney or otherwise.<sup>105</sup> By analogy the Court pointed out that a robbery suspect has no constitutional right to use money stolen from a bank to hire an attorney if the suspect is arrested.<sup>106</sup> Although the money is in the defendant's possession, it is not rightfully his. The government does not violate the defendant's sixth amendment right to counsel if it seizes the money and refuses to permit the defendant to use it to pay attorney's fees.<sup>107</sup>

The Supreme Court rejected Caplin & Drysdale's attempt to distinguish the government's interest in forfeited assets from a bank's title to stolen money.<sup>108</sup> The Court held that section 853(c) grants the United States full title to the assets under the relation back doctrine<sup>109</sup>

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96. *United States v. Reckmeyer*, 631 F. Supp. 1191 (E.D. Va. 1986).

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

98. *In re Forfeiture Hearing as to Caplin & Drysdale*, 837 F.2d 637 (4th Cir. 1988), *aff'd sub nom.* *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646 (1989).

99. *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 363 (1988).

100. *Id.* at 2651-52. The Court reiterated that a "defendant may not insist on representation by an attorney he cannot afford." *Id.* at 2652 (quoting *Wheat v. United States*, 486 U.S. 153, 159 (1988)).

101. *Id.* at 2652.

102. *Id.*

103. *Id.* at 2652-53.

104. *See supra* note 58.

105. *Caplin & Drysdale*, 109 S. Ct. at 2653.

106. *Id.* at 2652-53.

107. *Id.*

108. *Id.* at 2653.

109. The use of relation back provisions to grant the government title to assets upon commission of the requisite criminal act has been upheld for over 100 years. *See Caplin & Drysdale*,

as soon as the requisite criminal act takes place.<sup>110</sup> Caplin & Drysdale did not claim that all criminal forfeitures are unconstitutional—merely those that seek to recover assets a defendant intends to use to hire an attorney. The Court declined to adopt Caplin & Drysdale's interpretation of the sixth amendment and refused to distinguish between the right to counsel and other constitutional rights such as the right to travel or freedom of religion.<sup>111</sup> Thus, because the Court was unwilling to recognize an exception to forfeiture for assets intended to be used for the exercise of these other constitutional rights, it refused to do so for the right to counsel.<sup>112</sup>

The Court also rejected Caplin & Drysdale's claim that a balancing analysis of the government's interest in the forfeited assets versus the defendant's sixth amendment rights weighed in favor of recognizing an exception to forfeiture.<sup>113</sup> The Court emphasized three distinct governmental interests in the recovery of assets forfeitable under section 853. First, the United States has a significant pecuniary interest in any assets it might receive to continue funding its law enforcement efforts.<sup>114</sup> Second, because section 853(n) permits recovery by the rightful owner of any forfeited property, the government has a restitutionary interest in preserving such property intact.<sup>115</sup> Third, the government has an interest in fulfilling one of the primary purposes of the criminal forfeiture provisions—lessening the economic power of criminals committing drug offenses, including the power to hire expensive private counsel for their defense.<sup>116</sup>

Given these factors, the Court concluded that the government has a strong interest in obtaining full recovery of all forfeitable assets that overrides any sixth amendment interest in allowing a defendant to use the assets to pay for a defense.<sup>117</sup> The Court added that, were it to hold otherwise, whenever the government took assets that a defendant might have used to hire an attorney, including ordinary tax assessments, a violation of the sixth amendment would occur.<sup>118</sup>

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109 S. Ct. at 2653 (citing *United States v. Stowell*, 133 U.S. 1, 10 (1890)).

110. *Id.* at 2653. The Court noted that it had sustained the operation of a criminal forfeiture statute as early as 1890 in *United States v. Stowell*, 133 U.S. 1 (1890). *Id.*

111. *Id.* at 2653-54.

112. *Id.*

113. *Id.* at 2654.

114. *Id.*

115. *Id.*

116. *Id.* at 2654-55.

117. *Id.* at 2655.

118. *Id.*

## B. United States v. Monsanto

In *United States v. Monsanto*<sup>119</sup> the government charged the respondent with operating a continuing criminal enterprise in the form of a sizable heroin distribution network. The district court granted the government's motion, pursuant to section 853(e), to freeze several of Monsanto's assets, including 35,000 dollars in cash.<sup>120</sup> Monsanto then requested that the court vacate its restraining order to allow him to use his frozen assets to retain counsel and that it exempt any attorney's fees he might pay from forfeiture under section 853(c). The district court, however, refused Monsanto's motion.<sup>121</sup>

Monsanto appealed to the Second Circuit, which refused to overrule the district court but remanded the case for an adversarial hearing.<sup>122</sup> The court of appeals later vacated this decision and held a rehearing en banc in which it modified the district court's order to permit the frozen assets to be used to pay for Monsanto's defense.<sup>123</sup> The Supreme Court subsequently granted certiorari and reversed.<sup>124</sup>

In *Monsanto* the Supreme Court considered whether freezing a defendant's assets before conviction and before the assets are conclusively held to be forfeitable violates the Constitution.<sup>125</sup> The Court concluded that pretrial freezing of assets is permissible when the trial court's restraining order is based on a finding of probable cause that the assets are forfeitable.<sup>126</sup>

The Court noted it previously had authorized the government's seizure of property upon a showing of probable cause that the property would be forfeitable.<sup>127</sup> To hold that a defendant's property could not be restrained prior to trial when the defendant could be placed in custody would be inconsistent. Because the government could have incarcerated Monsanto to assure that he appeared at trial and to protect public safety, the Court held that a similar restraint on his property to

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119. 109 S. Ct. 2657 (1989).

120. *Id.* at 2660.

121. *Id.* at 2660-61.

122. *United States v. Monsanto*, 836 F.2d 74 (2d Cir. 1987), *vacated on rehearing*, 852 F.2d 1400 (2d Cir. 1988), *rev'd*, 109 S. Ct. 2657 (1989). The government's initial motion to freeze Monsanto's assets was heard *ex parte*. The court of appeals ordered an adversarial hearing at which the government had the burden of demonstrating the likelihood that the assets were forfeitable. *Id.*

123. *Monsanto*, 852 F.2d at 1400. The court of appeals' reversal of its earlier decision was not announced until near the end of Monsanto's trial. Because summations were about to begin, Monsanto, who had been represented by an appointed attorney, declined the district court's offer to use his frozen assets to retain private counsel. *Monsanto*, 109 S. Ct. at 2661 n.5.

124. *United States v. Monsanto*, 109 S. Ct. 363 (1988).

125. *Monsanto*, 109 S. Ct. at 2666.

126. *Id.*

127. *Id.* (citing *United States v. \$8,850*, 461 U.S. 555 (1983), and *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974)).

protect its "appearance" at trial and society's interest in recovery of the assets was constitutional.<sup>128</sup>

The Court rejected Monsanto's argument that a balancing of the government's interest in the assets and the defendant's intention to use the assets to obtain counsel mandated that at least some of the assets be free from pretrial restraint.<sup>129</sup> The Court cited its holding in *Caplin & Drysdale* that, after weighing the various interests involved, assets a defendant had intended to use for legal fees may be subject to forfeiture.<sup>130</sup> The Court concluded that no constitutional violation occurs from freezing forfeitable assets prior to trial because prohibiting the use of forfeited assets to pay attorney's fees after conviction is not unconstitutional.<sup>131</sup>

### C. Dissenting Opinion

The dissent in *Caplin & Drysdale* and *Monsanto* criticized the majority for finding that a defendant's sixth amendment right to counsel of choice was so unimportant that it could be outweighed by the legal fiction of the government's alleged property interest in forfeitable assets.<sup>132</sup> The dissent claimed that the majority lost sight of several fundamental legal interests that the right to counsel of choice serves to protect. First, the right to hire private counsel fosters a relationship of trust between the attorney and client that is critical to an attorney's effectiveness.<sup>133</sup> Second, private counsel can help provide some level of equality of resources and experience between the government and the individual it seeks to prosecute.<sup>134</sup> Third, the existence of the private defense bar serves other institutional interests of the law including the prevention of excessive socialization by encouraging individual initiative and the employment of legal specialists to handle particularly complex or technical matters.<sup>135</sup>

The dissent further charged that, if Congress intentionally had sought to undermine the modern adversarial system of justice, it could not have selected a better mechanism than attorney's fees forfeiture.<sup>136</sup> Not only will defendants whose assets are currently restrained or forfeited be unable to hire their counsel of choice, but also the mere threat

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128. *Id.*

129. *Id.* at 2666-67.

130. *Id.*; see *supra* notes 86-118 and accompanying text.

131. *Monsanto*, 109 S. Ct. at 2666-67.

132. *Caplin & Drysdale*, 109 S. Ct. at 2672 (Blackmun, J., dissenting).

133. *Id.*

134. *Id.* at 2673.

135. *Id.* at 2673-74.

136. *Id.* at 2674.

of future fee forfeiture may make it impossible for many other defendants to find private counsel willing to represent them.<sup>137</sup> Even if a defendant is able to find an attorney who will take the case, the possibility of future forfeiture will continue to undermine the attorney-client relationship. The threat of forfeiture discourages the attorney from conducting an extensive investigation of the case for fear of failing to qualify under section 853(c) as an innocent transferee without cause to know that fees paid might be subject to forfeiture.<sup>138</sup> A conflict of interest between the lawyer and the defendant likely will arise if, for example, the government offers to waive asset forfeiture as part of a plea bargain agreement. The forfeiture provision also gives the government the power to control and intimidate the attorney by threatening fee forfeiture if the attorney pursues the client's case too vigorously or successfully.<sup>139</sup>

The dissent disagreed that the government's interest in the forfeitable assets was so substantial as to outweigh the defendant's sixth amendment rights.<sup>140</sup> The dissent first noted that the government's desire for forfeiture to prevent the defendant from hiring private counsel did not constitute a legitimate state interest.<sup>141</sup> The government's pecuniary interest in the property, while admittedly legitimate, was too weak to justify the resulting interference with the right to counsel of choice, particularly because this governmental interest arises from the legal fiction of the relation back doctrine.<sup>142</sup>

The dissent strongly criticized the government's use of its already questionable postconviction interest in a defendant's property to justify pretrial restraint of those assets.<sup>143</sup> Although a court must determine probable cause before issuing a restraining order over the assets, the mere possibility that such an order will be issued has a significant chilling effect on the defendant's ability to retain counsel.<sup>144</sup> The dissent disagreed with the majority's analogy of freezing a defendant's assets to holding the defendant in custody prior to trial. The government's interests in the assets are not nearly as compelling as its interests in protecting public safety and ensuring the appearance of a defendant at trial, which justify pretrial custody.<sup>145</sup>

Finally, the dissent argued that section 853 was unconstitutionally

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137. *Id.*

138. *Id.* at 2675.

139. *Id.*

140. *Id.* at 2676.

141. *Id.*

142. *Id.* See generally *supra* note 110.

143. *Caplin & Drysdale*, 109 S. Ct. at 2677 (Blackmun, J., dissenting).

144. *Id.*

145. *Id.*

underinclusive.<sup>146</sup> Most providers of services will be protected because section 853(c) provides an exemption for assets transferred to third parties who do not have notice that the assets may be forfeitable.<sup>147</sup> Attorneys, however, who properly investigate their clients' cases cannot help but know that assets may be subject to forfeiture if their clients are convicted.<sup>148</sup> The effect of this disparity places the burden of drug proceeds forfeiture almost entirely upon the defendant's exercise of a constitutionally protected right.<sup>149</sup> The dissent concluded, therefore, that a balancing analysis of the government's weak pecuniary interests in forfeitable property against the defendant's compelling sixth amendment rights clearly weighed in favor of recognizing an exception from forfeiture under section 853 for assets used, or intended to be used, to pay attorney's fees.<sup>150</sup>

## V. ALTERNATIVE ANALYSIS

### A. *The Court's Balancing Test*

Before conducting an independent evaluation of a defendant's interests in sixth amendment rights and the government's interests in forfeitable assets, it is useful to assess the objectivity of the majority's analysis in *Caplin & Drysdale* and *Monsanto*. Several factors in the majority's opinions suggest that the Court is at best ambivalent, and at worst hostile, toward the constitutional guarantees contained in the sixth amendment.

First, the most conspicuous factor suggesting prejudice is the majority's failure to discuss the various sixth amendment values that were at stake.<sup>151</sup> The Court fails to explain how it could possibly balance the

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146. *Id.* at 2677-78.

147. *Id.* at 2678.

148. *Id.*

149. *Id.*

150. *Id.* Justice Harry Blackmun concluded his dissent by stating:

In my view, the Act as interpreted by the majority is inconsistent with the intent of Congress, and seriously undermines the basic fairness of our criminal-justice system. That a majority of this Court has upheld the constitutionality of the Act as so interpreted will not deter Congress, I hope, from amending the Act to make clear that Congress did not intend this result. This Court has the power to declare the Act constitutional, but it cannot thereby make it wise.

*Id.*

151. After reviewing the governmental interests allegedly served by forfeiture, the majority simply concludes that these interests override any sixth amendment rights of criminal defendants. Conspicuously absent is any discussion of the value of those rights or of how they are affected by forfeiture. *See id.* at 2655. Indeed, the dissent is forced to deduce "[t]hat the majority implicitly finds the Sixth Amendment right to counsel of choice so insubstantial" because the majority never makes an *explicit* statement of the value of the sixth amendment. *Id.* at 2672 (Blackmun, J., dissenting).

competing interests accurately without at least mentioning the interests of the defendant. The majority criticizes Caplin & Drysdale's balancing analysis for failing to identify accurately the government's interests in potentially forfeitable assets.<sup>152</sup> Ironically, the Court makes a similar error by ignoring the components of a defendant's right to counsel.

Second, the majority either is unaware of the ethical constraints placed on defense attorneys or chooses to ignore these limitations by implicitly endorsing the adoption of contingency fee relationships by the private criminal bar.<sup>153</sup> The Court attempts to minimize the burden of attorney's fees forfeiture on the exercise of sixth amendment rights by pointing out that criminal defendants may be able to find attorneys who are willing to represent them in the hope that the defendants will be acquitted and able to pay attorney's fees.<sup>154</sup> This rationale, of course, ignores the fact that defense attorneys who are willing to take on such a case would be forced to inflate their standard fees to break even after discounting the current fee structure by the probability that the defendant will be convicted, assets forfeited, and the fees uncollectible.<sup>155</sup> The result of such a system is to create compensation on a de facto contingency fee basis.

Third, the majority refuses to recognize the unique nature of the right to counsel in the context of criminal forfeiture.<sup>156</sup> The Court claims that it is unwilling to create an attorney's fees exception to forfeiture on the grounds that it would then be forced to create an exception for the exercise of all other constitutionally guaranteed rights, such as the right to travel or freedom of religion.<sup>157</sup> Such a claim, however, ignores the fact that the right to counsel is critical not only to ensure the fundamental fairness of the defendant's trial, but also to determine whether the government may seek forfeiture of the assets in the first place. The prerequisite to drug proceeds forfeiture is conviction of the underlying drug felony.<sup>158</sup> By restraining a defendant's assets and inter-

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152. *Id.* at 2654.

153. *Id.* at 2652. Contingency fees in criminal cases are proscribed by both the Model Rules of Professional Conduct and the Model Code of Professional Responsibility. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(d)(2) (1989) (prohibiting "a contingent fee for representing a defendant in a criminal case"); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(C) (1980) (stating that "[a] lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case").

154. *Caplin & Drysdale*, 109 S. Ct. at 2652.

155. For a brief illustration of the effect of contingency fee systems on attorney's fees revenues and the need to discount expected income by the probability of winning, see R. COOTER & T. ULEN, *LAW AND ECONOMICS* 484 (1988).

156. *Caplin & Drysdale*, 109 S. Ct. at 2653-54.

157. *Id.*

158. See 21 U.S.C. § 853(a) (1988) (requiring conviction of a specified drug felony before authorizing criminal forfeiture of assets).

fering with the defendant's ability to hire well-qualified counsel, the government increases its chances of obtaining a conviction and thereby secures its entitlement to the restrained assets. This nexus between the right to counsel and criminal forfeiture clearly justifies distinguishing the exercise of sixth amendment rights from other constitutionally protected liberties and recognizing a reasonable attorney's fees exception to forfeiture.<sup>159</sup>

### B. *Effect of Forfeiture on the Right to Counsel*

The sixth amendment interest most directly affected by criminal forfeiture is the right to counsel of choice. A defendant's ability to exercise this right may be destroyed completely if all the defendant's assets are forfeited or subjected to pretrial restraint.<sup>160</sup> The right to counsel of choice also is subject to significant indirect interference because of the chilling effect the threat of future forfeiture has on an attorney's willingness to represent defendants charged with drug related crimes. Even if a defendant's assets are unrestrained, it may be impossible to hire the attorney of choice given the possibility that any fees paid might be subject to forfeiture after trial.<sup>161</sup> As the *Caplin & Drysdale* dissent pointed out, the denial of the right to counsel of choice hurts not only the individual defendant, but also a number of broad institutional interests served by the private defense bar.<sup>162</sup>

Extending criminal forfeiture to include attorney's fees also creates a potentially serious conflict of interest between criminal defendants and their attorneys. Government prosecutors could, for example, offer a plea bargain in which the defendant pleads guilty to certain charges, but will not have his assets subject to forfeiture. Given the attorney's own personal interests in those assets for the payment of his fees, the attorney could not advise his client objectively about whether to accept or reject the offer.<sup>163</sup> While it would be highly unethical for a prosecutor

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159. The dissent supports this distinction by recognizing the unique nature of the sixth amendment right to counsel and its core function in the criminal justice system. *Caplin & Drysdale*, 109 S. Ct. at 2672-74 (Blackmun, J., dissenting).

160. *Id.* at 2674-77.

161. See, e.g., Fricker, *Dirty Money*, A.B.A. J., Nov. 1989, at 60 (stating that fee forfeiture may cause some defense attorneys to quit practicing criminal law or to reduce their representation of drug defendants); Gallagher, *RICO Risks*, A.B.A. J., Oct. 1989, at 28 (stating that some lawyers may reject RICO and drug cases to avoid possibility of fee forfeiture).

162. See *supra* notes 135-38 and accompanying text.

163. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1989) (stating that "[a] lawyer shall not represent a client if the representation of that client may be materially limited . . . by the lawyer's own interests"); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(A) (1980) (providing that "[e]xcept with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests").

to propose such a plea bargain for the purposes of exploiting this conflict of interest, the Supreme Court conceded that such exploitation was possible in *Wheat v. United States*.<sup>164</sup> Even if no actual conflict of interest arises, the government's ability to create one constitutes a serious interference with the attorney-client relationship. This potential conflict of interest also interferes indirectly with the right to counsel of choice by giving the government additional grounds on which to challenge representation by one's desired counsel.<sup>165</sup>

Finally, given the extremely complex nature of many federal drug prosecutions that seek criminal forfeiture, representation by appointed counsel raises serious questions about the effectiveness of assistance of counsel at trial.<sup>166</sup> While the right to appointed counsel is critical to ensure the fundamental fairness of most criminal trials, it may not be sufficient in cases involving extremely complex issues of fact and law that generally are handled only by trained and experienced specialists within the private defense bar.<sup>167</sup> The shortcomings of appointed counsel are further aggravated by the highly deferential standard of review for claims of ineffective assistance of counsel outlined in *Strickland v. Washington*.<sup>168</sup> Defendants whose assets are subject to pretrial restraint or forfeiture, without an exception for attorney's fees, may soon find that the sixth amendment is a right without a remedy.

### C. Governmental Interests in Forfeiture

The majority in *Caplin & Drysdale* identified three governmental interests served by the drug proceeds forfeiture statute—a pecuniary interest in the assets themselves, restitution of third-party property rights, and deterrence of future criminal activity.<sup>169</sup> Of these three interests, however, only the deterrence rationale possibly could be characterized as compelling.

While the dissent conceded the legitimacy of the government's pecuniary interest in a defendant's assets, this interest cannot serve as an independent justification for forfeiture.<sup>170</sup> Clearly, the government receives an economic benefit from the assets it seizes and may use them

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164. 486 U.S. 153, 162-63 (1988).

165. *Id.*

166. *Caplin & Drysdale*, 109 S. Ct. at 2673-75 (Blackmun, J., dissenting).

167. For a detailed discussion of the functions of private defense attorneys in our criminal justice system and the effect of drug proceeds forfeiture, see Cloud, *Forfeiting Defense Attorneys' Fees: Applying An Institutional Role Theory To Define Individual Constitutional Rights*, 1987 WIS. L. REV. 1; see also Brickey, *Forfeiture of Attorneys' Fees: The Impact of RICO and CCE Forfeitures on the Right to Counsel*, 72 VA. L. REV. 493 (1986).

168. See *supra* notes 18-20 and accompanying text.

169. See *supra* notes 115-17 and accompanying text.

170. *Caplin & Drysdale*, 109 S. Ct. at 2676-77 (Blackmun, J., dissenting).

to support its activities.<sup>171</sup> The Constitution, however, gives Congress ample powers of taxation,<sup>172</sup> and this method is a more appropriate mechanism for raising revenue and funding law enforcement. The derivative economic benefit of forfeiture, therefore, is secondary to its deterrent effect and should not provide a separate and independent governmental interest.<sup>173</sup>

The government admittedly has a legitimate restitutionary interest in returning forfeitable assets to their true owner. This interest, however, is not significantly furthered by section 853 because the statute merely duplicates other remedies that already are available.<sup>174</sup> In fact, criminal forfeiture actually may destroy a third party's interests in a defendant's property. Section 853(n) gives third parties only thirty days in which to challenge the forfeiture of assets in a defendant's custody; otherwise, the United States is declared to have clear title to the property.<sup>175</sup> Anyone who fails to see the published notice or respond within the deadline might well find that their interest in the property has been forfeited along with the defendant's, notwithstanding the restitutionary interests allegedly at stake. Finally, the recognition of a duty to facilitate restitution of third-party property rights in forfeited assets also undermines the government's alleged pecuniary interest in those assets.<sup>176</sup>

The use of forfeiture to take the profit out of crime and reduce the economic incentive to engage in future criminal activity provides the only legitimate governmental interest that is significantly served by section 853. The overall deterrent effect of the statute, however, would not be impaired substantially by recognizing an attorney's fees exception to forfeiture. Whether money is seized by the government or paid to a private attorney, the net economic effect to the defendant is the same; the

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171. See 28 U.S.C. § 524(c) (1982 and Supp. V 1987) (creating a fund of forfeited assets for Justice Department law enforcement activities).

172. See U.S. Const. art. I, § 8.

173. Unlike the forfeiture of assets that defendants intend to use to pay attorney's fees, the general collection of tax revenues constitutes a much less direct interference with the exercise of core constitutional rights, particularly because the burden is spread across the population as a whole and generally constitutes only a small portion of total income. Furthermore, the purpose of taxation—to raise revenue—is less intrusive than the purpose of drug proceeds forfeiture—criminal punishment. Cf. *Caplin & Drysdale*, 109 S. Ct. at 2655-56 (holding that criminal forfeiture is no different from ordinary tax assessments).

174. The majority fails to demonstrate how traditional legal and equitable remedies for breach of contract and conversion fail to protect adequately the property interests of third parties in assets that might be subject to forfeiture. Nor does it explain why third-party property interests in nonforfeitable assets also should not be given additional legal protections.

175. See *supra* notes 73-77 and accompanying text.

176. Clearly the government cannot claim a pecuniary interest in assets which it undertakes to return to third parties. To the extent that forfeiture does serve a restitutionary interest, it necessarily conflicts with any alleged pecuniary interest.

defendant no longer has possession of the money, which removes the incentive to commit additional crimes. While the defendant will receive some benefit from the services of the attorney, this right to counsel is the very interest that the sixth amendment was designed to protect. As the *Caplin & Drysdale* dissent pointed out, the government's desire to interfere directly with a defendant's ability to hire private counsel is not a legitimate state interest and cannot serve as an independent justification for forfeiture.<sup>177</sup>

#### D. Pretrial Restraint of Forfeitable Assets

Balancing a defendant's sixth amendment rights against the government's interest in forfeitable assets becomes even more difficult when evaluating pretrial restraint of those assets. The majority opinion in *Monsanto*, however, ignored the pretrial-posttrial distinction and simply referred back to its analysis in *Caplin & Drysdale*.<sup>178</sup>

First, the Court neglected to consider the time-sensitive nature of the various interests involved. Before conviction a defendant's interest in sixth amendment rights is at its greatest. The importance of counsel before a criminal judgment reflects the basic premise of *Powell v. Alabama*<sup>179</sup> that the assistance of counsel is critical both before and during trial to ensure the fundamental fairness of the proceeding.<sup>180</sup> The government's interests, on the other hand, are at their weakest prior to trial because the government must discount its interest in the drug proceeds by the probability that the defendant will be acquitted and assets will not be forfeited.<sup>181</sup>

Second, the Court's analogy of pretrial restraint of assets to pretrial restraint of a defendant<sup>182</sup> is fallacious. The primary justifications for pretrial custody of a defendant are to protect the public safety and guarantee the defendant's presence at trial.<sup>183</sup> The government's interests in a defendant's assets are not nearly as compelling and must be discounted by their uncertainty. Moreover, even when a defendant is placed in pretrial custody, the government may not interfere with the sixth amendment right to counsel.<sup>184</sup> By applying the Court's own anal-

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177. *Caplin & Drysdale*, 109 S. Ct. at 2676 (Blackmun, J., dissenting).

178. See *supra* note 130 and accompanying text.

179. 287 U.S. 45 (1932).

180. *Id.* at 57.

181. See 21 U.S.C. § 853(a) (1988); see also *Caplin & Drysdale*, 109 S. Ct. at 2676 n.15 (Blackmun, J., dissenting) (noting that government's claim to forfeitable assets does not arise until after the government has secured a conviction).

182. See *supra* note 128 and accompanying text.

183. *United States v. Monsanto*, 109 S. Ct. 2657, 2666 (1989).

184. See, e.g., *Brewer v. Williams*, 430 U.S. 387, 398 (1977) (holding that the sixth amendment right to counsel vests upon the initiation of judicial proceedings, including pretrial custody).

ogy of this situation to criminal forfeiture, therefore, we would conclude that the pretrial restraint of potentially forfeitable assets is permissible only to the extent that it does not interfere with a defendant's sixth amendment rights.

## VI. CONCLUSION

This Note concurs with the dissent's view that an accurate balancing of the conflicting governmental and individual interests mandates the recognition of an attorney's fees exception to the drug proceeds forfeiture statute. Such an exception would serve a vast array of sixth amendment interests while negatively affecting the deterrence of future drug felonies only marginally.

It should be noted, however, that a wide middle ground exists between the majority and dissenting opinions. One commentator, for example, has advocated that defense attorneys be treated as bona fide purchasers under 21 U.S.C. section 853(c) with respect to fees paid prior to the issuance of a pretrial restraining order based on clear and convincing evidence.<sup>185</sup> Even such a limited exception to forfeiture gives the fundamental values of the sixth amendment right to counsel far more protection than the rule handed down by the majority.

An independent examination of the Supreme Court's balancing analysis in *Caplin & Drysdale* and *Monsanto* suggests that the Court erred by undervaluing a defendant's sixth amendment rights and overestimating the government's interests in potentially forfeitable assets. Taken alone, these two decisions might be viewed as deeply regrettable but ultimately tolerable anomalies.

Unfortunately, however, these cases are only a small part of a much larger erosion of constitutional protections motivated by the current war on drugs.<sup>186</sup> This war already has been used to justify a wide variety of intrusions into previously protected areas, including mandatory drug testing of public employees,<sup>187</sup> the utilization of standardized profiles for suspicionless searches and seizures,<sup>188</sup> and the use of the

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185. See Wuslich, *Procedural Due Process and the Defendant's Right to Choice of Counsel Under the Comprehensive Forfeiture Act*, 15 AM. J. CRIM. L. 83, 113-14 (1988).

186. See generally Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889 (1987).

187. See Special Project, *Government Drug Testing: A Question of Reasonableness*, 43 VAND. L. REV. 1343 (1990).

188. See Special Project, *Drug Couriers and the Fourth Amendment: Vanishing Privacy Rights for Commercial Passengers*, 43 VAND. L. REV. 1311 (1990).

military as a superpolice force both domestically and abroad.<sup>189</sup> The nagging question that remains behind is which liberty will be the next casualty of war?

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189. See Special Project, *Drug Diplomacy and the Supply-Side Strategy: A Survey of United States Practice*, 43 VAND. L. REV. 1259 (1990).

\* The Author would like to dedicate this Note to his wife, Tracy Michelle Berube. He would also like to thank Professors Donald J. Hall and Rebecca L. Brown of Vanderbilt Law School and Dr. James R. Beattie for their extremely helpful comments.