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CAPLIN & DRYSDALE, CHARTERED V. UNITED STATES*: SUPREME COURT APPROVES ATTORNEY FEE FORFEITURE

The sixth amendment right¹ to counsel of choice² is a qualified right subject to some government interference.³ However, the Supreme Court has yet to fully define its outer limits.⁴ This right became the center of controversy when the federal government began pursuing the forfeiture⁵ of attorneys' fees⁶ using criminal forfeiture

* 109 S. Ct. 2646 (1989).

1. U.S. CONST. amend. VI states, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." The Supreme Court has interpreted the sixth amendment to guarantee that counsel be present in capital cases, *Powell v. Alabama*, 287 U.S. 45 (1932); that counsel be appointed to indigents; *Gideon v. Wainwright*, 372 U.S. 335 (1963); that counsel be effective; *United States v. Cronin*, 466 U.S. 648 (1984); and that the accused, if he has the means, be allowed to choose counsel, *Powell*, 287 U.S. at 53.

2. The sixth amendment is silent as to the right to counsel of choice. Nonetheless, courts have recognized it as a qualified right dependent upon the defendant's means. *United States v. Harvey*, 814 F.2d 905, 923 (4th Cir. 1987) (right to counsel of choice qualified by defendant's means and compelling government interests, i.e. orderly administration of justice); *Linton v. Perini*, 656 F.2d 207, 208 (6th Cir. 1981) (right to counsel of choice implicit in sixth amendment); cf. *Chandler v. Fretag*, 348 U.S. 3, 10 (1954) (defendant must be given opportunity to employ counsel for sixth amendment to function properly). Additionally, the history of the sixth amendment suggests that the framers preferred the right to counsel of choice over counsel being appointed. The famous trial of John Peter Zenger in colonial America, wherein the British government attempted to suppress his choice of counsel, is noted for, inter alia, prompting this right to be included in the Bill of Rights. Winick, *Forfeiture of Attorneys' Fees Under RICO and CCE and the Right to Counsel of Choice: the Constitutional Dilemma and How to Avoid It*, 43 U. MIAMI L. REV. 765, 786-99 (1989).

The right to counsel of choice is also noted for serving the adversary system, providing for a meaningful attorney-client relationship, accurate fact determinations, autonomy of the accused in presenting a defense, and the accused's perception of fairness in the proceedings. For further discussion of these principles, see *infra* notes 85-89 and accompanying text.

3. The orderly administration of justice is a compelling reason to interfere with the right to counsel of choice. *Wheat v. United States*, 108 S. Ct. 1692 (1988) (prosecutor's desire to disqualify defendant's choice to switch counsel close to time of trial sufficient to overcome right); *Morris v. Slappy*, 461 U.S. 1, 13 (1982) (trial court justified in denying defendant's midtrial motion to change counsel).

4. *United States v. Nichols*, 841 F.2d 1485, 1501-02 n.9 (10th Cir. 1988) (noting cases that have dealt with the issue on related grounds: due process, right to conduct one's own defense).

5. Forfeiture is "[s]omething to which the right is lost by the commission of a crime or fault or the losing of something by way of penalty." BLACK'S LAW DICTIONARY 584 (5th ed. 1979). The use of forfeiture as punishment for criminal acts, or *in personam* forfeiture, is deeply rooted in English law. See 4 W. BLACKSTONE, COMMENTARIES* 381-89. The United States, too, has used *in personam* forfeiture as well as its cousin, *in rem* forfeiture. For a complete discussion of the history of forfeiture, see Hughes & O'Connell, *In Personam (Criminal) Forfeiture and Federal Drug Felonies: An Expansion of a Harsh English Tradition into a Modern Dilemma*, 11 PEPPERDINE L. REV. 613, 619-24 (1984).

6. The attorney fee forfeiture phenomenon is the by-product of the forfeiture

provisions under the Racketeer Influenced and Corrupt Organizations Act⁷ ("RICO") and the Continuing Criminal Enterprise Act⁸ ("CCE"). In *Caplin & Drysdale, Chartered v. United States*,⁹ the Court addressed the issue of whether forfeiture, or the threat of forfeiture, of attorneys' fees constituted an undue infringement upon a criminal defendant's sixth amendment right to counsel of choice. In a 5-4 decision, the Court ruled that fee forfeiture did not offend the

provisions of RICO and CCE, see *infra* notes 7-8, and the Justice Department's initiative to seek forfeiture of attorneys' fees. See DEPT. OF JUSTICE, U.S. ATTORNEYS' MANUAL, § 9-111.000-.700, reprinted in 38 CRIM. L. REP. 3001-08 (Oct. 2, 1985) [hereinafter U.S. ATTORNEYS' MANUAL].

Fee forfeiture arises when an attorney defending a RICO or CCE client is put on "notice" that the government is "initiating civil proceedings against the assets, or by application for pre-indictment or post conviction restraining orders . . . , or by obtaining an indictment containing a forfeiture count." U.S. ATTORNEYS' MANUAL, *supra*, at § 9-111.511. The fee forfeiture scenario may occur directly or indirectly. It occurs directly when the government freezes all of the defendant's assets. It occurs indirectly when there is a threat of fee forfeiture. The threat occurs when the government obtains an indictment against the defendant which contains a RICO or CCE count, and the government need not pursue the forfeiture until after the trial is over and substantial fees have accrued. See generally Genego, *The Legal and Practical Implications of Forfeiture of Attorneys' Fees*, 36 EMORY L.J. 836, 840-44 (1987).

As the above scenario illustrates, the fee forfeiture situation enables the prosecution to render the defendant a constructive indigent who is unable to retain counsel of choice for his defense. Professor Morgan Cloud aptly referred to this situation as "whipsawing" the defendant. Cloud, *Forfeiting Defense Attorneys' Fees: Applying an Institutional Role Theory To Define Individual Constitutional Rights*, 1 WIS. L. REV. 1, 35 (1987). "Whipsawing" is defined as "to get the advantage of (an opponent) two ways at once. . ." WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 2085 (2d ed. 1979), or as "something that is disadvantageous in two ways," 4 OXFORD ENGLISH DICTIONARY 1273 (supp. ed. 1986). Thus, "whipsawing" accurately describes the plight of the RICO or CCE defendant who is disadvantaged by the dual forces of the heavy hand of government prosecution on one side and his functional indigency on the other.

7. RICO was originally enacted in 1970 as Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, and is codified at 18 U.S.C. §§ 1961-1968 (1988).

8. CCE was enacted as Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1265 (1970), and is codified at 21 U.S.C. §§ 848 (1988). Congress augmented the power of these laws when it amended RICO with the Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, 301 Stat. 98 (1984) [hereinafter "CFA"], and made similar provisions in CCE. The forfeiture provisions of both RICO and CCE are essentially the same. Compare 21 U.S.C. § 853(a)(3)(1988) (Persons convicted shall forfeit ". . . any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.) with 18 U.S.C. § 1963(a)(2) (1982 ed. Supp. IV) (Persons convicted shall forfeit ". . . any (A) interest in; (B) security of; (C) claim against; or (D) property or contractual right of any kind affording a source of control over . . . (any enterprise violative of sec. 1962). For an in depth analysis of CFA and its effect on RICO and CCE, see Reed, *Criminal Forfeiture Under the Comprehensive Forfeiture Act of 1984: Raising the Stakes*, 22 AM. CRIM. L. REV. 747 (1985).

9. 109 S. Ct. 2646 (1989).

sixth amendment.¹⁰ By this ruling, the Supreme Court severely undermined the sixth amendment. The most obvious casualty of this decision is the RICO or CCE defendant's right to counsel of choice. Less apparent, but no less profound, is the impact on the adversary system of justice¹¹ which will suffer the ill-effects of this decision for a long time to come.¹²

In *Caplin*, the petitioner, a law firm, had represented Christopher Reckmeyer throughout various phases of a CCE case brought against him.¹³ Upon indictment, the Government obtained an ex parte restraining order effectively freezing all Reckmeyer's assets.¹⁴ While this order was in effect, Reckmeyer attempted to pay Caplin & Drysdale for legal services rendered.¹⁵ The trial court held this sum in escrow, and Caplin & Drysdale continued to represent its client until he later pleaded guilty.¹⁶

Prior to this plea, Caplin & Drysdale sought to modify the restraining order to allow payment of its fee.¹⁷ Then, after the plea, Caplin & Drysdale moved to recover its fee via a provision allowing third parties to recover *bona fide* debts from forfeited assets.¹⁸ The court granted the motion on both statutory and constitutional grounds but predominantly on the latter.¹⁹

10. *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646, 2655-56 (1989).

11. The Anglo-American ideal of the adversary system of justice lies at the heart of the controversy. Opponents of fee forfeiture claim that the practice will lead to the elimination of the criminal defense bar as it exists today and that a "socialized" defense bar, comprised of public defenders and appointed counsel, will take its place. See generally Brief of the Committee on Criminal Advocacy and Criminal Law of the Association of the Bar of the City of New York, as *ex rel* as Amici Curie in Support of Respondent, *United States v. Monsanto*, 109 S. Ct. 2657 (1989)(No. 88-454).

12. While the fee forfeiture issue has run its course in the judiciary, the resolution of the dilemma may not be final. Congress may still amend the statute to exempt attorneys' fees. *Caplin*, 109 S. Ct. at 2667 (Blackmun, J., dissenting).

13. *Id.* at 2649-50. *Caplin & Drysdale*, a Washington D.C. tax law firm, had been representing Reckmeyer since the summer of 1983 in connection with a grand jury investigation of Reckmeyer involving criminal tax violations. Brief for Petitioner at 3, *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646 (1989) (No. 87-1729). The investigation led to indictments against Reckmeyer and 25 others for 48 counts of tax and drug law violations. *Id.* at 3-4.

14. *United States v. Reckmeyer*, 631 F. Supp. 1191, 1193 (E.D. Va. 1986), *aff'd sub nom.*, *United States v. Harvey*, 814 F.2d 905 (4th Cir. 1987), *rev'd sub nom.*, *In re Forfeiture Hearing as to Caplin & Drysdale, Chartered*, 837 F.2d 637 (4th Cir. 1988), *aff'd sub nom.*, *Caplin*, 109 S. Ct. 2646 (1989).

15. *Id.* The court found Caplin & Drysdale's fee of \$170,513 to be legitimate.

16. *Id.*

17. *Id.*

18. *Id.* Here, Caplin & Drysdale moved to recover its fees pursuant to 21 U.S.C. § 853(n)(6)(A), which states that one seeking to recover forfeited assets as a bona fide purchaser must establish, inter alia, that "at the time of purchase [he was] reasonably without cause to believe that the property was subject to forfeiture under this section."

19. *United States v. Reckmeyer*, 631 F. Supp. 1191, 1196 (E.D. Va. 1986). The

On appeal, the Fourth Circuit Court of Appeals upheld the lower court's decision but on purely constitutional grounds.²⁰ There, the court balanced the defendant's qualified right to counsel against the government's asserted interest²¹ to reach its holding.²² This decision, however, was short-lived. On rehearing, the Fourth Circuit, sitting *en banc*, overturned the panel's decision.²³ The majority stated that the sixth amendment right to counsel of choice applied only to persons with legitimate assets.²⁴ Moreover, it held that defendants without legitimate assets would have to rely on appointed counsel.²⁵ The Supreme Court granted certiorari because this decision conflicted with the Second Circuit's position on this issue.²⁶

In *Caplin & Drysdale, Chartered v. United States*, the Supreme Court held that the law firm had no sixth amendment right to the forfeited assets.²⁷ In reaching this conclusion, the Court enter-

court reasoned that, while a literal reading of the statute would not exempt attorneys' fees, such an exemption would bring the statute in accord with the sixth amendment and would not obstruct congressional intent. *Id.*

20. *United States v. Harvey*, 814 F.2d 905, 929-30 (4th Cir. 1987). The court rejected the statutory construction arguments because the plain meaning of the statute did not exempt attorneys' fees and the unambiguous language of the statute precluded consideration of legislative intent. *Id.* Other courts have entertained several statutory interpretation arguments relating to the fee forfeiture issue. One argument is that 21 U.S.C. § 853 (e)(1)(A), which provides that "[u]pon application of the United States, the court may enter a restraining order or injunction . . . or take any other action to preserve the availability of . . . (forfeitable assets) . . . upon the filing of an indictment . . . for which criminal forfeiture may be ordered." (emphasis added), confers discretion upon the court to exercise traditional principles of equity in granting restraining orders. See, e.g., *United States v. Monsanto*, 852 F.2d 1400, 1405-09 (2d Cir. 1988) (*en banc*), *rev'd*, 109 S. Ct. 2657 (1989). Another argument calls for a pretrial hearing to establish the likelihood of which assets will be forfeited, with the remainder available for attorneys' fees free and clear of post-conviction forfeiture. See, e.g., *Monsanto*, 836 F.2d at 83-84. Yet another calls for legitimate attorneys' fees to be exempt under the "bona fide purchaser" exemption under 21 U.S.C § 853 (c). *Id.* at 78.

21. The court concluded that the individual interests of protecting the guilty as well as the innocent and having a sufficiently informed defense counsel outweigh the government interests of deterrence, preserving forfeitable property, and crippling the economic power base of organized crime. *Harvey*, 814 F.2d at 925.

22. Specifically, the court held:

In sum, we hold that to the extent the Act authorizes freeze orders and property forfeitures whose effect is to deprive an accused of the ability to employ and pay legitimate attorney fees to private counsel to defend himself against charges underlying the forfeiture, such applications violate the sixth amendment right to counsel of choice.

Id. at 926.

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

24. *Id.* at 645.

25. *Id.* at 646. The court also rejected the contention that appointed counsel was presumptively unqualified to adequately defend CCE cases. *Id.*

26. *United States v. Monsanto*, 109 S. Ct. 2659, 2661 (1989).

27. 109 S. Ct. at 2659. The Court also dealt with some statutory construction issues, see *Id.* at 2659-61, but primarily it addressed these issues in *United States v.*

tained two related constitutional issues. First, it considered whether the statute, insofar as it rendered indigent otherwise solvent defendants, violated a defendant's sixth amendment right to counsel of choice.²⁸ The Court concluded that the government's interest outweighed any constitutional interest the law firm might have.²⁹ Next, the Court discussed whether the statute's propensity to put defendants at a disadvantage in retaining counsel of choice upset the "balance of forces between the accused and his accuser."³⁰ The Court rejected the validity of this argument because it "proved too much."³¹

The Court's analysis moved from the general to the specific. First, the Court addressed petitioner's broad contention that the forfeiture statute's propensity to impoverish defendants overly burdened, if not completely denied, the right to counsel of choice.³² The Court's initial response was to assert that the sixth amendment does not guarantee "impecunious" defendants the right to counsel of choice.³³ Next, the Court pointed out that the statute did not necessarily deny defendants the right to choose counsel.³⁴ From this line of reasoning, the Court concluded that, generally, the forfeiture statutes placed only a limited burden on the defendant's right to counsel of choice.³⁵

Having dispensed with the more general contentions, the Court entertained the petitioner's specific contention that the forfeiture statutes infringed upon the sixth amendment insofar as they rendered a defendant unable to retain chosen counsel. According to Caplin, a defendant subject to forfeiture is unable to retain chosen

Monsanto, 109 S. Ct. 2657 (1989). In *Monsanto*, the Court rejected two statutory interpretation contentions. One was that the statute did not expressly include attorneys' fees in forfeiture and that Congress did not intend that such fees be forfeited. *Id.* at 2662-64. Another was that the forfeiture statute's language conferred discretion upon the court to employ "traditional principles of equity," which, when properly used, would exempt attorneys' fees. *Id.* at 2664-65.

28. Caplin & Drysdale, Chartered v. United States, 109 S. Ct. 2646, 2652-56 (1989).

29. *Id.* at 2655-56.

30. *Id.* at 2656-57.

31. *Id.* at 2657.

32. *Id.* at 2651-52.

33. Caplin & Drysdale, Chartered v. United States, 109 S. Ct. 2646, 2652 (1989) ("[A] defendant may not insist on representation by an attorney he cannot afford." (quoting *Wheat v. United States*, 486 U.S. 153, 159 (1988))).

34. *Id.* The Court stated the obvious in asserting that "nothing in [the statute] prevents a defendant from hiring the attorney of his choice, or disqualifies any attorney from serving as defendant's counsel." *Id.* Further, the court pointed out that even the defendant who stands to lose all his assets "may be able to find lawyers willing to represent them, hoping that their fees will be paid in the event of acquittal, or via some other means that a defendant might come by in the future." *Id.* (emphasis added). For a discussion of the weaknesses of these hypotheses, see *infra* notes 62-65 and accompanying text.

35. *Id.*

counsel because of either a present denial of access to forfeitable assets or the attorney's fear that the government may later recoup his fees.³⁶ The Court responded by reiterating that a defendant's right to retain counsel of choice extends only as far as his means.³⁷ To illustrate this point in the fee forfeiture context, the Court put forth the bank robber analogy.

According to the analogy, "[a] robbery suspect . . . has no Sixth Amendment right to use funds he has stolen from a bank to retain an attorney to defend him if he is apprehended."³⁸ The Court amplified this point by positing that "the privilege to practice law is not a license to steal."³⁹ Caplin sought to distinguish this analogy by pointing out that the bank's pre-existing property rights were unquestionably superior to the robber's mere possession.⁴⁰ By contrast, in the forfeiture scenario, the government's property interest did not stem from pre-existing property rights, but from the fictive property law concept of "relation back."⁴¹ Based on this shaky foundation, Caplin argued that the government's interest was insufficient to supersede the defendant's interest in using the money to retain counsel.⁴² The Court, however, rejected this distinction.⁴³

Initially, the Court attacked the premise that the government's interest was too weak to supersede the defendant's. Toward this end, the court gave considerable credence to the statute's "relation back" concept. Relying on Congressional intent,⁴⁴ the Court found

36. *Id.*

37. "Whatever the full extent of the Sixth Amendment's protection of one's right to retain counsel of his choosing, that protection does not go beyond the individual's right to spend his own money to obtain the advice and assistance of . . . counsel." *Id.* (quoting *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 370 (1985) (Stevens, J., dissenting)).

38. *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646, 2652 (1989). For a criticism of the bank robber analogy see *infra* notes 67-71 and accompanying text.

39. *Caplin*, 109 S. Ct. at 2653 (quoting *Laska v. United States*, 82 F.2d 672, 677 (10th Cir. 1936)).

40. *Id.* See also Brief for Petitioner at 40-41, *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646 (1989) (No. 87-1729).

41. *Caplin*, 109 S. Ct. at 2653. Generally, relation back is "a principle that an act done today is considered to have been done at an earlier time." BLACK'S LAW DICTIONARY 1158 (5th ed. 1979). This legal fiction is incorporated into the forfeiture provisions of 18 U.S.C. § 1963(c)(1988) and 21 U.S.C. § 853(c)(1988), but it is not a novel concept. The use of the relation back concept in criminal forfeiture dates back to Old England, and it operates the same today as it did then. Compare 4 W. BLACKSTONE, COMMENTARIES *381 ("This forfeiture relates back to the time of the treason committed") with 21 U.S.C. § 853(c) ("All right, title, and interest in [forfeitable property] vest in the United States upon the act giving rise to forfeiture under this section"). Utilizing the relation back concept, modern forfeiture laws operate to vest title in all illegally gained property in the United States upon conviction, but the date when title is deemed to have vested is upon the occurrence of the crime.

42. *Caplin*, 109 S. Ct. at 2653.

43. *Id.*

44. The Court looked to Congress' legal support for the relation back concept,

this "long-recognized" practice of vesting title of tainted assets in the government upon the commission of the crime to supersede a defendant's right to alienate such assets.⁴⁵ Moreover, this "relation back" provision applied despite the defendant's wish to use such assets to exercise his sixth amendment right to retain chosen counsel.⁴⁶ To hold otherwise would lead to absurd results. According to the majority, if a defendant is allowed to use forfeitable assets to enable him to exercise his sixth amendment rights, then similar allowances will have to be made for other constitutional rights.⁴⁷ The Court declined to embark on such a path.

Next, the Court criticized Caplin's "balancing analysis."⁴⁸ According to Caplin, the government's interest in restraining forfeitable assets was insufficient to overcome the defendant's constitutional interest in them.⁴⁹ The government's interest was limited to preventing sham transfers, and this interest was not frustrated by the defendant's use of the assets to pay *legitimate* attorneys' fees.⁵⁰ On the other hand, the imposition of fee forfeiture unduly hampered a defendant's efforts to retain counsel of choice.⁵¹ Thus, given the light weight of the government's interest balanced against the heavy burden fee forfeiture places on the sixth amendment, the constitutional scales should weigh against fee forfeiture.⁵²

The Court found this analysis flawed for three reasons. First, the government had a pecuniary interest in the forfeitable assets.⁵³ Second, the government's restitutionary interest in returning the

specifically an 1890 tax case: *United States v. Stowell*, 133 U.S. 1 (1890). *Caplin*, 109 S. Ct. at 2653.

45. *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646, 2653 (1989). See *infra* notes 72-74 and accompanying text for a discussion of the Court's erroneous approval of the relation back concept.

46. *Id.* at 2654.

47. *Id.*

48. *Id.*

49. Caplin pointed out that because the forfeiture provision is penal in nature it does not apply until conviction. Brief for Petitioner at 40-41, *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646 (1989) (No. 87-1729). Because of this, the relation back provision operates only to prevent sham transfers, not determine true title to the property. *Id.*

50. "If a defendant is permitted to pay *legitimate* attorneys fees . . . the government's interest in depriving a criminal of economic benefits upon conviction can be squared with the defendant's right to hire counsel of choice to defend him. *Id.* at 39 (emphasis original). The Court interpreted this argument to mean that "once assets have been paid over from client to attorney, the principal ends of forfeiture have been achieved: dispossessing a drug dealer or racketeer of the proceeds of his wrongdoing." *Caplin*, 109 S. Ct. at 2654.

51. Brief for Petitioner at 39, *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646 (1989) (No. 87-1729).

52. *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646, 2653 (1989).

53. *Caplin*, 109 S. Ct. at 2654. The Court here referred to a fund set up to receive forfeited assets to support law enforcement efforts. For a criticism of this interest, see *infra* notes 77-78 and accompanying text.

forfeited assets to wrongfully deprived third parties bolstered its need to keep the earmarked assets from being diminished.⁵⁴ Lastly, the government's purpose behind the forfeiture statutes was to cripple the economic power base of organized crime, and legal talent was but one facet of that power base.⁵⁵ Weighing these additional factors, the Court concluded that the government's interests in obtaining all forfeitable assets outweighed any sixth amendment right "criminals" might have in using such assets to retain counsel of choice⁵⁶ and that appointed counsel would have to suffice.⁵⁷

Finally, the majority addressed Caplin's due process argument. Caplin contended that the forfeiture statute offended the due process clause of the fifth amendment⁵⁸ because it upset the "balance of

54. "Where the Government pursues this restitutionary end, the government's interest in forfeiture is virtually undistinguishable from its interest in returning to a bank the proceeds of a bank robbery. . . ." *Id.* For a criticism of this government interest, see *infra* notes 79-80 and accompanying text.

55. "Congress has already underscored the compelling public interest in stripping criminals such as Reckmeyer of their undeserved economic power, and part of that undeserved power *may* be the ability to command high priced legal talent." *Caplin*, 109 S. Ct. at 2655 (emphasis added) (quoting *In re Forfeiture Hearing as to Caplin & Drysdale, Chartered*, 837 F.2d 637, 649 (4th Cir. 1988)). For a criticism of this government interest, see *infra* notes 81-83 and accompanying text.

56. *Caplin*, 109 S. Ct. at 2656. Additionally, the Court dispensed with contentions that fee forfeiture promoted unethical practices and inherent conflicts of interest between attorney and client. See Brief for Petitioner at 35-37, *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646 (1989) (No. 87-1729); Brief Amicus Curiae of the American Bar Association in Support of the Petitioner at 17-22, *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646 (1989) (No. 87-1729). First, the Court disposed of the contention that the forfeiture statutes gave defense counsel a disincentive toward investigating the facts of the case lest he learn the truth and lose his fee for having "cause to believe" it was forfeitable. According to the Court, such circumstances would never arise. *Caplin*, 109 S. Ct. at 2656 n.10. Likewise, the Court dismissed the second contention, that the forfeiture statutes would propel defense counsel to negotiate a plea bargain which would preserve his fee and compromise his defendant's interests, because it was not present either. *Id.* Moreover, if it was present, it would be handled best as an ineffective assistance of counsel case. *Id.* The last contention met the same fate. That the effect of the forfeiture statute was akin to a contingency fee system was not present in *Caplin*, and, if it were, there was no authority that a violated ethical code renders a federal statute invalid. *Id.*

57. *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646, 2655 (1989). The Court further emphasized that "[t]he modern day Jean Valjean must be satisfied with appointed counsel." *Id.* (quoting from *In re Forfeiture*, 837 F.2d 637, 649 Hearing as to *Caplin & Drysdale, Chartered* (4th Cir. 1988)) (Jean Valjean is the villain in Victor Hugo's *Les Miserables*.) Also, the Court rejected the contention that appointment of counsel for constructively indigent RICO or CCE defendants were *per se* ineffective. *Id.* at 2655 n.7.

58. U.S. CONST. amend. V states, in pertinent part: "No person shall . . . be deprived of life, liberty, or property without due process of law." The fifth amendment is cited as authority for the proposition that allowing attorneys to perform their role in the adversary system promotes its effectiveness. *Polk County v. Dodson*, 454 U.S. 312, 318 (1981) ("The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness"); *New York v. Herring*, 422 U.S. 853, 862 (1975) ("The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free"). See also *Cloud*, *supra* note 6,

forces between the accused and his accuser."⁵⁹ This contention rested on the theory that the forfeiture statutes gave prosecutors unfettered discretionary power to deny a defendant's choice of counsel.⁶⁰ The Court rejected this contention because it proved too much; such due process claims must rest on either specific cases of abuse or an inherently unconstitutional rule.⁶¹

While the forfeiture laws play a crucial role in the war on crime,⁶² this is no reason to expand them beyond their constitutional bounds. Yet the Court, through its flawed analysis, did just that. The majority's analysis was flawed for two reasons. First, the Court concocted a framework of unrealistic indulgences, specious analogies, and evasive tactics which eliminated the need for any proper analysis of the right to counsel of choice. Second, from this shaky framework, the Court administered a faulty, if not erroneous, balancing analysis. The results of this reasoning and the Court's failure to address the issue of counsel of choice are potentially disastrous to the criminal defense bar and the adversary system.

First, the Court built its decision on a shaky framework comprised of faulty components. One such component was the use of unrealistic indulgences to patch over problem areas of the case. For instance, the Court posited that defendants in Reckmeyer's predicament could possibly retain counsel willing to take a chance on acquittal.⁶³ This hypothetical is not only unethical⁶⁴ but unrealistic.⁶⁵

at 8-15.

59. *Caplin*, 109 S. Ct. at 2656 (quoting *Wardius v. Oregon*, 412 U.S. 470, 474 (1973)).

60. By appending a RICO or CCE charge, listing substantial assets as forfeitable, and putting defense counsel on notice, the prosecutor can effectively veto a defendant's right to retain chosen counsel. See Brief for Petitioner at 43, *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646 (1989) (No. 87-1729).

61. *Caplin*, 109 S. Ct. at 2657.

62. The amended forfeiture provisions are integral to the present administration's war on drugs. Prior to the augmented RICO and CCE forfeiture provisions, drug traffickers could ply their trade with relative financial impunity. Previous forfeiture statutes proved an ineffective deterrent, and, consequently, crime paid. See generally *Hughes & O'Connell*, *supra* note 5, at 613-17; *Reed*, *supra*, note 7, at 747-49.

63. *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646, 2652 (1989). The Court also postulated that the defendant might come by funds to hire chosen counsel "via some other means." *Id.* Because the Court failed to explain what these other means might be, the defendant is left to his imagination. One reputed racketeer may have found this enigmatic "other means." Suspecting that Ernest Rocco Infelice might soon be indicted under RICO, his friends held a fundraising banquet to pay for future legal fees. *The Chicago Tribune*, Dec. 20, 1989, § 2, at 4, col. 1.

64. The Court's proposal would obstruct all relevant ethical standards. For instance, it would promote calculated ignorance on the part of the attorney, for he or she would benefit from not knowing the source of the client's wealth. *United States v. Badalamenti*, 614 F. Supp. 194, 196 (S.D.N.Y. 1985). This situation would frustrate ABA STANDARDS FOR CRIMINAL JUSTICE, §§ 4-3.1-3.2 (1980) (relating to importance of establishing attorney-client relationship). Also, the defense attorney would find his or her financial interests at odds with the client's interests because the threat of forfeiture, which ultimately turns on acquittal, would render the fee arrangement into a

Indeed, the lower courts castigated such an arrangement, chiding that only a "foolish, ignorant, beholden or idealistic" attorney would take such a case.⁶⁶

Another component was the use of the deceptively simple bank robber analogy to address a complex title issue.⁶⁷ This analogy was inaccurate as applied to the case at bar. Factually, *Caplin* did not involve so blatant an example of ill-gotten gains as in the bank robber analogy.⁶⁸ Moreover, the analogy was legally distinguishable.

contingency fee. Cloud, *Government Intrusions Into the Attorney-Client Relationship: The Impact of Fee Forfeitures on the Balance of Power in the Adversary System of Criminal Justice*, 36 EMORY L.J. 817, 828 (1987). This situation implicates § 4-3.3(a) of the ABA STANDARDS FOR CRIMINAL JUSTICE ("It is unprofessional conduct for a lawyer to enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case"). See ABA STANDARDS FOR CRIMINAL JUSTICE, § 4-3.3(a) (1980). Also, the conflict of interest created by fee forfeiture may lead to plea bargains structured to assure that the attorney is paid but leaving the client with a stiffer sentence. Cloud, *supra*, at 828. The purpose behind these ethical standards is that the accused should not have to fear improper legal representation. See ABA STANDARDS FOR CRIMINAL JUSTICE, § 4.37 (1980). These ethical standards do not exist for themselves but for the furtherance of sixth amendment ideals. Indeed, the Supreme Court has recognized them as such and has relied on them for guidance. See, e.g., *Strickland v. Washington*, 104 S. Ct. 2052, 2064-65 (1984). Yet, in *Caplin*, the Court ignored this guidance. Had the Court properly followed this guidance, it would have realized that the fee forfeiture's corrosive effect on the professional standards equates to a corrosive effect on the sixth amendment. Cloud, *supra* note 6, at 13-15.

65. "[L]awyers in criminal courts are necessities, not luxuries." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). The same holds true for private, chosen counsel in RICO and CCE cases because they are better qualified to wage a full defense in the face of government prosecution of these complex cases. Estimates put the cost at \$100,000 to prepare a RICO case and an additional \$250,000 to try it. *RICO Risks*, Oct. 1989 A.B.A. J. 28, 29. Numerous federal district courts have noted this point. *United States v. Reckmeyer*, 631 F. Supp. 1191, 1197 (E.D. Va. 1986), *aff'd*, 814 F.2d 905 (1987), *rev'd*, 837 F.2d 637 (1988) (Criminal Justice Act compensation rates insufficient to compensate appointed counsel defending RICO cases); *United States v. Bassett*, 632 F. Supp. 1308, 1368 (D. Md. 1986), *aff'd on other grounds sub nom.*, *United States v. Harvey*, 814 F. 2d 905 (4th Cir. 1987) (expressing doubt that attorneys would take RICO or CCE case on pro bono basis); *United States v. Rogers*, 602 F. Supp. 1332, 1349 (D. Colo. 1985) (mounting a full RICO defense entails resources and expertise beyond the capability of public defenders); *United States v. Badalamenti*, 614 F. Supp 194, 196 (S.D.N.Y. 1985) (RICO and CCE cases are big and time-consuming, making it unlikely that an attorney would take case where fee forfeiture looms). See also *United States v. Thier*, 801 F.2d 1463, 1476 (5th Cir. 1986) (Rubin, J., concurring). Given the tremendous cost of defending a RICO or CCE case, it is unrealistic to expect defense attorneys to take on these cases when there is a threat that they will lose their fee. The Supreme Court should heed the admonitions of the district courts, for their proximity to the adversarial system enables them to better comprehend the damage done by fee forfeiture. *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2667 (1989) (Blackmun, J. dissenting).

66. *Badalamenti*, 614 F. Supp. at 196.

67. The issue, properly framed, is whether the government's title to the allegedly ill-gotten gains, at the pre-conviction stage, is superior to the accused's apparent title. Cf. *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2667, 2676 (1989) (Blackmun, J., dissenting).

68. In *Caplin*, the firm was unaware of the case's RICO implications from the outset. *RICO Risks*, *supra* note 65, at 28. This unawareness cost the firm plenty, and

The distinction lay in the issue of title to the allegedly ill-gotten gains. In the bank robber analogy, the robber's title to the loot was hopelessly inferior to the bank's pre-existing title⁶⁹ or the government's restitutionary interest.⁷⁰ However, in the case at bar, Reckmeyer's title in the allegedly ill-gotten gains was paramount to the government's title, which rested on the the shaky foundation of "relation back." The Court rejected this distinction, however, by broadly approving the "long-recognized" practice of the relation back principle.⁷¹

The Court's approval of this fictive property law concept was another faulty component which prevented proper analysis of the right to counsel of choice.⁷² It effectively rendered the defendant a pauper, who, like any other, was unqualified to exercise the right to counsel of choice. By swiftly deeming the defendant a pauper, the

it stands as a lesson to others to be wary of the prospective client appearing beyond the pale RICO or CCE.

69. That the bank's title is superior to the robber's is axiomatic. *Cf.* United States v. Harvey, 814 F.2d 905, 926 (4th Cir. 1987) (property manifestly owned by another), *replaced on reh'g sub nom., In re* Forfeiture Hearing as to Caplin & Drysdale, Chartered, 837 F.2d 637, 645 (1988).

70. *Caplin*, 109 S. Ct. at 2654.

71. Properly understood, the government's "title" in forfeitable assets does not actually "vest" in the government upon the commission of the prohibited act. The government's title is not based on common law principles. United States v. Nichols, 841 F.2d 1485, 1510 (10th Cir. 1988) (Logan, J., dissenting). It does not even resemble the government's acquisition of title under the Old English forfeiture system. That system operated under the feudal property system which was premised on the theory that the King owned everything. *Id.* at n.2. Forfeiture under the feudal system simply caused title to revert back to the King, the original owner. *Id.* The property scheme in the United States, however, is significantly different. It is based on fee ownership. *Id.* at n.1. Because the United States government is not the original owner, its title in forfeitable assets is not based on traditional common law principles. *Id.* at 1510. Instead, the government's title rests on public policy grounds. *Id.* This policy is to prevent criminals from profiting from their crime, and, consequently, the government's title is limited by this policy. *Id.* at 1510-11.

Compared to the limited nature of the government's title, the defendant's title in allegedly ill-gotten gains is much more substantial. It is based upon the fifth amendment's guarantee that no person shall "be deprived of . . . property without due process." U.S. CONSR. amend. V; *cf. Nichols*, 841 F.2d at 1510. The defendant's title to the funds is strengthened by his intention to use the assets to retain counsel in order to insure that due process is carried out. *Cf. id.* at 1511. Given the substantial title interests of the defendant and the comparatively limited title interests of the government, the defendant's interests ought to prevail.

72. *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646, 2653 (1989). The Court's approval of Congress' adoption of this principle was erroneous because the use of relation back in tax matters is significantly distinguishable from its proper use in criminal matters. Other courts have properly distinguished the jeopardy assessment sequestration analogy. *Nichols*, 841 F.2d at 1510 (equates jeopardy tax assessment with creditor's lien, which is based on common law property principles); United States v. Harvey, 814 F.2d 905, 926 (4th Cir. 1987) (jeopardy tax assessment preserve assets *already owed* by the government and wrongfully withheld), *replaced on reh'g sub nom., In re* Forfeiture Hearing as to Caplin & Drysdale, Chartered, 837 F.2d 637, 646 (4th Cir. 1988). *See also* Winick, *supra* note 2, 2 at 814-15 n.243 (claims under jeopardy tax assessments arise from independent source).

majority was not bound to analyze the right to counsel of choice any more than was necessary to dispense with it. Other courts have recognized this line of reasoning as begging the true question: whether the fictive property law concept of relation back is sufficient to cut-off an otherwise financially able defendant's right to counsel of choice.⁷³ Accordingly, these courts have properly limited the application of relation back to the prevention of sham transfers, an interest not implicated where fees are legitimate.⁷⁴ However, because the majority in *Caplin* overly extended the relation back principle, it precluded any sound analysis of the issue.

Nonetheless, the Court put forth its own faulty,⁷⁵ if not erroneous,⁷⁶ balancing analysis. The analysis was faulted in the importance it attached to the government's interests and the insignificant weight it attached to the defendant's right to counsel of choice. The weight the Court assigned to the government's interests in preserving forfeitable assets from dissipation were makeweight at best. For instance, the pecuniary interest of raising revenue for law enforcement was slight.⁷⁷ In fact, the government conceded this point in a

73. *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2667, 2676 (1989) (Blackmun, J., dissenting); *In re Forfeiture Hearing*, 837 F.2d at 652.

74. *Harvey*, 814 F.2d at 924 (sham transfers to attorneys defined constitutional reach); *United States v. Thier*, 801 F.2d 1463, 1474 (5th Cir. 1986) (payment of reasonable attorneys' fees not an economic benefit); *United States v. Bassett*, 632 F. Supp. 1308, 1317 (D. Md. 1986) (statute not intended to reach legitimate professional services); *United States v. Ianniello*, 644 F. Supp. 452, 458 (S.D.N.Y. 1985) (sixth amendment compels exemption of legitimate attorneys' fees); *United States v. Rogers*, 602 F. Supp. 1332, 1348 (D. Colo. 1985) (forfeiture not intended to reach legitimate services). See also Winick, *supra* note 2, at 837 ("So long as (the government) can be assured that a fee paid to the attorney is a bona fide and reasonable one, rather than a sham or fraudulent transfer designed to avoid forfeiture, Congress' stated purpose is not frustrated").

In a similar vein, if the defendant fritters all his assets away on legal fees, and is still convicted, the purpose of the statute is still fulfilled because he is divested of his wealth. Cloud, *Government Intrusions Into The Attorney-Client Relationship: The Impact of Fee Forfeiture on the Balance of Power in the Adversary System of Criminal Justice*, 36 EMORY L.J. 817, 832 (1987). Professor Cloud points out further that "set-aside" orders are one way of keeping attorneys' fees legitimate. *Id.*

75. The Court's standard of review here is odd. The Court appeared to scoff at any sort of balancing analysis, yet, in criticizing *Caplin's* balancing analysis, it surreptitiously implemented its own. The Court's balancing analysis was a foregone conclusion, however. Because the Court had already stripped *Caplin* of any constitutional interest, it started the analysis with no weight on the individual rights side of the scale. All the government had to show was some interest to tip the scale in its favor. See *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646 (1989). For examples of proper balancing analyses, see *infra* note 93.

76. Given the fact that fee forfeiture works to totally deprive a defendant whose assets are all forfeitable of the right to counsel of choice, the strict scrutiny standard should apply. This deprivation of the right is both unnecessary and arbitrary. Winick, *supra* note 2, at 812-13.

77. The financial gain would be modest due to the offset of paying appointed counsel. *Id.* at 836 n.354.

factually similar case, *United States v. Monsanto*.⁷⁸ Also, the government's interest in restitution was likewise more form than substance.⁷⁹ Paradoxically, it is usually *forfeiture* that deprives innocent third parties of property, not the defendant's wrongful acts.⁸⁰ Finally, the government's interest in eliminating legitimate, private legal talent in order to cripple the economic power base of organized crime was not only weak but deeply troubling. It was weak in its lack of authority.⁸¹ It was disturbing in the negative light it cast on the role of the independent attorney in the adversary system.⁸² Ulti-

78. 852 F.2d 1400, 1407 (2d Cir. 1988) (en banc), *rev'd* 109 S. Ct. 2657 (1989).

79. The Court claimed that 21 U.S.C. § 853(n)(6)(A) (1988), which provides "rightful owners" an opportunity to recover their property from the forfeited assets, served a restitutionary interest "virtually indistinguishable" from the one alluded to in the bank robber analogy. *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646, 2654 (1989). In reality, 21 U.S.C. § 853(n)(6)(A) promotes restitution as much as a ban on snipe hunting would promote wild life conservation. In both instances, there is a seemingly legitimate means to an ostensibly legitimate, although non-existent end. RICO and CCE aim at racketeering and drug trafficking, both victimless crimes. Brief for Eugene R. Anderson, Esq. as Amicus Curiae in Support of the United States of America at 4, *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646 (1989) (No. 87-1729). Without victims, there is really nobody to whom the government can make restitution. The mere willingness to make restitution is not enough. *Caplin & Drysdale, Chartered v. United States*, 2667, 2670 n.6 (1989) (Blackmun, J., dissenting).

80. Under 21 U.S.C. § 853(n)(6)(B), a bona fide purchaser for value must prove the debt and that he was "without cause to believe" that the debt was forfeitable. This puts a burden on the purchaser in recovering what is owed him, a burden not so much attributable to the defendant's wrongful act as the government's zeal in increasing its take.

81. The Court cites mere rhetoric instead of authority in reiterating that "Congress has already underscored the compelling public interest in stripping criminals such as Reckmeyer of their undeserved economic power, and part of that undeserved power may be the ability of to command high-priced legal talent." *Caplin*, 109 S. Ct. at 2655 (emphasis added) (quoting In re forfeiture Hearing as to *Caplin & Drysdale, Chartered*, 837 F.2d 637, 649 (1988)). The word "may" stands out as if to say there is uncertainty on this point, again begging the question. The Court offered little to clear up the uncertainty except to say that "the harsh reality that the quality of a criminal defendant's representation frequently may turn on his ability to retain the best counsel money can buy." *Id.* (quoting *Morris v. Slappy*, 461 U.S. 1, 23 (1983) (Brennan, J., concurring)). But this quote is misapplied. Justice Brennan's expression of "harsh reality" was only by way of introducing ways to mitigate it so as to better serve the adversary system. *Morris*, 461 U.S. at 23 n.5 (courts should consider indigent defendant's interest in continuing with a particular public defender).

82. The Court's comments, *supra* note 81, implied that RICO and CCE defendants benefited from high priced legal talent. This proposition is ludicrous and misconstrues the proper view of the role the independent attorney plays in the adversary system. "[E]quating the ability to raise a defense to a 'benefit' of crime is like considering the right to a jury trial a benefit of being accused of murder." *United States v. Nichols*, 841 F.2d 1485, 1512 (10th Cir. 1988) (Logan, J., dissenting). A more enlightened view of the role attorneys play in the adversary system shows that it entails more than just benefiting criminals. The role of the independent attorney is that of a "guardian of our freedom," *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 371 (1985) (Stevens, J., dissenting), or a "shield in defense of right and to ward off wrong," *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 247 (1957) (Frankfurter, J., concurring). In the attorney's hands are entrusted "all the interests of man that are comprised under the constitutional guarantees given to 'life, liberty

mately, it revealed the government's true and impermissible purpose behind fee forfeiture: crippling the legitimate defense of those it prosecutes.⁸³

On the other side of the scale, the defendant's sixth amendment rights were afforded little to no weight. The Court's earlier adoption of relation back precipitated this result.⁸⁴ Had the Court properly explored these rights, the scales would have tipped the other way. The sixth amendment right to counsel of choice serves several important functions. Generally, it fosters the viability of the adversary system by promoting: accurate fact determinations;⁸⁵ autonomy of the accused in presenting his defense;⁸⁶ trust between attorney and client;⁸⁷ and the defendant's perception of fairness in the proceedings.⁸⁸ Of course, the ultimate goal is that the "guilty be convicted and the innocent go free."⁸⁹ Accordingly, courts have properly allot-

and property." *Id.* The *Caplin* Court did not appear to embrace these ideals. Rather, the Court would restrict the role of the independent criminal defense lawyer by limiting his market to the manifestly wealthy and thereby relegate the right to counsel of choice to this elite class. *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. at 2675 (Blackmun, J., dissenting).

83. *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2667, 2678 n.16 (1989) (Blackmun, J., dissenting) (burdening defendant's right to counsel of choice not a coincidence of fee forfeiture, but its purpose).

84. See *supra* notes 72-74 and accompanying text for explanation of the Court's use of relation back.

85. Partisan advocacy promotes accuracy "because each party is propelled into maximum effort in investigation and presentation by the prospect of victory . . ." G. HAZARD JR., *ETHICS IN THE PRACTICE OF LAW* 121 (1978).

86. "A primary purpose of the Sixth Amendment is to grant a criminal defendant effective control over the conduct of his defense." *Wheat v. United States*, 108 S. Ct. 1692, 1700 (Marshall, J., dissenting). Because defense counsel will orchestrate the defense, the choice of counsel is pivotal to the defendant's freedom to conduct his own defense. *Id.* The right of a lay person to defend himself also reflects this autonomy interest. *McKaskle v. Wiggins*, 465 U.S. 168, 176-77 (1984) (right affirms dignity and autonomy of accused); *Faretta v. California*, 422 U.S. 806, 834 (1975) ("respect for the individual is the lifeblood of the law") (quoting *Illinois v. Allen*, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring)); *United States v. Laura*, 607 F.2d 52, 56 (3d Cir. 1979) (right to counsel of choice derivative of right to decide type of defense). See generally Winick, *supra* note 2, at 799-806 (autonomy values clash when appointed counsel foisted upon constructively indigent defendant).

87. The trust between attorney and client oils the machinery of the adversary system. *Polk County v. Dodson*, 454 U.S. 312, 324 n.17 (1981) (adversary system works best when confidence between attorney and client is high); *Linton v. Perini*, 656 F.2d 207, 209 (6th Cir. 1981) ("basic trust between counsel and client . . . is cornerstone of adversary system"). See also A.B.A. STANDARDS FOR CRIMINAL JUSTICE 4.31, commentary at 4.29 (2d ed. 1980); Winick, *supra* note 2, at 804.

88. See *Flanagan v. United States*, 465 U.S. 259, 268 (1984) ("reflects constitutional protection of defendant's free choice independent of concern for the objective fairness of the proceeding"). Cf. *Joint Anti-Fascist Refugee Committee v. McGrath*, 71 S. Ct. 624, 648-49 (1951) (Frankfurter, J., concurring) (opportunity to be heard important to a popular government). See also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 10-7 at 666 (2d ed. 1988) (chance to be participate an intrinsic value to due process); Winick, *supra* note 2, at 802-03 n.185 (citing empirical studies supporting proposition that participation fosters trust in the adversary system).

89. *Herring v. New York*, 422 U.S. 853, 862 (1975).

ted greater weight to these interests to maintain the adversarial nature of our system.⁹⁰ Until now, this was true whether the adversary system was jeopardized on either the specific ground of the sixth amendment⁹¹ or the general ground of the fifth.⁹² In the fee forfeiture context, the lower courts properly allotted more weight to these interests than the government's limited interest.⁹³ In *Caplin*, however, the majority has apparently lost sight of the values underlying the sixth amendment, for, not only did it fail to see its implication in the fee forfeiture scenario, but it afforded it so little weight.

The effect of this decision on the adversary system is potentially devastating. The approval of the fee forfeiture system will diminish the ranks of the private criminal defense bar.⁹⁴ In the future, fee forfeiture is likely to grow in both frequency and scope,⁹⁵ despite the Court's deference to Congress to eliminate fee forfeiture if indeed that was its intent.⁹⁶ Further, with RICO-like statutes spread-

90. *Wood v. Georgia*, 450 U.S. 261, 268-71 (1981) (upholding right to counsel without conflicting interests); *Herring*, 422 U.S. at 862 (closing argument at trial important aspect of adversary system); *Faretta v. California*, 422 U.S. 806, 834 (1975) (autonomy values support right to defend self at trial); *Argersinger v. Hamlin*, 407 U.S. 25, 33-37 (1972) (criticizing "assembly line" justice); *United States v. Rankin*, 779 F.2d 956, 958 (3d Cir. 1988) (upholding right to choice of counsel); *Linton v. Perini*, 656 F.2d 207, 209 (6th Cir. 1981) (trust between attorney and client essential component to sixth amendment); *United States v. Laura*, 607 F.2d 52, 56 (3d Cir. 1979) (choice of counsel synonymous with freedom to choose type of defense).

91. See, e.g., *United States v. Cronin*, 466 U.S. 648, 654 (1984) (underscoring importance of sixth amendment values).

92. See, e.g., *Wardius v. Oregon*, 412 U.S. 470, 474 (1973) (due process clause speaks of balance of forces between accused and his accuser). *Chandler v. Fretag*, 348 U.S. 3 (1954) (arbitrary denial of opportunity to retain counsel violates due process).

93. *United States v. Harvey*, 814 F.2d 905, 924-25 (4th Cir. 1987); *United States v. Thier*, 801 F.2d 1463, 1474 (5th Cir. 1986); *United States v. Estevez*, 645 F. Supp. 869, 871 (E.D. Wis. 1986); *United States v. Bassett*, 632 F. Supp. 1308, 1316-17 (D. Md. 1986); *United States v. Ianniello*, 644 F. Supp. 452, 456-58 (S.D.N.Y. 1985); *United States v. Badalamenti*, 614 F. Supp. 194, 196-98 (S.D.N.Y. 1985); *United States v. Rogers*, 602 F. Supp. 1332, 1349-50 (D. Colo. 1985).

94. Professor Winick predicted that fee forfeiture would lead to an "exodus of talented attorneys" from the criminal defense bar. Winick, *supra* note 2, at 781. This exodus may have already started. One criminal defense attorney stated that the percentage of his RICO and CCE defense work has gone from 50% to 5%. *RICO Risks*, *supra* note 65, at 28. However, not all defense attorneys are shying away. One attorney adamantly held that "[i]t's the responsibility of the legal profession not to back away from the risky cases. Despite the potential for loss and prosecutorial attacks, I won't let this decision affect my taking of these cases." *Id.* at 29.

95. With the Court's broad approval of fee forfeiture, the government may continue to seek fee forfeiture with relative impunity. Given this new tactical weapon, the government is likely to use it in a growing number of applications under RICO: e.g., dealing in obscene matter, wire fraud, mail fraud, welfare fraud and fraudulent sale of securities. See 18 U.S.C. § 1961 (1988).

96. The majority stated that if Congress had indeed meant to exempt legitimate attorneys' fees, it was free to make an amendment to that effect. *United States v. Monsanto*, 109 S. Ct. 2657, 2664 (1989). The Dissent likewise called on Congress "to make clear that Congress did not intend this result." *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646, 2657 (1989) (Blackmun, J., dissenting).

ing to the states,⁹⁷ it is likely that fee forfeiture will follow. Given this state of affairs, prudence would dictate that the Court either interpret the statute to exclude fee forfeiture or properly analyze the sixth amendment issues. Failing this, the Court continues a broader trend of approving pre-emptive strikes on certain troublesome attorney-client relationships.⁹⁸ Thus, the effect of *Caplin* is to put teeth into Shakespeare's popularly quoted proposition: "The first thing we do, let's kill all the lawyers."⁹⁹ But, this being a bit extreme, the Court appears to have opted for the next best thing: "Let's see that they do not get paid."

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97. Illinois, for instance, has adopted a similarly far-reaching forfeiture provision. It states:

A person who commits the offense of narcotics racketeering shall . . . [f]orfeit to the State of Illinois . . . any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of this Act, that the sentencing court determines, after a forfeiture hearing, to have been acquired or maintained as a result of narcotics racketeering.

ILL. REV. STAT. ch. 56 ½, para. 1655 sec. 5(a)(3)(B) (1987). See also CAL. PENAL CODE § 186 (West 1988) (Criminal Profiteering).

98. The Supreme Court approved a similar tactic which negatively impacted the attorney-client relationships in civil rights cases. In *Evans v. Jeff D.*, 475 U.S. 717 (1986) (6-3 decision), the Court upheld the settlement of civil rights cases conditioned upon the litigant's waiver of attorneys' fees. Under the Civil Rights Attorney Fee Act, 42 U.S.C. § 1988 (1976), legal fees were recoverable in civil rights cases to provide an economic incentive to private attorneys to take these cases. *Evans*, 475 U.S. at 745 (Brennan, J., dissenting). The effect of allowing fee waivers was to discourage private attorneys from ever taking these cases for fear of losing their fees. *Id.* at 745-59 (Brennan, J., dissenting). The same is true just as in the fee forfeiture scenario. In both instances, higher social goals are compromised. With fee waiver, important civil rights issues will go uncontested. With fee forfeiture, trust in the adversary system will diminish.

99. W. SHAKESPEARE, 2 HENRY VI, Act IV, scene ii, lines 76-77 (Riverside ed., 6th printing, 1974). The popular notion that Shakespeare literally meant what his character said is misunderstood. As Justice Stevens pointed out, "a careful reading of that text will reveal, Shakespeare insightfully realized that disposing of lawyers is a step in the direction of a totalitarian form of government." *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 371 n.24 (1985) (Stevens, J., dissenting) (discussing function of lawyer as guardian of freedom).