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### Representing Defendants on Charges of Economic Crime: Unethical When Done for a Fee

David Orentlicher

*University of Nevada, Las Vegas – William S. Boyd School of Law*

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# REPRESENTING DEFENDANTS ON CHARGES OF ECONOMIC CRIME: UNETHICAL WHEN DONE FOR A FEE

*David Orentlicher\**

## INTRODUCTION

As prosecutors have increasingly invoked asset forfeiture laws in their war against crime, scholars have harshly criticized the use of forfeiture laws to seize attorneys' fees. In cases in which attorneys' fees are seized, prosecutors claim that defendants are paying their lawyers with the proceeds of criminal activity. For example, drug dealers might use the profits from cocaine or heroin sales to finance their defense, or embezzlers might use the skimmed funds to defray their legal expenses. According to many commentators, attorneys' fee forfeitures raise serious constitutional problems. If payments to attorneys may be seized by the government, criminal defendants will be greatly constrained in their ability to retain a lawyer, thereby compromising the defendants' Sixth Amendment right to counsel and undermining the fairness of the criminal justice system.<sup>1</sup>

In *Caplin & Drysdale, Chartered v. United States*,<sup>2</sup> the Supreme Court rejected the constitutional challenge to seizures of attorneys' fees. However, the debate over seizures of fees often misses an important concern. The real issue at stake is not whether prosecutors can seize attorneys' fees, but whether attorneys should be able to accept the fees in the first place. This misplaced focus reflects the fact that the attorneys' fee issue has been viewed primarily through the lens of defendants' Sixth Amendment right to counsel, without adequate consideration of lawyers' ethical obligations to decline their clients' ill-gotten gains. By taking into account lawyers' professional responsibilities

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\* Samuel R. Rosen Professor of Law, Indiana University School of Law-Indianapolis. J.D., Harvard Law School 1986; M.D., Harvard Medical School 1981. I am grateful for the helpful comments of Frank Bowman, John Connor, Judy Failer, Philip Guentert, William Hodes, William Marsh, James Mutchnik and Stuart Green and the helpful research assistance of Jennifer Bagby and Will Binder.

<sup>1</sup> See, e.g., Morgan Cloud, *Forfeiting Defense Attorneys' Fees: Applying an Institutional Role Theory to Define Individual Constitutional Rights*, 1987 WIS. L. REV. 1; Bruce J. Winick, *Forfeiture of Attorneys' Fees Under RICO and CCE and the Right to Counsel of Choice: The Constitutional Dilemma and How to Avoid It*, 43 U. MIAMI L. REV. 765 (1989).

<sup>2</sup> 491 U.S. 617 (1989).

as well as defendant's constitutional rights, one can come to a more complete understanding of the attorneys' fee issue. The criminal justice system can shape its ethical and legal rules not only in terms of the relationship between individual defendants and the state, but also in terms of the relationship between individual defendants and their lawyers.

When a lawyer's moral duties are adequately considered, it becomes clear that it is almost always unethical for attorneys to accept fees for defending individuals charged with economic crimes. Such individuals should have to rely on court-appointed counsel (or pro se representation) for their legal defense. This conclusion rests on the important moral ground that lawyers may not traffic in the ill-gotten gains of their clients, which means that lawyers cannot accept payment when there is good reason to think that at least some of the payment comes from illicit funds.

Commentators often have misjudged the attorneys' fee issue for a second reason—an incomplete analysis of the consequences for the quality of legal representation if criminal defendants cannot use their funds to hire a lawyer. As many commentators observe, the justice system is poorly served if defendants are denied good legal counsel.<sup>3</sup> In an adversarial system of justice premised on vigorous advocacy for both sides, we must be suspicious of convictions obtained when defendants lack effective representation. According to the usual analysis, if alleged perpetrators of economic crimes are forced to retain public defenders (or other court-appointed lawyers),<sup>4</sup> an already overwhelmed public lawyering system will be even further stretched. Court-appointed lawyers will be unable to provide good representation, and prosecutors will gain an unfair advantage over defendants.

While there is much to be said for the concern about defendants' being prohibited from using illicit funds to hire an attorney, this concern is insufficiently persuasive. Other commentators are correct that there would be a substantial shift in representation from paid lawyers to court-appointed lawyers if attorneys could not accept possibly tainted funds from their clients. However, by assuming a static rather than a dynamic perspective, these

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<sup>3</sup> See, e.g., Cloud, *supra* note 1; Winick, *supra* note 1.

<sup>4</sup> Many court-appointed lawyers are employed as public defenders; in addition, many lawyers in private practice accept court appointments on a regular or occasional basis. See STEVEN K. SMITH & CAROL J. DEFANCES, U.S. DEP'T OF JUSTICE, INDIGENT DEFENSE (Bureau of Justice Statistics Selected Findings No. NCJ-158909, 1996); Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58(1) LAW & CONTEMP. PROBS. 31 (1995).

commentators inadequately analyze how such a shift would affect the quality of legal counsel for criminal defendants. That is, the problem with the usual analysis is its assumption of a static system: we have only so many public defenders, so increasing their workload would mean that they can spend even less time on each case.<sup>5</sup> However, like other systems, the criminal justice system is dynamic. If external conditions change, the justice system will adapt to the new conditions, and the effects of the changes will be different than if the system were static.

Accordingly, one needs to ask from a dynamic perspective what changes will take place if lawyers decline paid representation when economic crimes are involved and potential clients are sent to public defenders. From this perspective, there is reason to believe that a major shift from paid counsel to court-appointed lawyers for economic crimes will result in an enhancement rather than a deterioration of the public lawyering system. Currently, there is relatively weak public support for funding of court-appointed lawyers. Most people probably see the funding as involving a redistribution of money from themselves to indigent criminals, a class of persons that they dislike and do not expect to join. However, if *all* persons charged with economic crimes must turn to court-appointed lawyers, the constituency for a strong public lawyering system will widen. It will widen in terms of numbers of total supporters and, more importantly, it will widen in terms of numbers of politically influential supporters. Not only will drug dealers and convenience store robbers be sent to public defenders, but so will business people who commit securities fraud, antitrust violations or environmental crimes. If corporate executives recognize that they may someday need a strong public lawyering system to protect their own interests, they will be much more likely to support adequate funding for court-appointed lawyers.

In other words, denying paid counsel for the defense of economic crimes will put more people behind the Rawlsian veil of ignorance.<sup>6</sup> It is easy for people to withhold support for funding of court-appointed lawyers when it seems reasonably clear that they will never need a court-appointed lawyer

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<sup>5</sup> Likewise, we have only so much funding for other court-appointed lawyers, so increasing their workload also would unduly stretch their capacity to provide representation.

<sup>6</sup> The "veil of ignorance" is an analytic device for assessing the fairness of a proposed policy. Ordinarily, people will support or oppose a policy proposal in large part based on whether it will help or hurt them personally rather than on whether it is a fair policy overall. If, however, people did not know whether they would be helped or hurt by the policy (that is, if they were viewing the policy from behind a "veil of ignorance"), they would judge the policy in terms of its overall fairness. JOHN RAWLS, *A THEORY OF JUSTICE* 11-16 (1971).

themselves. Most potential perpetrators of securities fraud, antitrust violations or other “white-collar” crime assume they will be able to pay for a lawyer if they are charged, so they need not worry about the quality of the public lawyering system. Indeed, it is in their interest to spend fewer of their dollars on the system through taxes so that they have more money to retain paid counsel, if ever the need should arise. However, if people realize that they may need a public defender themselves some day, because they will be precluded from retaining paid counsel, they will be more willing to support funding for public defenders. A seemingly ironic implication of this analysis becomes clear: The public lawyering system could become stronger as it becomes more widely used. Instead of becoming a drain on the system, the expanded client base might well become a source of strength for the system.

How can one know that this scenario correctly predicts what will happen if lawyers are limited in their freedom to accept legal fees from clients charged with economic crimes? The situation instead could develop according to the usual analysis, and the quality of representation would seriously deteriorate for defendants charged with economic crimes. However, the important point is that one really cannot say with any certainty which way it will go. There could be good or bad consequences from tighter restrictions on the freedom of clients to pay their legal fees with possibly tainted funds. In the face of such uncertainty, society lacks sufficient justification to permit lawyers to accept the funds. In order to override the important ethical principle that lawyers should not accept ill-gotten gains, other important interests must be served by the override. Because it is not clear whether the interests of criminal justice will be better served if lawyers are permitted to accept fees from persons charged with economic crimes, the ethics of the legal profession should not be compromised by allowing lawyers to be paid with possibly tainted funds.

The remainder of this Article will elaborate on these issues further. Part I will discuss the relevant moral concerns, concluding that it is generally unethical for lawyers to accept fees from defendants who are charged with economic crimes. Part II then will explain why the arguments in favor of permitting lawyers to accept such fees are not persuasive. Accordingly, defendants charged with economic crimes generally should rely on court-appointed lawyers for their representation.

## I. ACCEPTING FEES FOR THE DEFENSE OF ECONOMIC CRIMES IS GENERALLY UNETHICAL

### A. *The Duty to Decline Stolen Money*

When attorneys accept fees for the representation of people charged with economic crimes, serious ethical and legal problems arise. To demonstrate this point, I will start with a simple, illustrative case. Assume that, after identifying their suspect from pictures taken by hidden video cameras, the police arrest an unemployed young adult and charge the person with multiple robberies of automatic teller machines (ATMs). Assume further that the person comes from a poor family and has never held a steady job. After being released on bail, the defendant seeks legal counsel and pulls out \$20,000 in cash to pay the lawyer's up-front fee.<sup>7</sup>

Ethical and legal principles indicate that the lawyer should refuse the cash. If the lawyer accepts the fee, the lawyer likely is accepting property that rightly belongs to someone other than the client, for it is highly probable that the source of the cash is the proceeds of the robberies. Given the defendant's employment and family history, there is little reason to think that the \$20,000 was lawfully obtained by the defendant. Because it is ethically and legally impermissible for lawyers to receive stolen property, the lawyer would have to decline the fee,<sup>8</sup> and the defendant would have to obtain the services of a court-appointed lawyer.

My analysis of this illustrative case reflects a widely-held view. When academic experts discuss the seizure of attorneys' fees, they routinely use a case very similar to this one as an example of a case in which the lawyer clearly cannot accept the fee.<sup>9</sup> There are several reasons for this conclusion. The money belongs to the bank, so the lawyer may not take it for personal use.

<sup>7</sup> This example is adapted from 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* § 1.6:405, at 210 (2d ed. Supp. 1996).

<sup>8</sup> See *id.* at 210-211; see also *In re Ryder*, 381 F.2d 713, 714 (4th Cir. 1967); *Bennett v. State*, 211 So. 2d 520 (Miss. 1968). If the lawyer took the fee and then realized that it had been stolen, there would be an obligation to turn the money over to law enforcement officials. See CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 645 (1986).

<sup>9</sup> See, e.g., 1 HAZARD & HODES, *supra* note 7, § 1.6:405, at 210-11; Kathleen F. Brickey, *Tainted Assets and the Right to Counsel: The Money Laundering Conundrum*, 66 WASH. U. L.Q. 47, 50-53 (1988); Thomas D. Morgan, *An Introduction to the Debate Over Fee Forfeitures*, 36 EMORY L.J. 755, 755-56 (1987).

Rather, the money needs to be returned to the bank. Also, by taking the money, the lawyer would become a participant in the defendant's criminal activity, and lawyers, who are officers of the court, should not foster the criminal activity of other persons.<sup>10</sup> To be sure, the lawyer would not be complicit in the robbery itself, but the lawyer would be facilitating the robbery. Theft is worthwhile only to the extent that the stolen property can be turned to one's advantage. If a bank robber can find no one to accept the stolen money, there is little point to committing the robbery in the first place. Hence, the lawyer would provide a critical link in the defendant's criminal scheme. Accordingly, as state codes reflect, the criminal law has traditionally prohibited the receipt of stolen property.<sup>11</sup> There is a third reason lawyers cannot accept funds from bank robbers. By taking the money, the lawyer would be helping the defendant conceal some very important evidence of the theft.<sup>12</sup>

Accepting the \$20,000 fee also might put the attorney in violation of laws other than state stolen property laws. A federal statute prohibits individuals from "engag[ing] in a monetary transaction" with "criminally derived property" if the value of the property exceeds \$10,000 and the criminal activity falls within a long list of crimes, including bank robbery.<sup>13</sup> Seemingly, the statute includes a provision that would exclude attorneys' fees from its coverage. In the definitions clause, the term "monetary transaction" does not include "any transaction necessary to preserve a person's right to representation as guaranteed by the Sixth Amendment to the Constitution."<sup>14</sup> However, this exclusion was rendered a nullity when the Supreme Court rejected a Sixth Amendment challenge to attorneys' fees forfeitures in *Caplin & Drysdale, Chartered v. United States*.<sup>15</sup>

To be sure, it may be the case that the \$20,000 is not tainted money. If that is so, the lawyer could accept the fee. However, the burden should be placed on the lawyer to determine reliably that the cash was in fact lawfully obtained, because the circumstances surrounding the proffer of cash strongly suggest

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<sup>10</sup> See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d) (1983) ("A lawyer shall not . . . assist a client, in conduct that the lawyer knows is criminal or fraudulent . . .").

<sup>11</sup> See CAL. PENAL CODE § 496 (West 1988); N.Y. PENAL LAW § 165.40 (McKinney 1999); *In re Ryder*, 263 F. Supp. 360, 369 (E.D. Va. 1967) (applying Virginia law). See generally 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW §8.10(a), at 422 (1986).

<sup>12</sup> See GEOFFREY C. HAZARD, JR. ET AL., THE LAW AND ETHICS OF LAWYERING 49-50 (2d ed. 1994).

<sup>13</sup> 18 U.S.C. § 1957 (1994) (incorporating by reference 18 U.S.C. § 2113 (1994), which makes bank robbery a federal offense).

<sup>14</sup> 18 U.S.C. § 1957(f)(1) (1994).

<sup>15</sup> 491 U.S. 617, 623-33 (1989).

that the money came from someone else's till.<sup>16</sup> When the likelihood is very high that the client will be paying with funds that were stolen, the lawyer must take steps to ensure that no ill-gotten gains are accepted. In contrast, lawyers ought not to be required to ascertain the exact source of the client's fee in cases in which there is no presumption of taint. Extensive audits of potential clients can chill a lawyer-client relationship<sup>17</sup> and can make it very difficult for clients to maintain their privacy. Thus, for example, when O.J. Simpson retained his lawyers, they could accept his payments because there was no reason to think that his money was taken from Nicole Brown Simpson or Ronald Goldman when they were murdered or that his money was otherwise earned unlawfully.

Even after making inquiries about the source of funds, the lawyer may still be unsure whether the funds were legally obtained. Clients may not be forthcoming with their answers, or their answers may not seem fully trustworthy. An important question, then, is: How likely must it be that a fee would be paid out of stolen property before a lawyer would be obligated to decline the fee?

There are two parts to this question. First, how likely is it that the client committed the crime? Second, will the client be paying the lawyer's fee out of the stolen funds or out of previously and licitly obtained funds? In the remainder of this subpart, I will respond to the first question; in the next subpart, I will respond to the second question.

With regard to the likelihood that the client is guilty, lawyers can turn to the Model Penal Code and state criminal codes for their provisions regarding the possession of stolen property. According to the Model Penal Code, people are guilty of theft if they receive someone else's property with the knowledge that the property was stolen or with the belief "that it has *probably* been stolen."<sup>18</sup> As one court has held, prosecution for theft is permissible if the defendant believed it was "more likely than not" that the property was stolen.<sup>19</sup> Most modern state codes follow the Model Penal Code example.<sup>20</sup> From the

<sup>16</sup> See 1 HAZARD & HODES, *supra* note 7, § 1.6:405, at 210-11.

<sup>17</sup> See Morgan 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, 827 (1987).

<sup>18</sup> MODEL PENAL CODE § 223.6 (emphasis added).

<sup>19</sup> *State v. Gabriel*, 473 A.2d 300, 306 n.7 (Conn. 1984).

<sup>20</sup> See, e.g., ALA. CODE § 13A-8-16 (1994); CONN. GEN. STAT. § 53a-119(8) (1981); ME. REV. STAT. ANN. tit. 17-A, § 359 (West 1983); MINN. STAT. § 609.53 (West 1987); N.H. REV. STAT. ANN. § 637:7 (1996); N.J. STAT. ANN. § 2C:20-7 (West 1995); 18 PA. CONS. STAT. ANN. § 3925 (West 1983); S.D. CODIFIED LAWS § 22-30A-7 (Michie 1998); UTAH CODE ANN. § 76-6-408 (1995). See generally 2 LAFAYE & SCOTT, *supra* note 11, at 428.



law of theft, then, one might conclude that, when lawyers are trying to decide whether their fees are paid from stolen property, they should be guided by a preponderance of the evidence standard. If the preponderance of circumstantial evidence indicates that a proffered fee represents the fruits of criminal activity, the lawyer should refuse to accept the funds.

However, the standard for finding someone guilty of trafficking in stolen property is not necessarily the appropriate standard for a lawyer's *ethical* responsibilities when offered possibly tainted fees. Indeed, there are three important principles in law and ethics that suggest a stricter standard, such as a requirement that lawyers refuse fees once there is good reason (or "probable cause") to believe that the funds come from stolen property.<sup>21</sup>

According to the first important principle, society ordinarily holds people to higher standards for their ethical responsibilities than for their legal responsibilities. For example, a physician may have an ethical duty to treat patients even when they cannot pay for their care, but physicians generally do not have a legal duty to provide medical care without compensation.<sup>22</sup> Similarly, parents may have a moral duty to provide the best possible upbringing for their children, but they have a legal duty only to provide a non-abusive upbringing. While people disagree on exactly why morality differs from law, and indeed some people try to impose their sense of morality through the law,<sup>23</sup> it is generally accepted that one's legal duties are a subset of one's ethical duties.<sup>24</sup> The law, it is said, tries to enforce a minimum standard of conduct.<sup>25</sup> Morality, in contrast, tries to bring about an ideal standard of conduct, a way of living that is aspirational rather than mandatory. Commonly, the distinction between law and morality reflects a desire to accommodate

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Federal laws governing the receipt of stolen property typically require a showing that the defendant had knowledge that the property was stolen. *See, e.g.*, 18 U.S.C. § 659 (1994); *id.* §§ 2312-2318. However, knowledge can be inferred from circumstantial evidence. *See* United States v. Flaherty, 668 F.2d 566, 579 (1st Cir. 1981); United States v. Hardesty, 645 F.2d 612, 614 (8th Cir. 1981).

<sup>21</sup> Some states already have a standard similar to probable cause for their stolen property laws. *See, e.g.*, ALA. CODE § 13A-8-16 (1994) (individuals are guilty of receiving stolen property if they have "reasonable grounds" to believe the property is stolen); MINN. STAT. ANN. § 609.53 (West 1987) (people are guilty of receiving stolen property if they have "reason to know" that the property is stolen).

<sup>22</sup> *See* WILLIAM J. CURRAN ET AL., HEALTH CARE LAW AND ETHICS 128-29 (5th ed. 1998).

<sup>23</sup> *See* JUDITH N. SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS 39-64 (1986).

<sup>24</sup> Compare ANDREW ALTMAN, ARGUING ABOUT LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY 35-37 (1996) (describing the relation between law and morality under the natural law theory of St. Thomas Aquinas), with H.L.A. HART, THE CONCEPT OF LAW 181-207 (1961) (describing the relation between law and morality under his positive law theory).

<sup>25</sup> *See* HART, *supra* note 24, at 188-89.

different religious or philosophical views about the right and the good and to use the law to reflect only those core social obligations to which all members of society can subscribe.<sup>26</sup> In addition, it often is thought that there are limits to the effectiveness of the law in producing moral behavior. For some ethical obligations, we must rely on moral suasion rather than legal mandates to bring about the desired conduct. From the important principle that ethical duties exceed legal duties, we would conclude that lawyers should decline fees that might represent stolen funds under a stricter standard than that used for holding a person liable under laws prohibiting the receipt of stolen property.

The second important principle relevant to determining the lawyer's ethical duty to refuse a possibly tainted fee is that, in general, when society is willing to impose legal duties, it is less willing to impose criminal liability than to impose civil liability. Society gives people more leeway when it drafts criminal laws than when it establishes rules of civil law. For simple negligence, for example, individuals routinely will be held accountable under tort law, but rarely so under the criminal law.<sup>27</sup> Because of the profound social consequences of labeling someone a criminal, society imposes only civil penalties on much legal misconduct and reserves criminal penalties for the more serious misconduct. Identifying misconduct as a crime rather than as a tort or other civil wrong is an important way in which society expresses its greater moral condemnation of the misconduct.<sup>28</sup> Thus, while legal duties generally are an imperfect measure of ethical duties, a person's responsibilities under the criminal law are an even less appropriate measure of one's moral obligations. Accordingly, one should be especially concerned about looking to criminal laws regarding stolen property as a guide to the ethical standards for lawyers who might be paid from ill-gotten gains.

A third important principle suggests a heightened ethical standard for lawyers in a position to accept possibly tainted funds. Not only are lawyers' ethical obligations higher than their legal obligations, but their ethical obligations also are higher than those of lay persons. Among the hallmarks of a profession are special expertise and self-regulation of that expertise according to rigorous codes of conduct.<sup>29</sup> As it does for other professionals, society expects lawyers

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<sup>26</sup> See *id.*

<sup>27</sup> See 1 LAFAVE & SCOTT, *supra* note 11, § 3.7, at 325-26.

<sup>28</sup> See Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404-05 (1958).

<sup>29</sup> See ELIOT FREIDSON, PROFESSIONALISM REBORN: THEORY, PROPHECY, AND POLICY 62-64 (1994).

to observe stricter ethical standards than are expected of other persons.<sup>30</sup> Thus, for example, it is commonly believed that lawyers should provide pro bono legal services on a regular basis,<sup>31</sup> even though it is not expected that landlords set aside an apartment on a routine basis for those who are too poor to afford the building's rent. Society also holds the legal profession to a higher ethical standard because of lawyers' roles as officers of the court. As officers of the court, lawyers should be especially reluctant to take payment of funds that might have been stolen.

All of these reasons for a high professional standard suggest that lawyers should employ a lower threshold than the "preponderance of the evidence" standard from stolen property law when deciding whether to reject fees from funds that might have been stolen. Because of the impropriety of lawyers' facilitating criminal activity, the profession should be fairly strict in setting ethical standards to prevent such facilitation. Accordingly, lawyers should decline fees when there is a "reasonable suspicion" that the money was illegally gotten. In other words, the profession should employ a standard akin to the probable cause standard in criminal law for suspecting someone of criminal activity.

If lawyers were required to decline fees from defendants charged with bank robbery or other theft when there is reasonable suspicion that the money was illegally obtained, then lawyers would almost always have to decline representation of people charged with theft or other economic crimes. Because the standard for the defense lawyer in deciding whether to accept the fee would be the same as the burden of proof for the prosecutor to bring charges, it would be a rare case in which lawyers fairly could conclude that there was no reasonable suspicion of guilt. While I believe this is the correct result, it is necessary to consider other important aspects of the analysis before reaching a firm conclusion about the obligation of lawyers to decline a fee because it might represent the proceeds of criminal activity. These other aspects are the subject of the next two sections.

Before proceeding to the next section, I have one final point about the threshold at which lawyers should decline possibly tainted fees. I have argued that the profession should adopt a stricter standard than the preponderance of

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<sup>30</sup> See DEBORAH L. RHODE, *PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD* 38 (2d ed. 1998).

<sup>31</sup> See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1983) ("A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year.").

the evidence standard from stolen property law, that in terms of *ethics*, it makes more sense to have a reasonable suspicion standard. But even if it is more appropriate to employ the same standard for the lawyer's ethical and legal obligations (i.e., the preponderance of the evidence standard from stolen property law), lawyers likely still would be disqualified from accepting fees from most defendants who are charged with economic crimes. Because criminal defendants generally have committed the crime charged,<sup>32</sup> lawyers in most cases will probably believe it more likely than not that their client is guilty and that the client's payments would come out of tainted funds.

### *B. The Inability to Separate Licit and Illicit Funds*

Until now, I have focused on the degree of suspicion the lawyer has in the client's guilt: should lawyers decline a fee when they think it more likely than not that the client is guilty, or as soon as they have reasonable suspicion of the client's guilt? To complete the analysis, we also need to consider the likelihood that, even if the client is guilty, the attorney's fee would come from legally-earned funds rather than out of the proceeds of crime. In other words, for a lawyer to believe that a proffered fee was illegally obtained, the lawyer would have to believe two things: that the defendant committed a theft *and* that the payment to the lawyer came out of the funds that were stolen. Some thieves make some of their money legally and some illegally. Perhaps the defendant would be paying the lawyer's fee out of legally-earned assets. In the example of the alleged bank robber who was unemployed and had no real means of family support, it would make sense to conclude that the defendant was paying the attorneys' fees out of stolen money. However, we can easily imagine cases in which the question would not be so clear, as, for example, when banking executives embezzle funds from their employers.<sup>33</sup> An executive might be sufficiently wealthy that, even after returning the embezzled funds, there would be enough money left to pay a lawyer.<sup>34</sup> In such a case, is it permissible to accept payment from the client, on the ground that the payment is coming from the client's legally earned assets?

To answer this question, it will be helpful to consider a second illustrative case. In June 1995, the Justice Department launched an investigation of

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<sup>32</sup> See ALAN M. DERSHOWITZ, *THE BEST DEFENSE* xxi (1982).

<sup>33</sup> This example was suggested by 1 HAZARD & HODES, *supra* note 7, at 210.

<sup>34</sup> In the real world, of course, it is entirely possible that embezzlers often steal money because they cannot cover their financial obligations with lawfully earned money. For example, a bank official might embezzle funds to cover losses from gambling or bad investments.

Archer Daniels Midland ("Archer Daniels") on suspicion of price-fixing violations in the global markets for high-fructose corn syrup (used to sweeten foods), citric acid (added to food for its tart taste and preservative properties) and lysine (an amino acid added to animal feed to stimulate growth and lean muscle development).<sup>35</sup> The company pled guilty to charges in October 1996,<sup>36</sup> and in September 1998, a federal jury in Chicago convicted three Archer Daniels executives of engaging in a conspiracy to fix prices in the lysine market.<sup>37</sup> According to newspaper reports, the company paid the legal fees for its executives<sup>38</sup> and brought "enormous legal firepower" to the case in doing so.<sup>39</sup>

When Archer Daniels asked lawyers to defend its executives against the antitrust charges, the lawyers must have had good reason to believe that the company was guilty of the charges. But did the lawyers have good reason to believe that Archer Daniels would pay them out of profits derived from the antitrust conspiracy? In one view, there was nothing unethical about the lawyers' accepting payment of their fees from Archer Daniels. Presumably, the company earned much, if not most, of its profits honestly. According to a common analysis, it was ethically acceptable for the lawyers to represent Archer Daniels, as long as the company had sufficient funds that were legally-earned from which it could pay its legal fees.<sup>40</sup> In other words, there would be no problem accepting payment from Archer Daniels as long as the fee was lower in amount than the company's legally obtained assets. Under this analysis, it is assumed that Archer Daniels drew on all of its licit funds to pay the lawyers before turning to any of its illicit funds.

While this approach makes a good deal of sense, it also leads to a morally perverse result. Criminals who make their money both licitly and illicitly would be better able to hire the most talented lawyers than criminals who do

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<sup>35</sup> See Barnaby J. Feder, *Investigation Of Company Stirs Curiosity*, N.Y. TIMES, July 10, 1995, at D4.

<sup>36</sup> The company also agreed to pay a \$100 million fine. See Nancy Millman, *Indictments May Lift Curtain on ADM Price-Fixing Case*, CHI. TRIB., Dec. 4, 1996, at 1.

<sup>37</sup> *United States v. Andreas*, 23 F. Supp. 2d 855 (N.D. Ill. 1998); *United States v. Andreas*, 23 F. Supp. 2d 863 (N.D. Ill. 1998). Two of the defendants each were sentenced to two years in prison and fined \$350,000; the third defendant received a two and one-half year sentence. See Kurt Eichenwald, *Three Sentenced in Archer Daniels Midland Case*, N.Y. TIMES, July 10, 1999, at C1.

<sup>38</sup> See Millman, *supra* note 36.

<sup>39</sup> Kurt Eichenwald, *Former Archer Daniels Executives Are Found Guilty of Price Fixing*, N.Y. TIMES, Sep. 18, 1998, at A1. An economist who has studied the price-fixing conspiracies estimates that Archer Daniels and its co-conspirators have spent more than \$75 million on legal fees. See John M. Connor, *The Global Lysine Price-Fixing Conspiracy of 1992-1995*, 19 REV. AGRIC. ECON. 412, 419-20 (1997).

<sup>40</sup> See 1 HAZARD & HODES, *supra* note 7, § 1.6:405, at 210-11.

not have a source of legally earned funds. Guilty corporate executives and Wall Street financiers would be more likely than other defendants to be acquitted, despite their guilt, by virtue of being able to afford very skilled legal counsel. Yet, though we generally cannot excuse criminal behavior, we can at least understand more readily why the indigent person with dim opportunities for gainful employment would turn to crime than why a successful businessperson would do so.

An alternative analysis would take a diametrically opposite view. Instead of assuming that illegally-obtained funds were the *last* funds used to pay attorneys' fees, we could assume that illegally-obtained funds were the *first* funds used. If Archer Daniels probably had some illicit earnings, the lawyers would have to assume that the first dollars they received would come from ill-gotten gains, and the lawyers would be unable to accept any payment from the company. The company's officials would have to turn to court-appointed counsel for their representation.

Indeed, some courts have used this approach in asset forfeiture cases to impose a very tough standard on recipients of funds from criminals who want to show that the funds did not derive from criminal activity. For example, in a case involving funds in a bank account that were allegedly the proceeds of illegal drug dealing, the U.S. Court of Appeals for the Second Circuit observed that the government could assume that all of the tainted money was paid out in a particular transaction or that all of the tainted money still remained in the bank account.<sup>41</sup> In other words, once the government ascertained the amount of the tainted money, it could choose where the tainted money went. Applying this theory in a case like the one involving Archer Daniels, the government could assume that at least some of the attorneys' fees were tainted if Archer Daniels had some tainted earnings. In addition, the government could assume that all of the fees paid were tainted if the total fees did not exceed the total illicit earnings of Archer Daniels.

However, whether one assumes that illegally obtained funds are used first or last to pay attorneys' fees, the analysis employs a dubious legal and economic fiction: it assumes that companies or people segregate their assets into a legally obtained pool and an illegally obtained pool and that some expenses are paid with the legally obtained assets while other expenses are paid with the illegally obtained assets. What really happens is that assets are mixed, and

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<sup>41</sup> *United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1158-60 (2d Cir. 1986).

companies like Archer Daniels pay their lawyers with a combination of legally and illegally obtained funds. In the antitrust litigation, the most logical conclusion is that Archer Daniels's lawyers received some tainted money and some untainted money.

What this reality suggests is that Archer Daniels's lawyers acted improperly when they accepted their fees. For every dollar they received, they indubitably accepted some ill-gotten gains, thereby violating their ethical and legal obligation to decline such payments.

The lawyers might argue that only a small percentage of their fee was illicit. Archer Daniels's earnings from lysine and the other products for which it allegedly fixed prices probably amounted to a small percentage of the firm's overall earnings. There may have been some tainted funds in the firm's payments, but the illicit dollars likely were dwarfed by the licit dollars.<sup>42</sup> According to this view, lawyers can accept possibly tainted fees as long as most of the fees would come from legally obtained dollars. Obviously, there would be disagreement as to whether fifty-one percent, sixty-seven percent, seventy-five percent or some other percentage of the fee would have to come from legitimate funds, but there would be leeway allowed to accept possibly tainted money.

This argument is not persuasive. Lawyers should not justify accepting a small percentage of tainted funds by pointing to the large percentage of untainted funds any more than a pawn shop should justify accepting stolen jewelry on the ground that it was only a small percentage of the total jewelry accepted. If criminals could "launder" the proceeds of their criminal activity simply by mixing them with some legally obtained money or other property, then laws prohibiting the receipt of stolen property could easily be evaded.

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<sup>42</sup> Actually, this may not be accurate. While precise figures are not available, we do know that, before the years in which Archer Daniels was accused of price-fixing in the markets for high-fructose corn syrup, citric acid and lysine, its net earnings had been about \$500 million a year for the previous five years. In the first full year of the conspiracy, the company's net earnings jumped nearly 60%, to \$796 million. See Connor, *supra* note 39, at 414.

Moreover, in the market for lysine, the illicit profits clearly were substantial. The companies participating in the conspiracy had estimated total sales of lysine of \$460 million in the United States during the three-year period of the conspiracy, and the overcharge was estimated by the government at \$78 million. See Government's Redacted Supplemental Economic Submission Under the Alternative Fine Provision, 18 U.S.C. § 3571(d), at 3-4, *United States v. Andreas*, No. 96-CR-762 (N.D. Ill. April 12, 1999). Thus, the ill-gotten gains were about 17% of sales. This figure is more than three times the company's usual profit margin. For all of its products (both high-profit margin and low-profit margin), Archer Daniels had after-tax earnings of about 5.5% of sales. See Connor, *supra* note 39, at 414.

Because it is impermissible, both ethically and legally, for lawyers to take money that belongs to someone else, the lawyers should have refused the fees proffered by Archer Daniels.<sup>43</sup>

The lawyers might suggest a second way to justify the payment of their fee. They might say that, if seventy-five percent of Archer Daniels's funds were legally obtained, they could charge seventy-five percent of their usual fee. In this way, the lawyers arguably would be accepting only legitimate money. If they would have billed \$160,000 for their services, they would bill seventy-five percent of that amount, or \$120,000, instead. However, it still would be the case that twenty-five percent of the reduced fee would come from the defendant's illicit funds. With a fee of \$120,000, seventy-five percent of the \$120,000, or \$90,000, would be from legitimate assets, but \$30,000 would still represent ill-gotten gains. Because licit and illicit funds are not segregated, we have to assume that twenty-five cents of every dollar paid by Archer Daniels were illegally obtained. The prohibition against accepting illicit funds would mean that lawyers could not accept any possibly tainted fees, even if the overwhelming percentage of the fees was legally earned. In sum, once a lawyer has reasonable suspicion that a client has ill-gotten gains, the lawyer generally cannot accept any payment from the client, because at least some of the payment would represent illicit funds.<sup>44</sup>

One might critique this argument on the ground that lawyers would be held to a different ethical standard than other people who might engage in financial transactions with criminals. If lawyers must worry that some of their fees might represent the proceeds of criminal activity, why shouldn't grocers or landlords have similar concerns and be required to refuse payments that might be tainted in part?<sup>45</sup> Indeed, if lawyers cannot accept payment from Archer Daniels, how can any of the company's suppliers accept payment from the

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<sup>43</sup> While price-fixing is not the same as theft, it effectively deprives people of their money unlawfully by making them pay a higher price than they otherwise would have paid.

<sup>44</sup> It might be argued that criminal defendants should be able to free up their licit assets by effectively segregating their legally and illegally-earned dollars. For example, a defendant charged with an economic crime could put into escrow with the court an amount equal to the amount of allegedly ill-gotten gains and then use any remaining funds to pay a lawyer. The problem with this suggestion is that we cannot really know in most cases how much of a criminal's assets are legally obtained. Moreover, once a company or an individual takes in ill-gotten gains, those gains can be leveraged through legitimate investments or other uses to produce even more ill-gotten gains. See, e.g., *Alexander v. United States*, 509 U.S. 544, 559 (1993).

<sup>45</sup> For a discussion of the argument that lawyers are treated differently than other people who may engage in transactions with alleged criminals, see Stacy Caplow, *Under Advisement: Attorney Fee Forfeiture and the Supreme Court*, 55 BROOK. L. REV. 111, 120 (1989).



company, and how could any of the company's employees accept their paychecks?

There are a few responses to this argument. First, when criminal defense lawyers accept payment from their clients, the likelihood that tainted funds are involved is much higher than when another business accepts payment from its customers. There is no reason for a grocer to think that any particular customer is purchasing food with ill-gotten gains any more than there is reason for a lawyer to think that a client is paying with ill-gotten gains for the defense of a non-economic crime. Of course, in some circumstances, non-lawyers will have good reason to believe they are being offered tainted funds, as would have been the case with suppliers or employees of Archer Daniels once the company was indicted.<sup>46</sup> In such cases, there may be limitations on what non-lawyers can accept from defendants charged with economic crimes. For example, money-laundering laws apply to non-lawyers in the same way that they do to lawyers. In addition, we often would consider it unethical for non-lawyers to accept payments from defendants charged with an economic crime.<sup>47</sup> However, there still are good bases for distinguishing lawyers and non-lawyers in terms of their ethical obligations. I have discussed reasons why lawyers have ethical obligations that are more stringent than their obligations under laws of general applicability as well as being more stringent than the ethical obligations of lay people.<sup>48</sup> Indeed, society does not rely on lay people to enforce the law, nor does it charge them with duties to protect the criminal justice system from corruption. Lawyers, on the other hand, are officers of the court with fundamental, professional obligations to ensure that the justice system remains untainted.<sup>49</sup>

Moreover, when lawyers are required to decline possibly tainted funds, the criminal defendant is not left without a lawyer entirely. Rather, a court-appointed lawyer is provided for the defendant. In contrast, if employees of Archer Daniels must decline their paychecks once they have good reason to suspect their employer of price-fixing, the company does not get government-provided replacement employees (nor do the employees have any guarantee that another job will be waiting for them).

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<sup>46</sup> Even here, lay people are in a different position than are lawyers. The client's lawyer is in a much better position than is a lay person to judge the soundness of the charges.

<sup>47</sup> For example, a car dealer would violate moral norms by knowingly accepting the proceeds of a bank robbery as payment for an automobile.

<sup>48</sup> See *supra* notes 22-31 and accompanying text.

<sup>49</sup> See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rules 3.3, 3.4 (1983).

This distinction between criminal defense and other services leads to a further point. If it is true that a lawyer could not accept a fee to represent Archer Daniels Midland on its price-fixing charges, does that mean that lawyers cannot accept fees to represent companies in civil matters if the company may have committed an unrelated economic crime? For example, while the federal government was pursuing its antitrust charges against Archer Daniels, should lawyers have declined to represent Archer Daniels in all of its civil cases? Archer Daniels, after all, would be using the same funds for civil representation as for criminal representation.

The civil attorney can be distinguished from the criminal lawyer because there is no right to counsel on civil matters. If Archer Daniels were prohibited from using any of its money to secure civil counsel, the company would be left entirely without the ability to secure legal representation on civil matters. Moreover, while it is fair in prosecutions for economic crimes to hold defense counsel responsible for recognizing that their fees come in part from the charged crime, civil counsel often are not in a very good position to know when their fees might come in part from criminal misconduct.<sup>50</sup>

### *C. The Obligation to Decline All Ill-Gotten Gains*

Until now, I have considered whether lawyers can accept fees from funds that might rightly belong to someone else. A lawyer defending a bank robber might be paid out of the bank's funds; a lawyer defending a price-fixing company might be paid out of funds generated by price-gouging, that is, funds that should be rebated to all of the company's customers who paid higher prices than they should have paid. But what if the defendant's illegally obtained money does not really belong to someone else? Should the analysis change when the defendant has committed an economic crime but has not really deprived other persons of their property? For example, assume the defendant was charged with selling cocaine or heroin. The defendant is not entitled to the proceeds of the drug sales, but neither are the defendant's customers. They presumably got what they paid for.

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<sup>50</sup> One might also ask whether lawyers should forever be barred from accepting fees from Archer Daniels for representation on criminal matters. If *some* illicit gains taint *all* of the company's assets, when could a criminal defense lawyer ever assume that a fee from Archer Daniels was not tainted? For the most part, once criminal proceedings have been completed, one could assume that the taint has been lifted. As part of any conviction, the government will try to recover the illicit gains. Indeed, as mentioned, Archer Daniels paid a \$100 million fine after pleading guilty to its price-fixing charges. *See supra* note 36. However, if a subsequent criminal proceeding involved charges of economic crime, any fees paid by Archer Daniels would be tainted by the subsequent crime.

Although stolen property laws cannot reach attorneys' fees paid by drug dealers, there are other laws that apply in the same way. Moreover, even though the ethical considerations are not exactly the same as with receiving stolen property, there is more than enough ethical concern to justify a rule under which lawyers would have to decline fees from defendants charged with drug dealing or other economic crimes that do not involve stolen property.

First, when I discussed the ethical and legal obstacles to accepting fees from bank robbers, I observed that lawyers may not accept stolen property from their clients. This prohibition is an example of the larger principle that lawyers may not accept the fruits or instrumentalities of criminal activity from their clients.<sup>51</sup> This principle, which has both ethical and legal force, does not distinguish the "fruits" of criminal activity according to whether they rightly belong to someone else. Rather, lawyers may not accept any proceeds of criminal activity, and they may not do so because (a) they would facilitate the defendant's criminal activity by giving the defendant a place to use the ill-gotten gains, (b) they would be trafficking in contraband and (c) they would help the defendant conceal evidence of the crime.<sup>52</sup>

A second problem with a lawyer's accepting the proceeds of drug dealing or other criminal activity is that the proceeds effectively belong to the government. Asset forfeiture statutes turn the profits of criminal activity into the government's property, and title to the profits actually vests in the government at the time the profits are earned.<sup>53</sup> Lawyers who accept the proceeds of criminal activity, then, effectively are stealing from the government.

Third, accepting proceeds of criminal activity would often put the lawyer in violation of ethical and legal prohibitions against money laundering. I have discussed a federal statute, 18 U.S.C. § 1957, which governs monetary transactions involving the proceeds of a broad range of criminal activities.<sup>54</sup> That statute makes it a felony to engage in monetary transactions involving property

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<sup>51</sup> See 1 HAZARD & HODES, *supra* note 7, § 1.6:401-02, at 193-198.3, § 1.6:405, at 210-13.

<sup>52</sup> See *id.*; see also HAZARD ET AL., *supra* note 12, at 49-50.

<sup>53</sup> See *Caplin & Drysdale, Chtd. v. United States*, 491 U.S. 617, 627 (1989) (discussing the effects of the asset forfeiture provisions of 21 U.S.C. § 853 (1982)). Commentators have criticized the statutory vesting of assets as a legal fiction. See Winick, *supra* note 1, at 816-817. However, if one takes the view that property ownership constitutes a bundle of rights that is decided by the government in the first place, then government restrictions on property used in crime are no more a legal fiction than is any other rule of property rights. See MARC L. MILLER & RONALD F. WRIGHT, *CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS* 1179 (1998).

<sup>54</sup> See *supra* note 13 and accompanying text.

derived from criminal activities when the value of the property is greater than \$10,000.<sup>55</sup> Money laundering statutes do not distinguish between ill-gotten gains that belong to someone else, as with the proceeds of a bank robbery, and ill-gotten gains that do not belong to another person, as with the proceeds of drug sales.<sup>56</sup> Lawyers who take ill-gotten gains effectively are laundering money.

## II. THE LEGAL NEEDS OF CRIMINAL DEFENDANTS DO NOT JUSTIFY THE ACCEPTANCE OF TAINTED FUNDS BY LAWYERS

To this point, I have argued from basic principles of ethics and law that lawyers may not accept fees from defendants charged with an economic crime once the lawyer has reasonable suspicion of the client's guilt. As with other issues in ethics or law, there is another side to the issue. Other commentators have advanced arguments in favor of permitting lawyers to accept possibly tainted funds.<sup>57</sup> While these are important arguments, I believe that they are ultimately unpersuasive.

In response to the ethical and legal concerns that arise when lawyers take payment from possibly tainted funds, many commentators cite the important social goal of ensuring that defendants are not convicted unless they have been given effective legal representation.<sup>58</sup> If defendants charged with economic crimes find it too difficult to obtain good legal services, society must worry that many people will be convicted for lack of competent legal representation rather than because they deserve incarceration. Our adversarial system of justice is based on the idea that a fair outcome will result from the vigorous efforts of opposing counsel. Accordingly, we do not want lawyers to disqualify themselves too readily when they are asked to represent a defendant charged with an economic crime.

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<sup>55</sup> 18 U.S.C. § 1957(a) (1996). For a discussion of § 1957, see D. Randall Johnson, *The Criminally Derived Property Statute: Constitutional and Interpretive Issues Raised by 18 U.S.C. § 1957*, 34 WM. & MARY L. REV. 1291 (1993); G. Richard Strafer, *Money Laundering: The Crime of the '90's*, 27 AM. CRIM. L. REV. 149 (1989); Alan J. Jacobs, Note, *Indirect Deprivation of the Effective Assistance of Counsel: The Prospective Prosecution of Criminal Defense Attorneys for "Money Laundering"*, 34 N.Y.L. SCH. L. REV. 303 (1989).

<sup>56</sup> See, e.g., 18 U.S.C. § 1956 (1996) (covering, among other crimes, bank theft, smuggling and drug distribution). For a comprehensive and thoughtful discussion of money laundering and lawyers, see Eugene R. Gaetke & Sarah N. Welling, *Money Laundering and Lawyers*, 43 SYRACUSE L. REV. 1165 (1992).

<sup>57</sup> See Cloud, *supra* note 17, at 831-35; Winick, *supra* note 1, at 839-69.

<sup>58</sup> See Cloud, *supra* note 1, at 35-65; Winick, *supra* note 1, at 777-84.

How should we balance conflicting social goals in answering the question of when a lawyer should decline fees because the money may have been obtained illicitly? In Section A of this Part, I will present arguments for permitting attorneys to accept tainted funds. In Section B, I will explain why these arguments are not persuasive.

*A. Arguments in Favor of Permitting Criminal Defendants to Pay Their Legal Fees with Ill-Gotten Gains*

If lawyers may not accept a defendant's payment, the defendant's constitutional rights to counsel and to due process arguably are implicated. To be sure, there need not be state action when members of the private bar individually or collectively decide to forgo certain kinds of representation on ethical grounds. However, because legal codes of professional responsibility have become a matter of state law in this country,<sup>59</sup> it is important to consider whether it would be constitutional for a state to amend its ethics code to prohibit lawyers from accepting possibly tainted fees. Moreover, even if there are no violations of constitutional rights, the same concerns underlying the constitutional claims would constitute important policy arguments in favor of permitting defendants to pay their legal fees with ill-gotten gains.

Commentators have claimed that the Sixth Amendment's guarantee of a right to counsel<sup>60</sup> would be violated if defendants could not use their financial assets to hire a lawyer. Similarly, the Fifth and Fourteenth Amendments guarantee due process, and that right arguably is infringed if defendants are relegated to a court-appointed lawyer instead of a privately-paid attorney. For analysis of the right to counsel and due process implications of ethical rules prohibiting lawyers from accepting tainted fees, one can turn to a related issue: the authority of the government to seize attorneys' fees under asset forfeiture laws. These laws permit law enforcement officials to seize property that represents a fruit or instrumentality of criminal activity.<sup>61</sup>

Before the Supreme Court's decision in *Caplin & Drysdale, Chartered v. United States*,<sup>62</sup> scholars pursued a lively debate about the constitutionality of

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<sup>59</sup> See NATHAN M. CRYSTAL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION 8-11 (1996).

<sup>60</sup> The Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

<sup>61</sup> See, e.g., 21 U.S.C. § 853 (1996); Mary M. Cheh, *Can Something This Easy, Quick, and Profitable Also Be Fair? Runaway Civil Forfeiture Stumbles on the Constitution*, 39 N.Y.L. SCH. L. REV. 1, 1 (1994).

<sup>62</sup> 491 U.S. 617 (1989).

government decisions to seize attorneys' fees under asset forfeiture laws.<sup>63</sup> The Supreme Court settled the matter when it unequivocally upheld the constitutionality of such seizures. Still, one might question whether the Court was correct. If the Court's rationale is unsound, one might hesitate to move from a regime in which attorneys' fees might be seized to a regime in which they could not be accepted in the first place.<sup>64</sup>

Accordingly, let us now turn to the Supreme Court's decision in *Caplin & Drysdale*. In that case, an alleged drug kingpin was charged with engaging in a "continuing criminal enterprise" in violation of 21 U.S.C. § 848.<sup>65</sup> As part of the proceedings against the defendant, the court issued a restraining order forbidding the transfer of any forfeitable assets. This order prevented the defendant from paying his legal fees, so his law firm, Caplin & Drysdale, challenged the order as violating the defendant's Sixth Amendment right to counsel.<sup>66</sup> The firm also pressed a due process claim, arguing that seizures of attorneys' fees upset the balance of power between the prosecutor and defendant.

In support of its Sixth Amendment claim, Caplin & Drysdale cited the individual's "right to select and be represented by one's preferred attorney,"<sup>67</sup> but the Court responded that this right exists only as far as the defendant can afford. Indigent defendants cannot choose which public defenders will represent them; they must accept the attorneys appointed for them by the court.<sup>68</sup> The

<sup>63</sup> See, e.g., *Symposium: Government Intrusion into the Attorney-Client Relationship*, 36 EMORY L.J. 755 (1987).

<sup>64</sup> For useful discussions of civil forfeiture laws beyond the context of attorneys' fees, see LEONARD W. LEVY, *A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY* (1996); Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35 (1998); *Symposium: Federal Asset Forfeiture Reform*, 21 J. LEGIS. 155 (1995); *Symposium: What Price Civil Forfeiture? Constitutional Implications and Reform Initiatives*, 39 N.Y.L. SCH. L. REV. 1 (1994).

<sup>65</sup> According to the statute, "Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment." 21 U.S.C. § 848(a) (1996). If defendants have been previously convicted under the statute, they face a substantial fine and stiffer penalties. See *id.*

A person is engaged in a "continuing criminal enterprise" when the person (1) is part of a group of six or more persons that perpetrates a series of criminal violations, (2) assumes a managerial, organizational or supervisory position in the group and (3) "obtains substantial income or resources" from the group's criminal activities. 21 U.S.C. § 848(c) (1996).

<sup>66</sup> Although there appeared to be a standing problem with the law firm's assertion of the defendant's constitutional right to counsel, the Court observed that the law firm's stake in the forfeited assets satisfied the injury-in-fact requirement of Article III. In addition, the special nature of the attorney-client relationship and the impact of the litigation on the interests of the third-party law firm counseled against rejection of standing on prudential grounds. See *Caplin & Drysdale*, 491 U.S. at 623 n.3.

<sup>67</sup> *Wheat v. United States*, 486 U.S. 153, 159 (1988).

<sup>68</sup> See *Caplin & Drysdale*, 491 U.S. at 624.

right to choose one's attorney, in short, means only that defendants can "spend [their] *own* money to obtain the advice and assistance of . . . counsel."<sup>69</sup> This makes a good deal of sense. People need food, clothing and shelter to survive, but we do not therefore permit them to use stolen money to purchase those goods. As to the fact that the defendant's *constitutional* right to counsel was implicated by the seizure of assets, the Court noted that asset seizures interfere with the exercise of multiple fundamental rights, including the right to speak, to practice one's religion and to travel.<sup>70</sup> Nevertheless, asset forfeitures still are permitted.

The Court quickly dispensed with the argument that seizures of attorneys' fees would upset the balance of power between prosecutors and defendants. The Court reasoned that the due process clause's guarantee of a fair trial operates primarily through the protections of the Sixth Amendment, and the Court had already found the Sixth Amendment challenge unavailing.<sup>71</sup> Further, to make out a claim of unfair prosecutorial tactics under the due process clause, defendants must show prosecutorial misconduct or the implementation of a rule that is "inherently unconstitutional," and neither criterion was present in the case.<sup>72</sup>

The dissent in *Caplin & Drysdale*, which was decided by a 5-4 margin, invoked several important policy concerns to justify a Sixth Amendment prohibition on the seizure of assets used for legal fees. First, the dissenters observed that if defendants are forced, through loss of their assets, to accept court-appointed lawyers, the government will have compromised the effectiveness of the lawyer-client relationship.<sup>73</sup> Lawyers can function as truly effective advocates only if they enjoy the full trust of their clients, and criminal defendants have good reason to distrust lawyers who are appointed and paid by the government, which is their adversary.<sup>74</sup>

The dissent also invoked the concern about maintaining a fair balance between prosecutors and defendants. Citing Bruce Winick's discussion,<sup>75</sup> the

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<sup>69</sup> *Id.* at 626 (emphasis added) (quoting *Walters v. National Ass'n. of Radiation Survivors*, 473 U.S. 305, 370 (1985) (Stevens, J., dissenting)).

<sup>70</sup> *Id.* at 628.

<sup>71</sup> *Id.* at 633.

<sup>72</sup> *Id.* at 634.

<sup>73</sup> *Id.* at 644 (Blackmun, J., dissenting).

<sup>74</sup> *Id.* at 645.

<sup>75</sup> Winick, *supra* note 1, at 779-84; see also Caplow, *supra* note 45, at 128-29; William J. Genego, *The Legal and Practical Implications of Forfeiture of Attorneys' Fees*, 36 EMORY L.J. 837, 842-43 (1987).

dissent noted that not only would criminal defendants be precluded from hiring skilled lawyers if attorneys' fees could be seized, but over the long-term, the diminished opportunity for compensation would drive talented lawyers away from criminal law.<sup>76</sup>

Finally, the dissent found that seizures of attorneys' fees would result in the "virtual socialization of criminal defense work," as defendants would be forced to accept public defenders or other court-appointed counsel.<sup>77</sup> Such a socialization would result in a standardization of criminal defense services by eliminating the "maverick and the risk taker" whose advocacy styles might not fit into the "structured environment of a public defender's office."<sup>78</sup> In addition, the criminal defense bar would lose much of its independence from the government, as judges could decline to appoint counsel whom they did not like.<sup>79</sup>

Although the dissent did not prevail in its argument, it invoked some very important arguments in favor of permitting defendants to use the proceeds of their criminal activity for legal fees. Our adversarial system is premised on the idea of justice emerging from the efforts of vigorous advocates on both sides of a case. If criminal defendants are prevented from securing the assistance of the best defense lawyers, we must wonder whether convictions reflect justice or simply the greater resources of the government.<sup>80</sup> Moreover, if criminal defense lawyers are increasingly paid by the government, we must wonder whether the attorneys are sufficiently independent of their clients' adversary. Accordingly, even if there are no constitutional barriers to stricter standards for accepting fees from clients charged with economic crime, we might conclude that it would be bad policy to adopt stricter standards. In the next section, I will consider this policy question and conclude that, on policy grounds, criminal defense lawyers should not accept possibly tainted fees from their clients.

### *B. Reasons for Rejecting the Arguments in Favor of Permitting Lawyers to Accept Possibly Tainted Fees from Criminal Defendants*

For several reasons, the arguments in favor of permitting lawyers to accept possibly tainted fees ultimately are unpersuasive.

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<sup>76</sup> See *Caplin & Drysdale*, 491 U.S. at 646-647 (Blackmun, J., dissenting).

<sup>77</sup> *Id.* at 647.

<sup>78</sup> *Id.*

<sup>79</sup> See *id.*

<sup>80</sup> See Lisa Rackner, Note, *Against Forfeiture of Attorneys' Fees Under RICO: Protecting the Constitutional Rights of Criminal Defendants*, 61 N.Y.U. L. REV. 124, 146-148 (1986) (discussing the threat to the adversary system from seizures of attorneys' fees under asset forfeiture laws).



### 1. *Illegitimate Means*

The arguments presented above presume that the benefits of having defendants receive a strong legal defense will overcome the ethical concerns with lawyers accepting tainted funds. However, it is problematic to suggest that good consequences can justify conduct that is inherently unethical. Permitting lawyers to accept ill-gotten gains so that defendants have a better legal defense entails the morally problematic course of encouraging illegitimate means to a desirable end. The acceptability of a practice does not depend simply on whether it produces more gains than losses on balance.<sup>81</sup> Rather, conduct violating an important moral principle should be condemned, even if the conduct might lead to some beneficial consequences. It is morally wrong for lawyers to traffic in ill-gotten gains, and the moral wrongness persists even when the important interests of criminal defendants in obtaining good legal counsel are implicated.

To put it another way, if the argument in favor of allowing tainted fees turns on notions of justice, then the argument runs afoul of itself, for the "just" outcome is reached only by an unjust process: the hiring of lawyers with tainted dollars. Lawyers are officers of the court as well as advocates for their clients. It is wrong for anyone to traffic in illicit funds, but it is especially wrong for those who have a professional obligation to uphold the law. People should not be able to steal their way to a highly skilled lawyer. If criminals can use ill-gotten gains to pay their attorneys, we end up with the rather perverse result that the more successful the criminal, the better the legal defense. The simple bungler would be relegated to a public defender while the person tripped up only after years of law breaking could afford the most talented lawyers.

If we consider other ethical obligations of lawyers, we see that potentially good consequences cannot override important moral principles. For example, just as lawyers must not traffic in ill-gotten gains, they also must not lie or present false testimony on behalf of their clients.<sup>82</sup> Yet, there might be times in which false testimony would result in a more just outcome. Suppose, for

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<sup>81</sup> One could say that morally wrong acts produce bad consequences by virtue of their immorality and that the bad consequences always outweigh the good consequences. However, I am referring instead to the deontological view that we should judge the rightness or wrongness of conduct on grounds other than the consequences produced. See TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 56 (4th ed. 1994).

<sup>82</sup> See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(b) ("A lawyer shall not falsify evidence, counsel or assist a witness to testify falsely . . .") (1983).

example, that person V (victim) was accosted while walking down a quiet street at night, dragged into an alley and then robbed and beaten. Person W (witness), who lives on the street, will correctly identify person B (bystander) as having walked away from the scene of the crime around the time of the crime. Because of W's identification of B, and the fact that B is roughly the same height and weight as the assailant (according to V's testimony),<sup>83</sup> B's lawyer thinks it very likely that a jury would convict B even though B had nothing to do with the crime. B just happened to be in the wrong place at the wrong time. On the other hand, B can produce a fairly convincing alibi, which would likely ensure an acquittal, but the lawyer knows the alibi to be false. Can the lawyer put B on the stand to testify to the false alibi?<sup>84</sup> Principles of ethical responsibility and perjury law say no.<sup>85</sup> The prohibitions on false testimony do not include exceptions for lies that result in better consequences than would the truth. Even though B's lie would lead to a more just verdict, it is not permissible for the lawyer to participate in the lie.<sup>86</sup>

In sum, as a general matter, the potential for good consequences cannot override a lawyer's obligation to maintain professional integrity. Accordingly, the interest in better legal representation for criminal defendants cannot excuse the practice of lawyers accepting tainted funds from their clients.

## 2. *Balancing the Conflicting Interests*

Even under a more consequentialist view that would permit a balancing of benefits and costs, we still should deny criminal defense lawyers the freedom to receive ill-gotten gains from their clients. As I will demonstrate, the

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<sup>83</sup> V is unable, however, to recall enough about the assailant to determine whether B was the culprit.

<sup>84</sup> This example is a modified version of a hypothetical presented in MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 30-31 (1975), and in Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1474-75 (1966).

<sup>85</sup> See 1 HAZARD & HODES, *supra* note 7, § 3.3:204, at 589 (Supp. 1991) (observing that the lawyer's ethical duty not to lie under the Model Rules of Professional Conduct is not qualified in any way; it flatly prohibits a lawyer from "offering" evidence she "knows" to be false); Norman Lefstein, *Client Perjury in Criminal Cases: Still in Search of An Answer*, 1 GEO. J. LEGAL ETHICS 521, 523-25 (1988). But see FREEDMAN, *supra* note 84, at 31 (arguing that, while the lawyer must warn the client that the proposed testimony is unlawful, the lawyer should let the client testify so as not to violate the professional duty of confidentiality); Freedman, *supra* note 84, at 1475.

<sup>86</sup> One might distinguish subornation of perjury from the acceptance of tainted fees on the ground that the fees are external to the judicial process. Perjury directly undermines the court's proceedings while tainted fees do not affect the integrity of the jury's decision. The problem with this distinction is that it rests on a limited view of the system at stake. If one considers the entire criminal justice system, then both subornation of perjury and laundering of criminal proceeds by lawyers are internal to the system.

arguments in favor of permitting tainted fees can be countered with equally persuasive arguments against the acceptance of such fees. In the end, one cannot say with any confidence that, on balance, the criminal justice system or criminal defendants will be better served if lawyers can accept illicit funds from their clients. To be sure, one also cannot say with certainty that the criminal justice system or criminal defendants will be disserved. However, in the face of such indeterminacy, society must come down against possibly tainted fees. Because it is not clear that there would be good consequences if lawyers could accept the fees, there is not a sufficient basis for overcoming the important ethical concerns raised when lawyers take ill-gotten gains from their clients. That is, before society overrides an important ethical principle by citing countervailing benefits from an override, it should have stronger evidence that the benefits would in fact materialize.

Allowing lawyers to accept possibly tainted fees may well not result in benefits for either criminal defendants or the criminal justice system. The argument for permitting tainted fees proceeds as follows: Our adversarial system is premised on the idea that just verdicts result from the vigorous clash of opposing counsel. If defendants charged with economic crimes are unable to secure private counsel, their representation will suffer, and one must wonder whether convictions result from guilt or from inadequate representation. However, several considerations cast doubt on the proposition that the criminal justice system will suffer if lawyers are prohibited from accepting possibly tainted fees.

First, it is not at all clear that criminal defendants fare better with private lawyers than with court-appointed counsel. Surprisingly, the majority of studies on the issue show no difference between privately-retained counsel and public defenders or other court-appointed lawyers.<sup>87</sup> The quality of service appears to be roughly similar, as do the results of the representation.<sup>88</sup> Whether defendants have privately or publicly paid counsel seems to have little effect on the severity of charges for which the defendant is convicted (e.g., felony vs. misdemeanor), on the type of punishment (e.g., no incarceration vs. incarceration) or the probable length of incarceration

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<sup>87</sup> See Floyd Feeney & Patrick G. Jackson, *Public Defenders, Assigned Counsel, Retained Counsel: Does the Type of Criminal Defense Counsel Matter?*, 22 RUTGERS L.J. 361, 365-78, 407-08 (1991). To be sure, if resources for a defendant's representation fall below a minimal level of adequacy, then the quality of the representation will be seriously compromised. See *id.* at 406-07.

<sup>88</sup> See *id.*

(measured by the number of months typically served for the sentence imposed).<sup>89</sup>

Second, even assuming that defendants receive a weaker defense from court-appointed counsel, it does not follow that the criminal justice system will be worse if more criminal defendants must rely on court-appointed lawyers. It might be true that more defendants would receive a suboptimal legal defense and that, therefore, the adversarial system would not work as designed. However, we need to consider other benefits and costs to the justice system. If criminals can use their ill-gotten gains for lawyers' fees, then people have a greater incentive to commit crimes. The drug dealer, the bank robber and the organized crime boss will discount the likelihood of being caught and convicted by the likelihood that a first-rate lawyer will be able to win an acquittal.<sup>90</sup> The availability of outstanding legal counsel will be especially important for people who contemplate the complicated financial crimes for which highly-paid lawyers are supposed to be especially important.<sup>91</sup> Knowing that antitrust violations or securities frauds often are difficult to prove,<sup>92</sup> potential perpetrators of those crimes will take a good deal of comfort if they know they can turn to blue-chip lawyers to argue their defense.

Third, forcing every perpetrator of an economic crime to rely on court-appointed lawyers actually may serve the interests of both criminal defendants and society. In large part, what seems like a real conflict between the ethical concerns from tainted fees and the legal needs of criminal defendants may be only a false conflict. It is quite possible that preventing lawyers from accepting any proceeds of criminal activity will not have nearly the dire effects that are predicted. Indeed, criminal defendants as a group might benefit if lawyers were held to a fairly strict standard when it comes to accepting potentially tainted funds. As more criminal defendants are forced to accept court-appointed lawyers, we can expect a strengthening rather than a weakening of

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<sup>89</sup> See Robert V. Stover & Dennis R. Eckart, *A Systematic Comparison of Public Defenders and Private Attorneys*, 3 AM. J. CRIM. L. 265, 284-300 (1975) (reporting results from a comparison of private attorneys and public defenders in a major city in 1972).

<sup>90</sup> In other words, if one believes that the threat of conviction deters crime, the deterrence is strengthened if potential criminals realize that they cannot turn to high-priced lawyers to secure an acquittal. See Michael J. Sharp, Comment, *Caplin & Drysdale, Chartered v. United States: The Supreme Court's Decision that Crime Doesn't Pay—Even for Attorneys' Fees!*, 24 GA. L. REV. 137, 154 (1989). But see Rackner, *supra* note 80, at 139; Winick, *supra* note 1, at 836.

<sup>91</sup> See Cloud, *supra* note 1, at 35-38; Winick, *supra* note 1, at 773-75.

<sup>92</sup> See, e.g., RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 232 (1976) (discussing the "enormous cost of antitrust proceedings" because of the complex economic issues involved).

the public lawyering system. To see why this is so, this Article will look more closely at the argument in favor of permitting lawyers to accept payments from clients charged with economic crimes.

The usual argument in favor of permitting lawyers to accept possibly tainted fees rests largely on the assumption of a static criminal justice system. If more criminal defendants must go to public defenders or other court-appointed lawyers, the quality of free legal representation will decline, given the already overly-stretched system of court-appointed counsel. As it is, these lawyers are underpaid and overworked and therefore cannot mount the sophisticated legal defense that can be provided by well-compensated defense lawyers.<sup>93</sup> In other words, if the criminal justice system as currently structured cannot properly handle every indigent defendant, how could it handle even more defendants needing court-appointed counsel?

However, it is incorrect to assume that the structure of the criminal justice system will remain unchanged if we restrict the freedom of private lawyers to accept fees from defendants charged with economic crimes. Like other systems, the criminal justice system is a dynamic one; its structure is determined in large part by external conditions. Failure to consider the implications of a change in policy from a dynamic perspective can lead to seriously inaccurate analyses. Consider the following example from consumer shopping to demonstrate how real-world systems operate dynamically rather than statically. If the price of beef increases, people will consume fewer steaks and roasts, but their standard of living will not drop as much as might be expected by looking just at the price increase and the amount of beef currently purchased. This is because the price increase will encourage individuals not only to buy less beef but also to substitute less expensive, alternative sources of animal protein in their diet. Increases in poultry and pork consumption will offset some or all of the decrease in beef consumption, and people may end up eating as much animal protein as they did before the price increase.<sup>94</sup> Or, assume that concerns about cholesterol lead consumers to prefer more fish in their diet. In the short

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<sup>93</sup> See RICHARD KLEIN & ROBERT SPANGENBERG, AMERICAN BAR ASSOCIATION, THE INDIGENT DEFENSE CRISIS (1993); Rebecca Marcus, Note, *Racism in Our Courts: The Underfunding of Public Defenders and Its Disproportionate Impact Upon Racial Minorities*, 22 HASTINGS CONST. L.Q. 219 (1994). Indeed, it is widely assumed that O.J. Simpson's acquittal on murder charges would not have occurred without his talented team of lawyers, DNA experts and other support. Simpson's 10-person team of lawyers sent him bills for his defense that were estimated at \$3-6 million. See Richard Price et al., *O.J.'s Finances May be Next Twist*, USA TODAY, Jan. 19, 1997, at 3A.

<sup>94</sup> See Louis Uchitelle, *The Budget Battle: The Calculations; The Negotiators Forgo A Cut in Inflation Index*, N.Y. TIMES, May 3, 1997, at 12.

run, the price of fish will increase as people bid up the price of the fish supply. Over the long run, however, companies will respond to the increase in demand by sending more boats out to fish or by opening fish farms to increase the fish supply. This increase in supply will drive the price of fish back down again. Similarly, if more criminal defendants will need court-appointed lawyers, the public lawyering system will immediately become overstretched, but the system will change in response to the greater demands placed upon it. Legislatures will allocate more funds to pay for court-appointed lawyers.

To be sure, the public lawyering system might not change that much in response to its greater demands. If more drug dealers end up in public defenders' offices, the offices probably will get more lawyers, but not necessarily in proportion to the increase in client base. The effects would be much like what has happened with prisons as the prison population has mushroomed in this country. We do have more prisons and prisoners now than we did 20 years ago—roughly 1500 prisons with 1,250,000 prisoners in 1997 versus 655 prisons with 280,000 prisoners in 1977—but we also have more overcrowding of prison cells than we used to tolerate. In 1977, prisons operated at six to eight percent above capacity, and by 1997, the prison population was fifteen to twenty-four percent above capacity.<sup>95</sup> If tougher rules on the acceptance of attorneys' fees affected the criminal justice in the way that tougher sentencing has affected the penal system, the critics of attorneys' fee forfeitures would be on solid ground. Making it harder for lawyers to accept fees in cases involving economic crimes would only worsen the ability of criminal defendants to secure effective legal counsel.

However, there is good reason to think that tougher rules on attorneys' fees would have a positive effect on the quality of legal representation of defendants charged with economic crimes. The key to a positive effect lies in adopting rules on attorneys' fees that are very strict. Indeed, the stricter the rules, the more positive the effect. As discussed above, this effect is an implication of the Rawlsian veil of ignorance.<sup>96</sup>

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<sup>95</sup> There is a range in the measurements of overcapacity because there are different ways to measure a prison's capacity. Capacity can be measured in terms of the institution's architectural plan (design capacity), in terms of what a rating official determines (rated capacity) or in terms of a prison's existing facilities, staff and services (operational capacity). Bureau of Justice Statistics, U.S. Department of Justice, *Prison Statistics* (visited Feb. 18, 1999) <<http://www.ojp.usdoj.gov/bjs/prisons.htm>> (basing the number of prisons in 1997 on estimates from 1995 data).

<sup>96</sup> See *supra* note 6 and accompanying text.

As a prelude to my argument, recall that there are two ways in which stricter ethical rules could make it more difficult for lawyers to accept fees from defendants charged with economic crime. First, society can lower the lawyer's required threshold of suspicion that the defendant is actually guilty of the crime charged. We could state that attorneys must decline payment once they have good reason, or "probable cause," to think that the defendant is guilty. Second, we can require lawyers to decline fees if *any* of their clients' assets might have been earned through illicit activity. Or, to put the two standards together, we could require lawyers to refuse a proffered fee if they have good reason to believe that some of the defendant's assets were illegally obtained.

Changing the standards in these ways would have two important effects. First, it would immediately broaden the pool of defendants who would need a public defender or other court-appointed lawyer. Lawyers would have to decline a greater proportion of tendered fees. Indeed, in almost all cases of alleged economic crime, lawyers would not be able to represent the defendants for a fee. Because prosecutors must meet a probable cause standard to file charges, lawyers virtually always would have good reason to suspect that their clients were guilty of the government's charges. Moreover, because people mingle their assets freely, the lawyer would have to assume that at least some of the payment would come from the ill-gotten gains.

The second effect a change in standards would impose is the more important one. Not only would there be a substantial increase in the pool of defendants needing court-appointed lawyers, there also would be an immediate change in the demographics of defendants needing court-appointed lawyers. The pool of defendants would pick up not only the bank robber and the drug dealer with no visible means of legal income, but also Wall Street financiers charged with insider trading, corporate executives charged with price-fixing and physicians charged with Medicare fraud. These criminal defendants now can hire their own lawyers because they likely have sufficient funds from licit activities to afford even the highest-priced legal talent. However, if lawyers had to assume that the profits from insider trading, price-fixing or Medicare fraud will be used to pay at least part of the legal bill, and lawyers were prohibited from accepting any tainted funds from their clients, then white collar criminal defendants would have to turn to court-appointed lawyers for their legal defense.

Such a change in the demographics of the clientele of court-appointed lawyers could have a profound effect on the criminal justice system. Currently, there is relatively lukewarm support for well-funded public defender programs because the system has a politically weak constituency.<sup>97</sup> Most people with wealth and political influence do not see themselves as beneficiaries of the public lawyering system and therefore have little reason to call for greater funding of the system. Indeed, they are much more likely to support government programs that more directly benefit them. In other words, with respect to the public lawyering system, people with political influence can peek beyond the Rawlsian veil of ignorance and see that they will not need the services of court-appointed lawyers. On the other hand, the people who do see themselves as potential beneficiaries of the public lawyering system are likely to be poor and lacking in political influence.

If, however, anyone charged with an economic crime is likely to require a court-appointed lawyer, then the political calculus looks very different. Suddenly, anyone at risk for "white-collar" criminal prosecution is at risk for needing a court-appointed lawyer. Suddenly, the pool of potential beneficiaries of the public defender program includes physicians and hospital directors who find themselves on the wrong end of a Medicare fraud prosecution; company presidents, accountants and lawyers who find themselves on the wrong end of a securities fraud prosecution; or corporate officers who find themselves on the wrong end of an antitrust or environmental pollution prosecution. Suddenly, the constituency for a strong public lawyering system has a great deal more wealth and political influence, and we can expect legislators to respond to the change in constituency when they vote for funding for public defenders and other court-appointed lawyers. In other words, if society changes the standards requiring attorneys to reject fees that might be tainted, it puts more people of wealth and political influence behind the Rawlsian veil with respect to the question whether they will need a court-appointed lawyer at some future time. This positive effect on funding for court-appointed lawyers grows as we adopt ever stricter standards. The stricter the standards, the more society broadens the demographics of the clients of court-appointed lawyers.<sup>98</sup>

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<sup>97</sup> See Norman Lefstein, *Keynote Address*, 14 N.Y.U. REV. L. & SOC. CHANGE 5, 10-11 (1986); Suzanne E. Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, 1982 WIS. L. REV. 473, 481-83; Charles J. Ogletree, Jr., *An Essay on The New Public Defender for the 21st Century*, 58(1) LAW & CONTEMP. PROBS. 81 (1995).

<sup>98</sup> It might be argued that I have overstated the change in incentives for a stronger public-lawyering system. Even if corporate officers, physicians, lawyers and accountants recognize that they will be sent to a



To put it another way, stricter standards will lead to a system of criminal defense representation in which the fortunes of the indigent are linked more closely to the fortunes of the well-to-do. Under current conditions, politically influential persons have little to gain personally from a strong public lawyering system. In their view, a strong system would require that they pay higher taxes and/or receive fewer benefits from other programs that affect their interests more directly. Moreover, under current conditions, politically influential persons likely would see a strong public lawyering system as putting themselves at greater risk from criminal threats. If court-appointed lawyers have more resources and better legal skills, they may frustrate efforts of prosecutors to convict and incarcerate lawbreakers. Under conditions with stricter professional standards, on the other hand, politically influential persons would have more to gain from a strong public lawyering system. They or their friends might well need court-appointed counsel someday, so a strong public lawyering system would be seen more as a safeguard against government overreaching than as a protector of criminals.

The enhanced constituency for a strong public lawyering program also would help address a related concern with rules that would drive criminal defendants to court-appointed counsel. Critics of attorney fee seizures under asset forfeiture laws have observed that court-appointed lawyers may be adequate for garden-variety criminal cases but contend that the lawyers lack the time and resources necessary to present an effective defense in complicated cases, like federal racketeering (or RICO) prosecutions.<sup>99</sup> This is an important concern, but it demonstrates again the benefits of broadening rather than narrowing the situations in which lawyers decline possibly tainted fees. If lawyers decline fees in a wide range of circumstances, and politically influential persons begin to see a strong public lawyering program as being in their interest, people with political power also will support adequate funding for complex cases. Indeed, they may be especially concerned about such funding because the expanded constituency would include individuals at risk for antitrust violations and other complex, white collar crime. Here again the

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public defender if criminal charges are brought, they may believe that they are so unlikely ever to be charged with an economic crime that they will not need a criminal defense lawyer.

I have two responses to this argument. First, because the stakes are so high with criminal prosecutions, the likelihood of being charged can be very low and still provoke considerable concern. More importantly, even if the politically powerful do not initially see themselves at much risk of criminal prosecution, the first time a company like Archer Daniels is sent to a public defender, Congress will be under tremendous pressure to increase funding for the public lawyering system.

<sup>99</sup> See 18 U.S.C. §§ 1961-68 (1996); Cloud, *supra* note 1, at 46-49; Morgan, *supra* note 9, at 759.

public lawyering system improves if we ensure that the system serves more than the disenfranchised members of society.

There is a useful analogy to other public benefit programs. Programs like Social Security and Medicare have been fairly successful in meeting the needs of the poor because they cover everyone, rich or poor. The more prosperous beneficiaries can protect their stake in the programs only if they also protect the stake of the poor. Other programs, like public housing and Medicaid, have been less successful because they cover only the indigent and suffer from their beneficiaries' lack of political power. When the well-to-do vote against increased funding for public housing or Medicaid, they are not harming their own interests. Indeed, they are serving their own economic interests by preventing the redistribution of their wealth.<sup>100</sup>

At this point, my argument for stricter professional standards with respect to accepting fees from clients dovetails with an important argument for a more egalitarian criminal justice system. Even aside from concerns about lawyers accepting fees from the profits of criminal activity, there are good reasons to support a criminal justice system in which all defendants rely on court-appointed lawyers. As Leroy Clark has argued, all defendants, regardless of their wealth, should be treated equally before the law, but equal treatment cannot be a reality when some defendants are able to spend millions of dollars on the highest quality legal representation, and other defendants must rely on the few-thousand-dollar budgets of court-appointed lawyers.<sup>101</sup> In addition, public confidence in the criminal justice system suffers when it appears that a defendant's likelihood of acquittal can turn on the defendant's wealth rather than on the defendant's actual guilt alone.<sup>102</sup>

My argument also serves a second important egalitarian goal for the criminal justice system. When the federal government invokes asset forfeiture laws to capture attorneys' fees, it does not do so in a way that treats all

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<sup>100</sup> See David Orentlicher, *Affirmative Action and Texas' Ten Percent Solution: Improving Diversity and Quality*, 74 NOTRE DAME L. REV. 181, 192 (1998). For additional arguments discussing the advantages of social programs that apply broadly, see THEDA SKOCPOL, *SOCIAL POLICY IN THE UNITED STATES: FUTURE POSSIBILITIES IN HISTORICAL PERSPECTIVE* 250-274 (1995); WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 118-24 (1987).

<sup>101</sup> Leroy D. Clark, *All Defendants, Rich and Poor, Should Get Appointed Counsel in Criminal Cases: The Route to True Equal Justice*, 81 MARQ. L. REV. 47, 47-52 (1997). See also Alan Wertheimer, *The Equalization of Legal Resources*, 17 PHIL. & PUB. AFF. 303 (1988) (arguing for equal access to counsel for civil litigants).

<sup>102</sup> See Clark, *supra* note 101.

criminal defendants equally. Attorneys' fees for certain types of criminals, like drug dealers and members of organized crime, are frequent targets of asset forfeitures.<sup>103</sup> Attorneys' fees for perpetrators of securities or Medicare fraud are much less frequently targeted. Indeed, the same bias occurs with respect to other kinds of asset forfeitures. Prosecutors are quite willing to seize the real property of drug dealers, but rarely, if ever, will they seize the business facilities of corporate defendants.<sup>104</sup> Tightening the ethical standards for lawyers regarding fees from potentially tainted funds would make it more likely for corporate executives to be treated the same way as drug dealers in terms of their ability to secure legal counsel.

In closing this section, I will reemphasize an earlier point. Criminal defendants and the criminal justice system may in fact be worse off if we drive more defendants to court-appointed lawyers by restricting the freedom of lawyers to accept possibly tainted fees. It may be that criminal defendants fare much better with privately-paid counsel than the empirical studies suggest;<sup>105</sup> it may be that the ability to use ill-gotten gains to pay lawyers does not entice many people to commit crimes they otherwise would not commit;<sup>106</sup> and it may be that a broadened constituency for the public lawyering system will not result in a strengthening of the system.<sup>107</sup> However, all of these possibilities cast substantial doubt on the argument that, if society employs strict ethical standards for attorneys' fees from clients charged with economic crimes, there will be serious consequences for the criminal justice system. Because *that* argument is highly questionable, there is not a sufficient basis for overriding

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<sup>103</sup> This bias reflects in part the way asset forfeiture laws are implemented. It also reflects the fact that asset forfeiture laws are drafted to target some crimes more than others. Indeed, contemporary asset forfeiture laws were passed "to create 'a powerful weapon in the fight against drug trafficking and racketeering.'" Cloud, *supra* note 1, at 16 (quoting S. REP. NO. 225-98, at 194 (1983), reprinted in 1984 U.S.C.C.A.N. 3374). The U.S. Department of Justice's focus on asset forfeiture in drug trafficking cases is illustrated by the titles of the guidebooks that they issue on asset forfeiture. See, e.g., MICHAEL GOLDSMITH, U.S. DEP'T OF JUSTICE, CIVIL FORFEITURE: TRACING THE PROCEEDS OF NARCOTICS TRAFFICKING (Supp. 1988 and 1992).

<sup>104</sup> For the federal government, "the overwhelming majority" of asset forfeitures occur in drug trafficking cases and drug-related money laundering. 1993 ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES 11 (1994). Hence, one can find cases in which the government seizes an entire apartment building because some of the apartments are used by tenants for drug selling. *United States v. 141st Street Corp.*, 911 F.2d 870, 880 (2d Cir. 1990) (affirming seizure of building in which fifteen out of forty-one units had drug trafficking activity). But I know of no company like Archer Daniels that has had its corporate facilities seized by the government in the context of a white collar criminal prosecution.

<sup>105</sup> See *supra* notes 87-88 and accompanying text.

<sup>106</sup> See *supra* notes 90-92 and accompanying text.

<sup>107</sup> See *supra* notes 93-100 and accompanying text.

the important moral principle that lawyers should not accept ill-gotten gains from their clients.

### *3. Responses to Other Concerns with a Strict Professional Standard*

Although stricter professional standards for accepting fees paid from possibly tainted funds would create incentives for a stronger public lawyering system and a more egalitarian criminal justice system, it is not so clear that they would generate a better or fairer system. If society drives more white collar defendants to court-appointed lawyers, it might raise the overall quality of the public lawyering system for criminal defendants, but at the same time, it might reduce the possibility of an unusually good legal defense. In other words, the floor of criminal defense work could rise, but the ceiling could be lowered. Even the best public defender program could not hope to match the resources of the elite, private bar.

In one view, it is not clear whether quality and fairness would be lost or gained by trading a lower ceiling for a higher floor. Some defendants would be better off, others would be worse off, and there is arguably no way to know whether the higher floor is worth the lower ceiling.

However, the law of diminishing marginal utility gives reason to believe that criminal defendants are better off with a higher floor and a lower ceiling than a lower floor and a higher ceiling. The law of diminishing marginal utility suggests that more is gained from improvements at lower levels than is lost from diminutions at higher levels.<sup>108</sup> For example, a salary increase of \$1,000 will have a more meaningful impact on the standard of living of someone earning \$25,000 a year than will a salary decrease of \$1,000 on the standard of living of someone earning \$250,000 a year. Similarly, substituting a reasonably well-paid public defender for a poorly-paid public defender could result in a meaningful improvement in legal representation, while substituting a reasonably-paid public defender for a highly-paid private lawyer would probably result in only a trivial decline in the quality of legal representation.<sup>109</sup>

Driving more defendants to public defenders raises another potential problem. Currently, juries probably assume that defendants who use publicly-paid

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<sup>108</sup> See PAUL A. SAMUELSON, *ECONOMICS: AN INTRODUCTORY ANALYSIS* 577-78 (1st ed. 1948).

<sup>109</sup> Moreover, even though the reasonably-paid public defender will receive a lower income than the highly-paid private lawyer, the public defender will receive an income similar to that of a prosecutor, making it more likely that the quality of lawyering will become more equal between the prosecution and the defense.

counsel do so because they cannot afford a privately-paid attorney. However, if private attorneys have to turn away defendants charged with economic crimes when they think the defendant is guilty, juries might presume guilt in economic crime cases in which defendants are represented by a publicly-paid lawyer. In other words, the burden of proof might implicitly shift from the prosecution to the defendant.

This does not seem to be a serious concern. Juries do not need to know whether the defendant is being represented by a publicly or privately-paid attorney, and efforts can be made to keep that information confidential. In addition, from the fact that the prosecution has charged the defendant, a strong suspicion of guilt already is created in the minds of juries.<sup>110</sup> The current system protects against that suspicion by employing the reasonable doubt standard. Even if the jury concludes that private lawyers thought it reasonably likely, or more likely than not, that the defendant was guilty, the issue for the jury is whether guilt has been shown beyond a reasonable doubt.<sup>111</sup>

A final concern about strict standards for attorneys' fees in cases of economic crime takes us back to an earlier argument for relatively lenient standards. If society forces most defendants in cases of economic crime to rely on court-appointed lawyers, it compromises the independence of the criminal defense bar. When lawyers are paid by the government, they are being paid by their client's adversary, and that creates a potentially serious conflict of interest for the lawyers. This is an important concern, and it requires a balancing of competing considerations. If we try to reduce the number of cases in which there is a conflict of interest for the criminal defense lawyer, we can do so only by allowing lawyers to traffic in tainted funds. Moreover, the public lawyering

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<sup>110</sup> According to one survey, nearly two-thirds of people believe that criminal defendants should bear the burden of proving their innocence at trial. See Barton L. Ingraham, *The Right of Silence, the Presumption of Innocence, the Burden of Proof, and a Modest Proposal: A Reply to O'Reilly*, 86 J. CRIM. L. & CRIMINOLOGY 559, 560 n.4 (1996). This result is not surprising. As an anonymous author wrote:

[T]he so-called presumption of innocence in favor of the prisoner at bar is a pretence. . . . The treatment of the prisoner negatives the presumption. If he is presumed innocent, why is he manacled? Why is he put in jail? Why is he let out only on bail? . . . How can a person be presumed innocent who is presumably guilty?

JAMES C. MORTON & SCOTT C. HUTCHINSON, *THE PRESUMPTION OF INNOCENCE* 3 (1987).

<sup>111</sup> This concern presents an additional argument for requiring lawyers to decline representation as long as they have a reasonable suspicion of the defendant's guilt rather than when they think the preponderance of the evidence points to the defendant's guilt. See *supra* notes 18-31 and accompanying text. The lower the threshold used by lawyers to decline representation, the smaller the potential prejudice to the defendant in the eyes of the jury.

system would lose the benefit of a broadened constituency. There is no clear way to resolve this matter. However, two considerations suggest that the risk of a conflict of interest is tolerable.

First, the risk seems to be a reasonable trade-off for criminal defendants as a class. In return for the prospect of a stronger system of court-appointed lawyers, defendants must assume some risk that their attorney's loyalty will be compromised. People will disagree about the trade-off, but most people probably would prefer the more capable lawyer with the conflict of interest than the less capable lawyer without the conflict of interest. Of course, for the majority of criminal defendants, there will be no trade-off at all, as most defendants already rely on court-appointed lawyers.<sup>112</sup> For these defendants, the conflict of interest posed by having one's lawyer paid by the government already exists. These defendants would benefit from the strengthening of the public lawyering system. They also would benefit from a greater sense of fairness because they no longer would be relegated to a less desirable form of justice than other, wealthier criminal defendants.

A second, more compelling reason to tolerate the conflict of interest is that experience with court-appointed lawyers illustrates their ability to remain independent. As indicated, criminal defendants commonly rely on court-appointed lawyers already, and there has been no real concern that their representation has been insufficiently vigorous because of their counsel's source of income.<sup>113</sup> There is evidence that public defenders are, to some extent, co-opted by their roles in the criminal justice system, but there is evidence that privately paid defense lawyers are similarly co-opted.<sup>114</sup> Regardless of their source of payment, it is in the interests of defense lawyers and their clients if the lawyers have a good working relationship with judges and prosecutors.<sup>115</sup> Hence, while the independence of court-appointed lawyers is a legitimate concern, it does not appear to raise the kinds of problems in practice that would justify a compromise of the lawyer's obligation not to traffic in the ill-gotten gains of clients.

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<sup>112</sup> According to estimates, 75% of defendants are represented by court-appointed lawyers in cases in which there is a right to counsel. See MILLER & WRIGHT, *supra* note 53, at 820.

<sup>113</sup> Indeed, the Supreme Court recognized the independence of court-appointed lawyers when it held that public defenders do not act "under color of state law" when representing criminal defendants. *Polk County v. Dodson*, 454 U.S. 312 (1981).

<sup>114</sup> See Roy B. Flemming, *If You Pay the Piper, Do You Call the Tune? Public Defenders in America's Criminal Courts*, 14 LAW & SOC. INQUIRY 393, 397-400 (1989).

<sup>115</sup> See *id.*

## CONCLUSION

Traditionally, academic analysis has been critical of laws or other rules that interfere with the ability of criminal defendants to use their illicit gains for legal representation. This critical tradition is not surprising, because the issue tends to be viewed through the lens of the Sixth Amendment right to counsel. But through the lens of lawyers' ethical obligations, the view is very different. The obligation to reject fees that are paid out of ill-gotten gains leads to the conclusion that lawyers should decline payment when there is reasonable suspicion that some of the fee would represent tainted funds. The state's duty not to interfere with the lawyer-client relationship does not entail an obligation for attorneys to ignore their ethical duties when establishing lawyer-client relationships.

Moreover, this conclusion does not reflect a failure to recognize the importance of criminal defendants' right to counsel or society's interest in an adversarial system with vigorous advocacy on both sides. Rather, it reflects the fact that a more stringent ethical rule on lawyers' fees from defendants charged with economic crimes may have positive rather than negative consequences for criminal defendants and the criminal justice system. Given the uncertainty as to the consequences, there is an insufficient basis for overriding the important moral duty of lawyers to decline their clients' ill-gotten gains.