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THE TENUOUS RELATIONSHIP BETWEEN THE FIGHT AGAINST MONEY LAUNDERING AND THE DISRUPTION OF CRIMINAL FINANCE

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This article examines the fight against money laundering as a case study of the separation between an enforcement system's objectives and performance. To launder money is to hide its illegal origin. The fight against money laundering is supposed to disrupt laundering in its various forms—especially what is done by third party launderers and leaders of criminal organizations. In the process, the fight is supposed to undermine the process of financing and profiting from crimes ranging from drug trafficking to terrorism. Yet this fight delivers less than what it promises. Like many other enforcement systems, the fight against money laundering involves three major components: statutes with criminal penalties charged by prosecutors, rules administered by regulators, and detection systems primarily run by investigators. A close analysis of its three components reveals the fight to have quite a limited scope, involving (1) the disproportionate imposition of severe penalties on predicate offenders who are easily detected; (2) lax and narrowly–focused regulatory authority; (3) limited capacity to detect a range of chargeable domestic and international offenses; and (4) global diffusion of a fight against money laundering that leaves

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implementing authorities plenty of room for discretion and lax enforcement. These limitations probably arise not because of blindness or bad intentions but because the major players involved in running the system—including legislators, prosecutors, investigators, and regulators—face a tangle of incentives that leads them to dilute the intensity and scope of enforcement against some targets and to enhance the sanctions faced by other targets. While there is some evidence that suspicious activity reporting probably helps identify drug money placement in banks, the system seems ill suited to detecting and disrupting the larger universe of criminal financial activity that is so often vilified by the rhetoric justifying the fight against money laundering. All of this makes it hard to target terrorist financing using the anti-laundering system, even though it is easy to freeze assets allegedly linked to terrorism. Some changes in the system such as enhancing audit trails and strengthening suspicious activity reporting and analysis could be defended in the name of making the system work, though politics would make them difficult to achieve and their ultimate consequences are hard to predict. In the meantime, any inequities in the detection of predicate crimes end up being reproduced in money laundering prosecutions, and the system's most compelling objectives—detecting crimes in a new way, and targeting third-party launderers and leaders of criminal networks—seem mostly beside the point.

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INTRODUCTION

Here is a classic description of the "money laundering" game.[1] A drug dealer has a large amount of currency earned from the sale of

[1] The term "money laundering" became ubiquitous in law enforcement discussions of drug and organized crime during the 1980s after a Reagan Administration report highlighted the perceived impact of money laundering on crime. *See* U.S PRESIDENT'S COMM'N ON ORGANIZED CRIME, INTERIM REP'T TO THE PRESIDENT AND ATTORNEY GENERAL, THE CASH CONNECTION: ORGANIZED CRIME, FINANCIAL INSTITUTIONS, AND MONEY LAUNDERING 7 (1984) (cogently defining money laundering as "the process by which one conceals the

crack and heroin.[2] His immediate problem is getting someone to turn stacks of crumpled $10 and $20 bills into balances at a local bank branch that can be easily transferred around the world, or across town to pay his supplier.[3] Once the money is credited to an account and moved around enough, it can be plowed back into more of the same criminal activity, invested in the legitimate economy, used to finance other criminal activities such as terrorism (so we are told in a post–September 11 world), or simply enjoyed by someone as profit.

To fight this system of criminal finance, governments aver a commitment to use a combination of criminal investigators—including undercover agents who offer to launder money and then

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existence, illegal source, or illegal application of income, and disguises that income to make it appear legitimate"). The report ascribes the term to "the argot of criminals, who refer to 'dirty' or 'black' cash being 'washed' so that it can be used openly." *Id.* at 84 n.4. Yet, the practice of hiding money's origin has a long history. *See* INGO WALTER, THE SECRET MONEY MARKET 4–6 (1990). Indeed, the term "money laundering" appears in federal cases well before criminal "money laundering" statutes were passed. Even in the absence of specific statutes criminalizing laundering, federal prosecutors used money laundering theories to seek convictions against defendants involved in organized crime and drug trafficking. *See, e.g.*, United States v. Freedson, 608 F.2d 739, 740 (9th Cir. 1979) ("Negotiations among appellant, Jackson, and the agents continued over the next five months, and culminated in a meeting in San Francisco at which the agents handed appellant a suitcase containing one million dollars in funds to be 'laundered.'"); United States v. Metz, 608 F.2d 147, 152 (5th Cir. 1979) (referring to the "money–laundering scheme"). For sources of the "classic" description of money laundering, see generally *infra* notes 2–10.

[2] In 1992, the National Institute of Justice used a supply–based methodology and reported that United States illegal drug sales generated approximately $100 billion. BARBARA WEBSTER AND MICHAEL S. CAMPBELL, U.S. DEP'T OF JUSTICE, INTERNATIONAL MONEY LAUNDERING: RESEARCH AND INVESTIGATION JOIN FORCES 1 (Sept. 1992). A study from the Office of National Drug Control Policy (ONDCP), using a demand–based methodology, estimated that spending in 1988 was $64 billion, which had declined to approximately $49 billion in 1993. Not all of this ends up being laundered. *See generally* WILLIAM RHODES ET AL., OFFICE OF NAT'L DRUG CONTROL POLICY, WHAT AMERICA'S USERS SPEND ON ILLEGAL DRUGS, 1988–1993 (1995) [hereinafter ONDCP REP'T]. Meanwhile, $1 million in U.S. currency weighs 111 lbs. in $20 bills, or, for example, 444 lbs. in $5 bills. U.S. GENERAL ACCOUNTING OFFICE, GAO/NSIAD PUB . 91–130, MONEY LAUNDERING: THE U.S. GOVERNMENT IS RESPONDING TO THE PROBLEM 13 (1991). Assuming that only two–thirds of ONDCP's estimated money spent on drugs was going to be placed in U.S. banks, and all of it was in $20 bills, traffickers would have to place currency weighing approximately 1,685,000 lbs.

[3] *See Anti-Money Laundering Efforts in Texas; Field Hearing Before the Comm. on Banking, Fin. & Urban Affairs, H.R.*, 103d Cong., 1st Sess. 2-3 (1993) (Statement of Rep. Gonzalez) ("It was not too long ago that money launderers could simply deposit suitcases full of money in local banks without fear of being identified . . . . Currency smugglers should also be wary of moving cash into Mexico. While this technique seems to be growing in popularity, the smugglers may soon find out that they are losing a great deal of money. . . .").

catch the criminals who accept their generosity—as well as informants and regulatory tools, such as reports of large currency transactions to supplement traditional methods of criminal investigation.[4] Banks insist they cooperate with investigators and regulators by telling the government about suspicious transactions and trying to ensure that their accounts do not become coffers for laundered money.[5] Banks, along with other financial institutions, are especially vigilant when confronted with large currency transactions—which subject them to government–mandated reporting requirements. Cash evinces such suspicion because it is anonymous.[6] With it, a person can pay for an airline ticket, a box cutter, a chemical, a rented car, or a baseball bat without leaving much of a paper trail. With cash reporting requirements and the vigilant cooperation of financial institutions to help keep an eye on other transactions, the authorities can "follow" dirty money back to its nefarious source,[7] freeze assets and punish predicate crimes like drug trafficking, terrorism,[8] and corporate fraud. In short, the fight against laundering allows authorities to disrupt financial activity linked to crime and to deter future offenses.[9]

Or does it? It turns out the preceding scenario gives a radically incomplete picture of money laundering, the fight against it, and the broader patterns of criminal financial activity that might in principle be motivating the fight against laundering. For example, the picture above assumes enforcement to be relatively effective, and obscures the larger question of what it means for the fight against money

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[4] As used here, "traditional" law enforcement methods of investigation include informants, undercover agents, and police patrol methods targeting predicate crimes like drug trafficking, corrpution, and terrorism.

[5] *See, e.g.*, Press Release, American Bankers Association Statement on Money Laundering Legislation (Oct. 4, 2001) (stating "ABA strongly supports the ongoing congressional efforts to strengthen existing money laundering laws"), *available at* http://www.aba.com/Press+Room/statementonmoneylaundleg100401.htm (last visited June 3, 2002).

[6] *See infra* Part IV.B.

[7] *See* U.S. DEP'T OF THE TREASURY, THE NAT'L MONEY LAUNDERING STRATEGY FOR 2000 6 (2000) ("The importance of money laundering to criminals creates opportunities for law enforcement to detect crime, as it forces criminals to interact with the commercial and financial sectors.") [hereinafter 2000 ANNUAL STRATEGY].

[8] *See* U.S. DEP'T OF THE TREASURY, THE 2002 NAT'L MONEY LAUNDERING STRATEGY 4 (2002) [hereinafter 2002 ANNUAL STRATEGY] ("The overriding goal of the 2002 Strategy is to deny terrorist groups access to the international financial system, to impair the ability of terrorists to raise funds, and to expose, isolate, and incapacitate the financial networks of terrorists.").

[9] *See generally infra* Part II.A.

laundering to be effective. Neither does the preceding account recognize that the fight against laundering—like many other enforcement systems—is the product of statutes, rules, and detection strategies each controlled by different institutions and individuals. In fact, we know precious little about how the fight against money laundering really works, either in the United States, where the fight was first christened and aggressively instituted, or across the world where it is has been fast adopted either in principle or practice.[10] Nor does most of the scholarly work on money laundering really address this question, as most of it focuses on whether banks and the government strike the right balance between disrupting financial activity connected to crime and protecting financial privacy and autonomy,[11] what precise interpretation should be given to the complicated federal laws criminalizing money laundering,[12] whether

[10] Although few official sources admit that little is known about the day–to–day reality of the anti–money laundering enforcement system, a number of sources instead (1) acknowledge how little is known about the size of the problem (which logically places limits on what can be inferred about the success of anti–laundering efforts), or (2) use anecdotal or descriptive information to draw questionable conclusions about the system's success. For examples of uncertainty about the size of the problem, see 2002 ANNUAL STRATEGY, *supra* note 8, at 3 ("We still do not know the full magnitude of the money laundering problem."); Ronald K. Noble & Court E. Golumbic, *A New Anti–Crime Framework for the World: Merging the Objective and Subjective Models for Fighting Money Laundering*, 30 N.Y.U. J. INT'L L. & POL. 79, 86 (1997–98) ("It is difficult to quantify the amount of criminal profits that enter into the international financial system each year."). For an example of justifications offered for the system, see *Bank Secrecy Act Reporting Requirements: J. Hearing Before the Subcomm. on Gen. Oversight and Investigations and Fin. Insts. & Consumer Credit of the Comm. on Banking and Fin. Serv.*, 106th Cong. 69–97 (1999) (testimony of Mary Lee Warren, *supra* note 10) (justifying the collection of suspicious activity reports of financial transactions on the basis that the FBI reported in FY 1998 that 98% of its financial institution fraud investigations used the reports, without explaining what such use involved).

[11] *See*, among others, Robert S. Pasley, *Privacy Rights v. Anti–Money Laundering Enforcement*, 6 N.C. BANKING INST. 147 (2002); KRIS HINTERSEER, CRIMINAL FINANCE 1 (2002) (arguing for the prioritization of anti–money laundering enforcement, despite the fact that it raises "various civil liberty related issues"); Fletcher N. Baldwin, Jr., *Money Laundering and Wire Transfers: When the New Regulations Take Effect Will They Help?*, 14 DICK. J. INT'L L. 413 (1996); Steven A. Bercu, *Toward Universal Surveillance in an Information Age Economy: Can We Handle Treasury's New Police Technology?*, 34 JURIMETRICS J. 383 (1994); Matthew N. Kleiman, Comment, *The Right to Financial Privacy Versus Computerized Law Enforcement: A New Fight in an Old Battle*, 86 NW. U. L. REV. 1169 (1992).

[12] *See, e.g.*, Rachel Ratliff, *Third–Party Money Laundering: Problems of Proof and Prosecutorial Discretion*, 7 STAN. L. & POL'Y Rev. 173 (1996).

there is enough international cooperation to fight money laundering,[13] or what form that cooperation should take.[14]

So who or what is caught with the fight against laundering?[15] After all, the scenario of the drug trafficker with bags full of crumpled paper currency to deposit does not even begin to describe the full extent of criminal financial activity that the federal government says it has an interest in disrupting.[16] The core anti–money laundering criminal statutes have a long list of predicate offenses that may have little if anything to do with drugs, and perhaps even little to do with currency.[17] Money from these predicates, such as wire fraud in the course of running an energy–trading company,[18] can trigger criminal liability under the money laundering statutes just as surely as drug money laundering can.[19] Nor are currency

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[13] *See, e.g.*, HINTERSEER, *supra* note 11, at 32.

[14] *See, e.g.*, Noble & Golumbic, *supra* note 10, at 79.

[15] U.S. Sentencing Commission statistics indicate that about 985 defendants were convicted under the two major federal anti–money laundering statutes (18 U.S.C. §§ 1956, 1957) in 2000. *See* U.S. SENTENCING COMM'N, 2000 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 24 (2000). But this understates the number of federal criminal convictions involving money laundering–related conduct, since activities such as breaking down currency deposits to evade reporting requirements can be charged under separate statutes. States also engage in some money laundering prosecutions, though no one appears to have studied the number or outcome of such prosecutions. Moreover, convictions do not reflect the impact of money laundering charges that do not lead to convictions, such as prosecutorial practices that depend on charging defendants with money laundering and then obtaining pleas to lesser charges. *See infra* Part IV.A.

[16] Russian individuals used the Bank of New York to launder billions of dollars, some of which apparently came from the Russian Central Bank. *See* United States v. $15,270,885.69, No. 99 Civ. 10255(RCC) 2000 WL 1234593, at *2 (S.D.N.Y. Aug. 31, 2000) ("According to the complaint, from 1996 to 1999, billions of Russian dollars have been transferred from the Sobinbank and DKB correspondent accounts at BONY into the Benex and Becs BONY Accounts, despite the fact that neither Benex nor Becs conducted any legitimate commercial activity.").

[17] A number of predicate offenses for 18 U.S.C. §§ 1956 and 1957 involve fraud, white–collar offenses, and specialized crimes such as the sale of counterfeit aircraft parts.

[18] *Cf.* Kurt Eichenwald, *Ex–Enron Official Admits to Payments to Finance Chief*, N.Y. TIMES, Aug. 22, 2002, at A1.

[19] *See, e.g.*, United States v. Villarini, 238 F.3d 530 (4th Cir. 2001) (defendant embezzled $83,000 from bank where she worked and deposited money in small transactions of less than $3,000 at two–to–four week intervals); United States v. Lee, 232 F.3d 556 (7th Cir. 2000) (where defendant fraudulently obtained a $280,000 loan from a bank, the deposit of loan into account of one of defendant's companies was enough to constitute money laundering under 18 U.S.C. § 1957). Moreover, some statutes designed to deter money laundering do not even require that the money involved come from a specific predicate crime. For example, the anti–structuring law, 31 U.S.C. § 5324, criminalizes the knowing

transactions necessarily the only ones that are anonymous or nearly so.[20] Using bank accounts sheltered by protective bank and corporate secrecy laws in offshore financial havens, individuals can move and exchange resources without leaving an easy trail for law enforcement to follow.[21] Indeed, the growing concern over terrorist financing in the wake of September 11 poignantly illustrates the disconnection between the rhetoric about the fight against money laundering and the larger challenge of disrupting criminal finance. While federal government officials emphatically describe the targeting of terrorist financing as a major part of the fight against laundering,[22] sponsors of terrorism may start with money that originates from non–criminal sources and is never in physical currency form.[23] The terrorist hijackers funded their life and learned to fly using money that itself

separation of deposits into amounts that can evade the $10,000 reporting requirement. Violations of these kinds of laws do not depend on where the money originates.

[20] In theory, transactions that break up deposits might run the risk of provoking banks to file suspicious activity reports that do not have inflexible currency amount thresholds. In practice, such reports may not be completely effective in revealing currency–based laundering. *See infra* Part II. Moreover, a substantial proportion of criminally–derived funds are moved between accounts through wire transfers. *See also Federal Government's Response to Money Laundering: Hearings Before the Comm. on Banking, Fin., & Urban Affairs*, 103d Cong. 397–406 (1993) (testimony of John E. Hensley, Assistant Commissioner for Enforcement, U.S. Customs Service) (contending the vast majority of money laundered is "going through financial institutions" for "wire transfer" purposes); DEP'T OF JUSTICE, DEP'T OF JUSTICE ALERT: WIRE TRANSFER LAUNDERING 14 (1992).

[21] Consider the example of Bermuda. Even in the late 1980s, Bermuda common law was interpreted to infer a contract of confidentiality between a Bermudan bank and its customer, resulting in a rule that "'no Bermuda bank may release information in its possession concerning its customers' affairs unless (1) it is ordered to do so by a court of competent jurisdiction in Bermuda, or (2) it receives a specific written direction from its customer requesting the bank to release such information.'" Doe v. United States, 487 U.S. 201, 203 n.1 (1988) (citation omitted).

[22] *See, e.g.*, 2002 ANNUAL STRATEGY, *supra* note 8, at 4 ("The overriding goal of the 2002 Strategy is to deny terrorist groups access to the international financial system, to impair the ability of terrorists to raise funds, and to expose, isolate, and incapacitate the financial networks of terrorists.").

[23] *See* James Risen, *Money Transfers by Hijackers Did Not Set Off Alarms for Banking Regulators*, N.Y. TIMES, July 17, 2002, at A16 (indicating that none of the September 11 hijackers' financial activities, which primarily involved receiving international wire transfers, appeared to trigger any regulatory "alarms"). *See also* John L. Lumpkin, *Al–Qaeda Activity Suggests More Attacks, Official Says*, HOUSTON CHRON., Mar. 17, 2002, at 32A (offering description of alleged links between Al–Qaeda and honey merchants, some of whom are engaged in legitimate business producing clean money). The recent concern over charities funneling money to terrorists shows it does not matter if the money comes from crime or not, or whether it begins as physical currency or not. These activities might violate the core anti–money laundering laws or some other provisions of federal criminal law. Even so, terrorist financing hardly seems to fit the basic pattern described above.

flew across the world from the United Arab Emirates to the U.S. through almost a dozen wire transfers, not bulk currency shipments.[24] Neither are financial institutions consistently reliable partners in the search for laundered money, because they might have at least as much of an interest in getting business as they do in supporting the government's policy objectives.[25] All of which reveals a gap between the simple picture of laundering described above and the more heterogeneous universe of what one could term "criminal finance," which includes the obvious scenario of simple cash placement laundering but also encompasses more complex schemes of currency laundering, non–currency laundering of proceeds from fraud or corruption, and the financing of crimes such as terrorism—whether the money comes from crime or not.

Abandon the more simplistic description of the laundering, and it starts to become plain just how much of the actual results of the fight against laundering depend on the intersecting effects of ambiguous criminal statutes, regulatory provisions, and detection strategies, all of which interact to produce the output of an enforcement system. Supposing that criminal statutes give prosecutors substantial flexibility regarding the conduct that counts as "laundering" (they do), then the sort of conduct that will end up being punished as such will depend on what sort of criminal activity is detected (it does). The more that the regulatory and investigative systems used to detect laundering or its close cousins rely on traditional investigative methods such as victim reports (for fraud) and undercover investigations (for drugs), the more that prosecutions for laundering and closely related crimes will tend to mimic the patterns of detection of the underlying predicate crimes. This dynamic should make one skeptical about the claim that the fight against money laundering is likely to be an effective means of detecting despised predicate offenses or disrupting the infrastructure of criminal finance that makes the underlying offenses possible.

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[24] *See* Indictment, United States v. Zacarias Moussaui (E.D.Va. 2001), *available at* http://www.usdoj.gov/ag/moussaouiindictment.htm (summarizing U.S. allegations on how the September 11th hijacking was financed through wire–transfers from Europe and the Middle East). The point is not that physical currency movement is unimportant, but that it would be unreasonable to seek a disruption in criminal finance through an exclusive focus on physical currency movement.

[25] Of course, this depends on whether the financial institution believes its acceptance of funds linked to crime (or meant to finance crime) will be detected, and whether that detection will lead to some sort of sanction from the institution.

That skepticism seems odd juxtaposed against the enthusiastic statements of the legislators who designed the system and many of the officials who run it. If one tries to make sense of these statements in light of the law, then the purpose of the fight against laundering can be best summed up in three words: disrupting criminal finance.[26] Just as the now–infamous federal RICO statute sought to deny criminals the opportunity of using an "enterprise" organizational form to carry out their crimes,[27] in principle the focus of the fight against money laundering appears to center on affecting the allegedly troubling intersection between crime and financial activity—not just laundering in its various forms, but also the overall financing of criminal activity.[28] As the reader will better grasp after the discussion of the system's characteristics in Part I, this does not clarify things completely, since even a cursory analysis of the rhetoric suggests there could be several quite different rationales for why criminal finance would be harmful. Maybe the ease of using the machinery of the financial system—banks, wire transfers, money exchanges, brokerage houses, and commodities traders—can lower the cost of perpetrating crime and increase its returns, particularly to the higher–level criminals who enjoy the largest profits from crime. Perhaps the financial activity associated with some kinds of predicate crimes is a smoking gun that makes it easier to detect such offenses, such as major drug smuggling or a terrorist plot—unless of course the smoking gun is camouflaged by professional third–party launderers whose stock in trade is moving money from the Bahamas to Basle.[29] The harm caused by money laundering could even have systemic, adverse consequences on the economy by distorting the incentives to engage in economic activity considered legitimate and productive, or

[26] *See infra* Part II.

[27] *See* S. REP. NO. 91–617, at 76 (1969); H.R. REP. NO. 91–1549, at 57 (1970) (discussing the objective of denying criminals the ability to use the private business organization as a means of perpetrating crime).

[28] *See infra* Part II.

[29] The most plausible version of this argument is not that all predicate crime is detectable through a financial paper trail (or its digital equivalent), but rather that the financial sector has the capacity to keep records and implement procedures that assist in the detection and punishment of criminals who want or need the convenience of bureaucratized finance, either before or after their crime is completed. *Cf.*, *e.g.*, U.S. CONG., OFFICE OF TECH. ASSESSMENT, INFORMATION TECHNOLOGIES FOR CONTROL OF MONEY LAUNDERING 35–36 (1995) [hereinafter OTA REP.] (discussing the expectation implicit in the Bank Secrecy Act of 1970 that "banks would be vigilant in identifying suspect customers and transactions"). *See also infra* note 305 (discussing the legislative history of the Bank Secrecy Act and emphasizing the point about the importance of detection).

by making it more difficult to formulate and implement economic policy.[30] Finally, the link between crime and financial activity may be so intimate—and disturbing—for a moral reason: it makes society complicit in crime by spreading (i.e., as legitimate economic investment in society) the gains from an activity considered so despicable that no one should profit from it.[31]

The preceding rationales imply that the law should have practical goals other than merely enhancing the punishment of run of the mill criminal offenders—a goal that would make the elaborate structure of the system targeting criminal finance a waste of time. Instead, virtually any effort to take the most plausible objectives of the fight against laundering seriously—that is, as something more than just political symbolism[32]—would yield a list of three concrete goals: (1) detecting crime through the "trail" of dirty money (i.e., raise the probability of being caught for both predicate crimes and laundering);[33] (2) targeting the laundering professionals who make it easier for criminals involved in predicate offenses to launder money (thereby raising the cost of laundering and eating into the profit from predicate crimes);[34] and (3) targeting the higher–level criminals that benefit the most from laundered money (lowering the return of financing, supporting, and engaging in the predicate crimes).[35]

The system to fight laundering can respond in ways other than meeting these goals, though, and it does. The principal anti–money laundering criminal statute and the doctrine interpreting it makes it easy for federal prosecutors to use laundering offenses to increase the sanctions that a large number of defendants face.[36] Detection

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[30] *See generally* VITO TANZI, INT'L MONETARY FUND, MONEY LAUNDERING AND THE INTERNATIONAL FINANCIAL SYSTEM, WORKING PAPER 96/95 (1996).

[31] *See infra* Part II.

[32] Of course, symbolic politics (defined *infra* Part IV) may have played a role in the development of the fight against laundering. But that does not settle the issue of whether the proffered justifications for the fight have any merit.

[33] *See* H.R. REP. NO. 91–975, at 3 (1970), *reprinted in* Federal Deposit Insurance Act, Pub. L. No. 91–508, 1970 U.S.C.C.A.N. 4394, 4395 (discussing the justification for anti–money laundering currency reporting requirements and emphasizing the value to regulators and law enforcement of documenting a trail of financial transactions to capture criminals).

[34] *See, e.g.*, S. REP. NO. 99–433, at 3 (1986) (noting that large amounts of cash generated by illicit activities linked to organized crime "pose a serious problem for which the services of launderers have been needed"). *See also infra* Part II.B (generally discussing legislators' professed interest in targeting third–party launderers).

[35] *See id.*

[36] *See infra* Part I.B.1 (discussing the incentives created by the structure of the major criminal statutes).

strategies make it hard to develop cases against higher–ups and third–party launderers because of the reliance on currency enforcement as well as informants and undercover operations.[37] Regulations and regulatory enforcement appear to be diluted because of interest group pressure from financial institutions, which regulators, legislators, and prosecutors have incentives to accept.[38] The result is that the lofty goal of disrupting the larger universe of criminal finance seems of little relevance to the main output of the system—reports that lead to few investigations, and severe penalties used against predicate offenders caught through traditional law enforcement methods with nothing that makes them particularly distinctive in terms of their financial activity. The disconnection between the justifications for the fight against laundering and its actual operation raises the most basic questions about criminal enforcement, such as whether people actually punished for an offense deserve it, whether people who are not punished deserve to get off because they are harder to catch,[39] and how elaborate enforcement schemes might be advanced by rationales that bear a loose relationship to how those schemes are used in the course of everyday legal practice.

The balance of this Article pursues two related lines of inquiry: it uses the framework of analyzing criminal statutes, regulatory rules, and detection strategies to examine the limitations of the fight against laundering, and it treats that fight as a case study in the law and politics of affecting complex enforcement systems. To this end, Part I explains what money laundering is by giving the reader a tour of some of the ways that money's illegal origin is hidden and by explaining the tangle of laws and regulations designed to interfere with that process. Part II considers possible approaches to justifying the obsession with money laundering, surveying both theoretical justifications and the legislative and executive history. Part III uses quantitative and qualitative data to contrast the consequences of the

[37] *See infra* Part I.B.2 (discussing the regulatory scheme).

[38] *See infra* Part I.B.3 (discussing detection strategies).

[39] One could turn these questions into simple problems of optimizing the use of scarce detection and enforcement resources to maximize some attractive–sounding goal, like deterrence or punishment of lawbreakers. But the simplicity begins to disappear the moment one acknowledges the possibility that the importance of a particular criminal offense (either for deterrence or for some other purpose) is not randomly distributed, nor does it necessarily correspond to the ease with which an offense can be detected. The more that different crimes justify different responses in principle (and different degrees of priority to address), the more troubling it is to allow an enforcement system to be driven primarily or exclusively by ease of detection.

fight against laundering with the lofty objectives of disrupting criminal finance cited by legislators and executive branch officials. The most striking result of this evaluation is that criminal penalties for money laundering are used overwhelmingly against people already subject to punishment for a predicate offense. Although suspicious activity and other reports probably also pick up drug and stolen vehicle cash placement, there is no indication that they pick up anything else, nor is there any comprehensive system to analyze all the information relevant to detection that the government already has. Part IV briefly considers some of the forces shaping the system's actual operation and considers possible changes to the fight against money laundering. Without changes in the system—and perhaps even despite them—the relationship between fighting money laundering and disrupting criminal finance will remain tenuous at best, making the asserted goals of the system mostly beside the point.

I. THE FIGHT AGAINST MONEY LAUNDERING

A petty thief, a drug trafficker, a corrupt businessman who gives kickbacks for contracts, and the crooked politician who gets those kickbacks might each have committed vastly different underlying offenses and boast strikingly different social backgrounds and skills.[40] But we might easily imagine they have something in common: their crimes involve money. A substantial proportion of criminal activity makes money, consumes money, or both. The petty thief may not have a difficult time using the cash gained from selling a stolen diamond ring to his fence, compared to a drug trafficker with a literal ton of cash to deposit. But given the link between crime and money, it would seem on the surface that one plausible way to combat crime is to pursue the people and activities that make it possible to profit from or to finance crime.[41] The Supreme Court endorsed this reasoning when it found constitutional a system of recordkeeping that

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[40] *Cf.* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 15 (1993):

> There are many ways to look at the causes of crime . . . Some people blame crime on poverty, on social disorganization, on injustice in society; others reject these theories. There are economic theories, psychological theories, psychoanalytical theories, cultural theories, genetic theories, and so on. We can label some of them right-wing or left-wing or middle-wing or multiwing . . . . Probably no one big, sweeping theory is ever going to work. Nobody is likely to discover *the* cause of "crime"; people are much too complicated for that.

Id.

[41] As I discuss later, the assumption that successfully disrupting criminal finance leads to decreases in predicate crimes should not be taken for granted. *See infra* Part II.

would help the government target criminal activity by detecting its financial component.[42] The laws at issue in that case were not criminal penalties against money laundering, but reporting requirements designed to help the government detect and disrupt financial activity linked to crime. When Congress approved new criminal money laundering statutes some years later, they were also framed as tools to help the government disrupt financial activity linked to crime. Since then, anti-money laundering laws have begun proliferating throughout the world.[43] Of course, money laundering and criminal finance are overlapping but different concepts, made all the more difficult to separate because government officials insist that the fight against money laundering is designed not just to punish a few people who happen to get caught with money after committing a crime, but to punish instead the larger infrastructure that allows domestic and global criminal networks to profit from and finance crime.[44] So the question that arises is whether there is a difference between what the system promises and what it delivers. Because the system is more than just the criminal statutes and the doctrine interpreting them, the answer to the question means we should also consider how bureaucracies make and enforce regulations meant to combat money laundering, and how investigators actually detect the activity.

A. HOW TO LAUNDER MONEY

The laundering metaphor refers not to any financial transaction linked to crime, but specifically to the process through which money received from crime is rendered more useful by two means: converting it into a desirable medium (i.e., a bank balance or equity in a company) and erasing its more obvious links to crimes.[45] This narrow definition tracks quite closely the approach taken in the major federal statutes targeting money laundering, which primarily focus on criminalizing transactions involving the proceeds of crime.[46] The

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[42] Cal. Bankers Ass'n v. Shultz, Sec'y of the Treasury, 416 U.S. 21, 47–49, 61 (1974); United States v. Miller, 435 U.S. 435 (1976) (focusing on the justifications for the recordkeeping requirements).

[43] *See infra* Part I.C.

[44] *See infra* notes 308–12 (explaining the arguments for disrupting criminal financial activity through the fight against money laundering and reviewing the rationales offered by the legislative and executive branches for this activity).

[45] *See, e.g.*, WALTER, *supra* note 1, at 38–44.

[46] See *infra* notes 90–115 and accompanying text, for a discussion of 18 U.S.C. §§ 1956 and 1957, and related federal anti-money laundering statutes. But note that § 1956(a)(2)

concept of criminal finance refers to something broader; activities related to profiting from or financing criminal activity. Obviously this includes the narrow definition of money laundering, including the laundering that is most likely to be picked up by existing enforcement methods (discussed below) as well as other types of money laundering that do not involve physical currency and may be more difficult for the existing system to detect. The concept of criminal finance also encompasses the financing of criminal activity such as terrorism with financial resources from whatever source—including crime as well as legitimate activity.

Official sources sometimes take even the narrow definition of money laundering as a paradigmatic example of criminal financial activity, and the laundering cash proceeds from drug sales as the most cogent illustration of money laundering.[47] One reason why this sort of laundering matters is that money from crime is not worth as much when it is in the form of bulky currency, when it is easily traced back to the crime, or when it shows up in some individual or company bank account that easily attracts suspicion because the owner of the account is under surveillance.[48] Much of what criminals get from selling drugs, for example, is physical currency. Common sense suggests that the higher up one travels in a criminal network, the more cumbersome it is for a trafficker to receive compensation in physical currency form.[49] Cash is bulky and ill–suited for use in most

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criminalizes the movement of money into or out of the United States to promote a specified unlawful activity, *even* if that money does not come from any crime.

[47] *See* PRESIDENT'S COMM'N ON ORGANIZED CRIME, *supra* note 1, at 7 (stating "Law enforcement agencies recognize that narcotics traffickers, who must conceal billions of dollars in cash from detection by the government, create by far the greatest demand for money laundering schemes").

[48] We might imagine a broader definition of laundering that makes reference simply to activity that hides money's origin when someone uses money for crime. In fact, federal law prohibits the movement of money into or out of the U.S. with the intent to promote the carrying on of a specified unlawful activity (such as drug trafficking). 18 U.S.C. § 1956(a)(2)(A) (2000). But it is helpful at this stage to contrast traditional money laundering with the larger category of activity that could be called criminal finance, which involves engaging in financial transactions connected in some way to the profit or financing from crime.

[49] The problems with using currency arise not only from the kingpins' ostensible desire to enjoy profits at the lowest cost, but also from the need of criminal networks to pay off people who provide valuable services, such as corrupt customs officials. A kingpin can use bank balances to transfer money to an account in a bank secrecy haven, or to any number of locations, where money might be withdrawn or otherwise transmitted through an appropriate reintegration scheme that helps the corrupt official minimize the probability of detection and solve his own logistical problems to enjoy the money.

legitimate economic transactions of any substantial value. Reporting requirements make cash transactions the object of possible government attention.[50] Even once the money is in a bank account, the money is hardly useful if the account belongs to someone the government suspects, or if the frequency of currency deposits to the account triggers government suspicion. A simple example helps illustrate the challenges criminals face in using currency. If a drug trafficker and the people he supervises sell $1 million worth of heroin in Chicago, they must transport and distribute about twenty-two pounds of heroin.[51] Yet the sale of $1 million can produce over 250 pounds of currency.[52] So the trafficker's first challenge is to place the money into the financial system and thereby change its physical form from paper bills into a balance at a financial institution.[53] A common technique to accomplish placement is to break up a large deposit into a number of smaller deposits. This technique, known as structuring, lets the trafficker solve the logistical problem of transporting physical amounts of currency, which minimizes the logistical problems of making large currency deposits and avoids the suspicion created by large deposits. Structuring deposits helps the trafficker avoid currency transaction reporting requirements that kick in when a person uses over $10,000 in a transaction.[54] In some cases, traffickers use the cover of an existing cash-intensive business, such as a money exchange business or a restaurant, to help justify large currency deposits—even if they exceed the reporting threshold.[55]

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[50] *See infra* note 281 (discussing the cumbersome nature of cash).

[51] *Taking the Profit Out of Drug Trafficking: The Battle Against Money Laundering: Hearing Before the Subcomm. on Crime of the Comm. on the Judiciary*, 105th Cong. 19–42 (1997) (Testimony of Mary Lee Warren, *supra* note 10).

[52] If the trafficker possesses $1 million in an equal mix of $5, $10, and $20 bills, the street cash weighs 256 pounds. *Id.* at 20. If the $1 million were all in $20 bills, it would still weigh about 150 pounds. Even if the money were exclusively in $50 bills, it would weigh about sixty pounds. Obviously, criminals other than drug traffickers might encounter the challenge of placing large sums of currency.

[53] *See, e.g., infra* Part II.A.

[54] *See* 31 U.S.C. §§ 5311, 5312, 5318 (2000). Filing a report does not mean that a person will be investigated, but it appears to raise the risk of investigation enough that criminals seek to avoid the filing of forms. *See* OTA REP., *supra* note 29, at 53–55 (describing existing monitoring systems for currency transaction reports and certain other filings required by the Bank Secrecy Act). Currency transaction records can also help prosecutors build an ex-post case against a person even if the crime is detected in another way.

[55] A classic placement scheme is for a cooperating cash-intensive business to justify deposits as business earnings. One scheme in Los Angeles, reported in the press, operated thus:

Once the placement is complete, the criminal will probably want to separate the ultimate destination of the funds from their initial placement site to make using the funds more convenient and reduce the possibility of detection. To do this, the criminal engages in "layering," a process that blurs the connection between the origin of the funds and the destination. The goal of this activity is to create a layer of transactions separating the ultimate destination of the bank balances that have been created as a result of the currency's placement.[56] What makes layering possible is the fact that money can be moved around, even across the world, in a series of relatively routine and inexpensive transactions.[57] But the fact that layering is possible does not necessarily make it useful to criminals. Most bank transactions leave a record of some kind, either in paper or electronic form.[58] Presumably, each wire transfer would leave some record, as would an analogous operation to create layering of transactions between the placement account and the destination account. If investigators knew where to look, they could in fact probably

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> A ring based in the Los Angeles jewelry district, for example, laundered $1.2 billion for Colombian drug kingpins in 18 months—more than $2 million a day, $90,000 an hour, 24 hours a day. Drug money poured in from New York, Miami, Phoenix, Houston and Los Angeles. Cash was stacked on pallets before being deposited in local banks as business earnings and wired out of the country. The operation was nicknamed La Mina—the gold mine.

Douglas Frantz, *Crushing Waves of Dirty Cash*, L.A. TIMES, June 26, 1991, at A1. The success of such a voluminous scheme depends not only on the existence of some plausible explanation for the cash (i.e., substantial revenues from wholesale and retail jewelry sales), but also on practical mechanisms to process the cash and account for its whereabouts as it moves from retail drug sale (for example) to a central location for accounting to a bank account.

[56] For a discussion of "layering" to increase the difficulty of tracing funds from initial account used for placement or commission of a crime, see U.S. DEP'T OF THE TREASURY, LAYERING, MONEY LAUNDERING UPDATES 9 (1991), *cited in* United States v. Garcia–Emanuel, 14 F.3d 1469, 1474 (10th Cir. 1994). For a description of layering in the context of a case, see United States v. Morris, 286 F.3d 1291, 1292 (11th Cir. 2002) (describing the facts of the case presumably in the light most favorable to the verdict, in which the prosecution prevailed):

> Morris and four others were indicted and charged with various counts stemming from investment fraud. In the scheme, Morris' co–conspirators obtained investors' funds by falsely representing the investments as legitimate high–yield opportunities. The co–conspirators then would use bank wire transfers to send funds to other persons and entities, including Morris, thus concealing the money trail and promoting the investment fraud.

Id.

[57] *See* Raj Bhala, *The Inverted Pyramid of Wire Transfer Law*, 82 KY. L.J. 347, 351–52 (1994) (discussing the relative ease with which money can be moved around the world).

[58] *See* OTA REP., *supra* note 29, at 36 (documenting that, in principle, non–currency transactions over a certain amount are required to leave some trail).

reconstruct the pattern of transactions. The problem is investigators do not necessarily know where to look.[59] If the layers of transactions involved include the transmission of money to accounts in so–called "bank secrecy" havens, which make it difficult to learn the identity of account holders, then layering makes it more difficult to reconstruct where money has been before it gets to where it is going.[60] Even if the layering strategy did not rely on bank secrecy havens, the number of transactions can make it difficult to figure out money's origin.[61] This makes it possible for the criminal to engage in the final stage of traditional laundering, which could be described as integration. Once placement has turned "dirty" currency into bank balances, and layering has obscured the connection between the placement account and the destination account, the criminal can integrate the funds into any number of streams of economic activity, including legitimate financial activity such as investments in securities and derivatives, government bonds, direct investment in a legitimate enterprise, or further financing of criminal activity.[62] When integration involves some legal economic activity, there must be some justification for where the new funds originated. But this justification is relatively easy to accomplish when the layering process has done its work.[63] Bank accounts controlled by a businessman in Colombia seem far

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[59] *See infra* Part I.C (explaining why investigators would have difficulty detecting money laundering activity); OTA REP., *supra* note 29, at 9 (discussing the difficulties of identifying suspicious wire transfers under existing laws regulating record–keeping for transfers).

[60] *See infra* notes 441–43 (discussing bank secrecy havens and their incentives).

[61] An example: suppose that investigators have reason to suspect that a construction company (D) is a front for laundered money, by helping its owner justify income from illegal sources. The authorities further suspect that the construction company receives money from account A, which belongs to a suspected criminal. If investigators have specific–enough suspicions, they can subpoena records of the construction company's financial activity. A wire transfer from a company B allegedly paying for construction services will not attract suspicion, unless investigators also decide to examine the sources of company B's funds, or—perhaps even more unlikely—the difference between the fair market value of the services provided by company D to company B and the fee paid by B. If investigators had examined company B's transactions, they might have discovered a wire transfer from account C, which in turn received a transfer from account A. But unless investigators examine at least three accounts (from the construction company D, company B, and account C), they would not discover the link between the construction company and account A.

[62] *See infra* Part II.A.

[63] One of the major reasons for layering is that it allows criminals to spread, transform, and reintegrate proceeds in a manner consistent with any number of legitimate justifications for the money, thereby making it easier for the hypothetical criminal to choose between enjoying the proceeds through direct consumption, reinvesting them in illegal activity, or investing them in the legitimate economy for portfolio diversification purposes.

removed in space and subject matter from the dozens of accounts at U.S. financial institutions that were first used to place the money.

Sometimes launderers vary the basic three-step process for disposing of currency if they want to outsource the risk of placing currency or simply want to engage in a mix of different strategies to confound law enforcement.[64] A money transmitting business like a Western Union branch can serve as a bank for the initial placement of currency, which is one reason why currency and suspicious activity reporting requirements now apply to these "money services businesses" as well as banks.[65] In the so-called "Black Market Peso Exchange" scheme, a drug seller gives currency to a currency exchange business, which then launders the money for a fee.[66] A common method for getting rid of the currency often associated with the currency exchange businesses is the use of currency to purchase consumer goods, such as televisions or kitchen appliances, for export. These products can then be dumped on the Colombian market and produce what appear to be legitimate commercial revenues.[67]

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[64] Some of what launderers do is reminiscent of the notion of a "mixed strategy" in the parlance of game theory. In the formalistic language associated with game theory, a mixed strategy is a response that assigns some probability of being chosen to two or more pure strategies (i.e., traditional laundering versus alternative methods) and then involves choosing between the pure strategies in some proportion to the prior assigned probabilities. If we imagine the situation as a game of some sort, where one player (i.e., law enforcement) is trying to anticipate what the other player (i.e., the launderer) will do, then the details of the mixed strategy (i.e., the probabilities assigned to the pure strategies) will depend on what the launderer thinks will be the best reply to the other player. The right mixed strategy can neutralize the advantages of the opposing player's best strategy. *See, e.g.*, JAMES MORROW, GAME THEORY FOR POLITICAL SCIENTISTS (1995).

[65] *See* Proposed Amendment to the Bank Secrecy Act Regulations—Definition and Registration of Money Services Businesses, 62 Fed. Reg. 27,890, 27,893-94 (May 21, 1997) (to be codified at 31 C.F.R. pt. 103).

[66] Anecdotal accounts frequently emphasize the existence of third-party launderers. *See, e.g.*, *Current Trends in Money Laundering: Hearing Before the Permanent Subcomm. on Investigations of the Comm. on Governmental Affairs*, 102d Cong. 89-93 (1992) (testimony of Arturo Gomez, Previous Owner of a "Casa de Cambio") (discussing cash businesses' frequent role in laundering money, and predicate criminals' reluctance to get involved in the process). The expansive meaning that courts have given the anti-money laundering criminal statutes should raise doubts that their use can be easily focused on just a few third-party launderers. *See also* United States v. Medina Cuartes, 155 F. Supp. 2d 1338 (S.D. Fla., 2001) (example of scheme similar to the "Black Market Peso Exchange").

[67] *See* U.S. DEP'T OF TREASURY, FINANCIAL CRIMES ENFORCEMENT NETWORK, FINCEN ADVISORY NO. 9, COLOMBIAN BLACK MARKET PESO EXCHANGE (1997) (for a detailed analysis of the "Black Market Peso Exchange"). *See also* United States v. $57,443.00, 42 F. Supp. 2d 1293 (S.D. Fla. 1999) (where the government used the "totality of the circumstances" to establish that currency delivered by a known money launderer to a third

Another approach is for the launderer to use currency to supplement an apparently legitimate transaction. The launderer could pay for a piece of commercial real estate worth $780,000 with a wire transfer of $500,000 and $300,000 in currency. The currency might be given to the seller under the table, effectively outsourcing the responsibility of placing the currency to the seller, who might be someone operating a currency–intensive business such as a restaurant. The buyer can then easily justify his added wealth because of the difference between the purchase price and the subsequently–appraised value of the commercial property. What all these schemes have in common is that someone ends up placing the currency in a bank account, and at some point the money produced from the crime is integrated into the financial system. This gives the owner of the funds the convenience to decide how to spend the money, but also creates tax liability just as if the money were legitimately earned (unless, of course, the owner of the funds engages in the sort of tax fraud that might defeat the convenience of justifying the existence of the funds in the first place). To the extent that criminals procure assistance from third–party launderers operating businesses that appear legitimate, criminals tend to pay a fee to the launderer.[68] If third–party launderers are behaving rationally, the fee or commission charged should be high enough to offset the additional tax liability that would arise from reporting the criminally derived funds as legitimate income—just as the owner of the laundered funds should be expected to derive a benefit from laundering that exceeds the cost from the tax liability imposed on legitimate income.[69]

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party was connected to a Black Market Peso Exchange transaction, involved proceeds, and was subject to forfeiture).

[68] *See* 2002 ANNUAL STRATEGY, *supra* note 8, at 12 ("The commission rate averages between four to eight percent with a high of 12 percent of the principal involved.").

[69] To the extent the criminal herself operates or controls the apparently legitimate business, she might gladly pay the added tax liability in exchange for obtaining funds that could be plowed into a greater range of legitimate investments (with higher rates of return and none of the risk that comes from reinvesting in criminal activities) and for avoiding the declining marginal utility of cash. If third–party launderers and others using legitimate businesses to launder do not seem to systematically pass their marginal additional tax liability generated from extra laundering–related earnings, there may be a few ways to explain this: (1) third–party launderers may be grossly underreporting the full extent of their tax liability, making it possible to avoid reporting the additional income derived from laundering activity; (2) third–party launderers may be involved in continuing relationships with the criminal seeking laundering, allowing the launderer either to derive further benefits from the entire relationship (i.e., helping out a family member), or to avoid coercive actions from laundering clients who may want to pressure the launderer into service through threats or perpetration of racketeering activity. In any case, it would seem highly unlikely that

Despite the challenges involved, the incentive to do it efficiently and reduce the overhead as well as the risk of detection can lead to laundering operations of substantial size. For example, an extensive money laundering operation focusing primarily (but not exclusively) on currency laundering was investigated by the U.S. Customs Service in 1998 in an effort known as "Operation Casablanca." In this operation, "brokers" who were actually U.S. law enforcement agents specializing in criminal finance worked in concert with representatives from Mexican drug cartels. For a fee, the criminal finance brokers placed the currency in U.S. bank accounts or smuggled the currency across the border to Mexico.[70] Using wire transfers and money smuggled into Mexico, the criminal finance brokers could then consolidate the money at banks with lax internal controls.[71] The money laundering scheme was described as follows by the government in a civil penalty complaint against a bank, with the government's own agents sometimes doing the laundering in the undercover sting operation:

> [T]he Mexican bank would establish bank accounts in the names of straw owners at one of its branches. When the government wished to launder money, it would wire–transfer the money (in the form of U.S. dollars) into these straw accounts. This frequently involved wire–transferring the money to one of the Mexican bank's accounts at a U.S. Bank (referred to as a "correspondent account"), for further credit to the straw account.The Mexican bank would then issue cashier's checks, again in U.S. dollars, to whatever fictitious names the informant or undercover agent would specify . . . . The Mexican banker involved would receive a commission for his participation in the money laundering.[72]

In contrast with Operation Casablanca, where money began as currency and was eventually wired or carried across borders, some

either predicate criminals or launderers engaged in criminal activity for profit would not consider to some degree the tax consequences of their laundering choices. This suggests that tax laws may have both indirect effects on the choice of laundering strategies, as well as some potential for control of laundering activity (i.e., by heavily taxing businesses that might be more likely to be used as fronts for laundering activity).

[70] In many cases, individuals smuggling currency into Mexico in connection with the laundering operation—including U.S. investigators—violated Mexican law, which requires the reporting of large currency transactions. *See* Art. 115, Codigo Fiscal de la Federación {hereinafter C.F.F.], Diario Oficial de la Federación, 28 de diciembre de 1989.

[71] *See* United States v. Banco Internacional/Bital, S.A., 110 F. Supp. 2d 1272, 1274–75 (C.D. Cal. 2000).

[72] *See id.* at 1274 (quoting U.S. government complaint, ¶¶ 16–18). *See also H.R. 4005—Money Laundering Deterrence Act of 1998 & H.R. 1756—Money Laundering and Financial Crime Strategy Act of 1997: Hearing Before the House Comm. on Banking and Fin. Services*, 105th Cong. 87–96 (1998) (statement of Raymond W. Kelly, Under Secretary for Enforcement, Department of the Treasury) [hereinafter Kelly statement].

criminal offenses produce money that is not in currency form at all. In *United States v. Piervinanzi*, the Second Circuit affirmed a conviction for international money laundering involving a fraudulent funds transfer scheme.[73] The facts showcase the challenges and opportunities faced by perpetrators of a crime that does not directly involve currency.

In March 1988, Anthony Marchese told DelGiudice that he and Piervinanzi were planning to rob an armored car. DelGiudice suggested a less violent alternative—an unauthorized wire transfer of funds from Irving Trust into an overseas account. DelGiudice explained that he could use his position at Irving Trust to obtain the information necessary to execute such a transfer. DelGiudice also explained that it would be necessary to obtain an overseas bank account of the scheme to succeed, because (1) United States banking regulations made the rapid movements of proceeds difficult, and (2) a domestic fraudulent transfer could, if detected, be readily reversed. . . . Tichio then told DelGiudice that he would be able to provide access to accounts in the Cayman Islands, and emphasized that the strong bank secrecy laws there would prevent tracing of the purloined funds. Tichio told DelGiudice that the $10 million they were then planning to steal could be repatriated in monthly amounts of $200,000.[74]

Without suggesting that the facts in *Piervinanzi* exemplify laundering schemes relating to fraud, the case highlights the relationship between the laundering scheme and the underlying crime,[75] and the role that bank secrecy havens play in making it more difficult to recapture the funds and detect the perpetrators even if the underlying scheme is discovered. One might envision similar

[73] 23 F.3d 670 (2d Cir. 1994).

[74] *Id.* at 672–73.

[75] The doctrine interpreting the principal anti-money laundering criminal laws (18 U.S.C. §§ 1956 and 1957) considers whether Congress intended to punish the underlying predicate offense and the laundering transaction separately, a requirement that is easily satisfied if there is even a small distinction between the action necessary to complete the predicate offense (for example, moving money on an electronic ledger balance from one account to another), and to engage in any transaction giving rise to the money laundering offense (for example, withdrawing cash from one of the accounts). For an example of merger doctrine in action, see United States v. O'Connor, 158 F. Supp. 2d 697 (E.D. Va. 2001) (wire fraud scheme involving movement of funds across borders did not "merge" with international money laundering offense in violation of 18 U.S.C. § 1956(a)(2)(B)(i)). The upshot is that two offenses could not be subject to merger and still be essentially parts of the same offense.

patterns for embezzlement involving public corruption instead of private financial institutions.[76]

The contrast between the *Piervinanzi* case and Operation Casablanca again shows how money laundering is not just about physical currency. Where a person seeks to launder funds that are not in currency form, as in the case above, there is no need to bother with placement.[77] The challenge is layering. Once the funds are suitably distanced from the original account (perhaps through one or more layers of protection arising from bank or corporate secrecy laws), the launderer can reintegrate them and justify their use. The name of the game is to distance the funds from the account from which the funds were taken.[78]

Layering might include more than simple wire transfers. Imagine, for example, a shell corporation set up in Liechtenstein, a jurisdiction that protects the secrecy of a certain kind of corporate entity's officers and directors.[79] Once the funds in question have

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[76] *See, e.g.*, JAMES ROAF, INT'L MONETARY FUND, CORRUPTION IN RUSSIA, PAPER PREPARED FOR THE APR. 2000 MOSCOW CONFERENCE (2000), *available at* http://www.imf.org/external/pubs/ft/seminar/2000/invest/pdf/roaf.pdf.

[77] While a launderer of non–currency dirty money need not be concerned with currency transaction reporting requirements (unless she withdraws money from the "hot" account and tries to withdraw it in cash), laundering money even after it has been placed in the financial system may create demand for money laundering schemes. *See* PRESIDENT'S COMM'N ON ORGANIZED CRIME, *supra* note 1, at 7 ("It must be noted . . . that numerous other types of activities typical of organized crime, such as loansharking and gambling, also create an appreciable demand for [money laundering] schemes."). *See also* 132 CONG. REC. S 9627 (daily ed. July 24, 1986) (statement of Senator Joseph Biden) (upon introduction of S. 2683, legislation to deter money laundering, "Without money laundering, drug traffickers would literally drown in cash. Drug traffickers need money laundering to conceal the billions of dollars in cash generated annually in drug sales and to convert this cash into manageable form.").

[78] Both layering of transactions to hide their origin and some underlying fraud schemes would have similar, overlapping steps, raising the question of whether the fraud "merges" into money laundering. Predictably, courts facing these questions have most often seen enough of a distinction between the elements of international–concealment money laundering under § 1956 and the elements of financial institution fraud, that they have determined the offenses do not merge. *See* United States v. Piervinanzi, 23 F.3d 670, 679 (2nd Cir. 1994) ("Contrary to Piervinanzi's assertion, this reading of the statute does not 'merge' the underlying criminal activity and promoting through laundering into one. The act of attempting to fraudulently transfer funds out of the banks was analytically distinct from the attempted transmission of those funds overseas, and was independently illegal.").

[79] An Anstalt (or "establishment") under Liechtenstein law is a certain kind of corporation which in practice serves as an international holding company (i.e., holding controlling or financial interests in foreign corporations), with a residence in Liechtenstein. A single founder, who could be a Liechtenstein representative acting for an anonymous owner, is enough to form an Anstalt. *See* W. DIAMOND & D. DIAMOND, TAX HAVENS OF THE

been siphoned off from an account where they belonged, the launderer might wire transfer them to an account controlled by the shell corporation. The shell corporation then makes a loan to the launderer, who pays the loan essentially back to himself. From an investigator's perspective an obvious problem with this sort of laundering is that the launderer does not face the difficulty of placing the funds in the financial system. What partly offsets this problem is that the victims of financial frauds that produce non–currency balances sometimes have an incentive to report the fraud so that the siphoned funds can be recovered.[80]

The foregoing picture of money laundering—involving hiding the origins of money obtained from crime—demonstrates its overlap with the larger concept of criminal finance, defined earlier as including all the various forms of laundering as well as the financing of crime. If money laundering is the process through which criminally derived funds are rendered usable, then surely any definition of criminal finance should at least encompass all activities that would be defined as money laundering. Sometimes money laundering would allow a criminal to reinvest in criminal activity, thereby providing a ready source of capital for the maintenance or expansion of criminal activity.[81] Even if this were not the case, the cost of laundering presumably is still an expense for the criminal and may reduce the fruits of the crime.[82] By the same token, the financing of crime might involve funds that begin entirely clean, with

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WORLD 5 (1989). *See also* ANTHONY GINSBERG, INTERNATIONAL TAX HAVENS 446 (2d ed. 1997) ("Like corporations, Anstalts need a board of directors, which may consist of just one member provided he is domiciled in Liechtenstein . . . . Their advantage . . . lies in the . . . flexibility of secrecy of their operations–in fact, the CIA is known to have used them.").

[80] Thus, Piervinanzi's scheme was uncovered when bank employees involved in a transaction suspected fraud against their institution and reported it. *See* United States v. Piervinanzi, 23 F.3d 670, 674 (2d Cir. 1994). Nonetheless, reporting is far from guaranteed. Financial institutions might decide that disclosure could create concerns about their safety and soundness. *Cf.* OTA REP., *supra* note 29, at 68 n.29.

[81] *See* STEVEN LEVITT AND SUDHIR ALLADI VENKATESH, NAT'L BUREAU OF ECON. RESEARCH, AN ECONOMIC ANALYSIS OF A DRUG–SELLING GANG'S FINANCES, WORKING PAPER NO. 6592 (1998) (documenting the meager return of drug sales to low–level gang employees on the basis of extensive data for a single gang, and thereby suggesting that reinvestment in criminal activity by gang leaders can purchase a lot of illicit labor at lower wages than what is offered in the legitimate sector); Interview with IRS Agent # 1, in Washington, D.C. (Aug. 31, 1998) (notes on file with author).

[82] Thus, the challenge of laundering not only decreases the marginal utility of cash, but also has the potential to increase the risk of detection. *But see infra* notes 282–83 and accompanying text (suggesting that changes in the expense of laundering money do not necessarily result in reductions of predicate crime).

no link to crime other than the nefarious intent of someone who comes to control the funds at some point and chooses to use them to further some crime. A person financing a crime such as terrorism with clean money might still be engaged in some sort of laundering (or obscuring of the source of funds) in order to achieve anonymity or at least pseudonymity, but the soil being washed away is not the crime that produced the money, but the person who finances it.[83] The techniques to pull this off involve something like traditional money laundering in reverse. Since there is no reason to assume the money would begin as currency, assume it is in a bank account somewhere outside the target country, where the money must arrive in order to be useful for the commission of the crime. To move the money into the target country, the criminal financier has a few choices. He can simply wire the money to an account in the target country. The wire transfer leaves an audit trail that might extinguish the financier's anonymity,[84] but only to the extent that the recipient's account is identified. Non–traditional alternatives include the use of an informal money broker. In South Asia, the so–called *Hawala* system allows someone to send money across the world without a paper trail by paying the principal and a fee to a broker in the country of origin and designating someone with a pseudonym to receive the money in the targeted country.[85]

In all cases, the owner of an account with bank balances has substantial advantages over the drug money launderer with crumpled bills or the fraudster trying to hide hot money stolen from a victim soon to miss it: there is almost never a need for placement, nor is there a clearly identifiable financial victim tending to have an incentive to report the offense. To the extent that anti–money laundering enforcement depends in some measure on creating logistical and legal impediments to placement, then the aspect of criminal finance that involves criminal financing might be quite difficult to detect. Neither is there a clearly identifiable victim with

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[83] The perpetrator might value anonymity in order to avoid responsibility for the crime, or simply (as in the case of someone with a profound ideological commitment to a cause) to protect his ability to engage in more of the same activity.

[84] *See* OTA REP., *supra* note 29, at 32 ("Treasury ha[s] always required that wire transfers be kept as part of deposit account records . . .").

[85] Stefan D. Cassella, *Money Laundering Has Gone Global: It's Time to Update the Federal Laws*, FED. LAWYER 24, 30 (Jan. 2002) (describing the workings of the "hawalas" system and its potential usefulness to individuals trying to finance crime). The recipient might be given a token of some kind to facilitate identification and allow for nearly complete anonymity.

an incentive to report an offense that does not involve fraud. In short, it is not at all clear whether any efforts to fight money laundering could easily come to disrupt terrorist financing or similar activities not necessarily involving cash, or whether such efforts would be likely to put a substantial dent even in cash placement. That depends on the details of the enforcement system targeting money laundering, to which we turn next.

B. COMPONENTS OF THE ENFORCEMENT SYSTEM

The near–relentless focus of legal scholarship on substantive laws and constitutional regulation of criminal procedures obscures a tripartite structure defining the law's efforts against many complex crimes or offenses.[86] Substantive criminal statutes obviously matter. Assuming a system that tends to encourage legal interpretations that meet some threshold of intellectual honesty, then the language of a statute shapes a court's decision over what to instruct the jury and a prosecutor's decision to charge a particular defendant. But a prosecutor cannot charge a defendant if she does not suspect that a particular defendant has committed an offense. Discovering this depends on what investigators do, and particularly how they gather information about the universe of possible violations, which depends in part on regulatory systems. The following pages provide an overview of these three components.[87]

1. Criminal Statutes Charged by Prosecutors

Our first stop is the core criminal statutes themselves, which bring us back into the rarified world of statutory text and judicial pronouncements about legal doctrine. The most often–studied federal anti–money laundering statutes are 18 U.S.C. §§ 1956 and 1957, known among prosecutors and commentators as "the" money

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[86] Examples of other domains of law and policy that could be analyzed using the tripartite focus on criminal statutes, regulations, and detection systems include immigration, natural resources management, and pollution control.

[87] The point of this overview is not to provide an encyclopedic discussion of the statutes and case law pertaining to money laundering enforcement. Instead, the goal is to highlight the most important elements in the statutes and case law to provide a basis for evaluating how the enforcement system compares to its stated goals. For a more comprehensive discussion of the recent doctrine interpreting the core federal anti–money laundering criminal statutes, see Daniel H. April & Angelo M. Grasso, *Money Laundering*, 38 AM. CRIM. L. REV. 1051 (2001).

laundering statutes.[88] Section 1957 targets conduct involving knowing transactions with certain kinds of criminal proceeds. Section 1956 criminalizes the concealment of criminal proceeds or the promotion of particular kinds of crime with monetary proceeds. The structure of the statutes appears to reflect two seemingly contradictory concerns. Since money laundering penalties extended criminal liability in a way that seemed strange and unusual, one objective was to narrow the scope of conduct subject to criminal penalties under the statutes.[89] At the same time, investigators and prosecutors clamored for more discretion, resulting in the inclusion of certain vague terms (such as "monetary transaction" and "financial transaction") that enlarged the statutes' scope to the point that almost any post–crime activity undertaken by someone with money generated from some list of crimes risks criminal liability for money laundering. As discussed below, this ability to use the money laundering statutes to cover such a broad range of conduct can prove irresistible to prosecutors trying to enhance the sentence of someone who has already been detected for an underlying offense. What follows elucidates the structure of the statutes and how they have been interpreted.

Begin with § 1956, which demonstrates some of the tension between limiting and expanding the scope of laws criminalizing

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[88] *See, e.g.*, *id.* at 1054 (referring to The Money Laundering Control Act as "consist[ing] of two sections, §§ 1956 and 1957" as "the statute"). Nonetheless, the federal government can use other statutes to charge people with conduct colloquially referred to as "money laundering," including conspiracy to import narcotics, the Travel Act, and criminal violations of currency reporting requirements. Although figures show federal prosecutors have steadily increased the number of money laundering charges filed and convictions achieved, the number is still small compared to the total number federal convictions specifically involving drug crime. For example, in FY 2000, 1106 defendants were convicted where the most severe charge involved an offense under §§ 1956 and 1957, and another 1565 were convicted where at least one offense of conviction was a core laundering offense. 2002 ANNUAL STRATEGY, *supra* note 8, at 27. Meanwhile, about 23,155 defendants were convicted of drug trafficking. *See* U.S. SENTENCING COMM'N, *supra* note 15, at 14. But as discussed below, these figures understate the impact of money laundering charges because they do not reflect: (1) instances where the defendant was convicted of a number offenses, including money laundering, but laundering was not the primary offense; (2) convictions for related statutes other than the core anti–money laundering statutes, such as the law against breaking down deposits to evade currency reporting requirements (*see* 31 U.S.C. § 5324 (2000)); or (3) instances where prosecutors use money laundering charges to obtain more favorable pleas.

[89] *See, e.g.*, 132 CONG. REC. E3827 (daily ed. Nov. 6, 1986) (statement of Rep. Hughes) ("The new 1956 offense is a pure money laundering offense. The new 1957 offense is an offense involving transactions in the proceeds of crime and is much broader than money laundering.").

laundering. Section 1956(a)(1) focuses on domestic financial transactions designed to conceal or promote a specified unlawful activity,[90] while § 1956(a)(2) prohibits certain international transfers meant to conceal or promote the specified activities. Since the statute's drafters appear to have recognized the difficulty of investigating some of these offenses—particularly if the statute was going to be used to punish money laundering activities of third-parties who specialize in this—§ 1956(a)(3) explicitly authorizes sting operations to catch violators. The paragraphs below discuss each of these sections in detail to give a sense of how this principal anti-money laundering statute works.

The intuitive logic behind the crime of money laundering is that financial transactions can help further a crime or make it easier to enjoy the fruits of it.[91] The first part of § 1956 addresses that type of situation. A person violates § 1956(a)(1) if she conducts a financial transaction (or tries to) involving proceeds of specified unlawful activity, knowing that the property involved in such a financial transaction represents the proceeds of some form of unlawful activity, and acting with a specific kind of intent.[92] The violator's intent must include one of the following: (a) promoting the carrying on of the specified unlawful activity,[93] (b) intending to violate 26 U.S.C. §§ 7201 and 7206 (tax offenses *not* included as specified unlawful offenses),[94] (c) knowing that the transaction is meant to confuse the

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[90] The long list of predicates that apply both to §§ 1956 and 1957 includes, among others: destruction of aircraft, counterfeiting, bribery, espionage, "prohibited transactions involving nuclear materials," a bevy of fraud offenses, kidnapping, hostage taking, and of course, drug offenses. *See* 18 U.S.C. § 1956(c)(7) (2000).

[91] *See infra* Part II.B (discussion of legislative history).

[92] Thus, a prosecutor trying to convict someone of an offense under § 1956 must prove: (1) knowledge, (2) the existence of proceeds derived from a specified unlawful activity, (3) a financial transaction, and (4) intent (discussed above). *See, e.g.*, United States v. Sayakhom, 186 F.3d 928, 942–43 (9th Cir. 1999) (listing the elements that must be proven to achieve a conviction under § 1956). Moreover, the transaction must involve some link to interstate commerce.

[93] 18 U.S.C. § 1956(a)(1)(A)(i) (2000). The range of different activities included in the list of predicates triggering liability means that the intent to promote the carrying on of a specified unlawful activity can lead to criminal liability for a whole range of different types of offense. *See, e.g.*, United States v. Febus, 218 F.3d 784, 790 (7th Cir. 2000) (defendant faced criminal liability when intending to reinvest the proceeds of an illegal lottery to promote its continuing operation); United States v. Ross, 210 F.3d 916, 921 (8th Cir. 2000) (concluding defendant violated § 1956 when intending to use the proceeds of wire fraud to facilitate the continuation of a wire fraud scheme).

[94] Section 7201 of the Internal Revenue Code provides: "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment

source or control of proceeds of specified unlawful activity, [95] or (d) acting with knowledge that the transaction is designed to avoid some of the Bank Secrecy Act's reporting requirements, or state reporting requirements, discussed below.[96] From the language of the statute one might conclude that a typical violation could involve not only the drug trafficker breaking down currency deposits to hide their origin, but also persons involved in the third-party laundering of non-currency criminal proceeds that have to do with offenses such as the sale of counterfeit aircraft parts.[97] After the new USA Patriot Act ("USAPA"), which radically expanded federal authority to engage in the fight against money laundering, the category of specified unlawful activity has expanded dramatically. It now includes, among other things, any crime of violence, bribery of a public official, smuggling of munitions, any offense for which the United States is obligated to extradite or prosecute someone by multilateral treaty, firearms trafficking, computer fraud, and "terrorism offenses" as defined in 18 U.S.C. § 2332(b).[98] If the specified unlawful activity category had the potential to serve as a means of focusing the use of criminal money laundering statutes, what little remained of that

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thereof shall, in addition to other penalties provided by law, be guilty of a felony . . ." I.R.C. § 7201 (West 2002). Section 7206 allows the government to prosecute taxpayers committing fraud or making false statements when attempting to defeat the assessment or collection of a tax. I.R.C. § 7206 (West 2002).

[95] Formally, 18 U.S.C. § 1956(a)(1)(B)(i) provides that the intent requirement for (c), discussed above, is satisfied if a person acts "with the knowledge that the transaction is designed in whole or part to disguise the nature, location, source, ownership, or control of the proceeds of the specified unlawful activity."

[96] 18 U.S.C. § 1956(a)(1)(B)(i) (2000). *See, e.g.*, United States v. Nunez-Hernandez, 221 F.3d 1349, 1351 (9th Cir. 2000) (concluding defendants faced liability because they sought to hide the fact that proceeds of the sale of illegal drugs were used to buy a house in which additional drug crime-related activity occurred); United States v. Thayer, 204 F.3d 1352, 1354–55 (11th Cir. 2000) (finding defendant violated § 1956 because of the intent to conceal the source of illegally derived funds by transferring them through a number of straw business accounts). *But see* United States v. Olaniyi-Oke, 199 F.3d 767, 770 (5th Cir. 1999) (fraudulent use of another person's name and credit card not enough to establish that a person intended to avoid some reporting requirement).

[97] *See* 18 U.S.C. § 1956(c)(7)(D) (2000).

[98] *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (U.S.A. Patriot Act) Act of 2001, Pub. L. No. 107- 56, § 315, 115 Stat. 272, 308–09 (2001). Terrorism offenses are included among the specified unlawful activities through amendments to RICO to include terrorism offenses as predicates, since the list of specified unlawful activities already encompasses all RICO offenses. The amendments also create predicates involving offenses under multilateral treaties for which defendants can be extradited. Most of those offenses involve conduct that would be described as terrorism colloquially, including hostage taking and aircraft hijacking.

argument has been vanquished by September 11 and the resulting USAPA changes.

The activity requirement necessary to establish an offense under § 1956(a)(1) is the existence of a "financial transaction," or at least an attempt to engage in one.[99] Perhaps in large measure with an eye to making life easier for prosecutors and investigators, the statute defines "financial transaction" quite broadly, including in that umbrella the purchase, loan, sale, pledge, gift, transfer, delivery or other disposition of property between parties.[100] When a financial institution is involved, a financial transaction includes the usual array of things that a bank can do for a customer, including a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, use of a safe deposit box, or just about any other payment, transfer, or delivery by, through, or to a financial institution.[101]

The statute does more than just criminalize financial transactions that conceal or promote specified unlawful activities. It also provides for a separate crime involving the activity of international movement, or the transnational transportation, transmission, or transfer ("transportation") of money connected to some crimes.[102]

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[99] *See* United States v. McLamb, 985 F.2d 1284, 1292 (4th Cir. 1993) (noting § 1956 bars both financial transactions and attempts at financial transactions). *But cf.* United States v. Fuller, 974 F.2d 1474, 1478–80 (5th Cir. 1992) (concluding that substantial steps toward completing the transaction must take place, and that mere preparation for criminal activity is not enough to constitute a transaction).

[100] 18 U.S.C. § 1956(c)(3) (2000). Meanwhile, § 1956(c)(4) defines financial transaction as:

> (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means, or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree.

The resulting definition is even broader when one considers the definition of "transaction" in § 1956(c)(3).

[101] 18 U.S.C. § 1956(c)(4).

[102] Formally, § 1956(a)(2) provides that the activity requirement for "international transportation, transmission, or transfer" money laundering is triggered when a person:

> transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States . . . .

The remainder of the subsection of the statute describes the relevant intent requirements that trigger liability. The statute defines a monetary instrument as:

Specifically, § 1956(a)(2) establishes three separate offenses: (a) intending to promote the carrying on of a specified unlawful activity through the transnational transportation; (b) the transnational transportation of money representing the proceeds of some form of unlawful activity, with the intent to conceal or disguise the link between the money and the unlawful activity; and (c) the transnational transportation of specified unlawful activity proceeds with the intent to avoid a state or federal transaction reporting requirement.[103] Offenses meant to promote the carrying out of some specified unlawful activity need not involve the proceeds of specified unlawful activity in order to trigger criminal liability. Thus, if a person uses perfectly clean money gleaned from capital gains on equity investments and uses it to support illegal drug agriculture in Bolivia, she is violating § 1956(a)(2)(A).

Of course, the fact that someone can be prosecuted for making transactions linked to the promotion or concealment of specified unlawful activity does not mean it is easy to detect such transactions. On the contrary: if the concern that gave rise to the anti–money laundering statutes is correct, then the existence of underworld professionals specializing in money laundering might make these transactions particularly difficult to detect.[104] Prosecutors use the "sting" provision contained in § 1956 to help allay this problem. Section 1956(a)(3) makes it a crime to conduct (or attempt to conduct) a financial transaction with property that a law enforcement officer represents[105] as the proceeds of a specified unlawful activity with one of three types of intent that are probably familiar by now: (a) promoting some specified unlawful activity,[106] (b) concealing or

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> (i) coin or currency of the United States or of any other country, travelers' checks, personal checks, bank checks, and money orders, or (ii) investment securities or negotiable instruments, in bearer form or otherwise in such form that title thereto passes upon delivery[.]

18 U.S.C. § 1956(c)(5).

[103] *See* 18 U.S.C. §§ 1956(a)(2)(A), 1956(a)(2)(B)(i), and 1956(a)(2)(B)(ii), respectively.

[104] The legislative history emphasizes the concern that money laundering professionals would prove particularly effective at evading detection. *See infra* Part II.B.

[105] The statute allows for criminal liability even when the representation is made not by a law enforcement officer but by some other person—such as a confidential informant—"at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section." 18 U.S.C. § 1956(a)(3).

[106] 18 U.S.C. § 1956(a)(3)(A); *see, e.g.*, United States v. Shorter, 54 F.3d 1248, 1257 (7th Cir. 1995) (money laundering conviction sustained where co–conspirator gave proceeds of illegal drug sale to a defendant using wire transfers, and co–conspirator testified that the same defendant supplied him with illegal drugs).

disguising unlawful activity proceeds,[107] or (c) avoiding reporting requirements.[108]

Most of the time prosecutors use § 1956 in connection with criminal prosecutions. But the statute also includes a civil penalty provision that lowers the standard of proof necessary to levy some sort of penalty under the statute. This gives prosecutors an added tool that can increase their bargaining power against individuals or financial institutions suspected of engaging in certain transactions to promote a crime or conceal it by hiding the money.[109]

If § 1956 opens the door for law enforcement to punish someone who did not commit a crime but supports it indirectly by hiding the money or plowing more of it into the criminal activity, § 1957 swings that door wide open—making it even easier to convict a third–party launderer who had nothing directly to do with the underlying offense. The offense is titled "engaging in monetary transactions in property derived from specified unlawful activity."[110] The statute essentially prohibits the knowing disbursement or receipt of more than $10,000 of criminally derived proceeds if a financial institution is used at some point.[111] Unlike with § 1956, a person commits an offense under this section even if the funds are not used for any additional criminal purpose or the defendant lacks any specific intent. Thus, if a

[107] 18 U.S.C. § 1956(a)(3)(B); *see, e.g.*, United States v. Wydermyer, 51 F.3d 319, 325 (2d Cir. 1995) (upholding money laundering conviction of defendant who consented to laundering money that police informant claimed were the proceeds of illegal arms sales).

[108] 18 U.S.C. § 1956(a)(3)(C); *see, e.g.*, United States v. Nelson, 66 F.3d 1036, 1040–45 (9th Cir. 1995) (where defendant believed that undercover officer was a drug dealer and defendant sought to avoid reporting requirement, money laundering conviction under § 1956(a)(3)(C) was warranted).

[109] Specifically, 18 U.S.C. § 1956(b) contains a provision for imposing civil penalties of not more than the greater of the value of the property, funds, or monetary instruments involved in the transaction, or $10,000, for anyone who conducts or attempts to conduct a transaction described in §§ 1956(a)(1) or (a)(3), or alternatively, a transportation, transmission, or transfer described in § 1956(a)(2). Some courts have even decided that a prosecutor can use the civil penalty provision against a person found guilty of some sort of money laundering–related criminal violation encompassing some of the same conduct. *See* United States v. Haywood, 864 F. Supp. 502 (W.D.N.C. 1994) (civil complaint filed under § 1956(b) did not put an attorney in double jeopardy where the attorney had earlier pled to an information setting forth a one–count violation of 26 U.S.C. § 6050I for the same transaction).

[110] 18 U.S.C. § 1957 (2001).

[111] Formally, it is a violation of 18 U.S.C. § 1957 if a person (1) engages or attempts to engage; (2) in a monetary transaction (interpreted to mean the use of a financial institution); (3) in criminally derived property; (4) where the value of that property is more than $10,000; (4) the property comes from specified unlawful activity (defined just as it is under § 1956); and (5) the person knows that the property is criminally derived. 18 U.S.C. § 1957.

car dealer takes more than $10,000 that he knows to be derived from criminal activity, he violates § 1957. Because criminal liability under the statute requires the transaction in question to be more than $10,000 but the transaction is so vaguely defined, a major issue in interpreting § 1957 is the exact meaning of the monetary amount threshold. Courts seem dismissive of the importance of tracing in the context of § 1956 prosecutions. Not so for § 1957, where it is well–settled that a conviction under that statute requires that at least $10,000 be traced back to some specified unlawful activity.[112] If courts let prosecutors dispense with proving tracing altogether, it would be hard to argue that the $10,000 threshold in § 1957 makes any difference at all in any case where the defendant happened to have access to an account with more than $10,000, because then all of that money could be assumed to be illegal. But just what "tracing" means in the context of § 1957 is not entirely clear, even if the trend suggests some sort of pragmatic balancing requiring the government to do more tracing as the ratio of tainted to clean funds increases.[113] At least one circuit has concluded that the government must trace the commingled funds to a specified unlawful activity or prove that the entire source of funds in an account derived from specified unlawful activity.[114] Meanwhile, as a result of the USAPA, prosecutors can also charge someone with a civil violation of § 1957.[115]

Distinctions in the details of §§ 1956 and 1957 should not obscure the prevailing pattern in the way courts parse the statutes' abstruse terms: with just occasional exceptions, over time the statutes' interpretation has tended to favor prosecutors. Court interpretation of the knowledge requirement under the two core anti–money laundering statutes illustrates the trend favoring prosecutors. Courts follow the language in the statutes to require knowledge that the funds in question were derived from some illegal activity, and not from a specified unlawful activity.[116] Beyond this, courts seem to

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[112] *See, e.g.*, United States v. Adams, 74 F.3d 1093 (11th Cir. 1996).

[113] *Compare* United States v. Sokolow, 81 F.3d 397 (3d Cir. 1996) (where $20,000 in dirty money was commingled, the government was not required to engage in extensive tracing to prove that all the money involved was dirty) *with* United States v. Mills, 116 WL 634207 (D. Ga. 1996) (concluding that the government could not presume that a transaction involves $10,000 in funds from specified unlawful activity, even if more than $10,000 was deposited into the account, when the ratio of clean to dirty money was about 800:1).

[114] United States v. Rutgard, 108 F.3d 1041 (9th Cir. 1997).

[115] *Supra* note 98, at § 317, 115 Stat. 310 (2001).

[116] Section 1956(c)(1) defines knowledge to mean "that the person knew the property involved in the transaction represented proceeds from some form . . . of activity that

accept the premise that the legislature created the statutes in large measure to target third parties who facilitate money laundering without necessarily being involved in the underlying crime.[117] This seems to lead courts to the conclusion that, although the statutes require "actual knowledge," willful blindness can amount to such knowledge, at least (1) when the defendant claims to lack such knowledge, (2) the facts suggest deliberate ignorance, and (3) jurors would not misunderstand the instruction as mandating an inference of willful blindness.[118] In some ways the ascribed similarity between actual knowledge and willful blindness is hardly surprising. Suppose a private banker who normally gleans some knowledge of the origin of his clients' funds is introduced to a potential client reputed to be a criminal. Suppose the private banker, having been placed on alert that his new customer might be a criminal, then changes his practices to avoid learning anything about the new client's funds. It seems plausible that the private banker should face the risk of liability at least under § 1957, which does not require specific intent to promote an unlawful offense. Indeed, the private banker's willful blindness almost amounts to actual knowledge, because it was triggered by the knowledge of the new client's reputation. The problem is that a potential defendant does not always know ahead of time that a new client is suspected to be a criminal. Because of this, courts applying the willful blindness doctrine have had to explain what it is about people, their behavior, or their money, that gives rise to such compelling suspicion that the rejection of that suspicion amounts to willful blindness. For example, in *United States v. Campbell*, a real estate agent was involved in a transaction with a person who drove a red Porsche, possessed a cellphone (certainly more unusual in 1992 than ten years later), and once brought a briefcase filled with $20,000 in cash to demonstrate his ability to pay for the property.[119] By concluding that the real estate agent engaged in "willful blindness," the court here endorsed the use of a sort of criminal profile that, if

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constitutes a felony under state, federal, or foreign law . . . " 18 U.S.C. § 1956(c)(1) (2000). Similarly, § 1957(c) indicates the "Government is not required to prove the defendant knew that the offense from which the criminally derived property was derived was specified unlawful activity." 18 U.S.C. § 1957(c) (2000); *see, e.g.*, United States v. Bornfield, 145 F.3d 1123, 1132 (10th Cir. 1998) (for conviction under § 1957, the defendant only needs to know that the property is "criminally derived").

[117] *See, e.g.*, United States v. Gamez, 1 F. Supp. 2d 176, 181 (E.D.N.Y 1998).

[118] *See, e.g.*, United States v. St. Michael's Credit Union, 880 F.2d 579, 584 (1st Cir. 1989) (explaining three-part test for the application of willful blindness theory).

[119] 977 F.2d 854 (4th Cir. 1992).

observed, should lead to the inference that the money or property in question is "criminally derived." If you drive a flashy car and have a briefcase with $20,000 cash but are saddled with bad credit, then people who ignore the possibility that you are a criminal when they take your money might be seen to be willfully blind.[120]

As with the willful blindness doctrine, courts have also broadened the scope of the term "financial transaction" in § 1956 to a striking degree, even when considering the open-ended language in the relevant portions of the statute.[121] A financial transaction must have a link to interstate commerce in order to trigger liability under § 1956—but this element is satisfied with minimal effects on interstate commerce, such as investment in construction of a shopping mall or deposits in a federally insured financial institution.[122] More importantly, courts have decided that "financial transaction" means, among other things, selling a car or transferring title to a truck.[123] It also means transferring cashiers' checks,[124] depositing money into a bank account,[125] wiring funds,[126] posting a bail bond,[127] writing

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[120] To be sure, in *Campbell* and a number of other willful blindness cases, the defendant also does something to try to hide the transaction that allegedly involved willful blindness. Even if that action, such as failing to include a payment in a real estate closing statement, falls far short of avoiding statutory reporting requirements, the action is taken by courts to be an indication of a defendant's guilty mind. *See id.* But the courts' legalistic reasoning about willful blindness hardly seems to require such an effort at concealment, and the elements of § 1957 certainly do not require it.

[121] The term "monetary transaction" used in § 1957 has also been subject to expansion, though courts have found it difficult to eviscerate the ineluctable textual requirement that the transaction retain some link to a financial institution. *See* United States v. Richard, 234 F.3d 763, 767 (1st Cir. 2000) (defining "monetary transaction," consistent with other circuits, to include giving fraudulent checks to a co-conspirator who then deposits them in a financial institution).

[122] *See* United States v. Lucas, 932 F.2d 1210, 1219 (8th Cir. 1991) (construction activities affect interstate commerce); United States v. Ladum, 141 F.3d 1328, 1339 (9th Cir. 1998) (interstate commerce nexus established if a transaction "employs a utility" of interstate commerce, such as FDIC-insured institution). *But see* United States v. Edwards, 111 F. Supp. 2d 1057, 1062–63 (E.D. Wis. 2000) (in-state currency payment does not satisfy requirement of interstate commerce nexus absent additional facts).

[123] *See, e.g.*, United States v. Blackman, 904 F.2d 1250, 1257 (8th Cir. 1990) (transferring title to a pickup truck amounts to a financial transaction because it was allegedly "purported to be a sale," and the statute should be interpreted fairly broadly).

[124] *See, e.g.*, United States v. Arditti, 955 F.2d 331, 338 (5th Cir. 1992) (stating that since cashiers' checks count as property and "funds," their transfer amounts to a financial transaction).

[125] *See, e.g.*, United States v. Jolivet, 224 F.3d 902, 909 (8th Cir. 2000) (invoking congressional intent as well as the plain language of § 1956 to conclude that merely depositing money in a bank account is a financial transaction).

checks,[128] or cashing embezzled checks at a bank.[129] This last sort of financial transaction highlights the related issue of when an act of money laundering "merges" with the underlying offense in situations where, as with the cashing of the embezzled check, the financial transaction might be viewed as part of the underlying offense. The prevailing view is that as long as the money laundering violation involves at least one separate transaction from the underlying crime, it counts as a separate offense.[130] Even when courts say that an underlying offense, by itself, does not amount to a money laundering violation, prosecutors can often cure the defect by charging someone for conduct that comes only slightly later in the process of committing a criminal offense. What makes this easier is the pliability of the definition of financial transaction—as more and more conduct involving money gained from crime is viewed as amounting to a financial transaction, it becomes easier for prosecutors to make a money laundering case against an underlying offender for doing almost anything at all with the proceeds from a specified unlawful activity.[131]

One might think that even if "financial transaction" ends up meaning almost anything under the sun, there would still be some

[126] *See, e.g*, United States v. King, 169 F.3d 1035, 1039 (6th Cir. 1999) (conviction affirmed when virtually all the financial transactions involved in offenses under § 1956 were wire transfers).

[127] *See, e.g.*, United States v. France, 164 F.3d 203, 208 (4th Cir. 1998) (holding that "posting of bond constitutes a sufficient financial transaction for money laundering purposes").

[128] *See, e.g.*, United States v. Jackson, 935 F.2d 832, 841 (7th Cir. 1991) (emphasizing the breadth of the term "transaction," and concluding that writing a check—along with almost anything else with some nexus to interstate commerce—amounts to a financial transaction).

[129] *See, e.g.*, United States v. Paramo, 998 F.2d 1212, 1216–17 (3d Cir. 1993) (concluding that a financial transaction occurred for the purposes of liability under § 1956 where defendant cashed embezzled checks).

[130] In most cases, courts resolving these issues invoke congressional intent and suggest that Congress intended to punish money laundering separately from the underlying offense. Whether or not this is true is difficult to discern because Congress is a "they," not an "it." But even if it were true, it begs the question of whether a single financial transaction—or a set of closely related transactions—should count as separate offenses.

[131] For example, in United States v. Holmes, 44 F.3d 1150 (2d Cir. 1995), the court considered the appeal of a local union president accused of embezzling the union's money. Prosecutors charged him with embezzling the money and then laundering it. Holmes claimed he should not be punished for both activities, since the embezzlement is what generated the funds that were laundered. The Second Circuit rejected Holmes' argument, because the purpose of the money laundering statutes was to "provide a punishment in addition to other punishment[s]." *Id.* at 1154 (citation omitted).

limits because offenses under § 1956(a) still require an intent to promote or conceal a specified unlawful activity. But while "intent to promote" still seems to have some content to it,[132] "intent to conceal" has proven more pliable.[133] In fact, whenever prosecutors have trouble tracing the money involved in a financial transaction back to the specified unlawful activity they might try to argue that obviously the transaction in question is meant to conceal the specified unlawful activity, because otherwise it would be easy to trace the proceeds back to the crime.[134] The predictable result is that prosecutors can almost always slap on a money laundering charge to financial crime offenses involving financial transactions, generating far more severe potential penalties and enhancing their bargaining position against defendants.[135]

The swelling reach of the concept of "financial transaction" under § 1956 stands despite a legislative history suggesting that Congress—to the extent it intended anything—sought to craft a definition of financial transaction that would not expand to include everything under the sun.[136] Moreover, because § 1956 has no explicit Sixth Amendment protection built in to prevent the government from using money laundering prosecutions or associated forfeitures to interfere with criminal defense funding, the widening scope of the statute also raises the question of when government interference with the funding of criminal representation violates the

[132] *See* United States v. Savage, 67 F.3d 1435 (9th Cir. 1995).

[133] United States v. Villarini, 238 F.3d 530 (4th Cir. 2001), nicely illustrates the point. A bank employee embezzled $83,000 from the bank where she worked. She deposited the money in small transactions of less than $3,000 at two–to–four week intervals. The court concluded that the defendant's deposits could give rise to a reasonable inference that she was trying to give the appearance of a legitimate income stream. Prosecutors needed to prove nothing more about the defendant's intent to conceal the underlying crime.

[134] Prosecutors could make the argument that difficulty of tracing implies "intent to conceal" in § 1956(a) prosecutions because of the implication that if transactions with intent to conceal had not taken place, then tracing money to the crime would be simple.

[135] See *infra* Part III.A for a discussion of the implications of this power. *But see* United States v. Garcia–Emanuel, 14 F.3d 1469, 1474 (10th Cir. 1994) (insisting that money laundering statutes are not "money spending" statutes).

[136] *See, e.g.*, H.R. Rep. No. 99–855, at 13 (1986) (listing a number of specific types of activities that the report's authors believed should be considered "financial transactions"). Of course, a reference to legislative history should not be taken as an assertion that Congress possesses a collective will on this issue or any issue. See *infra* note 309 and accompanying text, for a discussion of the uses and limitations of legislative history in discussing the goals of anti–money laundering legislation.

Constitution.[137] The continuing trend toward widening what is meant by financial transaction gives prosecutors ever more leeway in deciding when to use § 1956, because the occurrence of some kind of financial transaction is what triggers liability under the statute. In short, the pattern is that interpretations have become more draconian over time. Part of this is because the statutes are written to favor expansive interpretations that lower the costs of prosecuting the offense, as demonstrated by the expansive definition of financial transactions. But there may be other reasons why courts might tend to resolve so many of the ambiguities in §§ 1956 and 1957 in favor of prosecutors, a subject to which I turn below.[138]

The reason why §§ 1956 and 1957 are so useful to prosecutors is not only that it is relatively easy to prove the necessary elements for a conviction, but also that the penalties available for those convictions are tremendously severe under the federal sentencing guidelines.[139] In some cases, money laundering penalties are more severe than for the underlying predicate offenses.[140] Although the guidelines applicable to money laundering offenses have recently been revised to make a better case that the punishments have some relationship to the severity of the offense committed, the resulting guidelines still punish money laundering activity severely.[141] Even if the applicable guidelines for money laundering are not always more severe than those for predicate offenses, the sentences are certainly severe

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[137] *See generally* 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).

[138] Ironically, even though the statutes' text and interpretation favors prosecutors, the anti–money laundering laws are still better at addressing some kinds of money laundering and worse at addressing other kinds. For example, the text of §§ 1956 and 1957 still requires that most violations have some link to specified unlawful activity. This made it quite hard for prosecutors to make a case against some of the potential defendants in the case involving the suspected transfer of $7 billion in funds from Russia through the Republic Bank of New York. *See infra* note 447.

[139] Note that the usefulness of the statutes may be understated by the number of federal money laundering prosecutions; even the possibility of a money laundering charge with a severe penalty might lead defendants to strike different types of bargains with prosecutors. The federal government does not appear to keep data on the number of cases that could have given rise to a money laundering charge but were not so charged.

[140] *See supra* Part III.A.

[141] The new guidelines combine the previously separate provisions applicable to §§ 1956 and 1957, and aim to fulfill the Sentencing Commission's long–running objective of bringing the penalties for laundering more in line with the penalties for underlying offenses. The major impact is to reduce the applicable guideline range for money laundering involving fraud predicate offenses. *See* U.S. SENTENCING GUIDELINES MANUAL § 2S1.1 (2001).

enough that prosecutors and investigators could use money laundering charges as substitutes for underlying predicate offense charges that might be more difficult to prove against particular defendants. After all, §§ 1956 and 1957 generally only require that the money in question be traced to the specified unlawful activity, not that the defendant possess any particular link to the commission of the specified unlawful activity.

Although prosecutions under the core anti–money laundering statutes might be especially attractive given these draconian sentencing guidelines, they are not the only statutory tools prosecutors can use to undermine money laundering. Even before anyone had ever heard of federal anti–money laundering laws, prosecutors were using federal conspiracy statutes to attack forms of money laundering tied to drug trafficking offenses. For example, in *United States v. Barnes*, the Second Circuit noted:

> [I]mporters, wholesalers, purchasers of "cutting" materials, and persons who "wash" money are all as necessary to the success of a drug venture as the trafficker. They can all be held to agree with one another in what has been called a "chain" conspiracy.[142]

Such a theory of criminal liability is still available, though it is likely to be less attractive because it requires that prosecutors establish a link to the underlying criminal activity (i.e., drug trafficking) and does not expose the defendant to punishment for violating multiple statutes.

Still other tools available to prosecutors seeking to disrupt the sorts of activities encompassed by criminal finance include federal forfeiture provisions, criminal penalties for structuring and other reporting violations such as breaking up deposits to avoid reporting currency transactions, and state money laundering and forfeiture laws. Though forfeiture laws are controversial, it is at least plausible to view them as tools that might help the government attack money laundering through confiscation of criminal proceeds and accessories.[143] Federal law provides for the in personam criminal

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[142] 604 F.2d 121 (2d Cir. 1979).

[143] The Civil Asset Forfeiture Reform Act, Pub. L. No. 106–185, 114, Stat. 202 (2000), was the first civil asset forfeiture law to be passed by Congress since the initial forfeiture statutes were enacted in 1789. The law radically affected civil forfeiture. Among other things, it placed new burdens and time limits on the government, created a uniform "innocent owner" defense, allowed claimants to recover interest and attorneys fees, resolved ambiguities that had split the courts, and provided the government with new procedural tools that could enhance its ability to use forfeiture to address crime. For a discussion, see generally Stefan D. Cassella, *The Civil Asset Forfeiture Reform Act of 2000: Expanded*

forfeiture of any property traceable to (or involved in) a money laundering offense.[144] Civil forfeiture is also available against property connected to money laundering, as are civil and criminal forfeiture for the proceeds of any offense defined as specified unlawful activity.[145] Forfeiture seems to attract enthusiastic attention from law enforcement authorities, who have also held out the prospect of sharing forfeited assets with informants and foreign governments to galvanize their cooperation. In 1994 alone, the Department of Justice reported that the government achieved forfeiture of approximately $550 million.[146] Meanwhile, criminal penalties for currency–related reporting violations include, for example, the prohibition against the operation of an illegal money transmitting business,[147] prohibitions on breaking down deposits (or "structuring" them) to evade reporting requirements,[148] and penalties for financial institutions' failure to file reports—discussed below—required under the Bank Secrecy Act and other legal provisions.[149] Moreover, a financial institution violating criminal anti–money laundering laws may even face the regulatory equivalent of the "death penalty" by being forced to forfeit its charter and terminate its federal deposit insurance.[150] State anti–money laundering laws have

Government Forfeiture Authority and Strict Deadlines Imposed on All Parties, 27 J. LEGIS. 92 (2001).

[144] 18 U.S.C. § 982 (2000). The statute even permits for the forfeiture of substitute assets in appropriate circumstances. Courts have pervasively concluded that forfeiture under this section requires tracing. *See, e.g.*, United States v. Voight, 89 F.3d 1050, 1087 (3d Cir. 1996). *But cf.* United States v. Daccarett, 6 F.3d 37 (2d Cir. 1993) (upholding the warrantless seizure of wire transfers on the basis that such a seizure does not violate the Fourth Amendment when the Attorney General has probable cause to believe that property is subject to forfeiture).

[145] 18 U.S.C. § 981 (2000).

[146] OTA REP., *supra* note 29, at 38 n.11 (1995) (citing information provided by the Executive Office of Asset Forfeiture, Department of Justice, Jan. 13, 1995).

[147] 18 U.S.C. § 1960 (1994). Because of Title III of USAPA, operating an illegal money transmitting business is a general intent, rather than specific intent, crime. *See* USA Patriot Act, Pub. L. No. 107–56, § 373, 115 Stat. 339 (2001).

[148] 31 U.S.C. § 5321 *et seq.* (2000).

[149] *Id.* Convictions under this section carry penalties of up to five years for a single violation and up to ten years for "a pattern of any illegal activity involving more than $100,000 a year." 31 U.S.C. § 5324(c) (2000). *See also* United States v. Bank of New England N.A, 821 F.2d 854 (1st Cir. 1987) (developing doctrine of criminal liability where financial institutions and their officers exhibit "flagrant indifference" to Bank Secrecy Act requirements).

[150] *See* Annunzio-Wylie Act, Pub. L. No. 102-550 §§ 1502, 1503, and 1507, 106 Stat. 3672 at 4044-45, 4048-49, 4055-56 (codified as amended in scattered sections of 12 U.S.C.). *See also* 12 U.S.C. § 1818 (2000) (providing for termination of deposit insurance,

also proliferated, giving local prosecutors and investigators a chance to engage in some of the same charging patterns that their federal counterparts practice.[151] By the same token, state authorities might face similar problems in detecting money laundering activity when it is not obvious from large aggregations of currency or from an investigation incident to an underlying offense that has already been detected.[152]

In short, depending on the details of her conduct, a money launderer might face liability under § 1956 for promoting or concealing specified unlawful activity through a financial transaction, such as selling currency derived from some criminal activity to a money exchange business. The transaction might also give rise to criminal liability under § 1957 for the operator of the money exchange business if he knows the currency represented criminal proceeds. Both individuals might face the prospect of civil and criminal forfeiture of the instrumentalities of the laundering (i.e., the building housing the money transmitting business), as well as what the laundered money buys. The two persons might also face liability for criminal violations of regulatory–type provisions arising from conduct such as structuring cash deposits to evade reporting requirements. Finally, both might be punished under state anti–money laundering laws (by state prosecutors), or under a conspiracy theory (i.e., conspiracy to important narcotics) used to go after money laundering even before specific statutes against the practice were on the books. But even if individual launderers end up honeycombed with criminal liability, their opportunity to launder might depend substantially on the conduct of financial institutions, whose incentives might be driven at least as much by regulations and civil penalties (discussed below) as by criminal sanctions on individuals.

subsequent to a hearing); 12 U.S.C. § 93(d) (allowing for revocation of bank charter of offending bank).

[151] *See, e.g.*, ARIZ. REV. STAT. § 6-1242 (2003); CAL. PENAL CODE § 186.9 (West 2003); COLO. REV. STAT. ANN. §28-28-408 (West 2003); CONN. GEN. STAT. ANN. § 53a-289 (West 2003); 9 GUAM. CODE ANN. § 67.410 (2003); IND. CODE ANN. § 35-45-15-1 (West 2003); N.J. STAT.ANN. § 2C:21-25 (West 2003); TENN. CODE ANN. § 39-14-901 (West 2003).

[152] As far as I can tell from reported cases, state money laundering charges and convictions are not extremely common relative to federal ones. Aside from the lower incidence of charges and convictions, I am not aware of any evidence that state law enforcement agencies pursue any fundamentally different strategy when compared to federal authorities targeting money laundering.

2. Rules Administered by Regulators

Parallel to the system of criminal statutes and pretrial procedures administered by prosecutors is a framework of regulations and civil penalty actions overseen by regulators. This system of rules is aimed primarily at financial institutions, and has two obvious and interrelated purposes: to give financial institutions an incentive to cooperate in fighting against money laundering, and to force those institutions to generate information that can help investigators working with prosecutors to detect money laundering activity.[153] What follows is a discussion of the major regulatory requirements imposed on financial institutions and others, and a summary of the major changes to these requirements following the passage of Title III of USAPA, which represents the most dramatic change in regulatory authority designed to disrupt criminal finance since the entire system was created in 1970.

Not surprisingly, the bulk of the requirements involve accounting for transactions involving physical currency. Before 1970, banks could take large currency deposits—even from people whose circumstances and behavior hinted that the money's origin was probably illegal activity—without filing any sort of report. For the most part, banks lacked economic incentives to have any compunctions about taking such money.[154] The Currency and Foreign Transactions Reporting Act, commonly known as the Bank Secrecy Act of 1970, has been the basis of a decades-long effort to shape the behavior of financial institutions, create an audit trail allowing law enforcement to track large currency transactions, and thereby deter tax evasion and money laundering.[155] The "secrecy" in the Act's title is misleading, since its main purpose is to limit, rather

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[153] The legislative history of the Bank Secrecy Act highlights the two major purposes of the regulatory scheme: (1) generating information, and (2) driving a wedge between financial institutions and customers trying to launder money. *See generally Foreign Bank Secrecy and Bank Records: Hearings Before the Subcomm. on Fin. Insts., Supervision, and Deposit Ins., Comm. on Banking, Fin. Servs. & Urban Affairs, U.S. H.R.*, 91st Cong. 2nd Session (1970). *See also Foreign Bank Secrecy: Hearings Before the Subcomm. on Fin. Insts., Comm. on Banking & Currency, U.S. S.*, 91st Cong. 2d Sess. (1970).

[154] It is plausible that some banks might have harbored an interest in protecting their reputation by refusing deposits, but this assumes that such deposits would be detected. Given the quantity of money probably laundered each year (tens of billions of dollars) and the tiny amount detected or investigated, this assumption is hardly warranted.

[155] P.L. 91–508, Titles I and II, as amended, codified at 12 U.S.C. §§ 1829b, 1951–59 (2000), and 31 U.S.C. §§ 5311–5330 (2000). Regulations implementing Title II of the Bank Secrecy Act (codified at 31 U.S.C. §§ 5311–5330) appear at 31 C.F.R. § 103 (2002).

than boost, the secrecy of some financial transactions. Although the law's main purpose was not to outlaw money laundering directly, but to create a regulatory structure to obtain information about currency transactions, it also provides for criminal penalties for reporting violations.[156] The theory behind the law was in part that banks would be forced to become vigilant in identifying suspect customers and transactions.[157]

The Bank Secrecy Act gives the Treasury Department a substantial degree of discretion to define what counts as a "financial institution," which current regulations have defined to include depository institutions such as state and federally chartered commercial banks, money services businesses such as check cashers, currency exchangers, and money transmitters, post offices, casinos, and securities firms.[158] Under the regulations, financial institutions must file a Currency Transaction Report (CTR) to report any single currency transaction over $10,000, and multiple transactions that total over $10,000 conducted on the same business day if the institution knows the transaction was conducted on behalf of the same person.[159] Businesses and trades that receive more than $10,000 for a single transaction—including lawyers—have to file reports of the transaction.[160] So must licensed casinos,[161] except if they are in

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[156] A willful violation of the Bank Secrecy Act is punishable by a criminal fine of up to $500,000 or ten years imprisonment, or both. *See* 31 U.S.C. §§ 5322(a), (b).

[157] *Cf. infra* note 306.

[158] *See* Secretary of the Treasury, Report to Congress in Accordance with Section 357 of the USA PATRIOT Act 6 (2002), *available at* www.treas.gov/press/releases/reports/357.pdf. According to the report, Treasury's current definition of financial institution covers about 24,000 depository institutions, about 160,000 money services businesses (including, among others, check cashers, currency dealers or exchangers, issuers, sellers, and redeemers of traveler's checks, money orders and stored value cards, and money transmitters such as Western Union); 40,000 Post Offices (where people can purchase money orders); about 600 casinos and gaming organizations located in thirty states, territories, and tribal lands; and 5000 or so securities firms. An undetermined number of entities (including, for example, insurance companies) may also be covered under the functional definition of financial institution established by Treasury under authority from 31 U.S.C. § 5312 and under Section 352 of USAPA.

[159] *See* 31 U.S.C. § 5313 (2000) (establishing CTR requirement); 31 C.F.R. § 103.22(b)(1) (2002) (implementing CTR requirement, fulfilled by filing Form 4789).

[160] Regulations require the filing of IRS Form 8300 for currency payments in excess of $10,000 for a single transaction. *See* 26 U.S.C. § 6050I(f) (2000). Indeed, the example explaining the IRS regulation explicitly refers to a lawyer's receipt of cash for services rendered. Although reporting of Form 8300 historically was governed by the Internal Revenue Code, the requirement is now within the Bank Secrecy Act.

Nevada (where cash payouts over $10,000 need not be identified), a quirky exception that highlights the extent to which the details of regulatory requirements and enforcement might be driven by politics.[162] On the theory that launderers might physically carry money out of the country instead of taking their chances structuring deposits in the United States, the regulations also impose a requirement on individuals to report the transportation of $10,000 or more in currency or monetary instruments into or out of the country.[163] Individuals must also disclose the existence of foreign bank accounts over which they have signature authority or control with balances of more than $10,000 during the calendar year.[164] Because these requirements are likely to be tremendously overbroad, the Bank Secrecy Act requires Treasury to exempt some transactions and gives it the discretion to exempt even more.[165]

Some of the Bank Secrecy Act reporting requirements might seem invasive, but the Supreme Court has found those requirements constitutional. Shortly after its inception, bank customers whose activities were being reported challenged the constitutionality of the Bank Secrecy Act and the regulations it spawned. In *California Bankers Ass'n v. Shultz*, the Supreme Court held the recordkeeping requirements of the Bank Secrecy Act constitutional on their face, but

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[161] *See* 31 C.F.R. § 103.22(b)(2)(i) (2002) (requiring CTRs for cash transactions over $10,000 at certain casinos with annual gaming revenues over $1 million, fulfilled by filing Form 8362).

[162] Since the mid–1980s, Nevada casinos have avoided reporting requirements in part because of an aggressive lobbying effort. Nevada casinos must file suspicious activity reports, though. *See* Charles Blau, *Money Laundering and Currency Violations in Gaming Enforcement*, ABA CTR. FOR CONTINUING LEGAL EDUC. NAT. INST. B–41 (Apr. 16–17, 1998).

[163] *See* 31 U.S.C. § 5316 (2000) (establishing CMIR requirement, fulfilled by filing Form 4790).

[164] *See* 31 C.F.R. § 103.24 (2002) (establishing responsibility of individuals to disclose foreign bank accounts, fulfilled by filing FBAR (Form 90–22.1)).

[165] Treasury must exempt a depository institution from the requirement to report currency transactions concerning those between the depository institution and the following entities: (1) another such institution; (2) an agency of the U.S. government, any state, or any state political subdivision; (3) any entity established by the U.S. government or states; and (4) any business or category of business the reports on which have little or no value for law enforcement purposes. *See* 31 U.S.C. § 5313(d) (2000). Treasury may exempt the filing of CTRs for transactions involving "qualified business customers," which meet the criteria set by Treasury. For example, a customer who is withdrawing currency (1) solely for payroll purposes; (2) has been a bank customer for at least 12 months; (3) operates a firm that regularly withdraws more than $10,000 to pay its U.S. employees, and (4) is a U.S. resident is currently entitled to a discretionary exemption. *See* 31 U.S.C. § 5313(e) (2000).

determined that access to such records should not be arbitrary.[166] Instead, access to the records was controlled by "existing legal process."[167] In finding that the recordkeeping requirements were constitutional, the Court noted that Congress had virtually plenary power to regulate cross–border movements, which should logically be taken to include the movement of currency across borders (reported through CMIRs) and the existence of bank accounts abroad controlled by U.S. nationals (reported through FBARs).[168] Moreover, the Court believed the recordkeeping requirements to be reasonable because Congress had reason to believe currency aggregations were inherently suspicious, and had considered extensive testimony to this effect.[169]

When the Supreme Court again returned to pass on the Bank Secrecy Act, in *United States v. Miller*, it was asked to decide whether an alleged illegal whiskey distiller whose Bank Secrecy Act records had been obtained by allegedly defective subpoenas had a Fourth Amendment interest in his bank records.[170] The Supreme Court rejected the argument. This forced it to figure out a way of distinguishing *Boyd v. United States*, a holding that is now riddled with exceptions but has never been explicitly overturned by the Court.[171] Under *Boyd*, individuals have a property interest in documents subject to the government's subpoena power. In *Miller*, the Court reasoned that *Boyd* did not apply to currency and bank records since the customer had no property interest in the records. Neither did the Fourth Amendment's prohibition against unreasonable searches or seizures affect the government's access to the records, since its application depends on the individual's legitimate expectation of privacy and there was none in this case.[172] The customer had no legitimate expectation of privacy, the Court concluded, since he had consented to disclosure of the information in question to a third–party (i.e., the bank). It is easy to criticize the Court's argument that third–party disclosures obviate any reasonable expectation of privacy when hardly anyone would bank with an

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[166] 416 U.S. 21, 51 (1974).

[167] *Id.* at 52.

[168] *Id.* at 61 (making analogy to cross–border movements, invoking Congress' plenary power to regulate).

[169] Congress, the court concluded, has a justifiable interest in the reporting of activity that could be fairly considered inherently suspicious.

[170] 425 U.S. 435 (1976).

[171] 116 U.S. 616 (1886).

[172] *Schultz*, 416 U.S. at 21.

institution that promised to make all its customers' records completely available to the public on the Internet. Nonetheless, the Court might have been reluctant to completely eviscerate the government's ability to force third parties to keep records, which would have been the potential consequence of accepting *Miller*'s argument.[173] Had the Supreme Court decided otherwise, it is difficult to see how any of the recordkeeping framework of the Bank Secrecy Act or its subsequent changes (particularly those changes requiring the reporting of suspicious activities) could have been salvaged. Partly in response to these developments, legislators supported the Right to Financial Privacy Act, which regulated some of the federal government's access to financial information.[174] The Privacy Act does stop banks' extreme practices such as turning over entire customer files without telling customers, and instead creates a system where, save for some exceptions, investigators must request non–Bank Secrecy Act records in writing and banks must notify customers whose records are provided to investigators.[175] The Bank Secrecy Act therefore allows law enforcement to see records without the formalities associated with obtaining records through the Privacy Act or through a regular subpoena.[176]

While the Supreme Court recognized the value of having reporting requirements for currency transactions, those requirements are not set in stone. Obviously they can be changed through statutory

[173] In principle, the Court might have still left room for recordkeeping requirements even if it had accepted Miller's argument, by developing a privacy test grounded in the inherent nature of something rather than in the individual's expectation of privacy. Thus, the Court might have found Miller's financial records to be inherently private because of something about the nature of financial records. This would allow one to distinguish, for example, records of fertilizer purchases that might be useful for ex ante enforcement against the use of fertilizer to make bombs. The problem with this approach is that it is completely at odds with the direction in Fourth Amendment jurisprudence since *Katz v. United States,* 389 U.S. 347, 350 (1967), where individual expectations of privacy are central. If it were the nature of the information rather than the expectation of its privacy that determined whether some information were protected by the Fourth Amendment, then it would be hard to argue that such privacy protections should not extend to some kinds of incriminating information, such as the presence of illegal drugs in someone's back yard. In short, functional concerns help explain why the Court accepted the government's argument in Miller and found customers to have no privacy interest in records given to third parties.

[174] The Right to Financial Privacy Act of 1978, Pub. L. No. 95–630, 92 Stat. 3641, 3697–710 (1978) (codified as amended at 12 U.S.C. §§3401–3422); see also H.R. Rep. No. 95–1383, at 34 (1978), reprinted in 1978 U.S.C.C.A.N. 9273, 9306.

[175] *Id.*

[176] Grand jury subpoenas as example of alternatives available to federal law enforcement agents investigating possible money laundering offenses.

amendments and changes in regulations. In addition, the structure of the regulatory system itself allows Treasury to make some modifications in the details of the regulatory program without the need for public comment. For example, Treasury can approve "Geographic Targeting Orders" (GTOs) that lower the threshold amount of money that triggers a currency reporting requirement for particular geographic sectors that are considered to face severe money laundering problems.[177] In August 1996, Treasury responded to reports from federal agents describing the flow of money from New York City to Colombia by issuing a GTO. The order required twelve money remitters in New York (along with their 1600 agents) to file reports on all cash remittances involving $750 or more to Colombia.[178] A Treasury official described the apparent impact of the use of GTOs as follows:

> The Colombian GTOs had a significant impact on the flow of drug proceeds through the targeted remitters. Several of the remitters targeted under the GTOs stopped sending funds to Colombia altogether, while many others sent significantly lower amounts. Thirteen individuals and two corporations have been indicted or have pled guilty to structuring transactions to avoid the GTOs. Several others are under investigation. The GTOs also force the traffickers to resort to other, more difficult tactics to move their profits back to Colombia. In the first six months after the Colombian GTOs went into effect, Customs' currency seizures at East Coast Ports of entry [i.e., airports] increased approximately four hundred percent as traffickers were forced to move money in bulk.[179]

The GTO was renewed on several occasions, extended to cover certain New York City remittances to the Dominican Republic, and eventually expired in October 1997. Despite this assertion of optimism about GTOs, one would have to assume that launderers are relatively incompetent to accept that a temporary reporting change such as a GTO would have anything more than a temporary effect on money laundering practices. More plausible is a scenario where launderers make dynamic changes in response to anti-money laundering strategies that may have a longer-term effect depending (among other things) on the cost of the substitute strategy.[180] Just as

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[177] *See* 31 C.F.R. § 103.26 (2002). The statutory basis for the GTO regulation is 31 U.S.C. § 5326(a).

[178] *See* Kelly statement, *supra* note 72.

[179] *Id.* at 6.

[180] This is not to say that the GTO targeting remissions to Colombia is useless unless remittances of illegal money to Colombia are permanently halted. For example, some money transmitters facing a massive drop off in business because of the GTO might become unprofitable, forcing them to close or scale back. If the use of targeted enforcement such as GTOs were substantial enough, it might induce money transmitters to avoid becoming

the $10,000 reporting threshold leads to the breaking up of deposits into smaller chunks, launderers seeking to repatriate drug proceeds to Colombia might shift away from New York City money transmitters and instead use transmitters in Philadelphia or currency couriers leaving from JFK Airport. The long–term impact of targeted regulatory measures such as the GTO depends on the expense and permanency of the shifts in laundering strategy among traffickers.

Legislators and law enforcement officials have not been entirely blind to the possibility that laundering strategies are flexible and therefore require more nuanced responses in addition to the mechanistic currency reporting requirements. This was a major justification behind the Annunzio–Wylie Anti–Money Laundering Act of 1992, which introduced suspicious activity reporting requirements along with a host of other technical changes in the system.[181] Although the suspicious activity reporting system introduced in 1992 allowed Treasury to require such reports from the full range of financial institutions, the Federal Reserve Board and the Office of the Comptroller of the Currency had already been requiring financial institutions to report suspicious transactions to regulatory authorities since 1985.[182] Existing suspicious activity reporting regulations require financial institutions to report suspicious activity in a number of circumstances.[183] For example, financial institutions must report any known or suspected abuse by insiders, a suspected crime or attempted crime through the financial institution involving $5,000 or more (when the suspect can be identified), a crime through a financial institution when more than $25,000 is involved (even if the suspect cannot be identified), a transaction of $5,000 or more when the institution suspects money laundering, or a transaction that seems designed to avoid Bank Secrecy Act reporting requirements.[184] In theory, financial institutions are also supposed to report a transaction that "serves no business or apparent lawful purpose,"

dependent on business that could dry up as the result of temporarily imposed reporting requirements. To accept this scenario, though, we must make a host of assumptions about the money transmitting business, and the proportion of business generated by transfers to Colombia chilled by the GTO.

[181] Pub. L. 102–550, 106 Stat. 4044 (codified as amended in scattered sections of Titles 12, 18, and 31) (Title XV of the Housing and Community Development Act of 1992).

[182] *See* U.S. DEP'T OF THE TREASURY, ANN. ANTI–MONEY LAUNDERING STRATEGY 85 n.21 (2000).

[183] *See* 31 C.F.R. §§ 103.18 (for banks) & 103.20 (for money services businesses) (2002).

[184] *Id.*

where the financial institution "knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction."[185] Deciding what transactions fall into the categories created by the regulation is obviously left to bank employees, given the frequent use of subjective terms such as "apparent" and "suspected" in the regulations above.[186] This foreshadows an important point developed below about the limitations of regulatory enforcement.

Among other things, the Annunzio–Wylie law also addressed a somewhat surprising omission in previous anti–money laundering efforts—ensuring that financial institutions kept records of wire transfers that could be used as evidence in a criminal proceeding or that otherwise might be useful to law enforcement.[187] Financial institutions are now required to keep records of wire transfers for at least a number of years, and that record must include at least minimal information about the sender and recipient of the transfer.[188] Nonetheless, during the notice and comment phase of the regulations' development, financial institutions aggressively resisted Treasury's initial efforts to provide detailed specifications for the format and content of the wire transfer records.[189] Banks insisted that the more extensive recordkeeping requirements proposed by Treasury would cost hundreds of millions of dollars to implement, though it is unclear how they arrived at this figure.[190] The result was that the wire transfer regulations which once aimed at creating standardized records accessible to law enforcement in short order instead produced rules that merely required banks to keep wire transfer data in some

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[185] *Id.*

[186] The regulations seem to duck the question of how exactly Treasury would figure out whether suspicious activity reports are being under–filed. With respect to banks, for example, 31 C.F.R. § 103.18(f) (2002) says only the following:

> Compliance with this section shall be audited by the Department of the Treasury, through FinCEN or its delegees under the terms of the Bank Secrecy Act. Failure to satisfy the requirements of this section may be a violation of the reporting rules of the Bank Secrecy Act and of this part. Such failure may also violate provisions of Title 12 of the Code of Federal Regulations.

[187] Before the Annunzio–Wylie Act, the meager responsibilities banks and money services businesses had to keep track of wire transfer information arose from decisions of functional banking supervisors and state regulators.

[188] *See* 31 C.F.R. § 103.33 (2002).

[189] Financial institutions' aggressive opposition to the more extensive wire transfer recordkeeping proposals. *See generally* Baldwin, *supra* note 11, at 413.

[190] Banks insisted that Treasury's recordkeeping requirements would cost approximately $250 million a year to implement and maintain.

form, even if that form did not make the data immediately retrievable.[191]

As with virtually any regulatory system, the regulators can slap penalties on individuals and financial institutions that ignore the regulations.[192] Penalty enforcement includes civil penalties against institutions and individuals, criminal penalties against both, and supervisory enforcement activity from functional regulators, including the Federal Reserve, the Office of Comptroller of the Currency, and the Office of Thrift Supervision.

In addition to placing requirements on financial institutions, regulatory enforcement can also target the accounts of individuals and organizations. Even before September 11, some tools designed to provide executive branch authority to respond to national security threats had already been adapted for use against money laundering and terrorist financing. When officials in the federal government sought to block assets of people or entities thought to be engaging in substantial drug money laundering, they found authority in the International Emergency Economic Powers Act (IEEPA).[193] Since transactions with terrorists are prohibited, Treasury also works to identify and block their assets, at least in principle. The President can use IEEPA by executing a presidential decision directive naming the targets of the blocking authority.[194] Once the President decides to

[191] The original wire transfer regulations proposed in 1993 required wire transfer information to be available "readily." Following pressure from the banking industry, the term was dropped from the final regulation. *See* 60 Fed. Reg. 220, 225 (1995). The records need only be available for five years. 31 C.F.R. part 103.33 (1994). Moreover, the resulting scheme merely requires that information be "accessible within a reasonable period of time, taking into consideration the nature of the record, and the amount of time expired since the record was made." 31 C.F.R. part 103.38(d) (1994); 60 Fed. Reg. 220, 225 (1995). Under the changes to the Bank Secrecy Act made by USAPA, Treasury is directed to take "reasonable steps" to ensure that banks in other jurisdictions involved in sending wire transfers to the U.S. require the originator's name, and that such information remain with the wire transfer from the time of origination until disbursement. *See* USA Patriot Act, Pub. L. No. 107–56, § 328, 115 Stat. 319 (2001).

[192] Flagrant violations of provisions in the Bank Secrecy Act as amended by the Annunzio–Wylie Act are also subject to criminal penalties, discussed *supra* Part I.B.1.

[193] *See* 50 U.S.C. §§ 1701–1706 (1994 & Supp. V 1999). Under the IEEPA, the President's authority "may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat." *Id.* § 1701(a).

[194] *See* BUREAU OF INT'L NARCOTICS & LAW ENFORCEMENT AFFAIRS, INTERNATIONAL NARCOTICS CONTROL STRATEGY REP'T 548–49 (1998) (describing Presidential Decision

trigger IEEPA sanctions or to designate people or organizations as terrorists, Treasury's Office of Foreign Assets Control identifies the organization or individual targeted, along with address and known aliases and tells banks to freeze the assets in question. Banks not complying face criminal sanctions.[195] Largely because IEEPA is framed as a statute involving foreign policy and national security concerns, the use of IEEPA is subject to little judicial review, and the authority was further expanded by USAPA.[196]

In fact, none of the preceding regulatory authority was extinguished by USAPA. Instead, USAPA has substantially expanded regulatory authority in the name of the allegedly intertwined goals of fighting money laundering and disrupting terrorist financing.[197] The Act creates changes in the federal government's regulatory powers to disrupt criminal finance on the basic theory that regulators should get more authority to gather information and to close loopholes that still make it relatively easy for people to make transactions from U.S. bank branches through correspondent accounts, even while their accounts are based in offshore financial centers that protect bank secrecy.[198] Accordingly, under USAPA all financial institutions must create anti–money laundering programs.[199] Treasury is required to replace vague "know

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Directive 42, which froze assets of persons and organizations suspected of being connected with the Cali Cartel).

[195] *See generally* Hale E. Sheppard, *U.S. Actions to Freeze Assets of Terrorism: Manifest and Latent Implications for Latin America*, 17 AM. U. INT'L L. REV. 625 (2002); *see also* Holy Land Foundation for Relief and Development v. Ashcroft, 219 F.Supp. 2d 57, 63 (D. D.C. 2002) (discussing how Executive Order 13,334, issued by President George W. Bush pursuant to 50 U.S.C. § 1701(a) following the September 11 terrorist attacks, authorizes the Secretary of the Treasury to use substantial discretion to designate additional organizations and individual whose property or interests in property should be blocked because they act on behalf of terrorist organizations).

[196] *See, e.g.*, USA Patriot Act, Pub. L. No. 107–56, § 323, 115 Stat. 316 (2001), (allowing the government to use a restraining order to freeze assets in the U.S.).

[197] *See, e.g.*, *Testimony of Jimmy Gurulé, Under Secretary of the Treasury for Enforcement, Before the Senate Appropriations Comm., Subcomm. on Treasury and Gen. Gov't*, 107th Cong. (Apr. 17, 2002) ("Our war against terrorist financing extends to financial intermediaries and facilitators who infuse terrorist organizations with money, material, and support. We have come to clearly appreciate and understand that terrorism has been nourished by ample funding channeled from a plethora of sources, including banks, charities, Hawalas, narcotics traffickers, and money launderers.").

[198] Title III of USAPA is entitled the "International Money Laundering Abatement and Anti–Terrorist Financing Act of 2001." USA Patriot Act, Pub. L. No. 107–56, 115 Stat. at 296–342.

[199] *See* 31 U.S.C. § 5318(h) (2000) (as amended).

your customer" standards with explicit regulations establishing minimum standards.[200] U.S. banks face new prohibitions in their ability to offer correspondent accounts to foreign "shell" banks from offshore jurisdictions whose customers seek the convenience of transacting in the United States.[201] Even where offshore banks do not use U.S. correspondent accounts, Treasury has new regulatory authority to impose information-gathering measures on entire jurisdictions (or business sectors) that do not comply with minimum anti-money laundering standards imposed by regulators.[202] In addition, Treasury has authority (to be used in consultation with other agencies) to contemplate the use of extraterritorial pressure against foreign jurisdictions to force them to adopt minimum measures to combat money laundering, and to facilitate the sharing of suspicious activity reports (SARs) with the intelligence community.[203] The Act makes a panoply of other technical changes that will probably have less pronounced effects on efforts to disrupt criminal finance.[204]

The correspondent account limitations and the special recordkeeping measures illustrate the scope of the new regulatory powers. Both are steps toward the creation of a more dynamic system that allows the executive branch, at least in principle, to respond to the policies of foreign jurisdictions that allow individuals to purchase financial anonymity. Shell banks operating with no physical presence offer their customers precisely such anonymity but have a harder time offering the convenience that a full-scale bank in

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[200] *See* USA Patriot Act, Pub. L. No. 107–56, § 326, 115 Stat. 317 (2001). The minimum standards include making "reasonable and practical" efforts at verification of new customers; maintaining records of the information used to verify identification; and consulting lists of known terrorists.

[201] *See* USA Patriot Act, Pub. L. No. 107–56, § 312, 115 Stat. 305 (2001). The definition of financial institution applicable to this Part is narrower, including only insured banks, commercial banks or trust companies, private bankers, an agency or branch of a foreign bank in the United States, an insured institution, a thrift institution, or a broker or dealer registered with the SEC.

[202] *See supra* note 98, at § 311; 115 Stat. 298–304 (2001).

[203] *See supra* note 98, at § 358; 115 Stat. 326 (2001). The statute also allows federal agents to obtain credit information without notification of the target. *See id.*

[204] Title III of USAPA wrought substantial changes in the fight against money laundering, including among others: additional parties are subject to CTR and SAR filing requirements; authority of U.S. Executive Directors to international financial institutions can be used to combat money laundering and terrorist financing; and changes made to the Right to Financial Privacy Act. *See generally* John J. Byrne, *Key Sections of the International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001 (Title III of the USA Patriot Act of 2001)*, 1289 PRACTICING L. INST.: CORP. L. & PRAC. COURSE HANDBOOK SERIES 97 (2002).

the United States would provide.[205] Correspondent accounts help solve this problem for shell banks and any other foreign banks that want to offer convenience to customers in the United States without opening a branch.[206] Through a correspondent relationship, a U.S. bank harbors an account for a foreign bank and allows its customers to engage in transactions. Under USAPA, most banks are prohibited from offering correspondent relationships to foreign shell banks that are technically based offshore but lack a physical presence anywhere.[207] Although correspondent accounts are still permitted when foreign banks are subject to banking supervision in another country or affiliated with U.S. financial institutions, banks must engage in due diligence to ensure that correspondent accounts are not being used by a foreign bank to provide services to a shell bank.[208] If foreign jurisdictions or financial institutions fail to observe these limits or otherwise give Treasury reason to believe that they are a sector of "primary money laundering concern," then transactions from those jurisdictions or financial institutions may be subject to requirements to file records or reports, to retain information about the ownership of accounts, or to limit the power to open payable–through accounts or correspondent accounts on behalf of any foreign jurisdiction.[209]

Between the Bank Secrecy Act, the Annunzio–Wylie amendments, and the new changes made by USAPA, Treasury is vested with substantial means to generate information and to punish financial institutions that flagrantly reject the stylized due diligence requirements imposed by the regulatory component of the fight against laundering. But the presence of all this regulatory power does

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[205] Under the terms of the statute, a shell bank is one with no physical presence, not even in an offshore financial center. *See supra* note 98, at § 313.

[206] A "correspondent account" allows one bank to serve certain needs of its customers (including the need to make deposits, effectuate transfers, and receive disbursements) at another bank. This allows banks (i.e., based in offshore financial centers) who want to cater to customers in a certain jurisdiction (i.e., the United States) to do so without opening a branch. *See* William F. Bruton, *Money Laundering: Is it Now a Corporate Problem?*, 17 DICK. J. INT'L L. 437, 442 (1999).

[207] *See supra* note 98, at § 313; 115 Stat. 306 (2001).

[208] *See supra* note 98, at § 312; 115 Stat. 304 (2001).

[209] *See supra* note 98, at § 311; 115 Stat. 298 (2001). For a concise description of the differences between correspondent banks, shell banks, offshore banks, and just plain high–risk accounts, see 1 *Role of U.S. Correspondent Banking in International Money Laundering: Hearings Before the Permanent Subcomm. on Investigations of the Comm. on Governmental Affairs, United States Senate,* 107th Cong., at 277 (2001) [hereinafter *Correspondent Banking Hearing*].

not answer a few critical questions affecting the efficacy of the system to fight money laundering. In particular, the presence of regulatory authority does not imply that it will be used to promulgate regulations, and even if regulations are promulgated, it does not mean that they will be enforced.[210] Additionally, it is not clear how the data generated by all the regulations is actually used by investigators to detect money laundering activities, a subject to which we turn next.[211]

3. Detection Systems (Primarily) Run by Investigators

Lawyers naturally tend to focus on judicial doctrine when trying to figure out how a public organization functions. There is something to this since courts' decisions about doctrine help drive the decisions of prosecutors, and those, in turn, help drive the decisions of investigators. Yet the focus on doctrine misses the larger universe of things that might drive investigators' decisions. Moreover, the whole reason why investigators matter is because it would be profoundly difficult for prosecutors to figure out whom they could charge without investigators. After all, prosecutors cannot punish people whose violations they have not detected. The same applies, to a somewhat more limited degree, to regulators trying to punish violations of rules designed to disrupt criminal finance, such as currency reporting requirements. In both cases, the point is that the output of an enforcement system is driven substantially by the detection tools that are available to law enforcement (and regulatory authorities).

So consider the problems faced by federal investigators, inspectors, and local police in detecting criminal money laundering. At least some of what police do involves pervasive patrolling or responses to calls for maintaining "order," allowing them to detect potentially criminal activity through direct observation.[212] When a

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[210] In a hearing before the Senate, Citibank described how even when policies are designed to stop questionable offshore relationships with shell banks, they do not always succeed. *Correspondent Banking Hearing*, *supra* note 209, at 79.

[211] Despite these regulations, banks still do not have to share much information during criminal investigations and do not even have to testify in administrative proceedings. DENNIS CAMPBELL, INTERNATIONAL BANK SECRECY 677 (1992). Given the information available to banks, it is striking how few investigations are instigated by these institutions. Remarks of a Citibank official to the Senate serve to reinforce this point: the official offered testimony that a suspicious bank transfer would not necessarily trigger further bank investigation. *Correspondent Banking Hearing*, *supra* note 209, at 825.

[212] For a discussion of how "community policing" strategies reflect some of the efforts of police organizations to solve the detection problem, see Sarah E. Waldeck, *Cops, Community*

police officer responds to a request for help and walks past the doorway to a building and someone inside screams, the officer might infer that some improper activity may be afoot inside.[213] The world becomes more complicated when we imagine the challenge of detecting consensual activities that trigger criminal liability.[214] Other things being equal, two people involved in a drug transaction are not going to want it to attract police attention (assuming neither is an informant). Assuming police want to detect drug transactions, they might decide to concentrate surveillance activities in neighborhoods where those transactions happen with sufficient frequency that some of them could be readily observed.[215] Police can rarely find people who are engaged in money laundering or other types of criminal financial activity just by walking through a neighborhood and observing the act,[216] but the example of the cop looking for drug deals in a neighborhood known for them does point out two ways that agents can try to detect laundering. One approach is to look for the crimes that can be more easily spotted (ranging from drug transactions to fraud schemes with obvious victims), and then to develop cases against those people that may include sanctions for engaging in money laundering or some other chargeable criminal financial activity. Police can also rely on informants and undercover agents to detect people engaging in a range of criminal activities, including money laundering. The second approach is to focus on the most obvious problem of many launderers: getting rid of cash. Inspectors and investigators might look for bulky agglomerations of currency at airports and border crossing points and draw on the currency reports that the government gathers. Leaving these strategies aside, though, it becomes far more difficult for

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Policing, and the Social Norms Approach to Crime Control: Should One Make Us More Comfortable with the Others?, 34 GA. L. REV. 1253 (2000).

213 *See generally* JAMES Q. WILSON, BUREAUCRACY 37–38 (1989).

214 These activities are often referred to as "victimless" crimes, but it is an ill–fitting term since some such activities (like drug use) arguably produce sufficient negative externalities to make the term "victimless" inappropriate, and other activities such as terrorist financing may involve a consensual transaction (i.e., between the terrorist financier and the terrorist), but obviously have victims.

215 *See* William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. Rev. 1795 (1999).

216 The difficulty in observing laundering through ordinary police patrol activity comes in part from the intent and knowledge elements built into statutes such as 18 U.S.C. §§ 1956, 1957, and similar provisions. Thus, accepting an $18,000 cashier's check is no crime, but doing so with knowledge that the funds come from some illegal activity is a crime. *See* 18 U.S.C. § 1957 (2000). Though it is hard to observe this, investigators can use proxy variables instead.

investigators to detect criminal financial activity and, therefore, for prosecutors to build cases.

Much of the investigative activity that helps authorities build money laundering cases begins with looking for large aggregations of physical currency.[217] These methods, which I call "look for the currency" strategies, involve looking for large aggregations of physical currency that often (though not always) suggest some link to criminal activity. Even if large currency aggregations do not involve some obvious link to a serious underlying criminal offense, the bundle of cash raises the possibility that someone might be illegally "structuring," or breaking up, large currency deposits to evade reporting requirements. Large bundles of cash might also indicate the violation of reporting requirements that apply to many casinos, money services businesses, and cross–border movements of cash.

To look for currency, law enforcement authorities tend to use two kinds of methods: police patrol and investigative. Police patrol methods involve hovering around airports, asking people questions at border crossing locations, and searching for currency when the law entitles the government to commit a search. Like the cops who concentrate their work policing drug transactions in certain neighborhoods, investigators and inspectors physically patrolling for currency concentrate their work in locations where they are more likely to find large aggregations of currency. Financial institutions are supposed to be filing CTRs reporting on large currency transactions, which leaves investigators free to patrol other areas. Even if financial institutions were systematically disregarding their obligation to file CTRs, investigators view this as a problem for regulators, and in any case the major law enforcement entities investigating money laundering lack the agents necessary to provide coverage at even a fraction of the bank branches (let alone money services businesses) in areas considered to involve high concentrations of money laundering activity.[218] Instead, agents and

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[217] *Supra* note 81; Interview with Customs Agent #3, in Stanford, CA (Oct. 19, 2001) (notes on file with author).

[218] Agencies involved in anti–money laundering law enforcement activities have scarce resources. Even if agencies had such resources, patrolling financial institutions would be difficult without developing an organizational framework to integrate agents into the activities of processing financial transactions. Moreover, law enforcement bureaucracies would likely view the assignment of agents to individual bank branches as a waste of valuable resources of special agents better suited to more complex investigative tasks. All of this changes, though, when agents are working on a specific case targeting an individual

inspectors involved in physical searches and patrols for large aggregations of currency tend to congregate at airports and (to a lesser extent) at the land border. People carrying more than $10,000 in cash across a border are required to file a CMIR.[219] Customs inspectors roam airport international departure lounges, stand next to aircraft gates, or observe people about to cross the land border with Mexico.[220] Customs also occasionally inspects packages sent by express mail couriers or the U.S. postal service. Obviously Customs lacks the resources or mandate to inspect every single person, vehicle, or package crossing the border, so it must engage in some kind of targeting to decide whom to inspect. Although such targeting sometimes involves the use of advance information and the results of formal analysis using information technology, it appears that most such profiling involved in outbound currency involves subjective judgments made by inspectors, informed by profiles of suspicious activity generated by Customs headquarters. Customs also uses trained currency sniffing dogs, whose ability to sniff currency is comparable to or even better than their ability to detect drugs.[221] In the late 1990s, Customs used these methods to achieve seizures in the range of $60 million a year, which is by almost every account a tiny fraction of the money that is likely being physically smuggled out of the country.[222]

Investigative methods involve the use of tips and investigative leads developed either by people or by the use of currency transaction reports, primarily analyzed through the use of information

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known to be a financial institution's customer (or the financial institution itself), at which point deploying agents to a financial institution becomes more defensible.

[219] *See* 31 U.S.C. § 5316 (2000).

[220] Interview with Customs Agent #1, in Washington D.C. (June 10, 1998) (notes on file with author).

[221] *See "Detector Dogs" Sniff Out Smugglers for U.S. Customs*, NAT'L GEOGRAPHIC NEWS (July 12, 2002), *available at* http://news.nationalgeographic.com/news/2002/07/0712_020712_drugdogs.html (last visited Aug. 21, 2002) (noting that "In Fiscal Year 2001, for example, dogs discovered over . . . 21.6 million dollars in cash.").

[222] *See Statement of Bonni G. Tischler, Assistant Comm'r, Office of Investigations, U.S. Customs Serv., Before the Subcomm. on Fin. Insts. & Gen. Oversight, U.S. H.R.* (Apr. 15, 1999) *available at* http://financialservices.house.gov/banking/41599tis.htm (last visited May 8, 2003) ("[In FY '97] the number of cash seizures increased to 876 with a total value of over 55 million dollars. In fiscal year 1998, the amount of seizures grew to over 1200 and the total amount of cash seized increased to 68.3 million dollars."). These seized amounts must be a tiny fraction of smuggled currency, unless one believes that domestic placement is exceedingly simple (which runs counter to the view that reporting requirements interfere with such placement) or that estimates of money spent on drugs are off by a factor of 100 or so.

technology. The authorities use people in the form of informants, confederates, and agents engaged in undercover sting operations, all explicitly authorized by 18 U.S.C. § 1956.[223] Obviously, the use of informants or undercover agents still requires law enforcement bureaucracies to select among a range of possible targets. Law enforcement bureaucracies are not eager to release the details of how they allocate undercover or informant resources to target large aggregations of currency, but cases suggest certain patterns.[224] A few informants involved in either money laundering or predicate offenses such as drug trafficking contact law enforcement organizations on their own.[225] Others are caught through police–patrol currency enforcement or separate investigations of underlying crimes and agree to cooperate with authorities in infiltrating primarily drug organizations.[226]

At least some of the leads that result in law enforcement use of informants, undercover agents, and other traditional investigative tactics result from the analysis of Bank Secrecy Act reports, which brings us to the use of information technology.[227] With financial institutions and individuals filing about twelve million currency transaction reports a year, it becomes virtually impossible to consign a cadre of analysts to the mind–numbing purgatory of reading the

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[223] *See* 18 U.S.C. § 1956(a)(3) (2000). According to Customs, agents working in "long-term" undercover investigations of money laundering activity have assisted in the seizure of over $1 billion in currency between 1988 and 2000. *See Hearing Before the House Subcomm. On Criminal Justice, Drugs, Policy and Human Res.*, 106th Cong. (2000) (statement of John C. Varrone, Acting Deputy Assistant Commissioner, U.S. Customs Service).

[224] *Supra* note 81. *See infra* Part II.B.1. *See also* GARY T. MARX, UNDERCOVER: POLICE SURVEILLANCE IN AMERICA 37–43 (1988); Interview with Customs Agent #2, in Washington, D.C. (Aug. 14, 1998) (notes on file with author).

[225] Interview with Customs Agent #2, *supra* note 224.

[226] The focus on using informants for infiltrating drug organizations is probably driven in part by law enforcement bureaucracies' organizational priorities, which might be path dependent in the following sense. If the use of investigative "follow the currency" methods depends in part on the existence of informants who can be threatened with criminal sanctions as a result of previous drug investigations, then it will be easier for law enforcement bureaucracies to engage in more drug–related investigations. For a discussion of path dependence, see generally Vernon W. Ruttan, *Induced Innovation, Evolutionary Theory and Path Dependence: Sources of Technical Change,* 107 ECON. J. 1520, 1520-23 (1997).

[227] While banks produce massive amounts of paperwork to comply with the law, note that in almost all cases it is the government, rather than banks, attempting to detect violators. In a hearing before the Senate, a Citibank official, admitted that in most cases for the bank, "monitoring" comes down to relying on the government. *Correspondent Banking Hearing, supra* note 209, at 77.

reports and making sense of whether they amount to a smoking gun of illegal activity. Since the mid–1990s, Treasury's FinCEN has used a combination of expert systems and link analysis to investigate the millions of currency–related reports filed by financial institutions and individuals under the requirements of the Bank Secrecy Act.[228] Among other things, the system analyzes the currency reports for links among each other, and also for links to publicly available information. Wire transfer information is not included in the analysis, because none of it is systematically collected by the federal government.[229] FinCEN also collects all the suspicious activity reports (SARs) filed by financial institution employees. Although such reports cover more than just money laundering, the lion's share focuses on violations of currency reporting requirements.[230] Despite the approximately twelve million reports a year and FinCEN's analysis of them, the reporting requirements probably only result in a small number of proactive investigations a year.[231]

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[228] *See* OTA REP., *supra* note 29, at 44 (discussing the architecture of FinCEN's FAIS program).

[229] Since wire transfer information is not reported, it cannot be analyzed until agents know that they should ask for it.

[230] According to FinCEN statistics from a recent SAR report, 46% of all SARs filed between 1996 and April 2001 involved suspected violations of Bank Secrecy Act reporting requirements, or other activities connected to money laundering. *See* U.S. Dep't of Treasury, BANK SECRECY ACT ADVISORY GROUP, SAR ACTIVITY REV.: TRENDS, TIPS, AND ISSUES, ISSUE 3, at 10 (2001) *available at* http://www.fincen.gov/sarreviewissue3.pdf. [hereinafter 2001 SAR ACTIVITY REV.].

[231] *See* Michael Allen, *U.S. to Cut Bank Reports on Cash Deals*, WALL ST. J., Sept. 21, 1998, at A3 (noting that the filing of approximately 35 million CTRs in a recent three–year period "swamped" authorities and resulted in fewer than 1,000 investigations started exclusively from the reports). Of course, this does not necessarily mean the system is ineffective in terms of raising the cost of crime, for at least two reasons. First, case studies suggest criminals structure deposits to avoid reporting requirements. *See* Part II.A. If they did not, it is possible (though it is not clear how possible) that the reporting requirements would give rise to more investigations because criminals would be easier to detect in the absence of strategic activity. Second, even if virtually no criminals were detected exclusively because of reporting requirements, it seems plausible that the reporting requirements discourage some criminals from the most obvious or egregious uses of banks to place or transfer currency linked to criminal activity (just imagine the counterfactual world where criminals faced zero risk of detection regardless of their financial conduct). Nonetheless, it is hard to determine exactly how much of a deterrent effect is created by the currency reporting requirements. For example, while banks try to look good by citing the number of reports they file (*see, e.g., Correspondent Banking Hearing, supra* note 209, at 144), the number of reports, which represent large movements of cash, are likely to be highly correlated with laundering activity.

An observer might wonder why the police patrol and investigative methods would not be suited for disrupting criminal finance in situations that had nothing to do with currency–focused laundering. In principle, any method—whether involving information technology or undercover agents—could be adapted to advance almost any law enforcement agenda. But in practice, the use of investigative and police patrol strategies depends on information (i.e., about who is doing what, or where people are likely to do it). In most cases, the information to which law enforcement bureaucracies have access is about currency movements. Inspectors engaged in police patrol have trained canines that can smell currency rather than checks. Most of the reporting requirements that cross–border travelers violate with respect to money involve the movement of currency. And while neither informants nor undercover agents are limited to looking for currency, the currency–focused pattern is strengthened by the sources from which law enforcement bureaucracies obtain information. Much of the information that authorities use to decide about sting operations involves either drugs or currency.[232] Because of the likely path–dependent focus on drug investigations, many of the investigations are drug focused and therefore involve currency. Finally, computers may be perfectly capable of analyzing non–currency financial information (a subject discussed in Part IV), but that capability means little if the government does not have access to this data (for example, on international wire transfers).[233]

This leaves the "follow the crime" strategy, which involves the detection of a possible money laundering violation by detecting an underlying crime and then slapping on the money laundering charge subsequently. What is striking about the "follow the crime" approach to detecting money laundering and other types of criminal finance is how much it depends on the detection of predicate offenses. In fact, even the currency reports that are supposed to assist authorities in

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[232] During the 1980s, for example, the priorities of both federal as well as state/local law enforcement bureaucracies were increasingly driven largely by the "war on drugs." *See* Robert Reinhold, *Police, Hard Pressed in Drug War, Are Turning to Preventive Efforts*, N.Y. TIMES, Dec. 28, 1989, at A1 (between 1968 and 1988, drug arrests more than quintupled). Accordingly, one would expect that a substantial amount of information that agents and prosecutors would accumulate and find useful in developing undercover investigations would reflect such priorities.

[233] Even when investigators identify a target, access to information can be difficult to obtain. For example, courts have disallowed the use of nonspecific subpoenas targeting international transfers in some instances. *See* OTA REP., *supra* note 29, at 103.

detecting laundering schemes end up being used primarily for "follow the crime" enforcement once a predicate offender has been detected.[234] Aside from the suspicious activity reporting system, which allows financial institution employees to report suspected financial crime activity, the "follow the crime" method involves targeting and detecting predicate offenses rather than criminal finance. One way that investigators engage in the fight against money laundering is by following a suspected crime through the use of SAR review teams. For example, in New Jersey, a team of prosecutors, federal investigators engaged in anti–money laundering and related investigations, and local law enforcement officials review virtually every SAR from their jurisdiction.[235] The value of such review teams is that they can convert SAR reports into something more than just another way of detecting currency reporting violations (which are the most frequently–filed kinds of SARs). Through SAR review teams such as the one in New Jersey, SARs can be reviewed by a team of investigators and prosecutors with access to a range of case files that may shed light on whether to further probe matters relating to a SAR that would not appear to warrant further investigation when viewed without the benefit of the team's case files. The use of SAR review teams is useful as a means of giving SARs a bare minimum of necessary attention, since it is not clear that every SAR is actually read and analyzed by investigators.[236] Yet full–fledged review teams are quite rare,[237] and even SAR review teams might not be able to place individual SARs in their full context without access to wire transfer data not currently available.[238] Agents and prosecutors also frequently use CTR reports to assist in

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[234] *See Money Laundering: The Volume of Currency Transaction Reports Filed Can and Should be Reduced, Testimony Before the Senate Comm. on Banking, Housing and Urban Affairs, reprinted in The Anti–Money Laundering Act of 1993–S.1664: Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 103d Cong. 43 (1994) (statement of Henry R. Wray, Admin. of Justice Issues, General Accounting Office) ("[B]y far the biggest use of [CTR] data is in a 'reactive' manner, where a name or other form of identification of a suspect is known and search of the data is made. . . .").

[235] Between 1996 and 2000, New Jersey state authorities started eighty-eight investigations from SARs, giving New Jersey the highest ratio of SAR filings to state investigations reported of any state. *See* 2001 SAR ACTIVITY REV., *supra* note 230.

[236] *Supra* note 224; Interview with IRS Agent #1, *supra* note 81; Interview with FinCEN Official #1, in Washington, DC (June 18, 1998) (notes on file with author).

[237] In addition to the New Jersey SAR Review Team, the Southern District of California formed an interagency SAR Review Committee in 1998. *See* Mary Lee Warren Testimony, *supra* note 10.

[238] *See generally* Baldwin, *supra* note 11.

investigations against individuals already suspected of committing some offense.[239]

Agents trying to detect a money laundering related crime can also use undercover agents and informants to detect predicate crimes.[240] The reason law enforcement bureaucracies are likely to view this approach as bountiful is that it does not require authorities to do much of anything different from what they would ordinarily do to investigate predicate crimes.[241] On the contrary, if predicate crimes are detected and specific violators suspected, the anti–money laundering statutes simply leave prosecutors with more options regarding whom to charge and with what charge. After all, the core money laundering statutes themselves make virtually any disposition of money that can be traced to a predicate crime into a transaction that can trigger criminal liability.[242] The same is true for victims reporting a crime, such as fraud. The limitations with these approaches is that not all underlying predicate offenses are effectively detected with direct observation, undercover agents, informants, or victim reports. Although drug trafficking and distribution are notorious targets of undercover and informant–supported investigations, a substantial number of them are not detectable through such methods.[243] Moreover, some fraud or cyber–crime activity might not be fully or accurately reported, even by the

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[239] Indeed, it appears the disproportionate use of the currency transaction reports is to develop cases against people already known to be suspicious, not to detect offenses against unknown offenders. *See* Allen, *supra* note 231; David Overlock Steward & Marc E. Sorini, *Suspicious Activity Reporting for Casinos: The Next Wave in Currency Reporting*, *reprinted in* ABA CENTER FOR CONTINUING LEGAL EDUCATION NAT'L INST., GAMING ENFORCEMENT II: CRIM. JUST., Apr. 16–17, 1998, at D–31 (noting the frequent ex post use of CTR filings). While investigators may use the presence of SARs and CTRs to "follow the crime," this does not necessarily trigger substantial response from financial institutions. For example, in a letter submitted in Senate hearing, Citibank's lawyers admit that even if it knows of particular "follow the crime" strategy, this does not allways trigger a substantial bank regulatory response. *Correspondent Bank Hearing*, *supra* note 209, at 721.

[240] *See, e.g.*, U.S. SENTENCING COMM. REP'T, *supra* note 15, (indicating that almost 10% of money laundering cases in sample involved an undercover "sting" operation).

[241] Here is one indication: the Justice Department's Organized Crime and Drug Enforcement Task Forces nationwide were conducting 875 ongoing investigations in 1992, and 75% of them allegedly "addressed" money laundering—even though agents working through OCDETF are not specialized in or otherwise particularly well–suited to engaging in money laundering investigations. *See* 1993 Hearings on Money Laundering, *supra* note 20, at 419–20.

[242] See discussion on money laundering criminal statutes in Part I.A.1, *supra*.

[243] *See* Stuntz, *supra* note 215.

victims.[244] This means that detecting money laundering (and, more generally, criminal finance) using "follow the crime" methods aimed at predicate crimes makes the detection of criminal finance contingent on the political economy of criminal investigation. Whatever drives criminal investigation will drive the sort of criminal finance detected in relation to the underlying offenses and eventually charged by prosecutors. If drug crimes are more likely to be investigated than environmental offenses (which are, by the way, also predicates under §§ 1956 and 1957), then drug money laundering will be punished more severely. At the end of the day, if people can be caught for some criminal violation, they can be charged. Because of the loose interpretation of the core criminal statutes involved (§§ 1956 and 1957), there is little factual investigation necessary to charge someone with laundering if they are caught for underlying criminal activity and they handled money in some way.

Finally, the new USAPA legislation changes many of the legal restrictions in sharing information between U.S. intelligence and law enforcement agencies, making it easier for them to exchange knowledge. This allows for "follow the crime" type methods to be used where intelligence information gives rise to suspicion that some violation occurred.[245] For example, if the federal government possesses intelligence information indicating that a U.S. not–for–profit organization is providing money raised in the United States to a terrorist organization, that information can more easily be shared with law enforcement agencies that can investigate the not–for–profit organization's activities and help build a case against it for financing terrorism. Unfortunately, the federal government lacks a system that would make it possible for the opposite to happen; it would be difficult to ascertain whether an organization that is not considered suspicious should be investigated simply because of the patterns of transactions in which it engages. Even if the government wanted to investigate all the sources of funding of a particular known terrorist organization (or a drug kingpin abroad), it would face the challenge

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[244] Not all fraud and cyber–security breaches are quickly detected by the victims. *See, e.g.*, Marc Goodman, *Why the Police Don't Care About Computer Crime*, 10 HARV. J.L. & TECH. 465 (1997).

[245] Even before USAPA, law enforcement agencies sometimes relied on foreign intelligence to develop cases. Indeed, it was a report from British intelligence that appears to have alerted U.S. law enforcement authorities to the now–infamous scheme to launder billions of dollars through the Republic Bank of New York. *See Bombshell Expose of Russian Ties to BONY Bares Virgin Laundering Soil*, MONEY LAUNDERING ALERT, Oct. 1999, at 1.

of obtaining records from governments abroad.[246] Thus, the U.S. government's efforts to block the assets of alleged terrorist organizations does not evince a means of detecting terrorist financial activity from patterns of transactions, but instead appears to represent the use of regulatory and related criminal justice authority on the basis of intelligence information.

The point of this discussion is not to show that the "look for the currency" and "follow the crime" methods of detection are a waste of time, but that they result in a detection system with acute sensibility for some things and blind spots for others. The system has fairly pronounced sensitivity to currency movements (though even here there are some blind spots, as with land border outbound enforcement involving vehicles). The system has extreme sensitivity to possible money laundering charges that could be brought against someone detected for a predicate crime (i.e., fraud, drug trafficking), because prosecutors have an incentive to consider possible charges and the doctrine makes it easy to fulfill elements of the money laundering statutes without intensive fact–specific investigation. Yet the system is far less able to detect money laundering (or virtually any kind of criminal financial activity, including terrorist financing) when the "look for the currency" and "follow the crime" methods begin to falter. In other words, if a person whose identity does not arouse suspicion is engaged in money laundering or the financing of crime, it becomes exceedingly difficult for the government to detect this activity. The task becomes even more difficult if the person is smart enough to minimize (or avoid altogether) the use of currency in carrying out the activity.

C. THE SYSTEM'S GLOBAL DIFFUSION

Laundering's international element is virtually undeniable.[247] Through a combination of diplomatic peer pressure, explicit organized entities such as the OECD–sponsored Financial Action Task Force,[248] international treaties such as the Vienna Convention on

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[246] *See, e.g.*, C. Todd Jones, *Compulsion Over Comity, The United States' Assault on Foreign Bank Secrecy*, 12 NW. J. INT'L L. & BUS. 454 (1992).

[247] HINTERSEER, *supra* note 11, at 38 ("Money laundering is a global problem, and as such resolving the problems it creates will require an integrated solution . . . ."). For the U.S. government's version of this argument, *see* U.S. DEP'T OF STATE, INT'L NARCOTICS CONTROL STRATEGY REP. 20 (1995) (noting that money laundering "is occurring with varying degrees of regularity in more than 125 [countries]").

[248] The Financial Action Task Force is an organization created under the auspices of the Organization for Economic Cooperation and Development. Members include the countries

Narcotics,[249] and incentives in other countries, the global fight against money laundering is taking shape along the lines of what the U.S. has done—and is likely to suffer similar shortcomings.[250] In some ways the insistent push from U.S. government officials and representatives of other developed economies for international anti-money laundering efforts is hardly surprising. The major elements of the U.S. enforcement system reflect the preoccupation with cross-border financial flows tied to crime. In terms of criminal statutes, § 1956 contains an explicit prohibition on many international transactions and applies extraterritorially. Regulations are designed to give government access to information about many (though not all) cross-border movements of money. Even the strategies of investigators reflect the international preoccupation, as Customs agents and inspectors swarm through airports looking for outbound movements of currency. Despite all this, authorities correctly recognize that criminals' financial activity, like that of non-criminals, spills across borders. Moreover, financial systems are interconnected. The laws and regulations in other jurisdictions might affect the ease with which money derived from crimes committed in the United States can be laundered. This at least explains the overt reasons why U.S. officials and their international allies among developed economies have sought to create a system that increasingly forces other jurisdictions—particularly secrecy havens making it difficult for investigators to get account information—to adopt laws and policies to combat money laundering and terrorist financing.[251]

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of the European Union and the Gulf Cooperation Council, as well as 26 governments (mostly OECD members), including Hong Kong and Switzerland, considered major financial (or money laundering) centers. *See* FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, ANNUAL REP. 1998–1999 (July 2, 1999) (last visited Jan. 25, 2002), *available at* http://www.oecd.org/fatf/pdf/99ar-en.pdf [hereinafter FATF ANNUAL REP.].

[249] 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, UN Doc. E/Conf.82/15 (1988), *reprinted in* 28 I.L.M. 493 (1989) [hereinafter Vienna Convention on Narcotics].

[250] For an insightful discussion of the similarities, *see* Diane Marie Amann, *Spotting Money Launderers: A Better Way to Fight Organized Crime?*, 27 SYRACUSE J. INT'L L. & COM. 199, 216 (2000). Professor Amann described the similarity between the Financial Action Task Force's major anti-money laundering recommendations and the U.S. approach thus:

> [The Forty Recommendations] posit a two-pronged attack similar to the U.S. statutory scheme. Reflecting the Money Laundering Control Act, the Forty Recommendations call for stronger criminal laws against money laundering. Reflecting the Bank Secrecy Act, they call for an end to financial confidentiality and for imposition of reporting duties on banks.

[251] *See, e.g.*, *Treasury, Justice Unveil New Strategy to Combat Money Laundering Schemes*, 68 U.S Law Week 2182, 2184 (Oct. 5, 1999) (Treasury and Justice Department

The FATF recommendations tend to focus on the criminal and regulatory enforcement priorities emblematic of the U.S. approach to combating money laundering and disrupting criminal finance.[252] Countries are urged to pass statutes criminalizing money laundering. Laws and regulations should provide an audit trail for large currency transactions. Financial institutions should be forced to adhere to these requirements and to file suspicious activity reports when something subjectively arouses suspicion, and failure to comply with any of these requirements should subject an institution (as well as its officers) to civil or criminal penalties.[253] The organization promotes adoption of these laws and policies through mutual evaluations for its members and through the designation of non–member jurisdictions that flagrantly disregard any effort to fight money laundering or terrorist financing.[254] The result has increasingly homogenized the strategies used to fight money laundering and terrorist financing in developed economies that have membership in the organization. All of them have laws providing for separate criminal penalties for money laundering, which authorities can use alongside other laws such as criminal tax evasion statutes to target money laundering. Most FATF members now have currency reporting and suspicious activity reporting requirements, although some FATF members use suspicious activity standards even more subjective than the U.S. ones.[255] Since before September 11, FATF communiqués echoed the assertions of some U.S. government officials regarding the connection between anti–money laundering enforcement and terrorist

anti–money laundering strategy "calls for government officials to work to improve international cooperation and to intensify pressure on lax jurisdictions to implement strict money laundering controls.").

[252] The U.S. Department of the Treasury views the Forty Recommendations as being important enough to domestic anti–money laundering efforts to merit inclusion in the appendix to the 2002 ANNUAL STRATEGY. *See* 2002 ANNUAL STRATEGY, *supra* note 8, at A-22—A-27. *See also id.* at A-28—A-33 (describing progress in combating laundering by countries on a FATF "blacklist," primarily in terms of whether such countries passed statutes or established regulatory programs).

[253] Financial Action Task Force on Money Laundering, THE FORTY RECOMMENDATIONS OF THE FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, WITH INTERPRETATIVE NOTES, 35 I.L.M. 1291 (1996) (arguing for basic features of the U.S. and Western European model).

[254] *See* FATF ANNUAL REP., *supra* note 248 (describing FATF mutual evaluation process, as well as the legal basis for and consequences of designation of non–members who disregard anti–money laundering or terrorist financing objectives).

[255] *See* Noble & Golumbic, *supra* note 10.

financing.[256] Both concerns have led FATF members to adopt some version of "know–your–customer" standards that, among other things, press financial institutions to confirm their customers' identity at the time an account is opened.[257] What is not covered under this framework is in large measure what seems conspicuously left out of the American system: a formalized means of detecting criminal financial activity beyond what emerges from currency reporting or from the use of traditional law enforcement methods that detect underlying predicate crimes.

The most striking development in international cooperation has been the development of a FATF "blacklist" of bank secrecy havens and other jurisdictions of particular money laundering concern. Since the jurisdictions that are candidates for blacklisting tend to have some incentives to create bank secrecy regimes and otherwise avoid cooperating,[258] FATF members have threatened restrictions on financial transactions with blacklisted jurisdictions that do not make amends.[259] Although some have made the argument that FATF's actions interfere with international law, this argument is a stretch because the measures threatened by FATF members involve domestic law changes.[260] Ironically, although the basis for the FATF is not a binding international treaty but an agreement, it has provided the basis for an embryonic system to police the behavior of countries, including both members and non–members.[261] In contrast, the

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[256] *See* Cordia Scott, *Treasury Secretary Urges FATF to Set World Standard for Combating Terrorist Financing*, WORLDWIDE TAX DAILY, Oct. 30, 2001, *available at* LEXIS, 2001 WTD 210–1.

[257] *See* FATF ANNUAL REP., *supra* note 248.

[258] *See* Part III.A.4., *infra*, discussing the incentives of offshore financial centers and other bank secrecy havens.

[259] *See* Todd Doyle, *Cleaning Up Anti–Money Laundering Strategies: Current FATF Tactics Needlessly Violate International Law*, 24 HOUS. J. INT'L L. 279 (2002).

[260] Even if the General Agreement on Trade in Services applied to all the parties, it includes an exception for policies vital to the national security interests of signatories. If Japan has justified its subsidies to rice farmers on national security grounds in the context of the WTO agreement, then it seems difficult to imagine a restrictive enough definition of national security that would exclude the decisions by the U.S. government to impose some sort of restriction on nation–states that did not cooperate with anti–laundering measures. Admittedly, Japan's invocation of the national security exception as the basis for subsidies to rice farmers is the exception rather than the rule. The more common practice is for nation–states to stick to a narrow interpretation of "national security," which is itself an interesting puzzle. *See* James R. More, *Unlocking the Japanese Rice Market: How Far Will It Be Opened?* 9 TRANSNAT'L LAW. 273, 276 (1996).

[261] International Monetary Fund and World Bank, *Enhancing Contributions to Combating Money Laundering*, POLICY PAPER 11 (Apr. 26, 2001) (discussing how the FATF

Vienna Convention is a binding treaty, establishing formal legal obligations against the signatories. Yet unlike the FATF system, the Vienna Convention does not establish an enforcement system that generates useful information about signatories' compliance, because the Convention's provisions regarding the detection of criminal financial activity are tremendously vague.[262] Neither does the Convention have anything to say about the behavior of non-signatories, who obviously do not have legal obligations under the treaty.

The increasing convergence of the global recipe to fight money laundering should not obscure some important differences in the system. For years FATF members have not agreed on whether tax evasion should count as a predicate offense for money laundering, and therefore whether members should be encouraged to include tax evasion in the list of money laundering predicate offenses. French criminal statutes against money laundering include tax evasion as a predicate, for example, while U.S. statutes do not. In part the debate probably reflects the politics of tax enforcement and concern over slippery slopes in different countries, but the dispute has not had

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regime is forcing members and non-members to show some measure of adoption of core anti-money laundering policies). The paper notes:

> [T]he FATF has produced a set of 25 Criteria Defining Non-Cooperative Countries or Territories (NCCTs), based on, but not identical to the FATF 40 [recommendations] which it has used to evaluate 29 non-FATF members. The evaluations identified weaknesses and grouped countries based on their degree of compliance, and a list of NCCTs has been published.

Id.

[262] The Vienna Convention on Narcotics includes, for example, some of the following provisions, none of which specify the extent to which signatories must fund a regulatory system to detect offenses, or even a criminal justice system to prosecute them:

> Art III.1(b)(i) The conversion or transfer of property, knowing that such property is derived from any offence or offences [covered under the treaty]. . . or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions.

Vienna Convention on Narcotics, Art. III.1(b) *et seq.*, *supra* note 249. Despite the ambiguity of the Convention (beyond simply the requirement that signatories criminalize the offense), the creation of a criminal offense at least addressed a persistent problem in extradition—that most extradition arrangements require "double criminality," meaning that, in order to be extradited, an offender must have committed conduct that amounts to an offense in the requesting and the requested country. If signatories followed their responsibility under the treaty, then someone could be extradited for money laundering without creating a "double criminality" problem. The focus on issues like "double criminality" is obviously connected with ex post enforcement (it isn't much good if you don't know whom you want to extradite), and is consistent with the notion that the treaty is meant in part to serve the interests of prosecutors and investigators.

important practical consequences.[263] Some observers insist that Western European FATF members as a whole historically tended to rely more on subjective reporting than does the U.S. system.[264] Although the United States does provide for some exemptions from currency transaction reporting requirements, Western European approaches rely more on information exchange between financial institutions and government regulators or investigators—an approach that makes authorities even more reliant on financial institutions to uncover suspicious activity.[265] Moreover, not every system appears to be designed around the specifications of the United States and Western European approach. The Australian government's anti–money laundering system, for instance, provides wire transfer and currency reporting information to the Australian government's financial intelligence unit (Austrac), almost in real time.[266] Instead of relying almost entirely on subjective suspicious activity reporting, Austrac uses expert systems and link analysis to analyze all currency transaction reports and international wire transfers.[267] Yet the majority of systems appear to reflect the basic elements of the U.S. and Western European approaches.

The debates about the policies of FATF members and about the fate of the blacklisted jurisdictions might suggest that the recommended measures are costly and require dramatic changes for jurisdictions that adopt them. Yet in many ways, the FATF recommendations and associated minimum standards for blacklisted countries leave substantial flexibility to the jurisdictions. Everyone is able to get away with something, because the recommendations leave

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[263] For a discussion of the normative and practical issues raised by making tax evasion a money laundering predicate, *see* Peter Alldridge, *Are Tax Evasion Offenses Predicate Offenses for Money Laundering?* 4 J. MONEY LAUNDERING CONTROL 6 (2001).

[264] *See* Noble & Golumbic, *supra* note 10 (discussing differences between the objective approach, emphasizing mandatory currency reporting requirements, that predominates in the U.S., and the subjective model prevalent in Western Europe, which relies more heavily on suspicious activity reporting). Nonetheless, the two approaches are increasingly converging. *See id.*; Amann, *supra* note 250, at 216 ("the [FATF] forty recommendations . . . posit a two-pronged attack similar to the U.S. statutory scheme").

[265] *See* Noble & Golumbic, *supra* note 10, at 144 ("A system obliging financial institutions to . . . report anomalous transactions enhances the capacity to detect money laundering by placing . . . experts on the front lines"). *See also* Amann, *supra* note 250, at 217 ("abolition of bank secrecy is, in fact, a common aspect of transnational efforts against money laundering").

[266] *See* OTA REP., *supra* note 29, at 47–48.

[267] *See supra* note 228 and accompanying text for an example of how the U.S. regulatory system can deploy expert systems and link analysis.

open critical questions about prosecutors' discretion to charge people using the recommended criminal statutes, investigators' responsibility to detect activity, and regulators' use of their authority. This flexibility makes it politically easier for the increasingly standard menu of anti–money laundering and anti–terrorist financing prescriptions to grow in importance because it can be imposed in so many ways. The FATF requirements and treaties are one approach. But after USAPA, U.S. regulators have new authority to unilaterally punish jurisdictions that do not take steps in the direction of complying. As with domestic regulatory authority, the issue of when other countries' investigative and regulatory authority is actually used, and whether that use can fairly be called effective, are separate questions.

II. JUSTIFYING THE FIGHT AGAINST MONEY LAUNDERING AS AN ATTACK ON CRIMINAL FINANCE

Laws often fall short of their goals, so it is worth reviewing the specific goals of the fight against money laundering. Specifically, what sort of laundering is the system meant to fight? Is the goal simply to interfere with the movement of profit from crimes or to develop a whole system capable of preventing, detecting, and punishing crime? In short, is the fight against money laundering largely a convenient means of letting prosecutors make easier cases against criminals—especially drug traffickers—or is it meant to be something more than this? Leaving aside the evaluation of any specific law enforcement system for now, this section poses the question of why in principle society might be concerned about financial activity related to crime (i.e., what the system detects as well as what it does not detect). The more cause for concern about such financial activity, the larger the existing system's limitations would loom.

A. THE CAUTIOUS CASE FOR DISRUPTING CRIMINAL FINANCE

If legislators just wanted to change the risks or costs associated with perpetrating crime, they could have simply made sanctions even more draconian. The focus on laundering suggests something else. Some of that is almost certainly symbolic politics. Legislators want to take political credit for passing criminal statutes but they begin to run out of things to criminalize, so they look for new tropes that seem to make intuitive sense (i.e., fight the link between money and crime) and generate credit. But beyond the game of symbolic politics, is there anything to the notion that we ought to target this process of turning dirty money into clean money, or (more generally) this process of the intersection between money and crime?[268]

1. Disruption of the Financial Activities of (and the Supply ofSservices to) Criminals, Especially Leaders of Organized Criminal Networks

The most obvious argument for targeting criminal finance is that financial transactions connected to crime are complements for underlying criminal activity. Admittedly, this whole reason is only valid to the extent that it makes sense to punish the underlying crime—but leave this aside for a moment.[269] Begin with the premise that many criminals that are in it for money should be expected to respond to the possible financial rewards of crime as well as the costs, which include among others, the probability of being detected.[270] Financial transactions complement crime by making it marginally easier to directly enjoy the gains from criminal activity, to undertake legitimate economic investments, to plow money back into

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[268] That intersection, or "criminal finance" includes any financial activities or transactions related in some way to crime, including the money laundering activities detected and punished by the existing system. Besides the sort of laundering that could be discovered through "look for the currency," or "follow the crime" enforcement, criminal finance surely includes other forms of money laundering that are harder for the existing system to detect, as mentioned above. These include, among others, large scale non–currency related corruption activity, higher–level drug–related laundering that may have started with placement of cash but extends to layering or re–integration activities, and laundering connected with fraud and similar offenses, where the offender (and perhaps even the existence of the offense) is not yet known. Criminal finance also encompasses the financing of crimes such as terrorism. Other things being equal, the political leadership of a jurisdiction would almost always prefer to exert some control over criminal finance rather than no control. Governments have long exhibited an interest in controlling the movement of value (in the form of currency or valuable assets). *See* Stuart Corbridge & Nigel Thrift, *Money, Power, and Space: Introduction and Overview*, *in* MONEY, POWER, AND SPACE 1 (Stuart Corbridge et. al., eds. 1994) (discussing the history of, and inherent mobility of, money as a source of private and national power). The question is whether this interest is justified, and whether the failure of strategies to control criminal finance require some fix.

[269] Thus, if someone profits from selling computers illegally in China to dissident organizations and one believes that such distribution of information technology is normatively valuable, then it does not matter whether financial activity makes the "crime" easier because the underlying activity does not elicit derision.

[270] There is obviously some basis to expect that criminals—like non–criminals—behave this way even if they are not engaged in crime exclusively for the money. *See* Erling Eide, *Economics of Criminal Behavior*, *in* V ENCYCLOPEDIA OF LAW & ECONOMICS 345, 355–64 (Boudewijn Bouckaert & Gerrit de Geest eds., 2000) (providing a survey of empirical studies making this case).

criminal activity, or to avoid detection.[271] In theory, it is possible that financial activity linked to crime is the equivalent of a proverbial smoking gun, making it marginally easier for authorities (investigating tax, drug, or any sort of offense involving money) to detect crimes from the distinctive signature left by financial transactions.[272] Most criminals dealing with more money than what they can comfortably put under a mattress or spend on goods and services that can be easily purchased with cash will find it extremely valuable to use the financial system because of the benefits that come from using it. For example, through banks and other financial institutions launderers can access investment opportunities such as equity markets that would be unavailable if they dealt only in cash. All of this increases the possibility of obtaining rewards from crime. To the extent that authorities recognize this and make any effort to investigate suspicious financial activity (whether currency, non-currency, or whatever), then easy laundering reduces the probability that a criminal will be caught.[273] Easy and cheap laundering therefore should be expected to let a criminal use a greater proportion of the financial return from crime, without having to fritter a significant fraction simply converting the money into some useful form.[274]

Criminal financial activity can make the perpetration of crime cheaper and more efficient (from the criminal's point of view)

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[271] *See* Part II.A, *supra*.

[272] For example, the more criminals try to evade cash reporting requirements by structuring deposits to place them in different accounts, the more we might expect that multiple accounts receiving cash deposits under the threshold will eventually show wire transfer activity centralizing the money into a single account. Obviously, if criminals knew this would give them away (and currently it almost certainly does not, because of the system's incapacity to examine wire transfer activity for detection purposes), they might use another layer of accounts before centralizing the balances. If detection were not a problem, then perhaps even this could be ferreted out. Even if detection *were* a problem at that point, it would be hard to argue that criminals would be entirely neutral between the first and the second scenario, as the second one entails at least a few additional costs (i.e., opening the account, finding someone to be the account's owner, and managing transactions from that account).

[273] This assumes that enforcement is effective enough to create a substantial risk of detection and punishment.

[274] Anecdotal evidence reports that the cost of laundering has increased over time, perhaps as a result of the fight against money laundering. *See*, e.g., OTA REP., *supra* note 29, at 14 n.39 (quoting Interview with Greg Meacham, Chief of the Government Fraud Unit, Federal Bureau of Investigation, Mar. 14, 1994) ("Colombian cocaine cartels are said currently to pay contractors a 20% fee for money laundering; the contractors give the cartel a certified check for 80% of the dirty cash, up front, and themselves assume the risk of cleaning it.").

because it means criminals get to use the bureaucratized world of modern finance. Just as RICO was a response to the perceived threat of criminals operating as an enterprise or seizing control of a legal one, laws targeting laundering could be understood as a means of denying criminals access to a tool that might greatly increase their financial efficiency. As capital has become more mobile and private markets have expanded, financial institutions have grown in scope and size.[275] For example, larger markets mean transactions have the potential to be arm's–length in the sense that the parties have no previous relationship. Financial institutions have developed rules and procedures, often spurred by legal rules, to make otherwise anonymous financial transactions not only possible but relatively secure and reliable.[276] The bureaucratization of finance allows people engaged in crime–for–profit (or, to some extent, in financing crime) to solve a host of practical problems. Banks, for example, preserve the security of criminals' financial resources. Individuals and organizations involved in illegal activity can easily consolidate their resources, divide them, and easily allocate them between (legal and illegal) investment opportunities. Criminals also gain the power to move money around the globe almost instantly.[277] At the same time, though, financial institutions work through records of balances and transactions, replacing most physical movement of valuable assets with the movement of information that is settled through payment systems like CHIPS, Fedwire, and SWIFT.[278] The existence of a global financial system with bureaucratic financial institutions thus presents criminals with both an opportunity and a risk: the opportunity to better move and exploit money—thereby reducing costs and the possibility of detection—and the risk that the records left behind as money moves will lead investigators to the criminal.

So if authorities develop a capacity to disrupt the least detectable kinds of criminal financial transactions (i.e., cash transfers or financial activity where a corrupt banker shreds all the documents), they might get criminals to shift to financial activity that is more costly, more detectable, or both. This can yield law enforcement

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[275] *See* Susan Strange, *From Bretton Woods to the Casino Economy*, *in* MONEY, POWER, AND SPACE, *supra* note 268 (discussing banks, history).

[276] *See id.*

[277] In contrast, consider the cumbersome means of engaging in credit transactions without financial institutions. Some organized criminals engage in loan sharking, but other opportunities to participate in credit markets are scarce if money stays in cash form.

[278] *See* OTA REP., *supra* note 29, at 20–32

benefits. For example, exogenous factors might make crime for profit (or criminal activity requiring some non–trivial amount of financing) spike, raising the amount of criminal financial activity that could be detected, disrupted, and deterred in the right circumstances. If a crime increase is both elastic to changes in returns and overwhelms traditional law enforcement, it is then perhaps an effective means of detecting and punishing criminal finance that can help fill the gap. Of course, the fact that we are dealing primarily with an illicit, underground economy makes it difficult to estimate all the details with quantitative precision.[279] But even in the absence of quantitative estimates, two things should be clear. Not all increases in the price of laundering money will result in decreases in crime, and some increases in crime that overwhelm law enforcement can be affected by disrupting criminal finance, assuming that such disruption can detect crimes at least as well as traditional law enforcement strategies and criminals' cost of evading controls is high enough.[280] The result is that strategies capable of detecting criminal financial activity (assuming this is possible) could raise the probability of detecting despised predicate crimes.

Consider, for example, the now–familiar dilemma of a drug trafficker trying to place a large amount of cash in the financial system without detection. As more of it accumulates, its marginal utility probably declines.[281] Although the marginal utility of cash probably never reaches zero, it could decline to the point that it is cost–effective for a criminal to engage in strategies that yield money with higher marginal utility, such as bank balances—even if one

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[279] Even finding proxy variables is difficult. For example, an IMF study of the macroeconomic impact of money laundering uses crime as a proxy variable—yet not all crime requires financing or generates money, nor do we even have completely reliable measures of actual (as opposed to reported or investigated) crime. Tanzi, *supra* note 30, at 5.

[280] As discussed in Part II, these assumptions may be heroic—but are still sensitive to policy and legal changes that can render the system more effective.

[281] There are at least three reasons to expect that cash would have declining marginal utility. First, cash that is not placed in the financial system (i.e., at a bank) is much harder to use to make a range of legitimate investments, such as those in equity or futures markets, at least not without a report (either at the bank or, since passage of USAPA, at a securities firm) that increases the likelihood of the crime's detection. Second, not all goods and services can be easily purchased with cash—and anything costing $10,000 or more will trigger the requirement that a report be filed. Third, large concentrations of cash are unwieldy and must be guarded from threats, including among others marauding pilferers and even physical degradation. As one example, see Frantz, *supra* note 55 (noting that during the 1980s, Pablo Escobar's Colombian drug trafficking network appears to have abandoned as much as $400 million in the basement of a Los Angeles home because of the difficulty at the placement stage).

factors in the additional cost of placing the cash and risk of detection from an unusual transaction.[282] Thus, even adjusting bank balance money for the extra cost of getting into that form, it is still more useful. The upshot is that given a plausible set of assumptions, higher costs of laundering result in lower returns from crime. So an effective enforcement strategy against money laundering presumably has the potential to make it more costly to undertake an offense, and (in principle) provides an additional means of detecting the predicate offense.[283]

Of course, affecting the financial return from perpetrating crime is more than an aesthetic goal; the point is to interfere with the commission of crimes. Most arguments about the value of making the perpetration of crime more costly tend to imply that making crime more costly reduces crime, which would be true if criminals are in it for the money, and the rise in cost is enough to push at least some of them under the threshold where crime's risk–adjusted return makes it worth doing.[284] One might also assume (as legislators did)[285] that

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[282] The cost could include either increased risk of detection or increased financing cost of laundering if the risk of detection is outsourced or if a professional is used to lower the risk of detection, at a price.

[283] Note that raising the marginal cost of perpetrating criminal activity can itself conceivably have counterintuitive effects, at least in theory. To the extent that criminals engaged in crimes for profit are acting rationally, then raising the cost of crime can discourage smaller operations and clear the market allowing more sophisticated criminal organizations to innovate and take more control from less organized criminals. But it seems unlikely this would happen, because small–time criminals are less likely to be rational in the first place. What is more, in order for the rise in the cost of crime to have the counterintuitive effect of worsening the impact of crime, the benefits of organization and having the market cleared of smaller competitors would have to overwhelm the higher price of committing crime. If anything, larger organizations are more likely to be price sensitive.

[284] Analyzing criminals' behavior from this perspective does not preclude the view that criminals do not respond exclusively to financial incentives, or that they do not respond to such incentives in the same way that non–criminals would. One might imagine that the marginal value of cash could decrease more slowly for some criminals than for non–criminals, because a large wad of greenbacks conveys a social meaning that would be irrelevant or even counterproductive to the non–criminal while it enhances the status of the criminal. *Cf.* Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995). Instead of claiming that money is either the exclusive or even the primary incentive for criminal activity, a principled defender of the fight against laundering need only establish that criminals respond to incentives, including those that affect the financial return to perpetrating crime. *See generally* JAMES Q. WILSON, THINKING ABOUT CRIME 121 (rev. ed. 1983) ("People are governed in their daily lives by rewards and penalties of every sort. . . . To assert that 'deterrence doesn't work' is tantamount to either denying the plainest facts of everyday life or claiming that would–be criminals are utterly different from the rest of us.").

[285] *See infra* notes 306–309 (discussing legislators' perception that major sources of funding for criminal activity would come from criminal profits).

much of the money that would finance further crime—whether drug trafficking or terrorism—would come from criminal profits.[286] It is worth noting that even if one accepts this logic, the legitimacy of money laundering enforcement depends on the predicate crime that is being made more costly. Thus, China might be interested in using money laundering enforcement to catch people selling communications technology to dissident groups—a goal that would find much less sympathy among Americans.[287] But assuming one has no qualms about the underlying predicate crimes in question, then the disruption of criminal finance seems like an attractive way of cutting into the return people can make from criminal activity, and therefore into the amount of criminal activity.

Because the process of laundering is thought to affect the return from perpetrating a crime, cheaper laundering opportunities that allow criminals to obtain the greatest benefit from their money can thus lead to micro-level distortions in social and economic activity for at least two reasons. First, other things being equal, as the perpetration of illegal activity becomes less costly (either because the risk of detection is lower, the expected return is higher, or both) then the choice to forego it becomes more expensive. Not all people making a choice between legal and illegal activity make what could be defined as a "rational" choice[288] to engage in illegal activity, but those who tend to make such decisions are attracted to crimes for profit in part because of the benefit. Indeed, even individuals whose desire to engage in terrorist activity could hardly be termed "rational" might still make reasoned judgments meant to maximize the success

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[286] This position implies that it is easier for people already engaged in criminal activity to fund it rather than for new entrants to do so. It would be hard to deny the possibility that money would come from other sources, but at least some indications of the behavior of organized crime suggest that criminal networks might both (1) reinvest their profits in some of their existing activities (to pay for corruption, raw materials, human capital, and equipment) and (2) expand the scope of their illegal activities. *See* LEVITT & VENKATESH, *supra* note 81.

[287] Note that whether an offense is consensual or not does not necessarily give us an adequate means of assessing its legitimacy. For example, some people might view the consensual nature of most drug transactions as evidence that it should be condoned, but even libertarians should be uncomfortable about a consensual transaction to deliver nuclear fissile material to a terrorist group.

[288] Unfortunately, just exactly what is "rational" is not inherently clear. *See* Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710, 1793 (1997) ("The term rationality is susceptible of different definitions, varying as to their abstractness and the elements they contain.").

of their activity and lower the risk of detection.[289] In any case, for some people, legal and illegal activity can substitute for each other—as a means of making a living, making a profit, winning friends and influence, or just spending time. The greater the perceived benefit from illegal activity, the less attractive legal activity is by comparison.[290] This means at least some subset the population is more likely to engage in socially harmful activities. Second, laundered illegal money can subsidize anti–competitive and predatory practices by legitimate businesses infused with dirty cash.[291] Although this is hard to show empirically because of the difficulty in detecting money laundering, the scenario is easy to envision. Suppose two money exchange houses on the Texas side of the U.S.–Mexico border (A and B) compete, and one of them (B) receives dirty money on the side. As a result B can offer more favorable exchange rates; given the right market conditions (i.e., no unduly increasing marginal costs, acceptable tax consequences, and customers are highly price sensitive), then B might use its ability to offer slightly lower rates to steal much of A's business. In a competitive market A will have to lose business or look for its own source of dirty money.[292]

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[289] The indictment against Zacaraias Moussaui highlights the government's theory that the hijackers were goal–driven and made reasoned choices to maximize the probability of the success of their scheme. *See* Moussaui Indictment, *supra* note 24.

[290] *See* Eide, *supra* note 270, at 345-355 (reviewing empirical research on the determinants of criminals' behavior, including substitution between different kinds of illegal activity, and between legal and illegal activity).

[291] *Id.*

[292] In technical terms, one might say that B's willingness to undercut A depends on whether gains from extra customers' business outweigh the extra margin that could be obtained from the higher price that was foregone, adjusted for B's extra costs and the corresponding tax consequences. *See supra* note 69. Research from the IMF also makes a related argument that criminal finance, in principle, can lead to economic distortions and even macroeconomic instability, but the argument is not entirely convincing. *See* PETER QUIRK, MACROECONOMIC IMPLICATIONS OF MONEY LAUNDERING 24 (Int'l Monetary Fund, Working Paper No. 96/66, 1996). *See also* TANZI, *supra* note 30. In a nutshell the argument is this: criminals with lots of dirty money will not behave like rational, profit–maximizing investors looking for the most rewarding rate of return. Instead, they will (1) look for secrecy, distorting the incentives of jurisdictions and encouraging them to provide secrecy; and (2) develop the potential to move massive balances from one economy to another, destabilizing it. Although these papers persuasively suggest the possibility of an independent destabilizing macroeconomic effect arising from laundered money, there are a few problems with the argument: (a) it is not clear why criminals would use the movement of money to explicitly or implicitly undermine an economy's stability, especially since that could undermine the disposition of their assets or the security of their longer–term (possibly

The upshot: other things being equal, there is some law enforcement value in trying to disrupt criminals' access to the convenience of the modern financial system. The more financial resources a criminal controls, the more valuable it will be to the criminal to be able to transform the financial resources obtained from criminal activity into a convenient form (i.e., bank or financial institution balances without an obvious trail to people, places, or accounts connected to criminal activity)—either directly or by hiring someone to do it. Balances at a financial institution can easily be turned into consumable goods and services, reinvested in criminal activity, or diversified across a range of legal and illegal investments. The disruption of criminals' financial activity forces the high–level criminal and his underlings into an uncomfortable choice: pay more (i.e., in commissions to expert launderers) to get the money into its most usable, high–return usable form, or accept constraints in the extent to which money connected to crime can be moved, transformed, and used.

2. *Aid to Detection of Predicate Offenses*

One constraint on criminal financial activity may come from efforts to detect predicate offenses by monitoring financial transactions. Financial transactions leave records—and even those that do not leave as many records (such as cash transactions) can be *made* to leave behind a paper trail. All of which can aid investigators in the ex ante detection of predicate offenses linked to particular kinds of transactions (such as large currency deposits or wire transfers to accounts considered suspicious) or even in the ex post detection of factual information that can be helpful in building a legal case against a defendant.

In principle, using criminals' financial transaction patterns to detect their involvement in predicate crime may be more than just an efficient strategy. A strategy of using financial activity to trace the responsibility of higher–level criminals may also reflect a basic concern with fairness. One plausible story might be that the more difficult it is to trace money linked to criminal activity, the more law enforcement investigative strategies are confined to targeting the most visible wrongdoer. The most visible wrongdoer is not necessarily the most guilty, if by guilt one means someone who,

legal) investments; and (b) individual countries (especially offshore financial centers) might see their hard currency positions strengthened by the presence of criminal financial activity.

compared to others, either benefits more from an offense, had a more substantial role in spurring it, or both. Moreover, it is not morally controversial that someone financing a crime should be identified as responsible.[293]

3. Cleansing the Financial System of Benefits Derived from Crime

Now consider another potential sort of harm arising from criminal financial activity, quite apart from the impact of that activity on the criminal's return from perpetrating crime. Suppose one believed that money linked to crime—that is, either derived from crime or on its way to pay for criminal activity—should be kept apart from the financial system. There are two possible versions of this claim. One focuses on the potential harm to which financial institutions might be subjected when money that is linked to crime courses through their accounts. Another version could make more of a normative claim that it is undesirable for the financial system to spread the gains from criminal activity to the larger universe of people who are not lawbreakers.

The former argument is fairly straightforward, even though it depends on empirical presuppositions that are seldom defended. Balances obtained from criminal activity, goes the argument, can give banks and other financial institutions a stake in criminal activity.[294] The latter argument is perhaps more far–fetched. The idea is that money from crime can obviously contribute to legitimate economic activity, thereby serving as a sort of macro–economic stimulus, generating jobs and economic activity. Although some of this activity might help offset the micro–economic distortions and criminal subsidy problems discussed above, there might be reason to fear that the money would act as a sort of tempting "bribe" offered to particular groups or geographic regions if they merely look the other way and let the predicate crime occur. Under this view, a crime's reach extends not only to the people who are obviously involved but

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[293] *See supra* note 142 and accompanying text, discussing the extent to which financing an offense gives rise to criminal liability for it. Even under international law it is entirely possible to argue that someone who finances a terrorist act (whether the money is clean or not) becomes liable for its effects.

[294] For an example of the sort of rhetoric associated with this argument, *see* 2000 ANNUAL STRATEGY, *supra* note 7, at 7 ("Money laundering taints our financial institutions, and, if left unchecked, can undermine public trust in their integrity. . . . In an age of rapidly advancing technology and globalization, the uncontrolled laundering of large sums can disturb financial stability."). *See also supra* note 292.

also to the people who enjoy benefits from the profits of crime.[295] This latter theory makes more sense as another version of the "willful blindness" argument (i.e., akin to the situation where bankers put their talents at the service of an arms dealer), rather than as the expression of an abstract moral principle, since it is hard to accept a view where physical currency becomes possessed of some kind of moral agency that is somehow irredeemably soiled after the dollar is spent on some illegal deed. After all, forfeited dollars from drug sales or fraud end up being given to law enforcement. Cops then spend the money with no compunction, because it is the erstwhile

[295] There may be less than meets the eye to this argument. If money were not spent on illegal activity, presumably it would be eventually spent either on something else that is illegal, or on something legal. Either way, there is no good reason to think that the money spent on drugs, alien smuggling, or gun running would not eventually end up flowing through the economy. The Anglo-American legal tradition of in rem proceedings against property may foster the illusion that it is the money itself that is "guilty" and must be stopped from flowing through the economy—indeed, this is part of the legal reasoning that allows the government to seize and convert a lot of allegedly dirty money through forfeiture. But in the end, money doesn't buy things by itself, nor does it have a conscience. The idea that the dirty money itself is tainted and that anyone who touches it is also tainted means that we would just have to assume that handling the dirty money automatically taints someone (even if they have little knowledge of this). That does not seem especially satisfying either as a moral principle, or as a practical approach to deterring crime.

There is an alternative line of reasoning to save the "cleansing the financial system" argument, but one needs to make additional assumptions. Suppose our objective is to limit the extent of predicate crimes and encourage legitimate economic activity. Suppose further that the residents of the City of Guadalajara can invest either in new maquila plants or a drug money laundering infrastructure of loosely regulated banks and real estate markets. The maquila plants may pay off but will face greater competition than the drug smuggling activities. The drug activities will also produce more money, some of which (assume) will cycle through Guadalajara's economy, the proverbial tide that lifts all boats in the city. In this situation, we might say that laundering activities conducted through Guadalajara—and leaving it money—could make large chunks of the city derive a benefit from the illegal activity. This would be true not in the sense that the city's population were formally complicit, but in the more subtle sense that they would derive a benefit from the activity and would adopt even slight changes in behavior that would continue making the city a competitive center for laundering. We might imagine additional assumptions that the average Guadalajara citizen, knowing that his city's economy and tax case is swelling with drug money, becomes more corrupt—more willing to engage in illegal activity—given cognitive dissonance. The common folk in Guadalajara may not all be facilitating wire transfers of dirty money, but they may be subtly encouraging the illicit enterprise and its financial side. The more one pushes this line of argument, the more it starts to sound like the consequentialist case for catching lawyers, bankers, and other third-party launderers engaging in "willful blindness" when they use their talents to help predicate offenders. The problem is not that the money itself taints the financial system, but that the laundering process can give Guadalajarans an incentive to further the underlying, ostensibly harmful criminal activity in order to soak up riches that would otherwise be spent on something else.

criminal who used the money, and not the currency itself, that is worthy of blame.

4. Assessing the Justifications and the Goals They Imply

It is virtually beyond dispute that disrupting criminal finance is costly, though it is not clear that the financial costs are as high as banks and financial institutions contend.[296] Since any attempted disruption of criminal finance has financial as well as non–financial costs, policymakers should consider these costs in deciding whether to pursue efforts to disrupt criminal finance. Disrupting criminal finance may require the development of a framework for gathering financial data that would leave the government with more power than what "society" prefers (i.e., according to some defensible scheme for considering the consequences of government power). If anything, though, this is an argument for caution in institutional design—and not for abandoning the objective of disrupting criminal finance. Yet on balance, the assumptions of the skeptical arguments seem less plausible than the assumptions of the affirmative arguments, for two major reasons. A substantial amount of people engaged either in crime for profit or the financing of offenses such as terrorism are likely to be rational in the sense that they want to achieve an objective (i.e., get money, remain in control of a criminal organization, fund a crime that is effectively carried out). Therefore, if criminals have to accept some risk of detection when using the infrastructure of the global financial system, they may choose not to do so and will be forced to shoulder the cost of transacting outside that system.

In short, the project of disrupting criminal finance can hardly be evaluated comprehensively without further empirical assessments of the arguments for and against targeting criminal finance. In the meantime, though, it is at least possible to understand why legislators could conceivably have thought that building an elaborate enforcement system was worth doing as a means of targeting criminal finance.[297] The case that can be made is a cautious one, but someone who accepts all the skeptical arguments excessively trivializes the extent to which criminal activity is influenced by the presence of money and by efforts to obtain more of it. Going through the reasons

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[296] Their interests in the matter are self–explanatory. *See* Part IV, *infra*.

[297] This is not to suggest that the development of the fight against money laundering was a logical response to concern over crime and drugs. Legislators are politicians and respond to lawmaking opportunities as such. *See* Part IV.A, *infra*.

for skepticism is useful for two reasons. First, it shows that the precise impact of the alleged deleterious effects of criminal finance requires at least some more empirical testing. It might be true, for example, that cheap laundering lowers the cost of perpetrating crime and maximally enjoying the profits, but whether this means less crime depends on assumptions. But second, the most plausible assumptions are ones that suggest there are social costs that arise from criminal financial transactions: in principle, the cost of perpetrating particular kinds of crime often impacts the amount of criminal activity. In theory, financial surveillance can sometimes aid in crime detection, and penalties for laundering can make the world harsher for third-party launderers and others who help criminals profit from crime and reinvest that money, perhaps even in more illegal activity, of which terrorism is the example of the day.

The cautious arguments in favor of targeting criminal finance do not necessarily justify any sort of money laundering policy under the sun. Obviously the claim that a great many criminal activities have a financial component could be taken to mean that one can see laundering in every crime. But unless there is a special means of detecting crime through its financial component, then finding some sort of "laundering" component in every crime collapses into an effort to detect every ordinary substantive crime and to punish it more severely.[298] If special reasons exist to target laundering, then presumably these reasons should translate into some priorities for targeting particular offenses or conduct. One might advance the agenda of disrupting criminal finance, for example, by punishing financial activity undertaken by those who benefit most from the income produced by crime, such as the leaders of organized criminal networks (i.e., the proverbial drug "kingpins," among others). Another specific objective that would seem to follow from the acceptance that criminal financial activity produces a special harm is the targeting of individuals (or, if one prefers, organizations) with accumulated knowledge, expertise, and willingness to make

[298] Consider why this is the case. In a world where every case has a "laundering" component, then the presence or absence of laundering is as irrelevant to the choice of what offenses to target as the absence or presence "harm" in a world where every crime can be plausibly described as causing some kind of "harm." *Cf.* Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109 (1999). In the abstract, most every crime might be said to have a "laundering" or "criminal finance" component. A more targeted effort to disrupt criminal finance requires a more specific focus, such as attention to the importance of the criminal being targeted or the potential marginal impact of a prosecution on the finances of an organized criminal network.

laundering easier. Call these "third-party" launderers, because they may have no interest in getting involved in the substantive criminal offense. If the goal is to target laundering because of its distinctive harms or particular importance in crime, then it makes sense to target these launderers disproportionately since they are (presumably) in a position to facilitate a host of substantive criminal offenses (not just one). Finally, one might imagine that if criminal financial activity leaves a sort of smoking gun that can lead authorities to substantive crimes, then the government would be justified in developing an infrastructure to take advantage of such traces of information (and increase them). Moreover, the better the detection system (in principle), the easier it could be for authorities to detect the most damaging or large-scale criminal financial activity—thereby allowing them to fulfill the other objectives of focusing attention on organized criminal networks and third-party launderers.

Consider the deterrent impact of these three interrelated objectives: detection strategies raise the probability of detecting both predicate crimes and laundering, which means that criminals have to pay higher risk premiums solve the problems associated with managing their money (or bear the risk themselves). Targeting the leaders of organized criminal networks focuses resources on the individuals and bank accounts that can presumably do more harm (on average), in part because they harbor greater resources that could be reinvested in crime. And targeting third-party laundering disrupts both criminal financial activity and the underlying predicates. By increasing the risk to third-party launderers, the authorities could (again, in principle) increase laundering costs which are passed onto substantive offenders—thereby lowering the return from the perpetration of crime, and perhaps forcing some to substitute less expensive and less efficient methods of laundering that might make it easier for the authorities to detect the underlying predicate offense.[299]

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[299] For example, assume that drug traffickers have the choice between using a third-party launderer that would take care of depositing cash in American bank accounts and turning it into balances in Colombia that were not linked to drugs, or instead making bulk shipments of cash out of the United States. If the authorities target the third-party launderer and increase her risk, the providers of laundering services would tend to respond by raising the price of laundering services. The drug traffickers would then have to pay the higher prices for laundering, or substitute the costly strategy of making the bulk cash shipment themselves, making them easier to detect at airports and border checkpoints because of the cash-focused nature of most existing detection strategies there.

B. THE "OFFICIAL" STORY: LEGISLATIVE HISTORY AND EXECUTIVE JUSTIFICATION

Now turn from theory to history. At least some parts of the official justification for the fight against money laundering seems to match the cautious theoretical case. First, although the testimony and discussions during the legislative history lack analytical nuance, policymakers seemed to cling to the basic "cost of perpetrating crime" idea as the main justification. Two other justifications surface that are also consistent with the preceding analysis: the notion that targeting criminal finance helps in detecting crime, and that targeting criminal finance prevents "reinvestment" in crime. The logical implication of these arguments is that the focus of the whole enforcement apparatus against criminal finance—which became what I call the fight against money laundering—should be on third–party launderers and high–level criminal organizers. Those are indeed the figures upon which legislators focused. The focus on these sorts of villains probably served another purpose: it played into the symbolic value of the statutes, since it was (and is) easy to hate the underworld drug lord soaking up dirty money to buy a yacht and fast car, as well as the corrupt lawyer, accountant, or banker who (in theory) helps the kingpin pull this off the magical task of turning literally soiled crumpled currency into accounts at a bank secrecy haven. In short, the fight against money laundering is supposed to be about disrupting criminal finance.[300]

A cynic might disagree, insisting that the system's entire purpose is to increase the power of prosecutors and investigators to make it easier to target criminals. This is obviously true at some level, since changes expanding the scope of criminal law enhance the power of

[300] For what it's worth (and maybe not much), the legislative history seems to square with the cautious case that could be made for targeting criminal finance. *See supra* notes 290–296. This includes two important caveats, though. First, the legislative history should hardly be expected to serve as a picture of the full panoply of interests and dynamics that shape legislation. Part IV, *infra*, provides a discussion of the incentives of legislators, the pressure they might face from financial institutions, and the parallel interests of investigators and prosecutors. Second, even if we focus on the legislative history, it quickly turns out that a lot more (and perhaps less) is going on than just having Congress. The justification for the fight against money laundering was going on at a time of dramatically rising crime rates and (for the criminal penalties) a growing national obsession with drugs. So, in addition to whatever underlying purpose could have been served by the fight against money laundering in principle, the anti–drug and anti–crime hysteria is almost certainly part of what led legislators to take advantage of this new opportunity for lawmaking and its associated symbolic political payoffs.

prosecutors and investigators.[301] When criminal law covers more behavior, it is easier for prosecutors to make cases because it is easier to gather evidence of some criminal violation, even if that violation seems technical or unrelated to the reasons why someone initially aroused suspicion.[302] For example, during the 1970s, public concern over drug consumption was growing and law enforcement attention to drug offenses was increasing. Police faced increasing pressure to investigate drug–related offenses even as judicial regulation of criminal procedure was thought to get in the way of investigations. Enter the spoon laws: prohibitions against drug paraphernalia, including spoons when intended for use preparing drugs.[303] These laws then allowed prosecutors to build cases against people even in the absence of evidence of the underlying offense that probably generated concern against someone (i.e., drug trafficking or even possession). Not surprisingly, the action requirement to trigger liability under a spoon law—namely, possession of a spoon—becomes virtually meaningless: a spoon can be used to eat soup or to heat a drug–laced solution to make it easier to inject. It is the intended use of the spoon that triggers the criminal offense.[304] Proving intent might not always be easy for the prosecutor, but may still be simpler than building a case against someone for a more substantive violation involving something like possession of drugs with intent to distribute. Like the prohibitions on drug paraphernalia that criminalized the possession of a spoon with the intent to use it for the preparation or consumption of drugs, anti–money laundering laws turn some innocent conduct into guilty conduct, allowing prosecutors to have more tools with which to secure convictions. In this account, part of what drives the money laundering laws might be a simplistic concern over despised offenses that are difficult to detect and to prosecute.

All of this could make sense as a partial explanation for the politics of the definition of money laundering offenses (a topic

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[301] *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

[302] *See* Edward L. Glaeser et al., *What Do Prosecutors Maximize? An Analysis of the Federalization of Drug Crimes*, 2 AM. L. & ECON. REV. 259, 273 (2000).

[303] *See* Annotation, *Validity Under Fed. Const. of So-called "Head Shop" Ordinances or Statutes Prohibiting Manufacture and Sale of Drug Use and Related Paraphernalia* , 69 A.L.R. FED. 15 (defining as "drug paraphernalia" to include "(8) Blenders, bowls, containers, spoons and mixing devices used, intended for use, or designed for use in compounding controlled substances").

[304] *Id.*

addressed below), but does not necessarily shed light on the justifications used to sell the fight against money laundering. In fact, neither the legislative histories of the relevant laws nor statements from public officials since passage of the legislation brazenly say that the entire enterprise of fighting money laundering is simply cover for letting prosecutors boost their ratio of work to convictions. Nor does the simplistic prosecution–focused rationale explain legislators' interest in creating a regulatory framework of civil penalties and information gathering to complement the use of the statutes. If we assume that laws expanding the scope of criminal and civil liability increase the power of law enforcement authorities, the question is how such power has been justified by the officials who designed and administer the system.

The legislative history reveals primarily three concerns: (1) a recurring preoccupation with the nexus linking high–level figures in drug trafficking and organized crime to money laundering; (2) a conclusion that money laundering involved a range of financial activity, including complex financial schemes, that—if detected—could point to the presence of predicate crimes (and, more recently, to the presence of terrorism); and (3) and a concern with people thought to be specialists in money laundering, navigating the criminal underworld and helping people engage in illicit transactions.[305] The following passage from the Senate Report on the legislation creating the money laundering criminal statutes, quoting a previous Reagan Administration report, illustrates all three concerns:

> Ultimately, the degree of sophistication and complexity in a laundering scheme is virtually infinite, and is limited only by the creative imagination and expertise of the criminal entrepreneurs who devise such schemes. . . . [I]n recent years . . . [criminals] have mastered the details of modern technology, international finance, and foreign

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[305] For some of the Bank Secrecy Act's legislative history illustrating these concerns, *see* H.R. 15073, 91st Cong., 2d Sess., 116 CONG. REC. 16,955–56 (1970). For similar concerns animating discussion of substantive criminal statutes, *see infra* note 306. Although the disruption of terrorist financing might seem analytically distinct, the reflexive reaction from policymakers post September 11 is to identify fighting money laundering with fighting terrorist financing. *See supra* note 8. For analogous arguments about terrorist financing showing little sensitivity to subtle distinctions between that activity and ordinary laundering, *see* U.S. DEP'T OF THE TREASURY, CONTRIBUTIONS BY THE DEP'T OF THE TREASURY TO THE FINANCIAL WAR ON TERRORISM 4 (Sept. 2002) (highlighting the disruption of terrorist financial strategies as a major objective of anti–money laundering detection strategies). Note that any efforts to combat terrorist financing would still find logical coherence with the three major objectives described above. Indeed, without some version of these objectives, the fight against terrorist financing would devolve into a simple effort to target whomever is detected for, or suspected of, being a terrorist.

secrecy laws to create a select fraternity of money laundering professionals. As a result, organized crime today uses banks and other financial institutions as routinely, if not as frequently, as legitimate business.[306]

The image of the "select fraternity of money laundering professionals" recurs now and again in the legislative history.[307] So too does the notion that laundering prosecutions and regulations could be tools to detect and punish people higher up in criminal organizations—who were presumably more likely to be engaged in criminal activity for financial gain.[308]

Of course, the preceding discussion of legislative history does not imply that such history should occupy the most privileged position in making sense of the law. Congress is a "they," not an "it."[309] But legislative history shows how a statute is marketed to the public, and to courts that ultimately serve as arbiters of their meaning and their constitutionality. So even if one accepts the view of legislative history as politically self-serving or at least unreliable,[310]

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[306] S. Rep. No. 99-433, at 2 (1986).

[307] *See, e.g.*, WALTER, *supra* note 1, at 151 (quoting *Current Problem of Money Laundering: Hearing of the Committee on Governmental Affairs*, 99th Cong. (1st Sess. 1985):

> [Money laundering] is an extremely lucrative criminal enterprise in its own right. Treasury's investigations uncovered members of an emerging criminal class—professional money launderers who aid and abet other criminals through financial activities. These individuals hardly fit the stereotype of an underworld criminal. They are accountants, attorneys, money brokers, and members of other legitimate professions. They need not become involved with the underlying criminal activity except to conceal and transfer the proceeds that result from it. They are drawn to their illicit activity for the same reason to that drug trafficking attracts new criminals to replace those who are convicted and imprisoned—greed. Money laundering, for them, is an easy route to almost limitless wealth.

Press accounts also emphasize the existence of "white-collar" laundering professionals. *See, e.g.*, Timothy L. O'Brien, *Cash-Flow Woes: Law Firm's Downfall Exposes New Methods of Money Laundering*, WALL ST. J., May 26, 1995, at A1 (describing an alleged international network of "white-collar" professionals used by the Colombian Cali drug trafficking cartel to launder profits).

[308] The legislative history of the laws forming the bedrock of the fight against money laundering is replete with statements like this one, from Representative George Wortley:

> [M]oney is the reason people get into the drug trade. If we take away the lure of easy money, if we increase the costs associated with making that money, we will be much closer to greatly reducing, if not totally eliminating, the drug trade. To do this we have to get at the financial backers, which means we have to stop money laundering.

131 CONG. REC. H5382-01 (daily ed. July 10, 1985) (statement of Rep. George Wortley).

[309] *See* Kenneth A. Shepsle, *Congress as a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 244 (1992).

[310] *Id.*

its content reveals the arguments that many policymakers believed to be important in justifying the fight against money laundering.

Statements of executive branch officials accentuate the impression created by the legislative history. Since the statutes passed, officials from the Treasury, Justice, and State Departments have frequently insisted that the fight against money laundering is meant to disrupt criminal financial activity, particularly activity involving high–level leaders of criminal organizations and professional third–party launderers.[311] This implies that the statutes and regulations are not simply a means of enhancing the punishment faced by people who have already been detected for committing crimes. Sometimes the corrosive nature of money laundering is asserted repeatedly, even without a detailed analytical justification of its impacts. The larger message is that money laundering is the "life blood" of crime and the fight against money laundering is about shattering the link between money and crime.[312] The message coming from executive branch officials therefore shows remarkable consistency with the legislative history justifying the major anti–money laundering statutes.

Concerns over terrorist financing have only raised the volume and extent of claims that the fight against money laundering could fight criminal finance, including the financing of terrorism. Although some policymakers recognized a distinction between fighting money laundering and terrorist financing, the most frequently–heard claims are that fighting one helps disrupt the other. The claim tends to be made in two ways. Some people insist that terrorists raise funds through illegal activities, the profits of which become useful for

[311] *See, e.g.*, *Fed. Gov.'s Response to Money Laundering: Hearings Before the Committee on Banking, Finance, and Urban Affairs*, 103d Cong. 200–01 (1st Sess. 1993) (statement of Ronald K. Noble, Assistant Secretary for Enforcement, U.S. Dep't of the Treasury); *see also id.* at 453 (statement of Federick B. Verinder, Deputy Assistant Director, FBI):

> The use of the money laundering statutes reduces the profitability [of crime] through seizure and attacks the underpinning of the enterprise by attacking the organizational infrastructure which facilitates the money laundering function. . . . [allowing the] target[ing] [of] members of the enterprise for whom the money is being laundered.

[312] The reference to money laundering as the "life blood" of crime may be little more than a rhetorical flourish on the part of some policymakers, but some of the issues raised by the metaphor may be consistent with more analytically sophisticated discussions of why money laundering could matter to law enforcement. *See infra* notes 270-298 and accompanying text.

terrorism only if they can be laundered.[313] There is probably some support for this, although just how much is difficult to tell.[314] Indeed, one example of how at least the relationship between drug money and terrorism is not monotonic may come from the Taliban, whose support for Al–Qaeda tends to be widely acknowledged.[315] Less acknowledged after September 11 is the Taliban's apparent interest in undermining drug production in Afghanistan.[316] The other claim is that, even when terrorist financing is not directly related to money gleaned from illegal activity, the task of detecting terrorist financing cannot be separated from that of detecting money laundering.[317] This argument is plausible. In principle, the detection of money laundering involves figuring out if money comes from illegal activity.

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[313] A host of present and former executive branch officials imply that terrorist financing is at least partly grafted onto the process of money laundering. One former Deputy Treasury Secretary described the relationship thus:

> Terrorists must have money, to pay for weapons, travel, training, and even benefits for the family members of suicide bombers. The September 11 terrorists pent tends, if not hundreds, of thousands of dollars on U.S. flight training, and their U.S. living expenses were likely even higher.

Hearing on the Admin.'s Nat'l Money Laundering Strategy of 2001, Before the S. Comm. on Banking, Housing, and Urban Affairs (Sept. 26, 2001) (Testimony of Stuart E. Eizenstat, Former. Deputy Sec'y of the Treasury), *available at* http://banking.senate.gov/01_09hrg/092601/eiznstat.htm (last visited May 10, 2003). *See also* Remarks by Julie Meyers, Deputy Assistant Sec'y for Money Laundering & Fin. Crimes, U.S. Dep't of the Treasury, Before the Int'l Regulators Meeting (Mar. 15, 2002), *available at* http://wwww.ustreas.gov/press/releases/po2003.htm, (last visited Mar. 26, 2002) ("To say that September 11th refocused our attention on the problem of money laundering and the related threat of terrorist financing hardly seems to capture the import of that day, but was certainly one of its many effects.").

[314] There is anecdotal evidence that some of money from the Pakistani heroin trade (which feeds more than half of the heroin consumption in the U.S. market) was used to support Al–Qaeda.

[315] The Taliban are widely alleged to have supported Osama Bin Laden and Al–Qaeda. Although the most conspicuous example of this support involves the Taliban's apparent grant of permission to use Afghani territory for training camps, the precise extent of the depth of the Taliban's support for Al–Qaeda has not been documented publicly.

[316] One might speculate that ideological and religious extremist groups may loathe the impurity of American society as well as the growth and marketing of narcotics. Yet, as with so many enforcement efforts, politics might play a role here at least as much as ideology. In Afghanistan, for example, drug revenues might have been viewed as helping local warlords raise resources to resist centralized Taliban control, thereby making the Taliban erstwhile allies in the international campaign to control narcotics.

[317] Policymakers frequently make the argument that there is a seamless connection between fighting money laundering and disrupting terrorist financing. *See, e.g.*, Tamara Loomis, *Sept. 11 Attacks Created New Urgency for Legislation*, N.Y. L. J. 5 (col. 2) (Oct. 18, 2001) (quoting James. E. Johnson, former Under Secretary of the Treasury for Enforcement, discussing "the threats posed by people who launder money to facilitate other crimes").

This means investigators might trace the origin of funds to determine if they can establish a link between the funds and illegal activity (as required to establish a violation of § 1957 or to activate forfeiture provisions). Investigators might also determine that someone is likely to be involved in illegal activity, in which case the funds received by that person might be suspected of some link to crime. Although the detection of terrorist financing is different in principle (since there needn't be a link to illegal activity to generate the funds involved), it is similar in that it also involves figuring out where money came from and where it is going. Accordingly, the fight against money laundering encompasses regulatory authority and investigative tools—including suspicious activity reporting, informants, undercover investigations, asset freezes, and airport enforcement—that could help authorities investigate where money goes or comes from and therefore, how terrorism is financed. It therefore makes sense to think that one goal of the fight against money laundering is to make transactions traceable enough to enable investigators and regulators to detect and disrupt terrorist financing.[318] None of this suggests that the fight against money laundering is the only way or even the best way of disrupting terrorist financing. What should be clear instead is that policymakers view the fight against money laundering as a vehicle to achieve larger objectives involving the disruption of criminal finance, including terrorist financing. One consequence of the argument that the fight against money laundering disrupts terrorist financing has been that the aftermath of September 11 opened the door for laws further expanding prosecutors' power to combat money laundering, including, for example, creation of a new criminal offense of bulk cash smuggling[319] and further expansion of specified unlawful

[318] *See, e.g.*, *Money Laundering Investigations, Hearing Before House Committee on Banking and Financial Services* (June 11, 1998) (testimony of Raymond W. Kelly), *available at* 1998 WL 12761116 (requesting change in anti–money laundering criminal penalties to include terrorism among list of specified unlawful activities). Whether the fight against money laundering is actually able to deliver on this goal is, of course, another question. We might properly have skepticism over this issue given the limitations in investigative methods used to detect money laundering. *See* Part II.B, *infra*.

[319] USAPA Section 371 now prohibits the knowing concealment of more than $10,000 in currency or monetary instruments for the purpose of evading a currency reporting requirement when transporting or attempting to transport the currency into or out of the U.S. This crime is punishable by up to 5 years imprisonment, and the property involved in or traceable to the offense must be forfeited. *See generally* USAPA Title III (containing statutory changes premised on the connection between efforts to combat money laundering and the imperative of disrupting, terrorist financing).

activities for §§ 1956 and 1957,[320] regardless of whether these changes plausibly enhance the prospects for disruption of terrorist financing.

Perhaps an even more telling indication of the anti–money laundering system's grand ambitions is found in the nature of the laws and regulations that make up that system—which are not just focused on drugs, on cash, or simple penalty enhancement. Specified unlawful activities in the core anti–money laundering federal statutes range from sale of counterfeit aircraft parts to fraud to (recently) a full bevy of racketeering activities and crimes extraditable under multilateral conventions.[321] Specified unlawful activities also include offenses ranging from environmental crimes to murder–for–hire and precursor chemical offenses. The international laundering offense in § 1956 covers not only the movement of criminally derived proceeds out of the United States to hide them, but also the movement of money into or out of the United States to finance specified unlawful activities. Moreover, The Bank Secrecy Act's scope, as amended, extends to recordkeeping on monetary instruments and wire transfers. All of this suggests a concern with more than drugs (i.e., by covering white–collar offenses), more than cash (i.e., by covering wire transfers), and more than penalty enhancement (i.e., through the creation of a regulatory system for detection and audit trails). Then there are the laws designed to fight terrorist financing, which are not necessarily anti–money laundering laws in the technical sense of applying only to the disposition of criminal proceeds but are often referred to as part of the same system.[322] Suspicious activity reports are supposed to give bank employees a vehicle to report suspected activity linked to terrorism. These reports are analyzed (at least in theory) by FinCEN. Orders to block terrorist assets, like those designed to block the assets of narcotics traffickers, are implemented by OFAC.[323] Section 1956 now incorporates terrorist activity in its list of specified unlawful activity, both because RICO now includes terrorism as a predicate and because most of the offenses that are extraditable because of multilateral treaties involve what is ordinarily

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[320] *See, e.g.*, *supra* notes 147, 191, and 204 (discussing the expanded reach of USAPA).

[321] *See supra* note 17 (noting some offenses among the long list of predicates for18 U.S.C. §§ 1956 and 1957. *See also supra* Part I.B.2 (discussing USAPA's impact on the regulatory structure).

[322] A clear example of this asserted connection is in the history of Title III of USAPA, which makes pervasive reference both to terrorism and to money laundering.

[323] *See supra* note 195 (sources describing the scope of executive authority to block and freeze assets).

defined as terrorism, including threats to or violence against the civil aviation system, bombings meant to intimidate the public, and hostage–taking.[324]

Of course, the scope of all the laws and regulations designed to fight money laundering may strengthen the claim that its purpose must be in large measure to strengthen prosecutors' hand against some kinds of criminal defendants (namely, those whose alleged crimes have anything to do with money). As discussed earlier, there is something to this since it is almost impossible to deny that the criminal penalties and information that could be obtained through the operation of the anti–money laundering system can help prosecutors.[325] But even if this is true to some extent, it is worth noting that the system is not justified as a bald attempt to increase prosecutors' power (even if this is part of what it achieves), but as part of a systematic means of disrupting the financial aspects of crime. Moreover, the design of the system seems to undermine claims that policymakers and legislators were only concerned about bags of drug–tainted currency. Instead, both the rhetoric about the fight against money laundering and the statutes designed to carry out that fight suggest an interest in disrupting a larger universe of financial activity related to crime. That universe includes, among other things, all the specified unlawful activities that were long part of the core anti–money laundering criminal statutes and all the financial activities that might involve cross–border movements of currency (perhaps even including tax evasion).

In short, regardless of one's evaluation of what the fight against money laundering actually achieves, it is hard to escape the conclusion that the system was publicly justified on the basis that the fight would affect the financial gains that could be achieved from a broad range of crimes. To some extent, it was also designed to achieve this in principle, providing prosecutors and regulators with enough authority to punish a substantial range of involvement in the financial aspect of crime. According to the record, the paradigmatic scenario envisioned by legislative and executive branch officials at the time the major statutes were passed was that of a money laundering expert or facilitator with little if any involvement in the predicate crime. By targeting such people, the logic was, the government would have an effective tool to disrupt the possibility of achieving financial gain from a broad range of crimes. More recently

[324] *See supra* note 98.

[325] *See, e.g.*, *supra* notes 113-151 and accompanying text.

government officials insist that the system to fight money laundering should also be the primary vehicle to fight terrorist financing, especially once it is supplemented with the legal authority contained in USAPA.[326] The fact that some people have insisted that the system has quite ambitious objectives does not minimize the possibility that prosecutors, investigators, and some legislators recognized that the system's most direct result might simply be to make it easier to punish some people who might already be caught, or who might already be known but difficult to convict without the fight against money laundering. But neither should we ignore that the system has been publicly justified on the basis of the importance of disrupting criminal finance, because that public justification affects everything from financial institutions' compliance efforts to judicial responses in cases questioning the constitutionality of certain aspects of the fight against money laundering. When the Supreme Court weighed the constitutionality of the Bank Secrecy Act reporting requirements, it accepted the arguments Congress used to justify the fight against money laundering.[327] Whether this objective is achieved depends far less on the articulation of that objective than on the likely incentives of the players that run the system.

III. THE SYSTEM'S CONSEQUENCES

Broad grants of legal discretion are not turned into practical enforcement strategies by accident. Predictably, the operation of the system to fight money laundering appears to have been most directly shaped by the incentives of players who have a role in the system.[328] Legislators write and approve the substantive criminal laws that allow prosecutors to charge people for money laundering and related crimes.[329] Judges interpret those laws and in the process shape incentives of prosecutors and investigators whose work depends in part on building cases against suspected violators. Investigators work with the resources and tools at their disposal to target potential violators. Regulators administer a system of rules and civil penalties that often exists parallel to the criminal enforcement system, designed to supplement the work of the criminal justice system by providing it with information and to reduce the possibility of criminal violations by giving private parties incentives that make it more difficult to

[326] *See supra* note 22.
[327] *See supra* note 169.
[328] *See* Part IV, *infra*, for a more detailed discussion of some of these forces.
[329] *Id.*

commit crimes. Thus, the Bureau of Alcohol, Tobacco, and Firearms required federally licensed firearms dealers to conduct background checks on most firearms sale transactions,[330] and FinCEN promulgates regulations requiring banks to file reports of large currency transactions.[331] Beyond the government, financial institutions have a substantial stake in the way the system works, because they could face administrative, financial, and other burdens depending on the way laws are written, prosecutors charge, investigators detect, and regulators administer.

A. THE REALITY OF THE FIGHT AGAINST LAUNDERING

1. Result #1: Severe Penalties Focused on Predicate Offenders and Activity Involving Large Aggregations of Currency

This section analyzes the allocation of criminal penalties for laundering, particularly under the core anti–money laundering criminal penalties, 18 U.S.C. §§ 1956 and 1957. Obviously the criminal penalties and related forfeitures reach only a tiny fraction of laundered money. So penalties and forfeiture are not reaching the bulk of criminal finance. The question is then what is being reached, and what that tells us about the incentives of the major players in the system. Admittedly, the data used in this paper cannot answer every question about money laundering charges, convictions, or the role they play. For example, we do not know how many suspects are arrested for conduct connected to money laundering, or when in the plea bargaining process money laundering charges are added or dropped. But at least we can begin to understand what exactly is going on with money laundering charges and convictions.

a. Methods

Data were gathered from two major sources: a Bureau of Justice Statistics (BJS) database of records relating to federal criminal charges, and a random sample of fifty reported district court opinions and case dispositions, obtained through the Westlaw database, mentioning money laundering charges. (1) The Bureau of Justice Statistics maintains a database of records relating to all federal

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[330] 18 U.S.C. § 924 (2003). The statute provides for both civil penalties imposed through regulatory enforcement as well as criminal penalties.

[331] *See supra* notes 159-165 (discussing statutory and regulatory basis for currency reporting requirements).

charges for a given year (i.e., fiscal year 2000). Each record represents one offense charged against one person, so multiple records may correspond to a single indictment.[332] Data were extracted using SPSS code on file with author. (2) To provide for additional detail, I constructed a random sample of fifty reported district court opinions and case dispositions from among all such decisions available in Westlaw with dates between January 1, 1999 and May 15, 2002 mentioning "money laundering" and involving violations of 18 U.S.C. §§ 1956 and 1957. Each case was read and coded according to the following binary criteria: (1) whether the defendant was charged with a substantive predicate crime in addition to money laundering, or only with a money laundering offense;[333] (2) whether the offense involved currency; and (3) whether the offense was detected using informants or undercover work. If the case did not provide sufficient details to determine the answer, it was replaced with another case from the sample.[334] The remainder of the discussion below not focusing on the sources above involves analysis of previously–reported data of money laundering convictions from the U.S. Sentencing Commission, as well as doctrinal analysis of opinions interpreting the major federal anti–money laundering statutes (§§ 1956 and 1957), and sentencing defendants under those statutes.

First Conclusion: Money Laundering Charges Are Grafted Onto Charges for Substantive Offenses, and Penalties Tend to be Severe Compared to Criminal Statutes Used in Conjunction with Laundering

The first persistent result should be plain from the preceding discussion of the players' incentives. Not surprisingly, law

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[332] BUREAU OF JUSTICE STATISTICS, DATABASE OF FEDERAL CRIMINAL CONVICTIONS, 2000 (2001), *available at* http://fjsrc.urban.org/ (last visited Mar. 27, 2002).

[333] For the purposes of the coding "money laundering" offense refers to the statutory violations that the federal government classifies as "laundering" when deciding whether funds were forfeited by defendants because of a "money laundering" investigation. *See* 2002 ANNUAL STRATEGY, *supra* note 8, at A–2. The federal statutes listed include: 18 U.S.C. § 1956 (2000) (laundering of monetary instruments); 18 U.S.C. § 1957(2000) (engaging in transactions derived from unlawful activity); 18 U.S.C. § 1960 (operating an illegal money transmitting business); 31 U.S.C. § 5313 (2003) (failure to file a currency transaction report); 31 U.S.C. § 5316 (violation of currency and monetary instrument reporting requirements, and bulk cash smuggling); 31 U.S.C. § 5317 (2003) (forfeiture resulting from the failure to file currency and monetary instrument reports); 31 U.S.C. § 5324 (2003) (structuring financial transactions).

[334] Additional methodological details on file with author.

enforcement seizes and detects only the tiniest fraction of the total amount of money associated with crime.[335] Instead, the system tends to make available severe penalties against individuals already detected of committing some criminal activity, or people linked to large aggregations of physical currency. People committing federal offenses that can be predicates for money laundering (such as drug trafficking), for example, can now be charged with money laundering for doing almost anything in the world with money from specified unlawful activity, because of the watered down interpretations of the anti–money laundering statutes.

Criminal penalties for money laundering are severe. Sections 1956 and 1957, for example, provide for a maximum of twenty years and ten years imprisonment, respectively, as well as steep fines.[336] Moreover, until recently the relevant sentencing guidelines made punishment for money laundering offenses more severe than for the underlying crime. The guidelines have recently been amended to strengthen the link between punishment for money laundering involving a specified unlawful activity and the punishment for that underlying criminal activity. Nonetheless, prosecutors can still charge defendants with money laundering in addition to some other charge—worsening the potential punishment that a defendant faces given the facts of the case.

In fact, as Table 1 indicates, the vast majority of people charged with a federal money laundering offense were also charged with at least one other different kind of offense. This may not be altogether unusual as federal criminal charging patterns go, but it does raise threshold questions about the idea that the anti–money laundering criminal statutes are being used to target third–party launderers whose only (and indispensable) role in the criminal underworld is to hide money's origin, since the more that laundering charges were used against third–party launderers, the more we would expect laundering charges to be used alone. Not only that, but in the

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[335] In 1992, the Treasury Department's Asset Forfeiture Fund (which processes most annual forfeitures and seizures associated with federal criminal investigations) included $362 million. This pales in comparison to even the lower estimates of drug profits, and would be an even smaller fraction of total returns from crime if one also considered organized crime and fraud. *See* e.g., ONDCP REP'T, *supra* note 2, at 18 (estimating drug profits to be at least $49 billion in 1993).

[336] 18 U.S.C. §§ 1956 and 1957 (2001).

plurality of cases where money laundering is coupled with some other charge, money laundering carries the most severe penalties.[337]

Even in the minuscule number of cases charging money laundering where that offenses involving laundering constitute the only type of charge, the offense might still be a proxy for a predicate crime that is more difficult to make out. After all, prosecutors and investigators have strong incentives to use a money laundering violation as a proxy, and judicial interpretations of the core money laundering statues make it easy to establish a violation. Suppose, for example, that investigators learn about a prostitution ring, and prosecutors catch someone (call him John) spending money that can be traced to a prostitution ring but have trouble establishing John's position in the ring. Prosecutors may want to charge John with money laundering instead of going through the difficult process of establishing John's link to the prostitution ring. In such a scenario, the hardest thing prosecutors have to do is establish a link between the money John is spending and the prostitution ring (to satisfy the link to specified unlawful activity). If *that* link can be established and John spends more than $10,000 and uses a financial institution, though, then even a prosecutor with the skills of a trained monkey could make out a violation of § 1957.[338] A monetary transaction does not mean much beyond simply using a financial institution in some transaction connected to the criminally derived proceeds, and the statute's knowledge requirement can still be satisfied with a willful blindness argument.[339] It is hard to tell exactly what proportion of cases involving money laundering charges actually reflect substitution of laundering for predicate offenses that might have been detected but are hard to prove. The point is the ease with which a prosecutor can use money laundering charges to substitute for

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[337] The BJS data on case filings show that money laundering charges are the most severe or second most severe charges in the majority of cases where there is any money laundering charge at all. This shows that laundering charges are not mere technical afterthoughts. The severity of the sentencing guidelines applicable to money laundering until recently (and even the existing guideline) underscores the potential for laundering charges to be used to levy substantial punishments on predicate offenders. The Sentencing Commission also noted this trend in its own study. *See infra* note 343.

[338] Section 1957 requires the defendant to have engaged in a "monetary transaction," but just about anything involving a financial institution counts as that.

[339] *See supra* notes 116-119, discussing willful blindness and other doctrinal elements relevant to § 1957.

charges of committing some of the predicate crimes that might be more difficult to prove.[340]

Table 1

Federal Criminal Indictments for Core Money Laundering Offenses (2000), by Severity of Charge[341]

	§1956		§1957		Total §§1956 and 1957	
	#	%	#	%	#	%
Only money laundering charged	206	6.4%	33	6.3%	239	6.4%
Money laundering plus other charges	3,019	93.6%	487	93.7%	3,506	93.6%
Most severe charge	1,309	40.6%	147	28.3%	1,456	38.9%
Second most severe	889	27.6%	159	30.6%	1,048	28.0%
Third most severe	450	14.0%	90	17.3%	540	14.4%
Fourth most severe	241	7.5%	48	9.2%	289	7.7%
Fifth most severe	130	4.0%	43	8.3%	173	4.6%
Total All	3,225	100.0%	520	100.0%	3,745	100.0%

The absence of many cases where defendants were charged only with money laundering would appear to belie the idea that third–party launderers (wherever they are) attract a major chunk of prosecutorial attention. Most federal criminal indictments include more than one type of count, of course, but it is still telling that prosecutors making money laundering charges so often do so in conjunction with a battery of other charges that suggest the alleged launderer was more than just a third–party broker of some kind. Nonetheless, the charges indicated above might tend to be technical violations like lying to a

[340] The point is not that all or even most predicate crimes (i.e., drug trafficking, murder–for–hire, environmental crime, or anything else) are always harder to prove than money laundering. Depending on the facts linking the defendant to the predicate crime, sometimes a money laundering might be easier, harder, or just as hard to prove than a predicate crime.

[341] Data obtained from the Bureau of Justice Statistics criminal charges database (2000 figures). *See supra* note 332.

criminal investigator, instead of substantive crimes like drug trafficking. To make sure the effect was not just technical violations, I reviewed a random sample of cases qualitatively and still found a most pronounced pattern of money laundering being used against predicate offenders. The result was similar.[342] As the Table 2 below illustrates, the vast majority of defendants in the cases in the sample were charged for laundering as well as an underlying substantive offense such as fraud or drug trafficking. Virtually none of the cases where defendants were charged with a substantive offense in addition to laundering involved any laundering activity more sophisticated than depositing physical currency in a financial institution, conveying property, or (rarely) sending a simple domestic or international wire transfer.

Table 2

Sample of District Court Cases Involving Money Laundering Charges Under 18 U.S.C. §§ 1956 or 1957 (2000-2002)

	§1956	§1957
Charged for laundering and substantive predicate offense	74%	81%
Laundering scheme connected to physical currency	77%	64%
Investigation involved undercover operation or informant	32%	25%
Predicate offense involved drugs	43%	27%

Finally, the one major government study bearing on this issue involved the review of conviction files, which also showed a massive focus on convicting predicate offenders for laundering. In 1992, the U.S. Sentencing Commission's Money Laundering Working Group undertook what is apparently the only government study of sentencing practices under the money laundering guidelines (at the time, 2S1.1 and 2S1.2, corresponding to §§ 1956 and 1957, respectively).[343] The study examined a random sample of money laundering cases and found that defendants sentenced for money laundering under §§ 1956 or 1957 participated in the underlying

[342] *See supra* note 333 and accompanying text (methods) for details of how the sample was selected and coded.

[343] *See* U.S. SENTENCING COMM., MONEY LAUNDERING WORKING GROUP, REP'T SUMMARY (1995), *available at* http://www.ussc.gov/moneylau/monisum.htm (last visited June 2, 2002).

criminal conduct in 93.6% of cases in the sample.[344] The Working Group also found that offenders charged under 2S1.1 tended to be subject to higher offense levels than for the underlying criminal activity.[345] Immediately following the study, the Sentencing Commission supported changes consolidating 2S1.1 and 2S1.2 and bringing the offense level for money laundering more into line with the underlying offense, but Congress passed and the President signed a law barring the change from taking effect.[346] More recent data from the Sentencing Commission also reveal that 83% of individuals convicted of money laundering in 2002 did not receive any sort of enhancement for being the leader, manager, or organizer of money laundering activity, suggesting that people convicted are not sophisticated launderers.[347]

Consider the consequences. The fight against money laundering is consistent with—and strengthens—the trend toward more prosecutorial discretion and power. Prosecutors can use laundering charges to expand the scope of evidence that can be admitted at trial

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[344] The study highlights the extent to which prosecutors and investigators used money laundering charges to enhance the penalties faced by defendants who could already be convicted of the underlying crime:

> The working group found that 70 of the 79 cases (88.6%) involved criminally derived funds. Of the nine other cases, eight involved government "sting" operations. . . and one lacked sufficient information to determine the source of the funds. The defendant participated in the underlying criminal conduct in 93.6% of these 70 cases.

Id. at 2.

[345] *Id.* at 3 ("The money laundering offense level was higher than the underlying conduct's offense level in 52.5% of the drug cases and in 96% of the non–drug cases"). The working group took another random sample of cases in 1995 to update the 1992 results and found the pattern continued to hold true, noting that "[t]he inclusion of a money laundering count raised the offense level 94.5% of the time for fraud." Moreover, "[i]n approximately 75% of the cases, the increase was at least four levels." Perhaps in reaction to this, judges sentencing money laundering defendants made downward departures for 33% of all defendants, in comparison with a downward departure rate of 19% for other offenses. *Id.*

[346] *Id.* Legislators' interest in setting high penalties and responding to interest group pressure from prosecutors and investigators is consistent with passage of the law blocking the change. The money laundering guidelines were finally consolidated and adjusted in 2001 and took effect in November of that year. *See* U.S. SENTENCING GUIDELINES § 2S1.1 (2002).

[347] *See* 2002 ANNUAL STRATEGY, *supra* note 8, at 5. Because of the relatively draconian penalties associated with laundering, the low rate of enhancements could reflect prosecutors' or judges' reluctance to ask for all possible enhancements or plea bargains. But given the frequency of charges against predicate offenders (including many who acted essentially alone), this explanation by itself seems implausible. It seems at least as likely that, while statutory elements offer little constraint, the enhancement provisions of the Sentencing Guidelines do.

or documents that can be subpoenaed during the course of an investigation—even if the charges are eventually dropped.[348] What is more, assuming that anti-money laundering criminal laws allow prosecutors to enhance the potential sentences, fines, and extent of forfeiture faced by defendants when compared to the penalties faced without such laws, then the bargains struck between defendants and prosecutors are probably different. What drives a defendant's risk of facing these penalties is not how culpable one defendant is compared to another (assuming we could agree on a definition of culpability), but how easy it is to detect the defendant's laundering. As with every criminal offense, the penalties are not necessarily distributed evenly among all the people committing the offense defined by the statute. Instead, people run the risk of being prosecuted for money laundering depending on the probability that their conduct is detected. To the extent that people are being charged with money laundering because they are detected for committing a predicate offense—such as drug trafficking—then charging patterns for money laundering will reflect any of the inequities and biases inherent in the detection of the predicate crime. In fact, the number of laundering charges probably understates the extent to which the availability of laundering charges casts a shadow on the bargaining process between federal prosecutors (or state prosecutors who routinely use state laundering charges) and defendants, since prosecutors can brandish the prospect of a laundering charge without actually issuing the charge.[349]

Second Conclusion: Characteristics of Cases in the Sample of Recent Laundering Cases is Consistent with the Limitations in Detection Strategies Described in Part I

Returning to Table 2, consider how the sample of cases also reveals the use of informants and undercover agents in about a quarter of the cases, a substantial focus on drug laundering, and a disproportionate emphasis on cash laundering schemes. The random sample of district court laundering cases therefore also highlights

[348] Money laundering charges help in the introduction of evidence and the conduct (especially availability of documents through subpoena) of investigations, because if a particular document or conduct appears reasonably relevant to the laundering charge, ordinarily it can be introduced.

[349] The reason the threat to charge is credible, moreover, is because the doctrine interpreting the core laundering statutes makes it cheap for prosecutors and investigators to tack on money laundering charges with minimal additional facts (beyond a predicate crime that involves money or even property in some way). *See supra* note 348 (discussing the ease with which prosecutors can tack on laundering charges to substantive criminal offenses).

trends consistent with the operation of the detection strategies followed above. Nearly half the cases mentioning money laundering charges involve drugs, which suggests an investigative focus on drug laundering, and (probably) on developing laundering cases from drug investigations. The sample also shows that a large proportion of laundering cases involve undercover work, a proportion that probably understates the number of cases involving undercover work because not all district court opinions would explicitly discuss whether undercover techniques were used in an investigation. All of this is consistent with the view that detection systems rely heavily on existing investigative methods (hence the connection to drugs and the use of undercover agents) or looking for large aggregations of physical currency. By contrast, the cases reviewed do not provide any indication that CTRs or other reporting requirements assisted in the detection of offenses (even if it is plausible that they assisted in the prosecution). What few reports exist on the usefulness of reporting requirements are consistent with the view that, if reporting requirements help, they do so at the ex post, prosecution stage and not in detection.

The striking degree to which laundering prosecutions appear to focus on predicate offenders partly reflects the laundering statutes' structure and their interpretation—making it so cheap for prosecutors and investigators to pursue charges with minimum work once they detect predicate offenders touching money. The upshot here is that third–party launderers are not the subject of many laundering charges or convictions. If they were, then there would be many more people convicted of laundering without much (if any) involvement in predicate crimes. Instead it is the predicate offenders who end up being prosecuted for laundering. Some high profile exceptions like Operation Casablanca seem to break the mold here, but in large measure it was the government who became the third–party launderer and the scheme largely ended up resulting in the prosecution of drug traffickers. The preceding conclusions shed light on whether to accept or reject the theory that money laundering investigations, charges, and prosecutions target primarily third–party launderers and leaders of large–scale criminal organizations. The data indicate this is not the case: money laundering defendants are, for the most part, also drug and fraud defendants whose main transgression is an underlying predicate crime, not laundering or the financing of crime. Using the criminal penalties against offenders already detected is the path of least resistance, reflecting limits on what prosecutors and investigators can detect.[350] Where prosecutors use laundering statutes to charge a defendant who is also charged with a predicate offense, it becomes exceedingly simple to prove knowledge—because if a defendant is engaged in conspiracy to import cocaine, for example, it would be hard for him to prevail when arguing he did not know that certain money represented criminally–derived proceeds (or the equivalent).[351] Prosecutors prefer more, rather than less, discretion to decide whom to charge and how to charge them.[352] In contrast, targeting the sorts of third–party launderers and higher–level criminals that provided much of the justification for the system is much more difficult because of limitations in detection strategies since these are the people who amass the greatest expertise in concealing the origin of money, and both domestic and international bank secrecy laws get in the way of detecting people involved in criminal finance.[353]

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[350] In principle, prosecutors could insist that investigators seek (i.e., detect) more third–party money launderers, or some other kind of offender. But even if prosecutors did this, it is hard to force law enforcement bureaucracies to accomplish the task, particularly when their detection strategies are not designed to detect such offenders. In the meantime, prosecutors have no incentive to refrain from using the anti–laundering criminal statutes against defenders whose conduct meets the elements of the offense.

[351] Even if the facts did not allow a prosecutor to use the commission of the predicate crime directly in fulfilling the knowledge requirement, a laundering charge makes it easier for prosecutors to build a circumstantial case and introduce relevant evidence.

[352] *See* Stuntz, *supra* note 301.

[353] Statutory provisions in the Bank Secrecy Act allow investigators to get records of bank customers considered suspicious in the U.S. *See* Part I.B, *supra*. The USAPA further expands law enforcement power to obtain records of bank customers. *Id.* For example, new regulations implementing USAPA Section 314 allow FinCEN to request transaction information about an individual it considers suspicious. But ordinarily, it is not the bank records that would make FinCEN (or any other law enforcement agency) suspicious, but rather the preexisting suspicion (because of an informant's report, for example) that would lead investigators or analysts to seek the bank records. Prosecutors can also obtain records through traditional subpoenas; in both cases, government authorities (investigators and prosecutors) must have some independent reason to focus on the individual in question; for example, the individual may be suspected or known as an offender who committed a predicate crime. In contrast, when investigators know who committed a crime, they can start tracing where the funds came from. Or they can rely on informants or undercover operations. In short, the statutory provisions allowing law enforcement to have access to records and the traditional subpoena methods of obtaining records are useful where law enforcement already knows about suspicious individuals or organizations. These methods are less useful when law enforcement does not even know that someone is suspicious in the first instance.

Targeting terrorist financing is probably even harder with the existing structure—because some of the telltale signs that might be associated with traditional drug money laundering (i.e., connection to criminal networks that can be infiltrated by informants, or large currency transactions) are unlikely to be present. If they were caught, terrorist financiers would be subject to a bevy of criminal penalties, including among others those in § 1956(a)(2)(A).[354] Yet again, though, the problem is detection. The upshot on terrorist financing is this: when the President talks about "following the money trail" to "starve terrorists of financing,"[355] what he really means is we will freeze the accounts of people whom we suspect are involved in terrorist financing, if we are lucky enough to know their names.[356]

The patterns described above are hard to defend or to reconcile with the justifications initially offered for the fight against money laundering—and highlight how statutes are used for purposes other than how they are justified. The amendments to anti–laundering and related terrorist financing laws wrought by USAPA's Title III only continue this trend.[357] Assuming the legislature has priced predicate

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[354] 18 U.S.C. § 1956(a)(2)(A) (2000) (as amended by USAPA) (international movement of monetary instruments or funds with intent to promote a specified unlawful activity).

[355] Indeed, this is exactly why the September 11 terrorists did not trip the detection systems designed to identify patterns of criminal financial activity. *See* James Risen, *Money Transfers by Hijackers Did Not Set Off Alarms for Banking Regulators*, N.Y. TIMES, at A16 (July 17, 2002):

> Financial safeguards also failed to detect the money trail behind the September 11 plot. Even when the hijackers began to receive much larger amounts of money, their transactions did not prompt any of the banks that they were using to file federal reports of suspicious activity. In fact, because they received most of their money through wire transfers of funds directly into commercial bank accounts, the hijackers were able to avoid having to make large cash deposits, and so skirted several important bank reporting requirements, officials said.

Id.

[356] The Office of Foreign Assets Control implements an executive order's mandate to block the assets of specific individuals or organizations by instructing banks to block the assets of individuals on the basis of their name. Sometimes, the blocking orders include alternate names and spellings in order to raise the probability that the suspected target's assets will be blocked—though such a practice obviously expands the possibility that unsuspected account holders will be affected.

[357] For example, the anti–money laundering and terrorist financing provisions of USAPA were constantly justified on the basis of their importance to the war against terrorism, yet for the most part the new regulatory and criminal investigation tools are not limited to anti–terrorism uses (nor is terrorism defined in substantive terms that could render it useful as a means of legally limiting the Act's scope). Indeed, in Congressional testimony during January 2002, the Assistant Attorney General for the Criminal Division (Michael Chertoff) simultaneously lauded the anti–terrorist financing provisions of USAPA as critical to the

offenses anywhere near the appropriate range to deter the conduct in question, then the addition of money laundering charges against predicate offenders (as opposed to against third-party launderers) should have little if any effect on disrupting criminal finance. Moreover, it would be hard to argue that people caught handling currency and subsequently charged with a laundering offense are more culpable than traffickers who receive their money in bank balances abroad. Indeed, the former kind of defendant is probably likely to be poorer and less compensated than anyone who enjoys the financial fruits of drug trafficking by accessing a bank account of "clean" funds. This is true despite the evidence recognized even by

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terrorism investigation and yet one of the few concrete examples of the Act's alleged usefulness to prosecutors involved a prosecution that has no connection to terrorism:

> Section 319(a) provided us with a new tool to seize and forfeit criminal assets deposited into a foreign bank account through the foreign bank's correspondent bank account in the United States. This section provides that assets which are subject to forfeiture in the United States, but which are deposited abroad in a foreign bank may be deemed to be held in the foreign bank's correspondent account in the United States. Thus, where a criminal deposits funds in a bank account in a foreign country and that bank maintains a correspondent account in the United States, the government may seize and forfeit an equivalent sum of money in the correspondent account, irrespective of whether the money in the correspondent account is traceable to the proceeds deposited in an account held by the foreign bank.
>
> Although I was recused from the case because of a past representation, I can report that last month we recovered almost $1.7 million in funds using Section 34419, which will be used to compensate the victims of a fraud scheme. On January 18, 2001, a grand jury in the Southern District of Illinois indicted James R. Gibson for various offenses, including defrauded clients of millions of dollars by fraudulently structuring settlement agreements for numerous tort victims. .... Following the passage of the Patriot Act, and interagency consultation, the Criminal Division authorized the use of the Section 319(a) authority [to seize Gibson's assets].

Anti-Terrorism Money Laundering Enforcement: Hearing on The Financial War on Terrorism and the Administration's Implementation of the Anti-Money Laundering Provisions of the USA Patriot Act, 107th Cong. (2002) (statement of the Honorable Michael Chertoff, Assistant Attorney General, Criminal Division), *available at* 2002 WL 2010149. Whatever else one says about the USA Patriot Act, it would be virtually impossible to argue that the law's major articulated purpose is anything other than to combat terrorism and address the perceived threat of terrorism arising in the wake of September 11. Indeed, the core of USAPA appears in large measure to consist of proposals already rejected by Congress. Of course it is possible to find oblique references to "other purposes" in the act, and even to suggest that the larger system of criminal finance connecting drug traffickers and fraud perpetrators to banks somehow propitiates the conditions that allow terrorist financing to flourish. But these arguments require analytical support, which is often not forthcoming (and which, for example Assistant Attorney General Chertoff did not provide in his January 2002 testimony). This sort of legal "mission creep" could be understood as an example of the slippery slope discussed *infra*. Whether one chooses to use this metaphor or not, this sort of bait-and-switch phenomenon is probably driven in large measure by the agency problem arising from law enforcement authorities' dual role as experts on the threat society faces and major beneficiaries' of legal changes.

executive branch officials that a substantial number of financial transactions connected to crime do not involve physical currency at all.[358]

By the same token, it is not clear why people who commit an offense for which the legislature has already set a punishment should be subjected to still harsher punishment when the only thing they have done in addition to the predicate crime is to handle the money derived from it. Suppose a mid-level drug distributor accepts $5000 supplying some ounces of cocaine, and deposits the money at a local bank branch. Although the $5000 does not trigger a mandatory CTR, suppose (for the sake of argument) that an astute assistant supervisor at the branch decides to file a SAR, perhaps because the drug distributor's address information cannot be confirmed, or (for better or worse) because the distributor has a Latino surname and dresses in flashy clothing. Assuming (perhaps heroically) that the SAR gave rise to an investigation, investigators and prosecutors could easily decide to charge the distributor with distribution as well as money laundering. All this despite the fact that one might expect someone who commits a crime to do *something* with the money other than just keep it in a cellar. So what happens when the deposit of the $5000 (or nearly any other disposition of that money) ends up giving rise to the money laundering offense? One could argue that the distributor is twice facing punishment for what is at some level just one offense—distributing drugs for money—that the legislature has already decided to punish quite severely.[359] In an age of three strikes, it may seem like a lost cause to be arguing that drug distributors, or others among the unpopular constituency of criminal defendants, are facing punishments that are too severe. Regardless of whether criminal defendants are politically popular, though, the criminal justice system's claims of rationality and justice might be viewed as suspect if it functions in a manner that reflects blatant intellectual dishonesty, or a shallow understanding of the practical realities of crime.[360] The sentencing guidelines do nothing to remedy this

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[358] *See, e.g.*, Mary Lee Warren testimony, *supra* note 10 (acknowledging problems with non-currency money laundering, but essentially conceding defeat and giving up the fight).

[359] Note that the consequences of the money laundering charge arises even if the distributor is sentenced to serve sentences concurrently for the two offenses because if one charge is dismissed on appeal or for other reasons the other still stands.

[360] One might be able to make a similar critique of conspiracy law, where some offenses that are almost impossible to commit (such as bank robbery) without engaging in some sort of group activity, and therefore, without engaging in conspiracy, thereby triggering penalties

problem, even if they have been recently amended to make punishments for laundering more commensurate with the punishments for the underlying offenses in question: people can still be punished for both the predicate and money laundering when they have done little more than committing the predicate offense and handling the resulting money in some way.[361] Indeed, over time courts have interpreted the relevant sentencing guidelines in a manner that makes it easier to sentence someone to a severe punishment for money laundering even when that activity was quite incidental to the underlying criminal activity.[362]

Admittedly, some questions cannot be answered from the present sample. Because the analysis of recent cases selected at random relies on dispositions or opinions (however long or brief) available in legal research databases, the focus is on what can be discerned from such records—not all of which describe the circumstances under which the alleged criminal financial activity was detected. For example, one might speculate whether the fight against money laundering at least serves to help detect large numbers of other non–laundering crimes given all the reporting requirements.[363] This turns out to be highly unlikely once we consider the detection strategies

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for both the underlying offense and the conspiracy. A number of critiques of criminal justice focusing on the poor fit between enforcement and normative goals.

[361] For a cogent explanation and empirical analysis of the impact of the Federal Sentencing Guidelines, *see* James M. Anderson et al., *Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines*, 42 J. L. & ECON. 271 (1999) (concluding that the expected difference between two typical judges in average sentence length was about 17% in the years immediately before enactment of the Guidelines and 11% in the years following adoption).

[362] *See* United States v. Diaz, 245 F.3d 294 (3rd Cir. 2001).

[363] If one believed this theory, one might conjecture that investigators and prosecutors might be developing cases that involve money laundering and related charges against predicate offenders (which are part of the present sample) that could have been detected using anti–money laundering regulations. Virtually none of the cases in the sample provided fact descriptions that would easily allow one to make the inference that reports required by the Bank Secrecy Act or other regulatory requirements had assisted in detection. This is consistent with qualitative accounts and press reports suggesting that such requirements are little used in ex ante detection, even if they are still conceivably useful to law enforcement for the ex post phase of criminal investigation and prosecution. What the existing sample of cases cannot shed light on is whether cases that do not lead to laundering charges might have still been detected through anti–laundering regulatory requirements. Nonetheless, it seems hard to imagine that the reporting requirements and investigative methods related to financial activity would be such a boon for detecting non-laundering activity if they have limited potential to detect financial offenses. Moreover, if non-laundering activity were detected using reporting requirements, the low statutory threshold for charging financial offenses would give prosecutors an incentive to also bring such a charge. *See infra* note 389.

alongside the legal doctrine interpreting the laundering statutes and the incentives of investigators and prosecutors. Since the interpretation of the laundering statutes makes it so easy to charge predicate offenders with laundering (a development borne out by the data), then we should expect prosecutors to charge predicate offenders *detected* because of their financial behavior with laundering as well as the predicate crime. For reasons discussed above, the laundering cases that are made do not seem to involve substantial laundering activity beyond simply the commission of the predicate crime, nor do they seem to have been detected because of laundering. So if we cannot view the existing trove of laundering cases as an indication of successful detection strategies at work, then neither can we view the large number of drug and other criminal prosecutions not involving laundering as a testament to the fight against laundering's effectiveness in detection.

Third Conclusion: A Statutory Scheme At War With Itself

This use of the anti-money laundering criminal statutes to disproportionately target people who are either committing a predicate offense or making cumbersome cash-related transactions may be strikingly at odds with the prospective uses one might have imagined from the legislative history.[364]

A major reason why prosecutors and investigators find it easy to make laundering charges and to achieve laundering convictions is because courts have interpreted the laundering statutes' ambiguities in a manner that lowers the threshold of both the act and intent requirements necessary to trigger §§ 1956 and 1957.[365] There is a hint of perversity in the resulting charging and conviction patterns described above, which highlight how in some sense the statutes, as interpreted, are at war with the most defensible account of their purpose. By setting lower act and intent thresholds, the core laundering laws eviscerate the legal distinctions between the sort of laundering that could most significantly enhance the return from crime and the sort of financial activity that is potentially more cumbersome for criminals yet is referred to as "laundering" merely because of the circular logic that it triggers criminal liability under an anti-laundering statute.

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[364] *See supra* note 308, in Part II for a discussion of the legislative history of the anti-money laundering statutes (emphasizing the goal of increasing criminals' cost of engaging in efficient financial transactions).

[365] *See supra* Part I.B.1, describing the statutory scheme in detail.

An illustration: in principle, anti–laundering laws are supposed to punish people not for the underlying criminal offense (even if it is meant to produce financial gain), but for engaging in the sort of activity that makes it easier to enjoy that profit—which is why one premise behind § 1956 is to punish a perpetrator's effort to conceal money's link to crime. Yet the wide interpretation of the statute instead tends to criminalize a range of conduct involving money obtained from crime regardless of whether the offense involves much concealing or elaborate financial footwork.[366] So the statutory scheme as interpreted seems to defeat its own purpose by failing to distinguish between, for example, criminals' elaborate transactions at financial institutions—the alleged ill to which the statute was addressed—and bulk currency smuggling, which is the more inefficient and costly alternative that one would hope criminals would adopt as a substitute.[367] Similarly, if one of the problems that the anti–laundering criminal statutes targeted was the use of special skills or knowledge to launder (either directly or by hiring someone with substantial skills in this domain), then the statutes' low threshold for convicting someone who has not hired a third–party launderer or used specialized knowledge seems at cross–purposes with one of the articulated statutory justifications.[368]

One might think of various responses to this critique. One is that prosecutorial discretion actually focuses prosecutions on the more significant launderers. The charging and conviction patters discussed above, though, reveal exactly the opposite—where the most discernible focus is on predicate offenders whose criminal conduct hardly involves elaborate laundering activity. Another argument might be that perpetrators are not sensitive to such small distinctions

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[366] *See id.*

[367] Not only are a host of activities involving bulk currency smuggling arguably criminalized under § 1956, but bulk currency smuggling is also criminalized separately under USAPA. Consider a description of a recent money laundering case:

> A New York City policeman pled guilty in March 2002 to laundering between $6 and $10 million obtained from the sale of drugs in the New York City area. Proceeds of the drug sales were driven to Miami, Florida, and delivered to various businesses, which accepted the drug money as payment for goods, such as video games, calculators, print cartridges, bicycle parts and tires, which were subsequently exported to Colombia.

2002 ANNUAL STRATEGY, *supra* note 8, at 34. Although the policeman's behavior is obviously reprehensible, there is something slightly odd about a conviction for laundering when at least some of his behavior reflects precisely the sort of inefficient transacting by criminals that the rest of the system (i.e., including the currency reporting requirements, for example) is designed to promote.

[368] *See* Part I.B.1, describing the statutory scheme in detail.

in statutory interpretation; instead they are likely either to know there is a laundering statute and be deterred by it or to ignore it altogether. This is possible. Yet the statutes are founded on the sort of "best case" scenario that actors in the system behave something close to rationally. If not, one wonders whether any of the premises of the system make sense, whether offered by legislators ex ante or by executive branch officials and scholars post hoc. Virtually all the justification offered for the fight against laundering depends on the assumption that people whom the statute seeks to affect act rationally, or at least rationalistically.[369] So if laundering penalties are not providing a means of focusing punishment on the more "harmful" criminal activity, then one might wonder why the statutes could not (should not?) be replaced with simple, across–the–board penalty enhancements.[370] Last is the argument that maybe the statutes (as interpreted) no longer distinguish between degrees of laundering activity, but the Sentencing Guidelines do.[371] Although the question of how the Guidelines are used is empirical in principle, the discussion that follows on sentencing inconsistencies does not bode well for this argument. It is doubtful whether the Guidelines are used with the consistency necessary to send the message that different kinds of laundering activity are reliably associated with specific kinds of sanctions.

Fourth Conclusion: Judges Seem to React to Laundering Charging and Conviction Patterns by Making Inconsistent Departures on the Sentencing Guidelines

In fact, the stiff penalties levied on people already subjected to substantial punishment for predicate crime not only reflects inequities

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[369] *See supra* Part II.A, explaining the justifications for disrupting criminal finance (and thus, for fighting laundering) that depend on the implicit assumption that raising the marginal cost of perpetrating crime (or, conversely, lowering the marginal return) can reduce criminal activity.

[370] The positive (as opposed to normative) answer is, of course, almost certain to be a function of politics. Regardless of the purposes served (or not served) by the actual operation of the system, legislators may have an interest in calling for, supporting, and achieving passage of criminal statutes that send a signal about their concern regarding the offenses. Thus, even though the financing of terrorist activity is an offense that can lead to a conviction under 18 U.S.C. § 1956, the most recent Annual Money Laundering Strategy still calls for Congress to pass a separate offense criminalizing the financing of terrorism. *See* Part IV.A, *infra*, for a more detailed discussion.

[371] The argument here would be that the Sentencing Guidelines would adjust the offense level for how elaborate the laundering scheme is. *See generally* U.S. SENTENCING GUIDELINES MANUAL (2001).

in the detection process but also drives them in the sentencing process. Federal judges must sentence defendants in accordance with the U.S. Sentencing Guidelines, but they retain some flexibility to make some downward departures.[372] The Sentencing Commission found in its study that the rate of downward departures for money laundering cases was particularly high. To a striking degree courts making (or appellate courts accepting) downward departures in money laundering cases appear to justify their departures by critiquing the practice of using money laundering charges against predicate offenders.[373] If judges engaged in such a practice consistently, substituting downward departures for discretion in interpreting the elements of the offense, perhaps the application of the laundering offenses would be less of a concern. But not all courts accept such departures where predicate offenders are charged with money laundering.[374] Some of the differences probably depend on

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[372] *See* Koon v. United States, 518 U.S. 81, 92 (1996) (holding that judges must follow the sentencing guidelines, which mandate a range of appropriate punishment based on the offender's criminal history and the characteristics of the offense).

[373] The long list of cases includes: United States v. Smith, 186 F.3d 290, 299–300 (3d Cir. 1999) ("The fact that the money laundering statute facially applied to the defendant's activity was insufficient to mandate the application of U.S.S.G. § 2S1.1 because [defendant's] conduct. . . was atypical."); United States v. Woods, 159 F.3d 1132, 1135 (8th Cir. 1998) (downward departure upheld from money laundering Guidelines because money laundering offense played "minor" role); United States v. Gamez, 1 F. Supp. 2d 176, 183 (E.D.N.Y 1998) (motion for downward departure granted, because no highly organized money laundering scheme existed); United States v. Bart, 973 F. Supp. 691, 696–697 (W.D. Tex. 1997) (departing downwards from money laundering guidelines because the case did not involve substantial connection to organized crime or drugs).

[374] *See, e.g.*, United States v. Charles, No. 98–4010, 1998 WL 539469, at *22 (4th Cir. Aug. 25, 1998) (affirming district court decision that it lacked the legal authority to depart from the applicable money laundering guidelines on the basis of lack of severity in the money laundering conduct); United States v. Adams, 74 F.3d 1093, 1103 (11th Cir. 1996) (deciding that the district court lacked authority to make downward departure from the money laundering guidelines because it would have effectively nullified the jury's finding of guilt on that charge); United States v. Pierro, 32 F.3d 611, 620 (1st Cir. 1994) (finding that departure from money laundering guidelines is not warranted because the defendant's conduct fell within the language of the money laundering statute, regardless of the scheme's complexity); United States v. Rose, 20 F.3d 367, 374–75 (9th Cir. 1994) (concluding that a downward departure was not appropriate on the basis of the fact that, if the prosecutor had charged the identical conduct under another statute, it would have allowed for substantially less severe punishment). One could write a traditional law review analysis about which of the two trends is correct given the relative degree of ambiguity in the factors courts can use to make downward departures and the deferential standard of review. The larger point, though, is to highlight that the use of downward departures has probably not lowered all or most laundering sentences levied on predicate offenders but has probably made them more

case–specific factors, but something else seems to be at work: judges in cases with similar fact patterns appear to have different visceral reactions to the use of money laundering charges as penalty enhancements, which leads them to make different conclusions about the extent to which downward departures are possible for people charged with money laundering as well as predicate offenses.[375]

An example: two cases involving defendants charged with food stamp fraud and money laundering involve similar facts (except for the amount of money laundered) but widely disparate sentences, with the defendant who laundered more money receiving a substantially lower sentence. In *United States v. Caba*, the defendant committed a long–running food stamp fraud from which he laundered $11,700,000 over a two–year period.[376] At sentencing, the trial court granted the defendant's request for a downward departure, accepting the argument that the laundering conduct fell outside the "heartland" of money laundering offenses.[377] As a result, the defendant received a sentence of thirty to thirty–seven months imprisonment instead of the twelve to fifteen year sentence that would have resulted if the court had not granted the downward departure.[378] Compare this with *United States v. Arnous*, where the defendant was also convicted of food stamp fraud and money laundering involving the equivalent of $1,056,000.[379] The trial court in this case refused to grant a

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inconsistent, thereby thwarting what was supposed to be a major reason for the Sentencing Guidelines.

[375] In more formal terms, the contention is that federal judges could be arrayed ordinally in accordance with their rejection of the apparent mis–pricing of predicate offenses arising from the use of predicate as well as money laundering charges. The higher the level of rejection from a judge, one might imagine, the more probable that a given fact–pattern involving such charging will lead to a downward departure. Another factor affecting the probability of a downward departure is whether the offense involves drugs, in which case some courts satisfy themselves that Congress intended the severe money laundering penalties to apply (even if there is little evidence that Congress intended the penalties to apply routinely to drug offenders who essentially only committed a predicate crime). *See, e.g.*, *Smith*, 186 F.3d at 298 (finding clear legislative mandate that the money laundering statutes would be used against drug dealers). Courts' penchant to make much about the distinction between drug and non–drug offenses (instead of drawing a distinction, say, between money laundering committed by a predicate offender versus a third–party) seems strange given the long list of specified unlawful activities including a large number of "white–collar" offenses.

[376] 911 F. Supp. 630, 632–633 (D. N.Y. 1996), *aff'd* 104 F.3d 354 (2d Cir. 1996).

[377] *Id.* at 642. The court cryptically noted that the type of laundering committed did not justify a 10–year prison sentence.

[378] *Id.*

[379] No. 96–6275, 1998 WL 136533, at *4 (6th Cir. Mar. 16, 1998).

downward departure, resulting in a guideline sentence of ten years in prison and three years in a supervised release program.[380] Sentencing disparities like those between *Caba* and *Arnous* make it harder still to defend the normative legitimacy of using money laundering charges to increase the penalties of predicate offenders.[381] Although the guidelines applicable to the core money laundering offenses have recently been amended, the basic dynamic still applies: the watered–down statutory elements for money laundering make defendants face substantial sentences under the guidelines even if they have done little more than commit the underlying predicate act, a development to which judges are likely to continue reacting unevenly by doling or withholding downward departures.[382]

A facile explanation for the sentencing disparities—and perhaps even the draconian impact of the money laundering statutes themselves—is to note that the problem lies with prosecutors' "mistaken" drive to use laundering charges and the corresponding guidelines for non–drug related offenses.[383] This view misses the point, since §§ 1956 and 1957 include a large number of non–drug offenses among their predicates. Perhaps a more defensible claim is that the paradigmatic villain the statutes were designed to target was not the person who commits a crime (whether involving drugs or "white collar" fraud) and engages only in the minimum amount of financial activity designed to complete the offense.[384] In contrast, one

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[380] *Id.* (upholding the district court's sentencing determination). The Sixth Circuit noted that the trial court distinguished *Caba*, 911 F. Supp. at 632, on the basis of the absence of mitigating circumstances in *Arnous*. Yet the allegedly mitigating circumstances to which the Sixth Circuit alludes largely consist of the absence of anything significant to distinguish the money laundering scheme from the underlying offense. On that score, one could easily argue that *Arnous* poses essentially the same situation. Arnous was not laundering money for others, nor was he engaging in activity that allowed him to expand to other sorts of offenses.

[381] Neither the differences in the facts of the underlying fraud nor the differences in the laundering process appear to provide any justification for the disparity. *Compare Arnous*, 1998 WL 136533, at *2, (describing Arnous' scheme as the trafficking of food stamps and laundering of them through the use of supermarkets), *with Caba*, 911 F. Supp. at 632, (food stamp laundering scheme involved the purchase of them for a fraction of the cost).

[382] For an extended review of some of the disparities in money laundering cases involving so–called "white–collar" offenses, *see* Jonathan H. Hecht, Comment, *Airing the Dirty Laundry: The Application of the United States Sentencing Guidelines to White Collar Money Laundering Offenses*, 49 AM. U. L. REV. 289, 319–324 (1999).

[383] *See id.* at 319–320.

[384] Thus, even a person using cumbersome means of engaging in crime–related financial activity—presumably exactly what the statutes were supposed to encourage—faces liability for their offense. *See supra* note 365 and accompanying text.

might imagine a situation where a food stamp fraud perpetrator such as Caba or Arnous was able to dramatically increase the scope and consequence of the fraud scheme because of financial wizardry.[385] So what plausibly seems to be fueling the inconsistencies is more subtle than just a "mistaken" use of the money laundering charge to target non–drug offenders: that the use of the guideline for conduct with little financial component beyond the underlying crime does not fit the paradigmatic sort of justification offered for the statute. Judges react differently to that disconnection,[386] and it is uncertain whether even changed guidelines making laundering penalties more consistent with those of the underlying predicate offense might well entirely alleviate these differences.[387]

In closing, one might note that the question remains then why there are not even *more* laundering cases made against predicate offenders, since the threshold established by the statutes is so easy to reach, and since federal laundering charges—unlike RICO charges—do not require central approval from Main Justice.[388] One answer goes back to plea bargaining—there can be many more threats to charge (and there are many more charges in case filings than actual convictions) because such practices help prosecutors negotiate more draconian pleas involving non–laundering charges. So the focus on

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[385] For instance, imagine a perpetrator that opens various different accounts through which she funnels money from a small food stamp fraud operation into the accounts of other grocery stores as bribes to entice them into the scheme. The ownership of at least one account might be in the name of a fictitious person, to increase the difficulty of tracing the scheme back to the fraud perpetrator. In this example, the perpetrator is more than just a criminal committing a single offense—he becomes the leader of an (admittedly small–time) organized criminal network of sorts.

[386] Note that the disconnection described here is not between drug and non–drug defendants, but between defendants that vary in the extent to which they appear similar to the paradigmatic villains that figured prominently in the story of why criminal finance should be disrupted.

[387] *See* U.S. SENTENCING GUIDELINES MANUAL § 2S1.1 (2001) (harmonizing sentences corresponding to many types of money laundering activities to a significant degree with sentences for many kinds of predicate offenses). For example, even under the new guidelines, judges will likely still face a host of cases where prosecutors charge both laundering and the predicate offense, and must still decide whether they accept the prosecution's recommendation to make those charges run concurrently or not. Moreover, even the new guidelines require judges to decide whether to accept prosecutors' requests for upward adjustments or departures involving the complexity of the financial scheme. Depending on how prosecutors frame the factual description of the underlying offense, a financial scheme can appear either incidental (and perhaps even central) to the commission of the predicate offense, or it can appear as a separate venture to conceal and advance the purposes of that scheme.

[388] *See* U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL 9–110.101 (June 1998).

charges and convictions actually understates the extent to which laundering affects the mass of other prosecutions. Second, the time trend is definitely in the direction of *more* laundering charges and convictions every year, suggesting that prosecutors and investigators are increasingly deciding to make laundering cases once they detect predicate offenders.[389]

2. Result #2: Regulations of Limited Scope

Now consider the regulatory component of the fight against money laundering. The regulations chronicled above are extensive, but when considered alongside each other, a striking picture emerges: the bulk of the regulatory requirements cover only a tiny fraction of financial activity—that involving currency. The one major exception to this involves suspicious activity reporting and financial institutions' limited responsibility to "know" their customers, but even here the regulations create such subjective standards that it becomes exceedingly difficult for the government to ever punish someone for violating the requirements. Meanwhile, the existing wire–transfer regulations rarely if ever require reports to authorities (aside from what would be reported under the suspicious activity reporting requirements), and even leave banks substantial flexibility to determine how they keep records of wire transfers.

Besides the criminal penalties in federal law and some analogous state laws, the single most salient feature of the fight against money laundering is the battery of reporting requirements that apply to physical currency.[390] Between the reports required to be filed by banks and money services businesses, the forms individuals must fill out when moving more than $10,000 across borders, and the related casino and retail reports, the government gets some picture of who is making large cash transactions[391]—even if some blind spots still exist

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[389] The difficulty in detecting more elaborate laundering activity combines with prosecutors' and investigators' ability to easily develop laundering charges, resulting in a significant skew of laundering investigations and prosecutions toward predicate offenders. Absent more substantial changes, the mere command of the federal government to focus on "major money laundering organizations" is little more than an empty exhortation.

[390] *See* Part I.B, *supra*.

[391] Through the use of GTOs, regulators and investigate can adjust the system to generate more information about sectors considered particularly troublesome. The use of GTOs to target money services businesses is conspicuous because it excludes banks. When regulators decide to target money services businesses, it is their customers—probably more likely to be poor and minorities—that are subjected to all the reporting requirements. This is not to suggest that reporting requirements shouldn't follow differential crime rates. But if the

in this area.[392] Some would argue that the focus on currency makes sense because other kinds of transactions already leave a record.[393] A credit card transaction, for example, leaves records with the credit card company, the business where a purchase is made, and the customer.[394] In contrast, currency is anonymous: a cash transaction between two people needs no record to be consummated, because currency is a medium of exchange accepted virtually everywhere.[395] All of this might help make the case that reporting requirements for cash are important, but they do not necessarily establish that physical currency is the only important medium for criminal transactions. Indeed, the focus on audit trails should not obscure the fact that CTRs and other currency–related reports required under the Bank Secrecy Act serve not only as a resource to help document offenses already known, but also as a proactive means of detecting crime. That is, FinCEN and Treasury analyze current transaction data in much the same way that they analyze SARs: to detect patterns of potential illegal activity that warrant further investigation.[396] Presumably, if the records of currency transactions are supposed to be useful in detecting criminal offenses, it is not immediately clear why records of at least some non–currency transactions should not also be subject to analysis (i.e., if they are linked in some way to suspicions cash activity, or for some other reason). Yet, while most non–currency transactions are auditable in principal, they are rarely subject to some kind of audit—either because the government lacks access to the information without individualized suspicion or lacks the technical capacity to analyze the information it does collect.[397]

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reporting requirements are precisely the means through which crimes are detected, then their differential application can lead to different rates of punishment.

[392] *See infra* notes 8-27 and accompanying text for discussion on SARs.

[393] *See* OTA REP., *supra* note 29, at 68–72 (defending to some degree FinCEN's focus on analyzing CTRs); Mary Lee Warren testimony, *supra* note 10 (emphasizing the importance of investigating large currency transactions).

[394] In fact, once the customer pays off the balance, the financial transaction between the customer and the bank issuing the credit card creates its own cluster of records.

[395] This property of cash helps illustrate the importance of creating an audit trail, discussed in Part IV, *infra*. Digital cash may pose particular problems because it could include the anonymity of cash and the convenience of non–cash payment systems.

[396] *See* OTA REP., *supra* note 29, at 41.

[397] For example, the government does not have access to most wire transfer data without individualized suspicion. At the same time, it appears that the government lacks the organizational and technical capacity to centralize the analysis of all financial information it collects in the course of developing criminal cases for prosecution.

If the currency–focused regulations cannot be expected to cover the full gamut of criminal financial activity, then perhaps we can expect the suspicious activity reporting (SAR) system to make up the difference. Employees and banks and money services businesses, recall, must fill out SARs in accordance with a number of requirements, all of which are essentially subjective.[398] The SAR statistics reveal a growing concentration of filings, with 500,000 reports filed so far, and higher concentrations of filings in states with greater populations and financial centers (especially California and New York).[399] One might plausibly conclude that subjective reports of suspicion are not junk. The SAR system allows authorities to have a centralized system to pick up these suspicious reports and analyze

In all likelihood, criminals and their financial partners probably face some higher costs because of the anti-laundering regulations. The cost may come from a genuinely greater risk that currency transaction reports or suspicious activity reports will give them away, thereby raising the risk that the criminals face when perpetrating crimes that require (or greatly benefit from) financial transactions. Or it may come from criminals' efforts to simultaneously evade reporting requirements and solve organizational problems (like policing big concentrations of cash) without recourse to the legal system. The latter possibility is more likely, given the anti-laundering system's difficulties in detecting even a lot of cash-focused laundering. *See infra* Part III.B. Even if one makes highly favorable assumptions about what all these regulations (backed up by criminal penalties) are going to accomplish, a principled analysis has to acknowledge that at some point their various costs will start to outweigh the benefits. For example, the fact that launderers (or terrorists) may use informal money transmission systems does not necessarily justify severe criminal penalties and registration requirements on all unlicensed money transmitters. This sort of aggressive prophylactic enforcement could make limited sense as a practical matter, even if it is attractive politically. *See infra* notes 449-481 and accompanying text.

[398] Banks, for example, must fill out suspicious activity reports in accordance with five requirements: (1) insider abuse of a financial institution, involving any amount, detected by the institution; (2) federal crimes against, or involving transactions conduct through a financial institution that the institution detects and that involve at least $5000 if a suspect can be identified, or at least $25,000 regardless of whether a suspect can be identified; (3) transactions of at least $5000 that an institution knows, suspects, or has reasons to suspect involve funds from illegal activities and banks; (4) transactions of at least $5000 that the institution knows, suspects, or has reason to suspect are designed to evade the impact of Bank Secrecy Act reporting requirements; and (5) transactions of at least $5000 that the institution knows, suspects, or has reason to suspect have no business or lawful purpose, or are not the sorts of transactions that the particular customer would normally be expected to engage in. *See* 31 C.F.R. § 103.18 (2001) (establishing suspicious activity reporting requirements for banks); 31 C.F.R. § 103.20 (2001) (establishing suspicious activity reporting requirements for money services businesses). Note that all these requirements are essentially subjective, because they turn on whether the official with the responsibility to file the report "knows, suspects, or has reason to suspect . . ." that a report should be filed.

[399] *See* 2001 SAR ACTIVITY REV. *supra* note 230, at 5–12.

(at least some of) them.[400] The system also helps remedy some of the problems inherent in reporting requirements with rigid amount cutoffs. A $10,020 cash deposit requires a CTR filing but may not be inherently suspicious when placed in the context of who is making the deposit, what sort of business is (allegedly) involved, and how frequently deposits are made to the account. By contrast, an $8,000 deposit does not require a CTR filing but may be profoundly suspicious when placed in context. The SAR system (at least in principle) builds in the flexibility to consider context. What this means is that (again, in principle) bank officials can be trained to seek out suspicious patterns of transactions. FinCEN's advisories on certain laundering schemes, like the Black Market Peso Exchange, can serve as a basis for financial institution employees to learn to recognize suspicious patterns that can be reported through the SAR system. Even in the absence of any special training or even the recognition that specific laundering schemes are particularly dangerous or prevalent, SAR review teams (such as the one in New Jersey) run by some U.S. Attorneys' Offices focus attention on SARs.

One indication of the limits of the usefulness of SAR reporting comes from the relationship between the number of SARs filed and the amount of different kinds of criminal activity, by state. Presumably, if the number of SARs filed (adjusted by population) can be predicted from the incidence of criminal activity in a state, one might conclude that SAR filings are probably being driven to some degree by the money generated from criminal activity. The results showcase how the SAR reporting system has potential—but only up to a point. It turns out that the SAR filings indicating possible violations of bank secrecy reporting requirements (such as structuring), adjusted for population, have a weak but not insignificant association with the per capita demand for drugs in a state. Although the analysis below does not control for all the factors that could affect the relationship, some obvious controls (such as number of financial institutions and overall crime) seem to have little effect. The results are consistent with the notion that drug demand produces currency, and more currency deposits lead to more SARs.[401]

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[400] In 2000, federal law enforcement agencies received 6,375 direct referrals from financial institutions filing SARs, and state and local law enforcement agencies received 10,950 direct referrals. *Id.* at 13–14.

[401] Data taken from 2001 SAR ACTIVITY REV., *supra* note 230, Appendixes. Drug demand data taken from U.S. Department of Health and Human Services, Annual Household

By the same token, SAR reporting bears no statistically significant relationship to a host of other factors, including fraud arrests (the SAR system has 12 reporting categories focused on fraud), property crimes (which also produce money), and violent crimes (which may be connected to organized crime). This suggests that SARs are probably not particularly effective in filling in all the gaps left

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Drug Survey (2000). The data on property, violent, and vehicle theft crimes taken from the Federal Bureau of Investigation, Crime in the United States (2001), *available at* http://www.fbi.gov/ucr/01cius.htm.

The first model tests whether the rate of per capita SAR reports alleging money laundering violations, by state, can be predicted from the percentage of a state's population that used drugs in the last month. The model also includes controls for the state's population size, number of FDIC-insured financial institutions, and assets held by those institutions. The model is statistically significant (adjusted r-squared = .365; $p < .0001$), and so is drug use (t-statistic = 1.637; $p < .10$). As expected, more drug use per capita were associated with more per capita SAR reports alleging money laundering. There are no obvious multicollinearity problems. Similar models including violent crime and vehicle thefts are also significant [adjusted r-squared = .326; $p < .0001$). The vehicle theft variable is also a statistically significant predictor (even more so than drug use) of per capita SAR filings (t-statistic = ; p < .2.109; $p <.05$). Violent crime is not, and neither are any property crimes besides vehicle theft (tested in a separate model to avoid multicollinearity). A third model analyzes whether per capita SAR reports alleging fraud, by state, can be predicted from the limited available data on state fraud arrests reported to the U.S. Department of Justice. Neither the fraud arrest variable nor the model itself is statistically significant. Additional results and data on file with author.

The fact that SAR reporting on money laundering is more strongly predicted by per capita vehicle theft than per capita drug use for the rate of SAR reporting on money laundering hints at two important themes discussed earlier in this article: that subjective reporting requirements are not perfect, and that criminal networks probably have different levels of skill in managing the financial flows associated with criminal activity. One would think that drug use would be a better predictor of SAR reporting on money laundering than vehicle theft, since the former generates so much more money. But drug traffickers may be more skilled at laundering than car thieves, making it easier for them to evade detection. This means that vehicle theft might have a greater effect on SAR reports, because transactions associated with these crimes might be easier for bank employees to notice. Like legitimate businesses, some criminal networks could gain important skills through experience, trial-and-error, incentives that attract and keep talented people, and outsourcing their work to others with expertise. Indeed, part of the point of the fight against laundering was to target skilled third-parties working with launderers.

Moreover, the ability to predict SAR filings from drug demand per capita does not imply that banks and other financial institutions are filing enough SARs, even if we just focus on drug crime. The federal government's analyses do not shed light on whether higher SAR filing rates involve lower triggers of suspicion among banking officials or higher degrees of objectively suspicious activity in the jurisdiction. Thus, the number of filings for certain offenses might (or might not be) related to the amount of crime in a state, but financial institution employees may still be systematically under–reporting suspicious activity (only that, when it comes to drug demand, the degree of under–reporting is consistent enough across states that it does not affect the relationship between SAR reports of Bank Secrecy Act violations and drug demand).

because the regulatory system is disproportionately currency-focused. Bank employees may be able to pick up on at least some activity designed to evade currency reporting requirements, but differing standards of subjective suspicion probably lead to both over and under-inclusive reporting of activity that would be considered objectively suspicious if there were a reliable frame of reference.[402] Scrupulous bank employees may even end up filing SARs as a response to what they believe holds the greatest interest for authorities—which is perhaps why only thirty-two SARs were filed mentioning terrorism during the entire history of the system up to September 11 (April 1996 to September 11, 2001), but more than 1,600 SARs mentioned allegedly terrorism—related financial activity between September 12, 2001 and March 31, 2002.[403]

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[402] *See* Part IV, *infra*, for a discussion of how to design a system to ferret out certain transactions in a subset (i.e., international wire transfers) that are objectively suspicious.

[403] U.S. DEP'T OF THE TREASURY, FINANCIAL CRIMES ENFORCEMENT NETWORK, THE SAR ACTIVITY REV. TRENDS, TIPS, AND ISSUES: ISSUE 4 25 (2002) [hereinafter 2002 SAR ACTIVITY REV.]. This sort of feedback relationship between the authorities' investigative priorities and the number of SAR reports filed may reflect the well-known phenomenon in social science of questioner effects on survey respondents, where respondents may be swayed to answer what they expect the questioner wants to hear. The resulting dramatic upsurge in the number of SAR reports filed mentioning terrorism in their narrative portion may reflect greater sensitivity to financial activity genuinely tied to terrorism, more of such activity or merely greater responsiveness to factors that bankers or authorities consider more likely to be related to terrorism. The latter alternative seems at least as plausible as any of the others, given the relatively meager guidance that financial institutions seem to get from Treasury about what constitutes terrorism related to financial activity. For example, Treasury's above-referenced SAR Activity Review discusses a number of suspicious transactions involving the Middle East in a section of the Review entitled "Aspects of Financial Transactions That May Indicate Terrorist Funding." *Id.* at 17. The discussions are revealing for two reasons. First, the decision to tie the concept of "terrorism" to the Middle East reveals a substantive conception of what is meant by terrorism that excludes, for example, activities such as those pursued by Timothy McVeigh. Second, the fact that financial activity involving the Middle East is subjectively framed as being more likely to involve terrorism probably increases the likelihood that bankers evaluating ambiguous financial behavior will decide that it is suspicious. For instance, the post-September 11 SAR Activity Review chronicles a series of transactions by a charitable relief organization focused on the Middle East. The transactions described below resulted in multiple SAR filings:

> One bank filed three SARs that reported the activities of a relief organization operating in the U.S., whose stated primary purpose is the collection of donations and funds for worthwhile causes in Middle Eastern countries. Over an approximate 15-month period, the relief organization initiated wire transfers from its U.S. bank account totaling $685,560 through its primary account in a former Soviet Republic to its accounts in other former Soviet Republic countries. The relief organization's U.S. bank account also received wire transfers totaling $724,694 from unknown senders at a European bank and wired a total of $65,740 to a U.S. charitable organization. The filing institution deemed *this activity inconsistent with the stated purpose of the account.*

Moreover, although some bank and financial institution employees might scrupulously try to file suspicious activity reports when they consider it appropriate, it is worth noting that banks and other financial institutions might have an affirmative economic interest in not filing reports aggressively: at the organizational level, financial institutions have little to gain in terms of avoiding penalties, because the subjectivity in the standard makes it virtually impossible to assess penalties for non–compliance,[404] and the reports can anger customers and lead to lost business.[405] The predictable result is that SAR reports do not pick up a great many things that might meet some acceptable definition of suspicion, like the financial behavior of the September 11 hijackers. Bank employees may simply not find behavior subjectively suspicious, and the lack of any objective enforcement standard further lowers the incentive to make new decisions about what is suspicious.[406]

Investigators probably perceive some of the shortcomings discussed above, a perception that probably combines with long–standing organizational resistance to engaging in analytical work or poring over regulatory reports to detect criminal offenses. It is admittedly difficult to assess the degree of law enforcement concern

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Id. (emphasis added).

One might tell a story suggesting that the relief organization's financial activity merited further scrutiny, but one might also tell a story about this behavior that makes it relatively consistent with what one might expect of a relief organization serving the needs of Muslim populations in former Soviet Republics, except perhaps for the (deep and intractable?) matter of where exactly the "Middle East" begins and ends. Absent more systematic information and analysis of a host of additional variables, it is hard to tell which story is more plausible. In any case, extensive use of information technology, algorithms, and outside data to evaluate individual SARs in context does not appear to be commonplace (or perhaps even possible) with SARs. *See* Interview with FinCEN Official #2, in Washington, DC, (June 18, 1998) (notes on file with author).

[404] Treasury appears to have assessed a penalty for non–compliance with SAR reporting only once in the history of the program. It assessed a penalty against the Great Eastern Bank of Florida: a bank that lends to "many Asian–American–owned companies doing international business." Jane Bussey, *Treasury Agency Levels $100,000 Fine against Great Eastern Bank of Florida*, MIAMI HERALD, at F1 (Sept. 12, 2002). The $100,000 penalty for "willful" violations appears to have been detected primarily for two reasons: its failure to develop a comprehensive BSA compliance program and the filing off a large number of SARs with incomplete information, hampering any meaningful investigations. *Id.* In short, were it not for banks' filing of incomplete SARs (as opposed to no SARs at all) the alleged failure of the bank might still be waiting to be detected.

[405] Note that currency–related SAR filings may be an exception, because the cash deposit business might be less lucrative than other kinds of financial business from customers who use less cash and make more transactions.

[406] This is exactly what happened. *See* Bussey, *supra* note 404; Risen, *supra* note 355.

that an individual SAR should trigger, but it is hard to defend a system that appears to ignore (or consider only in passing) a large proportion of SAR reports.[407] Nor can state law enforcement agencies be relied upon to ensure that all SARs are analyzed, as only a small fraction of states report any use of SARs at all in developing investigations.[408]

To its credit, regulators at Treasury recognized some of the limitations arising from the inherent subjectivity of the SAR system and sought to remedy them by creating more explicit regulations requiring banks in particular to "know" their customers. In contrast with the existing regulations that do not specify exactly how banks are supposed to "know" their customers, the proposed "know–your–customer" regulations would have established a minimum set of responsibilities that banks would have needed to fulfill in order to understand patterns in the financial behavior of their customers.[409] Banks aggressively opposed these changes and, with the help of legislators supportive of banking interests and financial privacy, effectively killed the proposal.[410]

Sometimes a SAR report is a diamond in the rough.[411] But because of the limited scope of regulations, there is no formalized

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[407] I am not aware of any federal government report, analysis, or policy statement that definitively establishes a means of ensuring that SAR reports are investigated. Although the FBI claims that it reviews all SARs, other law enforcement officials dispute this—and the FBI does not show up as one of the major requesters of SAR data. *See supra* notes 81, 224, 236, 405.

[408] *See* 2001 SAR ACTIVITY REV., *supra* note 230, at 33 (indicating that even the most frequent state and local users of SARs to start investigations, by state, did not use SARs to start investigations more than about 35 cases a year).

[409] One might imagine a comparison of the existing, relatively mild know–your–customer requirements implicit in SAR regulations and the more extensive proposal to formalize the process. From banks' perspective, the existing requirement makes it virtually impossible for them to face liability, at least for specifically violating the subjective standards in the regulations. In contrast, the proposed regulations would have created a system making it much easier to compare banks' performance to their regulatory responsibilities.

[410] *See* David F. Scranton, *Public Cried "No" to Know–Your–Customer Regulations*, NAT'L. L. J., at B5 (May 10, 1999) ("On March 23, federal banking regulators withdrew one of their most controversial proposals in recent history: the 'know your customer' rules."). The post-September 11 interest in disrupting criminal finance pushed Treasury to issue requirements for customer identification in 2003. *See* Office of Public Affairs, U.S. Dept. of the Treasury, Treasury and Federal Financial Regulators Issue Final Patriot Act Regulations on Customers Identification (April 30, 2003) (available at http://www.ustreas.gov/press/releases/js335.htm). Some of these concerns are understandable. *See infra* notes 501-02.

[411] Treasury claims that a SAR helped authorities nab former Peruvian intelligence chief and fugitive from justice Vladimiro Montesinos. *See* 2002 SAR ACTIVITY REV., *supra* note

system to detect suspicious activity. Movement in that direction, as with know–your–customer rules proposed by Treasury in the late–1990s, provoked marked political opposition. Obviously this leaves investigators with less information about transactions that do not involve physical currency. A more subtle point is that the existing regulatory structure may not even be especially well–suited to catching people laundering physical currency. The filing of a currency transaction report (or the equivalent, which is Form 8300, for a retail transaction) does not necessarily lead to an investigation. Moreover, if someone is structuring deposits, then the only regulatory mechanism that can lead to detection is a SAR, and given the almost complete lack of government enforcement of SAR requirements (because they are subjective). In short, the existing regulations have quite a limited scope compared to the extent of authority vested in regulators and the sorts of records that could (in principle) assist in the detection and prosecution of criminal finance.

3. Result #3: Lax Enforcement of Existing Regulatory Authority

Leave aside now the fact that Treasury and other regulators only use a fraction of the authority conferred to them, and that such authority tends to focus disproportionately on currency reporting instead of other kinds of reporting. Do the regulators at least enforce these requirements aggressively? If anything, the same reasons that help explain regulations of limited scope also suggest that even existing regulations should be subject to lax enforcement. The relevant regulators might lack the infrastructure—in terms of personnel, information, and technical systems for centralizing and reviewing information—necessary for aggressive enforcement of existing regulations. To get that infrastructure, regulators would have to overcome pressure from banks and other financial institutions subject to regulations. That pressure would also rouse legislators and officials in the executive branch sympathetic to the industry. The predictable result is that existing regulations are enforced subject to the existing organizational structure and its considerable limitations.

For starters, regulators took a substantial amount of time to promulgate even the core currency reporting regulations of the fight against money laundering and to implement plans for the

403 ("The investigation determined that Venero was a known associate for indicted former Chief of the Peruvian Intelligence Service, Vladimiro Montensinos.").

enforcement of these regulations.[412] Even in the mid–1980s, congressional oversight hearings produced some critiques of Treasury's slow development of regulations establishing reporting requirements and drawing up plans for their enforcement.[413] More recently, FinCEN took years to develop regulations that would apply many of the amended Bank Secrecy Act requirements approved under Annunzio–Wyile, including the requirement to file CTRs and SARs to money services businesses.[414]

Then there is the issue of civil penalty enforcement. Until 1986, Treasury did not even have the authority to compel regulated entities (such as banks) to disclose the existence of Bank Secrecy Act violations.[415] Functional supervisory agencies such as the Federal Reserve could use their supervisory authority to investigate violations. Other options included the use of criminal statutes to punish banks for flagrant violations, if they were detected.[416] But such punishments were exceedingly rare. The alternative approach for more routine enforcement was to provide for the imposition of civil penalties for violations, which could be imposed more easily (subject to a civil standard of proof) and could serve to deter violations. Following the creation of FinCEN in the mid–1980s, Treasury and bank regulators created the following system. Functional banking industry regulators (primarily the Office of the Comptroller of the Currency and the Federal Reserve) would use their supervisory power to detect civil penalty violations, and would refer them to FinCEN. Then, depending on FinCEN's evaluation of

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[412] Treasury still frequently delays release of anti–money laundering related regulation, even after September 11. *See, e.g.*, Steve Cocheo, *"An Uncommon War": Briefing–The Money War*, 1/1/03 A.B.A. BANKING J. 7 (2003) (discussing delay in issuance of § 326 regulations under USAPA).

[413] *See, e.g.*, *Hearings on S. 572, S. 1335, and S. 1385, Before the Senate Committee on the Judiciary*, 99th Cong. 90 (1985) (Statement of Senator Joseph Biden) (excoriating Treasury and other regulators for the meager pace at which regulations were being developed and resources focused on their enforcement). Although the critiques that Treasury received at this and other congressional hearings were severe, legislators only rarely appear to have used their oversight powers to engage in much more than jawboning regulators (in comparison, for example, to transferring resources or jurisdiction to other agencies or otherwise punishing regulators).

[414] *See supra* Part I.B.2 (discussing the tortured history of the regulations for money services businesses).

[415] *See* John K. Villa, *A Critical View of Bank Secrecy Act Enforcement and the Money Laundering Statutes*, 37 CATH. U. L. REV. 489, 504 (1988).

[416] *See* U. S. v. Global Union Bank, 1984 U.S. Dist. LEXIS 23203 (S.D.N.Y. Sept. 28, 1984).

the referral from the functional regulators and any additional information it gleaned from reports already filed, Treasury would impose a penalty on financial institutions. Yet since the system has been operating in 1986, FinCEN developed a dismal record of delay in imposing penalties. As the figure below shows, FinCEN sometimes takes years to resolve civil penalty referrals, and perhaps as a result has been receiving fewer civil penalty referrals each year as regulators contemplate the substantial backlog of unresolved referrals.[417] For example, in 1997 FinCEN received nearly forty new referrals from the Federal Reserve, the Office of the Comptroller of the Currency, and other banking-related regulators indicating probable reporting violations from banks. But FinCEN closed only about twenty cases, or less than 20% of its accumulated total of penalty referrals for the year, leaving 80% of penalty referrals unresolved.[418] The predictable result is that most penalty referrals take years to resolve.[419]

It is not immediately clear what to make of the dramatically falling civil penalty referral rate, which may reflect among other things a decline in the extent of enforcement by functional regulators or a shift away from detection of reporting violations because they long lacked authority to impose actual penalties without action from FinCEN.[420] Either way, it is hard to believe that both the falling penalty referral rate and the low rate of resolving cases means that bank compliance with regulatory reporting requirements has improved dramatically. The argument that enforcement has become less necessary is hard to defend given that required filings under the Bank Secrecy Act have been increasing at the same time that referrals have been falling and the percentage of inventory closed has been

[417] *The Operations of the Department of the Treasury's Financial Crimes Enforcement Network, Hearing Before the Subcommitee on General Oversight and Investigations, Committee on Banking and Financial Services*, 105th Cong. 102–04 (1998).

[418] *Id.* at 103–04.

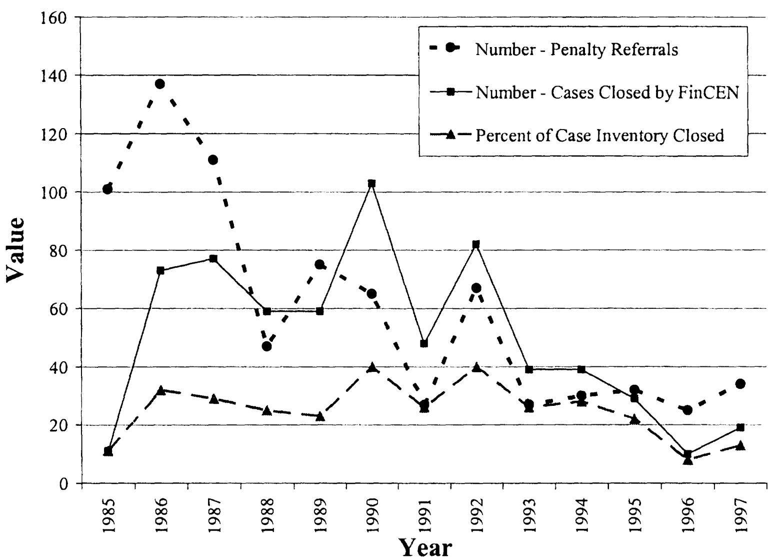
[419] *Id.*

[420] Perhaps the referral rate responds in part to public and legislative concern about criminal finance. The statistics reported through 1997 show the referral rate peaked in 1986, the year the original money laundering criminal statutes were passed partly in response to the specter of drug kingpins profiting from the perceived epidemic. Recently regulators report higher numbers of Bank Secrecy Act compliance audits, perhaps in reaction to September 11. *See* 2002 ANNUAL STRATEGY, *supra* note 8, at 9 n.5. But the figures released in that strategy do not indicate the extent of civil penalties imposed or the thoroughness of the audits conducted.

falling.[421] Although recent reports indicate that civil penalty enforcement may be improving, the record covering most of FinCEN's history highlights some of the limitations in ensuring that banks comply with even the existing currency reporting requirements.[422] Whatever problems Treasury faces in resolving civil penalty referrals made against banks, its problems are exacerbated when it comes to enforcing the new regulatory requirements on money services businesses—where no functional regulator engages in supervision that allows them to detect and refer potential regulatory violations.

Chart 1

FinCEN Civil Penalty Enforcement Actions for Bank Secrecy Act Violations, 1985-1997[423]



The fate of Form 8300, the recordkeeping form that applies to cash purchases of $10,000 or more, also highlights the limitations of

[421] A skeptic might ascribe the larger amount of forms to greater compliance, but this flies in the face of anecdotal evidence reporting substantial compliance problems, and does not consider the impact of inflation on the number of cash transactions. A more plausible assumption in the absence of any disconfirming information is that compliance rates have stayed the same—which suggests that if the number of reportable transactions is increasing, the actual amount of violations may be increasing.

[422] *Supra* note 236.

[423] *Id.*

existing regulatory enforcement.[427] Businesses and service firms accepting $10,000 or more in cash in return for goods or services must file the form.[428] Federal law enforcement agencies appear to rarely audit businesses to determine if they file Form 8300. In 1993, only 117,000 were filled out, while banks filed millions of CTRs. Even as CTR filings were rising (indicating the likelihood that more cash was being used in the economy), Form 8300 filings were declining.[429]

A skeptic might suggest that the system could be in equilibrium, so that a tiny amount of enforcement might still be enough to maintain almost complete compliance by financial institutions. It is certainly true that the limitations in the fight against money laundering partly arise from the fact that not all reports result in detection of laundering schemes, and not all laundering schemes even yield required reports. But past cases indicate that banks and other financial institutions do not always comply with anti–money laundering reporting requirements.[430] The fact that the shortcomings in bank reporting are sometimes detected and lead to penalties may bolster the argument that financial institutions probably improved reporting practices. But any plausible model of financial institutions' incentives must consider their judgments about the probability that reporting problems will be detected.[431] Even if we take the number of open investigations as a baseline indicator of the possibility of being detected, the number of investigations (as of 1998, for example) is tiny when compared to the potential volume of transactions (over ten million a year, judging by CTRs and similar currency transaction reports actually filed). Moreover, the monetary sanctions faced if

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[427] Form 8300 was originally collected and administered by the IRS for tax enforcement purposes. The IRS long resisted giving non–tax federal law enforcement agencies full access to information collected from the forms. Under USAPA, Form 8300 requirements are changed from the tax code to the Bank Secrecy Act, giving federal law enforcement agencies unfettered access to the forms.

[428] Regulations require filing where the cash is given in connection with a "single" transaction. Thus, a client compensating a lawyer for legal representation in connection with a single transaction must file the form if the amount paid exceeds $10,000. *See* 26 C.F.R. § 1.6050 I-1, (a)(3)(iii).

[429] *See* OTA REP., *supra* note 29, at 36 n.4.

[430] *See* Part I.B, *supra*.

[431] Note that banks and other financial institutions may shift resources away from compliance, not just because they may have incentives to maximize deposits (other things being equal), but because they prefer to use compliance resources for some other purpose.

civil penalties are actually imposed are relatively small.[432] When tens of thousands of financial institutions covered by reporting requirements engage in hundreds of thousands of transactions every day, it is implausible that penalty referrals as few as thirty a year would serve as a meaningful deterrent.[433]

4. *Result #4: Globalization of the Fight Against Money Laundering*

The fourth result of the existing system is that it is being implemented throughout the world, a trend documented earlier during the discussion of the legal components of the fight against money laundering.[434] The trend arises in part from a recognition that laundering is likely to involve transnational activity,[435] and reflects the efforts of U.S. officials and their allies in other developed economies, working through organizations such as the FATF. Increasingly, the U.S. and allied developed economies have developed the organizational capacity to force less developed countries and secrecy havens to adopt the core elements of the fight against money laundering. Through the FATF, the United States and its allies have threatened to sanction jurisdictions that do not adopt minimum–anti money laundering standards.[436] Countries can also use regional organizations and even international financial

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[432] Since passage of USAPA, the Bank Secrecy Act has been amended to increase some civil and criminal penalties to $1,000,000 per violation. *See supra* note 98, at § 353.

[433] To expand this argument, suppose there were 365 penalty referrals a year, an average of one penalty a day. Thousands of financial institutions engaged in hundreds of thousands of transactions a day would face (under these assumptions) a risk profile where an average of one penalty a day is given out. Moreover, although a civil penalty referral might lead to a criminal investigation, the probability of this appears to be relatively low, as does the possibility of significant reputational harm from a single penalty. If one makes different assumptions the impact of civil penalties may loom larger. For example, one might imagine that FinCEN and cooperating financial regulators would cooperate with prosecutors to levy criminal sanctions but its not clear this happens. Moreover, even if the reputational cost of civil penalties were a possible deterrent, that cost would have to be quite high in order to turn such a small number of penalties into a big stick. Things may change in the post-September 11 era, but it's not clear how much.

[434] *See* Part I.C, *supra*.

[435] *See, e.g.*, William Gilmore, *Introduction to* INTERNATIONAL EFFORTS TO COMBAT MONEY LAUNDERING, xi (W.C. Gilmore, ed., 1992) (citing a Canadian estimate that more than 80% of money laundering is transnational); U.N. COMMISSION ON CRIME PREVENTION AND CRIMINAL JUSTICE, U.N. ECONOMIC AND SOCIAL COUNCIL, *quoted in* U.N. DRUG CONTROL AND CRIME PREVENTION, WORLD DRUG REP'T 1997 at 141–42 (1998), *available at* http://www.undcp.org/adhoc/world_drug_report_1997/CH4/4.6pdf (last visited Apr. 8, 2003) (describing internationalization as a major trend in drug trafficking).

[436] *See* Part I.C, *supra*.

institutions to promote objectives relating to money laundering.[437] It would be difficult to argue that any of these measures violate international law.[438] Although laws and policies to address money laundering in the U.S. and Western Europe once reflected differing priorities, their approaches are increasingly converging.[439] Developed bank secrecy havens appear to be making changes to adopt this model—which includes adopting the major features of the U.S. system described above.[440] Finally, multilateral treaties on matters ranging from narcotics to terrorist financing provide some additional legitimacy for the contention that the fight against money laundering should be global in scope.[441]

This diffusion of these laws and policies reflects a few forces. At some level, the globalization of the fight against money laundering probably has something to do with the development of norms about the sorts of banking and financial policies considered desirable for countries around the world.[442] But a more rational calculus is probably at work. Political actors within developed economies probably have an interest in reducing criminal financial activity as a means of reducing the impact of crime within their jurisdiction. Moreover, to the extent that their domestic financial sectors are subject to a host of regulatory requirements that increase administrative costs and may reduce opportunities for some business, domestic interest groups probably support the globalization of the

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[437] *See generally* Doyle, *supra* note 259.

[438] None of the efforts to force countries to make anti–money laundering law or policy changes technically violate their sovereignty. Virtually all the sanctioning mechanisms involved for countries that do not comply with anti–money laundering standards involve domestic law or policy changes by the threatening countries (or by international financial institutions that have legal authority to change the structure of their relationship with debtor countries). One might argue that the imposition of anti–laundering requirements violates sovereignty in a deeper sense, but international law does not protect nations from political or economic pressures to change their domestic laws. *See* MICHAEL JANIS, INTRODUCTION TO INTERNATIONAL LAW (1997).

[439] *See* 2002 ANNUAL STRATEGY, *supra* note 8, at 95.

[440] *See* Part I.C, *supra*.

[441] *Id. See also* Charles Clifton Leacock, *Internationalization of Crime*, 34 N.Y.U. J. INT'L L. AND POL. 263 (2001).

[442] *See generally* JOHN W. MEYER & RICHARD SCOTT, ORGANIZATIONAL ENVIRONMENTS: RITUAL AND RATIONALITY (1983) (suggesting that the development of world norms makes it difficult for countries to avoid adopting organizational forms that convey legitimacy). Other scholars have also written on organizational norm adoption (offering adaptive and bounded rationality reasons why organizations choose policies).

fight against money laundering.[443] Meanwhile, the leadership in smaller jurisdictions may seek to avoid the imposition of sanctions and controls that have economic or political costs. What about the political costs of adopting the fight against money laundering? The preceding account of the fight against money laundering in the United States shows how what looks like an airtight system from a distance has a number of escape valves. The same is probably true across jurisdictions. For the most part, where jurisdictions change their laws and even regulations to conform to some standard—such as FATF's minimum standard—the political authorities in the impacted jurisdiction retain control over budgets, enforcement policy, and prosecutorial discretion.[444] This means that the political impact of rule changes on constituencies ranging from offshore banks to accountants depends on the way that the new legal provisions are implemented, not just on the fact that the new legal provisions exist. All of this lowers a jurisdiction's cost of joining the vaunted fight against money laundering.

Notice where this leaves the many advocates of the globalization of the fight against transnational crime (or, perhaps, against anything). Without some compelling reason to believe otherwise, one might expect that compliance with at least some emerging international law norms, treaties, or even informal agreements and pressures would not raise just one, but rather two questions for the relevant jurisdiction: first, should a government (i.e., the Bahamas) modify its laws to be in line with international pressure (i.e., FATF Recommendations); and second, how should the laws be implemented? The bolder the goal, the more the international legal regime might have to engage in successive expansions of what is regulated (i.e., prosecutors' salaries, number of regulatory investigators, and so on) in order to achieve its objectives.

B. WHAT GOES UNDETECTED

So if the fight against money laundering has blind spots, where exactly are they? The answer is that while the system produces perhaps too much of a certain kind of enforcement—against people already detected of committing predicate crimes and against some

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[443] *See supra* Part III.A (discussing the interest of domestic financial institutions in the United States in globalizing the fight against money laundering).

[444] *See* Bussey, *supra* note 406 (discussing the Bahamas' apparent failure to prioritize anti-laundering enforcement, despite having signaled an interest in complying with emerging international norms condemning laundering).

people who leave a paper trail when handling criminally–derived physical currency, perhaps the system also produces too little of another kind of enforcement. In particular, the system seems on balance less capable of detecting and punishing the sorts of offenses that helped galvanize support for criminalizing money laundering: sophisticated third–party laundering, and the use of criminally–derived funds by the heads of trafficking networks and organized–crime entities.

To begin with, probably only a tiny fraction of currency–related acts of money laundering are detected. Despite the undercover investigations, informants, and use of regulatory reports, investigators seize less than $1 billion a year in the best of years, while even the lowest estimates of the profits of drug trafficking alone exceed $50 billion.[445] The higher the estimates of the amount of money generated by drug crime, the more that the system is allowing to leak.[446] In part such leakage results because currency–focused regulations are not aggressively enforced, probably resulting in gaps in the filing of some currency reports.

On balance, though, the fight against money laundering is less capable of detecting non–physical currency and third–party laundering for a host of reasons. Obviously, more sophisticated techniques used by third–party launderers, who are repeat players in the nebulous underground world of criminal financing, are more likely to evade detection. Moreover, people who engage in large–scale public corruption or tend to have greater responsibility in criminal networks often capture more of the surplus from the organization's activity.[447] The amount of money that corrupt public officials in other countries or leaders of these organizations amass

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[445] *See supra* note 222 and accompanying text (discussing seizure statistics).

[446] Not all of the money generated from drug sales necessarily ends up in financial institutions, at least directly. Consider the case of drugs. Presumably, some faction of the proceeds from drugs is spent as cash. But this is likely to be a relatively small fraction of the total, because drug proceeds tend to be asymmetrically divided between more numerous street distributors and less numerous smugglers (who are often, though not always, working for some kind of transnational criminal network). It would be exceedingly questionable to assume that traffickers are unwilling to assume the risk of placing proceeds in the financial system when (1) they have already assumed the risk of smuggling; (2) they must pay suppliers and allies in the trafficking process, which is easier if money can be moved around quickly; and (3) they are likely to amass larger concentrations of money, making the marginal utility of cash decline (though certainly not to zero). *Cf.* LEVITT & VENKATESH, *supra* note 81.

[447] *See supra* notes 1–10 (discussing the financial returns generated from illegal activities such as drug trafficking).

probably increases their reliance on wire transfers and offshore banking centers, which makes currency reporting requirements less useful as means of detecting their laundering activity.[448] Some might argue that, while the leaders of organized criminal networks may be able to outsource the risk of placing currency in the system, catching the little guy structuring currency deposits can lead to the proverbial bigger fish. Believing that story requires a host of assumptions that are probably not warranted. A small–time launderer structuring deposits must be willing to become an informant and able to navigate the intervening layers in the organization. The higher–level targets (i.e., the Pablo Escobars) may not even be within reach of investigators, even if their conduct falls within the scope of a federal criminal law with extraterritorial jurisdiction.[449]

Where currency is not involved and investigators do not know who they are looking for, the only thing left is to look for the predicate crime. That may be simple in some cases, as where a business victimized by fraud chooses to report it and works with investigators to detect the offender. In other cases it may be far more difficult. Drug transactions may be possible to observe on the street in some neighborhoods, but beyond that they are difficult to detect because they are consensual. And some companies do not want to report fraud because they do not want to attract attention to their vulnerability. In summary, if someone is not explicitly being sought by law enforcement, does not use currency, and does not commit a predicate offense that is easy to detect, then one is not likely to be detected. Whatever deterrent impact, the system would be diminished by these limitations.

One example of an offense fitting this description is terrorist financing. Although the government has started drawing some distinctions between the challenges involved in fighting money

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[448] Consider, for example, the discovery of apparent laundering through the Republic Bank of New York. The investigation uncovered about $7 billion in questionable transfers that appeared to involve laundered money from Russia. Yet investigators were unable to build a money laundering case. Even when the scheme itself was detected (in part because the bank reported its existence), the origin of the money was unclear, making it difficult to build a case on the basis of § 1956 (which requires a link to specified unlawful activity). One reaction to this situation is to keep expanding the scope of specified unlawful activity. But even then detection would be the larger challenge in building a money laundering case not involving currency or someone already known to have committed a predicate crime. *See supra* note 16.

[449] *See, e.g.*, 18 U.S.C. § 2332 (2001) (criminalizing terrorist offenses and providing for extraterritorial jurisdiction).

laundering and disrupting terrorist financing, efforts to disrupt terrorist financing are grafted onto a system of regulatory reports, investigative activity, and criminal penalties originally designed to combat money laundering.[450] Yet there is no reason to assume that perpetrators primarily use currency. Neither the financiers nor the recipients of the money are necessarily known to law enforcement or intelligence agencies in advance. Hardly anyone is likely to report the financing of terrorism. Where the government blocks assets of suspected terrorists, it is only because it suspects the organization or person of being linked to terrorism, not (for the most part) because it actually detects any kind of financial activity overtly connected to terrorism.

Curiously, a careful assessment distinguishing what the anti–money laundering system promises and what it delivers has never really happened.[451] If the government and financial institutions developed a different system less tied to looking for physical currency aggregations or to punishing known violators, some larger proportion of criminal financial activity might be detected in principle. The process of imagining how such a system would

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[450] *See* Part II, *supra*.

[451] The 2002 ANNUAL STRATEGY, *supra* note 8, comes closest to admitting this, though still a relatively oblique way. *See id.* at 3 ("We will analyze federal resources devoted to anti–money laundering endeavors so that actual costs are understood and can shape future budget allocations."). *Id.* at 9 ("What we cannot quantify easily are the results that can be attributed to [anti–money laundering] efforts."). *But see id.* at 40 (making apparently unsupported empirical claims such as "The mandatory filing of SARs has produced changes in criminal behavior"). The 2002 ANNUAL STRATEGY's revelations may reflect the influence of banking and financial institutions in the Bush Administration's Treasury Department, or simply a partial (if subtle) acknowledgement of the complexity involved in disrupting criminal finance. But if it is the latter, then the Annual Strategy does not reflect it in its discussion of the goal of disrupting terrorist financing. *See id.* at 18:

> The emphasis for the United States Government must be on targeting the financial substructure of terrorist organizations worldwide. The concentration will remain on Al Qaeda support networks, so as to prevent any further terrorist attacks against the United States, but it will also focus on other terrorist networks, as appropriate, such as the FARC and AUC, that pose a grave risk to U.S. interests around the world. The ultimate measure of success in this effort will be designations [i.e., allowing the government block assets under Executive Order 13224] that rupture terrorist financing flows and deter those who would otherwise provide material support and financing for terrorists.

In short, the Annual Strategy that is most forthright about the lack of assessment that pervades much of the government's efforts to disrupt criminal finance still explicitly states an extraordinarily high expectation—that the government's efforts will allow it to contribute to "preven[tion of] any further terrorist attacks against the United States." These high expectations seem relatively divorced from any assessment of detection strategies based on financial transaction patterns.

function sheds light on how governments can continue keeping track of money even in an age of international finance and growing financial anonymity. Interest groups with reason to police government overreaching can probably help constrain government civil liberties abuses too, as they have for a long time in policing the Bank Secrecy Act's expansion. This might render the law better able to affect criminal finance and other gray market activity spilling across borders and sectors. The real question left is not just whether "society" is willing to pay the price to achieve such disruption, but whether the various actors and interests with control over the fight are willing or able to do so—and what price is paid if they do not.

IV. THE FATE OF EFFORTS TO DISRUPT CRIMINAL FINANCE

The preceding section suggests that the system is better at detecting some kinds of currency–intensive laundering, especially if it is clumsy or involves undercover sting operations, and at punishing criminals for handling money even if what they are doing is difficult to fit under a more colloquial definition of money laundering. This implies there is a tenuous relationship between that fight and the larger objective of disrupting criminal finance, since criminal finance includes a range of money laundering activities that the system is less able to detect and also encompasses the related problem of the financing of crime—including terrorism—that the system is even less capable of detecting. Which raises two important questions: (1) why the disconnection between justification and reality?; and (2) how could the system be modified to close the gap? Although it would take separate projects to fully answer each of these questions, this Part surveys the terrain those projects would have to address. That terrain makes it plain that much of what shapes the fight against laundering is a political economy of interests and incentives. Anyone who wants to "fix" the fight against laundering would have to face not only the pressures from the political economy of the fight against laundering, but also the technical challenge and value questions implicit in reshaping the financial architecture to capture and analyze more information about who pays for what and with what money.

A. FORCES SHAPING THE SYSTEM: THE POLITICAL ECONOMY OF DISCRETIONARY ENFORCEMENT

Since the fight against money laundering can affect the interests of various legal, political, and economic constituencies, a major force driving the reality of that fight is likely to be its political economy.[452] By "political economy," I mean the political and economic incentives encountered by the actors in the fight against laundering. Although the impact of political economy on legal rules is frequently recognized and remarked–upon in the regulatory context, [453] the impact is less recognized in the criminal justice context.[454] This is striking, because the criminal justice system is itself just a specialized example of a regulatory system—with the fight against money laundering being a more obvious example because one of its major components involves economic regulation. Although a full discussion of the political economy of money laundering will have to await another paper,[455] it is worth briefly reviewing some of the forces that might be at play here.

Begin with the legislature. Federal legislators are responsible for the lion's share of the fight against money laundering. One might expect them to care about pleasing interest groups on specific issues that concern those groups,[456] and about pleasing local constituents on

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[452] *Cf.* Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245 (1997); John A. Hird, *The Political Economy of Pork: Project Selection at the U.S. Army Corps of Engineers*, 85 AM. POL. SCI. REV. 429 (1991).

[453] For just a few interesting examples, see McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J. L. ECON. & ORG. 180 (1999) (providing a theory of the political function served by the Administrative Procedure Act, with empirical analysis supporting the theory); CHARLES SHIPAN, DESIGNING JUDICIAL REVIEW: INTEREST GROUPS, CONGRESS, AND COMMUNICATIONS POLICY (1997) (discussing the political forces shaping judicial review of regulatory policy in telecommunications); Robert A. Kagan, *Political and Legal Obstacles to Collaborative Ecosystem Planning*, 24 ECOLOGY L.Q. 871 (1997) (describing the political forces affecting environmental planning); Cass R. Susntein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985) (describing the role of interest groups in litigation and legislation affecting regulatory policy); Barry R. Weingast, *The Congressional-Bureaucratic System: A Principal-Agent Perspective (with Applications to the SEC)*, 44 PUB. CHOICE 147 (1984) (assessing how changes in the composition of congressional committees overseeing the Securities and Exchange Commission).

[454] For some excellent notable exceptions, see Stuntz, *Pathological Politics*, *supra* note 301, at 523; William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997).

[455] In particular, a separate paper might: (1) explain in detail the political logic behind the use of "symbolic" statutes to address public concerns about criminal enforcement; (2) discuss what symbols are likely to be politically effective; (3) explain how different law enforcement entities and agencies might exert different kinds of pressures; and (4) develop in more detail the political economy of the financial services industry's reaction to anti–laundering regulation.

[456] *See generally* Kay Lehman Schlozman & John T. Tierney, *More of the Same: Washington Pressure Group Activity in a Decade of Change*, 45 J. OF POLITICS 351 (1983) (discussing the growing extent of interest group activity to influence federal legislators); Ronald B. Rapoport, Walter J. Stone & Alan I. Abramowitz, *Do Endorsements Matter?*

issues of common concern such as controlling crime.[457] Take these one at a time. Legislators' public constituencies might differ in a host of ways, but they generally care about a host of symbolic and concrete matters such as economic prosperity and crime control.[458] On that score, even if federal legislators are not likely to be blamed for local crime, as a matter of symbolic politics appearing "tough on crime" seems to be a strategy that is hard to disparage for most federal legislators.[459] Legislators might be expected to emphasize nuggets of information such as sentencing changes and passage of new substantive criminal laws that are easy to explain in a speech or a town meeting. For example, concern over carjackings fueled in part by a high–profile incident in Maryland can encourage federal legislators to pass a statute making carjacking a separate federal offense, even though carjackings were already subject to criminal penalties.[460] With respect to interest groups, federal legislators are likely to receive pressure from law enforcement interest groups and financial institutions. Law enforcement interest groups, including investigators, prosecutors, and the executive branch officials who oversee them (and are often drawn from their ranks) are likely to prefer broader criminal statutes to make their work easier.[461] Meanwhile, although banks might occasionally have different

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Group Influence in the 1984 Democratic Caucuses, 85 AM. POLI. SCI. REV. 193 (1991) (finding that interest group endorsements from labor unions and teachers' groups have substantial effects on the candidate choices of Democratic caucus attendees).

[457] DAVID MAYTHEW, CONGRESS: THE ELECTORAL CONNECTION 139 (1974). For a discussion of how voters "discipline" politicians, see John A. Ferejohn, *Incumbent Performance and Electoral Control*, 50 Pub. Choice 5, 6-8 (1986).

[458] *Cf.* Paul Sniderman, Richard Brody & James Kuklinski, *Policy Reasoning on Political Values: The Problem of Racial Equality*, 28 AM. J. OF POL. SCI. 75, 79–84 (1984) (discussing the process through which individuals establish connection between their preferences and the policies that may or may not realize them). *See also* NORMAN H. NIE, SIDNEY VERBA, & JOHN R. PETROCICK, THE CHANGING AMERICAN VOTER 319 (1976) (reviewing empirical research indicating that the electorate responds to psychological and sociological predispositions but also to "the issues of the day and . . . the way in which candidates present those issues").

[459] BENJAMIN O. PAGE, THE RATIONAL PUBLIC 90–97 (1992) (discussing the impact of perceptions of threat and crime rates on the public).

[460] *See, e.g.*, Don Terry, *Carjacking: New Name for Old Crime*, N.Y. TIMES, Dec. 9, 1992, at A18; 18 U.S.C. § 2119 (1992) (criminalizing "carjacking").

[461] To the extent that prosecutors and investigators want to keep the most favorable possible ratio of convictions to work, or the most opportunity to achieve favorable plea bargains, they would have a substantial incentive to obtain statutes providing more discretion, which can enhance discretion to choose targets, engage in plea bargains favorable to law enforcement, and introduce evidence that assists in building cases against people. *Cf.* Stuntz, *Pathological Politics*, *supra* note 301.

interests when compared to broker–dealers or other financial services providers,[462] on balance financial institutions would tend to prefer meager regulation, or at least grants of regulatory authority giving regulators the option of not exercising authority instead of strict statutory requirements.[463] This should lead legislators to be interested in passing laws criminalizing a broad range of conduct (which pleases prosecutors and investigators), laws authorizing but not requiring substantial regulatory enforcement (which makes for good symbolic politics without excessively rankling financial institutions), and, at least on some occasions, holding hearings. Court decisions narrowing the scope of laundering–related laws might provoke a swift congressional overruling, as occurred after the Supreme Court interpreted the leading anti–structuring statute as a specific intent crime.[464] Lawmakers might be less concerned about the details of

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[462] For instance, if banks see little likelihood of rolling back the suspicious activity and cash transaction reporting requirements to which they are subject, then banks might prefer to expand requirements to cover other financial services providers instead of the status quo. This way, banks do not end up competing with non–bank financial services providers on the basis of the resource cost of complying with the anti–laundering regulations or the lost anonymity (which presumably matters substantially, but not exclusively, to customers engaged in illicit activity).

[463] For instance, after September 11, it became harder for banks and other financial institutions to openly oppose efforts to pass changes in anti–laundering and related statutes and regulations that were increasingly framed in Congress as being about security from terrorism. Accordingly, banks and their allied institutions shifted from trying to categorically oppose changes to supporting grants of regulatory authority, which would still allow them an opportunity to oppose any substantive change in responsibility contemplated by a regulatory agency. One press account specifically highlighted the strategy of leaving the details to regulators:

> The deep–pocketed banking industry has been lobbying for changes in the legislation. The American Bankers Association, financial services giant Citigroup and investment banking firm J.P. Morgan Chase are among those that want Congress to leave some of the details about what banks can do up to the Treasury Department rather than spell out specifics in the law.

U.S. House Passes Bill to Fight Terrorist Financing, Money Laundering, ASSOC. PRESS , Oct. 17, 2001, *available at* 2001 WL 29080451. Eventually, the American Bankers Association decided to support the legislation, apparently satisfied that (a) its opposition would likely provoke derision and would be unlikely to slow down the statutory changes (as occurred in 1970 with the original Bank Secrecy Act), and (b) it would have an opportunity to shape the regulations ultimately imposed through the rulemaking process. *See* Barbara de Lollis, *Bankers Becoming New Weapon in War on Terrorism*, GARNETT NEWS SERVICE, Oct. 23, 2001, ("The American Bankers Association supports the legislation, although it had some . . . concerns about language dealing with regulations that spell out future compliance duties. . . .").

[464] *See* Ratzlaf v. United States, 510 U.S. 135 (1993) (holding that breaking up, or "structuring" currency deposits to evade reporting requirements was an specific intent crime, requiring proof beyond a reasonable doubt that the defendant sought to violate the anti–

regulatory implementation designed to target criminal finance, because few among the public are likely to understand the value of it. Lawmakers are also likely to be reluctant to pressure regulators to use all their authority over financial institutions because they have reason to avoid the ire of financial institutions who want to avoid regulation, and indeed, some lawmakers may be actively opposed to some anti-money laundering regulation,[465] either because they benefit from financial institutions' political support, because they are concerned about privacy, or both.

Although no interest group necessarily has a fail-safe means of blocking a legislator's reelection, the concerted opposition of an interest group can frustrate a legislator's agenda and, to some degree, her election prospects.[466] By the same token, the ringing endorsement of law enforcement interest groups—including, for example, retired federal law enforcement officers' associations and subtle support from prosecutors and investigators—might be valuable to a legislator.[467] There is thus an asymmetry, broadly consistent with the sorts of political problems that arise when beneficiaries have collective action problems—between interest groups' concern over the technical details of regulatory and policy programs affecting an industry and the voters' concern.

The reason for this asymmetry is that authorization and appropriations decisions supporting law enforcement are more likely to produce political benefits for legislators than decisions supporting regulatory policy, which may be harder to explain as beneficial to law enforcement and may provoke opposition from interest groups. Legislative activity creating new crimes and appropriating resources for law enforcement would tend to produce more political benefits to legislators than decisions supporting regulatory enforcement.[468]

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structuring statute). In just a few months, *Ratzlaf* was overruled by Congress in Section 411 of the Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, §411, 108 Stat. 2160 (1994). Section 411 amended the anti-structuring statute to delete the word "willfully" from the definition of the crime—essentially making it a strict liability crime.

[465] Before September 11, Banking Committee Chairman Phil Gramm, an ally of the banking industry, consistently blocked virtually all the money laundering and terrorist financing proposals eventually included USAPA Title III. After September 11, he appears to have played only a minor role in shaping the legislation.

[466] *Cf.* Rapoport et al., *supra* note 456.

[467] *Cf.* Stuntz, *Pathological Politics*, *supra* note 301.

[468] Even prosecutors and investigators may be less interested in regulatory enforcement, which might involve the transfer of resources to different bureaucracies and could require them to hone new investigative or prosecutorial approaches. Executive branch officials

Aggressive regulatory enforcement might produce opposition from industries facing concentrated costs, such as financial institutions in the case of the fight against money laundering.[469] Of course, interest groups ranging from meat packers to drug companies to banks may recognize that it is too much to ask of the political process to avoid any regulation whatsoever. But given a choice between detailed, strict regulatory requirements imposed by statute and flexible regulatory authority that can be whittled down to size through the rulemaking process, industry representatives would tend to prefer the latter.[470] Unless legislators had intense, principled convictions that aggressive regulatory enforcement is valuable for its own sake (a few might), then even if public demand for policy output is high (i.e., safer food, more drug enforcement), legislators' tendency should be to prefer to write statutes that give broad grants of regulatory authority to the bureaucracy instead of engaging in a fight over the narrow application of such authority. After passing a combination of criminal statutes and statutes that merely allow for (but do not require) exercise of regulatory authority, legislators have already obtained the political payoff from supporting a statutory change. In most cases, efforts to provide the public's desired policy outputs by engaging in close oversight of the exercise of regulatory authority

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would also be wary of private sector and diplomatic reactions that could arise from the use of regulatory authority. *See, e.g.*, Hudson Morgan, *Treasury's Kid Gloves: Laundry Bag*, THE NEW REPUBLIC, April 14, 2003, at 16, 18.

[469] By "aggressive regulatory enforcement," I mean simply a given policy of regulatory enforcement that imposes, compared to other proposals, more costs and responsibilities on a given industry than what the industry would prefer. *See, e.g.*, *Hearings Before the Subcommittee on Financial Institutions, Senate Committee on Banking and Currency*, 91st Cong. 73 (2d Sess. 1970), where a banking industry representative identified five problems with the currency reporting requirements that were eventually accepted by banks: (1) the possibility that the reporting requirements would invade privacy; (2) the existence of provisions believed to adversely affect the strength of the dollar as an international currency; (3) the difficulty in oversight of the delegated authority to the Treasury Department; (4) operational difficulties and administrative costs to banks in implementing the Act's provisions; and (5) the potential adverse effects of the bill on the trading in, and the market for, American securities. Mr. Desch submitted proposed changes, but none were adopted at the time. *See also* Michael Allen, *Banking Authorities Likely to Abandon Proposal to Thwart Money Laundering*, WALL ST. J., Feb. 18, 1999, at A4 (describing an industry–led protest, resulting in about 30,000 letters and emails, prompting regulators to abandon the more explicit know–your–customer rules proposed).

[470] The Administrative Procedure Act creates a structure that allows interest groups a second opportunity to participate in the development of rules governing their industry when most regulatory rules are developed implementing statutory authority. *See* 5 U.S.C. § 553-556 (2001).

probably have diminishing marginal returns.[471] Political payoffs for legislators sometimes depend on positions taken, not policy outputs.[472] Where regulatory authority is used to achieve a popular objective—such as freezing terrorist assets or imposing a geographic targeting order in New York—regulators and the executive branch are likely to get more of the credit for a successful instance of exercising discretion over the opposition of organized interests. So other things being equal, legislators probably prefer avoiding attacks on organized interest groups that can impair chances of reelection.

A fair inference is that legislators should tend to support broad and open-ended criminal statutes creating liability to money laundering,[473] and substantial grants of authority to regulators. Oversight hearings and funding overall might be affected by the larger set of legislative priorities, but aggressive pro-regulation oversight and funding for regulatory enforcement would probably tend to be limited to some extent by interest group pressure from affected industries.[474] The funds for regulatory enforcement might also be limited because of how much there is to do in enforcing the regulations. If there are fewer regulatory requirements to enforce and legislators' appropriations decisions are driven to any extent by functional concerns, then less regulation to enforce should mean less pressure on Congress to appropriate such funds.

Regulators probably want to avoid angering legislators, and are forced to absorb the apprehensions of financial institutions because of the legal architecture of the administrative state.[475] Although

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[471] There are exceptions to this. Sometimes legislators on committees overseeing regulatory enforcement call oversight hearings to examine regulatory enforcement efforts. But with a few notable exceptions (such as the hearings leading to the Annunzio-Wylie legislation), holding hearings is equivalent to passing statutes that broaden criminal law or increase regulatory authority without establishing many requirements—the hearings allow legislators to claim credit for advancing a goal, without attracting full industry ire by attempting to change the structure of the regulations.

[472] The classic cite is Mayhew, *supra* note 457, at 13-19.

[473] *Cf.* Stuntz, *Pathological Politics*, *supra* note 301, at 544–545 ("[I]f the Justice Department says federal prosecutors need a given statute in order to punish serious criminals, the claim will have immediate credibility with the public . . . .").

[474] Thus, if some legislators sought to double funding for regulatory enforcement responsibilities under the Bank Secrecy Act, we might expect financial institutions to seek to stop it, or to assuage the impact of this through some change in the applicable regulations.

[475] Regulators may seem like dispassionate experts, but they face important political constraints. *See, e.g.*, SERGE TAYLOR, MAKING BUREAUCRACY THINK (1984); WILSON, *supra* note 213, at 133 (agencies develop standard operating procedures of not violating political constraints).

prosecutors and investigators could exert pressure on the other side (for example, requesting strict audits to ensure bank employees are filing enough suspicious activity reports), they have little incentive to do so. Meanwhile, in most cases prosecutors should be less concerned with crime detection and prevention than with the punishment of people already detected (or at least suspected)—which is the function that allows them to fulfill their institutional mission and advance their careers.[476] And with few exceptions, investigators tend to develop skills, abilities, and proclivities wedded to the detection methods already available—the familiar duo of "look for the cash" and "follow the crime" strategies.[477] Finally, judges basically have no opportunity to encourage expansion of the regulatory system beyond what the executive branch would want (which is likely to be chilled by the industry), and would face an uphill battle in trying to narrow the scope of anti–money laundering criminal statutes that are broadly worded and used against unpopular defendants.[478]

Assemble the pieces of the puzzle. The result is a system of broad grants of discretion from legislators to regulators and prosecutors, who are the ones that most directly administer the fight against money laundering. The prevailing legal interpretations of the core anti–money laundering statutes almost define away limits on concepts such as "financial transaction,"[479] making it cheap for investigators and prosecutors to tack money laundering charges onto virtually any federal criminal investigation that involves the spending, receiving, transacting with, or touching of money.[480]

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[476] *See* Stuntz, *Pathological Politics*, *supra* note 301.

[477] *Supra* notes 81, 224; Interview with Secret Service Agent #1, in Washington, D.C., (Nov. 8, 1998).

[478] Pamela S. Karlan, *Two Concepts of Judicial Independence*, 72 S. CAL. L. REV. 535, 555–556 (1999). Though it is hard to know what common denominator exists to explain judges' motivations in interpreting statutes like the money laundering crimes, some scholars and practitioners have suggested that judges do not like to be reversed or overridden. If so, then Eskridge's research on legislative overrides to court statutory interpretation decisions is relevant. *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 362 (1991) (finding that between 1967 and 1990, Congress overrode 18 Supreme Court decisions involving the interpretation of federal criminal statues).

[479] *See supra* notes 113-133 (discussing prevailing doctrine expanding the scope of coverage of the core anti–money laundering statutes).

[480] This makes it easier to play the plea bargaining game—even if the laundering charges are ultimately dropped. *Cf.* Robert G. Morvillo & Barry Bohrer, *Checking the Balance: Prosecutorial Power in an Age of Expansive Legislation*, 32 AM. CRIM. L. REV. 137, 142–43

Meanwhile, regulatory enforcement would tend to be diluted because no one has a strong, concentrated incentive to demand that regulators use all or most of their regulatory authority or something like optimal regulation to maximize deterrence.[481] All of this is consistent, moreover, with the tendency of investigators and prosecutors to use the available criminal statutes and discretionary enforcement to ratchet up penalties for offenders that are actually detected. Some consequences of the proposed "political economy" of laundering enforcement might be familiar to scholars of regulatory and administrative politics, but perhaps less so to commentators focusing on the politics of criminal justice, where the locus of explanation for policy changes is often on overall public sentiment about crime rather than interest groups and institutional politics.[482] To wit: whatever the shortcomings in the existing system, some people have argued that September 11 "changed" it by making the disruption of criminal finance into a major national priority. And in some ways there has been a change. Statutory changes that had been in the works for a half–generation but had been opposed by financial institutions or individual government agencies were enacted in days. But virtually all of this was regulatory authority that the agencies then must figure out how to use, and while political concern over financial enforcement may ebb,[483] the design of the administrative state ensures that interest groups get a second bite at the apple when it comes time to drafting the regulations.[484]

(1995) (contending that prosecutors "assiduously" use money laundering charges to gain leverage in plea negotiations and prosecute cases not connected to third–party money laundering activity or organized criminal networks). For an interesting discussion of prosecutors' incentives and their effect on the plea bargaining process, *see generally* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992) (emphasizing prosecutors' interest in obtaining relatively harsh sentences without a trial).

[481] It is possible to build a theoretical model to discern some sort of "optimal" amount of anti–money laundering regulation, but turning the results of such a model into a practical guide for the administration of a statute is quite difficult. For example, this "optimal" level may undercut a bank's desire to maintain the privacy of its clients. *See Correspondent Banking Hearing*, *supra* note 209, at 145 (Bank of America explaining the value of allowing it to maintain its clients' privacy).

[482] *But see* Stuntz, *Pathological Politics*, *supra* note 301 for a cogent account of such institutional politics (particularly in the context of explaining state criminal law and enforcement policy). *See also* WILSON, *supra* note 213 at 327–29 (discussing the institutional politics of law enforcement bureaucracies).

[483] *Cf.* Stephen Labaton & Richard A. Oppel, Jr., *Enthusiasm Waning for Tougher Post–Enron Controls*, N.Y. TIMES, June 10, 2002, at A1.

[484] The Administrative Procedure Act defines the process through which participation is channeled. *See* 5 U.S.C. §§ 551–556 (2001).

B. CHANGES TO THE SYSTEM

The preceding discussions of how the system operates in practice and what forces might be shaping that operation raises the question of how it might change. After all, if we cannot expect the existing system to do much to disrupt criminal finance—whether such financial activities involve terrorism or drug trafficking—it is worth considering briefly what might be the alternatives, and how a project to assess those alternatives would proceed.[485]

1. Incremental Changes in Substantive Criminal Statutes and Regulatory Policy

First is the matter of the criminal statutes themselves. In their current form, federal anti-money laundering statutes are blunt instruments that tend to serve the interests of prosecutors in increasing punishment against people already detected.[486] It would be easier to defend statutes that were narrowly tailored to target major sources of concern: significant third-party launderers, higher-level figures in criminal organizations, financiers of crime. In some sense the statutes' breadth may seem to be an advantage, because they allow prosecutors to increase the sanction that defendants face at little additional cost. But in a larger sense the "costs" are not entirely trivial: the broad statutes and the resulting number of money laundering charges create the impression that the existing fight is making strides in disrupting criminal finance (when this is questionable). Moreover, as discussed earlier, the use of the statutes simply heightens the extent to which the criminal justice system operates in a way that distorts the penalties defendants might face for engaging in the predicate crime.[487] As discussed earlier, judges can do relatively little about this given the statutes' broad language and precedents reifying their interpretations—except to the extent that the facts of a case place it on the margin of what the statute might defensibly be viewed as proscribing, thereby allowing even a judge

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[485] It would take a separate paper to discuss in detail: (1) why achieving the alleged objectives of the fight against laundering would require drastic changes in the domestic and international financial architecture; (2) what those changes would entail both technically and legally; and (3) how one might resolve the difficult ethical questions that such a system might raise. The discussion that follows is just an initial effort to survey the relevant issues.

[486] *But see* Amann, *supra* note 250 (suggesting that RICO is "broader" than money laundering laws).

[487] *See* Part II.B, *supra*.

strongly committed to legal craft values to restrain the reflexive use of laundering charges.[488]

The more circumscribed reach of substantive statutes (either because they are amended or because they are interpreted narrowly by judges in cases where the facts are close) would not do much by itself to change how authorities detect laundering. That would require substantial changes in regulatory authority, because laundering detection depends primarily on information generated in large measure through reporting requirements and private sector vigilance imposed through regulatory enforcement. One might imagine, for example, changes in the SAR system as one plausible vehicle to improve the ability to detect laundering other than through the predicate offense or through stumbling across a large aggregation of currency. Regulators appear to have no formal system to validate, audit, or test the existing SAR system. This is a problem, because the remaining standard is entirely subjective. Not only does this dilute the potential value of the reports (which are often ignored by law enforcement, even though they are likely to contain at least some valuable information), it also makes it tremendously difficult to tell whether banks or other financial institutions are fulfilling their regulatory responsibilities or not. Treasury could respond in at least two (complementary) ways: by engaging in "sting" operations where agents engage in suspicious activity that does not meet the currency reporting threshold and assessing whether employees file the required report, and by developing explicit standards of what constitutes suspicious behavior that would give rise to reporting obligations.[489]

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[488] Judges appear to do this most in the sentencing phase, when deciding whether money laundering guidelines or other guidelines should be used in calculating an offender's penalty—which is part of what contributes to inconsistent laundering sentences. *See supra* notes 375–377 and accompanying text (discussing inconsistencies in the application of guidelines pertaining to laundering). Recent changes in the applicable guidelines narrow the difference in sentence imposed by the laundering guidelines compared to what would be imposed by the corresponding guideline for the predicate offense.

[489] Of course, the more complex and numerous the patterns of suspicious behavior, the more the standards would have to be updated dynamically to reflect what is learned about the link between financial and criminal activity. This may seem troubling to privacy advocates who might wonder if the use of formal standards in suspicious activity reporting would turn into an excuse to extinguish financial privacy. That concern is worth taking seriously. *See infra* notes 502-03 and accompanying text. Still, the existing system of suspicious activity reporting has a troubling pair of characteristics. On the one hand, the system is driven by subjective and potentially inconsistent impressions of private sector workers. *See supra* note 186 and accompanying text. On the other hand, the reports become part of a system that can help make discretionary law enforcement decisions look technical and objective. *See supra* note 403.

These changes go far beyond the preferred post–September 11 remedy of simply extending the scope of SAR reporting to new domains (such as broker–dealers not affiliated with banks or bank holding companies),[490] and instead would probably require more trust for, and resources from the federal government as well as compliance from the private sector. Both would probably generate political opposition. So if political resistance could be overcome enough to impose revamped SAR reporting, one might wonder if more dramatic changes might also be possible (or advisable).

2. Radical Changes (and the Questions Raised)

On that score, two more radical changes are worth mentioning for the sake of provoking thought—even though a full consideration of them lies beyond the scope of this paper.

The first radical change is to dramatically enhance the audit trails that financial transactions leave behind. Transactions involving cash, for example, interrupt the audit trail. If police suspect that someone is a terrorist and want to track his movements, they can do so if he paid for things by credit card (as did some of the September 11 hijackers). Similarly, if investigators determine that an account in the U.S. may be used for money laundering and money in the account was wired to an account in an offshore financial center (i.e., the Cayman Islands), authorities cannot easily follow the so–called money trail because Cayman Islands authorities may not easily allow bank secrecy laws to be pierced.[491]

In light of this problem, the most radical approach would be to virtually ban cash, or at least (for example) all notes above $20. The purpose here would be two–fold: to force criminals to solve ever greater logistical problems arising from relatively bulkier low–denomination currency, and also to ensure that a greater proportion of transactions leave an audit trail that could help build a case against a wrongdoer. Similarly, the United States and its allies probably possess the economic resources to subject offshore financial centers to an even higher standard of openness than what has been currently

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[490] *See New Treasury Rules for Broker–Dealers Impose Duty to Report Suspicious Activity*, 71 U.S. LAW WEEK 2029–30 (News, July 9, 2002).

[491] The Cayman Islands boasts over 500 banks, including branches of 44 of the world's 50 largest banks, more than any cities except London and New York. Norman Peagan, *A Financial Centre with a Low Profile*, EUROMONEY May 1, 1989. The question is not whether it would *ever* be possible for authorities to get their hands on records from the Cayman Islands, but what standard of proof would be required in order to achieve this.

achieved.[492] The advantages of this radical approach include that a great many more transactions would leave behind audit trails, going from a small-scale street vendor all the way through accounts in offshore financial centers and to the destination account.[493] The disadvantages are virtually self-explanatory. The greenback is a simple and convenient medium of exchange—it does not require a database or anything else to function, except people's willingness to accept it.[494] Offshore finance, meanwhile, might be missed by some users more than others—but squelching it completely is virtually a pipe dream given the continuing innovation in financial technology and the difficulty of imposing some policies across borders.[495]

If anything like these enhanced audit trails were ever created, they would only exacerbate the pressure for authorities to "profile" transactions especially likely to be tied to crime. Such "money profiling" is premised on a simple insight: the key to picking targets for financial investigation is to design a system capable of screening certain kinds of transactions (for example, international wire transfers) that have characteristics justifying some measure of suspicion. Using computer algorithms and a substantial degree of existing legal authority, the result (or at least the goal) would be a system capable of profiling financial transactions—even if they do not involve merely large physical currency movements. The discussion below addresses how one might build a system to "profile" money as a means of improving decisions about where to focus law enforcement investigative resources. For example, financial transactions such as wire transfers are accomplished

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[492] The chosen measures would be quite likely to survive scrutiny under existing international law doctrine. *See supra* note 260 and accompanying text (discussing the argument that the FATF's existing blacklist is compatible with international law).

[493] The audit trails would not only be useful in ex post enforcement (i.e., to build a case against a target that has already been identified). They might also be useful in building profiles of suspicious activity that could later be used to identify transactions that merit additional scrutiny, as discussed below.

[494] *See supra* Part I (discussing the convenience of cash). But note that this is an argument against the complete elimination of cash, not necessarily for the continued existence of high-denomination notes.

[495] Thus, efforts to squelch offshore finance are best analyzed in terms of the types of offshore financial institutions that might be most likely to react to different specific policy initiatives (i.e., restricting their ability to transact with U.S. financial institutions), and the potential substitution by users of existing offshore finance from the more sensitive institutions to the less sensitive ones. At the very least, though, restrictions on offshore financial activity are likely to raise users' costs even when they can still substitute to use financial entities that offer secrecy or other benefits that tend to be associated with offshore status.

because information—rather than physical currency—moves.[496] The information necessary to complete a wire transfer includes the name of the sender and the recipient, as well as the relevant banks. This information, coupled with banks information about the sending or receiving account, is enough with which to profile. Some information on those variables can be obtained from U.S. banks maintaining individual, corporate, or correspondent accounts.[497] Although money does not physically cross any borders as it is transferred from an account in a foreign bank to a U.S. bank account or vice–versa, regulators could develop a standard to distinguish cross–border transfers primarily on the basis of information already contained in a standard international wire transfer form.[498]

Suppose the focus of attention of the profiling system is international wire transfers. Most international transactions are conducted through CHIPS or SWIFT, systems that allow banks to credit or debit different accounts across borders. CHIPS could be forced to incorporate a profiling system.[499] In addition, CHIPS wire transfers "carrying" money to U.S. banks nearly always pass through the largest U.S. international banks in New York, such as Citibank, Chase, and other institutions. These banks could be made part of the money profiling network—and might even require money passports (carrying the additional information most useful to the profiling

[496] Wire transfers are movements of information about the value of different accounts backed by a legal obligation for institutions to settle accounts or resolve disputes about such settlements. *See* Raj Bhala, *The Inverted Pyramid of Wire Transfer Law*, 82 KY. L.J. 347, 351 (1994) (describing the purposes of the funds transfer law and the system it serves as "supporting growth and development in domestic and international financial markets"). U.S. wire transfer systems handle hundreds of thousands of transactions every day. Taken as a whole, the domestic transactions on the Federal Reserve's Fedwire system and the international transactions primarily moving through the CHIPS and SWIFT systems set up by bank consortia approach the vicinity of one million transactions a day. *See* OTA REP., *supra* note 29, at 64.

[497] The requirements need not even be implemented through regulation of banks, for banks are not the only choke–points for financial transactions. All wire transfers occurring to or from U.S. accounts pass through one of three transaction clearinghouse systems—Fedwire, responsible for the lion's share of domestic transactions, or CHIPS and SWIFT (through which flow most cross–border transactions that end or begin in the U.S.).

[498] Information on domestic transactions would require new regulations imposing requirements on financial institutions (including many mid–size and smaller banks), forcing them to keep information longer or submit it to the government. The Annunzio–Wylie Anti–Money Laundering Act allows Treasury and the Federal Reserve to impose additional recordkeeping requirements for wire transfers. The additional requirements could require financial institutions to standardize the electronic records of wire transfers enough to allow for money profiling.

[499] *See* OTA REP., *supra* note 29, at 64.

system) for higher–risk transactions. Obviously, whatever the chosen chokepoint (or, if you prefer, checkpoint), money profiling depends on some change in the means through which the institution chosen keeps its records. But in contrast with the situation confronted by Treasury and the Federal Reserve when they first contemplated recordkeeping rules applying to wire transfers, most entities that could serve as chokepoints already keep transaction records in some electronic form.[500] Whatever the form, it would have to be rendered compatible with the government's profiling information technology. The extent of the change is a major factor driving money profiling's total cost.

Profiling could be used in other contexts. Consider, for example, the challenge faced by a country with a long history of corruption. If an independent authority such as the Central Bank could use a formal system to analyze the accounts of public officials, their families, and their associates for unusual activity, it could be possible to detect a range of potential corrupt activities. Of course, assuming a corrupt public official knew about the surveillance and how to evade it, he could still try to interfere with the surveillance on his account. A persistent–enough corrupt official could also seek alternative means of moving resources (i.e., barter, or an unknown person's account). But these tasks add steps to the corrupt activity, and another opportunity for detection.[501]

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[500] For example, federal wire records and bank wire records are in electronic form at some point during a wire transfer transaction. *See id.* at 65 ("bank records . . . originate in electronic form").

[501] The country in question would have to adapt the profiling system to its financial architecture or work with the administrators of international wire transfer payment systems (such as CHIPS and SWIFT) to implement surveillance. The larger question of whether it would work is difficult to answer in a vacuum, but a number of existing approaches could be adapted to the task. For example, Brian Jacob and Steven Levitt studied teacher cheating on standardized tests in Chicago using a simple pattern recognition algorithm focusing on changes in scores by classroom compared with suspicious answer strings. *See* Brian Jacob & Steven Levitt, *Teacher Cheating* (Sept. 2001) (unpublished research paper draft, on file with author). Although the analogy is not perfect, profiling for corrupt activity could also assess some combination of changes in account balances of family and associates combined with unusual transaction activity and even public information unrelated to (but potentially valuable when viewed in concert with) financial activity. *Cf.* D. Wayne Osgood *et al.*, *Routine Activities and Individual Deviant Behavior*, 61 AM. SOCIOL. REV. 635 (1996) (providing an empirical assessment of the relationship between routine activities and criminal behavior among eighteen to twenty–six year olds, and finding that—even after controlling for age, sex, and socioeconomic status—participation in a host of routine activities was strongly associated with criminal behavior, heavy alcohol use, use of marijuana and other illicit drugs, and dangerous driving). The question is not whether such a

In any case, one should think of enhanced audit trails and money profiling not as fully formed proposals but as ingredients that could be mixed and matched depending on the particular deficiencies of alternative law enforcement strategies (say, picking people to investigate on the basis of race, an officer's intuition, or both), the capacity to protect interests in individual autonomy and government accountability, and the needs created by certain kinds of substantive criminal or regulatory violations (say, Enron– or WorldCom–style corporate fraud). Although figuring out how to implement either of these proposals on a larger scale would be devilishly difficult, it would be hard to argue that the changes would be impossible in principle. For all its path dependence, the domestic and international financial architecture is fundamentally contingent and malleable. Cost is also a problem, but it would be difficult to argue that either the financial costs or the technical challenges are intractable. The architecture of the payments system is, of course, an architecture—for all its path dependence, it can change and it is changing. Internet finance is just one example of the continuous changes in the payments system architecture that provide opportunities for more formalized approaches to law enforcement.

The more difficult question is not whether an architecture for money profiling could be designed in principle but whether such a venture would be warranted. Some commentators have inveigled against formalized approaches that rely on information technology because these lack the measured ability to consider context that humans bring to situations.[502] Perhaps they fail to consider that

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profiling system would be impossible to elude (it would not) or whether such a system would fail to yield false positives (it would yield them). Instead, the proper question is whether such a system is worth developing once we consider: (1) the benefit of raising corrupt public officials' cost (to some degree) of engaging in corruption, (2) the false positive rate (priced at some defensible rate), (3) the privacy risk generated by the system as designed, and (4) the cost represented by the risk that the system will degenerate into something more sinister. It seems hard to argue that the balancing of costs and benefits as described above (even accepting the substantial practical and organizational problems in assessing them) would routinely be a forgone conclusion.

[502] Writing in the 1940s, sociologist Philip Selznick questioned whether "society" should embrace the dangerous combination of bureaucracy, technology, and law that would render virtually all violations of law possible to detect (and punish):

> Do we need or want agencies of control so efficient and so impartial that every actual offense has an equal chance of being known and processed? I am concerned that we do not respond too eagerly and too well to the apparent need for more effective mechanisms of social control. In the administration of justice, if anywhere, we need to guard human values and forestall the creation of mindless machines for handling cases according to set routines. Here vigilance consists in careful study of actual operations so that we may know what will be lost or gained.

human suspicion is itself possessed of baggage that can overwhelm context—ranging from racial prejudice to limited ability to evaluate different variables. The point is not that information technology can or should always replace human intuition in the fight against law enforcement or in any other context. Instead the point is that a computer algorithm may often provide keener insight than a bank employee who looks at an arriving customer and decides her behavior is suspicious on the basis of how she walks, or talks, or dresses.

Ultimately, whether we want to live in a world with enhanced audit trails and money profiling depends much more on larger issues that lurk in the background. First, what is the comparative advantage of trying to detect crime using enhanced audit trails and money profiling versus more traditional law enforcement methods? Regardless of how one tries to analyze this question (i.e., empirically, through computer simulations, or whatever), it should be noted that the whole point of using audit trails and profiling for detection is to understand things that our intuition cannot; if intuition yielded the same list of suspects that a computer algorithm did, there would be no need to use both. Which means intuitive guesses would tend to miss the potential value of profiling. Second, assuming that enhanced audit trails and money profiling were initially used only for laudable purposes (i.e., to advance good faith efforts to catch terrorists or other criminals), how should society evaluate the risk that accepting these new tactics will eventually pose an affront to privacy, due process, or any important value? Careless use of the slippery slope metaphor probably tends to obscure the different mechanics through which mild money profiling might become pervasive financial surveillance, as well as the various means through which those different slopes might be stopped. Forthright rejection of such possible degeneration, on the other hand, would seem to miss the point of this article, which is in part that a legal or administrative architecture may not be used primarily for its stated purpose. Anything beyond a mild symbolic change in the fight against laundering demands that these questions be confronted.

CONCLUSION

Whatever one thinks of the enterprise of disrupting financial activity related to crime, there is a tenuous relationship between the draconian, aggressive prosecutorial efforts to punish money

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Philip Selznick, *Foundations of the Theory of Organization*, AMER. SOC. REV. 13 (1948).

laundering and the larger project of using criminal penalties, regulation, and detection strategies to disrupt criminal finance. The relationship is tenuous primarily because of limitations in what sort of suspicious activity the system can detect, a limitation that becomes obvious once the system is viewed as a product of statutes, rules, and detection strategies. While the criminal statutes that govern who gets charged, convicted, and sentenced for money laundering give authorities tremendous power to call almost anything that involves money from crime "money laundering," the regulatory program and investigative strategies to ferret out criminal financial activity are quite limited, giving authorities only a few ways of finding the people who are gorging on profits from, and financing organized criminal activity. In most ways, the larger universe of criminal financial activity thus remains largely untouched by the fight against money laundering.

It does seem plausible that targeting financial activity related to crime may at times be an effective means of detecting and disrupting the underlying crime. Currency reporting makes some traffickers shyer about walking into a bank hefting a trash bag swollen with cash. Those forced to "structure" their deposits in order to evade reporting requirements probably face a marginally greater cost, forcing cash into the financial system. A terrorist known to the authorities who chooses to use her own name when opening a bank account runs the risk that her account will be frozen. But beyond some of these obvious stopgap measures, the rationale for targeting criminal financial activity is remarkably disconnected from the operation of the system.[503] Elements of the moralistic justification are readily apparent in the legislative history of the criminal and regulatory statutes that make up the fight against money laundering. Since then, advocates for the fight against money laundering tend to focus on how the fight can increase the costs of perpetrating crime or the ease of detecting offenders—whether the offenders are drug traffickers or terrorist financiers. Much of the argument makes sense and finds support in anecdotal episodes. Indeed, some of the consequentialist argument (i.e., justifying currency reporting

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[503] What is left as a justification for the reality of the fight against money laundering is the general principle that people should not profit from (or finance) crimes, regardless of whether they are major laundering figures or not—and that those who get caught doing so should be punished severely. If this is to be the major justification, then perhaps it is ironic that an enforcement strategy that is so often justified in the rationalistic language of raising the cost of perpetrating crime ends up having to justify its actual use in such moralistic terms.

requirements) is almost impossible to dismiss because its premises are so hard to refute (currency is bulky).

Still, the apparent institutional politics of the fight against money laundering has made it into something that is both less and more than what was promised. It is more than what was promised because the statutes have been so useful to prosecutors in increasing the punishment of predicate offenders ranging from fraudsters to international drug traffickers to local neighborhood drug touts. Whatever else the advocates of the fight against money laundering promised, they did not say, "people who commit predicate crimes deserve tougher punishments for doing those crimes, so let's pass statutes that allow us to punish those people more severely for doing anything with the money they get from their offenses." At the same time, the fight provides less than what was promised for a few interrelated reasons. Using money laundering charges against criminals already punishable for the predicate crime is unlikely to disrupt criminal finance, because predicate offenders already face punishment and there is unlikely to be marginal value in additional penalties for what is essentially still the predicate offense.[504] Beyond this, we do not know exactly how much the fight increases the cost of perpetrating a particular crime, and how much that increase in cost actually lowers criminal activity. We can tell plausible stories about why a world without any fight against money laundering would be much more desirable for criminals. The system lacks a built–in capacity to gather aggregate information and to allow for careful evaluation. Third, the system turns out to have limited capacity to detect and punish the third–party launderers and higher–level criminals that so often figured in the justification. It appears even less capable of detecting terrorist financing, which may bear no connection to cash and only occasional links to non–terrorism predicates.[505]

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[504] This would be true unless, of course, one contends that the legislature is systematically under–sanctioning predicate offenses relative to some optimal mix of imprisonment and fines, but if anything the legislature has incentives to do the opposite. *See* Part II.B, *supra*.

[505] What's left is to expose the shortcomings in the existing fight against money laundering, a fight that has become an increasingly prominent—and global—part of the criminal justice arsenal. Exposing those flaws gives us purchase on profoundly important questions about the reality of criminal justice. The questions that arise include: Who actually gets punished for committing crimes? Is the process of allocating responsibility for criminal offenses distorted by politics, leading to a disconnection between what justifies the system and what that system achieves?

This makes it hard to know, on balance, what to make of that fight. The system is not an unmitigated disaster. It is possible and perhaps even easy to accept that modern criminal and regulatory statutes are rarely just defining an inherent wrong—and often are just defining offenses that make it cheaper for the authorities to punish people for activity related to, but not directly involving, the dreaded harm of the predicate offense.[506] If one assumes away questions about the substantive offenses that are criminalized, then the system looks like it has some benefits. It gives law enforcement the legal authority to punish some aspects of criminal finance (i.e., a corrupt banker who scoffs at all the currency reporting requirements to make it easy for a known drug dealer to deposit his money). In principle, some of the fight might allow law enforcement to make limited strides against terrorist financing, because the framework for suspicious activity reporting (though subjective) is at least something that can help ferret out patently strange transactions, assuming the employee wants to cooperate. Nor should one ignore the potential benefits of the expressive condemnation of criminal finance—since laundering can be understood in part as making society an ally in enjoying profits from despised activity. Most of these benefits get mentioned when executive branch officials or prosecutors trot out the familiar cue–cards explaining the importance of fighting money laundering.[507]

Yet there are some trade–offs and shortcomings to the current system that are not so familiar. Other things being equal, prosecutors use money laundering statutes to punish predicate offenders, many of whom are already subject to severe penalties. Investigators follow physical currency and the money trails of offenders about which they already know, not necessarily because these are the worst criminal financiers or even the worst criminals, but simply because they are the easy to find and to charge with laundering. Whether these parties are the ones who most deserve to be punished for laundering gets lost in the shuffle somewhere. Investigators' heavy reliance on undercover investigations to detect money laundering even raises the specter of government complicity in allowing money laundering to proceed.[508] Regulators tend to resist promulgating rules that could

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[506] *See* Stuntz, *Pathological Politics*, *supra* note 301, at 519-520.

[507] *See* Part II.B, *supra*.

[508] The reliance on undercover operations resulted in the redrafting of § 1956 soon after its initial passage, to ensure that investigators had explicit authorization for "sting" operations. *See* OTA REP., *supra* 29, at 189 n.59.

change this state of affairs by requiring more disclosure of information that could be analyzed using information technology. Their main objective appears not to have been to design the most thorough means of detecting and disrupting financial activity linked to crime, but to design and operate a politically efficient system that survives the scrutiny of the political process. Ironically, the result is that the fight against money laundering seems least suited to detecting and punishing the sorts of figures that were so often cited as among the major reasons for creating the system—higher-ups in criminal organizations who do not deal in cash but in anonymous bank accounts at secrecy havens, and professional launderers (even those who deal in cash) expert enough to avoid being foiled by informants or undercover investigations. In the meantime, the elaborate legal machinery of this fight hums along, leading superficial observers to believe that, in laundering enforcement and its complements, the authorities have something like an ace in the hole against drugs, corruption, and terrorism.

A simplistic response to all this is to acknowledge the system's shortcomings but insist that they can be addressed. "Look," the respondent might say, "the system has its problems, but it's not a complete failure. Surely it can be fine-tuned. And what's more, do you want criminals to walk away with money, anonymity, and the power these bring?" Although this article has not comprehensively resolved the question of how one can "fix" the system, portions of Part IV note this is no mean feat. The architecture of the financial system may be pliable, but it would have to be reshaped to store more information about the people making transactions and the accounts involved. Even if the technical challenges are overcome, we have to live with the consequences of what we build—consequences that may involve a gap between the reality of post-modern financial enforcement made possible by the new architecture and the reasons for building that architecture in the first place.

Which leads to a more complex response to the present critique, focusing not on how to close the chasm between the anti-laundering system's justification and its reality but on the reasons why that chasm exists and the consequences that reverberate from such gaps in the whole enterprise of criminal justice.[509] Is the gap between the

[509] Perhaps there also a far more pessimistic response—that exposing the disconnection between what an enforcement system promises and what it delivers is a lost cause, and we would be better served by assuming that criminal enforcement strategies are pervasively justified on one basis yet used in a different way. But even if the law's story is often one

system's justification and performance a minor aberration, or a fairly pervasive feature of criminal justice—where a statute's ostensible justification is itself a sort of "laundering"? And how much should authorities allow the ease with which someone can be detected for engaging in illegal activity—whether laundering, corruption, terrorism, regulatory violations or whatever—to drive the distribution of punishments? As the fight against money laundering demonstrates time and again, these questions are not just minor technical problems to be solved before the real enforcement game begins. They *are* the game.

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involving this sort of bait-and-switch (whether planned or not), it seems altogether too cynical to believe that it is a waste of time to draw attention to the disconnections between justification and practical application—a disconnection that probably drives some of the profound disparities in money laundering sentences. Some people (prosecutors? legislators?) might say, "you know what? I don't care. It makes prosecutors' and investigators' lives easier, and it makes politicians feel like they are contributing to the fight against crime." If so, then perhaps they should have the courage of their convictions and justify the fight on a basis that is more faithful to what agents, prosecutors, regulators, and legislators actually do.