Spotting Money Launderers: A Better Way to Fight Organized Crime?

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INTRODUCTION

In 1970, Congress launched a new assault on organized crime by enacting the Racketeer Influenced and Corrupt Organizations Act.1 This law, commonly known as RICO, promised a new era in which crime would be prosecuted not simply as an isolated event, but rather as part of an ongoing, illegal racket. Three decades later, the efficacy of RICO remains in question. Proving the existence of a criminal organization can be a complex and cumbersome task. It is not surprising, therefore, that law enforcement has turned to more direct methods of attack.

One such method has been to develop new ways of spotting, prosecuting, and punishing money launderers. Money launderers are people who make dirty money clean; who, to quote a U.S. government report,

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"conceale[l] the existence, illegal source, or illegal application of income, and . . . disgu[e] that income to make it appear legitimate."²

Money laundering investigations have been much in the news of late. There have been stories that Raúl Salinas de Gortari laundered kickbacks from drug traffickers while his brother was President of Mexico.³ That Ferdinand Marcos stashed nearly half a billion dollars in Swiss banks while he ruled the Philippines.⁴ That two of Mexico’s largest banks have pleaded guilty to laundering charges stemming from a controversial U.S. sting operation.⁵ That the former prime minister of Ukraine pleaded guilty to Swiss charges that he laundered $9 million in stolen funds, even as he faced U.S. charges of laundering $114 million.⁶ And, of course, that Russian organized crime networks laundered billions of dollars through the Bank of New York.⁷

Despite the new-found celebrity of the crime, laws against money laundering have roots as long as those of RICO. This article will trace those origins, after evaluating RICO. The article then will consider whether domestic and international efforts to combat money laundering provide better means than RICO for fighting organized crime. It will demonstrate that anti-money-laundering laws themselves are complex and burdensome, yet of dubious effectiveness. The article will recom-


mend a new crime-fighting balance, one that accords due weight to the privacy and other interests of law-abiding businesses and individuals.

I. ATTACKING RACKETEERING

Spurred by a Presidential commission that had chronicled deep infiltration of organized crime families into businesses, labor unions, and other legitimate organizations, Congress in 1970 enacted comprehensive legislation to attack organized crime. The stated purpose of the legislation was to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

This Racketeer Influenced and Corrupt Organizations Act, often called RICO, forbids a person to conduct an “enterprise” through, or make use of income derived from, “a pattern of racketeering activity.” Criminal conviction exposes a person to twenty years’ imprisonment, a fine, and forfeiture of property. RICO also permits civil suits; the latter may be brought not only by the federal government, but also by anyone “injured in his business or property” because of a RICO violation. Remedies for a civil violation include divestment, dissolution, and other


11. See id. at 922.

12. See 18 U.S.C. § 1962(a) - (c) (1994). Conspiracy to engage in such conduct is also prohibited. See id. § 1962(d). A second predicate, engaging in similar activity related to “collection of an unlawful debt,” likewise proscribed. See id. § 1962(a) - (c). This predicate is relatively narrow and clear, and thus not as controversial as the “pattern of racketeering activity” predicate.

13. See id. § 1963(a). Although the maximum sentence ordinarily is twenty years, a defendant may be sentenced to life if the “racketeering activity” that served as a predicate for conviction itself permits a life sentence.

14. See id. §1964(b), (c). A final judgment of conviction in a criminal court estops a defendant to deny corresponding allegations in a civil suit. See id. § 1964(d).
injunctive relief, and, in the case of private lawsuits, treble damages and attorney's fees.\textsuperscript{15}

RICO contains sweeping definitions of key statutory terms.\textsuperscript{16} An "enterprise" refers to virtually any grouping, business or otherwise.\textsuperscript{17} "Racketeering activity" includes scores of state and federal offenses, among them gambling, extortion, fraud, murder for hire, drug trafficking, prostitution, and alien smuggling.\textsuperscript{18} Commission of at least two such acts within a ten-year period constitutes a "pattern of racketeering activity."\textsuperscript{19} Supreme Court efforts to define this last term – as "a series of related predicates," as entailing "continuity plus relationship," and as something more than two isolated acts\textsuperscript{20} – afford little clarity.

The elusive nature of these concepts has engendered criticism. A decade ago, Professor Gerard E. Lynch acknowledged lower courts' rejections of claims that the statute was unconstitutionally vague, yet questioned whether "the values of legality for guidance of the citizen are adequately served by a scheme in which prohibitions are clearly stated, but unexpectedly severe penalties can be imposed."\textsuperscript{21} Two years later, in \textit{H.J. Inc. v. Northwestern Bell Telephone Co.}, Justice Scalia, joined by three Justices, variously described the RICO statute as "enigmatic," "difficult to define," and "beyond me."\textsuperscript{22} He contended that the Court's effort at definition "increases rather than removes vagueness."\textsuperscript{23} The

\begin{itemize}
    \item \textsuperscript{15} See id. § 1964(a)-(c).
    \item \textsuperscript{16} See Testimony of Gerard E. Lynch, on Civil RICO, Extortion, and Public Advocacy Groups, 1998 WL 12762342 (July 17, 1998) [hereinafter Lynch Testimony] ("Because it is so abstract and so broadly applicable, RICO has proven adaptable to virtually any form of criminal activity. Political and labor corruption, business crime, organized criminal activity, terrorist groups, and ordinary violent crime have been prosecuted using the RICO statut[e].").
    \item \textsuperscript{17} See 18 U.S.C. § 1961(4) (1994) ("enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity"). \textit{See also} United States v. Turkette, 452 U.S. 576, 583 (1981) (broadly defining "enterprise" to include any "group of persons associated together for a common purpose . . . in a course of conduct"); Lynch Testimony, \textit{supra} note 16 ("An 'enterprise' under RICO can be almost any structured activity, legal or illegal, formal or informal: a corporation, a labor union, a government office, a Mafia family, a law practice, a civil rights organization, a church or just a group of people, loosely affiliated with each other, who share a common goal.").
    \item \textsuperscript{19} See id. § 1961(5).
    \item \textsuperscript{20} See \textit{H.J. Inc. v. Northwestern Bell Tel. Co.}, 492 U.S. 229, 241-42 (1989) (defining "pattern" as "a series of related predicates" over time); \textit{Sedima, S.P.R.L. v. Imrex Co.}, 473 U.S. 479, 497 n.14 (1985) (stating that "two isolated acts of racketeering do not constitute a pattern," and, citing legislative history, stressing importance of "continuity plus relationship" (emphasis in original)).
    \item \textsuperscript{21} Lynch, \textit{RICO I & II, supra} note 9, at 717-20.
    \item \textsuperscript{22} 492 U.S. at 251, 253, 255 (Scalia, J., joined by Rehnquist, C.J., O'Connor and Kennedy, JJ., concurring in judgment).
    \item \textsuperscript{23} Id. at 255 (Scalia, J., concurring in judgment). The Court has not entertained a vagueness challenge to RICO.
majority, however, found the "absence of any textual identification" of "pattern" to be nothing more than a demonstration of Congress's "flexible approach."\textsuperscript{24}

The Court has accorded RICO capacious scope. Although RICO was aimed at organized crime,\textsuperscript{25} less than 10 percent of RICO indictments filed in the first fifteen years involved a criminal organization's use of techniques like extortion to corrupt a legitimate business.\textsuperscript{26} Indeed, Professor Lynch has stated that prosecutors have exercised restraint in the use of criminal RICO.\textsuperscript{27} At the same time, the Court approved a broader use of RICO, one that reaches beyond the organized crime context. Thus, even as the Court acknowledged that RICO's "major purpose . . . is to address the infiltration of legitimate business by organized crime,"\textsuperscript{28} it held that a RICO "enterprise" may be an illegitimate as well as a legitimate business.\textsuperscript{29} It interpreted RICO's criminal forfeiture provision liberally, to serve a "broader goal . . . to remove the profit from organized crime by separating the racketeer from his dishonest gains."\textsuperscript{30} The Court further has permitted civil litigants to invoke the statute in myriad contexts unrelated to classic notions of organized crime. A notable example is \textit{National Organization for Women v. Scheidler}, in which the Court sustained the use of RICO to challenge anti-abortion protesters even though the defendants had no economic

\begin{itemize}
\item \textsuperscript{24} Id. at 238.
\item \textsuperscript{25} See Douglas E. Abrams, \textit{Crime Legislation and the Public Interest: Lessons from Civil RICO}, 50 SMU L. REV. 33, 35 (1996) ("RICO's goal was to eliminate the infiltration of organized crime and racketeering into businesses, labor unions, and other legitimate organizations operating in interstate commerce." (citing S. Rep. No. 617, 91st Cong., 1st Sess. 76 (1969)).
\item \textsuperscript{26} See Lynch, \textit{RICO I \\& II}, supra note 9, at 726-28 (stating that less than 8 percent of indictments in reported decisions in first fifteen years alleged infiltration of legitimate businesses, and that in "only a handful" was the infiltrator a classic criminal organization); \textit{see also} Abrams, supra note 25, at 52-53 (stating that only 9 percent of civil RICO decisions before 1985 "involved 'allegations of criminal activity of a type generally associated with professional criminals,' such as arson, bribery, commercial bribery, embezzlement, extortion, gambling, theft, and political corruption") (quoting \textit{REPORT OF THE AD HOC CIVIL RICO TASK FORCE OF THE ABA SECTION OF CORP., BANKING \\& BUSINESS LAW 55 (1985))}. \textit{Accord L. Gordon Crovitz, RICO's Broken Commandments, WALL. ST. J., Jan. 26, 1989} (alleging that federal prosecutors had violated internal rules and used RICO in mail fraud and tax cases and as a tool to prod plea bargaining, coerce testimony, and accomplish pretrial forfeitures).
\item \textsuperscript{27} Lynch Testimony, supra note 16 (stating that civil RICO "has been subject to greater abuse" in part because although "the Justice Department, in the exercise of prosecutorial discretion, has had a pretty good record of refusing to apply RICO to its fullest possible literal extent . . . private lawyers representing potential plaintiffs have no obligation or incentive to show similar restraint").
\item \textsuperscript{28} \textit{Turkette}, 452 U.S. at 591.
\item \textsuperscript{29} \textit{See id.} at 580-81.
\item \textsuperscript{30} \textit{Russello v. United States}, 464 U.S. 16, 28 (1983).
\end{itemize}
motive for their conduct. In the wake of such decisions, employment, health-care, securities, and product-liability suits often allege RICO violations.

There is some support for these developments. But there is concern as well. Critics have decried RICO's transmutation of state into federal offenses. They have worried that the blending of civil and criminal RICO improperly permits civil defendants to be branded with the stigma of criminal behavior. They have complained that the attraction of treble damages has spawned frivolous and inappropriate civil suits. One judge has called civil RICO "a recurring nightmare for federal courts."

A cause of headaches, although perhaps not nightmares, is RICO's complexity. A RICO offense is compound: the prosecution first must prove an underlying crime, then that the crime was committed in a statu-

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33. See, e.g., Gerard E. Lynch, RICO: The Crime of Being a Criminal, Parts III & IV, 87 COLUM. L. REV. 920, 983-84 (1987) [hereinafter Lynch, RICO III & IV] (offering some "favorable conclusions" that criminal RICO had not been frequently abused and that it had filled "some serious gaps in the federal penal code"); Blakely, supra note 8, at 341-49 (approving of civil RICO as means to enforce insufficiently prosecuted laws against fraud). Cf. Sedima, 473 U.S. at 499 ("[T]he fact that RICO was been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.") (internal quotation marks omitted).
34. See Sedima, 473 U.S. at 501 (Marshall, J., dissenting) (disparaging RICO for "validat[ing] the federalization of broad areas of state common law of frauds"), quoted in H.J. Inc., 492 U.S. at 255 (Scalia, J., concurring in judgment) (criticizing this trend in particular because of the amorphous nature of RICO's statutory terms). Cf. Lynch, RICO I & II, supra note 9, at 714 (stating that RICO may be said to have "swallowed" much of the federal and state penal codes). But cf. Turkette, 452 U.S. at 586-87 (concluding that Congress intended to "alter the balance between federal and state enforcement of criminal law," and that Congress had acted within its power).
35. See, e.g., Antonio J. Califa, RICO Threatens Civil Liberties, 43 VAND. L. REV. 805, 849-50 (1990). But see Sedima, 473 U.S. at 492 ("As for stigma, a civil RICO proceeding leaves no greater stain than do a number of other civil proceedings.").
spotting money launderers

This construction is not new to RICO. The Hobbs Act of 1948, an early attempt at federal regulation of organized crime, requires proof not only that a defendant committed robbery or extortion, but also that she did so with the particular effect of obstructing commerce. RICO, however, is more complicated. It requires a jury first to find that the defendant has committed the requisite pattern of offenses. Only after this predicate is established may the jury turn to consider whether the defendant’s conduct of an enterprise, or use of income derived from an enterprise, was sufficiently linked to this pattern. Because of this complexity, RICO entails protracted investigations that result in long, confusing trials, culminating in long, confusing jury instructions.

As if these concerns were not enough, some argue that RICO may not be effective against the sort of organized crime that Congress had contemplated. In part, this may be because organized crime has shifted away from the relatively stable crime “families” to loose and ever-changing amalgamations of individuals. Finally, critics question

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38. Proof of predicates allows guilt under RICO, as well as for substantive offenses; nonetheless, it has been deemed not to create a double jeopardy problem. See Dorean Marguerite Koenig, The Criminal Justice System Facing the Challenge of Organized Crime, 44 WAYNE L. REV. 1351, 1359-60 (1998).


40. See Koenig, supra note 38, at 1360 (describing claim of veteran defense lawyer that what once would have been a short state trial on prostitution charges had, by dint of RICO, metamorphosed into a month-long federal trial); see also Turkette, 452 U.S. at 579 (noting that RICO trial had lasted six weeks).

41. See Lynch Testimony, supra note 16 (“The very broad and very abstract definitions of the crime make it possible, especially in conspiracy prosecutions, to tie together numerous defendants, and very different sorts of predicate acts, committed in different places at different times, into a single prosecution, with the attendant risk that juror[s] will be confused and overwhelmed by the evidence, and convict, by association, individuals who would never be convicted if they had to be tried for specific, concrete crimes”).

42. See Lynch, RICO I & II, supra note 9, at 726 (stating that “RICO has been a nearly total failure as a weapon against the kind of activity that led Congress to enact it”; that is, against the infiltration of legitimate business by organized crime): Crovitz, supra note 26 (describing New York criminal RICO case lost for lack of proof, and concluding that “just as RICO is expanding to cover disputes with legitimate business concerns, prosecutors are finding RICO ineffective against organized crime”).

43. An agent for the Bureau of Alcohol, Tobacco and Firearms has written that this new type of criminal grouping makes it difficult to use RICO against firearms traffickers:

A major problem in conducting RICO investigations is not so much proving the predicate crime but establishing the group organizational structure. Groups dealing in firearms and other criminal activities do not appear as rigidly organized and structured as a traditional organized crime family or outlaw motorcycle gang. These groups appear to constantly combine, disband, and recombine, not necessarily with the same individuals, which causes difficulty in determining group structure and personnel.
whether the statute is a necessary crime-fighting tool. The predicate acts themselves are substantive crimes,\textsuperscript{44} which are often pleaded and proved in the same case,\textsuperscript{45} often more easily than the RICO counts.\textsuperscript{46} Nor is RICO any longer needed to secure harsh federal punishment. Federal criminal jurisdiction now includes what once were state offenses,\textsuperscript{47} and maximum sentences for many substantive crimes have been increased.\textsuperscript{48}

Given these criticisms, a more focused attack on illegal conduct of organized criminals would seem to hold more promise.

\section*{II. A Narrower Approach: Follow the Money}

One way to attack organized crime more directly is to follow the money. Those who make crime their livelihood must find ways to use the profits of their illegal conduct.\textsuperscript{49} This is not as easy as it may seem. A federal prosecutor commented, ""The major problem the cocaine traffickers have is not getting the drugs into the country. It's getting the money out."

Criminals must engage in money laundering,\textsuperscript{50} a term that, according to one version, derived from the Mafia's Prohibition-Era.


\textsuperscript{44} \textit{Accord} Craig M. Bradley, \textit{Racketeering and the Federalization of Crime}, 22 \textit{AM. CRIM. L. REV.} 213, 257 (1984) (asserting that ""RICO has virtually never been used in a case which was not reachable by other statutes"").

\textsuperscript{45} \textit{See}, \textit{e.g.}, Turkette, 452 U.S. at 579 (stating that defendant had been convicted of one RICO count, plus eight counts alleging substantive offenses for the same conduct named as RICO predicate offenses).

\textsuperscript{46} \textit{Cf.} Peter J. Henning, \textit{Individual Liability for Conduct by Criminal Organizations in the United States}, 44 \textit{WAYNE L. REV.} 1305, 1328-29 (1998) (describing varied levels of intent prosecutors must prove in order to secure RICO conviction).

\textsuperscript{47} \textit{See} Lynch, \textit{RICO III & IV}, \textit{supra} note 33, at 923 (""Theft, arson, extortion, prostitution, gambling, and of course narcotics trafficking, are all covered by federal statutes."); Lynch Testimony, \textit{supra} note 16 (""where RICO was once a vehicle to gain federal jurisdiction over the corruption of state and local public officials, there are now federal statutes that directly penalize such conduct, and RICO is no longer necessary"").

\textsuperscript{48} \textit{See} Lynch Testimony, \textit{supra} note 16 (""Unlike the situation in 1970, or even in the 1980's, with the adoption of enhanced fines and the federal sentencing guidelines, penalties for white collar offenses are today adequate, and there is no need for RICO to enhance them in particular cases"").


\textsuperscript{51} \textit{See} U.N. \textit{DRUG REPORT}, \textit{supra} note 49, at 136 (""Money laundering is a vital component of all financially motivated crime."").
practice of mixing illegal profits with money that laundromats had earned legally.\textsuperscript{52} And while adept leaders of criminal organizations may insulate themselves from much criminal activity, eventually they must come in contact with the laundered funds.\textsuperscript{53}

It is estimated that between $590 billion and $1.5 trillion are laundered each year throughout the world.\textsuperscript{54} U.S. officials, in particular, attribute much of this money to drug trafficking.\textsuperscript{55} Sociologist Manuel Castells has written that “about half of the laundered money, at least in the case of the Sicilian Mafia, is reinvested in legitimate activities.”\textsuperscript{56} In an observation that echoes congressional concerns that led to passage of RICO, he added, “This continuity between profits from criminal activities and their investment in legitimate activities makes it impossible to limit the economic impact of global crime to the former, since the latter play a major role in ensuring, and covering up, the overall dynamics of the system.”\textsuperscript{57}

It seems logical that if law enforcement can hinder this process by which criminals make their dirty money clean, it can hinder criminals themselves.\textsuperscript{58} On this premise, governments have endeavored, on both the domestic and the international fronts, to create such a hindrance.

\begin{footnotes}
\item[52] See Andrew Mitchell et al., Confiscation 218 (1992).
\item[53] See David A. Chaikin, Money Laundering as a Supranational Crime: An Investigatory Perspective, in Principles and Procedures for a New Transnational Criminal Law 415, 420-21 (Albin Eser & Otto Lagodny eds., 1992) (“Those at the top of the organization are insulated from the physical acts of the crime. The criminal leaders are extremely difficult to investigate, let alone prosecute. It is the money trail which often represents the only link between the leaders of the criminal organization and the crime itself.”); Ethan A. Nadelmann, Unlaundering Dirty Money Abroad: US Foreign Policy and Financial Secrecy Jurisdictions, 18 U. MIAMI INT’L L. REV. 33, 34 (1986).
\item[57] Id. at 169-70. See also U.N. Drug Report, supra note 49, at 136 (stating that criminal organizations often aim to “manipulate their illicit proceeds . . . through the legitimate financial sector”); William C. Gilmore, Introduction to International Efforts to Combat Money Laundering at ix, x (W.C. Gilmore ed., 1992) (same); Petrus C. van Duyne, Organized Crime in Europe 113 (1996) (same).
\item[58] See Nadelmann, supra note 53, at 34 (“[I]nsofar as criminals . . . act as they do for the money, the best deterrent and punishment is to confiscate their incentive.”).
\end{footnotes}
A. Domestic Efforts

1. Bank Secrecy Act of 1970

The same year that it passed RICO, Congress enacted the Bank Secrecy Act, often called the BSA, an early move against the conversion of ill-gotten gains. Departing from the common-law tradition that declines to criminalize failures to act, the BSA requires banks and other "financial institutions" to file with the U.S. government Currency Transaction Reports, or CTRs, on cash transactions involving more than $10,000. It authorizes civil as well as criminal actions; however, unlike RICO, which permitted private civil actions, the BSA allows only the U.S. government to bring such actions. Civil remedies include injunctions, fines, and forfeiture. Willful violations are deemed crimes, although initially they were punishable by no more than five years in prison.

The BSA is not precisely an anti-money-laundering law. It focuses on financial institutions rather than on the individuals who use them, and it requires reports even of legally obtained cash. Yet it aims

60. See California Bankers Ass'n v. Shultz, 416 U.S. 21, 27 (1974) (describing congressional intent to stop "serious and widespread use of foreign financial institutions" to violate U.S. laws); Koenig, supra note 38, at 1375 (stating that the BSA was "passed in 1970 in response to the increased use of financial institutions to launder 'unreported income and illegally obtained' money") (quoting David J. Elbaz et al., Financial Institutions Fraud, 34 AM. CRIM. L. REV. 665, 685 (1997)).
62. See 31 U.S.C. § 5313(a) (1994) (establishing reporting requirement); 31 C.F.R. 103.29 (1999) (setting amount at $10,000). The BSA's initial focus reflected the view that, as one article put it, "Cash is the medium of exchange for the underground economy." Steven Biskupic & Eric J. Klumb, 10 Things to Know about the Federal Money Laundering Law, 67 WIS. L. REV. 12, 12 (1994). Since 1990, however, the Treasury Secretary has required financial institutions to maintain logs of monetary instruments, such as cashier's checks, traveler's checks, and money orders, of more than $3,000. See Testimony of John J. Byrne for the American Bankers Association before the Subcommittee on Financial Institutions and Consumer Credit and the Subcommittee on General Oversight and Investigations Committee on Banking and Financial Services, U.S. House of Representatives, Regarding The Bank Secrecy Act and Bank Reporting, available in 1999 WL 16946435 (Apr. 20, 1999).
65. The BSA's stated purpose is to aid all "criminal, tax, or regulatory investigations or proceedings." 31 U.S.C. § 5311 (1994).
to help regulate money laundering by creating a paper trail through which launderers might be traced.

Creation of such a trail has come at a cost. Notwithstanding its name, the Bank Secrecy Act outlawed the tradition, common in the United States and abroad, by which banks kept information about their customers private.\textsuperscript{66} CTRs require a bank to report not only the nature and amount of transaction, but also the name, address, telephone number, Social Security number, occupation, and date of birth of the customer.\textsuperscript{67} The Supreme Court rejected arguments that these requirements were unduly burdensome or invasive.\textsuperscript{68}

The BSA's benefits, meanwhile, were not immediately apparent. As a measure to fight organized crime, it was patently overinclusive, for many CTRs reported legitimate transactions. At first banks seldom complied with the BSA's requirements, moreover, and enforcement was mired in litigation and bureaucracy.\textsuperscript{69} Investigations that were launched sometimes failed, in part because the BSA imposed the obligation to report on banks rather than on individuals.\textsuperscript{70}

There have been attempts to strengthen the BSA. Failure to report was made a felony punishable by as much as ten years' imprisonment for willful violations.\textsuperscript{71} Causing a bank to fail to file a required report, and structuring a transaction to avoid such filing, also were made crimes.\textsuperscript{72} Financial institutions were required to keep records of information on all persons involved in cash transactions of as little as $3,000.\textsuperscript{73} The definition of "financial institution" was broadened,\textsuperscript{74} and other businesses, including law firms, were required to file analogous


\textsuperscript{67} See Currency Transaction Report, Treasury Form 4789 (on file with author).


\textsuperscript{69} See Nadelmann, supra note 53, at 36.

\textsuperscript{70} See, e.g., United States v. Varbel, 780 F.2d 758 (9th Cir. 1986) (reversing convictions for conspiracy to conceal material facts from the Internal Revenue Service on the ground that the BSA did not require defendant customers to inform banks that they were making numerous currency transactions of less than $10,000).

\textsuperscript{71} See Act of Sept. 13, 1982, Pub. L. 97-258, Sept. 13, 1982, 96 Stat. 1000 (codified as amended at 31 U.S.C. § 5322(b) (1994) (allowing imprisonment of up to ten years and fine of up to $500,000 for willful violations occurring along with another federal offense or "as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period").


\textsuperscript{73} 31 U.S.C. § 5325 (1994).
CTR filing requirements were relaxed in favor of requirements that banks file, with a single federal agency, only reports on suspicious activities. The government worked with banks to institute know-your-customer and other internal compliance programs.

Even so, the BSA has failed to satisfy the need for a direct attack on the laundering, and launderers, of dirty money.


Sandwiched between the Hobbs Act and RICO in the U.S. Code are the laws aimed squarely at money launderers. The Money Laundering Control Act of 1986, or MLCA, focuses on criminal proceedings, which may result in punishment of up to twenty years in prison, hefty fines, and forfeiture, although there are some provisions for civil fines and forfeitures. Rather than subsume all money laundering under one umbrella, as RICO does with racketeering, the MLCA divides activity into four categories: transaction money laundering, transportation money laundering, and sting operations, proscribed in Section 1956, and spending of laundered property, proscribed in Section 1957.

Each of these categories entails similar elements. Both the transaction money laundering and sting categories of Section 1956 take aim at the conduct of “financial transactions,” broadly defined as any conveyance, not only of cash, but also of monetary instruments or real prop-

74. Id. § 5322 (a)(2) (defining “financial institution” to include dozens of businesses, ranging from traditional banks to pawnbrokers, businesses that sell vehicles, and the U.S. Postal Service).


76. See Michael Allen, U.S. to Cut Bank Reports on Cash Deals, WALL ST. J., Sept. 21, 1998, at A3 [hereinafter Allen, U.S. to Cut] (stating that under new U.S. Treasury regulations, banks no longer must report cash transactions with most commercial customers); see also 31 C.F.R. § 103.21(a)(2) (1999) (requiring filing of Suspicious Activity Report if bank knew or should have known that transaction was undertaken to evade BSA rules or with illegal proceeds, or had no apparent lawful purpose).

77. See 31 U.S.C. § 5318(h) (1994) (authorizing Treasury Secretary to require financial institutions to develop such “anti-money laundering programs”).

78. See 18 U.S.C. § 1956(a)(1), (a)(2) (1994) (permitting twenty years’ incarceration and fines of up to $500,000 or double value of the property involved, if that exceeds $500,000); 18 U.S.C. § 982 (allowing criminal forfeiture of any property related to the offense). Accord id. § 1956(a)(3) (stating that punishment may include up to twenty years’ imprisonment and a fine “under this title”); cf. id. § 1957(b) (limiting incarceration for a violation of Section 1957 to ten years and fines).

79. See id. §§ 981, 984 (civil forfeiture); id. § 1956(b) (civil fines).

80. “Transaction” is defined to include any:
by means of a financial institution. Transportation money laundering focuses narrowly on the movement of monetary instruments into or out of the United States, while the spending statute focuses on “monetary transactions” via financial institutions.

All three categories set forth in Section 1956 forbid actions taken with specified states of mind. A defendant must intend “to promote the carrying on of specified unlawful activity,” or, alternatively, know or intend either to conceal the nature of the proceeds or avoid a state or federal transaction reporting requirement. The defendant must know or believe that the funds or property involved has an illegal taint. Sec-

purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange or currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution . . .

Id. § 1956(c)(3).

81. Id. § 1956(c)(4) (defining “financial transaction” as a transaction that itself affects interstate commerce or that uses a financial institution having that effect, if it involves wire transfers, monetary instruments, or real property or vehicles).

82. Id. § 1956(a)(2) (1981). The statute defines “monetary instruments” to include U.S. or other countries’ currency, checks, money orders, investment securities, and bearer bonds. See id. § 1956(c)(5). It forbids not only physical movement, but also transmission or transfer by electronic means, of such instruments. See id. § 1956(a)(2); see also United States v. Monroe, 943 F.2d 1007 (9th Cir. 1991) (sustaining conviction for electronic transfer), cert. denied, 503 U.S. 971 (1992).


85. Id. §§ 1956(a)(1)(B)(i), 1956(a)(2)(B) (prohibiting activity with knowledge that it “is designed in whole or in part . . . to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity”); § 1956(a)(3) (prohibiting activity with “intent” so to conceal).

86. Id. §§ 1956(a)(1)(B)(ii), 1956(a)(2)(B)(ii) (forbidding activity with knowledge that it is designed “in whole or in part . . . to avoid a transaction reporting requirement under State or Federal law”); § 1956(a)(3)(C) (forbidding activity with “intent” to avoid such a requirement).

The transaction money laundering category adds an additional proscribed state of mind, the intent to violate U.S. tax laws. See id. § 1956(a)(1)(A)(ii).

87. Id. § 1956(a)(1) (requiring that the defendant “know that the property . . . represents the proceeds of some form of unlawful activity,” and that the transaction “in fact involves the proceeds of specified unlawful activity”); § 1956(a)(2) (requiring intent to promote specified unlawful activity or knowledge of illegality); § 1956(a)(3) (stating that property must have been “represented to be the proceeds of specified unlawful activity, or . . . used to conduct or facilitate specified unlawful activity” by a law enforcement officer or agent).

For a conviction under Section 1956(a), the government needs only to prove that the defendant knew the source of the money was felonious, not that the defendant knew the precise nature of the unlawful activity. See, e.g., United States v. Maher, 108 F.3d 1513 (2d Cir. 1997). The government satisfies its burden, moreover, by showing the likely, as opposed to actual source, of money. See, e.g., United States v. Jackson, 983 F.2d 757 (7th Cir. 1993) (affirming money-laundering conviction supported by evidence that defendant engaged in drug transactions around the time he purchased cars for cash).
tion 1957 requires no specific intent, simply proscribing knowing engagement in monetary transactions that involve property derived from specified unlawful activity. The concept of "specified unlawful activity" is vast. It incorporates virtually everything considered a "racketeering activity" under RICO, but does not stop there. "Specified unlawful activity" further comprises drug trafficking, violent crimes, and fraud committed overseas; and scores of other crimes, ranging from espionage to food stamp fraud. Like RICO, therefore, the MLCA makes a conviction for the stated offense, money laundering, contingent on proof of a statutory predicate. There is no need to prove any pattern, however; each act of money laundering constitutes a separate offense.

Much hinges on proof of states of mind, proof that may be easier to secure than it first might appear. Circumstantial evidence is permitted, so that jurors are likely to convict if the government can characterize transactions as unusual or suspicious. Moreover, jurors may convict if

88. 18 U.S.C. § 1957(a) (1994). The property must be worth more than $10,000. See id. Although a violation of Section 1957 thus should be easier to prove than one of Section 1956, prosecutors have exercised restraint in use of the former, perhaps out of fear of public backlash if the statute were routinely used against merchants. See Emily J. Lawrence, Let the Seller Beware: Money Laundering, Merchants, and 18 U.S.C. §§ 1956, 1957, 33 B.C. L. Rev. 841, 872 (1992).
90. Id. § 1956(c)(7)(B).
91. Id. § 1956(c)(7)(C)-(F). For examples of the variety of offenses on which money laundering convictions may be based, see, e.g., United States v. Griffith, 85 F.3d 284, (7th Cir.) (holding that prostitution qualifies as a specified unlawful activity), cert. denied, 519 U.S. 909 (1996); United States v. Lee, 937 F.2d 1388 (9th Cir. 1991) (holding that smuggling of salmon into the United States is a specified unlawful activity).
92. See Henning, supra note 46, at 1329 (noting the similarly compound structures of the two statutes). Reversal of conviction for the underlying offenses does not preclude conviction for money laundering. See United States v. Tencer, 107 F.3d 1120 (5th Cir.) (sustaining Section 1956 convictions despite reversal of mail fraud convictions, on ground that Section 1956 only requires that the subject transaction involve the proceeds of a specified unlawful activity, and the indictment's specification of the unlawful activity as "mail fraud" was sufficient), cert. denied, 522 U.S. 960 (1997).
93. See United States v. Martin, 933 F.2d 609 (8th Cir. 1991) (stating that the money laundering statutes bar individual acts, not a course of action).
94. As examples of circumstantial proof of knowledge elements, see United States v. Long, 977 F.2d 1264 (8th Cir. 1992) (noting that car dealer knew buyer listed false job on credit application, paid under table, and lied to grand jury); United States v. Isabel, 945 F.2d 1193 (1st Cir. 1991) (holding that unusual payroll scheme and business dealings permitted jurors to find defendant knew dealings designed to conceal drug proceeds); United States v. Brown, 944 F.2d 1377 (7th Cir. 1991) (concluding that the defendant's careful engineering of laundering scheme made no sense unless defendant knew the money was illegal proceeds); United States v. Massac, 867 F.2d 174 (3d Cir. 1989) (holding that defendant's transfers of cash to Haiti via fellow Haitian, rather than bank, showed she knew the transactions were designed to conceal drug proceeds). As an example of circumstantial proof of intent, see United States v. Savage, 67 F.3d 1435, 1441 (9th
they conclude the defendant did not actually know, but was willfully blind to whether the money was tainted.95 Banks and other corporations may be held liable for the aggregate knowledge or willful blindness of their employees.96 Indeed, those who do business with criminals are as much a target of these anti-money-laundering laws as are criminals themselves.97 A merchant who has no personal desire to conceal illegal proceeds thus is guilty of money laundering if she knew, or avoided knowledge, that the customer's motive was concealment.98

The MLCA includes two novel features. First, it explicitly authorizes sting operations.99 Second, it explicitly prescribes sweeping extraterritorial jurisdiction. A U.S. citizen may be prosecuted for money laundering wherever it takes place. Noncitizens face prosecution under Section 1956 as long as "the conduct occurs in part in the United States."100 Both features give the act a decidedly modern flavor. Proac-
tive investigations like sting operations are a favorite of contemporary law enforcement, and assertion of U.S. jurisdiction over extraterritorial crimes is on the increase.

B. International Efforts

It is inevitable that laws against money laundering should cross national borders, for the crime itself is international. The Bank of New York affair, for example, may have involved the laundering of the proceeds of arms trafficking, tax fraud, extortion, and prostitution through as many as forty countries. A typical money laundering scheme involves three phases — "placement," "layering," and "integration" — each of which has a cross-border component. During the placement phase, illegal proceeds are consolidated — often by filtering through a casino, a restaurant, or other high-cash-volume front business — then sent


See, e.g., United States v. Awan, 966 F.2d 1415 (11th Cir. 1992) (affirming conviction of former bank employees for overseas laundering of funds from the United States); United States v. Thomas, 893 F.2d 1066, 1068-69 (9th Cir.) (holding that U.S. national could be convicted of violating child pornography statutes even if acts were committed outside the United States), cert. denied, 498 U.S. 826 (1990); United States v. Davis, 905 F.2d 245, 248 (9th Cir. 1990) (permitting United States to prosecute captain of vessel seized in high seas for drug trafficking), cert. denied, 498 U.S. 1047 (1991).

See, e.g., Gilmore, supra note 57, at xi (citing a recent Canadian estimate that more than 80 percent of money laundering is transnational); U.N. Drug Report, supra note 49, at 141-42 (calling "internationalization" a "major trend" in money laundering); VAN DUYN, supra note 57, at 117 (stating that money laundering "without a 'foreign loop'" is difficult); Chaikin, supra note 53, at 431 (noting that because currency and markets now are international, money laundering is likely to involve more than one state).


See Barbot, supra note 105, at 167; Sultzer, supra note 100, at 149. Consolidation is particularly necessary for laundering of drug proceeds, because the physical volume of the notes exceeds the volume of the drugs. See Barbot, supra note 105, at 167 n.28.
outside the United States via electronic transfer or physical transport.\(^{107}\)

During the layering phase, funds are deposited in a bank in a haven jurisdiction – so called because the jurisdiction enforces bank secrecy and permits anonymous shell corporations – then transferred to the local branch of a reputable international, often European, bank.\(^{108}\) During the integration phase, funds are wired from the branch to the main bank, then returned to the United States for use as apparently legitimate funds.\(^{109}\)

Recognizing this international aspect, the United States has worked to develop a multilateral assault against money laundering. It has helped create a sophisticated network of law-enforcement cooperation.\(^{110}\) It spearheaded negotiation and adoption of the 1988 U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,\(^{111}\) and has conditioned receipt of foreign aid on compliance.\(^{112}\) Parties to the convention promise to enact domestic criminal laws against laundering of drug proceeds;\(^{113}\) to prosecute or extradite those suspected of money laundering in another state;\(^{114}\) to identify, trace, and seize illegal proceeds;\(^{115}\) and to assist other states’ investigations.\(^{116}\)

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107. See Barbot, supra note 105, at 167; Sultzer, supra note 100, at 149.
108. See Barbot, supra note 105, at 167-68; Sultzer, supra note 100, at 150-51.
109. See Barbot, supra note 105, at 168; Sultzer, supra note 100, at 151.
110. For discussions of the extent of international law-enforcement cooperation against money laundering, drug trafficking, and other transnational crimes, see, e.g., Diane Marie Amann, A Whipsaw Cuts Both Ways: The Privilege Against Self-Incrimination in an International Context, 45 UCLA L. REV. 1201, 1261-72 (1998) [hereinafter Amann, Whipsaw]; Zagaris, supra note 101.
112. See 22 U.S.C. §§ 2151-2429b (1994 & Supp. IV 1998) (authorizing denial of foreign aid unless a country is certified as having implemented requisite measures against drug trafficking and money laundering). This provision has been used against Colombia. See Zagaris, supra note 101, at 1408-11.
113. U.N. Drug-Trafficking Convention, art. 3(1).
114. See id., art. 4 (imposing duty to “establish . . . jurisdiction over” offender “present in its territory” whom it “does not extradite . . . to another Party”), art. 6 (stating that money laundering shall be an extraditable offense).
115. Id., art. 5.
116. U.N. Drug-Trafficking Convention, art. 7(1). The convention’s stated purpose, “to deprive persons engaged in illicit traffic of the proceeds of their criminal activities and thereby eliminate their main incentive for so doing,” reflects a goal of domestic laws against money laundering. See supra text accompanying note 49.
soon concluded a similar, regional convention to combat the laundering not just of drug proceeds, but of all criminal activity.117

In 1989, the United States joined six other major industrial nations to form the Financial Action Task Force (FATF), a Paris-based clearing-house for money-laundering regulation.118 The FATF works with other agencies, including Interpol,119 and conducts research on the nature and extent of money laundering.120 It also monitors implementation by its members of its “40 Recommendations.”121 These posit a two-pronged attack similar to the U.S. statutory scheme. Reflecting the Money Laundering Control Act, the 40 Recommendations call for stronger criminal laws against money laundering.122 Reflecting the Bank Secrecy Act, they call for an end to financial confidentiality and for imposition of reporting duties on banks.123


119. See FATF REPORT, supra note 118, at 6 (discussing cooperation with Interpol, the United Nations Office for Drug Control and Crime Prevention, the Council of Europe, and the Inter-American Drug Abuse Control Commission). Interpol, the International Crime Police Organization, coordinates enforcement efforts and also provides technical assistance and training in detection of money laundering. See Amann, Whipsaw, supra note 110, at 1266.

120. See FATF REPORT, supra note 118, at 4-6. A similar task force has been established for the Caribbean region. See Cleaning Up?, ECONOMIST, Mar. 20, 1999, at 78 (discussing formation in 1992 of the Caribbean Financial Action Task Force, pursuant to a U.N. program). To reduce the number of Caribbean havens, the United Kingdom recently conditioned a new status for its overseas territories on implementation of anti-money-laundering measures and fuller cooperation with outside law-enforcement agencies. Id.


122. Compare 40 Recommendations, supra note 121, at 1294-1300 with supra notes 78-101 and accompanying text. Many countries, although few in the developing world, have adopted laws against money laundering since the mid-1980s. U.N. DRUG REPORT, supra note 49, at 137 (stating that “many” developing countries had “expressed the willingness to do so”).

123. Compare 40 Recommendations, supra note 121, at 1296-98 with supra notes 59-77 and accompanying text.
Spotting Money Launderers

Abolition of bank secrecy is, in fact, a common aspect of transnational efforts against money laundering.124 The United States, in particular, has persuaded countries like Switzerland, where constitutionally guaranteed bank secrecy had developed in part to protect Jewish assets against Nazi incursions,125 to adopt stiff anti-money-laundering laws and to appoint prosecutors eager to enforce them.126 The United States also has resisted establishment of new haven jurisdictions.127 It promises to continue such pressure.128

III. A Better Way?

Throughout this last century, perceived increases in organized crime produced pressure for greater federal enforcement of old and new penal laws. Out of concerns about bootlegging syndicates came the Anti-Racketeering Act of 1934, parent to the Hobbs Act of 1948.129 Reports that crime families had infiltrated legitimate businesses spurred passage of RICO in 1970.130 Recognition that drug traffickers needed to cleanse their illegal proceeds prompted enactment of two domestic statutory schemes and several international measures against money laundering.131

124. U.N. and European conventions, for instance, both forbid a state from refusing to aid another member's money-laundering investigation on account of domestic bank-secrecy laws. See U.N. Drug-Trafficking Convention, supra note 111, arts. 5, 7(1); European Laundering Convention, supra note 117, arts. 4, 18(7). The latter provision, however, permits a state to seek judicial authorization to lift bank secrecy, if domestic laws so require. See European Laundering Convention, supra note 117, art. 18(7).


127. See Michael Allen, U.S., Antigua Duel on Money Laundering, WALL ST. J., Apr. 27, 1999, at A19 (quoting U.S. ambassador to Antigua as saying "the U.S. has to chop down one of the first independent countries to make the switch to offshore banking" in explaining U.S. criticism that new Antiguan rules are insufficient to curb money laundering).


129. See supra note 39 and accompanying text.

130. See supra text accompanying notes 8-9.

131. See supra text accompanying notes 49-53.
RICO signaled an especially far-reaching attack. Its primary goal was to prevent organized crime from penetrating legitimate entities; therefore, it targeted entire criminal organizations.\textsuperscript{132} This unique approach continues to draw fire. As this article has shown, critics have assailed RICO on a variety of fronts.\textsuperscript{133} Some complain that RICO permits convictions for behavior that falls within a broadly interpreted, less-than-clear, scope, and thus undermines individual liberty. Furthermore, RICO’s breadth has inspired many civil lawsuits challenging behavior unrelated to the traditional notions of organized crime that had prompted enactment of the statute. Others argue that RICO is too complex, that requiring a preliminary finding of a pattern of predicate offenses, then a finding of a connection between that pattern and defendant’s activities, prolongs investigations and confuses trials. Critics question both whether RICO has been effective in combating organized crime, and whether it is necessary given the subsequent proliferation of federal laws authorizing harsh punishment for what were once considered less serious offenses.

Among those offenses now subject to stiff federal penalties is money laundering. The Bank Secrecy Act of 1970 and the Money Laundering Control Act of 1986 were designed to discourage criminals by impeding their enjoyment of the profits of their illegal activities.\textsuperscript{134} Such laws represent an additional tool for domestic prosecution.\textsuperscript{135} Like RICO, these laws were intended to protect legitimate businesses; specifically, legitimate financial institutions.\textsuperscript{136} Recently that goal has ex-

\textsuperscript{132} See supra text accompanying notes 8-12.
\textsuperscript{133} See supra text accompanying notes 21-48.
\textsuperscript{134} See supra text accompanying notes 49-53.
\textsuperscript{135} One recent and not uncommon example is a case in which prosecutors settled a criminal case against the head of a defunct charity, who had faced separate civil suits alleging false advertising and unfair business practices, by permitting him to plead guilty to structuring, for failing to report 282 cash deposits totaling more than $1.7 million in one year. See Bill Wallace, \textit{Used-Car Rabbi Admits Violating Currency Law}, S.F. CHRON., Dec. 17, 1999, at A28; Eric Brazil, \textit{Rabbi guilty of money laundering}, S.F. EXAM, Dec. 16, 1999, at A25.
\textsuperscript{136} See U.N. \textit{Drug Report}, supra note 49, at 142 (asserting that “perhaps the single most significant impact of money laundering on the legitimate economy is that it undermines the integrity of the financial system”); \textit{Castells}, supra note 56, at 201 (asserting that the movement of illegal funds “has become an important source of destabilization of international finance and capital markets”); Basle Committee on Banking Regulations and Supervisory Practices, \textit{December 1988 Statement on Prevention of Criminal Use of the Banking System for the Purpose of Money Laundering}, ¶ 4 (“Public confidence in banks, and hence their stability, can be undermined by adverse publicity as a result of inadvertent association with criminals . . . .”)), reprinted in \textit{International Efforts}, supra note 117, at 274. See also supra text accompanying note 57. One article reported that the Russian Mafia “has moved about $27 billion through the banking system” of Switzerland, and controls “some 300 companies” based there. Agence-France Presse, \textit{Tracing Funds Harder Than Ever, Prosecutor Says}, N.Y. TIMES, Aug. 22, 1999, § 1, at 12.
Pandemic. Policymakers in the United States and abroad herald anti-money-laundering laws as a means to stop the current criminal bugbear, political corruption. Thus, international treaties now oblige parties to make bribery of a foreign official a predicate offense in their domestic anti-money-laundering laws.

Countries continue to band together to investigate, prosecute, and punish those who violate broad proscriptions against the laundering of the proceeds of crime. They have adopted anti-money-laundering laws more readily than RICO counterparts; thus, unlike with RICO, no double criminality problem precludes cooperation. Indeed, the global fight against money laundering has captured the popular imagination, as the abundance of stories about the Bank of New York scandal attests.

Given this ascendance, it seems appropriate to assess anti-money-laundering measures in light of the critique of RICO. Are these measures more narrow and less complex? Do they pose any threat to liberty? Are they effective? To these questions, this article now turns.


139. See Michael Brindle, Money laundering, tax and the criminal law, AMICUS CURIAE, July 1999, at 5 (stating that Criminal Justice Act, 1988, § 93A (Eng.), enacted through Criminal Justice Act, 1993, §§ 29-31 (Eng.), "clearly goes well beyond money laundering in the ordinary sense," in that it "extends to all indictable offences").

140. See Zagaris, supra note 101, at 1422-30 (discussing recent law-enforcement efforts to smooth this obstacle to cooperation in the area of complex crimes).

141. See supra note 7 and accompanying text. That the image of money laundering resonates is evident in efforts to categorize financial crimes as money laundering, even if prosecutors choose not to charge a violation of the Money Laundering Control Act. See infra note 152 and accompanying text (discussing charges in the Bank of New York case); see also Brazil, supra note 135 (quoting federal judge's statement in a different case that crime to which defendant pleaded "is technically structuring currency transactions," but that it is "otherwise known as money laundering").
A. Are Anti-Money-Laundering Laws More Narrow and Less Complex Than RICO?

Laws against money laundering seek to hit criminals in a vulnerable spot — the pocketbook — on the theory that enjoyment of illegal profits is a primary motive for organized criminals. In contrast to RICO, the focus of these laws is on criminal proceedings. And they permit litigation only by the government, thus eliminating the abusive private lawsuits that have dogged RICO. The anti-money-laundering laws thus appear to improve on RICO’s more diffuse approach.

Nonetheless, these laws, like RICO, do not directly attack harmful criminal behavior. They act as proxies, providing means to pursue and punish individuals whose underlying crimes cannot be proved beyond reasonable doubt. Like RICO, these laws remain overbroad. The BSA’s mandatory reporting requirements have created a database of 100 million CTRs, mostly of innocent transactions. Although the U.S. Treasury has cut back on reporting requirements, it has expanded greatly the types of businesses that must register with it. The MLCA, meanwhile, includes as predicate offenses many crimes not within the purview of RICO. Proposed legislation would add to this already long list more crimes committed abroad, including fraud, bribery of officials, misappropriation of public funds, arms trafficking, and violent crimes.

The anti-money-laundering laws do seem less complex than RICO. They do not, for instance, require proof of some amorphous pattern of racketeering. The BSA is particularly straightforward, simply stating a proscribed act, such as failure to report, and a proscribed state of mind, knowledge.

The MLCA, however, has a compound structure not unlike that of RICO. To secure a conviction for money laundering, prosecutors need

142. See supra text accompanying notes 49-53.
143. See supra text accompanying notes 78-79.
144. See supra text accompanying notes 63, 78-79.
146. See supra text accompanying note 76.
147. See Treasury Releases Long-Awaited Rule To Snuff Out Money Laundering at Non-banks, 68 U.S.L.W. 2121-22 (Aug. 31, 1999) (reporting on release of Treasury regulations extending registration requirements to “money services businesses, such as check cashing firms, money transmitters, providers of money orders, and foreign exchange agents”).
148. See supra text accompanying notes 89-91.
150. See supra text accompanying note 64; see also infra note 159 and accompanying text.
to prove: that the defendant conducted the requisite transaction; that she
did so in a manner intended to conceal illegal proceeds; and that the
proceeds derived from some specified unlawful offense. This combina-
tion makes money laundering “a difficult crime to prove.”

Perhaps emblematic of this is the fact that although the Bank of New York
matter has been called a money-laundering scandal, the first indictments did
not allege money laundering. Rather, defendants were charged with
illegal operation of a money-transfer business. Observers predicted it
would be difficult to prove at trial that the funds, at least some of which
stem from activities legal in Russia, constituted the proceeds of unlawful
activity.

B. Do They Pose Any Threat to Liberty?

This expected difficulty in discerning licit from illicit funds points
to a sinister effect of anti-money-laundering measures: ever-greater in-
cursion of the government into the private affairs of law-abiding individ-
uals and businesses.

Some transactions disfavored in the United States are encouraged
elsewhere. Even in the United States some business deals, such as
creation of tax shelters, may tread close to, yet within, the line of legal-
ity. To paraphrase Professor Lynch’s criticism of RICO, even if the

152. Timothy L. O’Brien, Bank of New York Ex-Employee Charged in Russian Case, N.Y.
TIMES, Dec. 1, 1999, at A8 (“The charges . . . fall short of money laundering charges, which are
typically difficult to prove.”) [hereinafter O’Brien, Ex-Employee]. Eventually, however, the initial
defendants did plead guilty to conspiracy to commit money laundering. See Robert O’Harrow Jr.,
153. See O’Brien & Bonner, Indictment, supra note 7 (reporting charges of conspiracy to
transmit funds and receive deposits illegally and of operation of an illegal money-transmittal busi-
ness); Jeff Leeds, Indictment Issued in N.Y. Bank Probe, L.A. TIMES, Oct. 6, 1999, at A1 (stating
that defendants’ business allegedly did not have required New York license).
154. See O’Brien & Bergman, supra note 104 (reporting investigators’ comments that “part
of the money is from ordinary wire transfers and tax avoidance, much of which is perfectly legal
in Russia, while some may be tied to organized crime, corporate embezzlement or political graft,”
and that “proof of the latter can only be unearthed by Russian authorities”); see also Leeds, supra
note 153 (stating that much of the money “may be capital legally sent out of the country by
Russia’s business and political elite”).
155. See Cleaning Up?, supra note 120, at 78 (indicating that even those offshore bankers
who subscribe to efforts against laundering of drug proceeds resist characterization of participa-
tion in “tax competition” as money laundering).
156. Cf. U.N. DRUG REPORT, supra note 49, at 137:
Views vary regarding which activities account for the highest proportion of money laun-
dered in global terms – large-scale tax evasion and securities fraud certainly rely on sys-
tems of financial secrecy, but the extent to which these activities constitute money
laundering is highly speculative. There is an important difference between capital in flight
which has been earned legitimately, and capital from criminal activities – in the former

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anti-money-laundering statutes are not unconstitutionally vague, the uncertainty of what they permit ought to cause consternation, given the harsh penalties that money-laundering convictions carry.157

The line may be crossed simply by a jury’s determination that the defendant acted with the requisite mens rea. The anti-money-laundering statutes specify what appear to be stringent state-of-mind requirements. But judicial interpretation has diluted them significantly; for example, by permitting convictions based on willful blindness and aggregate knowledge.158 Moreover, when the Supreme Court gave a protective construction to “willfulness,” the state of mind required for illegal structuring of a transaction, Congress immediately deleted the term from the anti-structuring statute.159 Thus a banker or merchant who is simply greedy, or stupid, and who has no actual knowledge of the source of the funds offered, may be held guilty of money laundering.160 The mens rea requirement serves the interest in a fair criminal justice system by making sure that only those who are morally culpable, who have no acceptable excuse, are punished.161 Because it undermines this aid to fairness, the dilution of mens rea in the anti-money-laundering statutes is disturbing.162

157. See supra text accompanying note 21. Judicial challenges to these statutes on vagueness grounds have failed. See, e.g., Antzoulatos, 962 F.2d at 726-27 (holding that MLCA is not void for vagueness as applied to used-car dealer who transacted business with a buyer who desired to conceal illegal proceeds); United States v. Scanio, 705 F. Supp. 768, 773-76 (W.D.N.Y. 1988) (rejecting argument that term “structuring” in 31 U.S.C. § 5324 is unconstitutionally vague).

158. See supra notes 95-98 and accompanying text.

159. Compare Ratzlaf v. United States, 510 U.S. 135 (1994) (holding that “willfulness,” the prerequisite for imposition of criminal penalties pursuant to the then-current version of 31 U.S.C. §5322(a), required proof that defendant knew structuring was illegal) with 31 U.S.C. § 5324(c) (1994) (stating that “whoever violates” the structuring statute is guilty, without requiring the violation to be willful).

160. See Henning, supra note 46, at 1333-34 (“a businessperson’s willingness to turn a blind eye has been transformed into proof of the defendant’s intent to commit the crime of money laundering”). For a critique asserting that private attorneys are not sufficiently insulated from prosecution for money laundering on account of their receipt of clients’ fees, see Barry Tarlow, Reminding Federal Prosecutors to Play by Their Own Rules in Money Laundering Investigations, THE CHAMPION, Dec. 1999, at 52.

161. Compare Jerome Hall, General Principles of Criminal Law 72-73 (2d ed. 1960) (stating that only morally culpable conduct deserves punishment) with H.L.A. Hart, Punishment and Responsibility 37-40 (1968) (asserting link between fairness of punishment and requirement that defendant “acted ‘voluntarily’”). Accord V William Blackstone, Commentaries 21 (St. George Tucker ed., 1969) (orig. pub. 1803) (“[T]o constitute a crime against human laws, there must be, first, a vitious will; and, secondly, an unlawful act consequent upon such vitious will.”)

162. Accord Edward M. Wise, Foreword: The International Association of Penal Law and the Problem of Organized Crime, 44 WAYNE L. REV. 1281, 1301-02 (1998) (criticizing U.S.-led trend toward attenuation of mens rea requirements as means of fighting organized crime); Koelnig,
It is not that long ago that ordinary individuals could deposit cash, purchase automobiles, or wire money without inviting government attention. That is no longer the case. Decades of mandated currency transaction reporting have provided the government with 100 million reports containing detailed information on individuals. As an FBI bulletin recognizes, this database now comprises "a wealth of information that law enforcement can use in any criminal investigation where suspects have access to large sums of money." Laws against money laundering further impose significant record-keeping and reporting burdens on entities that handle large sums of money. These burdens are being expanded, in fact, to include lawyers, accountants, and other professionals. The banking industry, which first felt the weight of the anti-money-laundering laws, has issued a report estimating that government money-laundering regulations cost it $10 billion dollars a year. Know-your-customer rules and Suspicious Activity Reports, moreover, conscript banks into the ranks of law enforcement by ordering them to scrutinize their clients' behavior at the government's behest. Such rules, which one congressional critic called "'big brotherism,'" are a far cry from the bank secrecy that was tradition not so long ago.

The U.S.-led pressure for worldwide abolition of bank secrecy is but one example of another feature of anti-money-laundering laws that threatens liberty; that is, their international appeal. The MLCA, the pri-
mary U.S. anti-money-laundering statute, explicitly authorizes extraterritorial jurisdiction against money laundering.\footnote{169. See 18 U.S.C. §§ 1956(f), 1957(d) (1994 & Supp. IV 1998), discussed \textit{supra} note 100 and accompanying text.} Recent legislation in the United Kingdom likewise casts an extraterritorial net.\footnote{170. \textit{See} Brindle, \textit{supra} note 139, at 6 (stating that the "most remarkable feature" of Criminal Justice Act, 1988, § 93A (Eng.) enacted through Criminal Justice Act, 1993, §§ 29-31 (Eng.) "is its extension . . . to the facilitation of criminal conduct taking place outside the UK . . . \cite{169.}Remarkably it is not necessary that the conduct taking place abroad should actually constitute criminal conduct there, only that it \textit{would} constitute an indictable offense if it had occurred in England and Wales, or Scotland.").} And despite the \textit{Restatement}'s approval of hesitation in the exercise of extraterritorial criminal jurisdiction,\footnote{171. \textit{See} \textit{Restatement (Third) of Foreign Relations Law of the United States} § 403 \textit{rptr. n.8} (1987) (stating that "the exercise of criminal (as distinguished from civil) jurisdiction in relation to acts committed in another state may be perceived as particularly intrusive," and thus "\cite{171.}it is generally accepted by enforcement agencies of the United States government that criminal jurisdiction over activity with substantial foreign elements should be exercised more sparingly . . ., and only upon strong justification").} the international nature of money laundering renders such exercise commonplace. At the same time, a trilogy of recent U.S. Supreme Court opinions suggests that the rights that individuals accused of domestic crimes enjoy do not fully constrain the investigative activities of U.S. agents overseas.\footnote{172. United States v. Balsys, 524 U.S. 666 (1998) (holding that a witness in a U.S. court may not invoke the Fifth Amendment privilege against self-incrimination out of fear that his compelled testimony would be used in a foreign prosecution); United States v. Alvarez-Machain, 504 U.S. 655 (1992) (holding that a Mexican defendant kidnapped by Mexican agents at the request of U.S. agents must stand trial in U.S. court); United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (declining to extend constitutional protection to a noncitizen defendant against whom the U.S. government intended to introduce evidence obtained in a warrantless search in Mexico).} The unsettled nature of the rights of the accused in the transnational context is cause for concern.\footnote{173. Zagaris, \textit{supra} note 101, at 1448 (stating that transnational cases "will bring into play the potential applicability of the various rights guaranteed by the U.S. Bill of Rights or applicable provisions of international human rights conventions," and increase "tension between the need for the United States to cooperate more with national governments and international tribunals and the concern for the fulfillment of constitutional and international human rights standards"). \textit{See generally} Diane Marie Amann, \textit{Harmonic Convergence? Constitutional Criminal Procedure in an International Context}, 75 \textit{Ind. L.J.} 809 (2000) (analyzing international trends toward and away from shared values regarding rights of the accused); Diane Marie Amann, \textit{The Rights of the Accused in a Global Enforcement Arena}, 6 \textit{ILSA J. Comp. \\& Int'l L.} (forthcoming 2000) (expressing concern about whether individual rights will be honored in transnational cases).}

This is especially the case given that transnational efforts against organized crime often entail intrusive crime-fighting measures. The longstanding wall between intelligence and law-enforcement agents, for
example, has crumbled;\textsuperscript{174} indeed, it was British intelligence that directed law enforcement to the laundering of funds at the Bank of New York.\textsuperscript{175} A “favorite” of law enforcement is the undercover money-laundering operation, which may result in convictions of individuals proved to have engaged in crime with no one but a government agent.\textsuperscript{176} Such sting operations are expressly authorized both in the MLCA and in the U.N. convention against drug-trafficking.\textsuperscript{177} Electronic surveillance is another frequent tactic.\textsuperscript{178} Other examples are U.S. proposals to fight transnational crime by increasing the government’s power to decode encrypted messages, to seize and forfeit assets, and to conduct warrantless searches of mail.\textsuperscript{179} The prevalence of such techniques, not only in the United States, but also abroad,\textsuperscript{180} clearly encroaches on individual autonomy.\textsuperscript{181}

Occasionally, countries outside the United States resist such efforts. In its outrage that an unauthorized sting operation had been conducted on its soil, for example, Mexico initially threatened to prosecute U.S.
undercover agents.\textsuperscript{182} And a Canadian court refused to extradite an individual caught in a U.S. money-laundering sting, because Canada does not permit such operations.\textsuperscript{183} Many countries, however, have come to tolerate, if not embrace, intrusive investigative and prosecutorial methods.\textsuperscript{184}

\section*{C. Are They Effective?}

Law enforcement always involves a balancing of costs and benefits. Perhaps, then, concerns about the extent and intrusiveness of laws against money laundering might be allayed if the laws indeed curbed crime.

Standing alone, the Bank Secrecy Act fails this test. Its focus on cash simply invites laundering by creative transactions.\textsuperscript{185} Even with regard to cash transactions, the sheer amount of information produced by compliance with the BSA makes it unlikely that the paper trail alone will flag a suspect. In 1997 alone, more than 12 million CTRs were filed, a volume that precluded quick detection of money launderers.\textsuperscript{186} Although the number of Suspicious Activity Reports is lower, about 100,000,\textsuperscript{187} this also represents an enormous amount of information. Such reporting thus will continue to produce evidence of money laun-

\textsuperscript{182} See Stanley Meisler, Albright Urges Mexico to Drop Threat in Drug Sting Diplomacy, L.A. \textsc{times}, June 12, 1998, at A4. Although these threats came to naught, relations between the United States reportedly remained strained. SeeGolden, Mexican Banks, supra note 5; accord Zagaris, supra note 101, at 1415-16 (citing occasional “tension” between Mexico over U.S. agents’ violations of its laws). Forty of the 100 people indicted in this sting operation have been captured. Thirty-one of those have pleaded guilty. The rest stood trial; three were acquitted. Recently, a judge overturned one of the remaining six convictions on the ground that the defendant banker had been entrapped. See David Rosenzweig, Judge Throws Out Laundering Verdict, L.A. \textsc{times}, July 20, 2000, at B1.


\textsuperscript{184} See Zagaris, supra note 101, at 1413-15 (discussing effect of U.S. policies on other countries); id. at 1420 (describing particularly close cooperation with Italy). U.S. pressure has, however, sparked some resentment abroad. See, e.g., Cleaning Up?, supra note 120, at 78 (“Others claim, sotto voce, that they are taking the blame for America’s failed war on drugs. The loss of privacy demanded by all these regulators and policemen comes at a price.”); \textsc{van Duyne}, supra note 57, at 114 (describing U.S. anti-money-laundering policy as “intrusive”).

\textsuperscript{185} See United States v. Phipps, 81 F.3d 1056 (11th Cir. 1996) (reversing conviction for causing failure to file requisite report, in violation of 31 U.S.C. § 5324(a)(1), on ground that because checks, and not cash, were deposited, bank’s duty to file a CTR never was triggered).

\textsuperscript{186} See Allen, \textit{U.S. to Cut}, supra note 76.

dering only after a more conventional method has provoked an investigation.188

The Money Laundering Control Act resolves some of these problems. It is concerned with all kinds of financial transactions, and it expressly contemplates proactive law-enforcement efforts such as sting operations.189 "Unlike RICO's attempt to protect legitimate businesses from organized crime," Professor Peter J. Henning has written, "the Money Laundering Control Act of 1986 has been much more effective in attacking the supporting infrastructure of organized crime."190 This may be true relative to RICO. In absolute terms, however, the success of anti-money-laundering measures has been modest.

On the domestic front, U.S. Department of Justice figures show that from 1987 to 1995, only 3,000 money-laundering cases, against 7,300 defendants, were filed, yielding 580 guilty verdicts and 2,295 guilty pleas.191 And although concerns about international laundering of drug proceeds prompted passage of the MLCA, U.S. laws seldom are used against this type of laundering.192 Thus other commentators have characterized federal prosecutions against money laundering as relatively un-usual and largely unsuccessful.193

On the international front the situation is no better. Despite advances in international cooperation, enforcement has been described as "sporadic and inconsistent,"194 and "less than adequate."195 Transnational evidence-gathering remains difficult; this well may hamper further prosecutions in the Bank of New York case.196 Some countries have yet

188. Accord Allen, U.S. to Cut, supra note 76 (stating that filing of 35 million CTRs in recent three-year period "swamped" authorities, and resulted in fewer than 1,000 investigations based on reports alone); Stewart & Sorini, supra note 187, at D-31 (describing post hoc use of CTR data).
189. See supra text accompanying notes 80-81, 99.
190. Henning, supra note 46, at 1329.
191. See Money Laundering Hotline, supra note 166, at 5.
193. See Barbot, supra note 105, at 193.
194. Gurulé, supra note 192, at 85.
195. FATF REPORT, supra note 118, at 31.
196. See Bombshell, supra note 175, at E1 (reporting "that top Russian leaders have not been quick to lend a helping hand"); Sharon LaFraniere, Bank Probe Up to Russian Investigators, WASH. POST, Oct. 29, 1999, at E1 (predicting that because of complexity of case and "relative inexperience" of Russian agents, "the case may end up with no major prosecutions"); Treasury, Justice, supra note 128 (quoting U.S. Department of Justice official's report of "considerable difficulty in obtaining evidence from Russia and other countries"). Late last year the U.S. government postponed the first Bank of New York case because of difficulty obtaining jurisdiction.
to enact strong anti-money-laundering laws, and others are lax in enforcement.\textsuperscript{197} Money launderers prey on emerging markets and weak legal systems,\textsuperscript{198} though even in places as established as London, money laundering appears rampant.\textsuperscript{199}

Nor can one expect prompt improvement. Law-enforcement officials themselves complain that anti-money-laundering measures have not kept pace with technological developments.\textsuperscript{200} The fluidity of capital in international markets also opens new means of laundering.\textsuperscript{201} Instead of bringing the leaders of criminal organizations within the grasp of law enforcement, anti-money-laundering efforts appear to have entrenched a new layer of intermediaries: accountants, bankers, and lawyers who receive commissions of up to 20 percent to do the dirty work of making money clean.\textsuperscript{202} Even for otherwise law-abiding bankers, the monetary incentives to relax know-your-customer controls, to look the other way, are enormous. In the Raúl Salinas and the Bank of New York cases, those incentives appear to have been irresistible.\textsuperscript{203}

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\item See Gurulé, \textit{supra} note 192, at 85 (“in many cases, parties have failed to enforce anti-money laundering laws aggressively”); Corbitt, \textit{supra} note 117, at 372 (citing European Commission report indicating that law enforcement fails to react appropriately to reports of suspicious transactions); Gerth, \textit{U.S. May Bar}, \textit{supra} note 137 (stating that a “culture of secrecy” maintained by “some private bankers,” as well as bank secrecy in remaining haven jurisdictions, hampered anti-money-laundering efforts).
\item See \textit{U.N. DRUG REPORT}, \textit{supra} note 49, at 141-42.
\item See \textit{Cleaning Up?}, \textit{supra} note 120, at 78 (“So much money passes through the City of London, the world’s biggest foreign exchange, that the State Department ranks Britain ahead of many offshore centres as being ‘of primary concern.’”).
\item See \textit{Treasury, Justice}, \textit{supra} note 128 (quoting statement by U.S. Department of Justice official that laws “‘are not keeping up with developments in the techniques of international crimes.’”).
\item See \textit{Cleaning Up?}, \textit{supra} note 120, at 78 (citing FATF report that “no sooner has one loophole been closed than another opens”).
\item See \textit{U.N. DRUG REPORT}, \textit{supra} note 49, at 141. In the words of a 1985 report of a U.S. Senate committee:

‘Money laundering is now an extremely lucrative criminal enterprise in its own right. The Treasury’s investigations have 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. This has resulted in the development of a professional criminal class of money launderers which includes accountants, bankers and lawyers. They need not become involved with the underlying criminal activity except to conceal and transfer the proceeds that result from it.’ \textit{Id.}

\item On Salinas, see, \textit{e.g.}, Jeff Gerth, \textit{Citigroup Head Concedes Laundering Controls Were Poor}, \textit{N.Y. TIMES}, Nov. 10, 1999, at A6 (reporting on testimony by co-chairman of Citigroup, parent of Citibank, that Citibank’s controls had been weak); Tim Golden, \textit{U.S. Report Says Salinas’ Banker Ignored Safeguards}, \textit{N.Y. TIMES}, Dec. 4, 1998, at A8 (discussing General Account-
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These challenges diminish expectations about the effectiveness of anti-money-laundering measures. Still, the figure on effectiveness startles. It is estimated that only .0062 of every dollar illegally earned from drugs - about half a penny - is subjected to governmental removal actions.204

One could challenge the veracity of these statistics. This is a valid point. The very nature of crime renders statistical analysis little more than the making of, to borrow a phrase, "estimates in the fog."205 One also could argue that low clearance of crime is not an uncommon result of law enforcement.206 This, too, is valid. Society should not abandon all law-enforcement efforts just because they are imperfect.

Nonetheless, when viewed against the backdrop of costs outlined earlier, the minimal benefit represented by these statistics should raise alarm.207 It should militate against waging a war of attrition against money laundering that causes great collateral damage to the autonomy of law-abiding individuals and businesses.208 It should counsel for mea-


205. See Van Duyne, supra note 57, at 113. The author used the phrase in criticism of international law-enforcement efforts to state the magnitude of money laundering. Later he quoted a Canadian report: "There is no verifiable method for determining the size of the illicit economy. Estimated figures in this area of illicit proceeds, however carefully calculated, are only guesses. Once stated they take on a reality they do not deserve." Id. at 128 (emphasis supplied by van Duyne). Perhaps in recognition of such statements, the FATF now is moving slowly toward setting a dollar figure on the extent of money laundering worldwide. See FATF Report, supra note 118, at 32.

206. Cf. Corbitt, supra note 117, at 372 (quoting "intelligence sources" who argued that despite appearance of "limited" results of anti-money-laundering laws, "information gathered . . . [w]as more valuable in clearing up crime than prosecutions brought").

207. The International Association of Penal Law recently sounded such "alarm bells . . . about the extent to which the world-wide legislative reaction" against organized crime contradicts "respect for the rule of law and the rights of the accused . . . ." Wise, supra note 162, at 1301. 1303. Accord Castells, supra note 56, at 203 ("In a desperate reaction to the growing power of organized crime, democratic states, in self-defense, resort to measures that curtail, and will curtail, democratic liberties."); Frank C. Razzano, American Money Laundering Statutes: The Case for a Worldwide System of Banking Compliance Programs, J. Int'l L. & Prac. 277, 277 (1994) (asserting that while "increasingly draconian money-laundering statutes" have not "stemmed the flow of drugs, they have succeeded in invading the financial privacy and individual liberties of America's citizenry").

208. One must question suggestions, like that in this statement by a European Commission official, that even incremental gains are sufficient:
sures to fight money laundering, and all organized crime, that fully respect principles of fair notice and legality, freedom from undue governmental intrusion, and individual privacy.

IV. A Better Way: Resetting the Balance Between the Rights of Individuals and the Need to Fight Organized Crime

In many ways the laws against money laundering improve on RICO. They are more precise and relatively less complex. Yet they, like RICO and other means of fighting organized crime, post significant threats to liberty. The effectiveness of anti-money-laundering measures is less than impressive. A new balance, of law-abiding individuals’ right to be free from undue governmental interference and of governments’ need to curb the laundering of the proceeds of organized crime, is in order. Measures should be tailored to assure maximal efficacy and minimal intrusion.

A step in the right direction is the recent shift from wholesale, mandatory currency transaction reporting in favor of more precise Suspicious Activity Reports. But as long as these reports are useful only as post hoc evidence, one must question whether such reporting should be required. After all, once probable cause centers on a suspect, law enforcement can ask a judge for a warrant to examine the suspect’s financial records. This conventional approach protects individual autonomy to a far greater degree than the mandatory-reporting regime, and with, perhaps, no less effectiveness.209

Conventional methods should receive greater emphasis in all aspects of the fight against organized crime. In stark contrast with RICO, legislation should be drafted narrowly, in a way that subjects only the most dangerous criminals to the most severe penalties. Penal laws should include state-of-mind requirements that serve fairness by making sure that only blameworthy individuals are punished. Law enforcement should endeavor first to investigate and prove substantive offenses like drug trafficking and bribery rather than jump to compound, proxy statutes like RICO and the MLCA. It should attempt conventional means

Increases in cross-frontier movements of cash, the search for laundering possibilities outside the traditional financial sector and reported increases in the actual cost of money laundering point to some success in making money laundering more difficult and expensive for organized crime.

Corbitt, supra note 117, at 371-72.

209. Cf. Wise, supra note 162, at 1303 (noting call by International Association of Penal Law for use of least intrusive law-enforcement techniques and for judicial supervision of intrusions on personal liberty or privacy).
rather than jump to intrusive and expensive tactics, such as sting operations and electronic surveillance. This new approach should be exported throughout the globe with the same vigor that accompanied the campaign against money laundering.

Before impressing private businesses into service, before invading the privacy of individuals, government always should consider whether the benefit to the public safety is worth the degree of intrusion.