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The Moral Limits of the Crime of Money Laundering

Peter Alldridge*

I. THE PROBLEMATIC

Clean money is worth more than dirty money. Clean money—money untainted by criminal association—can be invested in profitable activities or spent on consumption, more or less conspicuous, without risk of recrimination. Dirty money, generally speaking, can only be invested or spent less profitably, less visibly, and at a risk of punishment. It also carries the risk of being used as evidence of the initial crime. With the exceptions of small thefts of fungibles, like cash and the fantasy case of the criminal art collector who wishes to sit alone with a painting so famous that it could not be resold, virtually all income from criminal activities must be disguised to be of use to the criminal. Money laundering¹ is that process of disguise. Analysis of money laundering, in terms of criminal markets, holds that secrecy has value.² People will pay for secrecy because it costs less than disclosure. To the person in possession of money deriving from illegal sources, the dangers of disclosure relate to the possibility of prosecution and imprisonment. The process of money laundering holds out the prospect of gaining lasting secrecy for the information dealing with the provenance of the money. On the demand side, a person holding assets

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1. Jack A. Blum et al., *Financial Havens, Banking Secrecy and Money-Laundering* 6 (UNDCP Technical Ser. No. 8, 1998). The origin of the term is in the use of cash based retail service industries like laundries to disguise the origins of cash acquired through rackets in the United States. The object was to mix legally and illegally obtained cash to avoid the attention of corrupt police officers, competitors, and (from the time that prosecution for tax evasion came to be a potent weapon in the hands of authorities unable to bring successful prosecutions for specific substantive offenses) the tax authorities.

2. Ingo Walter, *The Economics of International Money Laundering* (1991).

acquired from illegal sources should be willing to expose him/herself to a reduced rate of return or a higher rate of risk (exchange rates, etc.) or both. Rational launders may prefer conservative portfolios. One conservative choice is to expatriate the money. On the supply side, if the channels of conventional inter-bank fund transfers are closed due to exchange controls, or appear unattractive due to the risk of disclosure, then alternatives will be sought.

In many ways, notwithstanding the very low conviction rate and low rates of monies recovered in the United Kingdom, money laundering was the "crime of the 1990s."³ It will remain high on the law enforcement agenda during the years that follow. It has moved quickly from being marginal in the early 1980s—not even a ground for confiscation, let alone a crime—to a position at the center of efforts at co-operation in the "war on drugs"⁴ and the "struggle against organized crime" and now "the war on terrorism." Growth in the interest in money laundering has coincided with globalization, characterized by increased deregulation, financial liberalization,⁵ and privatization. Globalization created reasons no longer to control international capital movements. Laundering creates new reasons to monitor them.

These developments have not occurred in a vacuum. As late as 1980, the ability to set criminal law was still one of the most significant attributes of the nation-state. Twenty years later that has changed. The development of the international response to money laundering has been one of the principal factors in this radical shift. Developments in co-operation against drugs and organized crime under the third pillar of the Treaty of European Union have focused around the area. Late in 1999, the

3. G. Richard Strafer, *Money Laundering: The Crime of the '90's*, 27 *Am. Crim. L. Rev.* 149 (1989).

4. The metaphor of war is a telling one. It is impossible to undertake a war without being prepared to commit vast resources and without a danger of indifference to the means by which progress is secured.

5. Capital movements throughout the European Union were fully liberalized as of July 1, 1990. Council Directive 88/361, art. 67, 1988 O.J. (L 178) 5 (Capital Movements Directive).

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Tampere European Council meeting⁶ placed enormous emphasis upon money laundering, calling, in particular, for an increase in consistency in the definition of predicate offenses, the adoption of the revised directive,⁷ and the greater availability of all relevant information for the purposes of exchange, irrespective of arguments from banking secrecy.

The process of demonization of the money launderer has directed attention away from any close consideration of the arguments for powers of confiscation and forfeiture of the proceeds of crime and for the criminalization of laundering. They will vary according to which enforcement power is in point and must be considered independently of one another. The fact that a case can be constructed for one of the three measures does not imply that it applies equally for the existence of a different power. Each power, if it should remain, requires an independent and sufficient justification. In particular, criminalization requires a justification discrete from those that will support confiscation.⁸ Criminalization of laundering an asset is not justified simply because the asset is liable to confiscation.

One of the great achievements of Feinberg's *Moral Limits of the Criminal Law* is the force with which, and depth to which, arguments were pursued, sometimes leading to uncomfortable conclusions about the proper scope of the criminal law. Since its publication,⁹ money

6. The conclusions of the Tampere Special European Council are available at www.europa.eu.int/council/off/conclu/oct99. See Julian Schutte, Tampere European Council (15 & 16 October 1999): Presidency Conclusions, 70 *Revue Internationale de Droit Penal* 1023, 1034-35 (1999).

7. See Proposal for a European Parliament and Council Directive amending Council Directive 1991/308 EEC of June 10, 1991 on prevention of the use of the financial system for the purpose of money laundering under discussion at time of writing. The 1991 Money Laundering Directive forms the basis of the law in the European Union.

8. As to the general question of the justifiability of forfeiture provisions, see Leonard W. Levy, *A License to Steal: The Forfeiture of Property* (1996); see also Guy Stessens, *Money Laundering: A New International Law Enforcement Model* (2000).

9. For the author's initial reactions, see Peter Alldridge, 1985 *Crim. L. Rev.* 411 (reviewing Joel Feinberg, *Harm to Others* (1983)); Peter Alldridge, 1986 *Crim. L. Rev.* 420 (reviewing Joel Feinberg, *Offense to Others* (1984)).

laundering has leapt up the criminal justice agenda to the point where no international discussion of criminal justice seems to be able to avoid the topic. The body of law surrounding laundering, however, has developed without the sort of transparent, principled public analysis, which would have been essential to the provision of a rational criminal law. But there are now some clear statements by the bodies responsible for the crusade against money laundering, particularly the Financial Action Task Force and the International Monetary Fund, as to what precisely the harm is that they seek to prevent. Money laundering is the most significant new serious crime to appear on statute books worldwide since the publication of *Moral Limits*.¹⁰ The purpose of this essay is to take the arguments for its existence seriously. The law of England and Wales will be used as the illustration, but this is an area in which most jurisdictions' laws are formulated in order to comply with international instruments. And while enforcement strategies vary, the actual prohibitions are usually similar. In particular, the shape of the prohibitions in English Law follows directly from the Vienna Convention and the E.U. directive.

II. THEORY: JUSTIFICATIONS FOR FORFEITURE AND CONFISCATION

There is a range of weapons that can be used against the financial gains of crime. Profits might be seized *in rem* or *in specie*, with or even without a conviction for the predicate offense. They might even be taxed. Powers of confiscation are relatively easy to justify, and powers of forfeiture have been the subject of a good deal of recent consideration. This essay will consider the range of possible justifications for the *criminal offenses* of money laundering. The first section deals with the question whether, and under what circumstances within the "harm"

10. I exclude "cybercrimes" which are largely new ways of committing old crimes.

framework, it is morally legitimate to criminalize money laundering at all, and if it is, what might properly be regarded as mitigating and aggravating factors, and hence might provide criteria by reference to which rational consistent sentencing may take place. The second section deals with a set of arguments about the economic harm which laundering is said to do, and their relationship to the existence and enforcement of criminal offenses. The purpose is to suggest that the crimes of laundering are unjustifiable and unnecessary.

a. Justifying Confiscation

Under English law, there is no “relation back” doctrine. The mere fact that property was acquired through the illegal conduct of a trade did not of itself generate a right to confiscate.¹¹ Limited claims were made during the twentieth century to argue that all profits of crime were held on constructive trust for the Crown, or that there was a duty to account for them.¹² In the absence of a contractual, fiduciary, or other duty, there is no power to deprive a person of the “literary proceeds” of crime. There is no general right for the victims of crime to seek redress against the proceeds of the sales of books describing the offenses, and there is no right in the State to seize them.¹³ Nor in English law is there a common law power for the State to seize the proceeds of crime,¹⁴ but statutory powers have been put in place to accompany a sentence with a confiscation order. There are concomitant enforcement powers and reporting obligations.

Confiscation, the appropriation by the state of money

11. See *Gordon v. Chief Comm'r of Metro Police* [1910] 2 K.B. 1080 (Eng. C.A.) [England, Court of Appeal] (holding income from illegal betting nonetheless belonged to the bookmaker).

12. See *Reading v. Attorney-General* [1951] A.C. 507 (H.L.) [United Kingdom, Appeal Cases, House of Lords].

13. *Attorney General v. Blake*, [2001] 1 A.C. 268.

14. *Attorney-General v. De Keyser's Royal Hotel*, [1920] A.C. 508 (H.L.); *Burmah Oil v. Lord Advocate*, [1965] A.C. 75; *The Queen v. Cuthbertson*, [1981] A.C. 470; *Blake*, [2001] 1 A.C. 268.

and goods equivalent at least¹⁵ to the profit made by the crime, is said to be justified by a "principle" that people, in general, should not profit from unlawful activity and from crime in particular is frequently said to be deeply ingrained into the law.¹⁶ It follows from the requirement that, if law is to impact upon people's behavior, it should deliver coherent messages. It is not coherent, on the one hand, to try to create disincentives to a particular form of behavior, but, on the other, to permit someone who does it to benefit. Expressed in utilitarian terms, the message delivered by the establishment of disincentives to particular forms of behavior should not be qualified by allowing the courts to be used in order to secure profits from that behavior.

*b. Justifying Forfeiture*¹⁷

Forfeiture provisions seize the impedimenta or instrumentalities of crime. The principle against allowing people to profit from crime cannot itself supply a reason to allow forfeiture. The ancient fiction, "about as irrational and unjust a proposition as a sober mind can concoct,"¹⁸ is that there is something criminal about the thing.¹⁹ Because the thing is guilty, the State can seize it and arguments from double jeopardy can be sidestepped. There are several objections that can be made to forfeiture provisions, consequent upon conviction. First, the impact of forfeiture

15. The system in England and Wales confiscates proceeds, which is a category defined more widely than "profits." English law does not allow a deduction for expenses, such as the purchase of a "stock" of drugs, incurred in the commission of a crime.

16. See Robert Goff & Gareth Jones, *The Law of Restitution*, ch. 37 (4th ed. 1993); see also Ronald Dworkin, *Taking Rights Seriously* (1977); *Riggs v. Palmer* 115 N.Y. 506 (1889).

17. For excellent general critiques of forfeiture, see David J. Fried, *Criminal Law: Rationalizing Criminal Forfeiture*, 79 *J. Crim. L. & Criminology* 328 (1988); Leonard William Levy, *A License to Steal: The Forfeiture of Property* (1996).

18. Jacob Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 *Temp. L.Q.* 169, 257 (1973).

19. Paul Schiff Berman, *An Anthropological Approach to Modern Forfeiture Law: The Symbolic Function of Legal Actions Against Objects*, 11 *Yale J.L. & Human.* 1 (1999).

falls unfairly upon the family of the person against whom the proceedings are brought.²⁰ Second, forfeiture is arbitrary since it does not link the value of the goods seized to the value of the property acquired by the crime committed. Third, there is the question of the relationship between forfeiture provisions and third party rights. The fiction underpinning forfeiture—that the thing is guilty—implied that the forfeiture provision should prevail over third party rights in the item forfeited. This is the consequence arrived at in *Bennis v. Michigan*.²¹ Indeed, if the “symbolism” argument for forfeiture²² is adopted, it ought not matter whether or not the item is stolen or not. Fourth, leaving aside the exception cases where possession of the item is itself criminal or the item can only have a criminal use, the State has no right to seize property simply because it is *used* in the commission of crime. This is an objection principle, but also an objection speaking to questions of human rights, and, in particular, the right to quiet enjoyment of property. Fifth, a most obvious objection both to forfeiture and to confiscation is that they can generate double punishments for the same offense. The fiction that the thing is guilty is only a fiction.²³ Even if the general acceptability of forfeiture is granted, some response must be provided to the double jeopardy argument, which states that a person should not be punished twice for the same offense.²⁴

All the objections, which apply to forfeiture upon conviction, apply *a fortiori* to forfeiture without a criminal conviction. In addition, the principal objection to forfeiture

20. See Sandra Guerra, Family Values?: The Family as an Innocent Victim of Civil Drug Asset Forfeiture, 81 Cornell L. Rev. 343 (1996).

21. *Bennis v. Michigan*, 516 U.S. 442 (1996).

22. See Berman, *supra* note 19.

23. “Goods, as goods, cannot offend, forfeit, unlade, pay duties, or the like, but men whose goods they are.” Sheppard v. Gosnold, (1671) Vaughan, 159, 172.

24. See generally Martin L. Friedland, Double Jeopardy (1969); George C. Thomas, Double Jeopardy: The History, The Law (1998). Formal double jeopardy protection under English law is slight, and the United Kingdom still has to accede to the double jeopardy protocol (Protocol 7 Article 4) to the European Convention on Human Rights.

provisions operating in the absence of a criminal conviction is that "it can too easily be used as a way of penalizing conduct without the safeguards of the ordinary criminal process."²⁵ On all of the grounds above, it is suggested that any use of forfeiture beyond the cases where the item in question is itself contraband is unjustified.

III. MORAL JUSTIFICATIONS OF CRIMINALIZATION

The international movement toward putting in place crimes of laundering centers upon the Vienna Convention.²⁶ Article Three obliges signatory nations to criminalize a list of activities to do with drug trafficking. It also obliges them to criminalize intentional money laundering in relation to various offenses of drug trafficking, and to take steps to ensure that bank secrecy does not impede enforcement, particularly cross-border enforcement. Subsequent international initiatives have extended the scope of money laundering law beyond those which have drugs offenses as predicates to those whose is other crime—perhaps serious or organized, but in principle any crime generating profit. The laundering legislation in England and Wales puts in place two parallel sets of crimes,²⁷ which are in the process of being merged.²⁸ The drug money laundering offenses preceded the offenses whose predicate offenses were not related to drugs, and remain, to some extent at least, the more draconian of the two. Those offenses bring the jurisdiction into compliance with the Vienna Convention and subsequent international

25. Derek Hodgson, *Profits of Crime and their Recovery*, 97 (1984). The Hodgson Report was written after *The Queen v Cuthbertson* [1981] A.C. 470, which held that there was no power to forfeit the proceeds of drug dealing. It was the progenitor of the Drug Trafficking Offences Act, 1986, c. 32 (Eng.), the first confiscation legislation in England and Wales.

26. United Nations Convention Against Illicit Traffic in Narcotics Drugs and Psychotropic Substances, U.N. Doc E/CONF. 82/15, reprinted in 28 I.L.M. 493 (1989) [hereinafter Vienna Convention].

27. Criminal Justice Act, 1988, c. 33, § 93A (Eng.), Drug Trafficking Act, 1994, c. 37, § 49 (Eng.).

28. The Proceeds of Crime Bill is at the time of writing (December 2001) moving through its Parliamentary stages.

agreements.

The assertion of a general principle that a person should not be permitted to benefit from crime (or even the application of that principle far more rigorously than is currently done in English law) does not necessarily justify the *criminalization* of dealing with the proceeds. Indeed, if the confiscation provisions were to operate ideally, and no profits actually were to be made from the predicate offenses to which the laundering provisions applied, then the independent argument for criminalization would be considerably weakened. The arguments for criminalization require some disentangling. But, broadly speaking, it is possible to distinguish between, on the one hand, the sorts of moral arguments which are the usual means by which the limits of the most serious criminal offenses are set (identifying a harm against which it is appropriate for the law to militate, identifying a guilty mental state and then, perhaps, sets of aggravating and mitigating characteristics), and, on the other, the set of economic arguments why laundering should be considered an issue sufficiently serious as to justify invoking the criminal law.²⁹ Frequently untouched in economic analyses is the link between the claim that economic damage is caused and that criminalization should follow. The major "moral" accounts of criminalization are as follows:

(1) Punishing Laundering Removes the Incentive to Commit Predicate Offenses³⁰

This argument is a very simple one, akin to the assertion of the principle against allowing profit from crime. There are two major sets of objections. First, it is

29. This distinction is by no means a hard and fast one. Deliberately to cause economic damage is immoral. Perhaps a more accurate way to state the distinction in the text might be between arguments which deal with long range economic harms and those which do not.

30. The expression "predicate offense," taken from the Vienna Convention (and many subsequent international instruments), indicates the offense by which the profits were acquired.

frequently taken for granted that if laundering were to be more difficult, there would be substantially fewer predicate offenses. This is by no means self-evident. Even if there were to be perfect enforcement of laundering offenses, the profits to be made from drugs are such that there would still be ample incentive for dealers simply to hold the money in cash until they are ready to use it. The U.K. money laundering legislation does not prevent the use of safe deposit boxes for cash to be spent later. Second, but more importantly, the argument depends for its validity upon an implausible and unproven empirical claim. If the predicate offense is already a crime and there exists power to confiscate the profits of the offense, what additional force do provisions have which make it a crime to dispose of the money? If somebody contemplating a course of conduct involving the unlawful acquisition of money followed by its laundering is not put off by the existence of the predicate offense nor by the existence of the power to confiscate, it is hardly likely that the existence of the laundering offense will make much difference.

The deterrent argument would be slightly stronger if the chances of being detected for the predicate offense are significantly lower than for laundering, which will seldom be the case, or where the penalties for the laundering offense are so much higher than for the predicate offense as to make a difference to a rational, calculating criminal. It would be difficult to justify such a sentencing regime.

(2) Laundering is a Form of Complicity in Predicate Offenses

The argument for regarding laundering as a form of complicity is slightly different. It is that laundering is a form of participation in *another* offense. It is clear that inchoate liability in English law has extended significantly beyond the traditional trio, rooted in common law, of attempt, conspiracy, and incitement. There is now a large group of statutory inchoate offenses (ranging from threat offenses, to going equipped for stealing, to possession of

firearms, explosives, or scales that give false measures). They have extended significantly the scope of the conduct covered by attempt, conspiracy, and incitement. In consequence of these statutes, criminal law now enjoins conduct that is significantly earlier in time, and further removed causally from the consummated offense, than an attempt. If laundering is a form of complicity, it also extends to cover conduct later in time and geographically removed from the crime.

The two main objections to treating money laundering as a form of complicity in the predicate offense are: first, that it is frequently by no means clear from which predicate offense the objectionable part of laundering is derived; and, second, that as a matter of labeling, it does not properly encapsulate the significance of the harm. As to the first, identification of the predicate offense is important because the usual account of complicity at common law holds that the degree of culpability of the accomplice is limited to that of the principal.³¹ If, for example, the launderer is regarded as an accomplice to possession of drugs, that differs, and usually is treated far less seriously, from being an accomplice to dealing. At the least, if this is the argument, then it needs to be explicated far more fully. As to the second, the sentences that are set in the very few English money laundering cases do not express any particular concern for the nature of the offense by which the money was acquired. If the "harm" in laundering is some more remote economic harm done by the launderer, then it is not relevant what the source of the money is, and laundering is better regarded as the offense itself, rather than as the coda to another.

31. Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine* 73 Cal. L. Rev. 323 (1985).

(3) Punishing Laundering “Gets the Real Criminals”

Discourse about “organized crime” in general, and drug dealing in particular, is peppered with references to the idea that crime, when organized, typically operates along hierarchical lines. That is, at the top of all criminal organizations there is someone who keeps most of the profits, lives a very comfortable life in an exclusive quarter, and rules the subordinates with a rod of iron. If this stereotype has any basis in reality, it is easy to see how people in the upper levels of an organization can distance themselves morally, psychologically, and geographically from the ugly ground level criminal activities. The argument, which is then made for criminalizing laundering is that these people cannot distance themselves from the profit because that is why they are in the enterprise.³² The really significant criminals can be identified and punished if the money can be traced to them.

The extent to which there are significant numbers of criminals conforming to the stereotype is unclear.³³ But if this is the justification, it has a far more wide-reaching impact. It embodies a curious ambivalence towards the effect of legislation. If a person fulfils this stereotype, then, in cases where there is adequate evidence that the money is linked to the predicate offenses, s/he probably will be an accomplice in those offenses. Failing that, conspiracy charges could be brought, and liability can be established independently of a crime of laundering. Where, on the other hand, there is no evidence that the money is linked to the predicate offenses, there will be no independent case for a crime of laundering. Where proof that the money is linked to the crime will depend upon shifting the burden of proof, criminalization—whether as accessory to or

32. See Performance and Innovation Unit, Cabinet Office, *Recovering the Proceeds of Crime* para. 1.3 (2000), at <http://www.cabinet-office.gov.uk/innovation/2000/crime/recovering/01.htm>

33. See Petrus C. Van Duyne, *The Emperor's Clothes of Disclosure: Hot Money and Suspect Disclosures*, 31 *Crime L. & Soc. Change* 245-71 (1999).

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conspirator in the predicate offense or for a distinct offense of laundering—will depend upon the legitimacy of the shifted burden.³⁴ But whether or not shifted burdens are acceptable, there is no independent case for criminalization. What the rhetorical deployment of this stereotype really argues for is a category of complicity based upon instigation, which would be a significant (if long overdue) reform of the law of complicity towards which the English Law Commission groped.³⁵

There is another way of stating the “real criminal” argument. Simply, if people without jobs, who do not claim benefit, are able to buy expensive cars and houses, and appear to emerge unscathed by the law, then this is an example to others as to how to make money that ought not to be given. Members of the police claim that public satisfaction follows the apprehension of such people, and it has been endorsed at the highest level:

[I]t simply is not right in Modern Britain that millions of law-abiding people work hard to earn a living, whilst a few live handsomely off the profits of crime. The undeserved trappings of success enjoyed by criminals are an affront to the hard-working majority. And it is, of course, often the underprivileged in society who suffer most from crime.³⁶

This is, of course, an argument for confiscation and not necessarily for criminalization. The “real criminals” argument will not provide a justification for criminalization.

34. Compare *H.M. Advocate v. McIntosh*, [2001] UKPC D1 (shifted burden in confiscation proceedings consistent with guarantee of presumption of innocence in European Convention on Human Rights because defendant subject to such proceedings has already been convicted), with *The Queen v. Lambert*, [2001] UKHL 37 (shifted burden in definition of criminal offense only exceptionally and with powerful justification acceptable).

35. See The Law Commission, Consultation Paper No. 131, *Assisting and Encouraging Crime* (1993).

36. Tony Blair, Foreword to *Recovering the Proceeds of Crime*, supra note 32.

a. Comparisons between Offenses—Sentencing Money Launderers

It would have been peculiar had the objectives of the law and the harms which they seek to prevent—so elusive at the point where the crime is defined— suddenly become pellucid at the point of sentence. They did not. If there is to be sensible sentencing, then it must rest upon a developed account of what actually is wrong with money laundering. Sentencers need to have some idea of what it is that is wrong with the offense in question so that they can know how the offense in question differs from the “standard” form that offense, what matters might amount to aggravating and what to mitigating factors, and so on. The difficulty that they faced in some of the early laundering cases was lack of clarity as to the governing rationale for the crime. Is it like theft or fraud, or drug dealing, smuggling, handling stolen goods, or what? If laundering is to remain a crime, then it is necessary to have a clearer idea of precisely what it is which is wrong in laundering.

The sentencing maxima under the current English legislation are severe and are set out in the table on the following page.

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	Criminal Justice Act 1988	Drug Traffick- ing Act 1994	Terror- ism Act 2000
Assisting another person to retain the benefit criminal conduct or of drug trafficking	14 years ³⁷	14 years ³⁸	14 years ³⁹
Acquisition, possession, or use of the proceeds of criminal conduct or of drug trafficking	14 years ⁴⁰	14 years ⁴¹	14 years ⁴²
Concealing or transferring the proceeds of criminal conduct or of drug trafficking	14 years ⁴³	14 years ⁴⁴	14 years ⁴⁵
Failure to disclose knowledge or suspicion of laundering	14 years ⁴⁶		
Tipping-off	5 years ⁴⁷	5 years ⁴⁸	
Failing to comply with the requirement to operate a proper reporting system ⁴⁹	2 years		

37. Criminal Justice Act, 1988, c. 33, § 93A(6) (Eng.).

38. Drug Trafficking Act, 1994, c. 37, § 54(1) (Eng.).

39. Terrorism Act, 2000, c. 11, § 19(8) (Eng.).

40. Criminal Justice Act, 1988, c. 33, § 93B(9).

41. Drug Trafficking Act, 1994, c. 37, § 54(1).

42. Terrorism Act, 2000, c. 11, § 19(8).

43. Criminal Justice Act, 1988, ch. 33 § 93C(4) (Eng.).

44. Drug Trafficking Act, 1994, c. 37, § 54(1).

45. Terrorism Act, 2000, c. 11, § 19(8).

46. Criminal Justice Act, 1988, c. 33, § 93C(4).

47. *Id.* c. 33 § 93D(9).

48. Drug Trafficking Act, 1994, c. 37, § 53.

49. Money Laundering Regulations, (1993) req. 5(2) (Eng.).

The Sentencing Advisory Panel was established in 1999 to give advice to the Court of Appeal on “standard” sentences, but it has yet to deal with money laundering. And, since there are very few prosecutions, it is unlikely to do so as a priority. More important for the categorization of the significance of an offense is the “standard” sentence that is applied, and that is to be found in the behavior and language of the courts. The language of the courts suggests that in sentencing three people (one for possession of x grams of drug y , one for selling x grams for $\pounds z$, and the last for laundering $\pounds z$), the approach of the court should be that the sentence of the dealer is greater than that of the launderer, whose is greater than the possessor. In 1999, for the first time, a sentencing case came before the courts in which the launderer had no other allegation against him/her. The court took a very harsh line, indeed.⁵⁰ Nonetheless, there are so few cases decided on the sentencing of offenders, under the money laundering legislation, that there is little guidance as to the underlying rationale of the offense to be found in the sentences that have been imposed.

b. Comparator Offenses

In the search for a justifying account of the vice in laundering, one analytical approach, therefore, is to have regard to possible comparators—offenses that might be thought to provide analogies. There are four types of serious offenses to which there are some obvious similarities.

1. Drug Dealing?

There are some indications in the earlier cases and legislation on laundering that the launderer is regarded more agreeably than the trafficker. The Home Office

50. *The Queen v. Ussama Sammy El-Kurd*, [2001] Crim. L.R. 234 (Eng. C.A.) (defendant fined $\pounds 1m$ and jailed for fourteen years, reduced on appeal to twelve).

Working Group on Confiscation⁵¹ pointed out that when enacting the 1986 Drug Trafficking Offenses Act, Parliament had regarded money launderers as lesser offenders than drug traffickers.⁵² But the 1995 Proceeds of Crime Act had given the courts power to make the assumptions when dealing with the offenses covered by the 1988 Criminal Justice Act, and the continued existence of the exception now appears anomalous.⁵³ In *R v. Greenwood*,⁵⁴ the Court of Appeal held that money laundering was “nearly as serious” as drug dealing. Now the exact moral wrong a drug dealer does is itself by no means clear.⁵⁵ This statement seems to assume that the seriousness of an act of laundering is directly proportional to that of the predicate. Unless laundering is a form of complicity, there is no reason why the vice in laundering need be, in any way, related to the means by which the money was acquired.

In any event, it was easier to see a connection between the gravity of drug dealing and laundering at the time⁵⁶ when the *only* laundering offenses were offenses of laundering the proceeds of drug dealing. At that time, the governing rationale might well have been that laundering was a form of complicity in dealing. And following a relatively unsophisticated “derivative” theory of complicity, the accomplice could not be guilty of a more serious, and generally was guilty of a less serious offense, than the perpetrator.

51. Great Britain Home Office Working Group on Confiscation, Third Report: Criminal Assets (1998).

52. During the debates on the Criminal Justice (International Co-operation) Act 1990, the Minister of State for the Home Office, Earl Ferrers, expressly maintained this distinction but without making clear the grounds upon which it rested. See 514 Parl. Deb., H.L. (6th ser.) (1990) 514.

53. The Working Group's recommendation that section 4(5) be repealed was affirmed by Recovering the Proceeds of Crime, *supra* note 32, and effected by the Proceeds of Crime Act 2002.

54. *The Queen v. Greenwood*, 16 Crim. App. R. 614 (1995) [England, Court of Appeal, Criminal Division].

55. Peter Alldridge, Dealing with Drug Dealing, in Harm and Justification 239 (A.T.H. Smith et al. eds., 1996).

56. There was such a time in English Law between 1990 and 1994.

2. Counterfeiting?

Another possible comparator is counterfeiting. Both are crimes involving the remote causing of huge remote damage which is difficult to identify. Money laundering may well be seen as a means of undermining the unit of exchange, but counterfeiting money is more than a means of obtaining by deception. If the counterfeit is entirely successful (the counterfeit currency is undetectable and enters circulation), there will be no identifiable loser. But the introduction of counterfeit currency into circulation will generate an increase—albeit very small, even when the sums of counterfeit currency are quite large—in the rate of inflation, because the cash supply will have increased. But that is not the real risk either in counterfeiting or laundering. The sources of anxiety are that there will be an alternative source of money to the “legitimately” powerful, and that the existence of such a source will be subversive of respect for that established authority.

3. Handling Stolen Goods?

In many ways, the panic surrounding laundering now has echoes of that surrounding Wild and the other thief-takers in the eighteenth century.⁵⁷ Offenses of handling have the obvious similarity to offenses of laundering inasmuch that they are offenses of disposal of unlawfully acquired property. There is a substantial overlap between handling and laundering offenses, and there have been suggestions⁵⁸ that the laundering offenses are little but an updated version of handling. The sense in which the two offenses are similar is that both create, and deal in, unlawful markets.⁵⁹

57. Gerald Howson, *It Takes a Thief: The Life and Times of Jonathan Wild* (1987); 1 Sir Leon Zadzinowica, *A History of English Criminal Law and Its Administration from 1750* 682-84 (1968).

58. Sir John Smith, Note to *R v. Gibson*, 2002 Crim. L.R. 479.

59. The appropriate sentencing strategy for handling stolen goods is currently under consideration by the Sentencing Advisory Panel at <http://www.sentencing->

4. Smuggling

Drug dealing, handling, and counterfeiting operate as comparitors to laundering without sharing its most significant distinguishing feature: its international character. Reform efforts continually target the changes in enforcement procedure that would be necessary to prevent money being spirited away through other jurisdictions. The economic accounts⁶⁰ of the gravity of laundering rely for their force upon the effect of laundering, upon *two or more* national economies or the global economy. If the only serious economic damage from laundering depends for its effect upon the international movement of money and goods, then there is clearly a case to be made for restricting the application of the criminal sanction, if it is to be imposed at all, to the cases where the proceeds of crime are moved between jurisdictions. In this account, the closest comparator crimes to laundering are smuggling, and (in jurisdictions where exchange controls exist) exchange control violations.⁶¹

The peculiarities of smuggling are that it takes its significance from the existence of boundaries between markets. From the eighteenth century, at the latest, the excise man had a function in raising public finance. But he also had another function: He was the instrument of economic protectionism. The smuggler, *per contra*, was the embodiment of free enterprise. Not only was the smuggler cutting cost to the consumer, (by not paying duty) he was also striking a blow against protectionism. Adam Smith and Beccaria⁶² both expressed admiration for smugglers. For Smith, the smuggler was:

[A] person who, though no doubt highly blamable for

advisory-panel.gov.uk (last modified Sept. 27, 2000).

60. See *infra* section IV.

61. In the United Kingdom the Exchange Controls Act of 1947 was repealed by Finance Act 1987 § 68 (Eng.).

62. Cesare Beccaria, *Of Crimes and Punishments* ch. 33 (Adolph Caso ed., Int'l Pocket Libr. 2d ed. 1992) (1778).

violating the laws of his country, is frequently incapable of violating those of natural justice, and would have been, in every respect, an excellent citizen had not the laws of his country made that a crime which nature never intended to be so.⁶³

On the same sort of account, the launderer is somebody who challenges attempts—albeit not expressly protectionist attempts—to isolate one market from another. As with smuggling, there is no *a priori* moral wrong. On this account, the gravity of laundering will depend upon the seriousness with which these attempts are taken.

c. Variables in Determining Sentence

Another approach to the task of quantification of the gravity of respective offenses of laundering for the purposes of sentencing is to identify aggravating and mitigating factors. By their close consideration, it might be possible to gain a clearer picture of the vice in the offense. Assume that the criminalization of money laundering is justified. How can distinctions be made between various ways of committing the offense? Consider some of the possible variables. Does it, and should it, matter to the sentence imposed upon someone convicted of a laundering offense:

1. that the money laundered was a large or a small amount;
2. that the money laundered was the product of a more serious or a less serious crime;
3. that the laundering was done knowingly, rather than merely suspecting, that the money was of unlawful provenance;

63. 2 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* 429 (Edwin Cannan ed., U. Chi. Press 1976) (1776).

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4. that it can be shown that the availability of the laundering route made the difference between the crime being committed and not;

5. that the money was acquired inside or outside the jurisdiction, or was to be invested inside or outside the jurisdiction;

6. how the money, when laundered, was to be deployed?

In each of these cases, an argument can be made that the distinction should be regarded as having significance. Taking them in turn:

As to (1), in all property crime, *ceteris paribus*, *quantum* is significant. As to (2), if the wrong in money laundering is seen as relating so closely to the harm of the predicate offense as for it to amount to a form of complicity, then the nature of the predicate offense should inform the degree of seriousness attached to the laundering transaction. On the other hand, if the punishment is *not* being directed against a form of complicity but against the causing of economic harms, then sentencing will ignore the nature of the predicate offense. If the offense is directed against both, then considerations about *mens rea* will be taken into account. Thus far, there has been no suggestion in the United Kingdom literature that there should be differential sentencing according to whether the offense was charged under the 1994 Drug Trafficking Act or the 1988 Criminal Justice Act, that is, whether the predicate offense was a drug trafficking offense or not. But that would be a consistent consequence of the "complicity" position.

As to (3), how significant is it that the laundering was done knowingly, rather than suspecting that the money was of unlawful provenance? It is standard treatment of questions of *mens rea* that the "higher" mental state will give rise either to a separate offense, or at the least a

greater punishment for the same offense. The issue in money laundering is, however, rather different because the defendant *can* be expected to have regard to his/her *own* mental state. It is the existence of the mental state that gives rise to the obligation to report or not to take part in the process. A defendant *will* know whether or not s/he is suspicious, and, if s/he is, will fall under the criminal proscription.

A person generally will not know at the time of acting whether s/he is *reckless* as to some consequence, because the nature of the inquiry is such that it generally can only be conducted *ex post*. A person may know, however, whether or not s/he suspects the provenance of funds with which s/he deals. If s/he suspects, then s/he knows and the obligation arises just as much as if s/he knows. If the knowledge or suspicion required for liability is taken to be merely the thing which imposes the obligation to act (in the case of the offenses of failing to disclose or failing to operate a proper system), or not to act, (in the case of the offenses of assisting another person to retain the benefit of criminal conduct or drug dealing or acquisition, possession or use of the proceeds of criminal conduct or drug dealing), then variations in mental state will not affect sentence. If, on the other hand, the knowledge or suspicion is not merely a precondition to that obligation, but also a *mens rea* descriptor of the way in which the obligation is discharged, then it should be taken into account.

Variable (4) raises a causal issue, which will arise rarely in practice but which focuses attention again upon the rationale for the offenses. One of the principal reasons asserted for the existence of the offenses is that people who commit crimes will be less likely to do so if it is less easy to have access to the profits in useable form. If it could be established that the predicate offense would not have happened at all without the availability of the launderer, then there is a case for suggesting that the launderer's participation was as instigator, as in the case of the participation of a handler in a theft to order of a unique artifact. In this case, the solution most consistent with the

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sentencing system is for the commissioning launderer to be treated as a handler of stolen goods. In the cases where the predicate crime would have occurred anyway, then this comparison is not available. However, it might be argued that where the contribution of the launderer is a *causa sine qua non*, the crime is aggravated because his/her conduct both causes crime to occur and profits from it, rather than just the latter.

As to (5), if the source jurisdiction of the money, or other aspects of the "money trail," take on international elements, then similar questions arise with a charge of possession with intent to supply: Does it make a difference that drugs possessed in jurisdiction A are intended for supply in jurisdiction B, having been made in jurisdiction C? Which jurisdiction is most legitimately aggrieved? Suppose someone is arrested in an airport in jurisdiction A, through which s/he is in transit. S/he is in the process of carrying banknotes generated by the sale of drugs from jurisdiction B to jurisdiction C, where the proceeds are going to be banked, with a view to their eventual investment in jurisdiction Z. How this contributes to the evaluation of the moral wrong in, or the sentence for laundering, depends upon the obligation which the one country has to another. The rhetoric of the "international community" and the operation of multi-national enforcement groups and mechanisms seek to suggest that whichever is the sentencing jurisdiction ought to sentence on the basis that all the offenses took place in a cumulative international jurisdiction, to which all the harm ascribed to the laundering could be imputed. If this position were not adopted, then sentencers would have to filter out harms ascribable elsewhere. That, however, would be inconsistent with the imposition of liability in the first place.

Variable (6) raises the question whether it would be a defense or a mitigation to give the money to charity, or another good cause, or to the Exchequer. The issue here is whether the use to which the money is to be put has any effect upon the degree of turpitude that is ascribed to it in sentencing. If the money is to be put to socially beneficial

use, then it is difficult to see a vice at all in laundering. If it is necessary to criminalize socially beneficial laundering because it would be impossible to isolate socially harmful cases, then social benefit should at least be a mitigation.

I conclude that it is impossible to generate an acceptable justifying account of the criminalization of laundering from the "moral" arguments and that detained consideration of aggravating and mitigating factors only reveals incoherences in the existing law. Theorists have tended to regard the insertion of considerations of economics into the criminal law as raising sets of arguments distinct from the moral.⁶⁴ One of the important things that Feinberg incorporated into the analysis in *The Moral Limits of the Criminal Law* was to reintegrate these considerations.⁶⁵ Harm worthy of the invocation of criminal law can, of course, extend to economic damage and to remote damage, but the arguments for laundering being regarded as a harmful phenomenon require analysis. It is to those arguments that consideration now turns.

IV. RELOCATING THE HARM - THE ECONOMIC CONSEQUENCES OF LAUNDERING IN INDIVIDUAL JURISDICTIONS

For any given national government, there are obvious immediate advantages to having money laundered into its own economy, rather than into another. A single anecdote serves to make this point forcefully. In the wake of the collapse of the U.S.S.R., criminal codes were put in place in a number of former Soviet Socialist Republics which mirrored more closely the legal framework and values of the West. Consultants were employed in their drafting. In

64. Criminal law was "generally considered the domain par excellence of moral rather than economic thinking in law." Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 *Colum. L. Rev.* 1193, 1230 (1985). Symposium, *Blackmail*, 141 *U. Pa. L. Rev.* 1565-1975 (1993); see also Peter Alldridge, *Relocating Criminal Law* 13-15 (2000).

65. See, e.g., Joel Feinberg, *Harm to Self* 134-42 (1986) (discussing the treatment of the economic consequences of motorcycling without a helmet).

a meeting between one of these consultants and a very senior government minister in one such republic, the minister, reviewing a provision outlawing money laundering, said (loosely translated): "Let me get this straight: money laundering is where people make money unlawfully elsewhere and bring it to this country and invest it—is that correct?" The answer was in the affirmative. "Why should I be against that?" came the response.⁶⁶ The *Realpolitik* of the minister reflects the "dominant strategy" which game theory produces of permitting money laundering.⁶⁷ If there are two countries (A and B) deciding, on the basis of economic self-interest, whether or not to criminalize money laundering, one of the considerations will be what the other country does. If Country B chooses to criminalize, then country A's self-interest will be to permit money laundering, because then A's financial institutions will receive all the profits (as between A and B) of laundering. And B will shoulder the burdens of law enforcement. On the other hand, if B chooses to permit laundering, the optimal choice for A is also to permit laundering for the same reasons. However, if both countries permit laundering, then the outcome is said⁶⁸ to be Pareto⁶⁹ inefficient because both sets of financial institutions benefit less. It also provides a policy basis driving the underlying criminal activity, which damages the licit economy.

66. See Vito Tanzi, International Monetary Fund Working Paper 96/55, Money Laundering and the International Financial System 5 (1996) (noting that "[r]ecently some small countries have almost advertised their willingness to accept laundered money.").

67. See Brent Fisse & David Fraser, Some Antipodean Skepticisms About Forfeiture, Confiscation of Proceeds of Crime, and Money Laundering Offenses, 44 Ala. L. Rev. 737 (1993); Rob Norton, In Defense of Money Laundering, Fortune, Sept. 27, 1999, at 37; Matthew B. Comstock, GATT and GATS: A Public Morals Attack on Money Laundering, 15 Nw. J. Int'l L. & Bus. 139 (1994) (explaining the game theory approach).

68. See Comstock, *supra* note 67, at 162 (citing Barbara Webster & Michael S. McCampbell, National Institute of Justice, International Money Laundering: Research and Investigation 6 (1992)).

69. An allocation or distribution of goods and services in an economy is said to be Pareto optimal if no alternative allocation could make at least one individual better off, without making anyone worse off.

If money laundering were to be considered simply to be the problem of each individual jurisdiction, then an economic approach to the questions of whether and how to regulate would include consideration of the costs of regulation. This includes bureaucracies, courts, prisons, and tax revenue foregone when criminal organizations are prevented from laundering money into legitimate businesses that pay tax and create honest jobs. It would also include less tangible costs, such as loss of privacy of the people whose transactions were scrutinized.

It is the international dimension to criminal law which has overridden the self-interest of individual states. International agreements are possible because, unlike the prisoner's dilemma case,⁷⁰ the parties are able to communicate with one another. Comstock argues that the Vienna Convention creates incentives for some nations to cheat. An unscrupulous nation knows with near certainty that many states will act against laundering, so the dilemma does not arise. It can attract laundered money without fear of competition.⁷¹ Comstock's view rests upon the absence of a system of sanctions for refusal to criminalize and argues for a system of penalties through the international trade *regime* (in particular, through the World Trade Organization) for failure to criminalize. These systems permit a system of sanctions on public moral grounds, for whose invocation he argues.

Whether or not his account is entirely correct,⁷² Comstock does highlight the point that laundering is behavior whose dangers only exist to a collectivity beyond

70. The dilemma is the case of two suspects in custody, both of whom know that their own position will be best served if both refuse deals with the police, but each suspect also realizes he will be worse off if he does not deal with the police and his confederate does.

71. See Comstock, *supra* note 67, at 162.

72. The major problem is that Comstock fails to distinguish criminalization as a matter of law from active pursuit as a matter of criminal justice policy. The underlying assumption of his analysis is that levels of enforcement do not vary significantly between nations that criminalize. (For a nation attempting to secure the benefits of being part of the "International Community," having money in its economy rather than in another country's might well allow a disjunction between the rhetoric and the reality of its approach).

the nation-state. And in the sense that it provides a common enemy, this can serve to provide a focus for those attempting to enhance international solidarity and co-operation over a range of issues. Money laundering is the first serious crime whose existence can be directly related to *global* economic concerns, rather than those of individual jurisdictions. That, more than any other reason, is why its emergence has coincided with globalization. It is, therefore, important to review the accounts which are to be found of the *international* economic ramifications of laundering—its effect upon global markets and the global economy. It is in this area that the economists working for major international organizations, particularly the Financial Action Task Force, child of the Organization for Economic Co-operation and Development (OECD) and the International Monetary Fund, have been very active. It is to those arguments that the article will now turn.

It should also be noted at the outset that the economic arguments are generally expressed to show some detrimental outcome from laundering. What the writers have done, however, is to concentrate upon the overall effect of laundering. This does not necessarily argue for any particular legal response. Proceeding from “harm” principles,⁷³ in order to provide a coherent basis upon which to criminalize, there must at least be an identifiable harm. To move from that outcome to the claim that criminalization is an appropriate response requires further argument to be supplied, and, in liberal theory,⁷⁴ the alternative legal mechanisms need to be shown to be inadequate.

(1) Money Laundering has the Capacity to Undermine

73. In the sense identified by Joel Feinberg, *Harmless Wrongdoing* (1988), x that is that the existence of the harm is a reason—neither necessary nor sufficient, for criminalization.

74. Stretching back to Beccaria, the idea, honored in recent years far more in the breach than the observance, of criminal law as the *ultimum remedium*—the mechanism to be invoked upon the failure of all alternatives. For a modern statement, see Nils Jareborg, *What Kind of Criminal Law Do We Want?* 14 *Scandinavian Stud. in Criminology* 17 (1995).

Financial Markets

The major economic argument resounding through the literature is that laundering has a detrimental effect on the operation of markets.⁷⁵ Tanzi, an IMF economist, argues that the resources that go into illegal activity might otherwise be directed legally.⁷⁶ Money laundering allocates dirty money around the world not so much on the basis of expected rates of return, but on the basis of the ease of avoiding controls, and this is inefficient.⁷⁷ As a consequence, the world allocation of resources is distorted first by the criminal activities themselves and then by the way the dirty money is allocated.⁷⁸ Now it may be the case that economic statistics are skewed by laundering, but this is hardly a reason to put in place criminal offenses commanding serious sanctions and very significant enforcement powers and mechanisms. It is simply a reason to find more reliable means of generating economic statistics. The argument from efficiency and the allocation of dirty money, if it can be substantiated, is far the more serious of the two.

A large stock of laundered capital might bring instability to the world market. The total assets controlled by criminal organizations may, so it is said, be so large that to transfer them from one jurisdiction to another may have important economic consequences. At the national level, this will affect exchange and interest rates. Integration of financial markets implies that difficulties can spread from market to market, transforming a national problem into a systemic one. This is the thesis which, if correct, accounts for the harm of money laundering. It only ever argues, however, for the criminalization of international laundering, not laundering in one jurisdiction only.

75. Recovering the Proceeds of Crime, *supra* note 32, para. 8.12.

76. Tanzi, *supra* note 66.

77. See Recovering the Proceeds of Crime, *supra* note 32, para. 11.34.

78. Tanzi, *supra* note 66, at iii.

(2) The Microeconomic Effects of Laundering

The microeconomic argument is easier to grasp. The microeconomic effect of laundering is more tangible and may well be more significant. The effect upon the identifiable business which is driven under and whose owner loses her job and house because the business of the competitor was subsidized with, and thus laundering, drug money, is more direct and telling.⁷⁹ Nonetheless, the argument is not overwhelming. There are two sorts of responses available. One is to challenge the stereotypes of how the money is deployed. This can only be done by attention to the micro data. Petrus van Duyne⁸⁰ suggests that the incidence of this sort of competition is far less than is suggested by the law enforcement agencies. Second (even if he is wrong and the microeconomic consequences of laundering are indeed widespread), in these sorts of cases the remedy might best be found in competition law. What causes the damage is the cross-subsidy, not the fact of its illegal source.

Masciandaro⁸¹ argues further that laundering has a pollutant effect. Once it takes place, then more and more property will become tainted.⁸² This is true, and particularly true if tax evasion is to be treated like other forms of "criminal conduct" for the purposes of money laundering.⁸³ But the very rate at which the pollution spreads might be regarded as an indication of the high degree of criminogenesis attributable to attempts to regulate laundering, and consequently provides a reason

79. Recovering the Proceeds of Crime, *supra* note 32, para. 6.5.

80. Van Duyne, *supra* note 33.

81. Donato Masciandaro, Money Laundering: The Economics of Regulation, 7 *Eur. J.L. & Econ.* 225-40 (1999); see also Donato Masciandaro, The Economics of Money Laundering (L'Economia del Riciclaggio e Della Politica Antiriciclaggio), *LIV Giornale Degli Economisti e Annali di Economia* 211-28 (1995).

82. See Gianandrea Goisis, Economic Impact of Rules Against Money Laundering, 43 *Rivista Internazionale di Scienze Economiche e Commerciali* 303-30 (1996).

83. See Peter Alldridge, Are Tax Evasion Offenses Predicate Offenses for Money Laundering?, 4 *J. Money Laundering Control* 6 (2001).

not to regulate.

(3) Corruption of Professionals

A further argument, upon which little reliance can be placed, is that allowing money laundering invites corruption of the professions, particularly lawyers, bankers, and accountants.⁸⁴ Quirk, for example, suggests that one of the ways in which laundering affects the banking sector is by corrupting bank officials.⁸⁵ He claims:

Money laundering activities can corrupt parts of the financial system and undermine governance of banks. Once bank managers have become corrupted by the sizeable sums of money involved in money laundering, non-market behavior can be introduced into operating areas other than those directly related to the money laundering, which creates risks for the safety and soundness of the bank. Bank supervisors also can be corrupted or intimidated, which would reduce the effectiveness of supervision.⁸⁶

If there were empirical evidence to bear this contention out, it still need not argue for confiscation provisions or for criminalization. It may just argue for different systems of banking regulation. However, there are jurisdictions, in which there are long traditions of banking

84. For example, in a statement commenting upon statistics for numbers of reports and urging the European Commission to go even further than the draft amended directive, Economic Secretary to the Treasury Melanie Johnson highlighted money laundering's "capacity to undermine financial markets and to corrupt professional advisers." Treasury Urges EC to Do More to Fight Money Laundering, Accountancy Age, Oct. 14, 1999, at 7.

85. Peter Quirk, International Monetary Fund Working Paper 96/66, *Macroeconomic Implications of Money Laundering* 24 (1996).

86. In a footnote Quirk adds:

Traditionally, anti-money laundering efforts are closer to the responsibilities of government bodies such as ministries of justice. Anti-money laundering efforts tend to be more politically sensitive than the traditional areas of central banking and an assumption of such responsibilities could possibly lead to less autonomy for the central bank, with spill-over effects into the monetary policy area.

Id. at 25.

without asking questions of the provenance of the money, which command enormous confidence. Switzerland, until the banking secrecy laws was revoked,⁸⁷ and Lichtenstein (still) have such reputations. The phenomena Quirk contemplates do not seem to present too much difficulty in those jurisdictions. That is to say, Quirk's argument only has force if the bank officials are in fact likely to be corrupted. In a jurisdiction where (for whatever reason, whether moral rectitude or the efficacy of their supervision) there is little danger of bank officials being corrupted, the argument lacks force. On the other hand, in a jurisdiction where bank officials can be bought in significant numbers, then that of itself is likely to be a serious problem, and there are very probably greater problems than money laundering. It may very well be that the same kind of response can be made to the more general "corruption of the professions" argument.

(4) A Specific Consequential Claim—Harm to the Banking System

Amongst the wider consequential claims, the effect of laundering upon the banking system is frequently a particular concern. Smith writes, "the fear of financial regulators is that when credit and financial institutions are used to launder proceeds from criminal activities . . . the soundness and stability of the [particular] institution concerned and confidence in the financial system as a whole could be seriously jeopardized."⁸⁸ Likewise, Cranston asserts that, "[money laundering] affects public confidence in, and the stability of, the banking system."⁸⁹ This is clearly a commonly held view, but why exactly is it that the fact that a bank launders money adversely affects

87. Shelby R. Du Pasquier, *The Swiss Anti-Money Laundering Legislation*, 13 *J. Int'l Banking L.* 160 (1998).

88. Geoffrey Smith, *Competition in the European Financial Services Industry: The Free Movement of Capital versus the Regulation of Money Laundering*, 13 *U. Pa. J. Int'l Bus. L.* 101, 111 (1992).

89. Ross Cranston, *Principles of Banking Law* 75 (1997).

confidence, either in that bank or in banking generally?

One of the dangers is said to be in banking liquidity. The argument goes like this: If a bank deals with investors, the provenance of whose money is illegal, then the kinds of demands which those investors will make are less predictable than those coming from more conventional investors. The proportion of its assets, which a bank will need to keep liquid to meet such eventualities without entirely collapsing, is affected by the sorts of clients with whom they choose to do business. It is, however, by no means clear that these kinds of effects have arisen in banks that launder money. Those who make the argument that money laundering endangers banks, frequently do so by reference to the most famous example of the collapse of a bank which did a great deal of business laundering money, the Bank of Credit and Commerce International (BCCI). In October 1988, the U.S. Federal government charged that BCCI and nine of its officers were involved in laundering more than \$32 million in drug money. Federal prosecutors alleged that bank officers of U.S. branches of BCCI took funds which they knew to be from U.S. cocaine sales. The prosecutors further alleged that the bank officers invested the funds in certificates of deposit issued by BCCI banks in France, the U.K., Luxembourg, the Bahamas, Panama, and South America and made loans to drug dealers. The loan proceeds were eventually wired to the Florida branch of BCCI.⁹⁰ They were then transferred back, without further ado, to members of the Medellin cartel. The indictment in Tampa was the precipitant to closer regulatory attention to all of the groups' activities. Before the Tampa arrests, BCCI (in common with many other financial institutions in the U.K.) had made no disclosures to the National Drugs Intelligence Unit (NDIU).⁹¹ Thereafter, following steps to overhaul and tighten compliance with international guidelines on the prevention of money laundering, many

90. They would not have been subject to the \$10,000 Cash Transaction Reporting rule.

91. Which preceded the National Criminal Intelligence Service as the agency to whom reports had to be directed.

disclosures were made. The opinion of NDIU is that, after a late start, BCCI made a positive move in the direction of due compliance.⁹² The bank's U.K. operation was closed by regulators on 19 July 1991; when it collapsed, BCCI was insolvent to the tune of \$3.2 billion worldwide.⁹³

Was there a causal connection between the collapse of the bank and the laundering to which it was a party? Or did it just happen that a bank, which committed huge frauds, also permitted large amounts of laundering, and that, if the frauds had not taken place, but the laundering had, the bank, upon being closed by the regulators for poor money laundering compliance, would have been found to be solvent and the creditors would have been paid? Although BCCI is inextricably connected in the public imagination with money laundering,⁹⁴ it is by no means clear that the laundering, which undoubtedly took place, was a causal contributor to the fact that when the bank ceased to trade it was insolvent. The alternative account is that the depositors in the bank were the victims of huge frauds and that the laundering was largely irrelevant. The subsequent reports found that, "[t]he systematic frauds now thought to have been practised in BCCI were on a scale that had never been known before."⁹⁵ That is, BCCI was insolvent because money was stolen, not because money was laundered. If a bank is taking investments from money launderers, why does that constitute any threat to the particular bank, or to the system as a whole? There are clear reasons why launders might actually be regarded by banks as desirable customers. For example, they will not care whether or not the highest rates of interest are available. They will be happy to receive a lower, or even negative rate. The bank need not make any risky

92. Sir Thomas Henry Bingham, Return to an Address of the Honourable the House of Commons Dated 22 October 1992 for the Inquiry into the Supervision of the Bank of Credit and Commerce International para. 2.554 (1992).

93. *Id.* para. 2.193.

94. LEXIS searches in the news file for documents containing the two expressions "Money Laundering" and "BCCI" are interrupted because it probably will retrieve more than 1,000 documents.

95. Bingham, *supra* note 92, para. 2.3.

investments with their money, and it can conform easily to any liquidity requirements.⁹⁶ If legislation is to be put in place to criminalize laundering based upon empirical claims about the banking system, then clear evidence should be required.

A final response, which may be made to the claim that money laundering endangers the banking system, is that it is of the (limited) nature of the claim that it can only provide a reason to intervene in money laundering which employs the banking system. Much of the current discourse surrounding laundering, including that dealing with the revised E.U. directive,⁹⁷ is directed towards the *expansion* of the range of activities subject to the regulatory framework. Where laundering is conducted by other means than the banking system, (for example by the use of *bureaux de change* or informal methods of transfer) or in other markets, the banking system is not endangered. And there is no independent reason for state intervention supplied by the "banking collapse" argument. There is no suggestion that *bureaux de change* or antiques markets will collapse as a result of failure to regulate against laundering. The case for banking to be treated differently in this regard should be viewed with skepticism.

(5) Further Claimed Effects of Laundering

Quirk attributes to money laundering the following further series of macroeconomic harms:⁹⁸

1. Policy mistakes due to measurement errors in macroeconomic statistics arising from money laundering;
2. Changes in demand for money that seem unrelated

96. Compare Banking Act 1987, c. 22, § 60 (Eng.), appearing to think special provision necessary.

97. See Council Directive 1991/308 EEC, *supra* note 7.

98. Quirk, *supra* note 85, at 27-28.

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to measured changes in fundamentals;

3. Volatility in exchange rates and interest rates, due to unanticipated cross border transfers of funds;

4. Other country-specific distributional effects or asset price bubbles, due to disposition of "black money";

5. Development of an unstable liability base and unsound asset structures of individual financial institutions, (or groups) creating risks of systemic crises and hence, monetary instability;

6. Effects on tax collection and public expenditure allocation, due to mis- and under-reporting of income;

7. Misallocation of resources due to distortions in relative asset and commodity prices arising from laundering activities;

8. Contamination effects on legal transactions, due to the perceived possibility of being associated with crime.

Taking these claims in turn, argument (1) is that money laundering generates policy mistakes due to measurement errors in macroeconomic statistics. As a result of these unexpected capital movements,⁹⁹ policymaking is detrimentally affected. For example, the policy makers of a country that, in the face of high inflation, overvalued exchange rate and a large fiscal deficit also experienced capital inflow, might be less inclined to change its interest rate policies.¹⁰⁰ Quirk's

99. "Seeming to defy the laws of economics." Tanzi, *supra* note 66, at 7.

100. *Id.*

second economic consequence of laundering (2) is little more than a function of (1). Changes in demand for money that appear unrelated to measured changes in fundamentals may be a consequence of laundering. But it hardly provides a reason for criminalization and huge expenditure on a regulatory structure. The simple response would be to get better economic data upon the basis of which to formulate policy. Furthermore, since data on international flows of cash have been discredited as indicia even of the amount of money that is laundered,¹⁰¹ it is difficult to see why they should be taken so seriously for the purposes of generating economic policy.

The next two consequences identified by Quirk (3 and 4), volatility in exchange rates and other price "bubbles," are the sorts of things that economists regard as being "harms." But whether they are sufficiently clearly established as being caused by laundering, or sufficiently important in terms of avoidable damage done, is far less clear. Exchange rates are notoriously unpredictable. It is entirely lawful for someone with enough money to behave in such a way as to impact upon the exchange rate. That was the way in which, for example, speculators drove sterling out of the European exchange rate mechanism in 1993.

As to (5), Quirk argues that development of an unstable liability base and unsound asset structures of individual financial institutions (or groups) creates risks of systemic crises and hence, monetary instability. This argument is best viewed in the context of the effects of money laundering upon banking. As is shown elsewhere,¹⁰² the more alarmist claims as to laundering and banking solvency are difficult to substantiate.¹⁰³ Quirk's sixth argument, that money laundering has deleterious effects on

101. These data have become increasingly poor indicators as cash has been supplanted by other forms of money and as foreign exchange trading has increased exponentially with the introduction of derivatives trading.

102. See *supra* section IV (4).

103. Of course, this argument would not apply in jurisdictions or systems in which exchange rates are fixed.

tax collection and public expenditure allocation, due to mis- and under-reporting of income, is, if anything, an argument for better tax collection methods. The relationship between tax evasion and money laundering is central to the modern international campaign, in respect of laundering. But the argument in this case seems overstated. Of course, money that is laundered for reasons other than tax evasion also represents income that is also an evasion of taxes, thus, compounding the economic distortions. However, in general, taxpayers will not declare unlawful income, whether or not there is a regulatory regime in place in respect of laundering. If the argument is really that regulating laundering will reduce the incidence of initial crime, then better evidence is necessary.

Quirk's seventh argument, that there will be misallocation of resources due to distortions in relative asset and commodity prices arising from laundering activities, simply restates (1), and has available the same response. As to Quirk's final argument, that if action against laundering is not taken then that will be contamination effects on legal transactions due to the perceived possibility of being associated with crime. Some lawful transactions with Russian entities, for example, have become more desirable because of their association with laundering. This is the sort of anecdotal evidence that ought to be treated skeptically.

a. The Neglected Steps in the Economic Argument

The economists argue that laundering is harmful. At their strongest, these arguments seem to rest upon empirical foundations, which require clear supporting evidence. At their weakest, the claims can be dismissed as accounts of any economic harm, let alone as grounds to invoke the criminal law. But let us grant their assumptions and consider the form which a law of laundering might take which was grounded in one or more of these economic theses. Assume that the overall phenomenon of laundering was one which is economically damaging on a global scale.

And that each individual act of laundering is a causal contributor to damage to the international economy in proportion to the amount laundered. The damage to the international economy accrues in unidentifiable countries, and while there are many estimates of the amount of money that is laundered globally, even if these claims were able to be supported no particular *quantum* follows for the economic *damage* done by laundering.

The economic arguments outlined above suggest that at least *some* money laundering creates conditions under which serious detrimental economic effects accrue. That is enough to support greater efforts to improve the rate at which the profits of crime are confiscated. But it is not enough, without more, to argue for criminalization. Within a liberal account of the proper limits of the criminal law, further arguments would still need to be made out. First, there is the question of the place of criminal law in the legislative armory. Feinberg provided a most searching analysis of the sorts of harms against which, in a liberal society, it was legitimate to invoke the criminal law, and the cases where it might be legitimate to invoke the criminal law notwithstanding the absence of harm. Many other liberal theorists argue that criminalization should be regarded not as a knee-jerk response, but as a last resort only to be invoked when all other methods of legal regulation of the phenomenon in question have been canvassed and found wanting.¹⁰⁴ There is a range of alternative means of regulation of laundering that could be tried. In particular, if confiscation works successfully to deprive criminals of the overwhelming preponderance of their profits, then there is little independent case for criminalization. Alternatively, if confiscation is ineffective, then strong evidence would be required to show that criminalization is likely to be efficacious.

Even if there were no viable alternative to the use of coercion by the criminal law, the second neglected step is the leap from identification of a harmful phenomenon to its

104. See Jareborg, *supra* note 74.

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attribution to a single perpetrator. Even if the most serious claims for the harms of money laundering *as a phenomenon* are correct, the causal contribution of any given individual launderer to any of these macroeconomic effects will almost always be very small. The economic argument is that the launderer makes a minuscule contribution to the risk that markets will operate below optimal efficiency. Even if it is assumed that these threats are very grave, if a launderer is to be blamed, not so much for dealing with the profits of crime, but for increasing the probability of some economic and political catastrophe occurring, then the extent of the contribution of the launderer needs to be able to be quantified. If the harm, which is being ascribed to the defendant for the purposes of the imposition of serious punishment is that of creating or increasing a *risk* of the occurrence of the consequences set out in the direst prediction of the effect of laundering, then, without some proof that the defendant actually did materially increase that danger, there is no harm and no basis for punishment.

As to the problem of *mens rea*, there is again a problem. Criminal law operates best, and is at its most morally justifiable, when the harm to avert which coercion is deployed is sufficiently closely related to the act which is required that nothing more is required than causing the harm intentionally. Heavy punishment is much more difficult to justify when, as in the case of laundering, it is necessary to supply a further justification for the punishment. In sentencing, courts should not need to have to add that the gravity of your conduct is increased because, in addition to helping someone benefit from crime, you behaved in a way that is very dangerous to the global economy. It is difficult to justify increasing the punishment of any individual launderer on such a basis. Ultimately, the economic argument for the criminalization of money laundering does not satisfy because it fails to make out successfully the explicit claim that money laundering can be harmful to the global economy and does not begin to consider the implicit claim that persons who

create a threat to the global economy should be *punished*.

V. CONCLUDING

Money laundering offenses have been put in place all over the globe. This essay has maintained that the arguments which might be made for the instantiation of such an offense do not support it. In the search for a coherent justifying account for the existence of a crime of money laundering, the essay has also considered the matters that might be relevant to sentence, according to which set of assumptions is taken to underpin the existence of the offense. It has also considered the claims of the economic analysts that money laundering is a harmful phenomenon, and the relationship of those claims to criminalization of laundering. The fact that crimes of laundering have been brought into force as part of a package of measures to deal with laundering means that they have escaped the scrutiny they deserve. There are good grounds for the existence of some powers of confiscation of the proceeds of crime, but they do not imply that laundering should also be a crime. We should beware of criminalization of remote harms,¹⁰⁵ overcriminalization,¹⁰⁶ and the deployment of the criminal law in the economic sphere.

Feinberg's lasting contribution to the theory of criminal law was to revive and hone the liberal tradition of Beccaria and Mill and to require an individual and sufficient justification for each act of criminalization. This is important in the event of criminalization occurring at the insistence of international bodies whose policy-making fora are not transparent. The criminalization of money laundering appears to have been added as a makeweight in international agreements for the provision of an

105. Andrew von Hirsch, *Extending the Harm Principle: Remote Harms and Fair Imputation: Harm and Culpability* 259 (A.P. Simester & A.T.H. Smith eds., 1996).

106. Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. Chi. L. Rev. 423 (1963).

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international regulatory framework for confiscation of assets which are held as the product of crime. The liberal tradition does not accept this kind of approach to be sufficient to justify the invocation of the criminal law. I have the temerity to suggest that had *The Moral Limits of the Criminal Law* been published in 2001, it would have explained that there is no justification for an independent crime of laundering.