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ARTICLES

The Wages of Sin — Taking the Profit Out of Corruption — A British Perspective

Dr. Barry A.K. Rider*

I. Introduction

Corruption is an “economic crime” par excellence! While there are examples in history of those who have taken advantage of their position to increase their power rather than wealth, in the vast majority of cases, those who succumb to corruption do so in contemplation of financial gain. Therefore, to seriously attack corruption, one of the most important strategies must be to take away from those who have become corrupted, the profits of their crime. In essence, corruption must be made uneconomic. Thus, this article will look at the law and practices of tracking and seizing such ill-gotten gains. This inevitably leads us into a discussion of “money laundering.”

Until the profits of crime are taken away from subversive and criminal factions, there is little chance of effectively discouraging criminal and abusive conduct that produces great wealth or, through its profits, allows power and prestige to be acquired. As soon as the state devises methods for the tracing and seizure of such funds, there is an obvious and compelling incentive for the criminal to hide the source of his ill-gotten gains — in other words, to engage in money laundering.

Like most social, let alone economic, evils, money laundering is nothing new. It is as old as is the need to hide one’s wealth from prying

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eyes and jealous hands. Concern about the uses and misuses of hidden money is not just an issue in our century. For example, in 1471, Minister Yao Ku'ei complained that the practice of ensnaring young and rising officials by providing "secret loans" that would ensure the lender great influence in the future was a scandal and therefore, called for the reporting of such advances.¹ Of course, the modern money launder will no doubt adopt more sophisticated techniques than the gem carriers of India or the Knights Templar,² but his objectives and essential *modus operandi* will be the same. The objectives will be to obscure the source. Thus, the nature of the wealth in question and the *modus operandi* will inevitably involve resort to transactions designed to confuse the onlooker and confound the inquirer.

II. Hot Money: Reasons Why Money Laundering Occurs

There are a legion of reasons why an individual, not to mention an organization, would wish to hide the source of money or to transmit it in a manner that obscures its ownership or character.³ While a great deal of attention has been given to the vast profits that are being generated by the illicit trade in narcotics, it is dangerous to assume that the processes involved in money laundering cannot be and are not deployed just as effectively to wash and to covertly transfer funds produced by other types of crime, or even activities that would not be generally considered criminal, but to which a certain amount of opprobrium might attach.⁴ There are pressing needs for "secret money" not only in the underworld of organized and syndicated crime, but also in the service intelligence and security networks, which utilize the "secret money" to facilitate if not "ordinary" commercial and banking transactions, at least activities that are not necessarily abusive. In many

1. See Barry Rider, *The Perception of Corruption in Developing Nations*, Address at the Third International Corruption Conference in Hong Kong (1987). By the same token, the debate on confiscating drug dealers profits is not new. See generally THE ILLUSTRATED LONDON NEWS, February 1, 1930.

2. See generally J. ROBINSON, *BORN IN BLOOD* (1989).

3. For a general discussion of the need for secret money see I. WALTER, *SECRET MONEY* (1989). See also V. TANZI, *THE UNDERGROUND ECONOMY IN THE UNITED STATES AND ABROAD* (1990). For an interesting account of how social travel was funded during the 18th century, see J. BOOKER, *TRAVELLERS' MONEY* (1994).

4. See B. RIDER, *MEMORANDA* (Commonwealth Secretariat, 1987); B. RIDER, *THE PROMOTION AND DEVELOPMENT OF INTERNATIONAL CO-OPERATION TO COMBAT COMMERCIAL AND ECONOMIC CRIME* (Commonwealth Secretariat, 1980); B. Rider, *Combating International Commercial Crime*, 2 LMCLQ 217 (1985); MEMORANDUM FROM THE GOVERNMENT OF ZAMBIA TO THE COMMONWEALTH LAW MINISTERS' MEETING IN HARARE (Commonwealth Law Ministers' Meeting, 1986).

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situations, there are also needs for "unaccountable funds," and the processes involved in washing money can and are efficiently employed to create hidden reserves or secret money. These processes are then utilized to service and transmit laundered money according to the requirements of those who desire them.⁵

It must also be remembered that the purposes for which money is required will also influence, if not dictate, the transactions that are used to hide its true character and the way in which it is permitted to move. For example, in developing nations, those involved in facilitating the flow of capital that violates currency and fiscal controls may be able to operate with impunity and no embarrassment in other jurisdictions, especially those receiving the money in question. Therefore, there will be little need to ensure that the money surfaces covertly and there will be no requirement that the money should appear to have a legitimate origin. Indeed, when the money is escaping from a country that is seeking to expropriate wealth, whether pursuant to a program of so-called indiginisation or otherwise, those involved in such financial operations may even be held in high esteem by those whom they service and those outside the country in question. On the other hand, where the funds are the result of criminal activity, it will be necessary to ensure that each element in the laundering process is covert and that when the money finally emerges from the pipeline, it is ostensibly legitimate.

The purpose to which such funds are to be applied will also influence the processes involved. If money is to be reinvested in other criminal or subversive operations it will be important that the transactions that establish it are not referable to other risk activity. The money need not appear to those who receive it to be from a legitimate source, however. In contrast, where the money is being used to penetrate an institution or organization,⁶ then it will have to not only be

5. See generally ROWAN BOSWORTH-DAVIES, *EURO-FINANCE — THE INFLUENCE OF ORGANISED CRIME* (1980); BARRY RIDER, *COMBATting ORGANISED CRIME* (Commonwealth Secretariat, 1986); B. RIDER, *ORGANISED CRIME AND MONEY LAUNDERING* (1991). As more and more information surfaces in regard to the "special services" provided by the Bank of Credit and Commerce International (BCCI), it becomes increasingly obvious that the demand for laundered funds is as pressing today as it ever has been. See J. ADAMS AND D. FRANTZ, *A FULL SERVICE BANK, HOW BCCI STOLE BILLIONS AROUND THE WORLD* (1992); N. KOCHAN AND B. WHITTINGTON, *THE FINANCIAL SCANDAL OF THE CENTURY — THE BCCI FRAUD* (1991); J. Beaty & S. Gwynne, *The Dirtiest Bank of All*, *TIME*, July 29, 1991.

6. See generally *The First National Bank of Boston Report of Hearing: Hearing Before the U.S. Senate Permanent Subcommittee on Investigations*, 99th Cong., 1st Sess. (1985); *ORGANIZED CRIME AND MONEY LAUNDERING* (U.S. President's Commission on Organized Crime, 1984); Barry Rider, *Recycling Dirty Money*, Address at the White House Conference for a Drug Free America (1988) (on file with author).

unconnected to the activity that generated it, but also be apparently acceptable to those in control of the relevant body. It should be obvious that the somewhat simplistic notions of money laundering that have been preferred in a number of recent reports and publications presuppose a clarity and simplicity of purpose that rarely exists.

Today, it is not uncommon to find indictments of those thought to be involved in money laundering by politicians, law enforcement officers, and the press. The term money launderer is pejorative and the practice of money laundering conjures up a shady world of men in wide-striped suits claiming to be "bankers" and acting for ill-defined customers and vague offshore enterprises.⁷ The fact that many of the cases that have come to light involve exactly such scenarios has tended to reinforce such perceptions.⁸

For those engaged in fighting serious crime, it is perhaps a useful device to persuade those whose job it is to handle other people's wealth that those who are prepared to assist criminals and terrorists to retain their ill-gotten gains and further their illicit enterprises are no better than the crooks they serve. Of course, when the money is the product of drug trafficking or even a bank robbery, then the opprobrium that can attach to those who assist in the laundering process is justly deserved. However, it is very important to remember that those most actively involved in providing such services may never transgress the law, and in many cases, the laundering may well involve funds that are not referable to a crime or other form of misconduct. The press has been wont to ignore this when criticizing the apparent failure of regulatory authorities to take effective steps to interdict what are assumed to be money laundering operations. Indeed, it is often forgotten that the relevant authorities, even if they had such information in a reliable form, would have been hard-pressed to have curtailed such operations through legal and coercive processes. Laundering the proceeds of drug trafficking is one thing, but merely assisting a leader of a developing country to retain his wealth on a confidential basis outside his country may be a very different issue.⁹ To say that even the knowing facilitation

7. See generally J. CARR, *HOW TO RECOGNISE A MONEY LAUNDERER* (1989); D. FRANCIS, *ENTREPRENEURS* (1988); R. FRANKLIN, *PROFITS OF DECEIT* (1990); R. NAYLOR, *BANKERS, BAGMAN, AND BANDITS* (1989).

8. ROWAN BOSWORTH-DAVIES, *MONEY LAUNDERING — THE USE OF THE FINANCIAL SERVICES MARKET TO DISGUISE THE PROCEEDS OF FUNNY MONEY* (1992); R. LACEY, *LITTLE MAN — MEYER LANKSY AND THE GANGSTER LIFE* (1991); D. Henry, *America's Hottest Export — Funny Money Stocks*, *FORBES*, Sept. 23, 1985, at 38. See also J. ROBINSON, *THE LAUNDRYMEN* (1994).

9. L. WELT, *BLOCKED FUNDS* (1990). Euromoney is a first rate account of how to "unblock"

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of such an individual's acquisition of wealth by covert movements of substantial amounts of wealth — where no specific crime is involved — is an unsound banking practice is a statement that few central bankers, let alone others, would be prepared to support. Responsible banking is a vague concept, even in a wholly domestic environment. In an international context, it is nebulous and is an entirely different issue than that of soundness.

III. Washing Money for a Price: The Legal Difficulties Posed by Money Laundering

Some countries have courted money and wealth on the basis that their legal systems will overthrow its owners. As such, their financial transactions weave a cloak of secrecy thicker and more impenetrable than the traditional rules relating to professional confidentiality. In some instances, an assurance of absolute secrecy has been marketed as a privilege that can be bought for either a relatively small registration fee or for the cost of establishing an account.¹⁰ The original justifications for laws that extended the more traditional privilege between a banker and his customer, were no doubt acceptable. It is hard to find fault with any attempt to protect those who are being slaughtered by an oppressive and evil regime. However, other countries have not been slow to perceive the benefits of becoming a depository for not only fugitive and flight capital, but also dirty money. Countries in and around Africa, Latin America, South East Asia, and the Pacific have been prepared to extend the privilege of secrecy not only to their oppressed, but also to their very rich neighbors. It is easy to criticize the naivety of such countries, but prostitution says more about the state of society and its values than the individual morality of the prostitute. There are countries that have become so isolated from conventional sources of development finance that their leaders, even assuming them to be men of honor, have but little alternative to seeking funds from those who require discretion.

The laundering of money through national treasuries and government-sponsored projects is nothing new. At perhaps a slightly less egregious level, the same pragmatic arguments can be made in support

funds. There are other publications specifically marketed as providing expert advice on how to launder and hide money.

10. Some countries have been prepared to allow others to market their willingness to facilitate "secret" transactions to an extent which has raised issues of national integrity. See *"Banks" Listed in Grenada Cause Alarm*, TIME, Aug. 6, 1991. See also A. SHIPMAN AND BARRY RIDER, ORGANISED CRIME INTERNATIONAL, SECURITY AND DEFENSE REFERENCE BOOK (Cornhill, 1987); G. DeGeorge, *Psst, Wanna Buy a Bank? How About a Few Dozen?* BUS. WEEK, Sept. 23, 1991.

of raising revenue and expanding the economy by offering the legal and other inducements to attract uncensored offshore business. Of course, some countries that have attracted more than their fair share of criticism and have got relatively fat on servicing secret accounts and the like, have in recent years shown signs of contrition. A cynic might well observe that the catalyst in the conversion, if not the reason, was the extent to which the bankers were themselves being exposed to frauds both as the victim and increasingly, in foreign jurisdictions, as the more or less innocent abettor.¹¹

This is not the place to enter upon a discussion of the economics, let alone the morality, of secret money in all its manifestations. Such may, with confidence be left to the economists and theologians. This article attempts to discuss only dirty money where the issues, while far from settled, are relatively clear. Dirty money is money, or some other form of wealth, that is derived from a crime or other wrong. Of course, even such a simple and unlawyerly definition opens a Pandora's box. First, even if one can determine a reasonably clear definition of money, it is not difficult to perceive the ramifications of a concept of wealth that is broad and ingenious enough to encompass the various products and derivations that may in a certain place at a particular time have a peculiar value of their own, or at least signify such a value to specific individuals. For example, there have been cases where inside information was used as a valuable commodity to purchase cocaine. Those who have encountered the various underground banking systems, which will be referred to later, will be aware that tokens, ranging from colored sugar lumps to mere pass words, will be used to facilitate the transfer of money. Such tokens, within the processes of the particular "banking" systems, will often represent great wealth.

Perhaps from a lawyer's, not to mention a policemen's standpoint, an even more vexing issue is when an item of wealth is the product of an act or series of acts, or even, in the case of some generous legal systems, a continuing enterprise. To some degree the issue is not just one of tracing, but rather referencing. The wealth in question may not necessarily be produced by the relevant conduct or crime. It may be sufficient that it is associated with such conduct to acquire a sufficient degree of taint. The legal process will generally require a much higher standard of relationship than might be acceptable at the level of, for example, an intelligence operation. Even if one passes over this very

11. See S. Froomkin, *Money Laundering — An International Perspective*, Address at the Meeting of Law Officers of Small Commonwealth Jurisdictions (Commonwealth Secretariat, 1988).

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difficult matter of relationship and causation, one must enter into an even more controversial area: Determining what sort of conduct will be sufficient to justify describing the money as "dirty."

It is not always acceptable to simply have regard to the criminal law of the country in which the funds originated. If the matter is a wholly domestic one, then no doubt the local law and system of values will satisfactorily determine the issue. However, most cases will involve two or more jurisdictions. It might well be that although the conduct giving rise to the funds is regarded as a criminal offense in the country concerned, the same conduct would not be regarded as even improper elsewhere, and certainly not in the country where the money comes to rest. It is hardly necessary to descend into examples, as a moment's thought will throw up scenarios involving religious and racial activities, which, while amounting to criminal offenses in a particular state, would not be considered improper in another.

The importance of this issue should be obvious when one considers the vast amounts of money that were made by the *Cosa Nostra* during the Prohibition in the United States. If such laws existed today in the United States, and such funds were transferred to foreign banks, would this amount to laundering dirty money? Perhaps viewed from the perspective of the U.S. legal system the answer would be yes, but a different view would surely be taken in most other countries. Even when the wealth in question is the proceeds of what might be considered an ordinary criminal offense, is it appropriate to designate it as dirty in all cases, and if so, for how long and to what state of derivation? No matter what the economists let alone the moralists might argue, common sense indicates there must come a point in time when the taint that attaches to the money loses its relevance.

Even when those responsible for the crime that created the profits or those who are charged with laundering it are unsuccessful in giving it an aura of legitimacy, there must come a time when longevity or complexity of its history accords *de facto* legitimacy. Indeed, given the vast sums of money that are passing through the laundering pipeline, it is perhaps good for society that most criminals, and certainly those with greater sophistication, evidently yearn to become, or at least appear to be legitimate and thus, support our own value system and financial structures. While wealth can to some extent assure respectability, there is an obvious incentive for those desiring such status to bring "dirty money" back into the conventional and lawful economy. Therefore, it can be argued that procedures and laws that serve to inhibit the repatriation of dirty money to the lawful economy perpetuate the taint that attaches to the proceeds, and as such, are disadvantageous. These

are pragmatic arguments, but it would be misconceived to assume that such views have always been rejected by governments, particularly those with significant underground economies and financial difficulties of their own.¹²

The simplest definition for dirty money is broad enough to encompass money that is in some way referable to a civil wrong. It is true that the proceeds of every imaginable civil wrong could not be considered to be "dirty." Such money may be "hot", but it will not be considered dirty. There are, however, situations where the proceeds of a civil wrong can and should be regarded as dirty. While it is difficult to be specific, it is appropriate to regard funds that are the proceeds of a civil wrong involving a degree of dishonesty as worthy of attracting the designation "dirty." It is not in every such case that the conduct would amount to a criminal offense. However, where the funds have been created by conduct lacking probity, it would not seem unjustified to regard them as dirty. Although perhaps little other than institutional and individual attitudes are influenced by such designations, there are practical considerations in not distinguishing too sharply between the proceeds of a specific crime and something that may only give rise to a claim in the civil courts.¹³

IV. *Modus Operandi*: The Money Laundering Process

Until now, this article has attempted to demonstrate what money laundering involves.¹⁴ Money laundering, secret money, and dirty money have been discussed without an attempt to establish the interface between the process and the product. However, definitions of money laundering range from authoritative language of statutes to the punchy comments of judges.¹⁵ For the purposes of this article, and at the risk

12. See *Drug Money Fears Halt of State Bond Sale*, TIME, Mar. 23, 1992. The State Bank of Pakistan had advertised the sale of bonds on the basis of "no questions about the source of funds" and "no identity to be disclosed." *Id.*

13. See, e.g., *Report by the UNCTAD Secretariat, Maritime Fraud* (1985) (concerning definition of fraud); BARRY RIDER, *FRAUD IN THE FINANCIAL MARKETS: THE REGULATION OF FINANCIAL AND CAPITAL MARKETS* (Singapore Academy of Law Press, 1991).

14. For an excellent discussion of the topic, see S. ALEXANDER, *THE PIZZA CONNECTION* (1989); *THE CASH CONNECTION: ORGANISED CRIME, FINANCIAL INSTITUTIONS, AND MONEY LAUNDERING* (U.S. President's Commission on Organized Crime, 1984); D. Chaikin, *Money Laundering: An Investigatory Perspective*, 2 CRIM. L. F. 467 (1991); J. Koers, *Current Methods and Techniques of Money Laundering*. Address at the Fifth Int'l Anti-Corruption Conference in Amsterdam (1992) (on file with author).

15. A "prince" among money launderers, Michele Sindona, observed: "Laundering money is to switch black money or dirty money . . . into clean money." L. DIFONZO, *ST. PETER'S BANKER — MICHELE SINDONA* (1983).

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of adding yet another to the lists, money laundering is a process that obscures the origin of money and its source. Of course, this is a wide approach that would encompass transactions designed to hide money as well as to wash dirty money into clean. It is the processes of transfer and misrepresentation that constitutes the *modus operandi* of washing and secreting money. Unfortunately, because of the attention money laundering has been given in connection with the fight against drug cartels, the topic of money laundering has become linked, if not captured, by the debate on tracing and confiscature of the profits from the illicit narcotics trade. Consequently, most discussions of money laundering focus almost exclusively on this, and ignore the wider issues. This article deliberately attempts to avoid placing emphasis on the drug-related aspects of the subject. Yet, from the standpoint of statutory law and in particular systems for international cooperation,¹⁶ it is in the area of narcotics trafficking that most, if not all, significant steps to combat money laundering have been taken.

Discussion of the processes involved in money laundering has been limited outside the United States. Few have recognized that even the now traditional process of laundering involves a series of actions and not a seamless process. While establishing the derivation of property pursuant to a tracing claim is nothing exceptional, such cases rarely involve the structuring of transactions solely for the purpose of avoiding investigation. Obviously, there are cases in which considerable care has been taken to frustrate inquiry, particularly where the funds in question have been created or diverted by a systematic fraud. However, until recently, in Britain at least, the need to examine deliberate and sophisticated attempts to obscure ownership and control were rarely encountered. Thus, there still tends to be a somewhat simplistic notion of the laundering process, even in the case of narcotics trafficking. To the contrary, however, laundering involves a series of stages and different legal and enforcement considerations are naturally applicable to each.

Many forms of crime and misappropriation produces quantities of cash in relatively low denominations. This will need to be consolidated

16. BASIC DOCUMENTS ON INTERNATIONAL EFFORTS TO COMBAT MONEY LAUNDERING (Commonwealth Secretariat, 1991); Bruce Zagaris, *Dollar Diplomacy: International Enforcement of Money Movement and Related Matters — A United States Perspective*, 22 GEO. WASH. J. INT'L L. & ECON. 465 (1989). It is a matter of regret that the Commonwealth initiative to combat money laundering has been narrowed for political reasons to the war against drugs, when many developing countries have other priorities, such as the control of corruption and economic crime. See generally Y.B. Dato Seri Anwa Imrahim, Malaysian Minister of Finance, Commercial Crime, Opening Address at CIDOEC in Kuala Lumpur (1992).

into a form of wealth that can be more easily smuggled out of the jurisdiction. The methods of achieving this are limited only by the ingenuity of the launderer. Of course, high turnover and relatively low investment enterprises that can be used to facilitate such a process will be especially attractive, particularly if they are outside the conventional banking system.¹⁷ Those involved in consolidating cash at this stage of the laundering cycle will be most concerned with how to avoid the creation of any external record that could be used to initiate an audit or paper trail leading to subsequent stages or layers of the operation.

Once the money has been converted into a form that can be transferred or smuggled, it will often be moved offshore. Taking the money out of the country has a number of practical advantages. First, it will often place the funds beyond the legal reach of the authorities in the jurisdiction where the activity giving rise to the profits occurred. Even if the relevant laws are capable of application on an extraterritorial basis, and very few are, by involving another jurisdiction, significant practical barriers are placed in the path of investigators in obtaining and securing evidence that would be admissible before a court. As already mentioned, certain jurisdictions are willing to offer banking and other facilities on the basis that secrecy will be assured. Sadly, there are countries that have been prepared to facilitate the receipt of money no matter what its source. Once the money has been taken offshore it can then enter either directly, or more likely indirectly, into the conventional banking system. Obviously, the more discreet this process, the better for the launderer. Hence, there is an attraction to jurisdictions that offer either secrecy or a level of corruption that is sufficient to ensure effective non-cooperation with foreign inquires.¹⁸

Once the money has entered the conventional banking system, it can move through usual channels. The launderer's objective will be to create a complex web of transactions, often involving a multitude of parties, with various legal statutes in as many different jurisdictions as possible, through which the money will be washed on a wave of spurious or misleading transactions. The purpose of this action is to confuse even the most dedicated and well-resourced investigator and to defeat any attempt to reconstruct a money trail. Given the ease with which

17. *Use of Casinos to Launder Proceeds of Drug Trafficking and Organized Crime: Report of Hearings by U.S. House of Representatives Sub-Committee on Crime*, 98th Cong., 2d Sess. (1984); U.S. DEP'T OF TREASURY, *TYPOLGY OF MONEY LAUNDERING, NON-TRADITIONAL FINANCIAL INSTITUTIONS* (Financial Action Task Force II, 1991); L. Richardson, *The Urgency of Detergency (Or how Money Laundering is Carried Out)*, 1987 TVI J. 12 (1986) (H.K.).

18. For a critical, although somewhat dated survey of "responsiveness", see R. BLUM, *OFFSHORE HAVEN BANKS, TRUSTS, AND COMPANIES* (1984).

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companies and other legal entities may be created in virtually any country in the world, the launderer's only constraints are likely to be time or finances. The laundering of money is costly, and thus, both he and his principals will only wish to expend what is necessary and prudent to ensure the relevant funds remain beyond the reach of law enforcement agencies or others interested in locating them.¹⁹

Obviously, the amount of effort and expense that will be required for laundering would be more than that required for frustrating a regulatory authority to investigate a case of insider dealing. It must also be remembered that while the money is in the pipeline, it is unlikely to be usable. Consequently, most launderers are not only mindful of the costs involved in the actual process, but of the length of time that will be involved in washing the money. Obviously, there are situations where the needs of the launderer are such that money can remain in the laundering process for only relatively short periods. Thus, the circumstances will to some extent influence the extent of the laundering process and its sophistication. Laundering operations will range from the most simple manipulation of accounts to structures involving hundreds of companies with thousands of bank accounts. However, it must always be remembered that the larger the organization that is employed to launder the money, the greater the costs and the higher the risk of detection or of something going awry.

The transactions that are used to obscure the source of the relevant funds will be structured in such a manner as to render it almost impossible for evidence to be obtained that would allow a court to establish the derivation of the money. Law enforcement agencies often refer to this process as layering, but this implies that the true facts may be uncovered through a diligent and progressive investigation. While there have been cases where dedicated, extremely lucky, and well-resourced investigators have been able to peel-off a series of layers to reveal what in fact took place, in the case of the more sophisticated structures, the concept of layering is too simplistic. Certain operations are structured in a manner that resemble a mosaic or kaleidoscope rather than a layer cake. Transactions will not be progressive but parallel, establishing mutual obligations that can be crossed, often on a contingent basis, and which would not be substantiated to the satisfaction of a court applying conventional legal rules. It is true, however, that insofar as the notion of layering is often used to conjure up a picture of a stone

19. See generally MONEY LAUNDERING — GUIDANCE NOTES FOR BANKS AND BUILDING SOCIETIES (Bank of England, 1994); MONEY LAUNDERING AND THE ILLICIT DRUG TRADE (DEA & RCMP, 1989).

gradually dropping to the bottom of a pond, the longer money remains in the system the more difficult it is to follow and identify. Furthermore, such an analogy makes the important point that the money in flight will be most noticeable when it first "splashes" into the pool. It is at this point of entry into the conventional banking system that regulations designed to create an "audit trail" are likely to be most effective.²⁰

Once the money has been "washed" to the satisfaction of the launderer, it will be necessary to place it in an "end deposit." Of course, the nature of this "end deposit" will depend upon a variety of factors. However, in most cases it will be desirable to return the money to the jurisdiction in which it was first generated. Those responsible for making such profits will often wish to enjoy at least part of the fruits of their endeavor. Therefore, the launderer may well be required to ensure that at least a proportion of the money is repatriated back to the country of origin. Thus, it will be necessary for the launderer to create a transaction, or more likely a series of transactions that will bring the "clean" money back home. This can be achieved in a number of ways, but it will be desirable to achieve the repatriation in a manner that can be explained and which will justify the surfacing of the wealth in the hands, or under the control, of the relevant principal.

A technique that has been employed to some effect is the incorporation of what are essentially shell companies which can then "sell" their securities to "overseas investors." The "overseas investors" will be the money launderers' puppets. The purchase of such securities, which will be properly documented, will provide a vehicle through which the cleansed money can flow back into the control of those who established the issue. It is important to recognize the use that such companies may be put to in the context of money laundering operations. There have been cases where the existence of operations such as this have been mistaken for high pressure selling frauds or "boiler room" scams. Although the *modus operandi* may be somewhat similar, especially at the early stages, the purpose and implications of the operation are very different.

20. Many jurisdictions impose reporting obligations in regard to transfers of cash or valuable securities above a certain value. See generally U.S. Currency and Foreign Transaction Reporting Act, 31 U.S.C. §§ 321, 5311-5314, 5316-5322 (1988); U.S. Internal Revenue Code, 26 U.S.C. § 6501 (1988); The Cash Transactions Reports Act, 1988 (Austl.). At the international level, attention is being given to recordkeeping and monitoring of cash transactions by non-financial institutions pursuant to Recommendation 11 of the Financial Action Task Force on Money Laundering.

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It must be appreciated that money laundering involves a series of stages and each stage will have its own characteristics. Those charged with the detection and investigation of such matters need to be alerted to the implications of a process that will have been carefully designed and structured with the objective of minimizing exposure and, thus, the risk of interference. Sadly, legislators have often failed to appreciate the complexity of money laundering both in terms of its character and objectives. They have taken for granted a somewhat stylized model that rarely conforms to reality. Indeed, given the nature and expertise, not to mention resources, of those involved in this industry, there is every incentive for their services to be adapted to take full account of any new threat — including legislation. Their culture is one of evasion and adaption.

V. Underground Banking: Facilitating the Money Laundering Process

Although the authorities in the United States recognized the reality of organized crime rather late, it is true that the United States has had far more experience in attempting to deal with such problems as racketeering and money laundering than anyone else. While it is also true that in some respect this experience has not always been impressive in terms of the results that it has achieved, it is not surprising that other countries have turned to the United States for advice. While this is wise, some countries have followed U.S. precedents in a rather unthinking fashion, forgetting the deficiencies of the U.S. legislation and in particular the very special situations that it was designed to confront. The U.S. law has been more or less expertly crafted to address specific crime problems that exist or did exist in the United States. The laws therefore reflect the social, political, and constitutional circumstances of the United States. As such, U.S. laws and their derivative enforcement policies are not always obviously applicable to different societies.²¹ Nonetheless, many countries have simply ignored this and enacted laws modeled on only a partial perception of the reality in the United States. The inappropriateness of essentially Western laws that presuppose Western structures and financial systems is clearly shown in regard to underground banking systems.

21. For example, laws that contemplate the structure and operations of the *Cosa Nostra* may have little practical relevance to the triads or yakuza organizations in the Far East. See *Japan—Dope Dealers' Delight*, FAR EASTERN ECON. REV., Mar. 15, 1990, at 12.

Underground banking systems have existed and developed to a level in some societies where they rival in terms of efficiency and capability the conventional banking system.²² While many underground banking systems developed within ethnic societies because of a natural distrust of the host country's institutions, many have a history that is rather more complex and reflect indigenous social and cultural factors. The importance of underground banking systems on money laundering operations has become more widely appreciated in recent years and, given the dispersal of certain ethnic communities, there is today little doubt that such systems exist on an international basis.²³ Given the possible involvement of certain ethnic groups in highly profitable crimes, such as drug trafficking, the significance of these traditional banking systems and more recent adaptations and imitations, cannot be underestimated.²⁴ Furthermore, given the distorting effect that the underground banking system can have on money flows, it cannot be ignored by those who operate wholly within the conventional banking system.

Most underground systems will also, at some stage, have to interface with conventional financial or banking institutions. There are innumerable types of underground banking ranging from highly sophisticated structures operated by overseas Chinese groups to relatively informal barter and smuggling based operations in Africa. Most systems do not involve the movement of cash and instead, depend on tokens for their efficacy. The Chinese "Chit" or "Chop" system and the Indian *Hawalah* operate primarily within defined racial groups often with some additional bond of a tribunal or geographic nature. They rarely involve the physical movement of cash, or for that matter anything other than tokens that are regarded as the equivalent in value to the relevant cash sums. The *Hawalah* system is rather more a system of compensation through related transactions, but given the facility for aggregation, actual payments between those "funding" the systems are kept to the minimum.

The efficiency of a paperless and practically recordless banking system that is capable of transferring substantial amounts of wealth is obviously an attraction for those involved in money laundering. Money

22. B.V. KUMAR, FLIGHT CAPITAL OPERATIONS AND THE DEVELOPING WORLD: UNDERGROUND FINANCIAL SYSTEMS AND DRUGS AND DIRTY MONEY (1992); M. Duckworth, *Money Laundering Looms Large in Asia*, ASIAN WALL ST. J., Dec. 6, 1991. W. Cassidy Fei-Ch'lien, *Flying Money: A Study of Chinese Underground Banking*, Address at the Twelfth Annual International Asian Organised Crime Conference (1990) (transcript available from U.S. Customs).

23. C. Blackhurst, *Underworld Hijacks Underhand Banking*, BUS., June 1998, at 86.

24. The General Secretariat of ICPO-Interpol convened a special meeting to discuss the underground banking in August 1991.

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launderers have emulated the underground systems to some extent, and have shown an increasing willingness to make use of existing systems on a commercial basis. Accordingly, laws and enforcement policies that have been fashioned to address money laundering through conventional banking systems are of little practical relevance in the case of such underground systems.

If the picture that many have of money laundering is a little misconceived, it is probable that the general conception of the type of individual engaged in money laundering is also misperceived. Since the days of Meyer Lansky, there have been individuals who are prepared, for a fee or part of the action, to provide their services to whoever may wish to have their money hidden or laundered.²⁵ Recent investigations have identified individuals who have been prepared to service, through the same offshore bank in the Caribbean, the financial interests of terrorists in Northern Ireland, bank robbers in England, drug dealers in Miami, and fraudsters in Hong Kong.²⁶ Many of these individuals are experts in financial and corporate matters and have created a network of corporate and other entities in jurisdictions not known for their willingness or ability to promote financial integrity. In a number of investigations, such individuals have shown not just a willingness to become involved in laundering hot and dirty money, but also to facilitate other dubious financial and commercial transactions. In particular, they have been prepared to utilize their corporate entities and offshore banking facilities to front or give credibility to those engaged in advance fee frauds and the like. Thus, modern money launderers are unlikely to be involved as a member of a criminal organization. Rather, they are much more likely to be on the periphery of the financial services or banking industry and are professional advisors, such as a lawyers or accountants, who are prepared to make their services available to whoever is willing to pay.

VI. The Criminal Law: Combatting Money Laundering

It is virtually impossible to have a clear understanding of the purpose of a law or regulatory policy without some appreciation of the

25. Meyer Lansky, although by no means the first person to launder the ill-gotten gains of others as a business, was perhaps the first or at least most notorious money launderer to do so on a scale that could service the needs of organized crime. See D. EISENBERG, ET AL., *MEYER LANSKY* (1979); R. LACEY, *LITTLE MAN—MEYER LANSKY AND THE GANGSTER LIFE* (1991).

26. It has only been recently that the financial aspect to terrorist organizations has attracted the attention of ordinary law enforcement agencies. See generally J. ADAMS, *THE FINANCING OF TERROR* (New English Library, 1986); P. CLARE, *RACKETEERING IN NORTHERN-IRELAND* (1989); R. CLUTTERBUCK, *TERRORISM, DRUGS & CRIME IN EUROPE AFTER 1992* (1990).

environment within which it has been cultured and is expected to operate.

This is particularly true of rules that operate within the financial sector, given the fact that, to a significant extent, most financial institutions reflect the societies and social value that they have been created or permitted to come into existence to serve. In the area of regulation, far too little attention is given to the institutional aspects of compliance and enforcement. Therefore, in an area of concern such as money laundering, it is vital to look at the nature of the practice and to have at least some regard for reality than the somewhat simplistic notions that have become vogue.

It has been said, that before Britain had laws providing for the seizure and confiscation of the proceeds of certain crimes — such as those relating to illicit trafficking in drugs — there was relatively little incentive for those engaged in such activities to go to the trouble and expense of laundering their money.²⁷ As mentioned above, the processes involved in laundering are not always cheap or risk free. Therefore, such individuals did not have to go to the trouble of laundering proceeds, as they were practically safe from confiscation. Now, with the Drug Trafficking Offences Act of 1986,²⁸ British courts do have the power to confiscate the proceeds of so-called profitable crimes. Thus, the scales of economic balance are tipped firmly in favor of cautious criminals engaging in money laundering. Somewhat paradoxically, Britain has given organized criminals the incentive to launder their ill-gotten gains without addressing the problems that this gave rise to.

Before the enactment of the British Drug Trafficking Offences Act of 1986, there was not a great deal of discussion in Britain concerning money laundering. Any debate that existed often centered on the need to reinforce provisions for confiscation and forfeiture of the proceeds of crime.²⁹ Of course, historically it has long been recognized in English law that it is appropriate to deprive a convicted felon of the instruments of crime. During the 1970s and early 1980s, it became increasingly accepted that it was desirable to take the profit out of those crimes which were motivated by financial gain and which required a substantial degree of reinvestment in a continuing enterprise. Various international

27. I. CRAMPTON, *THE LAUNDERING OF CRIMINAL ASSETS AND ASSOCIATED PROBLEMS* (1984).

28. *Drug Trafficking Offences Act, 1986* (Eng.).

29. *See generally* THE PROFITS OF CRIME AND THEIR RECOVERY: THE REPORT OF A COMMITTEE CHAIRED BY SIR DEREK HODGSON (1984).

meetings accepted this approach as necessary in combatting organized crime, which itself was increasingly recognized as a reality worthy of serious attention.³⁰ In Britain, as in virtually every other country, the debate was dominated, if not captured, by those concerned with the control and suppression of illicit trafficking in drugs. Within the various agencies of the United Nations, a similar debate was taking place, and at both the domestic and international level, attention was focused exclusively on confiscature of the proceeds of drug trafficking and the related issue of money laundering. Of course, the need to apply such principles to other areas of criminal activity were voiced, particularly by British Commonwealth Governments, most of which did not give control of narcotics the same degree of priority as certain rather more developed and dominant states. This, obviously, is not the place to enter into a discussion of the various international and regional initiatives, or for that matter English law, other than in outline.³¹

*A. Drug Trafficking Act of 1994*³²

In Britain, the laundering of the proceeds of drug-related crimes was made an offense by the Drug Trafficking Offences Act of 1986.³³ The Prevention of Terrorism (Temporary Provisions) Act of 1989 also made it an offense to launder the funds of terrorist organizations.³⁴ However, now that the European Community's Directive on Money Laundering has been adopted and brought into law by the Criminal Justice Act of 1993, laundering of the proceeds of all serious offenses is now a specific criminal offense under English law.³⁵

The provisions relating to the laundering of the proceeds of drug trafficking have been consolidated and re-enacted in the Drug Trafficking Act of 1994. Section 50 of the 1994 Act provides that it is an offense for anyone to assist a drug trafficker to launder money by assisting them

30. Commonwealth Law Ministers meeting in Barbados in 1980, in Columbo in 1983, and in Harare in 1986, recognized that organized crime was a major menace and should be attacked through, among other things, asset removal programs. Various General Assemblies of ICPO-Interpol and U.N. Crime Prevention Congresses similarly recognized the importance of attacking serious crime through its assets. See generally M. FOONER, INTERPOL (1991); Barry Rider, *Commercial Crime Co-operation with the Commonwealth*, in PUBLISHED PAPERS OF THE SEVENTH COMMONWEALTH LAW CONFERENCE IN HONG KONG (1983).

31. See Drug Trafficking Offences Act, 1986 (Eng.); Prevention of Terrorism (Temporary Provisions) Act, 1989 (Eng.). See generally R. BOSWORTH-DAVIES & G. SALTmarsh, MONEY LAUNDERING — A PRACTICAL GUIDE TO THE NEW LEGISLATION (1994).

32. Drug Trafficking Act, 1994 (Eng.).

33. Drug Trafficking Offences Act, 1986 (Eng.).

34. Prevention of Terrorism (Temporary Provisions) Act, 1989 (Eng.).

35. See Council Directive 91/308, 1991 O.J. (L 166/77); Criminal Justice Act, 1993 (Eng.).

to retain or to control the benefits of their criminal activity, even if this merely amounts to providing advice.³⁶ It is necessary for the prosecution to prove that the accused either knew or suspected that the other person is or was engaged in drug trafficking or has benefited from the drug trafficking activities of another person.³⁷ The accused is entitled to a defense if he can prove that he did not know or suspect that this was the case, or that he would have informed the authorities, but for a factor which reasonably prevented him from so doing.³⁸ If a person does make disclosure of his suspicions to the proper authorities, which, in the case of employees of banks and financial intermediaries, is the relevant compliance officer, he does not commit an offense even if he subsequently, at the request of the authorities, provides assistance which would otherwise be within the scope of the offense.³⁹ Section 52, in an attempt to further encourage reporting of suspicious transactions, provides that it is an offense to fail to disclose knowledge or suspicion of money laundering activity to the authorities, provided this is acquired in the course of certain professional duties or certain types of employment.⁴⁰ It is a defense, however, to prove that the person concerned had a reasonable excuse for not passing on the information in question or that it was passed to a designated compliance officer within the relevant business or organization.⁴¹ In regard to disclosure under both sections 50 and 52, there is immunity from the consequences of what might amount to a breach of contract or confidence.⁴² However, this does not extend to, for example, liability for defamation, although there is likely to be a defense of qualified privilege.

Section 53 of the 1994 Act renders it an offense to "tip-off" another person that an investigation into money laundering is in progress or is about to be commenced, when it is likely to be prejudicial to the investigation.⁴³ This is a widely drawn provision, as the accused is entitled to a defense if he can prove that he did not know or suspect that

36. Drug Trafficking Act, 1994, s. 50 (Eng.).

37. *See id.*

38. *Id.*

39. *Id.*

40. *Id.* s. 52. For a comprehensive discussion of "whistle blowing," see J. FROOMKIN, *THE RELUCTANT POLICEMEN* (1991). *See also* THE REGULATION OF FINANCIAL AND CAPITAL MARKETS (1991); A. Samuels, *Dirty Drugs Money*, *BUS. L. REV.* (1986); Barry Rider, *Memorandum Submitted to the Select Committee on Trade and Industry: The Third Report: Company Investigations*, 1990 H.C. 36.

41. *See* Drug Trafficking Act, 1994, s. 52 (Eng.).

42. *Id.* ss. 50, 52.

43. *Id.* s. 53.

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the disclosure was likely to prejudice a money laundering investigation.⁴⁴ Legal advisors are given specific protection from this offense, but on the condition that the information in question is not communicated in the furtherance of a criminal offense.⁴⁵ In regard to the proceeds of drug trafficking it should be noted that the offenses relate to the proceeds of such activity, wherever it takes place.⁴⁶ It is not necessary that the proceeds in question have to be a result of activity which is an offense under United Kingdom law, although it must be such as would have been an offense had it occurred within the jurisdiction where the drug trafficking took place.⁴⁷

The provisions in the Drug Trafficking Offences Act of 1986 that relate to money laundering were extended by the Criminal Justice (International Cooperation) Act of 1990.⁴⁸ These additional and important provisions have also been codified in the Drug Trafficking Act of 1994. Section 49(1) of the 1994 Act provides that it is an offense for a person to conceal or to disguise any property that wholly or partly, directly or indirectly, represents his own proceeds of drug trafficking.⁴⁹ It is also an offense if the trafficker converts, transfers, or removes the property from the jurisdiction of the courts.⁵⁰ This provision is aimed at the drug trafficker in his attempt to launder the proceeds of his crime, whereas section 49(2) renders it a crime for another person to engage in such acts for the purpose of assisting any person to avoid prosecution for a drug trafficking offense or the making of a confiscation order, when he knows or has reasonable grounds to suspect that the property in question is derived from the proceeds of drug trafficking.⁵¹ Obviously there is some overlap with section 50, which as stated earlier, renders it an offense to assist another to retain the benefits of his illicit trafficking.⁵²

Section 51 is a particularly significant provision, as it renders it an offense to acquire, possess or use property, knowing that it directly or indirectly represents another person's proceeds of drug trafficking.⁵³ It is important to note that before the offense can be committed, the

44. *Id.*

45. *See id.*

46. *See* Drug Trafficking Act, 1994, s.53 (Eng.).

47. *See id.*

48. Criminal Justice (International Cooperation) Act, 1990 (Eng.).

49. Drug Trafficking Act, 1994, s. 49(1) (Eng.).

50. *See id.*

51. *Id.* s. 49(2).

52. *See supra* note 36 and accompanying text.

53. Drug Trafficking Act, 1994, s. 51 (Eng.).

person concerned must actually know that the property in question is derived from drug trafficking.⁵⁴ Mere suspicion is not sufficient.⁵⁵ This section will not apply to property transferred under a legitimate contract, yet where the consideration is unreal, wholly inadequate, or illegal, there may well be an offense under this provision, provided there is the requisite degree of knowledge.⁵⁶ Statutory protection is afforded to those who legitimately provide goods and services, as long as these providers do not assist in the drug trafficking activities of the recipient.⁵⁷ Such statutory protection is provided even if the provider of the services is aware that payment is from the proceeds of a drug-related offense.⁵⁸ Thus, a lawyer receiving payment for defending a drug trafficker would not commit an offense under this provision. It is also a defense to a charge under this section that proper disclosure has been made to the authorities, or, where appropriate, to a compliance officer, or that the person concerned would have made due disclosure but was delayed in doing so for a reasonable cause.⁵⁹

B. Prevention of Terrorism (Temporary Provisions) Act of 1989⁶⁰

The provisions relating to the laundering of terrorist funds remain in the Prevention of Terrorism (Temporary Provisions) Act of 1989 and are in some respects more draconian than those relating to the laundering of the proceeds of drug trafficking. Under section 9 of the 1989 Act, it is an offense for a person to engage in certain conduct with the intention that or having reasonable cause to suspect that the funds in question will be used to commit or further acts of terrorism in Britain or elsewhere.⁶¹ The conduct in question includes soliciting or inviting another person to (1) give, lend, or otherwise make available any money or other property; (2) receive or accept from any other person any money or property; or (3) use or have possession of any money or other property whether for consideration or not.⁶² It is also an offense if a person, knowing or having reasonable cause to suspect that the money or other property will be used to commit or further acts of terrorism, either (1) gives, lends, or otherwise makes available to any other person such property or (2) is

54. *See id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *See Drug Trafficking Act, 1994, s. 51 (Eng.).*

59. *See id.*

60. *Prevention of Terrorism (Temporary Provisions) Act, 1989 (Eng.).*

61. *Id. s. 9.*

62. *See id.*

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concerned in an arrangement whereby money or other property is to be made available to another person either immediately or at some time in the future.⁶³ Section 10 provides that it is an offense for a person to (1) solicit or invite any person to give, lend or otherwise make available any money or other property, whether for consideration or not; (2) lend or otherwise make available such property; (3) receive, accept, use or have possession of any money or property; or (4) is concerned in an arrangement whereby money or other property is to be made available for the benefit of a proscribed terrorist organization.⁶⁴ Except where the offense involves solicitation, it is a defense for the accused to establish that he did not know or did not have reasonable cause to suspect that the money or property in question was for the benefit of a proscribed organization or related to such.⁶⁵

Section 11 of the Prevention of Terrorism Act is similar to section 50 of the Drug Trafficking Act of 1994 insofar as it renders it an offense for a person to enter into or otherwise be concerned in an arrangement that facilitates the retention or control of terrorist funds by or on behalf of another person.⁶⁶ However, there is an important difference in terms of the statutory defense to such a charge. In the case of section 11, the accused must establish that he did not know or did not have reasonable cause to suspect that the relevant arrangement related to terrorist funds, the test being objective rather than subjective. As in the case of the other provisions, section 11 applies to acts done or intended outside the United Kingdom, provided they constitute offenses triable in the United Kingdom.⁶⁷

Section 12 provides immunity to those who might otherwise be in breach of contract or the law of confidence in reporting their suspicions to the authorities.⁶⁸ Section 12 also provides a defense for those who engage in activity that would otherwise constitute a crime, provided they have made proper disclosure to the authorities and have been permitted to proceed, or can establish that they informed the authorities as soon as is reasonable after engaging in the relevant activity.⁶⁹ It is also a defense, as in the case of the drug trafficking provisions, that the accused had a reasonable excuse for not informing the authorities or that the

63. *Id.*

64. *Id.*

65. *See* Prevention of Terrorism (Temporary Provisions) Act, 1989, s. 9 (Eng.).

66. *See id.* s. 11. *See also supra* notes 36-39.

67. *See* Prevention of Terrorism (Temporary Provisions) Act, 1989, s. 11 (Eng.).

68. *Id.* s. 12.

69. *Id.*

accused informed an appropriate person according to the terms of a compliance procedure within the relevant organization.⁷⁰

The Criminal Justice Act of 1993 added to the 1989 Act a further provision to bring the law relating to terrorist funds in line with that relating to the laundering of drug-related funds. Section 18A makes it an offense to fail to disclose knowledge or suspicion that financial assistance is being given to promote terrorism.⁷¹ The obligation to report knowledge or suspicion is imposed on those who in the course of their trade, profession, business, or employment learn of the relevant facts.⁷² They will be guilty of an offense if they do not "blow the whistle" to the authorities, unless they prove that they have a reasonable excuse for non-disclosure or that they notified a compliance officer as prescribed by the relevant organization's procedure.⁷³ As in the case of the other provisions relating to the reporting of suspicions, a defense is also provided in regard to allegations of breach of contract and confidentiality.⁷⁴

Section 17 of the Prevention of Terrorism (Temporary Provisions) Act 1989, as amended by the Criminal Justice Act 1993, broadens the offense of "tipping off" along the same lines as section 58 of the Drug Trafficking Act of 1994.⁷⁵ It is now an offense for anyone to disclose information relating to an investigation, actual or contemplated, with the intention of prejudicing the inquiry.⁷⁶

Similarly, the Northern Ireland (Emergency Provisions) Act 1991 also contains provisions relevant to the funds of terrorist organizations.⁷⁷ Section 53 of that Act renders it an offense to assist another person to retain the proceeds of terrorist-related activities, when one knows or suspects that the person is or has been engaged in terrorist activities or has benefited by virtue of such conduct.⁷⁸ It is a defense for the accused to prove that what is done has been done with the prior consent of the authorities after proper disclosure to them or that there has been disclosure as soon as is reasonable after the assistance in question

70. *Id.*

71. *See* Criminal Justice Act, 1993 (Eng.).

72. *Id.*

73. *Id.*

74. *Id.*

75. Prevention of Terrorism (Temporary Provisions) Act, 1989, s. 17 (Eng.); *see also* Drug Trafficking Act, 1994, s. 58 (Eng.).

76. Prevention of Terrorism (Temporary Provisions) Act, 1989, s. 17.

77. Northern Ireland (Emergency Provisions) Act, 1991 (Eng.).

78. *Id.* s. 53.

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has occurred.⁷⁹ Furthermore, it is also a defense for the accused to establish that he is not guilty because he did not know or did not suspect that the arrangements related to the proceeds of terrorist-related activity or that he intended to inform the authorities and had a reasonable excuse for delaying.⁸⁰ As in the case of the provisions relating to drug trafficking, there is immunity from the civil law for proper disclosures where the liability would be based on breach of contract or an obligation of confidentiality.⁸¹

Additionally, it is an offense under section 54 of the Northern Ireland Act to conceal, disguise, convert, or transfer property that in whole or part, directly or indirectly, represents the proceeds of terrorist-related activity, or to remove it from the jurisdiction of the courts.⁸² Section 54(1) is directed at the terrorist racketeer who seeks to avoid confiscation of the proceeds of his crimes, whereas section 54(2) is aimed at those who assist such persons who know or have reasonable cause to suspect the source of the proceeds of terrorist-related activity, yet nevertheless assist the racketeers in “laundering” the proceeds of the terrorist-related activity.⁸³ It is also an offense for a person to acquire, use, or possess property that they know or have reasonable cause to suspect represents, in whole or in part, directly or indirectly, another person’s proceeds of terrorist-related activity.⁸⁴ However, since the Criminal Justice Act of 1993, it is a defense to such a charge if proper consideration — other than services — was given or that the person concerned intended to report his suspicions, but had reasonable excuse for delaying.⁸⁵ It is also a defense that what has been done was done after proper disclosure to the authorities with their consent.⁸⁶ There are also the usual provisions protecting against liability for breach of contract and the law of confidence.

Section 54A of the Northern Ireland Act, which was added by the Criminal Justice Act 1993,⁸⁷ makes it an offense to fail to disclose knowledge or suspicion of an offense under both sections 53 and 54 of the Northern Ireland Act.⁸⁸ As in the case of the provisions relating to

79. *See id.*

80. *Id.*

81. *Id.*

82. Northern Ireland (Emergency Provisions) Act, 1991, s. 54 (Eng.).

83. *Id.*

84. *Id.*

85. *See* Criminal Justice Act, 1993 (Eng.).

86. *See* Northern Ireland (Emergency Provisions) Act, 1991, s. 54 (Eng.).

87. *See infra* part VI.C.

88. Northern Ireland (Emergency Provisions) Act, 1991, s. 54A (Eng.).

drug trafficking,⁸⁹ this obligation to “blow the whistle” applies where the facts were learned in the course of a trade, business, profession, business or employment. The usual protections are provided in regard to civil liability or where the disclosure was to an appropriate person pursuant to a compliance procedure. Furthermore, legal advisors are given protection provided they are acting within the confines of accepted legal privilege.

*C. Criminal Justice Act of 1993*⁹⁰

It has already been stated previously that prior to the Criminal Justice Act of 1993, attempts to launder the proceeds of crimes other than those relating to drug trafficking and terrorism did not amount to a specific criminal offense.⁹¹ Where a freezing or confiscation order had been made under the Criminal Justice Act of 1988, an attempt to evade it might constitute contempt of court.⁹² There are also a variety of disparate provisions such as those in the Companies Act of 1985 that relate to the freezing of rights attaching to shares in certain circumstances, which, in particular circumstances, might have relevance in preventing activity that resembles laundering.⁹³ Furthermore, the handling of the proceeds of a theft or deception is a specific offense under section 22 of the Theft Act of 1968.⁹⁴ The Criminal Justice Act of 1993 extends most of the provisions that relate to money laundering and are susceptible to the making of a confiscation order under the Criminal Justice Act of 1988 to property derived from such criminal activity. Thus, the proceeds from all offenses that are triable on indictment and certain summary offenses, which have the smell of organized crime about them, such as those relating to sex establishment, supplying video recordings of unclassified work, possessing unclassified videos for the purposes of supply, or the use of unlicensed premises for the exhibition of videos, are within the reach of the new anti-money laundering provisions.

Section 93A, which has been added to the Criminal Justice Act of 1988, makes it an offense for a person knowing or suspecting that another is, has been engaged in, or has benefited from criminal conduct, to enter into an arrangement, or otherwise be concerned in facilitating the

89. See *supra* notes 40-42.

90. Criminal Justice Act, 1993 (Eng.).

91. See *supra* notes 33-35.

92. See Criminal Justice Act, 1988 (Eng.).

93. See Companies Act, 1985 (Eng.).

94. See Theft Act, 1968, s. 22 (Eng.).

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retention or control by or on behalf of another's proceeds of criminal conduct, whether by concealment, removal from the jurisdiction of the courts, or transfer to nominees or otherwise.⁹⁵ It is also an offense to enter into an arrangement or to be otherwise concerned where the proceeds of a person's criminal conduct are used to secure that funds are placed at his disposal or are used to acquire property by way of investment for that person's benefit.⁹⁶ As in the case of the drug-related offenses, an accused is entitled to a defense if he proves that what he did was done after proper disclosure to the authorities and with their approval, or that he reported what had happened as soon as reasonable.⁹⁷ Protection is also provided for those who disclose in breach of contract or an obligation of confidentiality.⁹⁸ An accused will also be entitled to a defense if he can prove that he neither knew nor suspected that any arrangement related to the proceeds of criminal conduct or that the arrangement involved facilitating the laundering of such proceeds.⁹⁹

Section 98B mirrors section 51 of the Drug Trafficking Act of 1994 in that it makes it an offense to acquire, use, or possess property, knowing that it is, in whole or part, directly or indirectly, derived from the proceeds of criminal conduct.¹⁰⁰ As in the case of section 51, it is necessary that the prosecution establishes actual knowledge, mere suspicion not being sufficient for liability.¹⁰¹ The same defenses are also available, namely the payment of adequate consideration, provision of goods and services in the ordinary course of business and "whistle blowing."¹⁰² By section 93C(1), it is an offense to conceal, disguise, convert, transfer, or remove from the jurisdiction of the courts any property which is directly or indirectly, in whole or part, the proceeds of criminal conduct.¹⁰³ Section 93C(2) renders it a crime for anyone else to assist another to do this, provided they have knowledge or reasonable grounds to suspect that any of the property represents directly or indirectly the proceeds of criminal conduct.¹⁰⁴ Finally, section 93D makes it an offense for a person knowing or suspecting that a money

95. *See* Criminal Justice Act, 1988 (Eng.).

96. *See id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *See* Criminal Justice Act, 1988 (Eng.). *See also* Drug Trafficking Act, 1994, s. 51 (Eng.).

101. *See* Criminal Justice Act, 1988 (Eng.).

102. *See id.*

103. *Id.*

104. *Id.* The objective element should be noted.

laundering investigation is in progress or is about to be initiated, to disclose this knowledge or suspicion to another if such disclosure is likely to prejudice the inquiry.¹⁰⁵

In addition to the substantive offenses, regard must be had to the Money Laundering Regulations, which came into effect on April 1, 1994.¹⁰⁶ These regulations are concerned with implementing mechanisms that ensure due compliance with the money laundering legislation, deter money laundering, and facilitate effective and efficient detection and investigation. As such, financial institutions that are within the scope of the Regulations are required to create, implement, and operate internal procedures.¹⁰⁷ Failure to do this is a criminal offense, although it is a defense for the institution to show that it took all reasonable steps and exercised proper due diligence in seeking to comply with the requirements of the Regulations.¹⁰⁸

There was considerable debate prior to the enactment of the Drug Trafficking Offences Act of 1986 as to whether it would be appropriate to follow the practice in the United States and require by law the reporting to an official agency, all cash and certain other financial transactions in excess of a specific amount to official agencies. This was opposed by the British banking community on the basis that it would be unworkable. The Government accepted this, and the legislation introduced a suspicion-based reporting system which, as discussed above, has been strengthened by the Criminal Justice Act of 1993. Where an individual is aware or suspects that he is dealing with a person who has funds by virtue of a drug offense, then he will be entitled to a defense on a charge of laundering, provided he reports his suspicions to the authorities. The authorities are empowered to authorize that person to continue to provide the service in question to enable further information to be obtained. The person who does report his suspicions is relieved from the prospect of civil liability for breach of contract, but possibly not other forms of civil liability.

VII. Civil Liability: Making the Launderer Pay

While the various provisions that exist in the criminal law have produced problems for those who regularly handle other people's money, in practice there is little chance of someone ending up in the criminal courts who has not acted with knowledge that he is participating in the

105. *Id.*

106. Money Laundering Regulations, 1993 No. 1933 (Eng.).

107. *Id.*

108. *Id.*

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laundering of dirty money. It is most unlikely that an honest, but stupid banker would find himself in court. Thus, criminal law, while obviously important, is nonetheless primarily a sword to be brandished *in terrorem*. Of course, the criminal law does set standards upon which regulations and compliance procedures can operate with due authority, and perhaps most important, it provides a basis for international cooperation.

Perhaps of far greater significance in terms of risk for the ordinary banker and financial intermediaries is the civil law. It is possible to conceive of a number of scenarios where civil liability for conspiracy or fraud might be a risk in a money laundering operation. It is the developments that have taken place in the law relating to constructive trusts that have placed such persons in real jeopardy. The majority of cases before the British Chancery Courts today involve attempts by persons who have been defrauded by another to impose liability on others, such as bankers or financial intermediaries, who in some way or another facilitated the fraud. There are clear advantages in pursuing the facilitators of transactions, as they are often relatively well-funded, more susceptible in practical terms to the jurisdiction of the court, and often are regulated or at least subject to some kind of professional supervision to keep and maintain records. In other words, they are easy and relatively wealthy targets who are almost certainly not going to adopt the tactics of a "real" fraudster. Indeed, U.S. agencies have long realized the cost effectiveness of "hitting" the professional financial advisor and thereby require such persons to almost vouch for the integrity of their clients and the deals they "sponsor."

The recent flood of cases seeking to impose civil liability on those, which might broadly be described as "fiduciary facilitators," are based on a principle of law most clearly set out by *Ungoed-Thomas J in Selangor United Rubber Estates v. Cradock*.¹⁰⁹ In this case, the learned judge referred to an established principle of equity, where a person who knowingly participates in another's breach of trust will be regarded as standing in the same place as the trustee. While there has been much discussion in the books and cases as to the exact nature of this liability, particularly whether in all cases it is properly considered a constructive trust relationship, suffice it to say that there would appear to be only two problems in fashioning this rule to become a most effective weapon against the money launderer. The first is simply what sort of misconduct will be sufficient to bring the principle into play. Most of the cases have involved either a conventional trust relationship,

109. 1 W.L.R 1555 (1968) (Eng.).

or at least something so close as to make little practical difference. It would seem, however, that the property diverted or misappropriated by the trustee must be capable of sustaining a proprietary claim and, is therefore, capable of being trust property.

This point arose in the interesting case of *Nanus Asia Co. Inc. v. Standard Chartered Bank*.¹¹⁰ Although the circumstances of the case are somewhat complex, it is sufficient to point out here, that the Hong Kong Court was required to determine whether the Standard Chartered Bank was in a position analogous to that of a constructive trustee in regard to profits from insider dealing in the United States made by a Taiwanese. There was no problem in this case in regard to the bank's state of knowledge, as it had already been joined in civil enforcement proceedings in the United States.

There has been considerable discussion as to the requisite state of knowledge. The cases have indicated two basic standards, one requiring subjective knowledge, and the other a more objective or constructive standard. The distinction could be justified in terms of whether the third party who facilitates the breach of trust comes into possession of the relevant property or simply facilitates its control or retention by another. In the first case, a more objective standard was considered appropriate and knowledge of facts that would put a reasonable man on notice that something dishonest was afoot would be sufficient to justify trustee liability. On the other hand, where the participation of the third party does not extend possession of the property, it was thought that the requisite degree of scienter should be actual knowledge.

In view of recent cases, it would seem that the fact situations are usually complex and the question of knowledge is rather more bound up with the nature of liability that is being imposed.¹¹¹ If the third party does not come into possession of the trust property or its proceeds, then it is difficult to conceive of him as a constructive trustee, or for that matter as having any status that would involve a proprietary nexus. The liability of such a person for participating in the breach of trust will be personal. For example, in *AGIP (Africa) Ltd. v. Jackson*,¹¹² the Court of Appeal found no difficulty in holding that individuals who had facilitated the laundering of proceeds of a fraud, by incorporating companies and opening bank accounts in the names of these companies, were constructive trustees and thus, personally liable. Of course, in such

110. 1 H.K. L. REV. 96 (1990) (H.K.).

111. See Sir Peter Millett, *Tracing the Proceeds of Fraud*, 107 L.Q.R. 71 (1991); B. Strong, *Civil Asset Recovery Procedures: How Equity Deter Fraud*, 13 COMPANY L. 44 (1992).

112. 3 W.L.R. 116 (Ct. App. 1991) (Eng.).

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cases, the liability is personal to the defendant and does not involve a proprietary liability. In this case, however, the courts found that the persons concerned had acted dishonestly. They knew or should in the circumstances have known and deliberately refrained from inquiries that would have easily uncovered the fraud.

Although the cases do indicate varying qualities of knowledge, it would seem the better view today that before a third party can be held liable as a facilitator, the court will have to be shown that the third party knew the facts or deliberately turned a blind eye and acted with a lack of probity.¹¹³ Thus, the prospect that a banker or financial intermediary could be held personally liable for negligently participating in money laundering operations appears to be receding. However, the position is still not certain and the courts are plainly unsympathetic to those who become involved in such operations.¹¹⁴ Speaking of the defendants in *AGIP v. Jackson*, Mr. Justice Millet, as he then was, observed:

[T]hey made no enquiries . . . because they thought that it was none of their business. That is not honest behaviour. The sooner that those who provide the services of nominee companies for the purpose of enabling their clients to keep their activities secret realise it the better.¹¹⁵

The interrelationship between the obligations of due diligence cast upon those who handle other people's money and the willingness of the courts to impose liability for knowing participation in breaches of trust has yet to be addressed.¹¹⁶ Obviously, the more information that intermediaries are required to obtain and test, the more onerous will be their responsibilities, not only in regard to compliance with the civil law, but also in regard to their duties under the criminal law. The more that an intermediary is bound to know about its client, the greater will be the obligation. For example, in the context of financial services law, intermediaries will have to ensure that financial advice is not only carefully given and researched, but is suitable to the circumstances of that particular client. By the same token, the more information that is required according to due diligence and compliance procedures, the more

113. *Id.*

114. See, e.g., *Finers v. Miro*, 1 All E.R. 182 (1991)(Eng.); *Polly Peck International Plc v. Nadir*, B.C.L.C. 67 (Ct. App. 1992) (Eng.); *Cowan de Groot Properties Ltd. v. Eagle Trust*, B.C.L.C 1045 (1991) (Eng.); *Eagle Trust v. SBC Securities*, B.C.L.C 438 (1991) (Eng.).

115. *AGIP v. Jackson*, 3 W.L.R. 116 (Ct. App. 1991) (Eng.).

116. See generally B. RIDER, *THE REGULATION OF THE BRITISH SECURITIES INDUSTRY* (1979); Barry Rider, *The Fiduciary and the Frying Pan*, 1978 CONVEYANCER 114.

difficult it will be for an intermediary to resist allegations that it did know, or at best turned a blind eye, to its involvement in a breach of trust. Intermediaries and professional advisers are placed on the horns of dilemma. They are being pressured from a variety of irresistible sources to create more information, which will fix them with greater knowledge on the one side, and yet on the other they are being required to assume responsibility for the integrity of transactions on the basis they had knowledge or should have had knowledge of the relevant facts. It might not even be sufficient for an intermediary to deliberately curtail its access to information, as within both the risk of liability in the criminal and civil law and certainly at the level of administrative and disciplinary proceedings, the requisite standards as to what information should be obtained and digested are set objectively.

In a number of countries, particularly those that have derived their laws from the Civil and Roman law traditions, the concept of the trust is either unknown or relatively undeveloped. However, even in some of these jurisdictions, such as Japan and Taiwan, law creating trust relationships is in the course of being introduced. Furthermore, the trust is a very well-known concept throughout the common law world, and even in Islamic law it is possible to find parallels. As the Hong Kong case of *Nanus Asia Inc. v. Standard Chartered Bank*¹¹⁷ clearly shows, it is possible to utilize these concepts by suing overseas, even in cases where a trust may not arise in a particular state. In *Standard Chartered Bank*, one of the defendants was a Taiwanese and the "hot money" was on its way to Taipei when the Hong Kong Court "froze it." In another recent case, Indonesia, a country where the trust is a very foreign concept, utilized, among other legal devices, a constructive trust to "freeze" and recover the proceeds of corruption that were held in Singapore.

VIII. Conclusion

This article has attempted to analyze what is meant by the laundering of money and wealth. It has deliberately avoided concentrating on the control of drug money, as this is a topic which has received a great deal of attention over the years. Rather, this article has attempted to demonstrate that by removing the financial benefit of crime, the motive for committing such crimes is undermined, as is the ability of criminals, particularly when syndicated and organized, to reinvest or fund other criminal and subversive activities. At present, sadly, crime

117. 1 H.K. L. REV. 362 (1990) (H.K.).

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does pay — in every country. Perhaps not minor street crimes, but crimes such as banking and stock market frauds, racketeering and even illicit trafficking in drugs and other controlled and banned commodities. Organized crime groups and terrorists have recognized this and have moved into such areas of activity. Seeking to remove the profits and assets from such sophisticated and internationally mobile criminals merely gives them an incentive to engage in money laundering, and thereby, not only hamper the effective removal of these funds, but place out of reach vital intelligence. Therefore, asset removal programs must be based on the existence of laws rendering the laundering of money and derivative wealth a specific criminal offense, and law enforcement must have the resources, training, will, and political support to ensure that such laws are properly applied.

Too much attention has been focused on the formal procedures for mutual assistance in matters, resulting in a loss of emphasis on such matters as the development of intelligence and the pursuit of criminal and abusive activity through alternative means. Britain has become increasingly concerned about the effectiveness of the criminal law in dealing with serious frauds. In 1987, it established a special agency, the Serious Fraud Office, with very wide investigatory powers, to pursue economic criminals and bring them before the criminal justice system. In certain respects this did not work, even though vast resources were spent. Consequently, the Director of the Serious Fraud Office is currently calling for fraudsters to be pursued through non-criminal procedures such as administrative and civil proceedings.

Now that the value of enforcement through civil proceedings is finally being acknowledged domestically, should we not learn from this experience at the international level? To misquote the famous phrase: There is more in Heaven and Earth, than in criminal law. If we are serious about protecting our societies and economies, all the devices and weapons of the legal system must be used to prevent, discourage, detect, interdict, and control those who wish to destroy what we value.

