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Smurfs, Money Laundering, and the Federal Criminal Law: The Crime of Structuring Transactions

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SMURFS, MONEY LAUNDERING,
AND THE FEDERAL CRIMINAL LAW:
THE CRIME OF STRUCTURING TRANSACTIONS

*Sarah N. Welling**

I.	INTRODUCTION	288
II.	THE SETTING: CREATING AN ENVIRONMENT CONDUCTIVE TO SMURFS	290
	A. <i>Some Background on Money Laundering</i>	290
	B. <i>The Original Reporting Statute</i>	292
	C. <i>Problems with the Statute and the Judicial Response</i>	295
	D. <i>Governmental Response to Misadventure in the Courts</i>	299
	1. Revised Regulations to Address Aggregation	299
	2. Recognizing a New Crime	303
III.	THE ANTI-SMURFING STATUTE	304
	A. <i>Elements and Theory of the Offense</i>	304
	1. Clause (1)	304
	2. Clause (2)	306
	3. Clause (3)	307
	B. <i>Knowledge of Illegality</i>	310
	C. <i>Constitutionality</i>	320
	1. The Fourth Amendment	320
	2. The Privilege Against Self-Incrimination	322
	3. Due Process	323
	D. <i>The Unit of Prosecution</i>	324
	E. <i>Anti-Smurfing Applied</i>	326
IV.	THE RELATIONSHIP OF THE ANTI-SMURFING STATUTE TO OTHER FEDERAL CRIMES	326
	A. <i>A Comprehensive Reporting Scheme</i>	327
	B. <i>The Ripple Effect</i>	327
	C. <i>Double Jeopardy and the Anti-Smurfing Statute</i>	328
	1. The Bank Reporting Statute	328
	2. Section 1001	331

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3. Conspiracy 336

V. CONCLUSION 338

VI. APPENDIX 340

I. INTRODUCTION

In 1970, Congress adopted a statute requiring financial institutions to report cash transactions over \$10,000 to the government.¹ Failure to report was a crime.² In 1987, Congress made it a crime to structure financial transactions to evade this reporting law. Thus, for example, if Joe arranges his banking so the cash transactions are below \$10,000 in order to avoid reporting, Joe commits a federal crime. What brought Congress to this point? Should we be alarmed at the extent of governmental intrusion into the arrangement of our financial affairs, or is the intrusion warranted? This article answers these questions and tells a good story as well.

The story begins with money laundering. Part II provides background on money laundering and describes the government’s opening salvo against laundering, a statute requiring financial institutions to report cash transactions over \$10,000 to the government.³ To skirt this law, launderers began to conduct multiple cash transactions just below the \$10,000 reporting threshold. The army of persons who scurried from bank to bank to accomplish these transactions became known as “smurfs” because, like their little blue cartoon namesakes, they were pandemic. Smurfs thrived when the 1970 reporting law encountered trouble in the courts. The government’s response to this new species was to adopt a new criminal provision, the 1987 anti-smurfing statute.⁴

Congress adopted the anti-smurfing statute quickly and without careful analysis. The legislative history includes examples of problems with the reporting law⁵ and descriptions of cases the government lost.⁶

1. Pub. L. No. 91-508, § 221-23, 84 Stat. 1122 (1970) (codified as amended at 31 U.S.C. § 5313(a) (1982); 31 C.F.R. § 102.1(b) (1970)).

2. *Id.* §§ 205(b), 209-10, 84 Stat. 1120-21 (1970) (codified at 31 U.S.C. § 5322 (1982 & Supp. IV 1980)).

3. 31 U.S.C. § 5313 (1982); 31 C.F.R. § 103.22(a)(1) (1988).

4. 31 U.S.C. § 5324 (Supp. IV 1986).

5. *See The Drug Money Seizure Act and the Bank Secrecy Act Amendments: Hearing Before Senate Comm. on Banking, Housing, and Urban Affairs*, 99th Cong., 2d Sess. 22, 41, 82-83, 89 (1986) [hereinafter *Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs*]; *Tax Evasion, Drug Trafficking and Money Laundering as They Involve Financial Institutions, Hearings Before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance, and Urban Affairs*, 99th Cong., 2d Sess. 179-82 (1986) [hereinafter *Hearings Before the House Comm. on Banking,*

Yet the history contains little analysis of the elements of this new crime,⁷ and no analysis of its basic theory, constitutionality, interaction with other reporting laws, or its relationship to federal criminal law as a whole. The lack of analysis results from several factors. Congress was in a hurry to plug the loopholes in the reporting statute to halt the drain of laundered money.⁸ Congress resented the insolence of money launderers, particularly the smurfs who flooded the banks with multiple transactions for \$9900, thereby avoiding the reporting requirement.⁹ Finally, the anti-smurfing statute was upstaged, but not obviated, by legislation making money laundering per se a crime.¹⁰

Finance and Urban Affairs]; *Money Laundering Legislation: Hearing Before the Senate Judiciary Comm.*, 99th Cong., 1st Sess. 224 (1985) [hereinafter *Hearing Before the Senate Judiciary Comm.*].

6. See *Hearing Before Senate Comm. on Banking, Housing and Urban Affairs*, supra note 5, at 53-55, 97, 128-35; *Hearings Before the House Comm. on Banking, Finance and Urban Affairs*, supra note 5, at 179-82, 846-47, 850; *Hearing Before the Senate Judiciary Comm.*, supra note 5, at 224.

7. See *Hearing Before the Senate Comm. on Banking, Housing and Urban Affairs*, supra note 5, at 49-50, 61-62, 66-68, 115, 136-37; cf. *Hearings Before the House Comm. on Banking, Finance and Urban Affairs*, supra note 5 (extensive analysis of elements of 18 U.S.C. §§ 1956-57 (Supp. IV 1986)).

8. Congress acted quickly in defining this new crime. As late as 1985, the reporting law appeared to present no significant problems. No improvements to the law were suggested in THE PRESIDENT'S COMM'N ON ORGANIZED CRIME, INTERIM REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL, THE CASH CONNECTION: ORGANIZED CRIME, FINANCIAL INSTITUTIONS, AND MONEY LAUNDERING vii-viii (1984) [hereinafter THE CASH CONNECTION]. The Department of Justice seemed confident of the bank reporting law in 1983. See NARCOTIC & DANGEROUS DRUG SECTION, CRIMINAL DIVISION, DEP'T OF JUSTICE, INVESTIGATION AND PROSECUTION OF ILLEGAL MONEY LAUNDERING — A GUIDE TO THE BANK SECRECY ACT 11-16, 99-129 (1983). Also, the cases generally upheld prosecutions until *United States v. Anzalone*, 766 F.2d 676 (1st Cir. 1985). But see COMPTROLLER GENERAL, BANK SECRECY ACT REPORTING REQUIREMENTS HAVE NOT YET MET EXPECTATIONS, SUGGESTING NEED FOR AMENDMENT (cited in *Anzalone*, 766 F.2d at 681-82) (identifying aggregation loophole and recommending amendment). Congress passed the anti-smurfing statute on October 27, 1986; it became effective three months later. Section 1364(a) of Pub.L. 99-570 provided that: "The amendment made by section 1354 shall apply with respect to transactions for the payment, receipt, or transfer of United States coins or currency or other monetary instruments completed after the end of the 3-month period beginning on the date of the enactment of this Act [October 27, 1986]." Anti-Drug Abuse Act, Pub. L. No. 99-570, § 1364(a), 100 Stat. 3207 (1986). A gestation period of two years from the time a problem arises until Congress has it solved is short.

9. See *Hearing Before the Senate Comm. on Banking, Housing and Urban Affairs*, supra note 5, at 41, 87, 89, 96; *Hearings Before the House Comm. on Banking, Finance and Urban Affairs*, supra note 5, at 654, 661; *Hearing Before the Senate Judiciary Comm.*, supra note 5, at 221-22.

10. See generally *Hearing Before the House Comm. on Banking, Finance and Urban Affairs*, supra note 5 (analysis of 18 U.S.C. §§ 1956-57 (Supp. IV 1986)).

This article takes a thorough look at the anti-smurfing statute. Following this introduction, part II presents the setting that facilitated the emergence of smurfs. Part III examines the statute itself, including its basic theory, elements, constitutionality, unit of prosecution, and practical operation. Part IV examines how this new crime fits into federal criminal law as a whole. The article concludes that on balance, the reduction in privacy that the anti-smurfing statute effects is warranted by the harm money laundering and the drug trade cause.

II. THE SETTING: CREATING AN ENVIRONMENT CONDUCTIVE TO SMURFS

A. *Some Background on Money Laundering*

Money laundering begins with dirty money. Money can get dirty in two ways. One way is through tax evasion; people make money legally, but they make more than they report to the government.¹¹ Money also gets dirty through illegal generation.¹² Common techniques include drug sales,¹³ gambling,¹⁴ and bribery.¹⁵ Once money is dirty, it must be converted into an apparently legitimate form, or "laundered" before it can be invested or spent.¹⁶ "Money laundering" is the process by which one conceals the existence, illegal source, or illegal application

11. See, e.g., *United States v. Heyman*, 794 F.2d 788 (2d Cir.), *cert. denied*, 479 U.S. 989 (1986); *United States v. Cook*, 745 F.2d 1311 (10th Cir. 1984), *cert. denied*, 469 U.S. 1220 (1985); see also *United States v. Tobon-Builes*, 706 F.2d 1092 (11th Cir. 1983) (defendant claimed his \$185,200 in cash was "poker winnings"; conceivably he generated it legally, for example in Las Vegas).

12. Illegally generated money is probably dirty in both ways because after illegal generation it presumably goes unreported.

13. See, e.g., *United States v. Dela Espriella*, 781 F.2d 1432 (9th Cir. 1986).

14. See H.R. REP. NO. 975, 91st Cong., 2d Sess. 11, *reprinted in* 1970 CODE CONG. & ADMIN. NEWS 4394, 4396 ("The money in many of these transactions may represent . . . the proceeds of a lottery racket . . .").

15. *Id.* ("The money in many of these transactions may represent . . . the bribery of public officials.").

16. Laundering is only required for large amounts of money because small amounts can be absorbed inconspicuously. For example, a person legally generating and reporting an income of \$100,000 could probably dispose of half of it in unlaundered cash on items like clothing, cars, restaurants, and travel without arousing suspicion. But when vast amounts of money are involved, it cannot simply be absorbed and spent as cash. Often drug trafficking is the crime generating the amounts of money that require laundering. See, e.g., *Dela Espriella*, 781 F.2d at 1432 (money derived from cocaine trafficking); *United States v. Thompson*, 603 F.2d 1200 (5th Cir. 1979) (money to be used to purchase cocaine); *infra* text accompanying note 24 (\$355 million worth of cocaine seized); see also *United States v. Tobon-Builes*, 706 F.2d 1092 (11th Cir. 1983) (defendant claimed his \$185,200 in cash was "poker winnings," but the court noted that the defendant had trouble speaking English and that his girlfriend possessed the return portion of a round-trip airline ticket from Medellin, Columbia to Miami, Florida).

of income, and then disguises that income to make it appear legitimate."¹⁷

Laundering has several goals. One is to hide or sanitize the property so the tax collector does not get it. This aspect of the laundering process has been chronicled in detail.¹⁸ Another goal is to convert the cash into a physically manageable and inconspicuous form. That form often is a postal money order or cashier's check,¹⁹ but it also could be gold, stamps, or any form of property. The importance of converting cash into a manageable physical form is illustrated by the case of Anthony Castelbuono. Castelbuono somewhat conspicuously brought \$1,187,450 in small bills to a casino. The cash had an estimated volume of 5.75 cubic feet and weighed 280 pounds.²⁰

Whatever its goal, money laundering is harmful. Underground money absorbs no portion of the tax burden. More importantly, laundering is harmful because it allows the underlying criminal activity to thrive. Drug sales, gambling, or other crimes that generate cash are pointless if the cash cannot be invested or spent. Without laundering, the risk/reward ratio for the underlying crime is unattractive. Thus, success of the criminal venture depends on laundering.²¹ Efficient laundering renders the underlying crime lucrative, and therefore perpetuates it.

17. THE CASH CONNECTION, *supra* note 8, at 7.

18. *Id.* at 13-15, 29-49.

19. Postal money orders and cashier's checks are the launderers' instruments of choice. Unlike property such as cash, gold, and real estate, money orders and cashier's checks are physically convenient and extremely mobile. They are better than two-party checks because they are guaranteed and require no underlying bank account. They are better than certified checks because no payor need be identified. Although banks and the Post Office keep some records of cashier's checks and money orders, the documentation is minimal. Postal money orders and cashier's checks are thus the most flexible and anonymous form of property. In fact, postal money orders became so popular that in August, 1987, the Postal Service imposed a temporary ceiling on sales of money orders to \$10,000 per person per day. *See* Restriction on Purchase Money Orders, 52 Fed. Reg. 27,992 (1987).

20. *See* *Hearing Before the Senate Judiciary Comm.*, *supra* note 5, at 104; *see also* *Hearings Before the House Comm. on Banking, Finance and Urban Affairs*, *supra* note 5, at 656 (drug trade worth \$110 billion per year in "huge bulky quantities of cash in denominations no larger than \$100").

21. "Money laundering . . . provides a function necessary for the effective operation of a number of types of criminal activities conducted on a large scale." *Hearing Before the Senate Comm. on Banking, Housing and Urban Affairs*, *supra* note 5, at 148 (response to questions by James Knapp and Brian Sun); *see also* THE CASH CONNECTION, *supra* note 8, at 3 ("Without the means to launder money, thereby making cash generated by a criminal enterprise appear to come from a legitimate source, organized crime could not flourish as it now does.").

Money laundering has become a major concern recently because of the thriving drug trade.²² Laundering is required only if large amounts of cash are involved, because smaller amounts of dirty cash can be absorbed inconspicuously into a criminal's lifestyle. Huge amounts of cash require attention to disposal, and the drug trade currently generates such huge amounts.²³ For example, in August 1988, five-thousand pounds of cocaine were seized in New York; the estimated street value was \$355 million.²⁴ Had this cocaine reached the streets, that \$355 million would exist originally as cash. To put that cash to its best use, it would have to be laundered.

Aside from combating these measurable harms, putting a halt to money laundering also is emotionally appealing. The existence of laundering schemes indicates that some people get rich unfairly because they pay no taxes. Furthermore, the people who need laundering schemes often get rich because they sell drugs in the United States. Drug money laundering is especially unsavory on an intuitive level, considering the source of the cash that drives it.

B. *The Original Reporting Statute*

The government's first attack on money laundering was indirect. In 1970, Congress passed the Currency and Foreign Transactions Reporting Act²⁵ ("the Act") as Title II of the Bank Secrecy Act.²⁶ The

22. See Restriction on Purchase of Postal Money Orders, 52 Fed. Reg. 27,992 (1987). See generally Abramovsky, *Money-Laundering and Narcotics Prosecution*, 54 FORDHAM L. REV. 471 (1986) (foreclosing the opportunity to launder drug dollars can substantially decrease the quantity of drugs imported and sold); Wisotsky, *Exposing the War on Cocaine: The Futility and Destructiveness of Prohibition*, 1983 WIS. L. REV. 1305, 1333 ("Importers and [drug] dealers . . . must confront the problem of processing a volume of cash so enormous that it must be weighed instead of counted, or counted with the aid of high-speed machines. In fact, one informant claims that getting rid of the money has become the hardest part of the dope business.") (footnote omitted).

23. See, e.g., *United States v. Dela Espriella*, 781 F.2d 1432 (9th Cir. 1986) (money derived from cocaine trafficking); *United States v. Tobon-Builes*, 706 F.2d 1092 (11th Cir. 1983) (circumstances led court to conclude cash was raised in drug transactions); *United States v. Thompson*, 603 F.2d 1200 (5th Cir. 1979) (money to be used to purchase cocaine); see also *Hearing Before the Senate Comm. on Banking, Housing and Urban Affairs*, supra note 5, at 125 (estimates of drug trade from \$50 to \$110 billion); *Hearing Before the Senate Judiciary Comm.*, supra note 5, at 220 (74 pounds of cocaine worth \$30 million); *Lexington Herald-Leader*, Mar. 25, 1989, at A3, col. 6 (Detroit cocaine ring generated as much as \$3 million per day from 1982 to 1988).

24. See *Lexington Herald-Leader*, Aug. 22, 1988, at A3, col. 1.

25. 31 U.S.C. §§ 5311-14, 5316-22 (1982 & Supp. IV 1986).

26. Bank Secrecy Act, Pub. L. No. 91-508, 84 Stat. 1114 (1970) (codified at 12 U.S.C. §§ 1829b, 1951-59 (1982)); *id.* §§ 5311-14, 5316-22 (1982 & Supp. IV 1986).

Act imposes reporting requirements for certain financial transactions.²⁷ One statute provides that when a domestic financial institution²⁸ is involved in a currency transaction under circumstances prescribed by regulation, the bank must file a report with the government.²⁹ The regulations require that banks report each transaction in currency exceeding \$10,000.³⁰ Failure to report can result in civil³¹ and criminal³² penalties.

The stated purpose of the Act is to generate reports with a "high degree of usefulness in criminal, tax, or regulatory investigations."³³ Congress recognized that criminals deal in cash. Thus, large cash

27. *Id.* See generally Note, *The Currency Reporting Laws and the War on Organized Crime*, 20 SUFFOLK L. REV. 1061 (1986) (discussing a financial institution's liability for its agents' reporting violations and the need for greater deterrence of reporting violations).

28. The reporting law applies to "domestic financial institutions," which include banks, securities dealers, currency exchanges, funds transmitters, telegraph companies, casinos, and anyone subject to state or federal banking authority. See 31 C.F.R. § 103.11(g) (1988). In this article the term "bank" is used for convenience, but the law is not so limited.

29. 31 U.S.C. § 5313(a) (1982) provides in part: "When a domestic financial institution is involved in a transaction . . . of . . . currency . . . under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report . . . in the way the Secretary prescribes."

30. 31 C.F.R. § 103.22(a)(1) (1988). The regulation provides in relevant part: "Each financial institution . . . shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution which involves a transaction in currency of more than \$10,000." *Id.* Portions of this regulation reflect an amendment effective April, 1987. Bank Secrecy Act, 52 Fed. Reg. 11,442 (1987) (codified at 31 C.F.R. § 103.22(a)(1) (1988)). The amended regulation is discussed *infra* notes 74-98 and accompanying text.

The form designed for the report is Treasury Form 4789 (Currency Transaction Report). See *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 39 n.15 (1974). The form is to be filed with the Commissioner of Internal Revenue. 31 C.F.R. § 103.26(4) (1988). A copy of the form is reproduced in the Appendix.

31. 31 U.S.C. § 5321(a)(1) (1982 & Supp. IV 1986); see also 31 C.F.R. § 103.47 (1988). The Secretary and Congress have amended both these provisions several times since adopting them in 1970. Both 31 U.S.C. § 5321 (Supp. IV 1986) and 31 C.F.R. § 103.47 (1988) reflect the progression of amendments in their legislative history sections. The original civil penalty was limited to not more than \$1000; today the same civil penalty for willful violation is limited to "not more than the greater of the amount (not to exceed \$100,000) involved in the transaction or \$25,000." 31 C.F.R. § 103.47(f) (1988).

32. 31 U.S.C. § 5322(a)-(b) (1982 & Supp. IV 1986). Like the civil penalty statute, see *supra* note 31, this criminal penalty statute has been amended twice since its adoption to increase the sanctions. Pub. L. No. 99-570, § 1356(c)(1), 100 Stat. 3207-24, 3207-26 (1986); Pub. L. No. 98-473, §901(b), 98 Stat. 2135 (1984). The original penalty was limited to a fine of \$1000 or one year in prison or both. 31 U.S.C. § 5322(a) (1982). Today the penalty is limited to a fine of \$250,000 or five years in prison or both. *Id.* § 5322(a) (Supp. IV 1986).

33. 31 U.S.C. § 5311 (1982).

transactions are suspect; they are often a clue to underlying criminal activity.³⁴ As Congressman McKinney said, "What legitimate business in the United States of America today transfers money in cash?"³⁵ Cash is the only practical medium in some businesses, and those are recognized in statutory exceptions.³⁶ Usually, though, large cash transactions are indeed suspect. Moreover, cash is riskier than other types of paper due to the possibility of loss or theft. The willingness to accept the higher risk makes large cash transactions even more suspect. Thus, Congress concluded that reports of large currency transactions would be valuable in ferreting out crime.³⁷

The reporting statute and regulations take an indirect approach in that they only require information. Large cash transactions are not illegal, but they must be reported. Failure to report such transactions, however, is criminal. Once the bank files the report, people are free to deal in cash without constraints.

The bank reporting law attacks laundering by alerting the government to the process at its earliest point, the initial cash transactions. As the laundering process continues, the transactions become byzantine and more difficult to trace. The initial cash transactions are a vulnerable point because large amounts of cash are difficult to obscure. From the government's perspective, the cash transactions are an attractive target because they occur early in the laundering process and are conspicuous.

34. H.R. REP. NO. 975, 91st Cong., 2d Sess., *reprinted in* 1971 U.S. CODE CONG. & ADMIN. NEWS 4396 ("Criminals deal in money — cash or its equivalent. The deposit and withdrawal of large amounts of currency or its equivalent (monetary instruments) under unusual circumstances may betray a criminal activity.").

35. *Briefing on the 1970 Currency and Foreign Transactions Reporting Act: Hearing Before the Subcommittee on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 99th Cong., 1st Sess. 51-52 (1985).

36. 31 C.F.R. § 103.22(b)(2)(ii) (1988) provides exemptions from the reporting requirement for, *inter alia*, sports arenas, race tracks, amusement parks, bars, restaurants, hotels, and vending machine companies.

37. *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 39 (1974) ("Congress recognized the importance of reports of large and unusual currency transactions in ferreting out criminal activity and desired to strengthen the statutory basis for requiring such reports."); *see also* *United States v. Heyman*, 794 F.2d 788, 789 n.1 (2d Cir.) (large cash transactions are often part of money laundering process), *cert. denied*, 479 U.S. 989 (1986); *United States v. Giancola*, 783 F.2d 1549, 1553 (11th Cir.) (Hill, J., dissenting) ("[C]urrency is the life blood of organized crime."), *cert. denied*, 479 U.S. 1018 (1986); H.R. REP. NO. 975, 91st Cong., 2d Sess., *reprinted in* 1971 U.S. CODE CONG. & ADMIN. NEWS 4396-97 ("These reports may be of considerable value to law enforcement agencies in criminal investigations and prosecutions.").

C. *Problems with the Statute and the Judicial Response*

The Act and regulations became effective in 1971.³⁸ In the early years banks largely ignored the reporting law.³⁹ United States attorneys apparently ignored the law as well, because few criminal cases were reported before the late 1970s.⁴⁰ At that time, appellate case law began to develop, and the early cases upheld the prosecutions.⁴¹ Beginning in 1985, however, the cases revealed two distinct problems with the law.

One problem was that the regulations imposed the duty to report cash transactions over \$10,000 only on banks.⁴² The question arose whether bank customers also had a duty to report these cash transactions.⁴³ Some courts found that customers did have such a duty, and could therefore be held criminally liable for failure to file a report.⁴⁴

38. Pub. L. No. 91-508, § 401(a), 84 Stat. 1114 (1970).

39. Few reports were filed in the early years. In 1975, 3,418 reports were filed. In 1979, 121,000 reports were filed. By the next year, the number almost doubled; 241,850 reports were filed in 1980. In 1986, an estimated 3.2 million reports were filed. *See Hearing Before the Senate Comm. on Banking, Housing and Urban Affairs, supra* note 5, at 33 (statement of Brian Bruh, Director, IRS Office of Criminal Investigations). The number of reports filed is also documented in THE CASH CONNECTION, *supra* note 8, at 9. *See generally* United States v. Sans, 731 F.2d 1521 (5th Cir. 1984) (referring to testimony that banks universally ignored the currency reporting requirements); *Hearing Before the Senate Judiciary Comm., supra* note 5, at 100 (testimony of James D. Harmon, Jr.) (referring to "the banks' . . . now documented abysmal record of ignoring the reporting requirements of the Bank Secrecy Act, a law on the books for some 14 years . . .").

40. *See* THE CASH CONNECTION, *supra* note 8, at 9 ("For most of the first decade after passage of the [Bank Secrecy] Act, the Federal Government did not vigorously enforce its provisions.") (footnote omitted).

41. *See, e.g.,* United States v. Cook, 745 F.2d 1311 (10th Cir. 1984), *cert. denied*, 469 U.S. 1220 (1986); United States v. Tobon-Builes, 706 F.2d 1092 (11th Cir. 1983); United States v. Thompson, 603 F.2d 1200 (5th Cir. 1979).

42. *See* 31 C.F.R. § 103.22(a)(1) (1988) (quoted *supra* note 30).

43. *See, e.g.,* United States v. Puerto, 730 F.2d 627, 631 (11th Cir.), *cert. denied*, 469 U.S. 847 (1984).

44. *See, e.g.,* United States v. Lafaurie, 833 F.2d 1468 (11th Cir. 1987); United States v. Richeson, 825 F.2d 17 (4th Cir. 1987); United States v. Cure, 804 F.2d 625 (11th Cir. 1986); *Puerto*, 730 F.2d at 633; United States v. Tobon-Builes, 706 F.2d 1092 (11th Cir. 1983); *see also* United States v. Hayes, 827 F.2d 469 (9th Cir. 1987) (person not associated with financial institution could not be punished as aider and abetter for conspiring to avoid currency transaction reporting requirements); *cf.* United States v. Heyman, 794 F.2d 788 (2d Cir.) (defendant was not a customer but rather an employee of the financial institution; conviction sustained), *cert. denied*, 479 U.S. 989 (1986); United States v. Cook, 745 F.2d 1311 (10th Cir. 1984) (customer liable under the bank reporting law for giving false information on report rather than for failure to file a report), *cert. denied*, 469 U.S. 1220 (1986); United States v. Thompson, 603 F.2d 1200 (5th Cir. 1979) (same).

These courts reasoned that customers were accomplices of the banks.⁴⁵ Other courts refused to hold customers liable for failure to file a report⁴⁶ on the basis that the regulations did not explicitly impose such a duty. Criminal liability therefore would be unconstitutional because the laws were too vague to provide fair notice.⁴⁷ These courts often reasoned that while the enabling legislation granted the Secretary of the Treasury authority to require "any . . . participant" to file reports, the Secretary's regulations required only that "financial institutions" do so.⁴⁸ Thus, the courts concluded, although he had the power, the Secretary specifically had chosen not to require reports from individuals.

Another problem with the reporting law was that the regulations imposed a duty to report only if the cash transaction exceeded \$10,000.⁴⁹ Assume that Joe, a smurf, is in charge of converting cash drug profits into cashier's checks. To do his job well, he does some research and finds that he can avoid the reporting requirement by manipulating cash transactions so none exceeds \$10,000. The cases began to reveal such schemes.⁵⁰ The number of variables involved in

Courts addressing the liability of customers as accomplices of banks did not distinguish among the three statutes (the bank reporting law, § 1001, and conspiracy) used to prosecute. *See, e.g.*, *United States v. Varbel*, 780 F.2d 758 (9th Cir. 1986) (customer not liable under § 1001 & § 371); *United States v. Anzalone*, 766 F.2d 676 (1st Cir. 1985) (customer not liable under § 5313 & § 1001); *United States v. Puerto*, 730 F.2d 627 (11th Cir.) (customer liable under § 5313, § 1001 & § 371), *cert. denied*, 469 U.S. 847 (1984); *cf.* *United States v. Heyman*, 794 F.2d 788 (2d Cir.) (account executive liable under § 5313 & § 371), *cert. denied*, 479 U.S. 989 (1986).

45. The courts relied on 18 U.S.C. § 2 (1982). *See* *United States v. Puerto*, 730 F.2d 627, 633 (11th Cir.), *cert. denied*, 469 U.S. 847 (1984); *United States v. Tobon-Builes*, 706 F.2d 1092, 1099-1101 (11th Cir. 1983).

46. *See, e.g.*, *United States v. Gimbel*, 830 F.2d 621 (7th Cir. 1987); *United States v. Larson*, 796 F.2d 744 (8th Cir. 1986); *United States v. Dela Espriella*, 781 F.2d 1432 (9th Cir. 1986); *United States v. Varbel*, 780 F.2d 758 (9th Cir. 1986); *United States v. Anzalone*, 766 F.2d 676 (1st Cir. 1985).

47. *See, e.g.*, *United States v. Larson*, 796 F.2d 244, 247 (8th Cir. 1986); *United States v. Varbel*, 780 F.2d 758 (9th Cir. 1986); *United States v. Anzalone*, 766 F.2d 676, 678 (1st Cir. 1985).

48. *See, e.g.*, *United States v. Larson*, 796 F.2d 244 (8th Cir. 1986); *United States v. Varbel*, 780 F.2d 758, 762 (9th Cir. 1986); *United States v. Anzalone*, 766 F.2d 676 (1st Cir. 1985). The statute and regulation are quoted *supra* notes 29-30.

49. 31 C.F.R. § 103.22(a)(1) (1988) (quoted *supra* note 30).

50. *See, e.g.*, *United States v. Heyman*, 794 F.2d 788 (2d Cir.), *cert. denied*, 479 U.S. 989 (1986). The defendant was an account executive with Merrill Lynch. *Id.* at 789. On July 26, 1982, he received a briefcase from a client containing \$70,000 in cash, and he deposited \$7,000 in 10 related accounts. *Id.* On the next day he transferred all the money into one joint account. *Id.*; *see also* *United States v. Cook*, 745 F.2d 1311 (10th Cir. 1984) (defendant attempted to avoid the \$10,000 reporting requirement by withdrawing money from one bank and re-depositing

financial transactions allowed smurfs like Joe endless opportunities for manipulation. The variables included the number of banks,⁵¹ the number of branch offices of a particular bank,⁵² the number of teller stations at one branch office,⁵³ the number of instruments purchased,⁵⁴ the number of accounts at a particular bank,⁵⁵ the time period during which the transactions were conducted,⁵⁶ and the number of persons doing the transactions.⁵⁷ Manipulating these variables to keep each transaction under \$10,000 required manpower. The armies of lower level operatives who appeared in banks became known as smurfs. As they scurried from bank to bank executing transactions just under the \$10,000 reporting limit, they seemed to be everywhere, much like the little blue cartoon characters.⁵⁸

it in another bank, using a false identity), *cert. denied*, 469 U.S. 1220 (1986); *United States v. Tobon-Builes*, 706 F.2d 1092 (5th Cir. 1983) (defendant and companion simultaneously deposited \$9,000 each in ten banks during a six-hour period).

51. *See, e.g.*, *United States v. Varbel*, 780 F.2d 753, 759 (9th Cir. 1986); *United States v. Denmark*, 779 F.2d 1559, 1560-61 (11th Cir. 1986).

52. *See, e.g.*, *United States v. Giancola*, 783 F.2d 1549, 1551 (11th Cir.), *cert. denied*, 479 U.S. 1018 (1986); *United States v. Sanchez Vazquez*, 585 F. Supp. 990, 993 (N.D. Ga. 1984).

53. *See, e.g.*, *United States v. Larson*, 796 F.2d 244, 246 (8th Cir. 1986).

54. *See, e.g.*, *United States v. Bank of New England*, 821 F.2d 844, 847 (1st Cir.) (checks), *cert. denied*, 108 S. Ct. 328 (1987); *United States v. Thompson*, 603 F.2d 1200, 1202 (5th Cir. 1979) (notes).

55. *See, e.g.*, *United States v. Heyman*, 794 F.2d 788 (2d Cir.), *cert. denied*, 479 U.S. 989 (1986).

56. *Compare Heyman*, 794 F.2d at 789 (transactions occurring simultaneously) *and Bank of New England*, 821 F.2d at 847 (same) *with United States v. Anzalone*, 766 F.2d 676, 679 (1st Cir. 1985) (transactions occurring over a two-week period) *and United States v. Konefal*, 566 F. Supp. 698, 700 (N.D.N.Y. 1983) (transactions over a two-month period).

57. *See, e.g.*, *United States v. Tobon-Builes*, 706 F.2d 1092, 1094 (11th Cir. 1983) (two people go to each bank; each person buys a \$9,000 cashier's check).

58. *See Hearings Before the House Comm. on Banking, Finance and Urban Affairs, supra* note 5, at 179 (smurfs scurry from bank to bank with increments of less than \$10,000); *id.* at 665 (term "smurfs" originated because like the cartoon characters, there are many of them running around everywhere); *id.* at 792 (the problem of smurfing); *id.* at 818 (smurfs would be good both as defendants and as witnesses); *Hearing Before the Senate Comm. on Banking, Housing and Urban Affairs, supra* note 5, at 21 (the "well known practice of smurfing"); *id.* at 41 (smurfs traveled to banks all over the United States); *id.* at 61 (structuring is "commonly known as smurfing"); *id.* at 79 (structured cash conversion schemes often dubbed "smurfing"); *id.* at 87 (long lines at banks discourage smurfs who go to other metropolitan areas to smurf cash); *id.* at 89 (law is ineffective, so launderers just "smurf away"); *id.* at 124 (referring to an "anti-smurfing" regulatory measure); *id.* at 150 (smurfs as relatively low on the organized crime totem pole); *id.* at 191 (smurfs convert illegally obtained cash into cashier's checks); *id.* at 226 (smurfs are escaping liability); *see also* Restriction on Purchase Money Orders, 52 Fed. Reg. 27,992 (1987) (temporary restriction on amount of money orders a customer can buy in one day adopted to prevent smurfs from using money orders to launder drug money).

These schemes exploited the lack of any aggregation requirement in the statutes or regulations that defined a \$10,000 transaction. The instructions on the back of the reporting form provided for aggregation,⁵⁹ but whether these instructions could serve as the basis for criminal prosecution was uncertain at best.⁶⁰ Some courts specifically found the instructions to be nonbinding.⁶¹

The judicial response to the smurfs' use of multiple transactions to avoid filing a report was mixed. In some limited circumstances, courts were willing to collapse the transactions and aggregate the amounts to reach \$10,000, thus rendering the defendant liable for failure to file.⁶² Generally, though, courts refused to aggregate transactions⁶³ and declared the defendants' conduct noncriminal.⁶⁴ These courts reasoned that no language in the statute or regulations imposed a duty to aggregate transactions. A criminal conviction therefore would be unconstitutional because nothing clearly warned the defendant that the conduct was criminal.⁶⁵ The courts that refused to find defendants liable often stated that it was for Congress or the Executive to declare

59. See *United States v. Anzalone*, 766 F.2d 676, 679 n.6 (1st Cir. 1985). The form provided: "Multiple transactions by or for any person which in any one day total more than \$10,000 should be treated as a single transaction, if the financial institution is aware of them." *Id.*

60. See, e.g., *id.* at 684 (Aldrich, J., concurring); *United States v. Palzer*, 745 F.2d 1350, 1357 (11th Cir. 1984) (no specific ruling but suggests that instructions are binding); *Tobon-Builes*, 706 F.2d at 1097-98 (court mentions instructions but extent of reliance thereon is unclear).

61. See *United States v. Reinis*, 794 F.2d 506, 508 (9th Cir. 1986) (bank reporting form not effective as regulation because not in compliance with Administrative Procedure Act); *Anzalone*, 766 F.2d at 679 n.6; *United States v. Cogswell*, 637 F. Supp. 295, 298 (N.D. Cal. 1985).

62. See *United States v. Bank of New England*, 821 F.2d 844 (1st Cir.) (simultaneous transfer, same teller window, multiple instruments), *cert. denied*, 108 S. Ct. 328 (1987); *United States v. Heyman*, 794 F.2d 788, 789 (2d Cir.) (simultaneous transfer, same representative, multiple instruments), *cert. denied*, 479 U.S. 989 (1986); *United States v. Giancola*, 783 F.2d 1549, 1551-52 (11th Cir.) (same day, same bank but different branches, multiple instruments) (distinguishing *United States v. Denmark*, 779 F.2d 1559 (11th Cir. 1986) on the basis that *Denmark* involved different banks), *cert. denied*, 479 U.S. 1018 (1986); *United States v. Thompson*, 603 F.2d 1200, 1202 (5th Cir. 1979) (simultaneous transfer, same teller, multiple instruments); cf. *United States v. Tobon-Builes*, 706 F.2d 1092 (11th Cir. 1983) (defendant and girlfriend went to same branch office of same bank, each completed \$9,000 transaction at different tellers; court treated this as one transfer of \$18,000).

63. See *United States v. Larson*, 796 F.2d 244 (8th Cir. 1986); *United States v. Dela Espriella*, 781 F.2d 1432 (9th Cir. 1986); *United States v. Varbel*, 780 F.2d 758 (9th Cir. 1986); *United States v. Denmark*, 779 F.2d 1559 (11th Cir. 1986); *United States v. Anzalone*, 766 F.2d 676 (1st Cir. 1985); *United States v. Cogswell*, 637 F. Supp. 295 (N.D. Cal. 1985).

64. See, e.g., *United States v. Varbel*, 780 F.2d 758, 761-62 (9th Cir. 1986).

65. See *United States v. Mastronardo*, 849 F.2d 799, 805 (3d Cir. 1988); *Varbel*, 780 F.2d at 760-61; *United States v. Anzalone*, 766 F.2d 676, 678 (1st Cir. 1985).

conduct criminal, not the courts.⁶⁶ Noting further that a Comptroller General's report had identified this aggregation loophole, the courts relied on the Secretary's subsequent inaction to conclude that the Secretary knew of the problem but apparently had chosen not to cure it.⁶⁷

Disagreement on the issues of customer liability and aggregation of transactions caused a split in the circuits.⁶⁸ The two issues raised distinct questions. Sometimes a case would present just one of these issues,⁶⁹ but frequently they were intertwined.⁷⁰ When that happened, courts generally failed to distinguish the issues.⁷¹ The law grew into confused disarray.

D. *Governmental Response to Misadventure in the Courts*

The government responded to these problems. The Secretary of the Treasury amended the regulations,⁷² and Congress passed a new criminal statute.⁷³

1. Revised Regulations to Address Aggregation

The Secretary amended the regulations of the bank reporting law to deal with the aggregation question.⁷⁴ First, a new regulation

66. See *United States v. Giancola*, 783 F.2d 1549, 1553-54 (11th Cir.) (Hill, J., dissenting), *cert. denied*, 479 U.S. 1018 (1986); *United States v. Cogswell*, 637 F. Supp. 295 (N.D. Cal. 1985).

67. See *Anzalone*, 766 F.2d at 681-82; *Cogswell*, 637 F. Supp. at 297-98.

68. See *supra* text accompanying notes 42-67; see also *United States v. Mastronardo*, 849 F.2d 799, 804 (3d Cir. 1988) (noting "severe split among the circuits" on issue of customer liability); *United States v. Nersesian*, 824 F.2d 1294, 1310 (2d Cir.) (noting split of authority on issue of customer liability), *cert. denied*, 108 S. Ct. 357 (1987); N. ABRAMS, *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* 119 (Supp. 1986).

69. See, e.g., *United States v. Denemark*, 779 F.2d 1559, 1561 (11th Cir. 1986) (aggregation only); *United States v. Puerto*, 730 F.2d 627 (11th Cir.) (customer liability only), *cert. denied*, 469 U.S. 847 (1984).

70. See, e.g., *United States v. Larson*, 796 F.2d 244, 246 (8th Cir. 1986).

71. See, e.g., *United States v. Varbel*, 780 F.2d 758 (9th Cir. 1986); *United States v. Anzalone*, 766 F.2d 676 (1st Cir. 1985); *United States v. Tobon-Builes*, 706 F.2d 1092 (11th Cir. 1983); *United States v. Thompson*, 603 F.2d 1200 (5th Cir. 1979).

72. Amendments to Implementing Regulations Under the Bank Secrecy Act, 52 Fed. Reg. 11,442 (1987) (codified at 31 C.F.R. § 103.22 (1988)).

In addition to these direct responses to loopholes in the reporting law, Congress recently adopted two new statutes which authorize new reporting requirements. See 31 U.S.C. §§ 5325, 5326, discussed in note 104 *infra*.

73. 31 U.S.C. § 5324 (Supp. IV 1986).

74. The Secretary did not amend the regulations to deal with the customer liability issue. Individuals were under no duty to report. The authorizing statute would have authorized such a duty, see 31 U.S.C. § 5313(a) (1982) (quoted *supra* note 29), but no duty was imposed due to

clarified the status of branch banks.⁷⁵ The old regulations did not specifically address this issue, but the definitions of “bank” and “financial institution” suggested that each branch was a separate entity.⁷⁶ Thus, transactions conducted at multiple branches of one institution would not be aggregated. Despite the language in these definitions, the courts concluded that transactions occurring at different branches of one institution should be combined.⁷⁷ The new regulation modified the definition of financial institution⁷⁸ to reflect the courts’ conclusion.⁷⁹ This modification codified the cases and left the law essentially unchanged.⁸⁰

The Secretary also adopted a regulation that codified the aggregation instructions on the back of the reporting form.⁸¹ As noted above, the reporting form included aggregation instructions,⁸² but the force of these instructions was unclear and the courts were reluctant to rely on them as the basis of a criminal prosecution.⁸³ This uncertainty has been cured now that the instructions are embodied in a regulation. The new regulation provides: “Multiple currency transactions shall be treated as a single transaction if the financial institution has knowledge that they are by or on behalf of any person and result in either cash

enforceability concerns. Telephone interview with John Landreth, Office of Financial Enforcement, Office of the Assistant Secretary (Enforcement), Department of the Treasury (Aug. 10, 1987).

75. See 31 C.F.R. § 103.22(a)(4) (1988).

76. See *id.* § 103.11(a) (defining “bank” as “Each agent, agency, *branch*, or office within the United States . . .”) (emphasis added); *id.* § 103.11(g) (defining “financial institution” as “[e]ach agent, agency, *branch*, or office within the United States . . .”) (emphasis added).

77. See *United States v. Giancola*, 783 F.2d 1549, 1552 (11th Cir.) (“[E]xchanges made by a single person or his partners or associates in a single day, in different branches of the same bank, do require the bank to file a [report].”), *cert. denied*, 479 U.S. 1018 (1986); *accord United States v. Sanchez Vazquez*, 585 F. Supp. 990 (N.D. Ga. 1984).

78. See 31 C.F.R. § 103.22(a)(3) (1988) (“A financial institution includes all of its domestic branch offices for the purpose of this paragraph’s reporting requirements.”).

79. The comments accompanying the new regulations state that the revision modifies the definition of financial institution “to comport with recent case law.” Bank Secrecy Act, 52 Fed. Reg. 11,436 (3) (1987).

80. *But cf. Giancola*, 783 F.2d at 1554 n.1 (Hill, J., dissenting) (“I recognize that there has been a recent amendment to 31 C.F.R. § 103.22(a) which in the future may or may not be sufficient to pull transactions such as those in this case within the purview of the CTR reporting requirement.”).

81. See Bank Secrecy Act, 52 Fed. Reg. 11,442 (1987) (codified at 31 C.F.R. § 103.22(a)(1) (1988)).

82. See *supra* note 59 and accompanying text.

83. See *supra* notes 60-61 and accompanying text.

in or cash out totalling more than \$10,000 during any one business day.”⁸⁴

This regulation requires that three conditions exist before multiple transactions are treated as one. The transactions must be “by or on behalf of any person,” the transactions must amount to over \$10,000 cash in or cash out in a single day, and the bank must have knowledge of both these conditions.⁸⁵ If any one of these conditions fails, then multiple transactions are not treated as a single transaction. Assuming that each individual transaction is for less than \$10,000, the bank has no duty to report.

This regulation raises several questions, some of which are resolved in the comments accompanying the amendments. For example, the comments indicate that only total cash in or cash out must be aggregated.⁸⁶ If \$8000 and then \$4000 are deposited in one account, the transactions must be aggregated, but if \$8000 is deposited and then \$4000 is withdrawn, aggregation is not required. Another question the regulation does not explicitly address is whether deposits one person makes to multiple accounts, or deposits multiple people make to a single account, must be combined into a single transaction. The comments indicate that in these situations, the presence of a single person or single account means that transactions involving that person or account must be combined and treated as a single transaction.⁸⁷

Other questions the regulation raises are not addressed in the comments.⁸⁸ One such question is the meaning of the requirement that

84. 31 C.F.R. §103.22(a)(1) (1988). This change necessitated a regulation to define “business day.” See *id.* § 103.11(q) (1988) (“Business day . . . means that day, as normally communicated to its depository customers, on which a bank routinely posts a particular transaction to its customer’s account.”).

85. *Id.* § 103.22(a)(1). The comments accompanying the new regulation describe the phrase “has knowledge.” The comments state, “Treasury has changed the term ‘is aware’ to ‘has knowledge.’ This term means knowledge on the part of a partner, director, officer or employee of a financial institution, or on the part of any existing system at the institution that permits it to aggregate transactions.” See Bank Secrecy Act, 52 Fed. Reg. 11,437 (1987).

86. Bank Secrecy Act, 52 Fed. Reg. 11,438 (1987). The relevant comment provides, Treasury also wishes to reiterate that ‘cash in or cash out totalling more than \$10,000’ means the total of all deposits *or* the total of all withdrawals. Deposits *and* withdrawals are not to be aggregated together for purposes of the Bank Secrecy Act. However, the total of all deposits or the total of all withdrawals during a particular business day should be aggregated in order to determine if a reportable deposit or withdrawal limit has been reached.

Id.

87. *Id.* “Examples of reportable transactions would be two people depositing more than \$10,000 in one account, though neither deposited a reportable amount, or one person making a deposit of more than \$10,000, but depositing the money in more than one account.” *Id.*

88. One question the regulations raise is how to resolve a conflict between the new regulations on branch banks and aggregation. If transactions are accomplished at multiple banks,

the transaction be "by or on behalf of any person."⁸⁹ The regulations define "person" as broadly as possible.⁹⁰ This language is literally meaningless because one cannot possibly conjure up a transaction that is not "by or on behalf of any person." The drafters probably meant to refer to transactions by or on behalf of a person or any *single* person, but were wary of limiting the regulation in this way. To have any meaning, the regulation should be interpreted to mean by or on behalf of a person.⁹¹

Another question is whether multiple transactions must be treated as one if all three conditions are met,⁹² but the cash in or cash out is transferred at different banks. The government's position is that a bank is under no duty to aggregate transactions conducted at different banks, even if the bank has knowledge of the other transactions.⁹³ The regulation as originally proposed would have captured this situation and required aggregation,⁹⁴ but the Secretary rejected that regulation, at least temporarily, in favor of the one adopted.⁹⁵

the banks have no duty to aggregate the transactions and report, even if the bank has knowledge of the multiple transactions. Yet if the transactions are done at multiple branches of the same bank, the regulations treat them as occurring at one bank, and the bank must combine and report them. But what if the bank does not know of the transactions at multiple branches? Which regulation controls, the one requiring transactions to be combined among branches or the one requiring aggregation only if the bank has knowledge? Treasury comments reveal that the intent was for the knowledge requirement to control. Thus, if branch banks have no knowledge of multiple transactions on behalf of one person, the bank need not combine and report the transactions. *See id.* at 11,437 (quoted *supra* note 85).

89. 31 C.F.R. § 103.22(a)(1) (1988).

90. *Id.* § 103.11(1) ("Person. An individual, a corporation, a partnership, a trust or estate, a joint stock company, an association, a syndicate, joint venture, or other unincorporated organization or group, and all entities cognizable as legal personalities.").

91. *Cf.* 26 C.F.R. § 1.6050I (1988). This regulation provides that for a similar reporting law, 26 U.S.C. § 6050I (Supp. IV 1986), the aggregation requirement operates when the transaction is on behalf of "a person." *See infra* note 214 and accompanying text.

92. *See supra* text accompanying note 85.

93. Telephone interview with John Landreth, Office of Financial Enforcement, Office of the Assistant Secretary (Enforcement), Department of the Treasury (Aug. 10, 1987).

94. 51 Fed. Reg. 30,233, at 30,234 as proposed (Aug. 25, 1986); *see also Hearing Before the Senate Comm. on Banking, Housing and Urban Affairs, supra* note 5, at 56 (prepared statement of Richard C. Wassenaar, Assistant Commissioner (Criminal Investigation), Internal Revenue Service).

95. The comments accompanying the new regulations mention that the regulations encompass all but three of the original proposals. Of the three not implemented, "two proposals, dealing with the purchase of more than \$3,000 in monetary instruments, are still under consideration by Treasury and will be the subject of a separate notice to be issued within the next few months." Bank Secrecy Act, 52 Fed. Reg. 11,436 (1987).

The amended regulations leave some options open to the ambitious launderer. For example, Joe can manipulate time by limiting his cash transactions to \$10,000 or less each day. This is an unattractive option, however, because the laundering process will be too slow for the volume of cash that many drug organizations generate. Another option, assuming Joe uses only a single bank, is to use multiple accounts and multiple agents to limit the bank's knowledge of the relationship between multiple transactions. If the bank lacks such knowledge, it has no duty to treat multiple transactions as single.⁹⁶ Finally, Joe can use multiple banks during a single day because the regulations do not require aggregation of transactions conducted at different banks.⁹⁷ So long as the transaction at each bank does not exceed \$10,000, the bank has no reporting obligation.⁹⁸

2. Recognizing a New Crime

Because launderers still could avoid the aggregation regulations in these ways, the regulations were an incomplete solution to the holes in the reporting law. Thus Congress enacted a new statute, which provides that no person shall for the purpose of evading the reporting requirements (1) cause a financial institution to fail to file a required report; (2) cause a financial institution to file a required report with an omission or misstatement; or (3) structure any transaction with one or more financial institutions.⁹⁹ Sanctions for violating this statute

96. The revised regulations include stricter provisions on customer identification that will make it more difficult for smurfs to hide their identity from the banks. *See* 31 C.F.R. § 103.27 (1988).

97. *See supra* text accompanying notes 93-95.

98. *See id.*; *see also* *United States v. Giancola*, 783 F.2d 1549 (11th Cir.) (bank required to report aggregate transactions over \$10,000 at different branches), *cert. denied*, 479 U.S. 1018 (1986); *United States v. Sanchez Vazquez*, 585 F. Supp. 990 (N.D. Ga. 1984) (same).

99. 31 U.S.C. § 5324 (Supp. IV 1986) provides:

No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction — (1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a); (2) cause or attempt to cause a domestic financial institution to file a report required under section 5313(a) that contains a material omission or misstatement of fact; or (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

The Secretary adopted a regulation mimicking the statute. *See* 31 C.F.R. § 103.53 (1988). The comments accompanying this regulation state that the "amendment merely incorporates into the regulations the new statutory violation of structuring . . ." *Bank Secrecy Act*, 52 Fed. Reg. 11,440 (1987).

include forfeiture,¹⁰⁰ civil penalties,¹⁰¹ and criminal sanctions of up to \$250,000 in fines, five years in prison, or both.¹⁰² The statute is officially titled "Structuring transactions to evade reporting requirement prohibited."¹⁰³ Unofficially, the statute should be called the "anti-smurfing statute," in honor of the smurfs who prompted it.¹⁰⁴

III. THE ANTI-SMURFING STATUTE

A. *Elements and Theory of the Offense*

1. Clause (1)

Clause (1)¹⁰⁵ takes conduct previously defined as criminal, failure of a bank to file a report, and extends liability to any person who causes that failure. This amounts to an accomplice liability provision tailored to the specific crime of failing to file a report. Federal law includes a general accomplice liability statute,¹⁰⁶ but the courts have

100. There is some confusion over forfeiture. See 31 U.S.C.A. §§ 5321(a)(4)(C), 5321(c) (1982 & Supp. IV 1986), both of which refer to structured transaction forfeiture provision § 5317(d). But no § 5317(d) appears. *Id.*

101. *See id.* § 5321(a)(4); 31 C.F.R. § 103.47(e) (1988).

102. *See* 31 U.S.C. § 5322(a) (1982 & Supp. IV 1986).

103. *Id.* § 5324 (Supp. IV 1986).

104. In addition to the amended regulations and the anti-smurfing statute which took effect in 1987, the government response to smurfing was bolstered again in November, 1988 when Congress added two new statutes with expanded reporting requirements. *See* Money Laundering Prosecution Improvements Act of 1988, Public Law 100-690, Nov. 18, 1988, codified at 31 U.S.C. §§ 5325, 5326. One statute, § 5325, basically requires banks to check and verify identification for persons purchasing with cash any instrument over \$3,000. This statute authorizes the Secretary of the Treasury to adopt regulations defining the type of identification required and the records that banks must keep on the identification. (The Secretary has begun the process of prescribing regulations, *see* Advance Notice of Proposed Rulemaking, 53 Fed. Reg. No. 247, p.51846-47 (Dec. 23, 1988)). All records must be provided to the Secretary upon request. 31 U.S.C. § 5325. The other statute basically authorizes the Secretary to target a particular bank or geographic group of banks and order them to keep such records and provide such information on currency transactions as the Secretary may require. 31 U.S.C. § 5326.

These new reporting requirements will make smurfing more difficult. For example, cash purchases of cashier's checks will have to be below the \$3,000 threshold or the identification provisions will increase the likelihood of bank knowledge that separate transactions are all by or on behalf of one person. *See* text accompanying note 96 *supra*. Or the Secretary might target a particular bank to report all cash transactions over \$1,000. Aside from making smurfing more difficult, these new reporting requirements have no impact on the operation of the anti-smurfing statute because the statute is based exclusively on the reporting requirements of § 5313.

105. 31 U.S.C. § 5324 (Supp. IV 1986). "No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction — (1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a)" *Id.*

106. 18 U.S.C. § 2 (1982).

disagreed on its applicability to nonreporting.¹⁰⁷ Congress responded to this disagreement by adopting this particularized accomplice liability provision.¹⁰⁸

This provision of clause (1) is obsolete today. Assume Joe goes to Bank A at ten o'clock, one o'clock, and three o'clock. Each time he buys a \$4000 cashier's check with cash. To find Joe in violation of clause (1), Bank A must have a duty to file a report, and must fail to do so. Under the regulations, Bank A has a duty to file only if it knows that multiple transactions for one person total cash in or cash out over \$10,000 in one day. If Bank A meets these criteria, i.e., it knows of Joe's three transactions, how could Joe "cause" its failure to file?

The explanation for this anomaly is historical. Congress drafted and adopted clause (1) of the anti-smurfing statute before the Secretary of the Treasury revised the regulations to impose the aggregation requirement. Because clause (1) was designed to impose liability on customers, the bank's knowledge was irrelevant. Under the revised regulation, however, if the bank is ignorant of one person's multiple transactions on one day, it has no duty to combine the transactions and therefore no duty to file a report. Joe's three trips, of course, caused the bank's ignorance and its consequent lack of duty to file. Even so, Joe cannot be held liable for causing failure to perform an act that the bank had no duty to perform.

Clause (1) also contains an attempt provision. Federal law includes no general attempt statute, but instead incorporates attempt language in individual statutes.¹⁰⁹ When Congress defines a new crime, it routinely includes attempt language. The attempt language of clause (1) still is vital under the regulations because it encompasses situations in which a customer attempts to mislead a bank, but the bank discovers the attempt and files a report. For example, assume Joe goes to Bank B at two o'clock and pays \$9000 cash for a cashier's check, then returns at four o'clock and does the same. To avoid a report, Joe uses false identification on the four o'clock trip. Bank B discovers that Joe ac-

107. Compare *United States v. Tobon-Builes*, 706 F.2d 1092, 1099 (11th Cir. 1983) (§ 2 is applicable) with *United States v. Anzalone*, 766 F.2d 676, 682 (1st Cir. 1985) (§ 2 is not applicable). See *supra* text accompanying notes 42-48.

108. At the same time, Congress declined to enact a general criminal facilitation statute. See *Hearings Before the House Comm. on Banking, Finance and Urban Affairs*, *supra* note 5, at 834 (prepared statement of Assistant Attorney General Stephen S. Trott); Joost, *Simplifying Federal Criminal Laws*, 14 PEPPERDINE L. REV. 1, 15-16 (1986).

109. See, e.g., 18 U.S.C. §§ 1341, 1951, 1952(a) (1982); *id.* § 1344 (Supp. III 1985).

complished both transactions and files a report. Under clause (1), the government can charge Joe with attempting to cause Bank B to fail to file.

2. Clause (2)

Clause (2)¹¹⁰ makes it a crime to cause a bank to file a report containing a material omission or misstatement. In this situation, the bank is aware of the cash transaction over \$10,000. The bank reporting law already defines making any misstatement in a report as a crime.¹¹¹ Clause (2) of the anti-smurfing statute extends liability to those who *cause* misstatements. Clause (2) also imposes criminal liability for causing a material omission in a report, conduct the bank reporting law does not reach.

Another criminal statute, 18 U.S.C. § 1001, affects the same conduct.¹¹² Causing the filing of a bank report with an omission may be criminal under section 1001,¹¹³ and causing the filing of a false report is always criminal under section 1001.¹¹⁴ Therefore, clause (2) of the anti-smurfing statute defines new criminal conduct in some omission fact patterns. In most cases, however, its impact is to impose another

110. 37 U.S.C. § 5324 (Supp. IV 1986). "No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction — . . . (2) cause or attempt to cause a domestic financial institution to file a report required under section 5313(a) that contains a material omission or misstatement of fact . . ." *Id.*

111. See 31 C.F.R. § 103.49(d) (1988) ("Any person who knowingly makes any false, fictitious or fraudulent statement or representation in any report required by this part may, upon conviction thereof, be fined not more than \$10,000 or be imprisoned not more than 5 years, or both.").

112. See 18 U.S.C. § 1001 (1982) (discussed *infra* text accompanying notes 236-64).

113. Section 1001 prohibits concealment of material facts, but only by "trick, scheme or device." *Id.*; *United States v. Woodward*, 406 U.S. 105 (1985). Thus, if a report contains an omission, but the omission is not attributable to a trick, scheme, or device, the concealment would not fall under § 1001. In this circumstance, clause (2) of the anti-smurfing statute makes otherwise legal conduct criminal.

114. See *United States v. Puerto*, 730 F.2d 627, 633 (11th Cir.), *cert. denied*, 469 U.S. 847 (1984).

The elements of § 1001 in the false statement context have been summarized: "Proof of five elements is essential . . . under the false statement proscription of § 1001: (1) a statement, (2) falsity, (3) materiality, (4) specific intent, and (5) agency jurisdiction." *United States v. Lange*, 528 F.2d 1280, 1287 (5th Cir. 1976). A false statement on a currency transaction report would satisfy all five elements. Congress intended this result and wrote a statute to insure it. See 31 U.S.C. § 1052(k) (1976) (repealed 1982) ("For the purposes of section 1001 . . . the contents of reports required under any provision of this title are statements and representations in matters within the jurisdiction of an agency of the United States."). This statute was later eliminated as unnecessary. See *Woodward*, 406 U.S. at 107 n.6.

layer of liability to conduct already deemed criminal under other laws.¹¹⁵

In addition, like clause (1), clause (2) prohibits attempts to cause incomplete or false filings. This attempt language defines new criminal conduct.

3. Clause (3)

Clause (3)¹¹⁶ defines an entirely new crime. Clause (3) makes it illegal to structure any transaction with one or more banks for the purpose of evading the reporting requirement. This clause addresses both problems the original bank reporting statute raised: customer liability and manipulation of transactions. Clause (3) establishes customer liability by imposing liability on anyone who assists or attempts to assist in structuring a transaction. Yet the crux of clause (3) relates to manipulation; it closes the loopholes remaining under the revised regulations.

As noted above, launderers have three methods available under the revised regulations to avoid aggregation and the duty to report.¹¹⁷ Clause (3) covers each of these. First, the crime of structuring is not limited to transactions accomplished in a particular time period. Thus, transactions that would avoid aggregation under the regulations because \$10,000 or less was transferred during one day would still qualify as structured transactions under clause (3). Second, because the crime of structuring does not depend on the bank's knowledge, using multiple agents and multiple accounts to keep the bank in the dark on the total transactions would not defeat liability under clause (3). Third, the crime of structuring includes transactions accomplished at "one or more domestic financial institutions,"¹¹⁸ so conducting the transactions at multiple banks will not avoid liability. This clause is independent of the aggregation regulation, thus it prohibits all structuring regardless of whether the bank has a duty to file a report.

The *mens rea* required for the crime of structuring is two-tiered. Conviction of any crime under the reporting laws requires willful-

115. See *infra* text accompanying notes 236-64.

116. 31 U.S.C. § 5324 (Supp. IV 1986). "No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction — . . . (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions." *Id.* Aside from the basic crime of structuring, this clause also includes complicity and inchoate provisions.

117. See *supra* text accompanying notes 96-98.

118. 31 U.S.C. § 5324(3) (Supp. IV 1986).

ness.¹¹⁹ In addition, the anti-smurfing statute requires that the defendant act for the purpose of evading the bank reporting law.¹²⁰ The combination of these two *mens reas*, each of which is rigorous alone, makes the *mens rea* element even more difficult to prove.¹²¹

The conduct element is defined less precisely. It is illegal to "structure" a "transaction." The regulations define the term "transaction in currency" as a physical transfer of currency.¹²² The definition of "structure" is more complicated. The statute contains no explicit definition, and the popular definition is not helpful,¹²³ so legislative intent is relevant.¹²⁴ The legislative history reveals no explicit congressional statement of intent concerning the meaning of the term "structure." But the legislative history does include an example of structuring,¹²⁵

119. *See id.* § 5322 (1982 & Supp. IV 1986).

120. The statute begins, "No person shall for the purpose of evading the reporting requirements of section 5313(a) . . ." *Id.* § 5324 (emphasis added); *see also Hearings Before the House Comm. on Banking, Finance and Urban Affairs, supra* note 5, at 846 (prepared statement of Assistant Attorney General Stephen S. Trott) ("structuring" is present when transactions are broken up "in order not to trigger the report filing requirements").

121. The *mens rea* will be even more difficult to establish if the courts impose a requirement of knowledge of the law. *See infra* text accompanying notes 135-81.

122. *See* 31 C.F.R. § 103.11(o) (1988) ("*Transaction in currency*. A transaction involving the physical transfer of currency from one person to another.>").

123. *See* *Caminetti v. United States*, 242 U.S. 470 (1917) (reliance on common meaning of statutory term). WEBSTER'S NEW COLLEGIATE DICTIONARY 1146 (1981) defines the verb "to structure" as to form into "something arranged in a definite pattern of organization." Another definition which might apply is provided for the noun "structure": "The aggregate of elements of an entity in their relationships to each other." *Id.* Neither definition is enlightening in this criminal context.

124. *See* *United States v. Culbert*, 435 U.S. 371 (1978) (reliance on legislative intent in construing federal criminal statute); Justice Dep't Handbook on the Anti-Drug Abuse Act of 1986 (Mar. 1987) ("[Subsection (3)] is the only one . . . that presents any significant problems of interpretation because the statute does not define 'structuring.' This definitional problem is hardly insurmountable if care is taken in bringing cases that Congress clearly intended to be covered by this section.>").

125. *See* S. REP. NO. 433, 99th Cong., 2d Sess., 22 (1986). The legislative history provides, in pertinent part:

[A] person who converts \$18,000 in currency to cashier's checks by purchasing two \$9,000 cashier's checks at two different banks or on two different days with the specific intent that the participating bank or banks not be required to file [reports] for those transactions, would be subject to potential civil and criminal liability. A person conducting the same transactions for any other reasons or a person splitting up an amount of currency that would not be reportable if the full amount were involved in a single transaction (for example, splitting \$2,000 in currency into four transactions of \$500 each), would not be subject to liability under [clause] (3).

Id.

and the testimony of the government drafters reveals what they intended by the term.¹²⁶ In the drafters' view, "structuring" is "breaking up a single currency transaction of more than \$10,000 into separate smaller transactions in order not to trigger the [report] filing requirements."¹²⁷ This definition is bolstered by the courts' use of the term in this way in cases decided prior to the anti-smurfing statute.¹²⁸ These definitions render the conduct element precisely congruous with the *mens rea* requirement.

Defining a criminal offense based on the structure of one's finances suggests an analogy to tax law. If Joe can legitimately structure his finances to avoid paying taxes, is it not correspondingly legitimate to structure finances to avoid reporting cash transactions? The answer is no. The courts recognized that this analogy was faulty but failed to identify the reason.¹²⁹ The analogy fails because the two acts, structuring finances to avoid paying taxes and structuring finances to avoid filing reports, have different purposes. When he structures to avoid taxes, Joe saves money but still provides information to the government. In contrast, when Joe structures to avoid the bank reporting law, he denies the government information. The statutory use of the term "evade" rather than "avoid"¹³⁰ expresses the congressional conclu-

126. See *Hearing Before the Senate Comm. on Banking, Housing and Urban Affairs*, *supra* note 5, at 66 ("structured" currency transactions are "currency transactions which are intentionally broken down into a series of smaller transactions, each under \$10,000, for the purpose of evading the reporting requirements of the Bank Secrecy Act") (prepared statement of Deputy Assistant Attorney General James Knapp); *Hearings Before the House Comm. on Banking, Finance and Urban Affairs*, *supra* note 5, at 846 (prepared statement of Assistant Attorney General Stephen S. Trott) ("Structuring" as used by the government in criminal prosecutions under Title 31 of the United States Code, consists of breaking up a single currency transaction of more than \$10,000 into separate smaller transactions in order not to trigger the [report] filing requirements.").

127. *Hearings Before the House Comm. on Banking, Finance and Urban Affairs*, *supra* note 5, at 846 (prepared statement of Assistant Attorney General Stephen S. Trott).

128. The verb "structuring" was first used in *United States v. Thompson*, 603 F.2d 1200, 1202 (5th Cir. 1979). Other courts also adopted the term. See *United States v. Giancola*, 783 F.2d 1549 (11th Cir.), *cert. denied*, 479 U.S. 1018 (1986); *United States v. Anzalone*, 766 F.2d 676 (1st Cir. 1985); *United States v. Bank of New England*, 640 F. Supp. 36, 37 (D. Mass. 1986), *aff'd*, 821 F.2d 844 (1st Cir.), *cert. denied*, 108 S. Ct. 328 (1987); *United States v. Cogswell*, 637 F. Supp. 295, 297 (N.D. Cal. 1985).

The Senate Report acknowledges the common law definition by stating that the anti-smurfing statute is intended to "codify *Tobon-Builes* and like cases." S. REP. NO. 433, 99th Cong., 2d Sess., 22 (1986).

129. See, e.g., *Thompson*, 603 F.2d at 1203-04.

130. The anti-smurfing statute begins, "No person shall for the purpose of *evading* the reporting requirements of section 5313(a) . . ." 31 U.S.C. § 5324 (Supp. IV 1986) (emphasis added).

sion that any reason to resist reporting is illegitimate and therefore an evasion. While one might legitimately avoid taxes,¹³¹ there exists no concept of legitimate avoidance of the reporting requirement.¹³²

The anti-smurfing statute is based implicitly on the judgment that resistance to reporting cash transactions is even more suspect than the large cash transactions themselves. This judgment is reasonable because no legitimate reason exists to resist reporting large cash transactions. The time it takes Joe to provide the bank with the information for the report is negligible,¹³³ and it will not cost him any money when the bank files a report.

Joe might object to the bank filing a report on the basis that the report invades his privacy, and that it is a scary situation indeed when the government is entitled to collect information (unrelated to taxes) on financial arrangements. Perhaps Joe is averse to the government knowing about his transactions. When balanced against the threat to society that the drug trade and money laundering pose, however, the threat to Joe's privacy is not compelling. The reduction in privacy is minimal. This country has a tradition of protecting individual privacy from governmental interference, but in view of the documented dangers of drugs and laundering, laws that protect individual privacy at all costs have become a luxury. The anti-smurfing statute results in less than perfect individual privacy, but the harms of drugs and laundering warrant the minimal reduction. Congress in effect made this judgment when it defined structuring to evade the reporting law as a crime.

Beyond inconvenience and privacy, Joe may have another reason for resisting the reporting requirement. Joe may need to hide other criminal activity. This reason is patently illegitimate and is one the law should neither recognize nor endorse.¹³⁴

B. *Knowledge of Illegality*

The anti-smurfing statute applies only when the defendant acts for the purpose of evading the bank reporting requirement.¹³⁵ Assume Joe

131. On the concept of legitimate tax avoidance, see *Commissioner v. Newman*, 159 F.2d 848, 850-51 (2d Cir.), cert. denied, 331 U.S. 859 (1947); *Helvering v. Gregory*, 69 F.2d 809, 810 (2d Cir. 1934), aff'd, 293 U.S. 465 (1935). See generally Rice, *Judicial Techniques in Combating Tax Avoidance*, 51 MICH. L. REV. 1021 (1953).

132. *But cf.* J. VILLA, BANKING CRIMES § 6.05[4][a] (1988).

133. A copy of Form 4789 (Currency Transaction Report) is reproduced in the Appendix.

134. For a discussion of the implications of the privilege against self-incrimination, see *infra* text accompanying notes 190-99.

135. See 31 U.S.C. § 5324 (Supp. IV 1986) (quoted *supra* note 99).

goes to the bank five days in a row and each day pays \$9000 in cash for a cashier's check. If Joe is unaware of the bank reporting law, he is not smurfing because he does not have the required motive to evade the bank reporting law. Joe is smurfing, however, if he is aware of the bank reporting law and structures his transactions to avoid a report. A smurfing conviction is impossible unless the defendant knows of the bank reporting law.

A separate question is whether a smurfing conviction is possible without knowledge of the anti-smurfing law as well. What happens if Joe knows of the bank reporting law and structures his transactions to avoid reporting, but is unaware that such structuring is itself a crime? In other words, is knowledge of illegality an element of smurfing, thus making ignorance of the anti-smurfing law a defense?¹³⁶ Some defendants have recently asserted that ignorance of the law is in fact a defense.¹³⁷

The express terms of the anti-smurfing statute do not require knowledge of the law,¹³⁸ so the question of whether knowledge of illegality is an element will be left to the courts.¹³⁹ In *United States v. Balint*¹⁴⁰ and *United States v. Freed*,¹⁴¹ the statutes prohibited selling

136. Asking whether knowledge of illegality is an element of the crime is an alternative way of asking whether ignorance of the law is a defense. If knowledge of illegality is an element, then ignorance of the law is necessarily a defense; if knowledge is not an element, ignorance is not a defense. Either formulation raises the same issue, and this article uses the two formulations interchangeably.

137. See Proposed Amendment to Bank Secrecy Act Regulations Providing for Notice to Customers of Anti-Structuring Provision by Financial Institutions, 53 Fed. Reg. 7948 (1988) (to be codified at 31 C.F.R. pt. 103) (proposed Mar. 11, 1988) [hereinafter Proposed Amendment to Bank Secrecy Act Regulations].

138. The conclusion that the express terms of the statute do not require knowledge of illegality assumes that the anti-smurfing statute's requirement of a purpose to evade the reporting requirement of § 5313 does not include knowledge of illegality.

139. If a statute is silent or ambiguous, a court tries to discern congressional intent from other sources, like the legislative history. See *United States v. Balint*, 258 U.S. 250, 252 (1922) (*mens rea* of empty statute is "a question of legislative intent to be construed by the court"); see, e.g., *United States v. Liparota*, 471 U.S. 419 (1985) (looking to legislative history); *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558 (1971) (same). The legislative history of the anti-smurfing statute does not indicate whether Congress intended knowledge of the law to be an element. If the legislative history is unhelpful because it is silent, see, e.g., *United States v. Freed*, 401 U.S. 601 (1971); *Balint*, 258 U.S. at 250, or ambiguous, see, e.g., *International Minerals & Chem. Corp.*, 402 U.S. at 558, a court falls back on common law principles to interpret the statute. See, e.g., *Liparota*, 471 U.S. at 423-28.

140. 258 U.S. 250 (1922).

141. 401 U.S. 601 (1971).

narcotics¹⁴² and possessing unregistered hand grenades,¹⁴³ respectively. Because the materials regulated were physically dangerous,¹⁴⁴ the Supreme Court declined to infer knowledge of illegality as an element and thus concluded that ignorance of the law was no defense.¹⁴⁵ Likewise, in *United States v. International Minerals & Chemical Corp.*,¹⁴⁶ the Court concluded that knowledge of the statute prohibiting shipping acid without proper documentation was not an element of the crime.¹⁴⁷ The *International Minerals* Court reasoned that the maxim that ignorance of the law is no excuse was so ensconced in our criminal law that it trumps ambiguous congressional statements.¹⁴⁸ Moreover, because acid is inherently dangerous, the probability of regulation was so great that knowledge of the law could be presumed.¹⁴⁹

142. *Balint*, 258 U.S. at 251.

143. *Freed*, 401 U.S. at 602-04.

144. In both cases, the Court primarily based its refusal to require knowledge of illegality on the dangerous character of the regulated items. In *Balint*, the Court stated, "Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided." *Balint*, 258 U.S. at 254. In *Freed*, the Court stated, "[Hand grenades] are highly dangerous offensive weapons, no less dangerous than the narcotics involved in [*Balint*]" *Freed*, 401 U.S. at 609. However, the Court also mentioned other factors indicating that knowledge of illegality should not be an element. In *Balint*, the Court referred to the likelihood of the defendant's knowledge and the difficulty of proof. *See Balint*, 258 U.S. at 254. In *Freed*, the Court referred to the likelihood of the defendant's knowledge. *See Freed*, 401 U.S. at 609 (the statute "may well be premised on the theory that one would hardly be surprised to learn that possession of hand grenades is not an innocent act") (footnote omitted).

145. *Balint*, 258 U.S. at 251. The language of *Balint* is ambiguous as to whether the issue was ignorance of law or fact. The indictment charged the defendants with unlawfully selling opium and coca leaves not on the written order form required by statute. *Id.* The Court stated, "The defendants demurred to the indictment on the ground that it failed to charge that they had sold the inhibited drugs knowing them to be such." *Id.* Did the defendants not know that the substances were drugs, or did they not know that the substances were inhibited? At another point, the Court stated that the purpose of the statute was to penalize those who sold the inhibited drug "in ignorance of its character." *Id.* at 254. Does this mean in ignorance of its character as opium, or in ignorance of its character as illegal? *Balint* does not adequately resolve this confusion, but in a later case, the Court clarified the matter by characterizing the issue in *Balint* as a question of ignorance of law. *See Freed*, 401 U.S. at 609.

146. 402 U.S. 558 (1971).

147. *Id.* at 563-64. The statute provided that whoever "knowingly violates any such regulation" would be fined or imprisoned. *Id.* at 559 (quoting 18 U.S.C. § 834(f) (1970)).

148. *Id.* at 563 ("We conclude that the meager legislative history of the 1960 amendments makes unwarranted the conclusion that Congress abandoned the general rule and required knowledge of both the facts and the pertinent law before a criminal conviction could be sustained . . ."). *But cf. id.* at 565-69 (Stewart, J., dissenting) (describing the "explicit legislative history").

149. *Id.* at 565.

The Court's mention of the second basis undermines the first, and indicates the Court's ambivalence toward the maxim that ignorance of the law is no excuse.

That ambivalence culminated in *United States v. Liparota*,¹⁵⁰ in which the Court held that ignorance of the law was a defense to the crime of unauthorized acquisition of food stamps.¹⁵¹ The anti-smurfing statute is more analogous to the statute construed in *Liparota* than those in *Balint* and *Freed* because the items the statutes regulate in the former, structured cash transactions and unauthorized food stamps, pose no physical danger. Many of the bases for the *Liparota* decision also apply to the anti-smurfing statute. The *Liparota* Court did not rely on congressional intent in construing the food stamp statute because it characterized the statutory language as ambiguous and the legislative history as silent.¹⁵² Likewise, the language and legislative history of the anti-smurfing statute both are silent on knowledge of illegality. The *Liparota* Court applied the rule of lenity¹⁵³ and concluded that because the ambit of the statute was unclear, the defendant should get the benefit.¹⁵⁴ Because the coverage of the anti-smurfing statute is unclear in the same way as the statute at issue in *Liparota*, the rule of lenity would have the same impact on the anti-smurfing statute. Thus *Liparota* would likely control the courts' interpretation of the anti-smurfing statute.

150. 471 U.S. 419 (1985).

151. *Id.* at 433-34.

152. *Id.* at 424-26, 430 n.13.

The *Liparota* Court also stated that a background assumption of our criminal law is that criminal offenses require a *mens rea* and Congress's silence or ambiguous statements in the food stamp statute are insufficient to signal a departure from this tenet. *Id.* at 426. This rationale is disingenuous. Surely our criminal law assumes that a *mens rea* is required, but that *mens rea* has traditionally extended only to knowledge of facts, not law. Compare Model Penal Code § 2.04(1)(a) & commentary at 269-71 (1985) (ignorance of fact or law is a defense if it negates the *mens rea* required for the crime) with *id.* § 2.02(9) & commentary at 248 (*mens rea* as to illegality of conduct is generally not required). See also Note, *Ignorance of the Law as an Excuse*, 86 COLUM. L. REV. 1392, 1399-1400 (1986) (discussing whether *Liparota* creates a defense of mistake of criminal law). The *Liparota* Court cited *United States v. Morissette*, 342 U.S. 246 (1952), for the principle that a *mens rea* is required. *Liparota*, 471 U.S. at 425-26. But the *mens rea* required in *Morissette* extended to knowledge of facts (whether the bomb casings were owned or abandoned), not to knowledge of law (whether stealing was a crime). See *Morissette*, 342 U.S. at 276. Thus *Morissette* is no precedent for *Liparota*. Finally, it is ironic that *Liparota* characterized the *mens rea* of knowledge of illegality as a "background assumption of our criminal law," *Liparota*, 471 U.S. at 426, when just 14 years earlier the Court emphasized "the general rule that ignorance of the law is no excuse." *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971).

153. *Liparota*, 471 U.S. at 427.

154. *Id.* (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)).

Yet one of the rationales of *Liparota* has questionable impact on the anti-smurfing statute. The *Liparota* Court held that requiring knowledge of illegality was appropriate in order to avoid criminalizing a broad range of innocent conduct.¹⁵⁵ Applying this reasoning to the anti-smurfing statute, can structuring cash transactions to avoid a reporting law be characterized as innocent conduct?

Structuring cash transactions to avoid reporting might be construed as innocent. One reason is that people may feel that their experience with tax law informs them that structuring cash transactions is acceptable conduct. Although the tax law analogy is defective for reasons discussed above,¹⁵⁶ courts should not expect this level of analysis from the typical bank customer. Another reason that structuring cash transactions might be innocent conduct is that this country historically has protected individual privacy from governmental intrusion. Arranging cash transactions to avoid a report to the government would strike many people as acceptable conduct, or at least noncriminal. At any rate, structuring cash transactions seems as likely to be deemed "innocent" as the conduct in *Liparota*, in which the defendant furtively bought food stamps that were stamped "nontransferable" at a substantial discount.¹⁵⁷

On the other hand, structuring cash transactions to avoid reporting to the government arguably is not innocent. To treat smurfing as innocent requires a narrow definition of innocence, one related only to the defendant's ignorance of this particular statute. Smurfs know of the bank reporting law and purposely evade it. As noted above, the only reason to avoid the reporting law is to hide other crime. Smurfing cannot be isolated from the laundering process, nor can it be isolated from the underlying crime that generates the cash. To define smurfing as innocent conduct demands both that we ignore the impetus for smurfing and adopt a compartmentalized definition of innocence. The law need not be limited to a fictional, counterintuitive definition of innocence. Smurfs are not necessarily innocent, even if they are unaware of the anti-smurfing statute.

The implications of *Liparota* for the anti-smurfing statute are mixed.¹⁵⁸ Other factors are relevant in analyzing whether ignorance

155. *Id.* at 425-26.

156. *See supra* text accompanying notes 129-31 (tax analogy).

157. *Liparota*, 471 U.S. at 434 n.17; *see Note, supra* note 152, at 1415 n.122.

158. One other case is helpful in understanding the Court's approach to ignorance of the law as a defense. In *Lambert v. California*, 355 U.S. 225 (1957), a municipal ordinance required all convicted felons living in Los Angeles to register with the city. *Id.* at 226. The ordinance was silent on knowledge of illegality and the Court mentioned no legislative history. *Id.* at

227-30. The Court held that ignorance of the law was a defense and that due process requires notice that conduct is criminal. *Id.* at 227. Because this ordinance criminalized mere unregistered presence in a city, due process precluded conviction unless the prosecution showed knowledge of illegality or the probability of knowledge. *Id.* at 229-30.

Lambert differs from *Balint*, *Freed*, *International Minerals & Chem. Corp.*, and *Liparota* in two ways. First, the Court based its decision on the due process clause of the Constitution rather than on canons of statutory construction. *Id.* Of course, because the case involved a Los Angeles ordinance rather than a federal statute, the Court had to base its decision on the Constitution in order to take jurisdiction. *Id.* at 266. Even so, the decision reveals the Court's willingness to find that knowledge of illegality is constitutionally mandated; the decision is important for that reason.

Lambert also differs from the four cases discussed above because the ordinance in *Lambert* criminalized pure omission to act while the other statutes depended on some element of positive conduct. In *Balint*, the conduct was selling opium and coca leaves without an IRS form. United States v. *Balint*, 258 U.S. 250, 251 (1922). In *Freed*, the conduct was receiving unregistered hand grenades. United States v. *Freed*, 401 U.S. 601, 603 (1971). In *International Minerals & Chem. Corp.*, the conduct was shipping acid without reflecting it on shipping papers. United States v. *International Minerals & Chem. Corp.*, 402 U.S. 553, 558 (1971). In *Liparota*, the conduct was purchasing food stamps at less than face value. *Liparota*, 471 U.S. at 421-22.

Yet *Balint*, *Freed* and *IMC* arguably can be characterized as omission cases as well. In *Balint*, defendants omitted to use the prescribed IRS form; in *Freed*, defendant omitted to receive registration papers with the grenades; and in *IMC*, defendant omitted to list the acid on the shipping papers. These three cases can thus be characterized as omission cases due to the lack of forms in each case. Even under this view, they still differ from the *Lambert* ordinance. The *Lambert* ordinance proscribed unregistered existence in Los Angeles and therefore included no element of positive conduct at all. As the Supreme Court stated, "Registration laws are common and their range is wide But the [*Lambert*] ordinance is entirely different. Violation of its provisions is unaccompanied by any activity whatever, mere presence in the city being the test" *Lambert*, 355 U.S. at 229.

One other line of cases holding ignorance of law to be a defense deserves mention. Under 31 U.S.C. § 5316 (1982 & Supp. IV 1986), persons importing or exporting \$10,000 in monetary instruments must file a report with the government. All courts confronting the issue have concluded that knowledge of the import/export reporting law is required before the defendant can be convicted of violating it. *See, e.g.*, United States v. *Eisenstein*, 731 F.2d 1540, 1543 (11th Cir. 1984); United States v. *Warren*, 612 F.2d 887, 889 (5th Cir. 1980); United States v. *Dichne*, 612 F.2d 632, 636 (2d Cir. 1979); United States v. *Chen*, 605 F.2d 433, 435-36 (9th Cir. 1979); United States v. *Schnaiderman*, 568 F.2d 1208, 1210-12 (5th Cir. 1978); United States v. *Granada*, 565 F.2d 922, 925-27 (5th Cir. 1978). Some courts reached this conclusion based on the statutory language. *See, e.g.*, *Schnaiderman*, 568 F.2d at 1211. But the statutory language is unclear; even more so than statutory language the Supreme Court has found ambiguous in the past. *See supra* notes 146-49 and accompanying text (statute which requires "knowing violation" is ambiguous). Thus the courts relying on the language fail to explain their decisions adequately. The better opinions recognize that knowledge of illegality should be inferred as an element because the statute criminalizes omission to report otherwise innocent conduct. *See, e.g.*, *Warren*, 612 F.2d at 891; *Dichne*, 612 F.2d at 636.

These cases construing the import/export reporting law have some predictive value for the courts' response to the anti-smurfing statute. The cases holding that knowledge of illegality is an element based on the statutory language are disingenuous and should be discounted. But if courts applied the language rationale to the anti-smurfing statute, they would probably conclude that its language requires knowledge of illegality. That conviction requires both a willful violation and that the defendant act for the purpose of evading the reporting law would support this

of the law should be a defense to the anti-smurfing statute. Inferring knowledge of illegality can be helpful to limit arbitrary enforcement.¹⁵⁹ If a statute is written broadly so that many violate it, the police freely may pursue the most blameworthy violators. Yet wide application allows police so much discretion that they may decide whom to arrest based on factors besides the violation of a statute.¹⁶⁰ If a statute encourages arbitrary enforcement, then ignorance should be a defense. It would ensure that the law apply only to blameworthy people, and would limit police discretion by narrowing the wide net that such a law creates.¹⁶¹

The anti-smurfing statute, however, does not encourage arbitrary enforcement. The statutory language defining the conduct of smurfing (to structure a transaction) is broad, but the *mens rea* requires a purposeful evasion of the bank reporting law.¹⁶² This *mens rea* limits the number of persons who violate the anti-smurfing statute and limits police discretion as well.

Another relevant question in determining whether ignorance should be a defense is the likelihood that the defendant had notice that the conduct was illegal.¹⁶³ If nothing in the situation a statute addresses would alert a person to possible illegality, then ignorance should be a defense.¹⁶⁴ Several factors illuminate the likelihood of notice. If the proscribed conduct is *malum in se* because it involves possible physical

conclusion. In this way, these import/export cases indicate that knowledge of illegality will be an element of the anti-smurfing statute.

The rationale mentioned in some import/export cases, namely that knowledge of illegality is required because the statute criminalizes omission to report otherwise innocent conduct, does not apply to the anti-smurfing statute. Smurfing is not based on an omission to report something, but rather on the positive conduct of structuring a cash transaction. Thus, the omission concept is irrelevant. Moreover, as discussed *supra*, smurfing is not really such innocent conduct that defendants would have no notice that the conduct is criminal. Smurfing is not analogous to the import/export reporting law, and the cases finding knowledge of illegality required for the latter would have little value for predicting whether courts will require such knowledge for smurfing.

159. See Note, *supra* note 152, at 1402-03.

160. *Id.* at 1398.

161. *Id.* at 1408; see also *id.* at 1398 (drawbacks of unbridled police discretion).

162. Of course, this conclusion depends somewhat on what is required to show purpose to evade the reporting law.

163. See *United States v. Freed*, 401 U.S. 601, 609 (1971) (quoted *supra* note 144); see also Note, *supra* note 152, at 1413 (courts should consider, among other factors, the likelihood that defendant had notice of the law).

164. Note, *supra* note 152, at 1413-14. See generally *Lambert v. California*, 355 U.S. 225 (1957) (ignorance of ordinance requiring all convicted felons to register with the city was a valid defense because due process requires notice that the conduct is criminal); *supra* note 153 (discussion of *Lambert v. California*).

harm¹⁶⁵ or has moral overtones,¹⁶⁶ then the likelihood of notice is high.¹⁶⁷ Smurfing involves no physical harm. As for moral overtones, smurfing is not as obviously immoral as fraud or statutory rape, but an effort to avoid the bank reporting law is not morally pure either. Smurfing arises only in the wake of an effort to evade another law. Although smurfing is morally ambiguous, Joe's intuition about criminal law should cause him at least to question its legality.

Other circumstances are relevant to the likelihood of the defendant's notice. One factor is how pervasively the field is regulated.¹⁶⁸ Defendants generally have knowledge of the law if they deal with a highly regulated substance like alcohol.¹⁶⁹ Regulation of cash transactions is not as pervasive. No state laws regulate cash transactions, and the only relevant federal laws are the ones this article describes.¹⁷⁰ Nonetheless, a smurf by definition knows of the bank reporting law, although he may be ignorant of the anti-smurfing law. Because smurfs are aware of at least one law regulating cash transactions, the relatively limited extent of regulation does not indicate that smurfs' knowledge of the anti-smurfing law is less likely.

The specialized nature of smurfing also bears on the likelihood of the defendant's knowledge.¹⁷¹ A person dealing in an unusual substance like dangerous chemicals or toxic waste is more likely familiar with the law than a person dealing in pencils, dental floss, or paperclips.¹⁷² Cash transactions are not specialized activities, although extremely large transactions subdivided into smaller increments are more unusual. Even so, the basic commodity of the anti-smurfing law is cash transactions, which are difficult to put in the specialized category with acid and toxic waste.¹⁷³

Some factors affecting the likelihood of notice are unique to the anti-smurfing statute. Assume Joe sets out to convert \$500,000 in cash

165. One example might be possession of hand grenades. See *Freed*, 401 U.S. at 603.

166. An example might be distribution of misbranded and adulterated drugs. See *United States v. Dotterweich*, 320 U.S. 277 (1943).

167. Note, *supra* note 152, at 1414.

168. See *id.*

169. Cf. *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 76-77 (1970) (defendants in effect consent to government inspection by engaging in pervasively regulated industry).

170. Those laws include three reporting statutes (the bank reporting law, 31 U.S.C. §§ 5311-14 (1982 & Supp. IV 1986), and the two described *infra* text accompanying notes 213-14); the anti-smurfing statute, *id.* § 5324 (Supp. IV 1986); and 18 U.S.C. § 1957 (Supp. IV 1986) (described *infra* text accompanying notes 221-22).

171. Note, *supra* note 152, at 1414.

172. See *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 564-65 (1970).

173. See *id.*

into cashier's checks. Joe learns that the law requires banks to report cash transactions over \$10,000 to the government, and he learns that reports can be avoided by simply keeping each transaction under \$10,000. As a practical matter, Joe should question whether such easy evasion is too good to be true. The obviousness of the loophole should cause Joe to question its legitimacy, and alert him that he is acting in an area of questionable legality. Moreover, the Treasury Department is considering specific measures to provide notice of the law to bank customers.¹⁷⁴ If any of these proposals is implemented, the likelihood that Joe will have knowledge of the law will be high.

The final issue in analyzing whether ignorance of the law should be a defense is whether ignorance of the law is itself blameworthy.¹⁷⁵ If a reasonable person would be on notice of the possibility of criminal liability, then that person should investigate; continuing ignorance of the law is blameworthy in that situation.¹⁷⁶ With regard to the anti-smurfing statute, the blameworthiness of ignorance is fairly clear. Smurfing is morally ambiguous enough that a defendant might not be certain the conduct is criminal. Yet the factors discussed above relating to the likelihood of knowledge indicate that smurfs should be alerted at least to the potential of liability. Once on notice of potential liability, smurfs reasonably may be expected to investigate the law. Smurfs know they are evading the reporting law. They obviously have researched the scope of the law, and know how to avoid it. Because smurfs are sophisticated enough to investigate the bank reporting law, it is reasonable to impose on them a duty to investigate related laws. If smurfs remain ignorant of the anti-smurfing statute, their ignorance is blameworthy and should not be a defense.

In summary, various factors indicate that ignorance of the law should not be a defense to the anti-smurfing statute. Admittedly, dealing in cash transactions is not a specialized activity. Structuring finances to avoid reporting to the government may seem acceptable in view of the tax avoidance analogy and the American tradition of privacy. Nevertheless, an ignorance defense is unnecessary to limit arbitrary enforcement. The likelihood is high that smurfs have notice that their conduct is questionable. Smurfs know of the bank reporting law, so they are aware that laws exist regulating cash transactions.

174. See Proposed Amendment to Bank Secrecy Act Regulations, *supra* note 137.

175. See Note, *supra* note 152, at 1413. This issue is related to the second, namely whether the defendant would have had notice of illegality. See *id.* at 1413-14.

176. *Id.* This criterion echoes the "willful blindness" doctrine courts developed to deal with knowledge as a *mens rea*. See, e.g., *United States v. Jewell*, 532 F.2d 697 (9th Cir.) (en banc), cert. denied, 426 U.S. 951 (1976).

Their effort to evade the bank reporting law also has moral overtones; it only can be deemed innocent by adopting an extremely narrow definition of innocence. Practically, evasion of the bank reporting law is so easy, a smurf should wonder whether it is too good to be true. Once on notice that smurfing may be questionable, continuing ignorance of the law is blameworthy because smurfs have a duty to research the law as they did when they investigated the bank reporting law.

On balance, ignorance of the anti-smurfing law should not be a defense to smurfing. Nonetheless, excessively cautious courts may establish it as a defense.¹⁷⁷ The innocence and immorality of smurfing are ambiguous, and *Liparota*, although a bad decision, indicates that the Supreme Court is receptive to the defense. At a minimum, courts may fall back on the rule of lenity to establish ignorance as a defense. If the courts infer knowledge of illegality as an element of the offense, they should not require actual knowledge. Rather, the government should be able to establish *mens rea* by showing that the defendant should have known the law. This latter option, really a *mens rea* of negligence, is preferable to actual knowledge.¹⁷⁸ The Court has suggested that this alternative is constitutionally acceptable.¹⁷⁹ More

177. If the courts decide to allow ignorance of the law as a defense to smurfing, they would likely do so based on principles of statutory construction rather than constitutional grounds. *Lambert* revealed the Supreme Court's willingness to rely on the due process clause to establish ignorance of the law as a defense. See *supra* note 158; see also *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 564-65 (1970) ("Pencils, dental floss, paper clips may also be regulated. But they may be the type of products which might raise substantial due process questions if Congress did not require . . . '*mens rea*' as to each ingredient of the offense."). Nonetheless, the Court is unlikely to choose that approach for the anti-smurfing statute for several reasons. First, the ordinance in *Lambert* is distinguishable from the anti-smurfing statute because the former criminalized an omission to act while the latter criminalizes only the positive conduct of structuring cash transactions. Because of this difference, the anti-smurfing statute does not entail the same danger of lack of notice the Court found critical in *Lambert*.

Another indication that the Court would rely on statutory construction to establish ignorance of the law as a defense is the Court's use of that approach in *Liparota*. *Liparota* was explicitly decided on statutory rather than constitutional grounds. See *United States v. Liparota*, 471 U.S. 419, 431-32 (1985). As described above, the *Liparota* statute is most analogous to the anti-smurfing statute. See *supra* notes 150-54 and accompanying text. Finally, the Court will likely rely on statutory construction because it avoids constitutional questions whenever possible. Using statutory construction, the Court has alternative grounds to reach the same result. Although commentators have criticized the use of statutory construction to establish ignorance of the law as a defense, see Note, *supra* note 152, at 1401-03, it is the approach the Court likely will take.

178. See Note, *supra* note 152, at 1414-16.

179. In *Lambert v. California*, 355 U.S. 225 (1957), the Court implied that a showing that knowledge of illegality is probable satisfies the Constitution. "Where a person did not know of

importantly, requiring proof of actual knowledge would exceed the legitimate boundaries of ignorance as a defense. As discussed above, Joe has good reason to be on notice that smurfing is questionable, thus he should have a duty to investigate the law. In this context, Joe's lack of actual knowledge is due only to his negligence.¹⁸⁰ Joe should not be allowed to assert his own negligence as a defense. And, as a practical matter, requiring the government to prove actual knowledge of the law would make prosecution for smurfing impossible in most cases.¹⁸¹

The *mens rea* of negligence is a compromise between the alternatives that knowledge of illegality is irrelevant and that knowledge of illegality must be actual. Once the Treasury Department implements measures ensuring that bank customers are informed of the anti-smurfing law, the combination of these measures with the "should have known" standard for knowledge of illegality will eliminate the defense of ignorance of the law.

C. Constitutionality

1. The Fourth Amendment

In *California Bankers Association v. Shultz*,¹⁸² plaintiff banks and depositors challenged the constitutionality of the bank reporting law under the fourth amendment.¹⁸³ The Supreme Court held that the statute did not violate the bank's fourth amendment rights, but the Court did not decide the issue as to depositors because it concluded that the depositors lacked standing to challenge the statute.¹⁸⁴ In a concurring opinion, Justice Powell expressed the view that the report-

the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process." *Id.* at 229-30. Whether the Constitution would likewise be satisfied by a showing that the defendant should have known the law is a slightly different question. If the Constitution allows punishment of a person who "probably knew," it should as well allow punishment of a person who "should have known."

180. *Cf. United States v. Jewell*, 532 F.2d 697 (9th Cir.) (en banc) (willful blindness), *cert. denied*, 426 U.S. 951 (1976). *See generally* Note, *supra* note 152, at 1415-16 (discussing why a purely subjective standard is undesirable).

181. *See Proposed Amendment to Bank Secrecy Regulations, supra* note 137, at 7948 ("[The] problem of establishing knowledge is presenting difficulties for investigators and prosecutors and is threatening to undermine Treasury's ability to assure compliance with [the anti-smurfing statute]."). *See generally* Note, *supra* note 152, at 1415-16 (describing reasons *mens rea* should not be limited to actual knowledge).

182. 416 U.S. 21 (1974).

183. *Id.* at 59.

184. *Id.* at 67-69.

ing law was constitutional, but stated that “[a] significant extension of the regulations’ reporting requirements . . . would pose substantial and difficult constitutional questions At some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy.”¹⁸⁵ Is the anti-smurfing statute the “significant extension” to which Justice Powell referred?

Under current law, the anti-smurfing statute does not violate the fourth amendment. In *United States v. Miller*,¹⁸⁶ the Supreme Court held that a bank customer suffers no search or seizure when bank records are turned over to the government. The statute breaches no legitimate expectations of privacy because the customer voluntarily conveys the information to the bank and assumes the risk that the bank will turn the information over to the government. Relying heavily on *Miller*, lower courts all have concluded that the bank reporting law does not violate bank customers’ fourth amendment rights.¹⁸⁷ Although the Court’s rationale in *Miller* is disingenuous and deserves reconsideration,¹⁸⁸ this article is not the place. Given the current state of fourth amendment jurisprudence, the anti-smurfing statute does not extend the reporting law so dramatically as to conflict with the fourth amendment.¹⁸⁹

185. *Id.* at 78-79 (Powell, J., concurring).

186. 425 U.S. 435 (1976).

187. See *United States v. Kaatz*, 705 F.2d 1237, 1242 (10th Cir. 1983); *United States v. Richter*, 610 F. Supp. 480, 492-93 (N.D. Ill. 1985), *aff’d sub nom. United States v. Mangovski*, 785 F.2d 312 (7th Cir. 1986), *cert. denied*, 479 U.S. 855 (1988); *United States v. Sanchez Vazquez*, 585 F. Supp. 990, 995 (N.D. Ga. 1984).

188. See generally W. LAFAVE & J. ISRAEL, *CRIMINAL PROCEDURE* 107 (1985) (*Miller* is “highly questionable” since customer expects bank documents will remain private); C. WHITEBREAD & C. SLOBOGIN, *CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS* 113-14 (2d ed. 1986) (the “assumption of risk” rationale of *Miller* is “particularly questionable” in light of necessity of using banking systems).

189. Smurfing rarely will occur in conjunction with a search or seizure. If a customer successfully structures transactions so that no report is filed, no search is made because no expectation of privacy (reasonable or otherwise) was invaded; the government and the customer made no contact. See *Richter*, 610 F. Supp. at 492. (“If we assume the truth of the facts in the indictment, we find that the defendants managed to deposit their money without triggering the Act’s reporting requirements. Thus, no search or seizure actually happened in this case. The defendants successfully avoided a search and are being prosecuted for doing so.”) *Id.* If, on the other hand, the customer does not structure transactions and the bank files a report, government contact is present and arguably an expectation of privacy is breached, but there is no crime because the customer did not structure transactions. Thus, while arguably there was a search, there will be no prosecution. In that situation, the existence of a search is wholly without criminal consequences. The final fact pattern involves a defendant who tries to structure trans-

2. The Privilege Against Self-Incrimination

Assume that Joe has \$450,000 in twenty-dollar bills he wants to send secretly and safely to an off-shore tax haven. Prior to adoption of the anti-smurfing statute, Joe had two options. He could get one cashier's check and let the bank report the transaction or he could get fifty \$9000 cashier's checks at different banks and avoid a report. The anti-smurfing statute eliminates the latter option by defining it as a crime.¹⁹⁰ Arguably, the anti-smurfing statute creates a dilemma and subtly coerces Joe into choosing the option the government prefers — self-reporting his suspicious activities. The Supreme Court has acknowledged that an odious choice may constitute compulsion for purposes of the privilege against self-incrimination.¹⁹¹

Even assuming a compelling effect, however, the anti-smurfing statute does not violate the privilege against self-incrimination because the courts have concluded that reports filed under the bank reporting law are not incriminating. The Supreme Court has yet to rule on this issue,¹⁹² but the lower courts have found no incrimination because the reporting requirement is not targeted at an inherently suspect group,¹⁹³ and because no direct nexus exists between the disclosure and potential criminal activity.¹⁹⁴ This definition of incrimination is extremely nar-

actions to evade the reporting law but fails, so the bank files a report. In this situation, the defendant has committed the crime of attempted structuring. The bank files a report, so arguably there is a search. This last pattern is the only one likely to include both a crime and a search, so in only limited circumstances would the question even arise.

190. See 31 U.S.C. § 5324 (Supp. IV 1986); cf. *United States v. San Juan*, 405 F. Supp. 686, 694 (D. Vt. 1975) (one factor lessening the danger of self-incrimination in the import/export law is the option of avoiding reporting requirements by arranging to carry less than \$5,000 at each border crossing).

191. See *South Dakota v. Neville*, 459 U.S. 553, 563-65 (1983).

192. In *California Bankers' Ass'n v. Schultz*, 416 U.S. 21, 75 (1975), the Court declined to rule because the plaintiff depositors' claims were premature.

193. *United States v. Sanchez Vazquez*, 585 F. Supp. 990, 996 (N.D. Ga. 1984); cf. *United States v. Dichne*, 612 F.2d 632, 639-40 (2d Cir. 1979) (import/export reporting law does not target inherently suspect group); *San Juan*, 405 F. Supp. at 692 (same). In these cases, the courts explained that the import/export law applied to all foreign travelers rather than a particular suspect group. In contrast, laws which have been determined to target suspect groups include laws applying to Communists, marijuana dealers, and gamblers. See *Leary v. United States*, 395 U.S. 6 (1969); *Grosso v. United States*, 390 U.S. 62 (1968); *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70 (1965).

194. *Sanchez Vazquez*, 585 F. Supp. at 996; cf. *Dichne*, 612 F.2d at 640 (import/export reporting law has no direct link to related criminal activity); *United States v. Richter*, 610 F. Supp. 480, 491-92 (N.D. Ill. 1985) (no standing to assert violation of privilege against self-incrimination), *aff'd sub nom.* *United States v. Mangovski*, 785 F.2d 312 (7th Cir. 1986), *cert. denied*, 479 U.S. 855 (1988); *San Juan*, 405 F. Supp. at 693 (same).

row. It contradicts Congress's express statement¹⁹⁵ and implicit assumptions¹⁹⁶ about large cash transactions. Filing a report brings Joe to the government's attention as a target for criminal investigation, and necessarily exposes him to an increased risk of prosecution.¹⁹⁷ A critique of the courts' definition of incrimination is beyond the scope of this article and is available elsewhere.¹⁹⁸ Given the current law, however, the anti-smurfing statute does not violate the privilege against self-incrimination regardless of its compelling effect because the information in the reports has been deemed not incriminating.¹⁹⁹

3. Due Process

Clause (3) defines a new crime of structuring transactions to evade the reporting requirement. One might challenge clause (3) as void for vagueness²⁰⁰ based on the verb describing the actual criminal act, "structure." Such a challenge seems initially strong because the term is not statutorily defined, no popular definition of the term exists, and Congress provided no explicit statement of its intent regarding the term.²⁰¹ Nonetheless, the Senate Report includes an example of structuring, and the drafters' congressional testimony reveals what they meant by the term.²⁰² Thus the legislative history provides some meaning to the word "structure." Even more fatal to a vagueness challenge is the fact that "structure" developed a common law meaning before

195. See *supra* notes 33-34 and accompanying text.

196. See *Briefing on the 1970 Currency and Foreign Transactions Reporting Act: Hearing Before the House Comm. on Banking, Finance and Urban Affairs*, 99th Cong., 1st Sess. 51-52 (1985) (comments of Congressman McKinney) ("What legitimate business in the United States of America today transfers money in cash?").

197. See *United States v. San Juan*, 405 F. Supp. 686, 693 (D. Vt. 1975). *San Juan* dealt with the import/export reporting law, but the impact of filing a report with the government is the same for the import/export law and the bank reporting law.

198. See Comment, "*Hollow Ritual[s]*": *The Fifth Amendment and Self Reporting Schemes*, 34 UCLA L. REV. 467 (1986). See generally C. WHITEBREAD & C. SLOBOGIN, *supra* note 188, at 340-43.

199. This conclusion assumes that it is not just the information in the reports that is arguably incriminating, but also the identification as one to whom the law applies. Thus, the self-incrimination claim should not depend on its assertion on the report form itself. See Comment, *supra* note 198, at 479 n.54. See generally *id.* at 478-80 (comparing cases involving registration forms for Communist Party membership and for income tax on income gained illegally).

200. See *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *United States v. Harriss*, 347 U.S. 612, 617 (1954); *Winters v. New York*, 333 U.S. 507, 518 (1948).

201. See *supra* text accompanying notes 124-25.

202. See *supra* notes 125-26 (quoting legislative history and congressional testimony regarding the meaning of "structuring").

the anti-smurfing statute was born.²⁰³ When a federal statute employs a common law term without defining it, the term retains its common law meaning.²⁰⁴ Thus one may rely on all the cases concerning "structuring" decided under the basic reporting law when interpreting the anti-smurfing statute. These cases clearly indicate what conduct is criminal.²⁰⁵ Considered together, these sources provide a sufficiently clear definition of "structure" to satisfy due process.²⁰⁶

In summary, the anti-smurfing statute should pass constitutional muster. This result may be attributable in part to dubious definitions of "search" and "incrimination." Assuming no change in these definitions, the anti-smurfing statute plainly is constitutional.

D. *The Unit of Prosecution*

Until now the analysis has focused on the point at which Joe's behavior triggers the anti-smurfing statute. A different question concerns the point at which Joe goes from violating the statute once to twice or more. What is the unit of prosecution for the anti-smurfing statute? Under clauses (1) and (2), which prohibit causing or attempting to cause a bank to fail to file or to file a faulty report, the unit of prosecution is clear. Each time the bank files a bad report or fails to file a required report constitutes one unit of prosecution.²⁰⁷ Likewise, each time a customer attempts to cause such a result is one unit of prosecution.²⁰⁸

203. See *supra* note 128.

204. *United States v. Turley*, 352 U.S. 407, 411 (1957).

205. See generally *Connally v. General Constr. Co.*, 269 U.S. 385, 391-92 (1926) (statute is sufficiently certain if it "employs words or phrases having . . . a well-settled common law meaning").

206. The *mens rea* element bolsters, in two ways, the conclusion that the anti-smurfing statute is not void for vagueness. First, the anti-smurfing statute requires that the defendant act "for the purpose of evading the reporting requirement[.]" The specificity of this *mens rea* helps offset an arguably obscure *actus reus*. See *Screws v. United States*, 325 U.S. 91, 101-02 (1945). Second, knowledge of illegality may be inferred as an element of smurfing. See *supra* text accompanying notes 135-81. This additional *mens rea* element will similarly contribute to dispel any vagueness. See *Boyce Motor Lines v. United States*, 342 U.S. 337, 339 (1952) (regulation requiring drivers of vehicles transporting explosives or flammable liquids to avoid, "so far as practicable, and, where feasible" driving through congested thoroughfares, tunnels, etc. was not invalid on the ground of vagueness where statute punished only those who knowingly violated the regulation).

207. The point at which a bank files an incomplete or false report is obvious. As for defining when a bank has failed to file a report that is due, the regulations establish when transactions must be aggregated and reports must be filed. See *supra* text accompanying notes 74-98.

208. Defining the conduct constituting an attempt is the subject of a voluminous common law that can be used here to define when one or more attempts have occurred.

Under clause (3), which deals with structuring a transaction, the unit of prosecution is more complex. Assume that each week Joe receives about \$90,000 in small bills to launder. Over the course of the week, he goes to ten banks and buys a \$9000 cashier's check at each. This might be defined as one unit of smurfing because Joe structured one \$90,000 transaction. At the other extreme, Joe's conduct might constitute ten units of smurfing, because each time he entered a bank, Joe structured a transaction. Or this might be defined as five units of smurfing, because assuming that for each unit of prosecution the aggregate amount of cash must exceed \$10,000, the transactions can be collapsed into five units of \$18,000 as Joe goes from bank to bank.

Joe's conduct is best defined as five units of smurfing. Defining Joe's conduct as ten units of smurfing is unwise because each unit of prosecution requires over \$10,000 in order for the government to prove that Joe intended to evade the reporting requirement.²⁰⁹ Defining Joe's conduct as one unit of smurfing is equally unwise because it relies arbitrarily on a one-week period. Using a time period is problematic because the usual situation will involve converting a continuing cash flow; thus any time period selected will be arbitrary. More importantly, the number of units of prosecution should relate to the amount of money smurfed rather than an arbitrarily selected time period. Focusing on the amount of money smurfed ensures that liability is commensurate with harm and culpability. Focusing on the amount of money smurfed also renders liability consistent from case-to-case.

Courts interpreting other federal crimes have tended to find multiple units of prosecution.²¹⁰ Using \$10,000 to define the unit of prosecu-

209. The anti-smurfing statute does not by its terms require the presence of \$10,000 for each unit of prosecution. See 31 U.S.C. § 5324 (Supp. IV 1986). As a practical matter, however, if less than \$10,000 is involved, no report is due, and the government will not have the chance to prove that the defendants acted for the purpose of evading reports. See *supra* note 125 (splitting up \$2,000 is not smurfing). In the example with Joe, assuming the transactions were at different banks, neither bank is under a duty to aggregate, so no reports were due. Joe might still be liable for structuring, but interpreting the ten transactions individually as ten separate crimes of structuring is inconsistent with the purpose of evasion. Only if the transactions are reconstructed and examined as a whole can the government establish that the defendants acted with the purpose of evading reports. The government often will find this impossible.

210. See, e.g., *United States v. Blankenship*, 746 F.2d 233, 236 (5th Cir. 1984) (interpreting mail fraud statute unit of prosecution to be each use of mails although only one fraudulent scheme was involved); *United States v. Tolub*, 309 F.2d 286, 289 (2d Cir. 1962) (interpreting Hobbs Act unit of prosecution to be each payment in an extortion scheme even if payments occur during continuance of the same underlying conditions); *United States v. Teemer*, 214 F. Supp. 952, 958 (D.W. Va. 1963) (interpreting Travel Act unit of prosecution to be each use of

tion furnishes a reasonably bright line. The \$10,000 line is certain and therefore predictable; it avoids extensive litigation over the definition of the unit of prosecution.

E. *Anti-Smurfing Applied*

Investigation of smurfing will be difficult. If a smurf structures transactions so that no reports are filed, the government will have to discover the conduct in some other way. Most discoveries will not result from an investigation targeting smurfing. Accidental discoveries of smurfing surely will occur, but probably not routinely.

Prosecution of smurfing also appears difficult because the government must prove that the defendant structured transactions for the purpose of evading the reporting requirement. Forcing the government to prove motive is onerous.²¹¹ As a practical matter, however, this burden may not be that difficult. Once the government introduces evidence that the defendant engaged in a series of cash transactions, each of which was at or below \$10,000, the jury will likely conclude that the defendant intended to avoid reporting. The defendant then must offer some other explanation for his transactions, and a convincing explanation for multiple cash transactions may be difficult to compose.

Regardless of its practical operation, the anti-smurfing statute has a symbolic aspect as well. Societal concern over structuring may be assuaged by this congressional response. Moreover, this particular type of response is significant in that Congress created an entirely new crime rather than amending existing statutes and regulations. The new crime signals a legislative commitment to eradicate money laundering. From this perspective, the statute is important symbolically, its efficacy notwithstanding.

IV. THE RELATIONSHIP OF THE ANTI-SMURFING STATUTE TO OTHER FEDERAL CRIMES

The federal criminal law lacks an organizing principle. It is not a code, but rather an assortment of unrelated crimes accumulated over the years. One result of this approach is that the interaction between

an interstate facility and each act of interstate travel although only one underlying scheme) (cited with approval in *United States v. Polizzi*, 500 F.2d 856, 898 (9th Cir. 1974)). See generally Thomas, *A Unified Theory of Multiple Punishment*, 47 U. PITT. L. REV. 1, 12-25 (1985).

211. The anti-smurfing statute is unusual in requiring the government to prove the defendant's motive. Motive is rarely an element of crimes; generally the government must prove that defendants intended to do the prohibited act but not why they did it.

crimes is often unanticipated and complex. This section explores relationships between the anti-smurfing statute and other federal crimes.

A. *A Comprehensive Reporting Scheme*

The bank reporting statute that the anti-smurfing statute aids and abets is part of a comprehensive scheme of reporting laws that captures all large cash transactions. The bank reporting statute is only one of three reporting statutes.²¹² The others are 31 U.S.C. § 5316, which requires each person to report the import or export of more than \$10,000 in monetary instruments at one time,²¹³ and 26 U.S.C. § 6050I, which requires any person who receives more than \$10,000 in cash in the course of trade or business in one transaction or in related transactions to file a return.²¹⁴ Collectively, these statutes cover all large cash transactions and require that the government be informed of them.²¹⁵ Thus, the government receives a report if Joe takes more than \$10,000 cash and conducts any financial transaction, sends the cash out of the country, or invests it in diamonds.²¹⁶ These laws were the government's first sortie against money laundering.²¹⁷

B. *The Ripple Effect*

Although federal criminal laws largely are unrelated, some crimes and sanctions depend on a combination of predicate offenses. There-

212. In addition, two new statutes authorize the Secretary to adopt expanded reporting requirements. *See supra* note 104.

213. 31 U.S.C. § 5316 (1982 & Supp. IV 1986) provides:

[A] person . . . shall file a report . . . when the person . . . knowingly . . . (1) transports [or] is about to transport . . . monetary instruments of more than \$10,000 at one time . . . from a place in the United States to or through a place outside the United States; or . . . to a place in the United States from or through a place outside the United States; or (2) receives monetary instruments of more than \$10,000 at one time transported into the United States from or through a place outside the United States.

214. 26 U.S.C. § 6050I (Supp. IV 1986) provides: "Any person . . . who is engaged in a trade or business, and . . . who, in the course of such trade or business, receives more than \$10,000 in cash in 1 transaction (or [two] or more related transactions), shall make [a] return . . . with respect to such transaction . . ."

215. The three statutes operate today as a comprehensive scheme but Congress did not enact them as one. The bank reporting law and the import/export report law were enacted in 1970 and § 6050I was added to the Internal Revenue Code in 1984. *See* Pub. L. No. 98-369, § 146(a), 98 Stat. 685 (1984) (enacting § 6050I); Pub. L. No. 91-508, §§ 221-23, 231, 84 Stat. 1114 (1970) (codified as amended at 31 U.S.C. § 5316 (1982 & Supp. IV 1986)).

216. Reinvesting the cash in a criminal enterprise may violate RICO. *See* 18 U.S.C. § 1962 (1982).

217. Today this indirect approach is joined by a direct approach in the form of statutes defining money laundering *per se* as a crime. *See id.* §§ 1956-57 (Supp. IV 1986).

fore, the birth of a new federal crime has a ripple effect. The anti-smurfing statute has made ripples by providing for enhanced sanctions when it is violated in combination with any other law of the United States.²¹⁸ Thus, a person convicted of structuring and any other federal crime is subject to more severe sanctions than a person convicted only of structuring. Congress also has included the anti-smurfing statute as a predicate offense for two other crimes, RICO²¹⁹ and the Travel Act.²²⁰ A person chargeable under the anti-smurfing statute also is more likely liable for RICO and Travel Act violations.

In contrast, one criminal provision declines to rely on the anti-smurfing statute as a predicate offense. Under 18 U.S.C. § 1957, conducting a monetary transaction in property derived from specified unlawful activity is defined as criminal.²²¹ Violations of the anti-smurfing statute and the bank reporting law do not constitute "specified unlawful activity,"²²² so the anti-smurfing statute does not contribute to a violation of section 1957.

C. *Double Jeopardy and the Anti-Smurfing Statute*

In some situations, the double jeopardy clause prohibits imposition of multiple punishment in a single trial. The relationship between the anti-smurfing statute and its predecessors must be defined to assure a coherent approach when the double jeopardy issues reach the courts.

1. The Bank Reporting Statute

The bank reporting law overlaps with the anti-smurfing statute so that often, both statutes define the same conduct as criminal. Clause (1) of the anti-smurfing statute prohibits causing a bank to fail to file a report. As noted above, some circuits hold customers liable for failure to file under the bank reporting law as accomplices of the banks, while others hold that customers are not liable as accomplices.²²³ Clause (2) of the anti-smurfing statute prohibits causing a bank to file

218. See 31 U.S.C. § 5322(b) (Supp. IV 1986), which states, in pertinent part:

A person willfully violating this subchapter or a regulation prescribed under this subchapter . . . while violating another law of the United States or as part of a pattern of any illegal activity involving more than \$100,000 in a 12-month period, shall be fined not more than \$500,000, imprisoned for not more than 10 years, or both.

219. 18 U.S.C. §§ 1961-68 (1982 & Supp. IV 1986).

220. *Id.* § 1952 (1982 & Supp. IV 1986).

221. 18 U.S.C.A. § 1957 (West Supp. 1989).

222. See 18 U.S.C. § 1956(c)(7)(A) (Supp. IV 1986).

223. See *supra* text accompanying notes 42-48.

a report with an omission or misstatement of fact. The bank reporting statute covers the same conduct in that it prohibits any false, fictitious, or fraudulent statement in a report.²²⁴ Unlike the failure to file situation, courts have never hesitated to apply this part of the reporting law to customers.²²⁵ Clause (3) of the anti-smurfing statute prohibits structuring transactions. Some circuits interpret the bank reporting law, coupled with the general accomplice liability statute, to reach some types of structuring on the theory that the customer caused the bank to fail to file.²²⁶ Jurisdictions that have adopted this theory of the bank reporting law only apply it to transactions structured within certain limits.²²⁷ Moreover, the bank reporting statute never directly prohibits structuring transactions. Rather, it only prohibits a particular result — failure to file. Some overlap exists between clause (3) and the bank reporting law, but it is minimal.

In the circuits in which customers are liable as accomplices under the bank reporting law, are they now also liable under the anti-smurfing statute? If the same conduct violates two statutes, then double jeopardy bars multiple punishment unless Congress has authorized multiple punishment.²²⁸ The existence of statutory authorization depends on congressional intent. If Congress intended that there be only one offense, then the double jeopardy clause bars multiple punishment. But if Congress intended to create multiple offenses, then statutory authorization exists and multiple punishment is allowed.²²⁹

The relevant inquiry is whether Congress intended for customers to be liable under both the bank reporting law and the anti-smurfing statute. With regard to the crimes of causing failure to file and structuring transactions under clauses (1) and (3) of the anti-smurfing stat-

224. See 31 C.F.R. § 103.49(d) (1988) (quoted *supra* note 111).

225. See, e.g., *United States v. Puerto*, 730 F.2d 627, 629 & n.2 (11th Cir.) (false information in reports would violate reporting law) & 631 (conspiracy to submit false reports), *cert. denied*, 469 U.S. 847 (1984).

226. See *supra* notes 44-45 and accompanying text.

227. See *supra* notes 62-64 and accompanying text.

228. See *Garrett v. United States*, 471 U.S. 773, 778 (1985).

229. See *id.*; cf. Thomas, *The Prohibition of Successive Prosecutions for the Same Offense: In Search of a Definition*, 71 IOWA L. REV. 323, 340-42 (1986) (concluding that a broader double jeopardy protection exists against successive trials than against multiple punishments in a single trial). According to Professor Thomas, legislative authorization of multiple punishments does not answer whether the double jeopardy clause permits successive trials. See *id.* at 370-75. The successive trial test that Professor Thomas develops is predicated on the underlying conduct rather than the *Blockburger* analysis of the statutory elements. See *id.* at 382-88 (relying principally on *Illinois v. Vitale*, 447 U.S. 410 (1980)). If this position is correct, my conclusion that multiple punishment is permissible should be limited to the context of a single trial.

ute, Congress did not explicitly state its intent. However, the legislative history of the anti-smurfing statute indicates that the purpose of the statute was not to impose multiple punishment on customers, but rather to change the law in some circuits to ensure that customers were liable.²³⁰ The anti-smurfing statute ensures customer liability and makes the law consistent nationwide. Nothing indicates that Congress intended to establish two separate offenses to increase punishment.

Clause (2) of the anti-smurfing statute is slightly different. The legislative history reveals that the main problems with the reporting law were customers causing failure to file and structuring transactions.²³¹ Congress addressed these two problems when it drafted clauses (1) and (3) of the anti-smurfing statute. The legislative history mentions liability for incomplete or false statements under clause (2) only once; a government witness explained that clause (2) of the anti-smurfing statute is a "restatement" of liability for false statements under the bank reporting statute and 18 U.S.C. § 1001.²³² The word

230. See *Hearing Before the Senate Comm. on Banking, Housing and Urban Affairs*, *supra* note 5, at 22, 30 (anti-smurfing law meant to cure inadequacies in current law in three federal circuits); *id.* at 48-49 (proposed anti-smurfing law corrects the problems revealed in case law); *id.* at 67 (anti-smurfing statute should close money laundering "loophole"; anti-smurfing statute "needed as prosecutions . . . continue to suffer from adverse case law"; anti-smurfing statute "should help clarify the state of the law and permit continued vigorous prosecution"); *id.* at 92 (anti-smurfing statute will cure confusion caused by case law and preclude unjustified dismissals); *id.* at 95 (anti-smurfing statute is designed to cure shortcomings in Bank Secrecy Act); *id.* at 134-36 (case law has created two major gaps in reporting law that anti-smurfing law should overcome); *id.* at 226 (anti-smurfing law is designed to overcome several recent court decisions); *Hearings Before the House Comm. on Banking, Finance and Urban Affairs*, *supra* note 5, at 792 (anti-smurfing statute is aimed at overcoming problems of structured transactions caused by recent cases); *id.* at 846 (describing recent case law as a severe blow to government efforts to use reporting requirements).

231. See *Hearing Before the Senate Comm. on Banking, Housing and Urban Affairs*, *supra* note 5, at 22, 30 (testimony of Francis A. Keating II, Assistant Secretary for Enforcement, Department of the Treasury) ("The [anti-smurfing law] would make a person who structures transactions to avoid the currency reporting requirements, or who causes a financial institution not to file a required report, subject to the criminal and civil sanctions of the Bank Secrecy Act."). Note that false statements are not mentioned, only failure to file and structuring. See also *id.* at 48-49 (description of anti-smurfing statute as it applies to structuring); *id.* at 55 (description of anti-smurfing law as it applies to causing failure to file); *id.* at 67 ("The [anti-smurfing statute] is needed as prosecutions based upon 'structured' transactions and the 'causing' of financial institutions to fail to file currency transaction reports continue to suffer from adverse case law.") (prepared statement of Deputy Assistant Attorney General James Knapp). Again, false statements are not mentioned, only failure to file and structuring.

232. "This new language is, in part, a restatement of the law of causation found in 18 U.S.C. § 2(b) and 31 U.S.C. § 5313, and the law pertaining to the intentional making of false

“restatement” is ambiguous, but it does not necessarily imply additional liability. Regardless of the meaning of “restatement,” references throughout the legislative history indicate that the purpose of the anti-smurfing statute was to cure problems with the reporting law by closing its loopholes.²³³

All evidence indicates Congress intended the anti-smurfing statute to tighten the reporting law rather than to define additional crimes to increase punishment. This consistent evidence of congressional intent makes it unnecessary to resort to the *Blockburger*²³⁴ test of statutory construction.²³⁵ Because Congress did not intend to impose multiple punishment, statutory authorization for multiple punishment is missing; punishment under both laws would therefore violate the double jeopardy clause.

2. Section 1001

Section 1001 deems it criminal when, within the jurisdiction of any government agency, a person intentionally conceals a material fact by trick, scheme, or device; makes any false, fictitious, or fraudulent statement; or makes or uses any false writing or document knowing

statements . . . codified at 18 U.S.C. § 1001.” *Hearing Before the Senate Comm. on Banking, Housing and Urban Affairs, supra* note 5, at 67 (prepared statement of Deputy Assistant Attorney General James Knapp).

233. *See supra* note 230; *see also* *Hearing Before the Senate Comm. on Banking, Housing and Urban Affairs, supra* note 5, at 62 (anti-smurfing statute as “closing the loopholes” created by case law); *id.* at 95 (anti-smurfing statute designed to “cure” shortcomings in Bank Secrecy Act).

234. *United States v. Blockburger*, 284 U.S. 299 (1932). For a discussion of the *Blockburger* text, *see infra* text accompanying notes 250-58.

235. *See* *Garrett v. United States*, 471 U.S. 773, 780-81 (1985); *Albernaz v. United States*, 450 U.S. 333, 343-44 (1981); *Simpson v. United States*, 435 U.S. 6, 11-16 (1977). At any rate, the reporting law and clause (2) of the anti-smurfing statute would likely fail the *Blockburger* test and would therefore be deemed the “same” offense. As *Woodward* makes clear, the *Blockburger* test is not applied to the facts of the case but to the words of the statute. *See* *United States v. Woodward*, 469 U.S. 106, 108 (1985). Thus a more accurate phrasing of the *Blockburger* test might be that each crime *may be established* by proof of a fact the other does not require. Applied to the reporting law and clause (2) of the anti-smurfing statute, the anti-smurfing statute does not necessarily prove a reporting violation because one can violate the anti-smurfing statute by merely attempting to file a false statement. Conversely, though, it is difficult to imagine how one could prove a “false, fictitious or fraudulent statement . . . in [a] report” under the reporting law without necessarily proving a false report under clause (2) of the anti-smurfing statute. Because violation of the reporting law could never be proved without establishing a violation of clause (2), the reporting law does not require proof of a fact the anti-smurfing law does not. Thus, these two offenses may be deemed the same offense under *Blockburger*.

it has a false, fictitious, or fraudulent statement.²³⁶ This statute overlaps with the anti-smurfing statute in several ways.

Clause (1) of the anti-smurfing statute prohibits causing a bank to fail to file a currency transaction report. The circuits are split on whether section 1001, coupled with the general accomplice liability statute, reaches this conduct.²³⁷ In the circuits that hold section 1001 applicable, one who causes a bank to fail to report is liable both under section 1001 and clause (1) of the anti-smurfing statute.²³⁸

Clause (2) of the anti-smurfing statute makes it a crime to cause a bank to file a report with a material omission or misstatement. Unlike the failure to file situation in which some courts held that section 1001 did not apply, the applicability of section 1001 to incomplete or false filings always was clear.²³⁹ Causing a false filing necessarily would violate section 1001,²⁴⁰ and causing an incomplete filing would violate section 1001 if the defendant used a trick, scheme, or device.²⁴¹

Clause (3) of the anti-smurfing statute prohibits structuring transactions. Clause (3) and section 1001 overlap only slightly. Some courts hold that section 1001 reaches conduct also covered under clause (3), but only when the customer causes the bank to fail to report.²⁴² In any other situation, section 1001 does not reach the conduct and does not overlap the anti-smurfing statute.

In circuits holding section 1001 applicable, would a person be liable both under section 1001 and the anti-smurfing statute? As noted above, the double jeopardy clause prohibits multiple punishment in a single trial unless Congress intended such a result.²⁴³ As for causing failure to file, some evidence supports the conclusion that Congress did not intend the anti-smurfing statute and section 1001 to impose multiple punishment. Section 1001 was in place when Congress enacted the

236. See 18 U.S.C. § 1001 (1982).

237. Compare *United States v. Nersesian*, 824 F.2d 1294, 1312 (2d Cir.) (defendant could have been held liable under § 1001 had he been charged), *cert. denied*, 108 S. Ct. 357 (1987) and *United States v. Tobon-Builes*, 706 F.2d 1092 (11th Cir. 1983) (defendant liable under § 1001) with *United States v. Larson*, 796 F.2d 244 (8th Cir. 1986) (defendant not liable under § 1001); *United States v. Varbel*, 780 F.2d 758 (9th Cir. 1986) (same) and *United States v. Anzalone*, 766 F.2d 676 (1st Cir. 1985) (same).

238. See *Nersesian*, 824 F.2d at 1311-12; *Tobon-Builes*, 706 F.2d at 1096-1101.

239. See *supra* note 114.

240. *Id.*

241. See *supra* note 113.

242. See *supra* note 238.

243. See *supra* notes 228-29 and accompanying text.

anti-smurfing statute,²⁴⁴ and courts were split over the former's applicability to failure to file situations. The legislative history of the anti-smurfing statute indicates that the purpose of the statute was not to add another layer of liability, but to ensure customer liability in the circuits holding other laws, including section 1001, inapplicable.²⁴⁵

But one also can argue that Congress did intend to impose multiple punishment under the anti-smurfing statute and section 1001. When Congress passed the original reporting laws in 1970, it also passed a statute describing one aspect of the relationship between section 1001 and bank reports.²⁴⁶ This statute indicated that Congress contemplated that section 1001 would apply to bank filings and failures to file.²⁴⁷ Although Congress later repealed this statute, the repeal only strengthens this argument, because Congress explained that the statute was unnecessary due to the obvious applicability of section 1001.²⁴⁸ Therefore, Congress recognized this impact of section 1001 and intended it to apply to filing or failing to file reports. Congress surely knew that clause (1) of the anti-smurfing statute would impose multiple punishment in the circuits holding section 1001 applicable.²⁴⁹

Because of the conflicting evidence of congressional intent in the legislative history, the *Blockburger* test²⁵⁰ defines congressional in-

244. Congress adopted the predecessor to 18 U.S.C. § 1001 in 1918. Act of Oct. 23, 1918, ch. 194, 40 Stat. 1015. See generally *United States v. Yermian*, 468 U.S. 63, 70-74 (1984) (the 1918 Act was first federal criminal statute prohibiting making a false statement).

245. See *supra* note 230; see also *Hearing Before the Senate Comm. on Banking, Housing and Urban Affairs*, *supra* note 5, at 67 ("This restatement of the applicability of [§ 1001] to the Bank Secrecy Act was believed necessary following the decision of the First Circuit in *Anzalone . . .*") (prepared statement of Deputy Assistant Attorney General James Knapp).

246. See 31 U.S.C. § 1052(k) (1976) (repealed 1982).

247. The statute provided: "For the purposes of section 1001 of Title 18 . . . the contents of reports required under any provision of this chapter are statements and representations in matters within the jurisdiction of an agency of the United States." *Id.* Although the statute does not mention failure to file, it presumably covered those situations as well.

248. The statute was repealed as "[u]nnecessary" because "Section 1001 applies unless otherwise provided." H.R. REP. NO. 651, 97th Cong., 2d Sess. 301, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 1895, 2195; see *United States v. Woodward*, 469 U.S. 105, 110 n.6 (1985).

249. The Supreme Court relied on a similar congressional intent argument in *Woodward*, 469 U.S. at 105. The *Woodward* Court cited the fact that in passing the import/export law, Congress's attention was called to § 1001. *Id.* at 109. Therefore, the Court stated, one cannot assume that Congress was unaware that there were two offenses. *Id.* Here, in passing the anti-smurfing statute, Congress's attention was similarly drawn to § 1001. See *supra* notes 246-47. Again, one cannot assume Congress was unaware of the existence of two offenses.

250. See *United States v. Blockburger*, 284 U.S. 299 (1932).

tent.²⁵¹ This statutory construction test provides that Congress intended to define separate crimes if each crime requires proof of a fact that the other does not.²⁵² The Supreme Court has applied this test to a situation analogous to the anti-smurfing law and section 1001. In *United States v. Woodward*,²⁵³ the defendant made a false statement in a report required under the import/export reporting statute.²⁵⁴ He was convicted of violating that statute and section 1001. The Supreme Court applied the *Blockburger* test and concluded that the statutes defined separate crimes because each required proof of a fact the other did not.²⁵⁵ The Court reasoned that proof of a reporting violation does not necessarily include proof of a section 1001 violation, because section 1001 requires proof of a fact the reporting statute does not, a "trick, scheme, or device."²⁵⁶ Conversely, section 1001 does not necessarily include proof of an import/export reporting violation.²⁵⁷ Therefore, Congress intended to define separate crimes and to authorize cumulative punishment.²⁵⁸

The *Woodward* analysis requires the same result when the *Blockburger* test is applied to the anti-smurfing statute and section 1001. Proof of an anti-smurfing clause (1) violation does not necessarily include proof of a section 1001 violation because section 1001 requires proof of either a false statement or concealment via trick, scheme, or device. In contrast, clause (1) requires only that the person cause the bank to fail to file; presumably this could be accomplished without a trick, scheme, or device. Even assuming that a trick, scheme, or device would be required to successfully cause a bank to fail to file,²⁵⁹ clause (1) also prohibits attempts to cause a bank to fail to file. Clearly a

251. *Garrett v. United States*, 471 U.S. 773, 779-80 (1985).

252. *Blockburger*, 284 U.S. at 304.

253. 469 U.S. 105 (1985).

254. *Id.* at 106; see 31 U.S.C. § 5316 (1982 & Supp. IV 1986) (described *supra* text accompanying note 213).

255. *Woodward*, 469 U.S. at 108.

256. *Id.*

257. *Id.* at 107 n.3.

258. *Id.* at 108-10.

259. This might be required as a practical matter, but the Supreme Court is capable of ignoring practical matters. In *Woodward*, it relied on the possibility that persons going through customs might not be asked whether they were carrying enough currency to require a report. See *infra* note 260. This is theoretically possible but extremely unlikely, because everyone passing through customs is presented with forms that ask whether the traveler is carrying over \$10,000. See, e.g., *United States v. Granda*, 565 F.2d 922 (5th Cir. 1978) (describing Customs Declaration Cards). See generally N. ABRAMS, *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* 574 n.3 (1986).

person could attempt to cause a bank to fail to file without necessarily violating section 1001. For example, Joe could conduct three transactions of \$4000 each in one day at a single bank, and just stand silently rather than volunteer information indicating a report is due. Without some affirmative trick, scheme, or device like false identities, the bank would probably discover the situation and file a report. Nonetheless, Joe would have violated clause (1) by attempting to cause a failure to file. However, because he used no trick, scheme, or device, he would not have violated section 1001. The Supreme Court relied on an analogous rationale in *Woodward* to hold it possible to violate the import/export reporting law without violating section 1001.²⁶⁰ Accordingly, clause (1) and section 1001 pass the *Blockburger* test as separate crimes and multiple punishment is authorized.²⁶¹

A slightly different question is whether Congress intended the anti-smurfing statute and section 1001 to define multiple crimes for incomplete and false filings. The legislative history of the anti-smurfing statute does not explicitly address this point.²⁶² The argument made above in support of multiple punishment for failure to file under clause (1) of the anti-smurfing statute and section 1001 likewise would apply to incomplete and false filings. The statute passed in 1970 and repealed in 1982 indicates that Congress intended section 1001 to apply to bank reports.²⁶³ Courts never doubted the applicability of section 1001 to incomplete and false filings.²⁶⁴ Thus, when Congress adopted the anti-smurfing statute in 1986, it must have known that the impact of clause (2) would be to impose another layer of liability in addition to section 1001. One can infer that Congress intended this result.

This evidence of congressional intent on causing the filing of an incomplete or false report under clause (2) indicates that Congress

260. The *Woodward* Court stated:

A person could, without employing a "trick, scheme, or device," simply and willfully fail to file a currency disclosure report. A traveler who enters the country and passes through Customs prepared to answer questions truthfully, but is never asked whether he is carrying over [\$10,000] in currency, might nonetheless be subject to conviction under [the import/export report law] for willfully transporting money without filing the required currency report. However, because he did not conceal a material fact by means of a "trick, scheme, or device," (and did not make any false statement) his conduct would not fall within . . . § 1001.

Id.

261. See *supra* note 229 for an argument limiting successive trials even when multiple punishment is authorized.

262. See *supra* notes 231-33 and accompanying text.

263. See *supra* notes 246-47 and accompanying text.

264. See *supra* note 114.

intended to establish multiple liability. Unlike the situation described above for failure to file, the evidence of congressional intent on false and incomplete filings is unambiguous. Thus resort to the *Blockburger* test is unnecessary. Yet if the *Blockburger* test were applied to clause (2) and section 1001, the conclusion that the statutes define separate crimes would be the same. The analysis would be the same as that used for failure to file. Clause (2) and section 1001 pass the *Blockburger* test because each requires proof of a fact the other does not. Clause (2) includes attempts and section 1001 includes a trick, scheme, or device. Either way, the conclusion is that multiple punishment does not violate the double jeopardy clause because Congress authorized it.

3. Conspiracy

The interaction between the anti-smurfing statute and the conspiracy statute²⁶⁵ is less complex. As with the laws above, the circuits are split. Some circuits allow prosecution of bank customers for conspiracy to violate the reporting law,²⁶⁶ while others do not.²⁶⁷ In circuits in which customers are liable for conspiracy to violate the reporting law, are they also liable under the anti-smurfing statute? The answer again depends on whether Congress intended to impose multiple liability.

The legislative history contains no direct evidence of congressional intent with regard to conspiracy liability, but one can infer the intent to allow multiple punishment from several factors. Conspiracy is an old and notorious crime²⁶⁸ of which Congress surely was aware when

265. See 18 U.S.C. § 371 (1982), which provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

266. See, e.g., *United States v. Nersesian*, 824 F.2d 1294, 1309-13 (2d Cir.), cert. denied, 108 S. Ct. 357 (1987); *United States v. Giancola*, 783 F.2d 1549 (11th Cir.), cert. denied, 479 U.S. 1018 (1986); *United States v. Puerto*, 730 F.2d 627 (11th Cir.), cert. denied, 469 U.S. 847 (1984). See generally Mann, *The Bank Secrecy Act: Conspiratorial Liability for Structured Transactions*, WHITE COLLAR CRIME REP. July-Aug. 1987, at 2, 9.

267. See, e.g., *United States v. Dela Espriella*, 781 F.2d 1432 (9th Cir. 1986); *United States v. Varbel*, 780 F.2d 758 (9th Cir. 1986).

268. Congress enacted the conspiracy statute in 1909 and revised it in 1948. See Act of Mar. 4, 1909, ch. 321, § 37, 37 Stat. 1096 (enacting statute); Act of June 25, 1948, ch. 645, 62 Stat. 701 (codified at 18 U.S.C. § 371 (1982) (amended version)). Since that time it has been used and debated frequently. See generally Marcus, *Conspiracy: The Criminal Agreement in Theory and in Practice*, 65 GEO. L.J. 925 (1977) (judges, practicing attorneys, and scholars have had a "love-hate" relationship with conspiracy throughout this century).

it adopted the anti-smurfing statute. That Congress said nothing about conspiracy suggests approval of its application in addition to the new anti-smurfing offense.²⁶⁹ This conclusion is strengthened further by the evidence of how Congress treated section 1001. First, Congress adopted a statute indicating that section 1001 applied to currency transaction reports, then it repealed the statute and explained that section 1001 applies unless otherwise provided.²⁷⁰ Surely Congress intended that the conspiracy statute similarly would apply unless otherwise provided, and Congress made no other provision. Finally, conspiracy does not merge with a completed substantive offense under federal law,²⁷¹ on the theory that the crime of conspiracy targets harms distinct from the substantive offense.²⁷² Congress knew of this established rule and chose by its silence to endorse multiple liability, the usual interaction between a substantive crime and conspiracy.

These factors indicate that Congress intended the anti-smurfing statute and the conspiracy statute to define separate offenses; this is sufficient evidence of congressional intent to render the *Blockburger* test inapplicable. At any rate, that test only corroborates the conclusion that Congress intended to authorize multiple crimes.²⁷³

In summary, the anti-smurfing statute authorizes multiple punishment with section 1001 and with the conspiracy statute but not with the bank reporting law. This conclusion effects rather than offends congressional intent. Congress meant for the anti-smurfing statute to reinforce the underlying reporting law by closing its loopholes, not by imposing additional punishment. Section 1001 and conspiracy are sepa-

269. The Court relied on a similar rationale in *Woodward*. In that case, the Court stated that in passing the import/export reporting law, Congress's attention had been drawn to § 1001, and its subsequent silence could not be interpreted to mean that Congress was unaware that it created two offenses and authorized multiple punishment. *United States v. Woodward*, 469 U.S. 105, 109 (1985). In passing the anti-smurfing statute, Congress's attention was not specifically drawn to conspiracy, but we must assume that Congress was aware of the statute. Thus silence accompanying the anti-smurfing statute with regard to conspiracy can only indicate that Congress intended two separate offenses.

270. See *supra* notes 246-47 and accompanying text.

271. See *Pinkerton v. United States*, 328 U.S. 640 (1946).

272. The primary justification is that collective action presents a greater risk to society than individual action and so warrants punishment in addition to that imposed for the substantive crime. See *United States v. Feola*, 420 U.S. 671, 693 (1975); *Callanan v. United States*, 364 U.S. 537, 593 (1961).

273. Conspiracy and the anti-smurfing statute pass the *Blockburger* test because each requires proof of a fact the other does not. Conspiracy requires proof of plurality, and the anti-smurfing statute requires proof that the defendant acted for the purpose of evading the cash transaction reporting law.

rate crimes directed at distinct evils, unrelated to the anti-smurfing statute.²⁷⁴ If the elements of those crimes happen to be met when the anti-smurfing statute is violated, then multiple evils are present and multiple punishment is appropriate. This is not the case, however, between the anti-smurfing statute and the bank reporting law. Those laws are closely related and are aimed at the same harms. They should not be used to pyramid liability.²⁷⁵

V. CONCLUSION

The anti-smurfing statute resulted from two determined forces converging: the incredibly lucrative drug trade in the United States, and the relentless effort of Congress to halt money laundering and contain the underlying drug trade.

The reporting law scheme was the government's first attack on money laundering. A central part of this scheme is the bank reporting law. When the bankers, prosecutors, and Joes of the world began to notice it, this legislation had an unpredicted consequence — the birth of smurfs. The bank reporting law experienced considerable difficulty in the courts. Soon the case law blossomed into gaudy disarray, and smurfs only occasionally were threatened. Congress quickly adopted the anti-smurfing statute.

The implicit message of the anti-smurfing statute is that no legitimate reason exists to keep large cash transactions secret. The very existence of the transactions is suspect; the bank reporting law acknowledges this. The anti-smurfing statute establishes that avoidance of the reporting law is unjustified. Reporting involves little time and negligible costs. The reports impose slightly on privacy, but weighed against the magnitude of damage that drugs and money laundering

274. See *United States v. Woodward*, 469 U.S. 105, 109 (1985) (congressional intent to allow separate punishment is shown by fact that statutes are directed at separate evils) (quoting *Albernaz v. United States*, 450 U.S. 333, 343 (1981)). Clearly the anti-smurfing law, § 1001, and conspiracy target separate evils. The anti-smurfing statute was designed to cure the problems with the reporting law, thus enabling it to operate effectively against money laundering. See *supra* note 230. Section 1001 was designed "to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described." See *United States v. Gilliland*, 312 U.S. 86, 93 (1941) (quoted in *Woodward*, 469 U.S. at 109). The conspiracy statute is designed to deter collective action. See *supra* note 272.

275. At any rate, the government has plenty of weapons in its arsenal. 31 U.S.C. § 5322(b), discussed *supra* text accompanying note 218, provides for enhanced sanctions when the anti-smurfing statute is violated with any other federal law. Therefore the availability of sections 1001 and 371 for prosecution with the anti-smurfing law increases the government's power beyond merely the sanctions allowed by multiple counts.

cause in our country, the reduction in privacy that the anti-smurfing statute causes is warranted. The only other reason to resist these reports is to hide other crime, either in generating the cash or in tax fraud. This objection to reporting is entitled to no weight and is accorded none.

One of the difficulties of curbing manipulation of the bank reporting law is drafting a law that is broad enough to be effective yet limited enough to avoid abuse. The anti-smurfing statute includes several guarantees against abuse. The *mens rea* requirement directs the government to prove the defendant acted with the motive of evading the bank reporting law. Smurfing is not totally innocent conduct, so criminal liability should not catch our friend Joe by surprise. Even so, under *Liparota*, the courts may infer knowledge of illegality as an element and thereby protect even further against abuse. Besides the integral role of *mens rea*, the anti-smurfing statute should be interpreted to incorporate other controls on abuse. First, the unit of prosecution should be defined to avoid undue proliferation of counts. Second, courts should define the relationship between the anti-smurfing statute and other federal crimes to allow multiple punishment with section 1001 and conspiracy, but not with the bank reporting law. Adopting these positions minimizes the danger of abuse.

The efficacy of the anti-smurfing statute in stemming the tide of laundered dollars is hard to predict. Investigation will be difficult because smurfs easily can obscure structured transactions. Prosecution also will be difficult, primarily because the government must prove the defendant's motive to evade the reporting law, although as a practical matter, this burden may shift to the defendant. Regardless of its efficacy, the adoption of a new crime also has symbolic importance in that it formally expresses society's condemnation of that conduct. Nonetheless, the symbolic importance of a crime is a not a sufficient justification for its existence. The law must confront reality; it cannot lapse into an intricate but irrelevant set of rules to be treated contemptuously and avoided as if in a cartoon. The anti-smurfing statute is a positive step to avoid that result.

Multiple Transactions

(Complete applicable parts below if box 1, 14, or 35a on page 1 is checked)

I Continued—Complete if box 1 on page 1 is checked

1 Last name	3 First name	4 Middle initial	5 Social security number
6 Address (number and street)		7 Occupation, profession, or business	
8 City	9 State	10 ZIP code	11 Country (if not U.S.)
12 Method used to verify identity: Issued by ▶		a Describe ▶ ----- c Number ▶	

1 Last name	3 First name	4 Middle initial	5 Social security number
6 Address (number and street)		7 Occupation, profession, or business	
8 City	9 State	10 ZIP code	11 Country (if not U.S.)
12 Method used to verify identity: Issued by ▶		a Describe ▶ ----- c Number ▶	

II Continued—Complete if box 14 on page 1 is checked

13 Individual's last name	16 First name	17 Middle initial	18 Social security number
19 Name of organization		b Check if: (1) <input type="checkbox"/> broker/dealer in securities, or (2) <input type="checkbox"/> financial institution (see instructions)	
21 Address (number and street)		20 Employer identification number	
22 Occupation, profession, or business			
23 City	24 State	25 ZIP code	26 Country (if not U.S.)

13 Individual's last name	16 First name	17 Middle initial	18 Social security number
19 Name of organization		b Check if: (1) <input type="checkbox"/> broker/dealer in securities, or (2) <input type="checkbox"/> financial institution (see instructions)	
21 Address (number and street)		20 Employer identification number	
22 Occupation, profession, or business			
23 City	24 State	25 ZIP code	26 Country (if not U.S.)

IV Continued—Complete if box 35a on page 1 is checked

27 Date of check or wire transfer	c Amount of check or wire transfer (in U.S. dollars) \$	d Payee
e Drawer of check		f Drawee bank and MICR number

27 Date of check or wire transfer	c Amount of check or wire transfer (in U.S. dollars) \$	d Payee
e Drawer of check		f Drawee bank and MICR number

General Instructions

Note: Beginning with this revision, file Form 4789 with the IRS Data Center in Detroit. See *When and Where to File* below.

Paperwork Reduction Act Notice.—The Paperwork Reduction Act of 1980 says we must tell taxpayers why we are collecting this information, how we will use it, and whether you have to give it to us.

The requested information is useful in criminal, tax, and regulatory investigations. In addition to directing the Federal Government's attention to unusual or questionable transactions, the reporting requirement discourages the use of currency in illegal transactions. Financial institutions are required to provide the information under 31 CFR 103.22, 103.26, and 103.27.

Who Must File.—Each financial institution other than a casino must file a Form 4789 for each deposit, withdrawal, exchange of currency, or other payment or transfer, by, through, or to the financial institution, which involves a transaction in currency of more than \$10,000. Multiple transactions by or for any person which in any one day total more than \$10,000 should be treated as a single transaction, if the financial institution is aware of them.

Exemptions.—See 31 CFR 103.22(b) for exemptions from the filing requirements by banks on certain customers.

When and Where to File.—File this form by the 15th day after the date of the transaction with the Internal Revenue Service Data Center, P.O. Box 32621, Detroit, MI 48232 ATTN: CTR, or hand carry it to your local IRS office. Keep a copy of each Form 4789 for 5 years from the date you file it.

Penalties.—Civil and criminal penalties (up to \$500,000) are provided for failure to file a report or to supply information, and for filing a false or fraudulent report. See 31 CFR, sections 103.47 and 103.49.

Definitions

Bank.—See 31 CFR 103.11 for the definition of a bank.

Currency.—The coin and currency of the United States or of any other country, which circulate in and are customarily used and accepted as money in the country in which issued. It includes United States silver certificates, United States notes, and Federal Reserve notes, but does not include bank checks or other negotiable instruments not customarily accepted as money.

Financial Institution.—Each agency, branch, or office in the United States of any person doing business in one or more of the capacities listed below:

- (1) a bank;
- (2) a broker or dealer in securities, registered or required to be registered with SEC under the Securities Exchange Act of 1934;
- (3) a person who engages as a business in dealing in or exchanging currency (for example, a dealer in foreign exchange or a person engaged primarily in the cashing of checks);

- (4) a person who engages as a business in issuing, selling, or redeeming traveler's checks, money orders, or similar instruments, except one who does so as a selling agent exclusively, or as an incidental part of another business;

- (5) a licensed transmitter of funds, or other person engaged in the business of transmitting funds abroad for others.

Person.—An individual, corporation, partnership, trust or estate, joint stock company, association, syndicate, joint venture, or other unincorporated organization or group, and all entities treated as legal personalities.

Transaction in Currency.—A transaction involving the physical transfer of currency from one person to another. A transaction in currency does not include a transfer of funds by means of bank check, bank draft, wire transfer, or other written order that does not include the physical transfer of currency.

Specific Instructions

Amended report.—If this amends a previously filed report, check the box in the upper right corner. Staple a copy of the previously filed report to this amended report and complete only those entries which you are correcting on the amended report.

Part I—Identity of individual who conducted the transaction.—This part must always be completed. If the individual conducts the transaction for another person, be sure to complete Part II also.

Box 1—Multiple individuals.—If two or more individuals conduct a transaction, check Box 1. All individuals must be positively identified. Enter information in Part I for one of the individuals. Complete the entry spaces on the back of the form for the other individuals. For example, a check made out to John Doe and Thomas Smith may be presented for payment at a financial institution. Both of the joint payees are present. Complete Part I on the front of the form for John Doe, and complete Part I on the back for Thomas Smith.

Items 2, 3, and 4—Name of person conducting transaction.—Enter the last name in Item 2, the first name in Item 3, and the middle initial in Item 4.

Item 5—Social security number.—A social security number must be provided if an individual is conducting the transaction for himself or herself. If the individual is conducting a transaction for another person or is a nonresident alien who does not have a social security number, write NONE in the space and complete Item 12.

Items 6, 8, 9, 10, and 11—Address.—Enter the permanent address, including ZIP code, of the individual who entered the financial institution to conduct the transaction. A P.O. Box number is not a street address.

Item 7—Occupation, profession, or business.—Fully identify the occupation, profession or business of the individual conducting the transaction; for example, secretary, carpenter, attorney, etc. Do not use nondescriptive terms such as merchant self-employed, businessman, etc.

Item 12—Method used to verify identity.—All individuals (except employees of armored car services) conducting a currency transaction for themselves or for another person must be positively identified. For individuals who are established customers, identifying information previously obtained from the customer and in the financial institution records may be provided. Statements such as "known customer" are not sufficient identifying information. For U.S. citizen, ask to see and inspect a driver's permit or any other written identification document acceptable to the financial institution in normal check cashing operations. For an alien, ask to see and inspect his or her passport, alien ID card, or other official document showing nationality or residence. Enter the type of document in Item a, s as driver's license, signature card, char card, passport, etc. Enter in Item b, the name of the state issuing the driver's permit, the name of the bank or store issuing the charge card, etc. Enter the number of the license, account, card, e in Item c.

Item 13—Reason items 2-12 not completed; armored car service, mail night deposit, or ATM transaction.—Check Box a if the transaction was a delivery by an armored car service licer by a state or local government. Enter th name of the armored car service in the space provided.

Check Box b if the currency was received or shipped through the U.S. F Service.

Check Box c if the transaction was night deposit or an ATM (automated te machine) transaction.

Check Box d if this report involves multiple transactions that when totalle became a reportable transaction and t individual(s) who conducted the transactions cannot be identified.

If you check Box a, b, c, or d, you d have to complete any other entries in f. However, be sure to complete Parts II, IV, and V.

Part II—Individual or organization f whom transaction was completed.—the individual in Part I is conducting th transaction for himself or herself, do n complete Part II. In all other cases, including armored car service, mail, n deposit, or ATM transactions, complt Part II.

Box 14—Multiple individuals or organizations.—If this transaction is conducted for more than one individu organization, check Box 14, and comp the applicable entries on the back of t form. Do this also if the individual in P conducts a transaction that involves b himself or herself and another indivi organization.

Items 15, 16, and 17—Name of dual.—Enter the last name in Item 15, first name in Item 16, and middle initial in Item 17, of the individual for whom the transaction was completed.

Item 18—Social security number.—Enter the social security number of the individual for whom the transaction was completed. You will have this in your file. If the individual is a nonresident alien and does not have a social security number, write NONE in the space for number.

Items 19 and 20—Organization's name and EIN.—If the transaction involves a business, show the business name in Item 19 and the employer identification number (EIN) in Item 20. This is a 9-digit number shown as 00-0000000. If the organization does not have an EIN, write NONE in Item 20.

Check Box 19b(1) if the individual or organization is a broker or dealer in securities. **Check Box 19b(2)** if the individual or organization is a financial institution described in item (3), (4), or (5) of the *Definitions of a Financial Institution* on page 3.

Items 21, 23, 24, 25, and 26—Permanent address.—Enter the permanent address including the ZIP code of the individual or organization for whom the transaction is completed in the appropriate boxes. If the address is outside the U.S., be sure to show country in Item 26. A P.O. Box number and street address.

Item 22—Occupation, profession, or business.—Fully identify the occupation, profession, or business of the individual or organization for whom the transaction was completed. Use descriptive terms, such as attorney, broker, attorney, auto dealer, do not use nondescriptive terms, such as self-employed, merchant, salesman, etc.

Item 21—Customer's account number affected by the transaction.

Item 27—Type of account and account number.—Check the boxes and enter the account numbers of the accounts affected by the transaction. If a deposit or withdrawal is made from a savings, checking, share, or other account, check the appropriate box and enter the account number. Other accounts would include all accounts with broker-dealers. If the transaction does not affect any account, no entry in Part III. For example, a check purchased with cash may affect any account and does not require entry in this part. Please note that the letters before the boxes are for IRS reporting purposes.

Item 28—Type of transaction.—Check the boxes that describe the transaction. For international transactions with foreign financial agencies (banks, currency exchange dealers, securities dealers, etc.)

involving receipts of currency for deposit, purchases of currency, withdrawal, shipments of currency for deposit, or sales of currency, check the appropriate box "Receipts from abroad" or "Shipments abroad" in Item 29 or 30.

Box 28—Currency exchange.—Check this box if currency was exchanged for currency. This includes exchanging U.S. currency for foreign currency (be sure to complete Item 34) and vice versa. It also includes exchanging small denomination bills of U.S. currency for large denomination bills of U.S. currency, or vice versa.

Box 29—Cash in.—Check the appropriate box(es) when currency is received by the financial institution as part of a transaction.

Box 30—Cash out.—Check the appropriate box(es) when the financial institution pays out currency as part of a transaction.

Item 31—Total amount of currency.—Enter the total amount of currency in the transaction. If a transaction involves both currency and checks, such as a deposit transaction, enter only the amount of the currency.

Item 32—Amount in \$100 bills or higher.—Enter the amount of the total currency transaction reported in Item 31 that is in denominations of U.S. currency of \$100 or higher. For example, if the total currency transaction is \$100,000 and \$50,000 is in U.S. currency of \$100 or higher denominations, enter \$100,000 in Item 31 and \$50,000 in Item 32.

Item 33—Date.—Enter the month, day, and year of the currency transaction. Use the actual calendar date, not the banking day date.

Item 34—Foreign currency.—If the currency transaction involves a foreign currency, enter the information in the appropriate spaces. Enter the name of the currency in Item b, the country in Item c, and the total amount of the foreign currency in U.S. dollars in Item d. Check the appropriate box in Item a, if foreign currency was exchanged for U.S. currency or U.S. currency was exchanged for foreign currency. For example, a currency transaction involving Italian lira being deposited would have lira entered in Item b, Italy entered in Item c, and the amount, converted into U.S. dollars, entered in Item d. Since currency was not exchanged, no entry is made in Item a. If currency of two or more foreign countries is involved in the transaction, attach a separate sheet of paper that clearly identifies the individual or organization for whom the transaction was completed (Items 15 through 20) and report the information for each foreign currency required by Item 34.

Item 35—Check or wire transfer.—If multiple checks or wire transfers are involved in the transaction, check Box a and furnish the information for one of the instruments on the front of the form and for the other instruments on the back of the

form in the spaces provided. If you have to report more instruments than there are entry spaces, attach a sheet of paper that clearly identifies the individual or organization for whom the transaction is completed (Items 15 through 20) and furnish the information for Items b through f for each check or wire transfer.

Date.—Enter the date shown on the check or the wire transfer of funds in Item b.

Amount.—Enter the amount of the check or wire transfer in Item c. Show the amount in U.S. dollars only.

Payee.—Enter the name of the individual or organization to whom the check or wire transfer of funds is made payable in Item d.

Drawer.—Enter the name of the individual or organization that wrote the check or who wire transferred funds in Item e.

Drawee bank and MICR number.—Enter the name of the bank and MICR number on which the check or wire transfer of funds is drawn in Item f.

Part V.—Financial institution where transaction took place.

Box 36—Type of financial institution.—Check the box that describes the type of financial institution you are.

Box 36a—Banks.—Enter the appropriate code number for the Federal agency that performs examinations for compliance with the Bank Secrecy Act regulations:

Code 1—Comptroller of the Currency

Code 2—FDIC

Code 3—Federal Reserve System

Code 4—None of the above

Items 37, 39, 41, 42, 43, and 44—Name, address, and MICR number.—Enter the full legal name, street address, city, State, ZIP code, and MICR number of the financial institution where the transaction occurred. *If the transaction occurred at a branch office, enter the complete street address and MICR number of the branch, not the headquarter's address and MICR number.* A P.O. Box number is not a street address. Enter the MICR number in Item 44.

Item 38—EIN.—Enter the financial institution's employer identification number (EIN).

Item 40—SSN.—If the financial institution does not have an EIN, enter the financial institution owner's social security number.

Items 45, 46, 47, and 48—Preparer's signature, title, and date.—Form 4789 must be signed in Item 45 by an individual authorized or designated by the financial institution to sign it. His or her title should be shown in Item 46 and the date of signature entered in Item 47. This signer's name should be typed or printed legibly in Item 48.

Items 49 and 50—Approving official's signature and date.—The official who reviews and approves the information on the form must sign in Item 49 and enter the date of signing in Item 50.

