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WHAT WENT WRONG WITH MONEY LAUNDERING LAW?

Peter Alldridge

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Preface

In 2003 I published a book entitled *Money Laundering Law*.[1] This is not the second edition, and I doubt if a second edition ever will be completed. Since 2003 money laundering law has burgeoned. There has been much law, in the form of international instruments, statutes, statutory instruments, and cases.[2] Dealing as it does with the power of the State to appropriate the property of the subject, like tax statutes, money laundering law necessarily involves highly technical law. The vast and intricate body of law with a wide range of sources raises many perplexing problems, and they are dealt in a number of excellent expository texts.

The purpose of this book is rather different: it is to stand back a little way, to ask what has happened. It is not a comprehensive account but one which selects the areas that have given rise to the greatest impact and controversy.

There are remediable technical flaws in the laundering law of England and Wales. The Proceeds of Crime Act 2002 has been to the highest courts numerous times. It would have been better had a restitutionary perspective been incorporated. It would have been better to revive and deploy the distinction between victimless and non-victimless crime. It would have been better to enunciate clearly the purpose of the criminal proscription on laundering.

The real problem, however, is the power of the AML narrative, which proceeds, from shaky evidential foundations to a very widespread and

[1] *Alldridge*, *Peter*, *Money Laundering Law* (Oxford: Hart, 2003) (hereinafter MLL).

[2] POCA has been amended countless times, more frequently by statutory instruments.

unreflective enthusiasm both in the UK and the 'international community' for the Anti-Money Laundering/Countering the Financing of Terrorism (AML/CFT) project, even amongst those who do not have a career interest in its pursuit,. It is the purpose of the book to consider it more sceptically than is usually done.

Acknowledgements

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London, January, 2016.

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CHAPTER 1

Introduction and a Short History

Criminals acquire property by or from their crimes. That is why they do it. It would be good if they could be stopped from enjoying the property and, if instead it was able to be acquired by the State and put to good use, building hospitals and schools or even paying for policing, prosecution, and prisons. It would be better yet if the additional policing effort that was involved could come at no cost to the taxpayer because it was subsumed into the general running expenses and corporate governance procedures of major financial institutions. It would be marvellous if one of the effects of stopping criminals enjoying the property they acquire would be to deter them or others from committing crimes. These simple considerations gave rise to money laundering law. They also gave rise to a crime—money laundering—and a bureaucracy—the Anti-Money Laundering (AML) industry—both of which have grown rapidly and in unforeseen ways.

At a time of declining crime rates, the one crime whose continued increase is guaranteed is money laundering. From a small and relatively marginal role in the 1980s and early 1990s, the crime of laundering has become central to law enforcement and has loomed larger and larger in the public consciousness. Twenty years ago the number of actual prosecutions

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of alleged launderers was negligible.[1] It is now significant.[2] Incidences of the appearance of the expression 'laundering' in the media are multiplying.[3] These changes have been accomplished without the articulation of any clear idea of what is wrong with laundering, why, if at all, it need be a crime, what the purpose is of AML, or whether there might be any negative aspects to its existence and enforcement. Regulatory activity has increased very substantially and can be expected to increase further.

[1] Cabinet Office Performance and Innovation Unit, *Recovering the Proceeds of Crime* (London: Cabinet Office, 2000), Fig. 9.1 shows the numbers of prosecutions in England and Wales to be 80, 50, and 115 for 1997, 1998, and 1999, respectively, with convictions hovering around 40. The figures for 2000 show 16 convictions from 73 prosecutions for drug money laundering and 23 convictions from 45 prosecutions for other crimes. HL Debates 25 June 2002 Col 1320 (Lord Falconer). HL European Union Committee, 19th Report, *Money Laundering and the Financing Of Terrorism* (2009) Supplementary memorandum (1) by the Crown Prosecution Service (CPS), Annex A states that the figures for prosecutions and convictions in England and Wales for the years after the enactment of POCA are as follows:

Year	Proceeded against	Convicted	Sentenced
2003	300	123	119
2004	552	207	205
2005	1,327	595	575
2006	2,379	1,273	1,244
2007	2,318	1,348	1,322

[2] Recorded crime figures for 2014 are (Criminal Statistics Table A4: Police recorded crime by offence, 2002/2003 to year ending December 2014 and percentage change between year to December 2013 and year to December 2014) for 2010/2011, 2011/2012, 2012/2013, 2013/2014 respectively 2,344, 1,779, 1,427, 1,485 (a reduction in police reports).

[3] A Nexis search on 4th July 2014 in the UK Broadsheets Library for the word 'laundering' gave the following numbers of occurrences for each of the named newspapers.

	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001
Independent	92	86	149	118	81	104	87	105	93	133	153	91	182
Times	124	79	95	56	53	95	105	77	88	88	215	106	217
Guardian	59	60	125	107	64	99	83	110	125	117	166	121	170
Daily Mail	0	0	0	64	42	21	83	4	56	84	99	52	68
FT Business	0	0	0	0	0	0	0	0	0	0	0	0	140

After a low-key start to the policing of the laundering provisions, which concentrates upon drug money, the current enforcement programme seems committed to bringing all activity in the black or grey economies under the classification of money laundering. The outcome is that a huge amount of money (we do not know how much) is now being spent on a global surveillance and reporting system, and we do not know whether and to what extent the system works or not. This book will therefore document a series of events and decisions which, taken independently, could each be seen as rational responses to specific problems and as incremental adjustments to the focus of the law but which, when taken together, led to significant change in the law and to the current situation. Underlying the entire AML industry is the crime of money laundering, which, having been devised more to provide a trigger for the reporting machinery than to describe and condemn a particular category of harmful behaviour, is now being used, both as an independent charge and in conjunction with other offences, in a far wider range of cases than is appropriate.

What Does Laundering Look Like?

There seem to be two major, operative ideal-types of laundering. That promulgated by the Financial Action Task Force (FATF), the United Nations, Global Financial Integrity, the World Bank, the International Monetary Fund (IMF), the OECD and the EU emphasises the use of international money transfers within the financial system.[4] On this account laundering is elaborate, sophisticated, glamorous, and vague. In contrast, consider the account of laundering famously given by Saul Goodman to Jesse Pinkman

	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Independent	109	111	162	189	143	93	58	71	59	71	274	136
Times	181	169	200	226	229	207	132	238	162	182	494	428
Guardian	127	105	142	163	127	165	113	139	108	119	178	186
Daily Mail	67	49	94	87	188	161	89	66	63	63	174	153
FT Business	86	69	60	32	45	33	25	23	25	26	59	49

[4] Consider even the *Oxford English Dictionary* (Oxford: OUP, 3rd edition, 2010) definition of 'money laundering': 'the concealment of the origins of illegally obtained money, typically by means of transfers involving foreign banks or legitimate businesses: *he was convicted of money laundering and tax evasion*.'

in *Breaking Bad*.[5] Saul explains to Jesse that he needs to invest in a nail salon in order to acquire a legitimate cover through which to run the profits of his drug dealing, upon which he would then pay tax, yielding a residue of 'lawful' income. Although Saul appeals to accounts of the vulnerability of the criminal arising from his tax liability, the actual laundering device does not use bank accounts or the international movement of money to effect the laundering.[6] The nail salon is concrete, quotidian, easily comprehensible, and difficult to regard as a global threat. It is tied to money laundering as an extension of drug dealing. We can only really speculate as to which of the two more accurately represents laundering activity at any given time in any given jurisdiction or worldwide. What we do know is that changes in the AML *régime* will have the effect that more laundering will be categorised as international and that that will shape the way in which laundering is reported.

A Principle

The idea that a person should not benefit from his/her crime is a *principle* of English Law.[7] It is entirely justified in ruling actions out on the basis of *ex turpi causa*,[8] in allowing employers to recover bribes paid to its employees,[9] in the interpretation of statutes,[10] and in the cases covered by the law

[5] High Bridge Entertainment, Gran Via Productions, *Breaking Bad*, Season 3, Episode 9 (2010).

[6] Note that Saul will be in danger of being held liable for an offence only if attorney–client privilege can be broken down—which means (on lines similar to the English Law authorities, following *R v Cox* & *Railton* (1884) 14 QBD 153) that there must be evidence outside the file that the lawyer was complicit.

[7] In the sense used by Dworkin (Dworkin, Ronald, *Taking Rights Seriously* (London: Duckworth, 1977) 23 *et seq*) of *Riggs v Palmer* (1889) 12 American St Rep 819.

[8] 'The Proceeds of Crime Act 2002 is concerned with the forfeiture to the State of proceeds of crime. The Act provided no clear steer for the scope and application of the common law principle *ex turpi causa non oritur actio* in a civil action for negligence and breach of duty': *Sharma* (*As Former Liquidator of Mama Milla Ltd*) *v Top Brands Ltd* [2015] EWCA Civ 1140, para 48, a judgement inviting the Supreme Court to look at the illegality defence.

[9] *FHR European Ventures LLP and others v Cedar Capital Partners LLC* [2014] UKSC 45; [2015] AC 250.

[10] *R v Registrar General, ex parte Smith* [1991] 2 QB 393 at 402.

of confiscation of the proceeds of crime or of criminal memoirs,[11] but it is not a binding, universal rule. The Forfeiture Act 1982, for example, permits people, under specified circumstances, to benefit from homicides for which they are responsible.[12] *A fortiori* for lesser offences. Prisoners *are* paid for work done in prison, even after deductions under the Prisoners' Earnings Act 1996.[13] In fact, the general rule in English law is that the mere fact that property was acquired through illegal conduct does not of itself generate a right for the police to appropriate the money. In *Gordon v Chief Commissioner of the Metropolitan Police*,[14] for example, income from illegal betting was held to belong to the bookmaker. In *R* (*on the application of Best*) *v Chief Land Registrar*[15] it was held that the fact that the trespassory occupation was also criminal did not operate to prevent the acquisition of property by adverse possession. That is, the existence of the principle against allowing people to profit from crime does not necessarily imply that the State has the right to take property from criminals that is the proceeds of crime. Something more is required.

Three major possible justifications have been ventured in Parliament and the courts for the powers to confiscate. They are:

(i) proceeds of crime belong to the State, not to the criminal (the proprietary rationale);
(ii) the State has a better claim to the property than the criminal (the priority rationale); and
(iii) by taking the proceeds, the State will prevent the money being reinvested in criminal enterprises (the preventative rationale).[16]

As to the first, in the debates on the Proceeds of Crime Act 2002 (POCA), Lord Falconer said, 'The proceeds of crime belong to the victim, where

[11] Part 7 of the Coroners and Justice Act 2009 introduced 'Exploitation Proceeds Orders' to deal with profits from the publication of memoirs, films and so on.

[12] And see *Dunbar v Plant* [1998] Ch 412; [1997] 4 All ER 289.

[13] Brought into force, after some wrangling, in 2011. Prisoners' Earnings Act 1996 (Commencement) (England and Wales) Order 2011 SI 1658.

[14] *Gordon v Chief Commissioner of the Metropolitan Police* [1910] 2 KB 1080.

[15] *R* (*on the application of Best*) *v Chief Land Registrar* [2015] EWCA Civ 17; [2015] CP Rep 18. See Goymour, Amy, 'Squatters and the Criminal Law: Can Two Wrongs Make a Right?' (2014) 73 *Camb LJ* 484–487.

[16] This account is used in cash forfeiture cases. See, *eg*, *R* (*on the application of Mudie*) *v Dover Magistrates' Court* [2003] EWCA Civ 237; [2003] QB 1238 (Laws LJ at para 29, citing *Butler v United Kingdom* (2002) Application 41661/98).

one is identifiable, and to society, where one cannot be identified.'[17] This view gives results quite different from the limits developed in the history of the principle against allowing the criminal to benefit, and, if it is taken as anything other than a moral or metaphorical claim, it would render the POCA machinery redundant. As to priorities, it is traditional in the common law to think about personal property in terms of priorities and not in terms of an absolute right like the Roman law *dominium*.[18] Cases such as *Webb*[19] were indeed argued in terms of the assertion of competing rights. The 'priority rationale', and a challenging application of it, was invoked by Lord Falconer in the House of Lords debates on POCA. In the Report stage debate, concerning the position of third party creditors of a person against whom a confiscation order was made, he said: 'Society's claim to the proceeds of crime is better than that of an unsecured creditor.'[20] Before the proceeds of crime legislation, the State did not have a prior interest as against the criminal and consequently did not have priority as against the unsecured creditor. The objection is that the interests of society might be thought to include, for example, the protection of honest traders from losses arising from bad debts and other issues arising from the reduction in security of property and transactions.

At another point in the same debate Lord Falconer said:

> …the person in possession of the proceeds of unlawful conduct should not be able to retain such wealth, on the basis that it never properly belonged to him. If it did not properly belong to him, he had no right to promise it to other people.[21]

The notion of '*properly* belonging' (rather than just 'belonging') to someone is, in English law, a novel one. The basic objection both to the proprietary and the priority claim is that each would go down a road which the leading civil law cases, *Reading* and *Blake*,[22] avoided taking. If

[17] HL Debates, 22 July 2002, col 49.

[18] *Armory v Delamirie* (1722) 1 Strange 505; 93 ER 664.

[19] *Webb v Chief Constable of Merseyside* [2000] 1 QB 427; [2000] 1 All ER 209, dealing with a claim by the police to hold on to property of suspect provenance, when the person from whom it was seized could show possession.

[20] HL Debates, 25 June 2002, col 1234.

[21] HL Debates, 25 June 2002, col 1236.

[22] *Reading v Attorney-General* [1951] AC 507, *Blake v Attorney-General* [2000] UKHL 45; [2001] 1 AC 268.

the State really did have a better claim than the person in possession to the property that is the proceeds of crime, it could simply sue to recover it. The fact that the property was acquired through crime does not *ipso facto* prevent the criminal owning it and asserting a possessory right to it in English Law.

As to the third, preventative rationale, its limitation is that it only applies to reinvestment. It does not apply to the criminal who retires to enjoy the proceeds, and the popular newspapers are, if anything, angrier about this case. The empirical objection to the preventative rationale is that whether or not it actually operates to reduce crime is at best an open question.

It is clear that the State is entitled to act to stop people benefitting from crime. One way is to try to stop them from committing crimes. Financial crime is as amenable to 'situational crime prevention' as many other types of crime.[23] Decriminalisation, where appropriate, can also help. Beyond those, a far better justification for proceeds of crime law would be to say candidly that it is State appropriation of property belonging to the criminal with a view to putting the criminal in the same position, or a position no better than s/he would have been in, had s/he not committed the crime. The adoption and implementation of such a principle and such a justification would have avoided many of the difficulties involved in quantifying 'benefit' for the purposes of confiscation.[24]

Countervailing Principles and Policies

The principle against allowing a criminal to profit is not absolute. It is necessary to consider countervailing principles and policies. Three are as follows. First, security of property is valuable, and consequently the increased possibility that any particular property might be subject to state appropriation, or that by any other means associated with mechanisms for the freezing and seizing of property it could be made precarious is, on the face of it, better avoided. Markets depend upon sellers' ability to assert good title, and the certainty with which a claim of good title could be made would be endangered by the possibility that at any moment the State might assert a better one. Second, the criminal sanction and its appurtenances should

[23] Levi, Michael, 'Qualitative research on elite frauds, ordinary frauds, and "organized crime."' in (Copes, Heith & J Mitchell Miller eds.) *The Routledge Handbook of Qualitative Criminology* (2015) 215.

[24] And see below, page 61 *et seq.*

be deployed, if not as a last resort,[25] then sparingly and not further than is required to achieve the professed objectives. A case was made out for confiscation of the proceeds of drug crime, where the law[26] until the Drug Trafficking Offenders Act 1986 was that the drug dealer was entitled to retain the proceeds of his/her sales. This did not imply any defect in the law so far as concerned the proceeds of other types of crime, where there were people or agencies with the right and the wherewithal to deprive the criminal of the proceeds and courts with appropriate powers to enforce those claims. In many of those other areas there was a victim, who might have been entitled either to sue or to a compensation order,[27] or a public body holding sufficient powers to compel the disgorgement of proceeds. Such bodies include HMRC and various regulatory agencies, in particular the Financial Conduct Authority. When the decision was made to extend AML beyond the area of drugs, the discussion was never had as to whether the new areas had any of the deficiencies made evident by *Cuthbertson*.[28] If the law is to be changed incrementally, it is important that the considerations bearing upon the decision to criminalise or not to criminalise be reassessed at each step. In moving AML beyond drugs, which was a major step, considerations which should have made a difference were ignored. Finally, if we are to pursue the proceeds of crime vigorously, we should either be aware of the costs. These are not limited to the (enormous) economic costs.

Consequences

If a person does profit from crime, and the law is to seize his/her property in consequence, what ought to be the objective of that seizure? It might be that the seizure is regarded as part of the punishment for the crime—a fine of some sort. But if the punitive aspect of the proceedings is taken to be over with the end of the criminal proceedings and the imposition of sentence, what should be the objective of the further seizure? One obvious possibility is that it should put the criminal in the position in which s/he

[25] Husak, Douglas, 'The Criminal Law as Last Resort' (2004) 24 *Oxford Journal of Legal Studies* 207–235. Husak, Douglas, *Overcriminalization* (Oxford: Blackwell Publishing Ltd, 2008). Ashworth, Andrew, 'Conceptions of Overcriminalization' (2008) 5 *Ohio State Journal of Criminal Law* 407.

[26] *R v Cuthbertson*, below fn 38.

[27] Powers of Criminal Courts (Sentencing) Act 2000 ss 130–133.

[28] See below, page 14.

would have been in had the crime not been committed. Perhaps because of fear of the computations that would have been required, English law went down a different path, that of quantifying 'benefit' from the crime far more widely than would have been required by the 'restitutionary' purpose, but still claiming, dubiously (for the purposes of Article 6) that the results were not punitive, and opening up many intractable questions.

Building on Sand—The Development of the AML Narrative

The earliest use of the word 'laundering' in this context in the English cases was in 1978.[29] Concern about money laundering arose because of the failure of the 'war on drugs'.[30] One effect of the war on drugs, from the early 1970s forward, was to inflate the profits available to dealers. In 1984, the (US) Presidential Commission on Organized Crime wrote:[31] 'If money laundering is the keystone of organized crime, these recommendations can provide the financial community and law enforcement authorities with the tools needed to dislodge that keystone, and thereby to cause irreparable damage to the operations of organised crime.' The Money Laundering Control Act 1986[32] made laundering a federal crime.[33] The Vienna Convention (1988)[34] was the first major international instrument dealing with the proceeds of dealing. Article 5 of the Convention requires its parties to confiscate proceeds from drug offenses and to empower its courts or other competent authorities to order that bank, financial, or commercial records be made available or seized. The Convention prohibits a party from declining to act on this provision on the ground of bank secrecy. The Convention contains the definitions of laundering which have

[29] *Briman Properties Limited v Barclays Bank Limited* & *Anor*, *Standfield Properties Ltd* v *National Westminster Bank* [1978] EWCA Civ J1130-1 (CA (Civ)) at 3.

[30] Duke, Steven B and Albert C Gross, *America's Longest War*: *Rethinking our Tragic Crusade against Drugs* (NYC, New York: Putnam, 1993).

[31] Presidential Commission on Organized Crime, Interim Report, *The Cash Connection* (Washington DC: 1984) 63.

[32] Money Laundering Control Act 1986 (US) Public Law 99-570 18 US Code § 1956.

[33] The development of US law in this area is set out at http://www.fincen.gov/news_room/aml_history.html.

[34] The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988).

informed statutes worldwide. Subsequent international instruments[35] have expanded the range of areas to which the machinery established as part of the war on drugs applies.

The mechanism by which the UK committed itself to the 'war on drugs' was the Misuse of Drugs Act 1971.[36] At that time, the major problem associated with drugs was perceived to be the harm that drugs do to their users. Dealing in drugs was regarded as a form of complicity in drug taking.[37] It was only from the late 1970s forward that concern began to grow as to the amounts of money that were being made by drug dealers. The great bugbear was the idea that a drug dealer would accumulate large sums of money by dealing, and then, even if s/he were apprehended and served a prison sentence, s/he could emerge and live comfortably on the profits of dealing. A focus was given by *Cuthbertson*,[38] in which the House of Lords held that there was no power, either under the Misuse of Drugs Act 1971 or at common law, to confiscate the proceeds of drug deals. In consequence came the Hodgson Report[39] and the Drug Trafficking Offenders Act 1986, implementing it to introduce confiscation orders, and the Criminal Justice (International Co-operation) Act 1990 implementing parts of the Vienna Convention, including the criminalisation, for the first time,[40] of some laundering.

The response to drug dealers and to *Cuthbertson* might have stopped at drugs and at confiscation provisions. Even if one deplores the fact that drug dealers profit from crime and wishes to confiscate those profits, it does not follow that one must necessarily be committed to the view that money laundering *itself* should be a crime. To achieve the objectives which the major national and international bodies had set themselves in respect of the proceeds of drug dealing, it was not necessary to criminalise any

[35] Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime (1990), International Convention for the Suppression of the Financing of Terrorism (1999), United Nations Convention against Transnational Organized Crime (Palermo, 2000), UN Convention against Corruption (2003).

[36] Things might have gone the other way: Home Office Advisory Committee on Drug Dependence, *Hallucinogens Sub-Committee*, *Report on Cannabis* (1969) (The Wootton Report) had proposed a more permissive *régime*.

[37] Alldridge, Peter, 'Dealing with Drug Dealing' in (Simester, AP & ATH Smith eds) *Harm and Culpability* (Oxford: Oxford University Press, 1996) 239–257.

[38] *R v Cuthbertson* [1981] AC 470.

[39] Hodgson, Derek, *Profits of Crime and their Recovery* (London: Heinemann, 1984).

[40] S 14.

laundering. In consequence 'organised crime' became an early focus. Frequently the same organisations were dealing drugs and engaging in other illegal activities, and the money would be following the same pathways. It made little sense, so it was argued, so long as they were all unlawful, to differentiate between their respective provenances. The move (in English law) from the Drug Trafficking Offenders Act 1986 to the Criminal Justice Act 1988 followed exactly that seductive route.

The Foundation and Growth of the Financial Action Task Force[41]

Although there is widespread support for the international initiatives on laundering, the reasons for them are less clear. There is a range of statements of the position received among major governments as to the harm in laundering.[42] The (now) 36-member Financial Action Task Force (FATF) is the international agency principally charged with leading action against laundering. FATF is (deliberately) an unrepresentative agency,[43] attempting to enforce worldwide its selected standards. FATF is not a treaty-based organisation. Its original mandate was a resolution on drugs by the (then) G7 in 1989. It is an intergovernmental standard-setting body that works to establish norms and facilitate co-operation in respect of laundering. The mandate was last renewed in 2012 (extending it until 2020). FATF still lacks a constitution and transparency. The website names the member countries but not the individuals who make the policies, nor the procedures by which they are made.

The main instrument by which FATF makes its wishes known is the Forty Recommendations,[44] intended for implementation by national

[41] And see Roberge, Ian, 'Financial Action Task Force' in Hale, Thomas and David Held, *Handbook of Transnational Governance*: *New Institutions and Innovations* (Cambridge: Polity, 2011), 45–50., Hülsse, Rainer, 'Creating Demand for Global Governance: The Making of a Global Money-laundering Problem' (2007) 21 *Global Society* 155–178.

[42] See Alldridge, Peter, 'The Moral Limits of the Crime of Money Laundering' (2002) 5 *Buffalo Criminal Law Review* 279.

[43] For discussion of this aspect see—HL European Union Committee,19th Report, *Money Laundering and the Financing Of Terrorism* (2009) Oral Evidence, 1 April 2009, Q327 *et seq.*

[44] International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation—the FATF Recommendations FATF February 2012, replacing the previous 40 + 9 (the 9 being counter-terrorist 'special recommendations' added after 9/11).

governments. FATF first issued in them in 1990 and has renewed them several times, most recently in 2012. They are widely recognised in the 'international community, including by the IMF and World Bank'[45] as setting out appropriate minimum standards to which all jurisdictions should adhere. They create a framework for AML cooperation by requiring States to put in place mechanisms to help one another identify, freeze, and confiscate tainted money. The recommendations require governments and financial institutions to adopt 'know-your-customer'[46] (KYC) and other customer due diligence (CDD) practices and to monitor and report suspicious transactions including all cash transactions above certain threshold amounts. Since 2001 they have contained provision for counter-terrorism funding and subsequently for dealing with nuclear proliferation.[47] The Forty Recommendations are enforced by a system of visits and reports. For a while 'blacklisting' of non-compliant jurisdiction was tried, but it was not a great success and may have even been counter-productive.[48] FATF directions have acquired 'hard law' status in English Law as one of the bases upon which the Treasury may issue directions under Schedule 7 of the Counter-Terrorism Act 2008.

The Involvement of the EU[49]

The first EU Money Laundering Directive dates from a time before the EU exercised any jurisdiction in matters of criminal law. The EU could not directly compel the member states to make criminal laws. It involved itself by asserting that the financial system was endangered by laundering and that financial institutions needed to be recruited to report suspicious transactions. The preamble to the First Money Laundering Directive stated:

[45] Gray, Larissa, Kjetil Hansen, Pranvera Kirkbride, and Linnea Mills, *Stolen Asset Recovery in OECD Countries* (Washington DC: World Bank Publications, 2014).

[46] Gill, Martin and Geoff Taylor, 'Preventing Money Laundering or Obstructing Business? Financial Companies' Perspectives on 'Know Your Customer' Procedures' (2004) 44 *British Journal of Criminology* 582.

[47] Passas, Nikos, 'Terrorism Finance: Financial Controls and Counter-Proliferation of Weapons of Mass Destruction' (2012) 44 *Case W Res J Int'l L* 747–955.

[48] Rawlings, Gregory and Jason Sharman, 'National Tax Blacklists: A Comparative Analysis' (2006) 29 *Law and Policy* 51–66.

[49] For a sympathetic view see Tsingou, Eleni, 'Money Laundering' in Daniel Mügge (ed.) *Europe and the Governance of Global Finance* (Oxford: OUP, 2014).

> Whereas when credit and financial institutions are used to launder proceeds from criminal activities (hereinafter referred to as "money laundering"), the soundness and stability of the institution concerned and confidence in the financial system as a whole could be seriously jeopardized, thereby losing the trust of the public; … &c.[50]

There is little or no evidence for the claim that, leaving aside the effects of the AML *régime* itself, allowing banks to launder money for clients endangers the banks in question or the financial system more generally. The one exception that is sometimes mentioned is BCCI, a Bank with headquarters in Luxembourg and branches worldwide, which failed in 1991.[51] The claim is sometimes made that BCCI became insolvent because they facilitated the laundering of Colombian drug money.[52] BCCI was used to launder drug money, but what drove the bank into insolvency was the fact that their depositor's money was stolen.[53]

So far as was possible to judge, significant quantities of laundering have taken place in Swiss banks at the latest since 1815, when the Congress of Vienna guaranteed Swiss neutrality. Of all the crises and insolvencies arising in financial institutions from the crash of 2007–08, none was as a result of money laundering. The claim that the EU's interventions are to safeguard its financial markets is therefore fanciful and smacks of policy-based evidence making. The public lost trust in financial institutions in 2007–08 with the crash and subsequently with the scandals around LIBOR, Forex,[54] and *HSBC Suisse*.[55] None of these events was related to money laundering.

In any event, having (by assertion) acquired jurisdiction, the EU went on to impose reporting obligations of CDD, and the legal basis in the UK for the panoply of controls that came to be known as AML is EU

[50] First Money Laundering Directive, 1991/308/EEC.

[51] Bingham (chair), *Inquiry into the Supervision of the Bank of Credit and Commerce International* (HC 198, 1992).

[52] Reuter, Peter and Edwin Truman, *Chasing Dirty Money*: *The Fight against Money Laundering* (Washington, DC: Institute for International Economics, 2004) 45.

[53] Passas, Nikos, 'Structural sources of international crime: policy lessons from the BCCI affair' (1993) 20 *Crime*, *Law and Social Change* 293; *MLL*, 36–38.

[54] Connor, John M, 'Big Bad Banks: Bid Rigging and Multilateral Market Manipulation' in Hawk, Barry E, (ed.) *International Antitrust Law and Policy*: Fordham Competition Law 2014 Vol. 41 (Huntington, NY: Juris Publishing, 2015) 213.

[55] See below, page 49.

Law. Directive followed Directive,[56] and they provide the basis for each of the subsequent measures in successive sets of (UK) Money Laundering Regulations (MLRs).[57] At first, it would have been possible to establish a legal framework to compel the disclosures, and the concomitant offences of failing to report, tipping off, and the offences under the MLRs themselves,[58] without putting in place a substantive crime of laundering. At its inception, the crime of laundering was a convenient peg on which to hang the reporting obligations. The financial and other institutions were being asked to report something: to emphasise its importance relative to the other things there is no duty to report, laundering was made a crime. Having expanded its jurisdiction, the next step was to extend the freezing and seizing jurisdiction to make extended confiscation (the sort about whose consistency with Article 6 was contentious), and the EU did that in 2014.[59]

The Instantiation of the AML Industry

With the advent of the Forty Recommendations and their endorsement both by the EU and in the Money Laundering Regulations, the banking industry began to engage. At first it was hostile to the expense and the controls and to the changes they would require in the financial institution's relationship to its customer. Appeals to the sanctity of the confidence between customer and bank had a hollow ring to them, but they were made and rejected. Once it had a secure foothold in banking (the time at which the banks ceased to complain about the cost to them and started to embrace the enterprise), the AML industry, as bureaucracies, unchecked, will, began to expand.

The trend towards the 'responsibilization'[60] of civil society in crime control took over. The growth of the compliance industry was much like the growth of any other area of the security industry. Increasing reporting

[56] First Money Laundering Directive (1991/308/EEC); Second Money Laundering Directive (2001/97/EC); Third Money Laundering Directive (2005/60/EC); Fourth Money Laundering Directive (EU) 2015/849.

[57] Money Laundering Regulations 1993 SI 1933; Money Laundering Regulations 2003 SI 3075; Money Laundering Regulations 2007 SI 2157.

[58] That is, those concerned with record-keeping, KYC, internal reporting and so on.

[59] Directive 2014/42/EU. And see below, page 65.

[60] Garland, David, 'The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society' (1996) 36 *British Journal of Criminology* 445–471.

of episodes featuring competitors could be used to amplify threats to any given organisation and to play on fear and the risk. Compliance was no longer the preserve of ex-police officers, but became a banking career whose rewards might not match those of market dealing or investment banking, but are substantial and carry significantly less risk.

The General Narrative(s) on Quantity

An overarching narrative informs the development of the law worldwide on money laundering and the growth of the AML industry. It states that huge amounts of money, the proceeds of crime, are travelling the world and that this phenomenon is tremendously harmful, and that action in its regard should be prioritised. The plan underpinning POCA, set out in the Cabinet Office report that preceded it,[61] was to double the receipts from seizures by 2004 by deploying additional resources, expertise, and greater international co-operation.[62] A subsequent plan was that by 2009–10 the Government would be acquiring £250 million *per annum* from the proceeds of crime and in due course £1 billion, that to include a significant proportion from civil recovery.[63]

The claims were never really supported by the known facts. For some years the FATF produced estimates of the total amount of money laundered worldwide. It gave up this practice, on the grounds that no reliable methodology could be agreed.[64] The methodological difficulties are obvious even from considering the difficulties in setting the extent of confiscation orders.[65] Nonetheless, the UN Office on Drugs and Crime holds that the estimated amount of money laundered globally in 1 year is 2–5 % of global GDP, or $800 billion—$2 trillion in current US dollars,[66] and there are many other sources pronouncing very large estimates. The National Crime Agency (NCA) assessment simply states: ‘Many hundreds

[61] Cabinet Office Performance and Innovation Unit, *Recovering the Proceeds of Crime* (London: Cabinet Office, 2000).

[62] HC Debates, 30 October 2001, col 758 (John Denham MP, Minister for Police, Courts and Drugs).

[63] Home Office, *Asset Recovery Action Plan* (2007).

[64] And see Unger, Brigitte et al., *The Amounts and the Effects of Money Laundering*, Report for the (NL) Ministry of Finance (Amsterdam: Ministry of Finance, 2006).

[65] See, for example, *Waya* and *Ahmad*, below, page 70.

[66] https://www.unodc.org/unodc/en/money-laundering/globalization.html, accessed 14th October 2014.

of billions of pounds of international criminal money is almost certainly laundered through UK banks, including their subsidiaries, each year.'[67]

Sums of the order of those contemplated by the AML narrative have yet to be identified and seized by the authorities. The UK government acquires around £150 million *per annum* from confiscation and forfeiture orders.[68] The disparity between the sums the government claims to be laundered, on the one hand, and those it seizes, on the other, does not present a problem to the proponents of the AML narrative, which has a built-in defence against criticism for failure to discover and to confiscate more money. The explanation proffered is that the relevant authorities are not able to recover the vast sums which nonetheless, the narrative maintains, are still 'out there', because of insufficient resources, insufficient powers, or other reasons outside their control (these are frequently to do with secrecy jurisdictions). That is, the authorities' failure is simply taken as a reason to grant them more power and more resources. Thus, for example, the Impact Assessment to the proceeds of crime provisions of the Serious Crime Act 2015[69] states:

> Sustained legal challenges to POCA (POCA) are frustrating attempts to further improve the recovery of assets attributable to criminal conduct. The asset recovery process is being delayed by criminals seeking to exploit POCA proceedings, in particular by using loopholes and weaknesses in the Act. Government intervention is necessary as legislation will be required to remedy the shortcomings identified in the Act.

Whatever the numbers are, they will be larger if more predicate offences (in particular tax evasion) are included, and if the other conditions for criminal liability are more easily satisfied.

Rhetoric, Mythology, Slurs, and the Narrative

The AML narrative is supported by various rhetorical devices. Two are as follows: first is the use of pejorative vocabulary, especially words like 'dirty'

[67] National Strategic Assessment of Serious and Organised Crime (London: NCA, 2014), 12.

[68] National Audit Office, *Confiscation Orders* (HC 738, 2013–2014), page 4.

[69] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/317533/2014-06-03_signed_IA_POCA.pdf.

and 'illicit', sometimes deployed more widely than is justified, frequently to foreclose discussion. Thus, for example, when, late in 2012, the bailout of the Cypriot banks was being discussed, one of the sticking points for Germany was said to be that some of the deposits in Cypriot banks that Germany was being asked to protect were the property of rich Russians, allegedly of dubious provenance and allegedly deposited to evade Russian tax or in breach of Russian exchange controls,[70] or both. There is a good deal of Russian money in Cypriot banks, and it has become commonplace to refer to it as 'dirty'.[71] The fact is that little is known about its provenance, and that, given the nature of the *régime* in Russia, it is entirely to be expected that anyone who holds money there will have good reason to expatriate it. A more plausible explanation, therefore, of the German reluctance to guarantee Cypriot banks was that the money was Russian, not that its provenance was, or might have been, dubious. How could it be justified to use German taxes to refund losses made by rich Russians, however they came by their money?

Similarly, in the summer of 2015 concern was raised about the use of the UK property market, particularly that of London, as the repository for laundered funds, using anonymity mechanisms (offshore companies).[72] Even that was reported in some contexts as something that might benefit wealthy Londoners.[73] The dilemma, as always, is that politicians may say they do not like laundering, but they also like investment coming into their own, rather than other jurisdictions, and they like the increased revenue (from stamp duty) that arises, and so there is a strong chance of inconsistency between statements and actions.

The second widely used rhetorical device is the use of martial imagery—the war on drugs, the war on terror, the use in international documents of images of struggle, fight, and so on. Things can be done in

[70] The English law definition of 'criminal conduct' for the purposes of the laundering offences (POCA s 340(2)) does not extend to other countries' exchange controls.

[71] Carsten Volkery, '*Cyprus* Bailout Talks Stalled: Money Laundering Accusations Could Delay Aid', Der *Speigel* English edition 12 November 2012 : http://www.spiegel.de/international/europe/money-laundering-accusations-could-stall-aid-to-cyprus-a-865580.html; accessed 14 October 2014, and Halliday, Terence, Michael Levi, Peter Reuter, *Global Surveillance of Dirty Money* (Chicago IL: Centre for Law and Globalization, 2014), para 7. The same sorts of accounts are given, for example, of Indian money in Mauritian, or French money in Belgian and Luxembourgeois banks.

[72] 'David Cameron to take action on 'dirty money' in UK property market', *Financial Times*, 28th July 2015.

[73] 'Cash from Crime Lords drives up house prices', *The Times*, 25th July 2015.

the prosecution of a war but not otherwise. Tony Blair proclaimed, 'You cannot beat drugs gangs according to the Queensberry rules'.[74] That is to say, the normal constraints upon governments imposed by considerations involving human rights do not apply. This ambivalence is particularly evident in the case of terrorism. The 'war on terror'[75] seems to be spoken as if actions in its prosecution carry some additional 'trump' value.

The Narrative and Professional-Client Relations?

Change has been wrought to the relationship between professionals and their clients. Before the advent of the AML industry, the idea that a member of a profession might be under a duty to inform the authorities as to the suspected criminality of a client was anathema. Now the professional is characterised increasingly not only as failing in a duty to inform but as him/herself being complicit in criminality. The extent and nature of the facilitation of money laundering by lawyers is disputed.[76] The UK legal profession is by far the most likely in the world to report suspicions of money laundering by their clients, though there are no serious studies rigorously analysing either outputs or outcomes from these reports.[77] The current UK government strategy on organised crime nonetheless states that:

> [O]rganised crime is serious crime planned, coordinated and conducted by people working together on a continuing basis. Their motivation is often, but not always, financial gain….organised criminals very often depend on the assistance of *corrupt*, *complicit or negligent professionals*, *notably lawyers*, *accountants and bankers*.[78]

[74] *The Guardian*, 27th September 2000.

[75] Gordon, Richard, 'A Tale of Two Studies: the Real Story of Terrorism Finance' (2014) 162 *U Pa LR* 269–283, responding to Baradaran, Shima, Michael Findley, Daniel Nielson & Jason Sharman, 'Funding Terror' (2014) 162 *U Pa LR 477*.

[76] And see Middleton, David, 'Lawyers and Client Accounts: Sand through a Colander' (2008) 11 *Journal of Money Laundering Control* 34.

[77] Middleton, David and Michael Levi, 'Let Sleeping Lawyers Lie: Organised Crime, Lawyers and the Regulation of Legal Services' (2015) 55 *British Journal of Criminology* 647–668.

[78] HM Government, *Serious Organised Crime Strategy* (London: TSO, 2013) paras 2.5 and 2.6 (italics added).

In consequence, and partly in connection with the attack on tax avoidance and the elision between avoidance and evasion, professionals are now constituted both as being part of the problem and part of the solution.[79]

The Narrative—Specific Issues

In addition to the general narrative about crime and money laundering, the AML project encompasses a changing range of more specific *foci*—usually the assertion that a particular crime is very serious, that it is inextricably connected to laundering, and that that crime, whatever it is, in conjunction with the laundering of its proceeds, either is or borders upon being a threat to national security. The thesis of this book is that these issues are selected more for their value to AML industry than anything else, in particular for any value they have in reducing crime or increasing security. Once their value diminishes for these purposes, the crime in question moves from the limelight, and another is selected.

Handling

The individualistic notion of agency underpinning English criminal law focuses attention on the perpetrator and regards the liability of others as being derivative from that. The idea that some accomplices might be more important, more dangerous, or more harmful than perpetrators appears at some points, most notably, perhaps, in the crime of conspiracy. In some ways the laundering panic is a reprise of previous panics about people handling stolen goods, either the thieftakers of the eighteenth century or the concerns about the use of children to steal in the nineteenth. Handlers are not necessary accomplices in theft, but their existence increases the danger that thieves will steal, they are typically 'professional' rather than opportunist, profiting from selling on (or ransoming) the proceeds of many thefts.

There are few, if any, reports to the police from 'victims' of handling, so whether particular actions appear in the reported crime statistics as handling or not turns upon their classification by the police. The rate of reported cases of handling has declined over the last 20 years. An important contributor to the decline in the reported incidences of handling is the decline in the rate of reports of domestic burglary.[80] The reasons for

[79] George Osbourne, HC Debates, 18 March 2015, cols 771–772.

[80] Recorded instances are now around 650K per annum, a 60% reduction from a peak in the early 1990s around 1.6M: Office for National Statistics, *Statistical bulletin*: *Crime in England and Wales, Year Ending March 2014* (London: Stationery Office, 2014).

this include aspects of situational crime prevention—improved household and car security and improved security in and diminishing black market value of electronic devices. None of this has anything to do with the punishments directed against handlers or the designations they are given. That is, rates of burglary would have come down anyway, and with them, rates of handling.

There is another reason, however, for the reduction in reports of handling: money laundering is defined so widely that there is no case of handling that would not also, *ipso facto*, be laundering, and the mental state required for a conviction for laundering (knowledge or *suspicion* as to the provenance of the property) is easier for the prosecution to prove than for handling (which requires knowledge or *belief*). Quite soon after the advent of POCA, prosecutors became aware that in a standard case of handling goods stolen in a domestic burglary it was easier to prove one of the laundering offences than it was to prove handling stolen goods under the Theft Act 1968.[81] This accounts at least in part for the decline in the recorded instances of handling stolen goods. That is, the reclassification by police and prosecutors of handling as laundering fed into the narrative by generating convictions branded laundering when previously they would not have been. The change, welcome as it was to police officers and to prosecutors, does not have approval at the highest judicial level. In *R v GH*, Lord Toulson, delivering the only judgment, discouraged the use of laundering charges where previously handling would have been used.

> The courts should be willing to use their powers to discourage inappropriate use of the provisions of POCA to prosecute conduct which is sufficiently covered by substantive offences, as they have done in relation to handling stolen property. A person who commits the offence of handling stolen property contrary to section 22 of the Theft Act 1968 is also necessarily guilty of an offence under section 329 of POCA, but the Court of Appeal has discouraged any practice of prosecuting such cases under POCA instead of charging the specific statutory offence under the Theft Act.[82]

[81] Theft Act 1968 s 22. See, eg, *R v Gabriel* [2006] EWCA Crim 229; [2007] 2 Cr App R 11 and *R v Stanley* [2007] EWCA Crim 2857 (defendant had dropped off a skip, knowing that it was to be used for a criminal purpose, and others had filled it with large manufacturing tools they had stolen). It is easier to prove 'suspicion' as to the provenance of the property than belief (which Theft Act 1968 s 22 requires).

[82] *R v GH* [2015] UKSC 24; [2015] 1 WLR 2126 at para 49, citing *R* (*on the application of Wilkinson*) *v Director of Public Prosecutions* [2006] EWHC 3012 (Admin) and *R v Rose* [2008] EWCA Crim 239, [2008] 1 WLR 2113, para 20).

Drugs

Drug-related crime was the law enforcement priority when AML came in the 1980s. The AML industry grew up as a result of the failure of the 'war on drugs'. If at any time before the expansion of the AML industry beyond drugs, a decision had been taken, instead of prosecuting the 'war', to decriminalise drugs, then the proceeds of drug dealing would no longer have been obtained by crime, and the perceived need for the AML industry might have disappeared. Now, while the changes in places such as Uruguay and Colorado[83] are welcome, these developments do not have the sort of global impetus that would lead to widespread decriminalisation. The moment has been missed. In terms of seizures, and with the exception of cocaine, which experienced a sharp rise in the years immediately after 2003, but is now declining, the figures have been showing a consistent downward trend for at least 10 years.[84] Recorded instances of drug trafficking and possession are also moving steadily downwards.[85] Arising from neither case (burglary or drugs) do we hear calls to be less concerned about the general issue of profits from crime as a result of this diminution, nor do we hear claims that the reductions in levels of burglary or drug crime are due to POCA and associated legislation. If the case for AML were argued under present conditions (as it was in the late 1980s) solely as a means of prosecuting the war on drugs, the argument would probably fail. This is why the AML industry[86] turned to other areas.

Organised Crime[87]

The 'organised crime' agenda follows from the idea that 'organised crime' is particularly threatening and that extraordinary measures are required to combat it. The EU is particularly keen to pursue it. Article 83(2) of the new Lisbon Treaty (2007) puts organised crime in the same category as

[83] Room, Robin, 'Legalizing a market for cannabis for pleasure: Colorado, Washington, Uruguay and beyond' (2014) 109 *Addiction* 345–351.

[84] Coleman, Kathryn, *Seizures of drugs in England and Wales, 2012/13*, Home Office Statistical Bulletin 04/13.

[85] Office for National Statistics, *Key Annual Trend and Demographic Tables—Crime in England and Wales, Year Ending March 2014*. It may be that fashion and the widespread availability of 'legal highs' also contributes.

[86] Verhage, Antoinette, *The Anti Money Laundering Complex and the Compliance Industry* (Abingdon: Taylor & Francis, 2011).

[87] And see von Lampe, Klaus 'Organized Crime: Analyzing Illegal Activities, Criminal Structures, and Extra-legal Governance' (London: Sage, 2015).

terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, and counterfeiting of means of payment,[88] and the UK's Serious Crime Act 2015 continues and amplifies the trend. The new offence of 'participation in an organised crime group'[89] is to 'ensure that police and prosecutors can take firm action against the white-collar associates of the gangs involved in Britain's £24 billion a year organised crime industry'.[90]

Liz Campbell[91] made the case against adding organised crime to the lurch into the security agenda on three grounds. First, there is a serious problem in the definition of an organisation at all, especially when the organisation is setting out not be identified as an organisation.[92] Second, what is known from empirical data suggests that organised crime, as it is defined and encountered usually in the United Kingdom, does not in fact constitute a serious threat to national security and thus ought not to be subsumed within the security agenda.[93] Third, there is the issue of proportion and of risk: the consequences of categorising a particular criminal offence as being an attack on national security should be resisted to the greatest extent possible, because of the extraordinary legal consequences it entails. In respect of each and any such offence the case must be made out and the burden is on those seeking to establish, and the standard is a high one. As with the presumption of innocence, the threshold should be set so as to mitigate the risk of error.

[88] And see Maugeri, Anna Maria, 'Criminal Sanctions against the Illicit Proceeds of Criminal Organisations' (2012) 3 *New J Eur Crim L* 257.

[89] S 45. Those convicted of the offence face up to 5 years' imprisonment and a new ASBO-style civil order restricting their travel and associations (s 51).

[90] The figure is from a Home Office press release, quoted without demur in *The Guardian*, 3 June 2014.

[91] Campbell, Liz, 'Organized Crime and National Security: A Dubious Connection?' (2014) 17 *New Criminal Law Review* 220–251.

[92] Serious Crime Act 2015 s 45(6) offers a definition: 'Organised crime group' means a group that—(a) has as its purpose, or as one of its purposes, the carrying on of criminal activities, and (b) consists of three or more persons who act, or agree to act, together to further that purpose.

[93] See Ramsay, Peter, *The Insecurity State*: *Vulnerable Autonomy and the Right to Security in the Criminal Law* (Oxford: Oxford University Press, 2012). Ashworth, Andrew and Lucia Zedner, 'Prevention and Criminalization: Justifications and Limits' (2012) 15 *New Criminal Law Review* 542.

While endorsing the arguments on these three grounds, a fourth might be added, that attempting to apply criminal law to an organisation can have the effect of changing its legal status in ways which may not have been foreseen but which can be very serious.[94] If a major company commits a criminal offence in the process of carrying out its purpose, and that offence produces proceeds, then when the company moves those proceeds around so as, for example, to invest or even minimise its liability to tax, that will be an act of laundering and the organisation will be close to being an 'organised crime group' within the statute.[95] If it is such a group the entire company is in danger of being seized by the State.

Terrorism Financing

The 11th of September 2001 provided the impetus for a further shift in the focus of money laundering control to consider the means by which terrorism is financed. Funding for terrorism is either itself the proceeds of crime, in which case it is covered already, or it is not, in which case the seizure of money intended for terrorist use, when no action has been taken towards its deployment, smacks of 'thought-crime' and does not fall within traditionally accepted notions of laundering, because the money is, within the terms of the laundering metaphor, clean. This was obscured in the association, in the days after 9/11, of Afghanistan with heroin sales.[96]

Until September 2001, the threat assessments of the USA in relation to terrorism had been to the effect that a damaging terrorist attack on the USA was possible, but there was little or nothing that could be done to prevent it by monitoring the movement of money.[97] The sums involved in the financing of terrorism (compared to those obtained, for example, from drug dealing) are very small, and, just as important, are easily replaced. Looking for terrorist financing amongst the billions of dollars that flow

[94] See the account of *Yukos*, below, page 82.

[95] The issue would turn on the meaning of the word 'purpose' in s 45.

[96] After the attacks on the USA, Tony Blair stated repeatedly that 90 % of heroin sold in Britain was of Afghan origin. (Labour Party conference, 2 October 2001; 'Air Strikes on Afghanistan: Prime Minister's Speech', *The Independent*, 8 October 2001; HC Debates, 8 October 2001 cols 814 & 821). The conceptual differences were, however, made clear by the Chancellor of the Exchequer, Gordon Brown, HC Debates 15 October 2001, col 943.

[97] Zagaris, Bruce, 'Financial Aspects of the War on Terror: the merging of the Counter terrorism and the Anti-Money Laundering Regimes' (2002) 34 *Law and Policy in International Business* 45.

through global financial markets was thought to be 'akin to searching for an indistinguishable needle amongst a stack of needles'.[98] A hard-headed but politically unpalatable consequence of this position, after the events of September 2001, might therefore have been not to change the policy. A possibility the risk of which had been known, correctly evaluated, and taken had eventuated. Instead, however, AML was adopted, adapted, and applied in the area of the financing of terrorism. The FATF put in place nine special recommendations in respect of terrorism, which were subsequently (2012) incorporated into the Forty Recommendations.[99]

While it is difficult to conduct an accurate assessment in terms of costs and benefits of AML, it is wholly impossible in the case of CFT, because nothing about the provenance of the money will stand out. In the case of terrorism, however, the apologists for the *régime* have an additional trump. They can always say that they, being privy to information which is not generally available, are in a better position to make the judgement, and that they can assure us that the *régime* is a valuable one, that we have it to thank for our continuing security, and if only they could tell us the information that is secret, we would agree.

From September 2001, the policy of the USA changed and countering the financing of terrorism (CFT), as a supercharged variation upon worldwide AML, began. So far as concerns its application in England and Wales, there were three main legal thrusts. First, the concept of 'terrorist property', broadly analogous to 'criminal property' in regular money laundering, was introduced, and a set of offences were put in place of doing things in respect of it.[100] Second, terrorist property and cash was subjected to forfeiture provisions, more draconian than the 'criminal property' provisions.[101] Third, a system was put in place of freezing and seizing the assets of bodies or individuals identified by the UN Sanctions Committee,[102] FATF, the EU,[103] or the Treasury. Statutory instruments[104] had given the

[98] Wolosky, Leo and Stephen Heifetz, 'Financial Aspects of the War on Terror: Regulating Terrorism' (2002) 34 *Law and Policy in International Business* 1.

[99] Page 15 above.

[100] Terrorism Act 2000 as amended ss 15–22A.

[101] Terrorism Act 2000 ss 23–31.

[102] Pursuant to UNSCR 1373 (2001).

[103] Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism.

[104] Terrorism (United Nations Measures) Order 2006 SI 2657 and the Al-Qaida and Taliban (United Nations Measures) Order 2006 SI 2952.

Treasury power to freeze the funds of persons provided certain criteria set out were met. After these were struck down by the Supreme Court,[105] temporary legislation was rushed through restoring their effect until the end of 2010,[106] and then further, permanent legislation was put in place.[107] This generates compliance to the 'designated person' provisions of the relevant United Nations Security Council resolutions.[108] The power[109] is in principle a temporary, prophylactic one. Being a 'designated person'[110] is a temporary status and when it ends the person has the property restored to him/her. The asset-freezing rules are, theoretically at least, preventative and not punitive. Nonetheless, there is clearly a period beyond which the freezing of assets becomes tantamount to an appropriation, and there are firm suggestions, at the very least as a matter of EU Law,[111] that the freezing of property for any length of time will engage the first protocol.[112]

The commission of any of the offences in the Terrorist Assets Freezing &c Act 2010 (including the 'catch-all' circumvention offence),[113] will give rise to the possibility of the property that they concern being subject to the 'regular' forfeiture provision.[114]

The Counter-Terrorism Act 2008 extends the CFT scheme to the enforcement of economic sanctions against Iran or Russia[115] and the issue

[105] *HM Treasury v Ahmed* & *Ors* [2010] UKSC 2; [2010] 2 AC 534.

[106] Terrorist Asset-Freezing (Temporary Provisions) Act 2010 Al-Qaida and Taliban (Asset-Freezing) Regulations 2010 SI 1197.

[107] Terrorist Asset-Freezing &c Act 2010. Al-Qaida (Asset-Freezing) Regulations 2011 SI 2742.

[108] Above, page 102.

[109] Under Schedule 7 to the Counter-Terrorism Act 2008 as amended by the Terrorist Asset-Freezing &c Act 2010.

[110] Terrorist Asset-Freezing &c Act 2010 s 1.

[111] *Kadi v European Commission* (T-85/09) [2011] All ER (EC) 169; [2011] 1 CMLR 24; And see *Kadi v Council of the European Union* (C-402/05 P)[2009] 1 AC 1225; [2010] All ER (EC) 1105.

[112] Léonard, Sarah, and Christian Kaunert, '"Between a Rock and a Hard Place?": The European Union's Financial Sanctions against Suspected Terrorists, Multilateralism and Human Rights' (2012) 47 *Cooperation and Conflict* 473–494; Van den Broek, Melissa, Monique Hazelhorst & Wouter de Zanger, 'Asset Freezing: Smart Sanction or Criminal Charge?'(2011) 27 *Utrecht J Int Eur L* 18–27.

[113] Section 18 creates an offence of circumventing or attempting to circumvent the prohibitions in the preceding sections. It is a clear violation of the principle of legality.

[114] Powers of Criminal Courts (Sentencing) Act 2000 s 143.

[115] Council Regulation (EU) No.833/2014.

of nuclear proliferation and other unlawful weaponry.[116] A consolidated list is published of objects of orders,[117] and quarterly reports are published on the operation of CFT.[118]

As with the relationship between terrorism and other areas of the criminal law,[119] the provisions involving financing of terrorism are in various respects more severe than those in 'regular' AML.[120]

Corruption and Tax

The mechanisms (the AML industry) which were introduced in the pursuit of drug money, and failed in that regard, were then transferred to the directed against terrorism, nuclear proliferation, and organised crime, largely failing also in those areas, have now been turned to corruption and to tax. Corruption is now a centrally important issue for the purposes of international development and the economics of globalisation.[121] The EU's Second Money Laundering Directive (1999) expressly listed 'corruption' amongst predicate offences. As a consequence of global forces, the UK revised its own legislation,[122] and is giving more attention to prosecution.[123] Globally, bribery, which until even 5 years ago would not have been investigated, is now being prosecuted, and in some cases convictions are being obtained.[124]

[116] Iran (Restrictive Measures) (Overseas Territories) Order 2012 SI 1756.

[117] http://hmt-sanctions.s3.amazonaws.com/sanctionsconlist.htm.

[118] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/411231/2014Q4-WMS.pdf.

[119] Walker, Clive, *Terrorism and the Law* (Oxford: OUP, 2011).

[120] And see King, Colin and Walker, Clive, 'Counter Terrorism Financing: A Redundant Fragmentation?' (2015) 6 *New Journal of European Criminal Law* 372–395.

[121] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Paris, 17 December 1997 (Cm 3994); *United Nations Convention Against Corruption* (2006).

[122] Bribery Act 2010.

[123] Without significant changed results. There has only yet (October 2015) been one conviction from an SFO bribery prosecution (*R v West and Stone*, Southwark CC, December 2014), and a number of the recent bribery prosecutions have been for betting scams which might better have been charged under Gambling Act 2005 s 42. See, eg *R v Amir* (*Mohammad*) *R. v Majeed*, and *R v Westfield* [2012] EWCA Crim 1186; [2012] 2 Cr App R 18. Others (*R v Patel* (*Munir*) [2012] EWCA Crim 1243; [2013] 1 Cr App R (S) 48) are the kinds of (local government) cases which would have been prosecuted prior to the Act.

[124] In other cases defendants are being allowed to buy off the possibility of a guilty verdict. For instance, in August 2014, Bernie Ecclestone entered into an agreement with prosecutors in Munich to compromise bribery charges. Deferred Plea Agreements have been introduced in England and Wales for this purpose (Crime and Courts Act 2013 Schedule 17), At the time of writing (March 2016) only one has been entered into SERIOUS FRAUD OFFICE

Sharman and Naikin produced a book to show that there are links between corruption and laundering.[125] The OECD agrees, pronouncing that: 'Corruption and money laundering are intrinsically linked.'[126] The FATF produced data to prove it.[127] Of course they are. The link could be claimed equally for any offence that either yields money or (in the case of terrorism or anti-proliferation offences) requires money for its commission. If the commentators' claims are rephrased as 'corruption and complicity in corruption are intrinsically linked', then the pleonasm becomes clear. This is not to say that corruption is not a serious and a pernicious group of crimes. It is, as is demonstrated amply by the scandal in 2015 surrounding FIFA. Far more needs to be done about it, but hoping that AML will do the trick is not the way. Resources, in the case of corruption, should be devoted to proactive measures. Proceeds of crime law, and following-the-money, is too much about the closure of stable doors subsequent to equine departure.

At the inception of AML, it was not thought that tax offences need or should be predicate offences to laundering,[128] nor was it thought that confiscation orders could or need be used to deal with unpaid taxes.[129] What someone had done who did not declare liability to tax is to put off the payment of a debt. The debt remained due. The tax authorities have extensive powers to obtain the money, impose penalties and interest, and until recently, were preferred creditors on insolvency.[130] It was also thought that tax evasion need not and should not be a predicate for the purposes of laundering. Then by a series of apparently marginal, incremental changes,[131] the change occurred. In his excellent polemic Naylor

v STANDARD BANK PLC (NOW KNOWN AS ICBC STANDARD BANK PLC) [2016] Lloyd's Rep. FC 91.

[125] Chaikin, David and JC. Sharman, *Corruption and Money Laundering*: *A Symbiotic Relationship* (Palgrave Series on Asian Governance) (London: Palgrave Macmillan, 2009).

[126] OECD http://www.oecd.org/cleangovbiz/toolkit/moneylaundering.htm.

[127] Financial Action Task Force, *Laundering the Proceeds of Corruption* (July 2011), available at http://www.fatf-gafi.org/dataoecd/31/13/48472713.pdf. And see Jakobi, Anja, 'OECD activities against money laundering and corruption' in (Martens, K & AP Jakobi eds.), *Mechanisms of OECD governance. International incentives for national policy-making*? (Oxford: Oxford University Press, 2010) 139–160.

[128] A predicate offence is the offence that gives rise to the property the subject matter of the laundering.

[129] The history is dealt with in Alldridge, Peter & Mumford, Ann, 'Tax Evasion and the Proceeds of Crime Act 2002' (2005) 25 *Legal Studies* 353.

[130] Enterprise Act 2000 s 251.

[131] The history is dealt with in Alldridge, Peter & Mumford, Ann, 'Tax Evasion and the Proceeds of Crime Act 2002' (2005) 25 *Legal Studies* 353.

criticises the myth that this was a slight shift, and characterises the extension of the range of required predicates.[132]

The 'Capital Flight' Concern

CFT was always a very small part of the global monitoring scheme involved in AML. When the sums promised from drugs failed to materialise, the focus of AML shifted from drugs to organised crime to global cash flows, and especially to 'capital flight'. Capital flight from the developing world is harmful because it erodes the tax base of developing nations, and taxation is the best sustainable means by which to fund government. Various influences are causing capital flight from the global south, frequently via 'secrecy jurisdictions'. The reasons for moving the money upon which they concentrate are tax avoidance, tax evasion, and money laundering.[133]

The concern over tax has several causes: first, the international rules on the taxation of companies (Starbucks, Google, Amazon &c); second, the application of those rules to individuals (the rules on 'non-doms'); third the use of 'offshore' secrecy jurisdictions;[134] and fourth, to the difficulty in establishing the real beneficial owner of a company in the name of which a bank account is operated.

The addition of tax offences to the category of predicates makes a significant difference to claims about laundering. Consider two claims: first, that capital flight is bad because it involves money laundering; and second, that money laundering is bad because it involves capital flight (with, in each case, the implication that action against one would militate against the other). Before tax offences were incorporated as predicates by FATF, the empirical claims about the interrelationship between money laundering and capital flight were difficult to make out, since they depended upon an overlap between the two which was unsupported by the data. On the few reliable data available—court orders—not much laundering fell within the 'transnational' category, and not much capital flight was laundering. That may remain the case, but the incorporation of tax evasion as a predi-

[132] Naylor, RT, *Counterfeit Crime Criminal Profits*, *Terror Dollars*, *and Nonsense* (Montreal/Kingston: *McGill*-Queens University Press, 2015) at 110 *et seq*.

[133] And see Alldridge, Peter, 'Tax Avoidance, Tax Evasion, Money laundering and the problem of "Offshore"' in (Lagunes, Paul & Susan Rose-Ackerman eds.), *Greed*, *Corruption and the Modern State*: *Essays in Political Economy*. (Cheltenham: Edward Elgar, 2015) 317–335.

[134] And see Young, Mary Alice, *Banking Secrecy and Offshore Financial Centres*: *Money Laundering and Offshore Banking* (London: Routledge, 2012).

cate offence necessarily raises estimates of the global sums laundered, the proportion of international capital movement that amounts to laundering, and the amount of laundering that is included in international capital movement. This in turn adds impetus to the AML industry. There will be more reports, more people employed in the industry,[135] more suspicion, more reports,[136] and so on.

One of the major obstacles to tax collection worldwide is corporate anonymity. As long as it is possible anywhere in the world to operate a company and its bank account so that the beneficial owner cannot be identified, then the people who were identified as a consequence of the HSBC leaks were a group who failed to take the steps that were open to them to disguise their holding. The UK government attempted to deal with anonymity in Part 7 and schedule 3 of the Small Business, Enterprise and Employment Act 2015, and with the 'Google' issue with the Diverted Profits Tax,[137] dubbed the 'Google tax', which is intended to raise more than £1 billion over the next 5 years and took effect on 1 April 2015. By making it 5% higher than the UK's corporation tax rate of 20%, the Treasury hopes to encourage companies to dismantle tax avoidance structures. These measures are also central to the attempt to prevent the UK property market being used by criminal money.[138]

HSBC Suisse as Flashpoint

These matters (tax havens, laundering the proceeds of tax and corruption offences) came to something of a head in the *HSBC Suisse* scandal,

[135] Verhage, Antoinette, *The Anti Money Laundering Complex and the Compliance Industry* (Abingdon: Taylor & Francis, 2011) is one of a number of commentators to develop a functionalist account of the industry. 'This new army of anti-money-laundering specialists can also command higher rates, with some contractors earning as much as £1,500 a day; a rise of 17 per cent, according to BrightPool, a recruiter that compiled the data.' Caroline Binham, 'Banks step up hiring of anti-money laundering specialists', *Financial Times*, 18 August 2014.

[136] The National Crime Agency publishes an annual Annual Report on Suspicious Activity Reports (SARs). The statistics for the most recent years are set out in Edmonds, Tim, *Money Laundering Law* (HC Briefing Paper Number 2592, 2015), page 17, rising from 240K in 2010 to 354K in 2014. Cases like *Crédit Agricole Corporation and Investment Bank v Papadimitriou* [2015] UKPC 13 amplify the effect.

[137] Finance (No 2) Act 2015 part 3. And see Neidle, Dan, 'The Diverted Profits Tax—Flawed by Design' [2015] BTR 147–166; Baker, Philip, 'The Diverted Profits Tax- A Partial Response' [2015] BTR 167–171.

[138] See above fn. 72, and 'Alarm bells ring as 'dirty cash' floods UK property market', *Financial Times*, 15th September 2015.

the extent of which became public in February 2015. It arose from joint action by various media agencies and disclosures by a former employee of the Bank, Hervé Falciani, that, during the period 2006–2008, large numbers of depositors from many jurisdictions had held large amounts of money in the HSBC private bank in Geneva. It seemed that the bank had been actively involved in the avoidance of tax by its *clientèle*, and it may also have crossed the line at least into providing assistance for unlawful evasion. HMRC received the Falciani list of 130,000 potential tax evaders using the Geneva branch of HSBC from the French authorities in 2010. HMRC identified from this list 3600 potentially non-compliant UK taxpayers. It has recovered £135 million[139] and brought one (successful) prosecution.[140] The first French conviction for tax evasion arising out of the HSBC affair was in 2015, that of Arlette Ricci, was treated by the court as 'a threat to public order and "*le pacte républicain*"'[141] and more such cases were said to be *en train*. Various tax authorities around the world are seeking to recover unpaid taxes. Belgium alone, for example seeks €540 million.[142] The Geneva prosecutor agreed to close the Swiss investigation into HSBC in return for the financial settlement of 40 million Swiss Francs.[143] These events attracted significant (UK) Parliamentary attention[144] at a time when evasion and avoidance were anyway under the spotlight. Against the background of the fallout from the financial crash and antipathy towards banks arising from bailouts, bankers' salaries and bonuses, and the scandals around the manipulation of LIBOR[145] and foreign exchange rates,[146] tax evasion became something of an issue in the

[139] This is around the amount gathered in a year from all confiscation orders. See above, page 24.

[140] In 2012, Michael Shanly pleaded guilty to tax evasion worth £430,000 in connection with the HSBC Swiss list. Fines and costs of £460,000 were imposed. http://www.bbc.co.uk/news/business-18713483.

[141] *The Guardian*, 14th April 2015.

[142] *The Guardian*, 2nd June 2015.

[143] *The Guardian* 4th June 2015.

[144] Hodge, Margaret (Chair), Public Accounts Committee *Tax avoidance and evasion*: *HSBC* Evidence (HC 1095, 2015); HM Treasury, *Tackling tax evasion and avoidance* (Cm 9047, 2015).

[145] Banks were found to have rigged the interest rate to which many financial transactions are pegged. The first criminal proceeding in England was in May–August 2015: *R v Hayes* [2015] EWCA Crim 1944). Further defendants were subsequently acquitted. 'Jury acquits five of six brokers in Libor trial' Financial Times January 27, 2016.

[146] In 2015 various banks were fined huge amounts of money by regulators for rigging the foreign exchange markets: 'Barclays fined $2.4 billion for forex rigging' *Financial Times*, 20 May 2015.

2015 General Election. The bank's defence was that the period to which the revelations referred had been a low point in its corporate governance, and that whilst it regretted what had happened, much had changed since then.

The size of the deposits held by *HSBC*, and the jurisdictions from which the deposits were held,[147] are striking and make the point very forcibly that if the purpose of the AML industry is to maximise the amount of money recovered from crime, as long as POCA is interpreted so as to include tax evaded, tax will be a far more fruitful area, by two or more orders of magnitude, than any others.

Immigration

The 2015 election returned a Conservative government to the UK. The government promised a crackdown on illegal immigration. One of the measures proposed by David Cameron is to make it a crime to work in the UK when not lawfully permitted so to do, and thus subject earnings thereby gained to the provisions of POCA, and also to take measures to prevent banks from assisting in the repatriation of money earned by persons working without permission in the UK. The Immigration Bill was announced in the Queen's Speech and introduced in September 2015.[148]

Typically, migrant workers, whether in the UK lawfully or otherwise, want to repatriate the money, usually to a family they support. Unlike tax evasion, the amounts of money that might be acquired in this way by the State are very small and will not pay for the enforcement costs, but there is a further political consideration. The government was elected on a manifesto commitment to repeal the Human Rights Act 1998. It is clear that the area of law surrounding the relationship of confiscation of earnings arising from jobs properly performed is a contentious one.[149] It may be that the Government would welcome a dispute, over a piece of legislation it was elected to enact, in which it could present the human rights claims of illegal immigrants as being the sort of thing they had in mind when developing the policy to repeal the Human Rights Act.

[147] The consortium produced a map of the world with jurisdictions proportionate in size to the deposits held in *HSBC Suisse*. See http://www.martingrandjean.ch/swissleaks-map/.

[148] Queen's Speech: Bill by Bill. http://www.bbc.co.uk/news/uk-politics-32898443. The Immigration Bill (Bill 74) contains provisions creating the crimes of working illegally and employing workers illegally (clauses 8 and 9) impose obligations upon the prosecutor to the prosecutor must consider whether to ask the court to commit the person to the Crown Court with view to confiscation order being considered).

[149] Below, page 88.

CHAPTER 2

Impacts upon Substantive Laundering Law

Thus far the book has traced the curious development of AML, and questioned the empirical foundations upon which the AML/CFT movement was established, and of the narrative underpinning the AML industry. It would be surprising if this series of developments had given rise to a neat, easily comprehensible and rationally defensible set of substantive laws, whose application in any unforeseen cases judges were able easily to divine. That is not what happened. The charge sheet is as follows. AML law has brought a very serious criminal offence into existence without a clear idea of what was wrong with it. It has failed properly to assess the nature of the principle against allowing a criminal to benefit from his/her crime, and in particular without a clear limiting principle based upon its application. It has legislated at every level on the repeated but baseless assumption that financial institutions are endangered by laundering. It has on successive occasions allowed incremental expansion of that crime without appropriate reassessments, and it has afforded insufficient significance to the distinction between crimes with and without victims. It is suggested that for predatory offences restitution to victims rather than confiscation by the government is the appropriate response.[1]

[1] Naylor, RT, *Counterfeit Crime Criminal Profits*, *Terror Dollars*, *and Nonsense* (Montreal/Kingston: McGill-Queens University Press, 2015) at 112. This has yet fully to be recognised in the 'restoration' cases, as to which see below, page 69.

P. Alldridge, *What Went Wrong With Money Laundering Law?*,
DOI 10.1057/978-1-137-52536-9_2

Resultant Law

The next set of objections has to do with the coherence of the scheme that has been established. In some cases the policy is not clear, and in others the laws do not follow from the enunciated principle. There is a range of important issues as to which the substantive law that has arisen owes little or nothing to its original professed purposes, and much to 'mission creep'.

The Criminalisation of Laundering—What Exactly Is the Harm?

First, there is the criminalisation of laundering. In consequence of the 'war on drugs', some dealers became rich and were able either to engage in conspicuous consumption or to invest money. In those days, dealing in money which was the proceeds of drug dealing was regarded largely as a form of complicity in the drug offence. Before there had been time properly to evaluate attempts to implement the 'follow the money' *nostrum* so far as concerns drugs, the idea took root that if it was good to criminalise the laundering of money obtained by drug dealing, it was probably also good to act in the same way in respect of money obtained by any other crime.

The idea that a person should not profit from crime would be satisfied by the establishment of an effective system of confiscation of the profits of crime, without the criminalization of money laundering. Concomitantly to the growth of confiscation,[2] however, the crime of money laundering was created and has been developed into an independent wrong.

The AML narrative and much of the accompanying rhetoric assumes but does not explain the seriousness of laundering. It is important to consider the reasons for criminalisation, because those shape the contours of the offence.

There are five main accounts of the harm in money laundering. The first, and by far the simplest, is that laundering is the form of complicity in the predicate offence, whatever that be. The law of complicity at common law stops at the commission of the offence, and common law liability for other offences after the offence was limited. Accessories after the fact helped conceal the defendant and compounding a felony was agreeing not to prosecute, but there was never a general offence of not turning someone in or even of helping someone get away. Analytically, the closest cog-

[2] Whether successful or not: see National Audit Office, *Confiscation Orders* (HC 738, 2013–2014), Hodge, Margaret (Chair) House of Commons Public Accounts Committee, Forty-ninth Report of Session 2013–2014, *Confiscation Orders* (HC 942, 2014).

nate offence to laundering is handling stolen goods, a statutorily extended form of complicity.[3] The category of predicate offences that could give rise to handling was limited.[4] An account of the harm of laundering along these lines could easily have been accommodated within existing doctrine but would have required specificity as to the predicate.

The obstacle faced by those who want to present money laundering as one of the great problems of the world is that they cannot limit their claim merely to saying that laundering is a form of complicity in crime, because that will not make it bad enough to justify the erection of the AML edifice. The gravity of any form of complicity in crime is, to some extent at least, a function of the gravity of the predicate offence that generates the profit.[5] It is essential to the AML narrative that *all* laundering, not just laundering of the proceeds of designated serious offences, be serious. That is why the complicity account is suppressed. The next three claims about the harm in laundering rely on economic analyses.[6]

The second major claim advanced for the criminalisation of money laundering is that it is bad for the financial system because it endangers financial institutions. Such claims are frequently found[7] but difficult to substantiate. They are of most importance to the EU, the only basis for whose interventions was originally this sort of claim,[8] and which continues to make them. The preamble to the Fourth Money Laundering Directive states:

> Money laundering and terrorism financing create thus a high risk to the integrity, proper functioning, reputation and stability of the financial system, with potentially devastating consequences for the broader society.[9]

However many times this kind of claim is repeated, its plausibility does not increase. In the world before AML, no bank or other financial institution was

[3] Theft Act 1968 s 22. The extension is that acts that could generate liability as accomplice must be before or contemporaneous to the offence.

[4] Theft Act 1968 s 24(4): the qualifying predicates are theft, fraud, and blackmail.

[5] How exactly this proposition is embodied in local complicity law varies from jurisdiction to jurisdiction.

[6] And see Unger, Brigitte et al., *The Amounts and the Effects of Money Laundering*, Report for the (NL) Ministry of Finance (Amsterdam: Ministry of Finance, 2006) chapter 5 for more detail and a clear sense of proportion.

[7] And were made in respect of BCCI, above page 19.

[8] Preamble to the First EU Money Laundering Directive (1991/308/EEC) recital 1.

[9] Preamble to the Fourth Money Laundering Directive (EU) 2015/849 recital 1.

ever endangered by the fact that it laundered money for its clients.[10] The financial crisis beginning in 2008 revealed that financial institutions were endangered by all manner of conduct by bankers[11] and politicians but not, apparently, by money laundering. In the absence of AML, launderers were desirable depositors. The advent of AML may generate circumstances in which the liquidity of a bank is threatened (and only because of AML—not because of the laundering) but not its solvency. This can hardly be regarded as an argument for greater regulatory powers.

Third, there is the claim that laundering is part of capital flight from the developing world.[12] It might be, but if it does, this is really as an aspect of a larger problem. The claim that laundering involves unwelcome international flows of money is not a new one. It goes back, as does much in this area, to a paper written for the International Monetary Fund (IMF) by Vito Tanzi.[13] He argued, *inter alia*, that laundering was harmful because the movements of money involved would be for reasons other than the optimal and efficient operation of markets. The same kind of attitude underpins the later, fuller account of the IMF.[14] Campaigners against 'offshore', especially the 'Tax Justice', movement suggest that this is because money is being laundered and the flows are 'illicit', and the Organisation for Economic Co-operation and Development (OECD) Oslo project targets the relationship between 'illicit' financial flows and tax havens. While capital flight is frequently presented as being a problem arising from the 'illicit' nature of the money involved, however, it occurs for a number of reasons, legal and illegal. Insofar as the harmful economic consequence of 'offshore' is the erosion of the tax bases of developing nations, it is largely unrelated to the lawfulness or otherwise of the provenance of the money. If capital flight is bad and it is possible to inhibit, then the inhibition ought not to be dependent upon allegations of criminal-

[10] Levi, Michael & Peter Reuter, 'Money laundering' (2006) 34 *Crime and Justice*: *A Review of Research* 289–376.

[11] Financial Services (Banking Reform) Act 2013 s 36 introduced the criminal offence, committed by senior management, of recklessly decision causing a financial institution to fail. Pontell, Henry N, William K Black, Gilbert Geis, 'Too big to fail, too powerful to jail? On the absence of Criminal Prosecutions after the 2008 Financial Meltdown' (2014) 61 *Crime, Law and Social Change* 1.

[12] And see above, page 45.

[13] Tanzi, Vito, *Money Laundering and the International Financial System*, IMF Working Paper 96/55 (Washington DC: International Monetary Fund, 1996).

[14] International Monetary Fund, *Anti-Money Laundering and Combating the Financing of Terrorism* (AML/CFT)—Report on the Review of the Effectiveness of the Program Prepared by the Legal Department (Washington DC: IMF, 2011).

ity. If the use of the criminal sanction—the expansion of laundering liability, particularly by increasing the range of qualifying predicate offences—had any provable effect on the rates of flight the position might be different, but as long as AML is leap of faith, it is not. It might well be that offshore is best treated as a tax problem, not a property crime problem, and overlaps with criminal justice are more 'too many cooks' than 'belt and braces'.

Fourth, on a micro level, is the argument that failure to control laundering leads to unfair competition—that organised criminals laundering money through a restaurant or a nail salon will be able to compete on an advantageous basis with the independent and unsullied provider. A similar kind of argument is deployed in respect of the tax avoidance activities of groups like Starbucks. How can the local independent coffee shop, which pays domestic corporation tax, contend with Starbucks, which pays little or no tax in the jurisdiction? The independent may well serve a superior *doppio* to that of Starbucks but cannot compete on price. We may well want to do something about undesirable cross-subsidies and their effects upon competition. Whether or not the subsidy comes from a lawful source does not, on this account, affect the harm it does. The neighbourhood independent restaurant will always be threatened by the competitor restaurant which enjoys cross-subsidies from elsewhere within a large organisation, whether or not that 'elsewhere' is a function of tax avoidance, money laundering, or just the movement of resources within a large organisation with a view to targeting a particular market.

That is, the macro argument about capital flows and the micro-argument about the position of individual businesses are both, essentially, competition arguments. Neither relies for its validity upon any particular claim as to the provenance of the money. If competition law, whether domestic law on cross-subsidies or international rules on tax competition, were able to deal satisfactorily with them, then the problems would go away. If it cannot, then there is little reason to suppose that money laundering law can.

There is a further consideration, applying to the economic crime arguments, that arises from criminal law theory. It is usual for the gravity of criminal offences to be limited by the intention or the foresight of the defendant. It is rare for a defendant to be punished for an offence the real gravamen of which is a remote and unforeseen harm. Defendants are usually punished for deciding to bring about a particular harm and then bringing it about, or, in the case of inchoate offences, taking steps towards bringing it about. There are some cases where the defendant may not be aware of the remote harm to prevent which the crime exists, but

these—indeed the criminalisation of the causing of remote harms—are rare and should be thought exceptional.[15] They include some cases of market abuse and, most obviously, counterfeiting of money, which, when carried out undetected, causes no identifiable harm to individual persons, but adds to the rate of inflation, something of which counterfeiters might very well be unaware. The culpable mental state that might be associated with laundering is most akin to the state we would associate with handling stolen goods, that is, an extended form of complicity. If we really want to blame the launderer for bringing down banks or causing capital flight or undermining competition, then the usual way in which to do that might be to structure the offences so as to include intention (or recklessness) as to those consequences, perhaps as an aggravating feature to 'regular' laundering. If that were to be done, however, then few would be convicted, they not having adverted to these matters, and not all laundering would be serious, and the narrative depends for its value on not differentiating the serious from the not serious.

The fifth possible justification for the criminalization of laundering is seldom discussed, but it may be the most important. The AML industry must operate on the basis that there is something, an act or an event, to which the reporting obligations attach.[16] The AML obligations are extremely onerous. In order to justify their imposition, therefore, the 'something' needs to be particularly bad because there are many bad things in respect of which there is no such reporting obligation. Under the FATF framework it is also incumbent on the relevant governments to put in place investigatory powers and punishments commensurate with the 'something' being a very serious offence.[17] So it was necessary to invent the crime of laundering. That is, the tail wagged the dog. A very serious offence was put in place without a clearly articulated rationale. Its scope then was enlarged to cover more and more predicates by interpretations from the courts that did not insist upon the degree of specificity as to the identification of the property that the statute seems to demand and by the application of the offence to circumstances which might reasonably have been supposed to have been covered better by other offences.

[15] See Simester, AP and Andreas von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Oxford: Hart, 2011) para 4.4 *et seq*.

[16] In the UK this is currently done by Money Laundering Regulations 2007 SI 2157.

[17] This is required by the FATF: see recommendation 39.

How do these considerations translate into a definition for the crime? Technically, in English law the crime of money laundering is doing one of a list of things in respect of 'criminal property'. The list is written very widely. It is an offence to conceal, disguise, convert, or transfer criminal property or to remove it from the jurisdiction.[18] It is an offence to enter into or become concerned in an arrangement which, the defendant knows or suspects, facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person.[19] It is an offence to acquire, use, or have possession of criminal property.[20] It is also an offence to be complicit in any of these things.[21] 'Criminal property' is itself defined by a complex provision.[22] There has been case law on these very widely drawn provisions but nothing like the amount for the confiscation provisions. The only significant major early decision, giving the statute a literal meaning,[23] caused such alarm that it was rapidly reconsidered.[24] Subsequent decisions at the highest level have been more reflective but still indicate little inclination to practice what they preach[25] and to read the statute restrictively.[26]

Suspicion

One respect in which English Law goes well beyond the exigencies of the international *régime* is in its use of 'suspicion' as the trigger in three important areas. Property is criminal property if:

[18] POCA s 327.
[19] S 328.
[20] S 329.
[21] S 340(11).
[22] S 340.
[23] *P v P* (*Ancillary Relief*: *Proceeds of Crime*) [2003] EWHC Fam 2260; [2004] Fam 1.
[24] *Bowman v Fels* [2005] EWCA Civ 226; [2005] 1 WLR 3083.
[25] 'Although the statute has often been described as "draconian" that cannot be a warrant for abandoning the traditional rule that a penal statute should be construed with some strictness.' *R v Waya* [2012] UKSC 51; [2013] 1 AC 294 para 8 (Lord Walker and Sir Anthony Hughes).
[26] *R v Rogers* [2014] EWCA Crim 1680; [2014] 2 Cr App R 32 (noted at [2014] Crim LR 910–915), *Holt v Attorney General* [2014] UKPC 4; [2014] Lloyd's Rep FC 335, *R v GH* [2015] UKSC 24; [2015] 1 WLR 2126.

> '(3) […]—
>
> (a) it constitutes a person's benefit from criminal conduct[27] or it represents such a benefit (in whole or part and whether directly or indirectly), and
>
> (b) the alleged offender knows or suspects that it constitutes or represents such a benefit.'[28]

'Suspicion' is thus an element in all three 'headline' laundering offences.[29] In each of them it is sufficient that the defendant suspect that the property, the subject matter of the alleged offence, is criminal property. Suspicion is also an element in the failure to report offence, so that two suspicions—that the property is the proceeds of crime and that the transaction is a laundering transaction—are enough to trigger the obligation to report.[30] 'Suspicion' in this context is widely defined. The leading case, *R v Da Silva*[31] speaks of 'any inkling or fleeting thought that the money being paid into her account … might be the proceeds of criminal conduct will suffice for the offence against her to be proved'. This has the effect that if the person in the regulated sector has an inkling that the client has an inkling that the property in question is of dubious provenance, then reports should be made. The consequence is that far more reports are made in the UK than in comparable jurisdictions.[32] Simply being contacted by the authorities to stop a transaction is enough to give rise to suspicion.[33] Using suspicion (rather than belief, or, as is all that is required by the relevant international instruments, knowledge) as the baseline and then a very inclusive definition of what may amount to suspicion increases the rate of reporting. It also makes laundering a preferred charge (over handling and offence analogous to handling)[34] and makes it easier for prosecutors to

[27] Defined in s 340(2).

[28] POCA s 340.

[29] POCA ss 327–329.

[30] POCA s 330(1).

[31] *R v Da Silva* [2006] EWCA Crim 1654; [2007] 1 WLR 303.

[32] Fisher, Jonathan, 'The anti-money laundering disclosure regime and the collection of revenue in the United Kingdom' [2010] BTR 235 draws attention to another line of cases on the meaning of suspicion which might have cast the net less widely—see especially *Hussein v Chong Fook Kam* [1970] AC 942.

[33] *N2J Ltd v Cater Allen* [2006] EWHC B10.

[34] *Eg* Customs and Excise Management Act 1979 s 170A.

secure convictions, thus creating more convictions, more reporting … and so on.

Double Counting in Criminalisation

The form of transformation which the AML narrative insists takes place is that worthless (and potentially dangerous to its possessor) property—the proceeds of crime—which cannot without danger be enjoyed, is being transmuted by laundering into gold. There is also, however, another form of alchemy going on. It is that one type of wrongdoing, whether it be drug dealing or another predicate ('x') has been made into two, of 'dealing + laundering' or 'x + laundering', so that, at times when most recorded crime statistics are falling, laundering can be presented to give increased concern and to attract more resources.

In the days when the use of the term 'laundering' was just a trigger to send the regulatory *régime* into action, and when laundering was seldom used as an independent charge, the existence of the offence of money laundering was little more than a legal fiction. But now it has taken on a life of its own. Laundering is now frequently used as an independent charge, often when it might not seem the most obvious charge,[35] or even one easily permitted by the rules on abuse of process.[36] Money laundering as complicity in property offences has become property offences as a form of complicity in money laundering.

Confiscation and Amplified Benefits

'Multiple counting' also informs the inflation of confiscation orders. Confiscation proceedings take place after a finding of guilty against the defendant in a criminal case. Confiscation proceedings are criminal in nature, but the standard of proof is the civil one—the balance of probabilities.[37] The rules of evidence are apparently those of a sentencing

[35] For an example of its use in an advanced fee fraud case, see *R v Emu and Nusi*, Winchester CC 8th September 2014.

[36] *R v J* [2004] UKHL 42; [2005] 1 AC 562.

[37] POCA s 6(7).

hearing. The 'strict'[38] rules of criminal evidence do not apply,[39] and the Criminal Justice Act 2003 hearsay regime does not apply 'strictly and directly' but may apply by analogy in ensuring the fairness of the proceedings.[40] Confiscation proceedings are not penal,[41] and so do not attract the protection of Article 6.2 and 6.3 of the ECHR,[42] even when the 'lifestyle' rules are triggered.[43]

Hodgson's view was that the point of confiscation orders was to put the criminal in the position s/he would have been in had s/he not committed the offence.[44] This might be called the 'restitutionary' objective of confiscation. There is much to be said for it. If confiscation is not intended to be punitive[45] then it is easy to see that the State should still have the right to take property from the defendant until s/he has not gained from the crime, but it has no obvious right to go further. To adopt an approach designed to restore the *status quo ante* would not be to claim that there would be no difficulty in quantifying the amounts to be confiscated. The law of restitution has very much these objectives and can be very complex.[46] What in fact happened was worse: the State did go further, using confiscation as a penal measure and denying that it was doing so. This doublespeak has only partly been ameliorated by two decisions of the Supreme Court, *Waya* and *Fields*, with each case invoking the Human Rights Act and, in particular, Article One of the First Protocol to the ECHR (A1P1). Beyond that, the lack of clarity

[38] Criminal Justice Act 2003 s 134(1) defines 'criminal proceedings' as 'criminal proceedings to which the strict rules of evidence apply'.

[39] *R* v *Silcock* & *Levin* [2004] EWCA Crim 408; [2004] 2 Cr App R (S) 323, in which, at para 69, the Court of Appeal declined even to certify this question as being of general public importance. *Silcock and Levin* decides that they do not, and this was affirmed in *R v Clipston* [2011] EWCA Crim 446; [2011] 2 Cr App R (S) 101.

[40] *R v Clipston*, fn 40, at para 64(b), a notion that might apply to other types of evidence that would be excluded under the criminal rules. Compare the position in civil recovery, below, page 91.

[41] POCA s 13(4).

[42] *HM Advocate v McIntosh* [2001] UKPC D1; [2003] 1 AC 1078 paras 14 *et seq*; *Phillips v United Kingdom* (2001) 11 BHRC 280, *R v Rezvi* [2002] UKHL 1; [2003] 1 AC 1099; *R v Benjafield* [2002] UKHL 2; [2003] 1 AC 1099.

[43] POCA s 10.

[44] Hodgson Report, page 14 fn 39 above.

[45] And that precept is embodied in POCA s 13.

[46] Burrows, Andrew, *The Law of Restitution* (Oxford: OUP, 3rd edition, 2010).

in the objectives of confiscation has given rise to a wide range of more specific problems.

The Lifestyle Provisions

The lifestyle provisions provide that a defendant with specified convictions is presumed in confiscation proceedings to have obtained any property s/he acquired in the preceding 6 years by crime, with the burden on him/her to disprove the assumptions. The effect of this is that when the lifestyle rules are triggered, there need no longer be any causal link between the crime for which the defendant is convicted and the property acquired. That is, where the lifestyle rules apply, giving a 'general benefit', it will not matter whether the specific benefit rules are harsh. Notwithstanding the shift in the burden of proof and that there is no specific further offence alleged to that for which the conviction is gained, the lifestyle rules are apparently ECHR-compliant.[47] In *Phillips v United Kingdom*[48] the ECHR held that the pre-2003 English rules on confiscation[49] did not violate Article 6. In *Rezvi*[50] and *Benjafield*[51] the House of Lords in England followed *McIntosh*[52] and held that the statutory assumptions about lifestyle[53] were consistent with the Article 6.2 of the Convention.[54] This (burden of proof) aspect of the rules on lifestyle remain seriously questionable, because they operate by treating the defendant as having committed offences other

[47] This is a particularly problematic aspect of the decisions in *R v Rezvi* [2002] UKHL 1; [2003] 1 AC 1099 and *R v Benjafield* [2002] UKHL 2; [2003] 1 AC 1099.

[48] *Phillips v United Kingdom* (2001) 11 BHRC 280.

[49] Criminal Justice Act 1988 s 71 *et seq*, which did not differ in relevant particulars from those under the Proceeds of Crime 2002.

[50] *R v Rezvi* [2002] UKHL 1, [2003] 1 AC 1099.

[51] *R v Benjafield* [2002] UKHL 2, [2003] 1 AC 1099.

[52] *HM Advocate* v *McIntosh* [2001] UKPC D1; [2003] 1 AC 1078.

[53] These are the provisions that apply in confiscation proceedings to provide the assumption that all property acquired by the defendant in the 6 years prior to the conviction was acquired by crime.

[54] The House also dealt briefly and dismissively with the argument that the First Protocol was put in issue: 'Counsel argued that Article 1 of the First Protocol [A1P1] requires a different conclusion on proportionality. That cannot be right. The legislation is a precise, fair and proportionate response to the important need to protect the public. In agreement with the European Court of Human Rights in *Phillips v United Kingdom* I would hold that the interference with Article 1 of the First Protocol is justified' (Lord Steyn *in Rezvi* [a case decided in the context of the DTA 1994] at para 17). See now amended POCA s 6(5), and below, fn 144 and accompanying text.

than that with which they are charged.[55] Although *Waya*[56] was not a lifestyle case, the Supreme Court nonetheless considered the rules and drew attention to the qualifications in section 10(6) to the obligation to confiscate in 'lifestyle cases'.[57] The assumptions should not be made if they are shown to be wrong or if making them would give rise to a risk of serious injustice.[58] The Supreme Court said: '[T]hese provisions, … ought to mean that to the extent that a confiscation order in a lifestyle case is based on assumptions it ought not, except in very unusual circumstances, to court the danger of being disproportionate because those assumptions will only be applied if they can be made without risk of serious injustice.'[59] What the Act contemplates is that there is something about *that property* that would create serious injustice were the order made. When the lifestyle rules do not apply, because of the application of section 10(6), the prosecution must revert to proving specific benefit and will be governed by *Waya* and the amended[60] section 6(5) of POCA. When the lifestyle provisions do apply, the burden on the defendant is notoriously difficult to discharge, because any evidence produced by anyone with those convictions to show lawful acquisition may be discredited as part of the scheme of criminality to which the defendant was committed.[61]

The First Protocol

A1P1 states that:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public

[55] Boucht, Johan, 'Extended confiscation and the proposed Directive on freezing and confiscation of criminal proceeds in the EU: on striking a balance between efficiency, fairness and legal certainty' (2013) 21 *EurJ CrimeCrLCrJ* 127–162. The Article 6.2 position was regarded as beyond argument in *R v Bagnall*, *R v Sharma* [2012] EWCA Crim 677; [2013] 1 WLR 204.

[56] *R v Waya* [2012] UKSC 51; [2013] 1 AC 294.

[57] That is, those governed by POCA s 75 and Second Schedule.

[58] Section 10(6)(b).

[59] Para 25. And see Fortson, Rudi, *Misuse of Drugs and Drug Trafficking Offences* (London: Sweet and Maxwell, 6th edition, 2012) paras 13–131.

[60] By Serious Crime Act 2015 Schedule 4 para 19.

[61] The criminal burden applies, exceptionally, in some lifestyle cases where the prosecution seeks to infer benefit from crimes not admitted. *R v Briggs-Price* [2009] UKHL 19; [2009] 1 AC 1026, and see *R v Moss* [2015] EWCA Crim 713.

> interest and subject to the conditions provided for by law and by the general principles of international law.
>
> 'The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.'

After some indications to the contrary,[62] and as a way of imposed general limits in a number of areas,[63] in *Waya*,[64] the Supreme Court held unanimously that the effect of jurisprudence on A1P1 is to require that confiscation orders under POCA be proportionate[65] to the aims of that Act.[66] To avoid the application of POCA from leading to a disproportionate confiscation order, the judge should tailor that order under the Protocol.[67] The Court was prepared, where necessary, to ensure compliance to the Convention[68] to read into section 6(5)(b) of POCA ('…make an order (a confiscation order) requiring him to pay that amount…') the qualifying words 'except insofar as such an order would be disproportionate and thus a breach of A1P1 and, it is necessary to do so in order to ensure that POCA remains Convention compliant'.[69] Consequently the Crown Court should only make confiscation orders which would be proportionate in each case,[70] but the Supreme Court

[62] Per Lord Steyn in *R v Rezvi* [2002] UKHL 1, [2003] 1 AC 1099, para 17, above, page 56.

[63] Below, pages 33–47.

[64] A1P1 'imports, via the rule of fair balance, the requirement that there must be a reasonable relationship of proportionality between the means employed by the State in, *inter alia*, the deprivation of property as a form of penalty, and the legitimate aim which is sought to be realised by the deprivation'. Para 12, citing *Jahn v Germany* (2006) 42 EHRR 1084, para 93.

[65] Much turns on the metaphor of proportionality, but it is a metaphor (of comparative magnitude) and can be used to make decisions appear more rational than they are. The relative magnitude of the impact of the order, on the one hand, and the aims of confiscation, on the other, cannot quantified.

[66] And see Alldridge, Peter, 'Two Key Areas of Proceeds of Crime Law' [2014] *Crim LR* 170–188, and the provision inserted into POCA s 6(5), by Serious Crime Act 2015 Schedule 4 para 19.

[67] Paras 108, 111, 113.

[68] Using Human Rights Act 1998 s 3.

[69] Para 16.

[70] *Waya*, paras 12–16.

made it clear that this does not amount to giving general discretion to judges to fit confiscation orders to their own view of the facts and justice of a case.[71]

Recognition of the relevance of A1P1 removes any need for one other possibility, which had been mooted in some earlier cases. This is that the 'abuse of process' doctrine might provide a useful mechanism to avoid making confiscation orders that appear excessive or inappropriate.[72] Confiscation orders of the kind considered in cases such as *Morgan and Bygrave*,[73] and *Shabir*[74] '… ought to be refused by the judge on the grounds that they would be wholly disproportionate and a breach of A1P1. There is no need to invoke the concept of abuse of process.'[75] Once the Supreme Court recognised that the court has A1P1 at its disposal to deal with any disproportionate effect of the Act, it was no longer necessary, or desirable, to depart from the natural meaning and effect of the provisions of POCA in an attempt to avoid an unfair result.[76]

In *Waya*, the majority gave a few examples of the circumstances in which A1P1 would be engaged, but it did not (and could not) provide a closed list of such circumstances. They did make it clear, however, that neither the prosecutor nor the trial judge has any discretion in the imposition of the orders.[77]

Waya contemplates two interpretative devices to reconcile confiscation orders with A1P1. The first is the 'regular' use of interpretative techniques and of section 3 of the Human Rights Act 1998 to find meanings for the statute which, while not necessarily obvious or natural, nonetheless bring the order into compliance with the Convention. The second is that in some areas, whether or not by reference to A1P1, the courts have already developed ways of reading the statute so as to restrict the ambit

[71] *Waya*, para 24.

[72] *R v Nield* [2007] EWCA Crim 993.

[73] *R v Morgan and Bygrave* [2008] EWCA Crim 1323; [2009] 1 Cr App R(S) 60 (sum already repaid to victim).

[74] *R v Shabir* [2008] EWCA Crim 1809; [2009] 1 Cr App Rep (S) 84 (claims to large sums legitimately owed inflated by small percentage: confiscation order in respect of total held to be abuse of process). Confiscation of profits not proceeds would be a more principled resolution, but the statutory formulation of 'benefit' does not permit it.

[75] Para 18.

[76] Para 103.

[77] Para 19.

of confiscation orders.[78] Only failing those two being available should the insertion of overriding words into the statute be considered. Some indication of what might be involved in the application of A1P1, and other interpretative devices, can be gathered by considering some the major categories of confiscation order.[79]

Serial and Concurrent Obtainers

A major difficulty in setting limits to the proportionality of confiscation orders on the basis of the majority judgment in *Waya* is that it explicitly accepted (from *May*[80]) as being proportional the three sets of cases around which it might have been thought most appropriate to build paradigms of disproportionality and then apparently seeks to establish a category beyond them to which A1P1 might provide boundaries. In a much quoted passage the majority stated:

> 26. It is apparent from the decision in *May* that a legitimate, and proportionate, confiscation order may have one or more of three effects:
>
> (a) it may require the defendant to pay the whole of a sum which he has obtained jointly with others;
>
> (b) similarly it may require several defendants each to pay a sum which has been obtained, successively, by each of them, as where one defendant pays another for criminal property;
>
> (c) it may require a defendant to pay the whole of a sum which he has obtained by crime without enabling him to set off expenses of the crime.[81]

The problem is that, were the matter in *Waya* to have arisen as *res integra*, these are exactly the cases that might have provided the core

[78] See, *eg*, *R v James*, below fn *115* (expression 'obtain' did not extend to acquisition of leasehold without power of disposal or other right envisaged by *Jennings* and obtaining 'as a result of or in connection with criminal] conduct' did not extend to 'ordinary everyday transactions with supplier in transactions that were perfectly lawful in themselves').

[79] This will not be affected by the placing of the proportionality issue on a statutory footing by the provision inserted into POCA s 6(5), by Serious Crime Act 2015 Schedule 4 para 19.

[80] *R v May* [2008] UKHL 28; [2008] AC 1028, one of three cases (the others being *CPS v Jennings* [2008] UKHL 29; [2008] AC 1046, and *R v Green* [2008] UKHL 30; [2008] AC 1053) in which, on an earlier occasion, the House of Lords had attempted to bring order to the confiscation *régime*.

[81] 'It also follows from this clear line of authority that not infrequently, and perhaps even ordinarily, the amount of money confiscated will exceed the profit made by the criminal from his offence.' *Shabir*, above, fn 75, para 13 (Hughes LJ).

of a set of limits to confiscation orders based on proportionality. The obvious objection to (a) and (b) is that they will involve orders against individual defendants which are larger than the sums the defendants collectively have gained, and so go beyond the objectives of the statute. They also give rise to inconsistency between the treatment of defendants who acquire property and are made to disgorge it (from drug dealing or fraud, for example) and those who 'obtain' it for the purposes of POCA but then do not retain it and are made to pay anyway. As to the third, the Supreme Court in *Waya* clearly dismissed the idea of allowing deductions from proceeds to give a profit figure, largely because of its unwillingness to countenance deductions for the expenses of running a criminal business.[82]

Confiscation was further restricted in *Fields* & *Ahmad*,[83] where the Supreme Court held that the total to be confiscated as the outcome of a particular offences should not exceed the total benefit. The mechanism by which this was achieved was to differentiate between the orders to be made and their enforcement. It is at the point of enforcement that A1P1 applies. So far as concerned joint beneficiaries, the court held that:

> where a finding of joint obtaining is made, whether against a single defendant or more than one, the confiscation order should be made for the whole value of the benefit thus obtained, but should provide that it is not to be enforced to the extent that a sum has been recovered by way of satisfaction of another confiscation order made in relation to the same joint benefit.[84]

If the legislation had set an appropriate limit to confiscation in the first place, none of this would have been necessary. The limits of confiscation ought not need to be set by reference to human rights. They should be set by reference to a principled account of the objectives of confiscation.

The Restoration Cases

Waya does change significantly the set of cases, usually after a theft, where the defendant has restored to the victim the property which is the subject

[82] Para 26.
[83] *R v Ahmad*, *R v Fields* [2014] UKSC 36, [2015] AC 299.
[84] *Ahmad* at para 74. And see *R v Dad* [2014] EWCA Crim 2478.

matter of the crime. Previously the view that had prevailed was that '… the scheme of the Act […] is to focus on the value of the defendant's *obtained* proceeds of crime, whether those proceeds were *retained* or not'.[85] This had been pushed to the point at which a defendant who only held the property for a short time before giving it back still faced a confiscation order for its full value. To make a confiscation order where the defendant has restored to the loser any proceeds of crime which he had ever had is now disproportionate. It would not achieve the statutory objective of removing his proceeds of crime but would simply be an additional financial penalty.[86] The Supreme Court said in *Waya* that to the extent that the previous case of *Rose*[87] held that the recovery and restoration intact of the stolen property was always irrelevant to the making of a confiscation order, 'that part of the decision should not be followed'.[88] However, loss, damage, or seizure of the proceeds is not the same as restoration and will not affect the propriety of a confiscation order.[89] The Supreme Court did not mention *Farquhar*,[90] in which fraudulently obtained monies had fully been repaid, but a confiscation order in that sum was still approved. It is difficult to see how this case could survive *Waya*.

Developing this theme to use A1P1 to address the problem of disproportionality, one conceivable approach would have been to create an exception to the availability of confiscation orders by saying that A1P1 prevents as disproportional a confiscation order when the criminal does not acquire property in chattels. The Supreme Court understood the intention of the draftsperson to be to cover theft and that to hold otherwise would 'emasculate' the Act.[91] This, however, is by no means clear. There are some mentions in the preparatory work for POCA[92] of the threat

[85] Para 27.

[86] Statements in the previous cases of R v *Nield* [2007] EWCA Crim 993 and *R v Forte* [2004] EWCA Crim 3188, that a confiscation order could be imposed in such a case because the purpose of the statute was to impose an *additional* punitive sanction were disapproved in *May* at para 48 and *Waya at* para 28.

[87] Above fn 94.

[88] *Waya*, para 30. *Rose*, it was said, preceded both *Morgan and Bygrave*, above, fn 74, and also *May*, and neither A1P1 nor any issue of proportionality was addressed in argument.

[89] Para 33.

[90] *R v Farquhar* [2008] EWCA Crim 806; [2008] 2 Cr App R (S) 104.

[91] Para 68.

[92] Cabinet Office Performance and Innovation Unit, *Recovering the Proceeds of Crime* (London: Cabinet Office, 2000), Box 3.5. and para 3.13.

posed by handlers of stolen goods, but they were never central to the harm against which the legislation was directed, and the Supreme Court has discouraged the use of laundering charges against handlers.[93] No dissatisfaction has been expressed with the operation of the procedure for restoring property to victims of theft.[94] It is suggested that the Act could function perfectly satisfactorily, without being shorn of its reputation as being 'draconian', if confiscation orders were not made in the case where the property the subject matter of the predicate offence is stolen goods, remaining the property of, and being restored to its owner. However, again, such a change would now require legislation.[95]

In *Waya*, the Supreme Court was also concerned[96] with the cases where the defendant does not acquire property in, for example, stolen goods, but wilfully or by neglect, causes damage to the property before its restoration.[97] In these cases, however, a compensation order is required, and there is appropriate provision in the legislation.[98] The majority said there might be cases analogous to circumstances of restoration which will have to be decided 'on a case by case basis'.[99] This was a serious concession. The Court says that neither the Act nor the Convention, with their respective jurisprudences, expresses sufficiently clearly the extent of the orders to be made and invites lower courts to develop the law *ad hoc*.

In *R v Jawad* (*Mohid*)[100] the court held that a confiscation order would generally be disproportionate if it required the offender to pay, for a second time, money which he had already fully restored to his victim under a compensation order. However, if the offender was subject to a compensation order which he had not paid, that would not necessarily render the confiscation order disproportionate.

There had been a suggestion that *Waya* might provide an opportunity to clear up a wider matter in the use of confiscation in tax cases, presented

[93] Per Lord Toulson in *R v GH* [2015] UKSC 24; [2015] 1 WLR 2126 at para 49, citing *R* (*Wilkinson*) *v Director of Public Prosecutions* [2006] EWHC 3012 (Admin) and *R v Rose* [2008] EWCA Crim 239; [2008] 1 WLR 2113.

[94] Powers of Criminal Courts (Sentencing) Act 2000 ss 148–149.

[95] And see *R v Davenport* [2015] EWCA Crim 1731.

[96] Para 68.

[97] This was part of Lord Rodger's argument in *R v Smith* (*David Cadman*) [2001] UKHL 68; [2002] 1 WLR 54, above, 76 for making a confiscation order even when stolen goods (or, as in that case, a tax advantage) are only possessed very briefly.

[98] Powers of Criminal Courts (Sentencing) Act 2000 s 130.

[99] Para 34.

[100] *R v Jawad* (*Mohid*) [2013] EWCA Crim 644; [2014] 1 Cr App R (S) 16.

by the decision of the House of Lords in *R v Smith* (*David Cadman*),[101] in which the defendant had evaded the payment of duty on imported cigarettes by smuggling them past the customs post. The decision in the case was that the pecuniary advantage thus (admittedly) obtained[102] had not retrospectively been undone by the subsequent seizure of the cigarettes. That was held in *Waya* plainly to be correct.[103] In spite of doubts on some points,[104] *Smith* (*David Cadman*) has been followed.

The restoration cases could be dealt with by the recognition that where restoration can take place, confiscation proceedings are quite inappropriate. Failure to differentiate crimes with identifiable victims from those without, which is central to a rational approach to the proceeds of crime, has led to this problem.

Value

Section 79 of POCA provides:

> Value: the basic rule
>
> (1) This section applies for the purpose of deciding the value at any time of property then held by a person.
>
> (2) Its value is the market value of the property at that time.
>
> (3) But if at that time another person holds an interest in the property its value, in relation to the person mentioned in subsection (1), is the market value of his interest at that time, ignoring any charging order under a provision listed in subsection (4).

In *Rowsell*,[105] the court held that it had been correct to hold an offender to have a full interest in land of which he was the legal owner even though it was accepted that various people had paid him to acquire a share of the land. In the absence of a declaration of trust or registration of an equitable

[101] *R v Smith* (*David Cadman*) [2001] UKHL 68; [2002] 1 WLR 54. And see the attempt to amend the Bill at HC Debs 26 February 2002, Col 639, HL Debs 22 April 2002, Col 57 *et seq*.

[102] But incorrectly valued. If the pecuniary advantage is the deferment of a debt, the value of the pecuniary advantage is the value of the deferment, *not* the value of the debt. In most tax cases this value will be small or nil.

[103] Para 33. Permission had been given in *Waya* to challenge the correctness of *Smith* (*David Cadman*), but in the event the challenge did not get off the ground. See now, *eg*, *R v Kakkad* (*Freshkumar*) [2015] EWCA Crim 385.

[104] Alldridge, Peter, 'Smuggling, Confiscation and Forfeiture' (2002) 65 MLR 781–791.

[105] *R v Rowsell* [2011] EWCA Crim 1894.

interest or any other clear evidence, the purchasers' interests could not be taken into consideration for the purposes of POCA s 79(3) 'because their precise nature could not be established'.[106] A more permissive approach to arrangements involving property might lead to reductions in questionable orders without recourse to A1P1.

If the defendant's limited interest sets the extent of the benefit for the purpose of confiscation, then it might have been inferred that where the defendant does not have and does not acquire any interest at all (the theft case), then no benefit arises. On the contrary, the law appears to be that if neither the defendant nor the third party holds any interest in the property (as in the case of theft), then both are subject to confiscation orders to its full market value.[107] The Supreme Court wrote:

> The same argument can be presented on the basis that a thief obtains no title to the stolen property, but at most a possessory interest good against third parties, and thus of no significant value. If the argument is good, the effect will be in most cases to reduce the value to the defendant of property obtained by acquisitive crime to nil, or to next to nothing, since almost every loser has the right to the restoration of such property. It is quite clear that section 79(3) cannot carry this meaning without wholly emasculating POCA.[108]

The alternative explanation would be that, far from rendering the legislation ineffectual, the proffered reading (so as not to extend to property that is restored to its owner), which is a very natural one, would have the effect of keeping the operation of POCA away from the simple theft case, which is one with which it never had any business in the first place, the existing mechanisms being quite adequate.

Benefits, Deductions, Proceeds and Profits

A wide range of confiscation orders involve consideration of whether some deduction is to be contemplated from the full amount that the defendant obtained. In *Waya* the Supreme Court dismissed the idea that

[106] Para 26 (Cranston J).

[107] And see, when there is no lawful market, *R v Islam* [2009] UKHL 30; [2009] 1 AC 1076.

[108] *Waya* at para 68.

confiscation should, in general, be directed against profits not proceeds of crime.

> To embark upon an accounting exercise in which the defendant is entitled to set off the cost of committing his crime would be to treat his criminal enterprise as if it were a legitimate business and confiscation a form of business taxation. To treat (for example) a bribe paid to an official to look the other way, whether at home or abroad, as reducing the proceeds of crime would be offensive, as well as frequently impossible of accurate determination. To attempt to enquire into the financial dealings of criminals as between themselves would usually be equally impracticable and would lay the process of confiscation wide open to simple avoidance. Although these propositions involve the possibility of removing from the defendant by way of confiscation order a sum larger than may in fact represent his net proceeds of crime, they are consistent with the statute's objective and represent proportionate means of achieving it.[109]

The expressed rationale is simple: to attempt to enquire into the financial dealings of criminals as between themselves would usually be impracticable and would lay the process of confiscation wide open to avoidance.[110] However distasteful, the accounting exercise would be necessary if an attempt were to be made to put the defendant in the *status quo ante*. Even under the POCA scheme, it is neither unnecessary nor invariably difficult, and the difficulty does not vary according to the lawfulness of the conduct but the quality of the records and other evidence. Any charge of tax evasion by under-declaration will involve consideration of lawful deductions. Until 1992 at the earliest, and most probably 2000, [111] for the purposes of taxation, companies were able to deduct from their profits bribes paid overseas, and the mechanisms for proving, for the purposes of the relevant deduction, that payment had been made were reasonably robust. Even since then, the range of excluded deductions for tax purposes is much more restricted. To be excluded from being deductible, the actual making of the payment must be a criminal offence,[112] so if a

[109] Para 26.

[110] *Waya* at para 26.

[111] It was unclear whether or not this had been achieved by the insertion, by the Finance Act 1992 and Finance Act 1993, of Income and Corporation Taxes Act 1988 s 577A. It was finally put beyond argument, from 1st April 2002, by Finance Act 2002 s 68(2).

[112] Income Tax (Trading and Other Income) Act 2005 s 55.

charge arises of criminal tax evasion by under-declaration of profits or by laundering the proceeds of criminal tax evasion, then the profits would have to be computed and the computation would include the deduction of any allowable expenses. It therefore oversimplifies to rule out these computations altogether.[113]

One technique used by the Court of Appeal, particularly Hooper LJ, was to hold that expenditure is not 'as a result of or in connection with [… criminal] conduct' if it appears to be part of an ordinary business deal. The idea would then be that if the enterprise is 'criminal' its entire turnover of an organisation falls for confiscation, but if there is an individual transaction that can be said to be a normal business transaction.[114] It is not always easy, however, to draw the borderline between a criminal and a non-criminal enterprise. Widely drawn laws mean that the taint of illegality can spread quickly throughout a large organization so that what appears to be a large legitimate conglomerate can be treated, in law, as a criminal enterprise, since any transactions within it can be treated as criminal laundering.[115]

One particular area where deductions are sometimes allowed and sometimes not is corruption. The confiscation regime was not designed to deal with corruption: the preoccupation with it that has arisen largely since 2002 has raised its own problems. In *R v Sale*,[116] where a contract had been obtained by bribery, but the work carried out without criticism as to its price or quality, the question was whether the whole amount payable under the contract, or only the profit, or something in between taking into account other matters, was 'benefit' for these purposes. The court held that an order for the whole amount paid under the contracts would be disproportionate since Network Rail had received value for money under the contracts, but, nonetheless, that the offences had also impacted the company's competitors and distorted the market in contracts with Network Rail, and so a proportionate confiscation order would also include the value of pecuniary advantage obtained by the company. Leaving aside the arguable issue whether the benefit in the competition is property or a pecuniary advantage for the purposes of POCA, a more

[113] As was shown in *R v Harvey*, below fn 125.

[114] *R v James (Michael)* [2011] EWCA Crim 2991; [2012] 2 Cr App R (S) 44.

[115] The Yukos affair in Russia, in which a 'normal' oil company was able to be characterised as a criminal organisation, is a prime example. See Stephan, Paul B III, 'Taxation and expropriation The destruction of the Yukos Oil Empire' (2013) 35 *Houston J Int Law* 1.

[116] *R v Sale* [2013] EWCA Crim 1306; [2014] 1 Cr App R (S) 60.

restitutionary approach would take the profit from the company that performed the contracts and pay compensation to those who were deprived of the possibility of competing fairly. There is much to be said for that approach.

In *Ahmad and Ahmed*[117] the defendants committed a Missing Trader Intra-Community (MTIC) VAT fraud. High-value goods were imported into the UK by one company, then sold to further ('buffer') companies, and ultimately re-exported to the overseas company which had supplied them in the first place. These chains of transactions were completed quickly, sometimes in a single day. The exporting company, under normal VAT rules, is eligible to obtain a refund, from HMRC, of the VAT it paid on its purchase of goods which it exports. If the company from which it has purchased the goods then fails to make payment to HMRC of the VAT it charged when selling the goods to the exporter, then HMRC will lose and the fraudsters will gain. The appellants were involved in 32 very large transactions in a period of less than 3 weeks. These resulted in VAT refunds of over £12 million. The question was whether the confiscation orders should be based on the turnover (which amended for inflation, and subject to questions raised in the Court of Appeal, of 'double counting' amounted to £92 million) or 'just' the VAT 'refunds'. The Court of Appeal held that the orders should be based on the amounts of the refunds, and this finding was not challenged in the Supreme Court. Nonetheless in *R v Chahal*,[118] *Ahmad* (*CA*) was held no longer to be law on this matter.

In *R v King* (*Scott*),[119] a car trader guilty of falsely claiming or creating the impression that he was not acting for purposes relating to his trade, contrary to the Consumer Protection from Unfair Trading Regulations 2008, it was proportionate to base a confiscation order on the turnover, rather than merely the profit, on the sale of 58 cars he sold as a private seller. His deliberate misrepresentations that he was a private seller were to avoid having to provide a warranty on the vehicles. The court held[120] that where, as in this case, the entire undertaking was unlawful, it was legitimate not to allow deductions.

[117] *R v Ahmad* (*CA*) [2012] EWCA Crim 391.

[118] *R v Chahal and another* [2015] EWCA Crim 816 [2015] 1 Lloyd's Law Reports: Financial Crime Plus 45.

[119] *R v King* (*Scott*) [2014] EWCA Crim 621; [2014] 2 Cr App R (S) 54.

[120] Following *R v Beazley* [2013] EWCA Crim 567; [2013] 1 WLR 3331.

In *Department for Works and Pensions v Richards*,[121] a benefit fraud case, no reduction was allowed to the assessed (POCA) benefit to take account of the notional benefits to which he would have been entitled had he behaved honestly and made a truthful claim. The analogous approach to tax fraud would be to treat the tax return as being a full statement of the facts giving rise to his/her liabilities, and, at the least, to disregard any aspects of the tax return stating facts to the advantage of the defendant (claiming allowances, deducting allowable expenses in the computation of income or profits, and so on) but there is a long history of treating tax offenders more favourably than people convicted of benefits offences. Beyond that, the rule that benefits are to be assessed without reference to expenses incurred in their commission is now sufficiently entrenched that a change would require legislation.

R v Eddishaw[122] is a further case in which the court went further than it need have. The appellant operated a factory producing counterfeit vodka. The liquid was bottled and sold to retailers. In this way payment of duty otherwise due under the Alcoholic Liquor Duties Act 1979 was avoided. The defendant pleaded guilty to conspiring[123] to cheat the revenue. In the subsequent confiscation proceedings, in the first instance the prosecution asked for the amount of duty which would have been payable had the vodka been genuine, and properly sold. No duty had ever been due as none had been demanded by HMRC. The prosecution then changed its approach and calculated the applicant's benefit as the money received for selling bottles of counterfeit vodka, or the value of those bottles unsold. The court held that the appellant's argument took too narrow a view of section 76(4). The appellant was operating an enterprise by bottling and selling a dutiable liquid without paying the duty. The vodka produced, held, or sold was obtained as a result of or in connection with the conspiracy to cheat HMRC, to which he had pleaded guilty. The court held that the ambit of section 76(4) is a relatively wide one, and it will be read so as to catch tangible items produced in the commission of an offence. In this case a more appropriate charge would have related to

[121] *Department for Works and Pensions v Richards* [2005] EWCA Crim 491.

[122] *R v Eddishaw* [2014] EWCA Crim 2783; [2015] Lloyd's Rep FC 212.

[123] A general issue exists in ascribing benefits to conspiracies rather than their implementation. The courts seem to ignore the distinction between inchoate and complete offences for this purpose.

counterfeiting the goods. It is to be regretted that the court was so keen to rectify this error.

R v Harvey[124] shows very clearly the changes in the way in which behaviour is categorised since the advent of POCA. The defendant owned a plant hire and contracting company, which had regularly acquired and sold stolen plant. The value of these items when stolen had been £315K, but when recovered it was £160K. The judge assessed the revenue derived from the stolen plant as 38 % of the company's total revenue, £1960K, and Harvey's benefit from criminal conduct as that figure plus the £315K, a total of £2275K. Harvey argued that from this sum should have been deducted the VAT on the sums gained by using the plant, which had been passed on to HMRC. The Court of Appeal refused to permit such a deduction. The total amount ordered to be confiscated was thus well above all the criminal had gained. On appeal, the UK Supreme Court held by a bare majority, apparently creating an *ad hoc* exception, that he was to be allowed a deduction for the VAT.[125]

So far as concerns the use of the stolen vehicles, what might have happened before POCA is that Harvey would have been charged only with handling stolen goods. The court would have exercised its power to make a restitution orders[126] in respect of the stolen goods and a compensation order[127] in respect of damage to those goods.[128] There might have been rights subrogated to insurance companies in respect of those items for which claims had been made. So far as the stolen plant was used to generate income, there would have been a duty to account to the owners for the profits. No issue would have arisen about the VAT. That, it is suggested, would have been a perfectly satisfactory outcome.

There is little consistency in these cases. Courts seem to be allowing deductions where the defendant is appealing but not otherwise. Again, an approach that was directed towards putting the defendant in the *status quo ante* would be more principled. It would also prevent litigation by allowing lawyers to give clearer advice on settlement of confiscation orders. The unwillingness of the courts even to consider the possibility of deductions

[124] *R v Harvey* (CA) [2013] EWCA Crim 1104, *R v Harvey* [2015] UKSC 73.

[125] *R v Harvey* [2015] UKSC 73.

[126] Powers of Criminal Courts (Sentencing) Act 2000 s 148. A restitution order is an order to give the victim back his/her property.

[127] Powers of Criminal Courts (Sentencing) Act 2000 s 130.

[128] And see *R v Taylor and Wood* [2013] EWCA Crim 1151.

has the clear affect that confiscation is punitive, and that defendants are being punished twice for the same thing.

Gaining by Crime the Possibility of Earning

R v Waya may have cast doubt on the correctness of some of the cases concerned with the confiscation of wages or fees earned from employment secured by a false representation or action in breach of some legal prohibition or disqualification.[129] On the face of it, where the defendant has committed a crime as a result of which s/he gains the opportunity to earn money, all the income the defendant 'obtains' for the purposes of POCA will be covered. If the defendant gains the opportunity to earn money as an employee, paying tax under PAYE, then the deductions from earnings, which are not paid to the defendant, will not be part of the benefit under section 76(4) because s/he will not have 'obtained' the property, but it might be argued that the fact of having his/her tax and National Insurance liability discharged is a pecuniary advantage for the purpose of section 76(5). Where the defendant is an independent contractor being paid 'gross', then s/he will have obtained the full sum s/he is paid and on a plain reading of the statute will have obtained that benefit.[130] It need not follow, however, that all the receipts are subject to the order. Simply because the income is obtained after the crime, and would not have been obtained without the crime, does not mean it is 'as a result of or in connection with [the crime]'.[131]

As with other areas, the case law on the matter is far from satisfactory. In *Del Basso*[132] the defendants had failed to comply with an enforcement notice contrary to section 179(1) and (2) of the Town and Country Planning Act 1990 making money by operating a 'park-and-ride' business. The court held that the benefit gained by the defendants was the total value of the property or advantage gained, not their net profit after deduction of expenses. It was for the judge to find as a fact what property the two men had obtained and, thus, the extent of the benefit. If this case were to be heard today, then the confiscation order might be scaled back

[129] *R v Carter and Others* [2006] EWCA Crim 416.

[130] Although a most obvious example of money obtained as a result of crime is earnings in prison, they would not be subject to confiscation. The deductions *régime* under the Prisoners' Earnings Act 1996 and *R* (*on the application of S and another*) *v Secretary of State for Justice* [2012] EWHC 1810 (Admin) excludes POCA from prisoners' earnings.

[131] And see *James*, above, fn 115.

[132] *Del Basso* & *Goodwin v R* [2010] EWCA Crim 1119; [2011] 1 Cr App R (S) 41.

to a level related to the profit of the business (which was essentially legitimate) rather than its total turnover.[133] It is not clear, however, whether this is desirable (they had, after all, very clearly been told not to trade in this way) nor whether it would be achieved by restrictive interpretation of section 76 or by the application of the overriding proportionality test. Whether it is desirable that the defendant lose every last penny earnt through performing some employment s/he acquires through crime is something that should be debated. It is a policy question but obviously not a human rights one. The approach of the law to these matters and to the serial and concurrent obtainers should then be reconciled. It is difficult to defend reductions in orders in respect of income earned while allowing multiple orders and orders for the full value of an item only transiently possessed.

In *Sumal & Sons (Properties) Ltd*,[134] it was held that a person who received rent in respect of a house which was unlicensed did not obtain the rent 'as a result of or in connection with' his criminal conduct, within the meaning of section 76(4) of POCA. In *Hussain*[135] the defendant was held liable in respect of a building let in breach of the relevant planning rules. In *McDowell*[136] the Court of Appeal made 'a narrow but critical distinction' between an offence which prohibits and makes criminal the activity of the offender and an offence comprised in the failure to obtain a licence to carry out an activity otherwise lawful.[137]

Paulet[138] had obtained employment by misrepresenting his immigration status in the UK. A confiscation order was made in the sum earnt.[139]

[133] 'There may be other cases of disproportion analogous to that of goods or money entirely restored to the loser. That will have to be resolved case by case as the need arises. Such a case might include, for example, the defendant who, by deception, induces someone else to trade with him in a manner otherwise lawful, and who gives full value for goods or services obtained. He ought no doubt to be punished and, depending on the harm done and the culpability demonstrated, maybe severely, but whether a confiscation order is proportionate for any sum beyond profit made may need careful consideration.' *R v Waya*, para 34.

[134] *R v Sumal & Sons (Properties) Ltd* [2012] *EWCA Crim* 1840; [2012] *Lloyd's Rep FC* 692.

[135] *Hussain v Brent London Borough Council* [2014] EWCA Crim 2344; [2015] Lloyd's Rep FC 102.

[136] *R v McDowell* [2015] EWCA Crim 173 at para 34.

[137] At paras 28–34.

[138] *R v Paulet* [2009] EWCA Crim 288; [2009] EWCA Crim 1573; [2010] QB 678.

[139] *Paulet v United Kingdom* [2014] ECHR 6219/08; [2014] Lloyd's Rep FC 484.

He made an application to the ECHR argued that on the facts of his case the order was disproportionate. The Fourth Section did not rule on the proportionality of the confiscation order but confirmed the domestic court's responsibility to apply A1P1 and to determine 'whether the requisite balance was maintained in a manner consonant with the applicant's right to the peaceful enjoyment of his possessions'.[140] The Court of Appeal had carried out a narrow examination as to whether the proceedings constituted an abuse of process or were oppressive but had not considered the fair balance requirement of A1P1. The Fourth Section concluded that there had been, for this reason, a violation of A1P1. If POCA is to cover earnings by people who did not have the appropriate permissions to work, it is difficult to see why it should not extend to any people who misrepresent their qualifications.

Harvey[141] creates a small exception for VAT, but only a small exception. *Waya*, *Ahmad*, and *Harvey* are all sticking plasters. It should not have required the deployment of Human Rights jurisprudence to place proceeds of crime law on a basis less than outrageous. In 2015 there was an attempt to place *Waya* on a statutory basis. The Serious Crime Act 2015 introduces a new provision after POCA s.6(5), to state:

> "Paragraph (b) applies[142] only if, or to the extent that, it would not be disproportionate to require the defendant to pay the recoverable amount." [143]

The explanatory notes[144] say that this provision is intended to give statutory effect to *Waya*. The syntax is not perfect, because the provision does not say what needs not to be disproportionate to what. *Waya* held that a confiscation order must be proportionate to the aim of deprivation of proceeds of crime. It would have been better to make this explicit. It is very unlikely that the amended s 6(5) will be read to introduce any wider changes in the areas to which attention has been draw, for example by overturning *R v Smith* (*David Cadman*). A long-term solution requires a better articulated notion of exactly what objective the law is seeking to

[140] Following *Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35; [1982] ECHR 7151/75, para 69.

[141] *R v Harvey* [2015] UKSC 73.

[142] Section 6 is the provision imposing the duty to impose a confiscation order.

[143] Serious Crime Act 2015 Schedule 4, para 19.

[144] Para 352.

achieve. This was not properly discussed at the time of POCA's enactment. At the least, we should know whether the purpose is to put D in the position s/he would have been in had s/he never committed the crime or to put D in no better a position than had the crime not been committed, or what? Only when this question is answered will the way forward be clear.

Civil Recovery

One of the innovations of POCA was the introduction of 'civil recovery'. Civil recovery proceedings involve a 'specific-property' *régime*, to be differentiated from a 'value-based' system such as is confiscation.[145] Civil recovery is an *in rem* action for 'property which is, or represents, property obtained through unlawful conduct', and is in the hands of someone other than a *bona fide* purchaser for value. The procedure involves strong investigatory powers.[146] It carries powers to freeze and seize assets and put them in the hands of an interim trustee.[147] On the success of the action a proprietary right is conferred by the court (as in bankruptcy) on a trustee.

Civil recovery proceedings confer upon a designated state official a right to bring a proprietary action to acquire property in the hands of a criminal or anyone else,[148] not being a *bona fide* purchaser for value, and to trace it into property that 'represents' the unlawfully acquired property, without any requirement first to obtain a conviction.[149] Since it is a proprietary action, accrued profits are included.[150] Mixed property is divided proportionately according to source, rather than by a 'last in, first out' rule.[151] It is expressly provided that there can be no provision in a

[145] *R v Waya* [2012] UKSC 51; [2013] 1 AC 294, paras 2–3.

[146] POCA ss 340 *et seq.*

[147] POCA ss 243 *et seq.* The trustee is not paid from the seized property: *R* (*on the application of Eastenders Cash* & *Carry Plc*) *v Revenue and Customs Commissioners* [2014] UKSC 34; [2015] AC 1101.

[148] POCA s 305.

[149] POCA s 305–306. The action thus supplements confiscation orders, which do follow convictions.

[150] POCA s 306. This does not, of course, depend upon the money having been invested lawfully. The enforcement authority might therefore benefit from such a windfall as in *Foskett v McKeown* [2001] 1 AC 102; [2000] 3 All ER 97.

[151] POCA s 306.

recovery order inconsistent with Convention rights.[152] There now is a dual-criminality requirement.[153] In order to be subject to the procedure, there must be 'property obtained through unlawful conduct'.[154] It was not the objective of the legislation that every case would be litigated. As with any other civil case, a settlement will often be the preferred outcome for both sides. Guidance as to its policy in reaching settlements was published first by the Assets Recovery Agency and then by its successors, the Serious and Organised Crime Agency and now the National Crime Agency.[155] The increased use of settlement is part of the Serious Fraud Office's policy in the areas under its jurisdiction.

There was significant discussion at the time of the enactment of POCA as to whether the procedure would flounder in the face of human rights claims. *Walsh v Director*, *Assets Recovery Agency*[156] decided that civil recovery actions do not attract the protections of Article 6.2 and 6.3 for the defendant, because a criminal charge is not involved. The principle line of argument to the contrary had arisen from Lord Bingham's judgment in *McIntosh v HM Advocate*, a *confiscation* case.[157] Kerr LCJ said:

> '… Mr McCollum focussed on the statement that the confiscation proceedings did not involve any inquiry into the commission of drug trafficking offences and suggested that, if such an inquiry had been required, the Privy Council would have held that the respondent had been charged with a crim-

[152] POCA s 266(3)(b). So the problems that arose and required to be remedied arising from the absence of a dual criminality provision in the definition in s 340 of POCA.

[153] POCA s 241 as amended by Serious Organised Crime and Police Act 2005 Sch. 6 para 8(a). The 2002 Act as enacted applied to proceeds in the UK acquired by activity performed elsewhere which would have been unlawful in the UK, giving rise to the problem case—cherished but apparently hypothetical—of the Spanish matador living in retirement in Eastbourne on the proceeds of bullfighting.

[154] *Ie*, conduct that is unlawful under the criminal law of the part of the UK in which it takes place, or which takes place in another country, is unlawful there and would be unlawful in the relevant part of the UK. POCA s 241. A suggestion that this expression might be read restrictively was made in *Director of Assets Recovery Agency v John and Lord* [2007] EWHC 360 (doubtful whether monies received for goods sold in the course of unlicensed trading would amount to 'property obtained through unlawful conduct' for the purposes of s 242 of the Act).

[155] http://www.assetsrecovery.gov.uk/downloads/ARA_settlement_policy.pdf (civil recovery) http://www.assetsrecovery.gov.uk/downloads/TaxCaseGuidance.pdf (taxation). SOCA Annual report 2008–2009.

[156] *Walsh v Director*, *Assets Recovery Agency* [2005] NICA 6; [2005] NI 383.

[157] *HM Advocate* v *McIntosh* [2001] UKPC D1; [2003] 1 AC 1078. Above, fn 53.

> inal offence. Again we do not accept that submission. We do not regard the fact that there was no inquiry into drug trafficking offences as pivotal to the decision.'[158]

That is, Lord Bingham in *McIntosh* said confiscation is not covered by Articles 6.2 and 6.3 because there has already been a conviction. Kerr LCJ in *Walsh* said Articles 6.2 and 6.3 do not apply to civil recovery because civil recovery is just like confiscation. The obvious objection is that there is no conviction in civil recovery. In *Walsh*, an application for leave to appeal to House of Lords was refused[159] and an ECHR appeal also failed,[160] and the consistency of the procedure with the Convention is now beyond argument.[161]

Although the ARA is regarded as having succeeded in Northern Ireland, where there was a history of racketeering linked to terrorism, it was considered a failure in England and Wales. It operated only until 2007 and was then abruptly abolished. This followed the publication of a report by Grant Shapps MP, which established that in the first 4 years of its existence the Agency had not been able to acquire enough money to cover its own costs,[162] and a critical Public Accounts Committee report shortly afterwards.[163] With the end of the Agency, the duties and powers of the Director were placed by the Serious Crime Act 2007 in the hands of various Directors responsible for prosecutions.[164] The civil recovery and taxation powers of the Assets Recovery Agency were given to the Serious Organised Crime Agency (SOCA) and also to the major

[158] *Walsh* at para 26.

[159] House of Lords minutes 7 July 2005, 17th Report from the Appeal Committee, para 12.

[160] *Walsh v United Kingdom* [2006] ECHR 1154.

[161] *SOCA v Gale* [2011] UKSC 49; [2011] 1 WLR 2760. See King, Colin, 'Civil forfeiture and Article 6 of the ECHR: Due Process Implications for England and Wales and Ireland' (2014) 34 *Legal Studies* 371–394, Boucht, Johan, 'Civil asset forfeiture and the presumption of innocence under article 6(2) ECHR' (2014) 5 *New Journal of European Criminal Law* 221–255.

[162] Shapps, Grant, *Report into the Underperformance of the Assets Recovery Agency* (London: Shapps, June 2006) http://www.shapps.com/AssetsRecoveryAgency-underperformance.pdf.

[163] Public Accounts Committee 50th Report of Session 2006–2007, *Assets Recovery Agency* (HC 391).

[164] Serious Crime Act 2007 s 74 and Schedules 8 & 9.

prosecuting bodies.[165] SOCA generated about £11 million in 2011–12 civil recovery orders, SFO £6 million.[166] The abolition of the ARA and its replacement with a more general scheme for the allocation of the proceeds of prosecutions[167] was accompanied by the establishment of the Assets Recovery Incentive Scheme. Under the most recent version of the scheme agencies get back 50% of assets they recover by civil recovery, split between the enforcing and referring agencies as they agree.[168]

From around 2011, the Crown Prosecution Service (CPS) has prioritised POCA powers (including civil recovery powers).[169] The Serious Fraud Office (SFO) has a team specifically dedicated to the active pursuit of proceeds of crime and clearly sees civil recovery as a significant element in its shift away from the use of criminal prosecutions.[170] With the powers redistributed and more widely used, £48 million was collected in 2012–13 from civil recovery, cash forfeitures, and tax recovery on criminal proceeds.[171]

After the publication of the NAO report on Confiscation Orders,[172] and in response to a Home Affairs Committee Report,[173] the National

[165] Serious Crime Act 2007 s 74. From 2013 these powers have been vested in the National Crime Agency: Crime and Courts Act 2013 Part 1.

[166] SOCA Annual Report available at http://www.soca.gov.uk/about-soca/library. SFO annual report 2011–2012.

[167] The Asset Recovery Incentivization Scheme, as to which see, for HMRC, http://www.hmrc.gov.uk/about/cf-framework-exec-summary.htm.

[168] Under the Scheme, half of all assets recovered are returned to law enforcement and prosecution agencies involved in the asset recovery process. The Home Office calculates quarterly the amounts to be allocated. For cash forfeitures, civil recovery and taxation, agencies receive a 50 % share of the money remitted to the Home Office. For confiscation receipts, 50 % of the receipts to the Home Office are split between the investigation, prosecuting and enforcing agencies in the following ratio: 18.7 %: 18.7 %: 12.5 %. HC Deb, 11 June 2012, c86W (Brokenshire, James).

[169] Milford, Alan , 'The new challenges to organised crime prosecution' May 2011 'powers we are starting to exercise in the High Court' CPS website. Earlier, when civil recovery had been thought more specialised, there had been less interest in it in the CPS.—HC 10 February 2009: Column 1861W (Baird, Vera, QC, Solicitor-General).

[170] Numbers of orders obtained by the SFO remain low, however. Serious Fraud Office Annual Report and Accounts 2012–2013 (HC 9) page 11.

[171] National Audit Office, *Confiscation Orders* (HC 738, 2013–2014) page 4.

[172] *Ibid.*

[173] Vaz, Keith (Chair), Home Affairs Committee *Evaluating the new architecture of policing: the College of Policing and the National Crime Agency* HC 800 (2015).

Crime Agency (NCA) published a new account of what it is seeking to achieve when bringing civil recovery proceedings. It turns out that it is not now even trying to use civil recovery primarily to increase revenue.

> We want to deny criminals access to their money whenever we can, but the aim is not to generate revenue. The real value of going after the money comes from its disruptive effect on criminal activity.[174]

Anthony King and Ivor Crewe's book *The Blunders of Our Governments* contains a chapter devoted to the ARA and seems to hold that the problem was a lack of clear focus.[175] Subsequent events have indicated that it may be that the abolition of the ARA might have been the mistake, not its establishment. Had the NCA current policy on civil recovery (prioritizing disruption not revenue) been articulated at the time of the collapse of the ARA, as the ARA's policy, it would have provided an excellent reason not to abolish the Agency. But had it been known at the outset that civil recovery was not going to yield large sums, then the ARA probably would not have been established in the first place.

The increased emphasis on non-conviction-based confiscation[176] raises a further question. The reason so much importance attaches to the distinction between criminal and other proceedings is that Articles 6.2 and 6.3 of the European Convention on Human Rights grant certain rights to persons 'charged with a criminal offence'. The Convention was drafted when the distinction between criminal and civil proceedings was clearer. In particular, there is now in England and Wales a far wider range of regulatory bodies with power to impose penalties without a court order. If the Convention were to be redrawn today, it would probably not have so hard-and-fast a distinction, and a binary distinction between civil and criminal law would be replaced by a continuum of interferences with the rights of the defendant, and corresponding protections, without the crimi-

[174] National Crime Agency, 'NCA approach to criminal assets' Press Release 17 February 2015.

[175] King, Anthony and Ivor Crewe, *The Blunders of Our Governments* (London: Oneworld Publications, 2013) Ch. 11.

[176] See, *eg*, Boucht, Johan, 'Civil asset forfeiture and the presumption of innocence under article 6(2) ECHR, (2014) 5 *New Journal of European Criminal Law* 221–255, Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union EU 2014 PE-CONS 121/13.

nal/civil distinction being critical. The ECHR might be too difficult to amend: it may be that the days in which the binary criminal/civil distinction served a useful function as a human rights axiom may be drawing to a close.

Tax

The idea that tax law might provide a mechanism by which to deal with crime is not a new one, but the advent of money laundering changes the dynamic.[177] The great advantages of tax evasion as a focus for those invested in the AML industry is that once tax offences are regarded as appropriate predicates, then, first, the amounts of money involved in the AML narrative will increase sharply, and, second, more or less any criminal enterprise by which property is acquired will be covered, and it will not be necessary to establish another more specific type[178] of predicate in order to show laundering. Somebody making a living from dealing drugs will almost always not be declaring the income, so where it is possible to prove that they received the money, treating the evasion of tax as the predicate, simply by aggregating wealth, avoids the need to be more specific about the provenance.

From 2005 onwards the law in England and Wales came to include tax offences as predicates, and this was made obligatory worldwide by FATF in the 2012 revision of the Forty Recommendations.[179] This has led to an unnecessary and complex blurring between tax and criminal justice. It also renders the amounts of money that can be ascribed to laundering far higher and makes yet broader the margins for error in any

[177] There is a significant literature around Al Capone: see *Capone v United States* (1931) 56 F 2d 927, cert denied, 286 US 553, 76 LEd 1288, 52 SCt 503 (1932); *United States v Capone* 93 F 2d 840 (1937), cert denied, 303 US 651, 82 LEd 1112, 58 SCt 750 (1938). More generally, see Baker, Russell, 'Taxation: potential destroyer of crime' (1951) 29 Chicago-Kent Law Review 197; Gallant, Michelle, 'Tax and the proceeds of crime: a new approach to tainted finance?' (2013) 16 *Journal of Money Laundering Control* 119–125; Bucy, Pamela H 'Criminal tax fraud: The downfall of murderers, madams and thieves' (1997) 29 *Arizona State Law Journal* 639.

[178] On a charge of a POCA laundering offence, the prosecution does not have to prove a specific predicate offence but a type to give the mental state for the purposes of POCA laundering offences: *R v Kuchhadia* [2015] EWCA Crim 1252; [2015] Lloyd's Rep FC 526.

[179] FATF, *Interpretive Note to Recommendation 3* (MONEY LAUNDERING OFFENCE) para 4.

claims as to the size of the problem and increases the proportion that can be allocated to the transnational component of the global sum claimed to be laundered.

In English law, the criminal property is deemed to exist in the hands of the tax evader, and defendants have been held to launder the proceeds of the crime of evasion. In *R v William*, *William* & *William*[180] the Court of Appeal held that where a taxpayer cheated the Revenue by falsely representing the turnover of a business, he obtained a pecuniary advantage and was taken to have obtained a benefit equal to tax due on the undeclared turnover. Moreover, the 'criminal property', was the entirety of the undeclared turnover, not merely the tax due. Once the law commits to the fiction that the tax evader actually has in his/her possession property that s/he does not have and uses that as a basis for conviction, there is no obvious point to stop. If tax evasion is a predicate offence to criminal laundering, then, since almost all income from unlawful sources is taxable profits, there is a danger that the chosen enforcement mechanism—against, for example, drug dealers—will be to treat their money as the proceeds of tax evasion and charge laundering of that, rather than have to prove the predicate. If the prosecution need only establish that money was undeclared income, then unless the sentences for laundering vary according to the predicate offence, there is no point in proving any other more serious or more specific 'criminal conduct' as a predicate. English law has no restriction preventing liability for 'self-laundering' (i.e. laundering the proceeds of one's own crime),[181] so the effect of these developments is that it is now very unlikely that any defendant who commits an evasion offence will not also be liable for a laundering offence. This trend is exemplified by *R v Kuchhadia*,[182] in which the defendant's lifestyle was taken as evidence of a number of possible predicates, of which evasion was one and the most easily proven.

The extension of laundering law into tax evasion will become more serious if the proposal for a strict liability offence of offshore tax evasion is

[180] *R v William*, *William* & *William* [2013] EWCA Crim 1262, approving and expanding upon *R v Gabriel* [2006] EWCA Crim 229; [2007] 2 Cr App R 11 *R v K* [2007] EWCA Crim 491; [2008] STC 1270; and *Serious Organised Crime Agency v Bosworth* [2010] EWHC 645 (QB).

[181] German and Austrian law both exclude liability for self-laundering: § 261 and § 165 StGB of the respective Criminal Codes.

[182] *R v Kuchhadia* [2015] EWCA Crim 1252; [2015] Lloyd's Rep FC 526.

enacted.[183] It would be very difficult to commit the new evasion offence without also committing a laundering offence. If this is really what is intended, at least this should be made explicit. If people do evade tax, by under- or non-declaration or other means, they will have more money than otherwise they would have had, but that does not necessarily mean that so far as concerns any act that might fall within the definition of the major laundering offences.[184] Notwithstanding arguments to the contrary,[185] in English law the relevant deeming provision[186] has been construed, where the pecuniary advantage is the deferral of a debt, to impute to the defendant the value of the debt, not the value of the deferral. In the case of tax fraud by under- or non-declaration,[187] it is clear that the taxpayer will have more property, but there will not necessarily be any identifiable property arising from the evasion to which a laundering charge can be attached. Even if there is identifiable property the defendant will not necessarily hold the required mental state (knowledge that or suspicion as to whether the property in question 'represented or constituted'[188] the proceeds of an offence of the type of the predicate offence) for conviction, but the conceptual problems raised as to the quantity and identity of the criminal property have consistently been ducked in the laundering case law in England and Wales.

The creation of the new offence of overseas evasion[189] will broaden the scope of tax evasion offences and consequently enlarge the scope of the offence of laundering the proceeds of tax evasion. This might have as a consequence that the introduction of a relatively minor offence would involve a significant change in the criminal law. As things stand, the minimum mental state required for conviction for laundering the proceeds

[183] The suggestion first made in HMRC, *Tackling Offshore Tax Evasion*: *A New Criminal Offence* (London: HMRC, 2014); See now HMRC, *Tackling offshore tax evasion*: *A new criminal offence for offshore evaders Summary of Responses and Further Consultation* (London: HMRC, 2015). Finance (No 2) Bill 2016 Part 10.

[184] POCA ss 327–329.

[185] Alldridge and Mumford, above, fn 129.

[186] POCA s 76(5) (confiscation) and s 340(6) (criminal laundering): 'If a person obtains a pecuniary advantage as a result of or in connection with conduct, he is to be taken to obtain as a result of or in connection with the conduct a sum of money equal to the value of the pecuniary advantage.'

[187] But not falsely claiming rebates.

[188] A legal judgment is implied in 'constituted', and consequently mistake or ignorance in that regard should, in principle, provide a defence: *R v Smith* (*DR*) [1974] QB 354.

[189] Finance (No 2) Bill 2016.

of tax evasion is suspicion as to whether the property in question was obtained by evasion, and that suspicion[190] must address the relevant mental state (dishonesty or a fraudulent intent of some sort) as well as the acquisition of the funds itself.

The mental state required for conviction of laundering the proceeds of the new offence would be knowledge that or suspicion as to whether the property in question 'represented or constituted' the proceeds of the offence, and that suspicion will no longer need to advert to a relevant serious mental state but simply as to whether the offence was committed, albeit blamelessly, or, if a defence is provided, of a reasonable care. Under the new offence, the taxpayer would be liable for laundering if s/he considered the possibility that the offence had been committed—that is, that he or she or somebody acting on his or her behalf made a mistake when completing the tax forms. There can be few people who complete tax forms without considering such a possibility. So the introduction of a new offence would not only install a new band of liability below the existing criminal offences of evasion, but it would also broaden radically the scope of the offence of laundering the proceeds of evasion, which is a much more serious offence. On the face of it, the penalties for this offence would not have been significantly different from those for any other laundering offences.[191]

The English law definition of laundering now extends, in particular, to include activity directed towards the disposal of money which is the product of tax evasion. Almost all undeclared income from crime is taxable. The consequence of this is that at least as much money will be laundered in any given economy as is equivalent to the entire black economy of the jurisdiction in question, plus some (because some honest mistakes will come in too). The same applies globally. Far from being a slight change, the introduction of the new offence would be a huge one, which, at the very least, should have been considered. It is easy to say that tax evasion is

[190] And see above, page 39 *et seq*. See also *Shah v HSBC Private Bank (UK) Ltd* [2010] EWCA Civ 31; [2010] 3 All ER 477. *K Ltd v National Westminster Bank Plc* [2006] EWCA Civ 1039; [2007] 1 WLR 311.

[191] In the early sentencing cases on laundering the courts were strongly influenced by the gravity of the predicate offence: *R v Goodyear* [2005] EWCA Crim 888; [2005] 1 WLR 2532; *R vYoonus* [2004] EWCA Crim 1734; [2005] 1 CAR (S) 46; *Attorney General's Reference No.48 of 2006* (*Andrew Farrow*) [2006] EWCA Crim 2396. Since then there has been a move away from that position: Sentencing Council, *Fraud, Bribery and Money Laundering Offences: Definitive Guidelines* (2014).

a crime (or even a serious crime) and that it should be treated equally with other serious crimes as a predicate to laundering.

The intranational form of laundering (Saul and his nail parlour[192]) cannot plausibly be regarded as giving rise to any justification for the AML industry. Only international movements of money can justify the sorts of interventions the narrative demands. If a system of international information exchange could be established that is sufficiently comprehensive and accurate as to make a significant impact upon the use of offshore to evade tax, then a severe blow would have been struck against their use to hide the proceeds of crime.

Two fundamental, and hitherto insuperable, difficulties have stood in the way of international action against tax havens: the identification of the beneficial owner or money in a bank account and the beneficial owner of a corporate entity. For many years it appeared as though some places (tax havens, secrecy jurisdictions) were sufficiently powerful to resist international pressure for greater transparency, but pressure placed on Switzerland by the USA gave rise to the USA–Swiss tax agreement.[193] FATCA,[194] which requires individuals to report their financial accounts held overseas and foreign financial institutions to report to the Internal Revenue Service (IRS) about their American clients, is a further step. The OECD's move towards automatic exchange of information between jurisdictions on overseas accounts is planned to take effect from 2018[195] and is a precondition to effective action. As the leaks from *HSBC Suisse*[196] showed, scarcely a country around the world has been able to exert their taxing rights over income held undeclared in secrecy jurisdictions. Zucman[197] estimates that at any one time $7.6 trillion are held offshore. The Tax Justice Network estimates $13 trillion.[198]

[192] Above, page 3.

[193] Department of Justice Press release, 'United States and Switzerland Issue Joint Statement Regarding Tax Evasion Investigations', Thursday, 29 August 2013. http://www.justice.gov/opa/pr/united-states-and-switzerland-issue-joint-statement-regarding-tax-evasion-investigations.

[194] Foreign Account Tax Compliance Act 2010 (US) 124 Stat. 97–117.

[195] OECD, Standard for Automatic Exchange of Financial Account Information (Paris: OECD 2014).

[196] Above, pages 29 *et seq*.

[197] Zucman, Gabriel, 'Taxing across Borders: Tracking Personal Wealth and Corporate Profits' (2014) 28 *Journal of Economic Perspectives* 121–148.

[198] Henry, James S, *The Price of Offshore Revisited* (London: Tax Justice Network, 2012).

The changes in the treatment of international tax liabilities have an important consequence. If the combined actions of 'the international community' were to generate a situation in which it is impossible to hide money anywhere in the world from the attentions of tax collection agencies, then the AML *régime* would become redundant; if, on the other hand, it is not possible to secure the level of information that would be necessary, then neither the AML nor the tax regime will be able to operate properly. That is, if it is possible to make progress by tax-directed means, especially the exchange of information, in respect of the deposits held offshore, then the AML/CFT aspects will become increasingly irrelevant. If it is not, then there is little reason to suppose that AML/CFT will work where the efforts of tax authorities to combat offshore evasion have failed.

Having made strong commitments to the new OECD standard going ahead,[199] major players now seem less keen. The USA has moved back from its original commitments to provide—and not only demand—tax information. Switzerland has set a course for bilateral rather than multilateral information provision, strongly suggesting that only the strong will be able to benefit from the weakening of banking secrecy. The UK government's position on the Caymans Island has become more permissive again. As ever, governments have an interest in acting so as to diminish the quantum of money laundered, but if laundering is to take place, they would rather be the beneficiaries than not.

Consequences and Prescriptions

So far as concerns each of these specific narratives, the point of this book is not that drugs or organised crime, or corruption, or tax crime, or terrorism are being given too much attention in the contemporary criminal justice agenda, nor that they are not associated with laundering. It is simply that whatever the *crime du jour* happens to be will necessarily be linked either to the use of money in, or the obtaining of money by, its commission. This does not mean, however, that laundering is the main problem. It means that the predicate offences are. The use of the

[199] 'We will ensure developing countries have full access to global automatic tax information exchange systems.' Conservative Party Manifesto, 2015 General Election.

mystifying and glamorising term 'laundering' obfuscates. The idea that the property is obtained by some act or other, and that that act has a particular (limited) reprehensibility, and that there is then some added turpitude when the criminal tries to do anything with the property is wholly artificial. Calling it 'money laundering' rather than 'participation in crime' adds only rhetorical force and raises the stakes by bringing the crime within the security agenda, whatever the gravity of the predicate. The problem is property crime of one sort or another. That has always been the problem.

The AML narrative is resilient because it is non-falsifiable. It is consistent with any state of the data. If large sums are found and seized, that means that large sums are available to be found and seized. If not, it may still be asserted that large sums are available to be found and seized. The sums which have been spoken of in the AML narrative have not materialised,[200] but the easy response is that if the money has not been found, then that is because the authorities do not have enough powers or resources, that there are too many (legal and practical) obstacles,[201] and that in any event AML/CFT is just as much about the disruption of criminal activity[202] as the seizure of assets. Thus the preamble to the EU Directive on Freezing and Seizing (2014) states:

> (4) Although existing statistics are limited, the amounts recovered from proceeds of crime the Union seem insufficient compared to the estimated proceeds. Studies[203] have shown that, although regulated by Union and national law, confiscation procedures remain underused.[204]

[200] National Audit Office, *Confiscation Orders* (HC 738, 2013–2014), Hodge, Margaret (Chair) House of Commons Public Accounts Committee, Forty-ninth Report of Session 2013–2014, *Confiscation Orders* (HC 942, 2014).

[201] The amendments made by Part 1 of the Serious Crime Act 2015, dealing with third party interests and various other ways of securing compliance, reflect this view. See Fisher Jonathan, 'Part 1 of the Serious Crime Act 2015: Strengthening the restraint and confiscation regime' [2015] Crim LR 754.

[202] Gallant, Michelle M, 'Money Laundering Consequences: Recovering Wealth, Piercing Secrecy, Disrupting Tax Havens and Distorting International Law' (2014) 17 *Journal of Money Laundering Control* 296–305.

[203] The main study to which reference is made seems to be European Commission Directorate-General Justice, Freedom & Security, *Assessing the effectiveness of EU Member States' practices in the identification, tracing, freezing and confiscation of criminal assets* Final Report June 2009.

[204] Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European

The studies in question show inconsistency in national rates, and it is from this that the Commission infers underuse in some jurisdictions.[205] There are other explanations, and it is by no means necessarily the case that the jurisdictions that make the most seizures, or seize the most property, are the optimal enforcers. We know so little of the costs of enforcement that such a claim could not, without more, be justified. All this has harmful consequences in various areas.

Human Rights Jurisprudence and Avoidance

The Human Rights Act 1998 was introduced amidst much fanfare and the promise of the introduction of a 'human rights culture'.[206] There have arisen areas of apparent conflict between human rights and proceeds of crime law. In confiscation, even under the 'lifestyle provisions', civil recovery and forfeiture courts have declined to invoke Articles 6.2 and 6.3, and Article 8 (private life) has yielded nothing. After a slow start, A1P1 has now grown in significance and has been used by the UK Supreme Court (*Waya*, *Ahmad*, *Harvey*) to restrict confiscation orders and their enforcement. A7P4 (double punishment), to which the UK has yet to sign up, is rather more marginal, but as a matter of principle the sets of questions around multiple counting should be affected. Until what may be the sea-change of *Waya* the judges had become swept up in the laundering panic so as to give the legislation a fairer wind than might have been expected, and they have helped legislators and draftspeople in a number of avoidance devices that take AML/CFT outside the scope of human rights protections.

The fundamental human rights objection to the way in which proceeds of crime law has operated is to be laid at the door not of judges, but of legislators. Much of laundering law has been written to avoid the

Union EU 2014 PE-CONS 121/13. Even this does not satisfy the hawks. Alagna, Federico, 'Non-conviction Based Confiscation: Why the EU Directive is a Missed Opportunity' (2014) *European Journal on Criminal Policy and Research* 1–15.

[205] And see Forsaith, James, Barrie Irving, Eva Nanopoulos, Mihaly Fazekas, *Study for an impact assessment on a proposal for a new legal framework on the confiscation and recovery of criminal assets prepared for the European Commission* (Directorate General Home Affairs, 2012).

[206] Hunt, Murray, 'The Human Rights Act and legal culture: the judiciary and the legal profession' (1999) 26 *Journal of Law and Society* 86–102.

consequences of Articles 6.2 and 6.3. Legislators have behaved like the tax avoiders they decry. Far from putting in place a human rights culture, they have put in place an avoidance culture which looks at human rights documents with a view to finding loopholes that can be used so as to secure legislative objectives without pesky human rights proving an obstacle.

Distortion of Criminal Law

The criminal law, especially the serious criminal law that must be explained to and applied by juries, is at its best when it targets some identifiable, easily comprehensible wrong. The relative gravity of offences should be assessed from time to time and may change. What is wrong is for that relativity to be affected by means of an unforeseen consequence of the growth of AML. The growth of the AML industry has had the effect that unless a criminal can be regarded as making a living from theft or frauds with identifiable victims,[207] his/her crimes have diminished in gravity compared to those to which the additional laundering charges can be added on. This is an important change, which should have been considered properly, rather than being accomplished by a sidewind.

Discretion in State Officials

The standard response to a claim that a particular law covers too many activities is that all is well because those who hold the discretion to bring or not to bring prosecutions can be trusted to exercise it in such a way as only to cover the cases obviously falling within the intended scope. This is an argument at odds with the Rule of Law. One of the consequences of criminal laws under which the net of liability is cast very wide is that it gives more power to prosecutors to select defendants.

Levi points out that there are reasons that in economic crime enforcement practices might well differentiate, and it may be that the largest banks behave as if they are fully aware of their invulnerability (because of the risks of their being caused to fail).

[207] The *Harvey* (above, fn 126) type of case, which is comparatively rare.

'Despite the creation of an impressive appearing set of AML controls in these banks, many big banks seemed comfortable with continued violations of their own rules. The reputational cost, at least as expressed in share prices, is minimal, possibly because banks are already little esteemed, but also because the 'nuclear option' of prosecuting banks or taking away their licenses has been reserved for marginal players: the collateral damage of drastic action being deemed too high (as the bankers doubtless know). It is well known from deterrence research that expected sanction celerity and certainty are more important than severity,[208] and it seems plausible that it is applicable to elites also.'[209]The increased vagueness and reordering of criminal law does matter and is harmful.

Failure to Cost and Clarity of Objectives

The most curious aspect of the growth of the laundering industry is that it has been treated as not having had a cost. There is a price in all the monitoring, reporting, and disclosure. There is a price in its administration. It is usually something the financial institutions and professions are required to do for no payment from the State and whose costs are passed on to their customers. The regulatory structure depends upon the active engagement of the financial sector, the cost of whose time and skills are not compensated but must be passed on to consumers. We still do not know the price. The AML industry was not costed properly at its birth nor upon any of the many subsequent incremental additions made to it. A report written for the IMF was unequivocal.

> 'To date there is no substantial effort by any international organization, including the IMF, to assess either the costs or benefits of an AML/CFT regime. The FATF system has proceeded as if it produces only public and private goods, not public or private 'bads' or adverse by-products against which the 'goods' have to be weighed…'

[208] Citing Nagin, Daniel S 'Deterrence in the twenty-first century' (2013) 42 *Crime and Justice* 199–263. (my fn).

[209] Levi, Michael, 'Legitimacy, Crimes, and Compliance in "The City": de maximis non curat lex?' in Tankebe, Justice & Alison Liebling (eds.) *Legitimacy and Criminal Justice* (Oxford: OUP, 2013) 157–177.

> 'There needs to be more open acknowledgement of actual and potential financial costs of AML/CFT controls, their potential misuse by authoritarian rulers,[210] and possible adverse effects on populations that rely on remittances and the informal economy, as well as potential negative impacts on NGOs and parts of civil society. Likewise the benefits, including a more universally compatible mutual legal assistance scheme, laundering prevention and better proceeds of crime detection and recoveries, need to be articulated more clearly.'[211]

Failure properly to cost also involves failure to consider the available alternative legal responses. AML grew as a response to drug dealing, which is a 'victimless' crime in the sense that there is no aggrieved person who might sue or otherwise act to get the proceeds from the criminal. Where there is already a potential plaintiff there is no such *lacuna* as that exposed by *Cuthbertson*[212] and, in particular, in tax cases, where the authorities have ample powers to recover the money.

There seem to be three main justifying accounts of the AML industry, as follows. First, because, on a proper economic costing, AML/CFT more than pays for itself in property seized and reductions in other crime (by preventing reinvestment or reducing the incentives) and therefore the State can use the money thereby acquired to build hospitals, schools, and prisons. If it is required to be cost-effective the costs and the effects need to be known. Second, because it is an end in itself—because like Kant's example of the murderers on the island that is being vacated,[213] AML/CFT and the extraction of proceeds from criminals and their confederates should be carried out whatever the cost. It is difficult to defend such an approach, but much of the literature seems to proceed from this or a similar assumption. Only if this account is adopted are the costs irrelevant. Third, a more cynical approach might say that because there is a political or career advantage to be gained. Tony Blair did very well out of profits of crime,[214] and now David Cameron is appropriating it to his own ends.

[210] On which the Yukos case, below fn 116, is a strong example (author's footnote).

[211] Halliday, Terence, Michael Levi, Peter Reuter, *op cit* fn 71 above, page 9 para 7.

[212] *R v Cuthbertson* [1981] AC 470, above page 14.

[213] Kant, Immanuel, *The Metaphysical Elements of Justice* (Indianopolis, IN: Bobbs-Merrill, J Ladd trans. 1965) at 102.

[214] Above, page 16 *et seq.*

What Is To Be Done?

Unlike other panics centred around specific crimes or other activities, and partly at least because of its global impetus and links to whichever crimes are in the current focus, the laundering industry is unlikely just to blow over, as have, in previous eras, gin,[215] thieftakers,[216] drugs,[217] white slave trafficking, mugging,[218] pornography, and offences connected to (voluntary or involuntary) commercial sex work. The internal logic of AML/CFT is that regulation must be global, pervasive, and indefinite.

Much of this book has dealt with the responses of legislators and the courts in producing the law. There are clearly things that could be done at the margins of the legal definitions to rein in the growth of AML in the UK. First, adoption of a rule against liability for self-laundering would prevent unnecessary additions of makeweight laundering charges to property predicate charges when the predicate itself fully captures the gravity of the wrong involved. Second, the English Law rules that suspicion is enough for liability and to trigger the reporting regime[219] could be replaced by a 'knowledge or belief', or even a 'knowledge' criterion. Third, it would be an improvement to be far more exacting about identifying 'criminal property', and in particular not to use fictions. This would not even require a change to the law. Reading section 340 of POCA to mean what it says would be sufficient. Fourth, instead of having blanket inclusion in a list of predicates, each criminal offence should be assessed individually to determine whether it should be so included. Fifth, confiscation could be limited by the re-adoption of a clear restitutive principle. There are things that could be done to improve decision making by legislators. In particular, so far as concerns the influence of transnational bodies in the area, especially FATF, there should be far greater transparency and accountability in its decision-making processes.

More significant change would have to occur at an international level. The cost–benefit comparison between using AML and various other forms of expenditure on criminal justice, which should have taken place in the

[215] Dillon, Patrick, *Gin*: *The much-lamented death of Madam Geneva* (Brookline, MA: Justin, Charles & Co, 2004).

[216] Above, page 19.

[217] Above, page 9.

[218] Hall, Stuart, J Clarke, C Critcher, T Jefferson and Brian Roberts, *Policing The Crisis*: *Mugging*, *Law And Order and the State* (London: Macmillan, 1978).

[219] Above, page 61.

1980s before the snowball started rolling, should be undertaken now and a rational response made. The outcome may be that the AML industry is good value for money, or it may be that the money might better be spent elsewhere (e.g. in more proactive policing and regulatory activity against financial crime). Or it may be that the AML industry is not worth the candle and does not need to be replaced by anything. It would be good for this possibility, belatedly, to be considered.

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