

LET THE SELLER BEWARE: MONEY LAUNDERING, MERCHANTS AND 18 U.S.C. §§ 1956, 1957

"Riches are for spending," wrote Francis Bacon.¹ Bacon could not have imagined the enormous riches generated by illegal drug trafficking and the difficulty drug dealers have in spending such sums.² Because the proceeds of drug sales are "dirty," they cannot be spent until they are "washed" to appear legitimate. Without washing, government authorities can link illegal funds to their owner, making the owner liable for income taxes, prosecution and forfeiture.³ This washing of illegal monies, called money laundering, is big business and is one of the largest problems currently facing law enforcement.⁴

The federal government has attacked money laundering in different ways, beginning indirectly by imposing statutory reporting requirements.⁵ The Bank Secrecy Act made failure to report certain transactions a crime, although large cash transactions were not themselves illegal.⁶ Statutory loopholes and mixed judicial interpretation of the statute⁷ led to the Money Laundering Control Act of 1986 ("MLCA"), which sought to close the loopholes and to make money laundering itself a criminal act.⁸ Finally, Congress passed the Money Laundering Prosecution Improvements Act as part of

¹ FRANCIS BACON, *Of Expense*, in *THE ESSAYES OR COUNSELS, CIVILL AND MORALL* 87, 87 (Michael Kiernan ed., Harvard Univ. Press 1985) (1625).

² In 1990 the Federal Bureau of Investigation estimated that the revenues from drug trafficking totaled \$300 billion worldwide, \$100 billion of which was from trafficking in the United States. Carl P. Florez & Bernadette Boyce, *Laundering Drug Money*, FBI L. ENFORCEMENT BULL., Apr. 1990, at 22, 23. The Department of Justice noted that this totals almost two percent of the gross national product and is larger than the entire U.S. automobile market. Jonathan Marshall, *Untaxable Billions*, S.F. CHRON., July 28, 1991, at 13.

³ H.R. REP. NO. 746, 99th Cong., 2d Sess. 16 (1986). As noted by the Department of the Treasury, willful violations of the reporting or money laundering laws can result in criminal and civil penalties and forfeitures. DEP'T OF THE TREASURY, *THE REPORTING REQUIREMENTS OF THE BANK SECRECY ACT AND SECTION 6050I OF THE INTERNAL REVENUE CODE* 1 (December 1991 Report to the Congress).

⁴ H.R. REP. NO. 746, *supra* note 3, at 16.

⁵ See Sarah N. Welling, *Smurfs, Money Laundering, and the Federal Criminal Law: The Crime of Structuring Transactions*, 41 FLA. L. REV. 287, 288-89, 292 (1989); see also 31 U.S.C.A. §§ 5311-5324 (West 1983 & Supp. 1991).

⁶ Welling, *supra* note 5, at 294.

⁷ *Id.* at 298, 303.

⁸ *Id.* at 289; see also 18 U.S.C.A. §§ 1956-1957 (West Supp. 1991); 31 U.S.C.A. § 5324 (West Supp. 1991).

the Omnibus Anti-Drug Abuse Act of 1988.⁹ The 1988 provisions expanded the definition of "financial institution" to encompass, among others, car, plane and boat dealers, and persons involved in real estate closings.¹⁰ Thus the 1988 changes made the previously enacted reporting requirements applicable to certain merchants and also made those merchants subject to charges of money laundering.¹¹

This note analyzes the money laundering statutes and the types of prosecutions brought under them, addressing why a particular section, 18 U.S.C. § 1957, has not been used as often as its counterpart, 18 U.S.C. § 1956. Section I examines the development of money laundering legislation, including the rationales and concerns behind it.¹² Section II describes the types of cases prosecuted under the legislation, noting changes in the types of persons prosecuted for money laundering.¹³ Section III examines the intended range of application of the two primary money laundering statutes, and the paucity of cases brought under section 1957.¹⁴ Section III also analyzes some of the arguments against increased use of section 1957 and posits that they are not persuasive.¹⁵ The note concludes that section 1957 should be used against merchants more often than it is now, particularly when the section 1956 elements may be difficult to prove.

I. LEGISLATION AGAINST MONEY LAUNDERING

A. *The Bank Secrecy Act of 1970*¹⁶

Prior to the Bank Secrecy Act of 1970 ("BSA"), legislation did not prohibit money laundering because the government viewed

⁹ 18 U.S.C.A. § 1956 (West Supp. 1991).

¹⁰ 31 U.S.C.A. § 5312(a)(2)(T)-(U). The definition of "financial institution" already included dealers in precious metals, stones or jewels. *Id.* at § 5312(a)(2)(N).

¹¹ See § 5312(a)(2)(N). Title 18 U.S.C.A. §§ 1956(a)(1) and (a)(3) prohibit certain financial transactions that involve "the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree." 18 U.S.C.A. § 1956(c)(4)(B) (West Supp. 1991). Because the law now considers certain types of retail businesses to be financial institutions, transactions with them would be subject to the money laundering prohibitions of § 1956. See 31 U.S.C.A. § 5312 (a)(2)(T)-(U).

¹² See *infra* notes 16-56 and accompanying text.

¹³ See *infra* notes 57-173 and accompanying text.

¹⁴ See *infra* notes 178-208 and accompanying text.

¹⁵ See *infra* notes 209-270 and accompanying text.

¹⁶ Currency and Foreign Transactions Reporting Act of 1970, Pub. L. No. 91-508, 84 Stat. 1118 (1970) (current version at 31 U.S.C.A. §§ 5311-5324 (West 1983 & Supp. 1991)).

laundering as tangential to the underlying crime that generated the money.¹⁷ The BSA highlighted this view in its statement of purpose, indicating that the financial transactions reported would shed light on criminal activity.¹⁸ The BSA's accompanying Department of Treasury regulations required financial institutions to file a Currency Transaction Report ("CTR") for each transaction in currency over \$10,000.¹⁹ The BSA made failure to report such a transaction illegal.²⁰

Several federal appellate decisions made clear that there was an exploitable loophole in the BSA's reporting requirements.²¹ Because the reporting requirements applied only to currency transactions of at least \$10,000, the practice of "structuring" allowed individuals to arrange their transactions so that each was less than \$10,000.²² Individuals known as "smurfs" provided the structuring service by engaging in multiple banking transactions for those who needed to launder money but did not want the transactions to be reported.²³ Some United States circuit courts of appeals reversed convictions of defendants who structured their transactions to avoid a CTR filing, holding that the BSA and relevant regulations did not give fair warning that it was illegal to structure transactions to avoid

¹⁷ See Mark R. Irvine & Daniel R. King, Comment, *The Money Laundering Control Act of 1986: Tainted Money and the Criminal Defense Lawyer*, 19 PAC. L.J. 171, 172 (1987).

¹⁸ Title 31 U.S.C.A. § 5311 states, "It is the purpose of this subchapter . . . to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings."

¹⁹ 31 C.F.R. § 103.22 (1988). The form is Treasury Form 4789 (Currency Transaction Report). Welling, *supra* note 5, at 340. The constitutionality of the BSA was questioned in *California Bankers Ass'n v. Schultz*, 416 U.S. 21, 25 (1974). The Supreme Court, in a decision by Justice Rehnquist, affirmed the constitutionality of the Act. See *id.* at 77.

²⁰ Welling, *supra* note 5, at 294.

²¹ See, e.g., *United States v. Mastronardo*, 849 F.2d 799, 802 (3rd Cir. 1988) (no provision in the law made it a crime for an individual to structure transactions); *United States v. Varbel*, 780 F.2d 758, 762 (9th Cir. 1986) (structuring by an individual not prohibited by the statute); *United States v. Anzalone*, 766 F.2d 676, 681 (1st Cir. 1985) (nothing in the law said that an individual's structured transaction was illegal). But see, e.g., *United States v. Cook*, 745 F.2d 1311, 1314-15 (10th Cir. 1984) (reporting requirements apply to an individual's conduct), *cert. denied*, 469 U.S. 1220 (1985).

²² Welling, *supra* note 5, at 296, 297 n.58.

²³ *Id.* at 297. These operatives became known as "smurfs" because they, like the popular cartoon characters of the same time, were seemingly everywhere. *Id.*

As an example of a typical structuring transaction, imagine a person who wishes to deposit \$50,000 of dirty cash into a bank account. Making the deposit in a lump sum would trigger a CTR filing by the bank, which might capture the attention of revenue or law enforcement agents. To avoid having a CTR filed, a "smurf" would go to six branches of a bank and make deposits of less than \$10,000 at each one. Because none of the transactions exceed \$10,000, a CTR would not be filed.

the reporting requirements.²⁴ Congress criticized such decisions and later legislatively overturned them.²⁵

B. Money Laundering Control Act of 1986²⁶

The Money Laundering Control Act of 1986 ("MLCA") established distinct money laundering offenses.²⁷ In addition, the MLCA closed the structuring loophole in the reporting statute.²⁸ The change made it a crime to structure transactions for the purpose of avoiding reporting requirements.²⁹

The money laundering offenses in the MLCA are twofold.³⁰ First, section 1956 prohibits an individual's involvement in a financial transaction when the individual knows that the property involved in the transaction represents the proceeds of specified unlawful activity ("SUA").³¹ Further, the individual must engage in the

²⁴ *Mastronardo*, 849 F.2d at 804; see also *Varbel*, 780 F.2d at 761-62. The *Mastronardo* court noted that the First, Seventh, Eighth and Ninth Circuit Courts of Appeals would overturn convictions for activities such as those in the *Mastronardo* case, while the Second, Fourth and Tenth Circuit Courts of Appeals had each upheld convictions for similar activities. *Mastronardo*, 849 F.2d at 804.

²⁵ G. Richard Strafer, *Money Laundering: The Crime of the '90's*, 27 AM. CRIM. L. REV. 149, 161 (1989); see also S. REP. NO. 433, 99th Cong., 2d Sess. 21-22 (1986); H.R. REP. NO. 746, 99th Cong., 2d Sess. 18-19 (1986).

²⁶ 18 U.S.C.A. §§ 981-982, 1956, 1957 (West 1983 & Supp. 1991); 31 U.S.C.A. § 5324 (West Supp. 1991).

²⁷ 18 U.S.C.A. §§ 1956-1957.

²⁸ 31 U.S.C.A. § 5324. The statute states:

No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction —

(1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a);

(2) cause or attempt to cause a domestic financial institution to file a report required under section 5313(a) that contains a material omission or misstatement of fact; or

(3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

Id. This statute became known as the "anti-smurfing statute." Welling, *supra* note 5, at 304. The statute suggests that there is no legitimate reason to keep large transactions secret, and so there is no legitimate reason to structure transactions. See *id.* at 338.

²⁹ 31 U.S.C.A. § 5324.

³⁰ See 18 U.S.C.A. §§ 1956-1957.

³¹ § 1956(a). The SUAs, applicable both to § 1956 and § 1957, are numerous and varied. §§ 1956(c)(7), 1957(f)(3). The statutes incorporate by reference offenses listed as racketeering activities in 18 U.S.C.A. § 1961(1). 18 U.S.C.A. §§ 1956(c)(7), 1957(f)(3). Racketeering activities include "murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs." 18 U.S.C.A. § 1961(1) (West 1984 & Supp. 1991). Other SUAs include: acts constituting a continuing criminal enterprise; offenses against a foreign nation involving manufacture, importation, sale or

transaction with either the intent to promote the carrying on of SUA, or with the knowledge that the purpose of the transaction is either to avoid a reporting requirement or to conceal the nature, location, source, ownership or control of SUA proceeds.³²

Second, section 1957 prohibits an individual from engaging or attempting to engage in a monetary transaction involving property valued at more than \$10,000 when the individual knows that the property is derived from SUA.³³ A monetary transaction is defined in the statute as a "deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds . . . by, through, or to a financial institution."³⁴ Under section 1957, therefore, a merchant is not criminally liable for receiving proceeds of SUA as payment for a sale, but is liable for using those proceeds in a

distribution of controlled substances; and offenses under a wide range of federal statutes. § 1956(c)(7).

³² § 1956(a). Section 1956(a)(1) also includes the intent to engage in tax evasion or tax fraud. § 1956(a)(1)(A)(ii). The statute states, in pertinent part:

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity —

(A) (i) with the intent to promote the carrying on of specified unlawful activity; or
(ii) with intent to . . . [violate] section 7201 or 7206 of the Internal Revenue Code of 1986; or

(B) knowing that the transaction is designed in whole or in part —

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or
(ii) to avoid a transaction reporting requirement . . . ,

shall be sentenced

(2) Whoever transports, transmits, or transfers [or attempts such] a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States —

(A) with the intent to promote the carrying on of specified unlawful activity; or

(B) knowing that the . . . funds involved . . . represent the proceeds of some form of unlawful activity and knowing that such transportation is designed

. . . —

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or
(ii) to avoid a transaction reporting requirement . . .

shall be sentenced

18 U.S.C.A. § 1956(a)(1), (a)(2).

³³ § 1957. The statute states, in pertinent part: "(a) Whoever . . . knowingly engages or attempts to engage in a monetary transaction in criminally derived property that is of a value greater than \$10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b)." *Id.*

³⁴ 18 U.S.C.A. § 1957(f)(1).

financial transaction.³⁵ In practice, this element will be satisfied after the sale because a section 1957 transaction must involve property of a minimum value of \$10,000. The merchant or business receiving that large sum will have to do something with it, such as depositing it into a financial institution.³⁶

Although both sections prohibit certain transactions involving criminally derived proceeds, there are major differences between the sections. The greatest difference is the requirement that an individual prosecuted under section 1956 must engage in the transaction with the intent to promote the carrying on of SUA or with the knowledge that the transaction's purpose is to conceal the nature of the proceeds or to avoid a reporting requirement.³⁷ Section 1957 requires no such intent or knowledge as to the transaction's purpose.³⁸ Rather, section 1957 requires only that the individual has engaged in a monetary transaction with property known to be derived from SUA and valued at more than \$10,000.³⁹ This required minimum value is another difference between the two statutes, as section 1956 has no such requirement.⁴⁰ Finally, the penalties under section 1956 are more severe than those under section 1957.⁴¹ Together, sections 1956 and 1957 make it a crime to conduct business with, or perform a financial transaction for, anyone who derives their money from SUAs if the person conducting the transaction knows it involves SUA proceeds.⁴²

³⁵ Eugene R. Gaetke & Sarah N. Welling, *Money Laundering and Lawyers* 4 (Feb. 21, 1992) (unpublished manuscript, on file with the *Boston College Law Review*).

³⁶ *Id.* at n.17. As one prosecutor pointed out, a businessperson receiving that kind of money would not stuff it into a mattress. Telephone Interview with Jeff Lindy, Assistant U.S. Attorney, E.D. Pa. (Mar. 5, 1992) (the views expressed are those of Mr. Lindy alone and do not reflect those of the Office of the U.S. Attorney for the Eastern District of Pennsylvania or the U.S. Department of Justice).

³⁷ 18 U.S.C.A. § 1956(a). Section 1956 also includes as a prohibited transaction purpose the intent to engage in tax violations. *Id.*

³⁸ See § 1957.

³⁹ *Id.*

⁴⁰ See § 1956.

⁴¹ §§ 1956 (a)(1)-(2), 1957 (b)(1)-(2). Conviction under § 1956 carries a sentence of imprisonment for not more than 20 years and/or a fine of not more than \$500,000 or twice the value of the property involved in the transaction, whichever is greater. § 1956(a)(1)-(2). Section 1957 carries with it a penalty of imprisonment for not more than 10 years and/or a fine of not more than twice the amount of the criminally derived property involved in the transaction. § 1957(b)(1)-(2). Violations of §§ 1956 and 1957 may also subject property involved in the violation to civil or criminal forfeiture. 18 U.S.C.A. §§ 981-982 (West 1983 & Supp. 1992).

⁴² John K. Villa, *A Critical View of Bank Secrecy Act Enforcement and the Money Laundering Statutes*, 37 CATH. U. L. REV. 489, 497 (1988).

The money laundering laws as passed in 1986 prompted two specific concerns. The first was that a criminal defense lawyer could be liable under section 1957 if he or she accepted fees in excess of \$10,000 to defend an accused drug trafficker, and then deposited such fees in a bank account.⁴³ The second concern was that the wording of section 1956 prohibited the use of government sting operations.⁴⁴ As explained by a representative of the Department of Justice, section 1956 requires that the financial transaction must in fact involve the use of SUA proceeds.⁴⁵ If the government were conducting an undercover sting operation, the proceeds would not actually derive from SUA, because the government was not really involved in an unlawful activity to generate the funds.⁴⁶ At least one defendant, charged with violating section 1956(a)(2)(B), tried unsuccessfully to capitalize on this paradox.⁴⁷ Congress addressed both of these concerns in 1988 legislation amending the MLCA.⁴⁸

C. Money Laundering Prosecution Improvements Act⁴⁹

Passed as part of the 1988 Omnibus Anti-Drug Abuse Act, the Money Laundering Prosecution Improvements Act made some significant changes to the government's efforts to combat money laundering.⁵⁰ First, it expanded the BSA's definition of "financial institution" to include automobile, airplane and boat dealerships, persons engaged in real estate closings and the United States Postal Service.⁵¹ Further, the Secretary of the Treasury has the authority to designate as financial institutions other businesses whose activities

⁴³ Irvine & King, *supra* note 17, at 171.

⁴⁴ Strafer, *supra* note 25, at 186 (citing U.S. DEP'T OF JUSTICE, HANDBOOK ON THE ANTI-DRUG ABUSE ACT OF 1986, at 68). The Department of Justice warned against using sting operations in enforcing section 1956. *Id.*

⁴⁵ Money Laundering Control Act Amendments of 1988: Hearing Before the House Comm. on Banking, Finance and Urban Affairs, 100th Cong., 2d Sess. 9 (1988) (statement of Victoria Toensing).

⁴⁶ *Id.*

⁴⁷ But see *United States v. Parramore*, 720 F. Supp. 799, 800 (N.D. Cal. 1989). The defendant invoked the impossibility defense and asserted that the proceeds he was accused of attempting to launder were not in fact drug proceeds because the "trafficker" with whom he allegedly conspired was really a government agent. *Id.* The court denied the defendant's motion to dismiss the indictment. *Id.*

⁴⁸ 18 U.S.C.A. §§ 1956(a)(3), 1957(f)(1).

⁴⁹ Omnibus Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4354-59, 4378 (1988) (current version at 18 U.S.C.A. §§ 1956(a)(3), 1957(f)(1) (West Supp. 1991)).

⁵⁰ Patrick T. O'Brien, *Tracking Narco-Dollars: The Evolution of a Potent Weapon in the Drug War*, 21 U. MIAMI INTER-AM. L. REV. 637, 666-67 (1990).

⁵¹ 31 U.S.C.A. § 5312(a)(2)(T)-(V) (West 1983 & Supp. 1991).

are related to those listed or whose cash transactions have a high degree of usefulness in criminal matters.⁵² A proscribed transaction with one of the newly-designated financial institutions, then, would be money laundering.⁵³ The second change was that section 1956 explicitly allowed the use of sting operations.⁵⁴ The last major change in the 1988 Act was to exempt payment of attorneys' fees for criminal defense from the definition of a prohibited transaction.⁵⁵ Although there have been minor additions to the money laundering statutes since 1988, Congress has passed no major money laundering bills since then.⁵⁶

II. PROSECUTING UNDER THE STATUTES

Money laundering has traditionally involved hiding illegal proceeds by reinvesting them.⁵⁷ Such reinvestment could be in the drug

⁵² 31 U.S.C.A. § 5312(a)(2) at (X)-(Y). These businesses' cash transactions are considered useful because knowledge of them can lead to cases involving money laundering, drug trafficking and unreported income. See DEP'T OF THE TREASURY, *supra* note 3, at 3. The money laundering statutes both state that the term "financial institution" has the definition given the term under 31 U.S.C.A. § 5312(a)(2). 18 U.S.C.A. §§ 1956(c)(6), 1957(f)(1).

⁵³ §§ 1956(c)(4)(B), 1957(f)(1). The money laundering statutes prohibit certain transactions, which are defined in part as involving the use of a financial institution. *Id.*

⁵⁴ § 1956(a)(3). The subsection states in pertinent part:

(a)(3). Whoever, with the intent —

(A) to promote the carrying on of [SUA];

(B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of [SUA]; or

(C) to avoid a transaction reporting requirement . . .

conducts or attempts to conduct a financial transaction involving property represented by a law enforcement officer to be the proceeds of [SUA]

Id. (emphasis added).

⁵⁵ § 1957(f)(1). The statute states: "the term 'monetary transaction' . . . does not include any transaction necessary to preserve a person's right to representation as guaranteed by the Sixth Amendment to the Constitution." *Id.* The Amendment guarantees "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. Not all transactions with an attorney are exempted, of course—only those involving the attorney's work on his or her client's criminal charges. Sarah N. Welling, 'Transaction' Law Dangerous to Many, MONEY LAUNDERING ALERT, May 1991, at 1. Furthermore, because the right to counsel does not attach until after indictment, fees paid by a client involved in SUA while the client is merely under investigation, but not yet indicted, could expose the client's attorney to liability under § 1957. *Id.* Department of Justice internal guidelines indicate that the government will not prosecute attorneys for taking fees derived from criminal activities unless the attorney actually knew that the payment derived from criminal activity. See *id.* The actual knowledge must come from sources other than confidential communications with the client or the attorney's own efforts while representing the client. See *id.*

⁵⁶ Money Laundering Bill Once Again Delayed in Congress, MONEY LAUNDERING ALERT, Dec. 1991, at 8. In 1990, for example, felony violations of certain environmental statutes were added to the list of SUAs. 18 U.S.C.A. § 1956(c)(7)(E) (West 1984 & Supp. 1991). Congress had not passed a major money laundering bill as of April 1992.

⁵⁷ Telephone Interview with Jeff Lindy, *supra* note 36 (Jan. 9, 1992). This type of

trafficking operation that generated the proceeds, in secret accounts overseas or in legitimate business and real estate ventures.⁵⁸ Another, newer aspect of laundering involves not hiding or investing proceeds or transferring them offshore, but rather, using the illicit proceeds for consumption of items like homes and cars.⁵⁹ Individuals who launder money through the purchase of consumer goods are liable under the money laundering statutes.⁶⁰ The government has prosecuted not only those who make and spend dirty money—the customers—but also those who take dirty money—the merchants.⁶¹

A. *Spending Dirty Money: The Customers*

A person spending dirty money on a car, vacation home, jewelry or boat often has one concern not shared by the typical consumer: he or she does not want the transaction to come to the attention of the authorities.⁶² Thus the purchaser often tries to conceal the source and nature of his or her funds or to ensure that the seller will not report the transaction.⁶³ In addition, the purchaser sometimes buys items necessary for the customer to continue to carry on his or her illicit business, such as beepers or paging devices.⁶⁴ These seemingly routine transactions therefore have characteristics indicative of money laundering—efforts to conceal the source of the funds or purchase of an item needed to promote the illicit business. These characteristics are, as discussed above, elements of a section 1956 violation.⁶⁵

In successfully prosecuting individuals under section 1956 for laundering their dirty money through purchases, the government

laundering typically involves shell corporations, foreign bank accounts and use of electronic money transfers. See Jonathan Beaty & Richard Hornik, *A Torrent of Dirty Dollars*, TIME, Dec. 18, 1989, at 50, 53, 55.

⁵⁸ Beaty and Hornik, *supra* note 57, at 53.

⁵⁹ See *id.* at 55. The authors described the growth of this laundering, through car dealers and other entrepreneurs, as an "explosion." *Id.* The Department of Justice estimates that about twenty percent of narcotics proceeds are spent on the flashy accoutrements of drug dealers' lifestyles such as cars, jewelry, speedboats and the like. Allan Dodds Frank, *See No Evil*, FORBES, Oct. 6, 1986, at 38, 40.

⁶⁰ 18 U.S.C.A. §§ 1956–1957.

⁶¹ See *infra* notes 73–173 and accompanying text for a discussion of customer and merchant prosecutions.

⁶² Harry Jaffe, *Dirty Money*, WASHINGTONIAN, Jan. 1992, at 59, 60.

⁶³ See *infra* note 90 and accompanying text for a discussion of the concealment of a buyer's funds.

⁶⁴ See *infra* note 76 and accompanying text for a discussion of a purchase involving items necessary to promote the SUA.

⁶⁵ See *supra* note 32 and accompanying text for a discussion of the elements of an 18 U.S.C. § 1956 violation.

must prove that the defendant intended the transaction to be for the purpose of promoting the continuation of SUA.⁶⁶ Alternatively, the government can prove that the defendant knew the transaction was for the purpose of concealing the source of the proceeds or avoiding reporting requirements.⁶⁷ The cases discussed below illustrate how different transactions are made for the different section 1956 purposes.⁶⁸ One case shows how a defendant can engage in transactions both with the intent to promote the carrying on of SUA and with the knowledge that the purpose of the transaction is to conceal the source of the SUA proceeds.⁶⁹ Another shows that defendants can be liable even if they themselves did not intend that the transaction be for the purpose of concealing the nature of the proceeds, as long as they have knowledge that that is the purpose.⁷⁰ Finally, two companion cases provide an example of how intent or knowledge as to the transaction's purpose can be a difficult element to prove.⁷¹

Section 1956 requires the government to prove that the defendant intended the transaction to promote the carrying on of SUA or to prove that the defendant knew the transaction was for the purpose of avoiding reporting requirements or concealing the nature of the SUA proceeds.⁷² In the 1991 case *United States v. Jackson*, the United States Court of Appeals for the Seventh Circuit affirmed the conviction of the Reverend Joseph Davis under section 1956(a), holding that Davis intended the transactions to promote the carrying on of SUA and that Davis knew the purpose of the transactions was to conceal the source of his dirty cash.⁷³ Defendant Davis, a preacher, in an effort, perhaps, to serve very different flocks, also ran two crack houses, depositing some of the cash proceeds into

⁶⁶ 18 U.S.C.A. § 1956(a)(1)(A)(i).

⁶⁷ § 1956(B).

⁶⁸ See *infra* notes 73–91 and accompanying text for a discussion of different § 1956 transaction purposes.

⁶⁹ *United States v. Jackson*, 935 F.2d 832 (7th Cir. 1991). See *infra* notes 73–82 and accompanying text for a discussion of the case.

⁷⁰ *United States v. Lee*, 886 F.2d 998 (8th Cir. 1989).

⁷¹ *United States v. Sanders*, 929 F.2d 1466 (10th Cir.), *cert. denied*, 112 S. Ct. 143 (1991); *United States v. Sanders*, 928 F.2d 940 (10th Cir.), *cert. denied*, 112 S. Ct. 142 (1991).

⁷² 18 U.S.C.A. § 1956(a).

⁷³ 935 F.2d at 841. Davis was convicted of violating § 1956(a)(1)(A)(i) (intent to promote the carrying on of SUA) and § 1956(a)(1)(B)(i) (knowing the transaction's purpose was to conceal or disguise the source of the funds). *Jackson*, 935 F.2d at 841. The government must prove only one of the purposes specified in § 1956 in order to prove a § 1956 violation. *Id.* at 842.

bank accounts in his church's name.⁷⁴ A jury convicted Davis on three counts of money laundering under section 1956, based on checks he had written on church accounts to beeper and telephone services, to his landlord and to a savings and loan in return for cash.⁷⁵

The court stated that to violate section 1956 Davis had to do more than simply conduct the transactions using dirty cash.⁷⁶ According to the court, he either must have intended the transactions to be for the purpose of promoting SUA, or he must have had knowledge that the purpose of the transactions was to avoid reporting requirements or to conceal the source of the SUA proceeds.⁷⁷ The *Jackson* court agreed that Davis's checks to a beeper service were intended to promote his drug activities.⁷⁸ The court therefore held that Davis had violated section 1956.⁷⁹

The court did not, however, agree that the checks to a cellular phone service, Davis's landlord and the savings and loan for cash, were made for the purpose of promoting drug activity.⁸⁰ The purpose of those checks, the court held, was to conceal or disguise the source of Davis's cash.⁸¹ Thus Davis also violated section 1956 with those transactions, which were for a different transaction purpose than were the transactions with the beeper service.⁸²

In the *Jackson* case, the court held that some of the defendant's transactions were for the purpose of concealing or disguising the source of his dirty money, thereby violating section 1956(a)(1)(B).⁸³ Unlike section 1956(a)(1)(A)(i), which requires that the defendant have the specific intent to promote the carrying on of SUA, section 1956(a)(1)(B) requires only that the defendant know that the purpose of the transaction is to conceal the source, nature or location of the SUA proceeds, or that the purpose is to avoid reporting mandates.⁸⁴ Subsection B means that the customer making the

⁷⁴ *Id.* at 836.

⁷⁵ *Id.* at 837-38.

⁷⁶ *See id.* at 840.

⁷⁷ *Id.* at 842.

⁷⁸ *Id.* at 841. A witness testified that Davis gave beepers to his drug runners so that he could contact them with instructions about when to make pickups of cash from the crack houses. *Id.*

⁷⁹ *Id.* To be exact, Davis violated § 1956(a)(1)(A)(i). *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* These transactions violated § 1956(a)(1)(B)(i). *Id.*

⁸³ *Jackson*, 935 F.2d at 841.

⁸⁴ 18 U.S.C.A. § 1956(a)(1)(A)(i), (B).

transaction need not necessarily have the intent to conceal the source of the proceeds used in the transaction as long as the customer *knows* that this is the intent of the person who arranged the transaction.⁸⁵

One case that illustrates the point that the person who arranges the transaction for a prohibited purpose need not be the person who carried out the transaction, is the 1989 case *United States v. Lee*.⁸⁶ In *Lee*, the United States Court of Appeals for the Eighth Circuit affirmed Lance Robinson's conviction and sentence for money laundering under section 1956 after Robinson purchased a house for co-defendant Kevin Paige.⁸⁷ Paige offered to pay Robinson if Robinson would purchase a house for him.⁸⁸ Robinson did so, knowing that the money for the purchase came from the proceeds of Paige's drug sales.⁸⁹ Robinson also appeared to know that the purpose of the transaction was to conceal Paige as the source of the purchase money.⁹⁰ This case, then, shows that even if Robinson himself did not intend the transaction to conceal SUA proceeds, he had the requisite knowledge of Paige's intent and was thereby liable under the statute.⁹¹

Regardless of whether a defendant charged under section 1956 has the intent or the knowledge of intent of the transaction's purpose, the transaction must still be conducted for one of the purposes specified in section 1956: to promote the carrying on of SUA, to conceal the source of the SUA proceeds or to avoid a reporting requirement.⁹² The United States Court of Appeals for the Tenth Circuit emphasized the importance of the transaction's purpose as an element of a section 1956 violation in the 1991 companion cases *United States v. Sanders* and *United States v. Sanders*.⁹³ In both cases, the court reversed the Sanderses' convictions for money laundering

⁸⁵ See Strafer, *supra* note 25, at 162.

⁸⁶ 886 F.2d 998 (8th Cir. 1989).

⁸⁷ *Id.* at 1003, 1004. Paige operated several crack houses. *Id.* at 1000.

⁸⁸ *Id.* at 1003.

⁸⁹ *Id.* It is a necessary element of a § 1956 violation that the defendant know the property involved in the transaction represents (or is represented to be, in the case of a sting operation) the proceeds of SUA. 18 U.S.C.A. § 1956.

⁹⁰ See *Lee*, 886 F.2d at 1003. Robinson secured a loan and bought the house in his name, pretending that he would rent the house to Paige. *Id.*

⁹¹ *Id.* Paige was also convicted of money laundering under § 1956. *Id.* at 1000.

⁹² 18 U.S.C.A. § 1956.

⁹³ 929 F.2d 1466, 1472 (10th Cir.), *cert. denied*, 112 S. Ct. 143 (1991) (defendant was Renee Armstrong Sanders); 928 F.2d 940, 946 (10th Cir.), *cert. denied*, 112 S. Ct. 142 (1991). (defendant was Johnny Lee Sanders, husband of Renee Armstrong Sanders).

because the government did not sufficiently prove that the defendants' purpose in purchasing two cars was to conceal the source of the purchase money.⁹⁴

The Sanderses' money laundering convictions under section 1956 were based on the purchase of two cars with the alleged proceeds from heroin distribution.⁹⁵ In the first purchase, the Sanderses bought a Volvo.⁹⁶ The Sanderses also bought a Lincoln, which they titled in their daughter's name.⁹⁷

In reversing the Sanderses' convictions, the Tenth Circuit held that the Sanderses did not attempt to conceal their identity as the cars' purchasers and therefore did not violate section 1956.⁹⁸ The Sanderses were both present when they bought the Volvo, and both were known to the salesperson.⁹⁹ The court described the Lincoln purchase as a closer case for a money laundering conviction because the car was titled in the Sanderses' daughter's name.¹⁰⁰ The court noted, though, that the daughter was present at the car lot during the purchase and shared the same surname as the defendants, which would make obvious her connection to them.¹⁰¹

The government did not counter the defendants' arguments but argued instead that section 1956 should be interpreted to cover all such transactions that involve the use of SUA proceeds.¹⁰² The court expressly rejected this argument.¹⁰³ Interpreting section 1956 to encompass all transactions with dirty money, rather than limiting the statute's reach to transactions for one of the purposes mentioned in the statute, the court said, would turn the money *laundering* statute into a money *spending* statute, something Congress did not intend.¹⁰⁴ The *Sanders* cases are important for the court's emphasis that section 1956 was intended to prohibit not ordinary transactions

⁹⁴ *Sanders*, 929 F.2d at 1473; *Sanders*, 928 F.2d at 946.

⁹⁵ 929 F.2d at 1468, 1471; 928 F.2d at 942, 944.

⁹⁶ 929 F.2d at 1471; 928 F.2d at 946.

⁹⁷ 929 F.2d at 1472; 928 F.2d at 946. Johnny Sanders testified that the car was titled in his daughter's name for insurance purposes. 929 F.2d at 1471; 928 F.2d at 945.

⁹⁸ 929 F.2d at 1472; 928 F.2d at 946.

⁹⁹ 929 F.2d at 1471; 928 F.2d at 946.

¹⁰⁰ 929 F.2d at 1472; 928 F.2d at 946.

¹⁰¹ 929 F.2d at 1471; 928 F.2d at 945. In addition, both the Volvo and the Lincoln were "conspicuously" used by the defendants, making their connection to the cars a simple matter for law enforcement officers investigating the defendant's alleged drug dealing. *See* 929 F.2d at 1472; 928 F.2d at 945-46.

¹⁰² 929 F.2d at 1472; 928 F.2d at 945.

¹⁰³ 929 F.2d at 1472; 928 F.2d at 946.

¹⁰⁴ 929 F.2d at 1472 & n.2; 928 F.2d at 946, 946 n.3.

with dirty money, but transactions for the purpose of concealing or disguising the dirty money and its source.¹⁰⁵

Thus, the defendants convicted of money laundering under section 1956 in the *Jackson* and *Lee* cases all did more than merely spend dirty money.¹⁰⁶ They violated section 1956 by engaging in the transactions with either the intent to promote the carrying on of SUA, or with the knowledge that the purpose of the transaction was to conceal the source of the SUA proceeds or to avoid a reporting requirement.¹⁰⁷ Proving the defendant's intent or knowledge of the transaction's purpose is a requisite part of a section 1956 prosecution for money laundering, as shown in the reversal of the Sanderses' convictions.¹⁰⁸ Without this element, section 1956's focus would be more on the activity of spending money than on the activity of laundering money.¹⁰⁹

B. *Accepting Dirty Money: The Merchants*

The cases described above, involving customers who laundered their dirty money by spending it, focused on the individuals actually involved in the SUA that generated the proceeds used in the transaction.¹¹⁰ There were, of course, other people involved in the transactions, namely the merchants who sold the goods.¹¹¹ With the 1988 inclusion of sellers of cars, planes and boats, along with persons involved in real estate closings, in the definition of "financial institution," these merchants became liable under sections 1956 and 1957.¹¹²

The merchants prosecuted thus far, with one exception, have all been charged under section 1956.¹¹³ In such cases, the prose-

¹⁰⁵ See *Sanders*, 929 F.2d at 1472; *Sanders*, 928 F.2d at 946.

¹⁰⁶ See *supra* notes 73-91 and accompanying text for a discussion of the *Jackson* and *Lee* cases.

¹⁰⁷ See 18 U.S.C.A. § 1956 (West Supp. 1991).

¹⁰⁸ See *Sanders*, 929 F.2d at 1472; *Sanders*, 928 F.2d at 946.

¹⁰⁹ *Sanders*, 929 F.2d at 1472; *Sanders*, 928 F.2d at 946.

¹¹⁰ See *supra* notes 73-91 and accompanying text for a discussion of specific cases. In *United States v. Lee*, 886 F.2d 998 (8th Cir. 1989), the defendant was not the person directly involved in the SUA, but rather was designated by that person to engage in the laundering transaction. *Id.* at 1003.

¹¹¹ See, e.g., *United States v. Jackson*, 935 F.2d 832, 837 (7th Cir. 1991) (provider of cellular telephone and paging services); *Sanders*, 929 F.2d at 1471 (salesperson at car dealership).

¹¹² 31 U.S.C.A. § 5312(a)(2)(T)-(U) (West 1983 & Supp. 1991).

¹¹³ See *infra* notes 123-73. Ellen Campbell, a real estate agent, was charged under both § 1956 and § 1957. *United States v. Campbell*, 777 F. Supp. 1259, 1260 (W.D.N.C. 1991).

cution must prove three elements.¹¹⁴ First, the proceeds used in the transaction must be, or must be represented as, SUA proceeds.¹¹⁵ Second, the merchant must know that the proceeds are derived from SUA.¹¹⁶ Third, the merchant must intend the transaction to be for the purpose of promoting the carrying on of SUA or the merchant must have the knowledge that the transaction's purpose is to avoid reporting requirements or to conceal the source or nature of the SUA proceeds.¹¹⁷

The following cases provide examples of the types of cases brought against merchants.¹¹⁸ They illustrate that the merchants often not only know that the intent of the transactions is to conceal the source or ownership of SUA proceeds, but also that they actively participate in the concealment.¹¹⁹ The cases also give examples of the various methods by which merchants launder the SUA proceeds.¹²⁰ Finally, two cases show that the government may have difficulty proving the merchant knows that the transaction involves SUA proceeds, and that the concept of willful blindness may not be of much use as a basis of proof.¹²¹

Three money laundering cases against merchants illustrate the extent to which the merchants not only know the purpose of the transaction, but utilize various methods to help the customer accomplish that purpose.¹²² In June 1990, in one of the earliest merchant money laundering cases, the government indicted three Los Angeles car dealers, owners of AMS Auto Sales, under section 1956.¹²³ Within five months all the defendants had pled guilty.¹²⁴ The car dealers admitted that most of their customers were drug dealers who needed to dispose of conspicuous cash so as to avoid government suspicion.¹²⁵ The defendants laundered their customers'

¹¹⁴ 18 U.S.C.A. § 1956.

¹¹⁵ § 1956 (a)(1), (a)(3).

¹¹⁶ § 1956 (a)(1).

¹¹⁷ § 1956 (a).

¹¹⁸ See *infra* notes 123-73 and accompanying text for a discussion of these cases.

¹¹⁹ See *infra* notes 123-41 and accompanying text for a discussion of merchant participation.

¹²⁰ See *infra* notes 123-41 and accompanying text for a discussion of these methods.

¹²¹ See *infra* notes 150-73 and accompanying text for a discussion of cases in which the government argued willful blindness.

¹²² See *infra* notes 123-41 and accompanying text for a discussion of these cases.

¹²³ See *L.A. Car Dealership Seized, Money Laundering Charged*, MONEY LAUNDERING ALERT, July 1990, at 6 (citing Case No. 90-415 (C.D. Cal. 1991)).

¹²⁴ *L.A. Car Dealers Plead Guilty in Sting*, MONEY LAUNDERING ALERT, Nov. 1990, at 3.

¹²⁵ *L.A. Car Dealership Seized, Money Laundering Charged*, *supra* note 123, at 6. It is not surprising that the SUA was the narcotics trade. See Nathaniel Sheppard Jr., *Drug-Money*

money using a variety of methods.¹²⁶ Such methods included using a fake buyer's name when recording the sale, bringing in a third party to buy the car for the drug dealer, and putting false liens on the car to keep the car's title in the dealership's name.¹²⁷ The defendants knew that the purpose of the transactions was to conceal the source of the customers' cash, as shown by the methods the merchants designed to do just that.¹²⁸ The defendants, then, not only knew that the money involved was derived from SUA and that the purpose of the car purchases was to conceal the ownership of the proceeds, but they themselves assisted in the concealment.¹²⁹

A second case that shows that merchants often know the intended purpose of the laundering transaction and also actively advance that purpose was brought in October 1990 in the U.S. District Court for the Southern District of New York against five car dealerships.¹³⁰ Three of the five dealers pled guilty to laundering money in violation of section 1956.¹³¹ Undercover investigators found that almost all the dealers were willing to accept cash payments from supposed drug dealers without filing the required IRS Form 8300s.¹³² All but one dealership agreed to use false names in titling the cars.¹³³ Moreover, there was no doubt that the car dealers knew

Launderers Cleaning up with Cash, CHI. TRIB., Oct. 23, 1989, at 1. Drug sales account for the biggest portion of the so-called "underground economy," which means that drug money will likely be the biggest portion of laundering activity as well. *See id.*

¹²⁶ *L.A. Car Dealership Seized, Money Laundering Charged*, *supra* note 123, at 6.

¹²⁷ *Id.* The last method, putting a false lien on the car to retain title in the dealership, serves two purposes. *See Car Leases Gave 'Seizure Protection'*, MONEY LAUNDERING ALERT, June 1991, at 1. It makes it more difficult for law enforcement officers to trace the car back to the drug dealer and, more importantly, it protects the car from being forfeited in the event that the drug dealer is prosecuted for his or her drug trafficking. *See id.*

¹²⁸ *See L.A. Car Dealership Seized, Money Laundering Charged*, *supra* note 123, at 6.

¹²⁹ *Id.*

¹³⁰ *Five N.Y. New Car Dealers Charged*, MONEY LAUNDERING ALERT, Nov. 1990, at 1. The government charged Mercedes-Benz Manhattan, Inc., Manhattan Nissan, Inc., Manhattan Mazda, Gidron Ford and Bronx Acura. *Id.*

¹³¹ *Auto Dealers Guilty, Pay \$342,000*, MONEY LAUNDERING ALERT, June 1991, at 3.

¹³² *Five N.Y. New Car Dealers Charged*, *supra* note 130, at 1. The Bank Secrecy Act ("BSA") defines car dealerships, among other businesses, as "financial institutions." 31 U.S.C.A. §§ 5311-5324 (West 1983 & Supp. 1991). The BSA's regulations govern how the law is administered. Businesses named in the BSA as financial institutions, but not named as such in the BSA regulations, do not have to file CTRs, also designated as IRS Form 4789. Sarah N. Welling, *Rules Modify BSA Definition of 'Financial Institution'*, MONEY LAUNDERING ALERT, July 1991, at 6. They are required, however, to file similar IRS Form 8300s for cash transactions of over \$10,000. *Id.* Car dealers must use Form 8300 to report transactions. *Id.*

¹³³ *Five N.Y. New Car Dealers Charged*, *supra* note 130, at 1. The names used included Magic Johnson and Ray Charles. *Id.* Insurance agents were also implicated in the case, as they fabricated drivers' licenses and insurance papers to match the false names. *Id.*

where the cash came from, as undercover agents told the salespeople that the purchase money was derived from drug sales.¹³⁴ The car dealers knew that the purpose of the transactions was to avoid reporting requirements or to conceal the source of the SUA proceeds.¹³⁵ The car dealers' knowledge is shown by the ingenious ways they found to disguise the identities of their supposed drug-dealing customers.¹³⁶

Finally, a third case illustrates that car dealers are not the only merchants laundering money.¹³⁷ Retailers in other industries also launder money through methods adaptable to their particular trade.¹³⁸ A federal jury in Washington, D.C. found Charles Wynn, owner of the Linea Pitti clothing store, guilty of money laundering in October 1991.¹³⁹ Wynn laundered money for drug kingpin Rayful Edmond III and Edmond's associate, Tony Lewis.¹⁴⁰ Wynn's methods of laundering included falsifying sales records to keep the drug dealers' names off the invoices and putting Lewis on the payroll even though he never worked at the store.¹⁴¹

The three cases discussed above illustrate that a number of merchants in different industries know that their customers' intended purpose for their purchasing transactions is to avoid reporting requirements or to conceal the source of the illegal pro-

¹³⁴ *Five N.Y. New Car Dealers Charged*, *supra* note 130, at 1. The government may find it easier to prove its case when an investigation involves undercover agents posing as drug dealers, rather than relying on the testimony of actual drug dealers to make the case against merchants. Telephone Interview with Christopher Mead, Assistant U.S. Attorney, D. Md. (Feb. 11, 1992) (the comments expressed are the remarks of Mr. Mead alone and do not reflect those of the Office of the U.S. Attorney for the District of Maryland or the U.S. Department of Justice). Juries may prove reluctant to take the word of bona fide drug dealers against the merchants, whereas undercover FBI or Drug Enforcement Agency agents are more credible witnesses. *Id.*

¹³⁵ *Five N.Y. New Car Dealers Charged*, *supra* note 130, at 1.

¹³⁶ *Id.* See *supra* note 133 and accompanying text for a discussion of the methods used.

¹³⁷ See *Clothier Convicted in Washington, D.C.*, MONEY LAUNDERING ALERT, Dec. 1991, at 5 (citing No. 91:40 (D.D.C. 1991) (defendant owned clothing store)).

¹³⁸ See *id.*; *Jewelers Convicted in Los Angeles*, MONEY LAUNDERING ALERT, Jan. 1991, at 2 (four jewelers and bullion dealers convicted of money laundering).

¹³⁹ Tracy Thompson, *Ex-Clothier in Georgetown Convicted of Money Laundering*, WASH. POST, Oct. 16, 1991, at D5.

¹⁴⁰ *Id.* In 1989, Rayful Edmond, who ran the largest cocaine sales organization in the District of Columbia, was convicted of drug distribution. *Id.* Tony Lewis and other members of the Edmond gang were also convicted of drug distribution. *Id.*

¹⁴¹ *Clothier Convicted in Washington, D.C.*, MONEY LAUNDERING ALERT, Dec. 1991, at 5. Wynn also bought over \$200,000 worth of cars for Lewis, putting the cars in his (Wynn's) name to conceal Lewis's drug money. *Id.* Interestingly, the government considered prosecuting the car dealership that sold the cars to Wynn, but concluded that it was unable to build a case against the dealership. See Jaffe, *supra* note 62, at 139.

ceeds.¹⁴² In addition, the merchants know that the money used comes from illegal activities.¹⁴³ Thus these merchants are in violation of section 1956.¹⁴⁴

To prove a violation of either section 1956 or section 1957, the government must show that the defendant knew the property used in a financial transaction represented the proceeds of illegal activity.¹⁴⁵ This knowledge was evident in the AMS Auto Sales, New York car dealership and Charles Wynn cases.¹⁴⁶ This is not always the case, however, and the government has tried to use the concept of willful blindness to establish a defendant's knowledge.¹⁴⁷ A person is willfully blind if he or she deliberately avoids affirmative knowledge and, after his or her suspicions are aroused, deliberately omits making further inquiries because of a wish to remain in ignorance.¹⁴⁸ The government has had difficulty in proving knowledge by showing willful blindness.¹⁴⁹

One 1990 case illustrates the difficulty of proving that merchants knew the transaction involved SUA proceeds. In this case, the federal government prosecuted a car dealership, Capital Imports, in the U.S. District Court for the District of Maryland.¹⁵⁰ A jury acquitted three car dealers of money laundering after the prosecution failed to convince the jury that the defendants knew they were dealing with drug dealers.¹⁵¹

¹⁴² See *supra* notes 128, 135, 140 and accompanying text.

¹⁴³ See *supra* notes 125, 134, 140 and accompanying text.

¹⁴⁴ 18 U.S.C.A. § 1956 (West Supp. 1991).

¹⁴⁵ 18 U.S.C.A. §§ 1956(a), 1957(a).

¹⁴⁶ See *supra* notes 125, 134, 140. One set of defendants admitted that most of their customers were drug dealers; undercover agents told other defendants that they were making the purchases with drug money; and the last defendant knew that his customer was the head of a drug organization in the city. *Id.*

¹⁴⁷ See *infra* notes 150-73.

¹⁴⁸ *United States v. Jewell*, 532 F.2d 697, 700 (9th Cir.), *cert. denied*, 426 U.S. 951 (1976). One commentator has criticized the use of the willful blindness concept in money laundering prosecutions because, he asserts, it results in shifting the burden to the defendant to prove that he or she was acting reasonably and without knowledge. See Strafer, *supra* note 25, at 169. Strafer argues that under the willful blindness standard the government need only show that the defendant has had business dealings with someone identified as a criminal. *Id.* The defendant would then have to rebut the concomitant presumption of guilt. See *id.* Despite Strafer's misgivings, willful blindness has not been a boon to the government in money laundering prosecutions, as shown by the cases discussed *infra* notes 150-73.

¹⁴⁹ See *infra* notes 150-73.

¹⁵⁰ See *Jury Acquits Car Dealers on Money Laundering Charges*, MONEY LAUNDERING ALERT, Jan. 1991, at 3 (citing No. JH 89-0380 (D. Md. 1990)).

¹⁵¹ *Id.* Although the government used undercover agents to develop the case, it also presented actual drug dealers as witnesses at trial. *Id.* The jury apparently had difficulty believing the testimony of drug dealers and was of the impression that the government had

The government proceeded on the theory of willful blindness in order to prove that the car dealers knew the transaction involved the proceeds of SUA.¹⁵² Undercover agents brought packages wrapped in tape to the car dealers and implied that they held cocaine.¹⁵³ In addition, the agents used coded language implying that they were drug dealers.¹⁵⁴ The agents never actually said the word "drugs," however, leading the jury to reject the argument that the defendants knew they were conducting business transactions with alleged SUA proceeds.¹⁵⁵ Further, the jury did not accept the theory of willful blindness to impute the requisite knowledge to the defendants.¹⁵⁶

In the 1991 case *United States v. Campbell*, the government again argued willful blindness to show the defendant's knowledge that the transaction involved SUA proceeds.¹⁵⁷ The U.S. District Court for the Western District of North Carolina set aside the jury's verdict convicting a real estate agent of section 1956 and section 1957 money laundering.¹⁵⁸ The court found that Ellen Campbell did not know that part of her client's purchase money for a house was derived from drug activity, thereby making impossible her section 1956 and section 1957 convictions.¹⁵⁹

Ellen Campbell was a licensed real estate agent in North Carolina who assisted Mark Lawing, a drug dealer, in his purchase of a lakeside vacation home.¹⁶⁰ Lawing often wore gold jewelry and traveled to his appointments with Campbell in a Porsche equipped with a cellular telephone.¹⁶¹ On one of his visits to Campbell, Lawing

made deals with drug traffickers in order to prosecute car dealers. *Id.* As the prosecuting attorney surmised, juries will accept the word of drug dealers in cases against drug dealers, but not necessarily in cases against legitimate businesspeople. Telephone Interview with Christopher Mead, *supra* note 134.

¹⁵² Telephone Interview with Christopher Mead, *supra* note 134.

¹⁵³ *Jury Acquits Car Dealers on Money Laundering Charges*, *supra* note 150, at 3.

¹⁵⁴ *Id.*

¹⁵⁵ *See id.*

¹⁵⁶ *See* Telephone Interview with Christopher Mead, *supra* note 134. As Mead explained, willful blindness is a way of communicating to a jury that common sense, coupled with a suspicious transaction, would lead to the conclusion that the defendants were aware of the SUA nature of the transaction funds. *Id.* In this case, the jury did not make that conclusion. *Id.*

¹⁵⁷ 777 F. Supp. 1259, 1264 (W.D.N.C. 1991). The case against Campbell resulted in the first conviction of a real estate agent. "Willful Blindness" Prosecutions Are Dealt Setback, *MONEY LAUNDERING ALERT*, Nov. 1991, at 1.

¹⁵⁸ *Campbell*, 777 F. Supp. at 1260, 1270.

¹⁵⁹ *Id.* at 1267-68.

¹⁶⁰ *Id.* at 1260-61.

¹⁶¹ *Id.* at 1261.

demonstrated his ability to buy a house by showing her \$20,000 in cash.¹⁶² When Lawing found a house he wanted to buy, he was unable to secure a loan for the contract price of \$182,500.¹⁶³ Instead, he asked the sellers to lower the contract price by \$60,000 and accept that amount in cash under the table.¹⁶⁴ According to a colleague of Campbell's, Campbell mentioned that the cash may have been drug money but that she, Campbell, did not care where it came from.¹⁶⁵

Although the jury convicted Campbell, the court granted Campbell's motion for a judgment of acquittal because it found problematic the jury's findings that Campbell knew the purchase funds were the proceeds of SUA.¹⁶⁶ The government argued that Campbell was willfully blind to the fact that the proceeds used in the transaction were derived from SUA.¹⁶⁷ Had Campbell not intentionally averted her attention from the facts, the government explained, it would have been obvious to her that Lawing was a drug dealer.¹⁶⁸

The court rejected the willful blindness argument, however, asserting that the only testimony concerning Campbell's knowledge was based on Lawing's appearance and lifestyle.¹⁶⁹ Lawing owned an expensive new boat, told Campbell of his trips to Las Vegas, drove a red Porsche and wore gold jewelry.¹⁷⁰ While the court described Lawing as a spendthrift playboy whose image might garner attention, the court wrote that Lawing's uncommon lifestyle and habits were not so unusual that his outward appearance alone would indicate he was a drug dealer.¹⁷¹ Further, Lawing told Campbell that he operated or participated in an auto repair shop and a restaurant, both high cash volume businesses.¹⁷² Thus the court held that Campbell had not violated either section 1956 or section

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* Lawing told Campbell that he wanted the cash payment hidden because he was lying to his parents about the price of the house. *Id.* at 1262.

¹⁶⁵ *Id.* at 1262. The statement was questionable, as the colleague could not recall when Campbell made the statement and had previously testified before a grand jury that she could not recall if Campbell had ever made a statement about drug money. *Id.* at 1266-67.

¹⁶⁶ *Id.* at 1263.

¹⁶⁷ *Id.* at 1264.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 1265.

¹⁷⁰ *Id.* at 1261, 1265, 1266.

¹⁷¹ *Id.* at 1265-66.

¹⁷² *Id.* at 1266.

1957, because there was inadequate proof that Campbell knew the transaction funds were derived from SUA.¹⁷³

The cases prosecuted against money laundering merchants illustrate three points. First, the methods used by merchants to launder money are varied and include using fake buyers' names to record sales, putting false liens on cars and falsifying payroll records.¹⁷⁴ Second, these actions by merchants show not only that merchants often know that the purpose of the transactions is to conceal the source of SUA proceeds or to avoid reporting requirements, but also that they actively participate in accomplishing these purposes.¹⁷⁵ Third, it is not always easy for the government to prove that a merchant knew the property used in a transaction was derived from illegal activity, an element necessary for either section 1956 or section 1957 convictions.¹⁷⁶ The concept of willful blindness has furnished insufficient proof to convince a jury or judge that the defendant merchants had such knowledge.¹⁷⁷

III. SECTION 1957 IS RARELY USED AGAINST MERCHANTS IN COMPARISON TO SECTION 1956: THE MISGUIDED REASONS FOR THAT RELUCTANCE

A. *The Government's Intent to Apply the Statutes Beyond Those Who Make Dirty Money*

There is no doubt that both Congress and the Executive Branch intended sections 1956 and 1957, the money laundering statutes,

¹⁷³ *Id.* at 1267-68. In addition, the government was unable to prove, as required by § 1956, that the purpose of the transaction was to conceal the source of the transaction funds. *Id.* at 1264. As the court noted, the location, source, ownership and control of the money were clearly in the person of Lawing; the question was whether the transaction was designed to conceal the nature of the money. *Id.* at 1263 & n.5. Although Lawing did not title the house in his own name, the court found that titling the house in his parents' name was hardly an attempt at concealment, for he could be readily identified with them. *Id.* at 1264. In addition, the court pointed out, Lawing did not conceal his identity in the transaction: he was present at every consequential meeting concerning the sale of the house; he personally brought the \$60,000 to Campbell's office; and the sellers counted the money in his presence. *Id.* The government has filed an appeal on the reversal of conviction under § 1957. Telephone Interview with Frank Whitney, Assistant U.S. Attorney, W.D.N.C. (Dec. 20, 1991) (the comments expressed are the remarks of Mr. Whitney alone and do not reflect those of the Office of the U.S. Attorney for the Western District of North Carolina or the U.S. Department of Justice).

¹⁷⁴ See *supra* notes 127, 133, 141 and accompanying text.

¹⁷⁵ See *supra* note 142.

¹⁷⁶ See *supra* notes 155, 159 and accompanying text.

¹⁷⁷ See *supra* notes 156 and 159 and accompanying text.

to apply both to those who make dirty money and to those who take dirty money.¹⁷⁸ Congressional reports and testimony at hearings indicate that the legislature was well aware that money laundering is a necessary facet of the drug trade, and that the purchase of cars, real estate and jewelry is an integral part of money laundering.¹⁷⁹ In the Executive Branch, the 1991 creation of a money laundering unit indicated the administration's understanding that the statutes applied to a wider range of defendants than simply those who amassed dirty money through illegal activity.¹⁸⁰

When the money laundering statutes were first discussed before passage of the 1986 Money Laundering Control Act, Congress addressed the problem of merchants who do business with customers spending dirty cash.¹⁸¹ Congress recognized that money laundering need not only involve institutions such as banks, and that other, non-financial businesses were also being used extensively in laundering schemes.¹⁸² Congress specifically mentioned jewelers, automobile dealers and real estate agents as those who would be guilty of money laundering if they knew their transactions were part of a customer's plan to conceal criminally derived property.¹⁸³ As one congressperson remarked, it was unacceptable for a person to engage in transactions with dirty money and try to justify it by asserting that he or she had not committed the crime that generated the money.¹⁸⁴

One member of Congress posed an example of a merchant who accepted dirty money. He asked hypothetically whether a local grocer who was aware of a customer's reputation for drug dealing would be guilty of money laundering if the grocer took the customer's money for five pounds of hamburger and later deposited it in

¹⁷⁸ E.g., H.R. REP. NO. 855, 99th Cong., 2d Sess., pt. I, at 13 (1986).

¹⁷⁹ See, e.g., *Money Laundering: Hearings Before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 101st Cong., 1st Sess. 27 (1989) [hereinafter *Money Laundering*] (comment of Rep. Saxton) (witness had pointed out how important the aspect of money laundering is in the drug business); H.R. REP. NO. 855, *supra* note 178, at 15 (money laundering schemes need not involve financial institutions such as banks and non-banking transactions are used extensively as parts of money laundering schemes).

¹⁸⁰ See *Justice Department Creates Money Laundering Unit*, MONEY LAUNDERING ALERT, Jan. 1991, at 1.

¹⁸¹ See *infra* notes 182-93 and accompanying text.

¹⁸² H.R. REP. NO. 855, *supra* note 178, at 15.

¹⁸³ *Id.*

¹⁸⁴ See *id.* at 13. Congressman Shaw declared, "I am sick and tired of watching people sit back and say, '... my hands are clean even though I know the money is dirty I am handling.'" *Id.*

a bank.¹⁸⁵ In the legislator's understanding of the statutes under discussion, the grocer would be liable if he or she knew the customer had no legitimate source of income.¹⁸⁶ Similarly, the grocer would also be liable if he or she had direct knowledge that the customer was involved in illegal activity, such as seeing the customer selling drugs before coming into the store.¹⁸⁷

While the members were correct in their understanding that a grocer *could* be liable under the money laundering statutes, the grocer would not be subject to prosecution under the particular hypothetical described. Under section 1956, the purpose of the transaction would have to be to promote the carrying on of the drug dealing, to conceal the source of the drug proceeds, or to avoid reporting requirements.¹⁸⁸ Because the hypothetical drug dealer ostensibly made the purchase of hamburger in person and did not seek to use a false name, for example, it is unlikely a court would find this element of section 1956 fulfilled. As for liability under section 1957, the statute would not apply to this transaction because the purchase of five pounds of hamburger is not a transaction in the amount of \$10,000 or more.¹⁸⁹

Like the House, the Senate also considered merchants' involvement in money laundering schemes in debating the 1986 Money Laundering Control Act.¹⁹⁰ The Senate discussed merchants in regard to the concept of using willful blindness to show how a defendant could be willfully blind to the fact that a transaction involved

¹⁸⁵ *Id.* at 13-14. Congressman McCollum asked the question and proceeded to answer it. *Id.*

¹⁸⁶ *Id.* at 14. While this may have been Congress's understanding in 1986, the United States Court of Appeals for the Eighth Circuit subsequently noted in *United States v. Blackmun*, 904 F.2d 1250 (8th Cir. 1990), that the government cannot rely "exclusively" on the lack of a legitimate source of income to impute that a defendant was using proceeds from unlawful activity. *Id.* at 1257 (court's emphasis).

¹⁸⁷ H.R. REP. NO. 855, *supra* note 178, at 14.

¹⁸⁸ 18 U.S.C.A. § 1956 (West Supp. 1991).

¹⁸⁹ 18 U.S.C.A. § 1957 (West Supp. 1991). Congress returned to the issue of money laundering merchants in the years after passage of the MLCA when considering both amendments to the Act and the efficacy of the laws. *See, e.g., Business Community's Compliance with Federal Money Laundering Statutes: Hearing Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 101st Cong., 2d Sess. 5 (1990) [hereinafter *Compliance*]. Congressman Rangel stated, "those people behind the counter . . . are just as much violators and criminals . . . as the hoodlums on the street." *Id.* at 6; *See also Money Laundering, supra* note 179, at 205 (Congressman Torres asked what could be done to deal with the problem of laundering money through jewelry stores, car dealerships and other businesses with high cash volumes).

¹⁹⁰ *See* S. REP. NO. 433, 99th Cong., 2d Sess. 2 (1986) (participation in money laundering schemes spans the spectrum from individuals to legitimate businesses to organized crime).

specified unlawful activity ("SUA") proceeds.¹⁹¹ According to the Senators, a currency exchanger engaged in a large cash transaction with a known drug dealer, who accepts a commission far above the market rate, would have the requisite knowledge or "willful blindness" necessary for a section 1956 violation.¹⁹² In contrast, the Senate pointed out, a car dealer who sells a car at market prices to a person only suspected of drug involvement, without more, would not have violated the law.¹⁹³

Like the Legislative Branch, the Executive Branch also signaled its intention to apply the statutes more widely to reach merchants when it established the new Money Laundering Section at the Department of Justice.¹⁹⁴ The Narcotics and Dangerous Drugs Section had previously handled money laundering.¹⁹⁵ Making enforcement of money laundering laws the focus of a new section implied that the laws have a broader application than only the prosecution of narcotics dealers.¹⁹⁶ Even before the establishment of the new section at the Department of Justice, administration officials had testified before Congress as to merchant involvement in money laundering.¹⁹⁷ One federal prosecutor asserts that many federal law enforcement agencies and prosecutors now spend as much time investigating where drug money goes as where the drugs came from.¹⁹⁸

The legislators who drafted sections 1956 and 1957 intended the laws to apply both to those who spend dirty money and to those who accept it in transactions.¹⁹⁹ The Executive Branch has also focused on the different types of launderers, looking beyond those

¹⁹¹ *Id.* at 9-10.

¹⁹² *Id.* at 10.

¹⁹³ *Id.*

¹⁹⁴ See *Justice Department Creates Money Laundering Unit*, *supra* note 180, at 1.

¹⁹⁵ See *id.*

¹⁹⁶ *Id.*

¹⁹⁷ E.g., *Money Laundering: Hearings Before the House Comm. on Banking, Finance and Urban Affairs*, 101st Cong., 1st Sess. 45 (1989) [hereinafter *Laundering*] (official of the U.S. Customs Service asserted that many types of businesses are suited to money laundering); *MLCA of 1986 and the Regulations Implementing the BSA: Hearings Before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 100th Cong., 1st Sess. 105 (1987) [hereinafter *MLCA*] (William Weld, then Assistant Attorney General, Criminal Division, stated that it was hoped that § 1957 would eliminate the large market in luxury items used by procurers of illegal money).

¹⁹⁸ Frank D. Whitney, *The Nuts and Bolts of Federal Money Laundering and Currency Reporting Statutes and Asset Forfeiture Laws and Procedure 1* (paper for Continuing Legal Education seminar, on file with the *Boston College Law Review*).

¹⁹⁹ See *supra* notes 182-93 and accompanying text.

who actually generate the illegal proceeds.²⁰⁰ Despite the dual weapons of sections 1956 and 1957 and their possible range of money laundering defendants, prosecutors have used the two laws in widely disparate fashion.²⁰¹ As of the middle of 1990, the government had filed charges against 302 people under section 1956, while charging only 14 people under section 1957.²⁰²

*B. Section 1957, Broader than Section 1956, Can Be Interpreted as a Money Spending Statute*²⁰³

That section 1957 is used so rarely in comparison to section 1956 is curious, considering that commentators have described section 1957 as a broader, more widely applicable statute than section 1956.²⁰⁴ The district court in the two *Sanders* cases did not accept the government's argument that section 1956 should apply to all transactions, ordinary on their face, that involve the proceeds of SUA.²⁰⁵ Such an interpretation, the court said, would turn section 1956, a money laundering statute, into a money spending statute.²⁰⁶

While the required element of section 1956 regarding the purpose of the transaction indicates that section 1956 is indeed directed at money laundering and not money spending, such an interpretation of section 1957 is by no means certain. Authorities have read this section simply as prohibiting monetary transactions in property derived from criminal activity or engaging in financial transactions

²⁰⁰ See *supra* notes 194–198 and accompanying text.

²⁰¹ See Welling, *supra* note 55, at 1.

²⁰² *Compliance*, *supra* note 189, at 208.

²⁰³ Calling § 1957 a "money spending" statute does not imply that its use is limited to those who spend dirty money. Rather, the designation suggests the major elemental difference between § 1956 and § 1957. The former requires that the purpose of the transaction be to promote the criminal activity or to conceal the source of the dirty funds. 18 U.S.C.A. § 1956. The latter does not require this element; engaging in a transaction of more than \$10,000 of known dirty proceeds is sufficient to violate the statute even without any attempt at concealment. 18 U.S.C.A. § 1957.

²⁰⁴ Charles Thelen Plombeck, *Confidentiality and Disclosure: The Money Laundering Control Act of 1986 and Banking Secrecy*, 22 INT'L LAW. 69, 79 (1988) (stating that § 1957 has "potentially the broadest application"); Telephone Interview with Sarah Welling, Professor of Law, University of Kentucky at Lexington (Jan. 7, 1992) (§ 1957 is a broader statute). Professor Welling has written about money laundering several times and is on the Editorial Board of *Money Laundering Alert*.

²⁰⁵ *United States v. Sanders*, 929 F.2d 1466, 1472 (10th Cir.), *cert. denied*, 112 S. Ct. 143 (1991); *United States v. Sanders*, 928 F.2d 940, 946 (10th Cir.), *cert. denied*, 112 S. Ct. 142 (1991). See *supra* notes 93–104 and accompanying text for a discussion of the cases.

²⁰⁶ *Sanders*, 929 F.2d at 1472; *Sanders*, 928 F.2d at 946.

with proceeds generated from specified crimes.²⁰⁷ Indeed, at least one federal prosecutor and one money laundering expert assert that section 1957 is a money spending statute.²⁰⁸

C. Why Isn't Section 1957 Being Used?: Practicality and Policy Argue for Its Use Against Merchants

Because section 1957 is a broader statute than is section 1956, and because it encompasses money spending, though not money laundering, it is well suited for use against merchants who knowingly accept dirty money. Yet it is rarely used for that purpose, begging the question, why not? Some of the reasons given for the infrequent use of section 1957 have been purely practical. Others are based on the policies of the proper role of merchants in fighting drugs and money laundering and the risk of adverse public reaction. The concerns raised by these policies, however, are unpersuasive. At the very least, there is an argument for increased use of section 1957 in order to test the validity of the arguments against using the statute more often.

1. Practicality

There are several practical reasons why prosecutors use section 1956 more often than section 1957. The Justice Department provides prosecutors with more training and seminars on how to prosecute under section 1956.²⁰⁹ In addition, section 1956 may provide a greater incentive for use because of its greater penalties. The maximum prison sentence under section 1956 is twice that of section 1957.²¹⁰ Further, because prosecutors have discretion to choose which offense to charge, they are likely to charge the offense that

²⁰⁷ Plombeck, *supra* note 206, at 79; Welling, *supra* note 55, at 1. It is important to keep in mind, however, that § 1957 requires that the transaction involve property derived from SUA of value greater than \$10,000. 18 U.S.C.A. § 1957(a) (West Supp. 1991).

²⁰⁸ Telephone Interview with Sarah Welling, *supra* note 204; Telephone Interview with Frank Whitney, *supra* note 173.

²⁰⁹ Telephone Interview with Stephen Patrick O'Meara, Assistant U.S. Attorney, S.D. Iowa (Dec. 31, 1991) (the views expressed are those of Mr. O'Meara alone and do not reflect those of the Office of the U.S. Attorney for the Southern District of Iowa or the U.S. Department of Justice).

²¹⁰ 18 U.S.C.A. §§ 1956(a), 1957(b). A § 1956 conviction carries a possible sentence of up to 20 years imprisonment and/or a fine of \$500,000 or twice the value of the property involved in the transaction, whichever is greater. § 1956(a). A § 1957 conviction carries a possible sentence of up to 10 years imprisonment and/or a fine of not more than twice the amount of the criminally derived property involved in the transaction. § 1957(b).

offers the greatest penalties.²¹¹ Thus section 1956 may be the starting point more often than section 1957, even though it is the more difficult offense to prove.²¹²

While there are practical explanations for the current non-use of section 1957 relative to section 1956, they are not enough to prevent the use of a powerful weapon in the government's arsenal. If training focuses more on section 1956, the obvious remedy to prosecutors' unfamiliarity with section 1957 is additional training and seminars in the use of that section.

There are cases in which the evidence may not be sufficient to prove the additional section 1956 element of the purpose of the transaction, much less the merchant's knowledge of that purpose.²¹³ In those cases, it is wiser, perhaps, to prosecute under section 1957, despite its lesser penalty, than to risk losing the case under section 1956. The *Campbell* case provides a good example of when a section 1957 case may exist and a section 1956 case does not.²¹⁴ There, the court reversed the defendant's convictions under both section 1956 and section 1957 on the ground that the defendant did not know the cash involved in the purchase of a house was derived from SUA.²¹⁵ The court further held, with regard to the section 1956 conviction, that there was insufficient evidence as to the purpose of the transaction and the defendant's knowledge of the purpose.²¹⁶ While the government may have conceded that the defendant did not know the purpose of the transaction, it is appealing the section 1957 decision, hoping to prove that the defendant did know the funds were derived from SUA.²¹⁷ Thus even if the crucial "purpose" element of section 1956 is gone, there may still be a violation under section 1957.

There are cases, then, where section 1957 is a more appropriate charge than section 1956. A prime candidate for a section 1957

²¹¹ Telephone Interview with Stephen Patrick O'Meara, *supra* note 209.

²¹² Section 1956 is more difficult to prove because the government must show that the defendant knew the funds were the proceeds of SUA (also a required element of § 1957). In addition, however, the government must show that the defendant either intended the transaction to promote the carrying on of the SUA or that the defendant knew the transaction's purpose was concealment of the location, nature or ownership of the funds or avoidance of reporting requirements. § 1956.

²¹³ *United States v. Campbell*, 777 F. Supp. 1259 (W.D.N.C. 1991).

²¹⁴ See *supra* notes 157-73 and accompanying text for a discussion of the case.

²¹⁵ *Campbell*, 777 F. Supp. at 1267. See *supra* note 173 and accompanying text.

²¹⁶ 777 F. Supp. at 1267. See *supra* note 173.

²¹⁷ Telephone Interview with Frank D. Whitney, *supra* note 173. While the government did not expressly concede the lack of a § 1956 purpose, it has appealed only the § 1957 reversal.

prosecution would be a merchant who knows that a customer is using dirty money in a purchase, but where the transaction lacks the required section 1956 element of intending the continuation of SUA, concealing the SUA proceeds or avoiding reporting requirements. A customer who asks a merchant to use a blatantly false name on a new car title is signaling that the transaction is intended for the purpose of concealing the customer's identity, and the merchant who engages in the transaction could likely be convicted under section 1956. Where the title is in a name different from the customer's, yet is not obviously misleading, as in the *Campbell* case where the customer titled the house in his parents' name, then the government may not be able to prove that the purpose of the transaction was to conceal the illegal source of the funds.²¹⁸ In such a case, if the merchant knows the funds are dirty but does not overtly attempt to conceal their source or to avoid reporting the transaction, then it would be wiser for the government to prosecute under section 1957.

2. The Role of Merchants in Fighting Money Laundering

In attempting to fight the drug and crime war on all fronts, Congress, by passing the money laundering laws, may have drafted merchants as unwilling deputies.²¹⁹ Until 1986, taking and exchanging dirty money was not a criminal act as long as merchants fulfilled reporting requirements.²²⁰ By 1986, growing concern over drug trafficking and drug use prompted Congress to recognize that in addition to those who supply and sell drugs, those who launder the proceeds and sell the high-priced trophies of the trade such as cars and jewelry are also part of the drug problem.²²¹

²¹⁸ *Campbell*, 777 F. Supp. at 1264.

²¹⁹ At the outset of this discussion, it may seem tempting to look to the Prohibition era for analogous provisions. The search is not a fruitful one, however, largely because the crime of money laundering did not exist in the Prohibition era. Prosecutions against merchants focused largely on their actions in supplying distillers with the ingredients needed to manufacture intoxicating liquor and often proceeded on the theory of conspiracy. See, e.g., *United States v. Wilson*, 59 F.2d 97, 98 (W.D. Wash. 1932) (defendant guilty of conspiracy in the illicit manufacture and sale of alcoholic liquor for furnishing bootlegger with yeast, sugar and materials to build a still). Such situations might be analogous to the present day merchant who supplies the chemicals needed to manufacture methamphetamine, but any liability in that instance is different from liability for accepting and laundering money derived from the subsequent sale of the methamphetamine.

²²⁰ See *supra* note 17. Prior to the 1970 Bank Secrecy Act, money laundering activities were not prohibited. *Id.*

²²¹ H.R. REP. NO. 855, *supra* note 178, at 13 (Congressman Shaw urged, "[t]he only way

There are two reasons why merchants are in fact proper "deputies" whose actions can aid law enforcement and, conversely, whose actions should make them liable when they contribute to the problem. There is also a way to prevent merchants from becoming overprotective and thus unfairly refusing certain customers. First, the drug problem is huge and money laundering is inextricably connected to it.²²² Second, many merchants are themselves part of the money laundering problem, and Congress expressed its belief that merchants be held criminally liable for engaging in laundering activity.²²³ Finally, there are guidelines that could be implemented to aid merchants in halting money laundering, while at the same time preventing legitimate customers from being wrongly refused service.²²⁴

Because of the extent of the drug trafficking industry and the ties between drug traffickers and merchants, increased enforcement of the money laundering statutes against merchants will also prove useful in combatting the traffickers as well. The illegal narcotics industry is a huge business, worth \$100 billion annually in the United States alone.²²⁵ The industry is linked to money laundering out of necessity, because a drug trafficker's cash must be laundered to be of any value to the trafficker.²²⁶ Some estimate that laundering in certain cities exceeds \$3 billion each year.²²⁷ While not all of the dirty money is spent on consumer items such as cars or motorboats, enough dirty money enters the legal economy that it is profitable

we will get at this problem is to let the whole community, the whole population, know they are part of the problem").

²²² *Money Laundering Legislation: Hearing Before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 101st Cong., 2d Sess. 1 (1990) (Congressman Annunzio observed, "[m]oney laundering is the lifeblood of the drug trade You cannot have an illegal drug business without money laundering").

²²³ See *infra* notes 231-35 and accompanying text for a discussion of merchants' flouting of reporting requirements.

²²⁴ See *infra* notes 236-39 and accompanying text for a discussion of guidelines.

²²⁵ Florez & Boyce, *supra* note 2, at 23.

²²⁶ *Money Laundering*, *supra* note 179, at 1-2 (Congressman Annunzio pointed out that a drug dealer's cash is nothing more than pieces of paper until it can be exchanged for bank credits or goods).

²²⁷ See Marshall, *supra* note 2, at 13. The surplus in a Federal Reserve branch bank is a good indicator of drug money laundering taking place in that city, because the federal reserve system usually pays out more cash than it takes in. *Id.* In Miami, for example, the surplus in the Federal Reserve's regional bank is almost \$5.4 billion. *Id.* In Los Angeles, the surplus is \$3.4 billion. *Id.* The Federal Reserve Board reports that of the \$245 billion in currency in circulation, the Board can account for only one dollar in nine. *Id.* That means the other eight-ninths are either hidden, overseas or circulating in the underground economy.

for merchants to accept it despite the risk of prosecution.²²⁸ Because drug trafficking and money laundering are so closely linked, increased enforcement of reporting and money laundering statutes will help to identify and later prosecute drug dealers.²²⁹ In addition, merchants prosecuted for money laundering will sometimes provide information about their drug-dealing customers in order to help their own case.²³⁰

Merchants should be a part of the law enforcement effort against money laundering because they are often active participants in the laundering. It is probably true that some merchants inadvertently accept dirty money, unaware of the nature of the money they are handling. Other merchants, however, far from being neutral in the drug war, actively participate in laundering drug money and thus profit from the drug trade.²³¹ Congressional investigators reported that businesses across the country routinely schemed with customers to avoid reporting requirements.²³² These investigators approached different types of businesses in nine cities, disguised as customers who wanted to pay cash for goods over \$10,000 without having the transaction reported.²³³ Ninety-six percent of the businesses contacted were willing to take cash without reporting it.²³⁴ In a 1990 hearing on compliance with the money laundering statutes, Congress found this collaboration between merchants and cash customers alarming and reiterated its belief that the business community has a responsibility not to engage in transactions involving dirty money.²³⁵

²²⁸ See, e.g., Jaffe, *supra* note 62, at 60. In Washington, D.C., for example, as much as \$1 billion a year in dirty money is spent locally—and Washington is a smaller market than Florida, California or New York. *Id.* A prosecutor in Washington describes merchant involvement as “part of an unholy alliance between business and drug dealers that fuels the fire of drug trafficking . . .” *Id.* at 139.

²²⁹ DEP’T OF THE TREASURY, *supra* note 3, at 3 (information in filing reports is extremely useful in developing cases involving drug trafficking).

²³⁰ E.g., Jaffe, *supra* note 62, at 138 (government offered clothier Charles Wynn a deal if he would help them find drug dealers).

²³¹ See *supra* notes 123–41 and accompanying text for a discussion of merchants who laundered drug money.

²³² *Compliance*, *supra* note 189, at 2.

²³³ *Id.* at 14. Investigators did not complete the transactions, but merely negotiated for the items. *Id.* at 42. Some of the items discussed for sale included a \$73,000 Porsche, a \$17,000 Rolex watch, an \$18,000 French armoire and a \$15,700 Persian rug. *Id.* at 3, 27–28.

²³⁴ *Id.* at 14.

²³⁵ *Id.* at 2–3. (“It is shocking,” declared Congressman Pickle, “that businesses are routinely conniving with customers to violate the law”); *id.* at 5–6 (Congressman Schulze stated that although he is opposed to placing unnecessary burdens on legitimate businesspeople,

Lest increased prosecutions under section 1957 prompt merchants to become overly cautious, there are guidelines that the government and merchants could implement that would help merchants to identify laundering customers and transactions. Financial institutions, which are also liable for money laundering and reporting lapses, have adopted a "Know Your Customer" standard.²³⁶ According to the American Bankers Association, "Know Your Customer" means verifying the business of a new account holder, reporting activity disproportionate to the known business and verifying that the customer's identification documents are genuine.²³⁷ Trade associations, such as the National Automobile Dealers Association and the National Association of Realtors, for example, could assist their members in developing similar, industry-specific standards.²³⁸ Further, government agencies could inform oft-targeted industries about what constitutes a suspicious transaction and might also aid in developing profiles analogous to drug courier profiles used in airports.²³⁹

Any new guidelines would also address the concern that merchants may begin to rely on racial stereotypes and refuse to deal with certain customers in an attempt to protect themselves from criminal liability. Even if the customers are not in fact involved in any illegal activity, merchants might refuse to conduct business with them on the basis of misleading or stereotypical characteristics such as a customer's age, race or manner of dress. Thus, the argument goes, someone who is merely suspected of criminal involvement—perhaps because of appearance alone—would find it difficult to engage in everyday commerce.²⁴⁰

everyone in the business community must do their part to stop the drug and crime problem); *id.* at 45 (Congressman Anthony asserted that the business community needs to understand that they may well be arrested if they help launder dirty money).

²³⁶ *Money Laundering*, *supra* note 179, at 75.

²³⁷ *Laundering*, *supra* note 197, at 308.

²³⁸ The National Association of Realtors noted, for example, that it is not at all routine for a real estate purchase to be conducted in cash. Telephone Interview with Mary Stark-Hood, Legal Department of the National Association of Realtors (Feb. 11, 1992). The National Automobile Dealers Association closely follows enforcement actions and regulations that affect its members and would likely aid its members in protecting themselves, particularly because their industry has been frequently linked to money laundering activity. *See Car Dealers Urge Clarify [sic] in Cash Rules*, MONEY LAUNDERING ALERT, July 1991, at 4.

²³⁹ The Department of the Treasury has provided financial institutions with guidelines as to what constitutes suspicious patterns of transactions. DEP'T OF THE TREASURY, *supra* note 3, at 35. Similarly, the IRS has developed a plan of action to inform vendors of items such as cars and boats of their statutory responsibility to report currency transactions. *Id.* at app. 3 at 4.

²⁴⁰ *See Villa*, *supra* note 42, at 500.

There are two reasons, however, why this argument is unpersuasive. First, section 1957 requires that the transaction involve property valued at a minimum of \$10,000.²⁴¹ Most people's everyday commerce does not involve transactions in excess of that amount. Second, professional guidelines for recognizing suspicious customers and transactions would be based on industry and law enforcement experience, not on unsavory stereotyping by an individual merchant. While there would still be the chance that a merchant might apply the profile in a discriminatory fashion, presumably such a profile would be more accurate than simply a perceived profile imagined by the single merchant.

There are thus two reasons why merchants should participate in the efforts against money laundering and should be held criminally liable under section 1957 if they do not. First, the drug trade and money laundering services are closely linked, with the latter supporting the former. Increased enforcement of the money laundering statutes not only would deter money laundering, but might also have the secondary effect of providing information about drug trafficking. Second, merchants are not always unwitting participants in money laundering transactions, but rather knowing and active participants. Under section 1957 the government has an obligation to prosecute such merchants. Further, there are ways to aid merchants in detecting unlawful transactions without causing the merchants to refuse legitimate customers. For example, government agencies and industry trade associations could do more to develop guidelines and standards to aid in identifying suspicious customers and questionable transactions so that legitimate customers are not unfairly hampered in or refused their transactions.

3. Public Perception: Addressing the Fear of Backlash

Perhaps the single greatest factor preventing increased use of section 1957 against merchants is the fear that public perception will be negative, thereby endangering support for all attempts to combat money laundering.²⁴² Because section 1957 on its face is

²⁴¹ 18 U.S.C.A. § 1957(a) (West Supp. 1991).

²⁴² See Michael A. Defeo, *Depriving Int'l Narcotics Traffickers and Other Organized Criminals of Illegal Proceeds and Combatting Money Laundering*, 18 DEN. J. INT'L L. & POL'Y 405, 414 (1990). Mr. Defeo's concern is that money laundering investigations targeting greedy businesspeople eager to make easy money but not otherwise criminally involved, will lead to a negative legislative reaction. *Id.* Such a reaction would endanger all "currency control, asset tracing, and forfeiture legislation." *Id.*

broad in its application than section 1956, the Department of Justice has been wary of using section 1957 as much, mindful that the public must perceive prosecutions as reasonable and just.²⁴³

This fear of public backlash against efforts to prosecute all entities involved in laundering money is valid, but readily mitigated. First, while there is no documentation of public resistance to such prosecutions, there are instead indications that the public sees drug trafficking and its effects on society as one of the major problems facing the country.²⁴⁴ Because drug trafficking is closely tied to money laundering by the traffickers' need to render their illegal profits usable, there is some indication that the public is as wary of money launderers as it is of drug dealers.²⁴⁵ Further, businesses that launder money have an unfair advantage over their law-abiding competitors, a situation likely to raise the public's ire in difficult economic times.²⁴⁶

Second, the statutory elements of section 1957 prevent the government from prosecuting merchants who are unaware of the source of their customers' cash and merchants who engage in small transactions.²⁴⁷ To be liable under section 1957, a merchant must know that the property involved in a transaction is derived from criminal activity.²⁴⁸ As shown in the *Campbell* and *Capital Imports* cases, the element of knowledge is not always an easy element to prove.²⁴⁹ In *Campbell*, the government was unable to prove that the

²⁴³ See *MLCA*, *supra* note 197, at 108.

²⁴⁴ E.g., R.W. Apple Jr., *White House Race is Recast: No Kremlin to Run Against*, N.Y. TIMES, Feb. 6, 1992, at A8 (graphic showing that for three straight years, from 1988 through 1990, drugs were identified as the most important problem facing the country); Robert Dvorchak, *'Drug War' Has No Ammunition, Front-Line Troops Complain*, L.A. TIMES, Dec. 3, 1989, at A2 (National League of Cities spokesman called drugs "far and away the No. 1 issue for our cities," and a community leader called drugs the "worst crisis to hit America since Pearl Harbor").

²⁴⁵ See Suzanne Gamboa, *Innocent Ties to Drug Dealers Can Hurt*, L.A. TIMES, Feb. 18, 1990 (Sun. Preview Ed.), at A19. When U.S. Marshals seized a shopping center because its owner was a drug trafficker, the shopping center's tenants got the Marshals to issue a statement saying that their businesses were legitimate and not tied to the drug-dealing landlord. *Id.* Some customers told the merchants that if their stores were involved in money laundering, they would boycott the stores. *Id.*

²⁴⁶ *Black Money, Gray Money, Funny Money: The Many Shades of Dirty Deals*, PR NEWswire, Feb. 4, 1992, available in LEXIS, Nexis Library, prnews file. A retailer that launders money has access to a cash flow unavailable to the honest retailer, giving the dishonest merchant an advantage over his or her competitors. *Id.*

²⁴⁷ 18 U.S.C.A. § 1957(a) (West Supp. 1991).

²⁴⁸ *Id.*

²⁴⁹ *United States v. Campbell*, 777 F. Supp. 1259 (W.D.N.C. 1991); *Jury Acquits Car Dealers on Money Laundering Charges*, MONEY LAUNDERING ALERT, Jan. 1991, at 3 (citing *Capital*

defendant knew from her client's lifestyle and appearance that his funds were derived from drug dealing.²⁵⁰ In the Capital Imports case, the undercover customers' display of small wrapped packages and use of code words did not convince the jury that the car dealers knew their customers were drug dealers.²⁵¹ Further, the statute's \$10,000 minimum threshold means that even if a merchant were aware of the illegal source of the funds, the merchant would not be liable under section 1957 if the transaction was for less than this amount.²⁵² Thus the government would not prosecute merchants engaged in everyday, small transactions if, for example, they sold a bag of groceries or tank of gas to a customer whose funds were known to be criminally derived.

The concern about public reaction is based on the idea that there will be an outcry if the government prosecutes an otherwise honest merchant who accepts dirty money.²⁵³ For example, consider a car dealer who knows that the customer with cash is involved in SUA. The customer purchases an automobile for \$25,000 and pays cash, but does not seek to conceal his or her identity as purchaser, disguise the nature of the funds or avoid reporting of the transaction. Assume also that the car dealer files the proper IRS form. In such a case, there is no section 1956 violation.²⁵⁴

If the car dealer has done everything right, the argument goes, why should he or she be prosecuted under section 1957? The answer, in short, is that the hypothetical car dealer has *not* "done everything right." Knowingly participating in a transaction with dirty money hardly renders the car dealer blameless. The truly blameless car dealer is the one who has unwittingly participated in a transaction with property derived from SUA. A merchant who lacked that knowledge would not be liable under section 1957.²⁵⁵

Third, with thoughtful choices about which kinds of cases to prosecute, the government should be able to convince the public that the merchants involved are large-scale violators of money laundering laws and thus avoid a backlash against section 1957 prose-

Imports, No. JH 89-0380 (D. Md. 1990)). See *supra* notes 150-73 and accompanying text for a discussion of these cases.

²⁵⁰ *Campbell*, 777 F. Supp. at 1265.

²⁵¹ *Jury Acquits Dealers of Money Laundering Charges*, *supra* note 150, at 3.

²⁵² 18 U.S.C.A. § 1957(a) (West Supp. 1991).

²⁵³ Defeo, *supra* note 242, at 414.

²⁵⁴ 18 U.S.C.A. § 1956 (West Supp. 1991). Section 1956 requires that the government prove the transaction was for the purpose of promoting the SUA, concealing the nature of the proceeds or avoiding reporting requirements. *Id.*

²⁵⁵ § 1957.

cutions. Prosecutors could alleviate possible adverse public reaction by focusing only on merchants who are systematically and repeatedly involved in large scale transactions with dirty money.²⁵⁶ A good case for section 1957 would involve a merchant who engages in numerous transactions with dirty money, but who does not undertake the transactions for one of the purposes that would bring the transactions under the auspices of section 1956. For example, if a merchant consistently titles cars in obviously false names, the government could prosecute under section 1956 because the transaction would be for the purpose of concealing the true owner of the illegal proceeds.²⁵⁷ Nevertheless, if the car dealer uses names that are not obviously disguises, such as another family member's name, then a section 1956 violation is more difficult to prove.²⁵⁸ Such a car dealer would be a prime candidate for a section 1957 prosecution, particularly since savvy money launderers may start to take advantage of this gray area between a blatantly false name and a name that provides some protection from identification without overtly concealing identity.²⁵⁹

Fear of adverse public reaction to section 1957 prosecutions of merchants is unwarranted. First, there is evidence that the public is concerned about drug trafficking and its web of related money laundering.²⁶⁰ Furthermore, there is some evidence that the public would not be sympathetic to money laundering merchants.²⁶¹ Second, section 1957 requires that the transaction amount exceed \$10,000 and that there be knowledge that the funds are dirty.²⁶² Thus, section 1957 provides checks against prosecution of merchants engaged in small, ordinary transactions and against merchants who unwittingly accept tainted money but otherwise comply with the reporting requirements.²⁶³ Third, a cautious prosecution

²⁵⁶ Merchants in a particular area who are willing to accept dirty money become known as the merchants to visit if a customer wants to spend cash with no questions asked. See, e.g., L.A. *Car Dealership Seized, Money Laundering Charged*, *supra* note 123, at 6.

²⁵⁷ 18 U.S.C.A. § 1956. For example, some car dealers used the name Magic Johnson when titling cars. See *supra* note 133, at 1.

²⁵⁸ *United States v. Campbell*, 777 F. Supp. 1259, 1264 (W.D.N.C. 1991). The customer bought a house and titled it in his parents' names, which the court said was insufficient proof of an intent to conceal the source of the proceeds. *Id.*

²⁵⁹ As one IRS official remarked, "the government is getting smarter, but so are the traffickers." Marshall, *supra* note 2, at 13.

²⁶⁰ See *supra* note 244.

²⁶¹ See *supra* note 245.

²⁶² 18 U.S.C.A. § 1957(a).

²⁶³ See *id.*

strategy would target only those merchants who engage in repeated large-scale transactions with dirty money but who manage to avoid the purpose element of section 1956. For these reasons, there is little basis to fear a public backlash against section 1957 prosecutions.

4. Congress Advocates Using All Available Weapons Against Money Laundering

The reluctance of prosecutors to bring section 1957 actions is surprising, considering that Congress has voiced its support for using all available statutes against money laundering.²⁶⁴ When presented with facts and figures about the business community's lack of compliance with reporting requirements, Congress voiced its disapproval and urged greater action against violators.²⁶⁵ In a 1990 oversight hearing concerning enforcement of transaction reporting laws, one congressman indicated his belief that reporting violations ought to be more vigorously prosecuted.²⁶⁶ Considering that the reporting requirements include transactions in both clean and dirty money, it is difficult to imagine that Congress would press for prosecution of reporting violations,²⁶⁷ yet balk at increasing enforcement of laundering laws, such as section 1957, aimed only at dirty money.

In addition, the Department of Justice has stated its commitment to developing a just and reasonable standard for field prosecutors for section 1957 prosecutions.²⁶⁸ Yet with only 14 individuals charged under section 1957 as of mid-1990, that standard has not yet been instituted and prosecutors are not using the statute.²⁶⁹

It would not take many section 1957 prosecutions to impart the lesson to merchants that they should not knowingly accept dirty money. Indeed, one witness testified before Congress that all it would take to get the attention of the non-reporting community is

²⁶⁴ See, e.g., *Money Laundering*, *supra* note 181, at 50 (Congressman Annunzio opined that the basic money laundering laws are in place and what is needed is to have them enforced).

²⁶⁵ *Compliance*, *supra* note 189, at 211 (Congressman Pickle stated that all members were in agreement that if there has been a reporting violation, then those cases ought to be prosecuted).

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *MLCA*, *supra* note 197, at 108.

²⁶⁹ *Compliance*, *supra* note 189, at 208.

a few publicized enforcement efforts against errant businesses.²⁷⁰ The same could be said for section 1957 prosecutions against merchants. A few prosecutions would put money laundering merchants on notice that their activity must cease. It would also send the message to legitimate businesspeople not to risk accepting dirty money.

Congress passed the money laundering statutes with the intention that they be enforced to their fullest. Increased enforcement of the money laundering statutes would signal merchant launderers that they must stop their illegal activity or risk prosecution. Increased enforcement would also deter other merchants from entering the money laundering business.

IV. CONCLUSION

The conception of money laundering has evolved from the original approach that the underlying criminal activity was the sole illegal act, to the belief that financial institutions must report certain transactions, and finally to the current view that money laundering itself is a serious and distinct crime. With drug trafficking generating enormous sums of dirty money, law enforcement is concerned about merchants' involvement with the drug trade. If traffickers cannot launder their dirty money so as to shield the owner from investigation and prosecution, or to enable the owner to make expensive purchases, then there is little incentive to engage in the activity.

Congress fully intended sections 1956 and 1957 to hold responsible anyone involved in money laundering, whether a drug trafficker engaged exclusively in illegal narcotics deals, or a merchant who caters to the drug trade by laundering the traffickers' money. Whereas prosecutors have used section 1956 aggressively against merchants in different industries across the country, they have seldom used section 1957 against anyone and even more rarely against merchants.

Section 1957 is written more broadly and with elements of proof different from those of section 1956. Thus the government has been reluctant to use it, fearing an adverse public reaction if the prosecutions focused on small merchants whose only crime was having accepted dirty money. Yet section 1957 generally protects

²⁷⁰ *Id.* at 120.

such merchants from prosecution. The elements of the statute are not easy to prove, particularly the requirement that the defendant know the property used in a transaction is criminally derived. In addition, the \$10,000 minimum ensures that there will not be a spate of frivolous cases charged.

Moreover, the public would probably support, as Congress seems to, increased use of section 1957 against merchants who accept dirty money. Merchants who knowingly accept dirty money enable criminal activity to thrive. Considering the ceaselessness of crime in general and drug trafficking in particular, there is a strong likelihood that the public would want to deter such merchants. It is time to hold accountable merchants who profit from the drug trade and, in turn, make the drug trade possible. Section 1957 is a valuable weapon against such persons, and it should be used more often.

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