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NOTES

Federal Money Laundering Crimes—Should Direct Tracing of Funds Be Required?

BY JOSEPH R. MILLER*

INTRODUCTION

Dirty Money. This phrase has long been used to describe criminals' ill-gotten gains. Defining this term has also become a necessity for our federal courts. In the last four decades, organized crime and the drug trade have frequently provided the impetus for the creation of new federal crimes. They certainly provided the motivation for Congress when it enacted the Money Laundering Control Act of 1986 (the “Act”). The Act contains two substantive criminal provisions: 18 U.S.C. § 1956, entitled “Laundering of monetary instruments,” and § 1957, entitled “Engaging in monetary transactions in property derived from specified unlawful activity.”

The substantive money laundering crimes quickly became a favorite of federal prosecutors—one former federal prosecutor commented: “MOVE OVER RICO. The white collar crime of the 1990s is here and it is Money

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3 Id. § 1957.
Laundering.\textsuperscript{4} The frequent use of the money laundering statutes in criminal prosecutions can be attributed to their relative simplicity, breadth, and the harsh forfeiture and sentencing consequences that result from conviction.\textsuperscript{5}

The frequent usage of these statutes has spawned a commensurate amount of case law. Other white collar cases have required federal courts to analyze complex fact patterns and novel concepts in the criminal arena.\textsuperscript{6} This Note analyzes one of these concepts—the notion of criminal “proceeds” in the context of money laundering. This concept is crucially important to the money laundering laws. Specifically, this Note analyzes the dilemma of commingled funds, focusing primarily on two questions. When “dirty money”\textsuperscript{7} is commingled in an account with “clean money”\textsuperscript{8} and funds are subsequently withdrawn, is the money coming out clean or dirty? Must prosecutors trace the withdrawn funds to the dirty money that was originally deposited in order to obtain a money laundering conviction? The concept of “proceeds,” while relatively new to the criminal law, has been dealt with in detail in the commercial law tradition.\textsuperscript{9} Surprisingly, courts have rarely looked to the commercial law analog in defining the scope of criminal proceeds.\textsuperscript{9}

Part I of this Note briefly outlines the substantive offenses.\textsuperscript{10} Part II explains how the federal courts have (not always uniformly) addressed the issue of commingled funds in the context of money laundering.\textsuperscript{11} Part III analyzes the courts' decisions and reasoning in light of the purposes of these statutes and a commercial law tradition which, long before money laundering was a federal crime, had addressed the issue of proceeds and


\textsuperscript{5} Id.

\textsuperscript{6} See, e.g., United States v. Banco Cafetero Panama, 797 F.2d 1154, 1158-62 (2d Cir. 1986), \textit{superseded by statute as stated in} United States v. All Funds Presently on Deposit at Am. Express Bank, 832 F. Supp. 542 (S.D.N.Y. 1994) (applying accounting rules in order to determine whether monies in fire bank accounts were “proceeds traceable” to narcotics sales).


\textsuperscript{8} See \textit{infra} notes 105-23 and accompanying text.

\textsuperscript{9} See discussion \textit{infra} Part III.B.

\textsuperscript{10} See discussion \textit{infra} Part I.

\textsuperscript{11} See discussion \textit{infra} Part II.
had developed tracing rules. Part IV concludes that the federal circuit courts of appeals have generally come to the correct conclusions on tracing, but that protections are needed to ensure that these (necessarily) broad statutes are used appropriately.

I. MONEY LAUNDERING: THE SUBSTANTIVE OFFENSES

To gain an understanding of the commingling problem, it is important to first describe the basic elements of the money laundering crimes.


Section 1956 is the basic, and most frequently used, money laundering statute. It contains three subsections which criminalize three types of criminal activity: § 1956(a)(1) covers domestic financial transactions; subsection (a)(2) deals with international money laundering; and subsection (a)(3) was drafted to include government sting operations. This Note addresses only the subsection (a)(1) crimes.

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12 See discussion infra Part III.
13 See discussion infra Part IV.
14 This brief outline of the substantive offenses, while necessary to introduce the commingling issue, does not address many complex issues raised by these criminal statutes that have been addressed by the federal courts. Nearly every term in the statutes has been litigated, including constitutional “void for vagueness” challenges. See infra note 39. This is symptomatic of a broad statute used to prosecute sophisticated criminals always on the lookout for new ways to conceal the nature of their activity and make it more profitable. See generally Gurulé, supra note 1, at 828 (“Applying the MLCA [Money Laundering Control Act] has confounded the courts.”). For an excellent explication of all elements of the substantive money laundering crimes, see Sixteenth Survey of White Collar Crime: Money Laundering, 38 Am. Crim. L. Rev. 1051 (2001) [hereinafter Survey of White Collar Crime].
16 Id. § 1956(a)(2).
17 Id. § 1956(a)(3).
18 Section 1956(a)(1) punishes offenders by imprisonment for up to twenty years and a substantial fine for a defendant who:

[K]nowing 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
The essential elements of subsection (a)(1) crimes are: (i) The defendant must “conduct;” (ii) a “financial transaction;” (iii) the proceeds involved in the transaction must be “in fact the proceeds of a specified unlawful activity;” and (iv) the defendant must act with the requisite mens rea. Section 1956(a)(1) can be further subdivided into four categories: (A)(i)—the promotion provision; (A)(ii)—the tax evasion provision; (B)(i)—the concealment provision; and (B)(ii)—the reporting requirement provision. All four provisions of § 1956(a)(1) share the element that the defendant must act “knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity.”


Section 1957, the companion statute to § 1956, punishes offenders by subjecting them to up to ten years imprisonment and levying a fine against anyone who “knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity.” Section 1957’s essential elements are: The defendant must (i) “knowingly;” (ii) “engage” in; (iii) a “monetary transaction;” (iv) in “criminally derived property of a value greater than $10,000.” One can immediately see that § 1957 does not contain the detailed mens rea requirements present in § 1956. Indeed, §

activity; or
(ii) with intent to engage in conduct constituting a violation of 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 under State or Federal law. . . .

Id. § 1956(a)(1).


20 Id.; 18 U.S.C. § 1956. The § 1956(a)(1) crimes are known as “transaction money laundering” since it is the financial transaction itself that is the crime. Survey of White Collar Crime, supra note 14, at 1054.


22 Id. § 1957.

23 Id.

1957’s only mens rea requirement is that the “financial transaction” be conducted “knowingly”—absent is any mens rea to conceal funds, evade income taxes, et cetera. This has led some to characterize § 1957 as a strict liability offense because all that is required to violate § 1957 is to engage in a monetary transaction in criminally derived property.

C. Commingled Proceeds

There would be no interpretive problem in the tracing context if the account at a financial institution contained exclusively dirty money, but this is frequently not the case. Dirty money (i.e., “proceeds of specified unlawful activity” as used in § 1956 and “criminally derived property” as used in § 1957, hereinafter referred to collectively as “proceeds”) is frequently commingled in accounts with clean funds. When a withdrawal is made from the account, should the presumption be that the funds coming out are clean or that they are dirty? Defendants have frequently challenged their convictions under §§ 1956 and 1957, arguing that the government rendered insufficient evidence by failing to trace funds leaving the account to the unlawful activity. These challenges have framed the issue for federal courts.

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25 Id. § 1957.
26 See infra notes 62-77 and accompanying text for an analysis of the strict liability nature of § 1957.
28 Id. § 1957(a).
29 See, e.g., United States v. Hardwell, 80 F.3d 1471, 1483, different results reached on reh’g, 88 F.3d 897, 897-98 (10th Cir. 1996) (conviction reversed because evidence of financial statements of codefendant were admitted in violation of Fifth Amendment).
30 It is very clear, however, that in order to obtain a conviction under either of the money laundering statutes, the government need not prove that proceeds were both deposited and withdrawn. The deposit itself can be charged as a crime under either statute as the provisions of both statutes define the “transaction” requirement to include a deposit at a financial institution. 18 U.S.C. § 1956(c)(3); id. § 1957(f)(1); see, e.g., United States v. Rutgard, 116 F.3d 1270, 1292 (9th Cir. 1997). However, it is easy to see that both a deposit and a withdrawal would, other things being equal, lend more weight to a prosecutor’s argument that a defendant intended to launder funds. The issue really boils down to whether funds withdrawn from a commingled account are presumed dirty. See infra notes 31-81 and accompanying text.
II. COMMINGLED FUNDS IN MONEY LAUNDERING CASES:
THE STATE OF THE LAW

A. Prosecutions Under § 1956

The bulk of federal money laundering charges are brought under § 1956. Consequently, this statute has spawned more case law than its counterpart, § 1957. The following cases give prototypical examples of the commingling issue and demonstrate how the federal courts have addressed it.

In United States v. Jackson, three defendants were convicted of conspiring to distribute cocaine. One of the defendants, the Reverend Joseph Davis, was also convicted of engaging in a continuing criminal enterprise and money laundering based on § 1956(a). Davis' church and its "development corporation" each maintained checking accounts at a local savings and loan. Davis had authority to write checks on both accounts. The government introduced evidence at trial that Davis deposited funds into these accounts that he obtained from presiding over a crack cocaine business. Funds derived from other, "legitimate," sources were also deposited into the accounts. Davis wrote out some checks to cash for personal use, wrote some to the order of vendors who provided beepers and cell phones, bought several automobiles, and wrote out other checks to his landlord.

On appeal, Davis made numerous challenges to his convictions. Amongst these included the argument that there was insufficient evidence to allow the jury to convict him of laundering funds from his narcotics operations. He argued that there were other sources of income deposited

32 United States v. Jackson, 935 F.2d 832 (7th Cir. 1991).
33 Id. at 837.
34 Id. at 836.
35 Id. at 837.
36 See id.
37 Id.
38 Id.
39 One of Davis's arguments was that § 1956(a)(1) violated his right to due process because it was impermissibly vague. The Seventh Circuit Court of Appeals concluded that the statute was not unconstitutionally vague as applied to Davis. See id. at 838.
40 Id. at 839.
in the checking accounts and that "no rational juror could decide beyond a reasonable doubt that the individual checks and transactions enumerated in [the money laundering] counts . . . of the indictment involved money derived from drug activities."\(^{41}\)

The government countered Davis' argument using the testimony of an internal revenue agent. The agent testified at trial that Davis earned $102,500 from non-drug sources during the relevant period, while over $200,000 was deposited in the two accounts.\(^{42}\) The government argued that, given the other evidence presented at trial, the jury could have reasonably inferred that the difference in these amounts was attributable to the narcotics operation.\(^{43}\) Furthermore, the government also argued that the statute did not require direct tracing—it was enough to show that some of the money came from the unlawful activities.\(^{44}\) The Seventh Circuit agreed with this argument and held in favor of the government.\(^{45}\)

Relying on the statutory language contained in § 1956,\(^{46}\) the court reasoned that Congress's use of the word "involve" showed that the government was not required to trace the origin of all funds going into a bank account to determine whether funds coming out were proceeds of a specified unlawful activity.\(^{47}\) The court further concluded that Congress did not intend to allow criminals to avoid money laundering convictions by commingling funds.\(^{48}\) Finally, the court found that "the commingling in this case is itself suggestive of a design to hide the source of ill-gotten gains that the government must prove under § 1956(a)(1)(B)(i)."\(^{49}\)

Similarly in United States v. Bencs,\(^{50}\) the defendant was convicted of "conspiring to defraud the United States, evading income tax, money laundering, and structuring financial transactions to avoid cash reporting

\(^{41}\) Id. Davis's "other sources of income" included "bird-dogging cars, arranging purchase-money loans, and demolishing buildings." Id.

\(^{42}\) Id. at 839.

\(^{43}\) Id.

\(^{44}\) Id. at 839-40.

\(^{45}\) See id. at 840-41.

\(^{46}\) 18 U.S.C. § 1956(a)(1) (2000) (emphasis added) ("Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct a financial transaction which in fact involves the proceeds of specific unlawful activity.").

\(^{47}\) Jackson, 935 F.2d at 840.

\(^{48}\) Id.

\(^{49}\) Id.

\(^{50}\) United States v. Bencs, 28 F.3d 555 (6th Cir. 1994).
Bencs challenged the adequacy of the evidence, claiming that the government must trace the funds in the subject financial transactions to specific criminal activity. The Sixth Circuit, also relying on the "involve" language in § 1956 and the Jackson court's interpretation, found Bencs's argument unavailing. The court affirmed Bencs' convictions under the statute.

Jackson and Bencs accurately represent other circuit courts' treatment of this issue. Courts have looked to the "involve" language in the statute and the broad remedial intent of the money laundering statute to hold that requiring direct tracing is contrary to the statutory language and would allow criminals to avoid conviction by commingling dirty money in accounts with other funds. Commingling itself has been held to be indicative of intent to launder funds. No circuit has required the government to directly trace proceeds to specified unlawful activity in a § 1956 case. Therefore, one can easily see why this is the statute of choice in money laundering cases.

One may legitimately conclude that the relative ease with which the government can prove the "proceeds" portion of its case is mitigated by the detailed mens rea requirements of § 1956. It would seem that involvement in criminal activity would provide an adequate basis to infer such a mens rea.

51 See id. at 557.
52 Id. at 561-62.
53 Id. at 562.
54 Id.
55 See, e.g., United States v. Ward, 197 F.3d 1076, 1082-83 (11th Cir. 2000) (holding that requiring the government to "trace the origins of the funds and ascertain 'exactly which funds were used for what transaction' " is unnecessary and contrary to congressional intent); United States v. Tencer, 107 F.3d 1120, 1131 (5th Cir. 1997) (holding that the government need only prove "at least part of the money [in the deposit account] represented such proceeds" to justify conviction under § 1956); United States v. Hardwell, 80 F.3d 1471, 1483, different results reached on reh'g, 88 F.3d 897, 897-98 (10th Cir. 1996) (stating that the government is not required "to trace the money to a particular illegal drug transaction" to satisfy the statute); United States v. Garcia, 37 F.3d 1359, 1365 (9th Cir. 1994) (finding it "sufficient to prove that the funds in question came from an account in which tainted proceeds were commingled with other funds").
56 United States v. Jackson, 935 F.2d 832, 840 (7th Cir. 1991).
58 The mens rea requirement of § 1956(a) is two-fold: the defendant must "know" the property is dirty and must act with the requisite mens rea included in the subcategory the defendant is charged with violating. 2 WELLENT AL., supra note 7, § 18.14.
The money laundering crimes were intended to address the specific evils of money laundering in the context of drug dealing and organized crime—\textsuperscript{59} not to provide a surrogate crime when, for example, federal prosecutors feel that the predicate offense would not result in punishment commensurate with the severity of the offense.\textsuperscript{60} Furthermore, a defendant need not be found guilty of the predicate crime (e.g., bank fraud, drug dealing) in order to be found guilty of money laundering.\textsuperscript{61}

\textbf{B. Prosecutions Under § 1957}

Unlike § 1956 prosecutions, the federal circuit courts of appeals are in disagreement as to the commingling issue in § 1957 prosecutions.\textsuperscript{62} A majority of circuits have held that the government is not required to trace criminally derived funds in commingled accounts to prove that the subject funds were derived from specified unlawful activity.\textsuperscript{63} Some of the circuits have utilized the reasoning used in § 1956 cases to arrive at this result.\textsuperscript{64} However, the Ninth Circuit, in \textit{United States v. Rutgard}, held that direct tracing is required.\textsuperscript{65}

Jeffrey Rutgard was a physician convicted of mail fraud, false claims to Medicare, and transactions in money derived from these predicate crimes.\textsuperscript{66} He was convicted of engaging in two transactions in money derived from specified unlawful activity because his wife had made two wire transfers to a bank on the Isle of Man from a trust account maintained at a financial institution in San Diego.\textsuperscript{67} This account contained funds derived from numerous deposits, including a deposit of municipal bonds, all of which had their origin in his medical practice.\textsuperscript{68} The court, evaluating the fraud convictions, determined that Rutgard’s entire medical practice, contrary to the government’s theory, was not a fraud and that only certain

\begin{itemize}
  \item \textsuperscript{59} See Pasztor, \textit{supra} note 1.
  \item \textsuperscript{60} See generally Gurulé, \textit{supra} note 1.
  \item \textsuperscript{61} 18 U.S.C. § 1956(a) (2000). The statute only requires the defendant to know that the proceeds derive from or could derive from an unlawful activity. \textit{Id.}
  \item \textsuperscript{62} See \textit{Survey of White Collar Crime}, \textit{supra} note 14, at 1063.
  \item \textsuperscript{63} See 2 \textit{WELLING ET AL.}, \textit{supra} note 7, § 18.15.
  \item \textsuperscript{64} See, e.g., \textit{United States v. Moore}, 27 F.3d 969, 976-77 (4th Cir. 1994).
  \item \textsuperscript{65} \textit{United States v. Rutgard}, 116 F.3d 1270 (9th Cir. 1997).
  \item \textsuperscript{66} \textit{Id.} at 1275.
  \item \textsuperscript{67} \textit{Id.} at 1290.
  \item \textsuperscript{68} \textit{Id.}
deposits could be characterized as emanating from specified unlawful activity. The trust account, therefore, contained commingled funds.

The Ninth Circuit undertook a detailed analysis of § 1957 and § 1956 in order to determine whether direct tracing is required. The court described § 1957 as follows:

The description of the crime does not speak to the attempt to cleanse dirty money by putting it in a clean form and so disguising it. This statute applies to the most open, above-board transaction. The intent to commit a crime or the design of concealing criminal fruits is eliminated. These differences make a violation of § 1957 easier to prove. But also eliminated are references to "the property involved" and the satisfaction of the statute by a design that "in part" accomplishes the intended result. These differences indicate that proof of violation of § 1957 may be more difficult.

... 

It [§ 1957] is a powerful tool because it makes any dealing with a bank potentially a trap for the drug dealer or any other defendant who has a hoard of criminal cash derived from the specified crimes. If he makes a "deposit, withdrawal, transfer or exchange" with this cash, he commits the crime; he's forced to commit another felony if he wants to use a bank. This draconian law, so powerful by its elimination of criminal intent, freezes the proceeds of specific crimes out of the banking system. A type of regulatory crime has been created where criminal intent is not an element. Such a powerful instrument of criminal justice should not be expanded by judicial invention or ingenuity.

This reasoning required the government to trace the funds in order to sustain the § 1957 conviction in this particular case. The court gave several examples of instances where the government could meet is burden of proof without resorting to tracing. These examples include: if the defendant withdrew all of the funds from the account or if there was a presumption that once criminally derived property is deposited, any transfer out of the account is presumed to be of tainted monies. Finally, since § 1957 speaks

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69 See id.
70 See id.
71 Id. at 1290-93.
72 Id. at 1291-92 (citations omitted).
73 Id. at 1292-93.
74 See id. at 1292.
75 Id. at 1292-93. The court declined to adopt this theory, however, reasoning that this would eviscerate the distinction between § 1956 and § 1957. See id.
to “financial transaction[s],” the government can charge the deposit itself as a crime. However, the fact that the transactions “involved” funds obtained from specified unlawful activity alone was not sufficient.

C. Comparison of § 1956 and § 1957

The Ninth Circuit’s analysis in Rutgard is persuasive in that it is based on the plain meaning of the language in the statutes and of the different terms that were used. Since these statutes were enacted at the same time, it seems wholly appropriate to interpret them together. Furthermore, the paltry mens rea requirement in § 1957 obviously would cause judicial reluctance to adopt an overly broad interpretation of that statute’s terms.

If direct tracing is not required to convict under § 1957, essentially the two statutes address the same type of prohibited activity, but the § 1957 crime is easier to prove than the § 1956 offense. In Rutgard, the Ninth Circuit spoke about § 1957 as a crime that “freezes” criminal proceeds out of the banking system. Perhaps § 1957 can best be viewed as a type of prophylactic measure, albeit one that carries harsh sanctions. The fact that § 1956 carries a stiffer penalty than § 1957 may also demonstrate that Congress viewed these crimes differently.

The substantive money laundering crimes are not, however, the only context in which tracing is relevant. The courts have also had to grapple with this dilemma in forfeiture cases.

D. Criminal and Civil Forfeiture

Other federal statutes dealing with the commingling issue are the federal forfeiture statutes. Cases construing these statutes have also re-

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76 See id. at 1292.
77 See id. at 1292-93.
78 See id. at 1290-93.
79 But see John D. Cline, Ninth Cir. Requires Tracing Under Sec. 1957, Causes Conflict, 7 MONEY LAUNDERING L. REP. 1 (May 1997) (arguing that the differences in the two statutes identified by the Ninth Circuit do not justify different tracing rules and that tracing should also be required under § 1956).
80 Rutgard, 116 F.3d at 1291.
82 Id. § 981 (general civil forfeiture); id. § 982 (general criminal forfeiture); id. § 1963 (RICO forfeiture); 21 U.S.C. § 853 (2000) (criminal drug forfeiture); id. § 881 (civil drug forfeiture). While there are numerous criminal and civil forfeiture
quired federal courts to analyze the issue of commingled proceeds. The forfeiture statutes contain different language relating to proceeds than that contained in §§ 1956 and 1957 and have resulted in some differing interpretations as to what constitutes "proceeds" in the context of commingled accounts.83

One of the cases involving this analysis is United States v. Banco Cafetero Panama.84 This case outlines some of the common factual situations presented in civil forfeiture in the context of monies maintained at financial institutions. A civil forfeiture action was brought by the government based upon the theory that funds maintained by a bank in the United States were derived from a criminal drug conspiracy headed by the president of another foreign bank.85 The bank argued that the subject funds were insulated from forfeiture based on the realities of banking practice and banking law: "Banks are not bailees of their depositors' money, and a depositor may not replevy his money as a specific res or follow it into the hands of another bank customer."86 The bank further argued that for the court to hold otherwise would impose burdens of investigation upon banks.87 The court disagreed and held that the funds were forfeited.88

These civil forfeiture cases are to be distinguished from money laundering prosecutions because the forfeiture statute makes reference to statutes, they are similar in that the underlying activity that gives rise to forfeiture is some offense defined by statute. For example, the federal civil forfeiture statutes allow the government to bring an action to "forfeit" property associated with certain criminal offenses. See Stefan D. Cassella, The Uniform Innocent Owner Defense to Civil Asset Forfeiture: The Civil Asset Forfeiture Reform Act of 2000 Creates a Uniform Innocent Owner Defense to Most Civil Forfeiture Cases Filed by the Federal Government, 89 KY. L.J. 653, 654 n.1 (2001) (describing the authority for civil asset forfeiture).


85 Id. at 1157.

86 Id. at 1158.

87 Id.

88 Id. at 1161.
"proceeds traceable to . . . [a narcotics] exchange." The Second Circuit, in *Banco Cafetero*, first outlined three general situations where the tracing problem comes up.

First, the court analyzed "[a]ccount[s] used [s]olely for [d]rug [p]roceeds." This relatively simple situation presents no real analytical difficulty for courts. Even the defendants "grudgingly acknowledge[d]" that these funds may be subject to forfeiture.

Second, the court analyzed "[a]ccount[s] [u]sed for [d]rug [p]roceeds and [o]ther [t]ransactions." This situation presents the commingling problem directly. The defendants, pursuant to their banking practice argument, posited that these commingled funds should be free from risk of forfeiture. The court looked to the legislative history of § 881 and concluded that Congress intended the statute to encompass criminal proceeds that are commingled with clean monies.

The court proceeded to analyze three accounting theories which could be used in these situations: (i) a "drugs-in, last-out rule" (essentially the same as the "lowest intermediate balance rule" from trust and secured transactions law); (ii) the "averaging" rule (essentially a pro-rata type analysis); and (iii) a "drugs-in, first-out" rule. The government argued that it was entitled to select from either the first or third approaches; the court agreed. Interestingly, however, the court wrote:

> Which approach reflects reality in any particular case will depend on the precise circumstances. For example, if a depositor placed a $175 check from his automobile insurer in payment of a damage claim into an account that contained $100 from a drug sale and the next day paid a $175 bill for car repairs, a fact-finder would be entitled to conclude that the $175 withdrawal did not contain "traceable proceeds" of the drug transaction but solely the "traceable proceeds" of the insurance payment, with the tainted deposit remaining in the account.

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90 *Banco Cafetero*, 797 F.2d at 1158.
91 See id.
92 Id. at 1158-61.
93 See id. at 1159.
94 See id.
95 See id.
96 Id. at 1158-59.
97 Id. at 1160.
Finally, the court analyzed the third scenario—"[a]ccount[s] [f]unded at [a]nother [b]ank with [d]rug [p]roceeds." The court relied, primarily, on congressional intent to reach monies exchanged through a series of transactions. The court felt that "intervening" transactions did not permit tainted monies to cease to be criminal proceeds.

The detailed approach taken by the court in Banco Cafetero stands in stark contrast to the "involv[ing]" approach used by most courts in § 1956 and § 1957 prosecutions. One may legitimately wonder whether Congress intended such disparate outcomes based on such small differences in statutory language.

III. SHOULD DIRECT TRACING BE REQUIRED IN MONEY LAUNDERING PROSECUTIONS?

"Proceeds of specified unlawful activity" and "criminally derived property" are relatively new concepts to the criminal law. The commercial law tradition, however, has addressed the concept of proceeds at length in the context of security interests and constructive trusts. For example, assume that A, an automobile dealer, has obtained a bank loan in order to finance his inventory of new cars from B, a commercial bank. B, in order to reduce his exposure in the event of default, takes a security interest in the inventory of new cars (the "collateral"). When A sells the cars to consumers, cash is generated. Although B's security interest is limited to the cars,

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98 Id. at 1161.
99 See id.
100 Id.
101 See discussion supra Parts II.A and II.B. The argument that the resort to such techniques in forfeiture and criminal cases is inappropriate is not without merit and, arguably, is supported by the plain meaning of the money laundering criminal statutes. See 18 U.S.C. §§ 1956-1957 (2000). It would seem that if Congress wished to provide for such techniques it would have done so in the statutes.
102 The differing treatment of "proceeds" in the civil forfeiture context can also be justified on the basis that civil forfeiture often involves collateral consequences to third parties—an individual who receives tainted property subject to civil forfeiture can have that property taken away unless she qualifies as an "innocent owner." Proving that one is an innocent owner can involve substantial cost and hardship. See generally Cassella, supra note 82.
104 Id. § 1957(f)(2).
he retains a security interest in identifiable "proceeds" recognized upon the disposition of the automobiles—i.e., he has a security interest in the cash. 105

If A deposits these funds into a segregated account, B’s task is not difficult in the event of default. However, if A has deposited these monies into an account containing other funds, B is in a much more difficult position from a proof standpoint. Since B’s security interest only covers "identifiable" proceeds, he must trace the proceeds in order to prevail. 106

Courts have developed theories to use in this "tracing" context when the proceeds have been commingled with other funds. 107 The general rule is that "proceeds are 'identifiable' if they can be traced in accordance with the state law governing the transaction." 108

The commercial law’s definition obviously would not be binding on federal courts in criminal cases unless the criminal statute incorporated this meaning, but it would seem to inform courts’ analysis in the absence of other authority. 109 References to state law, at first blush, may seem to be wholly inappropriate in federal criminal cases. Federal courts, however, have looked to state commercial law in federal mail fraud cases to deter-

106 See id.; id. § 9-315(b)(2).
109 See, e.g., Durland v. United States, 161 U.S. 306, 312-13 (1896) (holding that the federal crime of mail fraud reaches conduct that would not have come within the common law definition of "false pretenses"). The Court looked to Congress’s remedial intent in passing the mail fraud statute—holding that if the mail fraud statute only encompassed common law fraud, it would have excluded certain activity that Congress certainly intended to be prosecuted through this statute. Id. at 313. Cf. Carpenter v. United States, 484 U.S. 19 (1987), superseded by statute as stated in United States v. Brumley, 116 F.3d 728 (5th Cir. 1997) (holding that an employee’s misappropriation of confidential information constituted fraud for purposes of the mail fraud statute). In Carpenter, the Court relied, in part, on New York’s common law notion that employees who owe a fiduciary obligation to their employers are prohibited from disclosing confidential information obtained in the course of that relationship. Id. at 27-28. The Court also cited the Restatement (Second) of Agency in arriving at its conclusion. Id. at 28. Notwithstanding Durland, Carpenter seems to support the conclusion that federal courts may look to commercial common law concepts to inform their analysis in certain criminal cases.
mine what constitutes "fraud" and what constitutes "property." This type of analysis can be justified on two grounds. First, did Congress intend to incorporate the common law meaning of the commercial law terms into the federal statute? Second, would a definition of, for example, "fraud," entirely divorced from the generally understood meaning, raise any constitutional "void for vagueness" problems with the statute?

It does not appear that any defendant has made the argument that Congress intended to incorporate any type of common law concept of commingled proceeds in the money laundering statutes. They have usually couched their arguments in terms of challenging the sufficiency of the evidence. Furthermore, as applied, "void for vagueness" challenges to the money laundering statutes have been unsuccessful in the particular cases in which they were raised.

A. The Uniform Commercial Code

Article 9 of the Uniform Commercial Code (the "UCC") is a comprehensive body of commercial law governing secured transactions. Section 9-315 addresses a secured party's right to the proceeds realized upon the disposition of secured collateral. The UCC explicitly addresses commingled funds:

Proceeds that are commingled with other property are identifiable proceeds: . . . (2) if the proceeds are not goods, to the extent that the secured party identifies the proceeds by a method of tracing, including application of equitable principles, that is permitted under law other than this article with respect to commingled property of the type involved.

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10 See Carpenter, 484 U.S. at 25-28 and discussion supra note 109.
11 See, e.g., United States v. Tencer, 107 F.3d 1120, 1125-26 (5th Cir. 1997); United States v. Jackson, 935 F.2d 832, 837 (7th Cir. 1991).
12 See Jackson, 935 F.2d at 838-39.
14 Id. § 9-315(a)(2) ("[A] security interest attaches to any identifiable proceeds of collateral.").
15 Id. § 9-315(b)(2). The official comment elaborates:

[Subsection b] indicates when proceeds commingled with other property are identifiable proceeds and permits the use of whatever methods of tracing other law permits with respect to the type of property involved. Among the "equitable principles" whose use other law may permit is the "lowest intermediate balance rule."

Id. § 9-315 cmt. 3.
As one would expect, the tracing of proceeds is a very difficult thing to prove when funds become hopelessly commingled in bank accounts. To resolve these situations, courts have resorted to legal fictions like the "lowest intermediate balance rule."\(^{116}\) This principle comes from trust law and could apply, for example, when a trustee dissipates trust monies that have been commingled with other funds.\(^{117}\) Section 202, Comment \(j\) of the Restatement of Trusts provides:

\begin{quote}
Effect of withdrawals and subsequent additions. Where the trustee deposits in a single account in a bank trust funds and his individual funds, and makes withdrawals from the deposit and dissipates the money so withdrawn, and subsequently makes additional deposits of his individual funds in the account, the beneficiary cannot ordinarily enforce an equitable lien upon the deposit for a sum greater than the lowest intermediate balance of the deposit.\(^{118}\)
\end{quote}

Illustration 20 to Comment \(j\) follows:

\begin{quote}
A is trustee for B of $1000. He deposits this money together with $1000 of his own in a bank. He draws out $1500 and dissipates it. He later deposits $1000 of his own in the account. B is entitled to a lien on the account for $500, the lowest intermediate balance.\(^{119}\)
\end{quote}

Application of these concepts is easier said than done. Cases where courts have had to grapple with these concepts have necessitated detailed analysis into the daily balances and disbursements made from accounts.\(^{120}\) One


\(^{118}\) Restatement (Second) of Trusts § 202 cmt. j (1959).

\(^{119}\) Id. § 202 cmt. j., illus. 20.

published opinion included a chart showing deposits, withdrawals, and the daily balances in the account.\textsuperscript{121}

Furthermore, unlike the money laundering situation, in the commercial law monies can, in effect, cease to be identifiable proceeds if the account is commingled to the point that there is no rational basis for segregating the funds.\textsuperscript{122} Furthermore, if a debtor bought property with proceeds, that property is also proceeds, but from a proof standpoint, eventually a secured creditor would be unable to meet the "identifiable" test.\textsuperscript{123}

\section*{B. When Using the Commercial Law's Concept of Proceeds is Appropriate}

The commercial law serves functions that are very different from those of the federal criminal laws. However, as federal crimes become increasingly complex and continue to address white collar crime, it is essential that courts have an analytical framework from which to work.\textsuperscript{2} With the increasing use of the money laundering statutes in criminal prosecutions,\textsuperscript{125} these issues will continue to arise.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{121} Id.
\item \textsuperscript{122} See U.C.C. \S 9-315(b)(2) (1999); id. cmt. 3.
\item \textsuperscript{123} See id. cmt. 5, ex. 1.
\item \textsuperscript{124} Federal criminal law has evolved to confront sophisticated crime. This increasing sophistication seems to favor the use of commercial law concepts to inform analysis, particularly in white collar criminal cases. Many of these concepts are entirely new to the criminal law and the statutes themselves provide only minimal guidance. Courts have, generally, looked to the (presumed) common sense intent of Congress to interpret these statutes. See, e.g., United States v. Garcia, 37 F.3d 1359, 1365 (9th Cir. 1994) ("Congress, in drafting the money laundering statutes, did not intend for defendants to be able to avoid the sanction of the statute by commingling funds."). This approach overlooks the existing body of commercial law that is much more concrete but was developed in a much different context.

The money laundering statutes are paradigmatic of many federal criminal statutes in that they were broadly written to effectuate broad, remedial goals. The breadth of these statutes may allow prosecutors flexibility in individual cases. However, this breadth also raises possibilities for abuse. Department of Justice approval is not usually required in order for prosecutors to seek a money laundering conviction, see Abramowitz, \textit{Money Laundering}, supra note 4, and the guidelines provided in the \textit{U.S. Attorneys Manual} are broad and not binding. U.S. DEP’T OF JUSTICE, \textit{U.S. ATTORNEYS MANUAL} 1-1 (1997). Therefore, the consequences of being charged with money laundering depend entirely on the discretion of the individual prosecutor.

\item \textsuperscript{125} See ABRAMS & BEALE, \textit{supra} note 31, at 397.
\end{enumerate}
\end{footnotesize}
Whether federal courts should use the commercial law's notion of proceeds depends upon the objectives Congress had in enacting the statutes. Insofar as they were attempting to freeze the assets of organized crime and drug figures, the money laundering laws seem, in this instance, duplicative of the existing criminal and civil forfeiture laws.\(^{126}\) However, it seems clear that Congress intended to paint with a broad brush; it was clearly attempting to write a broad and harsh law to combat organized crime and drug dealing.\(^{127}\) The money laundering laws achieve this (in addition to providing harsh sentences) by depriving the criminal of the fruits of his crime, thereby making crime unprofitable and making the reinvestment of criminal proceeds impossible.\(^{128}\) This rationale does not support the conclusion that federal courts should narrow their understanding of “proceeds” through the use of commercial law precedents.

However, the popularity of the money laundering laws may indicate that these draconian statutes are being used against not only the organized criminal and large-scale drug dealer, but also against those who do not present such a clear danger of future criminal involvement.\(^{129}\) Such a statute seems most appropriately used against those who pursue crime “as a business” or those who are laundering funds for others—not those whose offenses happen to qualify them for a money laundering charge because of the statutes’ breadth, but who present no real risk of future criminal activity. An expansive definition of criminal proceeds seems appropriate where the Money Laundering Control Act’s remedial purposes are being served (i.e., when the statute is being used against those who are involved in crime “as a business”). The clear intent of Congress is being furthered in this situation.

\(^{126}\) See supra notes 82-102 and accompanying text.

\(^{127}\) See generally Gurulé, supra note 1, at 823-25 (discussing the legislative history behind the Act). Gurulé notes that Congress intended to cut off the “lifeblood” of drug trafficking and organized crime, thwart the activities of professional launderers (who tended to be professionals—accountants, lawyers, bankers), and close a loophole in existing law. Id.

\(^{128}\) See 18 U.S.C. § 981 (2000); id. § 982(a)(1) (stating that a court “shall” order a forfeiture if a person is convicted under § 1956).

If these statutes are being used in a "piling on" manner against those who have committed isolated acts of criminal activity, the intent of Congress is not furthered by an overly expansive definition of "proceeds" in the commingling context. This situation merely constitutes enhanced punishment for the underlying crime. One commentator has argued that, in enacting the Act, Congress was intending to criminalize activity not already covered by existing law. In situations where the predicate crimes do not indicate a risk of future criminal involvement, the money laundering statutes, presumably, would be used appropriately if the defendant actually "laundered" the specific dirty money. In these contexts, tracing seems appropriate where the defendant is being charged based on a pure "laundering" theory.

One can, however, legitimately argue that drug dealing and organized crime were not the only targets of these laws based on the statutory text itself. Section 1956(c)(7)(D) lists the predicate crimes that can give rise to criminal proceeds. The list is long and relates to numerous topics, some wholly unrelated to drug dealing or organized crime as those terms are generally understood. A cursory review of these crimes and the fact that, under existing law in many circuits § 1957 is a strict liability offense, indicate that a huge number of crimes can give rise to a money laundering charge. One should also remember that these crimes were enacted under the heading "Money Laundering Control Act"—not "An Act to Criminalize Unlawful Activity that Involves Money." The list of predicate acts leads one to wonder whether the money laundering crimes were also intended to serve the purpose of providing a vehicle for criminal prosecution when the government cannot, for some reason, charge or convict the defendant of the underlying criminal activity which gave rise to the criminal proceeds.

IV. CONCLUSION

The broad definition of "proceeds" in the commingling context is appropriate where Congress's remedial purposes are being served. Where

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130 See Gurulé, supra note 1, at 853 (arguing that the broad construction given to statutory language in § 1956 can result in conviction for conduct already punished under other criminal statutes).

131 18 U.S.C. § 1956(c)(7)(D)(2000). Section 1957(f)(3) incorporates the predicate acts listed in § 1956(c)(7)(D). Id. § 1957(f)(3). These predicate acts include destruction of aircraft, espionage, bank fraud, copyright infringement, food stamp fraud, and violations of the Foreign Corrupt Practices Act. Id. This list of predicate acts looks very similar to that provided in the RICO statute. See id. § 1961(1).
there is no risk of future criminal involvement or where pure money laundering is "in and of itself" the only crime, the commercial law analog seems to point in the right direction. Adopting different rules of statutory construction for different cases is completely unacceptable and, at least under § 1956, not justified by the statutory language. Therefore, this argument really becomes one about prosecutorial policy rather than about the literal interpretation of these statutes.

No one can doubt the power that federal prosecutors possess in white collar cases with the money laundering statutes in their arsenal. The statutes' broad provisions and harsh sanctions have certainly leveled the playing field in the continuing fight against those who, before 1986, had somehow escaped prosecution by laundering their funds or those who were allowed to reinvest ill-gotten gains in a continuing criminal business.132 Given the power of this weapon, one would hope that it is being used only against those whom Congress had in mind when it enacted the legislation.133

Given the circuit split on the § 1957 commingling issue134 and conceivable "void for vagueness" challenges to § 1956,135 the money launder-

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132 See Elkan Abramowitz, The Times Are Changing for Money Laundering Trials, 8 Money Laundering L. REP. 1 (Aug. 1997) [hereinafter Abramowitz, The Times Are Changing] (arguing that one reason for the decrease in the number of white collar criminal trials because of guilty pleas is the threat of a money laundering charge). The author states:

The mere threat of a money laundering charge—the ease with which it can be applied and the disproportionately harsh sentences that these offenses carry under the Sentencing Guidelines—creates an overwhelming pressure for many white-collar defendants accused of relatively simple frauds to plead guilty and avoid the heightened risks of trial.

Id.

133 There are commentators who feel that the money laundering statutes have been used inappropriately from a policy standpoint. See Gurulé, supra note 1, at 853. On the other hand, if one views the job of the federal prosecutors as one to charge a defendant with every crime of which he may be convicted, there is no inappropriate use of these statutes. The broad language in many federal criminal statutes and the policies in the U.S. Attorneys Manual, while not binding, show that the prosecutors' job indeed entails a large degree of discretion. For a discussion of how some federal decisions interpreting the money laundering laws "render virtually every crime with a financial component an act of money laundering as well," see Abramowitz, The Times Are Changing, supra note 132, at 3.


135 See, e.g., United States v. Tencer, 107 F.3d 1120, 1125-26 (5th Cir. 1997); United States v. Jackson, 935 F.2d 832, 837 (7th Cir. 1991).
ing statutes seem to be appropriate subjects for Supreme Court review. Given the Supreme Court’s decision in *Durland*, it seems unlikely that the Court would promulgate a strict standard of what constitutes “proceeds” in the money laundering context. Some limit on the use of these statutes is foreseeable, however, since an intent to launder funds need not be shown for a conviction under § 1957. The Internet and increased international business activity will likely increase the need for prosecutors to use these statutes to prosecute sophisticated criminal activity and will likely bring up even more complicated commingling issues. A uniform tracing rule where commingled proceeds are involved would provide a refreshing level of uniformity.

Lastly, efforts should be made to treat the money laundering crimes as the powerful weapons that they really are. The statutes’ broad terms and harsh sanctions make these laws similar to RICO, another powerful weapon used to prosecute those involved in the drug trade and organized crime. RICO is viewed as the ultimate federal crime and Department of Justice policies, justifiably, require detailed steps to be followed before charges are brought. One of these steps is Department of Justice approval. Some formal review process should also be required for money laundering prosecutions. This process would ensure that a money laundering charge is not merely being used as enhanced punishment for the underlying crime, and that the intent of the Money Laundering Control Act—to combat large-scale drug dealing and organized crime—is being furthered through the use of this device.

While one can envision many undesirable consequences that flow from overly broad criminal statutes, we must keep in mind that this is exactly what Congress intended when it enacted many of the crime-fighting measures of the past three decades. The intent was to cover activity that previously “fell through the cracks” of existing statutes. The breadth in

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139. *See* Abramowitz, *Money Laundering*, *supra* note 4 (noting that Department of Justice approval makes RICO less appealing to prosecutors since the enactment of the money laundering statutes).
140. The number of instances of money laundering would render impractical a process as detailed as that required for RICO. However, a number of procedures short of formal Department of Justice approval could be developed to ensure appropriate use of prosecutorial discretion.
these statutes gave prosecutors needed flexibility to charge offenders who had an uncanny ability to stay one step ahead of the law.

The development of overly detailed tracing rules would, in some instances, completely thwart this goal and turn a criminal trial into something akin to an accounting shell game with each side calling expert witnesses to describe how, based on an accounting theory or banking practice, the funds that left the account could not have possibly been the dirty money. It is completely natural, however, to want to see more concrete evidence than that the funds merely “involved” criminal proceeds, particularly in cases involving isolated acts of criminal activity. This is the dilemma with the money laundering laws and, indeed, with most statutes designed to facilitate prosecution of the most sophisticated criminals. The resolution of this problem must necessarily lie with individual prosecutors.

No one should doubt the utility or necessity of the money laundering laws. They serve the necessary purpose of prosecuting those whose activity allows criminal enterprises to flourish and makes detection less likely. These purposes necessarily require a large degree of flexibility which, in some individual instances, can lead to the inappropriate use of these statutes. By providing some limitations on their use, the effectiveness of these laws is not curtailed. Rather, it is assured that the true purposes of these statutes are being served.