The Criminally Derived Property Statute: Constitutional and Interpretive Issues Raised by 18 U.S.C. § 1957

D. Randall Johnson
ARTICLE


D. RANDALL JOHNSON*

I. INTRODUCTION .................................................. 1292
II. BACKGROUND OF SECTION 1957 ............................... 1298
III. THE ELEMENTS OF SECTION 1957, INTERPRETIVE PROBLEMS, AND SUGGESTED JURY INSTRUCTIONS ........ 1305
   A. The Elements ................................................. 1305
      1. Defendant Knowingly Engaged or Attempted to Engage in a Monetary Transaction .............................. 1305
      2. The Defendant Knew the Transaction Involved Criminally Derived Property .... 1310
         a. The Problem of "Tracking" the Language of the Statute ................. 1311
         b. Knowledge of "Criminally Derived Property": Are Misdemeanors Included? .................. 1311
         c. After-Acquired Knowledge .................. 1313
         d. Actual Knowledge, Willful Blindness, and Subjective Intent .......... 1314
      3. The Value of Criminally Derived Property Exceeds $10,000 .................. 1320
         a. Structured Transactions .................. 1320

* Visiting Assistant Professor, Chicago Kent College of Law, Illinois Institute of Technology. B.S., United States Military Academy, 1980; J.D., University of Alabama, 1988; LL.M., Yale Law School, 1992.
I. INTRODUCTION

Congress enacted the Money Laundering Control Act of 1986¹ in response to calls for more effective means to combat the growing problem of money laundering—"the process by which one conceals the existence, illegal source, or illegal application of income, and then disguises that income to make it appear legitimate."² The most far-reaching of the Act's provisions are the two new criminal statutes codified at sections 1956 and 1957 of Title 18 of the United States Code. Although both of these statutes have been

---


called money laundering statutes, only section 1956 criminalizes solely conduct necessarily related to an effort to conceal or disguise income. Section 1957, in contrast, criminalizes certain conduct without regard to whether it is part of an effort to conceal or disguise income. Entitled "Engaging in monetary transactions in property derived from specified unlawful activity," section 1957 criminalizes "knowingly engag[ing] or attempt[ing] 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." A conviction under section 1957 carries a maximum penalty of ten years incarceration, criminal fines, and the forfeiture of all property involved in or traceable to the offense.

Despite the enactment of section 1957 as part of a comprehensive money laundering control package, Congress omitted the money laundering element from section 1957 with the very purpose of criminalizing a category of conduct that is completely unrelated to money laundering activity—engaging in certain ordinary commercial transactions that, while involving criminally derived property, are in no way designed to conceal or disguise that property. Moreover, Congress specifically intended that liability under section 1957 should extend both to those who actually engage in the criminal activity that generates illegitimate funds and to those who merely receive or otherwise handle illegitimate funds while providing ordinary, legitimate goods or services. Indeed, the legislative history of section 1957 reveals that Congress fully intended that the archetypical section 1957 defendant would be the otherwise law-abiding citizen who is alleged to have simply knowingly accepted illegitimate funds as payment for ordinary, legitimate goods or services, or otherwise knowingly handled illegitimate funds while providing these services. The principal legislative doc-

5. Id. § 1957(b)(1).
6. Id. § 1957(b)(1)-(2) (providing that a court may impose any fine authorized under Title 18 or, alternatively, not more than twice the amount of criminally derived property involved in the transaction).
7. 18 U.S.C. § 982(a). In addition, commission of an offense under § 1957 may give rise to civil forfeiture proceedings. See id. § 981(a)(1)(A).
A person who engages in a financial transaction using the proceeds of a designated offense would violate this section if such person knew that the subject of the transaction were the proceeds of any crime. The House Judiciary Committee's Subcommittee on Crime is aware that every person who does business with a drug trafficker, or any other criminal, does so at some substantial risk if that person knows that they are being paid with the proceeds of a crime and then uses that money in a financial transaction. As argued by Representative Clay Shaw, "I am concerned about a broker who might take a quarter of a million dollars of cash down to Fort Lauderdale taking that as payment. I am concerned about the realtor who is going to make a $50,000 or $100,000 commission on a deal by knowingly doing it. I am sick and tired of watching people sit back and say, 'I am not part of the problem, I am not committing the crime, and, therefore, my hands are clean even though I know the money is dirty I am handling.' The only way we will get at this problem is to let the whole community, the whole population, know they are part of the problem and they could very well be convicted of it if they knowingly take these funds. If we can make the drug dealers' money worthless, then we have really struck a chord, and we have hit him where he bruises, and that is right in the pocketbook. You have outstanding business people who are otherwise totally moral who are accepting these funds and profiting greatly from drug trafficking that is going on throughout this country, and this will put a stop to it."  

Attacking criminal activity indirectly by threatening not just criminals but also those who deal commercially with criminals is not a new concept. Federal laws prohibiting the sale or receipt of various types of stolen property have a long history. Section 1957, however, is fundamentally different from its predecessors because of its expansive definition of the term "criminally derived property." The term applies not only to funds stolen or

---

9. Id. at 13 (quoting Markup by the Subcomm. on Crime of H.R. 5077, Money Laundering Control Act of 1986 [hereinafter Markup of H.R. 5077], at 22-23 (July 16, 1988)).
10. E.g., 18 U.S.C. § 2313 (criminalizing the sale or receipt of stolen vehicles); id. § 2315 (criminalizing the sale or receipt of stolen goods, securities, moneys, or fraudulent state tax stamps); id. § 2317 (criminalizing the sale or receipt of stolen livestock).
obtained by fraud, but also to a vast category of property colloquially referred to as "profits" of criminal activity, such as a drug dealer's income from illegal drug sales.\textsuperscript{11} For this reason, the probability of a conviction based on marginal or insufficient evidence is substantially greater under section 1957 than under its predecessors. Many juries in section 1957 cases might simply assume—once the government has established that the source of funds involved in a monetary transaction either was a professional criminal, fitted common stereotypes of how a professional criminal "looks and acts," or was simply "reputed" to be a professional criminal—that those facts alone are sufficient to justify further findings 1) that the transaction involved funds derived from criminal activity and, correspondingly, 2) that any individual (including the defendant) who dealt commercially with that person "must have known" that criminally derived property was involved.

Indeed, in the very first reported case under section 1957 involving the archetypical section 1957 defendant—a defendant alleged to have knowingly handled tainted funds but not alleged to have engaged in the criminal activity that generated the funds—the jury returned a verdict of guilty notwithstanding the lack of any evidence affirmatively showing that the defendant knew that the funds were derived from criminal activity. The defendant in United States v. Campbell\textsuperscript{12} was a real estate agent who had arranged for the purchase of a home by a man who turned out to be a drug dealer.\textsuperscript{13} The jury's verdict of guilty contained implicit findings that the defendant knew that 1) the buyer of the home was a drug dealer and that 2) the funds used in the purchase were the profits of illegal drug activity. Both findings, however, were based

\textsuperscript{11} See id. § 1957(f)(2) ("[T]he term 'criminally derived property' means any property constituting, or derived from, proceeds obtained from a criminal offense ") (emphasis added); H.R. Rpt. No. 855, supra note 8, at 14 (observations of Rep. McCollum) (declaring that § 1957 applies to funds obtained from "peddling drugs"); see also United States v. Johnson, 971 F.2d 562, 568 (10th Cir. 1992) (stating that the Money Laundering Control Act appears to have been aimed at "profits of drug activity"); cf. Russello v. United States, 464 U.S. 16, 20-21 (1983) (determining that a RICO provision calling for forfeiture of "any interest acquired in violation of section 1952," 18 U.S.C. § 1963(a)(1), applies to "profits and proceeds" received as a result of RICO activity).


\textsuperscript{13} Id. at 1260-62.
primarily on evidence that the buyer "looked and acted" like a criminal: the buyer "drove a red Porsche__, owned an expensive new motor boat __, carried a portable cellular phone __, flashed $20,000 in cash __, [and] drank beer away from his place of business during the business day"14 As will be shown in this Article, although this evidence may have established beyond a reasonable doubt that the real estate agent suspected that criminally derived property was involved, it did not establish that she knew that criminally derived property was involved.

Although the jury's verdict in Campbell ultimately was vacated,16 the case demonstrates that verdicts of guilty under section 1957 based on questionable levels of evidence are more than just a hypothetical possibility: section 1957 poses a very real danger to bankers, merchants, and other persons whose businesses require them to handle funds of members of the public. Any banker, merchant, or other businessperson who accepts funds from a customer or client who arguably "looks and acts" like a professional criminal, or who arguably is "reputed" to be a professional criminal, does so at some risk of a felony conviction and lengthy prison term if it later turns out that the funds were indeed property derived from crime. As this Article will show, unrestrained application of section 1957 could not only lead to the conviction of innocent persons—those whom Congress did not intend to brand as criminals—it could result, in the words of one commentator, in the transformation of persons merely suspected of criminal activity "into commercial pariahs that bankers and businessmen will shun."

The purpose of this Article is to examine section 1957 and suggest ways to minimize its possible abusive application. Part II provides general background information concerning section 1957's

14. Id. at 1265.
15. The trial judge concluded that the evidence was insufficient to support the verdict and entered judgment of acquittal, id. at 1264, but the Fourth Circuit reversed. United States v. Campbell, 977 F.2d 854 (4th Cir. 1992), cert. denied, 122 L. Ed. 2d 716 (1993). In so holding, the court of appeals focused on the irregularity of the transaction and on evidence that Campbell stated to an acquaintance that the funds involved "may have been drug money." Id. at 859. The court of appeals affirmed the trial court's conditional grant of a new trial. Id. at 860. The Campbell case is discussed more fully infra part IV.B.
CRIMINALLY DERIVED PROPERTY STATUTES

history, purpose, and potential applications, as well as the differences between section 1957 and its companion statute, section 1956. Part III outlines the elements of section 1957, identifies potential interpretive problems raised by the statute's wording, and suggests jury instructions to reduce the possibility of convictions based entirely on conduct that, although within section 1957's literal terms, was not meant by Congress to be criminalized. Part IV analyzes several constitutional issues raised by section 1957. The Article concludes that section 1957 is not unconstitutionally vague and, when properly construed, is not facially invalid under the First Amendment's overbreadth doctrine.

Nonetheless, to ensure that section 1957 does not encroach upon constitutionally protected associational rights, jury instructions must emphasize that the jury is required to acquit the defendant unless the evidence affirmatively establishes, beyond a reasonable doubt, that the defendant knew that the transaction at issue involved criminally derived property. Juries must be instructed that guilty verdicts may not be based on evidence that the defendant merely suspected that criminally derived property was involved, nor may guilty verdicts be based merely on evidence that the source of the property at issue "appeared" or was "reputed to be" a criminal. Indeed, juries must be instructed that a conviction may not be based merely on evidence that the source of the property was a criminal. In addition, and importantly, the courts must carefully review verdicts of guilty under section 1957 to ensure that juries have in fact complied with these instructions.

Finally, the Article concludes that a 1988 amendment to section 1957 exempting "transaction[s] necessary to preserve a person's right to representation as guaranteed by the Sixth Amendment to the Constitution" should be replaced with more precise language specifying the extent to which the receipt of bona fide attorneys' fees is exempt from liability under the statute. Statutory incorporation of current Justice Department prosecution standards, if extended to include fees received for legal representation in a civil matter, should accomplish this objective.

II. BACKGROUND OF SECTION 1957

In 1984, the President's Commission on Organized Crime released an interim report, The Cash Connection: Organized Crime, Financial Institutions, and Money Laundering.\(^\text{18}\) The interim report described the dramatic growth of money laundering, the connection of money laundering to organized crime, and the inability of existing statutes and regulations to address the problem adequately.\(^\text{19}\) It then proposed several administrative and legislative changes, as well as voluntary guidelines for financial institutions, that the Commission believed would aid the government in its war against money laundering.\(^\text{20}\) In response to the interim report and other suggestions, Congress enacted the Money Laundering Control Act of 1986.\(^\text{21}\) Among other things, the Act strengthened the Bank Secrecy Act's currency reporting requirements,\(^\text{22}\) created a new antistructuring offense,\(^\text{23}\) granted broader investigative powers to federal agencies,\(^\text{24}\) created the new substantive money laundering offenses codified at section 1956,\(^\text{25}\) and created the new criminally derived property offense codified at section 1957\(^\text{26}\).

Before the enactment of the Money Laundering Control Act, criminal liability could be imposed on an individual for engaging in money laundering activity only through indirect means. These indirect means consisted of imposing criminal liability on the money launderer for: 1) conspiring to engage in the criminal activity that generated the illegitimate funds; 2) violating or conspiring to commit criminal activity in violation of the Travel Act;\(^\text{27}\) and 3) violating or conspiring to violate the currency transaction reporting pro-

---

19. Id. at 58-82.
20. Id.
22. Id. § 1354, 100 Stat. at 3207-22 (codified at 31 U.S.C. §§ 5313, 5324 (1988)).
23. Id.
27. Id. § 1952.
visions of the Bank Secrecy Act. None of these measures proved entirely adequate and, consequently, section 1956 was enacted to criminalize money laundering activity directly. Section 1956 defines and prohibits three separate money laundering offenses. The first is the "financial transaction" money laundering offense and is defined and prohibited at subsection (a)(1); it applies to financial transactions or attempted financial transactions involving proceeds of unlawful activity. The second offense is the "extraterritorial transportation" money laundering offense and is defined and prohibited at subsection (a)(2); it applies to the extraterritorial transportation or attempted extraterritorial transportation of monetary instruments or funds involving, or represented to be, proceeds of

28. 31 U.S.C. §§ 5311-5324. For a comprehensive discussion of government efforts to prosecute money laundering activity prior to the enactment of the Money Laundering Control Act of 1986, see Strafer, supra note 16, at 150-57. As the Strafer article points out, the chief obstacle facing the government's attempts to impose conspiracy liability on a suspected money launderer was the principle established in United States v. Falcone, 109 F.2d 579 (2d Cir.), aff'd, 311 U.S. 205 (1940), and Direct Sales v. United States, 319 U.S. 703 (1943). Strafer, supra note 16, at 150-51. Those two cases established that a businessman does not become a member of a conspiracy to engage in illegal activity simply by providing ordinary, legitimate goods or services to the perpetrator of the illegal activity, even if the businessman does so with knowledge that the goods or services will be used to facilitate the illegal activity. Direct Sales, 319 U.S. at 713; Falcone, 109 F.2d at 581. The businessman also must provide the goods or services with intent to "further, promote, and cooperate in" the illegal enterprise. Direct Sales, 319 U.S. at 711. As a result of this principle, in virtually every reported case upholding the conviction of a money launderer for conspiring to engage in the illegal activity that generated illegitimate funds, the money launderer was an active participant in the illegal enterprise itself. Strafer, supra note 16, at 153-57 (citing cases). One of the few cases inconsistent with this view is United States v. Loften, 518 F. Supp. 839 (S.D.N.Y. 1981). The court denied a motion to dismiss a RICO conspiracy indictment of an attorney charged with knowingly assisting his client in the investment of illegitimate funds, even though the attorney was not charged with engaging in the activity that generated the funds. Id. at 844; see Strafer, supra note 16, at 156-57.

Because the Travel Act, 18 U.S.C. § 1952, criminalizes inter alia the intention to "facilitate" an ongoing, continuous illegal business enterprise, government efforts to prosecute money launderers under the Travel Act have been somewhat more successful. Strafer, supra note 16, at 154-55. Nonetheless, Travel Act prosecutions of money launderers is limited to "individuals who knowingly distribute and launder proceeds of an unlawful activity as defined in [18 U.S.C.] section 1952(b)." United States v. Lignarolo, 770 F.2d 971, 978 n.11 (11th Cir. 1985), cert. denied, 476 U.S. 1105 (1986), quoted in Strauss, supra note 16, at 155.

For a discussion of problems incurred by the government in prosecuting suspected money launderers for violating or conspiring to violate the provisions of the Bank Secrecy Act, see infra part IIIA.

unlawful activity. To commit either of the first two section 1956 offenses, an individual must: 1) know that proceeds of unlawful activity are involved in the transaction or transportation at issue and 2) either a) intend to promote specified unlawful activity, b) know that the transaction or transportation at issue is designed to conceal or disguise the monetary instruments or funds involved, or c) know that the purpose of the transaction or transportation is to avoid a state or federal transaction reporting requirement. The third money laundering offense under section 1956 is a “financial transaction sting offense” and is defined and prohibited at subsection (a)(3). It was added by amendment in 1988 and imposes liability for engaging in financial transaction money laundering offenses even when the property involved is “property represented by law enforcement officers to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity.” The property need not be the actual proceeds of unlawful activity. The purpose of this offense is to provide federal authorities with the ability to use government money during undercover sting operations to achieve convictions under the financial transaction prong of section 1956. A conviction under any provi-

30. 18 U.S.C. § 1956(a)(2) (1988 & Supp. II 1990). The lone exception is the offense defined and prohibited at subsection (a)(2)(A) of § 1956, which criminalizes the extraterritorial movement or attempted movement of monetary instruments or funds “with the intent to promote the carrying on of specified unlawful activity.” Id. § 1956(a)(2)(A). By its terms, subsection (a)(2)(A) applies to both illegitimate and legitimate funds (even when not represented to be illegitimate).

31. Id. § 1956(a)(1)-(2). With respect to the financial transaction offense only, this final element also can be established by showing that the defendant engaged or attempted to engage in a financial transaction “with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986.” Id. § 1956(a)(1)(A)(ii). Neither the extraterritorial movement offense, § 1956(a)(2), nor the financial transaction sting offense, § 1956(a)(3), contains any similar tax evasion money laundering provision.


34. The legislative history of subsection (a)(3) of § 1956 provides:

This amendment would permit undercover enforcement officers to pose as drug traffickers in order to obtain evidence necessary to convict money launderers. The present statute does not provide for such operations because it permits a conviction only when the laundered money “in fact involves the proceeds of specified unlawful activity,” 18 U.S.C. § 1956(a)(1). Since money provided by an undercover officer posing as a drug trafficker does not “in fact” involve drug money, the laundering of such money is not presently an offense under the statute.
sion of section 1956 carries a maximum penalty of twenty years imprisonment, criminal fines, and the forfeiture of all property involved in or traceable to the offense.\textsuperscript{35}

The other new substantive criminal offense created by the Money Laundering Control Act is the criminally derived property offense defined and prohibited at section 1957 \textsuperscript{36} Both sections 1956 and 1957 apply only to transactions that involve funds or property generated by criminal activity or, with respect to section 1956, funds represented to be the proceeds of crime.\textsuperscript{37} The two statutes differ, however, in two key respects. First, section 1956 contains no minimum value threshold, while section 1957 applies only to transactions involving tainted property of value greater than $10,000.\textsuperscript{38} Second, section 1956 generally applies only to transactions that are in some way designed to further unlawful activity or conceal or disguise the proceeds of unlawful activity,\textsuperscript{39} an element not present in section 1957 Thus, unlike section 1956, section 1957 criminalizes certain conduct not necessarily related to an effort to launder money

This latter distinction was highlighted recently by the Tenth Circuit in \textit{United States v. Sanders}.\textsuperscript{40} In that case, a drug dealer was convicted after a jury trial on one count of violating section 1956(a)(1)(B)(i) through the purchase of a Volvo automobile and one count of violating section 1956(a)(1)(B)(i) through the purchase of a Lincoln automobile.\textsuperscript{41} The defendant purchased both automobiles at a commercial car dealership.\textsuperscript{42} The evidence was clear that the defendant had purchased the automobiles with proceeds from his unlawful drug activity; however, there was no evi-

\footnotesize{\textsuperscript{35} The maximum penalty for a violation of § 1956 is 20 years imprisonment, a fine of $500,000 or twice the value of the property involved in the activity giving rise to conviction, or both. 18 U.S.C. § 1956(a)(1)-(3) (1988 & Supp. II 1990).


\textsuperscript{37} 18 U.S.C. §§ 1956(c)-(e), 1957(a) (1988 & Supp. II 1990). The lone exception is the § 1956(a)(2)(A) offense, which applies to both illegitimate and legitimate funds (even when not represented to be illegitimate). \textit{See supra} note 30.


\textsuperscript{40} 928 F.2d 940 (10th Cir.), \textit{cert. denied}, 112 S. Ct. 142 (1991).

\textsuperscript{41} \textit{Id.} at 945.

\textsuperscript{42} \textit{Id.} at 944-46.}
dence that the defendant's purpose in purchasing the Volvo was to conceal or hide the tainted proceeds. He was simply enjoying his ill-gotten gains. Similarly, the only evidence that the defendant's purpose in purchasing the Lincoln was to conceal or hide the tainted drug proceeds was that he titled the car in his daughter's name and that his wife signed her daughter's name to the purchase agreement.

On appeal, the government argued that subsection (a)(1)(B)(i) should be interpreted broadly to criminalize all commercial transactions made with knowledge that proceeds of unlawful activity are involved, regardless of whether the transactions are also designed to conceal or disguise those proceeds. The court of appeals rejected the government's argument and reversed the convictions. Although the court noted that "the Lincoln purchase clearly presents a closer case in favor of conviction than the Volvo purchase," the court concluded that the evidence was insufficient to support either conviction. The court noted that, by its terms, subsection (a)(1)(B)(i) applies to transactions "designed to conceal or disguise the nature, the location, the source, the ownership or the control of the proceeds of specified unlawful activity." Therefore, the court concluded, the government's asserted interpretation of section 1956 would conflict with Congress' express intent and turn section 1956, a money laundering statute, into a "money spending statute."

Had the defendant in Sanders been prosecuted under 18 U.S.C. § 1957, the government may well have been able to support convictions for the purchase of each automobile. Unlike section 1956, section 1957 is indeed a "money spending statute" in the sense that a criminal can violate it by simply knowingly spending more than $10,000 of ill-gotten gains, without any other unlaw-

43. Id. at 946.
44. Id.
45. Id. at 945-46.
46. Id. at 946.
47. Id.
48. Id. at 947.
50. Id.
51. Obviously, the government would have had to establish that each transaction involved funds exceeding $10,000 in value. See supra note 38 and accompanying text.
ful purpose. Section 1957 is also a "money receiving statute" in the sense that the knowing receipt or other handling of more than $10,000 of tainted funds or property, without any other unlawful purpose, can constitute a violation of the statute.\(^5\)

Section 1957 is a money "laundering" statute only in the sense that, under some circumstances, it can be used by prosecutors to attack money laundering activity indirectly. One example would be when prosecutors suspect that an individual has engaged in a monetary transaction with the purpose of laundering money but believe they lack sufficient evidence to prove such unlawful purpose. If the prosecutors nonetheless believe the evidence is sufficient to support a section 1957 conviction, they can still prosecute the individual, albeit under section 1957 and not 1956, in an attempt to put the suspected money launderer behind bars.

Another example along this line is when prosecutors believe they have sufficient evidence to support a section 1956 conviction and draft the indictment to include a count charging a violation of section 1957 based on the same monetary transaction. Their purpose in doing so simply is to reduce the defendant's chances of gaining an outright acquittal at trial. As an illustration, suppose that federal prosecutors have information that an individual deposited $20,000 in proceeds from specified unlawful activity in a bank with knowledge that the funds were proceeds of unlawful activity. The prosecutors also have information that the individual did so with knowledge that the purpose of the transaction was to conceal or disguise the $20,000. The latter information—which if true changes the nature of the transaction from one that might have been associated with money laundering activity to one that was money laundering activity—leads the prosecutors to seek an indictment with a count charging the suspect with a violation of section 1956(a)(1)(B)(i).

Because the suspect's conduct also constitutes a violation of section 1957, the prosecutors seek an additional count charging the suspect with a violation of that statute. Although the prosecutors' main goal is to achieve a section 1956 conviction, the addition of the section 1957 count will lessen the suspect's chances of gaining an outright acquittal at trial. If at trial the prosecutors encounter

difficulties meeting their burden of proof with respect to the last element of a section 1956 offense (i.e., the defendant knew that the purpose of the transaction was to conceal or disguise the tainted funds), they can still achieve a conviction, albeit under section 1957 instead of section 1956.

Because prosecutions under section 1956 require proof that the defendant knew that the purpose of the transaction was to commit money laundering, prosecutors attempting to achieve a conviction under that section will often face many of the same evidentiary obstacles faced by prosecutors attempting to convict suspected money launderers for conspiracy to engage in the illegal activity that generated the illicit funds. In many cases, a conviction under section 1956 will require proof of extensive communications between the suspected money launderer and the criminal or criminal enterprise that generated the funds, as well as the nature of those communications, in order to show that the suspected money launderer realized that the criminal was not simply spending illicit funds. Such evidence may not be available; section 1957 is available as an alternative when it is not.

53. See supra note 31 and accompanying text.
54. See supra note 27 and accompanying text.
55. An interesting question is whether, assuming the defendant in this hypothetical is convicted under both the § 1956 and § 1957 counts, the double jeopardy clause would prohibit the sentencing court from imposing cumulative punishments. Under Blockburger v. United States, 284 U.S. 299 (1932), the double jeopardy clause prohibits the imposition of multiple punishments if one of the offenses of conviction is a lesser-included offense of the other, i.e., all of the elements of one of the offenses constitute elements of the other. Id. at 304. Under this standard, in the hypothetical, the imposition of cumulative punishments would not be barred because one element of a § 1957 offense—the $10,000 threshold—is not included within the § 1956 offense. However, the Blockburger test is simply a "rule of statutory construction," a guide to determining whether the legislature intended multiple punishments. Grady v. Corbin, 495 U.S. 508, 517 (1990) (citation omitted). A strong argument could be made that Congress did not intend the imposition of multiple punishments for situations in which the defendant has been convicted of both a § 1956 offense and a § 1957 offense based on the same monetary transaction.

The double jeopardy clause, however, does not bar imposition of a punishment for committing a § 1957 violation and a separate punishment for committing the underlying offense that gave rise to the criminally derived property forming the basis of the § 1957 offense. United States v. Lovett, 964 F.2d 1029, 1041-43 (10th Cir.) (holding that double jeopardy was not violated by the imposition of separate punishments for monetary transactions derived from unlawful activity and for the unlawful activity), cert. denied, 113 S. Ct. 169 (1992); see also United States v. Edgmon, 952 F.2d 1206, 1212-14 (10th Cir. 1991) (holding
III. The Elements of Section 1957, Interpretive Problems, and Suggested Jury Instructions

A. The Elements

Subsection (a) of section 1957 reads in its entirety as follows: "Whoever, in any of the circumstances set forth in subsection (d), 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)." Subsection (a)'s reference to the "circumstances set forth in subsection (d)" merely provides for extraterritorial application of the statute. As discussed below, the following constitutes the elements of a section 1957 offense that the government should be required to include in charging instruments and prove beyond a reasonable doubt at trial: 1) the defendant knowingly engaged or attempted to engage in a monetary transaction; 2) the defendant knew that the transaction involved criminally derived property; 3) the value of the criminally derived property involved in the transaction exceeded $10,000; and 4) the property involved in the transaction was derived from specified unlawful activity.

1. The Defendant Knowingly Engaged or Attempted to Engage in a Monetary Transaction

The first element of a section 1957 offense is readily discernable from the statute's language. The statute defines "monetary transaction" as "the deposit, withdrawal, transfer, or exchange, in or af..."
fecting interstate or foreign commerce, of funds or a monetary instrument by, through, or to a financial institution (as defined in section 5312 of title 31)." By thus incorporating the broad definition of "financial institution" found in 31 U.S.C. § 5312, the exchange of funds or monetary instruments in a vast array of commercial settings will qualify as "monetary transactions" under section 1957.

59. Id. § 1957(f)(1). The statute further provides that 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 inclusion of this language is discussed infra part IV.C.

The term "monetary instrument," as used in § 1956 and § 1957, is much broader than the term "monetary instrument" as currently defined in the regulations implementing the Bank Secrecy Act. Personal checks, bank checks, and money orders are "monetary instruments" under § 1956 and § 1957 regardless of whether they are in bearer form or otherwise. 18 U.S.C. §§ 1956(c)(5), 1957(f)(1) (1988 & Supp. II 1990). In contrast, personal checks, bank checks, and money orders are "monetary instruments" under the Bank Secrecy Act only if "in bearer form, endorsed without restriction, made out to a fictitious payee or otherwise in such form that title thereto passes upon delivery." 31 C.F.R. § 103.11(m)(iii) (1992).

60. Section 1957 incorporates the Bank Secrecy Act's definition of "financial institution" by reference. Id. The Bank Secrecy Act defines "financial institution" as:

(A) an insured bank (as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h)));
(B) a commercial bank or trust company;
(C) a private banker;
(D) an agency or branch of a foreign bank in the United States;
(E) an insured institution (as defined in section 401(a) of the National Housing Act (12 U.S.C. 1724(a)));
(F) a thrift institution;
(G) a broker or dealer registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.);
(H) a broker or dealer in securities or commodities;
(I) an investment banker or investment company;
(J) a currency exchange;
(K) an issuer, redeemer, or cashier of travelers' checks, checks, money orders, or similar instruments;
(L) an operator of a credit card system;
(M) an insurance company;
(N) a dealer in precious metals, stones, or jewels;
(O) a pawnbroker;
(P) a loan or finance company;
(Q) a travel agency;
(R) a licensed sender of money;
(S) a telegraph company;
(T) a business engaged in vehicle sales, including automobile, airplane, and boat sales;
One question is whether the "in or affecting interstate commerce" requirement of section 1957 is an element of the offense that the government must allege in charging instruments and prove beyond a reasonable doubt at trial. Language from one court's opinion arguably suggests that it is not. In United States v. Kelley, the Tenth Circuit upheld a section 1957 conviction against the claim that the evidence was insufficient to support the jury's finding that the monetary transaction at issue was one "in or affecting interstate commerce." In upholding the conviction, the court reasoned that the government need only show a "minimal effect" on interstate commerce, and that it had met that burden. The court stated that section 1957's "requirement that the transaction be 'in or affecting interstate commerce' must be met in order to confer jurisdiction on federal courts. Such, however, is not an essential element of the crime charged."

Because the precise issue before the court in Kelley was the sufficiency of the evidence, not the validity of the charging instrument or the propriety of the jury instructions, the court's opinion should be considered dicta to the extent it suggests that the interstate commerce requirement of section 1957 is not an element of the offense that must be included in charging instruments and jury instructions. In any event, such a conclusion conflicts with well-established precedent that the interstate commerce ingredients of "affecting commerce" federal criminal statutes normally are elements that must be included in charging instruments and proved

(U) persons involved in real estate closings and settlements;
(V) the United States Postal Service;
(W) an agency of the United States Government or of a State or local government carrying out a duty or power of a business described in this paragraph;
(X) any business or agency which engages in any activity which the Secretary of the Treasury determines, by regulation, to be an activity which is similar to, related to, or a substitute for any activity in which any business described in this paragraph is authorized to engage; or
(Y) any other business designated by the Secretary whose cash transactions have a high degree of usefulness in criminal, tax, or regulatory matters.

62. Id. at 585-86.
63. Id. at 586.
64. Id. (emphasis added).
beyond a reasonable doubt at trial. Although the government need only prove a minimal nexus to interstate commerce and need not prove that the defendant knew that an interstate commerce connection existed, it must prove, to the trier-of-fact's satisfaction, the existence of a minimal connection beyond a reasonable doubt.

Kelley is indeed correct to the extent it suggests that the "interstate commerce" language in section 1957 is a jurisdictional requirement and, as such, the court—in addition to the jury—must be satisfied that the requisite interstate commerce connection exists. The "interstate commerce" language in section 1957 is undoubtedly nothing more than the typical boilerplate Congress normally includes, in an excess of caution, to remove any doubts concerning its constitutional power to regulate in the area in question. However, because Congress chose to impose this "jurisdic-

65. United States v. Lovett, 964 F.2d 1029, 1038-39 (10th Cir.) (holding that the prosecution must show a nexus, albeit minimal, to interstate commerce to support a § 1957 conviction), cert. denied, 113 S. Ct. 169 (1992).
67. See, e.g., United States v. Bass, 404 U.S. 336 (1971). Bass concerned a felon's challenge to a conviction for the possession of two firearms. Id. at 337. The relevant statute provided in pertinent part: "[It is a criminal offense for a convicted felon to] receiv[e], possess[, or transport[ ] in commerce or affecting commerce any firearm]" 18 U.S.C. app. § 1202(a) (1968) (emphasis added). The government did not allege in the indictment, and did not attempt to prove at trial, that the firearms at issue had been possessed "in commerce or affecting commerce." Bass, 404 U.S. at 338. The Supreme Court held that these failures required setting the convictions aside because "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," and "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." Id. at 347-49 (citations omitted). Although the Court did not precisely hold that the interstate commerce nexus must be proven to the jury's satisfaction (as opposed to just the trial court's satisfaction), the Court's emphasis on the procedural posture of the case (the government's failure to allege the requisite nexus "in the indictment" and prove the requisite nexus "at trial"), as well as the "ambit" of the criminal statute, strongly suggest that the interstate commerce nexus must be proven to the jury's satisfaction. See id. at 339-43; see also United States v. Rone, 598 F.2d 564, 573 (9th Cir. 1979) (finding that in a prosecution for a violation of 18 U.S.C. § 1962, the jury need only be instructed that the government must show a nexus, albeit minimal, to interstate commerce), cert. denied, 445 U.S. 946 (1980).
68. "Affecting commerce" statutes should be distinguished from "class of activity" statutes. Under a properly enacted "class of activity" statute, the government need not allege and prove an interstate commerce connection in an individual prosecution so long as the conduct subject to the prosecution is within a class of activity that affects commerce. Perez v. United States, 402 U.S. 146, 151-52 (1971). The constitutionality of "class of activity" federal criminal statutes was upheld in Perez, which concerned a prosecution for loan-shark-
tional” limitation in a manner that also restricts the substantive scope of the statute, due process requires that the government also must prove the interstate commerce connection to the jury’s satisfaction beyond a reasonable doubt—not as a jurisdictional requirement, but as a substantive element of the offense. In short, the “interstate commerce” requirement is both jurisdictional and substantive: the government must prove the interstate commerce connection to the satisfaction of both decisionmakers.69

Consequently, federal prosecutors would be well advised to continue drafting section 1957 indictments and jury instructions in a manner that makes it clear that the interstate commerce requirement is an “element” of the offense.70 As a practical matter, doing so would rarely result in an acquittal solely on that point; failure to do so, however, could result in the reversal of an otherwise properly obtained conviction.

69. It is not suggested here, however, that a district court must explicitly state on the record that it has independently found the existence of subject matter jurisdiction. A court’s entry of judgment of guilt in accordance with the jury verdict normally would implicitly manifest that the court had independently examined the evidence, without deference to any credibility determinations by the jury, and had concluded that the requisite interstate commerce connection existed (thus conferring jurisdiction on the court), and that the jury’s finding that the necessary interstate commerce connection existed was based on sufficient evidence (assuming that the defense had made a timely motion for judgment of acquittal at the close of trial).

70. One straightforward, unambiguous method of doing this would be to set out the elements of the offense as suggested in this Article and then provide the grand jury or petit jury with the definition of “monetary transaction” set out in 18 U.S.C. § 1957(f)(1).
2. The Defendant Knew the Transaction Involved Criminally Derived Property

The key element of section 1957 is its requirement that the defendant must know that the transaction involves criminally derived property. Unfortunately, the grammatical structure of subsection (a) is somewhat ambiguous with respect to this element. The ambiguity arises from the position of the word “knowingly”; it is unclear whether it modifies the phrase “in criminally derived property,” or just the phrase “engaging or attempting to engage in a monetary transaction.” The legislative history of section 1957, however, leaves no doubt that Congress intended to criminalize only those transactions made with knowledge that criminally derived property is involved. Furthermore, subsection (f)(2) defines “criminally derived property” as “property constituting, or derived from, proceeds obtained from a criminal offense.” Because subsection (c) provides that “the government is not required to prove that the defendant knew that the offense from which the criminally derived property was derived was specified unlawful activity,” Congress’ failure to state specifically that the government also need not prove that the defendant knew that the funds involved were proceeds of any form of criminal activity raises a strong presumption, by negative implication, that Congress intended that the government must affirmatively prove that the defendant knew that the monetary transaction at issue involved criminally derived property.

72. See id.
75. Id. § 1957(c).
76. See United States v. Krenning, No. 91-514 § N, 1992 U.S. Dist. LEXIS 11283, at *11 (E.D. La. July 17, 1992) (holding that the plain meaning of § 1957 “does not restrict the application of the term 'knowingly' to 'monetary transaction' but rather applies it to all the elements except those specifically excluded by the statute”) (citing United States v. Baker, No. 89-83-CR-T-15B (M.D. Fla. July 28, 1989)). The rule of lenity also suggests this construction: “The [Supreme] Court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language.” McNally v. United States, 483 U.S. 350, 359-60 (1987) (citing United States v. Bass, 404 U.S. 336, 347 (1971); Rewis v. United States, 401 U.S. 808 (1971); United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221-22 (1952)).
a. The Problem of "Tracking" the Language of the Statute

Because the grammatical structure of subsection (a) of section 1957 is ambiguous with respect to the knowledge element, the first two elements of a section 1957 offense should not be merged in charging instruments and jury instructions by simply "tracking" the language of the statute. In other words, charging instruments should not simply state that "the defendant knowingly engaged or attempted to engage in a monetary transaction in criminally derived property," nor should petit juries be instructed, without more, that such conduct is an element of the offense. Doing so runs the risk that the defendant will be charged or convicted on the mistaken belief that a section 1957 offense can be committed without knowledge that criminally derived property was involved in the transaction at issue. Grand and petit juries must make their decisions without access to legislative history or rules of statutory construction. Separation into two elements, as previously indicated, eliminates this ambiguity.

b. Knowledge of "Criminally Derived Property" Are Misdemeanors Included?

The term "criminally derived property" is defined in subsection (f)(2) of section 1957 as "any property constituting, or derived from, proceeds obtained from a criminal offense." The term "criminal offense" is not defined in section 1957, but subsection (c) provides: "In a prosecution for an offense under this section, the Government is not required to prove that the defendant knew that the offense from which the criminally derived property was derived was specified unlawful activity." Although this language is clear as to what the government need not prove, it leaves unclear what the government must prove. It certainly means that the government may meet its burden of proof by showing that the defendant believed that the criminally derived property at issue was derived from any felony, not necessarily one of the felonies.

78. Id. § 1957(c).
listed as “specified unlawful activity” in section 1956 (which applies to section 1957 by cross-reference).\footnote{79} The \textit{Department of Justice Manual}, however, takes the position that the government can also meet its burden by proving that the defendant believed that the funds at issue were derived from a misdemeanor.\footnote{80} This contention should be rejected. The legislative history of section 1957 is inconclusive on this point,\footnote{81} but the language and legislative history of section 1956 provide valuable guidance. Subsection (c)(1) of section 1956 states:

\begin{quote}
[T]he term “knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity” means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a \textit{felony} under State, Federal, or foreign law, regardless of whether or not such activity is [specified unlawful activity].\footnote{82}
\end{quote}

Senate Report 433, the principal legislative document accompanying section 1956, explains the purpose of this provision in the following passage:

This distinction is drawn in order to prevent a defendant from escaping conviction by merely alleging that he or she thought the property involved represented the proceeds of a crime not covered in the term “specified unlawful activity.” It was reported to the Committee that such a defense has been successfully raised in other countries whose statutes do not draw the distinction drawn in this section and it is the Committee’s intention to avoid that result.

\footnote{79} Id. § 1957(f)(3).
\footnote{80} \textit{DEPARTMENT OF JUSTICE MANUAL}, supra note 3, § 9-105.400.
\footnote{81} The only relevant legislative history on this point is the following inconclusive passage:

[T]he government need not prove that the defendant knew that the offense from which the criminally derived property was derived was a designated offense. The government must prove, however, that the defendant knew that the subject matter of the transaction was derived from some crime, and it must prove that the subject matter of the transaction was derived from a designated offense.

\footnote{H.R. REP. No. 855, supra note 8, at 16.}

As explained above, the significance of this phrase is that the defendant need not know exactly what crime generated the funds involved in a transaction, only that the funds are the proceeds of some kind of crime that is a felony under Federal or State law. This will eviscerate the defense that a defendant knew the funds came from a crime, but thought the crime involved was a crime not on the list of [specified unlawful activity].\[83

The clear implication of both the language and legislative history of section 1956 is that Congress' purpose in lowering the government's burden of proof in prosecutions under that statute was to relieve the government of having to prove that the defendant believed that the felony involved was one of those listed as specified unlawful activity, not to relieve it of having to prove that the defendant believed that any felony at all was involved. The gap Congress left in section 1957 should be filled by reference to the approach it took with respect to section 1957's companion statute, absent any other indication from Congress concerning how the statute should be interpreted.\[84

c. After-Acquired Knowledge

To commit an offense under section 1957, one must be aware of the illicit nature of the property involved at the time the monetary transaction occurs.\[85 Thus, a person who engages or attempts to engage in a monetary transaction involving criminally derived property, without knowledge that the transaction involves criminally derived property, has not violated section 1957 even if he or she gains such knowledge after the transaction is completed. After-acquired knowledge, however, can satisfy the statute's scienter element with respect to further monetary transactions that are engaged in with the same tainted funds. For example, an automobile

84. See District of Columbia v. Orleans, 406 F.2d 957 (D.C. Cir. 1968) (finding that the meaning of undefined statutory words may be ascertained by looking to the definition of such words in other relevant statutes); United States ex rel. McCoy v. California Medical Review, Inc., 133 F.R.D. 143 (N.D. Cal. 1990) (stating that when a statutory term is not defined in the statute or its legislative history, courts may look for guidance to other relevant statutes or other authority where the term has been defined).
dealer who receives $30,000 from the sale of an automobile without knowledge that the funds are criminally derived property has not thereby committed a section 1957 offense. If, however, the dealer subsequently learns that the proceeds from the sale are criminally derived property and then deposits the $30,000 into a bank account, the dealer's conduct would normally constitute a violation of the statute.  

\[ \text{d. Actual Knowledge, Willful Blindness, and Subjective Intent} \]

Section 1957 requires proof of "knowledge" on the part of the defendant; Congress expressly rejected law enforcement calls for lesser "reason to know" or "reckless disregard" scienter standards. Normally, this means that the defendant must have had "actual" or "positive" knowledge that criminally derived property was involved in the monetary transaction at issue. In numerous analogous contexts, however, the courts have held that the government may also satisfy the knowledge requirement of a criminal statute by showing that the defendant acted with "willful blindness." The legislative history of the Money Laundering Control Act supports the view that Congress was aware of judicial recognition of the willful-blindness standard and fully endorsed its use in prosecutions under section 1957. Although section 1957's legislative history does not refer to the willful-blindness standard, Senate Report 433, the principal legislative document accompanying section 1956, does.

One of the "knowing" scienter elements of section 1956 referred to in Senate Report 433 is knowledge that the funds involved are

86. See infra part II.B.
87. Congress' rejection of "reason to know" and "reckless disregard" standards came in response to testimony by representatives of the National Association of Criminal Defense Lawyers, the American Civil Liberties Union, and other groups that vigorously opposed use of these standards as a substitute for actual knowledge. S. Rep. No. 433, supra note 83, at 6-7.
89. Id. at 704.
90. S. Rep. No. 433, supra note 83, at 9-10 (citing Jewell, 532 F.2d at 697) ("The [two] 'knowing' scienter requirements [of section 1956] are intended to be construed, like existing 'knowing' scienter requirements, to include instances of 'willful blindness' ").
tainted—the same scienter element in section 1957 Senate Report 433, therefore, strongly suggests that Congress intended that in appropriate cases the government also may satisfy its burden of proof in section 1957 cases through use of the willful-blindness standard.

The endorsement of the willful-blindness standard for prosecutions under sections 1956 and 1957 has been criticized as indirectly lessening the scienter requirement to the same extent that adoption of reason-to-know or reckless-disregard standards would have done directly. In this author’s view, this is true only to the extent that the willful-blindness standard is articulated incorrectly. Both the reason-to-know and reckless-disregard standards have objective components such that a defendant’s claim of subjective ignorance cannot entirely defend against them. In contrast,

92. E.g., Strafer, supra note 16, at 166.
93. The rejected reason-to-know standard corresponds to the following definition of “negligently” in the Model Penal Code:

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor’s failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.

MODEL PENAL CODE § 2.02(2)(d) (1974) (emphasis added). The rejected reckless-disregard standard corresponds to the following definition of “recklessly” in the Code:

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.

Id. § 2.02(2)(c) (emphasis added). Although the Code’s negligence standard is entirely objective, its recklessness standard is part subjective and part objective. The “consciously disregards” language of § 2.02(2)(c) plainly means that to act recklessly, the actor must subjectively realize that some risk is involved. However, the actor need not subjectively realize that the degree of risk involved is “substantial and unjustifiable.” Id. So long as the risk is “a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation”—evaluated from an objective standard—the actor’s conduct is reckless. In Robinson v. Commonwealth, 569 S.W.2d 183 (Ky. Ct. App. 1978), the court stated that when gravamen of the offense is the failure to perceive a substantial and unjustifiable risk (and) such failure is a gross deviation from the standard of care
such a claim can defend entirely against the willful-blindness standard, if properly articulated. United States v. Jewell,94 to which Senate Report 433 refers, quotes the Model Penal Code definition of "willful blindness". "When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes it does not exist."95 This means that a jury in a section 1956 or 1957 prosecution may not convict under the willful-blindness standard unless it finds beyond a reasonable doubt that the defendant subjectively believed that there was a high probability that the monetary transaction at issue involved tainted funds. The jury may not convict merely because a reasonable person in the defendant's shoes would have believed that there was a high probability that the monetary transaction involved tainted funds.96

In answering the willful-blindness question, of course, the trier-of-fact may draw appropriate inferences from objective circum-

94. 532 F.2d 697 (9th Cir.) (en banc), cert. denied, 426 U.S. 951 (1976).
95. Id. at 700-01 (emphasis added) (quoting MODEL PENAL CODE § 202(7) (Prop. Official Draft, 1962)).
96. See MODEL PENAL CODE § 202(2)(d).
In this regard, Congress' endorsement of the willful-blindness standard in Senate Report 433 is immediately followed by two examples of how the standard would apply in hypothetical cases:

Thus, a currency exchanger who participates in a transaction with a known drug dealer involving hundreds of thousands of dollars in cash and accepts a commission far above the market rate, could not escape conviction, from the first tier of the offense, simply by claiming that he did not know for sure that the currency involved in the transaction was derived from crime. On the other hand, an automobile car dealer who sells a car at market rates to a person whom he merely suspects of involvement with crime, cannot be convicted of this offense in the absence of a showing that he knew something more about the transaction or the circumstances surrounding it.

Both of these examples are instructive concerning the quantum of evidence necessary to support a jury's verdict of guilty under the willful-blindness standard in a section 1956 or section 1957 prosecution: both emphasize that a jury's verdict of guilty may not be sustained if the evidence supports only a finding that the defendant suspected that criminally derived property was involved in the monetary transaction at issue. The currency-exchanger example, however, is misleading to the extent it suggests that, under the willful-blindness standard, juries may be instructed that the existence of certain objective facts, such as those outlined in the automobile-dealer example, raises an irrebuttable presumption of guilt under section 1957—a presumption that cannot be overcome even if, notwithstanding these objective facts, the jury is not convinced beyond a reasonable doubt that the defendant was willfully blind to the fact that the transaction involved criminally derived property. It bears repeating that application of the willful-blindness

---

97. See County Court v. Allen, 442 U.S. 140, 156 (1979) (recognizing that inferences and presumptions are a "staple of our adversary system of fact finding").
99. See Sandstrom v. Montana, 442 U.S. 510 (1979). At issue in Sandstrom was the validity of an instruction in a criminal trial that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts." Id. at 513. The Court first concluded that this instruction could have been interpreted by the jury as either a conclusive, irrebuttable presumption that required the jury to find criminal intent once the underlying facts were trag-
standard is a subjective inquiry; if the defendant did not subjectively believe that there was a high probability that criminally derived property was involved, the defendant must be found not guilty regardless of how objectively unreasonable that belief might have been.

Finally, Senate Report 433's reference to United States v. Jewell has apparently led some courts in section 1956 and 1957 cases to rely on variants of the "conscious purpose" willful-blindness charge used by the trial court in that case:

"The Government can complete [its] burden of proof by proving, beyond a reasonable doubt, that if the defendant was not actually aware [of the fact at issue] his ignorance in that regard was solely and entirely a result of his having made a conscious purpose to disregard [learning the fact at issue], with a conscious purpose to avoid learning the truth."
However, both the majority and dissent in Jewell criticized use of the “conscious purpose” instruction and recommended use of the Model Penal Code version of the willful-blindness charge instead. Among other things, the conscious-purpose charge is ambiguous, deemphasizes the subjective nature of the willful-blindness inquiry, and misleadingly suggests that a level of knowledge bordering on mere suspicion that tainted funds are involved is enough to sustain a conviction. In contrast, the Model Penal

been obvious to her. A finding beyond a reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a defendant's knowledge of a fact may be inferred upon willful blindness to the existence of a fact.

It is entirely up to you as to whether you find any deliberate closing of eyes and inferences to be drawn from any evidence. A showing of negligence is not sufficient to support a finding of willfulness or knowledge.

I caution you that the willful blindness charge does not authorize you to find that the defendant acted knowingly because she should have known what was occurring when the property at 763 Sundown Road was being sold, or that in the exercise of hindsight she should have known what was occurring or because she was negligent in failing to recognize what was occurring or even because she was reckless or foolish in failing to recognize what was occurring. Instead, the Government must prove beyond a reasonable doubt that the defendant purposely and deliberately contrived to avoid learning all of the facts.

Id. at 857 (emphasis added). The court of appeals did not address the propriety or the instruction because neither party disputed its adequacy or applicability to the case. Id. This version of the willful-blindness charge has been used frequently in the Fourth Circuit. E.g., United States v. Chorman, 910 F.2d 102, 107 (4th Cir. 1990); United States v. Cogdell, 844 F.2d 179, 181 (4th Cir. 1988); United States v. Martin, 773 F.2d 579, 584 (4th Cir. 1985).

101. The majority concluded that the conscious-purpose charge was deficient and recommended use of the Model Penal Code version instead. Jewell, 532 F.2d at 704 n.21. However, the majority concluded that the error had not been preserved at the trial court level and did not constitute plain error mandating reversal. Id. Judge (now Justice) Kennedy, writing for the dissent, agreed with the majority that the conscious-purpose charge was deficient and endorsed the Model Penal Code version of the willful-blindness charge. Id. at 705-08 (Kennedy, J., dissenting). He disagreed, however, with the majority's conclusion that the error was harmless. Id. at 707-08.

102. The facts of United States v. Campbell, discussed infra parts I and IV.B, provide an excellent illustration of how the conscious purpose jury instruction is misleading. The instruction in that case—that “a conscious purpose to avoid enlightenment” constitutes knowledge, Campbell, 977 F.2d at 857—strongly implied that, once Helen Campbell simply became suspicious that tainted funds were involved (as opposed to subjectively realizing that a high probability existed that tainted funds were involved), she then was under an affirmative duty to verify the nature of the funds or refrain from acting. In effect, this conveyed to the jury that it could convict Campbell simply because she suspected that tainted money was involved, a conclusion bolstered by the jury's return of a guilty verdict notwithstanding the slim evidence presented in the case. Although the district court attempted to
Code version is straightforward and emphasizes the subjective nature of the willful-blindness inquiry and the high level of knowledge required. Its use for prosecutions under sections 1956 and 1957 is preferable.

3. **The Value of Criminally Derived Property Exceeds $10,000**

   a. **Structured Transactions**

   Section 1957's requirement that the tainted property involved must exceed $10,000 in value substantially reduces the number of transactions that potentially fall within the statute's ambit. The scope of section 1957 could be further limited by Congress' failure to include antistructuring language within its express terms. This omission could be construed as meaning that an individual who, for the purpose of avoiding liability under section 1957, intentionally structures a transaction involving tainted funds exceeding $10,000 in value into two or more smaller transactions, each involving funds of $10,000 or less, has not thereby committed a section 1957 violation.

   Equating mere suspicion with actual knowledge is both inconsistent with Congress' intent in enacting section 1957, H.R. Rep. No. 855, supra note 8, at 13-14, and the theoretical underpinnings of the willful-blindness theory itself. The willful-blindness theory requires a level of subjective awareness of the likelihood of the existence of a fact which is markedly higher than that required under a "mere suspicion," a "should have known," or even a "reckless disregard" standard. See Jewell, 532 F.2d at 704 ("A court can properly find willful blindness only where it can almost be said that the defendant actually knew.") (quoting GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART § 57, at 159 (2d ed. 1961)). It might be said that under the willful-blindness standard the defendant must be almost certain of the existence of the fact in question. While the Model Penal Code's "awareness of a high probability that at fact exists" standard adequately conveys this concept, the "conscious purpose" instruction does not. Id. at 705-08 (Kennedy, J., dissenting).

   When the misleading nature of the jury instruction in *Campbell* is considered in tandem with the appellate court's excessively deferential approach to the jury's verdict, the likelihood that Campbell's § 1956 and § 1957 convictions were based on innocent conduct—mere suspicion that tainted funds were involved—becomes all the more evident. See infra part IV.B.

Before the enactment of the Money Laundering Control Act, authorities were split as to whether a crime is committed when transactions are intentionally structured to circumvent the Bank Secrecy Act’s $10,000 currency reporting requirements.\textsuperscript{104} Courts holding that it was a crime relied on a substance-over-form analysis, piercing the myth that the structuring of a transaction to avoid currency reporting requirements was lawful simply because doing so was in technical compliance with the literal language of the Bank Secrecy Act and its implementing regulations.\textsuperscript{105} Courts holding that it was not a crime relied on a due process rationale: “'[A] penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'”\textsuperscript{106} The enactment of the new antistructuring statute\textsuperscript{107} has resolved this conflict with respect to efforts to evade the Bank Secrecy Act’s currency reporting requirements.\textsuperscript{108} The structuring question, however, remains unanswered with respect to section 1957

In this author’s opinion, section 1957 should be construed as criminalizing the intentional structuring of a transaction involving

\begin{itemize}
  \item \textsuperscript{104} Compare United States v. Massa, 740 F.2d 629, 645 (8th Cir. 1984) (upholding a conviction under 18 U.S.C. § 1001 for structuring transactions to avoid reporting requirements), cert. denied, 471 U.S. 1115 (1985) and United States v. Tobon-Builes, 706 F.2d 1092, 1100 (11th Cir. 1983) (same) and United States v. Thompson, 603 F.2d 1200, 1203-04 (5th Cir. 1979) (upholding the conviction of a bank chairman for structuring transactions to avoid filing a currency transaction report) with United States v. Varbel, 780 F.2d 758, 762-63 (9th Cir. 1986) (reversing a conviction under 18 U.S.C. § 1001 for structuring transactions to avoid reporting requirements) and United States v. Denemark, 779 F.2d 1559, 1562-64 (11th Cir. 1986) (same) and United States v. Anzalone, 766 F.2d 676, 682-83 (1st Cir. 1985) (same).
  \item \textsuperscript{105} E.g., Massa, 740 F.2d at 645.
  \item \textsuperscript{106} Varbel, 780 F.2d at 760 (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983)).
  \item \textsuperscript{107} Pub. L. No. 99-570, § 1354, 100 Stat. 3207-22 (codified at 31 U.S.C. § 5324 (1988)).
  \item \textsuperscript{108} The new antistructuring provision reads as follows:
    No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction—
    \begin{enumerate}
      \item cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a);
      \item 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
      \item structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.
    \end{enumerate}
tainted funds exceeding $10,000 into two or more smaller transactions for the purpose of avoiding liability under section 1957, notwithstanding Congress' failure to state so explicitly. One argument against this conclusion is the existence of the antistructuring statute itself. That statute was enacted as part of the same legislative package—the Money Laundering Control Act—in which section 1957 was enacted. It could thus be argued that, at the time section 1957 was enacted, Congress was aware of the need to state its intentions explicitly with respect to the structuring issue; therefore, its failure to do so with respect to section 1957 implies that it did not intend for the statute to criminalize the intentional structuring of a transaction to avoid the $10,000 threshold.

This argument fails, however, when one considers that, as originally proposed, section 1957 contained no minimum value threshold at all. The $10,000 threshold was only added during late-night compromise sessions held during the final days before the Money Laundering Control Act was enacted. Before this last-minute change, the need for explicit antistructuring language simply was not an issue. Given the hectic circumstances during which the change was made, it is highly doubtful that the need for anti-


109. See supra note 107 and accompanying text.


111. See H.R. REP. No. 855, supra note 8.

112. The criminally derived property statute (now § 1957) was first introduced in Congress as part of H.R. 5077, 99th Cong., 2d Sess. (1986). H.R. 5077 was reintroduced as H.R. 5217, 99th Cong., 2d Sess. (1986), and eventually incorporated into H.R. 5484, 99th Cong., 2d Sess. (1986), the bill that ultimately became the Omnibus Drug Enforcement, Education, and Control Act of 1986 (Omnibus Drug Act), Pub. L. No. 99-570, 100 Stat. 3207-1, of which the Money Laundering Control Act of 1986 is a part. As late as October 8, 1986, the proposed criminally derived property statute in H.R. 5484 still did not contain any minimum value threshold. 132 CONG. REC. 29,608, 29,642 (1986). In fact, the $10,000 threshold did not appear in any published version of H.R. 5484 until October 17, 1986, the very day the House and Senate finally agreed on a finalized version of H.R. 5484 and voted to enact the Omnibus Drug Act. Id. at 32,728. The Congressional Record reflects that during this interim period (October 8-17, 1986), the Senate and House considered several last-minute amendments and counteramendments to the Act. See, e.g., id. at 30,318, 31,407, 32,728. Nothing in the Congressional Record, however, indicates exactly when, or for what reason, the $10,000 threshold was added to section 1957 during this interim period.
To determine congressional intent, a more realistic, common sense question should be asked: would allowing a person to escape section 1957 liability by intentionally circumventing its $10,000 threshold, for the purpose of avoiding liability under the statute, be in any way consistent with Congress' decision that the line between criminal and noncriminal conduct exists at $10,000? The answer is, "No." No legitimate distinction exists between the moral culpability of an individual who violates section 1957 implicitly (i.e., by intentionally breaking up a transaction involving tainted funds exceeding $10,000 in value into two or more smaller transactions) and the moral culpability of a person who violates section 1957 explicitly (i.e., by engaging in a single transaction involving more than $10,000 in tainted funds).

In fact, normally the culpability of the person who violates section 1957 implicitly is greater; a person who violates section 1957 explicitly does not necessarily act with a purpose related to flouting the law. Such a person may properly be convicted even if he is wholly unaware that the conduct violates the law. In contrast, a person who violates section 1957 implicitly almost always does so for some purpose or combination of purposes related to flouting the law, including avoiding liability under section 1957, avoiding the currency reporting requirements of the Bank Secrecy Act, or evading income taxes. It would be anomalous to suggest that Con-

113. Obviously, a conviction under § 1957 requires some knowledge that an illegality has occurred—the government must prove that the defendant knew that the property involved was "criminally derived." See supra part III.A.2; see also Liparota v. United States, 471 U.S. 419 (1985) (determining that a prosecution for food stamp fraud requires proof that the defendant knew that she was acting in a manner not authorized by statute or regulation). However, the government need not prove that the defendant was aware that the actual conduct at issue—engaging in a transaction with that property—was itself a violation of the law. See Cheek v. United States, 498 U.S. 192, 199 (1991) (stating that the general rule in the American legal system is that ignorance of the law is no defense to criminal prosecution).
gress intended to impose criminal liability not on persons who purposely violate the law, but on those who do not.\(^{114}\)

Notwithstanding the conclusion that it would be \textit{inconsistent} with congressional intent to construe section 1957 as \textit{not} criminal-

\(^{114}\) It is not contended here that the intentional structuring of a monetary transaction involving tainted funds in order to avoid the $10,000 threshold would constitute a § 1957 offense if done solely to avoid a currency transaction reporting requirement, to evade income taxes, or for a combination of these two purposes. Such conduct constitutes a violation of § 1956. See 18 U.S.C. § 1956(a)(1)(B)(ii) (1988 & Supp. II 1990) (criminalizing engaging in a financial transaction involving proceeds of specified unlawful activity knowing that the transaction is designed in whole or in part "to avoid a transaction reporting requirement under State or federal law"); \textit{id.} § 1956(a)(1)(A)(ii) (criminalizing engaging in a financial transaction involving proceeds of specified unlawful activity "with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986"). The intentional structuring of a monetary transaction involving tainted funds to avoid the $10,000 threshold is of concern here only when done for the specific purpose of avoiding liability under § 1957 itself.

The only legislative history on point supports the conclusion that, had Congress considered the matter, it would have intended that § 1957 be construed as criminalizing efforts to avoid its impact through transaction structuring. Senate Report 433 reveals that, at the time § 1957 was enacted, Congress approved of those cases holding that it was a crime to structure transactions to evade currency reporting requirements notwithstanding the absence of an express prohibitive statutory provision. S. Rep. No. 433, \textit{supra} note 83, at 21. Congress enacted the antistructuring statute simply to codify what it already believed was a correct statement of the law. \textit{Id.} at 22.

A related issue is whether the structuring of transactions to evade § 1957's $10,000 threshold should be construed as a violation of § 1956. Subsections (a)(1)(A)(i), (a)(2)(A), and (a)(3)(A) of § 1956 criminalize knowingly engaging or attempting to engage in a transaction involving tainted funds (or funds represented to be tainted) "with the intent to promote the carrying on of specified unlawful activity." 18 U.S.C. § 1956(a)(1)(A)(i), (2)(A), (3)(A). Because a § 1957 offense is included within § 1956's definition of "specified unlawful activity," \textit{id.} § 1956(c)(7), the structuring of transactions to evade § 1957 is arguably a violation of § 1956 under that statute's literal terms.

Nonetheless, such a construction should be rejected. The § 1956 and 1957 offenses only fall within § 1956's definition of "specified unlawful activity" through a strange double cross-reference with the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968 (1988). At the time of their enactment, the § 1956 and 1957 offenses were added to the list of RICO predicate acts; two years later, Congress amended § 1956 to add the RICO predicate acts to its list of "specified unlawful activity," thereby incorporating the § 1956 and 1957 offenses themselves as "specified unlawful activity." See 18 U.S.C. §§ 1956(c)(7), 1961(1). Obviously, Congress never intended by this to expand the substantive scope of § 1956 to criminalize the intentional structuring of transactions to evade § 1957. To do so would mean that such conduct would be subject to greater criminal penalties than those provided for under § 1957 itself, an absurd result. \textit{See Columbia Gas Dev. Corp. v. Federal Energy Regulatory Comm'n}, 651 F.2d 1146, 1158 (5th Cir. 1981) (stating that courts interpreting and construing two statutes that affect one particular subject matter or area should attempt to reconcile the two acts, if possible, so as to produce a symmetrical result).
izing the intentional structuring of transactions to avoid liability under the statute, a due process inquiry remains. Is it fair to impose criminal liability on someone who intentionally circumvents section 1957's $10,000 threshold to avoid liability under the statute when no specific statutory language so provides? The due process inquiry focuses on two often related but conceptually distinct concerns: the statute's potential for discriminatory or arbitrary enforcement, and whether the statute provides fair notice to potential defendants that the conduct in question has been criminalized. With respect to section 1957, the first concern is alleviated so long as charging instruments and jury instructions emphasize that the defendant's subjective, not objective, intent controls. The second concern is more problematic. Can it fairly be said that the absence of explicit antistructuring language within section 1957's express terms somehow misleadingly suggests that one does not commit a crime by intentionally breaking up a transaction involving more than $10,000 in tainted funds into two or more smaller transactions to avoid liability under the statute?

To answer this question, it is helpful to consider two hypothetical situations, both involving an actor who has access to $12,000 in illicit funds, which he desires to deposit in a bank, and who is apprised of section 1957's language. The first actor, wishing to avoid criminal liability under section 1957, deposits exactly $10,000 in the bank and leaves the remaining $2,000 where it is. The second actor, also wishing to avoid criminal liability under section 1957, simply makes two deposits of $6,000 each.

Imposition of section 1957 criminal liability on the first actor would violate both due process and congressional intent. The first situation is analogous to that of an automobile driver who chooses to drive at exactly the sixty-five miles per hour speed limit. Without doubt, the driver straddles the line at the speed limit for the very purpose of avoiding criminal liability. The driver's purpose, however, is irrelevant because the legislature has determined, and has communicated to the public, that the speed limit is the point where noncriminal conduct ends and criminal conduct begins. Similarly, in the case of section 1957, Congress chose $10,000 as the

116. See infra part IV.A.
line between criminal and noncriminal conduct and has communicated this choice to the public. It is irrelevant that the first actor’s purpose was to avoid criminal liability. It also is irrelevant that there may be little, if any, difference between the moral culpability of the first actor and that of someone who knowingly engages in a transaction involving funds exceeding $10,000 in value. The choice of which categories of morally culpable conduct will be subject to criminal sanctions involves the resolution of many competing policy considerations and is generally a choice for the legislature, not the courts.

Imposition of section 1957 criminal liability on the second actor, however, would violate neither due process nor congressional intent. As was the first actor’s purpose, the second actor’s purpose was to avoid criminal liability. Unlike the first actor, however, the second actor did not act on this purpose by modifying his or her conduct to conform to the law. Instead, the second actor elected to tread into an area that he unquestionably knew had been defined as criminal by Congress. The second actor is simply trying to call the conduct something it is not through technical manipulation. This is not a case in which Congress has used ambiguous language to define the line between criminal and noncriminal conduct and therefore the second actor is unsure of whether the conduct has been criminalized. Congress did not, for example, define the line at “a high value” or an “extraordinarily large value.” Instead, Congress has used a precise benchmark—$10,000—to define the line between criminal and noncriminal conduct. Those who choose to cross that line should not be allowed to escape the consequences of their acts through technical manipulation.

117. Indeed, a primary purpose of the criminal law is to encourage conformance with the law.

118. See United States v. Bass, 404 U.S. 336, 348 (1971) (“[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.”).

119. An analogous situation would be if the state enacted a law prohibiting travelling at “an unreasonable speed.” Such a law would encourage arbitrary and discriminatory enforcement. It also would raise legitimate questions of fair notice: is travelling 75 miles per hour reasonable? To some yes, to others no.
b. Knowledge That the Value of the Criminally Derived Property Exceeds $10,000

Although the government must prove that the value of the criminally derived property exceeded $10,000, it should not be required to prove that the defendant knew that the value of the criminally derived property exceeded $10,000. Nothing in the grammatical structure or legislative history of section 1957(a) suggests such a conclusion. Moreover, such a requirement would impose an almost impossible burden for the government to meet in many cases. The following example illustrates this problem.

Suppose that the monetary transaction at issue in a section 1957 prosecution is a drug dealer's withdrawal of $30,000 from a bank account, a transaction that also constituted the defendant's closing of the account. At trial, the government establishes that from the time the defendant opened the account to the time of its closure, the defendant had deposited a total of $50,000 in legitimate funds into the account and $50,000 in tainted funds. The account's largest balance at any one time was $40,000. The government should be allowed to meet its burden of proving that more than $10,000 of the funds withdrawn were tainted through the use of accepted accounting techniques that allocate various percentages of outgoing funds to different sources of incoming funds. Even if the government succeeds in accomplishing this objective, however, it would be virtually impossible for the government also to establish that the defendant knew that more than $10,000 of the funds withdrawn were attributable to tainted funds. Few persons engage in elaborate account analysis of this sort within their minds prior to withdrawing funds from a bank account. It thus would be difficult, if not impossible, for the government to prove beyond a reasonable doubt that the defendant in this example knew that the with-

120. See United States v. Yerman, 468 U.S. 63 (1984). In Yerman, the Supreme Court, faced with interpreting 18 U.S.C. § 1001, looked to its predecessor statute for guidance: "'[W]hoever shall knowingly and willfully make any false or fraudulent statements or representations, in any matter within the jurisdiction of any department or agency of the United States shall be fined.'" Id. at 69 n.6 (quoting Act of June 18, 1934, ch. 587, 48 Stat. 996 (codified as amended at 18 U.S.C. § 1001)). The Court concluded that under "any natural reading" of § 1001, "knowing and willfully" applied only to the making of false or fraudulent statements or representations, not to the fact of jurisdiction. Id. at 69.

121. See infra part III.A.4.a.
drawal involved more than $10,000 in tainted funds. Section 1957 should not be interpreted in a manner that would nullify it in a situation in which Congress clearly intended it to apply.\footnote{122. This approach also is consistent with well-established precedent that commission of crimes of higher level larceny do not require knowledge by the defendant that the value of the goods was sufficient to constitute higher level larceny. \textit{E.g.,} People v. Magee, 471 N.Y.S.2d 164 (App. Div. 1983) (holding that because the defendant stole a wallet with credit cards, he committed grand larceny in the third degree despite the fact that he did not take the credit cards, but only the cash); Hedge v. State, 229 S.W 862 (Tex. Crim. App. 1921) (holding that defendant, who cashed a check from his debtor for more than was owed to him, was guilty of larceny).}

4. The Property Involved Was Derived from Specified Unlawful Activity

The final element of a section 1957 offense that the government must establish beyond a reasonable doubt is that the criminally derived property involved in the transaction at issue was derived from specified unlawful activity.\footnote{123. 18 U.S.C. § 1957(a) (1988).} The term “specified unlawful activity” has the same meaning as the term is given in subsection (c)(7) of section 1956,\footnote{124. 18 U.S.C. § 1956(c)(7) (1988 & Supp. II 1990).} which sets out a laundry list of state and federal felonies “associated with organized crime, drug trafficking, and financial misconduct.”\footnote{125. S. REP. No. 433, supra note 83, at 13.} The government must allege and prove all the essential elements of the particular “specified unlawful activity” from which the property at issue is criminally derived.\footnote{126. United States v. Lovett, 964 F.2d 1029, 1041-42 (10th Cir.), \textit{cert. denied}, 113 S. Ct. 169 (1992).}

a. Commingling

One problem posed by this element is commingling. What happens when the funds involved in a monetary transaction otherwise satisfying the definition of a section 1957 offense come from a source that contains both legitimate and illegitimate funds? The issue typically arises when a monetary transaction involves the transfer of a large sum from a bank account into which both legitimate and illegitimate funds have been deposited. The question is
whether more than $10,000 of the amount transferred can be attributed to the tainted source.

Courts considering this issue under section 1956 have upheld convictions based only upon evidence that the funds at issue were transferred from a commingled account, notwithstanding the government’s failure to demonstrate, through accounting evidence or otherwise, that at least a portion of the transferred funds were tainted.\textsuperscript{127} This view is understandable and probably flows from section 1956’s lack of a minimum value threshold; section 1956 is triggered if any portion, no matter how slight, of the funds involved in the transaction are the proceeds of specified unlawful activity.\textsuperscript{128} In essence, the view that, in section 1956 prosecutions, the government should not be required to demonstrate affirmatively that at least a portion of funds transferred from a commingled account were tainted amounts to no more than recognition of a nonconclusive, rebuttable presumption in favor of the government; once the government has established beyond a reasonable doubt that the funds at issue were transferred from a commingled account, the jury is simply allowed to presume that at least a portion of the funds so transferred were tainted, unless the defense can rebut the presumption through accounting or other evidence.\textsuperscript{129}

In the case of section 1957, however, allowing the government to prove this element through speculation or presumption would render meaningless Congress’ decision to criminalize only those transactions involving more than $10,000 in tainted funds. Thus, in a section 1957 case involving a commingled account, the government should be required to prove affirmatively that more than $10,000 of the funds transferred from the account were attributable to the tainted portion of the account. However, the government should be allowed to meet this burden through the use of accepted accounting techniques, or other reasonable methods, which determine the various percentages of the outgoing funds that are attrib-


\textsuperscript{129} See County Court v. Allen, 442 U.S. 140, 157 (1979) (finding that a mandatory presumption requires the jury to find one fact if another fact is found unless the defense has rebutted the connection between the two facts).
utable to each source of incoming funds. Three such techniques might be: 1) the "drugs-in, last-out" method; 2) the "averaging" method; and 3) the "drugs-in, first-out" method.\textsuperscript{130} The approach that "reflects reality in any particular case will depend on the precise circumstances."\textsuperscript{131}

Obviously, the use of accounting techniques to determine the various percentages of outgoing funds attributable to each source of incoming funds presents conceptual difficulties because of the fungible nature of money.\textsuperscript{132} These conceptual difficulties make it impossible in most cases to prove to a mathematical certainty that the percentages yielded by these methods are accurate. In fact, the only time that the government could do so would be when the amount of the outgoing transaction exceeds, by more than $10,000, the total amount of all legitimate funds ever transferred into the account. Our previous hypothetical illustrates this problem.\textsuperscript{133} The drug dealer there had deposited a total of $50,000 in legitimate funds and $50,000 in tainted funds into the account at issue. Only a withdrawal in excess of $60,000 would have been guaranteed to a mathematical certainty to be comprised of more than $10,000 in tainted funds. Yet, the account never contained a balance of more than $40,000 at any one time.

Not allowing the government to use accounting techniques to prove this element, and instead requiring it to prove to a mathematical certainty that more than $10,000 of the funds transferred from a commingled account were tainted, would effectively allow criminals to avoid section 1957 liability by simply commingling illegitimate funds with legitimate funds. This would defeat the purpose of the statute.\textsuperscript{134} Moreover, there is no procedural or due pro-

\textsuperscript{130} See United States v. Banco Cafetero Panama, 797 F.2d 1154, 1159 (2d Cir. 1986). Banco Cafetero Panama involved the civil forfeiture statute, 21 U.S.C. § 881 (1982), under which commingled funds are forfeitable to the extent they can be traced to an unlawful transaction. Id. § 881(a)(6).

\textsuperscript{131} Banco Cafetero Panama, 797 F.2d at 1160.

\textsuperscript{132} The court in Banco Cafetero Panama dealt with this issue by noting that in the civil forfeiture context, Congress has placed the burden of uncertainty on the forfeitee. Id.

\textsuperscript{133} See supra part III.A.3.b.

\textsuperscript{134} See United States v. Jackson, 935 F.2d 832, 840 (7th Cir. 1991) ("[W]e cannot believe that Congress intended that participants in unlawful activities could prevent their own conviction under [section 1956] simply by commingling funds derived from both specified unlawful activities and other activities.").
cess reason for imposing such a heavy burden on the government. The standard of proof in a criminal trial is not beyond all doubt, but beyond a reasonable doubt. In section 1957 cases involving commingled accounts, therefore, the government should be allowed to prove this element through accepted accounting techniques or other reasonable methods, so long as the jury is clearly instructed that it may not find that more than $10,000 of the outgoing funds were tainted unless it is convinced so beyond a reasonable doubt.\textsuperscript{135}

\textit{b. "Profits" of Criminal Activity}

Although section 1957 is in part modeled on criminal statutes that prohibit the sale or receipt of property stolen or obtained by fraud,\textsuperscript{136} unlike its predecessors, section 1957 is not limited to funds stolen or obtained by fraud. The term "criminally derived property" also includes "profits" of criminal activity, such as the income earned by a drug dealer through illegal drug sales.\textsuperscript{137} The inclusion of profits of criminal activity within the definition of criminally derived property is significant for at least two reasons. First, unlike the spending of funds stolen or obtained by fraud, the spending of more generic profits of unlawful activity generally does not constitute an interference with the property rights of other persons. For example, the bank robber who spends stolen money is dissipating the actual property of others, whereas the drug dealer who spends profits from illegal drug activity is not interfering with the property interests of other persons.\textsuperscript{138} Thus, the government's interest in protecting private property by preventing the dissipation of funds stolen or obtained by fraud is more compelling than its interest in preventing the dissipation of general profits of un-

\begin{itemize}
\item \textsuperscript{135} One commentator has contended that "[d]efendants [in money laundering prosecutions] should be entitled to the same options afforded the government in \textit{Banco Cafetero Panama}, of choosing which accounting principle to apply to the commingling problem." Strafer, supra note 16, at 188. Obviously, nothing prevents the defense from attempting to rebut the government's case by presenting accounting evidence of its own.
\item \textsuperscript{136} See supra note 10.
\item \textsuperscript{137} See supra note 11.
\item \textsuperscript{138} But see United States v. Monsanto, 491 U.S. 600, 607 (1989) (refusing to differentiate between profits from theft and profits from drug dealing for purposes of forfeiture under 21 U.S.C. § 853(b) (1982 & Supp. V 1987)).
\end{itemize}
lawful activity, an important factor to consider when determining the extent to which the governmental interests promoted by section 1957 outweigh constitutional values such as the First Amendment right to freedom of association and the Sixth Amendment right to counsel. Second, the generation of vast profits of unlawful activity is an endeavor particularly associated with the trade of drug dealers and more “traditional” organized crime figures. Stereotypical notions of how these criminals “look and act” are commonplace. Consequently, the probability of section 1957 verdicts of guilty, based almost entirely on evidence that the source of the funds at issue fitted common stereotypes associated with crime, is increased. Juries in such cases are more likely simply to assume that the defendant must have known that criminally derived property was involved. Allowing juries to engage in assumptions of this kind will not only violate congressional intent but also infringe on First Amendment associational rights.

c. Property “Derived from” Proceeds of Specified Unlawful Activity

Section 1957 defines criminally derived property as “any property constituting, or derived from, proceeds obtained from a crim-
nal offense."143 The use of the term "derived from" leaves some
doubt concerning exactly when property arguably generated by un-
lawful activity but changed into other forms will no longer be con-
sidered criminally derived property 144

d. Sting Operations

In 1988, Congress added subsection (a)(3) to section 1956 to al-
low convictions under the financial transaction prong of that stat-
ute when the property involved is not the actual proceeds of un-
lawful activity but is instead "property represented to be the
proceeds of specified unlawful activity, or property used to conduct
or facilitate specified unlawful activity."145 Congress did not enact
a similar amendment with respect to section 1957 This omission
means that section 1957, unlike section 1956, does not criminalize
transactions involving government or otherwise legitimate funds,
regardless of whether such funds are represented to be illegitimate
by government undercover operants.

B. Limiting Application of Section 1957 to Conduct That
Congress Intended to Criminalize

Legislatures have a well-documented tendency to define crimes
broadly so that all persons who engage in the conduct sought to
be criminalized are confronted with a statutory facade that is
wholly devoid of loopholes."146 This over-defining of crimes, how-
ever, also means that often categories of conduct that Congress did
not consider culpable and did not intend to criminalize will fall
within the literal terms of a criminal statute. Although the courts
should give effect to legislative policy judgments as long as they do
not conflict with the Constitution, this does not mean that the
courts should blindly apply a criminal statute against a defendant,
in accordance with its "literal" language, when doing so is inconsis-

144. See infra part IV.A for a suggested standard for addressing this problem.
(1988)).
146. Wayne R. LaFave, The Prosecutor's Discretion in the United States, 18 Am. J.
Comp. L. 532, 533 (1970) (quoting A.B. COMM'N ON ORGANIZED CRIME, ORGANIZED CRIME
AND LAW ENFORCEMENT 75 (1952)).
tent with congressional intent. Even in the absence of constitutional concerns, it is entirely appropriate for the courts to narrow the applicability of a criminal statute so that persons whom Congress did not intend to brand as criminals are not ensnared by a literal application of the statute.

Fortunately, at least two procedural devices are available to the courts to reduce the likelihood of such convictions. The first is the creation of new elements of the offense that go beyond those stated expressly in the words of the statute. The second is the allowance of appropriate jury instructions, when timely requested by the defense, to narrow the scope of the statute's literal language to cover only conduct Congress intended to criminalize.

Both of these measures have the same basic goal: to narrow the net of a criminal statute so that innocent individuals are not caught within its literal terms, but to do so in a manner that does not allow blameworthy individuals to escape the statute's consequences. It should be noted, however, that allowing timely defense requests for jury instructions is generally a more preferable solution to this problem than the trial or appellate courts' postconviction creation of new elements of the offense. Elements of an offense must be included in the charging instrument and submitted to the trial jury as part of the government's prima facie case. If the government has failed to include an element of the offense in the charging instrument, or if the trial judge has failed to submit the element to the trial jury as part of the government's prima facie case, any resulting conviction must be set aside.

This is true even if the evidence at trial overwhelmingly supported a finding that the new element existed beyond a reasonable doubt, and

---

147. See, e.g., United States v. Keith, 605 F.2d 462, 464 (9th Cir. 1979) ("[A]n indictment is inadequate when it fails to allege an essential element of the offense even when it tracks the language of the statute.").

148. Another measure is the exercise of prosecutorial discretion not to file charges even though conduct that technically falls within the terms of a statute has been committed; the prosecutor may legitimately decline to bring a criminal charge even though a person has engaged in culpable conduct. See LaFave, supra note 146, at 536.

149. See infra note 156.

150. See United States v. King, 587 F.2d 956, 963 (9th Cir. 1978).

151. Id.

152. The failure of an indictment to allege all elements of the offense charged renders it fatally deficient. Russell v. United States, 369 U.S. 749, 763-64 (1962); King, 587 F.2d at
even if the defense did not raise the error prior to or during trial.\textsuperscript{183} The motivation and opportunity for defense sandbagging is apparent.\textsuperscript{184} Moreover, usually the need for narrowing a statute’s scope does not arise directly from the wording of the statute but instead arises implicitly from an examination of legislative intent, which is rarely unambiguous. Accordingly, the waste of resources that results from correction of the problem through post hoc creation of a new element usually is not justifiable on the ground that federal prosecutors “should have known” to include the element in the charging instrument and jury instructions.\textsuperscript{185} Requiring the defense to submit timely requests for jury instructions allows the trial court to resolve the issue of whether the scope of a criminal statute should be narrowed \textit{before} the jury retires to consider its verdict, possibly avoiding the need for a new trial.\textsuperscript{186}

\textsuperscript{963; United States v. Purvis, 580 F.2d 853, 858 (5th Cir. 1978), cert. denied, 440 U.S. 914 (1979). The omission of an element of the crime charged is not a mere error of formality; rather, it is a deficiency of constitutional magnitude. Inclusion of all the required elements ensures that the grand jury has considered and found all essential elements of the offense charged, as required by the Fifth Amendment’s guarantee that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.” Russel, 369 U.S. at 760. Additionally, an indictment that fails to allege all essential elements of the offense charged potentially results in a deprivation of other Fifth and Sixth Amendment rights. United States v. Wylie, 919 F.2d 969, 972 (5th Cir. 1990).

\textsuperscript{153. See Fed. R. Crim. P 12(b)(2) (stating that objections to the indictment or to the information’s failure to charge an offense must be recognized by the court at any time).

\textsuperscript{154. See Lee v. United States, 432 U.S. 23 (1977). In Lee, the trial judge dismissed the indictment in the middle of a bench trial because the indictment did not contain an essential element. \textit{Id.} at 26-27. The judge did so even though the defendant waited until just prior to trial to raise the objection, \textit{id.} at 25, and even though the evidence was overwhelmingly in favor of guilt. \textit{Id.} at 26. Although the Supreme Court held that double jeopardy did not bar retrial of the defendant, \textit{id.} at 34, the defendant’s last-minute timing was at least partially successful: it bought him more time to negotiate with the prosecutors and gave him a second shot at presenting a defense. Sandbagging until \textit{after} trial provides another advantage: the defendant gets a free shot at acquittal with the first jury. \textit{Id.} at 32. If unsuccessful, the defendant still has the opportunity to obtain an acquittal at the second trial.

\textsuperscript{155. See \textit{id.} at 34 (finding that prosecutors’ omission of element in the indictment “was at most an act of negligence, as prejudicial to the Government as to the defendant”).

\textsuperscript{156. Criminal defense attorneys do not always sandbag, of course. They often raise the issue of the prosecution’s failure to include a necessary element prior to or during trial. If the issue is raised pretrial, it is usually raised by a Rule 12(b)(2) motion to dismiss the indictment for failure to charge an offense. Necessary elements may include “hidden” elements that do not arise directly from the wording of the statute and which the courts have not previously recognized.

Even at the pretrial stage, recognition of a new element will result in the expenditure of considerable resources because the indictment must be dismissed and the case resubmitted
This is not to say that postconviction creation of new elements of an offense is never appropriate; the dictates of Russell v. United States, its progeny, and other law must be followed. It is only to say that use of this measure to narrow the scope of criminal statutes imposes considerable costs on the criminal justice system and therefore should be approached with circumspection. The accomplishment of the same objective by requiring—and allowing, when appropriate—defense requests for jury instructions will normally be the preferred approach.

The effort here, therefore, is first to identify conduct that falls within the literal terms of section 1957 but which Congress did not intend to criminalize. For each category of conduct so identified, a jury instruction is recommended to protect persons from being convicted on the basis of such conduct without also insulating those who have engaged in conduct that Congress did seek to criminalize. Three hypotheticals, each describing conduct within the literal terms of section 1957, will be used to aid this analysis.

Scenario 1. An automobile dealer sells a $30,000 automobile to a drug dealer and receives $30,000 in exchange. At the time of the sale, the automobile dealer knows that the $30,000 are proceeds of unlawful drug activity. Otherwise, the sale is an ordinary commercial transaction—neither the drug dealer nor the automobile dealer engaged in the transaction to conceal or disguise the tainted funds.

The use of section 1957 to prosecute persons who engage in monetary transactions completely unrelated to actual money laundering activity presents significantly greater potential for abuse than does its use to prosecute persons who engage in transactions for purposes related to money laundering. Nonetheless, the lan-
guage of section 1957 and its legislative history leave little doubt that the statute reflects a legislative policy judgment that both of the following categories of activity constitute morally culpable activity warranting criminal sanctions: 1) the spending of illegitimate funds by those who have engaged in the criminal activity that generated the funds, and 2) the knowing receipt or other handling of illegitimate funds by those who did not engage or assist in the criminal activity that generated such funds but who nonetheless intentionally profit from criminal activity by accepting or handling illegitimate funds while providing goods or services. Because both the drug dealer and automobile dealer in this scenario engaged in conduct of this type, no special jury instruction is warranted to isolate their conduct from the effect of section 1957.

Scenario 2: A jeweler sells a $20,000 watch, receives $20,000 in exchange, and places the entire amount in the store’s safe. At the time of the sale, the jeweler does not know that the $20,000 are proceeds of unlawful activity. Later the same day, however, the jeweler is told by a reliable individual that the person who purchased the watch did so with proceeds of unlawful drug activity. The jeweler is unsure of what to do with the $20,000 but does not want to keep it in the store safe. Consequently, the next morning the jeweler deposits the $20,000 in the store’s bank account. Later, after thinking the matter over, the jeweler reports the matter to the police.

The jeweler’s deposit of the $20,000 in the store’s bank account, although within the literal terms of section 1957, is not the type of transaction that Congress intended to criminalize under the statute. In United States v. Sheridan, the Supreme Court suggested in dicta that submission of an “innocent purpose” defense to the jury is the appropriate solution to this problem. At issue in Sheridan was the statutory provision of 18 U.S.C. § 2314: “Whoever transports in interstate or foreign commerce any goods of the value of $5,000 or more, knowing the same to have been stolen” shall be guilty of a crime. By its terms, this

159. See supra note 4 and accompanying text.
160. See supra note 8-11 and accompanying text.
162. Id. at 390.
provision criminalizes the knowing transportation of stolen goods without regard to whether the goods were transported with unlawful or fraudulent intent. Nonetheless, the Court concluded that it could be inferred that Congress intended to criminalize the knowing transportation of stolen goods only when done with unlawful or fraudulent intent:

One who knowingly transports stolen goods would do so for one of three sorts of objects, namely: (1) to dispose of them or use them unlawfully; (2) to aid in concealing the theft, thus avoiding prosecution for himself or another; or (3) for some purpose wholly innocent, such as to turn them over to the police or the rightful owner.

In the first two instances there would be inherent in the act "unlawful intent" or "fraudulent intent," though proof of this might not be required apart from the proof of knowledge and absence of any showing of innocent purpose. Congress obviously did not intend to make criminal such an instance as the third.

The reasoning of the Sheridan dicta applies fully to section 1957, which also should be construed as criminalizing only conduct that the defendant engaged in with unlawful or fraudulent intent. The only question is whether the narrowing of section 1957 in this manner should be accomplished by requiring the government to allege and prove unlawful or fraudulent intent as an element of the offense or by granting a defense request for an "innocent purpose" jury instruction. The Sheridan dicta suggests that the latter is the appropriate solution.

After comparing the language of the statutory provision at issue, which did not expressly require "unlawful or fraudulent" intent, with the language of other provisions of section 2314, which expressly required "unlawful or fraudulent" intent, the Court stated:

[Proof of the innocent intent might be required as matter of defense, the other elements being made out. In other words, it may well be doubted that adding the requirement "with unlaw-

164. Sheridan, 329 U.S. at 385 & n.11.
165. Id. n.11 (emphasis added).
166. See supra notes 60-70 and accompanying text.
ful or fraudulent intent” in [the other provisions of section 2314] added anything to the substantive crime; for its effect [in the other provisions] is apparently only to require the state to allege and prove the unlawful or fraudulent intent, rather than to require the defendant to allege and prove his innocent purpose.168

The implication of the Sheridan dicta—that in section 1957 prosecutions the defendant should bear the burden of raising the “innocent purpose” defense by requesting a jury instruction to that effect—is persuasive. As previously noted, the post hoc recognition of new elements not expressly within the terms of a criminal statute poses substantial costs on the criminal justice system.169 In addition, in many section 1957 cases no evidence will exist supporting the inference that the defendant did not act with unlawful or fraudulent intent.170 Requiring juries in such cases to consider unlawful or fraudulent intent anyway (as an element of the offense) would only obfuscate more relevant issues. By instead requiring the defense timely to request an “innocent purpose” jury instruction, the court may properly deny the request if no evidence exists to support the defense’s claim.171

The Sheridan dicta also implies that section 1957 defendants should bear the burden of proving innocent purpose. The more prudent approach, however, is to place the burden of proof on the government to rebut innocent purpose once the defendant has requested the instruction and some evidence has been produced to support the instruction.172 The following jury instruction is consistent with this approach:

It is an absolute defense to the charge made against the defendant in Count ____ that the defendant engaged in the monetary transaction referred to therein with a wholly innocent purpose, such as [state applicable innocent purpose here, e.g., to

168. Id. at 385 n.11.
169. See supra note 156.
171. United States v. Rochester, 898 F.2d 971, 978-79 (5th Cir. 1990); see also United States v. Troutman, 814 F.2d 1428, 1451-52 (10th Cir. 1987) (holding that jury instructions unrelated to the charged crime are properly omitted).
WILLIAM AND MARY LAW REVIEW

turn the property referred to therein to the police or the rightful owner).

The burden of establishing lack of innocent purpose rests upon the prosecution. The defendant is under no obligation to prove innocent purpose; rather, the prosecution must prove lack of innocent purpose beyond a reasonable doubt.\textsuperscript{173}

\textit{Scenario 3: A drug dealer approaches a bank teller and requests to deposit $250,000 in the bank. The teller knows that the $250,000 is criminally derived property. Consequently, the teller requests instructions from a bank officer, informing the officer of the illegal nature of the proposed deposit. Nonetheless, to avoid losing a lucrative customer, the officer instructs the teller to accept the deposit. The teller does so.}

In terms of culpability, the bank officer's conduct in this hypothetical is essentially indistinguishable from that of the automobile dealer in \textit{Scenario 1}. More problematic are the actions of the teller, who has performed what is essentially a ministerial act. Although there was some testimony before the House of Representatives that section 1957 was intended to reach those who perform ministerial duties,\textsuperscript{174} there is no mention of such a purpose in House Report 855. On the contrary, the House Report emphasizes the culpability of persons who knowingly engage in a monetary transaction for the purpose of profiting directly and personally from the transaction.\textsuperscript{175} Although it is arguable that the teller in the hypothetical profited indirectly from the transaction in the sense that making the transaction allowed the teller to keep his job, House Report 855 suggests that liability may be imposed

\textsuperscript{173} Cf. Leonard B. Sand et al., \textit{Modern Federal Jury Instructions} ¶ 8.01 (1984) (suggesting a similar instruction for a charge of tax evasion).

\textsuperscript{174} Money Laundering Legislation: Hearings Before the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. 106 (1986) [hereinafter \textit{Money Laundering Hearings}] (statement of Mr. James D. Harmon, Jr., Executive Director and Chief Counsel, President's Commission on Organized Crime). Mr. Harmon stated that those responsible for mere ministerial duties (such as the picking up or delivery of the funds being laundered) may not know all the details of their clients' activities, but are highly likely to be exposed to information that gives them actual knowledge (or reason to know) the true nature or source of the funds they are laundering.

under section 1957 only if the defendant expected to profit directly and personally from the transaction. Moreover, because liability may be imposed under section 1957 without regard to whether the defendant was aware that he was violating the law, subjecting the teller to section 1957's severe penalties would constitute a gross injustice, one Congress surely did not intend. The following jury instruction is thus recommended to limit the applicability of section 1957 in this situation:

Even if you find beyond a reasonable doubt that the defendant knowingly engaged or attempted 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, as alleged in Count ——, you must acquit the defendant if his/her acts were merely ministerial, i.e., he/she did not engage in the monetary transaction to profit directly and personally.

The defendant is under no obligation to prove that his/her actions were merely ministerial. The prosecution bears the burden of proving beyond a reasonable doubt that the defendant's actions were not merely ministerial.

IV CONSTITUTIONAL IMPLICATIONS

A. Vagueness Doctrine

Congress' endorsement of a willful-blindness standard for prosecutions under sections 1956 and 1957 has led to criticism of both statutes on vagueness grounds. In this author's opinion, imple-

176. Id.
177. Cf. SAND ET AL., supra note 173, ¶ 8.01 (suggesting the same culpability standard for similar offenses).
178. One commentator, G. Richard Strafer, expressed his concerns as follows: Congress expressly intended the term "knowing" to encompass instances of "willful blindness." By way of guidance, the Senate Report gives the following examples:

Thus, a currency exchanger who participates in a transaction with a known drug dealer involving hundreds of thousands of dollars in cash and accepts a commission far above the market rate, could not escape conviction, from the first tier of the offense, simply by claiming that he did not know for sure that the currency involved in the transaction was derived from crime. On the other hand, an automobile car dealer who sells a car at market rates to a person whom he merely suspects of in-
menting a willful-blindness standard for section 1956 and 1957 prosecutions would require careful scrutiny of jury verdicts for sufficiency of the evidence but would not render either statute void for vagueness.

A criminal statute is void for vagueness when the state has used in the statute inherently ambiguous language that leaves potential defendants guessing as to the standard of liability under the statute.\footnote{179} In \textit{United States v. L. Cohen Grocery Co.},\footnote{180} for example, the Supreme Court struck down a statute that criminalized the charging of "unjust or unreasonable" rates.\footnote{181} The Court concluded that the standard resulted in "the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against."\footnote{182} More recently, in \textit{Gentile v. State Bar},\footnote{183} the Court reversed the imposition of sanctions against an attorney for violating a state ethical rule that pro-

volvement with crime, cannot be convicted of this offense in the absence of a showing that he knew something more about the transaction or the circumstances surrounding it.

The examples provided in the \textit{Senate Report} underscore the statute's vagueness. If the automobile dealer in the second example sells a vehicle at the market rate to the known drug dealer in the first example (rather than merely the suspected drug dealer in the second example), has he then violated section 1956? If the currency exchanger in the first example accepts only a reasonable commission, is he no longer guilty? What if the currency exchanger accepts a huge commission, but merely suspects the individual he is dealing with is a drug dealer; does the size of the commission plus suspicion satisfy the government's burden of proof? Neither the language of section 1956 nor its legislative history provides answers to these simple variations on the hypotheticals advanced in the \textit{Senate Report}.


\footnote{179} United States v. Harriss, 347 U.S. 612, 617 (1954).

\footnote{180} 255 U.S. 81 (1921).

\footnote{181} \textit{Id.} at 81, 93.

\footnote{182} \textit{Id.} at 89.

hibited commenting on current litigation to the press. The attorney had relied on a safe-harbor provision to a general rule that allowed explanation of the "general" nature of defenses without further "elaboration."\textsuperscript{184} The Court concluded that the terms "general" and "elaboration," as used in the safe-harbor provision, were "classic terms of degree" with "no settled usage or tradition of interpretation in the law."\textsuperscript{185}

One of the underlying principles of the vagueness doctrine, as underscored in cases such as Cohen Grocery and Gentile, is that no one should be subject to criminal sanctions for violating a normative standard that is not defined with reasonable precision, if at all, until after the conduct in question has been committed.\textsuperscript{186} The application of the willful-blindness standard to prosecutions under sections 1956 and 1957 does not violate this principle. As previously shown, the willful-blindness standard, when properly articulated, has a settled usage or tradition of interpretation in the law that involves the defendant's subjective state of mind.\textsuperscript{187} In a section 1957 prosecution, the defendant cannot be found guilty under the willful-blindness standard unless the jury finds beyond a reasonable doubt that the defendant was aware that there was a high probability that the transaction involved criminally derived property, unless she actually believed such high probability did not exist.\textsuperscript{188} The question for the jury is not whether a reasonable person in the defendant's shoes would have concluded that such a high probability existed, but whether the defendant subjectively believed that such a high probability existed. If the jury finds that the defendant did not believe that a high probability existed, it

\textsuperscript{184} Id. at 2731.
\textsuperscript{185} Id.
\textsuperscript{186} When a jury or other decisionmaker is faced with a vague normative standard, it must first attempt to define the standard, at least in the decisionmaker's own mind, before it can then determine whether the defendant's conduct complied with the standard. The vagueness concern, therefore, is not that a normative standard is never given reasonably precise definition, but that this occurs only after commission of the conduct in question. The underlying principles of the vagueness doctrine are thus in many respects similar to those underlying the ex post facto doctrine. See generally Neil C. McCabe & Cynthia A. Bell, Ex Post Facto Provisions of State Constitutions, \textit{4 Emerg. Issues St. Const. L.} 133, 133-40 (outlining the purposes behind the federal ex post facto doctrine).
\textsuperscript{187} See supra part III.A.2.d.
\textsuperscript{188} See supra part III.A.2.d.
must acquit the defendant regardless of how objectively unreasonable the defendant's belief was.\textsuperscript{189}

Under the willful-blindness standard, therefore, the jury must answer one essential question: given a known, reasonably precise normative standard, did the defendant's state of mind match that standard? In contrast, the jury faces two tasks when called upon to apply an objective, or reasonable person, normative standard: it must first give precision to the vague normative standard by making a value judgment concerning applicable "community standards" or similarly amorphous criteria, and then determine whether the defendant's conduct matched that standard. It is the failure of a decisionmaker to perform this first task prior to the commission of the conduct at issue that poses constitutional vagueness concerns, not its failure to perform the second.

Without doubt, of course, juries sometimes err and find innocent defendants guilty even when faced with an entirely subjective scienter standard. This dilemma, however, is the natural consequence of asking a factfinder to "look" into the defendant's past state of mind. It is no more peculiar to cases involving the willful-blindness standard than it is to cases involving other subjective scienter elements, such as willfulness, actual knowledge, or intent. No one would suggest that the solution to this problem is to invalidate, on grounds of vagueness, all criminal statutes that involve a subjective scienter element. Rather, the solution is the use of procedural mechanisms that reduce the probability of erroneous judgments of guilt—for example, carefully worded jury instructions emphasizing that the willful-blindness inquiry is a subjective, not objective, inquiry, and meaningful review of jury verdicts for sufficiency of the evidence.\textsuperscript{190}

A more tenable criticism of section 1957 on vagueness grounds is its use of the term "criminally derived property," which is defined only as "property constituting, or derived from, proceeds obtained from a criminal offense."\textsuperscript{191} Bankers, merchants, attorneys, and others who must deal commercially with the public can legiti-


\textsuperscript{190} See infra notes 227-31 and accompanying text for further discussion of these devices.

CRIMINALLY DERIVED PROPERTY STATUTES

mately complain that to some extent section 1957 leaves them guessing as to how close the connection must be between criminal activity and property arguably generated by such activity before the statute is triggered. A reasonably precise articulation of section 1957’s definition of “property constituting proceeds obtained from a criminal offense” can be garnered by reference to the drug forfeiture statute. Among other things, this statute declares forfeitable “[a]ll moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance.” With this definition for guidance, under section 1957 “property constituting proceeds obtained from a criminal offense” would generally be limited to the original cash or other property generated by specified unlawful activity—such as the actual “street cash” a drug dealer receives from his customers. Once these original proceeds have been transformed, however, by placing them in a bank account for instance, they would constitute criminally derived property under section 1957 only if they fall within its “derived from” language.

This is where vagueness problems potentially can occur. What exactly does “derived from” mean? At what point does the connection between the original proceeds and the transformed property become too attenuated to say fairly that the latter is derived from the former? Unless some attempt is made to articulate some reasonably precise definition of when the transformed property is no longer considered “derived from” the original illegal proceeds, the vagueness problem remains.

194. Indeed, in its most recent case involving forfeiture, the Supreme Court referred to this very problem:

As a postscript we identify [an] issue[] that the parties have addressed, but that need not be decided.

At oral argument, the Government suggested that [21 U.S.C. § 881(a)(6)’s] reference to “all proceeds traceable to such and exchange” is subject to a narrowing construction that might avoid some of [its] harsh consequences. If a house were received in exchange for a quantity of illegal substances and that house were in turn exchanged for another house, would the traceable proceeds consist of the first house, the second house, or both,
The drug forfeiture statute contains "traceable" language that is similar to the "derived from" language of section 1957. Unfortunately, case law interpreting this language provides little guidance on the attenuation question. An approach suggested here, at least with respect to section 1957, would be to consider the original criminal proceeds as criminally derived property, despite transformation of that property into other forms, until after some intervening legitimate use has been made of the property that dissipates its taint. Under this approach, for example, the original cash receipts generated by a drug dealer would be considered "criminally derived property" even if they are placed in a bank account, transferred among various accounts, and eventually used to purchase a house for the drug dealer. However, the house itself (as opposed to the money used to purchase the house) would not be considered "criminally derived property" so long as the drug dealer purchased it simply to live in, and not to facilitate his illegal drug business, at least with respect to further transactions concerning the house by persons other than the drug dealer. Thus, a subsequent buyer of the property from the drug dealer would not be committing a section 1957 violation even if she purchased the property with knowledge that the drug dealer had purchased the house originally with drug proceeds. Without this or a similar approach, property generated from crime theoretically would remain tainted forever and could never again be put to legitimate economic use.

with the Government having an election between the two? Questions of this character are not embraced within the issues that we granted certiorari to resolve, however, and for that reason we express no opinion concerning the proper construction of that statutory term.


195. Section 881(a)(6) also provides for forfeiture of, inter alia, "all proceeds traceable to [the original proceeds of the drug offense]." 21 U.S.C. § 881(a)(6).

B. First Amendment Freedom of Association

In enacting section 1957, Congress fully expected that the statute would be used to impose criminal liability on those who profit indirectly from criminal activity by knowingly accepting or otherwise handling criminally derived property while providing ordinary, legitimate goods or services, regardless of whether such persons are law-abiding citizens in other respects.\(^\text{197}\) Congress' principal purpose in doing so was to reduce the motivation of criminals to engage in unlawful activity by making it more difficult for them to enjoy the fruits of their crimes and thereby lessening their motive and opportunity to engage in more crime.\(^\text{198}\) Without doubt, therefore, the very purpose of section 1957 is to chill a particular type of association, albeit a type of association that Congress has defined as criminal. Few would argue that section 1957 violates the First Amendment simply because its purpose or effect is to frustrate criminal associations of this kind.\(^\text{199}\)

Far more problematic is the incidental effect that section 1957 has or could have on noncriminal associations that are protected under the First Amendment. The issue is whether section 1957 will cause bankers, merchants, and other business persons to refrain from dealing with a customer simply because that individual is a criminal, is reputed to be a professional criminal, or fits common stereotypes of how professional criminals look and act.\(^\text{200}\) One commentator articulated this concern in the following passage discussing the chilling effect that section 1956 could pose to associational rights protected under the First Amendment:

> What banker or businessman will run the risk of triggering section 1956's onerous twenty year penalties in order to engage in an ordinary financial transaction with someone he "suspects," or is told by an overzealous law enforcement officer that the government suspects, of being "a criminal." Section 1956 at-

---

197. See supra part III.B.
199. The logical conclusion of such an argument would be that criminal conspiracies are associations protected under the First Amendment.
tempts to transform such suspects into commercial pariahs that bankers and businessmen will shun.201

Prior to enacting the Money Laundering Control Act of 1986, several members of Congress attempted to allay such fears:

The following example illustrates the potential problem that an expansive reading of the state of mind [requirement] would have in extending the reach of the offense beyond that intended by the Committee. The corner grocer in a small community is aware of the reputation of a person who is the local drug trafficker. That person comes to the store and buys five pounds of hamburger. The grocer takes the cash and deposits it in his bank account with his other receipts. The financial transaction is the act of the grocer depositing his day's receipts in his bank account. The question is whether the grocer is guilty of violating [section 1957].

As Mr. McCollum observed, “You [the grocer] have to know what he is coming in to buy groceries with is indeed, the money derived from the particular designated crimes; and to get to that point, you would have to prove to a jury [that the grocer knew that] the fellow had no other source of income or that [if] he had—the grocer had some more direct knowledge this fellow was just standing outside on that street corner before he came in peddling drugs, like if [the grocer] saw him doing it. [Under those circumstances] I don’t have any problem whatsoever holding the grocer accountable if he sees the guy [the trafficker] outside dealing in drugs and takes cash and walk[s] into his store.”

Mr. Lungren stated his understanding of the Committee’s use of the term “knowingly”, “It is a ‘knowing’ standard. I think it is repetitive of what he [Mr. McCollum] said, but I think that is extremely important. It is not ‘should have known, might have known, a reasonable person would have known, it is ‘this person knew the source of the income’ ” 202

Nonetheless, in the very first reported case under section 1957 involving the archetypical section 1957 defendant—a businessperson alleged to have knowingly handled tainted funds while providing goods or services to a criminal but not alleged to have engaged

201. Id.
or assisted in the criminal activity that generated the funds—the jury returned a verdict of guilty based primarily on evidence that the customer "looked and acted" like a professional criminal.203 The defendant in United States v. Campbell204 was Ellen Campbell, a real estate agent who had arranged for the purchase of a home by a man named Mark Lawing.205 The home was located in a vacation and waterfront luxury area near Charlotte, North Carolina.206 After seeing Campbell's photograph at the real estate office where she worked, Lawing contacted her, presented himself as the owner of an autocraft business, and indicated that he was interested in purchasing a home.207 Thereafter, during a period of approximately five weeks, Campbell met with Lawing once a week during normal business hours and showed him ten to twelve homes; Lawing eventually selected a home listed for $191,000.208 Through the work of Campbell and other real estate agents, Lawing and the sellers agreed to a final price of $182,500.209 Unfortunately for Campbell, however, Lawing's true occupation was that of a drug dealer; moreover, he had purchased the home with income derived from his illegal drug activity.210 As a result, Campbell was charged with one count of violating section 1956, one count of violating section 1957, and one count of violating 18 U.S.C. § 1001.211

At trial, the government proceeded under both an actual knowledge theory and a willful-blindness theory to support its charges under sections 1956 and 1957.212 The chief evidence supporting the inference that Campbell knew or was willfully blind to the fact that Lawing was a drug dealer, and correspondingly that Campbell knew or was willfully blind to the fact that Lawing purchased the home with the proceeds of illegal drug activity, was the following:

204. Id.
205. Id. at 1260-61.
206. Id. at 1261 n.2.
207. Id. at 1261.
208. Id.
209. Id.
210. Id. at 1261, 1268.
211. Id. at 1259.
212. Id. at 1264.
1) Lawing "drove a red Porsche, owned an expensive new motor boat, carried a portable cellular phone, flashed $20,000 in cash, [and] drank beer away from his place of business during the business day"; 2) after Lawing failed to secure financing, he suggested that the contract purchase price of the home be reduced to $122,500 and the remaining $60,000 be transferred to the sellers "under the table" (Lawing’s suggestion was followed); 3) title to the home was placed in the names of Lawing’s parents; 4) Campbell caused a false HUD-1 report to be filed concerning the transaction; 5) one witness testified that she heard Campbell say that she believed drug money "may have been" involved in the transaction; and 6) another witness testified that she heard Campbell say that "she didn’t care where the money came from." There was no evidence, however, that Lawing and Campbell had known each other before the transaction or that Lawing ever told Campbell, either directly or indirectly, that his true occupation was drug dealing. Nonetheless, the jury found Campbell guilty under all three counts.

The district court entered judgment of acquittal with respect to the section 1956 and 1957 counts and conditionally granted a new trial on those counts, on the ground that the evidence was insufficient to support the jury’s finding that Campbell knew that the funds used to buy the house were drug proceeds. The court’s principal concern was that the jury’s finding might have been unduly influenced by evidence concerning Lawing’s persona:

None of th[e] evidence [concerning Lawing’s flashy dress and extravagant lifestyle] proves that Mark Lawing was anything but a spendthrift playboy who enjoyed demonstrating his wealth, however it might have been acquired [T]he jury may have convicted Ellen Campbell because of the outrageous

213. Id. at 1265 (quoting the Government’s Brief).
214. Id. at 1261.
215. Id. at 1259.
216. Id. at 1262.
217. Id. at 1266.
218. Id.
219. In fact, the only evidence on this point was Lawing’s testimony that he never told Campbell that he was a drug dealer. Id. at 1265.
220. Id. at 1259.
221. Id. at 1269.
and exorbitant lifestyle of Mark Lawing. The court believes that the conviction of Ellen Campbell stems from undue consideration by the jury of the conspicuous display of wealth by Mark Lawing.222

On appeal, the Fourth Circuit reversed the entries of judgment of acquittal but affirmed the conditional grant of a new trial.223 In holding that the evidence was sufficient to find that Campbell knew that drug money was involved, the court of appeals emphasized the irregular nature of the real estate transaction and Campbell's statement that the funds "may have been drug money."224

In terms of congressional intent alone, the Fourth Circuit's ruling in Campbell was incorrect. Under the circumstances, Campbell's statement that the funds "may have been drug money" could support a finding beyond a reasonable doubt that she suspected drug money was involved, but not that she knew that drug money was involved. Likewise, although the irregular nature of the transaction suggested that the transaction might have been designed to conceal or hide illegitimate funds, it also suggested that the transaction might have been designed to conceal or hide legitimate funds.225 In short, the evidence before the jury raised nothing more than a reasonable inference that Campbell realized that drug money may have been involved—which she herself acknowledged. The Fourth Circuit's holding thus endorses a quantum of evidence—mere suspicion that illegal funds are involved—that Congress repeatedly rejected as sufficient to support a conviction under section 1957.226

Congress' clearly expressed intent is reason enough for giving clear instructions to juries that evidence of mere suspicion is not enough to support a conviction under section 1957 and for carefully reviewing any verdict of guilty under section 1957 to ensure that the jury complied with these instructions. The need for these

222. Id. at 1265, 1269.
224. Id. at 859-60.
225. For example, a transaction of the type in question easily suggests an effort to avoid the payment of taxes.
measures is rendered all the more necessary by the need to protect First Amendment associational values.\textsuperscript{227} Normally, the extent to which courts should defer to jury verdicts of guilty is a question of legislative intent and due process.\textsuperscript{228} In the case of section 1957, however, sustaining a verdict of guilty based on insufficient evidence will generally penalize a form of association protected under the First Amendment—a consideration not present when evaluating prosecutions under most other criminal statutes. Not only is Campbell being penalized for engaging in conduct Congress did not intend to criminalize, she is being penalized for engaging in associational activity protected under the First Amendment. She is being penalized for choosing to associate with someone who fit common stereotypes of how criminals look and act. The imposition of criminal sanctions on that basis violates the First Amendment right to freedom of association.\textsuperscript{229} Indeed, even if Campbell had

\textsuperscript{227} See Strafer, supra note 16, at 171.

\textsuperscript{228} The courts can never be absolutely certain that a jury’s verdict of guilty reflects the truth; therefore, the extent to which due process forbids the courts from deferring to a jury’s guilty verdict is ultimately a question of how probable it is that the jury’s verdict is erroneous and whether as a civilized society we are willing to tolerate that probability of error. This concept is similar to that underlying the appropriate standard of proof to be applied by the fact finder at trial:

The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to “instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.” The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.


\textsuperscript{229} See Scales v. United States, 367 U.S. 203 (1961); Sawyer v. Sandstrom, 615 F.2d 311 (5th Cir. 1980). Scales concerned the constitutionality of the Smith Act, 18 U.S.C. § 2385, which prohibits, inter alia, membership in an organization advocating the overthrow of the government by force or violence. Scales, 367 U.S. at 205. The Court held that the statute could constitutionally reach only active members “having also a guilty knowledge and intent.” Id. at 228. A conviction could not be based upon passive membership, or “what otherwise might be regarded as merely an expression of sympathy with the alleged criminal enterprise, unaccompanied by any significant action in its support or any commitment to undertake such action.” Id. The Court reasoned:

In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity that relationship must be sufficiently substantial to satisfy the concept of personal guilt [sic] in order to withstand attack under the Due Process Clause
known that Lawing was a drug dealer, instead of merely suspecting that he was a drug dealer, imposition of criminal liability on that basis alone would penalize protected First Amendment activity.

A strong tradition exists in this country that rumor, gossip, and stereotypical notions concerning dress and persona are an improper basis for forming judgments concerning whether to interact with another person, especially in the commercial context. Cases such as *Campbell* turn this tradition on its head: *Campbell* effectively means that businesspersons are expected to make judgments based on information of this type and will suffer criminal sanctions if they do not.

C. Sixth Amendment Right to Counsel

As originally proposed, section 1957 contained a provision exempting “financial transactions involving the bona fide fees an attorney accepts for representing a client in a criminal investigation or any proceeding arising therefrom.” The proponents of the attorneys’ fees exemption had argued that it was necessary to prevent section 1957 from chilling the attorney-client relationship in

---

*Sawyer* concerned a Florida ordinance that prohibited “loiter[ing] in any place with one or more persons knowing that a narcotic or dangerous drug is being unlawfully used or possessed.” *Sawyer*, 615 F.2d at 313. The Fifth Circuit held that the ordinance violated the First Amendment because it effectively punished one for “having the wrong kinds of friends and for being with them on a public street.” *Id.*, see also *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (holding a loitering statute unconstitutional because, inter alia, it encouraged suppression of the rights of minorities and other disenfranchised groups to associate freely).

230. See *Sawyer*, 615 F.2d at 313.

231. Although § 1957 poses some potential threat to First Amendment associational values, the appropriate remedy is not to invalidate that statute on its face but to instead require carefully worded jury instructions and meaningful review of jury verdicts to ensure that convictions are not based on mere suspicion that criminally derived property is involved. The strong remedy of invalidating § 1957 on its face is not warranted given that the statute can be narrowed by construction so that it does not criminalize conduct protected under the First Amendment. See *Board of Airport Comm’rs v. Jews for Jesus*, 482 U.S. 569 (1987) (narrowly constructing a Board of Airport Commissioners Resolution); *Houston v. Hill*, 482 U.S. 451 (1987) (municipal ordinance); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (state law).

232. The original exemption for attorney’s fees read: “[Section 1957] does not apply to financial transactions involving the bona fide fees an attorney accepts for representing a client in a criminal investigation or any proceeding arising therefrom.” H.R. Rep. No. 855, supra note 8, at 1.
criminal matters; without it, they contended, criminal defense attorneys might not investigate their clients' cases fully for fear of learning information that could trigger liability under the statute. Opponents of the exemption feared that its broad wording would allow some criminal defense attorneys to further the illegal enterprises of their clients by knowingly accepting tainted fees.

In the final days before the Money Laundering Control Act of 1986 

233. Representative Bill McCollum, the sponsor of the exemption, stated: "I am concerned, as you are, I have been for some time, about the impact our statute might have on chilling the relationships between a defense attorney in a criminal proceeding and his client." Norman Lefstein, American Bar Association Criminal Justice Section Report to the House of Delegates No. 110A, at 8 (Feb. 1987) (quoting Markup of H.R. 5077, supra note 9, at 7).

House Report 855 further explained the purpose of the exemption:

The Subcommittee [on Crime] was aware of a potential impact upon the exercise of the sixth amendment right to the effective assistance of counsel in the event of application of this offense to bona fide fees received by attorneys. An attorney representing a person facing criminal investigation or prosecution, in order to carry out the professional obligation to fully represent their clients, must inquire into many aspects of a client's personal lives [sic] and financial circumstances and thus may learn that part of the fee with which the attorney has been paid was derived from a designated offense. The Subcommittee was very concerned that, in the absence of this provision, the potential for such discovery might have had the effect of inhibiting the attorney's complete investigation of the client's case (to avoid learning any information which could have triggered this offense) and would thus have interfered with the client's sixth amendment right to effective assistance of counsel.

H.R. REP. No. 855, supra note 8, at 14.

234. The President's Commission on Organized Crime noted that "mob-connected" lawyers and "lawyer-criminals" use the protections afforded by the attorney-client relationship to further their client's illegal enterprise through, inter alia, the subornation of perjury and the obstruction of justice. CASH CONNECTION, supra note 2, at 257-58.

Representative Clay Shaw argued against the exemption for bona fide attorneys' fees:

"Now this is not an indictment of the Criminal Bar, but it is an indictment of an ongoing relationship between drug dealers and a single lawyer that seems to go on and on and on. And to make the monies that are paid as bona fide fees for this particular lawyer as an exemption when he probably, more than anyone else, should bear responsibility for knowingly taking these funds I think would be a very bad mistake, and I would hope this committee would not accept that."

was enacted, the opponents of the attorneys' fee exemption prevailed and it was dropped.235

Nonetheless, representatives of the American Bar Association (ABA) and the National Association of Criminal Defense Lawyers (NACDL) immediately began urging Congress to amend section 1957 to reinstate the attorneys' fees exemption.236 The ABA and NACDL solicited the Justice Department's support for the statutory exemption, an effort that proved unsuccessful.237 Instead, the Justice Department assured Congress that the Department's internal prosecution standards would adequately protect the Sixth Amendment right to effective representation in a criminal matter.238 In 1988, Congress again chose to avoid the issue of the extent to which attorneys' fees are exempted from section 1957. Cong.

---

235. Representative McCollum, commenting on the late-night session that produced the final version of section 1957, stated the following with respect to the last-minute decision to drop the attorneys' fees exemption:

I think that last night most of us working on this issue recognized that the risk that the Department of Justice would prosecute an attorney in this circumstance was really so very remote that a special statutory exception was really not necessary.

We did not omit this provision because we have any doubts about the wisdom of the policy it was intended to carry out. There was concern about the narrowness of the exception which the provision created.

1986].

236. The NACDL also registered its opposition when the new offense was first introduced in the House of Representatives. See H.R. REP. No. 855, supra note 8, at 9.

237. Id.

238. On May 6, 1987, William F. Weld, Assistant Attorney General for the Department of Justice's Criminal Division, appeared before a House subcommittee and testified in part:

Because the Department firmly believes that attorneys representing clients in criminal matters must not be hampered in their ability to effectively and ethically represent their clients within the bounds of the law, it is the proposed policy of the Department that prosecutions under Section 1957 will not be brought against attorneys based upon the receipt of property constituting bona fide fees for the legitimate representation in a criminal matter, except if there is clear and convincing evidence that the attorney had actual knowledge of the illegal origin of the specific property received and such evidence does not consist of confidential communications or other information obtained by the attorney during the representation and in furtherance of the obligation to effectively represent the client.

This proposed prosecution standard applies only to fees for legal services actually rendered in a criminal matter. Attorneys who engage in other commercial transactions unrelated to the representation of a client in a criminal matter or who represent clients in civil matters should be treated as any other non-privileged vendor of goods or services.
gress amended section 1957 but only to provide that 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." 239

The extent to which section 1957 threatens the Sixth Amendment right to effective representation in a criminal matter is a complicated issue that has been the subject of considerable commentary and debate. 240 This Article does not purport to address this issue exhaustively; however, it offers two specific recommendations. First, the Justice Department's standards for the prosecution of attorneys based on the receipt of bona fide fees should be extended to the representation of clients in civil matters. 241 The separation of legal services into service for civil and criminal representation is analytically unsound for purposes of determining the extent to which section 1957 threatens the Sixth Amendment right to effective representation in a criminal matter.

Second, Congress should amend section 1957 to incorporate the Justice Department's standards—extended to representation in civil matters—directly into the wording of the statute. The Justice Department guidelines that were eventually issued with respect to the applicability of § 1957 to attorneys' fees were essentially the same as the proposed policy communicated by the Department to Congress prior to its enactment of the 1988 amendment to section 1957. See id.

The Justice Department guidelines that were eventually issued with respect to the applicability of § 1957 to attorneys' fees were essentially the same as the proposed policy communicated by the Department to Congress prior to its enactment of the 1988 amendment to section 1957. See id. 239. 18 U.S.C. § 1957(f)(1) (1988).

Congressional hesitancy to enact a more precise statutory provision specifying the extent to which attorneys' fees are exempted from § 1957 can probably be attributed to concern that such a provision could appear to constituents as another example of lawyers (i.e., Congress) protecting their own. Senator Dole, for example, stated:

I know there is a sixth amendment but it is going to be hard to explain to some why we take care of lawyers, that we have a forfeiture or whatever. They will be paid even though the money comes from drug trafficking.

We do not exempt anybody else but attorneys are exempt and as my friend from New Hampshire [Senator Rudman] pointed out, it has been that way forever.


241. See infra part IV.C.1.
Department standards are not binding and therefore cannot be relied on to protect the attorney-client relationship in criminal matters to the extent Congress intended. Moreover, two recent Supreme Court cases rejecting Sixth Amendment challenges to the forfeiture of attorneys' fees suggest that the courts might not construe section 1957's "Sixth Amendment" exception in a manner that will effectuate Congress' intent. \textsuperscript{242} Finally, section 1957's specific reference to the Sixth Amendment could be construed as creating an unintended defense to liability under the statute—an attorney otherwise guilty under the statute could escape conviction solely on the ground that he subjectively believed that receipt of the tainted funds as fees was necessary to protect the Sixth Amendment right to counsel, regardless of whether the belief is objectively reasonable. The amending of section 1957 as suggested should cure this problem.

1. Extension of Justice Department Prosecution Policy to Representation in Civil Matters

Under the Department of Justice's guidelines for prosecutions under sections 1956 and 1957, approval of the Assistant Attorney General for the Criminal Division is required before prosecutors may seek an indictment charging an attorney with a violation of section 1957 based on fees paid to the attorney for representation in a criminal or civil matter. \textsuperscript{243} Although the Department's guidelines do not expressly acknowledge any Sixth Amendment limitation to the scope of section 1957, they implicitly suggest that unlimited application of section 1957 to cases involving bona fide attorneys' fees could implicate Sixth Amendment values by chilling the attorney-client relationship in criminal matters:

There is no statutory prohibition upon the application of Section 1957 to transactions involving bona fide fees paid to attorneys for representation in a criminal matter. However, the Department recognizes that attorneys in such situations, unlike all others who may deal with criminal defendants, may be required to investigate and pursue matters which will provide them with

\textsuperscript{242} See Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989); United States v. Monsanto, 491 U.S. 600 (1989); infra notes 254-73 and accompanying text.

\textsuperscript{243} DEPARTMENT OF JUSTICE MANUAL, supra note 3, § 9-105.300.
knowledge of the illicit source of property they receive. Indeed, the failure to investigate such matters may be a breach of ethical standards or may result in a lack of effective assistance to the client. 244

Under the Department's policy, an attorney may not be prosecuted under section 1957 based on the receipt of bona fide fees received for legitimate representation in a criminal matter unless proof exists beyond a reasonable doubt that the attorney had actual knowledge of the illegal origin of the specific property received. Moreover, the evidence of such knowledge must not consist of

(a) confidential communications made by the client preliminary to and with respect to undertaking representation in a criminal matter, (b) confidential communications made during the course of representation in the criminal matter, or (c) other information obtained by the attorney during the course of the representation and in furtherance of the obligation to effectively represent the client. 245

The term "bona fide fees" under this standard means "fees paid in good faith without fraud or deceit for representation concerning the defendant's personal criminal liability." 246

The chief problem with the Justice Department's standard is that it does not apply to attorneys' fees received for representation in a civil matter. In the Department's view, attorneys representing clients in civil matters "should be treated as any other non-privileged vendor of goods or services." 247 Undoubtedly, this position has some theoretical appeal. The Sixth Amendment only applies to representation related to a criminal matter. 248 It thus could be argued that, from a constitutional perspective, legal services provided to a client in a civil matter are conceptually indistinguishable from the services provided by other vendors of goods or

244. Id. § 9-105.600.
245. Id.
246. Id. § 9-105.610.
247. Money Laundering Hearings, supra note 238, at 107-08 (statement of William F Weld, Assistant Attorney General, Criminal Division).
248. The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.
services. Many would contend, for example, that the services provided by doctors and accountants are as important to society as the services provided by attorneys in a civil matter. Moreover, although attorneys in civil matters often cannot perform their duties properly without substantial freedom to investigate their client’s affairs, the same can be said of doctors and accountants. Certainly, an attorney’s representation of a client in a civil matter is the same as the services provided by a doctor or an accountant in that none are accorded special constitutional protection. Under this view, therefore, Congress’ enactment of section 1957 manifests a legislative policy judgment that the beneficial interests to society gained by full application of section 1957 to all nonconstitutionally protected relationships—including the attorney-client relationship in civil matters—outweighs the harmful effects to society that full application of section 1957 poses to those relationships. Indeed, it was Congress’ concern that the original attorneys’ fee exemption in section 1957 would lead to special treatment for the civil aspects of some attorney-client relationships, while other similar relationships would not be exempt, that led Congress to drop the more specific exemption for attorneys’ fees that was originally proposed.  

The difficulty with this view, however, is that it assumes that legal services can always be neatly categorized as either representation in a “civil” or “criminal” matter. In the context of section 1957, this is not the case. The consequences of section 1957 become significant to an attorney whenever he or she becomes aware that a client is or has been engaged in criminal activity, regardless of whether the client is being represented in a civil or criminal matter. As an illustration, suppose that a law firm is retained by a corporation to defend it in a civil lawsuit. In the course of investigating the corporation’s affairs to prepare a particular defense, the firm’s attorneys uncover information that could, but will not necessarily, lead to knowledge that the corporation has violated, and might be continuing to violate, RICO. Further investigation could lead to knowledge that the firm’s fees are being paid with funds derived from RICO activity. Because the firm does not

249. See supra note 234.
want to lose its lucrative client, and certainly seeks to avoid criminal liability under section 1957, it decides that the better course is to continue representing its client in the civil lawsuit but to pursue defenses less likely to uncover information establishing that its client has engaged in criminal activity.

At first glance, in this hypothetical the specter of section 1957 would seem to have resulted only in chilling effective representation in a civil matter: the firm breached its professional obligation to represent its client effectively in the civil lawsuit. A closer examination, however, reveals that the specter of section 1957 has chilled the effective representation of the client in a potential criminal matter. The firm’s premature termination of its investigation means that its client is unknowingly acting without counsel in a criminal matter—representation that a client in this situation could legitimately expect the law firm to provide, at least temporarily, even though the firm had only been retained for a civil matter. Among other things, the firm’s premature termination of its investigation could result in its client’s inadvertent disclosure of information protected by the Fifth Amendment privilege against self-incrimination and, if the client is continuing to engage in criminal activity, its failure to discontinue that activity because it was not given proper legal advice. Thus, applying section 1957 to the receipt of bona fide attorneys’ fees for representation in a civil matter chills the Sixth Amendment right to effective representation in a criminal matter.

251. See Model Code of Professional Responsibility DR 5-101(A) (1980) (“Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.”).

252. Cf. Easley v. State, 334 So. 2d 630 (Fla. Dist. Ct. App. 1976) (stating that an attorney has a duty to inform a client when he is not competent to represent the client in a criminal matter); Model Rules of Professional Conduct Rule 1.6 cmt. (1983) (“One of the lawyer’s functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.”); id. Rule 1.1 cmt. (“In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical.”); Model Code of Professional Responsibility DR 6-101(A)(1) (“A lawyer shall not handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.”).
2. Incorporation of Justice Department Policy Directly into Language of Section 1957

Congress should amend section 1957 to incorporate the Justice Department’s standards (as extended to representation in civil matters) directly into the wording of the statute. The Justice Department standards are not binding and therefore cannot be relied on to fully protect the Sixth Amendment right to effective representation in a criminal matter. Moreover, two recent Supreme Court cases rejecting Sixth Amendment challenges to the forfeiture of attorneys’ fees indicate that the courts might not construe section 1957’s reference to a Sixth Amendment exception in a manner that will fully effectuate congressional intent.

The Supreme Court decided United States v. Monsanto and Caplin & Drysdale, Chartered v. United States on the same day in 1989. Both cases concerned pretrial restraining orders, entered immediately after the defendants’ indictments on drug-related charges, that froze most of the defendants’ assets as potentially forfeitable under the drug forfeiture statute. In Monsanto, the district court denied the defendant’s motion to vacate the restraining order in order to permit him to use the frozen assets to pay his attorney. An en banc panel of the Second Circuit reversed the district court’s decision and ordered that the restraining order be modified to allow the assets to be used to pay the attorney’s fees. The Supreme Court reversed the Second Circuit and reinstated the restraining order.

In Caplin & Drysdale, the defendant, notwithstanding the pretrial restraining order, had transferred $25,000 to his attorneys for preindictment legal services, which the attorneys placed in an escrow account. Subsequently, the defendant pleaded guilty and

256. Both opinions were decided June 22, 1989.
257. Caplin & Drysdale, 491 U.S. at 619-20; Monsanto, 491 U.S. at 603-04.
258. Monsanto, 491 U.S. at 604.
260. Monsanto, 491 U.S. at 605-06.
261. Caplin & Drysdale, 491 U.S. at 620.
his assets were declared forfeited.262 Thereafter, his attorneys petitioned the district court for a share of the forfeited assets, relying on a provision of the drug forfeiture statute that protects the property interests of third parties in forfeitable assets that result from bona fide transactions which the third party entered into without reasonable cause to believe that the assets were subject to forfeiture.263 The attorneys sought both the $25,000 held in escrow and an additional $170,000 for postindictment legal services.264 The district court granted the attorneys' petition; however, the Fourth Circuit reversed en banc,265 a decision affirmed by the Supreme Court.266

In both cases, a majority of the Supreme Court rejected the contention that an exemption exists to the federal drug forfeiture statute for bona fide fees paid to an attorney for representation in a criminal matter.267 The majority also rejected the contention that the Sixth Amendment proscribed the forfeitures of attorneys' fees that had been ordered in the two cases.268 The majority concluded that under the relation back doctrine, a legal fiction that vests title in forfeitable property in the United States upon commission of the criminal acts giving rise to forfeiture, the government has significant interests in recovering forfeitable assets that might be used to pay an attorney.269 These interests, the majority reasoned, are not outweighed by any chilling effect that the forfeiture of attorneys' fees poses to the Sixth Amendment right to effective representation in a criminal matter, including the right to counsel of one's choice. That right, according to the majority, extends only to "the individual's right to spend his own money to obtain the advice and assistance of counsel."270 Comparing a person who

262. Id. at 621.
263. Id.
264. Id.
266. Caplin & Drysdale, 491 U.S. at 620.
267. Id. at 622-23; United States v. Monsanto, 491 U.S. 600, 606-14 (1989).
268. Caplin & Drysdale, 491 U.S. at 628; Monsanto, 491 U.S. at 614.
269. Caplin & Drysdale, 491 U.S. at 627.
270. Id. at 626 (quoting Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 370 (1985) (Stevens, J., dissenting)).
seeks to spend forfeitable property to a bank robber who seeks to spend funds stolen from a bank, the majority concluded that no constitutional principle gives a person the right to spend tainted funds, even for the purpose of retaining counsel for defense against criminal charges:

There is no constitutional principle that gives one person the right to give another's property to a third party, even where the person seeking to complete the exchange wishes to do so in order to exercise a constitutionally protected right. If defendants have a right to spend forfeitable assets on attorneys' fees, why not on the exercises of the right to speak, practice one's religion, or travel? The full exercise of these rights, too, depends in part on one's financial wherewithal; and forfeiture, or even the threat of forfeiture, may similarly prevent a defendant from enjoying these rights as fully as he might otherwise. Nonetheless, we are not about to recognize an antiforfeiture exception for the exercise of each such right; nor does one exist for the exercise of Sixth Amendment rights.271

If the majority's reasoning in Monsanto and Caplin & Drysdale is any indication, the Supreme Court is unlikely, at least anytime in the near future, to be receptive to arguments that the Sixth Amendment, in and of itself, places special limitations on the scope of section 1957 simply because bona fide attorneys' fees are involved. The only arguable distinction between the impact of section 1957 and the impact of civil forfeiture law on the right to counsel of one's choice is that section 1957, unlike forfeiture law, involves the threat of criminal sanctions.272 Therefore, the potential chilling effect of section 1957 on the right to counsel is ostensibly greater than the potential chilling effect of forfeiture law.

271. Id. at 628.
272. As noted, § 1957 applies to profits of unlawful activity as well as property stolen or obtained by fraud. See supra part III.A.4.b. A criminal who dissipates profits of illegal activity, as opposed to funds stolen or obtained by fraud, is not interfering with the property rights of another person. See supra part III.A.4.b. It could thus be argued that, in considering the extent to which the governmental interests promoted by § 1957 outweigh the First Amendment right to freedom of association and the Sixth Amendment right to counsel, the government's interests have less weight. However, Justice Blackmun made this same argument with respect to the drug forfeiture statute in Monsanto and Caplin & Drysdale, an argument ignored by the majority. Caplin & Drysdale, 491 U.S. at 652-53 n.15 (Blackmun, J., dissenting) (combining a dissent for Monsanto and Caplin & Drysdale).
Nothing in *Monsanto* or *Caplin & Drysdale*, however, indicates that a majority of the Supreme Court would consider this distinction significant.\(^{273}\)

Without doubt, however, the very purpose of the 1988 amendment to section 1957 was to *limit* its scope to some degree—to whatever degree is necessary to prevent a chilling of the right to effective representation in criminal matters. After *Monsanto* and *Caplin & Drysdale*, which were decided after section 1957 was amended in 1988, it seems clear that Congress must affirmatively act if it expects section 1957 to be limited as it desires.

Even assuming that the courts will eventually establish specific standards that effectuate Congress' intent with respect to the applicability of section 1957 to the receipt of bona fide attorneys' fees, Congress should amend the statute to avoid the unhealthy situation that currently exists. For one thing, it would hardly be reassuring to an attorney convicted under section 1957 to learn that the case had resulted in an opinion clarifying the law in this area, but unfortunately his or her conduct fell just outside of what the court had decided was lawful, and the conviction was therefore upheld. Suppose, for example, that an attorney believes in good faith, as this Article contends, that the Sixth Amendment proscribes liability under section 1957 based on the receipt of bona fide attorneys' fees in a civil matter. The attorney engages in such a transaction and is subsequently convicted under section 1957. Later, the courts conclude that the Justice Department's prosecution standards, as currently written, strike the appropriate balance between the Sixth Amendment right to counsel and the government's interest in crime control. The courts specifically reject the contention that the Sixth Amendment invalidates section 1957 convictions based on the receipt of bona fide attorneys' fees in a civil matter. Under these circumstances, is it fair to hold the attorney criminally responsible when she could not have known how section 1957 would eventually be interpreted?

---

\(^{273}\) With respect to the forfeiture of attorneys' fees, one of the only issues left open in *Monsanto* and *Caplin & Drysdale* is whether an attorney who knowingly receives tainted property as fees must forfeit the fees even if he received them prior to the entry of a restraining order.
Normally, an individual who violates the language of a criminal statute under a good faith belief that his conduct is nevertheless protected under the Constitution assumes the risk that the courts might reject this constitutional view.\textsuperscript{274} Unlike almost any other criminal statutes, however, section 1957 specifically includes a constitutional "safe harbor" provision on its face. This could be construed as allowing an attorney otherwise guilty under the statute to escape conviction—perhaps justifiably so—on the ground that the attorney's subjective belief was that his or her actions were necessary to protect the Sixth Amendment right to counsel, regardless of whether the belief was objectively reasonable. A similar safe-harbor provision led the Court in \textit{Gentile v. State Bar}\textsuperscript{275} to reverse the conviction in that case on vagueness grounds.\textsuperscript{276} \textit{Gentile} probably is distinguishable from cases involving section 1957 because it did not concern a constitutional safe-harbor provision.\textsuperscript{277} Nonetheless, no sound reason exists for allowing this unhealthy situation to continue. Congress would better serve the public by replacing the Sixth Amendment exception to section 1957 with specific language stating the precise extent to which the statute applies to the receipt of bona fide attorneys' fees.

\section*{V Conclusion}

Congress' enactment of section 1957 is in most respects a legitimate response to the growing economic power of organized crime. Section 1957 at least has the potential to pose a significant hurdle to the ability of professional criminals to enjoy their ill-gotten gains or use them to further their criminal activity. Nonetheless, the particular method Congress selected to achieve this goal

\begin{footnotes}
\item \textsuperscript{274} Cheek v. United States, 498 U.S. 192, 204 (1991) (holding that a good faith belief that the income tax laws were unconstitutional would not be a defense for charges of willfully evading income taxes and failing to file income tax returns).
\item \textsuperscript{275} 111 S. Ct. 2720 (1991).
\item \textsuperscript{276} Id. at 2731. The Court reversed the imposition of sanctions against an attorney for violating a state ethical rule that prohibited commenting on current litigation to the press. \textit{Id.} The attorney had relied on a safe-harbor provision to the general rule that allowed explanation of the "general" nature of defenses without further "elaboration." \textit{Id.} at 2721. The Court concluded that the terms "general" and "elaboration," as used in the safe-harbor provision, were classic terms of degree, with no "settled usage or tradition of interpretation in the law." \textit{Id.} at 2731.
\item \textsuperscript{277} \textit{Id.} at 2721.
\end{footnotes}
—imposing criminal liability on bankers, merchants, and other businesspersons who knowingly provide professional criminals with a market for their ill-gotten gains—could have severe side effects if not exercised carefully. Unrestrained application of section 1957 could result in the conviction of innocent persons, the infringement of constitutionally protected associational rights, and the invasion of the Sixth Amendment right to effective representation in criminal matters. The courts should be especially vigilant when constructing section 1957’s language, instructing juries, and reviewing jury verdicts to ensure that these harmful effects do not occur.