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## Cost Savings as Proceeds of Crime: A Comparative Study of the United States and the United Kingdom

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# “Cost Savings” As Proceeds of Crime: A Comparative Study of the United States and the United Kingdom

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## Abstract

*The article begins by comparing and contrasting the provisions relating both to asset forfeiture and money laundering under U.S. federal law and the law of the United Kingdom (in this area, the differences between the provisions of the three jurisdictions making up the United Kingdom are not significant). Some reference is also made to Florida state law, but principally by way of example rather than analysis. It then analyzes the U.S. case law relating to costs saved through the commission of a criminal offense and considers the possible effect of the amendment, made in 2009, to 18 U.S.C. § 1956, before turning to the English case law for comparison. Finally, recommendations are made as to possible further reform to the U.S. provisions.*

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## I. Introduction

It is a principle now firmly established in most jurisdictions that the proceeds of criminal offenses are interdicted in two key ways. First, they are seized by the state, either through criminal confiscation or some form of civil forfeiture,<sup>1</sup> depending on the circumstances of the case and, especially, the jurisdiction.<sup>2</sup> Second, the handling of the proceeds constitutes the separate crime of money laundering.<sup>3</sup> Indeed, both of these are now required under the Forty Recommendations of the Financial Action Task Force (FATF): seizure is required under Recommendation 3, while the prohibition of money laundering is required under Recommendations 1 and 2.<sup>4</sup> The key areas in which the provisions of the various jurisdictions differ are: the range of predicate crimes covered, the degree of intent required for a money laundering conviction and, to a lesser extent, the imposition of a threshold value that the property in question must reach to be covered. In regard to the United States and the United Kingdom, the jurisdictions considered in this article,

1. In certain jurisdictions, such as Italy, both criminal and civil removal of assets are termed "confiscation," while in others, such as the United States, both are termed "forfeiture," albeit that this term is then sub-divided into "criminal" and "civil" forfeiture. Terrance G. Reed, *American Forfeiture Law: Property Owners Meet the Prosecutor*, CATO POLICY ANALYSIS No. 179, paras. 11-12 (1992). The United Kingdom's terminology is particularly complex: "confiscation" refers to the criminal procedure of removal of the proceeds of crime following the defendant's conviction. See Proceeds of Crime Act, 2002, c. 29, § 6 (U.K.). "Civil recovery" refers to the civil removal of such proceeds irrespective of the defendant's guilt, or even accusation, of any crime. See *id.* § 240. "Forfeiture" relates to the removal of either: 1) an instrumentality of smuggling contraband goods or illegal entrants; 2) property which forms the actual subject matter of a crime (for example those contraband goods or illegal drugs); or 3) cash which is shown to be either derived from, or intended to be used for, a crime.

2. For example, *in rem* civil forfeiture has been possible in the United States since, at least, the beginning of the 19th Century, *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974); indeed, it predates criminal forfeiture. Terry Reed, *Criminal Forfeiture under the Comprehensive Forfeiture Act of 1984: Raising the Stakes*, 22 AM. CRIM. L. REV. 747, 747 (1985). In contrast, modern civil recovery has, in respect to the proceeds of crime, only existed in the United Kingdom since the coming into force, in 2003, of Part 5 of the Proceeds of Crime Act 2002, fifteen years after criminal confiscation was first introduced. Proceeds of Crime Act, 2002, c. 29, Part 5 (U.K.). For a consideration of the U.K. powers of forfeiture of either the instrumentality or the subject of a crime, as well as a brief consideration of older powers of forfeiture, see Richard Alexander, *Confiscation Orders: Do the U.K. Provisions for Confiscation Orders Breach the European Convention on Human Rights?*, 5 J. FIN. CRIME 374 (1998).

3. 18 U.S.C. § 1956(a)(1) (2009).

4. THE 40 RECOMMENDATIONS, FINANCIAL ACTION TASK FORCE 3-4 (2003), available at [http://www.fatf-gafi.org/document/28/0,3746,en\\_32250379\\_32236920\\_33658140\\_1\\_1\\_1\\_1,00.html](http://www.fatf-gafi.org/document/28/0,3746,en_32250379_32236920_33658140_1_1_1_1,00.html).

there is considerable similarity, albeit not a complete overlap. It is helpful to take each of the three areas in turn.

## II. What Predicate Crimes Are Covered?

### A. MONEY LAUNDERING

In regard to the range of predicate crimes, the key U.S. money laundering provisions, 18 U.S.C. § 1956 and § 1957, refer to "specified unlawful activity," which in turn refers to a number of lists of predicate crimes, amounting to over 200 separate offenses, but nonetheless omitting some.<sup>5</sup> It is notable, however, for the particular discussion of this article, that among the offenses that are included are a range of environmental crimes,<sup>6</sup> as well as fraud and misuse of visas, permits, and other documents.<sup>7</sup> The latter has been held to include employment of foreign nationals who are not permitted to work in the United States.<sup>8</sup>

The U.K. position is simpler: all crimes are, by definition, predicate crimes. The money laundering offenses, contained in Part 7 of the Proceeds of Crime Act 2002, refer to "criminal property."<sup>9</sup> This is defined in section 340 of the Act as a "benefit" derived from "criminal conduct," which in turn is defined as "conduct which constitutes an offense in any part of the United Kingdom"<sup>10</sup> Therefore, all criminal offenses that give rise to proceeds, from a contract murder to selling a pack of cigarettes to a minor,<sup>11</sup> are predicate crimes covered by the Act and handling property derived from them, in virtually any way, will constitute money laundering.<sup>12</sup>

Furthermore, the proceeds of crimes committed abroad are also covered: "criminal conduct" extends to conduct that "would constitute an offence in any part of the United Kingdom if it occurred there."<sup>13</sup> In theory, this is qualified by a dual-criminality rule, contained in each of the individual provisions in sections 327 to 329 of the Act, that provides the conduct must also have constituted a criminal offense in the jurisdiction where it was carried out.<sup>14</sup> In practice, however, this is of limited impact because under a subsidiary order to the Act, this defense does not apply to conduct that, had it occurred in the

5. 18 U.S.C. §§ 1956(a)(1), (c)(7), 1957(a), (f)(3) (2009).

6. *Id.* § 1956(c)(7)(E).

7. *Id.* § 1546.

8. *E.g.*, *United States v. Tyson Foods, Inc.*, 258 F. Supp. 2d 809 (E.D. Tenn. 2003).

9. Proceeds of Crime Act, 2002, c. 29, §§ 327(1), 329(1) (U.K.).

10. *Id.* §§ 340(2)(a), (3)(a). This includes any of the three jurisdictions making up the United Kingdom: England & Wales, Scotland or Northern Ireland.

11. The United Kingdom defines a minor as a person under eighteen. Children and Young Persons Act, 1933, c.12, § 7(1) (Eng., Wales). This is an example of a less serious offense because it is a summary offense (approximately equivalent to a misdemeanour in the U.S. system), carrying a maximum sentence of a fine of £2,500 (currently approximately US\$3,865). *Id.*

12. Proceeds of Crime Act, 2002, c. 29, §§ 327(1), 329(1) (U.K.). Compared to the U.S. provisions, the range of activities covered by the U.K. money laundering provisions is extremely wide, covering not only concealment, disguise, or transfer of the property, but also acquisition or even use of it. *Id.* §§ 329(1), 327(1), (3). As discussed below, no particular intent is required; merely knowledge or suspicion that the property in question is derived from some kind of criminal offense. *Id.* § 340(3)(b).

13. *Id.* § 340(2)(b).

14. Serious Organised Crime and Police Act, 2005, c. 15, §102(1)-(2), (4) (Eng., Wales, N. Ir.).

United Kingdom, would have carried a maximum prison sentence of at least one year.<sup>15</sup> Exceptions include unlicensed gambling or operation of a lottery, and also to engagement in, or promotion of, unlicensed financial services business,<sup>16</sup> but these do not significantly diminish the general impact of the order, which was enacted the same day, May 15, 2006,<sup>17</sup> that the local legality defense was introduced into the Act.<sup>18</sup>

This contrasts with the more limited U.S. position with regard to conduct abroad. Crimes carried out abroad against either the United States or its citizens, like terrorist offenses or drug trafficking, are covered as are a range of offenses against foreign states, such as murder, bribery of a foreign public official, fraud, or human trafficking.<sup>19</sup> Similarly covered is any offense for which the United States would be required, under a multi-lateral treaty, either to extradite a person or to try them domestically.<sup>20</sup> But this will still leave a wide range of offenses which, for the purposes of the U.S. money laundering statute, will be predicate crimes if they are committed within the territory of the United States but not if they are committed abroad. As such, handling the proceeds of the latter will not constitute money laundering under 18 U.S.C. § 1956 or § 1957, although it will under the U.K.'s counterpart legislation.

#### B. CONFISCATION/FORFEITURE

The closest the United States comes to a general criminal forfeiture provision is 18 U.S.C. § 982.<sup>21</sup> As with the money laundering statute, this provision, rather than referring to the proceeds of crimes in general, contains a long list of specific offenses, the proceeds of which may be subject to criminal forfeiture.<sup>22</sup> Money laundering offenses, under both 18 U.S.C. § 1956 and § 1957, are covered; as has just been seen, these may involve the proceeds of certain crimes committed abroad.<sup>23</sup> With this exception, however, all of the offenses listed in section 982 are domestic crimes.<sup>24</sup> In contrast to section 1956, there is no reference to crimes against foreign states. Although this may seem strange, there is a clear rationale. Criminal forfeiture, very much an *in personam* measure, forms part of the criminal sentence imposed on a defendant following his conviction (or plea of guilty) at the conclusion of a criminal prosecution.<sup>25</sup> That prosecution can only be brought on the basis of a violation of a U.S. criminal law.<sup>26</sup> Because a person cannot be tried before a U.S. criminal court for a violation of the law of a foreign jurisdiction, it follows that that court cannot impose a confiscation order in relation to it. It is true that, as mentioned above, a number of acts committed abroad may be subject to the jurisdiction

15. Proceeds of Crime Act (Money Laundering: Exceptions to Overseas Conduct Defence) Order, 2006, § 2(2).

16. *Id.* § 2(2).

17. *Id.* § 1.

18. Serious Organised Crime and Police Act (Commencement No. 6 and Appointed Day) Order, 2006, c. 37, § 3.

19. 18 U.S.C. § 1956(c)(7) (2009).

20. *Id.*

21. *See id.* § 982.

22. *See id.*

23. *Id.* § 982(a)(1).

24. *Id.* § 982.

25. FED. R. CRIM. P. 32.2(b)(1)(a).

26. *See* U.S. CONST. amend. V.

of the U.S. criminal courts.<sup>27</sup> Examples range from attacks on U.S. military personnel and government officials to bribery through an offer (other than in accordance with the U.S. securities laws) of securities to a U.S. person<sup>28</sup> or bribery by a U.S. person of a foreign public official.<sup>29</sup> All of these, however, are violations of U.S. criminal law and are prosecuted as such; violations of foreign laws lie firmly outside the U.S. criminal courts' jurisdiction.

Most of the U.S. provisions relating to criminal forfeiture are, however, not found in section 982, but scattered among a wide range of sections throughout the United States Code. In most cases, the forfeiture provision is contained in the chapter dealing with the particular offense in question. Thus, for example, Chapter 71 of 18 U.S.C. provides, in sections 1460 *et seq.*, that the production, transportation,<sup>30</sup> shipping, mailing,<sup>31</sup> or receipt<sup>32</sup> of obscene material is a crime and then goes on to state, in section 1467, that any property "constituting or traceable to gross profits or other proceeds obtained from such offense" or used as an instrumentality of the offense, as well as the obscene material itself, is subject to forfeiture.<sup>33</sup> Chapter 110, dealing with the sexual exploitation and abuse of children, similarly creates, in sections 2251 and 2252, offenses relating to the production and transfer of pornographic images involving minors,<sup>34</sup> and then provides in section 2253 that property related to these offenses may be forfeited,<sup>35</sup> while 21 U.S.C. §§ 841 through 843 and section 853 contain similar provisions regarding drug trafficking and the forfeiture of property related to it respectively.<sup>36</sup>

The general civil forfeiture provision, 18 U.S.C. § 981, is wider.<sup>37</sup> It similarly contains a long list of offenses, the proceeds of which may be subject to forfeiture. Nonetheless, although section 981 covers a wider range of offenses than its criminal counterpart (for example, it includes property relating to the production of obscene material), there remains a large number of civil forfeiture provisions that are found elsewhere. Examples include 18 U.S.C. section 2254, relating to pornography involving minors,<sup>38</sup> and 21 U.S.C. § 881, relating to drug trafficking.<sup>39</sup>

But 18 U.S.C. § 981(a)(1)(B) provides that the proceeds of certain crimes against a foreign nation may also be subject to civil forfeiture.<sup>40</sup> This provision is made possible by the

27. 18 U.S.C. § 1956(c)(7)(B) (2009).

28. Meaning a U.S. citizen or resident.

29. 18 U.S.C. § 1956(c)(7)(B)(iv) (2009). For an analysis of the extra-territorial jurisdiction of U.S. criminal laws, including a chart of federal statutes that explicitly provide for this, see CHARLES DOYLE, CONG. RESEARCH SERV., EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW 94-166A (2010).

30. 18 U.S.C. § 1465 (2006).

31. *Id.* § 1461.

32. *Id.* § 1462.

33. *Id.* § 1467(a).

34. *Id.* §§ 2251(a), 2252(a).

35. *Id.* § 2253(a).

36. 21 U.S.C. §§ 841(a), 842(a)-(b), 843(a)-(c), 853(a) (2010). For details of the location of all the criminal and civil forfeiture provisions in the United States Code, see the chart, "What Is Forfeitable?," attached as a CD to STEFAN D. CASSELLA, ASSET FORFEITURE IN THE UNITED STATES (2007).

37. 18 U.S.C. § 981 (2006).

38. *Id.* § 2254.

39. *Id.* § 881.

40. *Id.* § 981(a)(1)(B).

*in rem*, rather than *in personam*, nature of civil forfeiture.<sup>41</sup> Because a civil forfeiture action is taken against the asset, not the individual who happens to currently possess it, it does not depend on a conviction of any person under U.S. criminal law.<sup>42</sup> Hence, it may be applied to property relating to specified foreign crimes.<sup>43</sup>

The offenses against foreign states, which may form the basis of civil forfeiture proceedings are the trafficking of weapons of mass destruction (or the technology or material to produce them), drug trafficking, and those acts listed under section 1956.<sup>44</sup>

There are two provisos: the offense in question must be punishable in the jurisdiction in which it is committed, either with death or with a term of imprisonment of at least one year, and the offense must similarly be punishable in the United States with at least one year's imprisonment.<sup>45</sup> At first glance, the reference to the death penalty may seem strange to a U.S. audience. It is, however, significant. Although the death penalty exists not only in U.S. federal law but also in the state laws of the majority of the U.S. states,<sup>46</sup> the U.S. Supreme Court has ruled that it is only applicable, in relation to crimes against an individual, to homicide offenses.<sup>47</sup> Thus cases of capital crimes that produce proceeds will be rare, the most likely being a contract murder.<sup>48</sup> Many other jurisdictions, however, use the death penalty more widely. Drug trafficking carries a mandatory death sentence in a large number of jurisdictions, including many in East and South-East Asia and the Middle East;<sup>49</sup> in mainland China,<sup>50</sup> the death penalty is also prescribed for serious cases<sup>51</sup> of financial crimes ranging from fraud to corruption.<sup>52</sup> Therefore, if the provisions for the

41. Reed, *supra* note 1, paras. 11-12.

42. *Id.* para. 11.

43. 18 U.S.C. § 981(a)(1)(B) (2006).

44. *Id.* § 981(a)(1)(B)(i).

45. *Id.* § 981(a)(1)(B)(ii)-(iii).

46. DEATH PENALTY INFORMATION CENTER, FACTS ABOUT THE DEATH PENALTY (2011), <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>. At the time of writing, thirty-four of the fifty states provided for the death penalty.

47. Kennedy v. Louisiana, 554 U.S. 407, 421 (2008). The Court did not express any opinion in relation to crimes committed against the state or society at large (for example treason), as opposed to against an individual. *Id.*

48. 18 U.S.C. § 1956(c)(7)(D) (2009). Where a murder is committed in the course of a different acquisitive crime, for example a robber opening fire to evade arrest, the proceeds will be from the acquisitive crime (in this case robbery), not from the murder itself.

49. AMNESTY INTERNATIONAL, DEATH SENTENCES AND EXECUTIONS 12, 17, 20, 25 (2010), <http://www.amnesty.org/en/library/info/ACT50/001/2011/en> (generally where the amount of drugs trafficked exceeds a prescribed limit).

50. But not Hong Kong: although a Special Administrative Region of China since July 1997, it has its own laws and legal system, which continue not to provide for the death penalty even for the most serious crimes. *In Focus: Death Penalty*, AMNESTY INTERNATIONAL HONG KONG, <http://www.amnesty.org.hk/html/whatwedo?tid=1012> (last visited Nov. 23, 2011).

51. Chen Jieren, *Raising the Bar to Punish Corruption*, CHINA DAILY, April 4, 2010, [http://www.chinadaily.com.cn/opinion/2010-04/19/content\\_9745170.htm](http://www.chinadaily.com.cn/opinion/2010-04/19/content_9745170.htm) (where the proceeds exceed 1 million RMB, currently approximately US\$154,300).

52. An example of the latter concerned Zeng Jinchun, a senior Communist Party official in Hunan Province, who was executed in Dec. 2010 following conviction for receiving bribes of over US\$4.7 million in relation to mining contracts. John O. Membrino, *China Executes Official Convicted in \$4.7M Bribery Case*, AOL NEWS, Dec. 30, 2010, <http://www.aolnews.com/2010/12/30/china-executes-zeng-jinchun-official-convicted-in-4-7-million/>. As regards the former, it is highly likely that, had their offenses taken place in China, Kenneth Lay and Bernard Madoff would both have faced the death penalty.

forfeiture of the proceeds of overseas crimes are to refer to a specific sentence, as section 981 does,<sup>53</sup> they should include reference to the death penalty, not merely a minimum sentence of imprisonment if all serious crimes are to be covered.

In contrast, in the the United Kingdom, the provisions for criminal confiscation are found in one place: Part 2 of the Proceeds of Crime Act 2002 (The Act),<sup>54</sup> while those for civil recovery and cash forfeiture are similarly grouped in Part 5 of the Act.<sup>55</sup> There are certain forfeiture provisions which are offense-specific and therefore contained in separate legislation, but relatively few. In any case, they relate not to proceeds of crime in general, but property which either, by its very nature, is intrinsically illegal, such as illegal drugs,<sup>56</sup> pornographic material,<sup>57</sup> illegally-held firearms<sup>58</sup> and contraband goods,<sup>59</sup> or was used as an instrumentality either to import illegal drugs or other contraband goods<sup>60</sup> or to bring aliens illegally into the country.<sup>61</sup> Property may be subject to confiscation if it is found to be "criminal property," defined as a "benefit from criminal conduct,"<sup>62</sup> or to civil recovery if it is "property obtained through unlawful conduct."<sup>63</sup>

The definitions of "criminal conduct" in Part 2 of the Act<sup>64</sup> and "unlawful conduct" in Part 5<sup>65</sup> are very similar to that under the money laundering provisions, although there are minor differences in terms of the proceeds of overseas crimes.<sup>66</sup> In terms of confiscation, the practical impact of this will, however, be limited, because Part 2 makes it clear that the measure takes place as part of the sentencing process following a criminal trial.<sup>67</sup> Where the property is derived from a crime committed outside the United Kingdom, therefore, it will in practice only be subject to confiscation following a conviction for a

53. See 18 U.S.C. § 981(a)(1)(B)(ii) (2006).

54. Proceeds of Crime Act, 2002, c. 29, Part 2 (Eng., Wales).

55. Part 5 (U.K.).

56. Misuse of Drugs Act, 1971, c. 38, § 27 (U.K.) (This also covers property that is the instrumentality of a drug trafficking offense and has been held also to extend to the proceeds of drug trafficking, albeit that, since 1986, the latter has been confiscated under the proceeds of crime legislation: currently Part 2 of the Proceeds of Crime Act 2002.)

57. Obscene Publications Act, 1964, c. 74, § 1(4) (Eng., Wales).

58. Firearms Act, 1968, c. 27, § 52 (Eng., Wales, Scot.).

59. Customs and Excise Management Act, 1979, c. 2, § 49 (U.K.).

60. *Id.* §§ 88, 141.

61. Act, 1971, c. 77, § 25(6) (U.K.).

62. Proceeds of Crime Act, 2002, c. 29, § 340(3)(a).

63. *Id.* § 242.

64. Proceeds of Crime Act, 2002, c. 29, § 76 (Eng., Wales). Part 2 of the Act contains the confiscation provisions for England & Wales; the provisions relating to Scotland (Part 3) and Northern Ireland (Part 4) are, however, very similar.

65. *Id.* §§ 241-242 (U.K.). The term used is "property obtained through unlawful conduct," rather than "criminal property," but the definition itself is identical. *Id.* Civil recovery under the U.K. legislation is a process by which the proceeds of crime may be seized through civil, rather than criminal, proceedings; it is therefore analogous to the U.S. measure of civil forfeiture. Like civil forfeiture, the proceedings are *in rem* and, although the burden of proof is on the state (previously the Assets Recovery Agency, now, except in Scotland, the Serious Organised Crime Agency, Serious Organised Crime and Police Act, 2005, c. 15, § 1 (Eng., Wales, N. Ir.), the standard of proof required is the balance of probabilities, Proceeds of Crime Act, 2002, c. 29, § 241, much the same as the U.S. standard of preponderance of the evidence.

66. See Proceeds of Crime Act, 2002, c. 29, §§ 327, 329; Serious Organised Crime and Police Act, 2005, c. 15, § 102; Proceeds of Crime Act 2002 (Money Laundering: Exceptions to Overseas Conduct Defence) Order 2006 § 2.

67. Proceeds of Crime Act, 2002, c. 29, § 6(2) (or a plea of guilty; the point, however, remains the same).



money laundering offense.<sup>68</sup> In this respect, the provision is very similar to its U.S. counterpart.<sup>69</sup>

In regards to civil recovery, however, the position is different. Civil recovery, in contrast to confiscation, is both a civil procedure and, crucially, an *in rem* measure.<sup>70</sup> No criminal conviction is required.<sup>71</sup> Thus far, the position is the same as that in the United States. However, in contrast to the U.S. position, where there has been a criminal conviction civil recovery will not be applied because the policy is that it is only to be used where a criminal prosecution is not a viable option.<sup>72</sup> Although Part 5 of the Act does not expressly state this, the statement made to Parliament by the then-Minister for Police, Courts, and Drugs when the provisions were being debated makes the purpose of civil recovery clear:

Civil recovery will not be an alternative to prosecution, which will remain the preferred course wherever possible. The law enforcement and prosecution authorities will apply their normal evidential and public interest tests in deciding whether to pursue criminal proceedings. They will refer cases to the director<sup>73</sup> for possible civil recovery only where prosecution is not available.<sup>74</sup>

An exposition of the types of cases in which the view will be taken that a criminal prosecution is not practicable, and hence that civil recovery proceedings should be brought instead, may be found in Anthony Kennedy's article in the *Journal of Money Laundering Control*, "Civil recovery proceedings under the Proceeds of Crime Act 2002: the experience so far."<sup>75</sup>

Section 241 of the Act states that assets shown, on the balance of probabilities, to be the proceeds of "unlawful conduct" may be subject to civil recovery: essentially the same as the U.S. remedy of civil forfeiture.<sup>76</sup> Like its counterparts in Parts 2 and 7 of the Act, "unlawful conduct" covers any U.K. criminal offense whatsoever, as well as conduct committed abroad which, had it been committed in the United Kingdom, would have constituted a criminal offense.<sup>77</sup> There is, however, a stronger dual-criminality rule: the conduct must also have constituted a crime in the country or territory where it was com-

68. *Id.* §§ 327, 329; Serious Organised Crime and Police Act, 2005, c. 15, § 102; Proceeds of Crime Act 2002 (Money Laundering: Exceptions to Overseas Conduct Defence) Order 2006 § 2.

69. 18 U.S.C. § 982(a)(1) (2007).

70. Proceeds of Crime Act, 2002, c. 29, § 240.

71. *See id.*

72. *See* 373 PARL. DEB., H.C. (6th ser.) (2001) 764 (where a criminal prosecution is brought, the expectation is that the proceeds of the offense will be removed by means of a confiscation order and hence civil recovery will not be necessary).

73. The Director of the Assets Recovery Agency, *see id.* at 761. The Assets Recovery Agency has since been replaced in England & Wales and in Northern Ireland by the Serious Organised Crime Agency. John Leyden, *SOCA Soaks Up Asset Recovery Agency*, THE REGISTER, Apr. 1, 2008, [http://www.theregister.co.uk/2008/04/01/soca\\_gets\\_asset\\_recovery\\_powers/](http://www.theregister.co.uk/2008/04/01/soca_gets_asset_recovery_powers/).

74. 373 PARL. DEB., H.C. (6th ser.) (2001) 764.

75. Anthony Kennedy, *Civil Recovery Proceedings under the Proceeds of Crime Act 2002: The Experience So Far*, 9(3) J. MONEY LAUNDERING CONTROL 245 (2006). At the time of writing this article, Kennedy was Director of Legal Services of the Northern Ireland section of the Assets Recovery Agency.

76. Proceeds of Crime Act, 2002, c. 29, § 241 (U.K.).

77. *See id.*

mitted.<sup>78</sup> No exception to this rule is provided in relation to crimes of a particular severity.<sup>79</sup> Hence, funds derived from, for example, the sale of pornography in Denmark<sup>80</sup> or moderate insider trading carried out in Spain<sup>81</sup> will not be subject to civil recovery in the United Kingdom.

It must, however, be stated that the sharp dichotomy between criminal confiscation and civil recovery contrasts sharply with the approach in the United States. Here, civil forfeiture is a clear alternative to criminal confiscation and is not precluded by the bringing of a criminal prosecution. To quote Stefan D. Cassella, one of the leading U.S. experts in the area of asset forfeiture: "because a civil forfeiture does not depend on a criminal conviction, the forfeiture action may be filed before indictment, after indictment, or if there is no indictment at all."<sup>82</sup>

From the U.S. perspective, therefore, the U.K. approach may be viewed as strange; indeed, some U.S. practitioners have, in discussions with the author, expressed surprise at it. The rationale was clearly expressed in the U.K. Cabinet Office's report, "Recovering the Proceeds of Crime,"<sup>83</sup> published at a time when the government was considering the introduction of what ultimately became the 2002 Act. It expressed the fear that, unless safeguards were provided, civil recovery might be seen as an easier approach for law enforcement and could therefore, unless restrictions were imposed, be preferred to a criminal prosecution.<sup>84</sup> Although such an approach would indeed result in the removal of criminal assets, a clear policy aim of the government, it was felt that the price would be unacceptable: criminals who rightfully belonged in jail would escape it.<sup>85</sup> Offenders should both go to jail and lose their assets: it should not be a case of one or the other. Another concern was that, in a world where law enforcement and prosecution resources are, realistically, limited and choices therefore sometimes need to be made as to which criminals to proceed against, availability of civil recovery could result in that decision being made not on the basis of the heinousness of a person's crime but, pragmatically, on the level of their available assets.<sup>86</sup> The report cited a case in the United States in which law enforcement, faced by limited resources and a choice between two drug dealers, elected to proceed against one who had engaged in dealing in cannabis, rather than the

78. *Id.* (Like the dual-criminality rule in relation to the money laundering offenses in Part 7, this provision was not contained in the Act when it first came into force in 2003; it was only inserted under an amendment in May 2006.)

79. *See id.*

80. The legislation of Denmark and certain other European states such as Belgium or the Netherlands has a more liberal approach than that of the United Kingdom to the publication of material which in some jurisdictions (including the United Kingdom) is considered obscene and therefore illegal. *See generally* Case 34/79, *Regina v. Henn*, 1979 E.C.R. 3797.

81. Insider trading only constitutes a crime if, *inter alia*, it gives rise to profits of at least €450,000. Spanish Penal Code art. 285 (B.O.E. 1995). Where this threshold is not met, however, the trading may be punished by an administrative fine imposed by the National Securities Market Commission.

82. CASSELLA, *supra* note 36, at 15.

83. *See generally* CABINET OFFICE, PERFORMANCE AND INNOVATION UNIT, *RECOVERING THE PROCEEDS OF CRIME*, June 2000.

84. *See id.* ¶ 5.26.

85. *See id.*

86. *See id.* It has, for example, often been noted in the United Kingdom that many illegal drug addicts deal to fund their own habit: as one British police officer put it, "the proceeds have all gone up his arm." Such persons typically have few available assets but this does not take away from the serious nature of their drug dealing.

other, who had dealt in heroin, because the former had greater assets which could be forfeited.<sup>87</sup> The British Government made clear that such instances were to be avoided in the United Kingdom.<sup>88</sup>

Discussions by the author with those involved in law enforcement in the United States showed that civil forfeiture can in fact comfortably co-exist, in relation to the same defendant, with a criminal prosecution.<sup>89</sup> This was partly because their experience was that not every criminal conviction resulted in a criminal forfeiture order as well as other forms of sentence.<sup>90</sup> Some of the reasons for this are set out by Cassella, referred to above.<sup>91</sup> Hence, civil forfeiture proceedings not only could be, but often were, brought in relation to property held by persons who had already been sent to prison but against whom no criminal forfeiture order had been made.<sup>92</sup> The British Government was, however, adamant that the solution was that criminal courts should make confiscation orders in all cases where a benefit from the crime could be shown.<sup>93</sup> Although this is what Part 2 of the Act clearly provides,<sup>94</sup> research since has suggested that, as in the United States, confiscation orders have in fact by no means been made in all cases in which they could have been.<sup>95</sup> It is salutary to compare remarks made by those with experience of law enforcement in both jurisdictions:

Firstly, not all cases with restraint and confiscation potential are identified as such, largely because issues are not mainstreamed into the daily work of frontline police investigators and CPS<sup>96</sup> area prosecutors . . . there is a feeling that the identification of and exploitation of cases is a job best left to the specialists, because it is a separate complex area of law which should not impinge on the main job of prosecuting and sentencing criminals in the conventional way, or which can safely be left until post-conviction.<sup>97</sup>

Criminal prosecutors like to point out that asset forfeiture law is a bit of a specialty in the United States, and that specialties are best handled by specialists. Thus, in some jurisdictions, policy makers have decided that it is preferable to have a forfeiture specialist handle the forfeiture in a separate civil case, rather than have the overburdened criminal prosecutor go through the trouble of learning forfeiture law so that the forfeiture can be made part of the criminal prosecution and sentence.<sup>98</sup>

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87. *Id.* at Box 12.1

88. *See id.* ¶ 5.26.

89. *See* CASSELLA, *supra* note 36, at 20-21.

90. *Id.*

91. *Id.*

92. *See id.* at 17.

93. Proceeds of Crime Act, 2002, c. 29, § 6 (U.K.).

94. *Id.*

95. HER MAJESTY'S CROWN PROSECUTION SERV. INSPECTORATE, HER MAJESTY'S INSPECTORATE OF COURT ADMIN. & HER MAJESTY'S INSPECTORATE OF CONSTABULARY, JOINT THEMATIC REVIEW OF ASSET RECOVERY: RESTRAINT AND CONFISCATION CASEWORK (2010), <http://library.npia.police.uk/docs/hmcpsi/AssetRecovery.pdf>.

96. Crown Prosecution Service.

97. JOINT THEMATIC REVIEW OF ASSET RECOVERY, *supra* note 95, ¶ 2.4.

98. CASSELLA, *supra* note 36, at 18. Although Cassella makes clear at the beginning of the book that the views expressed in it do not necessarily represent the views of the U.S. Department of Justice or any of its

In regards to the fear of prosecution decisions being made on the basis of a prospective defendant's assets rather than the severity of their alleged offense, discussions with officers of at least one significant U.S. prosecution department have indicated that this does not occur in their jurisdiction. This may, however, be partly due to reforms in the way that assets are distributed by both the federal and state governments following forfeiture.<sup>99</sup>

Nonetheless, in the United Kingdom, a wide range of proceeds of overseas crimes will still remain amenable, including in many cases where criminal confiscation will simply not be an option. A criminal prosecution will require the availability of the defendant to stand trial (criminal trials in the defendant's absence, although far from uncommon in many civil law jurisdictions, are very rare in the United Kingdom). Civil recovery, in contrast, is not so hampered.<sup>100</sup> All that needs be shown is that, on the balance of probabilities, the property in question is derived from some form of criminal activity, either in the United Kingdom or elsewhere.<sup>101</sup> It need not be shown that a specific person perpetrated the crime or even that the property is derived from a specific, identified crime.<sup>102</sup> If it is more likely than not that the property is derived from some form of activity deemed to be a crime under the law of any part of the United Kingdom and also, where applicable, in the jurisdiction where it is likely that activity took place, it may be recovered.<sup>103</sup>

### III. Mens Rea Required

#### A. UNITED STATES

In regards to the degree of intent required for a money laundering conviction, the U.S. position is complex and worthy of consideration in a separate journal article in its own right. For the purposes of this article, a summary may be given, principally with the aim of contrasting it with the simpler approach taken in the United Kingdom.<sup>104</sup> 18 U.S.C. § 1956 defines money laundering as the carrying out of various types of financial transactions with one of a series of specified intents:

- with the intent to promote the carrying on of specified unlawful activity (*i.e.* a predicate crime as specified later in the section);

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agencies, they are informed by considerable experience as a senior prosecutor of economic and financial crime and of enforcing the U.S. federal asset forfeiture provisions in the courts.

99. In the past, it was common for forfeited assets to be assigned to the law enforcement agency that brought the case: the police department, sheriff's office, the (federal) Drug Enforcement Administration, etc. Reform at both the federal and state level has, however, resulted in a more centralized approach: in North Carolina, for example, forfeited assets are to be sold and the proceeds used for education, N.C. CONST. art. IX, § 7, while, at the federal level, they may be used solely for a) the equipment of federal law enforcement agencies; b) paying the salaries of these agencies' officers/agents; c) asset sharing, *i.e.* distribution of a certain proportion of the assets to other agencies, whether in the United States or overseas, which played a part in bringing the defendant to justice; or d) victim restitution. In no case may the assets simply be given to the agency that brings the arrest.

100. Indeed, an action for civil recovery has on occasion been brought where the perpetrator of the predicate crime is actually deceased. See KENNEDY, *supra* note 75, at 246.

101. See *id.*

102. See *id.*

103. Proceeds of Crime Act, 2002, c. 29, § 241 (U.K.).

104. This is perhaps unsurprising, given the leading role of the United States, first in pressing for and then in modeling the international measures against money laundering.

- with intent to engage in tax evasion or tax fraud;
- with knowledge that the transaction is designed, in whole or in part;
  - to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or
  - to avoid a transaction reporting requirement under state or federal law.<sup>105</sup>

Although this follows the international norms, it is quite restrictive in comparison to some jurisdictions, especially, as noted below, the United Kingdom. The test is subjective: constructive knowledge is not sufficient,<sup>106</sup> although more recently courts have held that “knowledge” can extend to willful blindness, *i.e.* deliberately shutting one’s eyes to facts patently before one.<sup>107</sup> The side of the line a case will fall on will depend on its particular facts.

18 U.S.C. § 1957, which refers to “engaging in monetary transactions in property derived from specified unlawful activity,” is wider in scope.<sup>108</sup> No specific intent is required, although substantive knowledge is. The section states “[w]hoever . . . knowingly engages or attempts to engage in a monetary transaction . . . .”<sup>109</sup> The wider scope of the offense is also reflected in the comparatively lower penalty, a maximum prison sentence of ten years, rather than twenty years as under section 1956.<sup>110</sup> It is also, however, subject to a value threshold: to be covered, the transaction must have a value of at least \$10,000.<sup>111</sup> In contrast, the section 1956 offense has no such threshold.<sup>112</sup>

## B. UNITED KINGDOM

In the United Kingdom, the original money laundering provisions, found in the Drug Trafficking Offences Act 1986 (and later the Drug Trafficking Act 1994), in relation to drug trafficking, and the Criminal Justice Act 1988, in relation to other forms of crime, had a very similar intent element to that found in 18 U.S.C. § 1956.<sup>113</sup> It was felt, however, that this placed an unreasonable burden on the prosecutor: how can one prove beyond reasonable doubt what a person actually intended? Even without a specific intent, substantive knowledge is difficult to prove. It is all too easy for a defendant to claim that he quite possibly should have known that the property was derived from crime and that it showed decided incompetence, or even lack of intelligence, on his part that he did not realize it. Neither incompetence nor stupidity, *per se*, render a person criminally liable.

The provisions of Part 7 of the Proceeds of Crime Act 2002 are therefore considerably simpler. As with 18 U.S.C. § 1957, no specific intent is required.<sup>114</sup> Rather, the Act’s

105. 18 U.S.C. § 1956 (2009).

106. *United States v. Heaps*, 39 F.3d 479, 484 (4th Cir. 1994).

107. *United States v. Rivera-Rodriguez*, 318 F.3d 268, 272 (1st Cir. 2003); *United States v. Campbell*, 977 F.2d 854, 859-60 (4th Cir. 1992).

108. 18 U.S.C. § 1957 (2009).

109. *Id.*

110. *Compare id.*, with *id.* § 1956.

111. *Id.* § 1957.

112. *Compare id.*, with *id.* § 1956.

113. *See* Drug Trafficking Offences Act, 1986, c. 32, § 24 (U.K.); *see, e.g.*, Criminal Justice Act, 1988, c. 33, § 134 (U.K.).

114. Proceeds of Crime Act, 2002, c. 29, § 340.

starting point is the defendant's level of awareness.<sup>115</sup> It does not do this in the offenses portion of the Act but in the definition of criminal property itself in section 340.<sup>116</sup> For the property in question to constitute criminal property, it must be derived from a criminal offense (or an act committed abroad which would have constituted a criminal offense had it been committed in the United Kingdom), and the defendant must, at the time that he handled it, have known or suspected that.<sup>117</sup>

Two points need to be made here. First, actual knowledge is not required; mere suspicion will suffice. Suspicion, in English law, has its ordinary English meaning: the defendant suspected that something was amiss.<sup>118</sup> This falls short of the U.S. concept of willful blindness, even as defined in case law, let alone of actual knowledge. For a U.K. defendant to be convicted of one of the key offenses in sections 327 to 329 of the 2002 Act, it is not necessary to show that he shut his eyes to the obvious.<sup>119</sup> The question is simply whether the jury is satisfied that, on the facts, this defendant suspected that the assets had some kind of criminal origin.

This leads into the second point. What must be shown is that the defendant suspected that the property had some kind of criminal origin, not necessarily the actual criminal origin.<sup>120</sup> Suppose, for example, that a bank is instructed to transfer £200,000 to an account in Turkey. The bank officer is not satisfied with the explanation given for the transfer and suspects that the funds are derived from drug trafficking, because he knows that Turkey is an important transit country for heroin imported into the United Kingdom from Afghanistan and Iran. In fact, the funds have no connection whatsoever to drug trafficking, but are derived from human trafficking. The officer, if he continues to deal with the funds, will be guilty of money laundering. He will even be guilty if he has no clear idea at all of what the funds might in fact be derived from, but does not believe that their origin is a lawful one. Indeed, it has been held that it is not even necessary for the prosecutor to show that the property was derived from a specific, identified offense: it is sufficient to show that it must have been derived from some form of crime.<sup>121</sup>

The incorporation of the *mens rea* into the definition of criminal property itself, rather than the money laundering offenses relating to it, does result in the bizarre situation where the same assets may be criminal property in the hands of A (who either knew or suspected that it had a criminal origin), but not when it reaches the hands of B, who

115. *Id.*

116. *Id.*

117. *Id.*

118. See CAMBRIDGE DICTIONARIES ONLINE (2011), <http://dictionary.cambridge.org/dictionary/essential-british-english/suspicion?q=suspicion>.

119. Proceeds of Crime Act, 2002, c.29, § 340.

120. See *id.*

121. *Ahmad v. Her Majesty's Advocate*, 2009, J.C. 73 (Scot.); *R v. Anwoir*, [2008] EWCA (Crim) 1354, [21] (Eng.). It has, however, been stressed that for a money laundering prosecution to succeed the defendant must know or suspect that the origin of the property itself is criminal; knowledge or suspicion that it may be linked to a crime to be committed at some indeterminate point in the future is not sufficient. See *The Queen v. Geary*, [2010] EWCA (Crim) 1925, [15] (Eng.). Hence, where the defendant believes that money has a legal origin but receives it in the belief that it is to be concealed in forthcoming divorce proceedings, a charge of money laundering will not stand (although one of conspiracy to obstruct the course of justice might do). The money, at the time of receipt, is neither known nor suspected by the defendant to be derived from a criminal offense.

believed its origin to be legitimate.<sup>122</sup> In practice, however, this is a matter of semantics: the effect, that A will in this situation be guilty of money laundering but B will not, is uncontroversial.

Once the prosecutor has established that the defendant knew or suspected that the assets had a criminal origin, and hence that those assets constituted criminal property, his remaining task is a simple one. The Act merely states that if a person engages in various types of action with criminal property, which include not only concealment or disguise, but also its mere transfer, removal from the jurisdiction, acquisition or use, he is guilty of money laundering.<sup>123</sup> Why the defendant did what he did may conceivably be of relevance for the purpose of sentence, but will have no relevance whatsoever for the purpose of determining guilt. Did he know, or at least suspect, that the assets were criminally derived? If so, did he, knowing or suspecting this, conceal, disguise, convert, receive, transfer, or even simply possess or use it? If he did, he is guilty of money laundering and faces up to fourteen years of imprisonment.<sup>124</sup> Although fourteen years is a light sentence compared to the twenty years per transaction that the U.S. legislation provides,<sup>125</sup> it is a substantial one by U.K. standards. Perhaps more seriously, given that, in line with the more general sentencing guidelines, U.K. courts only impose the maximum sentence in the most egregious cases, the conviction for money laundering will also mean that, by definition, the defendant is deemed to have a criminal lifestyle. This in turn will mean that the value<sup>126</sup> of all assets which he has acquired, transferred, or even held (regardless of when he acquired them), will be presumed to be the proceeds of crime and hence liable to confiscation.<sup>127</sup>

In this respect, the money laundering offenses under sections 327-329 of the 2002 Act are more like that of money spending under 18 U.S.C. § 1957 than that of money laundering itself under section 1956.<sup>128</sup> In this context, the maximum sentence of fourteen years<sup>129</sup> is not quite so lenient, for the section 1957 offense is, after all, ten years rather than twenty.<sup>130</sup> A more fundamental difference, however, lies in the value threshold prescribed.<sup>131</sup> The section 1957 offense will only be committed where the property in question has a value of at least \$10,000;<sup>132</sup> if this is not met, the prosecutor must prove the requisite intent for the section 1956 offense or lose the case entirely.<sup>133</sup> In contrast, under

122. Regina v. Afolabi, [2009] EWCA (Crim) 2879 (Eng.).

123. Proceeds of Crime Act, 2002, c.29, §§ 327-29.

124. *Id.* § 334.

125. Compare *id.*, with 18 U.S.C. § 1956 (2009).

126. It is important to note that, under the 2002 Act, a confiscation order is in personam and always in terms of the monetary value of the criminal property, not of the property itself. See Proceeds of Crime Act, 2002, c. 29, § 9. This contrasts with civil recovery, which is in rem and relates to the property itself, not its value as such. See *id.* §§ 243-45.

127. *Id.* § 10. This presumption may, however, be rebutted by the defendant on the balance of probabilities (the English equivalent of the preponderance of the evidence). The criminal lifestyle provisions are set out in detail towards the end of this article.

128. Compare *id.* §§ 327-29, with 18 U.S.C. §§ 1956-57 (2009).

129. Proceeds of Crime Act, 2002, c. 29, § 334.

130. 18 U.S.C. § 1957 (2009).

131. Compare Proceeds of Crime Act, 2002, c. 29, §§ 327-29, with 18 U.S.C. §§ 1956-57 (2009).

132. 18 U.S.C. § 1957 (2009).

133. *Id.*; *id.* § 1956.

the U.K. legislation, the value threshold is a mere £250.<sup>134</sup> This is approximately equivalent to \$400, *i.e.* four percent of the threshold prescribed in section 1957.<sup>135</sup> Further, this threshold only applies to banks and even then only in relation to transactions involving accounts that they hold.<sup>136</sup> In all other cases, a defendant could, at least in theory, be convicted of laundering sixty pence (the approximate equivalent of US\$1.00).

#### IV. But What Are "Proceeds?"

Thus far, however, phrases such as "proceeds of crime," "derived from a criminal offense," "a criminal origin," and the like have not been examined. While other elements have been examined in detail and while it is recognized that these may involve potentially complex issues for prosecutors, government (in the case of civil forfeiture/civil recovery) and defense counsel alike, it has been taken for granted that it is at least clear what is meant by "proceeds." In the United States, this assumption was, for a time, broken in 2008 by the decision of the U.S. Supreme Court in *United States v. Santos*, which held that "proceeds" were confined to net profits.<sup>137</sup> The logic was that the "proceeds" of a crime are what the offender acquires as a result of it.<sup>138</sup> If he incurred expenses to commit the crime, the value of these expenses cannot be included.<sup>139</sup> The alarm with which the *Santos* decision was greeted by U.S. law enforcement, who viewed with horror the prospect of having to undertake a complex accounting exercise in each and every money laundering prosecution, was so great that Congress amended section 1956 the following year to define "proceeds" as: "any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity."<sup>140</sup>

A similar issue arose in the United Kingdom, albeit in relation to confiscation orders rather than money laundering convictions *per se*. But in contrast to the U.S. Supreme Court the English Court of Appeal held that "proceeds" do extend to gross receipts.<sup>141</sup> The key case was *Crown Prosecution Service Nottinghamshire v. Rose*,<sup>142</sup> which, perhaps ironically, was heard in the same year as *Santos*. The case involved a defendant who was convicted of possession of four items of stolen property: a trailer, a quantity of alcoholic and soft drinks contained in that trailer, an agricultural vehicle, and a horse trailer.<sup>143</sup> The total value of the property was assessed at £27,252.50; however, the trailer and the vehicle were recovered and returned to the rightful owners.<sup>144</sup> Although the alcoholic and soft drinks were also recovered and returned, the owner was a brewery that was legally prohibited from selling drinks which had left its possession; hence the drinks were now

134. Proceeds of Crime Act, 2002, Annex A, § 102 (as amended by the 2005 Serious Organised Crime and Police Act).

135. *Id.*

136. *Id.*

137. *United States v. Santos*, 553 U.S. 507, 514 (2008).

138. *Id.* at 514.

139. *Id.* at 517.

140. 18 U.S.C. § 1956(e)(9) (2009).

141. See *Crown Prosecution Service Nottinghamshire v. Rose*, [2008] EWCA (Crim) 239, [65] (Eng.).

142. *Id.*

143. *Id.* at [24].

144. *Id.* at [26].



unusable.<sup>145</sup> Similarly, the owner of the horse trailer had been paid under an insurance policy; although the trailer was returned to the insurer, it had, by the time the case came to trial, gone missing.<sup>146</sup> The Crown Prosecution Service (CPS) sought a confiscation order of the full £27,252.50;<sup>147</sup> Rose, however, successfully argued at trial that the amount confiscated from him should not include the value of property which had been returned to the owner.<sup>148</sup> A confiscation order of £8,272.50 was therefore made, being the value of the drinks and the horse trailer.<sup>149</sup> The CPS appealed.<sup>150</sup> The Court of Appeal held that the “benefit” of a crime constituted the full value of the property concerned, irrespective of whether some of it was returned to its rightful owner.<sup>151</sup> Hence it increased the confiscation order to £27,252.50.<sup>152</sup>

Rose also appealed, separately, against the prison sentence imposed on him, but the value of the property was not an issue in that appeal.<sup>153</sup>

But the case was a little curious. The purpose of a confiscation order has always been explicitly stated as being to deprive criminals of their ill-gotten assets, not to compensate their victims.<sup>154</sup> This is underlined by the fact that the money confiscated (because, as noted above, a confiscation order is always in terms of a monetary value rather than specific assets) goes to the government, not to anyone else. Nor, in contrast to the position in the United States,<sup>155</sup> does the government pass on any part of confiscated proceeds to victims in restitution.<sup>156</sup> Victims may be compensated, but through separate, distinct procedures. Where the offense in question is theft and a) the stolen property is still in the possession of the defendant and b) the rightful owner can be identified (by no means always the case), it will be returned directly—as happened in *Rose*.<sup>157</sup> Where the property cannot adequately be returned, or alternatively, where the loss cannot be stated in terms of property, as in crimes of violence, the court may instead make a compensation order.<sup>158</sup> This is exactly as it sounds: the defendant is ordered to pay a specified sum, in compensation, to the victim. Alternatively, the victim may himself bring a civil action against the offender, claiming damages.<sup>159</sup> This will, however, in practice be limited by the victim’s

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145. *Id.* at [24].

146. *Id.*

147. *Id.* at [26].

148. *Id.*

149. *Id.*

150. *See generally id.*

151. *Id.* at [91].

152. *Id.*

153. *Regina v. Rose*, [2007] EWCA (Crim) 3432 (Eng., Wales).

154. *Regina v. Rose*, [2008] EWCA (Crim) 239, [65] (Eng.).

155. Victim restitution is a permitted use of property forfeited in federal proceedings. 18 U.S.C. § 3663A (2000). The position at the state level varies. In North Carolina, for example, forfeited property may be used solely for education; in Florida, the property simply becomes part of the Treasury’s general revenue (the same as the position in the United Kingdom). N.C. CONST. art. IX, § 7.

156. It may, however, pass on a proportion of the sum to governments of other jurisdictions when they have been involved in the case under international/bilateral asset sharing agreements; those authorities may then, if their own law allows, pass on some or all of that to victims. Proceeds of Crime Act, 2002, c. 29, §§ 54-57. The U.K. authorities themselves, however, will not use any part for compensation of victims. *See id.*

157. *See Rose*, [2008] EWCA (Crim) 239 at [24].

158. *See id.*

159. This may not only be used as a means to obtain compensation, but also to seek justice where a criminal prosecution has failed, because the standard of proof is lower in civil cases (balance of probabilities) than it is

means: under the Law Society rules "no win, no fee" arrangements in England are permitted in a far more restricted range of cases than they are in the United States. In no case, however, will victims be compensated by means of a confiscation order. Hence the defendant's raising of the issue of restoration of part of the owner's property as a defense to confiscation was strange.

The Court of Appeal, in its judgment, also stated explicitly that the confiscation proceedings were conducted on the basis that this was not one in which the "criminal lifestyle" provisions were held to apply, and therefore the precise benefit of the offenses had to be established.<sup>160</sup> This is a point worth noting because Rose had been convicted of possession of criminal property, a money laundering offense under the Proceeds of Crime Act 2002, rather than receipt of stolen goods under the Theft Act 1968.<sup>161</sup> The choice of charge underlines the broad range of the U.K.'s money laundering offenses: "criminal property" covers any kind of property derived from a criminal offense, not merely money derived from it.<sup>162</sup> The reason for the choice of charge in *Rose* was that it merely required the prosecution to prove that Rose was in possession of property which he knew or suspected was derived from some kind of crime, not specifically that he knew or believed that it was derived from theft and, further, that he had received it dishonestly: both would have needed to be proved for a Theft Act charge.<sup>163</sup> It did, however, expose an anomaly in the criminal lifestyle provisions under section 75 of the 2002 Act.<sup>164</sup> There are a number of criteria for the establishment of a criminal lifestyle, although in any given case only one need be met.<sup>165</sup> Most relate to repeat offenders; another relates to cases where the offense has been carried out over a protracted period of time (as might be the case, for example, with certain frauds, as well as more general criminal enterprises).<sup>166</sup> A further criterion, however, is where the defendant has been convicted of a specific offense listed in Schedule 2 to the Act.<sup>167</sup> This list includes the first two groups of substantive money laundering offenses under sections 327 and 328 of the Proceeds of Crime Act 2002, but not the third of acquisition, possession, or use of criminal property under section 329.<sup>168</sup> Rose could therefore be convicted of money laundering, as indeed he was, but could not, on the facts of the case, be held to have a criminal lifestyle on the basis of a conviction of possession of criminal property alone.

This was indeed fortunate for Rose because, as will be seen later in this article, the measures following a finding of a criminal lifestyle are draconian indeed. The omission of section 329 from the list of Schedule 2 offenses is, however, curious. A person who makes arrangements that facilitate the acquisition or use of criminal property by another person

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in criminal cases (where the jury must be "satisfied so that they are sure"). A notable example was where the family of a homicide victim successfully sued a property tycoon, whom they alleged had ordered the killing, after his criminal prosecution for manslaughter failed. *Tycoon 'Responsible for Killing'*, BBC NEWS, Dec. 19, 2005, <http://news.bbc.co.uk/2/hi/4541878.stm>.

160. *Rose*, [2008] EWCA (Crim) 239 at [25].

161. *See id.* at [1].

162. *See id.* at [1-4].

163. *Id.*

164. *Id.*

165. Proceeds of Crime Act, 2002, c. 29, § 75.

166. *Id.*

167. *Id.* § 75(2)(a).

168. Proceeds of Crime Act, 2002, c. 29, sch. 2.

(contrary to section 328) will by definition have a criminal lifestyle, but the person who actually acquires or uses it, with the same degree of knowledge (because, as has been seen above, the state of knowledge is a core element of the definition of criminal property) will not.<sup>169</sup> Similarly, a person who transfers criminal property will be deemed to have a criminal lifestyle, but the person to whom it is transferred (unless he commits further acts with it, such as converting or concealing it) will not.<sup>170</sup>

In Rose's case, the issue is illustrated as follows. Had he sold the stolen property, he would have committed the section 327 offense of transferring it. That offense would also have been committed had he returned it to the persons for whom he was storing the property; because there was no suggestion by either the prosecution or the defense that Rose intended to use it for himself, it seems that, had the property not been discovered by the police as quickly as it was, he would have done one or the other.<sup>171</sup> Paradoxically, the key factor in his meeting of the criteria for a criminal lifestyle was the efficiency of law enforcement! Although this was fortunate for Rose, it is not convincing in favor of the current legislation.

In fact, however, in *Rose* the court could arguably have applied the criminal lifestyle provisions notwithstanding the fact that he was charged and convicted under section 329.<sup>172</sup> It is true that, as discussed, the section 329 offenses are not listed in Schedule 2 to the Proceeds of Crime Act 2002.<sup>173</sup> Nor had Rose, in the previous six years, been convicted of other offenses from which he had derived a benefit, nor had he been in possession of the stolen property for a period exceeding six months.<sup>174</sup> He had, however, been convicted of not merely one but four separate counts of possessing criminal property: the trailer, the drinks, the farm vehicle, and the horse trailer.<sup>175</sup> Under section 75(2)(b) and (3)(a), conviction on three or more separate counts from which the defendant has benefited may also trigger a finding of a criminal lifestyle.<sup>176</sup> At trial, the finding by the Crown Court that Rose's benefit did not include the value of either the trailer or the farm vehicle would have ruled out such a finding in his case. When the Court of Appeal, however, reversed this decision, finding that the value of all four items constituted benefit to him,<sup>177</sup> it could have applied the criminal lifestyle provisions. Similarly, the Crown Prosecution Service, in its appeal, could have raised this point: the absence, in the Court of Appeal judgment, of any reference to such an argument would seem to indicate that the CPS did not do so. The fact that neither addressed the issue underlines the point made by Casella, referred to above: that all too often, prosecutors and judges alike are not sufficiently educated on the details of confiscation/forfeiture law.

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169. *Id.*

170. *Id.*

171. Although the identity of the actual thief/thieves of the property was never addressed in terms, it was strongly implied in the judgment of the appeal by Rose against the length of his prison sentence, heard separately, that it had been stolen by others, who then delivered it to land that he occupied. Regina, [2007] EWCA Crim. 3432 (Eng., Wales) at [3].

172. *Id.* at [2].

173. Proceeds of Crime Act, 2002, c. 29, sch. 2.

174. Regina, [2007] EWCA Crim. 3432 (Eng. & Wales) at [8].

175. *Id.* at [2-4].

176. Proceeds of Crime Act, 2002, c. 29, §75.

177. Regina, [2007] EWCA Crim. 3432 (Eng. & Wales) at [7].

The combination of the *Rose* decision and the criminal lifestyle provisions makes it clear that the *Santos* issue will not arise in the United Kingdom, just as the amendment to 18 U.S.C. § 1956 ensures that it does not, in future, arise in the United States.<sup>178</sup> Another key issue in relation to how the proceeds of crime are defined, however, remains: that of "cost savings."

## V. Cost Savings

So far in this article, we have considered crimes that produce direct proceeds: drug trafficking, theft, etc. Even *Santos* fell into this area: the two defendants were convicted of running an illegal gambling scheme from which they clearly made proceeds.<sup>179</sup> While the U.S. Supreme Court debated how to classify expenses incurred in the course of the illegal business, it was clear that the business itself was illegal.<sup>180</sup> Had there been no illegal lottery, there would have been no proceeds at all. Similarly, a drug trafficker, if he does not traffic in drugs, whether by selling them, importing them for someone else, etc., will not make any proceeds. There are certain other types of business, however, which are in principle legitimate, but that may be made more profitable through illegal means.

In some cases, even in generally legitimate businesses, the proceeds of the crime are easy to define. A significant example is bribery of foreign public officials, as with a U.S. engineering and construction company that, for example, pays bribes to government officials in Panama to secure a highway contract.<sup>181</sup> It is clear that building a highway in Panama is per se a legitimate business: the activity is legal and Panama is not a country that the United States imposes restrictions on its persons doing business with.<sup>182</sup> The bribes paid to secure the contract are, however, crimes under the Foreign Corrupt Practices Act.<sup>183</sup> The proceeds of those bribes will be the value of the contract—say \$300 million—and these may be seized. The same will apply in the United Kingdom, where bribery of a foreign public official is a crime currently under section 1 of the Public Bodies Corrupt Practices Act 1889 and section 1 of the Prevention Act 1906,<sup>184</sup> due to be replaced in July 2011 with provisions in section 6 and 7 of the Bribery Act 2010.<sup>185</sup> In other

178. See generally *id.*; United States v. Santos, 553 U.S. 507 (2008); 18 U.S.C. §1956 (2009).

179. *Santos*, 553 U.S. at 509.

180. *Id.* at 515-16.

181. This is merely a hypothetical example. It may, however be noted that Panama was given a rating of 3.6, indicating a high level of corruption, in the 2010 Transparency International Corruption Perceptions Index. Transparency Int'l, Transparency Int'l Corruption Perceptions Index 2010, available at <http://www.guardian.co.uk/news/datablog/2010/oct/26/corruption-index-2010-transparency-international#data>.

182. Indeed, a free trade agreement has been negotiated, although not yet brought into force, between Panama and the United States. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, PANAMA TRADE PROMOTION AGREEMENT (Sept. 18, 2011), [www.ustr.gov/trade-agreements/free-trade-agreements/panama-tpa](http://www.ustr.gov/trade-agreements/free-trade-agreements/panama-tpa).

183. See generally Foreign Corrupt Practices Act, 15 U.S.C. §78 (2006).

184. As amended by section 108 of the Anti-Terrorism, Crime and Security Act 2001. Anti-terrorism, Crime and Security Act 2001, 2011, § 108 (U.K.). See generally Public Bodies Corrupt Practices Act, 1889, c. 69, §§ 1-10 (Gr. Brit.). See generally Prevention of Corruption Act, 1906, c. 34, §1-4 (U.K.).

185. Bribery Act 2010, 2010, c. 23, §§ 6-7 (U.K.). For an analysis of how the proceeds of a commercial contract obtained through bribes may be deemed in the United Kingdom to be criminal property for the purposes of the Proceeds of Crime Act 2002, see Richard Alexander, *Corruption as a Financial Crime*, 30(4) COMPANY LAW 98-104 (2009). Since that article was written, a confiscation order of £1.1 million was made following a plea agreement by the engineering company, Mabey & Johnson, in 2009. Christopher Hope,

cases, however, the matter will be somewhat more complex: these include tax evasion, employment of undocumented workers,<sup>186</sup> violations of health and safety laws, and violations of environmental protection laws.

All of these are crimes in both the United States and the United Kingdom; in the United States, a number will be crimes both under federal law and the laws of the individual states. Before analyzing the application of the money laundering and forfeiture provisions to them, however, it is worth spending some time first to emphasize the harm that each of these causes, together with how money is actually saved through them.

#### A. TAX EVASION

Tax evasion is, from one perspective, the most controversial. If, as was famously said by Benjamin Franklin, "in this world, nothing is certain except death and taxes,"<sup>187</sup> it is also true that they are both generally regarded as unattractive. While relatively few may go so far as to share the view, said to remain popular in Ireland, that taxation is by its very nature the act of an occupying power, many countries have a thriving profession that exists to minimize the amount of tax that one is legally required to pay.<sup>188</sup> It must be recognized, however, that taxation is necessary though unpleasant. Whatever one's personal political beliefs and the consequent views as to what governments should spend money on, few would seriously advocate the abolition of taxation altogether. Even Tea Party founding member and spokeswoman, Dana Loesch, when she demanded in a recent CNN interview in relation to government funding, "Cut it all. Cut it or shut it," did then, in the same interview, clearly oppose threats to the payment of salaries to members of the U.S. armed forces—which of course comes out of government funding paid through taxation.<sup>189</sup> Whether, therefore, it is a politically liberal administration seeking to fund welfare programs or the building and maintenance of an efficient transportation network or a more conservative one whose primary focus is on law enforcement and defense, all governments need a certain amount of money, and taxation is the principal means by which they acquire it. Relatively few will have the luxury of being able to draw significantly on profitable sovereign wealth funds or other state assets,<sup>190</sup> while another key means of

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*Mabey & Johnson Fined £3.5 Million Over Bribes*, THE TELEGRAPH, Sept. 25, 2009, <http://telegraph.co.uk/news/politics/6232469/Mabey-and-Johnson-fined-3.5million-for-breaching-UN-sanctions-and-bribing-officials.html>.

186. The use of the term "undocumented workers," rather than the more popular "illegal workers," is deliberate. As has been pointed out by Hsiao-hung Pai in "Chinese Whispers: The True Story Behind Britain's Hidden Army of Labour," the persons involved are not illegal per se. Rather, the illegality lies in the fact that they lack the documentation required to be employed in the country concerned or, in some cases, be present in that country at all. "Undocumented workers" is therefore a more accurate, and hence appropriate, description for them. HSIAO-HUNG PAI, CHINESE WHISPERS: THE TRUE STORY BEHIND BRITAIN'S HIDDEN ARMY OF LABOUR (2008).

187. BENJAMIN FRANKLIN, LETTER FROM BENJAMIN FRANKLIN TO JEAN-BAPTISTE LEROY (Nov. 13, 1789), <http://www.thisdayinquotes.com/2010/11/nothing-is-certain-except-death-and.html>.

188. One need only consider TV advertisements in the United States: proclamations of the amounts of weight that the users of Hydroxycut claim to have lost may be compared with similar advertisements of the tax refunds that may be achieved by the clients of tax advisory services such as Tax Masters.

189. CNN Newsroom (CNN television broadcast Apr. 8, 2011).

190. There are some jurisdictions that are fortunate enough to have substantial state-owned assets, the revenues for which are sufficient to pay for the government's expenditure. A notable example is the Principality of Monaco, which meets its entire government budget out of the profits of the state-owned Monte Carlo

government finance, public borrowing, is seen increasingly as having a definite downside. Nor is this merely the perspective of politicians. While there may be debate over the precise amounts that should be spent on them, only the most extreme libertarians would argue that there should be no police departments, sheriff's offices or armed forces, no maintenance of the roads, nor any kind of care of the elderly whatsoever funded out of the public treasury. If one accepts that these are needed, one must, however reluctantly, accept that taxation is also needed to pay for them. Further, tax evasion will inevitably have one or even both of two consequences. Either the ability of the government to fund the necessary programs will suffer or the burden on the rest of the population, individuals and corporations alike, will increase as the government is compelled to raise the level of taxation to meet its financial needs. Therefore, a crime that at first glance appears to have the government as its sole victim in fact has an impact, directly or indirectly, on the whole society.<sup>191</sup>

Before considering how money is saved through tax evasion (in fact, a relatively brief and simple matter), the offense should, for the sake of clarity, be distinguished from various types of tax-related fraud.<sup>192</sup> What the latter have in common is the employment of some kind of device intended to mislead the government into believing not only that the perpetrator is not liable to pay the full amount of tax that he in fact owes, but that the government, through its revenue department, is actually liable to pay him money. This may be achieved through the fraudulent claiming of tax benefits or refunds, for example in relation to tax-deductible business expenses; alternatively, as is very common in the European Union, it may involve the manipulation of the Value Added Tax (VAT) regime. VAT in Europe operates in a broadly similar way to sales tax in the United States, but with the important difference that, as the name implies, the tax is levied on the value that is added by the business to the goods or services involved.<sup>193</sup> Where, therefore, an entity pays VAT on the goods/services that it requires to operate its business, it then claims this back, because VAT will be charged on the full price of the entity's own goods/services.<sup>194</sup> Hence, fraudsters claim VAT refunds on non-existent goods and services, or alternatively through the "carousel" of repeated cross-border sales of the same goods and services (which, when done legitimately, give rise to other forms of VAT refunds). Because, however, such frauds give rise to proceeds illegally earned, just as any other fraud does, rather than achieving cost savings, this article does not deal with them; rather, it deals in this part specifically with the evasion of tax on income derived from otherwise legitimate business.

It is relatively clear how money is saved. Tax is paid on the income of the business (or the individual as the case may be). If, therefore, some or all of that tax is evaded, the net

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Casino. The same is true, albeit to a lesser extent, of certain jurisdictions in the Arabian Gulf that fund much of their public expenditure from the revenues of state-owned oil and gas reserves or those of highly profitable state-owned business groups.

191. This article specifically deals with illegal tax evasion, a criminal offense; it does not seek to enter the political debate as to the merits/ethics of making use of legal devices, such as offshore domicile, trusts, and the like, to minimize tax liability.

192. It is more useful to use the term "tax-related fraud" in this context than "tax fraud," because the latter, in a number of jurisdictions, has the specific legal meaning of using fraudulent documents (for example, a falsified tax return) to evade the payment of tax due either in whole or in part.

193. European Commission Taxation and Customs Union, *How VAT Works*, EUROPA.EU, [http://ec.europa.eu/taxation\\_customs/taxation/vat/how\\_vat\\_works/index\\_en.htm](http://ec.europa.eu/taxation_customs/taxation/vat/how_vat_works/index_en.htm) (last updated Sept. 19, 2011).

194. *See id.*

income will be greater—or, put another way, the difference between gross income and net income will be less. In practice, particularly in a business, that difference will never actually reach zero because the business will have other, unavoidable expenses, but the savings may well be considerable nonetheless. In fact, for an individual, they may be even higher because rates of income tax (levied on the income of a natural person) tend to be higher than those of corporation tax (levied on the income of a corporation).<sup>195</sup> In Europe, this is particularly so: the main rate of corporation tax in the United Kingdom (levied where annual profits exceed £1.5 million) is currently twenty-eight percent, compared to the “additional,” *i.e.* highest, rate of income tax (levied on individuals with an annual income of above £150,000) of fifty percent.<sup>196</sup>

## B. EMPLOYMENT OF UNDOCUMENTED WORKERS

The illegal employment of undocumented workers can be an equally controversial issue, not least because of the benefits that it brings to many of us. It has been said, at various times, that the agricultural sector of the United States could quite simply not function without the large numbers of undocumented workers, principally from Latin America, that it employs.<sup>197</sup> Similarly, in the United Kingdom representatives of the restaurant business have said that they could not offer menus competitively if they did not employ undocumented workers whom they not only need not pay the national minimum wage but also in respect of whom they do not pay tax or National Insurance.<sup>198</sup> Such workers also enable a range of other businesses to operate more cheaply, and hence charge more competitive prices, than would be the case if they solely hired persons with full documentation. Many in society then benefit through the large-scale availability of affordable produce (often packaged) in supermarkets and restaurant prices that enable us to eat out more often than would otherwise be possible, not to mention the convenient and (relatively) cheap cleaning and child care services enjoyed by many professionals. And indeed, some might argue, the undocumented workers themselves benefit; their income, though below the minimum wage officially set by developed countries such as the United States or the United Kingdom, is still considerably higher than they could hope to earn in their home countries of Mexico, Honduras, China or Belarus.<sup>199</sup> They are therefore able

195. See *Tax Rates Around the World*, WORLDWIDE-TAX.COM, <http://www.worldwide-tax.com/#partthree> (last updated Aug. 23, 2011). Although some U.S. states, such as Florida, do not impose an income tax on individuals, the United States at the federal level, in common with most countries, does. *States Without a State Income Tax*, IRS.GOV, Mar. 31, 2011, <http://www.irs.gov/efile/article/0,,id=130684,00.html>.

196. OECD Center for Tax and Policy Administration, *OECD Tax Database Table I.1 & II.1*, OECD.ORG, [http://www.oecd.org/document/60/0,3746,en\\_2649\\_34533\\_1942460\\_1\\_1\\_1\\_1,00.html#pir](http://www.oecd.org/document/60/0,3746,en_2649_34533_1942460_1_1_1_1,00.html#pir).

197. See Alicia Caldwell, *Agriculture Industry Fears Disaster if Illegal Immigration Enforcement Program E-Verify is Implemented*, HUFFINGTONPOST.COM, June 4, 2011, [http://www.huffingtonpost.com/2011/06/04/agriculture-industry-e-verify-illegal-immigration\\_n\\_871391.html?view=print&comm\\_ref=false](http://www.huffingtonpost.com/2011/06/04/agriculture-industry-e-verify-illegal-immigration_n_871391.html?view=print&comm_ref=false).

198. National Insurance is a particular form of tax that funds the state pension system and also certain welfare benefits. Both employees and their employers are legally required to make payments (termed “contributions”) to it. *National Insurance: The Basics*, DIRECT.GOV.UK, [http://www.direct.gov.uk/en/MoneyTaxAndBenefits/Taxes/BeginnersGuideToTax/NationalInsurance/IntroductiontoNationalInsurance/DG\\_190048](http://www.direct.gov.uk/en/MoneyTaxAndBenefits/Taxes/BeginnersGuideToTax/NationalInsurance/IntroductiontoNationalInsurance/DG_190048) (last visited Sept. 19, 2011).

199. *Compare Gross National Income by Country*, NATIONMASTER.COM, <http://www.nationmaster.com/graph/economy/economy-gross-national-income-per-capita> (last visited Sept. 19, 2011), with *Characteristics of the Illegal Alien Population*, FAIRUS.ORG, [http://www.fairus.org/site/PageServer?pagename=iic\\_immigrationissuecentersdfc9?&printer\\_friendly=1](http://www.fairus.org/site/PageServer?pagename=iic_immigrationissuecentersdfc9?&printer_friendly=1) (last visited Sept. 19, 2011).

to send remittances back to their families, providing much needed financial support. Everyone benefits, so this argument would claim: our societies and the undocumented workers, the developed world and the developing world alike.

The employment of undocumented workers does, however, have a very definite dark side. Most obviously, it denies jobs to local communities, particularly the unskilled labor market. If a business has a choice between paying a U.S. citizen or legal resident \$65.25 for a nine hour day (nine hours at the federal minimum wage of \$7.25 per hour)<sup>200</sup> with taxes on top of that, or paying an undocumented worker thirty dollars per day, or even less (with no additional costs) for the same or more hours, the latter will be all too tempting. The situation is exacerbated when, as at present, the economic climate is harsh. When customer orders are down and the business is struggling, the managers will find avoiding the extra \$211.50 per worker per week all too attractive. Yet an economic downturn is precisely the time when the local, documented workers find jobs hard to find because unemployment remains high.<sup>201</sup> It is for this reason that, particularly in such times, immigration becomes a prominent political issue, whether expressed through Arizona's much publicized state immigration law, the attacks by the political right on those who, whether at national or state level in the United States,<sup>202</sup> propose a different approach, or the concerted efforts in the United Kingdom by both the current and the previous governments to make the already strict immigration rules tighter still.<sup>203</sup>

This is, however, by no means the only issue; indeed, it has been the experience in the United Kingdom, at least, that in many sectors foreign citizens in fact take jobs which local workers either simply do not wish to take or, if they do, in which their performance is significantly less satisfactory than their overseas counterparts. It is not the employment

200. *Wages*, U.S. DEPT. OF LABOR, <http://www.dol.gov/dol/topic/wages/minimumwage.htm> (last visited Sept. 19, 2011).

201. In Florida, for example, in March 2011, the unemployment rate was quoted as 11.1%. Press Release, Florida Agency of Workforce Innovation, Florida's March Employment Figures Released (Apr. 15, 2011), [http://www.floridajobs.org/publications/news\\_rel/LMS%20Release04-15-11.pdf](http://www.floridajobs.org/publications/news_rel/LMS%20Release04-15-11.pdf). In the United States as a whole in January 2011, the rate was quoted at nine percent. News Release, United States Department of Labor Bureau of Labor Statistics, The Employment Situation—January 2011 (Feb. 4, 2011), [http://www.bls.gov/news.release/archives/empst\\_02042011.htm](http://www.bls.gov/news.release/archives/empst_02042011.htm). These represent one in nine and one in eleven workers respectively.

202. In the 2010 gubernatorial election campaign in Florida, TV advertisements for the Republican candidate, Rick Scott, described his Democrat opponent, Alex Sink, as "very, very liberal," referring explicitly to her opposition to the introduction in Florida of similar provisions to Arizona's immigration law. Meanwhile, at national level, President Obama's proposals for some form of integration of certain groups of long-term immigrants that currently lack formal status have proven decidedly controversial. The ongoing controversy surrounding the issue of immigration in the United States is further illustrated by the recent proposal by Texas legislators of a state law specifying penalties of up to two years' imprisonment for employing undocumented workers, as well as the proposed immigration laws by at least three other states (though these, like Arizona's itself, have been the subject of challenges in the courts). Walter Pacheco, *Election 2010: Polls in Central Florida are Closed-Now We Wait*, ORLANDO SENTINEL, Nov. 2, 2010, [http://articles.orlandosentinel.com/2010-11-02/news/os-election-polls-20101102\\_1\\_polling-location-voter-turnout-kinneret-towers](http://articles.orlandosentinel.com/2010-11-02/news/os-election-polls-20101102_1_polling-location-voter-turnout-kinneret-towers).

203. In the 2010 general election in the United Kingdom, the two main political parties, Labour and Conservative, conspicuously sought to exceed each other in their promises of measures both to reduce legal immigration and to increase the rate of deportation of those illegally present in the country. It was generally accepted that this was motivated by a widespread concern, albeit of questionable basis, that the current levels of immigration were too high, leading to foreign citizens taking British jobs. See *U.K. General Election - Immigration Implications*, WORKPERMIT.COM, May 10, 2010, <http://www.workpermit.com/news/2010-05-10/uk-uk-general-election-immigration-implications.htm>.



of foreign citizens per se, even in large numbers, which this article suggests is harmful; rather, it is the employment of *undocumented* foreign citizens.

The impact of the cost differential has just been addressed in terms of the difficulty that it causes for local workers to compete on equal terms. Because employment of undocumented workers almost invariably involves the cutting of costs demanded by law (in particular in terms of wages), it results in a general depressing of wage rates. At a time when a number of costs of living are rising (food and gasoline being two significant examples), a depressing of wage rates makes life considerably more difficult even for those legitimate workers who are able to find jobs. Nor can it be said that such wage deflation will counteract rising prices: the increase in many costs are due to factors unconnected with wages, whether food costs rising because of poor harvests caused by periods of poor weather (either too little rain or too much at the wrong time, or perhaps a prolonged period of cold) or global oil prices being driven up by political instability, actual or feared, in jurisdictions from which much of our oil is imported.<sup>204</sup>

The employment of undocumented workers has an impact on individuals and businesses. Businesses that comply fully with the law, employing only those who are legally permitted to work, at the full rates required by federal or, where applicable, state or city law<sup>205</sup> and making the legally required tax and other payments will find it difficult to compete with those which do not. The economy suffers further as a result.

Perhaps the most serious consequence of the employment of undocumented workers, however, is the impact on the workers themselves. Because they are not legally permitted to work in the jurisdiction in which they are currently located (and therefore face arrest, detention, and ultimate deportation if they are caught), the labor rights provided to workers by legislation will, in practice, simply not apply to them. They will typically be paid significantly less than the minimum wage for working considerably longer hours than their documented coworkers.<sup>206</sup> In some cases, the little that they do earn is reduced further by rent and subsistence charges imposed by their employers, resulting in effective bondage: they have paid significant sums to the agents who arranged the work—and possibly very significant sums to traffickers who brought them into the country—<sup>207</sup> but they have little hope of paying this off on the very low net wages that they receive. The already bad situation to which this gives rise is often worsened still by their employers' failure to

204. Current examples include the disruption to oil supplies caused by the civil war in Libya and the fears that the unrest across a number of other Arab countries could spread to oil/gas producing Qatar, Saudi Arabia, and the United Arab Emirates. See *World Oil Price Plunge Stabilises as Markets Absorb Impact of Supply Boost*, THISMONEY.CO.UK, Jun. 24, 2011, <http://www.thisismoney.co.uk/money/article-2007654/World-oil-price-plunge-stabilises-markets-absorb-impact-supply-boost.html?printingPage=True>.

205. The federal minimum wage is merely a default minimum: states or even cities may provide for higher levels. *Minimum Wage Laws in the States*, U.S. DEPT. OF LABOR, Jan. 1, 2011, <http://www.dol.gov/whd/minwage/america.htm>. The State of Washington, for example, now provides for a minimum wage of \$8.67 per hour while that of the City of San Francisco is even higher at \$9.92 per hour. SAN FRANCISCO ADMIN. CODE § 12R (2011).

206. Certain employers even have two separate work schedules: one for those workers with legal documentation and another, rather more demanding one, for those who lack this. See HSIA-HUNG PAI, *supra* note 186.

207. The precise nature of these traffickers will vary: the *coyotes* who physically guide Mexican and other Latin American immigrants across the border into the U.S. Southwest, those who smuggle persons into Western Europe from a wide range of Asian countries, or the more sophisticated "snakeheads" who arrange false documentation, flight tickets, etc. for Chinese immigrants particularly. See MOISÉS NAIM, *ILLICIT: HOW SMUGGLERS, TRAFFICKERS, AND COPYCATS ARE HIJACKING THE GLOBAL ECONOMY* 97-99 (2006).

comply with health and safety requirements—knowing that their workers, due to their undocumented status, are not in any position to seek redress. In extreme cases, deaths have resulted.<sup>208</sup>

The employment of undocumented workers also plays a major role in fueling the business of human trafficking itself by criminal organizations.<sup>209</sup> The Chinese snakeheads are perhaps the best-known examples, but there are many others, based in regions ranging from Latin America, through West Africa, to Central and Eastern Europe.<sup>210</sup>

### C. OCCUPATIONAL SAFETY AND HEALTH VIOLATIONS

Although failure to comply with the occupational safety and health requirements imposed by law is an all too common consequence of the employment of undocumented workers, it does occur otherwise. Even where all workers employed have legal documentation, it can be tempting for businesses to cut corners in terms of safety. As with other offenses considered in this article, that temptation can increase in times of economic downturn. Implementation of the full occupational safety and health measures now required under the legislation of jurisdictions such as the United States and the United Kingdom is expensive. It might be suggested that, particularly in the United States, this is offset by the consequences of a resulting accident. Personal injury damages awarded by juries are famously high (typically considerably higher than in the United Kingdom, for example) and there is no shortage of law firms, specializing in personal injury, willing to take on clients on a "no win, no fee" basis, often underlined by an offer of "free advice with no obligation." Although there may be some truth in this, the fact remains that businesses may take a calculated risk. A lawsuit will only take place if there is an accident; with luck, there might not be. Put another way, the risk of a high payment in damages (accompanied by a fine) may be regarded as preferable to the certainty of the lower, but still considerable, cost of putting in place the necessary safety measures.

The statistics bear this out: although fatal accidents at work are relatively rare in the United States, they do happen. In 2009, the latest year for which figures are available, there were 4,340 fatal occupational injuries.<sup>211</sup> Many of these were caused by violence or transportation accidents, but a total of 1,741, or just over forty percent, were caused either by contact with objects or equipment (that includes objects falling on the worker concerned), falls suffered by the workers themselves, or by exposure to harmful substances or environments.<sup>212</sup> As a proportion of the total U.S. workforce, this is indeed small, but it nonetheless represents 4,340 families and partners bereaved of a parent, spouse, partner, sibling, or child.<sup>213</sup> To them, every one of the 4,340 is considerably more than a mere statistic.

In the same year, non-fatal workplace injuries and illnesses occurred to some 3.6% of U.S. workers; in 1.8% of them, around half of the cases, the workplace injury/illness was

208. HSIAO-HUNG PAI, *supra* note 186.

209. See MOISES NAIM, *supra* note 207, at 97-99.

210. See *id.*

211. BUREAU OF LABOR STATISTICS, REVISIONS TO THE 2009 CENSUS OF FATAL OCCUPATIONAL INJURIES (CFOI) COUNTS (2010).

212. *Id.*

213. *Id.*

sufficiently severe to cause, at least, time off work.<sup>214</sup> For 0.8%, around one-fifth of cases, it resulted in a job transfer or restriction.<sup>215</sup> Because the total U.S. workforce in 2009 was reported to be 130,315,800, this means that over a million workers that year suffered a workplace injury or illness so severe that they were unable to continue in their previous job.<sup>216</sup> As with the numbers of those actually killed at work, each of these represents a human being. A TV advertisement run during 2010 by the U.K.'s Health and Safety Executive put the point well: "Workplace Accidents Shatter Lives."<sup>217</sup>

It is of course recognized that human beings are fallible and that some accidents happen through no fault of the employer. It is also recognized that certain occupations by their very nature carry a certain amount of danger. It is, however, possible to mitigate these risks to a significant extent and this is what the occupational safety and health laws require. When those laws are violated, the risk of workplace injury and illness increases and the principles of statistical probability alone mean that the actual numbers of those injured or who fall ill will inevitably increase.

#### D. VIOLATIONS OF ENVIRONMENTAL PROTECTION LAWS

The impact of violations of environmental protection laws is, if anything, even greater. The issues surrounding climate change are well documented: the divisions between national governments largely surround questions as to how countries whose economies are still at an earlier state of development are to compete if they are bound by strict pollution-control agreements that, in their eyes, the developed nations have drafted to deal with problems that the developed nations themselves, with their longer history of industrialization, have principally caused.<sup>218</sup> The effects of other forms of pollution, although they are more local in nature, can be just as dramatic and certainly more immediate. Chemical waste that is simply dumped onto either land or water can quickly cause conditions in the local population ranging from cancer to birth defects. It is salutary to remember that, good though we feel at the end of such movies as "A Civil Action" and "Erin Brockovich"

214. News Release, U.S. Dept. of Labor Bureau of Labor Statistics, Workplace Injuries and Illnesses-2009 (Oct. 21, 2010).

215. *Id.*

216. *Id.*

217. Health and Safety Executive, Shattered Lives, <http://www.hse.gov.uk/shatteredlives/resources.htm> (last visited Sept. 24, 2011).

218. See generally Anup Shah, *Climate Change and Global Warming*, GLOBALISSUES.ORG, <http://www.globalissues.org/issue/178/climate-change-and-global-warming> (last updated Oct. 23, 2011). This has not always been an issue solely for the developing world: U.S. President George W. Bush consistently opposed measures to combat climate change, such as emission controls for vehicles, with the twin arguments that a) science had not actually proven irrefutably that climate change was linked to environmental pollution and b) even if such a link were proven, the need for U.S. industries to remain competitive was paramount. Michael Coffman, *Bush Backs out of Global Warming Treaty*, DISCERNING THE TIMES, Apr. 2001, [http://www.discerningtoday.org/bush\\_rejects\\_kyoto.htm](http://www.discerningtoday.org/bush_rejects_kyoto.htm). Since the beginning of the Obama Presidency in 2009, however, there has been somewhat greater consensus in the developed world, albeit that agreement on all the details of a global compact has proven elusive. For certain developing countries, however, such as China, there remain definite challenges. See, e.g., Foon Rhee, *Obama Addresses Global Warming Summit*, BOSTON.COM, Nov. 18, 2008, [http://www.boston.com/news/politics/politicalintelligence/2008/11/obama\\_addresses\\_5.html](http://www.boston.com/news/politics/politicalintelligence/2008/11/obama_addresses_5.html).

at the victories achieved by their heroes, these movies were based on very real events that impacted the lives of real people.<sup>219</sup>

The impact of other forms of pollution may be more indirect but no less real. A year before a massive spread of algae in the sea off Qingdao threatened the viability of the sailing events of the Beijing 2008 Olympics, a spread in Taihu Lake in May 2007 resulted in supplies of drinking water to Wuxi, a city with a population of some six million, being interrupted for four days.<sup>220</sup> A similar outbreak occurred the following year in Chaohu Lake, the source of drinking water for 320,000 people.<sup>221</sup>

Although illnesses and injuries in local populations caused by the illegal dumping of toxic waste may clearly be seen to be the fault of those who dumped it, algae spreads of the kind referred to above may be seen as natural disasters: unfortunate, true enough, but events of nature nevertheless, which are therefore nobody's fault. A closer examination reveals, however, that this is misleading, certainly in the Taihu and Chaohu cases. The massive build-up of algae, in both cases (and probably also that of the Qingdao outbreak), occurred because the animals and other organisms, living in the water, that eat the algae and thus keep it in check had disappeared—killed by the high levels of chemical pollution.<sup>222</sup> Just as poor-quality construction materials and methods result in an earthquake bringing greater devastation and loss of life than it would otherwise—as demonstrated by a comparison of the Haiti earthquake in January 2010 with the one that struck Christchurch, New Zealand in February 2011<sup>223</sup>—so chemical pollution can cause natural disasters of its own.

The stakes are therefore high—very high. Although the above crimes each differ considerably in nature from each other, they all have one key factor in common: they are committed to save money, and hence increase corporate profits (or, in the case of tax evasion by individuals, increase the proportion of gross income that the individual is able actually to retain). Although the core activity of the business/individual is itself legitimate, the motivation of the illegal ancillary activity is financial, just as much as that of the drug dealer or human trafficker. These offenses may thus, in a very real sense, be considered to be economic crimes. This article suggests that it is therefore appropriate to treat them as

219. "A Civil Action" was based on the first *Anderson v. Cryovac* litigation. See generally *Anderson v. Cryovac, Inc.*, 96 F.R.D. 431 (D. Mass. 1983). "Erin Brockovich" was based on the litigation leading up to the settlement in 1996 of the class action brought against Pacific Gas and Electric. *Anderson v. Cryovac, Inc.*, 862 F.2d 910 (1st Cir. 1988); see also Kathleen Sharp, *Erin Brockovich: The Real Story*, SALON.COM, Sept. 25, 2011, [www.salon.com/ent/feature/2000/04/sharp/print.html](http://www.salon.com/ent/feature/2000/04/sharp/print.html).

220. See *Algae Threatens Wuxi's Water Supply*, SHANGHAI DAILY, May 31, 2007, <http://english.sina.com/china/p/1/2007/0531/113600.html>.

221. *Algae Outbreaks at Chaohu Lake*, XINHUA NEWS AGENCY, June 5, 2008, [http://www.chinadaily.com.cn/china/2008-06/05/content\\_6740394.htm](http://www.chinadaily.com.cn/china/2008-06/05/content_6740394.htm).

222. Richard Stone, *On Lake Taihu, China Moves to Battle Massive Algae Blooms*, YALE ENVIRONMENT 360, July 21, 2011, <http://e360.yale.edu/content/feature.msp?id=2429>.

223. The estimates of the number of deaths in the Haiti earthquake vary considerably but conservative figures start at 92,000 (estimates by the Haitian Government are as high as 316,000). Armand Vervaeck & James Daniel, *Haiti Death Toll Questioned Once Again by Independent Study*, EARTHQUAKE-REPORT.COM, June 2, 2011, <http://earthquake-report.com/2011/05/31/haiti-death-toll-questioned-once-again-by-independent-study>. This may be compared to the reported death toll in the 2011 Christchurch earthquake of 166. *Christchurch Earthquake Death Toll Still 166*, HARNESSLINK NEWS ROOM, Mar. 15, 2011, <http://www.harnesslink.com/www/Article.cgi?ID=87868>. The greater magnitude of the Haiti quake can only be viewed as one factor, given how sharply the figures contrast.

such to combat them with the weapons that governments, through the proceeds of crime statutes considered at the beginning of this article, have already created to deal with other financial crimes: confiscation/forfeiture of the proceeds themselves and the criminalization, with severe penalties, of those who continue to invest them in their businesses.

## VI. Case Law: United States

In the United States, this has in fact already been attempted several times in relation to a range of a number of such offenses with, however, moderate success at best. With regard to the forfeiture of sums deemed to have been "saved" (as opposed to earned outright) through illegal means, one case to date has succeeded: that of *United States v. Tyson Foods, Inc.* in 2003.<sup>224</sup> This case involved a business that employed workers whom it knew were not legally permitted to work in the United States.<sup>225</sup> It was the government's case that the company knew that the identification documents provided by the workers were not genuine, and that it had, indeed, connived in the use of these documents.<sup>226</sup> The government went on to claim that the company had by doing this saved wage costs through having paid these workers wages that were less than the statutory minimum.<sup>227</sup> Both the employment of undocumented workers in the United States and the use of false documentation to facilitate this are federal crimes, contained in the list of "specified unlawful activities," and the federal government therefore sought to forfeit the costs saved as the proceeds of this crime under 18 U.S.C. § 982.<sup>228</sup>

The company opposed this on the basis that "proceeds" meant money earned through activity that was per se illegal.<sup>229</sup> It argued the activity that it engaged in was per se legitimate: the manufacture of foodstuffs.<sup>230</sup> It was merely the means by which it carried out that activity, i.e. through the employment of undocumented workers, that was illegal.<sup>231</sup> Hence there were no proceeds of crime. In support of this argument, it cited an earlier, linked decision, also of the U.S. District Court for the Eastern District of Tennessee, *Trollinger v. Tyson Foods Inc.*,<sup>232</sup> which appeared to state exactly this. The court in *United States v. Tyson Foods*, however, supported the government.<sup>233</sup> The court in *United States v. Tyson Foods* noted that the plaintiffs in *Trollinger* were other, legally documented, employers of Tyson Foods, whose action was brought under 18 U.S.C. §§ 1961 and 1964, provisions of the RICO statute, which allow for civil suits by the victims of RICO crimes,<sup>234</sup> not the government.<sup>235</sup> In *Trollinger*, the plaintiffs argued that Tyson Foods' illegal employment of undocumented workers had also depressed the wages paid to their

224. *United States v. Tyson Foods, Inc.*, No. 4:01-CR-061, 2003 U.S. Dist. LEXIS 26385 (E.D. Tenn. Feb. 4, 2003).

225. *Id.*

226. *Id.* at \*5-6.

227. *See id.* at \*4.

228. *Id.* at \*4-5; 18 U.S.C. § 982 (2007).

229. *See Tyson Foods, Inc.*, 2003 U.S. Dist. LEXIS 26385, at \*15-16.

230. *See id.* at \*9-13.

231. *See id.*

232. *Trollinger v. Tyson Foods, Inc.*, 214 F. Supp. 2d 840, 843 (E.D. Tenn. 2002), *rev'd*, *Trollinger v. Tyson Foods, Inc.*, 370 F.2d 602 (6th Cir. 2004).

233. *See generally Tyson Foods, Inc.*, 2003 U.S. Dist. LEXIS 26385, at \*9-13.

234. *See generally Racketeer Influenced and Corrupt Organizations*, 18 U.S.C. §§ 1961-68 (2006).

235. *Tyson Foods, Inc.*, 2003 U.S. Dist. LEXIS 26385, at \*10; *see also Trollinger*, 214 F. Supp. 2d at 842.

legally documented coworkers and that they were therefore entitled to claim the difference between what they were actually paid and the wages they would have received otherwise.<sup>236</sup> The court rejected this argument on the basis that a precise link of causation could not be proven between the illegal employment of undocumented workers and the wages that the other workers had been paid.<sup>237</sup> *United States v. Tyson Foods*, the court pointed out, involved a different statute: 18 U.S.C. § 982.<sup>238</sup> Hence, the question before the court was not whether the employment of undocumented workers had resulted in quantifiable harm to other persons, but whether the monies saved by so doing constituted proceeds of crime that could be subject to forfeiture.<sup>239</sup>

The next question was whether the section extended to cost savings. The court in *United States v. Tyson Foods* acknowledged that the statute itself was not explicit on this: it did not define "proceeds."<sup>240</sup> It therefore stated that the definition of the term to be adopted was "its ordinary or natural meaning."<sup>241</sup> To discover this, it referred to two Webster's dictionaries.<sup>242</sup> These defined "proceeds" as "the total amount of revenue or profit arising from an investment, transaction or business"<sup>243</sup> or "what is produced or derived from something (as a sale, investment, levy, business) by way of total revenue; the total amount brought in."<sup>244</sup> It was therefore clear, the court then held, that the government's definition of "proceeds," as including costs saved, was consistent with the word's ordinary meaning:

In the instant case, the government's theory of cost savings falls within this definition of 'proceeds.' The ordinary, natural meaning of the word 'proceeds' and the plain meaning of the term 'proceeds' in 18 U.S.C. § 982(a)(6)(A)(ii)(I) is broad enough to encompass the government's theory of cost savings.<sup>245</sup>

Hence, costs saved through the committing of a criminal offense constituted proceeds of crime for the purposes of 18 U.S.C. § 982<sup>246</sup> and were liable to forfeiture.

*United States v. Tyson Foods* remains, however, the only reported decision that deals directly with the question;<sup>247</sup> as such, the court's decision in *United States v. Tyson* has not been directly affirmed or overruled on appeal to a higher court. It was, however, disapproved by the District Court for the Middle District of Florida in *United States v. Maali*,<sup>248</sup>

236. *Trollinger*, 214 F. Supp. 2d at 842.

237. In fact, this decision was overturned, on appeal, by the Sixth Circuit. *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602 (6th Cir. 2004). That appeal, however, was decided in June 2004, some sixteen months after the *United States v. Tyson Foods* decision by the Eastern Tennessee District Court. *Id.*

238. *Tyson Foods, Inc.*, 2003 U.S. Dist. LEXIS 26385, at \*10; see also 18 U.S.C. § 982 (2007).

239. See *Tyson Foods, Inc.*, 2003 U.S. Dist. LEXIS 26385, at \*10.

240. *Id.* at \*15.

241. *Id.*

242. *Id.*

243. *Id.* (citing WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 678 (7th ed. 1970)).

244. *Id.* at \*15-16 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1807 (3d ed. 1981)).

245. *Id.* at \*16.

246. 18 U.S.C. § 982 (2007).

247. Indeed, it may be noted that it is not published in any of the standard law reports, merely on Lexis-Nexis. Given the importance of the issue, it is unfortunate and it is hoped that the case will be published more widely in the future. See generally *Tyson Foods, Inc.*, 2003 U.S. Dist. LEXIS 26385, at \*1-16.

248. *United States v. Maali*, 358 F. Supp. 2d 1154, 1158-59 (M.D. Fla. 2005).

as it happens, also a case involving the illegal employment of undocumented workers and subsequent savings in wages (as well as taxes).<sup>249</sup> In *Maali*, the court also acknowledged that “proceeds” are not specifically defined in statute and, hence, stated that the ordinary meaning of the word should therefore be followed.<sup>250</sup> It then, however, went on to remark that several judicial decisions had addressed this question and had referred to a variety of sources in doing so.<sup>251</sup> All of these sources, the court said, led to the conclusion that cost savings fell outside the ordinary meaning of “proceeds,” save for that adopted in *United States v. Tyson Foods*.<sup>252</sup> It therefore questioned why the court in *United States v. Tyson Foods* held that the government’s theory of cost savings fell within the Webster’s definitions of proceeds and, more fundamentally, why, when so many other definitions did not encompass cost savings, it had adopted the one that did.<sup>253</sup>

The *Maali* decision was upheld by the Eleventh Circuit, where the appeal was heard under the name *United States v. Khanani* (Khanani being *Maali*’s co-defendant).<sup>254</sup> The Eleventh Circuit did not refer to the District Court’s comments on *United States v. Tyson Foods*, but it did find that proceeds of crime did not encompass cost savings.<sup>255</sup>

On this, however, two points can be made. The most fundamental one is that the decisions in *Maali* and *Khanani* did not concern a forfeiture action under 18 U.S.C. § 982 but a money laundering prosecution under 18 U.S.C. § 1956.<sup>256</sup> Hence, just as the decision in *Trollinger* was not binding on the court in *United States v. Tyson Foods*, so the *Maali* and *Khanani* decisions would not appear to alter the current legal position concerning the forfeiture of cost savings. This was explicitly stated by the District Court of the Eastern District of New York in *United States v. Catapano*:<sup>257</sup>

*Tyson*, however, was decided in the context of a forfeiture claim, not a money laundering prosecution. This distinction is significant because the forfeiture statute at issue, 18 U.S.C. § 982(a)(6)(A)(ii)(I), applies to property ‘that constitutes, or is derived from or is traceable to the proceeds obtained directly or indirectly from the commission’ of the underlying offense. The money laundering statute, in contrast, is more narrowly limited to ‘proceeds of specified unlawful activity.’<sup>258</sup>

The only case directly on the point of cost savings in the context of a forfeiture action is *United States v. Tyson Foods*, and hence it would appear to decide the matter.

Secondly, as seen in *United States v. Tyson Foods*, the court considered the definition given to “proceeds” in not one but two separate dictionaries, both of them produced by Webster, the U.S “standard” dictionary source.<sup>259</sup> To suggest, therefore, as the court in

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249. *Id.* at 1155–56.

250. *Id.* at 1158–60.

251. *Id.*

252. *Id.*

253. *Id.*

254. *United States v. Khanani*, 502 F. Supp. 3d 1281, 1297 (11th Cir. 2007).

255. *Id.* at 1296–97.

256. See generally *id.*; 18 U.S.C. §§ 982, 1956; *Maali*, 358 F. Supp. 2d at 1158–59.

257. *United States v. Catapano*, No. CR-05-229, 2008 U.S. Dist. WL 2222013, at \*27 (E.D.N.Y. May 22, 2008).

258. *Id.*

259. See *United States v. Tyson Foods, Inc.*, No. 4:01-CR-061, 2003 U.S. Dist. LEXIS 26385, at \*15 (E.D. Tenn. Feb. 4, 2003).

*Maali* appeared to, that the court in *United States v. Tyson Foods* had searched determinedly to find a definition, however obscure, that would meet the needs of the government's case would not seem to fit the facts.<sup>260</sup>

The position regarding a money laundering charge under either 18 U.S.C. § 1956 or § 1957 or the related RICO provisions, is, however, different.<sup>261</sup> Although the issue has to date never been considered by the U.S. Supreme Court, a consistent approach has been taken by a number of lower courts, including at least one circuit of the U.S. court of appeals. The number of cases in which the government has advanced the argument is a testament to its determination to pursue those who engage in economically-motivated crime and to its recognition of the importance of this issue. That the courts have so consistently rejected the argument is unfortunate and their decisions therefore merit examination.

An early case, *Anderson v. Smithfield Foods, Inc.*,<sup>262</sup> involved a class action under 18 U.S.C. §§ 1962 and 1964, part of the RICO statute,<sup>263</sup> and in fact the same statute on which the plaintiffs in *Trollinger* based their action.<sup>264</sup> In *Anderson v. Smithfield Foods*, the plaintiffs alleged that the defendants, a pork processor and hog producer, had violated a number of federal environmental protection laws and falsely represented to federal authorities that they were in compliance with these laws, and had saved costs as a result.<sup>265</sup> Further, they alleged the defendants had used these saved costs to continue to violate these laws and this ongoing illegal activity had caused loss to the plaintiffs.<sup>266</sup> They therefore claimed damages in consequence.

The District Court of the Middle District of Florida did not examine what some might consider the key issue: whether the defendants had violated the federal environmental laws.<sup>267</sup> The court determined that resolution of the case did not require it to resolve the question.<sup>268</sup> Indeed, although the court found for the defendant, Chief Judge Kovachevich stated explicitly that the judgment was made applying the standard of de novo review, assuming that all of the facts alleged by the plaintiff are true.<sup>269</sup> Even if this were the case, however (and clearly, if it were not, the finding for the defendants would by definition have an even firmer foundation), this did not mean that the defendants were liable under RICO:

Assuming that all of the Plaintiffs' facts are true, the Court concludes that the Defendants did not engage in any money laundering activity. The mere accusation that the failure to comply with environmental statutes results in the use of illegal funds to

260. See *id.*; *United States v. Maali*, 358 F. Supp. 2d 1154, 1158-59 (M.D. Fla. 2005).

261. 18 U.S.C. §§ 1956-57, 1961 (2009).

262. *Anderson v. Smithville Foods, Inc.*, 209 F. Supp. 2d 1270, 1272, 1274 (M.D. Fla. 2002).

263. 18 U.S.C. §§ 1962, 1964.

264. *Trollinger v. Tyson Foods, Inc.*, 214 F. Supp. 2d 840, 841 (E.D. Tenn. 2002), *rev'd*, *Trollinger v. Tyson Foods, Inc.*, 370 F.2d. 602 (6th Cir. 2004).

265. *Anderson*, 209 F. Supp. 2d at 1272.

266. *Id.*

267. It was also alleged that the defendant had violated certain Florida state laws. However, the Court's judgment referred to these as "unnamed," i.e. that the plaintiffs had not specified which. *Id.*

268. *Id.*

269. *Id.* at 1275.



promote criminal activity is insufficient to show that the Defendants engaged in money laundering.<sup>270</sup>

Judge Kovachevich then proceeded to give the crucial sentence of the entire judgment, saying “saving money as a result of the alleged noncompliance with the requirements of an environmental statute does not make the money illegally obtained for the purposes of the money laundering statute.”<sup>271</sup>

The decision was not appealed by the plaintiffs. As far as cost savings from violations of environmental protection laws were concerned, therefore, the position was now clear. Because the decision had been made in relation to a class action under the RICO statute, it would arguably have been open to the federal government to bring a money laundering prosecution under 18 U.S.C. § 1956, or the State of Florida under the Florida Money Laundering Act,<sup>272</sup> particularly because it was alleged that Florida state laws were also violated. It would appear, therefore, that neither chose to do so. Indeed, *Anderson* would later, with success, be cited by criminal defendants facing a money laundering prosecution in relation to costs that they had saved through alleged violations of federal criminal laws.<sup>273</sup>

This was then followed by another case involving Florida defendants, *United States v. Maali*,<sup>274</sup> referred to above. The defendants were charged with a variety of offenses surrounding their illegal employment of undocumented workers and also evasion of both federal and state employment taxes in relation to these workers.<sup>275</sup> It was held that not only had they illegally employed the workers (itself a criminal offense) but that they also engaged in a variety of frauds to facilitate this; there were seventy-five counts in all.<sup>276</sup> Further, it was alleged the defendants had deposited the proceeds in the accounts of shell corporations and then withdrawn some of these funds to pay the workers.<sup>277</sup> On the basis of this, they were also charged with money laundering (count fifty-five) because they had engaged in financial transactions in relation to proceeds from an unlawful activity—the illegal employment of undocumented workers, facilitated by fraudulent documentation—with the intent of furthering a criminal enterprise: the ongoing illegal employment of the workers themselves.<sup>278</sup> The proceeds were alleged by the U.S. government to be the money that the defendants had saved through being able to pay the workers wages below that of the federal minimum,<sup>279</sup> as well as evading the applicable taxes.<sup>280</sup> The defendants,

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270. *Id.*

271. *Id.*

272. Fla. Stat. § 896.101 (2009). This covers transactions involving the proceeds not only of felonies under Florida state law but also those under U.S. federal law; see also 18 U.S.C. § 1956 (2009).

273. *E.g.*, *United States v. Maali*, 358 F. Supp. 2d 1154, 1159 (M.D. Fla. 2005); *United States v. Khanani*, 502 F. Supp. 3d 1281, 1288 (11th Cir. 2007); *United States v. Catapano*, No. CR-05-229, 2008 U.S. Dist. WL 2222013, at \*26 (E.D.N.Y. May 22, 2008).

274. *Maali*, 358 F. Supp. 2d at 1158.

275. See *id.*; however, because tax evasion, whether under federal or state law, is not a predicate crime under 18 U.S.C. §1956, the money laundering charge related only to the illegal employment itself and the frauds arising out of it, not to the evasion of either federal or state taxes.

276. *Id.* at 1155.

277. *Id.* at 1157.

278. *Id.*

279. As discussed above, federal labor laws set a minimum wage. Although individual states may choose to set a level above this; where they do not, as in Florida, the federal level applies.

in response, argued that they had not derived any proceeds from any criminal offense.<sup>281</sup> Rather, all the funds in question were derived from legitimate businesses: retail stores selling, *inter alia*, denim jeans.<sup>282</sup> If, which they denied, they had employed undocumented workers and engaged in the alleged fraudulent devices, this merely enabled them to reduce some of their costs. The actual proceeds were of a legitimate business. The government argued that if the criminal offenses had enabled the defendants to reduce the costs of their business, the costs which they had so saved were the proceeds of those offenses.<sup>283</sup> Although the case involved a different statute, 18 U.S.C. § 1956, rather than section 982, the arguments on each side were effectively the same as those in *United States v. Tyson Foods*.<sup>284</sup>

The court found against the defendants in relation to the illegal employment of undocumented workers and the linked frauds—hence the appeals by the defendants against these convictions.<sup>285</sup> The court rejected, however, the government's case in relation to the money laundering count.<sup>286</sup>

Because this case was also brought before the District Court for the Middle District of Florida, it might have been thought that it would have been sufficient for the court merely to follow *Anderson*.<sup>287</sup> But it took a more in-depth approach. Indeed, just as the arguments before it had been very similar to those in the *Tyson Foods* case, the approach that it took to decide the case was very similar to that of the District Court for the Eastern District of Tennessee, albeit with a different conclusion.

It noted that although 18 U.S.C. § 1956 referred to the "proceeds of specified unlawful activity" and further defined what was meant by "specified unlawful activity,"<sup>288</sup> the term "proceeds" was not defined. The court, therefore, was to apply the ordinary, natural meaning of the word. In finding this, it considered three dictionary definitions: "the amount of money received from a sale,"<sup>289</sup> "the sum, amount, or value of property sold or converted into money or into other property,"<sup>290</sup> and "that which is obtained . . . by any transaction."<sup>291</sup> In support of these, it referred to two previous judgments: *United States v. Grasso*<sup>292</sup> and *United States v. McHan*.<sup>293</sup> All three of these definitions, the court said, could be summarized as "something which is obtained in exchange for the sale of something else as in, most typically, when one sells a good in exchange for money."<sup>294</sup>

280. *Maali*, 358 F. Supp. 2d at 1157.

281. *Id.* at 1157-58.

282. *Id.*

283. *Id.* at 1158.

284. *United States v. Tyson Foods, Inc.*, No. 4:01-CR-061, 2003 U.S. Dist. LEXIS 26385, at \*15-16 (E.D. Tenn. Feb. 4, 2003).

285. *Maali*, 358 F. Supp. 2d at 1160-61.

286. *Id.* at 1161.

287. *Anderson v. Smithville Foods, Inc.*, 209 F. Supp. 2d 1270, 1270 (M.D. Fla. 2002).

288. U.S.C. § 1956 (2009).

289. BLACK'S LAW DICTIONARY 1222 (7th ed. 1999).

290. BLACK'S LAW DICTIONARY 1204 (6th ed. 1991).

291. THE OXFORD ENGLISH DICTIONARY 2311 (compact ed., Oxford University Press, USA 1971).

292. *United States v. Grasso*, 381 F.3d 160, 167-68 (3rd Cir. 2004).

293. *United States v. McHan*, 101 F.3d 1027, 1041 (4th Cir. 1996).

294. *United States v. Maali*, 358 F. Supp. 2d 1154, 1158 (M.D. Fla. 2005).

Although the court recognized that a different definition had been adopted in *Tyson Foods*, it felt this, as discussed above, to be at odds with the prevailing view.<sup>295</sup> The general definition, as stated by the court, excludes money saved through a criminal offense as opposed to directly earned from it.<sup>296</sup> Indeed, the court said as much a few lines earlier in the judgment: “[d]efendants’ motions for acquittal have . . . been granted because the Government’s cost savings theory is at odds with the plain and ordinary meaning of ‘proceeds’.”<sup>297</sup>

In support of the view that the “plain and ordinary meaning” of “proceeds” excluded cost savings, the court upheld the defendants’ core argument:

While it is natural and clearly correct to say that Defendants received ‘proceeds’ from the sale of jeans, it is, by contrast, both causally tenuous and decidedly unnatural to say that the moneys one has received from the sale of a good are, not the ‘proceeds’ from the sale of a good, but ‘proceeds’ of the labor used to produce the good.<sup>298</sup>

The case was then appealed by two of Maali’s co-defendants, Saleem Khanani and David Portlock, in respect to other aspects of the case, and by the U.S. government in respect to the finding that cost savings could not constitute proceeds of crime for the purposes of 18 U.S.C. § 1956.<sup>299</sup> The appeal judgment, as mentioned above, was therefore reported under the name of *United States v. Khanani*.<sup>300</sup> The Eleventh Circuit, while rejecting all the defendants’ other arguments, upheld the acquittal in relation to the money laundering count.<sup>301</sup> It took a more balanced view on the variety of definitions of “proceeds,” found both in dictionaries and in case law, than the district court had done. It acknowledged some inconsistencies but firmly endorsed the court’s view that proceeds, in their natural meaning, were those of the sale of jeans, not of the illegal employment of undocumented workers or the evasion of their taxes.<sup>302</sup> The judicial view remained, therefore, that cost and tax savings remained outside the remit of 18 U.S.C. § 1956.

The issue was presented again in *United States v. Catapano* in May 2008.<sup>303</sup> This time the allegation was that lower wage costs had been achieved through corruption: the defendants had bribed agents of local labor unions so that the unions would not enforce collective bargaining agreements that they had entered into.<sup>304</sup> Thus the defendants were able to hire a smaller number of workers and as a result saved costs through their offenses of bribery.<sup>305</sup> They were also charged with bribing representatives of public utility companies to approve inflated invoices.<sup>306</sup> Thus, in addition to the alleged predicate crimes, they were charged with separate counts of money laundering: both of the costs that they

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295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.* at 1160.

299. *United States v. Khanani*, 502 F. Supp. 3d 1281, 1285 (11th Cir. 2007).

300. *Id.*

301. *Id.* at 1297.

302. *Id.* at 1296.

303. *United States v. Catapano*, No. CR-05-229, 2008 U.S. Dist. WL 2222013, at \*1 (E.D.N.Y. May 22, 2008).

304. *Id.*

305. *Id.*

306. *Id.*

had saved through their bribes of the union officials and of the additional amounts that they had been paid as a result of the bribes paid to the public utility representatives.<sup>307</sup> In fact it was only the former that they disputed; they accepted, when the case reached the district court, that a money laundering charge could in principle be brought in relation to the separate charges of utility fraud.<sup>308</sup> The issue of cost savings as the proceeds of crime was therefore once again under examination.

Because this case was heard by the District Court for the Eastern District of New York, which is part of the Second Circuit, the decision by the Eleventh Circuit in *United States v. Khanani*,<sup>309</sup> although the highest-level decision on the point to date, was merely persuasive authority. The Court did, however, consider that decision carefully, as well as the lower court's decision in *Maali*,<sup>310</sup> because it was the only relevant case on point being cited by either party or by the U.S. magistrate judge. The Court felt that the other cases cited by the government were distinguishable because *Tyson Foods, Inc.*<sup>311</sup> did not concern a money laundering charge, and both *United States v. Estacio*<sup>312</sup> and *United States v. Frank*,<sup>313</sup> although related to 18 U.S.C. § 1956, involved simple proceeds of frauds, not cost savings.<sup>314</sup>

The latter ruling seems reasonable: an analysis of these cases does indeed show that the property in question did not consist of cost savings. However, the former is questionable. Although *Tyson Foods, Inc.* related to a different statutory provision than 18 U.S.C. § 1956,<sup>315</sup> so did *Anderson*.<sup>316</sup> This court did consider this at some length, after its consideration of *Khanani*,<sup>317</sup> in support of the defendants' arguments.<sup>318</sup> That weight should have been given to the decision in *Anderson*, while the decision in *Tyson Foods, Inc.* was distinguished, is also curious given the subsequent history of *Trollinger v. Tyson Foods*, referred to above. This, like *Anderson*, was a RICO class action in which the plaintiffs alleged that cost savings made by the defendants through committing a criminal offense constituted the proceeds of that offense and that the plaintiffs were entitled to claims on this basis.<sup>319</sup> Although this argument was rejected by the District Court for the Eastern District of Tennessee,<sup>320</sup> it was subsequently accepted by the Sixth Circuit.<sup>321</sup> This appeal decision, moreover, had been given four years before the decision in *Catapano*. If weight

307. *Id.* at \*2.

308. *Id.* at \*28. The defendants sought to have the money laundering charge in relation to the utility fraud dismissed on other grounds; this was, however, rejected by the court.

309. See *United States v. Khanani*, 502 F. Supp. 3d 1281, 1281 (11th Cir. 2007).

310. See generally *United States v. Maali*, 358 F. Supp. 2d 1154 (M.D. Fla. 2005).

311. See generally *United States v. Tyson Foods, Inc.*, No. 4:01-CR-061, 2003 U.S. Dist. LEXIS 26385 (E.D. Tenn. Feb. 4, 2003).

312. *United States v. Estacio*, 64 F.3d 477, 478 (9th Cir. 1995).

313. *United States v. Frank*, 354 F.3d 910, 915 (8th Cir. 2004).

314. *United States v. Catapano*, No. CR-05-229, 2008 U.S. Dist. WL 2222013, at \*27 (E.D.N.Y. May 22, 2008).

315. *Tyson Foods, Inc.*, 2003 LEXIS 26385, at \*4.

316. See generally *Anderson v. Smithville Foods, Inc.*, 209 F. Supp. 2d 1270 (M.D. Fla. 2002) (This case involved a claim under 18 U.S.C. §§1962 and 1964(c)).

317. See generally *United States v. Khanani*, 502 F. Supp. 3d 1281, 1281 (11th Cir. 2007).

318. *Anderson*, 209 F. Supp. 2d at 1275.

319. *Trollinger v. Tyson Foods, Inc.*, 214 F. Supp. 2d 840, 841 (E.D. Tenn. 2002), *rev'd*, *Trollinger v. Tyson Foods, Inc.*, 370 F.2d. 602 (6th Cir. 2004).

320. *Id.*

321. *Trollinger v. Tyson Foods, Inc.*, 370 F.2d. 602, 622 (6th Cir. 2004).

was to be given to *Anderson*, therefore, it should also have been given to the appeal decision in *Trollinger*, given that the latter was a) of a court of a superior level (Court of Appeals rather than District Court) and b) more recent. In fact, however, *Trollinger* was not even referred to.

The court did not, however, stop with *Khanani* and *Anderson* although it stated explicitly that it found them convincing.<sup>322</sup> It then followed by saying that, even if the term “proceeds” was ambiguous, and hence could arguably be construed as encompassing cost savings, the rule of lenity applied.<sup>323</sup> This rule states that in criminal cases where a statute is ambiguous, the court is to choose the interpretation that is the more favorable to the defendants. In support of this principle, the court cited *United States v. Dauray*.<sup>324</sup> This, the court held, settled the matter: cost savings were not proceeds for the purposes of the money laundering legislation.<sup>325</sup>

The issue, then, appeared to be firmly decided, at least in most of the country, although the decisions of the Sixth Circuit in *Trollinger* and the District Court for the Eastern District of Tennessee in *Tyson Foods* may suggest that had such a money laundering prosecution been brought in one of the states of the Sixth Circuit,<sup>326</sup> it could well have succeeded. No such prosecution has been reported to date, however. The only means by which the matter could be settled beyond doubt on a national basis is if there were a decision by the U.S. Supreme Court or a clarification of the statute by the U.S. Congress.

To date, the issue has never been referred to the U.S. Supreme Court. Indeed, it is apparent from a subsequent judgment of U.S. Magistrate Judge Gold in the *Catapano* litigation of August 12, 2008 that the government did not seek to appeal its decision on this matter to the Second Circuit, let alone a higher court.<sup>327</sup> Rather, the government chose the second option by trying to persuade Congress to amend the statute itself.

The catalyst for this change was the U.S. Supreme Court decision in *United States v. Santos* in 2008.<sup>328</sup> The case also concerned the meaning of the term “proceeds,” but the question was whether it was to be construed as meaning the gross receipts from a crime or merely the profits from it.<sup>329</sup> The Supreme Court noted that, in previous cases, some courts had adopted the former definition while others adopted the latter.<sup>330</sup> Again, applying the rule of lenity, it ruled that “proceeds” were to mean profits, rather than gross receipts.<sup>331</sup> As discussed at the beginning of this article, the U.S. Department of Justice (DOJ) considered this to place an unacceptable burden of proof on the government in

322. *United States v. Catapano*, No. CR-05-229, 2008 U.S. Dist. WL 2222013, at \*26-27 (E.D.N.Y. May 22, 2008).

323. *Id.* at \*28.

324. *Id.*

325. *Id.* at \*25-26.

326. The Sixth Circuit includes Michigan, Ohio, Kentucky, and Tennessee. Sixth Circuit, Courts of the Sixth Circuit, [http://www.ca6.uscourts.gov/lib\\_hisu/Courts/index.html](http://www.ca6.uscourts.gov/lib_hisu/Courts/index.html).

327. See generally *United States v. Catapano*, No. CR-05-229, 2008 WL 4107177 (E.D.N.Y. Aug. 12, 2008). It is possible that the government's decision was influenced by the explicit citation of the Second Circuit's judgment in *United States v. Dauray*, 215 F.3d 257 (2d Cir. 2000), even though that case did not concern money laundering.

328. See generally *United States v. Santos*, 553 U.S. 507 (2008).

329. *Id.* at 509.

330. *Id.* at 511-513.

331. *Id.* at 514.

future money laundering prosecutions and therefore the DOJ lobbied hard for Congress to amend the statute. This was done in May 2009; the amended definition of "proceeds" in 18 U.S.C. § 1956 now reads "any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity."<sup>332</sup>

Although the decision in *Santos* spurred the change, the series of defeats in relation to cost savings was also very much in the DOJ's mind when the amendment was drafted. Indeed, one of the officials involved in the drafting stated, albeit off the record, that the new wording was intended not only to deal with the "gross receipts" versus "net profits" problem, but also to bring cost savings firmly within the reach of the statute. Although the former has explicitly been achieved, whether the latter will have the same success remains to be seen. The DOJ's view is that "obtained or retained, directly or indirectly" is sufficient to cover cost savings, but there have been no reported cases to date that have established this one way or the other.

Until the courts decide the matter, one can merely speculate. It may be that the outcome will vary according to the particular case, and even the particular predicate crime. It may, therefore, be useful to consider the change to the statute in the context of the crimes and cases considered in this article.

## VII. Impact of Change to 18 U.S.C. § 1956(c)(9)

A key factor in deciding the impact of the change to 18 U.S.C. § 1956 will be whether or not the offense in question constitutes a predicate crime as defined in the section. Any argument for further reform to bring the offenses committed in this article within the remit of this section, where they are not covered, will only have weight if the offenses are covered. The cost savings made would then come within the definition of subsection (c)(9). If they will not, defining the offenses as predicate crimes will in itself achieve little. It is therefore useful to look at whether the cost savings will now be covered, at least in principle, and then to consider what, if any, amendments need to be made to the definition of predicate crimes.

### A. CAN COST SAVINGS BE SHOWN?

Where tax is evaded on an otherwise legitimate business, it seems clear that the government's view will prevail: money that should have been paid to the revenue authorities was retained by the evader through some form of unlawful activity, *i.e.* the commission of the crime of tax evasion. The precise sum can easily be quantified by taking the amount of tax that should have been paid but was not. Indeed, the broad wording of the phrase "some form of unlawful activity" would seem to cover not only the evasion of federal taxes but also those imposed by the state or county,<sup>333</sup> even though these are not per se the subject

332. 18 U.S.C. § 1956(c)(9) (2009).

333. The latter will not be confined to minor, obscure charges, but will also apply to "mainstream" taxes, such as sales tax or, where the state or county imposes it, income tax. In the State of Florida, for example, sales tax is levied by the county as well; Alachua County, at the time of writing increased the state rate of six percent by 0.5%. Press Release, Florida Dep't of Revenue, Alachua County Adds an Additional One-Half Percent (.5%) Discretionary Sales Surtax Beginning January 1, 2009 (Nov. 24, 2008), *available at* <http://dor.>

of any federal law.<sup>334</sup> If the facts in *Maali*<sup>335</sup> had taken place after May 2009, the evaded federal and state taxes would have constituted the proceeds of crime and hence could have formed the basis of a money laundering prosecution.<sup>336</sup> The concealment of the evaded taxes in the accounts of shell corporations and their continued use in the defendants' business would both have satisfied the other elements of the statute.

The cost savings made by the defendants through their payment of unlawfully low wages to their undocumented workers<sup>337</sup> might pose a more difficult problem. Was any money "retained" as such? There is an argument that it was. In illegal and legitimate businesses alike, payment of costs is typically met out of the gross receipts of the business. In the case of *Maali*, the defendants sold jeans to customers.<sup>338</sup> The "proceeds" from the labor force helped produce the jeans and pay various expenses, including the purchase of merchandise stock (the material needed to make the jeans), utility bills, and the payment of their employees' wages.<sup>339</sup> The reduction of any one of these costs, in this case the wages, results in a higher proportion of the gross receipts being retained by the business. Further, in a small unincorporated business such as that of Maali and his co-defendants, the receipts retained by the business would be the same as those retained by its operators.<sup>340</sup>

The argument for the defense, however, may also be foreseen. They might argue that it is not at all a foregone conclusion that, had they not violated the immigration laws, they would have employed the same number of documented workers at at least the minimum wage. Perhaps they would have employed fewer workers, or for fewer hours. In a retail store, in particular, they could argue that this would not have resulted in lower proceeds, or at least that the government cannot prove that, because it cannot be predicted how much longer customers might have been willing to wait to be served, particularly during a busy period when fewer staff are available. Even in a manufacturing business it could be argued that proceeds are dependent not solely on the number of items produced, but also

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myflorida.com/dor/tips/tip08a01-13.html. Similarly, New York City, which, like a number of major U.S. cities, also constitutes a county in its own right, imposes an additional income tax to that levied by the State of New York. See *Personal Income Tax*, NYC FINANCE, [http://www.nyc.gov/html/dof/html/services/business\\_tax\\_nys\\_income.shtml](http://www.nyc.gov/html/dof/html/services/business_tax_nys_income.shtml) (last visited Sept. 26, 2011).

334. The list of crimes contained under the federal RICO statute, in 18 U.S.C. §1961 (2006), includes a number of offenses under state, as well as federal, law: "any act or threat . . . [of various types] . . . which is chargeable under State law and punishable by imprisonment of more than one year." 18 U.S.C. §1961(1)(A). Although the list does not include tax evasion, it does make clear the principle that the proceeds of a state crime may form the basis of a federal money laundering prosecution. 18 U.S.C. § 1961. In any case, a federal prosecution under 18 U.S.C. §1956 would not preclude a separate state action under the state's own money laundering statute.

335. See generally *United States v. Maali*, 358 F. Supp. 2d 1154 (M.D. Fla. 2005).

336. Provided that tax evasion constituted a predicate crime. See LORRAINE HYDE & JEFFREY TORP, *IDENTIFYING UNDERLYING CRIME, BSA/ANTI-MONEY LAUNDERING 6.4* (2011) (arguing that tax evasion constituted a predicate crime).

337. *Maali*, 358 F. Supp. 2d at 1156.

338. *Id.* at 1160.

339. *Id.*

340. Where the business is a corporation, it will be a different matter because the corporation will be a legally separate person to the operators. This will not, however, be a barrier to a money laundering prosecution of the operators because they will still be guilty of engaging personally in financial transactions with money retained by the corporation through a form of unlawful activity or, at the very least, being wilfully blind as to the unlawful origin of this portion of the corporation's profits.

the number of those items which the business is able to actually sell. A good defense attorney could easily argue that there are just too many variables and unknowns for the government to be able to show that any property at all, in this case money, was retained by the defendants as a result of their crimes, let alone the valuation of such property. The government's difficulties may also be exacerbated by the all too predictable next move: accepting a guilty plea to the charge of employing undocumented workers (particularly if, as is often the case, the workers were actually found on the premises or, as in *Maali*,<sup>341</sup> false documentation is found) in return for the prosecutor dropping the money laundering charge.

The complex nature of the case, incidentally, underlines the importance of the government bringing separate money laundering charges in relation to the proceeds of different predicate crimes. In *Catapano*,<sup>342</sup> the defendants, as discussed above, accepted the applicability of a money laundering charge in relation to the proceeds of the utility fraud; it was the applicability of section 1956 to the proceeds of the labor fraud that they disputed.<sup>343</sup> Because, however, the government had brought one charge of money laundering in relation to the combined proceeds of both crimes, the defendants then proceeded to seek to have the count dismissed in relation to the utility fraud charge as well. This attempt was unsuccessful because the court very clearly distinguished between the proceeds of the two crimes. However, the single charge created an unnecessary complication that could have been avoided by two separate charges.<sup>344</sup>

Therefore, there may be uncertain cases. None of these difficulties, however, preclude a money laundering charge in such cases as a matter of law, whether or not cost savings had been retained by the defendants as a result of their crimes; the issue in a given case would ultimately be a matter for the jury to decide. The success already experienced both by the government<sup>345</sup> and (on appeal) by the private plaintiffs in *Tyson Foods*<sup>346</sup> shows that such cases can be brought successfully. Some may not be successful, but with the efforts of a robust and determined prosecutor, some may be. In any case, a few unsuccessful cases may be the price that is necessary to pay to ensure that some other defendants pay fully for their misdeeds. In a paper presented at the Institute of Advanced Legal Studies in London, U.K. in January 2006, Anthony Kennedy, then Director, Northern Ireland, of the U.K.'s Assets Recovery Agency,<sup>347</sup> commented that the Agency's 100% success rate to date in civil recovery proceedings perhaps suggested that it was not initiating proceedings in the more difficult cases.<sup>348</sup> Indeed, in the journal article based on that paper, Kennedy expressed surprise that defendants had not brought more challenges to civil recovery ac-

341. *Maali*, 358 F. Supp. 2d at 1156.

342. *United States v. Catapano*, No. CR-05-229, 2008 U.S. Dist. WL 2222013, at \*26 (E.D.N.Y. May 22, 2008).

343. *Id.*

344. *Id.*

345. *See id.* at \*30-31.

346. *United States v. Tyson Foods, Inc.*, No. 4:01-CR-061, 2003 U.S. Dist. LEXIS 26385 (E.D. Tenn. Feb. 4, 2003).

347. The Agency has since been abolished and its functions transferred to the Serious Organised Crime Agency (SOCA). *SOCA Soaks up Asset Recovery Agency*, THE REGISTER, Apr. 1, 2008, [http://www.theregister.co.uk/2008/04/01/soca\\_gets\\_asset\\_recovery\\_powers/](http://www.theregister.co.uk/2008/04/01/soca_gets_asset_recovery_powers/).

348. Anthony Kennedy, *Civil Recovery Proceedings under the Proceeds of Crime Act 2002: The Experience so Far*, 9 J. OF MONEY LAUNDERING CONTROL 245, 253-54 (2006).



tions, in particular by way of judicial review, and anticipated a number of future challenges.<sup>349</sup> Nonetheless, he confirmed in the conclusion of the article that “the experience so far is that civil recovery works.”<sup>350</sup> The same boldness in the face of undoubted challenges may be recommended to the U.S. government.

Moving to violations of environmental protection laws, as in the *Anderson* case,<sup>351</sup> the arguments in favor of a money laundering charge would be the same as those set out above in relation to the employment of undocumented workers. The business earns gross receipts from its operations, such as those from farming, food processing (or as in the *Anderson* case, foods),<sup>352</sup> and manufacturing. Some of those receipts are then spent on certain costs including the disposal of waste and other by-products through particular processes in compliance with, *inter alia*, the Clean Water Act,<sup>353</sup> Clean Air Act,<sup>354</sup> Resource Conservation and Recovery Act,<sup>355</sup> and Toxic Substances Control Act,<sup>356</sup> as well as the regulations passed under them by the Environmental Protection Agency. As discussed above, failure to comply with these measures is a crime in many cases, but it also saves considerable costs.<sup>357</sup> The costs thus saved are monies that should, legally, have been spent but were not. As such, they were retained through the committing of a criminal offense and hence come within the revised definition of proceeds in section 1956. Their quantification could be achieved through the establishment, likely through the evidence of expert witnesses, of what the cost would have been of the measures necessary for compliance, such as the proper processing of waste, the engagement of the services of an external contractor specializing in such services, or the fitting of the required filters to a factory’s chimneys.

Of course, *Anderson* was a RICO civil action by private plaintiffs, not a money laundering prosecution by the U.S. government. The two actions are not, however, mutually exclusive. Indeed, they cannot be. A criminal prosecution under section 1956 results (if successful) in a criminal sentence for the defendant: a fine in the case of a corporation and a prison sentence (and, in all likelihood, a heavy fine as well) in the case of an individual. Even a forfeiture action under, for example, 18 U.S.C. § 981 or § 982 will result in the property being transferred to the federal government.<sup>358</sup> Although victim restitution is

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349. *Id.* at 262.

350. *Id.*

351. *Anderson v. Smithville Foods, Inc.*, 209 F. Supp. 2d 1270, 1275 (M.D. Fla. 2002).

352. *Id.* at 1272.

353. 33 U.S.C. § 1251 (1972).

354. 42 U.S.C. § 7401 (1970).

355. 42 U.S.C. § 6901 (1976).

356. 15 U.S.C. § 2601 (1976).

357. There will be exceptions to the latter: for example, where a truck crashes due to the negligence of the driver and its contents are spilt, as a result, onto the surrounding area or even into a nearby waterway. These were essentially the facts of the English case of *Express Ltd. (trading as Express Dairies Distribution) v. Environment Agency* [2005] 1 WLR 223, Divisional Court (2004). In such cases, a money laundering charge would clearly not be appropriate, although a charge under the relevant substantive environmental protection statute would be. In many cases, however, pollution or spillage of industrial waste does occur as a direct result of illegal cost-cutting by the business concerned. It is these cases that this article seeks to address and it is submitted that a money laundering charge is not only possible but appropriate in them.

358. See 18 U.S.C. § 981 (2006); 18 U.S.C. § 982 (2007). The states have their own separate provisions under which property may be forfeited to the state authorities. They vary, however, in their scope of application. For example, Florida provides only for *in rem* forfeiture, not *in personam*, and then only in relation to property linked to drug trafficking. Florida Contraband Forfeiture Act, FLA. STAT. §§ 932.701-932.706 (2011).

among the uses that the government is permitted to devote forfeited property to, this is not by any means the same as a private civil right of action. This is provided by the separate provision of 18 U.S.C. § 1964(c).

The two actions may, therefore, be brought in parallel. The close relationship between the two is further underlined by the explicit reference by Chief Judge Kovachevich, in her judgment in *Anderson* regarding the money laundering legislation; indeed, her finding that cost savings from non-compliance with the environmental protection laws did not constitute proceeds of crime for the purposes of the money laundering statute was key to her rejection of the plaintiff's RICO action.<sup>359</sup> That being the case, now that such cost savings may be seen to fit more clearly within the remit of the money laundering provisions, the basis on which the RICO action failed arguably no longer applies. That, combined with the finding of the Sixth Circuit in *Tyson Foods*, even before the 2009 amendment to the federal money laundering provisions, gives a strong basis to believe that cases similar to *Anderson* would be decided differently today.

The same would seem to apply in a case with the facts of *Catapano*.<sup>360</sup> The bribes paid to the labor union officials facilitated the employment of fewer workers than was provided for under the collective bargaining agreement and hence lower wage costs to the defendants. Hence money that would, had the bribes not been paid, been paid to the additional workers was retained. Further, the difficulties in proving such cost savings, which are discussed above in the context of the employment of undocumented workers, will not apply in a case like *Catapano*. The collective bargaining agreement will state clearly the minimum number of workers that are to be employed and also the wages that they are to be paid. Although breach of the agreement is not a crime per se (at most, it might be a breach of contract, but more likely, it would merely result in a further industrial dispute), the bribery of labor union representatives is. The cost savings will therefore have been achieved through the criminal offense of bribery. Alternatively, the path that the government took in *Catapano*, the savings may be considered to have been achieved through a fraud against the labor union. As for proof of the retained property, this will also be simple: it is the difference between the total wages that the company would have paid had the collective bargaining agreement been honored (*i.e.*, had the labor union representatives not been bribed) and the wages which were in fact paid. That difference will be property retained through the commission of a crime. All that would remain to be shown was that that property was then used to promote the carrying on of a specified unlawful activity, the operation of ongoing business activities facilitated by labor fraud, something the court in *Catapano* had no difficulty finding.

It is worth pointing out in today's context that the statutes currently being introduced in a number of states to outlaw collective bargaining agreements will not affect this argument. It is true that if successfully passed, they may eliminate the incentive for business operators such as *Catapano* and his co-defendants to engage in bribery and fraud to get around such agreements. The statutes will not, however, change the fact that if business persons bribe labor union officials, this will constitute a crime. It is for this reason that it is emphasized that, in *Catapano*, the government could, had it so chosen, have brought a charge of money laundering based on the offense of bribery rather than fraud. If collec-

359. *Anderson v. Smithville Foods, Inc.*, 209 F. Supp. 2d 1270, 1275 (M.D. Fla. 2002).

360. *United States v. Catapano*, No. CR-05-229, 2008 U.S. Dist. WL 2222013 (E.D.N.Y. May 22, 2008).

tive bargaining agreements are excluded by statute and in the subsequent industrial unrest business persons seek to protect their operations by bribing labor union representatives not to pursue a given course of action (such as a work to rule, or even an all-out strike), the choice by the government of such an approach may become of crucial importance.

There remains the question of violation of occupational safety and health statutes. None of the decisions considered in this article concerned such offenses. Were such a case to be brought in the future, however, it would be simple to establish the retention of property through the violation. Just as evidence could be offered in an environmental protection case of what the cost would have been to take the necessary measures to comply with the legal requirements, so could it in a case where occupational safety and health legislation had been violated: this would be the property that had been retained. Again, as with an environmental protection case, such a money laundering provision could be brought in parallel to a separate civil action by those who were injured as a result of the violation.

The one potential weakness in all of this, however, is the requirement of intent: typically, to promote the carrying on of a specified unlawful activity, but alternatively to engage in tax evasion, avoid a reporting requirement, or assist in concealment of the funds. In each of the cases examined in this article, this element was established because the saved costs were re-invested in the ongoing business enterprise. There will, however, be cases where this is not so. A person, as opposed to a business, may commit a one-off offense of tax evasion, perhaps on a specific item of income. Although showing that property was retained through the commission of a crime will be relatively simple, it will be somewhat more difficult to establish that the financial transaction involving the property is entered into with the intent either of promoting a criminal enterprise or of concealment of the property. Even if the money is held in an overseas bank account, the defendant could argue that it was held there for purposes other than concealment, perhaps for vacation expenses: many offshore jurisdictions, particularly in the Caribbean, but also in parts of Latin America, are also popular tourist destinations.<sup>361</sup> The same argument may be used to rebut, or at least cast reasonable doubt on, a government claim that the financial transaction (the placing the funds in the offshore account) was undertaken to evade the payment of tax, while the defendant is unlikely in any event to have been subject to a reporting requirement.

Alternatively, a business may employ undocumented workers for a specific project of limited duration: the harvesting of crops for a season of a few weeks or perhaps a construction project. Here again, property is clearly retained through a criminal offense, but proving any of the intents specified in section 1956 beyond reasonable doubt may not be easy.

It was to cover precisely such cases that an additional offense, sometimes referred to as "money spending" (to distinguish it from the offense of money laundering itself) was created in 18 U.S.C. § 1957. As seen at the beginning of this article, this statute prohibits financial transactions involving the proceeds of a specified criminal offense.<sup>362</sup> There is no requirement of a specific intent, but the property involved must be above a value

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361. This may not be credible where large amounts of funds are involved, but the amount of tax evaded by an individual may be more modest, particularly given the relatively low rates of income tax levied in the United States.

362. 18 U.S.C. § 1957(a) (2009).

threshold of \$10,000 and the maximum prison sentence is lighter: ten years rather than twenty years.<sup>363</sup> The section was not directly amended in May 2009, as 18 U.S.C. § 1956 was; however, it does provide that "proceeds" is to be defined as set out in section 1956.<sup>364</sup> Hence, property retained through the commission of a criminal offense may be the subject of a prosecution under section 1957, just as it may under section 1956.

#### B. ARE THE OFFENSES PREDICATE CRIMES?

One question remains: although all the crimes considered above are clearly unlawful activities, do they fall within the more limited categories of "specified unlawful activity" as referred to in section 1956?<sup>365</sup> The answer, at present, depends on the crime: some of the offenses do, while others do not. It may be noted, however, that this was not a point argued by the defense in any of the cases examined in this article. Where, if at all, each of the offenses considered fits within these lists is complex and it may therefore be helpful to examine each in turn. It should be noted, in this context, that many "specified unlawful activities" are in fact listed by reference to 18 U.S.C. § 1961(1); others, however, are listed separately in section 1956 itself.<sup>366</sup>

The core offenses of tax evasion, found in section 7201 and section 7202 of the Internal Revenue Code, although they carry criminal penalties including the forfeiture of the tax evaded, do not appear in either list.<sup>367</sup> As such, they are not predicate crimes. In theory, a money laundering prosecution could be brought in such cases based on other provisions. Tax evasion is generally achieved through the filing of a tax return in which relevant sums of income are either falsely stated or simply omitted. It may therefore be charged as the use of a device, the tax return, to defraud the revenue authorities out of the tax that is legally due to them. Because the tax return will either be mailed to the revenue authorities or (probably now more frequently) submitted to them online, this will constitute, as the case may be, either mail fraud under 18 U.S.C. § 1341 (2008) or wire fraud under 18 U.S.C. § 1343 (2008). Both are offenses listed in 18 U.S.C. § 1961(1) (2006). Although this line of argument clearly fits within the law, however, it is in practise barred by government policy. The DOJ is very concerned that eager (or, depending on one's point of view, robust) federal prosecutors should not make use of fraud offenses simply to bring a case where a straightforward tax evasion charge cannot be brought. It has therefore maintained to date a policy that a mail or wire fraud prosecution may only be brought in a tax evasion case if approval is given by the DOJ's Tax Division. This applies as much to a linked prosecution for money laundering as to one in relation to the fraud itself. In keeping with aim of the policy to restrict the bringing of such prosecutions, approval is rarely given: an effective block to a money laundering charge.

This is unfortunate. First, it is unsatisfactory that any prosecution should be made subject to government approval, although it is acknowledged that the United States is by no

363. *Id.* § 1957(a)-(b)(1).

364. *Id.* § 1957(f)(3).

365. Because section 1957 applies the section 1956 definition of "specified unlawful activity," just as it does that of "proceeds," any property that is covered by one section will also be covered by the other.

366. *See id.* § 1956(c)(7)(A), (D).

367. *See id.* §§ 1956(c)(7), 1961(1).

means the only jurisdiction to require such approval,<sup>368</sup> and a full discussion of this question lies outside the scope of this article. Second, and more central to the issues considered here, the exclusion of tax evasion from the list of money laundering prosecutions is particularly curious. The harm that tax evasion causes, not only to the government but to the public, has been considered above. Further, it is specified in 18 U.S.C. § 1956 as one of the purposes which renders a financial transaction involving the proceeds of specified unlawful activity money laundering.<sup>369</sup> Indeed, it is cited second in the list of such purposes—above concealment or disguise of the proceeds.<sup>370</sup> If tax evasion is considered to be so serious as to warrant being classified, in its own right, as a purpose of money laundering (a view with which this article would concur), it follows that it should constitute a predicate offense. This could be done simply enough by means of an amendment to section 1956(c)(7), including the offenses under section 7201 and section 7206 of the Internal Revenue Code in the list contained there.<sup>371</sup>

The employment of undocumented workers, or, to use the wording of the statute, “unauthorized aliens,” is a criminal offense under section 274(a) of the Immigration and Nationality Act.<sup>372</sup> This, like the core tax evasion offenses, is not listed in either 18 U.S.C. § 1961 or § 1956.<sup>373</sup> However, a number of linked offenses are. The one most commonly charged, as in both *U.S. v. Tyson Foods*<sup>374</sup> and *Maali*,<sup>375</sup> is fraud in relation to identification documents under 18 U.S.C. § 1028. This relates not to the employment of the undocumented workers per se, but to the use, or even manufacture, of falsified identification documents (for example, a Social Security card or a state driver’s license), such that it appears that the worker is entitled to work in the United States: a popular device by those who employ such persons.<sup>376</sup> This is specifically listed under 18 U.S.C. § 1961(1) (2006). Other options, also listed in that section, would include, depending on the facts of the given case, the reproduction of naturalization or citizenship papers,<sup>377</sup> fraud in relation to visas, permits, and other documents,<sup>378</sup> or the harboring or concealment of an unauthorized alien under section 274 of the Immigration and Nationality Act.<sup>379</sup>

This latter offense will often be applicable; as noted earlier in this article, those employing undocumented workers often provide their own accommodation for them, away from prying eyes. Indeed, given that the employers often also charge exorbitant rates of rent (in relation to the workers’ low wages) for this accommodation, the use of this offense would prove a useful additional weapon in proceeding against those involved. Not only could they be charged with laundering the costs that they had saved by reference to the mini-

368. For instance, in the United Kingdom, the Attorney General has the power to end any prosecution on the grounds that to continue it would not be in the public interest. *Private Prosecutions*, THE CROWN PROSECUTION SERVICE, [http://www.cps.gov.uk/legal/p\\_to\\_r/private\\_prosecutions/](http://www.cps.gov.uk/legal/p_to_r/private_prosecutions/) (last visited Sept. 19, 2011).

369. 18 U.S.C. §1956(a)(1)(A)(ii) (2009).

370. *Id.*

371. See generally 26 I.R.C. §§ 7201, 7206 (1982).

372. 8 U.S.C. § 1324(a) (2006).

373. See 18 U.S.C. § 1956(c)(7) (2009); 18 U.S.C. § 1961(1) (2006).

374. *United States v. Tyson Foods, Inc.*, No. 4:01-CR-061, 2003 U.S. Dist. LEXIS 26385 (E.D. Tenn. Feb. 4, 2003).

375. *United States v. Maali*, 358 F. Supp. 2d 1154, 1158-59 (M.D. Fla. 2005).

376. See 18 U.S.C. § 1028 (2006).

377. *Id.* §1426.

378. *Id.* §1546.

379. 8 U.S.C. § 1324 (2006).

imum wage that they would have paid legally documented workers, they could also, in a separate count, be charged with laundering the proceeds of harboring the aliens (*i.e.* the rent charged).<sup>380</sup> Given the frequent use by U.S. criminal courts (unlike their U.K. counterparts) of consecutive sentences for each count in an indictment, this could double the potential prison sentence and fine. Where even five undocumented workers were involved, for example, the maximum sentence would be a 200 year prison sentence and a fine of \$5 million.

With regard to violations of environmental protection laws, some of these are listed in section 1956 itself, although others are not. Specifically, felony violations of the Federal Water Pollution Control Act (also referred to as the Clean Water Act),<sup>381</sup> Ocean Dumping Act,<sup>382</sup> Act to Prevent Pollution from Ships,<sup>383</sup> Safe Drinking Water Act,<sup>384</sup> and the Resources Conservation and Recovery Act<sup>385</sup> are designated as predicate crimes for the purposes of the money laundering statute.<sup>386</sup> Indeed, it is perhaps strange that the status of costs saved through such crimes as proceeds of a specified unlawful activity was ever questioned because it is difficult to see in what other ways property could actually be derived from them.

Two important environmental statutes are not, however, listed in the section: the Clean Air Act<sup>387</sup> and the Toxic Substances Control Act.<sup>388</sup> The omission of the former is not, however, necessarily as significant as it may appear. The Clean Air Act, found in 42 U.S.C. § 7410, provides that the individual states are to draw up plans for the implementation of the Act. Enforcement of the Act will then fall under state law as part of those implementation plans. Although this will mean that the proceeds will more easily be dealt with under state, rather than federal, law, this need not be a problem; the states have their own money laundering statutes that run in parallel with the federal provisions of 18 U.S.C. § 1956 and § 1957.<sup>389</sup> Where, therefore, failure to comply with state legislation results in a crime covered by these statutes, a state money laundering prosecution may be brought in relation to the costs thereby saved.

In Florida, for example, the Florida Money Laundering Act covers the proceeds of any felony under both state and federal law.<sup>390</sup> The principal implementation in Florida of the Clean Air Act is the power of the Department of Environmental Protection, under the Florida Air and Water Pollution Control Act (Florida Air and Water Act), to require those who engage in activities that result in air pollution (and indeed other types of pollution) to obtain a permit and, having obtained it, comply with specified measures designed to re-

380. This rent could, of course, also be forfeited separately to the cost savings.

381. *See* Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1987).

382. *See* Ocean Dumping Act, 33 U.S.C. §§ 1401-45, 16 U.S.C. §§ 1431-47(f), 33 U.S.C. §§ 2801-05 (1992).

383. *See* Act to Prevent Pollution from Ships, 33 U.S.C. § 1901-12 (1980).

384. *See* Safe Drinking Water Act, Pub. L. No. 93-523, 88 Stat. 1660 (1974).

385. *See* Resources Conservation and Recovery Act, Pub. L. No. 94-580, 90 Stat. 2795 (1976).

386. 18 U.S.C. § 1956(c)(7)(E) (2009).

387. *See* Clean Air Act, 42 U.S.C. §§ 7401-7671(q) (1955).

388. *See* Toxic Substances Control Act, 15 U.S.C. §§ 2601-97 (1976).

389. *See, e.g.,* TEX. PENAL CODE ANN. § 34.01-34.03 (1993); CAL. PENAL CODE § 186.9-186.10 (2010); FLA. STAT. § 896.101 (2006).

390. FLA. STAT. § 896.101 (2009).

duce the pollution.<sup>391</sup> Failure to do so is not only punishable with civil or administrative remedies,<sup>392</sup> but may also be prosecuted criminally as a first degree misdemeanor.<sup>393</sup> From the perspective of a potential prosecution of money laundering, this will clearly not be helpful, because the predicate crime must be a felony.<sup>394</sup> Where the act does so result, the Florida Air and Water Act does, however, contain a separate offense of causing pollution itself, other than as provided under one of the exemptions in the chapter. Florida Statutes section 403.161(1) provides: “[i]t shall be a violation of this chapter, and it shall be prohibited for any person . . . [t]o cause pollution, except as otherwise provided in this chapter, so as to harm or injure human health or welfare, animal, plant, or aquatic life or property.”<sup>395</sup>

Where this offense is committed willfully, it constitutes a third degree felony.<sup>396</sup> While commission of the offense through mere recklessness or gross negligence will merely be a second degree misdemeanor,<sup>397</sup> the types of cases addressed by this article do involve willful violations. Accidents, by definition, happen through recklessness or negligence, not deliberate actions. The circumstances that lead to them, however, may well be created through a willful decision not to comply with the law. Moreover, where an entity makes a business decision to save costs and dispose of waste illegally, rather than in accordance with the procedures required by the Department of Environmental Protection regulations, this is a clear, willful act. A felony charge will thus only be avoided if the act does not in fact result in harm to either human, animal, plant, or aquatic life.<sup>398</sup> Where a felony does so result, the entity, and those of its officers/employees directly involved in the offense, will be liable for prosecution not only for the pollution offense, but for money laundering as well.<sup>399</sup> The sentence that may be imposed for this will, unlike under the federal money laundering provisions, depend on the amount of proceeds involved; it will, however, range from a maximum of five years imprisonment and a fine of \$5,000, where the proceeds obtained over a twelve month period have a value of between \$300.01 and \$19,999.99,<sup>400</sup> to a maximum of thirty years imprisonment and a fine of \$10,000, where their value is \$100,000 or more.<sup>401</sup> It may be noted that the maximum prison sentence in the most serious cases will therefore be fifty percent higher than under 18 U.S.C. § 1956.<sup>402</sup>

Florida’s “habitual felony” provisions under Fla. Stat. § 775.084 also should be noted. Where the defendant has previously been convicted of two other felonies in Florida in the

391. FLA. STAT. § 403.062 (2010).

392. FLA. STAT. § 403.121(1)-(2) (1996).

393. FLA. STAT. § 403.161(5) (2000).

394. FLA. STAT. § 896.101(2)(a) (1994).

395. FLA. STAT. § 403.161(1)(a) (1989).

396. FLA. STAT. § 403.161(3).

397. FLA. STAT. § 403.161(4).

398. FLA. STAT. § 403.161(1)(a).

399. See FLA. STAT. § 896.101(2)(a) (1994).

400. This constitutes a third degree felony. FLA. STAT. § 896.101(5)(a). The Act does not cover proceeds with a value of \$300 or less. FLA. STAT. § 775.082(3)(d) (2011). In practice, however, the financial cost of the procedures required to comply with the Florida Air and Water Pollution Control Act is likely to be greater.

401. This constitutes a first degree felony. FLA. STAT. § 896.101(5)(c). Laundering of proceeds with a value of \$20,000 or more, but less than \$100,000, constitutes a second degree felony and is therefore punishable with up to fifteen years imprisonment and a fine of up to \$10,000. FLA. STAT. § 775.082(3)(b).

402. Compare FLA. STAT. § 775.082(3)(b) (2011), with 18 U.S.C. § 1956 (2006).

previous five years or, alternatively, committed the current felony offense within five years either of a previous felony conviction or of their release from prison (or other specified sentence),<sup>403</sup> the maximum prison sentence may be increased.<sup>404</sup> For a third degree felony, such as laundering of property with a value of less than \$20,000, this will mean up to ten years of imprisonment; for a first degree felony, it will mean imprisonment for life.<sup>405</sup> The impact of this should not be underestimated. Persistent breaches of the anti-pollution requirements will be sufficient, because this will involve two felony offenses (*i.e.* the pollution offense itself and money laundering in relation to the costs saved),<sup>406</sup> thus only one previous conviction will be required.<sup>407</sup> So will even one violation in the case of an individual corporate officer who, say, had been released four years earlier from a prison sentence for a third degree felony.<sup>408</sup> Although most Florida felonies, even of the third degree, are relatively heinous (for example, battery resulting in very severe injury),<sup>409</sup> some may appear more minor: any kind of dealing in stolen property,<sup>410</sup> or a DUI resulting in serious personal injury.<sup>411</sup> In a business context, third degree felonies in Florida include low-value money laundering<sup>412</sup> (as just discussed), or the offer or sale of securities that are neither registered nor exempt.<sup>413</sup> Further, in the case of laundering of the costs saved through a violation of the Florida Water and Air Act that resulted in harmful pollution, the degree of the felony will depend solely on the expense that compliance with the Act would have involved.<sup>414</sup> Therefore, a factory manager who was responsible for serious cost-cutting in the area of environmental protection measures, where that cost-cutting resulted in actual harmful pollution (as it well might), could potentially face life in prison if he had a previous conviction for any kind of felony whatsoever. Whether quite such a severe sentence would be imposed in practice for such a crime may be another matter, but the power to do so is there.

Similarly, the federal Toxic Substances Control Act<sup>415</sup> is not specifically listed either in 18 U.S.C. § 1961 or in § 1956, although it does provide for violations to be punished with both civil and criminal penalties.<sup>416</sup> Conviction in the latter may result in a prison sentence of up to one year and a fine of up to \$25,000 per day of continued violation.<sup>417</sup> The Toxic Substances Control Act, like the Clean Air Act, does contain the power for

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403. That is, probation, community control, control release, conditional release, parole, or "court ordered or lawfully imposed supervision." FLA. STAT. § 775.084(1)(a)(2) (2010).

404. FLA. STAT. § 775.084(4)(a).

405. FLA. STAT. § 775.084(4)(a)(1), (3) (2010).

406. This is true because costs associated with these offenses will almost certainly be re-invested in the business that continues in ongoing pollution violations.

407. See FLA. STAT. §§ 403.161(3), 896.101(5).

408. See FLA. STAT. § 775.084(1)(a)(2)(b).

409. FLA. STAT. § 784.401 (2006).

410. FLA. STAT. § 812.019 (2006).

411. A DUI resulting in death is classified as manslaughter or vehicular homicide, both of which are second degree felonies. See FLA. STAT. § 316.193(3).

412. FLA. STAT. § 896.101(5)(a).

413. FLA. STAT. § 517.302.

414. See FLA. STAT. § 896.101(5).

415. See Toxic Substances Control Act, 15. U.S.C. §§ 2601-92 (2006).

416. 15. U.S.C. § 2615(a), (b).

417. *Id.* § 2615(b).



states to pass rules implementing it.<sup>418</sup> In Florida, the anti-pollution measures under the Florida Air and Water Pollution Control Act, considered above, do this. Hence, as with the Clean Air Act, costs saved through violation could form the basis of a state money laundering prosecution.

Nonetheless, the fact that only certain environmental crimes are predicate crimes for the purposes of the federal money laundering statute does mean that federal prosecutors might be advised where a given case gives rise to a possible prosecution under more than one environmental statute to choose the particular charges carefully. Separate federal and state prosecutions may achieve the desired end, and in some cases, there may be no option if the costs saved are to form the basis of a money laundering prosecution, not merely a forfeiture action; however, where all the charges can be brought in one single prosecution before one federal court, the simplicity that this will achieve is arguably preferable.

This leaves violations relating to health and safety at work. Clearly, there will be some overlap with the environmental crimes just considered. Frequent TV advertisements, usually by personal injury attorneys, but also by health information organizations, emphasize the potential long-term medical consequences of working in an unsafe environment. Mesothelioma is a notable example. However, as the charts published by the Bureau of Labor Statistics, considered earlier in this article, demonstrate, harm can also be caused to workers by various other types of violations.<sup>419</sup> These may range from inadequate guards on machinery to failure to provide proper safety protection for employees working at high levels on a construction site.<sup>420</sup>

The U.S. federal provisions in this area are found in the Occupational Safety and Health Act (OSHA), which now forms Title 29 of the U.S. Code.<sup>421</sup> In striking contrast to the other issues considered in this article, however, the enforcement of the OSHA provision is almost entirely civil.<sup>422</sup> Only where a violation is not only serious or repeated, but actually results in the death of an employee, may a criminal prosecution be brought.<sup>423</sup> Even then, the criminal penalties are quite modest: up to six months imprisonment and a fine of up to \$10,000 for a first offense or, where the defendant has a previous conviction in this area, up to one year imprisonment or a fine of up to \$20,000.<sup>424</sup> This may be considered lenient indeed for causing a person's death; by comparison, in Florida, a state considered by some to have unduly lenient drunk driving laws, the same prison sentence (*i.e.* a maximum of six months imprisonment) is provided for a first DUI conviction without reference to any injury resulting.<sup>425</sup> Causing death by driving under the influence is a second degree felony, punishable with up to fifteen years imprisonment.<sup>426</sup> This is fifteen times the maximum sentence provided by federal law for a repeat offender who causes the death of an

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418. *Id.* § 2684.

419. See BUREAU OF LABOR STATISTICS, CENSUS OF FATAL OCCUPATIONAL INJURIES 2, tbl.1 (2009), [http://www.bls.gov/iif/oshwc/cfoi/cfoi\\_revised09.pdf](http://www.bls.gov/iif/oshwc/cfoi/cfoi_revised09.pdf).

420. *Id.* at 2.

421. Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78 (2006).

422. See *id.* § 666.

423. See *id.* § 666(e).

424. *Id.*

425. See FLA. STAT. § 316.193(2)(a) (2006). Where a person is injured as a result, the offense increases in severity to a first degree misdemeanor, with a potential prison sentence of up to one year. *Id.*

426. See FLA. STAT. § 316.193(3).

employee through violating the occupational safety and health laws.<sup>427</sup> The business community's representatives might well respond that the civil penalties prescribed under OSHA are far from trivial, ranging up to \$70,000 for each willful or repeated violation.<sup>428</sup> Further, there are a large number of attorneys, as referred to above, who, where a person is injured at work, are only too willing to offer free advice and then sue the company concerned on a "no win, no fee" basis. The same attorneys, where the worker's injury was fatal, would be equally willingly to represent the bereaved family. Hence, the representatives might point out that a business that violates occupational safety and health laws and regulations can expect to emerge anything but unscathed.

This is not good enough. Violations of the law, particularly where they are committed willfully and cause personal injury to others, let alone death, should be punished accordingly. If the states agree that those who kill or injure others through choosing to drive a motor vehicle under the influence of alcohol or drugs should receive a prison sentence measured in years rather than months, the federal government, in regulating labor conditions, should prescribe similar criminal penalties for those who injure their employees through choosing not to adhere to the provisions required by law to protect them. Where these violations actually result in death, the applicable sentences should be even more severe.

For the time being, however, they are not. Because even the most serious of the occupational safety and health offenses are punished so lightly, it is not surprising that they are not listed as predicate offenses in any of the federal money laundering laws.<sup>429</sup> If, therefore, the costs saved through such violations are to be the subject of a money laundering prosecution, this will need to be done, as with those relating to the costs saved through environmental crimes, through state law provisions. Unfortunately, however, this is even less promising. Florida, for example, repealed its Occupational Safety and Health Act in 2000 and has not replaced it since.<sup>430</sup> The sole occupational safety provisions currently applicable in the state are therefore those provided by federal law, and as seen above, these are far from adequate. The consequence would appear to be that, all too often, businesses do not take occupational safety and health as seriously as they should. Although compiled statistics are not available for the period after 2009, the Department of Labor's Occupational Safety and Health Administration does, on its website,<sup>431</sup> publish certain details of individual fatal accidents that have taken place in 2011.<sup>432</sup> Some of these would seem to be clear examples of accidents that, although tragic, cannot reasonably be considered to be the fault of the worker's employer. In other cases, however, although it must be noted that the full facts are not stated on the website, it would appear that the accidents could, at least potentially, have been attributable to the employer's negligence. Examples from different parts of the country include the following:

427. See Occupational Safety and Health Act of 1970, 29 U.S.C. § 666(e) (2006).

428. *Id.* § 666(a).

429. See, e.g., Bank Secrecy Act, 12 U.S.C. 1953 (2006); Money Laundering Control Act of 1986, 18 U.S.C. 1956 (2006).

430. See FLA. STAT. §§ 442.001-442.21 (2001) (repealed 1999).

431. See OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, <http://www.osha.gov> (last visited Sept. 10, 2011).

432. Occupational Safety & Health Administration, Weekly Reports of Fatalities, Catastrophes, and Other Events, [http://www.osha.gov/dep/fatcat/dep\\_fatcat.html](http://www.osha.gov/dep/fatcat/dep_fatcat.html) (last visited Sept. 19, 2011).

On February 2, 2011 in Wyoming, a climbing assist failed, resulting in a worker on a derrick falling between 50 and 70 feet.<sup>433</sup> On February 8, in New York State, workers fell off a beam and fell fifty-six feet down an elevator shaft. It would therefore seem clear that no protective rail or restraint was in place. On February 20, in Florida, a "worker was installing an antenna on a newly erected tower [when he] fell 110 feet to the ground." It would therefore appear that no protective restraint was in place here either.<sup>434</sup> On February 28, in California, a worker was struck by the paddle of a meat blender while sanitizing it; the paddle had not been locked down.<sup>435</sup> On March 2, in Arkansas, "two workers . . . were rigging a steel member, hoisted by a crane, when the [crane] boom collapsed," striking the manlift containing the men and causing them to fall thirty feet to the ground.<sup>436</sup> In this context, the remark by Hilda Solis, Secretary for Labor, quoted on the Occupational Safety and Health Administration website, is apposite: "[w]ith every one of these fatalities, the lives of a worker's family members were shattered and forever changed. We can't forget that fact."<sup>437</sup>

While the full facts are not stated, if it were shown in any of these cases that willful failure to comply with the safety regulations had taken place to save costs, the employer responsible should be liable to penalties considerably more severe than those currently provided for. Those penalties should also reflect the financial element of the offense.

This will, however, require legislative change, which this article strongly calls for. In the meantime, there is one additional crime under the Occupational Safety and Health Act that may be applicable. Although mere failure to comply with OSHA's provisions is, as just seen, punishable only with a civil fine, knowingly making a false declaration in connection with a requirement under OSHA is a criminal offense.<sup>438</sup> Like that of causing death through a willful violation of OSHA, this is punishable with up to six months imprisonment or a fine of up to \$10,000.<sup>439</sup> Further, a conviction under OSHA will also allow for forfeiture of whatever sum the court considers would have been imposed as a civil fine had the business (or its manager as an individual) not disguised the violation; this could mean that they are required to pay not just \$10,000 but as much as \$80,000 in some cases.<sup>440</sup> This still falls significantly short of an adequate sentence, but it would be some enhancement.

In addition to highlighting the inadequate penalties currently available for serious violations of the Occupational Safety and Health Act, this issue also reveals a further area for improvement: that of the designation of predicate crimes under the federal money laundering statutes. Rather than merely certain specified offenses being classified as predicate crimes, all crimes should be. Indeed, Recommendation 1 of the Financial Action Task

433. Occupational Safety & Health Administration, Weekly Fatality/Catastrophe Report for February 19, 2011, [http://www.osha.gov/dep/fatcat/fatcat\\_weekly\\_rpt\\_02192011.html](http://www.osha.gov/dep/fatcat/fatcat_weekly_rpt_02192011.html) (last visited Sept. 19, 2011).

434. Occupational Safety & Health Administration, Weekly Fatality/Catastrophe Report for February 26, 2011, [http://www.osha.gov/dep/fatcat/fatcat\\_weekly\\_rpt\\_02262011.html](http://www.osha.gov/dep/fatcat/fatcat_weekly_rpt_02262011.html) (last visited Sept. 19, 2011).

435. Occupational Safety & Health Administration, Weekly Fatality/Catastrophe Report for March 5, 2011, [http://www.osha.gov/dep/fatcat/fatcat\\_weekly\\_rpt\\_03052011.html](http://www.osha.gov/dep/fatcat/fatcat_weekly_rpt_03052011.html) (last visited Sept. 19, 2011).

436. *Id.*

437. OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, <http://www.osha.gov> (last visited Sept. 10, 2011).

438. See Occupational Safety and Health Act of 1970, 29 U.S.C. § 666(g) (2006).

439. See *id.*

440. See *id.* § 666(a), (g).

Force requires that all offenses designated by the country as serious crimes are to be covered by the money laundering legislation.<sup>441</sup> In the United States, this would mean all felonies—which is the approach that Florida has taken under its state legislation.<sup>442</sup> It should, however, be noted that the Recommendation requires that these offenses be included “as a minimum.”<sup>443</sup> The approach of the United Kingdom, considered at the beginning of this article, is unusually wide in its scope. This arguably creates the potential for the money laundering legislation to be used to deal with crimes that, although deemed as relatively minor, still give rise to definite problems.<sup>444</sup> It is, however, common in European countries, which tend to classify criminal offenses into categories of seriousness in a way similar to that of the United States, to include both serious and moderate crimes within the scope of their money laundering statutes.<sup>445</sup> Were the United States to take a similar approach, this, combined with the amendment to 18 U.S.C. § 1956 already implemented, would make a money laundering prosecution in several of the areas discussed above considerably simpler. Those who committed such crimes could in the future be firmly brought to book, with appropriate penalties following. No longer could such violations be said to carry the risk solely of a fine that could simply be regarded as part of the cost of doing business.

## VIII. Case Law: United Kingdom

### A. RECOVERY OF PROCEEDS

In the United Kingdom, in contrast to the position in the United States, the courts have now stated consistently that cost savings constitute proceeds of crime both for the purposes of the money laundering offenses themselves and of confiscation (*i.e.* criminal forfeiture proceedings).<sup>446</sup> This, however, was not always the case. As in the United States, success in establishing such cost savings as being amenable to confiscation came before the first conviction for money laundering in relation to such savings. In the United Kingdom, however, there was a clear reason for this. The first “general crimes” money laundering provisions<sup>447</sup> to be introduced in the United Kingdom were contained in Part VI of the

441. *FATF 40 Recommendations*, FINANCIAL ACTION TASK FORCE, <http://www.fatf-gafi.org/dataoecd/7/40/34849567.PDF> (last visited Sept. 12, 2011).

442. See FLA. STAT. ANN. § 896.101(2)(a) (West Supp. 2011).

443. See FINANCIAL ACTION TASK FORCE, *supra* note 441.

444. For example, the issue of sales of alcohol to minors. See Proceeds of Crime Act, 2002, c. 29, s. 241 (Eng.).

445. In France, for example, the class of “crimes” corresponds to that of felonies in the United States, while that of “*delist*” broadly corresponds to misdemeanors: all offenses in either category constitute predicate crimes under the French money laundering provision, Article 324-1 of the Penal Code. C. Pén art. 324-1 (Fr.). Germany, similarly, divides criminal offenses into the more serious “*Verbrechen*” and the more moderate “*Vergehen*.” Both jurisdictions also have a third category, “contraventions” in the case of France and “*Ordnungswidrigkeiten*” in that of Germany, but these comprise very minor offenses; indeed, in Germany they are punishable solely by regulatory penalties. See C. pén art. 111-1 (Fr.); Gesetzes über Ordnungswidrigkeiten [Law on Administrative Offenses], Feb. 19, 1987, BGBl. I at 602, § 1 (Ger.).

446. See, e.g., *R v. Dimsey*, [2000] 1 Cr. App. R. (S.) 497, 497-98 (Eng.) (holding that taxes not paid, although still due and payable, constituted a pecuniary advantage for purposes of the statute); *R v. Moran*, [2002] 1 W.L.R. 253, 256-57 (Eng.) (holding that the court has the power to confiscate funds obtained by illegal means, equating tax fraud with drug trafficking).

447. As opposed to provisions relating specifically to the proceeds of drug trafficking.

Criminal Justice Act 1988; this also contained the first “general crimes” confiscation provisions.<sup>448</sup> A key element of these offenses was that they involved dealing with the proceeds of a crime committed by another. In other words, a person could not at that time be prosecuted for laundering the proceeds of his own crime.<sup>449</sup> His financial intermediary might be so liable, although only if a significant degree of not only knowledge but intent could be shown, broadly similar to that required in the United States under 18 U.S.C. § 1956(a)(1).<sup>450</sup> No equivalent to section 1957 existed under the 1988 Act.<sup>451</sup>

An early confiscation case concerning cost savings was *R v. Dimsey* in 1999.<sup>452</sup> This followed a conviction for a number of offenses of tax evasion.<sup>453</sup> At that time, the relevant proceeds of the crime statute in the United Kingdom was Part VI of the Criminal Justice Act 1988.<sup>454</sup> Although this was amended by the Proceeds of Crime Act 1995, the original provisions of the Act were considered in the judgment.<sup>455</sup> These, similar to their current counterparts in Part 2 of the Proceeds of Crime Act 2002, referred to a person benefiting from a criminal offense, albeit that only indictable offenses (the more serious crimes)<sup>456</sup> were covered.<sup>457</sup> Section 71(4) stated “[f]or the purposes of this Part<sup>458</sup> of this Act a person benefits from an offence if he obtains property as a result of or in connection with its commission and his benefit is the value of the property so obtained.”<sup>459</sup> Subsection (5) then continued, “[w]here a person derives a pecuniary advantage as a result of or in connection with the commission of an offence, he is to be treated for the purposes of this Part of this Act as if he had obtained as a result of or in connection with the commission of the offence a sum of money equal to the value of the pecuniary advantage.”<sup>460</sup> In either case, the value of the benefit was subject to confiscation.

The Crown’s case for confiscation was brought under subsection 5, arguing that Dimsey and his co-defendant, Allen, had both, through their tax evasion, obtained a pecuniary advantage (*i.e.* the ability not to pay the tax that was due).<sup>461</sup> Allen appealed against this, arguing that it was not in fact the case. He argued that, although he had evaded paying the tax to date, his obligation to pay the Inland Revenue<sup>462</sup> remained due.<sup>463</sup> Because his

448. See Criminal Justice Act, 1988, c. 33, pt. VI, § 93A, 93B (as amended 2002) (repealed 2003).

449. *Id.*

450. See *id.* § 93A.

451. See 18 U.S.C. § 1957 (2006).

452. *R v. Dimsey*, [2000] 1 Cr. App. R. (S.) 497, 497-98 (Eng.).

453. See *id.*

454. *Proceeds of Crime Guidance: General Guidance*, THE CROWN PROSECUTION SERVICE, [http://www.cps.gov.uk/legal/p\\_to\\_r/proceeds\\_of\\_crime\\_act\\_guidance/#confiscation](http://www.cps.gov.uk/legal/p_to_r/proceeds_of_crime_act_guidance/#confiscation) (last visited Sept. 19, 2011).

455. *Dimsey*, [2000] 1 Cr. App. R. (S.) at 497.

456. In English law, indictable offenses are those which may be tried before the Crown Court. In practice, this means crimes for which the maximum sentence is more than six months imprisonment or a fine of more than £5,000 (currently approximately \$8,100).

457. See Proceeds of Crime Act, 2002, c. 29, pt. 1 (Eng.).

458. *I.e.* Part VI.

459. Criminal Justice Act, 1988, c. 33, pt. VI, § 71(4) (Eng.).

460. *Id.* § 71(5).

461. See *R v. Dimsey*, [2000] 1 Cr. App. R. (S.) 497, 499 (Eng.).

462. Now H.M. Revenue and Customs. See *About Us*, H.M. REVENUE AND CUSTOMS, <http://www.hmrc.gov.uk/menus/aboutmenu.htm> (last visited Sept. 19, 2011).

463. See *id.*

debt to the Revenue remained as great as it ever had been, he had not actually obtained any pecuniary advantage at all; all he had achieved was a delay in payment.<sup>464</sup>

The Court of Appeal rejected this argument.<sup>465</sup> It remarked that Part VI of the 1988 Act did not, in specific terms, define a "pecuniary advantage."<sup>466</sup> That being the case, it stated that the ordinary meaning of the word should be adopted; this is a similar approach to that taken by the U.S. courts, in the cases considered above, in defining "proceeds."<sup>467</sup> In establishing, however, what the ordinary meaning of the word was, the Court did not consult dictionaries but drew on the admittedly limited legal sources.<sup>468</sup>

It first referred to a case heard by the Court of Appeal in 1998, *Government of the United States of America v. Montgomery*.<sup>469</sup> Although the case originated in a U.S. criminal forfeiture action before the District Court for the Middle District of Florida, it came before the English courts as the U.S. government had never in fact recovered the funds, due to their having been transferred to a Panamanian company, whose shares were then transferred to the defendant's wife.<sup>470</sup> Having divorced the defendant and re-married, she and her new husband were now the defendants in the English proceedings.<sup>471</sup> The U.S. government sought to obtain restraint, and then seizure, of funds from them because they were now located in England.<sup>472</sup> Although this case largely concerned different issues to those in *Dimsey* (which concerned simple proceeds of fraud, not cost savings of any kind), the court did examine the question of whether the defendants had obtained a pecuniary advantage within the meaning of Part VI of the Criminal Justice Act 1988 through avoiding satisfaction of the U.S. forfeiture order.<sup>473</sup> It held that they had.<sup>474</sup> The Court of Appeal ruled that no restricted meaning was to be given to the term:

I see no reason to give a restricted meaning to the wide words 'pecuniary advantage'. It is repugnant to common sense to suggest that someone who has retained valuable shares for 11 years (now 14) in defiance of a court order, who has meanwhile been drawing dividends on them and whose value may be expected to have increased over that time, has not obtained a pecuniary advantage from the crime.<sup>475</sup>

The House of Lords, in its judgment, upheld this view:

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464. *See id.*

465. *See id.*

466. *See id.*

467. *See id.*; *see, e.g.*, *United States v. Tyson Foods, Inc.*, No. 4:01-CR-061, 2003 U.S. Dist. LEXIS 26385, at \*1-20 (E.D. Tenn. Feb. 4, 2003) (Holding that "proceeds" are defined by their "ordinary and natural meaning.").

468. *Dimsey*, [2000] 1 Cr. App. R. (S.) at 500.

469. *See Government of the United States of America v. Montgomery*, [1999] 1 All E.R. 84 (Eng.). The Court of Appeal judgment was later upheld by the House of Lords (now the U.K. Supreme Court) in 2001; that judgment is reported in full at *Government of the United States of America v. Montgomery*, [2001] 1 WLR 196 (Eng.).

470. *See Montgomery*, [2001] 1 W.L.R. at 196.

471. *See id.*

472. *See id.*

473. *See Dimsey*, [2000] 1 Cr. App. R. (S.) at 498; *Montgomery*, [1999] 1 All E.R. at 84.

474. *Montgomery*, [1999] 1 All E.R. 84 at 96.

475. *Id.*

. . . [I]f one looks at the pecuniary advantage which the defendants received, section 71(4) of the Act as applied by the DCO<sup>476</sup> requires the defendants to be treated as if they had received "a sum of money equal to the value of the pecuniary advantage", i.e. [sic] the ODSA<sup>477</sup> shares. The retention of such a sum for 10 years is in itself a pecuniary advantage.<sup>478</sup>

Although the House of Lords decision took place after the hearing in *Dimsey*, the Court of Appeal judgment was available to it. Having considered this judgment, the court in *Dimsey* then held that the principle could be applied to a case of tax evasion.<sup>479</sup> Here, too, the defendants had, as a result of a criminal offense, enjoyed the use of property that they should not have. Giving the judgment of the court, Laws LJ stated "[t]he ordinary and natural meaning of pecuniary advantage must surely include the case where a debt is evaded or deferred."<sup>480</sup> He then continued:

In short, the fact that the tax remains due does not mean that its evasion did not confer a pecuniary advantage. . . . By his crime the appellant evaded payment of £4 million tax. That sum constituted the proceeds of the offence. . . . The fact that he remained in law liable to pay the tax, the fact even, were it so, that the Revenue might later recover it, does not, in our judgment, yield the proposition that the proceeds of his crime were one penny less than the whole of the tax evaded.<sup>481</sup>

It was thus firmly established that the savings made through tax evasion, even though the business from which the income was originally derived was legitimate, constituted proceeds of crime for the purposes of confiscation. The principle was clarified in *R v. Moran* in 2001.<sup>482</sup> This case also concerned tax evasion. The defendant had operated a legitimate business as a market trader, but had, over approximately twenty years, understated his income on his tax returns, resulting in a considerable saving of tax.<sup>483</sup> He was convicted of one count of tax evasion itself and one count of, effectively, submitting a fraudulent tax return.<sup>484</sup> The Crown<sup>485</sup> thus sought a confiscation order in respect of the proceeds of Moran's tax evasion.<sup>486</sup> It assessed that the part of the income from Moran's business which he had not declared to the tax authorities was a total of £356,584 and therefore sought a confiscation order for this amount.<sup>487</sup> The trial judge, at Mold Crown Court, although he did agree to make a confiscation order, declined to assess the proceeds

476. Under this statute enforcement of the U.S. order was sought in the United Kingdom. The Criminal Justice Act 1988 (Designated Countries and Territories) (Amendment) Order, 1994 (Eng., Wales).

477. Old Dominion, S.A. was a Panamanian corporation to which the original defendant had transferred the proceeds of his fraud. See *Montgomery*, [1999] 1 All ER at 84.

478. See *Montgomery*, [2001] 1 W.L.R. at 206.

479. *Id.*

480. See *R v. Dimsey*, [2000] 1 Cr. App. R. (S.) 497, 500 (Eng.).

481. *Id.* at 500-501.

482. See *R v. Moran*, [2002] 1 W.L.R. 253 (Eng.).

483. See *id.* at 254.

484. See *id.*

485. The standard expression used to refer to the government in a British prosecution: as a matter of legal theory, criminal prosecutions in the United Kingdom are brought in the name of the King or, as at present, Queen.

486. See *R v. Moran*, 1 W.L.R. at 254.

487. See *id.*

of Moran's crimes as comprising this entire amount.<sup>488</sup> Rather, he ruled, the proceeds consisted merely of the tax which he had evaded.<sup>489</sup> This he found to be £190,000 and therefore made an order that this, not the entire £356,584, be confiscated.<sup>490</sup>

The Crown appealed. It argued that the fact that this part of the business was operated, long term, without any tax being declared on it, rendered it illegal.<sup>491</sup> As such, its entire proceeds, not merely the evaded tax, were the proceeds of crime. It based its argument on the reference, in section 74(4) and (5) of the 1988 Act, to property, or a pecuniary advantage, obtained "as a result of or in connection with the commission of an offence."<sup>492</sup> It argued that proceeds of a business on which tax was evaded constituted property obtained in connection with a criminal offense, because the tax evasion was integrally connected with the proceeds of the business.<sup>493</sup> Moreover, as the non-disclosure of profits, to evade tax, had been systematic and persistent, the whole enterprise was to be regarded as fraudulent and the proceeds hence liable to confiscation. The Court of Appeal, however, disagreed. It began by referring to the definition of "pecuniary advantage" in *R v. Dimsey*,<sup>494</sup> but noted that, in that case, it was only the evaded tax to which the sought confiscation order related, not, as in the present case, the proceeds of the entire business.<sup>495</sup> On the immediate point before it, it remarked there was little if any applicable authority and it was therefore compelled to construe the statute itself.<sup>496</sup> It accepted that a pecuniary advantage obtained "in connection with a criminal offense" included not only the value of the evaded tax itself, but also any funds obtained through it: interest paid out or the proceeds of investment.<sup>497</sup> There was, however, a fundamental difference between property such as this and the entire proceeds of the otherwise legitimate business:

Giving the words of Act their ordinary and natural meaning, it is hard to see how the balance of the profits which are the product of lawful trading can be said to represent a pecuniary advantage which has resulted from or come about in connection with the commission of an offence.<sup>498</sup>

This is correct. It may assist in clarifying the position if one considers the situation where there is no tax evasion, where a person or entity pays all the tax required of them. Suppose that X earns, in a given year, an income of £100,000 from his business. On this, he is required to pay a total of £32,520 in tax<sup>499</sup> and he duly pays it. He will then be legitimately entitled to keep the balance of £67,480.<sup>500</sup> If, therefore, instead of paying the tax X evades it, the pecuniary advantage, the additional funds, that he obtains will be the

488. *See id.*

489. *See id.*

490. *See id.* at 256.

491. *Id.*

492. *See id.* at 257.

493. *See id.*

494. *R v. Dimsey*, [2000] 2 All E.R. 142 (Eng.).

495. *R v. Moran*, 1 W.L.R. at 256.

496. *Id.*

497. *Id.*

498. *Id.*

499. On current U.K. rates of income tax, a rate of twenty percent would be imposed on the income up to £37,400 and forty percent on the remaining £62,600. *Income Tax Rates and Allowances*, HM REVENUE & CUSTOMS, <http://www.hmrc.gov.uk/rates/it.htm> (last visited Sept. 12, 2011).

500. To keep this illustration simple, other charges, such as National Insurance, are not taken into account.



£32,520 that he should have paid in tax. It will not extend to the balance of the £100,000. It therefore follows that, because the balance of £67,480 would have been retained by X whether he had engaged in tax evasion or not, it should not be deemed to be the proceeds of crime and therefore should not be subject to confiscation. Even under the “criminal lifestyle” provisions, introduced by the Proceeds of Crime Act 2002 (and hence after the *Moran* case) and considered below, if X demonstrates that the £67,480 was obtained through legitimate trade, it will not be subject to confiscation. Nor should it be.<sup>501</sup>

Since the decisions in *Dimsey* and *Moran*, Part VI of the Criminal Justice Act 1988 has been replaced with Parts 2 and 7 of the Proceeds of Crime Act 2002: Part 2 in relation to the confiscation of the proceeds of crime and Part 7 in relation to laundering them.<sup>502</sup> Part 5, which contains the provisions for civil recovery, had no counterpart in the 1988 Act. The decisions, however, would be the same were similar cases heard under the 2002 Act because although the range of predicate crimes has been widened to include all criminal offenses, the definitions of “benefiting from criminal conduct,” now found in section 76(4) and (5) for the purposes of confiscation and section 340(5) and (6) for the purposes of a money laundering charge, are identical to those under the 1988 Act.<sup>503</sup> Indeed, as seen below in the context of money laundering, the 1988 Act case law has been cited directly in the interpretation of the 2002 Act.

While the position regarding cost savings through tax evasion was now established, the question was only raised in relation to money earned through the employment of undocumented workers comparatively recently, in *R (Chief Constable of Greater Manchester Police) v. City of Salford Magistrates’ Court* in 2008.<sup>504</sup> This case concerned not confiscation proceedings but the power, introduced by section 294 of the 2002 Act, for police<sup>505</sup> to seize cash where they have reasonable grounds to believe either that it is “recoverable property” or that it is intended for use in unlawful conduct. “Recoverable property” is defined in section 304 as “property [which has been] obtained through unlawful conduct”, which in turn is defined in section 242 as property which is obtained “by or in return for” unlawful conduct.<sup>506</sup> Like “criminal conduct,” “unlawful conduct” covers any criminal offense committed in any part of the United Kingdom.<sup>507</sup>

In this case, police, together with immigration officers, raided a clothing factory and discovered that, of the thirty workers present there, sixteen were undocumented.<sup>508</sup> The officers also discovered on the premises a total of £43,095,<sup>509</sup> plus a further 990 euro<sup>510</sup> in cash.<sup>511</sup> They seized this under the provisions referred to above, on the basis that it had either been obtained by unlawful conduct, *i.e.*, the employment of undocumented work-

501. Proceeds of Crime Act, 2002, c. 29, § 20(2)(a) (U.K.).

502. Criminal Justice Act, 1988, c. 33, § 74(5) (Eng., Wales).

503. Compare Proceeds of Crime Act, c. 29, §§ 76(4)-(5), 340(5)-(6), with Criminal Justice Act, c. 33, § 71(4).

504. *R v. City of Salford Magis. Ct.*, [2008] EWHC 1651 (Admin), [2009] 1 W.L.R. 1023.

505. And also Customs officers or the Serious Organised Crime Agency. Proceeds of Crime Act, c. 29, § 294.

506. *Id.* §§ 242(1), 304(1).

507. *Id.* § 241(1).

508. *R v. City of Salford Magis. Ct.*, 1 W.L.R. at 1023.

509. Currently approximately \$69,935. *Universal Currency Converter*, XE.COM, <http://www.xe.com/ucc> (last visited Sept. 12, 2011).

510. Currently approximately \$1,420. *Id.*

511. *R v. City of Salford Magis. Ct.*, 1 W.L.R. at 1025.

ers, a criminal offense under section 8 of the Asylum and Immigration Act 1996,<sup>512</sup> or that it was intended to be used for unlawful conduct: the payment of these workers. As required under the Act, the police subsequently applied to Salford Magistrates' Court<sup>513</sup> for an order for the continued detention of the cash. Although this order was initially granted, an extension of the order was refused.<sup>514</sup>

In many ways, the arguments were similar to those in *Dimsey*. The defendants argued that the activity of the business was per se legitimate: the manufacture of clothes.<sup>515</sup> This, they said, was the origin of the money. The mere fact that, in the course of that business, they had illegally employed undocumented workers did not alter the fact that the business itself was legitimate.<sup>516</sup> The District Judge accepted this argument:

[T]here is no authority for the proposition that legitimate money generated from [sic] somebody who employed illegal workers is unlawfully obtained and therefore recoverable. It follows that even if there are reasonable grounds to suspect that a significant number of the workforce were illegal workers it does not render the whole business unlawful with the consequence that money seized at those premises is recoverable money within the meaning of the Proceeds of Crime Act 2002.<sup>517</sup>

Hence, he held, there were not reasonable grounds to believe that the money was obtained by or in return for unlawful conduct.

The Greater Manchester Police then applied for judicial review of that decision. It may appear strange, given that the decision that the police objected to was made by a court, that they sought judicial review rather than a straightforward appeal to a higher level court—generally the Crown Court in the case of a Magistrates' Court decision. The detention of cash under section 295 of the Proceeds of Crime Act 2002 (or, as here, a refusal to detain it) is, however, an administrative action in contrast to confiscation under Part 2 of the Act and substantive civil recovery under other parts of Part 5, which are criminal and civil procedures respectively.<sup>518</sup> Hence, like any other administrative decision, it may be subject to judicial review.<sup>519</sup> This also contrasts with a forfeiture order made under section 298 of the Act although, in many ways, it may be compared to an administrative forfeiture order in the United States in that it may be challenged not by means of judicial review but, like other judgments, by means of appeal. It should also be noted that a U.K.

512. Since replaced by Section 21 of the Immigration, Asylum and Nationality Act 2006. Immigration, Asylum and Nationality Act, c. 13, § 61, sch. 3.

513. The Magistrates' Court is the lowest level criminal court in England & Wales. It is, however, under Part 5 of the Proceeds of Crime Act 2002, given the responsibility of making orders for the detention of cash believed to be derived from a criminal offense. Proceeds of Crime Act, 2002, c. 29, § 240(1)(b).

514. *R v. City of Salford Magis. Ct.*, 1 W.L.R. at 1027.

515. *Id.* at 1028-29.

516. *Id.*

517. *Id.* at 1028 (quoting the District Court's opinion).

518. See generally Proceeds of Crime Act 2002 (U.K.).

519. *R v. BC*, [2009] EWHC 2927 (Admin), [2010] 1 W.L.R. 1542.

forfeiture order may only be made in relation to cash;<sup>520</sup> removal of any other type of property must be sought through either confiscation or civil recovery proceedings.<sup>521</sup>

The Divisional Court quashed the decision of the Magistrates' Court. Unlike the District Court in *Tyson Foods*,<sup>522</sup> however, it did not adopt the cost savings approach. Rather, it targeted the proceeds of the business itself.<sup>523</sup> If, it said, the money was derived from the business and approximately half the workforce of that business was found to be illegally employed, it followed that there were reasonable grounds to believe that the money was obtained by unlawful conduct: the illegal employment of those workers.<sup>524</sup> Whether in fact it was so obtained, in all or in part, was a matter for the police to show in the substantive forfeiture proceedings yet to come.

It is therefore clear that, as a matter of English law, where a business illegally employs undocumented workers and derives proceeds from their labor, those proceeds constitute the proceeds of crime. The decision in the above case could be applied equally to a confiscation hearing: if proceeds obtained through the illegal employment of undocumented workers are obtained by unlawful conduct, it is more than arguable that they constitute property obtained as a result of, or in connection with, criminal conduct.<sup>525</sup>

With regard to the proceeds arising from violations of environmental protection laws, such violations are criminal offenses. Operating any kind of factory or plant without a permit from the Environment Agency is a criminal offense under Regulations 12 and 38 of the Environmental Permitting (England and Wales) Regulations 2010,<sup>526</sup> as is causing any "poisonous, noxious or polluting matter, or any solid waste matter . . . [or] trade effluent or sewage effluent" to enter British waters, whether sea, lake, or river unless the business operation has a permit to do so and complies with the requirements under that permit.<sup>527</sup> Where a business, therefore, cuts costs through not complying with Regulation 12, the costs saved will constitute a pecuniary advantage obtained by or in connection with a criminal offense and hence be subject to confiscation. The same principles will apply to those discussed above in relation to the Florida Air and Water Pollution Control Act, considered above.

There have been no reported cases directly on the point. One recent case, however, *Environment Agency v. Benson & Brough*, in 2009, is referred to on the Environment Agency's own website.<sup>528</sup> Here, the defendants allowed a large quantity of controlled

520. See generally Proceeds of Crime Act, 2002, c. 29, §§ 298-300 (U.K.) (discussing forfeitures solely in the context of cash forfeitures).

521. Except vehicles, vessels, and aircraft used for smuggling goods or facilitating illegal entry into the United Kingdom and also property that is by its very nature inherently illegal; examples of the latter are illegal drugs, contraband goods, and illegal firearms. Forfeiture of all of these, however, is provided for under separate legislation. Nationality, Immigration, and Asylum Act, 2002, c. 41, § 143 (U.K.).

522. *United States v. Tyson Foods, Inc.*, No. 4:01-CR-061, 2003 U.S. Dist. LEXIS 26385, at \*10 (E.D. Tenn. Feb. 4, 2003).

523. *R v. City of Salford Magis. Ct.*, [2008] EWHC 1651 (Admin), [2009] 1 W.L.R. 1023, 1030.

524. *Id.*

525. For its applicability to a money laundering prosecution, see below.

526. Environmental Protection, England and Wales, 2010, S.I. 2010/675, arts. 12, 38 ¶¶ 1-3. These provisions replace the offenses previously found in sections 85 and 86 of the Water Resources Act 1991.

527. *Id.* arts. 3, 12, 13.

528. *Skip Hire Boss Jailed after Waste Offences*, ENVIRONMENT AGENCY, June 02, 2011, <http://www.environment-agency.gov.uk/news/126340.aspx?page=8&month=1&year=2011>. This case is discussed further in an article on the Brachers LLP website. See Lee May, *Recovering the Proceeds of an Environmental Crime*,

waste to be dumped on their site without any kind of permit. In addition to a fine, a confiscation order was imposed of £234,393.<sup>529</sup> Because, however, the circumstances were such that the defendants provided an unauthorized service—a waste transfer station—to others, the benefit in this particular case consisted of direct proceeds, not cost savings. This case does demonstrate, however, that environmental crimes are now being taken seriously as predicate crimes for the purposes of confiscation orders. Because cost savings have also, as has been seen, been established to constitute a "pecuniary advantage" in other contexts, it would seem clear that they may also constitute pecuniary advantages for the purposes of confiscation orders in cases where the violation of the environmental protection laws produces a cost saving, rather than direct proceeds as was the case in *Benson & Brough*.

In terms of occupational safety and health legislation or, as it is termed in the U.K., health and safety, the United Kingdom's statute, the Health and Safety at Work Act 1974 (as amended) goes considerably further than its U.S. counterpart.<sup>530</sup> Failure to fulfil any duty to a business' employees, as set out in sections 2 to 7 of the Act, or to obstruct a health and safety inspector in the performance of his duties, is a crime.<sup>531</sup> Further, the crime may be tried on indictment, before the Crown Court, as well as summarily, before the Magistrates' Court, and hence may be compared to a U.S. felony rather than a misdemeanor.<sup>532</sup> On conviction on indictment, an individual may be punished with up to two years imprisonment; in addition (or alternatively), either an individual or an entity may be punished with an unlimited fine.<sup>533</sup> Further, causing a person's death through a gross violation of the duty of care owed to them, including that under the Health and Safety at Work Act 1974, may also give rise to a prosecution for corporate manslaughter (termed corporate homicide in Scotland) under section 1 of the Corporate Manslaughter and Corporate Homicide Act 2007.<sup>534</sup> This similarly carries an unlimited fine although, as a matter of practice, fines imposed following a conviction of manslaughter will generally be higher than those under the 1974 Act.<sup>535</sup> Although individual officers of the corporation are explicitly excluded from secondary liability, under section 18 of the 2007 Act, the Explanatory Note to the section makes clear that "this does not . . . affect an individual's direct liability for offences such as gross negligence manslaughter, culpable homicide or health and safety offences, where the relevant elements of those offences are made out."<sup>536</sup>

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BRACHERS LLP, Mar. 24, 2011, <http://www.brachers.co.uk/recovering-the-proceeds-of-environmental-crime/>.

529. ENVIRONMENT AGENCY, *supra* note 528.

530. Health and Safety at Work etc. Act, 1974, c. 37 (U.K.). Note, however, that this Act has been heavily modified by subsequent Acts.

531. *Id.* § 33(1)(a).

532. *Id.* § 39(1); sch. 3(a).

533. *Id.* sch. 3(a).

534. Corporate Manslaughter and Corporate Homicide Act, 2007, c. 19, §§ 1, 14. This Act only covers corporations, certain government agencies, partnerships and trade union organizations. Unincorporated businesses may, however, be charged with the common-law offense of manslaughter, which continued to apply to them even after the coming into force of the 2007 Act.

535. Section 19 of the 2007 Act makes clear that charges may be brought both under that Act and under the Health and Safety at Work Act 1974 and the jury invited to convict on both. *Id.* § 19. Further, where a conviction for corporate manslaughter reveals circumstances that also indicate a health and safety offense, the corporation may, where the interests of justice require it, be subsequently prosecuted for the latter. *Id.*

536. Corporate Manslaughter and Corporate Homicide Act, 2007, Explanatory Notes, ¶ 56.

A conviction of an individual for common-law manslaughter, including where it is committed through gross negligence, carries a maximum sentence of life imprisonment.<sup>537</sup>

Because, however, the Proceeds of Crime Act 2002 covers the proceeds of all criminal offenses, not merely the more serious ones, this will be immaterial to the ability to pursue property derived from offenses under the 1974 Act. The approach that a prosecutor could take is the same as for tax evasion or a violation of the environmental protection laws: the costs that the business saved through non-compliance with the requirements under the Health and Safety at Work Act 1974 or the regulations passed under it by the Health and Safety Executive are a pecuniary advantage obtained through the committing of a criminal offense. Again, there have not, to date, been any reported cases, but the potential certainly exists.

Although there have not to date been any civil recovery actions brought in relation to money saved through the committing of a criminal offense, it would seem clear that, given the very similar definitions of "criminal property" in Part 2 of the Proceeds of Crime Act 2002 and "property obtained by unlawful conduct" in Part 5 of the Act, cost savings would be amenable to a civil recovery action as well.<sup>538</sup> The principal barriers to such an action would seem, in practice, to be: first, the requirement that a civil recovery action only be brought where the possibility of a criminal prosecution is deemed to be unrealistic and second, the abolition of the specialist Assets Recovery Agency in 2008 and the transfer of its functions to the Serious Organised Crime Agency (SOCA). SOCA has a considerably more diverse range of responsibilities than did ARA and hence may regard civil recovery as less of a priority.

## B. MONEY LAUNDERING

The proceeds of tax evasion have also on occasion been the subject of money laundering prosecutions. Broadly speaking, a similar approach has been taken to the issue under Part 7 of the Proceeds of Crime Act 2002 to that previously adopted under Parts 2 and 5.

The first key case was *R v. Gabriel* in 2006.<sup>539</sup> Here, a large quantity of cash and some luxury goods was found in the home of the defendant, who was in receipt of welfare benefits. The defendant was charged with money laundering on the basis, essentially, that the quantity of cash and the expensive goods could not be funded solely out of the welfare benefits that the defendant and her husband received. The prosecution found implausible the explanation offered by the defendant that the money was largely derived from a mixture of savings from those welfare benefits and winnings from bingo. While considering their verdict, the jury asked the Recorder (a form of Crown Court judge) whether failure to declare money obtained through trading in legitimate goods to either the tax authorities or welfare authorities would render such money criminal property. The Recorder replied that, if there was dishonesty, it would. The jury then convicted the defendant.

The conviction was overturned by the Court of Appeal. It held that the mere fact that income was not declared to the Inland Revenue did not make that income per se crimi-

537. THE CROWN PROSECUTION SERVICE SENTENCING MANUAL, INVOLUNTARY MANSLAUGHTER (Nov. 30, 2010), available at [http://www.cps.gov.uk/legal/s\\_to\\_u/sentencing\\_manual/involuntary\\_manslaughter/](http://www.cps.gov.uk/legal/s_to_u/sentencing_manual/involuntary_manslaughter/).

538. Compare Proceeds of Crime Act, 2002, c. 29, § 76(4), with § 242(1).

539. *R v. Gabriel*, [2006] EWCA Crim 229, [2007] 1 W.L.R. 2272.

nal.<sup>540</sup> In certain circumstances it might be criminal, but the Recorder did not explain those circumstances clearly to the jury. Similarly, if the income had not been declared to the Department of Work and Pensions, it might constitute the proceeds of benefit fraud, but only if the entitlement to the welfare benefits paid was dependent on the level of the defendant's income.<sup>541</sup> It had not been proven at trial either that the benefits were so dependent or, if they were, that the defendant had not declared the additional income. Hence the conviction was unsafe.<sup>542</sup>

The issue was then raised again a year later in *R v. K*,<sup>543</sup> another tax evasion case. This was a more complex case than some of those considered so far in that the main defendants were charged with laundering not the proceeds of their own offenses but those of a co-defendant.<sup>544</sup> A co-defendant, MR, was accused of tax evasion through not declaring at least part of the takings of his business as a seller of produce and sending these takings, in cash, from the United Kingdom to Pakistan through the services of a money transfer business, KME. KME was operated by the principal defendants, SK and IK. MR was charged both with the evasion of income tax and Value Added Tax (VAT)<sup>545</sup> and with the money laundering offence of becoming involved in an arrangement to facilitate the retention of criminal property, under section 328 of the Proceeds of Crime Act 2002. SK and IK were charged with the same money laundering offence. The prosecution argued that the criminal property in question was banknotes, derived from MR's tax evasion.<sup>546</sup>

It was also a complex case in other respects. The cash that MR was found to have delivered to KME amounted to £200,000. The accounts of KME, however, revealed a discrepancy of £5.9 million between the total amount held by the business and that shown on the daily reconciliation sheets. The prosecution's case was that, because there was no legitimate explanation as to the origin of this £5.9 million, the jury could infer that it was criminal property. That said, no predicate crime other than tax evasion was suggested: in the judgment of the Court of Appeal, it was explicitly stated that there was no evidence as to the money's provenance.<sup>547</sup>

At trial, the Crown Court judge, Judge Elwen, dismissed the money laundering charges, holding that there was no case to answer. His ruling centred on whether the proceeds of tax evasion could constitute criminal property for the purposes of Part 7 of the Proceeds of Crime Act 2002. He ruled that they could not.<sup>548</sup> Directly citing *R v. Gabriel*, he acceded to the submission of the defense that, "the banknotes relied upon cannot be criminal property, because they are the product of legitimate trading, and nothing done or not done in relation to them can suddenly convert them into criminal property."<sup>549</sup>

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540. *Id.* at 2276.

541. Under the welfare system in the United Kingdom, certain benefits are "means tested," *i.e.*, dependent on the applicant's income (and sometimes also other assets), while others are not.

542. *R v. Gabriel*, 1 W.L.R. at 2277.

543. *R v. K*, [2007] EWCA (Crim) 491, [2007] 1 W.L.R. 2262.

544. They were also charged with various offenses of false accounting, which are not relevant to this article. *Id.* at 2263.

545. Essentially the European equivalent of sales tax.

546. *R v. K*, 1 W.L.R. at 2264.

547. *Id.* at 2265.

548. *Id.* at 2266-67.

549. *Id.* at 2266 (quoting the ruling of the Judge in the lower court).

He continued, saying that the proceeds of tax evasion, where that evasion relates to an otherwise legitimate business, cannot constitute criminal property and further, there could be no basis to any of the money laundering charges because the prosecution had adduced no evidence whatsoever of any other offense from which the money might have been derived.<sup>550</sup>

The prosecution then appealed. On appeal, the Court of Appeal examined the position set out in the *R v. Gabriel* judgment carefully. It accepted that the case stood, in part, for the proposition that failure to declare takings of a legitimate business to the tax authorities, either for the purposes of income tax or for VAT, does not per se render those takings criminal property. Further, it concurred that this judgment was correct: “[t]he profits<sup>551</sup> are not of themselves illegal or criminal property: they are the product of a business carrying on a lawful trade.”<sup>552</sup>

The Court went on, however, to make it clear that although the above proposition was true, it did not mean that no part of such proceeds could be criminal property. That part of such proceeds which represents the evaded tax, *i.e.*, the sums which should have been paid (in this case) to the Inland Revenue, and possibly H.M. Customs & Excise as well,<sup>553</sup> should constitute criminal property within the meaning of Part 7 of the Act:

“In our judgment, a person who cheats the revenue obtains a pecuniary advantage as a result of criminal conduct within the meaning of section 340(6) of POCA.<sup>554</sup> . . . Accordingly, MR was taken to have obtained a sum equal to the value of the amount of which the revenue was cheated . . . That sum is a benefit by reason of section 340(5).”<sup>555</sup>

The Court, therefore, made precisely the same distinction in relation to the money laundering offenses that it had made earlier in *R v. Moran*<sup>556</sup> in relation to confiscation. Indeed, he cited *Moran* directly.<sup>557</sup> Those who engage in tax evasion obtain a pecuniary advantage by so doing and, just as the value of that pecuniary advantage may be removed by way of confiscation, so it may form the basis of a money laundering charge.

In regard to the employment of undocumented workers, a similar application can be made of the principles laid down in *R (Chief Constable of Greater Manchester Police) v. City of Salford Magistrates’ Court*<sup>558</sup> in relation to confiscation. If all proceeds from business activities carried out through the illegal employment of such workers are a direct benefit from

550. *Id.*

551. The distinction between “profits” and “proceeds,” a key issue in the U.S. Supreme Court in *United States v. Santos*, 553 U.S. 507 (2008), was not an issue in the present case, nor, to date, has it been in any U.K. money laundering case. This is to be expected, given the wording of the U.K. provisions, referring to property, *inter alia*, received “in connection with” an offense. Significance should not, therefore, be given to the Court’s decision to refer here to “profits,” rather than “proceeds.”

552. *R v. K*, 1 W.L.R. at 2270.

553. At the time of the offenses, income tax in the United Kingdom was collected by the Inland Revenue, while VAT was collected by H.M. Customs & Excise. All tax collecting responsibilities were, however, subsequently given to a new, combined agency, H.M. Revenue and Customs, in 2005. *About Us*, HM REVENUE AND CUSTOMS, <http://www.hmrc.gov.uk/menus/aboutmenu.htm> (last visited Sept. 13, 2011).

554. See Proceeds of Crime Act, 2002, c. 29, §§ 327–340 (U.K.).

555. *R v. K*, 1 W.L.R. at 2270.

556. *R v. Moran*, [2002] 1 W.L.R. 253, 253 (Eng.).

557. See *R v. K*, [2007] EWCA (Crim) at [24].

558. *R v. City of Salford Magis. Ct.*, [2008] EWHC 1651 (Admin), [2009] 1 W.L.R. 1023.

a criminal offense, then any act in relation to them, including mere use, will constitute money laundering. It is therefore not surprising that recent prosecutions of those found to have employed undocumented workers typically include a charge of money laundering together with that of the immigration offense. This may, at first glance, appear draconian, particularly as the maximum sentence for money laundering in the United Kingdom is fourteen years,<sup>559</sup> in contrast to that of two years under s.21(2) of the Immigration, Asylum, and Nationality Act 2006 for employment of an undocumented worker.<sup>560</sup> In practice, however, criminal prosecutions are only brought in the most serious cases: more commonly, the U.K. Border Agency instead imposes an administrative fine of £10,000 per undocumented worker.<sup>561</sup> An example of a case where a criminal prosecution was brought was *R v. Solomka* in 2005.<sup>562</sup> This case involved not merely a business that happened to employ a number of undocumented workers but a defendant who built his entire fortune on the employment of such persons, through arranging for them to be sent to work for different employers. Ultimately, it was found that he had, through these activities, created a firm with a capital of some £5 million.<sup>563</sup> The media reports of the case also illustrate the types of abuses to which undocumented workers are often subjected, discussed earlier in this article.<sup>564</sup> The sentence which Solomka received, seven years imprisonment,<sup>565</sup> demonstrates both the seriousness of the case and the value of making use of the money laundering provisions in cases like it.

With regard to the proceeds of environmental crimes, there have been no reported money laundering prosecutions in the United Kingdom to date. The use, however, of the confiscation provisions in this context, considered above, would seem to indicate that such a charge could be brought, in view of the identical definitions of criminal property for the purposes of both the confiscation and the money laundering provisions, considered above, and also the wide range of activities covered by Part 7 of the 2002 Act.<sup>566</sup> Such a charge could similarly be brought in the context of a violation of the Health and Safety at Work Act 1974.<sup>567</sup>

## IX. Impact of Application (United Kingdom)

It has already been seen that the use of a money laundering charge can substantially increase the court's sentencing powers: in *R v. Solomka*, it resulted in a sentence of seven years imprisonment,<sup>568</sup> while the maximum sentence for the predicate crime of employing an undocumented worker (or conspiring with others to do so) would have been merely

559. Proceeds of Crime Act, 2002, c. 29, § 334(1)(b).

560. Immigration, Asylum and Nationality Act, 2002, c. 13, § 21(2).

561. Helen Watson, *New Penalties for Employing Illegal Workers*, FORUM OF PRIVATE BUSINESS, Mar. 19, 2008, [http://www.fpb.org/hottips/246/New\\_penalties\\_for\\_employing\\_illegal\\_workers.htm](http://www.fpb.org/hottips/246/New_penalties_for_employing_illegal_workers.htm).

562. The case, like many Crown Court cases, is not reported in the law reports, but was reported in the media. See, e.g., *Gangmaster Guilty over £5m Racket*, BBC NEWS, Feb. 3, 2005, [http://news.bbc.co.uk/2/hi/uk\\_news/england/norfolk/4232825.stm](http://news.bbc.co.uk/2/hi/uk_news/england/norfolk/4232825.stm).

563. *Id.*

564. *Id.*

565. *Gangmaster Sentenced to Seven Years*, THE GUARDIAN, Feb. 11, 2005, <http://www.guardian.co.uk/uk/2005/feb/11/ukcrime1>.

566. Proceeds of Crime Act, 2002, c. 29, §§ 327-340 (Eng.).

567. Health and Safety at Work Act, 1974, c. 37 (Eng.).

568. *R v. Solomka*, [2007] EWHC (Costs) 90099, [2] (Eng.).



two years.<sup>569</sup> This is perhaps particularly significant in the context of the English sentencing practice with regard to concurrent and consecutive prison sentences. While, in the United States, it is common for a court to pass consecutive sentences in respect to each count on an indictment, the approach in the English courts is much more restrictive.<sup>570</sup> Rather than taking each count in isolation, the court passes a sentence that is designed to reflect the total gravity of the defendant's conduct. To commit three residential burglaries, for example, is regarded as more serious than to commit only one, but not three times as serious. Hence, a slightly enhanced sentence will typically be passed in relation to the first burglary, with equal sentences passed in relation to the second and third, but these to be served concurrently. The result will be a decidedly shorter overall sentence.

This will often be reflected in the approach taken by prosecutors in drafting an indictment. This is less true in relation to the employment of undocumented workers, where the defendant will typically be charged with several counts, each relating to one worker,<sup>571</sup> but it is certainly the practice in relation to, for example, tax evasion. A person who evades tax over several years, as were the facts in both *R v. Dimsey* and *R v. Moran*, will typically be charged with one count of cheating Her Majesty's Revenue rather than, say, twenty counts, each relating to a separate fraudulent tax return or item of undeclared income. Hence, the maximum sentence that may be passed will be that laid down for one offence. The fourteen year maximum sentence for money laundering, therefore, allows for considerably greater discretion.<sup>572</sup>

An even greater impact, however, is to be found in the "criminal lifestyle" provisions, contained in sections ten and seventy-five of the Proceeds of Crime Act 2002 and briefly referred to above.<sup>573</sup> Here, the confiscation provisions of Part 2 of the Act and the money laundering offenses under Part 7 come together. For a defendant to be held to have a criminal lifestyle, the prosecutor must demonstrate that any one of four criteria is satisfied. Two of these relate to the defendant having committed a specified number of other offenses, either through other convictions in the previous six years or through the requisite number of other counts in the present indictment.<sup>574</sup> Either of these will be a matter of public record; however, the prosecutor must also prove that the defendant gained a benefit from each of these other offenses. The third is where the defendant committed the offense over a period of more than six months.<sup>575</sup> This may often be so, but it will sometimes be difficult to prove. In some cases, it may be established, as seen above, where it was found that both Moran and Dimsey had engaged in tax evasion over a sustained period of time, in Moran's case for over twenty years.<sup>576</sup> But in other cases it will be more difficult. A raid by the U.K. Border Agency, for example, will reveal that a business is

569. Immigration, Asylum and Nationality Act, 2006, c. 13, § 21(2) (Eng.).

570. And indeed those of Scotland and Northern Ireland. Wales forms a single jurisdiction with England.

571. Even this is not universally true. In *R v. Solomka*, for example, the defendant was initially charged with relatively few counts: ten more were added when he persisted in a plea of not guilty (Referred to in a subsequent hearing relating to costs). See *R v. Solomka*, [2007] 6 Costs LR 868, Supreme Court Costs Office (2007). Although this raises other questions in relation to prosecution practice, these fall outside the remit of this article.

572. See Proceeds of Crime Act, 2002, c. 29, § 334(1)(b) (Eng.).

573. *Id.* §§ 10, 75.

574. *Id.* § 75(2)(b), (3).

575. *Id.* § 75(2)(c).

576. *R v. Moran*, [2002] 1 W.L.R. 253, 256-57 (Eng.).

employing undocumented workers, but not for how long it has been doing so. Such workers will often be paid in cash, with no receipts or paperwork: indeed, the business is likely to shun such paperwork as it will provide evidence of its violations of the immigration laws and, very possibly, tax evasion as well. The workers themselves may perhaps be persuaded to give evidence, but they may well feel that they face certain deportation and therefore have nothing to gain by cooperating with the authorities.<sup>577</sup> In addition, particularly if, as in many cases, they have been trafficked into the country, they may feel too intimidated to provide information. Threats will often have been made not only against them but also their families.

The fourth criteria, however, will be simple to prove because it, as with that of other convictions, will be a matter of public record: a single conviction for money laundering.<sup>578</sup> As discussed above in the context of *Crown Prosecution Service (Nottinghamshire) v. Rose*,<sup>579</sup> the offenses of acquisition, use, or possession of criminal property under section 329 of the 2002 Act are excluded; however, those of concealment, disguise, conversion, or transfer of such property, or its removal from any one of the three constituent jurisdictions of the United Kingdom, under section 327 of the Act, are included, as is entering into an arrangement to facilitate the acquisition, retention, use, or control of such property by another person under section 328. In most of the situations discussed in this article, section 327 and possibly section 328 will apply.

Tax evasion is often achieved, as it was in both *R v. Dimsey*<sup>580</sup> and in *R v. K*,<sup>581</sup> through the transfer of the proceeds offshore: this will constitute both transfer of the property and its removal from the jurisdiction. Even where it is not, it is typically spent on something: those who engage in tax evasion, as with most economically-motivated crimes, rarely do so simply to admire the balance in their bank account. When they spend it, they convert criminal property from either cash or a right<sup>582</sup> into whatever it is that they spend the money on.

The proceeds of the employment of undocumented workers are partly paid to the workers themselves. This will constitute transfer of criminal property and also quite possibly entering into arrangement to facilitate the acquisition by another, *i.e.*, the undocumented workers, of criminal property. The remainder will typically be re-invested into the business, which will involve a number of other payments, each of which will constitute a transfer of criminal property, or possibly purchases, which will constitute conversion.

577. The option, exercised in some cases in the United States, of allowing an undocumented person to remain in the country in return for giving evidence against their employer or trafficker is less likely in the United Kingdom due to the current policy of the British Government, and hence the U.K. Border Agency, that every person found to be illegally present in the country should be deported.

578. Or indeed any of the offenses listed in Schedule 2 of the 2002 Act. None of the others, however, will be applicable in the contexts discussed in this article.

579. *Crown Prosecution Service Nottinghamshire v. Rose*, [2008] EWCA (Crim) 239, [1]-[2], [90]-[91] (Eng.).

580. *R v. Dimsey*, [1999] EWCA (Crim) 2261, [2000] 1 Cr. App. R.(S) 497 (Eng.).

581. *R v. K*, [2007] EWCA (Crim) 491, [9]-[10] (Eng.).

582. In English law, the balance held in a bank account is not considered to be money belonging to the depositor but rather a debt owed by the bank to the account holder. *Foley v. Hill*, [1848] 9 Eng. Rep. 1002 (H.L.). In the United States this common-law principle has been disappplied under the USA PATRIOT Act to forfeiture cases involving proceeds held in an interbank account of a foreign bank. *See United States v. Union Bank For Sav. & Inv. (Jordan)*, 487 F.3d 8 (1st Cir. 2007) (applying 18 U.S.C. § 981(k) (2006)). It is arguable that it continues to apply for other purposes.

The same will apply to cost savings from violations of both of the environmental protection regulations and the Health and Safety at Work Act 1974. These savings will be used for the further operation of the business, just as the proceeds of the employment of undocumented workers are. As such, they will be transferred: to employees as their wages, to suppliers in payment for goods and services, etc.

What remains is for prosecutors to exercise care in choosing the charges when drafting the indictment, noting the exclusion of the section 329 offenses from Schedule 2 and therefore charging under sections 327 or 328 where appropriate.<sup>583</sup> This will not, as just seen, be unduly difficult. Further, where they can show that the offense in question was committed over an extended time period, they should do this as a further basis for the finding of a criminal lifestyle.

Where it is found that the defendant does have a criminal lifestyle, the provisions found in section 10 of the 2002 Act will apply.<sup>584</sup> These apply a number of presumptions to assess the defendant's total benefit from crime. First, all property transferred to the defendant (i.e., received by him) during the six year period prior to his conviction will be deemed to be criminal property.<sup>585</sup> Second, any expenditure by the defendant during the same period will be deemed to have been met out of criminal property.<sup>586</sup> Third, any assets held by the defendant following his conviction will be deemed to be criminal property, regardless of when he actually acquired it.<sup>587</sup> This is perhaps the most severe of what have already been described as draconian provisions because it will mean that property obtained by the defendant, say, thirty years before will be deemed to be criminal property if he still held it after his conviction. Finally, all assets held by the defendant will be deemed to be held free of any third party interest.<sup>588</sup> Because all of these assets are presumed to be criminal property, they will be liable to confiscation, including the value of the assets now spent.

Any of these presumptions may, however, be rebutted by the defendant on the balance of probabilities. For example, he may show that a house which he holds, worth £800,000, is subject to an outstanding mortgage of £400,000, that he has made the monthly mortgage payments out of his legitimately earned salary, and that his Mercedes Benz car was similarly bought out of a legitimate salary. Where this is shown, the property concerned will not be subject to confiscation. But the burden of proof will be firmly on the defendant: if he cannot show that the property has a legitimate origin, he will lose it.

In a business context, which most of the crimes considered in this article involve, these provisions provide both a deterrent to operators and a considerable advantage to prosecutors. The deterrent is clear. A conviction for money laundering will mean that the business, whether the individual operating it or, in the case of an incorporated entity, its management, will need to show how each and every asset was paid for, how every penny in their bank accounts was earned—or see it confiscated. At the very least, this is likely to be an extremely burdensome and expensive exercise that could, in some cases, lead to the closing of the business. It may also expose other criminal offenses: for example, a detailed

583. See Proceeds of Crime Act, 2002, c. 29, §§ 327-29 (Eng.).

584. See *id.* § 10.

585. *Id.* § 10(2).

586. *Id.* § 10(3).

587. *Id.* § 10(4).

588. *Id.* § 10(5).

analysis of the accounts of a business found to have employed undocumented workers may often reveal evasion of tax and National Insurance payments.

As for the advantage to prosecutors, the finding of a criminal lifestyle will mean that they are not required to demonstrate precisely by what amount the defendant benefited from the offense. In contrast, where the defendant is not held to have a criminal lifestyle the prosecutor is required to do this, because it is the precise value of the assessed benefit that will be confiscated. Indeed, once a conviction of a Schedule 2 offense (such as one under section 327 or 328 of the 2002 Act) has taken place, the prosecutor is not even required to prove that any of the defendant's assets were derived from criminal activity. All they need to prove, under section 75(2)(a), is the offense, in this case money laundering itself.<sup>589</sup> This, to secure the conviction, they will just have done. In a health and safety case, for example, it will have been shown that the defendant obtained a pecuniary advantage through not implementing the measures necessary to ensure that its employees had a safe working environment. Precisely how much these measures would have cost will not need to be proven: it is sufficient to show that they would have cost something and that the costs saved were re-invested in some way in the business.<sup>590</sup> Similarly, where the defendant employed undocumented workers in his business, but also employed other workers who were legally documented (as were the facts in *R (Chief Constable of Greater Manchester Police) v. City of Salford Magistrates' Court*,<sup>591</sup> considered above), it need not be shown precisely what proportion of the business' proceeds were derived from the undocumented workers and what from their legally documented coworkers, merely that some proceeds were obtained from the sale of the goods or services that the undocumented workers produced and that these proceeds were transferred or converted. Once that has been shown, the presumption is that everything is to be confiscated unless the defendant shows otherwise.

## X. Conclusion

The conclusion is clear, therefore, in both the United States and the United Kingdom, that cost savings are now capable of constituting proceeds of crime for the purposes both of a money laundering prosecution and for a forfeiture action in the United States or confiscation/civil recovery proceedings in the United Kingdom. Certain further amendments to both federal and state legislation would be useful in the United States to bring all business crimes within the proceeds of crime provisions, allowing them to be punished with the severity that they deserve. This is particularly true of the tax evasion and the occupational safety and health offenses; indeed, urgent attention should be given to broadening the range of violations that are covered by the criminal law and also providing for considerably enhanced criminal penalties, including significant prison sentences.<sup>592</sup> It

589. *Id.* § 75(2)(a).

590. Clearly, however, it will assist if some figure can be given.

591. *R v. City of Salford Magis. Ct.*, [2008] EWHC 1651 (Admin), [2009] 1 W.L.R. 1023.

592. The current six month maximum prison sentence provided for causing the death of an employee through a willful violation of the Occupational Safety and Health Act may be contrasted with the approach of the United Kingdom, considered above, which provides not only for rather greater prison sentences for occupational safety and health offenses, but also, in appropriate cases, for sentences of up to life imprisonment for common-law manslaughter.

would, however, also be useful for a wider range of environmental crimes to be covered by 18 U.S.C. § 1956, although the emphasis under a number of the environmental statutes on enforcement under state law, rather than federal law, is recognized. A possible solution here might be an amendment of section 1956 to cover a wider range of predicate crimes under state as well as federal law, in the way that the Florida Money Laundering Act does,<sup>593</sup> although a further amendment would be welcome for the section to cover the proceeds of all crimes, not merely a list of specified offenses. At the very least, all felonies, and preferably also first degree misdemeanors,<sup>594</sup> should constitute predicate crimes.

In the discussions on these issues that led to this article, some have objected that if these proposals were implemented then every criminal act that involved the receipt or saving of money would automatically constitute money laundering. In the United Kingdom, this is indeed the case due to the draconian nature of Part 7 of the Proceeds of Crime Act 2002.<sup>595</sup> But this article does not propose that U.S. legislation go quite as far. If, as this article recommends, all business crimes become predicate crimes under 18 U.S.C. § 1956, the acts will only constitute money laundering if the intent and purpose requirements under the section are met: most commonly, in a business context, using the proceeds to promote the carrying on of a specified unlawful activity, *i.e.*, an ongoing criminal enterprise. A business that, for example, on an ongoing basis employs undocumented workers to keep its costs down will be guilty of money laundering. A couple who saves a few dollars by employing an undocumented worker to mow their lawn on a one-off basis will not, because they will not be using the money saved to perpetuate a criminal enterprise, to commit tax evasion,<sup>596</sup> or to conceal or disguise how the money was saved. Nor will the money laundering provisions extend to a business that fails to comply one time with environmental or occupational safety and health laws: they will only cover one which violates such laws repeatedly as part of a policy (formal or otherwise) to reduce its overhead.

What this article advocates, therefore, is where businesses violate these laws to reduce their costs, it should be treated as the financial crime that it is and the business should fully account for it. No longer should their managers be able to count on receiving nothing more than a moderate fine viewed as simply a cost of doing business. Serious penalties should ensure that the violation is not overall worthwhile. Forfeiture of the monies saved, a severe fine for the business entity, and prison sentences for its managers will achieve this. If this is done, the United States will build on the 2009 reforms and continue to lead the fight against economic, including corporate, crime.

593. See FLA. STAT. § 896.101 (2009).

594. This latter would mean that state tax crimes, at least in some states, were also covered. In Florida, for example, tax evasion and tax fraud both constitute first degree misdemeanors. See FLA. STAT. § 220.901 (2011).

595. See Proceeds of Crime Act, 2002, c. 29, §§ 327-340 (Eng.).

596. If they do, this will be a separate offense.