WILLFUL BLINDNESS: A PERMISSIBLE SUBSTITUTE FOR ACTUAL KNOWLEDGE UNDER THE MONEY LAUNDERING CONTROL ACT?

Money laundering[1] is the white collar crime of the 1990s.[2] Prosecutions under the Money Laundering Control Act of 1986 (MLCA),[3] once confined exclusively to drug traffickers,[4] have expanded to ensnare attorneys,[5] automobile dealers,[6] a real estate agent,[7] a former state

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1. Money laundering is the process of legitimizing illicit cash proceeds by "disguising its source and ownership." W. John Moore, *Nixing the Cash Injection*, NAT'L L.J., Dec. 2, 1989, at 2924. Three hundred billion dollars is laundered annually worldwide. *Focus on Drug Money Report Urges*, MONEY LAUNDERING ALERT (Alert Int'l, Inc.), March 1990, *available in* LEXIS, Nexis Library, Nwltrs File. In the United States, money laundering is a $100 billion per year industry. This translates roughly into 26 million pounds of $20 bills. Moore, *supra*, at 2924. Drug traffickers in particular are notorious drug launderers and are literally drowning in their own cash. The laundering of illicit proceeds is a problem endemic to drug lords and commonplace street-level pushers alike. *Id.*

2. In the period from 1988-1990, the U.S. Department of Justice charged 375 banks, businesses and individuals with money laundering. Rosalind Resnick, *Money Laundering*, NAT'L L.J., May 7, 1990, at 2. In the period from 1985-1990, 46 U.S. financial institutions were assessed civil penalties totaling $21 million in money laundering cases. *Id.* The MLCA is poised to supplant RICO as the prosecutor's statute of choice. The MLCA is straightforward, yet extremely broad in scope, and contains onerous sentencing and forfeiture provisions similar to those in RICO. Elkan Abramowitz, *Money Laundering: The New RICO?*, N.Y. L.J., Sept. 1, 1992, at 2.

3. 18 U.S.C. §§ 1956, 1957 (1988). The statute was introduced in the House as part of the Omnibus Drug Enforcement Education and Control Act of 1986. *See* H.R. 5077, 99th Cong., 2d Sess. (1986).

4. The MLCA was drafted primarily to redress narcotics trafficking. *See* United States v. Jackson, 935 F.2d 832 (7th Cir. 1991); United States v. Lee, 886 F.2d 998 (8th Cir. 1989); United States v. Giles, 768 F. Supp. 101 (S.D.N.Y. 1991), *aff'd* 953 F.2d 636 (2d Cir. 1991); United States v. Kimball, 711 F. Supp. 1031 (D.Nev. 1989); United States v. Manieri, 691 F. Supp. 1394 (S.D. Fla. 1988).

5. *See Loop Lawyer Guilty of Money Laundering*, UPI, Jan. 12, 1993, *available in* LEXIS, Nexis Library, UPI File; *Lawyer Receives 30-year Sentence*, MONEY LAUNDERING ALERT (Alert Int'l, Inc.), Nov. 1991, *available in* LEXIS, Nexis Library, Nwltrs File (lawyer sentenced to 30 years in prison and fined $176,000 for overseeing money laundering operation).

6. *See* United States v. Antzoulatos, 962 F.2d 720 (7th Cir.), *cert. denied*, 113 S. Ct. 331 (1992). Nineteen managers and salesmen of the tenth largest automobile dealership in the country were arrested after selling 70 cars to undercover federal agents who informed them that the cars were being purchased with the proceeds of illegal drug sales. Stephen Labaton, *Car Dealers Held in Laundering Case*, N.Y. TIMES, Jan. 15, 1993, at A10.

7. *See* United States v. Campbell, 977 F.2d 854 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1331 (1993).

legislator,[8] and even a rabbi.[9] Given the MLCA's broad definition of predicate unlawful activity, the range of conceivable money laundering prosecutions is limited only by a prosecutor's imagination.[10] Accordingly, it is now likely that money laundering charges will be included in every federal prosecution involving money.[11]

Ostensibly, the MLCA seeks to transform money launderers into "commercial pariahs" that legitimate businesses will shun.[12] Recent prosecutions under the statute, however, have significantly weakened the

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8. *See* United States v. Montoya, 945 F.2d 1068 (9th Cir. 1991). In *Montoya*, the federal government prosecuted a former California state legislator who deposited a $3,000 check from a fictitious FBI front company into his personal checking account. *Id.* at 1071. Significantly, reversal of the defendant's Hobbes Act conviction for extortion under the color of official right did not require reversal of the money laundering conviction.

9. Mathis Chazanov, *Rabbi Owed Millions in Loans, Congregants Say*, L.A. TIMES, January 14, 1993, at B1.

10. *See* 18 U.S.C. § 1956(c)(7). Section 1956(c)(7) provides a laundry list of predicate offenses that qualify as "specified unlawful activity." *See* United States v. Lee, 927 F.2d 1388 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 9277 (1992) (illegal acquisition, sale, and importation of salmon caught in Northern Pacific waters); United States v. Swank, 797 F. Supp. 497 (E.D. Va. 1992) (bank/mail fraud prosecution); United States v. Gleave, 786 F. Supp. 258 (W.D.N.Y. 1992) (bankruptcy fraud prosecution).

See also Robert W. Blanchard & Gordon A. Greenberg, *When Money Laundering Law Meets Environmental Risks*, A.B.A. BANKING J., July 1992, at 66. Blanchard & Greenberg describe a hypothetical environmental prosecution under the MLCA. *Id.* at 66-67. The authors conclude that the MLCA is "wrongly conceived as only an anti-drug measure." *Id.* In the environmental area, the statute covers violations of the Federal Water Pollution Control Act, the Safe Drinking Water Act and the Resource Conservation and Recovery Act. *See* 18 U.S.C. § 1956(c)(7)(E). Blanchard & Greenberg posed the following hypothetical that illustrates the perils inherent in the MLCA:

> Rust Belt Bank has been asked to modify a revolving loan commitment with Green Valley Mills. Green Valley requires additional funds to improve an anti-pollution system installed with the original loan proceeds. The system isn't working satisfactorily and it is probable that hazardous chemicals have been released in excess of federal standards.
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> Green Valley management proposes to continue operating during the four months it will take to install the improvements. Shutting the plant down would likely drive the loan into default. At the same time, Green Valley assures the bank that any release in excess of federal standards won't likely be significant and is unlikely to be detected. The bank, though concerned, doesn't see that it has much choice but to extend the additional credit.
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> One year later, Green Valley pleads guilty to a violation of the Clean Water Act. Subsequently, the bank is subpoenaed before a federal grand jury investigating potential violation of the MLCA. Because Green Valley officials testified that the company told the bank that releases could exceed federal standards, the EPA intends to demonstrate that the loan payments received by the bank while Green Valley was polluting constitute receipt of proceeds of specified unlawful activity in violation of § 1956.

Id.

11. Resnick, *supra* note 2, at 1.

12. G. Richard Strafer, *Money Laundering: The Crime of the '90's*, 27 AM. CRIM. L. REV. 149, 167 (1989).

required nexus between underlying criminal activity and liability.[13] The MLCA's legislative history contemplates broad application to reach all individuals who *knowingly* facilitate the money laundering process.[14] Courts have relaxed the MLCA's scienter requirement and thereby placed a significant investigatory burden upon business-persons who risk prosecution under what has become the statute's alternate scienter requirement of "willful blindness."[15] The MLCA, as currently applied, requires individuals to determine which clients are money launderers and which are not.[16] This burden is compounded by uncertainty in the law as to the proper use of willful blindness as a substitute for actual knowledge in criminal prosecutions.[17] Nevertheless, every federal court of appeals has adopted some form of a "deliberate ignorance" instruction equating willful blindness with actual knowledge.[18]

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13. *See, e.g.*, United States v. Antzoulatos, 962 F.2d 720, 724 (7th Cir.), *cert. denied*, 113 S. Ct. 331 (1992). The *Antzoulatos* court was unable to locate any cases discussing the constitutionality of a section 1956 money laundering prosecution of a merchant or salesperson not charged with an underlying criminal act. *Id.* Nevertheless, the court concluded that "[n]othing in the language of Section 1956(a)(1)(B), however, distinguishes between persons directly involved in the unlawful activity and those involved only in laundering the proceeds of the unlawful activity." *Id.*

14. *See* H.R. REP. NO. 855, 99th Cong., 2d Sess. 13-15 (1986) [hereinafter HOUSE REPORT]. Stock brokers, real estate agents, auto dealers, jewelers, and precious metal dealers are singled out as potential targets of prosecution. *Id.* In short, "[i]f you know that [a] person is a trafficker and has this income derived from the offense, you better beware of dealing with that person." *Id.* at 14.

15. The doctrine of "willful blindness" imputes subjective knowledge of illegal activity to a defendant and is used in both civil and criminal proceedings as a substitute mental state that fully satisfies a required mens rea of knowledge. *See infra* notes 57-64 and accompanying text for an in-depth discussion of the willful blindness doctrine.

In this Note, the term "willful blindness" is used interchangeably with a variety of other labels for the doctrine, including, "conscious avoidance," "deliberate ignorance," and the "ostrich instruction."

16. *See* Strafer, *supra* note 12, at 172 ("The banker or businessman is simply supposed to know one when he sees one and refrain from what would otherwise be normal commercial activity."); Moore, *supra* note 1, at 2928 ("Basically, the banker has become a junior G-man.").

17. *See* Tomala v. United States, 112 S. Ct. 1997 (1992) (White, J., dissenting). Justice White, dissenting from the Court's denial of certiorari, expressed concern about the indeterminacy of the willful blindness doctrine as interpreted by the courts: "[T]he outcome of a Federal criminal prosecution should not depend upon the circuit in which the case is tried." *Id.* In *Tomala*, the Government conceded that the outcome of the petitioner's case might have been different had it been tried in another circuit and cited conflicting decisions by the courts of appeals for the Ninth and Tenth Circuits. *Id. See* United States v. de Francisco-Lopez, 939 F.2d 1405, 1410 (10th Cir. 1991) ("The deliberate ignorance instruction must not be given unless evidence, direct or circumstantial, shows that defendant's claimed ignorance of an operant fact was deliberate."). *But see* United States v. Sanchez-Robles, 927 F.2d 1070, 1073 (9th Cir. 1991) (stating that deliberate ignorance instruction requires "facts and circumstances creating a high probability of criminal activity that the defendant then ignored").

18. *See, e.g.*, United States v. Campbell, 977 F.2d 854, 858-59 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1331 (1993); United States v. Antzoulatos, 962 F.2d 720, 724 (7th Cir.), *cert. denied*, 113 S. Ct.

Initially, application of the willful blindness doctrine in money laundering cases appears well settled. However, closer analysis reveals latent and unresolved philosophical and legal questions.[19] The primary philosophical question is whether willful blindness requires that fact finders impute subjective knowledge to criminal defendants in the absence of actual knowledge or objective confirmation.[20] Two corresponding legal issues are raised. First, does a money laundering prosecution premised on willful blindness impinge upon the constitutional due process requirement of proof of knowledge beyond a reasonable doubt?[21] Second, if the judiciary departs from the statutory requirement of knowledge, albeit with implicit congressional consent, does it unjustifiably encroach upon the exclusive legislative mandate to define criminal conduct?[22]

This Note addresses the disparity between the MLCA's explicit scienter requirement of actual knowledge and the imposition of a de facto standard of imputed knowledge under the doctrine of willful blindness. Part I analyzes the statutory language of the MLCA and Congress' adoption of the "knowing" scienter requirement. Part II explores the doctrine of willful blindness and its role in American jurisprudence. In particular, Part II analyzes the propriety of equating willful blindness with actual knowledge or recklessness. Part III examines two recent federal prosecutions under the MLCA that illustrate how courts are applying the willful blindness doctrine under the statute. Part IV highlights the problems inherent in MLCA prosecutions applying the willful blindness standard and suggests that Congress amend the MLCA to include a willful blindness scienter requirement.

I. LEGISLATIVE HISTORY OF THE MLCA

Congress enacted the MLCA[23] to curb the growth of money laundering

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331 (1992); United States v. White, 794 F.2d 367 (8th Cir. 1986); United States v. MacKenzie, 777 F.2d 811 (2d Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986); United States v. Aleman, 728 F.2d 492 (11th Cir. 1984); United States v. Glick, 710 F.2d 639 (10th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984); United States v. Cincotta, 689 F.2d 238 (1st Cir.), *cert. denied*, 459 U.S. 991 (1982); United States v. Restropo-Granda, 575 F.2d 524 (5th Cir.), *cert. denied*, 439 U.S. 935 (1978); United States v. Jewel, 532 F.2d 697 (9th Cir.), *cert. denied*, 426 U.S. 951 (1976).

19. Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. CRIM. L. & CRIMINOLOGY 191, 191-92 (1990).

20. *Id.* at 194. *See infra* notes 119-29 and accompanying text discussing the relation of objective and subjective knowledge.

21. Robbins, *supra* note 19, at 194. *See infra* notes 102-03 and accompanying text.

22. Robbins, *supra* note 19, at 194. *See infra* note 57 and accompanying text.

23. 18 U.S.C. §§ 1956, 1957 (1988).

in the United States.[24] Previous efforts to thwart this activity were limited by the shortcomings of the first money laundering statute, the Bank Secrecy Act of 1970.[25] The MLCA significantly enhances the federal government's ability to combat money laundering by imposing burdensome sentencing and forfeiture provisions.[26]

The MLCA is comprised of two complementary sections that target different aspects of money laundering.[27] Section 1956 specifies two categories of offenses—"transactional" offenses[28] and "transportational"

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24. Spurred by the high-profile prosecutions of the First National Bank of Boston, *see The First National Bank of Boston: Hearings Before the Subcommittee on Financial Institutions Supervision, Regulation, and Insurance of the House Committee on Banking, Finance and Urban Affairs*, 99th Cong., 1st Sess. (1985), and the Bank of New England for flagrant violations of existing money laundering laws, *see* United States v. Bank of New England N.A., 821 F.2d 844 (1st Cir.), *cert. denied*, 484 U.S. 943 (1987), Congress made money laundering a federal crime and enhanced penalties under the pre-existing law.

25. The first federal money laundering statute, The Bank Secrecy Act, 31 U.S.C. §§ 5311-5324 (1988), was an attempt to detect money laundering by requiring financial institutions to report cash transactions of over $10,000. But significantly, it did not prohibit the structuring of transactions to avoid the reporting requirement. Thus, "[s]o long as deposits of $10,000 or less were made with different banks, rather than branches of the same bank, no filing requirement was technically violated." Strafer, *supra* note 12, at 160. Although the government had demonstrated the ability and the resolve to prosecute offending institutions, *see supra* note 24, individuals structuring their transactions to avoid the reporting requirements were essentially immune from prosecution. *See* S. REP. NO. 433, 99th Cong., 2d Sess. 3 (1986). This shortcoming was not lost upon Congress which held extensive hearings on how to implement effective money laundering prohibitions. *See The First National Bank of Boston: Hearings Before the Subcommittee on Financial Institution Regulation*, 95th Cong. 1st Sess. (1985).

26. Abramowitz, *supra* note 2, at 3.

27. This separation resulted from the independent creation of each section. Section 1956 evolved primarily in the Senate. S. 2683, 99th Cong., 2d Sess. (1986). Section 1957 was created in the House. H.R. 5077, 99th Cong., 2d Sess. (1986).

28. Subsection (a)(1) provides:

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—
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> (A)(i) with the intent to promote the carrying on of a specified unlawful activity; or
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> (ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986 [26 U.S.C. § 7201 or 7206]; or
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> (B) knowing that the transaction is designed in whole or in part—
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> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or
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> (ii) to avoid a transaction reporting requirement under State or Federal law,
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> shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

18 U.S.C. § 1956 (1988).

offenses.[29] Both categories require the government to prove that the defendant: (1) took part in a financial transaction involving the proceeds of a specified unlawful activity; (2) knew that the property involved was the proceeds of a specified unlawful activity; and (3) knew that the transaction was designed, in whole or in part, either to conceal or disguise the proceeds, or avoid a transaction reporting requirement.[30]

Section 1957 is much broader in scope than section 1956.[31] Section 1957 prohibits one from knowingly engaging in a monetary transaction involving proceeds from specified unlawful activities in excess of $10,000.[32] Significantly, this prohibition extends to the provision of goods and services, including legal services.[33]

A. The Statutory Knowledge Requirement

The MLCA's scienter requirement is the product of legislative compro-

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29. Subsection (a)(2) provides:

> Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States—
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> (A) with the intent to promote the carrying on of specified unlawful activity; or
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> (B) knowing that the monetary instrument or funds involved in the transportation represent the proceeds of some form of unlawful activity and knowing that such transportation is designed in whole or in part—
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> (i) to conceal or disguise the nature, the location, or the source, the ownership, or the control of the proceeds of specified unlawful activity; or
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> (ii) to avoid a transaction reporting requirement under State or Federal law, shall be sentenced to a fine of $500,00 or twice the value of the monetary instrument or funds involved in the transportation, whichever is greater, or imprisonment for not more than twenty years, or both. . . .

18 U.S.C. § 1956 (1988).

30. United States v. Antzoulatos, 962 F.2d 720, 724 (7th Cir.), *cert. denied*, 113 S. Ct. 331 (1992) (summarizing 18 U.S.C. § 1956(a)(1) (1988)). *See also supra* note 28.

31. Section 1957 provides in part:

> (a) Whoever, in any of the circumstances set forth in subsection (d), *knowingly* engages or attempts to engage in a monetary transaction in criminally derived property that is of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).
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> (b)(1) Except as provided in paragraph (2), the punishment for an offense under this section is a fine under title 18, United States Code, or imprisonment for not more than ten years or both.
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> (2) The court may impose an alternate fine than that imposable under paragraph (1) of not more than twice the amount of the criminally derived property involved in the transaction.

18 U.S.C. § 1957 (1988).

32. *Id.*

33. Barry S. Engel, *The Money Laundering Act of 1986: A Primer*, 21 COLO. LAW 447, 448 (1992).

mise and haste rather than a well-reasoned policy decision.[34] In order to sustain a money laundering conviction, sections 1956 and 1957 both require knowledge that the property involved is derived from or represents the proceeds of some unlawful activity.[35] Because Congress had previously rejected bills incorporating "reason to know"[36] and "reckless disregard"[37] standards of knowledge, Congress' adoption of this standard was by no means intuitive.[38]

Ultimately, the higher "knowing" standard prevailed, but only with the

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34. S. REP. NO. 433, 99th Cong., 2d Sess. 5-9 (1986) [hereinafter SENATE REPORT]. Most witnesses at the Committee hearings, whatever their position on the scienter requirement, recognized the need for new legislation to fill gaping loopholes in the Bank Secrecy Act (BSA). This sense of urgency was instilled by three federal court decisions that refused to apply the provisions of the BSA to structuring arrangements designed to evade the reporting requirements of transactions over $10,000. *See* United States v. Anzalone, 766 F.2d 676 (1st Cir. 1985); United States v. Varbel, 780 F.2d 758 (9th Cir. 1986); United States v. Bismark, 779 F.2d 1559 (11th Cir. 1986). *See also* SENATE REPORT, *supra*, at 7.

Senator D'Amato, a sponsor of one of the competing bills, and James Harmon of the President's Commission on Organized Crime both emphasized that their primary concern was the "passage of some money laundering legislation, whatever form it might take." SENATE REPORT, *supra*, at 5-6. Senator Biden stated: "We cannot afford to waste any time. We need this weapon against drug traffickers and organized criminals and we need it now." *Id.* at 9.

35. *See* 18 U.S.C. § 1956(a)(1) (1988) ("Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity. . . ."); 18 U.S.C. §1957(a) (1988) ("Whoever . . . knowingly engages or attempts to engage in a monetary transaction in criminally derived property . . . derived from specified unlawful activity shall be punished . . .").

36. The first money laundering bill introduced in the Senate during the 99th Congress was S. 572, which incorporated the recommendations of the President's Commission on Organized Crime. SENATE REPORT, *supra* note 34, at 4.

37. A subsequent proposal, S. 1335, containing the "reckless disregard" language, was advanced by the Department of Justice at the request of the administration. SENATE REPORT, *supra* note 34, at 4-5.

A third bill, S. 1385, was proposed by Senator DeConcini (D-Ariz). This bill was similar to S. 572 except that it proposed additional penalties for violation of the BSA. *Id.* at 5.

38. During hearings on money laundering held by the Committee on the Judiciary, the appropriate scienter requirement was the subject of considerable testimony. *Id.* at 5-8. The scienter requirement was also discussed during the Committee's hearings on white collar crime. *Id.* at 5. Assistant Attorney General Stephen S. Trott emphasized that the "reason to know" standard could be interpreted to include negligent participation in a prohibited transaction. *Id.* at 6. Trott urged adoption of the higher "reckless disregard standard." *Id.* Neil Sonnet of the National Association of Criminal Defense Lawyers expressed opposition to both standards, as either could lead to the prosecution of individuals who were not in any way involved in money laundering. *Id.*

The appropriate scienter standard was also debated in the House of Representatives. HOUSE REPORT, *supra* note 14, at 13-14. Representative Lungren reiterated his understanding of the Committee's use of the term knowingly as follows: "It is a 'knowing' standard . . . . It is not 'should have known, might have known, a reasonable person would have known,' it is 'this person knew the source of the [unlawful] income.'" *Id.* at 14.

understanding that it would be construed—like existing knowing scienter requirements—to include instances of willful blindness.[39] However, Congress overlooked the lack of judicial consensus on the proper correlation between the two mental states.[40] Congress thus put its imprimatur on the indeterminacy of result inherent in money laundering prosecutions premised on willful blindness.

The statutory language of the MLCA requires a mental state of knowledge. In practice, however, the actual scienter requirement is significantly reduced.[41] Rather than dilute the knowledge requirement directly by adopting a lower scienter requirement, Congress did so indirectly by eroding the burden of proof.[42] A Senate report outlining the requirements for prosecution under section 1956 provides that a participant need not know that the proceeds were the product of a specified illegal activity, only that they were the product of some illegal activity.[43] While this construction prevents a defendant from pleading ignorance, or intentionally eluding the predicate acts contained in the section, its seemingly limitless application is unacceptably broad.[44]

As enacted, the MLCA's scienter requirement is ill-defined and unworkable. The Senate report provides several hypotheticals that inadequately describe application of the willful blindness doctrine under the statute.[45] In his analysis of the hypotheticals, G. Richard Strafer notes

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39. SENATE REPORT, *supra* note 34, at 9-10.

40. *See supra* note 18 and accompanying text.

41. *See* Strafer, *supra* note 12, at 166.

42. *Id.* at 166-69.

43. The Senate report provides:

> [I]n order to fall within this section, the participant need not know that the property involved in the transaction represents the proceeds of 'specified unlawful activity.' He or she need only know that it represents the proceeds of some form of unlawful activity. . . . [T]he significance of this phrase is that the defendant need not know exactly what crime generated the funds involved in a transaction, only that the funds are the proceeds of some kind of crime that is a felony under Federal or State law.

SENATE REPORT, *supra* note 34, at 11-12.

By adopting the relaxed standard of knowledge of "some" unlawful activity, Congress sought to eviscerate the defense that the defendant knew the proceeds resulted from criminal activity, but thought the particular crime was not among the list of specified crimes in section 1956(c)(7). *Id.* at 12.

44. See 18 U.S.C. § 1956(c)(7)(A)-(E) for a listing of the predicate acts that qualify as "specified unlawful activity."

45. *See* SENATE REPORT, *supra* note 34, at 10.

> [A] currency exchanger who participates in a transaction with a known drug dealer involving hundreds of thousands of dollars in cash and accepts a commission far above the market rate, could not escape conviction, from the first tier of the offense, simply by claiming that he did not know for sure that the currency involved in the transaction was derived from crime. On the other hand,

how they underscore the vagueness of the MLCA's scienter requirement.[46] Incorporating the willful blindness doctrine in the MLCA purports to move the scienter requirement away from actual knowledge, but such intent is not reflected in the statutory language. Strafer comments that the willful blindness inference impermissibly shifts the burden of proof to the defendant because the prosecutor is not required to produce direct evidence indicating precisely what knowledge the defendant is alleged to have consciously avoided.[47] A fact finder is permitted to infer that the defendant, in fact, harbored such unspecified knowledge.[48] This burden of proof shift is undesirable because it tends to "create a presumption of guilt."[49]

When Congress adopts a legal term of art with well-proscribed meaning, it presumably knows and adopts that widely-held interpretation.[50] The proper application of this rule of statutory construction is limited in the case of the doctrine of willful blindness. There is a surprising lack of uniformity surrounding the common-law evolution of the doctrine of willful blindness.[51] As a result of the discrepancy between congressional intent

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an automobile car dealer [sic] who sells a car at market rates to a person when he merely suspects of involvement with crime, cannot be convicted of this offense in the absence of a showing that he knew something more about the transaction or the circumstances surrounding it.

Id.

46. *See* Strafer, *supra* note 12, at 167. Strafer proposes the following variations on the Senate's hypotheticals to expose the insufficiency of the hybrid standard of knowledge envisioned by Congress:

If the automobile dealer in the second example sells a vehicle at the market rate to the known drug dealer in the first example (rather than merely the suspected drug dealer in the second example), has he then violated section 1956? If the currency exchanger in the first example accepts only a reasonable commission, is he no longer guilty? What if the currency exchanger accepts a huge commission, but merely suspects the individual he is dealing with is a drug dealer; does the size of the commission plus suspicion satisfy the government's burden of proof?

Id.

47. Strafer, *supra* note 12, at 169.

48. *Id.*

49. *Id.* (quoting United States v. Murrieta-Bejarano, 552 F.2d 1323, 1325 (9th Cir. 1977)).

50. *See supra* note 18 and accompanying text. *See also* Robin Charlow, *Willful Ignorance and Criminal Culpability*, 70 TEX. L. REV. 1351, 1354 nn.7-9 (discussing development of the willful blindness doctrine and the confusion surrounding its proper application).

51. *See* Morisette v. United States, 342 U.S. 246, 263 (1952) ("The spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute."); G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 126 (2d ed. 1961) ("The courts ought not to extend a mens rea by forced construction. If, when Parliament says 'knowing' or 'knowingly,' it does not mean actual knowledge, it should be left to say as much by amending the statute."). But see 2A J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 45.02, at 7 (5th ed. 1992), who asserts that when a statute's meaning is ambiguous, "[i]t is the

and statutory construction, the judiciary is left to divine the proper standard to apply. Courts have not hesitated to exercise this interpretive power, which has resulted in the promulgation of inconsistent standards.[52] For precisely this reason, the federal judiciary's power to determine criminal activity is generally confined to the language used in criminal statutes.[53]

At best, Congress' adoption of the willful blindness standard—as evidenced by statements in the Congressional Record—serves as a rebuttable presumption of imputed knowledge. Willful blindness is well-established as an independent mental state.[54] However, the routine substitution of willful blindness for actual knowledge has no foundation in the statutory language[55] and cannot be justified by reliance on the legislative history of the MLCA.[56]

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function of the court to make the referent clear or as clear as possible from the information and evidence which is presented to it."

See also United States v. Thompson/Center Arms Co., 112 S. Ct. 2102 (1992) in which Justices Scalia and Souter debate the relevance of legislative history. Justice Scalia, an ardent critic of legislative history, criticizes the plurality opinion for resorting to "that last hope of lost interpretive causes, that St. Jude of the hagiology of statutory construction, legislative history." *Id.* at 2111. Referring to United States v. R.L.C., 112 S. Ct. 1329 (1992) (Scalia, J., concurring in part and concurring in judgment), Scalia reiterated that "reliance on that source [legislative history] is particularly inappropriate in determining the meaning of a statute with criminal application." 112 S. Ct. at 2111.

Justice Souter responded to Justice Scalia's argument, noting:

> [t]he Shrine [of hagiology], however, is well peopled (though it has room for one more) and its congregation has included such noted elders as Mr. Justice Frankfurter:
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> > A statute, like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated. . . . The meaning of such a statute cannot be gained by confining inquiry within its four corners. Only the historic process of which such legislation is an incomplete fragment—that to which it gave rise as well as that which gave rise to it—can yield its true meaning.

Id. at 19 n.8 (quoting United States v. Monia, 317 U.S. 424, 432 (1943) (Frankfurter, J., dissenting)).

52. *Morisette*, 342 U.S at 263.

53. *See* Charlow, *supra* note 50, at 1353.

54. See *infra* Part II for a discussion of the development of the willful blindness doctrine.

55. *See supra* note 51 and accompanying text.

56. *See Morisette*, 342 U.S. at 263 (noting that the Court "should not enlarge the reach of enacted crimes by constituting them from anything less then the incriminating components contemplated by the words used in the statute.").

As Robin Charlow observes, Justice Scalia's skepticism as to the value of legislative history in determining statutory meaning is founded on his belief that legislative history is not an authoritative source for assessing congressional intent. Charlow, *supra* note 50, at 1354 (citing Wisconsin Pub. Intervenor v. Mortier, 111 S. Ct. 2476, 2487 (1991) (Scalia, J., concurring) ("We are a Government of laws and not of committee reports . . . [and this Court has rejected] utilizing legislative history for the purpose of giving authoritative content to the meaning of the statutory text.")).

But see Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992) (asserting that Scalia's view is not the dominant one).

II. THE DOCTRINE OF WILLFUL BLINDNESS

The doctrine of willful blindness expands the traditional standard of knowledge, which requires actual awareness of the existence of a particular fact.[57] Willful blindness requires an analysis of subjective mens rea and an objective assessment of blame in accord with what is reasonable.[58] The doctrine thus constructs a greater mental state than an actor may have actually had and is justified by the *deliberate* action of disregarding a previously-realized possibility.[59] Professor Glanville Williams' influential analysis of willful blindness concludes that willful blindness requires suspicion, realization of probability and avoidance of confirmation.[60]

Irregular circumstances may engender suspicion that one's intended activity may produce a result contrary to established legal norms.[61] If one implements a plan, without further investigation, the common law imputes

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57. Robbins, *supra* note 19, at 193; *see also* Rollin M. Perkins, *"Knowledge" as a Mens Rea Requirement*, 29 HASTINGS L.J. 953, 956 (1978) ("The holding that 'knowledge,' as a mens rea concept, includes a guilt belief, does not exhaust its meaning.").

58. M. Wasik & M.P. Thompson, *"Turning a Blind Eye" As Constituting Mens Rea*, 32 N. IR. L.Q. 328, 342 (1981). The authors reject the objective assessment altogether. They argue that an actor should be found to have the requisite mental state only if at the time of the actus reus, or some closely related [time] the necessary mental element of advertence to the fact or risk, was at the forefront of the actor's mind. *Id.* Failure to do so, they argue, would facilitate a slide from the subjective standard to an unacceptable objective standard premised on the actor's passive knowledge determined by "what he ought to have known." *Id.*

59. *Id.* at 330-31. The authors perceive willful blindness as involving the problem of non-coincidence of mens rea and actus reus. *Id.* R.A. Duff perceives their theory as constituting three distinct and successive mental processes. At t_1 the actor averts the actual risk; at t_2, he closes his mind to it. Therefore, at t_3 he is willfully blind to the risk created by his action at t_1. R.A. Duff, *Caldwell and Lawrence: The Retreat from Subjectivism*, 3 OXFORD J. OF LEGAL STUD. 77, 92 (1983). However, in the allegory of the man who is willfully blind to the infidelity of his wife, Duff criticizes this time-based analysis as failing "to recognize that knowledge may be actual without being explicit." *Id.* The husband's structuring of his conduct, so as to avoid confirmation of the truth presupposes an implicit awareness of the possibility, but he is unlikely to make that realization explicit to himself. *Id.*

60. WILLIAMS, *supra* note 51, at 159 ("A court can properly find willful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realized its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is willful blindness.").

61. Perkins, *supra* note 57, at 956. A typical example of willful blindness is exhibited by the traveler who agrees to transport a package for a stranger who in turn offers payment for the service. Clearly, the traveler harbors a reasonable suspicion that the parcel contains contraband, but without further inquiry, it cannot be said that he or she definitively "knows" the illicit contents of the parcel. The doctrine of willful blindness permits such an inference. If apprehended, the traveler will undoubtedly claim ignorance, however, the doctrine circumvents both the defense and the subjective requirement of actual knowledge by imputing such knowledge to the traveler.

to him knowledge of what he would have known had he not chosen to remain ignorant of the fact.[62] Such culpable conduct has assumed various names,[63] but semantics aside, the import of the doctrine is to establish a link between knowledge and deliberate ignorance by assigning equal culpability to each.[64]

In American jurisprudence, the doctrine of willful blindness has been recognized as a substitute for actual knowledge for nearly a century.[65] Initially, however, judges were hesitant to endorse the doctrine and most decisions that relied upon the theory did so with little support for their conclusions.[66] During the 1970s, the modern doctrine of willful blindness emerged as a result of federal narcotics prosecutions.

The interplay of two events was instrumental in the establishment of the modern doctrine. First, Congress passed the Comprehensive Drug Abuse Prevention and Control Act of 1970.[67] This statute prohibits knowing importation of controlled substances[68] and knowing possession of such substances with an intent to distribute.[69] However, because the definition of knowledge at the time was largely confined to actual knowledge, drug traffickers and users charged under the statute were able to successfully invoke the deliberate ignorance defense.[70] Second, in *Turner v. United States*,[71] the Supreme Court adopted the Model Penal Code definition of

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62. *Id.*

63. Willful blindness has assumed numerous aliases including: willful shutting of the eyes, deliberate ignorance, studied ignorance, connivance, purposely abstaining from all inquiry as to the facts, conscious avoidance, avoidance of any endeavor to know, a conscious purpose to avoid learning the truth, studied ignorance, and knowledge of the second degree and deliberately choosing not to learn. *See, e.g.*, PERKINS & BOYCE, CRIMINAL LAW § 4, at 867-68 (3d ed. 1982); Charlow, *supra* note 50, at n.1.

64. Robbins, *supra* note 19, at 196.

65. *See* Spurr v. United States, 174 U.S. 728 , 738-39 (1899) (endorsing jury instruction that if defendant had "shut his eyes to the fact and purposely refrained from inquiry or investigation for the purpose of avoiding knowledge," conviction was warranted); People v. Brown, 16 P. 1 (1887) (rejecting deliberate ignorance defense of defendant charged with procuring false evidence).

66. Robbins, *supra* note 19, at 203.

67. The Act provides in part that "it shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute or dispense . . . a controlled substance." 21 U.S.C. § 841(a)(1) (1988).

68. 21 U.S.C. § 952(a) (1988).

69. 21 U.S.C. § 841(1) (1988).

70. Robbins, *supra* note 19, at 200.

71. 396 U.S. 398 (1970). Eight months previously, in Leary v. United States, 395 U.S. 6 (1969), the court laid the ground work for *Turner*. In *Leary*, the defendant was charged with knowingly transporting illegally imported marijuana in violation of 21 U.S.C § 176(a). *Id.* at 8. At the time of the offense, the statute permitted an inference that mere possession of marijuana was sufficient to charge the defendant with knowledge of illegal importation. *Id.* at 46. Applying the Model Penal Code

knowledge, which recognizes deliberate ignorance as a substitute for knowledge.[72]

The Model Penal Code significantly limits the common law mens rea concept of knowledge.[73] Under the Model Penal Code, willful blindness requires awareness of a high probability of the existence of a fact and an absence of an actual belief that the fact does not exist.[74] This standard, explicitly adopted in *Turner*,[75] is an awkward restatement of the willful blindness doctrine[76] and presents two dilemmas. First, the "high probability" language encompasses the standard of both knowledge and recklessness, a problem which the drafters recognized but left unresolved.[77] Second, it is inconceivable that one can recognize the high probability that he is in receipt of proceeds derived from criminal activity, yet still believe that the proceeds are not in fact criminally derived.[78]

Turner legitimates the use of willful blindness as a substitute for knowledge, but it offers no explanation or guidance beyond that provided

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definition of knowledge, *id.* at 46 n.93, the Court concluded that, because of the large domestic supply of marijuana, it could not be said that the majority of marijuana users were aware that their marijuana had been imported. *Id.*

In *Turner*, the Court interpreted a similar section, 21 U.S.C. § 174, which prohibited knowingly receiving, concealing, and facilitating transportation of heroin. Section 174 provided that possession of a drug was sufficient to indicate knowledge of its importation. *Id.* at 416. Because the Court presumed that little or no heroin was produced in the United States, it held the presumption to be valid as to the heroin charge. *Id.* at 408-16. The presumption was held unconstitutional as applied to Turner's cocaine charge, as a significant portion of cocaine was produced domestically. *Id.* at 418-19.

72. MODEL PENAL CODE § 2.02(7) (1962).

73. Perkins, *supra* note 57, at 959; PERKINS & BOYCE, *supra* note 63 ("The Model Penal Code would restrict very greatly any criminal liability based upon knowledge.").

74. The Model Penal Code's interpretation of willful blindness is contained within its definition of knowledge: "When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist." MODEL PENAL CODE § 2.02(7) (1962).

75. *See supra* notes 71-72 and accompanying text.

76. Kenneth W. Simmons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 500 n.128 (1992). Simmons argues:

> First, by requiring subjective awareness of a high probability, it barely recognizes the doctrine, since there is often a thin distinction between believing something and believing that it is highly probable. Second, it liberalizes the doctrine by eliminating the usual requirement that the actor must have deliberately avoided knowledge in order to remain in ignorance.

Id.

77. *See* MODEL PENAL CODE § 2.02 cmt. 9 (1962) ("Whether such cases should be viewed as instances of acting recklessly or knowingly presents a subtle but important question.").

78. Simmons, *supra* note 76, at 500 n.128 (citing MICHAEL S. MOORE, LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP 86 (1984)). Moore concludes that the Model Penal Code assumes inconsistent beliefs. Simmons notes that Moore's hypothesis may be incorrect, but it is nevertheless supportable under the language of the Model Penal Code.

in the Model Penal Code.[79] As the Court failed to delineate a definitive willful blindness standard, the task fell to the trial courts.[80] Thus, the doctrine developed in an ad hoc fashion without sufficient critical analysis of the culpability requirements of knowledge as distinct from the culpability requirements of willful blindness.[81] The result has been confusion and rampant indeterminacy.[82]

A. United States v. Jewell

United States v. Jewell[83] is the touchstone for the modern doctrine of willful blindness and provides the definitive judicial analysis of the doctrine. In *Jewell*, the defendant was convicted of importing 110 pounds of marijuana. The marijuana had been concealed in a secret compartment in a car driven into the United States from Mexico.[84] The statute under which Jewell was prosecuted requires knowledge of the presence of the controlled substance.[85] Jewell testified that he did not know that marijuana was contained in the compartment.[86] However, there was evidence that Jewell knew of the compartment and had knowledge of facts indicating that it contained marijuana. Moreover, evidence indicated that Jewell

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79. *Turner*, 396 U.S. at 416 n.29. *See* Robbins, *supra* note 19, at n.65 and accompanying text. Nevertheless, relying upon *Leary* and *Turner*, the judiciary's use of willful blindness as a substitute for knowledge quickly progressed beyond drug trafficking to a variety of other offenses, including: filing false statements on income tax returns; making false statements to the Immigration and Naturalization Service; fraudulent use of the mails and wires; interstate transport of stolen treasury bills; and willfully harboring or concealing an escaped federal prisoner. *See, e.g.*, Robbins, *supra* note 19, at nn.66-71.

80. Charlow, *supra* note 50, at 1353 n.8.

81. *Id.* at 1353 nn.7-8.

82. *Id.* at 1353 n.8. Charlow provides an extensive listing of citations noting the seemingly random application of the willful blindness doctrine.

83. 532 F.2d 697 (9th Cir. 1976). In *Jewell*, the defendant requested an instruction requiring a finding of actual knowledge. *Id.* at 698. Rejecting the request, the trial judge instructed the jury that knowingly meant voluntarily and intentionally and not by accident or mistake. *Id.* at 699. The court of appeals, quoting the district court, stated:

> The government can complete their burden of proof by proving, beyond a reasonable doubt, that if the defendant was not actually aware that there was marijuana in the vehicle he was driving when he entered the United States his ignorance in that regard was solely and entirely a result of his having made a conscious purpose to disregard the nature of that which was in the vehicle, with a conscious purpose to avoid learning the truth.

Id. at 700.

On appeal, the majority concluded that "[t]he legal premise of these instructions is firmly supported by the leading commentators. . . ." *Id.*

84. *Id.* at 698.

85. 532 F.2d at 698. *See* 21 U.S.C. § 841(a)(1), discussed *supra* note 67.

86. There was circumstantial evidence, however, that Jewell had positive knowledge of the contraband and that his contrary testimony was false. 532 F.2d at 698-99.

deliberately avoided positive knowledge of the contraband to avoid responsibility in the event of discovery.[87]

Affirming the conviction, the Ninth Circuit used a three-step rationale for equating deliberate ignorance with knowledge.[88] First, the court noted that the deliberate ignorance doctrine is found "throughout the criminal law."[89] Second, the court noted that substantive justification for the rule exists because "deliberate ignorance and positive knowledge are equally culpable."[90] Finally, for textual justification, the court adopted the Model Penal Code definition of "knowledge," which reflects the belief that one "knows" facts even in the absence of subjective certainty.[91] Citing "society's interest" in punishing those who are "equally culpable,"[92] the court sought to eviscerate the deliberate ignorance defense by acknowledging a separate mens rea of willful blindness.[93]

The court's decision was not unanimous and contains a spirited dissent reflecting disagreement over the proper application of the doctrine. Judge Kennedy criticized relaxation of the Model Penal Code standard[94] to allow conviction based upon an objective theory of knowledge.[95] Stressing the importance of evidence of subjective belief, albeit circumstantial, Kennedy read section 2.02(7) of the Model Penal Code as a definition rather than a substitute for knowledge.[96] Although equally culpable, Kennedy viewed applying willful blindness under a statute specifically requiring knowledge as an element of the crime as an unjustified expansion of the statutory

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87. *Id.*

88. Robbins, *supra* note 19, at 204.

89. 532 F.2d at 700 (quoting WILLIAMS, *supra* note 57, at 157). The court relied upon Professor Williams' conclusion that "[t]he rule that willful blindness is equivalent to knowledge is essential, and is found throughout the criminal law." WILLIAMS, *supra* note 57, at 157.

90. 532 F.2d at 700. The court explicitly adopted the Model Penal Code formulation of willful blindness contained in section 2.02(7). "To act 'knowingly,' therefore, is not necessarily to act only with positive knowledge, but also to act with an awareness of the high probability of the existence of the fact in question. When such awareness is present, 'positive' knowledge is not required." 532 F.2d at 700.

91. *Id.* at 700-01.

92. *Id.* at 704.

93. *Id.* at 703. To construe "knowingly" as requiring positive knowledge would stymie the Drug Control Act's general purpose to address drug abuse in the United States as "it cannot be doubted that those who traffic in drugs would make the most of [the deliberate ignorance]." *Id.* at 703.

94. *See supra* note 74.

95. *Jewell*, 532 F.2d at 707.

96. *Id.* "This provision requires an awareness of a high probability that a fact exists, not merely a reckless disregard, or a suspicion followed by a failure to make further inquiry." *Id.* at 707. The court supported this statement with citations to Turner v. United States, 396 U.S. 398, 416 & n.29 (1970), and Leary v. United States, 395 U.S. 6, 46 n.93 (1969).

language.[97] Judge Kennedy concluded that when a statute specifies a mens rea of knowledge, the substitution of another mental state is unjustified even if the court deems that both mental states are equally culpable.[98]

B. Deconstructing Willful Blindness

Despite its wide acceptance, there is an undercurrent of dissatisfaction with the willful blindness instruction[99] and courts have not hesitated to impose their own restrictions upon its application.[100] Equating willful blindness with actual knowledge is inherently problematic as the two standards are not interchangeable.[101] Judicial substitution of willful blindness for actual knowledge pushes the limits of judicial discretion[102] and may contravene the Due Process Clause of the Constitution.[103] In

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97. *Jewell*, 532 F.2d at 706.

98. *Id.* at 706. Judge Kennedy criticized the majority's decision on several alternate grounds as well. First, he argued that the "conscious purpose" instruction was inconsistent with the mens rea of intent. *Id.* at 705. "It is difficult to explain that a defendant can specifically intend to distribute a substance unless he knows he possesses it." *Id.* Second, Judge Kennedy found the willful blindness doctrine uncertain in scope. *Id.* Last, he inexplicably expressed concern that one problem with the willful blindness doctrine is its "bias towards visual means of acquiring knowledge." *Id.*

99. United States v. Ramsey, 785 F.2d 184, 189 (7th Cir.), *cert. denied sub nom.* McCreary v. United States, 476 U.S. 1186 (1986).

100. *See, e.g.*, United States v. Garzon, 688 F.2d 607, 609 (9th Cir. 1982) ("The instruction should be given rarely because of the risk that the jury will convict on a standard of negligence: that the defendant should have known his conduct illegal."); United States v. Valle-Valdez, 554 F.2d 911, 914 (9th Cir. 1977) (dismissing indictment because of deficient jury instruction which failed to state that defendant is culpable only if "he was aware of the high probability that the vehicle carried contraband."); United States v. Murrieta-Bejarano, 552 F.2d 1323, 1325 (9th Cir. 1977) (concluding that a willful blindness instruction should not be given "in every case where a defendant claims a lack of knowledge, but only . . . where, in addition, there are facts that point in the direction of deliberate ignorance."). *Accord* United States v. Aleman, 728 F.2d 492, 494 (11th Cir. 1984); United States v. Battencourt, 592 F.2d 916, 918 (5th Cir. 1979).

In United States v. Esquer-Gomez, 550 F.2d 1231 (9th Cir. 1977), the court reversed the defendant's conviction because the judge had not given the balancing portion of the willful blindness instruction. *Id.* at 1235. The judge did not instruct the jury that knowledge is established by awareness of a high probability "unless [the defendant] actually believes it does not exist." *Id.* at 1235 (quoting *Jewell*, 532 F.2d at 704 n.21). "The judge gave only the part of the instruction that favored the government." *Id.*

101. *See, e.g.*, Robbins, *supra* note 19, at 220-27 (noting that willful blindness is evidence of recklessness and not knowledge); Comment, *Willful Blindness as a Substitute for Criminal Knowledge*, 63 IOWA L. REV. 466, 473 (1977) (applying standards of strict construction, a willful blindness jury instruction permits finding guilt from mere suspicion and should not be permitted because "[s]uspicion implies a lack of, rather than the presence of knowledge.").

102. *See supra* notes 51-53.

103. Several authors have commented that use of the willful blindness doctrine as a substitute for knowledge is unconstitutional. *See, e.g.*, Robbins, *supra* note 19, at 194-95, 231-32; Comment, *supra*

addition, there is concern about a jury's ability to properly apply the standard.[104]

In *United States v. Ramsey*,[105] the Seventh Circuit addressed the inadequacy of its own willful blindness instruction,[106] which it deemed "somewhat opaque"[107] and unhelpful to jurors.[108] The court initially noted that, although the doctrine may be useful as a judicial concept, it only confounds the lay juror.[109] The court observed that the doctrine's inherent ambiguities and arcane language do not fully convey to a jury that a defendant who has enough knowledge to prompt an investigation, but then fails to do so, really does "know" all that the law requires for convic-

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note 101, at 466-67, 472-73.

The outline of the argument is as follows: First, relying on the separation of powers principle as enunciated in *Morisette*, legislators, not courts, make law. Thus, courts are acting unconstitutionally when they substitute a different mens rea requirement than contained in the statute. *See* United States v. Morisette, 324 U.S. 246, 263 (1962) ("[T]he federal judiciary . . . should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute."); United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 93 (1820) ("It is the legislature, not the court, which is to define a crime, and ordain its punishment."). Second, the Due Process Clause of the Fifth Amendment requires that each element of a crime be proved beyond a reasonable doubt. *See In re* Winship, 397 U.S. 358, 364 (1970) ("[T]he due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). *But see* SINGER, *supra* note 51, at 7. *See generally* Charlow, *supra* note 50, at 1355 n.11 (discussing unconstitutionality of judicial substitution of mens rea requirements).

104. For an analysis of *Jewell*-based instructions and a discussion of potential inconsistent jury conclusions, see Charlow, *supra* note 50, at 1419-23. Charlow questions whether a jury is capable of discerning the subtle distinction between recklessness and willful blindness. "The danger here is that the reckless will be convicted as readily as the knowing, and that result is not what either the legislature or the Model Penal Code intended." *Id.* at 1422 (footnote omitted).

105. 785 F.2d 184 (7th Cir. 1986).

106. The court analyzed instruction 4.05 from the Seventh Circuit's Manual on Jury Instructions in Federal Criminal Cases (1965). The following instruction was given by the district court:

> The word 'knowingly'. . . means that the act (or omission) was done voluntarily and purposefully, and not because of mistake or accident. Knowledge may be proven by the defendant's conduct, and by all the facts and circumstances surrounding the case. No person can intentionally avoid knowledge by closing his or her eyes to facts which should prompt him or her to investigate.

785 F.2d at 189.

Citing cases rejecting "every possible challenge" to the instruction, the Seventh Circuit upheld use of instruction 4.05 despite the defendant's claim that it coerces testimony by placing pressure upon defendants to explain precisely what he or she knew and what inquiry, if any, was made. The court rejected this line of reasoning concluding that the pressure to testify "comes from the evidence, not from the instruction." *Id.*

107. *Id.* (quoting United States v. Burns, 683 F.2d 1056, 1061 (7th Cir. 1982), *cert. denied*, 459 U.S. 1178 (1983)).

108. *Ramsey*, 785 F.2d at 189-90.

109. *Id.*

tion.[110] Conversely, the court stated that it is important to make the jury understand that a large amount of information is required to prompt further investigation; otherwise, the prosecution is relieved of its burden of proving knowledge beyond a reasonable doubt.[111] The court did not go so far as to condemn the deliberate ignorance instruction, but it urged the adoption of a new instruction that would better explain the purpose of the doctrine and the factual basis required to support a finding of culpability under its terms.[112]

Soon after the *Jewell* decision, the Ninth Circuit recognized the dangers of jury indecisiveness and sought to limit the application of the willful blindness instruction. In *United States v. Murrieta-Bejarano*,[113] the defendant challenged the propriety of an instruction based on the Model Penal Code.[114] The court upheld the conviction but cautioned that the *Jewell* instruction should not be given in all cases in which the defendant claims lack of knowledge, "but only in those comparatively rare cases

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110. *Id.*

111. *Id.*

112. *Id.* at 190-91. The court's 1980 pattern instructions omitted the deliberate ignorance instruction altogether suggesting that the "subject should be left to argument by counsel rather than formal instructions from the judge." *Id.* at 191. Previously, in United States v. Josefik, 753 F.2d 585, 589 (7th Cir.), *cert. denied sub nom.*, Suteras v. United States, 471 U.S. 1055 (1985), the court suggested several alternative willful blindness instruction formulations. 785 F.2d at 189. The court went on to criticize the last sentence of instruction 4.05 as "obscure" and proffered two alternate instructions that explain instruction 4.05 in plain language. The court's first instruction read as follow:

> You may infer knowledge from a combination of suspicion and indifference to the truth. If you find that a person had a strong suspicion that things were not what they seemed or that someone had withheld some important facts, yet shut his eyes for fear of what he would learn, you may conclude that he acted knowingly as I have used the word.

Id. at 190 (quoting PERKINS & BOYCE, *supra* note 63).

The court's second instruction stated:

> The element of knowledge may be satisfied by inferences drawn from proof that a defendant deliberately closed his eyes to what would otherwise have been obvious to him. A finding beyond a reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a defendant's knowledge of a fact may be inferred from willful blindness to the existence of fact. It is entirely up to you as to whether you find any deliberate closing of the eyes, and the inference to be drawn from any such evidence. A showing of negligence or mistake is not sufficient to support a finding of willfulness or knowledge.

Id. at 190-91 (quoting 1 DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 14.09 (3d ed. 1977)).

113. 552 F.2d 1323 (9th Cir. 1977).

114. *Id.* at 1324. The trial court's instruction provided in part that "[t]he government can complete their burden of proof by proving beyond a reasonable doubt that the defendant was aware of a high probability of the existence of a controlled substance in the vehicle he was driving when he entered the United States." *Id.*

where, in addition, there are facts which point in the direction of deliberate ignorance."[115] Failure to restrict the instruction would create an impermissible presumption of guilt and allow a jury to infer knowledge when it otherwise would not have done so.[116]

Incorporating the above-mentioned limitations, the willful blindness instruction has survived judicial scrutiny relatively intact. Although willful blindness is recognized as a distinct mental state,[117] it occupies a tenuous middle ground between actual knowledge and recklessness. As a hybrid mental state, willful blindness is a product of both knowledge and recklessness. Nevertheless, it cannot be used interchangeably with either of these traditional concepts of culpability.[118] The task then is to determine what activity the willful blindness doctrine intends to punish and to form a definition that is distinct from recklessness and less culpable than actual knowledge.

C. *The Conflict of Objective and Subjective Knowledge*

Under the MLCA, one who engages in a monetary transaction knowing that the property involved is derived from some unlawful activity is subject to prosecution.[119] It is unclear, however, whether the statute requires

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115. *Id.* at 1325.

116. *Id. See also* United States v. Picciandra, 788 F.2d 39, 46 (1st Cir.), *cert. denied*, 479 U.S. 847 (1986). In *Picciandra*, the First Circuit proposed a concise three-step test to determine when the deliberate ignorance instruction is appropriate: (1) "when a defendant claims a lack of knowledge"; (2) "the facts suggest a conscious course of deliberate ignorance"; and (3) the instruction is formulated "so that the jury [knows] that it [is] permitted, but not required, to draw the inference." *Id.*

117. *See supra* notes 57-60 and accompanying text.

118. *See* Charlow *supra* note 50, at 1355 n.10, citing Robbins, *supra* note 19, at 220-27; Comment, supra note 101, at 473. *See also* WILLIAMS, *supra* note 51, at 159 (stating recklessness is "not quite the same thing as willful blindness.") *But see* Robbins, *supra* note 19, at 196, 233-34 ("[A] frank admission that deliberate ignorance is in fact recklessness will likely result in more accurate and less prejudicial jury instructions, as judges would be applying a familiar standard."); J. Edwards, *The Criminal Degrees of Knowledge*, 17 MOD. L. REV. 294, 298, 303-05 (1954) (referring to the "close relationship" between recklessness and willful blindness and citing with approval the proposition that willful blindness is "indistinguishable from recklessness.").

However, unlike knowledge, recklessness contains both objective and subjective elements. *See* Charlow, *supra* note 50, at 1377. Recklessness is a conscious disregard of a substantial and unjustifiable risk representing a significant deviation from the reasonable-person standard of care. *See* MODEL PENAL CODE § 2.02(2)(C) (1962). Knowledge and recklessness are distinguishable in that knowledge requires an awareness of the existence of a fact while recklessness requires only recognition of its probability. *See* Robbins, *supra* note 19, at 222.

119. *See supra* notes 27-33 and accompanying text.

objective or subjective criteria.[120] Subjective knowledge implies "knowledge [of a particular fact or circumstance] possessed by some knowing subject" while objective knowledge "consists of the logical content of our theories, conjectures, [and] guesses."[121] Viewed separately, the distinction between objective and subjective knowledge is readily apparent. However, when intertwined within the context of the willful blindness doctrine, imposition of objective standards upon subjective perception blurs the distinction.

In willful blindness prosecutions, subjective knowledge is tainted by the imposition of objective standards incompatible with a knowing scienter requirement. To have knowledge, one must have subjective certainty.[122] Subjective certainty requires awareness of the existence of a particular fact or circumstance.[123] Conversely, absence of a belief of a particular fact negates knowledge of that fact.[124] Thus, as a mens rea requirement, knowledge requires a subjective rather than an objective test.[125] In short, a finding of knowledge under the MLCA requires: (1) a belief or feeling of near certainty, (2) that is subjective and (3) that is correct.[126]

An objective search for subjective knowledge is problematic. A standard requiring the fact finder to determine whether the defendant harbored the requisite knowledge of some unlawful activity is rendered unworkable by the problem of verification.[127] The fact finder's inquiry inevitably becomes indirect and imposes objective standards upon the defendant's state of subjective knowledge.[128] Without resorting to objective criteria, for example, "ought to have known" or "the reasonable person would have

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120. The Supreme Court has not hesitated to strike down ambiguous standards. In Colautti v. Franklin, 439 U.S. 379 (1970), the Court rejected a Pennsylvania anti-abortion statute as unconstitutionally vague. The statute prohibited abortions except where the administering physician determined that "based on his experience, judgement or professional competence," the fetus is not "viable." *Id.* at 391. Noting the inherent ambiguity in such a standard, the Court concluded that it "is unclear whether the statute imports a purely objective standard, or whether it imposes a mixed subjective and objective standard." *Id.* The Court refused to endorse a provision that imposes criminal liability on such "confusing and ambiguous criteria." *Id.* at 394.

121. Robbins, *supra* note 19, at 218 (quoting K. POPPER, OBJECTIVE KNOWLEDGE: AN EVOLUTIONARY APPROACH 72 (1972)).

122. Robbins, *supra* note 19, at 219-20.

123. MODEL PENAL CODE §2.02(2)(b) (1962).

124. Charlow, *supra* note 50, at 1373.

125. PERKINS & BOYCE, *supra* note 63.

126. Charlow, *supra* note 50, at 1376.

127. Clare Dalton, *An Essay in the Deconstruction of Contract Theory*, 94 YALE L.J. 997, 1025 (1985).

128. *Id.*

known," the fact finder is incapable of identifying subjective intent. Thus, the search for subjective knowledge inevitably leads full-circle back to imposing objective criteria.[129] The resulting interpretive dilemma forces a jury to search in vain for the elusive correspondence between subjective knowledge and objective proof.[130] The resulting illegitimate chain of inferences leaves jurors in doubt and thereby dilutes the criminal law.[131]

Objective assessment of another person's state of mind necessarily depends upon circumstantial evidence. However, the MLCA provides no guidance detailing how a fact finder is to ascertain the existence of evidence sufficient to sustain a conviction. Judges and juries are left no choice but to impose at least some degree of objectivity into their assessment of mens rea.[132] This indeterminacy allows a loose interplay between objective and subjective standards within which a fact finder can justify finding or not finding any desired result in a given case.[133]

III. APPLICATION OF THE WILLFUL BLINDNESS DOCTRINE IN MONEY LAUNDERING PROSECUTIONS

The MLCA's lack of a clear scienter requirement fosters haphazard application of the statute and contradictory results. In *United States v. Antzoulatos*,[134] the Seventh Circuit attempted to determine when a merchant or seller knows that a transaction is being consummated with tainted money.[135] Concluding that it is "well settled" that willful blindness is the equivalent of knowledge, the court endorsed the conscious

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129. *Id.* at 1026.

130. *Id.* at 1100. *See supra* notes 105-08 and accompanying text.

131. *In re* Winship, 397 U.S. 358, 364 (1970).

132. *See* Wasik & Thompson, *supra* note 58, at 329 (asserting that subjective/objective dichotomy will remain an issue due to problems inherent in "applying . . . purely subjective principles in courts of law").

133. Dalton, *supra* note 127, at 1034.

134. 962 F.2d 720 (7th Cir. 1992).

135. *Id.* at 726. Given the vast amount of direct evidence that Antzoulatos actually knew that he was dealing with drug dealers, the application of the willful blindness doctrine is almost an afterthought. However, *Antzoulatos* is nonetheless useful as it is demonstrative of how courts apply the doctrine in money laundering prosecutions of individuals not charged with a predicate offense under the statute. The evidence at the time of sentencing demonstrated Antzoulatos' complicity in the money laundering scheme. *Id.* at 721-23. Antzoulatos allowed one drug dealer access to his company's checks to purchase cars at area auto auctions. *Id.* at 722. He allowed this dealer on several occasions to pay him back in cash increments designed to avoid currency transaction requirements. *Id.* Several of the customers were prepared to testify at trial that they told Antzoulatos directly that they were drug dealers and needed to conceal their drug profits. *Id.* at 722-23. On one occasion, Antzoulatos titled a car in the name of a client's one-year-old nephew. *Id.* at 722.

avoidance instruction when supported by the evidence.[136]

The Seventh Circuit first rejected the defendant's claim that the Due Process Clause of the Fifth Amendment protects merchants' rights to contract or engage in a lawful occupation.[137] Interpreting substantive due process rights in the post-*Lochner*[138] era, the court noted that due process does not provide "blanket protection" against government interference with property rights.[139] The court held that the MLCA does not violate due process because it places only a "narrow restriction" upon a merchant's right to sell his property.[140] Merchants can still engage in transactions, they are merely barred from selling to those whom they know to be money launderers.[141]

Addressing the problem of how to identify knowledge, the court fashioned a test premised upon the defendant's direct observation of unlawful activity or admission by the client that the transaction money is tainted.[142] Recognizing the problems inherent in its own test,[143] the

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136. *Id.* at 724 (citing *Jewell*, 532 F.2d 697, 700 (1976)). Although it ultimately rejected Antzoulatos' claim that the MLCA is void for vagueness, the court recognized the closeness of the question when the statute is applied to a car dealer not directly involved in the actual drug dealing. The court noted that "[a] drug dealer, if convicted on both a narcotics count and a money laundering count, by hypothesis knows that he is using tainted proceeds in the transaction, and also knows that his purpose is to conceal the nature or source of the proceeds. The merchant, on the other hand, has not been involved with the proceeds prior to the transaction." *Id.* at 726.

137. *Id.* at 725. The Seventh Circuit cited several cases affirming the continued importance of substantive due process rights, including: Moore v. City of East Cleveland, 431 U.S. 494 (1977) (finding due process right for family members to live together); Roe v. Wade, 410 U.S. 113 (1973) (finding due process right of women to chose abortion in certain circumstances); Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding parents entitled to educate their children outside of public schools). However, the court observed that "[s]ince the *Lochner* era . . . any substantive due process right to contract, or to engage in a lawful occupation has been sharply curtailed." *Id.* (citing *Moore*, 431 U.S. at 501).

138. Lochner v. New York, 198 U.S. 45 (1905) (holding that the federal government cannot intervene in the individual right to contract). *Lochner* has been considerably eroded to the point where any rational explanation for exercise of state police power will be upheld. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 501 (1977).

139. *Antoulatos*, 962 F.2d at 725 (quoting Schroeder v. City of Chicago, 927 F.2d 957, 961 (1991) ("'[W]e do not consider [substantive due process] a blanket protection against unjustifiable interferences with property. That way *Lochner* lies.'")).

140. 962 F.2d at 725. Assuming *arguendo* that Antzoulatos had a due process right to sell lawfully acquired cars, the court concluded that such a right did not immunize his conduct and the restriction could not amount to a government taking. *Id.* Section 1956's "narrow restriction" only prohibited Antzoulatos "from selling to persons he knows are drug dealers, and only then when the known purpose of the sale is to conceal the source, nature, or ownership of the proceeds." *Id.*

141. *Id.*

142. *Id.* at 726-27. Knowledge can reasonably be attributed to a merchant "when the merchant personally observes the unlawful activity and sees that the proceeds are being used to buy goods from

court nevertheless expressed confidence that courts are capable of "ferreting out" prosecutions that rely upon insufficient evidence.[144] Wishful thinking, however, does little to flesh out the parameters of knowledge under the MLCA and underscores the potential for capricious and irreconcilable results.

The Fourth Circuit's decision in *Unites States v. Campbell*[145] typifies the inherent ambiguity in the application of willful blindness in money laundering prosecutions. In *Campbell*, the evidence showed that Ellen Campbell, a realtor, had included unreported cash in the sale of a home to a reputed drug dealer.[146] Campbell was convicted of two counts of money laundering.[147] However, the federal trial judge overturned the jury's guilty verdict and acquitted Campbell on the basis of her post-trial motion.[148] After correctly reading the elements of the offense, the trial judge stated that in a prosecution of a person other than the actual money launderer, the Government must prove "a purpose of concealment" and "knowledge of the . . . [money launderer's] activities."[149]

On appeal, the Fourth Circuit concluded that the district court had erred in interpreting the correct elements of the offense.[150] The plain language

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him. It also is presumably sufficient if the buyer says directly to the merchant: 'this money is tainted.'" *Id.*

143. *Id.* The court recognized the problematic situation in which a merchant is asked to rely upon the word of a third person. *Id.* In addition, the court acknowledged the difficulty in permitting, or in some instances requiring, the merchant to rely upon the physical appearance of clients or the presence of unexplained wealth. *Id.* *See infra* notes 145-55 and accompanying text (discussing money laundering prosecution of real estate agent in which physical appearance of client proved decisive).

144. 962 F.2d at 727. As "a good example of careful application of Section 1956(a)(1)(B) to a merchant," the court cited United States v. Campbell, 777 F. Supp. 1259 (W.D.N.C. 1991).

145. 977 F.2d 834 (4th Cir. 1992).

146. 777 F. Supp. 1259, 1261-62 (1991). Unable to secure a loan for the purchase price of $182,500, the purchaser, Mark Lawing, asked the sellers to accept $60,000 in cash under the table and reduce the selling price to $122,500. They consented. *Id.* at 1261. Campbell had been informed by a co-worker that the broker-in-charge had previously handled a cash transaction in that manner. *Id.*

At the closing, Lawing arrived in the broker's office with a brown paper bag containing the cash. The money was counted and turned over to the sellers. One of the sellers testified that upon inquiry as to the source of the money, Campbell replied that she "didn't care where the money came from." *Id.* at 1262. In addition, emphasis was placed on Campbell's alleged statement that the cash involved "may have been drug money." *Id.* at 1262. The trial court discounted the evidentiary value of the testimony because it was at odds with her prior grand jury testimony. *Id.* at 1266-67. The Fourth Circuit criticized the trial judge for making an impermissible judgment on witness credibility which should have been left to the jury. 977 F.2d at 858-59.

147. 777 F. Supp. at 1259.

148. *Id.* at 1267.

149. *Id.* at 1265.

150. 977 F.2d at 857-58.

of the statute requires the Government to prove only that the defendant knew that the transaction was designed to conceal illegal proceeds.[151] In short, the knowledge component collapses into a single inquiry: "Did Campbell know that [the] funds were derived from an illegal source?"[152] Based upon the evidence presented,[153] the court concluded that a reasonable jury could not only find Campbell willfully blind to the fact that her client was a drug dealer, but also that the purchase of the property was intended to conceal the proceeds of his illegal drug operation.[154]

The *Campbell* court placed its faith in the reasonable jury. However, juries have proven no more able than judges at interpreting the willful blindness doctrine.[155] The burden thus shifts to Congress to incorporate an adequate willful blindness provision in the MLCA that will redress the current state of affairs.

IV. PROPOSAL FOR AMENDING THE MLCA

Congress should codify its tacit approval of the substitution of willful blindness for actual knowledge in money laundering prosecutions.[156] The failure to do so has engendered a discrepancy between the MLCA's statutory requirement of actual knowledge and the judiciary's adoption of a willful blindness definition that does not comport with what is traditionally understood to be knowledge.[157] The dangers inherent in maintaining the status quo are twofold. First, the judiciary's adoption of an inconsistent willful blindness standard threatens to usurp the exclusive congressional mandate to legislate.[158] Second, willful blindness is simply not the

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151. *Id.* at 858.

152. *Id.*

153. The other evidence included Campbell's statement concerning the origin of the cash, the fraudulent nature of the transaction, and testimony concerning Lawing's lifestyle. *Id.* at 857. The evidence showed that Lawing drove a new Porsche, carried a cellular phone, flashed large amounts of cash, and consumed beer while away from his purportedly legitimate business during working hours. 777 F. Supp. at 1261. The trial court discounted this behavior as not inconsistent with that of other affluent residents of the area who were not money launderers. *Id.* at 1265-66.

154. 977 F.2d at 859-60.

155. *See supra* notes 104-16 and accompanying text.

156. *See supra* notes 45-50 (discussing Congress' tacit adoption of willful blindness as a substitute for actual knowledge).

157. Charlow, *supra* note 50, at 1429 ("Although willful ignorance is usually employed to satisfy a statutory mens rea of knowledge, the most prevalent definitions of the doctrine describe a state of mind that is significantly different from what we generally understand to be knowledge, and that is not as culpable as knowledge in all or most circumstances.").

158. *See supra* notes 51-52 (discussing *Morisette* and limitations imposed upon the judiciary when it seeks to actively interpret Congressional intent). *See also* Robbins, *supra* note 19, at 232 (stating that

equivalent of recklessness or actual knowledge.[159] Congress clearly intended that willful blindness suffice as a culpable mens rea for prosecution under the MLCA, but it failed to do so explicitly.[160] This oversight should now be remedied by adoption of a clearly defined willful blindness provision in the MLCA.

The willful blindness doctrine defies categorization because it occupies the attenuated middle ground between actual knowledge and recklessness.[161] Nevertheless, courts and commentators alike have persisted in categorizing willful blindness according to Model Penal Code-based,[162]

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the judiciary's adoption of alternate willful blindness standard "infringes on the legislature's province of defining criminal conduct").

159. *See* discussion *supra* part II.C.

160. *See* SENATE REPORT, *supra* note 34, at 9-10 (citing *Jewell*) ("The 'knowing' scienter requirements are intended to be construed, like existing 'knowing' scienter requirements, to include instances of 'willful blindness.'").

161. *See* Charlow, *supra* note 50, at 1390 ("[M]ost definitions of willful ignorance delineate a mens rea that is the equivalent neither of knowledge nor recklessness."); Robbins, *supra* note 19, at nn.223, 227-31 (noting that Model Penal Code definition of willful blindness blurs the distinction between recklessness and knowledge leading courts to administer improper instructions allowing for convictions based upon negligence); Comment, *supra* note 101, at 477 (discussing willful blindness instruction that failed to differentiate between negligence and recklessness).

162. *See supra* notes 73-78 (discussing Model Penal Code's interpretation of willful blindness and its subsequent adoption by the Supreme Court in *Turner*). Professor Robbins, for example, proposes bridging the gap between willful blindness and knowledge by discarding the Model Penal Code's high-probability/unless standard and adding recklessness or specific deliberate ignorance provisions to statutes requiring actual knowledge as a prerequisite for conviction. *See* Robbins, *supra* note 19, at 233. He proposes the following sample statute and corresponding jury instructions prohibiting the importation of drugs:

> (1) It shall be unlawful for any person knowingly or recklessly to import into the Customs territory of the United States any controlled substance without proper authorization [as described elsewhere].
>
> (2) One acts knowingly with respect to facts, conduct, attendant circumstances, or results if he is aware that such facts, circumstances, conduct, or results exist or will be created or if he is virtually certain that such facts, circumstances, conduct, or results exist or will be created.
>
> (3) One acts recklessly with respect to facts, attendant circumstances, conduct, or results if he consciously disregards a substantial risk that such facts, circumstances, conduct, or results exist or will be created.
>
> One consciously disregards a substantial risk if he recognizes a high probability that such facts, circumstances, conduct, or results exist or will be created, unless he actually believes that they do not exist or will not be created.

Id.

Professor Charlow identifies three problems with Robbins' proposed statute. First, Robbins' statute does not recognize that Model Penal Code-based willful blindness is more culpable than recklessness. Charlow, *supra* note 50, at 1385-86. Second, the proposal renders recklessness as culpable as willful blindness. Thus, by equating willful blindness with knowledge and equating willful blindness with recklessness, knowledge is equated with recklessness. *Id.* at 1386. Third, like the Model Penal Code, Robbins' proposal includes the problematic "balancing" provision. *Id.* The net result is to exculpate

recklessness-based,[163] and willfulness-based[164] definitions that are respectively ill-suited to the traditional notion of willful blindness. Professor Robin Charlow advocates a "more culpable" form of willful blindness that circumvents these competing definitions entirely by focusing on what behavior the law seeks to punish.[165] However, given the

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one who actually believes the contrary if he recognizes a high probability of the fact, but inculpate one who actually believes the contrary if he merely recognizes a substantial risk of the fact. *Id.* at 1385.

See also PERKINS & BOYCE, *supra* note 63, at 875 (providing another Model Penal Code-based definition of willful blindness). The Perkins & Boyce definition is more demanding than recklessness:

> Whenever knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person believes that it probably exists. And one is deemed to have knowledge of what he would have known if he had not deliberately avoided knowing. Deliberate avoidance of knowledge may be established by direct proof, or by proof that a person is aware of a high probability of the existence of the fact unless he actually believes that it does not exist.

Id.

163. Definitions of willful blindness relying solely upon reckless disregard or indifference to the truth describe recklessness and do not sufficiently substitute for actual knowledge. "Because recklessness is not knowledge, definitions of willful ignorance using recklessness-based language alone or as an alternative to willfulness-based language describe a state of mind that is not knowledge and should not be used to satisfy a knowledge requirement." Charlow, *supra* note 50, at 1387-88. Professor Charlow lists a number of Ninth Circuit cases to demonstrate that reckless disregard is neither knowledge nor deliberate ignorance. *See, e.g.*, Unites States v. Pacific Hide & Fur Depo, Inc., 768 F.2d 1096, 1098 (9th Cir. 1985) (holding willful ignorance instruction inappropriate when defendant "was mistaken, recklessly disregarded the truth, or negligently failed to inquire"); United States v. McAllister, 747 F.2d 1273, 1275 (9th Cir. 1984), *cert. denied*, 474 U.S. 829 (1985) ("The government may not carry its burden by demonstrating that the defendant was mistaken, recklessly disregarded the truth, or was negligent in failing to inquire."); United States v. Williams, 685 F.2d 319, 321 (9th Cir. 1982) ("Although conscious avoidance of the truth may constitute knowing conduct, reckless conduct alone is not sufficient.") *Jewell*, 535 F.2d at 704 n.21.

164. Willfulness-based instructions imply that an individual intentionally avoided knowledge and was successful in doing so. Charlow, *supra* note 50, at 1388.

165. *Id.* at 1429. Charlow asserts that her definition is nearly as culpable as knowledge and comports more closely than current definitions with the behavior that society desires to punish. *Id.* Charlow proposes:

> A person is willfully ignorant of a material fact if the person (1) is aware of very good information indicating that the fact exists; (2) almost believes the fact exists; and (3) deliberately avoids learning whether the fact exists (4) with a conscious purpose to avoid the criminal liability that would result if he or she actually knew the fact.

Id.

Charlow remarks that society desires to punish "the knowing actor because we want to condemn his willingness to act on his correct belief that what he is doing is wrong." *Id.* at 1414. The act is doubly repugnant because the actor knows his actions are illegal but proceeds nonetheless. *Id.* When society passes judgment on a willfully blind defendant, but not a reckless actor, to the same degree as a knowing actor, the purpose is to redress an act equally as offensive as knowing. *Id.* at 1414-15. In short, we want to punish "the individual who may not know but is on the verge of knowing, and who displays the kind of callousness that we find in a knowing actor." *Id.* (citations omitted).

With the exception of the fourth element, however, Charlow's proposal is simply a restatement of

harshness of sanctions imposed under the MLCA,[166] care must be taken to avoid punishing those who are truly ignorant or merely reckless.[167]

Proper application of the willful blindness doctrine requires a two-step analysis. First, the fact finder must assess the actor's subjective mental state to determine whether an inference of actual knowledge of the transaction's purpose is warranted. Second, the fact finder must then determine why the actor failed to notice any obvious risks or telltale signs of illegal purpose.[168] It is not inconceivable that a merchant may be unaware of obvious signs of illicit conduct that he should have noticed. However, this does not preclude the possibility that at the time of the transaction the merchant was virtually certain of, or willfully blind to, the risk of the money laundering potential of the transaction.[169] Therefore, it is crucial to distinguish a willfully blind actor, "who *wants* or *needs* to be ignorant of some fact or risk, from one who does not notice it because he simply does not care" or is simply the naive-pawn of his clients.[170]

Imposition of a willful blindness standard as an alternate mens rea under the MLCA safeguards against the conviction of unsuspecting merchants and removes the confusion surrounding proper application of the doctrine. In addition, establishment of a separate mental state between knowledge and recklessness best comports with the behavior that society wants to punish. Both *Antzoulatos*[171] and *Campbell*[172] are easy cases because of the

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existing willful blindness doctrine. *See, e.g.*, Duff, *supra* note 59, at 92 (citing G. WILLIAMS, TEXTBOOK OF CRIMINAL LAW 78 (1978)). The fourth element imposes a motivation requirement that is largely irrelevant to the mens rea requirement of knowledge. In a willful blindness prosecution of a merchant, the only relevant inquiry is not his purpose or motivation, but rather his knowledge of the *client's* purpose or ulterior motive in consummating the transaction. *See Campbell*, 977 F.2d at 857.

166. A first-time money laundering conviction under section 1956 involving more than $100,000 can result in anywhere from 51-63 months imprisonment. UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL § 251.1 (1992).

167. This worry reflects a similar concern expressed in the Senate, which raised the scienter requirement from a "reason to know" or "reckless disregard" standard to one of "knowing." *See* SENATE REPORT, *supra* note 34, at 8.

Perils exist for prosecutors as well. In Ricci v. Key Bancshares of Maine, Inc., 662 F. Supp. 1132 (D. Me. 1987), the FBI and state law enforcement officials informed several banks that Ricci was involved with organized crime. *Id.* at 1137. In an effort to comply with section 1956, the banks terminated Ricci's lines of credit. Ricci subsequently sued under the Equal Credit Opportunity Act and was awarded $15 million in exemplary damages and $10,000 in punitive damages. *Id.* at 1139-40.

168. *See Campbell*, 977 F.2d at 858 ("[T]he knowledge components of the money laundering statute collapse into a single inquiry: Did . . . [the actor] know that . . . [the client's] funds were derived from an illegal source?").

169. *See* Duff, *supra* note 59, at 92.

170. *Id.* at 93.

171. *See supra* notes 134-44 and accompanying text.

172. *See supra* notes 145-55 and accompanying text.

highly irregular nature of the respective transactions.[173] A deciding factor in *Campbell* was the gross departure from standard business practices.[174] Such conduct justifiably triggers a heightened scrutiny of an otherwise routine commercial transaction. Any modification of the MLCA scienter requirement should include a rebuttable presumption of knowledge on the part of the merchant when the transaction in question departs from accepted industry norms.

The following definition of willful blindness incorporates the necessary changes discussed above.[175] The MLCA should be amended to provide:

> Willful blindness is an appropriate substitute for actual knowledge under this provision. A person is willfully blind of a material fact or risk if the person: (1) is involved in a financial transaction that substantially departs from reasonable and familiar business practices; (2) contemplates, recognizes, or suspects the likelihood that a particular fact or risk exists; and (3) closes his or her mind to the fact or risk and thereby deliberately avoids confirmation of the suspicion, regardless of any motive for doing so.

V. CONCLUSION

Jewell and its progeny recognize willful blindness as a substitute for actual knowledge. The radically different standards that courts can derive from this line of cases has engendered disparate application of the doctrine. Culpability, however, should not depend upon the venue in which one is prosecuted.[176] Therefore, Congress should amend the MLCA to provide explicit guidance to courts by enacting a definition of willful blindness such as the one proposed in this Note.

Frans J. von Kaenel

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173. Even so, the *Campbell* court admitted that the evidence of defendant's knowledge of her client's illegal activities was "not overwhelming." *Campbell*, 977 F.2d at 858-57.

174. *Campbell*, 977 F.2d at 858 n.5 ("The present case, by contrast, presents a highly irregular financial transaction which, by its very structure, was designed to mislead onlookers as to the amount of money involved in the transaction."). *See also Antzoulatos*, 962 F.2d at 720-23 (detailing defendant's close affiliation and ongoing relationship with avowed drug dealers); United States v. Isabel, 945 F.2d 1193, 1202-03 (1st Cir. 1991); United States v. Massac, 867 F.2d 174, 177-78 (3rd Cir. 1989).

175. The first prong of the proposed amendment circumvents the objective criteria/subjective perception dilemma, *see supra* notes 119-133 and accompanying text, by providing a bright line rule to objectively guide fact finders in their assessment of culpable mens rea. By shifting the inquiry from identifying subjective intent to focusing on overt behavioral manifestation of that intent, the proposed standard comports with traditional notions of right and wrong and punishes deviations from behavioral norms endemic to society and/or the accused. Thus, any deviation from "reasonable and familiar business practices" is a red flag denoting the existence of subjective recognition required by the second prong of the proposed amendment. Failure of the accused to conform to existing reasonable or past personal business practices satisfies the third prong of the proposed amendment and is indicative of culpable willful blindness.

176. Tomala v. United States, 112 S. Ct. 1997 (1992) (White, J., dissenting).