



1-1-2007

Unlicensed Money Transmitting Businesses and Mens Rae under the USA PATRIOT Act

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Unlicensed Money Transmitting Businesses and Mens Rea under the USA PATRIOT Act

Andrew Schouten*

TABLE OF CONTENTS

I. INTRODUCTION	1097
II. CULTURAL SIGNIFICANCE OF HAWALA IVTS NETWORKS	1101
III. SECTION 1960: TARGETING IVTS NETWORKS	1104
A. <i>IVTS and the USA PATRIOT Act</i>	1104
B. <i>Regulation and Registration</i>	1105
C. <i>Penalties for Failure to Register</i>	1106
D. <i>Federal Court Interpretation of § 1960</i>	1108
1. <i>United States v. Talebnejad</i>	1108
2. <i>United States v. Uddin</i>	1111
3. <i>Disregarding Principles of Statutory Construction?</i>	1112
IV. MENS REA AND § 1960.....	1115
A. <i>Criminalizing Morally Blameless Behavior?</i>	1115
1. <i>The Rule of Mandatory Culpability</i>	1116
2. <i>Professor Wiley’s Analytical Framework</i>	1123
B. <i>Proving a Minimally Higher Mens Rea Will Not Hamper Government Efforts</i>	1125
V. CONCLUSION.....	1128

I. INTRODUCTION

Consider the following hypothetical:¹ Aziz, a Pakistani national living in the United States, decides to send \$5,000 to his brother, Bashir, in Pakistan. His first stop is a major bank. To accomplish the transaction with the bank, he must open an account with them (which would require a social security number and identification), buy Pakistani Rupees (Rs) at the official rate (thirty-one rupees to the dollar), and pay the twenty-five dollar fee to issue a bank draft. This allows

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1. This hypothetical comes directly from PATRICK M. JOST & HARJIT SINGH SANDHU, U.S. DEP’T OF THE TREASURY & INTERPOL, *THE HAWALA ALTERNATIVE REMITTANCE SYSTEM AND ITS ROLE IN MONEY LAUNDERING* 5-7 (2004), <http://www.treas.gov/offices/enforcement/key-issues/hawala/FinCEN-Hawala-rpt.pdf> (on file with the *McGeorge Law Review*).

Aziz to send his brother Rs 154,225. Alternatively, he could use *hawala*, a form of underground banking and remittance system,² and visit Yasmeen, a *hawaldar*.³ To send the \$5,000, Yasmeen offers to charge him one rupee for every dollar transferred, an exchange rate of thirty-seven rupees for a dollar, and no delivery fee. This would allow Aziz to send Rs 180,000 to Bashir. Aziz chooses Yasmeen and gives her the \$5,000. Yasmeen, in turn, contacts her cousin, Zahid, in Karachi, Pakistan. Zahid then arranges to have the Rs 180,000 delivered to Bashir. Yasmeen does not issue a receipt, and her books reflect a \$5,000 debt to Zahid.

Yasmeen's business presents a challenge to American efforts to combat money laundering and terrorist financing. On one hand, Yasmeen is able to provide a lower cost service to her customers precisely because she operates her business more efficiently outside of the formal, international financial sector. On the other hand, because she operates her informal money transmitting business without a state or federal license, her customers' transactions effectively skirt any regulatory and law enforcement attention.

Moisés Naím claims that financial crimes, including money laundering and terrorist financing, now account for "up to [ten] percent of global [gross domestic product]." Because globalization lowered trade barriers and liberalized capital and currency exchange controls, "[m]oney launderers suddenly found themselves in paradise."⁵

A significant share of this global phenomenon belongs to *hawala* networks and other forms of Informal Value Transfer Systems (IVTS).⁶ The U.S. Treasury

2. *Id.* at 5 ("*Hawala* is an alternative or parallel remittance system. It exists and operates outside of, or parallel to 'traditional' banking or financial channels. . . . These systems are often referred to as 'underground banking'" (emphasis added)); see Nikos Passas, *Fighting Terror with Error: The Counter-Productive Regulation of Informal Value Transfers*, 45 CRIME L. & SOC. CHANGE 315, 317 n.2 (2006) [hereinafter Passas, *Fighting Terror with Error*].

Hawala—the term denotes 'transfer' in Arabic—is by far the most developed and extensive global [informal money transmitting] network. It emerged in the Indian subcontinent and grew with the assistance of successive immigration waves. The same informal method is called *hundi* in parts of South Asia, even though the term itself refers to the equivalent of a promissory note. *Fei ch'ien* is the Chinese variety, while *padala* refers to Filipino networks. They are all generally discussed under the term 'informal value transfer systems' (IVTS)

Id. (emphasis added).

3. JOST & SANDHU, *supra* note 1, at 5 (defining *hawaldar* as "hawala dealers").

4. MOISÉS NAÍM, *ILLICIT: HOW SMUGGLERS, TRAFFICKERS, AND COPYCATS ARE HIJACKING THE GLOBAL ECONOMY* 16 (Anchor Books 2006) (2005). Ten percent of global GDP is approximately \$4 trillion. See The World Bank, Data & Statistics Quick Reference Tables: Total GDP 2006, <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf> (Apr. 2008) (on file with the *McGeorge Law Review*).

5. *Id.* at 22. Even following the post 9/11 heightening of anti-money laundering rules, "the risk of conviction faced by money launderers is about 5 percent annually." *Id.* at 140.

6. *Informal Value Transfer Systems*, FINCEN ADVISORY (Fin. Crimes Enforcement Network, Vienna, Va.), Mar. 2003, at 1, http://www.fincen.gov/news_room/rp/advisory/pdf/advis33.pdf [hereinafter *Informal Value Transfer Systems*] (on file with the *McGeorge Law Review*). IVTS systems are called different names by the ethnic groups in which they are situated, including "'hawala' (Middle East, Afghanistan, Pakistan); 'hundi' (India); 'fei ch'ien' (China); 'phoe kuan' (Thailand); and 'Black Market Peso Exchange' (South America)." *Id.*;

Department defines ITVS as “any system, mechanism, or network of people that receives money for the purpose of making the funds or an equivalent value payable to a third party in another geographic location, whether or not in the same form.”⁷ After the September 11th terrorist attacks, tackling these informal systems became a government priority.⁸

Partly to that end, Congress passed Title III of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001,⁹ seeking to provide the U.S. Government with “new tools to combat the financing of terrorism and other financial crimes.”¹⁰ First, the USA PATRIOT Act amended 31 U.S.C. § 5330 (§ 5330) to expand federal anti-money laundering registration and reporting mechanisms under the Bank Secrecy Act (BSA)¹¹ to include IVTS.¹² Second, it amended 18 U.S.C. § 1960 (§ 1960).¹³ The amendments changed the mens rea

see NIKOS PASSAS, INFORMAL VALUE TRANSFER SYSTEMS AND CRIMINAL ORGANIZATIONS; A STUDY INTO SO-CALLED UNDERGROUND BANKING NETWORKS 28 (1999), <http://usinfo.state.gov/leap/img/assets/4756/ivts.pdf> [hereinafter PASSAS, IVTS AND CRIMINAL ORGANIZATIONS] (on file with the *McGeorge Law Review*) (discussing the regional origins and differences in IVTS).

7. *Informal Value Transfer Systems*, *supra* note 6, at 1.

8. See, e.g., Walid Al-Saqaf, *Bush Team Launches New ‘Hawala’ Crackdown*, WALL ST. J., May 24, 2005, at A6 (“Since the Patriot Act’s enactment, a total of 140 individuals have been arrested as part of the agency’s attempt to track down and curb unlicensed informal money-transfer businesses and \$25.5 million has been seized, according to [U.S. Immigration and Customs Enforcement (ICE) officials.]”); Michael Freedman, *The Invisible Bankers*, FORBES, Oct. 17, 2005, at 94 (noting that the Department of Homeland Security (DHS) has arrested 155 *hawala* operators since November 2001, of which ninety-two percent resulted in criminal indictments and \$25.8 million in illicit profits seized).

9. Pub. L. No. 107-56, 115 Stat. 272. The U.S. Senate passed the legislation with a vote of ninety-eight in favor, one opposed, and one not voting. U.S. Dep’t of Justice, Preserving Life & Liberty, Passed by Congress, http://www.lifeandliberty.gov/subs/p_congress.htm (last visited Nov. 19, 2006) (on file with the *McGeorge Law Review*). The U.S. House of Representatives passed the legislation by a vote of 357 in favor, sixty-six opposed, and nine not voting. *Id.* Observers described the passage as “the climax of a remarkable 18-hour period in which both the House and the Senate adopted complex, far-reaching antiterrorism legislation with little debate in an atmosphere of edgy alarm . . .” Robin Toner & Neil A. Lewis, *A Nation Challenged: Congress; House Passes Terrorism Bill Much Like Senate’s, But With 5-year Limit*, N.Y. TIMES, Oct. 13, 2001, at B6.

10. H.R. REP. No. 107-250, pt. 1, at 33 (2001).

11. 12 U.S.C.A. § 1829b (West 2001 & Supp. 2007); 12 U.S.C.A. §§ 1951-1959 (West 2001 & Supp. 2007); 31 U.S.C.A. §§ 5311-5332 (West 2003 & Supp. 2007).

12. See 31 U.S.C.A. § 5330(d)(1)(A) (West 2003 & Supp. 2007) (defining a “money transmitting business” to include “any person who engages as a business in an informal money transfer system or any network of people who engage as a business in facilitating the transfer of money domestically or internationally outside of the conventional financial institutions system.”); see also *id.* § 5312(a)(2)(R) (West 2003) (defining a “financial institution,” for purposes of the federal currency reporting statutes, to include “any person who engages as a business in an informal money transfer system or any network of people who engage as a business in facilitating the transfer of money domestically or internationally outside of the conventional financial institutions system.”).

13. 18 U.S.C.A. § 1960 (West 2000 & Supp. 2007).

Prohibition of unlicensed money transmitting businesses

(a) Whoever knowingly conducts, controls, manages, supervises, directs, or owns all or part of an unlicensed money transmitting business, shall be fined in accordance with this title or imprisoned not more than 5 years, or both.

term in § 1960, making the failure to register a business into a general intent crime¹⁴ and a felony punishable by five years imprisonment.¹⁵

Courts have struggled to interpret the newly revised § 1960, largely because of the changed mens rea component. Two cases illustrate this difficulty: *United States v. Talebnejad*¹⁶ and *United States v. Uddin*.¹⁷ In their interpretation of § 1960, these two courts largely discarded settled principles of statutory construction, ignoring the statute's plain text and basing their decisions on legislative history and executive memoranda.¹⁸

In light of these courts' difficulties interpreting § 1960 and the U.S. Government's increasing efforts to combat money laundering and terrorist financing, a critical evaluation of the statute's new mens rea requirement is

(b) As used in this section—

(1) the term 'unlicensed money transmitting business' means a money transmitting business which affects interstate or foreign commerce in any manner or degree and—

(A) is operated without an appropriate money transmitting license in a State where such operation is punishable as a misdemeanor or a felony under State law, whether or not the defendant knew that the operation was required to be licensed or that the operation was so punishable;

(B) fails to comply with the money transmitting business registration requirements under section 5330 of title 31, United States Code, or regulations prescribed under such section; or

(C) otherwise involves the transportation or transmission of funds that are known to the defendant to have been derived from a criminal offense or are intended to be used to be used [sic] to promote or support unlawful activity;

(2) the term 'money transmitting' includes transferring funds on behalf of the public by any and all means including but not limited to transfers within this country or to locations abroad by wire, check, draft, facsimile, or courier; and

(3) the term 'State' means any State of the United States, the District of Columbia, the Northern Mariana Islands, and any commonwealth, territory, or possession of the United States.

Id.

14. While the operation of an unlicensed IVTS was punishable prior to the USA PATRIOT Act, the new legislation "clarified" the mens rea requirement for § 1960 prosecutions, such that "an offense under § 1960 is a general intent crime for which a defendant is liable if he knowingly operates an unlicensed money transmitting business." H.R. REP. No. 107-250, pt. 1, at 54 (2001).

[O]ne has knowledge of a given fact when he has the means for obtaining such knowledge, when he has notice of facts which would put one on inquiry as to the existence of that fact, when he has information sufficient to generate a reasonable belief as to that fact, or when the circumstances are such that a reasonable man would believe that such a fact existed.

1 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 5.2 (2d ed. 2003 & Supp. 2007) (footnotes omitted).

15. 18 U.S.C.A. § 1960(a). In addition, the USA PATRIOT Act authorized civil forfeiture as a penalty for operation of an unlicensed money transmitting business. See 18 U.S.C.A. § 981(a)(1)(A) (West 2000 & Supp. 2007) (making "subject to forfeiture to the United States . . . [a]ny property, real or personal, involved in a transaction or attempted transaction in violation of [§ 1960] . . . or any property traceable to such property."). Adding civil forfeiture as a penalty allows the government to seize the property "even if the perpetrator is a fugitive." H.R. REP. No. 107-250, pt. 1, at 54 (2001).

16. *United States v. Talebnejad*, 460 F.3d 563 (4th Cir. 2006), *cert. denied*, 127 S. Ct. 1313 (2007); see *infra* Part III.D.1.

17. *United States v. Uddin*, 365 F. Supp. 2d 825 (E.D. Mich. 2005); see *infra* Part III.D.2.

18. See *infra* Part III.D.3.

necessary. This Comment will argue that otherwise innocuous behavior may be criminalized and punished without a showing of moral culpability because § 1960 and § 5330 now regulate previously unregulated businesses and purport to punish violators regardless of whether business owners knew of their obligation to register with authorities.¹⁹

This Comment will begin by exploring *hawala* networks' cultural significance and continued popularity. Part III will review § 1960, including its purpose, provisions, and recent decisional law interpreting it. Part IV will analyze § 1960. It will first conclude that existing interpretations of § 1960 run counter to established principles of statutory construction articulated by the Rehnquist Court's so-called "Rule of Mandatory Culpability" (Rule).²⁰ As a result, courts should interpret and apply the mens rea requirement to ensure that those who unwittingly violate § 1960's broad terms are not punished. Ultimately, this Comment will argue that other provisions of title 18, particularly § 1960(b)(1)(C), can just as easily—and more fairly—be employed to protect the nation from the threat of global crime and terrorism.

II. CULTURAL SIGNIFICANCE OF *HAWALA* IVTS NETWORKS

Alaskan Senator Richard Shelby estimated the number of IVTS operating in the United States in 2004 at nearly 160,000.²¹ The amount of money that flows through IVTS is difficult to determine, with annual global estimates ranging from tens of billions of dollars to between \$100 and \$300 billion.²² Notably, *hawala* networks account for greater annual inflows of money into Pakistan (\$2.5-3 billion) than traditional banks (\$1 billion).²³

In a basic *hawala* transaction, a *hawaldar* in one country accepts a customer's money and, for a fee, has an associate in another country pay the intended recipient an equal amount from the associate's funds.²⁴ *Hawaldar* "settle their debts with each other daily, weekly, or monthly, often by a reverse

19. See *infra* Part IV.A.

20. See *infra* note 128 and accompanying text.

21. *Policies to Enforce the Bank Secrecy Act and Prevent Money Laundering in Money Services Businesses and the Gaming Industry: Hearing Before Sen. Comm. on Banking, Housing, and Urban Affairs*, 108th Cong. 1 (2004) (statement of Sen. Richard C. Shelby, Chairman of the Senate Committee on Banking, Housing, and Urban Affairs) ("There are an estimated 15,000 licensed money services businesses and another 160,000 unlicensed ones. That excludes 40,000 post offices, each of which function as a money services business by issuing money orders.").

22. Walter Perkel, *Money Laundering and Terrorism: Informal Value Transfer Systems*, 41 AM. CRIM. L. REV. 183, 185 (2004) (noting "conservative" estimates of \$100 and \$300 billion in annual IVTS flows worldwide) (citing LEONIDES BUENCAMINO & SERGEI GORBUNOV, *INFORMAL MONEY TRANSFER SYSTEMS: OPPORTUNITIES AND CHALLENGES FOR DEVELOPMENT FINANCE*, DISCUSSION PAPER OF THE UNITED NATIONS DEP'T OF ECON. & SOC. AFFAIRS 2 (2002)).

23. Lan Cao, *The Transnational and Sub-National in Global Crimes*, 22 BERKELEY J. INT'L L. 59, 77 (2004).

24. Rachana Pathak, *The Obstacles to Regulating the Hawala: A Cultural Norm or a Terrorist Hotbed?*, 27 FORDHAM INT'L L.J. 2007, 2011-12 (2004); *Informal Value Transfer Systems*, *supra* note 6, at 4.

transfer.”²⁵ Accounts may also be settled by the transfer of legal or illegal goods.²⁶ Another method of transferring value is under- or over-invoicing the value of imported or exported goods.²⁷ This allows for account settlement while simultaneously evading import-export duties.²⁸

IVTS are more popular with consumers than formal financial institutions for several reasons. First, consumers choose to remit funds through IVTS because such transfers are more cost effective,²⁹ timely,³⁰ and reliable.³¹ Second, such transfers are desirable because they avoid cumbersome bureaucracies and taxes, and consumers remain anonymous.³² “The more regulations restrict trade, currency exchange, or the movement of money and people, the wider the use of [IVTS].”³³ Third, *hawala* networks thrive in places plagued by “political instability[,] . . . unstable financial sector[s],” or “a lack of easily accessible formal financial institutions in remote areas.”³⁴ Fourth, *hawala* networks are

25. Pathak, *supra* note 24, at 2012; *Informal Value Transfer Systems*, *supra* note 6, at 4-5.

26. NIKOS PASSAS, NATIONAL CRIMINAL JUSTICE REFERENCE SERVICE, *INFORMAL VALUE TRANSFER SYSTEMS, TERRORISM AND MONEY LAUNDERING* 26 (2005) <http://www.ncjrs.gov/pdffiles1/nij/grants/208301.pdf> (on file with the *McGeorge Law Review*) (examples of goods include “gold and precious stones to medical equipment and textiles”).

27. *Id.* at 26 (“Under-invoicing practically means the sending of value, while over-invoicing leads to the receipt of value by the issuer of the invoice.”).

28. *Id.* Profits are realized by *hawaldar* in two significant ways. First, they may charge customers commission on their transfers. Second, *hawaldar* make their profits by arbitrage—“exploiting the difference between the exchange rate agreed with the customer and the rate obtained in the black or other markets around the world”—a very lucrative process. *Id.* at 56. Between 1981 and 2000, black market exchange premiums in Iran, Pakistan, and Sudan were 890.65 percent, 13.2 percent, and 116.2 percent greater than official exchange rates. *Id.* at 57.

29. JOST & SANDHU, *supra* note 1, at 6-9 (showing that, due to *hawala* networks’ “low overhead, exchange rate speculation and integration with existing business activities,” a consumer would save \$880 when remitting \$5,000 to Pakistan if he used *hawala* instead of a major bank).

30. *Informal Value Transfer Systems*, *supra* note 6, at 3.

For example, a wire transfer of funds using banks involves fees charged to the sender and receiver, may take from two to seven days to complete, and may be delayed or lost. Funds moved through IVTS are available within 24 hours, with minimal or no fees charged to the participants.

Id.

31. JOST & SANDHU, *supra* note 1, at 9.

Complex international transactions, which might involve the client’s local bank, its correspondent bank, the main office of a foreign bank and a branch office of the recipient’s foreign bank, have the potential to be problematic. In at least once [sic] instance reported to the authors, money for a large commercial transaction (money being sent from the United States to South Asia) was lost ‘in transit’ for several weeks while trying to conduct such a transaction. When the bank located the money, it was returned to the customer. He enlisted the services of a local *hawaladar*, who was able to complete the transaction in less than a day.

Id.

32. *Informal Value Transfer Systems*, *supra* note 6, at 2-3; JOST & SANDHU, *supra* note 1, at 9 (noting that remitters include undocumented workers who are unable to procure a bank account due to lack of identification or Social Security number).

33. PASSAS, IVTS AND CRIMINAL ORGANIZATIONS, *supra* note 6, at 28.

34. *Informal Value Transfer Systems*, *supra* note 6, at 2. “[A]fter the 1947 India-Pakistan partition, currency exchange between Pakistan and India was banned, and *hawala* . . . played a vital role.” Pathak, *supra* note 24, at 2022-23 (emphasis added). “During the Vietnam War, many Americans used *hawala* to send money

characterized by trust between participants and situated within “insular, tightly knit” ethnic communities.³⁵ Trust is “a defining element of *hawala*,”³⁶ reducing transaction costs for participants.³⁷ These networks are internally self-policing, relying on familial or kinship bonds and participants’ honor and mutual trust.³⁸

The extent of terrorists’ use of IVTS is unknown, owing to their informality and lack of regular recordkeeping.³⁹ Terrorist groups use IVTS and other financing mechanisms outside the formal financial system to earn, move, and store their assets.⁴⁰ While initial reports suggested that two 9/11 terrorists received funding through IVTS, the 9/11 Commission found that *hawala* networks were not used to fund the operation; rather, “[w]ire transfers, physical importation of funds, and access of foreign bank accounts were sufficient to support the hijackers.”⁴¹ The 9/11 Commission did note that Al-Qaeda

to the United States through Indian merchants in Saigon.” *Id.* at 2023 (emphasis added). Afghans have relied on *hawala* for years, following the years of Soviet occupation, civil war, and Taliban rule. Michael M. Phillips, *Afghan Aid Flows Through Dark Channels: U.S. Is Forced to Move Funds in Money-Transfer Networks Used by Terror Groups*, WALL ST. J., Nov. 12, 2002, at A4 (reporting that in 2002, there were no commercial banks operating nationwide in Afghanistan). Ironically, the U.S. Government has discovered what aid agencies have known for years—“the only effective way to transfer funds into Afghanistan to aid in its reconstruction is to use the existing *hawala* banking system because no other financial infrastructure exists.” Eric J. Gouvin, *Bringing Out the Big Guns: The USA PATRIOT Act, Money Laundering, and the War on Terrorism*, 55 BAYLOR L. REV. 955, 978 n.106 (2003). “In addition, many Iranian Americans depend on *hawala* networks to send money to relatives in Iran because of sanction limitations.” Pathak, *supra* note 24, at 2024 (emphasis added).

35. Cao, *supra* note 23, at 78-79.

36. Nikos Passas, *Hawala and Other Informal Value Transfer Systems: How to Regulate Them?*, RISK MGMT., Apr. 2003, at 49, 51, available at <http://0-www.jstor.org.gocat.law.pacific.edu/stable/pdfplus/3867818.pdf> [hereinafter Passas, *Hawala and IVTS*] (emphasis added).

37. PASSAS, IVTS AND CRIMINAL ORGANIZATIONS, *supra* note 6, at 28-29.

[T]ransactions are ‘made easier if the parties believe in each other’s basic honesty: there is less need to spell things out in lengthy contracts; less need to hedge against unexpected contingencies; fewer disputes and less need to litigate if disputes arise. Indeed, in some high-trust relationships, parties do not even have to worry about maximizing profits in the short run, because they know that a deficit in one period will be made good by the other party later.

Id. (quoting FRANCIS FUKUYAMA, TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY 151 (1995)). Moreover, *Hawala* operators are known only to members of the same community and “[t]heir existence is not publicized outside their respective communities.” Cao, *supra* note 23, at 79.

38. Pathak, *supra* note 24, at 2017-18. Commentators describe *Hawala* networks’ operating paradigm as, “[y]ou pay me here, my Uncle will pay you there.” *Id.* at 2018. “Any cheaters will usually be punished by ex-communication, which is the equivalent of an economic death sentence.” *Id.*

39. U.S. GEN. ACCOUNTING OFFICE, GAO-04-163, TERRORIST FINANCING: U.S. AGENCIES SHOULD SYSTEMATICALLY ASSESS TERRORISTS’ USE OF ALTERNATIVE FINANCING MECHANISMS 3 (2003), <http://www.gao.gov/new.items/d04163.pdf> (on file with the *McGeorge Law Review*).

40. *Id.*

41. JOHN ROTH, DOUGLAS GREENBURG & SERENA WILLE, NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., MONOGRAPH ON TERRORIST FINANCING: STAFF REPORT TO THE COMMISSION 139 (2004), http://www.911commission.gov/staff_statements/911_TerrFin_Monograph.pdf (on file with the *McGeorge Law Review*).

The extensive investigation into the financing of the 9/11 plot has revealed no evidence to suggest that the hijackers used *hawala* or any other informal value transfer mechanism to send money to the United States. Moreover, [Khalid Sheikh Mohammed] and the other surviving plot participants have either not mentioned *hawalas* or explicitly denied they were used.

“frequently used *hawalas* to transfer funds from the Gulf area to Pakistan and Afghanistan.”⁴² Additionally, IVTS has been used to finance terrorist activities in Colombia, India, Kenya, and Tanzania, as well as narcotics, illegal immigrants, and body parts trafficking.⁴³

III. SECTION 1960: TARGETING IVTS NETWORKS

IVTS are subject to a host of federal and state laws with differing objectives. Federal laws are designed to prevent money laundering by collecting information that has “a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.”⁴⁴ State laws generally erect high barriers to entry, with the purpose of protecting against consumer fraud.⁴⁵

A. *IVTS and the USA PATRIOT Act*

After the September 11th terrorist attacks, President George W. Bush asked Congress for new authority to meet terrorist threats, including terrorist financing.⁴⁶ Congress responded with the USA PATRIOT Act. It made IVTS

Id.

42. *Id.* at 140 (emphasis added).

43. Alan Lambert, *Organized Crime, Terrorism, and Money Laundering in the Americas, Underground Banking and Financing of Terrorism*, 15 FLA. J. INT'L L. 9, 14 (2002) (discussing *hawala* networks' role in terrorist bombings of U.S. embassies in Kenya and Tanzania and continued hostilities in Kashmir); Perkel, *supra* note 22, at 189. Terrorist operations are generally cheap to mount. Passas, *Fighting Terror with Error*, *supra* note 2, at 325 tbl.3 (noting that the 9/11 attacks cost \$320,000; the U.S. embassies in Kenya and Tanzania \$10,000 each; the Bali nightclubs \$20,000; and the Madrid subway attacks 50,000).

44. 12 U.S.C.A. §§ 1829b(a)(2), 1951 (West 2001 & Supp. 2007); 31 U.S.C.A. § 5311 (West 2003). In 2001, the USA PATRIOT Act added counterintelligence and counterterrorism investigations and proceedings to the text of Sections 1829 and 5311. *See* 12 U.S.C.A. § 1829b(a)(2).

[R]ecognizing that, given the threat posed to the security of the Nation on and after the terrorist attacks . . . on September 11, 2001, such records may also have a high degree of usefulness in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism.

Id.; 31 U.S.C.A. § 5311 (“It is the purpose of this subchapter . . . to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism.”).

45. *See, e.g.*, CAL. FIN. CODE § 1800(a) (West 1999 & Supp. 2008).

It is the intent of the Legislature in enacting this chapter to protect the people of this state from being victimized by unscrupulous practices by persons receiving money for transmission to foreign countries and to establish a minimum level of fiscal responsibility and corporate integrity for all entities engaging in the business of receiving money for transmission to foreign countries without regard to the method of transmission.

Id.

46. President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html> (on file with the *McGeorge Law Review*) (“We will direct every resource at our command—every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war—to the disruption and to the defeat of the [Al-Qaeda] global terror network.”).

networks subject to § 5330's financial institution registration and licensing requirements.⁴⁷ It also "clarified" the mens rea requirement for § 1960 prosecutions, replacing *intentionally* with the lower *knowingly* element.⁴⁸

B. Regulation and Registration

Section 5330 requires that money transmitting businesses register with the Department of the Treasury.⁴⁹ Persons who fail to comply with § 5330 may be fined \$5,000 a day.⁵⁰ Explicitly modeled on statutes prohibiting illegal gambling businesses,⁵¹ "[t]he purpose of the registration requirements is to promote effective law enforcement by the Secretary [of the Treasury] and to encourage business cooperation in that effort."⁵² Legislators felt that the expansion of the BSA to money transmitters was necessary because "such businesses are particularly vulnerable to money laundering schemes because their level of BSA compliance is generally lower."⁵³ The House report on § 1960 and § 5330 lauded state-level licensing and regulation efforts as effective anti-money laundering mechanisms.⁵⁴ Thus, under § 5330, IVTS are subject to the same licensing and reporting requirements under the BSA as any formal financial institution.⁵⁵

47. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272; see H.R. REP. NO. 107-250, pt. 1, at 63-64 (2001) ("Although the Committee believes that informal value transfer banking systems like hawalas are already adequately covered by references to money transmitting businesses in certain provisions of existing law, this section makes that understanding explicit.").

48. Compare 18 U.S.C.A. § 1960 (West 2000) (amended 2001), with 18 U.S.C.A. § 1960 (West 2000 & Supp. 2007).

49. 31 U.S.C.A. § 5330 (West 2003). Section 5330 was amended in 1994 to require money transmitting business to register as part of the Riegle Community Development and Regulatory Improvement Act of 1994. Pub. L. No. 103-325, 108 Stat. 2160.

50. 31 U.S.C.A. § 5330(e)(1)-(2).

Any person who fails to comply with any requirement of this section or any regulation prescribed under this section shall be liable . . . for a civil penalty of \$5,000 for each such violation. . . . Each day a violation . . . continues shall constitute a separate violation

Id.

51. S. REP. NO. 101-460, at 15 (1990).

52. H.R. REP. NO. 103-652 103-438, at 192 (1994) (Conf. Rep.).

53. *Id.* at 191. In testimony before the House Subcommittee on Financial Institution, then Assistant Secretary of the Treasury for Enforcement expressed support for state measures like the Texas law, saying, "State licensing and regulation [of money transmitters] is essential to insure that these businesses are run to offer legitimate financial services and that they not be purchased or exploited for illegal purposes." *Id.* at 192 (alteration in original).

54. *Id.* at 191-92. The Conference Report noted that such a law curtailed money laundering activity by money transmitters in Texas, partly because the businesses "simply went out of business in order to avoid scrutiny of the licensing process." *Id.* at 191.

55. 31 U.S.C.A. §§ 5312(a)(2), 5330(d)(1)(A); see 31 C.F.R. §§ 103.20-23, 103.41 (2007) (BSA regulations for money transmitting businesses under § 5330); FIN. CRIMES ENFORCEMENT NETWORK, U.S. DEP'T OF THE TREASURY, MONEY LAUNDERING PREVENTION: A MONEY SERVICES BUSINESS GUIDE 4-13 (2003), http://www.msb.gov/pdf/msb_prevention_guide.pdf [hereinafter MSB PREVENTION GUIDE] (on file with the *McGeorge Law Review*) (summarizing BSA licensing and reporting regulations for money transmitting

Federal registration requirements are relatively straightforward. In their registration documents, IVTS operators must include the name and addresses of the business, its owners, and any depository institution where the business maintains a transaction account, an estimate of the coming year's business volume, and a list of the business' agents.⁵⁶ State requirements vary,⁵⁷ including minimum capitalization⁵⁸ and surety bonds or securities.⁵⁹ Nevertheless, a money transmitting business must be registered with the federal government, even if it is already registered with state authorities.⁶⁰

C. Penalties for Failure to Register

Business owners and operators who skirt federal regulatory requirements by failing to register with federal or state authorities are subject to § 1960's criminal penalty and forfeiture provisions.⁶¹ These provisions criminalize the operation of

businesses). For critical evaluations of the current regulatory regime, see Passas, *Hawala and IVTS*, *supra* note 36, at 57.

Western models of regulation are neither a guarantee of success nor appropriate for some types of relationships and contexts. So, an outreach and consultation program is recommended here, which may provide insights into novel modes of regulation. This should also enhance the compliance and collaboration of IVTS operators and users.

Id.; Courtney J. Linn, *How Terrorists Exploit Gaps in US Anti-Money Laundering Laws to Secretly Plunder*, 8 J. MONEY LAUNDERING CONTROL 200 (2005) (arguing for "more intense regulation" of check cashers and money services businesses); Passas, *Fighting Terror with Error*, *supra* note 2, at 316 (arguing that United States and international anti-terrorist finance and money laundering regulatory regimes are counterproductive, "produc[ing] the opposite from desired effects, including higher remittance costs, fewer options for remitters, unnecessary criminalization of economic sectors and ethnic groups, lower transparency and traceability of transactions, alienation and mistrust between ethnic communities and authorities"); Perkel, *supra* note 22, at 187 (arguing for "an incentive-based strategy that would award those IVTS dealers who comply with registration requirements and aid law enforcement officials").

56. 31 U.S.C.A. § 5330(b)-(c) (West 2003 & Supp. 2007); 31 C.F.R. § 103.41(b)-(d) (2007). In addition to its initial registration, the business must prepare and revise its agent list annually. 31 U.S.C.A. § 5330(c); 31 C.F.R. § 103.41(d). The agent list must contain for each agent a name, including trade or d/b/a names; an address; a service type; a listing of individual months in the past year where gross transactions through agent exceeded \$100,000; the name and address of depository institutions where a transaction account is maintained; the year the agent became an agent; and the number of branches or sub-branches the agent controls, if any. 31 U.S.C.A. § 5330(c)(1); 31 C.F.R. § 103.41(d)(2)(i)(A)-(H).

57. Passas, *Fighting Terror with Error*, *supra* note 2, at 326-28 (discussing the lack of uniformity resulting from state-driven registration and regulation regimes).

58. See, e.g., CAL. FIN. CODE § 1814(a) (West 1999 & Supp. 2008) (\$500,000); MD. CODE ANN., FIN. INST. § 12-406(a)(3) (LexisNexis 2003) (\$150,000-\$500,000); N.Y. BANKING LAW § 651 (McKinney 2001 & Supp. 2008) (equivalent to all outstanding payments); TEX. FIN. CODE ANN. § 151.307 (Vernon 2006) (\$100,000-\$1,000,000); VA. CODE ANN. § 6.1-374(A) (1999 & Supp. 2007) (\$100,000-\$1,000,000).

59. See, e.g., CAL. FIN. CODE § 1811 (West 1999) (determined by commissioner); MD. CODE ANN., FIN. INST. § 12-412(e)(1) (LexisNexis 2003) (\$150,000-\$1,000,000); N.Y. BANKING LAW § 643 (McKinney 2001 & Supp. 2008); TEX. FIN. CODE ANN. § 151.308(b) (Vernon 2006) (\$300,000-\$2,000,000); VA. CODE ANN. § 6.1-372(A) (1999 & Supp. 2007) (\$25,000-\$1,000,000).

60. 31 U.S.C.A. § 5330(b)-(c); 31 C.F.R. § 103.41(a).

61. 18 U.S.C.A. § 1960(a)-(b) (West 2000 & Supp. 2007). Section 1960 was first enacted as part of the Annunzio-Wylie Anti-Money Laundering Act, Pub. L. No. 102-550, § 1512, 106 Stat. 4044, 4057 (1992), and then amended by the Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No.

an unlicensed money transmitting business in three statutorily defined circumstances.⁶² First, § 1960(b)(1)(A) penalizes the operation of such businesses without a state license, where applicable.⁶³ Congress added language to § 1960(b)(1)(A) designed to specify that failure to register under state registration laws requires only a general intent mens rea, regardless of the incorporated state licensing statutes' provisions.⁶⁴ Second, § 1960(b)(1)(B) penalizes operating a money transmitting business without a federal license.⁶⁵ And, third, § 1960(b)(1)(C) penalizes any business transaction where the owner or operator knowingly transmits funds that are derived from, or will promote, criminal activity.⁶⁶ Subsection 1960(b)(1)(C) was added by the USA PATRIOT Act.⁶⁷ Violations of § 1960 are felony offenses punishable by criminal or civil forfeiture and up to five years imprisonment.⁶⁸

103-325, § 408, 108 Stat. 2160, 2252.

62. 18 U.S.C.A. § 1960(a).

63. *Id.* § 1960(b)(1)(A).

[T]he term 'unlicensed money transmitting business' means a money transmitting business which affects interstate or foreign commerce in any manner or degree and—is operated without an appropriate money transmitting license in a State where such operation is punishable as a misdemeanor or a felony under State law, whether or not the defendant knew that the operation was required to be licensed or that the operation was so punishable.

Id.

64. Compare *id.* (making punishable operation of a money transmitting business “without an appropriate money transmitting license in a State where such operation is punishable as a misdemeanor or a felony under State law, whether or not the defendant knew that the operation was required to be licensed or that the operation was so punishable” (emphasis added)), with H.R. REP. NO. 107-250, pt. 1, at 54 (2001).

The operation of an unlicensed money transmitting business is a violation of Federal law under 18 U.S.C. § 1960. First, section 104 clarifies the scienter requirement in § 1960 to avoid the problems that occurred when the Supreme Court interpreted the currency transaction reporting statutes to require proof that the defendant knew that structuring a cash transaction to avoid the reporting requirements had been made a criminal offense. See *Ratzlaf v. United States*, [510 U.S. 600] (1994). The proposal makes clear that an offense under § 1960 is a general intent crime for which a defendant is liable if he knowingly operates an unlicensed money transmitting business. For purposes of a criminal prosecution, the Government would not have to show that the defendant knew that a State license was required or that the Federal registration requirements promulgated pursuant to 31 U.S.C. § 5330 applied to the business.

Id.

65. 18 U.S.C.A. § 1960(b)(1)(B) (“[T]he term ‘unlicensed money transmitting business’ means a money transmitting business which affects interstate or foreign commerce in any manner or degree and . . . fails to comply with the money transmitting business registration requirements under section 5330 of title 31, United States Code, or regulations prescribed under such section.”).

66. *Id.* § 1960(b)(1)(C).

[T]he term ‘unlicensed money transmitting business’ means a money transmitting business which affects interstate or foreign commerce in any manner or degree and . . . otherwise involves the transportation or transmission of funds that are known to the defendant to have been derived from a criminal offense or are intended to be used to promote or support unlawful activity.

Id. See *infra* Part IV.B for a fuller discussion of § 1960(b)(1)(C).

67. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 373, 115 Stat. 272, 339.

68. 18 U.S.C.A. § 1960(a) (“Whoever knowingly conducts, controls, manages, supervises, directs, or owns all or part of an unlicensed money transmitting business, shall be fined in accordance with this title or imprisoned not more than 5 years, or both.”); see *id.* § 981(a)(1)(A) (West 2000 & Supp. 2007) (“Any property, real or personal, involved in a transaction or attempted transaction in violation of section 1956, 1957 or 1960 of

D. *Federal Court Interpretation of § 1960*

Courts have struggled when applying § 1960's new mens rea requirement. This section discusses those cases.

I. *United States v. Talebnejad*

Federal authorities charged Farhad, Fatameh, and Abodlrahman Talebnejad with operating an IVTS that allegedly sent \$18 million to unidentified individuals in Iran.⁶⁹ Farhad Talebnejad investigated whether his business needed a Maryland license.⁷⁰ After consulting with a Maryland official, Farhad concluded he did not need one because the Talebnejad's business, the Shirazi Money Exchange, did not "sell[] drafts or physically transmit[] money."⁷¹

Nevertheless, because the Shirazi Money Exchange sent money abroad through the United Arab Emirates without registering with Maryland⁷² or federal authorities, the Talebnejads were indicted on two counts of violating § 1960.⁷³ The U.S. District Court for Maryland dismissed the indictment, concluding that § 1960(b)(1)(A) violated the Talebnejads' due process rights.⁷⁴

First, it reasoned that because § 1960(b)(1)(A) incorporated Maryland state law, which required knowing and willful mens rea, Maryland state law controlled.⁷⁵ Congress' attempt to "extinguish the mens rea requirement" was "inoperative in states such as Maryland" that had prescribed a higher showing for

this title, or any property traceable to such property."); *Id.* § 982(a)(1) (West 2000 & Supp. 2007) ("The court, in imposing sentence on a person convicted of an offense in violation of section 1956, 1957, or 1960 of this title, shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property untraceable to such property.").

69. Petition for Writ of Certiorari at 4-5, *United States v. Talebnejad*, 127 S. Ct. 1313 (2007) (No. 06-8636). The Talebnejads claimed that the profits from their business, the Shirazi Money Exchange, covered only their rent and the annual salaries for Farhad (\$20,000) and Fatameh (\$3,000). Brief of Apellees [sic] and Cross-Appellants at 8, *United States v. Talebnejad*, 460 F.3d 563 (4th Cir. 2006) (No. 04-4841). Fatameh Talebnejad performed clerical and administrative duties. *Id.* at 7.

70. Brief of Apellees [sic] and Cross-Appellants, *supra* note 69, at 9. The official told him that he should register, but Farhad could not afford the necessary \$150,000 bond. *Id.* at 9-10.

71. *Id.* at 10. The official told him that he should register, but Farhad could not afford the necessary \$150,000 bond. *Id.* at 9-10.

72. See MD. CODE ANN., FIN. INST. § 12-405 (LexisNexis 2003) ("A person may not engage in the business of money transmission if that person, or the person with whom that person engages in the business of money transmission, is located in the State unless that person . . . [i]s licensed by the Commissioner."); *id.* § 12-430 ("Any person who knowingly and willfully violates any provision of this subtitle is guilty of a felony and on conviction is subject to a fine not exceeding \$1,000 for the first violation and not exceeding \$5,000 for each subsequent violation or imprisonment not exceeding 5 years or both.") (emphasis added).

73. *United States v. Talebnejad*, 342 F. Supp. 2d 346, 347-48, 350 (D. Md. 2004). The two counts alleged violations of either 18 U.S.C. § 1960(b)(1)(A) or § 1960(b)(1)(B). *Id.*

74. *Id.* at 353-56, 361-62.

75. *Id.* at 355 ("Unless each of the elements of that offense are alleged and proved beyond a reasonable doubt, the lack of a license simply is not 'punishable' in this state. And if the lack of a license is not punishable in Maryland, it is not punishable under 18 U.S.C. § 1960.").

violation of licensing statutes.⁷⁶ The court held that under Maryland law the government had to allege and prove the Talebnejads' duty to acquire a state license.⁷⁷ Any other reading could expose not only owners to criminal liability, but also "any number of individuals affiliated with an unlicensed money transmitting business."⁷⁸

Second, the court found that § 1960(b)(1)(B) violated the Talebnejads' due process rights. The statute contained an intentional mens rea requirement, thus it had to be shown that the "[d]efendant knew he was required to register his money transmission business with the U.S. Treasury and that he intentionally failed to do so."⁷⁹ The court reasoned that Congress created a strict liability offense in § 1960(b)(1)(B) because it did not expressly prescribe a mens rea element, unlike § 1960(b)(1)(A).⁸⁰ Subsection 1960(b)(1)(B) offended due process requirements because it lacked mens rea, it did not involve public welfare or morality, and it was punishable with five years imprisonment and possible forfeiture of millions of dollars.⁸¹

The Fourth Circuit Court of Appeals reversed, upholding § 1960(b)(1)(B) as a valid general intent crime.⁸² Section 1960(b)'s mens rea term is found in § 1960(a): "[W]hoever 'knowingly conducts . . . an unlicensed money transmitting business.'"⁸³ Subsection 1960(b)(1)(B) defines an "unlicensed money transmitting business."⁸⁴ Therefore, the government had only to allege and prove mens rea as to the crime's factual elements contained in § 1960(a), i.e. "that [the Talebnejads] were conducting a money transmitting business that affected interstate commerce and that [it] was unregistered."⁸⁵

The Fourth Circuit held that the lower court erred by incorporating the Maryland mens rea into § 1960(b)(1)(A).⁸⁶ Rather, the statute's legislative history revealed that Maryland law was relevant only insofar as it made violating the

76. *Id.*

77. *See id.* at 359 ("[I]nsofar as the Government bases its prosecution on 18 U.S.C. § 1960(b)(1)(A), the Court finds that the lack of license must be punishable under Maryland law before it may be punished federally.").

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *United States v. Talebnejad*, 460 F.3d 563, 565, 570 (4th Cir. 2006).

83. *Id.* at 572 (quoting 18 U.S.C.A. § 1960(a)) (emphasis added and omission in original).

84. *Id.* ("[The statute] defines unlicensed money transmitting business, in relevant part, as a money transmitting business which affects interstate or foreign commerce . . . and . . . fails to comply with the money transmitting business registration requirements set forth in 31 U.S.C.A. § 5330 or accompanying regulations.") (internal quotation marks omitted and alteration in original).

85. *Id.*

86. *Id.* at 568. Because "[a] well-recognized canon of construction requires courts to read statutory provisions so that, when possible, no part of the statute is superfluous," the District Court should not have rendered Subsection 1960(b)(1)(A)'s latter clause—"whether or not the defendant knew that the operation was required to be licensed or that the operation was so punishable"—as "inoperative." *Id.*

licensing statute punishable under federal law.⁸⁷ Therefore, the question was whether “Congress exceeded constitutional bounds when it declared that ignorance of state licensing requirements is not a defense to liability under the federal statute.”⁸⁸ The court found that Congress had not—due process requires that Congress specify a mens rea element as to the factual circumstances of a crime but not legal elements, which, in the court’s opinion, it had.⁸⁹

Although he found § 1960(b)(1)(A) and (B) facially valid, Judge Gregory dissented in part to “express [his] concern that these provisions could raise substantial due process questions in some circumstances.”⁹⁰ First, because § 1960(b)(1)(A) incorporates state law, the government must allege and prove all of the legal elements under Maryland law, in addition to those in the federal statute.⁹¹ It follows then that even though § 1960(b)(1)(A) does not provide its own mens rea term, a successful prosecution would nevertheless require proof of the incorporated state law’s mens rea elements.⁹²

Second, Judge Gregory explained that § 1960(b)(1)(A) and (B), while facially valid, “might not provide constitutionally sufficient notice of possible regulation,” giving rise to due process violations under particular factual circumstances.⁹³ In such cases, an “as-applied” challenge to § 1960(b)(1)(A)-(B) may be successful.⁹⁴

87. *Id.*

[Subsection] 1960(b)(1)(A) provides that it is a federal offense to (1) operate a money transmitting business, (2) that affects interstate commerce, and (3) that is unlicensed under state law, when (4) state law requires a license and (5) state law punishes lack of a license as a felony or misdemeanor.

Id.

88. *Id.* at 569.

89. *Id.* at 569-70 (citing *Bryan v. United States*, 524 U.S. 184, 192 (1998); *Staples v. United States*, 511 U.S. 600, 622 n.3 (1994) (Ginsburg, J., concurring); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72-73, 78 (1994)).

90. *Id.* at 573 (Gregory, J., concurring in part and dissenting in part).

91. *Id.* at 574 (explaining that, because Maryland law requires a showing of knowing and willful mens rea, “[i]t necessarily follows that these scienter elements must be established before a defendant’s conduct will qualify under § 1960(b)(1)(A) as punishable as a misdemeanor or a felony under State law”) (internal quotation omitted).

92. *Id.*

Prior to 2001, a violation of § 1960(b)(1)(A) only occurred if there was an *intentional* violation of the state licensing law. Thus, even in states that had no *mens rea* requirement, the federal statute supplied its own scienter requirement for the *federal* offense. The amended language of § 1960(b)(1)(A) makes clear that federal law no longer supplies an intent requirement; in states that do not require scienter or a misdemeanor or felony conviction, scienter is not necessary for a § 1960(b)(1)(A) conviction. The last phrase of the statute simply does not speak to the situation here, where it is state law that requires *mens rea*.

Id. (first emphasis added).

93. *Id.* at 576. Judge Gregory noted that a minority owner or silent partner owning only five percent of the unlicensed business would be subject to criminal liability. “Owning a small stake in a business does not require involvement in the business activity. Indeed, it may well be greatly attenuated from the operation of the enterprise.” *Id.* Such conduct would not give ample notice of criminality, insofar as “minimal ownership resembles the passive conduct proscribed by the flawed *Lambert* ordinance.” *Id.* This Comment will not discuss potential *Lambert* arguments.

94. *Id.*

2. United States v. Uddin

Mohammad Islam Uddin pled guilty to knowingly transferring at least \$2,900,000 to unidentified people in Bangladesh through the United Arab Emirates between February 1, 2002, and December 3, 2003.⁹⁵ Prior to his plea, Uddin moved to dismiss his indictment, admitting that he transmitted money without a federal license under § 5330, but arguing that § 1960(b)(1)(B) was a specific intent crime and that the government had not alleged sufficient facts to make that showing.⁹⁶ The district court disagreed.⁹⁷

First, the court reasoned that § 1960's legislative history "makes clear that a section 1960 violation is a general intent crime that does not require proof of the defendant's knowledge of the federal registration requirement."⁹⁸ Second, reading a specific intent requirement into § 1960 would "ignore well-settled rules of statutory construction" that absent any textual ambiguity the plain language of the statute controls.⁹⁹ Per the court's reading, § 1960's mens rea modified only the actus reus elements in § 1960(a) and not the attendant circumstances in § 1960(b).¹⁰⁰ Third, the court accepted the proposition that § 1960(b)(1)(B)'s "failure to comply" language does not connote knowledge that compliance is required.¹⁰¹

95. Rule 11 Plea Agreement at 2-3, *United States v. Uddin*, 365 F. Supp. 2d 825 (E.D. Mich. 2005) (No. 04-CR-80192).

96. *Uddin*, 365 F. Supp. 2d at 826.

97. *Id.* at 832.

98. *Id.* at 829. Compare *id.*, with H.R. REP. No. 107-250, pt. 1, at 54 (2001) ("[A]n offense under § 1960 is a general intent crime for which a defendant is liable if he knowingly operates an unlicensed money transmitting business.").

99. *Uddin*, 365 F. Supp. 2d at 829 ("When the statute at issue is clear, makes sense, and does not contain inconsistencies or ambiguities, 'the inquiry ends with a cogent means of reading the plain language of the statute.'" (quoting *United States v. Kelley Technical Coatings, Inc.*, 157 F.3d 432, 439 (6th Cir. 1998))).

100. *Id.*

Here, the statute describes the offense as "knowingly" conducting, controlling, managing, supervising, directing or owning an unlicensed money transmitting business. The Supreme Court has held that, absent a different result dictated by the text of the statute, "the term 'knowingly' merely requires proof of the knowledge of the facts that constitute the offense."

Id. (citation omitted) (quoting *Bryan v. United States*, 524 U.S. 184, 193 (1998)). Actus reus refers to "[t]he wrongful deed that comprises the physical components of a crime and that generally must be coupled with mens rea to establish criminal liability; a forbidden act." BLACK'S LAW DICTIONARY 39 (8th ed. 2004). "An attendant circumstance is a condition that must be present, in conjunction with the prohibited conduct or result, in order to constitute the crime." JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 130 (2d ed. 1999). The combination of actus reus, mens rea, "plus attendant circumstances and specified result when required by the definition of a crime—may be said to constitute the 'elements' of the crime." LAFAYE, *supra* note 14, § 1.2(c).

101. *Uddin*, 365 F. Supp. 2d at 830.

A "failure to comply" [with the Treasury registration requirements] does not connote a knowledge of the need to comply with section 5330 of Title 31 in the first place, just as a failure to obtain a license [where required by state law] does not connote a knowledge that a license is required.

Id. (quoting *United States v. Barre*, 324 F. Supp. 2d 1173, 1177 (D. Colo. 2004)) (alterations in original).

Fourth, the *Uddin* court reasoned that if Congress intended to make § 1960 a specific intent crime, it would have done so.¹⁰² It argued that by placing the mens rea in a different subsection than the subsection defining “unlicensed money transmitting business,” Congress intended to make § 1960 a general intent crime.¹⁰³ Thus, § 1960(a) “does not require proof that the defendant knew of the federal registration requirement; the government need only allege that Defendant knew that he was operating a money transmitting business and knew that the business did not have a license or registration.”¹⁰⁴

3. *Disregarding Principles of Statutory Construction?*

The *Talebnejad* and *Uddin* courts struggled with § 1960’s mens rea requirement, and arrived at their holdings by disregarding principles of statutory construction.¹⁰⁵ Before a court turns to extrinsic evidence to construe a statute, it must first examine the statute’s text.¹⁰⁶ “[T]he authoritative statement is the statutory text, not the legislative history or any other extrinsic material.”¹⁰⁷ Absent ambiguity, courts presume that a legislature meant what it actually enacted.¹⁰⁸

Subsection 1960(a) criminalizes the knowing operation of an unlicensed money transmitting business.¹⁰⁹ An “unlicensed money transmitting business” is a business that affects interstate or foreign commerce and is operated either (1)

102. *Id.* at 829-30 (“Had Congress intended that the statute required proof of the defendant’s knowledge of the federal registration or state licensing requirements, it would have used the word ‘wilful [sic].’”).

103. *Id.* at 830.

Moreover, placing the description of the offense and the definition of the terms used to describe the offense in separate subsections of Section 1960 demonstrates that Congress did not intend for proof of the defendant’s knowledge of either state licensing or federal registration requirements to be an element of a Section 1960 offense. This reading is consistent with the interpretation given by courts, including the Sixth Circuit, to 18 U.S.C. § 1955 upon which Section 1960 was modeled and the structure of which parallels the instant statute.

Id.

104. *Id.* at 832.

105. *See infra* Part IV.A.

106. *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

107. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005); *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) (“[The Court does] not resort to legislative history to cloud a statutory text that is clear.”); *Ex parte Collett*, 337 U.S. 55, 61 (1949).

[T]here is no need to refer to the legislative history where the statutory language is clear. “The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.”

Id. (quoting *Gemsco v. Walling*, 324 U.S. 244, 260 (1945)).

108. *Germain*, 503 U.S. at 253-54 (“We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’” (citations omitted) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981))).

109. 18 U.S.C.A. § 1960(a) (West 2000 & Supp. 2007).

without a state license;¹¹⁰ (2) without a federal license;¹¹¹ or (3) with knowledge of the illicit nature of the transmitted funds.¹¹²

The *Talebnejad* court interpreted § 1960(b)(1)(A) and (B) to preclude the operation of a mistake of law defense. Even though § 1960(b)(1)(A) expressly provides that knowledge of the state licensing requirement is not an element of the crime, at least one court has suggested that the *Talebnejad* court read the provision too broadly.¹¹³ Moreover, unlike § 1960(b)(1)(A), the federal licensing provision, § 1960(b)(1)(B), does not expressly preclude a mistake of law defense.¹¹⁴ Nevertheless, the court held that no mistake of law defense was available under § 1960(b)(1)(B).¹¹⁵ The House of Representatives Committee on Financial Services' report on the USA PATRIOT Act explains that Congress intended to create a general intent crime where ignorance of the law is no excuse.¹¹⁶ After reviewing the Conference Report, the court reasoned that "[i]n light of [the] clear expression of congressional purpose" to make § 1960(b)(1)(A) a general intent crime, "it would be unreasonable to conclude that Congress intended a greater mens rea for § 1960(b)(1)(B)."¹¹⁷

Similarly, the *Uddin* court construed § 1960(b)(1)(B) to preclude a mistake of law defense because the definition of "unlicensed money transmitting business" is contained in a separate provision than the statute's mens rea term.¹¹⁸

110. *Id.* § 1960(b)(1)(A).

111. *Id.* § 1960(b)(1)(B).

112. *Id.* § 1960(b)(1)(C).

113. Distinguishing *Talebnejad* from a § 1960(b)(1)(A) case brought for failure to register under N.Y. BANKING LAW §§ 641, 650, the U.S. District Court for the Southern District of New York said the following:

As an initial matter, it is entirely clear that Section 1960, as amended by the USA PATRIOT Act, makes the defendant's state of mind with respect to the need for a State license irrelevant, at least in the absence of a relevant provision of State law making the need for a license under State criminal law depend upon the defendant's state of mind. The Fourth Circuit, indeed, has gone further. It has held that Section 1960 has dispensed entirely with any requirement that the defendant know of a need for a State license, irrespective of whether such knowledge would be needed to convict under the pertinent State statute. [*Talebnejad*] But it is unnecessary to go so far to resolve this case.

United States v. Bah, No. S1 06 CRIM, 2007 WL 1032260 at *1 (S.D.N.Y. Mar. 30, 2007) (holding that, for a prosecution under 18 U.S.C.A. § 1960(b)(1)(A), the defendant's state of mind was irrelevant, because N.Y. Banking Law § 650 is a "strict liability [misdemeanor] crime, [n]o culpable mental state is required" to show a violation).

114. Compare 18 U.S.C.A. § 1960(b)(1)(A) ("[A business which] is operated without an appropriate money transmitting license in a State where such operation is punishable as a misdemeanor or a felony under State law, whether or not the defendant knew that the operation was required to be licensed or that the operation was so punishable."), with *id.* § 1960(b)(1)(B) ("[A business which] fails to comply with the money transmitting business registration requirements under section 5330 of title 31, United States Code, or regulations prescribed under such section.").

115. *United States v. Talebnejad*, 460 F.3d 563, 572 (4th Cir. 2006).

116. H.R. REP. NO. 107-250, pt. 1, at 54 (2001). The Report states that "[f]or purposes of a criminal prosecution [brought under § 1960], the Government would not have to show that the defendant knew that a State license was required or that the Federal registration requirements promulgated pursuant to 31 U.S.C. § 5330 applied to the business." *Id.*

117. *Talebnejad*, 460 F.3d at 572-73 n.9 (emphasis omitted).

118. Compare *United States v. Uddin*, 365 F. Supp. 2d 825, 829 (E.D. Mich. 2005) (quoting *United*

To support its interpretation, the *Uddin* court explained that Congress intended to close a loophole in § 1960(b)(1)(A) and, therefore, adding language to § 1960(b)(1)(B) was unnecessary.¹¹⁹ However, this statement of “congressional intent” came from a Department of Justice memorandum.¹²⁰

The *Uddin* court’s interpretation also runs counter to canons of statutory construction. First, a mens rea term must apply to all of the elements of a crime. It does not matter if a statutory term is defined separately because, by virtue of being a definition, it is incorporated into the provision’s elements.¹²¹ Second, the court treated the *actus reus* and attendant circumstances elements found in § 1960(a) and § 1960(b) as neatly severable elements. Yet, under the canons of statutory construction, attendant circumstances constitute part of the *actus reus* of an offense—it would be absurd to separate them.¹²²

Thus, the *Talebnejad* and *Uddin* decisions disregarded basic principles of statutory construction. Using extrinsic materials to construe a statute is like “looking over a crowd and picking out your friends.”¹²³ However, Congress voted

States v. Kelley Technical Coatings, Inc., 157 F.3d 432, 439 (6th Cir. 1998)) (“When the statute at issue is clear, makes sense, and does not contain inconsistencies or ambiguities, ‘the inquiry ends with a cogent means of reading the plain language of the statute.’”), with *id.* at 830 (“Moreover, placing the description of the offense and the definition of the terms used to describe the offense in separate subsections of Section 1960 demonstrates that Congress did not intend for proof of the defendant’s knowledge of either state licensing or federal registration requirements to be an element of a Section 1960 offense.”).

119. *Id.* at 827 (explaining that absent the “whether or not the defendant knew that the operation was required to be licensed or that the operation was so punishable” language, defendants could rely on an affirmative defense that they were not aware of the state law licensing requirements).

120. See *id.* (quoting U.S. DEP’T OF JUSTICE, REPORT FROM THE FIELD: THE USA PATRIOT ACT AT WORK 10 (2004)).

The Department of Justice summarized the amendment’s purpose in its *Report from the Field: The USA PATRIOT Act at Work*:

The USA Patriot Act also strengthened the criminal laws against terrorism by making it easier to prosecute those responsible for funneling money to terrorists. Under previous federal law, 18 U.S.C. § 1960, those who operated unlicensed money transmitting businesses were entitled to rely on the affirmative defense that they had no knowledge of the applicable state licensing requirements. Some of these businesses, called hawalas, have funneled extensive amounts of money to terrorist groups abroad. Section 373 of the USA PATRIOT Act amended federal law by eliminating this loophole requiring that the defendant know about state licensing requirements

Id. (emphasis omitted).

121. See *infra* Part IV.A.

122. DRESSLER, *supra* note 100, at 130. Professor Dressler uses the following example:

[A]ssume that a statute provides that “it is an offense to drive an automobile in an intoxicated condition.” The words “in an intoxicated condition” represent an attendant circumstance: the *actus reus* of the offense does not occur unless the actor drives her car (the conduct) while intoxicated (the circumstance that must be present at the time of the conduct).

Id.

123. Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. 546, 568-69 (2005).

Not all extrinsic materials are reliable sources of insight into legislative understandings, however, and legislative history in particular is vulnerable to . . . serious criticisms. . . . [L]egislative history is itself often murky, ambiguous, and contradictory. Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal’s memorable phrase, an exercise in “looking over a

on (and the President signed) § 1960's text, not the Conference Report.¹²⁴ Because of this, the text of a statute is authoritative, and extrinsic evidence should only be used to illuminate ambiguous terms.¹²⁵ Yet, despite an unambiguous statute, and no textual support for their reading, both the *Talebnejad* and *Uddin* courts relied heavily on extrinsic evidence to construe § 1960 and buttress their conclusions that § 1960(b)(1)(B) had the same mistake of law negating language as § 1960(b)(1)(A).

IV. MENS REA AND § 1960

How should the mens rea term in § 1960 be construed? This Comment argues that the mens rea term should apply to all of the elements of the crime, including knowledge of the state and federal licensing requirements. This means that a mistake of law defense would apply in § 1960 prosecutions. Otherwise, business owners will be exposed to felony punishment without proof of any morally blameworthy activity. Moreover, the U.S. Government's national security efforts would not be hampered by allowing a mistake of law defense, as it could prosecute violators under the rarely used third provision in § 1960(b)(1)(C). This section is preferable to the other subsections because it protects business owners acting in good faith, while reaching business owners and employees who act with knowledge of their illegal activities.

A. Criminalizing Morally Blameless Behavior?

Courts require both common law and statutory crimes to include a mens rea element.¹²⁶ "The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute."¹²⁷ However, the Supreme Court has made clear that there are

crowd and picking out your friends."

Id. (citing Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983)).

124. *See id.*

[J]udicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text.

Id.

125. *Id.* at 568 ("[T]he authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms.").

126. *United States v. Balint*, 258 U.S. 250, 251-52 (1922) ("While the general rule at common law was that the *scienter* was a necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crimes [except those defining a strict liability, public welfare offense.]; see LAFAVE, *supra* note 14, § 5.1 ("The basic premise that for criminal liability some *mens rea* is required is expressed by the Latin maxim *actus not facit reum nisi mens sit rea* (an act does not make one guilty unless his mind is guilty).").

127. *Liparota v. United States*, 471 U.S. 419, 424 (1985) (citing *United States v. Hudson*, 11 U.S. (7

limits to legislatures' power to define a crime's mens rea term. This rule of statutory construction has been called the "Rule of Mandatory Culpability" (Rule). Under the Rule, federal courts construe felony criminal statutes to require moral culpability for conviction.¹²⁸

1. The Rule of Mandatory Culpability

The Rehnquist Court developed the Rule through a body of case law that reaffirmed the necessity of proving mens rea where otherwise legal conduct would be criminalized by a *malum prohibitum* statute.¹²⁹ Three cases central to the Rule are discussed below.

In *Staples v. United States*, the Court struck down Howard Staples' conviction under the National Firearms Act. The Act requires firearms owners to register their guns with the government.¹³⁰ Failure to register a machinegun¹³¹ with

Cranch) 32 (1812)).

128. John Shepard Wiley, Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021, 1023 (1999).

[The Supreme Court's new] method [of statutory construction] amends the medieval slogan that ignorance of the law is no excuse When reading statutes, the Justices today suppose that Congress does not want blameless people to be convicted of serious federal crimes. This interpretive method makes moral culpability mandatory for criminal conviction in federal court.

Id.; Note, *The New Rule of Lenity*, 119 HARV. L. REV. 2420, 2421 (2006) [hereinafter *The New Rule of Lenity*].

The [New Rule of Lenity] requires that an ambiguous criminal statute be construed narrowly only when a broad interpretation would penalize 'innocent' conduct. . . . [A] statute punishes 'innocent' conduct if . . . the conduct at issue is not wrong by its very nature but rather wrong because it is prohibited (*malum prohibitum* instead of *malum in se*) and the statute does not make knowledge of wrongfulness or illegality an element of the offense.

Id.; see also Joseph E. Kennedy, *Making the Crime Fit the Punishment*, 51 EMORY L.J. 753, 754 (2002) ("[T]he loss of [discretion under the Sentencing Guidelines] has led the Court to redefine the crime to fit the punishment. . . . The Court has been interpreting mens rea to protect the morally innocent if the sentencing guidelines would likely require imprisonment upon conviction."); Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 889 (2005) (noting that "[t]he Supreme Court has a satisfactory record—lately, at least—of construing federal statutes to exempt morally blameless conduct from criminal condemnation" and that it "uses heightened mens rea requirements to hard-wire into the definition of the crime judicially enforceable protections for blameless conduct"); Darryl K. Brown, *Plain Meaning, Practical Reason, and Culpability: Toward a Theory of Jury Interpretation of Criminal Statutes*, 96 MICH. L. REV. 1199, 1207, 1207-08 (1998) ("[A] guilty verdict is at bottom a moral assessment of blameworthiness" and "the verdict serves criminal law's expressive function of assessing the moral quality of his judgment, and thereby his character.").

129. *The New Rule of Lenity*, *supra* note 128, at 2434-35.

A law criminalizes innocent conduct if, as in *Staples* . . . the defendant does not even need to be aware of the factual circumstances that make her actions criminal to be convicted or if the defendant must be aware of the relevant facts but need not be aware of their legal significance. Actions that are *malum in se* provide notice of wrongfulness by their very nature. When the conduct at issue is only *malum prohibitum*, however, this notice can only be guaranteed if the statute incorporates knowledge of illegality (*Ratzlaf*) or wrongfulness . . . into the definition of the offense.

Id. at 2435. A *malum prohibitum* crime is "[a]n act that is a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral." BLACK'S LAW DICTIONARY 978-79 (8th ed. 2004).

130. *Staples v. United States*, 511 U.S. 600, 602 (1994) (citing 26 U.S.C. §§ 5801-5872).

131. *Staples*, 511 U.S. at 602.

the Treasury Department is punishable by up to ten years imprisonment.¹³² The Act does not supply a mens rea term.¹³³ The government prosecuted Staples for failing to register an AR-15 assault rifle that had been converted for automatic firing, i.e., firing more than one bullet at a time.¹³⁴ Staples claimed that he did not know that the gun was capable of automatic firing as it jammed when he first fired the weapon.¹³⁵

The Court overturned his conviction—despite the need to infer Congress’ intent¹³⁶—because the common law’s emphasis on punishing morally blameworthy acts is applied equally to statutory, *malum prohibitum* crimes.¹³⁷ The government had failed to prove that Staples had the requisite amount of moral culpability because the Court construed the Act to require a defendant to know the facts that made his behavior illegal, even though the Act did not prescribe a mens rea term.¹³⁸ “Thus, to obtain a conviction, the Government should have been required to prove that petitioner knew of the features of his AR-15 that brought it within the scope of the Act,” i.e., that Staples knew that his weapon could fire automatically.¹³⁹

Justices Ginsburg and O’Connor concurred in the judgment, noting that the mens rea requirement is tempered by another legal maxim—“ignorance of the law or a mistake of law is no defense to criminal prosecution.”¹⁴⁰ Refining the

The Act includes within the term ‘firearm’ a machinegun and further defines a machinegun as ‘any weapon which shoots, . . . or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger.’ Thus, any fully automatic weapon is a ‘firearm’ within the meaning of the Act.

Id. (quoting 26 U.S.C. § 5845(a)(6), (b)) (omission in original).

132. *Id.* at 602-03 (citing 26 U.S.C. §§ 5841, 5861(d), 5871).

133. 26 U.S.C.A. § 5861(d) (West 2002) (“It shall be unlawful for any person . . . to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record.”); *id.* § 5871 (West 2002) (“Any person who violates or fails to comply with any provision of [the Act] shall, upon conviction, be fined not more than \$10,000, or be imprisoned not more than ten years, or both.”).

134. *Staples*, 511 U.S. at 603.

135. *Id.*

136. *Id.* at 605 (“[D]etermining the mental state required for commission of a federal crime requires ‘construction of the statute and . . . inference of the intent of Congress.’”) (quoting *United States v. Balint*, 258 U.S. 250, 253 (1922)).

137. *Id.* (explaining that courts must construe statutes “in light of the background rules of the common law, in which the requirement of some *mens rea* for a crime is firmly embedded” and that “the existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence”) (citing and quoting *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436-437 (1978)); see *Balint*, 258 U.S. at 251-52 (“[T]he general rule at common law was that the scienter was a necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crimes even where the statutory definition did not in terms include it.”). *Malum prohibitum* crimes are “not inherently evil; [the conduct is] wrongful] only because [it is] prohibited by legislation.” LAFAVE, *supra* note 14, § 1.6(b).

138. *Staples*, 511 U.S. at 619.

139. *Id.*

140. *Id.* at 622 n.3 (Ginsburg, J., concurring) (quoting *Cheek v. United States*, 498 U.S. 192, 199 (1991)) (“If the ancient maxim that ‘ignorance of the law is no excuse’ has any residual validity, it indicates that the ordinary intent requirement—*mens rea*—of the criminal law does not require knowledge that an act is illegal, wrong, or blameworthy.” (quoting *United States v. Freed*, 401 U.S. 601, 612 (1971) (Brennan, J., concurring))).

majority's holding, they reasoned that the government need only show that a defendant had knowledge of the facts which made his conduct illegal¹⁴¹ because proving knowledge of the gun's registration effectively meant that the government had to show Staples's knowledge of the law.¹⁴²

In short, *Staples* stands for two propositions. First, the U.S. Supreme Court will require that, at a minimum, "knowledge of illegality" be incorporated into the statutory terms of a *maulum prohibitum* crime that criminalizes otherwise innocent behavior.¹⁴³ Even if the statute lacks such a mens rea term, the Court will construe the statute so as to incorporate one.¹⁴⁴ Second, in prosecutions for violations of a licensing and registration program, the government must prove a knowledge mens rea term by showing that a defendant knows the factual circumstances, as defined by relevant statute, which create the duty to register.¹⁴⁵

Six months later, the Court further developed the Rule in *United States v. X-Citement Video*.¹⁴⁶ Under § 2256 of the Protection of Children Against Sexual Exploitation Act of 1977, criminal liability attaches to any person who knowingly transports, ships, receives, distributes, or reproduces child pornography.¹⁴⁷ In *X-Citement Video*, Rubin Gottesman shipped copies of a

141. *Id.* ("The mens rea presumption requires knowledge only of the facts that make the defendant's conduct illegal, lest it conflict with the related presumption, 'deeply rooted in the American legal system,' that, ordinarily, 'ignorance of the law or a mistake of law is no defense to criminal prosecution.'" (quoting *Cheek v. United States*, 498 U.S. 192, 199 (1991))); accord *Bryan v. United States*, 524 U.S. 184, 192-93 (1998) ("[T]he knowledge requisite to knowing violation of a statute is factual knowledge as distinguished from knowledge of the law.' . . . Thus, unless the text of the statute dictates a different result, the term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense." (quoting *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 345 (1952) (Jackson, J., dissenting) (footnote omitted)).

142. *Staples*, 511 U.S. at 622 n.3 ("Knowledge of whether the gun was registered is so closely related to knowledge of the registration requirement that requiring the Government to prove the former would in effect require it to prove knowledge of the law.").

143. *The New Rule of Lenity*, *supra* note 128, 2421, 2434-35.

144. *Staples*, 511 U.S. at 619-20 ("Silence does not suggest that Congress dispensed with mens rea for the element of § 5861(d) at issue here. . . . [O]ur holding depends critically on our view that if Congress had intended to make outlaws of gun owners who were wholly ignorant of the offending characteristics of their weapons, and to subject them to lengthy prison terms, it would have spoken more clearly to that effect.").

145. *Id.* at 619.

146. 513 U.S. 64 (1994).

147. *Id.* at 67-68 (citing to 18 U.S.C. § 2252 (1988 ed. and Supp. V)). 18 U.S.C. § 2252 provides that (a) Any person who—

(1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(2) knowingly receives, or distributes, any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if—

(A) the producing of such visual depiction involves the use of a minor engaging in

pornographic video starring Traci Lords, who was a minor at the time of the film's production.¹⁴⁸

The Ninth Circuit Court of Appeals threw out Gottesman's conviction because it found that the child pornography statute lacked a mens rea term, and, consequently, the statute was facially invalid because it did not require a showing that respondents knew that a performer was a minor.¹⁴⁹ The Supreme Court reversed and upheld the conviction.¹⁵⁰ Although the Ninth Circuit's reading of the statute was the "most grammatical reading," the Court did not accept it because it led to a "positively absurd" result: "If we were to conclude that 'knowingly' only modifies the relevant verbs in § 2252, we would sweep within the ambit of the statute actors who had no idea that they were even dealing with sexually explicit material."¹⁵¹ To illustrate, the Court provided three examples of innocuous activity that would fall under the statute: the photo developer who returns to a customer an uninspected roll of film; a new apartment resident who receives a previous tenant's mail; and a shipping courier who delivers a package.¹⁵² All three would be punishable under the Ninth Circuit's reading, despite having no knowledge of the sexually explicit material contained in the roll of film, mail, or package.¹⁵³

Instead, the Court found 18 U.S.C. § 2252 valid based on two principles: (1) a mens rea term must apply equally to all elements of a crime, and (2) a statute must be read as fairly as possible to avoid constitutional issues.¹⁵⁴ To accommodate both principles, Chief Justice Rehnquist construed § 2252's knowledge mens rea requirement to extend to all of a crime's factual elements, a reading which ran contrary to normal grammatical rules.¹⁵⁵ "Criminal intent

sexually explicit conduct; and

(B) such visual depiction is of such conduct;

148. *X-Citement Video*, 513 U.S. at 66; see Wiley, *supra* note 128, at 1043 ("An undercover officer asked [Gottesman] for video tapes of Traci Lords, who had just been widely publicized for her underage pornographic film roles. Gottesman sold the officer some videos featuring Lords before her eighteenth birthday, and later shipped him more of the same.") (citations omitted); see generally Dave Palermo, *Sex Films Pulled; Star Allegedly Too Young*, L.A. TIMES, July 18, 1986, at M1 ("Los Angeles police say that Lords, considered one of the top adult film actresses in the country, made about 75 sexually explicit movies and videos before she turned 18 last May, and adult film industry officials are being advised to stop selling and showing her movies to avoid criminal prosecution."); Aurelio Rojas, *Porn Queen's Age Prompts Removal of Sex Films*, UNITED PRESS INT'L, July 19, 1986, at Domestic News ("I would never have expected she was only 15 at the time. . . . She looks 22 or 24. She was very mature, acted very grown up and didn't act anything like you'd expect a 15-year-old to act. I consider her to be the biggest star in the industry. She is very beautiful and has . . . the most outrageous figure you've ever seen." (quoting Bunny Bleu, Lords' co-star) (second omission in original)).

149. *X-Citement Video*, 513 U.S. at 67.

150. *Id.*

151. *Id.* at 68-70.

152. *Id.* at 69.

153. *Id.*

154. *Id.* at 69, 72 ("Staples [511 U.S. at 619], instructs that the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct.").

155. *Id.* at 78.

serves to separate those who understand the wrongful nature of their act from those who do not, but does not require knowledge of the precise consequences that may flow from that act once [a person is] aware that the act is wrongful.”¹⁵⁶ Thus, the government met its burden of proving Gottesman’s knowledge of the facts (the shipment of the material across state lines, the sexually explicit nature of the material, and performers’ ages) that made his activity criminal.¹⁵⁷

Thus, *X-Citement Video* stands for the proposition that the Court will construe a statute to ensure that a mens rea term modifies all of the crime’s elements, even if it is grammatically incorrect and contrary to the literal meaning of the text.¹⁵⁸

The Court deepened its Mandatory Culpability Rule jurisprudence in *Ratzlaf v. United States*.¹⁵⁹ There, the Court considered Waldemar Ratzlaf’s conviction under the BSA for structuring currency transactions to evade the BSA’s mandatory reporting requirements.¹⁶⁰ Ratzlaf sought to repay a \$160,000 debt owed to a casino.¹⁶¹ The casino informed him that it would have to report any cash transaction over \$10,000 to the Internal Revenue Service, but that it “could accept a cashier’s check for the full amount due without triggering any reporting requirement.”¹⁶² The casino then “helpfully placed a limousine at Ratzlaf’s disposal, and assigned an employee to accompany him to banks in the

156. *Id.* at 73 n.3 (citing *United States v. Feola*, 420 U.S. 671, 685 (1975)).

157. *Id.* at 78. Thus, although the term “knowingly” modified “transports or ships in interstate or foreign commerce by any means” in § 2252(a)(1) and “receives, or distributes, any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce” in § 2252(a)(2), the Supreme Court held that the mens rea term extended to the “both to the sexually explicit nature of the material and to the age of the performers,” factual elements found in § 2252(a)(1)(A) and (B) and § 2252(a)(2)(A) and (B). *Id.*

158. *Id.* at 70 (“Our reluctance to simply follow the most grammatical reading of the statute is heightened by our cases interpreting criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them.”); *see also* LAFAVE, *supra* note 14, § 2.2(b) & n.13 (Citing *X-Citement Video* for the proposition that “courts sometimes conclude that what seems to be clear language is so harsh or foolish or devoid of sense that it is ambiguous after all, and they then proceed to find that the legislature did not mean what it literally said.”).

159. *Ratzlaf v. United States*, 510 U.S. 135 (1994).

160. *Id.* at 136. A financial institution and any participant must report any currency transaction of more than \$10,000 to the Treasury Department. 31 U.S.C.A. § 5313(a) (West 2003). Structuring a transaction to avoid § 5313’s reporting requirement is a felony punishable by 5 years’ imprisonment and forfeiture. 31 U.S.C.A. § 5324(a)-(d) (West 2003). Like money transmitting business operators, bank officials who suspect that a customer is attempting to evade the currency reporting requirements must file a Suspicious Activity Report (SAR) with FinCEN. *See* 31 C.F.R. § 103.18(b) (2007). The investigation of former New York Gov. Eliot Spitzer is one example of how the filing of an SAR can lead to criminal investigation. Federal agents began investigating Gov. Spitzer after his bank filed an SAR with FinCEN. His bank suspected that he was structuring cash transactions to avoid BSA reporting requirements because he wired \$15,000 in three installments to the operators of the Emperor’s Club VIP prostitution ring. Laurie P. Cohen, Glenn R. Simpson & Amir Efrati, *Spitzer Steps Down, Has No Deal To Avoid Prosecution*, WALL ST. J., Mar. 13, 2008 at A1. Gov. Spitzer resigned after wiretap evidence was made public which recorded him arranging a \$4,300 liaison with a prostitute in a Washington-area hotel. *Id.*

161. *Ratzlaf*, 510 U.S. at 137.

162. *Id.*

vicinity.”¹⁶³ After learning that banks were subject to the same reporting requirements for cash transactions, he bought \$160,000 in cashier’s checks “each for less than \$ 10,000 and each from a different bank.”¹⁶⁴

The Court reversed defendant Ratzlaf’s conviction, holding that the statute’s “willfully” mens rea term required that the government show not only an intent to evade the reporting requirements, but also that the defendant knew his behavior was unlawful.¹⁶⁵ The government was required to make a higher showing of culpability, the Court reasoned, because non-criminal motives may underlie one’s decision to structure a transaction that would avoid the reporting requirement.¹⁶⁶

The Court was “unpersuaded by the [government’s] argument that [currency] structuring is so obviously evil or inherently bad that the willfulness requirement is satisfied irrespective of the defendant’s knowledge of the illegality of structuring.”¹⁶⁷ Thus, while ignorance of the law is generally no defense, “[i]n particular contexts . . . Congress may decree otherwise. That, [the Court held], is what Congress” had done.¹⁶⁸

Ratzlaf was widely criticized.¹⁶⁹ Congress responded by enacting the Money Laundering Suppression Act, which amended the currency transaction structuring statute to eliminate any reference to “willful” behavior.¹⁷⁰ Five years later,

163. *Id.*

164. *Id.*

165. *Id.* at 138. Justice Ginsburg’s opinion found it significant that the “willfulness” mens rea that had been applied to other provisions within the same subchapter of the U.S. Code, “consistently has been read by the Courts of Appeals to require both knowledge of the reporting requirement and a specific intent to commit the crime, i.e. a purpose to disobey the law.” *Id.* at 141 (citing *United States v. Bank of New England, N.A.*, 821 F.2d 844, 854-59 (1st Cir. 1987); *United States v. Eisenstein*, 731 F.2d 1540, 1543 (11th Cir. 1984)) (internal quotation marks and emphasis omitted). Section 5330, the statute requiring IVTS to register with the Treasury Department, is also located within the same subchapter as the section in *Ratzlaf*, namely U.S. Code Title 31, Subtitle IV, Chapter 53, Subchapter II: Records and Reports on Monetary Instruments Transactions.

166. *Ratzlaf*, 510 U.S. at 144-46 (explaining that non-criminal reasons included minimizing the likelihood of an IRS audit, fear of burglary, hiding money from a spouse, avoiding the Stamp Tax of 1862, and taxable gifts reporting to the IRS under 26 U.S.C.A. § 2503).

167. *Id.* at 146 (internal quotations omitted).

168. *Id.* at 149.

169. William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 58-59 (1994).

The [*Ratzlaf*] Court imposed a further scienter requirement: the jury must also find that the defendant specifically knew that structuring (not just evading the reporting requirements) is unlawful. While this may be a (barely) plausible reading of the statute, it is not the most plausible, and certainly not the only plausible reading.

Id.

170. 31 U.S.C.A. § 5324 (West 2003 & Supp. 2007). According to the House Report,

The Act restores the clear Congressional intent that a defendant need only have the intent to evade the reporting requirement as the sufficient mens rea for the offense. The prosecution [in a currency transaction structuring] would need to prove that there was an intent to evade the reporting requirement, but would not need to also prove that the defendant knew that structuring was illegal.

H.R. Rep. No. 103-438, at 22 (1994). However, “[a] person who innocently or inadvertently structures or otherwise violates section 5324 would not be criminally liable.” *Id.*

however, the Court reaffirmed *Ratzlaf's* reasoning, limiting its operation to “highly technical statutes,” such as tax laws and provisions of the Bank Secrecy Act.¹⁷¹ Nevertheless, courts and observers disagree as to whether *Ratzlaf* is followed today or whether it was superseded by Congress.¹⁷²

It should be noted that the Rule only applies to *malum prohibitum* crimes. *Malum in se* crimes are unlikely to correspond to “blameless conduct” since they “provide notice of wrongfulness by their very nature.”¹⁷³ Ignorance of the law is no excuse because it would be too difficult to prove that a person knew the law when he claimed otherwise.¹⁷⁴ This may have been more appropriate when most, if not all, crimes were *malum in se*.¹⁷⁵ However, as shown by *Ratzlaf* and *Staples*, the maxim has lost force within the context of *malum prohibitum* crimes.¹⁷⁶

In sum, as developed in *Staples*, *X-Citement Video*, and *Ratzlaf*, the Rule is one of statutory construction applicable to *malum prohibitum* crimes, wherein “[t]he presumption in favor of scienter requires a court to read into a statute only that mens rea which is necessary to separate wrongful conduct from ‘otherwise innocent conduct.’”¹⁷⁷

171. *Bryan v. United States*, 524 U.S. 184, 194-95 (1998).

Both the tax cases and *Ratzlaf* involved highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct. As a result, we held that these statutes carve out an exception to the traditional rule that ignorance of the law is no excuse and require that the defendant have knowledge of the law.

Id. (footnotes and internal quotations omitted).

172. Compare 1 JOEL ANDROPHY, WHITE COLLAR CRIME § 10:12 n.4 (2d ed. 2001 & Supp. 2007) (“[T]he courts continue to follow the holding in *Ratzlaf*, thus a defendant must have knowledge that the structuring was illegal.” (citing *United States v. Threadgill*, 172 F.3d 357, 369 (5th Cir. 1999), cert. denied 528 U.S. 871 (1999); *United States v. Hill*, 167 F.3d 1055, 1070 (6th Cir. 1999), cert. denied 528 U.S. 872 (1999)), with *United States v. Lindberg*, 220 F.3d 1120, 1122 n.2 (9th Cir. 2000) (“*Ratzlaf* has been superseded by statute.”); *United States v. Ahmad*, 213 F.3d 805, 809 (4th Cir. 2000) (“In 1994, Congress amended § 5322 to eliminate [*Ratzlaf's*] willfulness requirement with respect to structuring violations under § 5324.”).

173. *The New Rule of Lenity*, supra note 128, at 2435.

174. Mark D. Yochum, *The Death of a Maxim: Ignorance of Law is No Excuse (Killed by Money, Guns and a Little Sex)*, 13 ST. JOHN'S J. LEGAL COMMENT. 635, 635 (1999) (“Ignorance of the Law excuses no man; not that all men know the law, but because it's an excuse every man will plead, and no man can tell how to refute him.” (quoting English Jurist John Selden (1584-1654))).

175. LAFAVE, supra note 14, § 1.6 n.25 (“An offense *malum in se* is properly defined as one which is naturally evil as adjudged by the sense of a civilized community, whereas an act *malum prohibitum* is wrong only because made so by statute.” (quoting *State v. Horton*, 139 N.C. 588, 51 S.E. 945, 946 (1905))).

176. Yochum, supra note 174, at 673.

The maxim that ignorance of the law is no excuse cannot prevail. As an interpretative device, it has been reduced to a starting point, at best, a faint predilection, almost to remind us of how criminal laws used to be. Over time, the maxim will not have vitality in newly decided cases. The maxim is trumped by any canon of new rigorous construction, the pressures of due process or even, the last resort, the medieval rule of lenity.

Id. See supra note 128 and accompanying text.

177. *Carter v. United States*, 530 U.S. 255, 269 (2000) (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994)); see supra notes 142-144, 157, 166, 171 and accompanying text.

2. Professor Wiley's Analytical Framework

A useful analytical framework for the Rule has been sketched by Professor John Shepard Wiley, Jr., who argues that the Rule follows three basic steps.¹⁷⁸ First, conventional statutory construction techniques are used to elucidate all of the crime's elements.¹⁷⁹ Second, a hypothetical is created to test "whether morally blameless people could violate these candidate elements."¹⁸⁰ If not, then the interpretation is final. If, however, a morally blameless person could violate the elements, then "a third step is necessary: [courts must] formulate an additional and minimally sufficient [mens rea] element . . . to shield blameless conduct from criminal condemnation."¹⁸¹

Turning to § 1960, the first analytical step is to determine all of the crime's elements. The elements of § 1960(b)(1)(A) would be the defendant (1) knowingly operated a money transmitting business, (2) knowing that it affected interstate commerce, and (3) knowing that the business was unlicensed, but (4) without any knowledge that state law requires a license and (5) without any knowledge that state law punishes lack of a license as a felony or misdemeanor. Subsection 1960(b)(1)(B)'s elements would be the defendant (1) knowingly operated a money transmitting business, (2) knowing that it affects interstate commerce, and (3) knowing that the business is unlicensed but (4) without any knowledge that such unlicensed operation "fails to comply" with federal law.

The next step in Professor Wiley's framework is to devise a hypothetical to test if a morally blameless person would be caught under the most conventional reading of the statute.¹⁸² Returning to the hypothetical in the introduction, if Yasmeen were sending money to Pakistan as part of a heroin smuggling ring to fund terrorist organizations, then she would not be morally blameless.¹⁸³ Assuming that Yasmeen was only providing a cost-effective service for Pakistani immigrants to remit money to their families back home, then Yasmeen would be guilty of nothing more than profit-seeking behavior. Alternatively, if Yasmeen used any profits from her business to subsidize her customers' transactions, motivated by a religious obligation to provide charity (*zakat*), then she would be guilty of being a charitable soul. Under this second step of his analysis, it is possible to conceive of Yasmeen acting without moral culpability and, yet, she would still be subject to § 1960's provisions.¹⁸⁴

178. Wiley, *supra* note 128, at 1023.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. She would also be liable under Subsection 1960(b)(1)(C), providing material support to terrorism, and a host of other offenses. See *infra* notes 196-97, 202-04.

184. Regardless of her intentions, Yasmeen would be guilty under the Government's interpretation of Subsections 1960(b)(1)(A) and (B). By sending money to Pakistan on behalf of Aziz, Yasmeen knowingly operates a money transmitting business that affects interstate commerce. The Government could prove that

The third step requires that courts formulate a “minimally sufficient” mens rea element to separate the morally blameless violator from the morally culpable violator.¹⁸⁵ To accomplish this, a court would not have to stray beyond the text of the statute. Rather, it should extend the mens rea requirement to embrace all of the factual circumstances that would, at a minimum, make Yasmeen’s behavior morally culpable. Returning to the hypothetical, the knowing transmission of terrorism-related funds would be a morally culpable activity. If Yasmeen were nothing more nefarious than a smart businessperson or dedicated charitable worker, her activities would not become morally culpable until it is shown that she knew that she had to register her business with the government and failed to do so. Therefore, the minimum sufficient mens rea would require the government to prove that Yasmeen knows her business (1) touches on or utilizes means of interstate commerce, (2) is unlicensed, and that it (3) must be registered with the relevant state and/or federal officials. However, because § 1960’s mens rea requires knowledge only, the government would not have to prove that Yasmeen purposefully avoided registration.

Following *Staples*, *X-Citement Video*, and *Ratzlaf*, the government must prove, at a minimum that a defendant knows all of the statutorily defined factual elements of a crime where otherwise innocuous behavior is criminalized.¹⁸⁶ Professor Wiley’s framework suggests how a court should determine the proper mens rea under those circumstances. As applied to § 1960, the government must prove that the defendant knew all of the elements of the crime in § 1960(a) and also the definitions of “unlicensed money transmitting business” found in § 1960(b)(1)(A) and (B). In other words, the government would have to show Yasmeen’s knowledge of the state and federal licensing requirements.¹⁸⁷ Although this reading runs counter to § 1960(b)(1)(A)’s language—but not that of § 1960(b)(1)(B)—such a reading is necessary to prevent the statute from reaching ordinary, innocuous entrepreneurial activity and converting it into criminal behavior. Requiring the minimum necessary mens rea term to punish morally culpable behavior—operating a business without a license where one is needed—logically requires a showing that the operator knew she needed a license but did not get it. This reading would be a proper construction of the statute.¹⁸⁸

Yasmeen knew that she did not have a license by simply pointing to the fact that the business was unlicensed.

185. Wiley, *supra* note 128, at 1023.

186. See *supra* notes 142-144, 157, 166, 171, 177 and accompanying text.

187. Requiring the Government to prove a defendant’s knowledge of the criminal penalties of a law would not comport with *X-Citement Video*. See *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73 n.3 (1994) (“Criminal intent serves to separate those who understand the wrongful nature of their act from those who do not, but does not require knowledge of the precise consequences that may flow from that act once aware that the act is wrongful.”).

188. *Carter v. United States*, 530 U.S. 255, 269 (2000) (“[T]he presumption in favor of scienter requires a court to read into a statute only that *mens rea* which is necessary to separate wrongful conduct from ‘otherwise innocent conduct.’”) (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70 (1994)).

Such an analysis, however, may be seen to effectively transform a requirement of proving factual knowledge into proving legal knowledge. *Staples* and *X-Citement Video* make clear that, when dealing with knowledge mens rea requirements, the government must show that the defendant knew the facts which made his activity criminal, but not that the defendant knew the law.¹⁸⁹ However, when a statute defines the factual circumstances of the crime, the government must allege and prove the defendant's knowledge of each of the statutorily prescribed facts.¹⁹⁰ Following *Staples* and *X-Citement Video*, then, it is not enough to show that a defendant knew that she did not have a license under § 1960 because § 1960's language treats relevant, enumerated state and federal licensing laws as integral parts of the definition of "unlicensed money transmitting businesses." As such, those laws' existences are factual circumstances which trigger criminal liability.¹⁹¹ To read the statute otherwise is to read factual elements of a crime (in this case the incorporated state and federal laws) as mere surplusage.¹⁹²

B. Proving a Minimally Higher Mens Rea Will Not Hamper Government Efforts

One may argue that because the threat from terrorism is grave and pressing, courts should err on the side of protecting the public and use the *Talebnejad* and *Uddin* reasoning. Requiring the government to prove a minimally higher mens rea element will protect individual defendants like Yasmeeen where it is unclear whether their behavior is "otherwise innocent conduct."¹⁹³ However, it may slow government efforts to protect national security and combat the \$4 trillion worldwide trade in illicit goods and services¹⁹⁴ because it may take longer to investigate or prosecute § 1960(b)(1)(A) and (B) crimes. In other words, would national security be jeopardized if the government had to prove a defendant's moral culpability?

Subsection 1960(b)(1)(C) holds the answer to that question. Under that provision, it is a crime to knowingly operate a money transmitting business that affects interstate commerce and "involves the transportation or transmission of funds that are known to the defendant to have been derived from a criminal

189. *Bryan v. United States*, 524 U.S. 184, 193 (1998); *Staples v. United States*, 511 U.S. 600, 622 n.3 (1994) (Ginsburg, J., concurring); *X-Citement Video*, 513 U.S. at 73 (citing *United States v. Feola*, 420 U.S. 671, 685 (1975)).

190. *Staples*, 511 U.S. at 619, 622 n.3.

191. This Comment does not take a position on whether laws can be properly construed as facts in either a metaphysical, ontological, or epistemological sense, because § 1960 treats the existence of state registration laws and federal regulations promulgated under § 5330 as attendant, factual circumstances.

192. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'") (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

193. *Carter*, 530 U.S. at 269 (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70 (1994)).

194. See *The World Bank*, *supra* note 4.

offense or are intended to be used . . . to promote or support unlawful activity.”¹⁹⁵ This provision specifically addresses funds transmitted for, or on behalf of, organized crime and terrorist groups.¹⁹⁶ Under this provision, owners and managers of a duly licensed and registered business could be prosecuted.¹⁹⁷ Moreover, unlike § 1960(b)(1)(A) and (B), § 1960(b)(1)(C) reaches beyond owners, extending liability to participants and employees.¹⁹⁸

Subsection 1960(b)(1)(C)’s greater reach is justified by the fact that it punishes activity based on a defendant’s knowledge of the funds’ “obviously evil or inherently bad” source.¹⁹⁹ According to Stefan D. Cassella, under § 1960(b)(1)(C), a prosecutor must prove one of two mental states contained in the provision: “[T]he mens rea elements of § 1960(b)(1)(C) are disjunctive: the Government must prove *either* that the defendant knew the money was criminally derived or that it was intended for an unlawful purpose. Proving one or the other of those two mental states is obviously easier than proving both.”²⁰⁰

Moreover, a violation of foreign law could serve as the basis for prosecution. As Casella argues, § 1960(b)(1)(C)’s “any unlawful purpose” language is very broad, such that even “tax evasion or violating the currency control laws of a foreign country” would satisfy the statutory provision.²⁰¹ In *Pasquantino v. United States*, the Supreme Court held that the fraud element under the federal wire fraud statute, 18 U.S.C.A. § 1343, could be satisfied by showing a scheme to defraud a foreign state of tax revenue.²⁰² Pasquantino had been convicted of smuggling liquor into Canada from the United States as part of a scheme to deprive Canada of excise tax revenues.²⁰³ The Court reasoned that its

195. 18 U.S.C.A. § 1960(b)(1)(C) (West 2000 & Supp. 2007).

[T]he term ‘unlicensed money transmitting business’ means a money transmitting business which affects interstate or foreign commerce in any manner or degree and . . . otherwise involves the transportation or transmission of funds that are known to the defendant to have been derived from a criminal offense or are intended to be used to be used [sic] to promote or support unlawful activity.

Id.

196. H.R. REP. NO. 107-250, pt. 1, at 54 (2001) (“Thus, a person who agrees to transmit or to transport drug proceeds for a drug dealer, or funds from any source for a terrorist, knowing such funds are to be used to commit a terrorist act, would be engaged in the operation of an unlicensed money transmitting business.”).

197. *Id.* (“It would not be necessary for the Government to show that the business was a storefront or other formal business open to walk-in trade. To the contrary, it would be sufficient to show that the defendant offered his services as a money transmitter to another.”).

198. Stefan D. Cassella, *Application of 18 U.S.C. § 1960 to Informal Money Service Businesses*, 39 CRIM. L. BULL. 590, 594 & n.6 (2003) [hereinafter Cassella, *Application of § 1960*].

199. *Ratzlaf v. United States*, 510 U.S. 135, 141, 146 (1994).

200. Cassella, *Application of § 1960*, *supra* note 198, at 595. Mr. Casella is the Deputy Chief of the Asset Forfeiture and Money Laundering Division at the U.S. Department of Justice. *Id.* at 590.

201. Stefan D. Cassella, *Terrorism and the Financial Sector: Are the Right Prosecutorial Tools Being Used?*, 7 J. MONEY LAUNDERING CONTROL 281, 283 (2003) [hereinafter Cassella, *Terrorism and the Financial Sector*].

202. *Pasquantino v. United States*, 544 U.S. 349 (2005).

203. While in New York, Pasquantino and his co-conspirators “ordered liquor over the telephone from discount package stores in Maryland.” Drivers under their employ drove the liquor to Canada, where they “avoided paying taxes by hiding the liquor in their vehicles and failing to declare the goods to Canadian

interpretation did not give the statute extraterritorial effect, because the fraudulent conduct occurred within the United States over interstate telephone wires, which only incidentally involved the tax revenue of a foreign sovereign.²⁰⁴ While the Court²⁰⁵ and commentators²⁰⁶ expressed reservation over the use of prosecutorial resources in this manner, *Pasquantino* stands for the proposition that violation of foreign law can supply an element for the prosecution of domestic criminal conduct.²⁰⁷

Broken down to its elements, it is a crime under § 1960(b)(1)(C) to (1) knowingly operate a money transmitting business, (2) knowing that it affects interstate commerce, and (3) transmitting funds (a) knowing that the funds are derived from criminal activity or (b) intending that the funds will be used to further any unlawful purpose.²⁰⁸ Ultimately, § 1960(b)(1)(C) protects the good-faith transmitter who sends money without knowledge of its illicit nature, and punishes the morally culpable who knowingly further any unlawful purpose. Furthermore, § 1960(b)(1)(C)'s requirement that a defendant know of the transmitted funds' unlawful nature is similar to Title 18 statutes that punish providing material support to terrorists or terrorists groups, or financing terrorism.²⁰⁹ Subsection 1960(b)(1)(C) and the material support for terrorism laws

customs officials." *Id.* at 353 (citations omitted).

204. *Id.* at 371.

205. "It may seem an odd use of the federal government's resources to prosecute a United States citizen for smuggling cheap liquor into Canada. But the broad language of the wire fraud statute [18 U.S.C.S. § 1343] authorizes it to do so." *Id.* at 372.

206. See, e.g., Ellen S. Podgor, *A New Dimension to the Prosecution of White Collar Crime: Enforcing Extraterritorial Social Harms*, 37 MCGEORGE L. REV. 83, 101-03 (2006) (arguing that the domestic social harm in *Pasquantino* was entirely derivative of the harm felt in Canada, and in such circumstances, prosecutions in the United States should be initiated only in response to a foreign state's request for assistance or pursuant to a treaty).

207. ANDROPHY, *supra* note 172, § 8.2.

208. 18 U.S.C.A. § 1960(b)(1)(C); see Cassella, *Application of § 1960*, *supra* note 200, at 595.

[F]or purposes of § 1960(b)(1)(C), the money does not have to be the proceeds of a 'specified unlawful activity.' To the contrary, all that is required is that the money be 'derived from a criminal offense' or 'intended to be used to promote or support unlawful activity.' That means *any* criminal offense, and *any* unlawful activity

Id.; Cassella, *Terrorism and the Financial Sector*, *supra* note 201, at 283.

To prove a violation of § 1960, all the prosecutor has to show is that the defendants were in the business of moving money and that they did not have a money remitter's license, or that they knew the money they were moving was derived from a criminal offense or was intended for an unlawful purpose. The second part of this needs to be emphasized: *any unlawful purpose* will suffice.

Id.

209. See 18 U.S.C.A. § 2339A(a) (West 2000 & Supp. 2007) (providing material support "knowing or intending" to promote terrorism); *id.* § 2339B(a)(1) (West 2000 & Supp. 2007) ("[A] person must have knowledge that the organization is a designated terrorist organization . . . that the organization has engaged or engages in terrorism") (emphasis added); *id.* § 2339C(a)(1) (West Supp. 2007) ("[U]nlawfully and willfully provides or collects funds with the intention . . . or with the knowledge that such funds are to be used, in full or in part, in order to carry out [a terrorist act]."). A shortcoming of the material support for terrorism crimes, however, is the lack of an affirmative defense for duress. Cf. Kara Beth Stein, Comment, *Female Refugees: Re-Victimised by the Material Support to Terrorism Bar*, 38 MCGEORGE L. REV. 815 (2007) (arguing

do not run afoul of the Rule because a defendant must have, at a minimum, knowledge of the unlawful purpose of his or her actions.

While § 1960(b)(1)(C) has an arguably broader scope than the terrorism support and financing laws,²¹⁰ an empirical examination of published case law suggests that it is harder to prosecute violations of § 1960(b)(1)(C) than § 1960(b)(1)(A) and (B).²¹¹ This is likely because the government does not have to prove that money sent abroad was used for unlawful purposes, or even identify recipients of transmitted funds under § 1960(b)(1)(A) or (B).

Returning to our hypothetical, it is possible that Yasmeen's actions would be prosecutable under § 1960(b)(1)(C), even without any additional facts. If Mr. Casella is correct, any unlawful purpose would trigger § 1960(b)(1)(C). As noted above, Yasmeen is providing Aziz with a better exchange rate (thirty-seven rupees to the dollar) than Pakistan's official exchange rate (thirty-one rupees to the dollar). Yasmeen could be prosecuted because she is violating Pakistan's currency control laws by offering a better rupee exchange rate than the official rate, and this would satisfy § 1960(b)(1)(C)'s "any unlawful purpose" element.

In short, reading a minimally sufficient mens rea requirement into § 1960(b)(1)(A) and (B) to require proof of moral culpability will not derail U.S. Government efforts to combat money laundering and terrorist financing. As shown above, Yasmeen could be successfully prosecuted under § 1960(b)(1)(C) on the same facts that prove troublesome under § 1960(b)(1)(A) and (B), without implicating the Rule.

V. CONCLUSION

Observers estimate that financial crimes, including money laundering and terrorism financing, now account for ten percent of global GDP.²¹² The vast bulk of this economic activity occurs within informal networks, which are difficult to

that a duress exception to the material support for terrorism crimes is necessary in the context of immigration laws to allow rape victims to seek refugee status).

210. See Cassella, *Terrorism and the Financial Sector*, *supra* note 201, at 283-84 ("[Subsection 1960(b)(1)(C)'s] any unlawful act [language] does not require proof of any terrorism nexus. Thus, violations of § 1960 may be easier to prove than some violations of the terrorism-specific statutes."). Notably, PayPal Inc., the online money service business, forfeited \$10 million as part of a settlement agreement with the U.S. Attorney for the Eastern District of Missouri. See Carol R. Van Cleef, Harvey M. Silets & Patrice Motz, *Does the Punishment Fit the Crime?*, 12 J. FIN. CRIME 56, 62 (2004). PayPal allegedly processed payments to and from "online gambling enterprises" that it knew or should have known were illegal. *Id.*

211. A Shephard's® citator search reveals that of the fifty-five published opinions citing to Section 1960, only one cites to Subsection 1960(b)(1)(C). See *United States v. \$244,320.00 in United States Currency*, 295 F. Supp. 2d 1050, 1052 & n.1 (D. Iowa 2003).

The [United States] seeks forfeiture and condemnation of . . . \$244,320.00 more or less ('Defendant currency'). . . . The action was brought in rem by Plaintiff to condemn Defendant currency . . . for Defendant currency's involvement in violations of 18 U.S.C. §§ 1960(b)(1)(B) (Count II) and 1960(b)(1)(C) (Count III).

Id.

212. NAFM, *supra* note 4, at 16.

trace and operate outside of regulatory attention. Yet *hawala* and other forms of IVTS serve an important function for developing economies. Émigrés send remittances to their families through them. The U.S. Government has used them, finding them necessary to transfer money to relief and economic development efforts in Afghanistan.

In the wake of 9/11, the government has been given powerful tools to combat money laundering and terrorism financing, among them § 1960. Section 1960 requires that operators of previously unregulated money transmitting businesses register with federal or state authorities or face five years imprisonment and asset forfeiture.

However, in light of the Rehnquist Court's Rule of Mandatory Culpability, courts must be skeptical when interpreting § 1960, lest it be used to convict people who are morally blameless. Government efforts might be better served under § 1960(b)(1)(C) and other Title 18 statutes specifically relating to support for terrorists and terrorist organizations, whose mens rea and notice requirements would provide significant protection for the morally blameless while ensuring that national security and law enforcement efforts do not suffer.

The government has vowed to use all means at its disposal to fight global terrorism, including criminal law. If the government uses criminal law to pursue national security matters, then it is vital that the protections afforded to those charged with crimes are not eroded. The judiciary is charged with guaranteeing the rights of criminal defendants. Eroding those guarantees delegitimizes not only the criminal laws, but also the judiciary.

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