

Chapter 13

Connections Between the Ethics of Combating Money Laundering and Reduction in Global Poverty

Adrian Evans¹

Why money laundering and global poverty are connected

Money laundering (ML) inevitably adds to global poverty for several reasons.

First, it assists organised crime. Global and regional criminal organisations, including terrorist groups and illicit arms dealers, depend upon ML to help them escape detection by delaying and confusing police and anti-crime agencies in their efforts to detect what happens to the funds generated by their activities. Organised criminals and rogue governments' *raison d'être* is the extraction of huge amounts of money from vulnerable and dependent groups (eg, addictive drug users, ethnic and religious minorities, problem gamblers, sex tourists and even paedophiles). These individuals develop sophisticated repressive cultures and networks that in turn entrench large numbers of other people in suffering as well. In some regions, for example, northern Mexico, southern Thailand, Somalia, South Sudan and numerous lesser-known parts of the world, the operations of criminal groups and the poverty of the people they effectively govern, are inseparable. These groups' ability to keep the proceeds of their oppression is secured by effective ML.

Secondly, ML deprives governments of revenue by allowing evasion of taxation systems. Particularly in those regions that are poverty stricken, those governments that wish to reduce poverty are impeded in their efforts to spend on social infrastructure – particularly expenditure on the primary and secondary education programmes that would make a longer-term dent in the personal dependency that helps keep poverty in an endemic state. These problems become even more pronounced when successive global recessions (including those contributed to be some professionals' failure to live up to the implications of professionalism) further depress economies, increase unemployment and reduce tax revenue again.

Thirdly, because ML requires professional help to manage, set up and keep secret the conduits for laundered funds, it undermines the integrity of professional groups such as lawyers, accountants, financiers and bankers. Collectively, these professions could be a key global resource in reducing poverty because they effectively mediate access to the means of production, wealth accumulation and, especially, wealth distribution. ML operates to reduce the collective authority of these professions, downgrading their members to 'technicians', whose opinions are less valued for their moral judgment

¹ Adrian Evans, Professor of Law, Monash University. This short note was prepared as a supplement to the Anti-Money Laundering and Ethics session.

and required more for their ability to deliver amoral services without question. To this extent, ML is a player in the maintenance of global poverty because it is contributing to the moral impoverishment of the key groups of citizens in all countries who could really do something to combat it.

What approaches are open to lawyers in deciding to engage with anti-money laundering?

Historically, the legal profession has been at the forefront of every political and social struggle to address injustice and strengthen humanity's commitment to fairness in resource distribution. But some sectors of the profession today appear less aware of these obligations of professionalism and may ask, 'why should lawyers get actively involved in any struggle against poverty?' They may echo a view of some legal academic commentators who consider that the role of lawyers is a narrow one – concerned essentially with interpretation and enforcement of law rather than a moral concern for social equity.² But there are other legal scholars and academic practitioners who are equally vociferous and take the opposite view. These writers are confident of the importance of lawyers' active application of a moral position to their everyday work.³

IBA commentary on professionalism

If it is correct that lawyers' professionalism requires an active moral agenda (and that remains a big 'if' in some legal circles, whether voiced or not!), then we can draw upon numerous sources in an effort to reinvigorate a wider sense of professional obligation to combat ML; not just because in most jurisdictions ML is illegal, but because it actively entrenches global poverty.

To begin with, the IBA Policy Guidelines for Training and Education for the Legal Profession identify the need for such training and education to include 'ethical-deontological considerations and issues'.⁴ The reference to the *deontological* (that is, to notions of fairness in human interaction), makes best sense in terms of the discipline of ethics when it is accompanied by an understanding of the major complementary approaches to ethics (*teleological* – 'the end justifies the means', and *virtue ethics* – the critical nature of human character. The differences between the three approaches have been described as follows:

'[Consequentialists] are... in general prepared to see individuals suffer when there is a greater good... at stake. They equate ethics with numerical survival of the greatest number [for the greatest good] and their perspective is often described as teleological...; Kant is the best known of the alternative "deontologists", who value rights and fairness over consequences. His "categorical imperative"⁵ originally required only benevolence and fidelity but more recently, "Kantianism" has shifted to the "moral rights" of others, so that... [r]ights rather than ends or consequences... [are the priority]; [and] Transcending both these approaches are *virtue ethics*, an ancient (but increasingly rejuvenated) character-based philosophy derived from Aristotle's

2 There are a number of authors who are sceptical of moral imperatives in the context of legal ethics. See for example, Daniel Markovits, *A Modern Legal Ethics: Adversary Advocacy in a Democratic Age* (Princeton University Press 2008); Stephen L. Pepper, 'The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities' (1986) *American Bar Foundation Research Journal* 613; W Bradley Wendel, 'Civil Obedience' (2004) 104 *Columbia Law Review* 363; and Tim Dare, *The Counsel of Rogues? A Defence of the Standard Conception of the Lawyer's Role* (Ashgate 2009).

3 See, William Simon, 'Role Differentiation and Lawyers' Ethics: A Critique of Some Academic Perspectives', (2010) 23 *Geo J Legal Ethics* 987 at 992; Christine Parker and Adrian Evans, *Inside lawyers' Ethics* (Cambridge University Press 2007); Stephen Parker and Charles Sampford (ed), *Legal Ethics and Legal Practice: Contemporary Issues* (Clarendon Press 1995); Julian Webb and Donald Nicolson, 'Institutionalising Trust: Ethics and the Responsive Regulation of the Legal Profession' (1999) 2 *Legal Ethics* 148; Mark Potter, 'The Ethical Challenges Facing Lawyers in the Twenty-first Century', (2001) 4 *Legal Ethics* 23; Duncan Webb, *Ethics, Professional Responsibility and the Lawyer* (Butterworths 2000); Julian Webb, 'Being a Lawyer/Being a Human Being' (2002) 5 *Legal Ethics* 130; Christine Parker, *Lawyers' Ethics and Access to Justice. Just Lawyers: Regulation and Access to Justice* (Oxford University Press 1999) and Robert W Gordon, 'A New Role for Lawyers? The Corporate Counselor after Enron', in Susan D Carle, *Lawyers' Ethics and the Pursuit of Social Justice: A Critical Reader* (New York University Press 2005).

4 See para 3(c), November 2011. The Guidelines are available at www.ibanet.org.

5 Immanuel Kant, *Foundations of the Metaphysics of Morals* (1785) (Lewis White Beck trans, 1959, Bobbs-Merrill, Indianapolis, 2nd edn 1990) 46.

Nicomachean Ethics.⁶ Lawyers accustomed to hard-nosed environments will tend to glaze over at the mention of classical scholarship, but ignoring virtue ethics as worthy of understanding would be a costly decision in itself. The virtue ethicist is a “good” person and therefore supposedly makes “good” decisions regardless of rights or consequences. [Their orientation is capable of incorporating other major ethical approaches because they are in]... ‘a state of contentment, a life integrated happily with a sense of purpose, lived out in community.’⁷ The qualities that such a person exhibits in order to achieve a proper life are the *virtues*. Together, the virtues: courage; temperance; magnificence; pride; good temper; friendliness; truthfulness; wittiness; shame and justice; to which Aquinas added faith, hope and charity,⁸ constitute the ethical life.⁹

Thus, ethical consciousness needs to go behind rules of conduct and take in ethical principles developed through moral philosophy. The IBA provides international leadership here:

‘The IBA urges judges, legislators, governments and international organisations to strive, along with lawyers and bars, to uphold the principles set out in the General Principles. However, no statement of principles or code of ethics can provide for every situation or circumstance that may arise.

Consequently, *lawyers must act in accordance with the dictates of their conscience*, in keeping with the general sense and ethical culture that inspires these General Principles.’¹⁰ [Emphasis added]

But after awareness of a likely ML situation, what lawyers may need and currently often lack, is the courage to act, which can come from the principles that underlie our national codes.

Apart from anti-money laundering (AML) treaties and increasing examples of national legislation to the same end, legal ethics codes are already trending away from blanket client confidentiality and towards encouraging lawyers to be courageous in disclosing clients’ criminal activities. Thus, lawyers cannot claim confidentiality when assisting criminal activity.¹¹ Further, whistleblowing in relation to *past* crimes is also increasingly important. The Commentary states that ‘a lawyer cannot invoke confidentiality/professional secrecy in circumstances where the lawyer acts as an accomplice to a crime’,¹² since to the extent that a lawyer becomes aware of a crime and remains silent, s/he risks becoming an accessory after the fact, and inculpated as an accomplice.

Options in approaching fundamental ethics

Leaving to one side *codes* of ethics (which are better defined as statements of professional responsibility, since *principles* of ethics cannot be codified in any regulatory, enforceable manner), there are also a variety of psychological scales or instruments that have been developed to measure levels of awareness of moral complexity – for example:

- moral imperatives derived from religious belief (too numerous to deal with here);
- Kohlberg’s¹³ six categories of moral development – as follows:
 - **Stage 1 Punishment and obedience** – blunt, basic and retributive;

6 See Justin Oakley and Dean Cocking, *Virtue Ethics and Professional Roles* (Cambridge University Press 2001); Tim Dare, ‘Virtue Ethics and Legal Ethics’ in Duncan Webb (ed), *Seven Essays on Professional Ethics* (Victoria University of Wellington, Wellington 1998) 141.

7 *Ibid.*, 58.

23 Thomas Aquinas (c 1224–1274) *Summa Theologiae*, I-II, 62, a 1.

9 This three paragraph summary is extracted from Adrian Evans, *Assessing Lawyers’ Ethics* (Port Melbourne, CUP 2011) 68–69. Dewhurst comments that, ‘numerical survival of the greatest number’ is too bald a statement for some consequentialists. He observes, ‘Mill did not support this position and thought that there were higher goods. For consequentialists like Mill, you only do harm to a few in favour of the many when harm is inevitable and you must choose one or the other to suffer a negative consequence. It is not a matter of imagining a positive benefit to many and then sacrificing a few to achieve it. For Mill, the goal of utilitarian action is to secure the virtues for all of mankind, the whole of sentient creation; and there are times when the individual must sacrifice for the good of all.’ (Comment on file with author, 25 October 2011).

10 Extract from IBA, ‘Commentary to the General Principles of the Legal Professional’ (2010) Introduction, #7.

11 See ‘Commentary on IBA General Principles for the Legal Profession’ (2010) Explanatory Note 1.2: ‘Lawyers cannot claim the protection of confidentiality when assisting and abetting the unlawful conduct of their clients. There is no protection provided by courts or governmental authorities for confidentiality/ professional secrecy among the participants in a crime.’ Further, national legal ethics codes typically *allow* a lawyer to disclose information where the purpose is to prevent a serious criminal offence, eg, the proposed *Australian Solicitors Conduct Rules*, r 9.2.4.

12 *Ibid.*

13 See Lawrence Kohlberg, *The Psychology of Moral Development* (Harper and Row 1984).

- **Stage 2 Instrumental relativist** – pragmatic – ‘you scratch my back and I’ll scratch yours’ – involving mutual self-interest rather than aspiration;
- **Stage 3 Interpersonal concordance** – good behaviour is that which others approve of – nice, friendly and insipid;
- **Stage 4 Law and order** is more contemporary – laws govern behaviour and obeying the law is a duty – tending to the religiously extreme and leaning to the unbending – (this is where AML legislation tends to sit);
- **Stage 5** is more promising – **Social contract/legalistic** – individuals are aware of the ‘relative’ nature of personal values and behave according to social utility;
- **Stage 6 – Universal ethics**, which asserts that the best behaviour is governed by chosen universal ethical principles that transcend laws, and importantly, the rules of professional conduct. It is not unreasonable to expect that a lawyer who can identify with either Stage 5 or 6 will also connect AML with the capacity and opportunity for professionals to reduce global poverty.
- several lawyer-specific scales, for example, Atkinson’s¹⁴ three lawyer types:
 - **Type 1 is morally neutral** and will conscientiously do almost anything for their clients (note Type 1 is *outside* Kohlberg’s Stages). This lawyer seeks justification by arguing (quite credibly) that society has no security except in a necessary willingness to engage lawyers in proper hair-splitting exercises about the strict letter of the law.
 - In contrast, **Type 2 lawyers see themselves as ‘officers of the court’** and look to public norms of propriety that may be a bit broader than the strict letter of the law (Kohlberg’s Stages 5 and 6) – focusing on notions of justice, truth and honour. A Type 2 lawyer is likely to be most receptive to the connections between AML and reducing global poverty.
 - **Type 3** is the lawyer as **change agent**, the provocateur who seeks out loopholes for reform purposes that he or she considers morally right (elements of Kohlberg’s Stage 6).
- and **Parker’s** four-part categorisation of **zealous advocacy, responsible lawyering, moral advocacy** and the **ethic of care**.

Parker’s typology of lawyers

Parker’s¹⁵ typology may be the most accessible for lawyers because it focuses on the concept of *role*. Many of us are already familiar with the first role below, but there are a number of other role categories that can provide more depth when dealing with the need to combat ML.

1. **The adversarial or zealous advocate** is often dominant and oriented to the ‘professional role’, agreeing to the client’s demands while reluctant to see any role for the lawyer as ‘self’. The zealous advocacy is the extreme and clinical consequence of dominant adversarial culture (similar to Atkinson’s Type 1; but *outside* Kohlberg’s stages).
2. **The responsible lawyer** who gives an equally convinced priority to the fairness of the dispute resolution process and lawyers’ duties to courts. Responsible lawyering offers the confidence that rules in their essence represent distilled notions of fairness, based on precedent (Atkinson Type 2; Kohlberg Stages 5 and 6).
3. **The moral activist** is typically consequentialist and concerned for socially just outcomes, though still without much emotional awareness of others (Atkinson Type 3; elements of Kohlberg’s Stage 6).
4. **The ethicist (or relationship) of care** walks fairly closely with virtue ethics – this type of lawyer prefers to nurture relationships between all affected by the justice system. This last type of lawyer could well be both virtuous and emotionally intelligent, and while not disregarding holistic solutions to difficult problems, seeks to maintain that relationship as both the method and purpose of all their professional interactions.

Professional conduct rules and popular media conceptions of lawyers’ roles help to imprint in new lawyers a view that their clients’ demands are their only legitimate priority. But clients’ demands are not necessarily the same as their longer-term interests. It may be difficult to see ourselves as anything other than zealous advocates, but the impact of the moral failures in the GFC, the burgeoning pressures

14 See R Atkinson, ‘A Dissenter’s Commentary on the Professionalism Crusade’ (1995) 74 Texas L Rev 259.

15 See, eg, Christine Parker, ‘A Critical Morality for Lawyers: Four Approaches to Lawyers’ Ethics’, (2004) 30 Monash Law Review 49.

of contemporaneous population growth, resource diminution and peak oil are compounding both global warming and global poverty. These in turn increase global unrest. ML is a tool of those who would deny and compound these huge challenges. In this context, the social expectations of lawyers are broadening significantly beyond narrow representative roles, especially for transactional lawyers. The modern picture of lawyer types, as the Venn diagram below suggests, offers an overlapping consciousness of opportunity:



While the overall relationship between lawyers' role preferences is complex and uncertain,¹⁶ for present purposes it is reasonable to assert that the lawyer who knows with which of these role types they are *most comfortable*, will be in a better position to anticipate the challenges that will be required of the profession in the context of many global challenges. They may also be better prepared to deal with overtures to engage in ML.

To put the situation *in extremis* and state the obvious, our clients are not always right or good, but we have choices about our own behaviour. And if we also appreciate that getting in touch with our ethical core will help us be on the alert for likely ML scenarios, then we will be rather less likely to meekly accept everything we are told by new clients who may seek to exploit any lack of experience we may have with ML.

16 Adrian Evans and Helen Forgasz, 'Framing Lawyers' Choices: Factor Analysis of a Psychological Scale to Self-Assess Lawyers' Ethical Preferences' (2013) 16(1) *Legal Ethics*, 134.