1

Business with Criminals

1.1 PRELUDE

The only time I ever bought a painting was in a town called Cooma in New South Wales, Australia, less than two hours' drive from the Australian National University in Canberra. This happened by accident as I had not planned on purchasing any artwork, let alone one by a convicted murderer.

I was visiting one of the town's attractions, a photography gallery tucked away in a former Methodist church. Its proprietor, Charles Davis, specialises in taking photos of Australian animals in the Snowy Mountains that surround Cooma. Kangaroos peering out from behind snow-covered branches of a tree; echidnas trudging on through the vast whiteness of improbably cold Australian winters; parrots standing out against the leaden sky in bursts of colour – all available for sale as prints, mugs and fridge magnets. All priced to reflect their creator's mastery and, save for one print of a wombat in the snow, judged by me to be too expensive a luxury.

A couple of blocks away is a prison, formally known as Cooma Correctional Centre. It was built in the 1950s specifically to house gay men convicted of sodomy under the law repealed in 1984. Next to it is a museum of New South Wales's prison system, another of Cooma's landmarks. The museum has the ambience of a cheap horror production from the 1970s, at once morbid and oddly upbeat. Its collection ranges from gallows used to execute upwards of fifty people, some of them for stealing bread, to the broken prison bars from the Long Bay prison in Sydney through which robber Russell 'Mad Dog' Cox escaped to freedom, all the way to trivia of prison life, such as a poster reading: 'Today's prison officer is a SUPERMAN with a sense of humour'.

Like any museum, this one features a shop. A sign announces that all products are made by inmates from a minimum-security prison next door, and they receive 75 per cent of the revenue. It was a Sunday, and Andrew, the museum manager, was manning the shop himself. We struck up a conversation, and as there was hardly anyone else in the building, Andrew took me on an hour-long tour of the

museum collection. Formerly a prison official in the UK, he had left the prison system for a more tranquil museum career and began scouring Australian prisons for discarded clothes, tools, contraband items and other accoutrements of the life behind bars.

As the tour drew to a close, I felt it would be stingy to leave without buying anything at all. There was, however, nothing particularly to my liking in the assortment of rugby-themed mugs, bottle holders and wooden figurines. At last, I settled on a funky-looking abstract painting coming together with a small wooden easel for a reasonable price of $20. Like parrots in the photo gallery I had just visited, the painting was a burst of bright colours of a canvas.

'How interesting you should choose that one,' said Andrew. 'This was made by a Colombian drug mule'.

This removed the last traces of hesitation in my mind. Cravenly, I had felt queasy about buying a painting in a prison. The prospect of unknowingly purchasing the work of some twisted, sadistic mind did not appeal to me. By contrast, a Colombian drug mule sounded respectable. And, as I was starting to write a book provisionally entitled *Doing Business with Criminals*, one could not think of better decoration for my hitherto artless office.

The following day, I proudly demonstrated my acquisition to a colleague in the office. She was distinctly unimpressed by my prison tourism and, even more so, by the indefatigable museum manager Andrew's role in enabling it. Still, the colleague was intrigued by the painting and, as she turned it around, she noticed the author's signature on the back of the canvas. She then put it into Google – and, to my surprise, several articles lit up.

As it turned out, my new friend Andrew had been economical with the truth. The artist did hail from Latin America, albeit not from Colombia, and was no stranger to drugs. His real crime, though, was attempting to murder his wife by stabbing her so violently that the knife handle broke. She survived; he went to prison for several years; and then, on his release, attacked another woman in a similarly gruesome fashion. By way of justification he said, simply, that Satan had told him to do so.

In my usual spirit of generosity, I offered the painting as a gift to the colleague who, through her Google research skills, discovered this story. She declined. So did the professor of public law next door. Then, at a work meeting that same day, at last I found someone possessed of a more scientific mindset than the rest of us; a quivering, superstitious lot. 'It's just a panting', the braver colleague said as she graciously accepted it. 'It looks nice, and it's got a history. He might have been reformed by now anyway'. The painting is still at ANU's Law School and, once I got over Andrew's economy with the truth in selling me the painting – which, after all, is not unheard of in the murky world of art dealing – I mustered the magnanimity to leave him a glowing review on TripAdvisor.

1.2 INTRODUCTION

Whatever one thinks of the relationship between the artwork and its creator, this story offers a useful, if self-indulgent, introduction to the topic of doing business with criminals. In this instance, I did not make any direct payment to an inmate, although he ought to have received $15 out of the $20 I spent. But even if I had engaged with him directly, the law would in no way encroach on my doing so. Subject to prison rules that apply to current inmates, whether someone is a convicted criminal has no bearing on their ability to do business, buy or sell property or pay taxes.[1] Our criminal justice system pursues the dual goals of rehabilitation and deterrence, alongside multiple other similar if ill-defined objectives,[2] not indefinite exclusion from social interactions.

But multiple areas of the law do regulate transacting with criminals, including those who have never been found guilty. On the one hand, I can lawfully buy a house from a drug dealer, convicted or not. On the other hand, if I knew that the house represents the proceeds of drug trade, or were reckless or even negligent as to that being so, I would be a committing a money laundering offence under Australian federal law.[3] In theory, I could know that someone is a drug trafficker yet reason that his or her house has been lawfully acquired from funds wholly unconnected to the drug trade. That would be a fine line, and therefore not buying houses from drug traffickers is a good rule of thumb.

Most ordinary citizens are unlikely ever to have to think about this issue. Some businesses, especially financial institutions, have to do so all the time. Anti-money laundering (AML) regulation obliges them to ensure they have programmes in place to make sure they are not used to invest, move or spend proceeds of crime – an activity known as money laundering. And, of course, they are precisely the place one would go to in order to invest, move or spend such proceeds. Banks and other regulated businesses are therefore locked into a never-ending time- and resource-intensive effort to safeguard their services from criminals, convicted or not, known or unknown. Furthermore, unlike private individuals, they are subject to the

[1] However, if a person who has committed an offence, whether or not convicted of it, has written a book or made a TV show about it, his or her income from it ('literary proceeds') can be liable to confiscation under federal and some state laws in Australia: Section 152 of the Proceeds of Crime Act 2002 (Cth). See also Jordan English, Sam Hickey and Simon Bronitt, *Federal Proceeds of Crime Law* (Thomson Reuters, 2023) 337–363.

[2] For example, the purposes of federal sentencing in Australia under Section 3A of the Crimes (Sentencing Procedure) Act 1999 (Cth) include punishment, deterrence, protection of the community, rehabilitation, accountability, denunciation and recognition of harm.

[3] See Division 14 in the Criminal Code (Cth), which sets out a range of money laundering offences that differ primarily by the amount involved and the defendant's state of mind (e.g. knowledge, recklessness or negligence as to the property being the proceeds of crime). Money laundering offences also exist at the state and territory levels in Australia.

obligation to make suspicious activity reports (SARs), also known as suspicious transaction reports (STRs) in some jurisdictions or suspicious matter reports (SMRs) in Australia.

Related to, but distinct from, AML is counterterrorist financing (CTF) regulation. As the term suggests, terrorist financing involves the provision of funds or other resources in support of terrorist activities. The paradigmatic example of terrorist financing is Osama bin Laden's financing of the 9/11 attacks, primarily done through tapping into Al Qaeda's resources and not, as the popular view holds, relying on family wealth.[4] Terrorist financing need not only involve overseas financiers knowingly funding acts of terror. Lasting controversy has surrounded the potential involvement in terrorist financing of perfectly legitimate actors acting under pressure or in pursuit of humanitarian aims, such as organisations or families paying ransom for hostages captured by terrorist groups; charities seeking to deliver life-saving aid to people within terrorist-held territories; or companies yielding to terrorist demands of a 'tax' to preserve their property. In those situations, the policy imperative of denying terrorists access to the resources they need clashes against the realities of coercion. In the meantime, the legal and reputational imperative of excluding terrorists from financial services may undermine the efforts to generate financial intelligence that can be useful in investigating terrorist activities.

In the context of AML/CTF measures, it is largely up to regulated businesses to ascertain whether their customer or counterparty might be laundering organised crime money or funding terrorism. Targeted financial sanctions, which present another key area of financial crime regulation, are different. Such sanctions involve a prohibition against anyone within the respective state's jurisdiction transacting with designated persons, individuals or companies, as well as the freezing of their assets. By using sanctions, governments manually control who should be treated as a bad actor to be isolated from the legitimate economy. By contrast with the AML/CTF regime,[5] which is characterised by a duality of purpose in terms of excluding known criminals from the economy and surveilling suspected criminals, sanctions are geared towards exclusion and the freezing of assets. This presents a similar but distinct range of challenges compared to AML/CTF.

Sanctions are perhaps best known as a means of addressing matters of high politics or international security, such as Iran's or North Korea's nuclear proliferation or Russia's invasion of Ukraine. However, they are also increasingly used to address money laundering, terrorist financing and other types of crime by designating persons suspected of involvement in it. This means that sanctions are both an area of

[4] 9/11 Commission, *Final Report of the National Commission on Terrorist Attacks upon the United States*, July 2004, 122.

[5] 'Regime' is understood here as a composite term comprising laws, institutions and practices. The word 'framework' is used in this book to denote the legal framework or, in other words, the corpus of AML rules, whether criminal, administrative or civil.

financial crime regulation in their own right and part and parcel of the response to other, more familiar financial crime threats.

The expansion of all these financial crime measures, as well as their reach into our commercial and personal lives, belies their novelty. The AML reporting regime started taking shape in the 1970s, and the laws criminalising money laundering only emerged in the 1980s. Until then, dealing with the proceeds of crime was not necessarily illegal and, notoriously, certain states promoted bank secrecy as their unique selling point without a concerted international pushback. As Peter Alldridge, a professor of criminal law at Queen Mary University of London, once put it in a lecture: 'Before the adoption of AML/CTF laws, you could turn up at a bank with a suitcase full of cash and say your name was Mickey Mouse. And the bank teller would reply, "Thank you for your custom, Mr Mouse."'

Likewise, as late as in the 1990s, there was no global consensus around the criminalisation of terrorist financing. This is not to suggest that bin Laden-style financing was considered legal, but simply that it would have been dealt with through general criminal law rules on complicity. However, those rules could place significant constraints on governments' ability to bring prosecutions against financiers-cum-accomplices. The outright criminalisation of terrorist financing dispenses with some of those technical obstacles, as well as creating the preconditions for establishing a broader CTF regime, such as extended record-keeping requirements for international wire transfers under the so-called travel rule.

Nowadays, if a transaction is suspicious, regulated businesses such as banks are obliged to report it to law enforcement authorities, via an agency known as a financial intelligence unit (FIU). In itself, this is a relatively benign affair. Hundreds of thousands of SARs are generated every year in major financial hubs, and few of them lead to the commencement of investigations. But the real risk for a customer is that, from a bank's perspective, the ongoing effort required to deal with suspicious customers is not worth the candle, with the result that it is cheaper to drop (or 'exit') the client relationship than keep worrying about record-keeping and reporting requirements. If this approach is taken to a whole swathe of customers, such as nationals of a particular high-risk country,[6] this can result in wholesale financial exclusion, often described as 'derisking'. Unsurprisingly, in some sectors of the economy, there is a particular disquiet about both the reporting obligations and the potential denial of access to services, especially in the legal profession.

Crucially, for any regulated business, the filing of a SAR does not eliminate the risk of liability for money laundering if it has the requisite *mens rea*, such as knowledge of the criminal origin of funds. Since the filing of a SAR indicates at least a suspicion of criminality, the safest course of action is to drop a customer once a SAR has been submitted. That sacrifices a potentially valuable source of further financial

[6] Although one could draw a distinction between 'high-risk' and 'higher-risk' countries, customers and so on, this book uses the term 'high-risk' for the sake of simplicity.

intelligence and is a prime example of the tension between exclusion and surveillance: one can either shut the criminals out of the financial system or use banks as the government's eyes and ears to spy on criminals, but not both at the same time. This also means that regulated businesses make decisions on a daily basis that sit uneasily with a broad, civic-minded conception of the presumption of innocence according to which state and private institutions should treat citizens as presumptively innocent in routine personal and commercial interactions.

It is not only financial crime regulation alone that gives rise to such encroachments on the presumption of innocence. Reputational pressure is an increasingly powerful incentive for businesses to self-police their choice of partners and customers. While financial surveillance, such as through the filing of SARs, remains a product of regulation, the exclusion of criminal actors from the legitimate economy is no longer solely government-driven. There has by now arguably emerged a moral and political principle that illicit actors should not benefit from interactions with the legitimate economy. Understanding the appeal of this principle, as well as the challenges it engenders, is vital to avoiding a caricatured portrayal of the existing financial crime regime as wholly misguided and based on knee-jerk reactions by politicians. It also explains the steady encroachment of such regulation upon other, previously sacrosanct principles: bank secrecy in the past and legal professional privilege and client confidentiality today.

1.2.1 *This Book's Project*

The principal aim of this book is to contribute to our current collective understanding of the legal and policy choices that need to be made as governments and parliaments attempt to regulate criminals' interactions with the legitimate economy. In essence, this is an exercise in ordering and clarifying our thinking about the objectives, incentives and challenges that manifest themselves across the sprawling, increasingly complicated domain of financial crime regulation.

This book's central argument is threefold.

First, there is a fundamental tension at the core of financial crime regulation. This is because financial crime regulation typically pursues two distinct objectives. The first of those is exclusion, or ensuring that known or suspected criminals do not benefit from financial interactions with the legitimate economy. The second is surveillance, or the gathering of financial intelligence about criminal activities to facilitate their investigation and prosecution. While those objectives are compatible up to a certain point, they become mutually exclusive if pursued aggressively. Our current regulatory frameworks do not commit wholeheartedly to either of these objectives: instead, they contain an admixture of elements that pull private-sector actors in two different directions.

However, there are also significant differences in how this dilemma manifests itself across various domains of financial crime regulation. For example, compared

to AML regulation, where the tension is at its strongest, sanctions are almost entirely exclusion-oriented but present a distinct set of challenges associated with 'targeted' exclusion of identified individuals and groups. Terrorist financing features a combination of AML-style ambivalence and sanctions-style exclusion of designated terrorist groups.

Second, there is another layer of tensions arising from the dual objectives of exclusion and surveillance. Those objectives are not absolute, and the extent to which we as society pursue them is a function of two sets of conflicting values and principles. For exclusion, the notion of denying some of our fellow citizens access to commercial services they would otherwise be entitled to conflicts with the presumption of innocence, understood as a manifestation of civic trust that we owe each other rather than as merely a fair trial guarantee. For surveillance, the benefit of gathering financial intelligence on the activities of potential criminals conflicts with citizens' financial privacy. This, too, explains why financial crime regulation is never without reserve in its embrace of exclusion and surveillance.

So, underneath concrete policy choices lurk differing conceptions and intuitions as to the value of the integrity of the legitimate economy; the presumption of innocence; financial intelligence; and financial privacy. In practical terms, much of the thinking surrounding these issues is preoccupied with avoiding the unintended consequences of financial crime regulation, such as derisking, the displacement effect, defensive reporting and tick-box compliance. This is summarised in Figure 1.1.

Third, the contemporary financial crime regime is characterised by the *undirected deputisation* of the private sector with the carrying out of government policy.

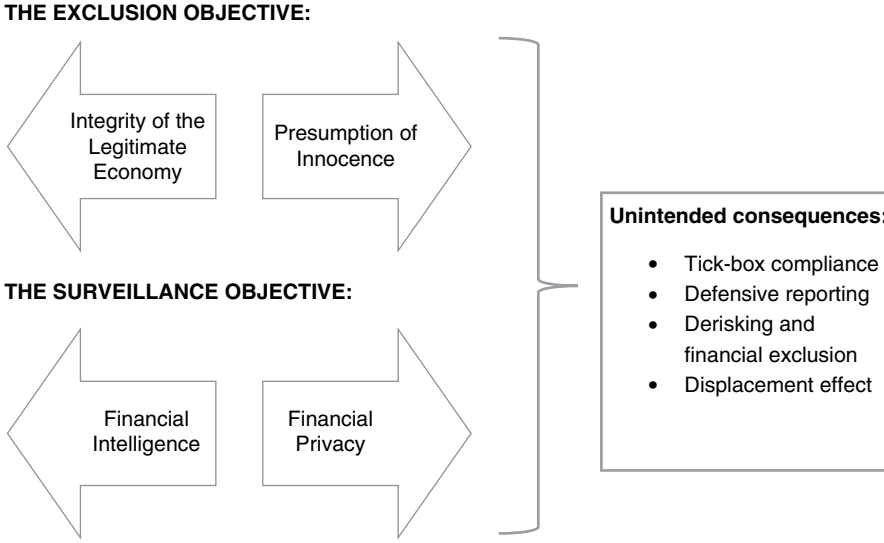

FIGURE 1.1 Key tensions of financial crime regulation

It is ultimately private-sector businesses who, acting within the framework of applicable financial crime rules, need to choose whether to deny their services to a particular customer or report his or her activities. One way to approach the task is to do as little as legally possible at the lowest available cost ('tick-box compliance'). Suppose, however, that a business wants to genuinely contribute to fighting financial crime. Then it has to confront the exceedingly difficult questions about the objectives behind the rules, other competing values and principles and unintended consequences.

Those are issues that few if any governments have entirely come to terms with. Even if a particular government has a fully fledged vision of how those tensions are to be resolved, the mechanisms for conveying that vision to the private sector, such as public–private partnerships, are in their infancy. Furthermore, their effectiveness relies entirely on private-sector goodwill. The incentives created by financial crime rules are too crude to give effect to government priorities in fighting financial crime. The key problem is therefore not so much that of deputising the private sector to interdict the proceeds of crime, but doing so without providing the details that are necessary to carry out the task in the most meaningful fashion. Those challenges manifest themselves across the board but are particularly acute in business sectors that prize client confidentiality and equal access, such as the legal profession.

The rest of the book demonstrates how the tensions identified earlier in this chapter shape the design of laws and regulations, affect the formulation and implementation of government policy and inform private-sector actions. For all their challenges and shortcomings, it is shortsighted to dismiss the financial crime regime as a product of flawed policymaking. In reality, they reflect a shift in public mores characterised by a growing societal pressure to eschew business dealings with criminal, or even controversial, counterparties.[7] The history of financial crime regulation is both a story of governments making rules and a story of them responding to the pressures that the public at large brings to bear on government and private-sector stakeholders.

1.2.2 *Contribution to Knowledge*

Financial crime law remains understudied. The paucity of financial crime-oriented academic courses and publications belies the scope and sophistication of the international and domestic regulatory regime. It hardly reflects the influence of specialised intergovernmental organisations, such as the Financial Action Task Force (FATF) or the Egmont Group of FIUs; the reams of AML/CTF regulations

[7] The emergence of the exclusion objective, which is centred around the role of private industry in facilitating illicit business, can be compared to the crystallisation of a state-centred moral and policy norm that 'prohibit[s] countries from hosting money stolen by senior officials of another country': J. C. Sharman, *The Despot's Guide to Wealth Management: On the International Campaign against Grand Corruption* (Cornell University Press, 2017) 4.

and guidance published by domestic governments; the expansion in legal services related to proceeds of crime law, AML/CTF compliance and sanctions advice; and the existence of a multibillion-dollar private-sector compliance industry. Slowly, this is beginning to change, and there has been a steady trickle of high-quality monographs published in this space over the past decade – yet none that fills the gap that this book addresses.

Some publications provide a *tour d'horizon* of financial crime, serving as a useful overview laws, institutions and typologies. Those include Martin Navias's *Finance and Security*, Stephen Platt's *Criminal Capital* and Kris Hinterseer's somewhat dated *Criminal Finance*, as well as Guy Stessens's international law-oriented monograph *Money Laundering*.[8] Moreover, multiple handbooks published over the past decade supply sweeping, panoramic overviews of current financial crime concerns.[9] Building on that work, this book focuses on the higher-order principles and values that cut across the areas of financial crime regulation, thus taking the discussion a step beyond outlining the regulatory and institutional frameworks in place.

Some existing literature traverses a similar terrain. There is a strand of critical scholarship interrogating the objectives and assumptions behind contemporary AML/CTF regulation, represented in its most forceful form in Peter Alldridge's *Money Laundering Law* and his openly polemical *What Went Wrong with Money Laundering Law?*[10] Critiques that are not dissimilar, albeit more sympathetic to governments' efforts against financial crime, can be found in the work of J. C. Sharman, especially his book *The Money Laundry*, and Michael Levi and Peter Reuter.[11] Some authors provide a more explicitly economic analysis of AML/CTF measures that seeks to quantify its substantial costs and notoriously elusive benefits.[12]

[8] Martin Navias, *Finance and Security: Global Vulnerabilities, Threats, and Responses* (Hurst Publishers, 2020); Stephen Platt, *Criminal Capital: How the Finance Industry Facilitates Crime* (Palgrave Macmillan, 2015); Kris Hinterseer, *Criminal Finance: The Political Economy of Money Laundering in a Comparative Legal Context* (Kluwer Law International, 2002); Guy Stessens, *Money Laundering: A New International Law Enforcement Model* (Cambridge University Press, 2000).

[9] Doron Goldbarsht and Louis de Koker, *Financial Crime and the Law: Identifying and Mitigating Risk* (Springer, 2024); Doron Goldbarsht and Louis de Koker, *Financial Technology and the Law: Combating Financial Crime* (Springer, 2022); Colin King, Clive Walker and Jimmy Gurule (eds), *The Palgrave Handbook of Criminal and Terrorism Financing Law* (Palgrave Macmillan, 2018); Barry Rider, *Research Handbook on International Financial Crime* (Edward Elgar, 2016); Brigitte Unger and Daan van der Linde, *Research Handbook on Money Laundering* (Edward Elgar, 2013).

[10] Peter Alldridge, *Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime* (Hart Publishing 2003); Peter Alldridge, *What Went Wrong with Money Laundering Law?* (Palgrave Macmillan, 2016).

[11] J. C. Sharman, *The Money Laundry* (Cornell University Press, 2011); Michael Levi and Peter Reuter, 'Money Laundering' in Michael Tonry (ed), *Crime and Justice: A Review of Research* (Volume 34, Chicago University Press, 2006).

[12] See, for example, Joras Ferwerda, 'Criminological Perspectives on Money Laundering: The Efficiency of Anti-Money Laundering Policies' in Valsamis Mitsilegas, Saskia Hufnagel and Anton Moiseienko (eds), *Research Handbook on Transnational Crime* (Edward Elgar, 2019) 112–121.

With only modest simplification, the current state of debate can be summarised thus: while most would agree that crime should not pay,[13] existing regulation fails to deliver on that objective, lacks a clear vision of how it can be achieved, and imposes significant burdens on those it applies to. From my experience of speaking to practitioners and government officials working in this area, many of them echo that assessment, so it cannot be dismissed as mere academic second-guessing by those removed from the grind of law enforcement activities. Indeed, one of the recent books highly critical of the extant regime, *Dirty Money* by Nicholas Gilmour and Tristram Hicks, was co-authored by a former head of proceeds of crime confiscation team at London's Metropolitan Police.[14]

There is much truth to this by-now conventional account of well-meaning yet ultimately misconfigured and occasionally unproductive government policies – domestically and internationally. Still, in my view, there is a vital piece of that story that remains missing. It relates to the tension between the two principal objectives of financial crime regulation, exclusion and surveillance, as well as the constant renegotiation of the principles and values underpinning our pursuit of those objectives. If that is correct, then the major limitations of the financial crime regime will endure. It would be simplistic to ascribe them solely to the FATF's or national governments' want of foresight, inertia or under-investment. All of those factors may play a role, to varying extents depending on the jurisdiction and context, but they form second-order concerns. Underneath them is a fundamental, intrinsic contradiction. We want to ensure that legitimate enterprises, such as banks, do not do business with, say, drug cartels, but we also want to deputise banks to collect intelligence on cartels' financial activities – all while living in a society where one is presumed innocent until proven guilty and financial privacy is respected.

And there's the rub: all those things are worth having. It would be easy to draw a caricature of the financial crime regime as an exercise in self-placating pursuit of objectives that, while sounding good, are ultimately unattainable or counterproductive. Exclusion of criminal actors is a particularly appealing target, which one might describe as a moralistic, puritanical preoccupation that merely displaces proceeds of crime to unregulated sectors of the economy and compromises our ability to gather valuable financial intelligence. As this book will demonstrate, there is a grain of truth in that, and the moral and political imperative of doing *no* business with criminals infuses policymaking and broader societal attitudes to an extent that can become problematic. Still, what gives rise to the truly fundamental challenges is not that this principle exists, but that its application needs to be moulded in light of multiple other, competing considerations.

[13] For instance, 'no disagreement whatsoever' with this precept was observed among the criminal justice practitioners interviewed in Colin King and Jennifer Hendry, *Civil Recovery of Criminal Property* (Oxford University Press, 2023) 102.

[14] Nicholas Gilmour and Tristram Hicks, *Dirty Money* (Bristol University Press, 2023).

In recognising this, this book aims to provide an account that is sympathetic towards the need for financial crime regulation yet clear-eyed about the problems it engenders.[15] While the challenges involved vary somewhat across money laundering, terrorist financing and sanctions evasion, they can be distilled to a similar set of tensions and trade-offs that play out differently depending on the specific criminal risks and political and economic environment. For simplicity, this book refers to all those different areas of crime – money laundering, terrorist financing and sanctions evasion – as financial crime, without purporting to set out any generally applicable definition of the concept.

As the astute reader will recognise, the subject matter of this book tracks the FATF's mandate, including terrorist financing-related and proliferation financing-related targeted financial sanctions. All of those forms of sanctions entail the overarching challenge of ensuring that private businesses identify whom they are dealing with; for example, whether an innocuous-looking Singaporean transport company is in fact a front for North Korea. This book does not deal with broader counter-proliferation financing measures, sometimes known as activity-based controls, that are aimed to deny nuclear proliferators access to the materials they require.[16] A thoughtful discussion of those issues would require straying into the domain of trade and export controls, as well as attempting a review of Western policies vis-à-vis two states presenting the greatest proliferation threat, namely Iran and North Korea, that other scholars are best placed to provide.[17]

The primary focus of this book is the regulation that governments impose on private-sector businesses, such as the obligations to undertake customer due diligence and file SARs. Such regulatory norms are themselves only one part of a broader spectrum of financial crime laws, including those that allow for the prosecution of money launderers or terrorist financiers and the confiscation of the proceeds and instrumentalities of crime, whether in criminal or in civil trials. While regulation is in the foreground of this book, those other domains of the law are also addressed as and when appropriate, especially to explore the extent to which private-sector compliance efforts genuinely support law enforcement activities, such as prosecutions and asset confiscations.

[15] The ambition of this book could therefore be compared to Andrew Ashworth's attempt to identify 'the principled core of criminal law', except that the area of law I am concerned with – financial crime law – is best thought as a cross-cutting field that incorporates aspects of criminal law, financial regulation and international law. See Andrew Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 *LQR* 225; Andrew Ashworth, 'Towards a Theory of Criminal Legislation' (1989) 1 *Crim LR* 41.

[16] For an explanation of the difference between targeted financial sanctions and activity-based proliferation financing controls, see Togzhan Kassenova and Bryan R. Early, 'Countering the Challenges of Proliferation Financing', *The Center for Policy Research*, July 2023.

[17] See Richard Nephew, *The Art of Sanctions: A View from the Field* (Columbia University Press, 2017) and Stephan Haggard and Marcus Noland, *Hard Target: Sanctions, Inducements, and the Case of North Korea* (Stanford University Press, 2017).

In essence, then, the questions that this book addresses can be summarised as follows. First, how did the extant regulatory regime come about? In exploring this, it is useful to consider both the historical development of applicable rules and the evolving policy thinking behind them. Second, what objectives does it pursue and what challenges does it encounter? Since those objectives and challenges are not static, this question is inextricably linked to the historical development of the regime. It leads, in turn, to the third and final major issue that this book seeks to address: what are the objectives of the financial crime regime that can be realistically pursued today, and how can the tension between exclusion and surveillance be best managed?

1.2.3 *Methodology*

Most of the content here is based on my own analysis of applicable legal, policy and ethical considerations. The former is achieved through doctrinal, black-letter research: that is, the study of legislation and case law with a view to identifying and critiquing cross-cutting principles or approaches, resolving or at least highlighting inconsistencies, and evaluating the state of the law in light of its explicit or presumed objectives, as well as the broader social consequences. In brief, doctrinal legal research involves understanding what the law says and whether it makes sense. This can be described, with greater gravitas, as 'legal hermeneutics'.[18]

In its treatment of policy and ethical concerns, the book also speaks of broader extra-legal considerations that shape the development and implementation of the law: objectives (e.g. exclusion and surveillance), values (e.g. the integrity of the legitimate economy and the availability of financial intelligence about crime) and principles (e.g. the presumption of innocence and financial privacy). Those terms are not used in a technical legal or philosophical sense, and the arguments made here do not hinge on the precise difference between objectives, values and principles. The point is simply to demonstrate and analyse the tensions between various desirable qualities that financial crime regulation simultaneously pursues. For completeness, though, I would describe 'values' as desirable social states of affairs that laws are meant to promote or protect,[19] and 'principles' as broad policy or moral norms that inform the development and implementation of laws.[20] 'Objectives' are,

[18] See Ralf Poscher, 'Hermeneutics and Law' in Michael N. Forster and Kristin Gjesdal (eds), *The Cambridge Companion to Hermeneutics* (Cambridge University Press, 2018) 326.

[19] While not expressly articulated, this understanding of values is implicit in Jeremy Horder, *Ashworth's Principles of Criminal Law* (9th edn, Oxford University Press, 2019) 38–55, who divides the values of criminal law into 'intrinsic values', such as bodily autonomy, and 'public goods', such as maintenance of public health. See also Julian V. Roberts and Lucia Zedner (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford University Press, 2012).

[20] A principle could be broadly understood as a standard that 'argues in one direction, but does not necessitate a particular decision'; for '[t]here may be other principles or policies arguing in the other direction': Ronald Dworkin, 'The Model of Rules' (1967) 35(1) *U Chicago LR* 14, 26.

in my view, a self-explanatory term and can be either explicit or, as is often the case in financial crime regulation, implicit.

In carrying out this study, I have benefitted from many interactions with policymakers, law enforcement officers, legal professionals and private-sector compliance experts over the past ten years. This includes events and meetings held, as well as hundreds of research interviews conducted, during my four-year employment at the Centre for Finance and Security at RUSI, a defence and security think tank in the UK. None of those interactions constitute a source of research data for this book, nor do I rely or on cite any information obtained through them. Nonetheless, they shaped my understanding of a wide array of financial crime issues and complemented the knowledge I gained through my earlier doctoral research at Queen Mary University of London, later published as the book *Corruption and Targeted Sanctions*. Finally, my ongoing research at ANU has stimulated further development in my views on the subject matter of *Doing Business with Criminals*. Such experiences have been essential in the gestation of this book.

While most aspects of the book could be adequately addressed through desk-based research and pre-existing knowledge, some of them benefitted from additional empirical research. To that end, fourteen semi-structured research interviews were conducted with sixteen select experts, listed in Annex 1 to this book. They covered, in the order of the number of interviews, the history of AML/CTF regulation; its plausible objectives; the impact of reputational and other non-legal pressures on businesses' decision to engage with controversial clients or counterparties; and the implications of AML/CTF regulation for the legal profession.

The primary purpose of the interviews was to glean insight from those with practical, first-hand experience of those involved in the development of AML/CTF rules in a particular area or working in it. While they cannot be treated as necessarily representative of the views in respective professions writ large, the degree of convergence they exhibit suggest that nor can they be taken to be outliers. Whenever specific factual claims were made in the interviews, those are only cited here if they can be triangulated using other, publicly available information.

Finally, this book is not beholden to any theoretical or ideological approach. It is likely that the twin objectives of exclusion and surveillance and the manifold dilemmas they engender can be parsed out in the light of various academic schools and traditions, such as law and economics (to discover the most economically efficient solutions) or regulatory theory (to identify regulatory approaches best suited to securing compliance among the regulated sectors). Those may be valuable directions for future study, but my project here is to highlight that hitherto underappreciated foundation for much of today's efforts against financial crime. To that end, this book adopts a common-sense, history-driven narrative that is free of any overt theoretical biases.

This is a fast-moving area, and the book reflects the state of affairs as known to me of the end of July 2024, with minor updates made during its production in

February 2025. That said, while laws, institutions and practices might change – and new court cases will inevitably arise – the fundamental tensions considered here are likely to remain relevant for quite some time.

1.2.4 *Audience*

This book is intended to appeal to a broad audience, including domestic and international policymakers, practicing lawyers, private-sector compliance experts, academics and even the general reader. On the one hand, this is an academic legal work, which dictates certain conventions in style and content. It explores legislation, court cases and policy documents in a degree of detail that may be prohibitive in a non-academic publication. On the other hand, its subject matter – crime and money! – holds some inherent appeal. The case study-based structure of each of the book's chapters is intended to bring to light the practical implications of the legal and policy choices considered here, as well as telling stories that are intrinsically interesting due to the difficult trade-offs they entail.

As such, it is hoped that *Doing Business with Criminals* can be of interest both to those with an existing expertise in financial crime law who are interested in a fresh view on the well-known challenges that beset it, and those who are looking for a reasonably wide-ranging introduction to the area. Furthermore, as Lord Sumption, formerly of the UK's Supreme Court, once said, law is mostly 'common sense with knobs on it'.[21] None of the legal issues discussed here will be beyond the grasp of the educated lay person, although some readers may be inclined to skim a page or two at some point.

1.2.5 *Structure*

Following this introductory chapter, Chapter 2 proceeds to tell the history of AML measures from their earliest days to today. In doing so, I seek not only to recount the chronology of laws and institutions but also to trace the origins of the main concepts that make up our current AML regime. One could describe this as an 'intellectual history' of AML laws, which is essential to understanding the purposes and limitations of the regime we currently have. Chapter 3 then examines how those purposes and limitations manifest themselves in several key policy dilemmas, such as that between exclusion and surveillance, that remain unresolved. The lack of clarity about how conflicting values and principles – including the presumption of innocence and financial privacy – should be balanced means that, at the core of the AML regime, there is always some uncertainty about what exactly it should be pursuing, and at what cost. Some potential solutions to those challenges are also discussed in that part of the book. Chapter 4 introduces terrorist financing, which is

[21] Emma Brockes, 'The Importance of Being Learned', *The Guardian*, 31 October 1999.

the other half of what gave rise to the modern AML/CTF framework, and targeted financial sanctions, including those related to terrorist financing and proliferation financing. They involve many of the same challenges as AML rules, with an addition of one further objective in the CTF context, namely that of denying terrorist actors the access to resources they need. In the imposition of sanctions, whether terrorism-related or otherwise, governments exercise manual control over who exactly should be excluded from the legitimate economy by explicitly identifying targeted individuals and companies. Such targeted exclusion gives rise to distinct law, policy and implementation challenges. Finally, Chapter 5 sums up the challenges in ensuring that the legitimate economy does not do business with criminals; lays out several principles for an effective AML/CTF regime; and proposes priority areas for meaningful implementation of targeted financial sanctions.