

**A VIRTUE ETHICAL ASSESSMENT OF LEGISLATION
TO COMBAT MONEY LAUNDERING
AND THE FINANCING OF TERRORISM**

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ABSTRACT

This report investigates whether the customer due diligence that is required by legislation to combat money laundering and terrorism financing is morally defensible, given that this diligence is expressed as automatic distrust. Automatic distrust refers to distrust that is a pre-determined, standard attitude to another party, and contrasts with judicious distrust that is shown for specific reasons based on specific circumstances. From the perspective of neo-Aristotelian virtue ethics, the finding is that the legal obligations that require clients of financial institutions to be automatically distrusted are not morally defensible: they express the virtue of diligence in an inappropriate manner, and impinge on important social and moral goods such as trust, respect and fairness; further, the inappropriate expression of diligence shows a lack of practical wisdom and is not compatible with the idea of living morally. The finding is reinforced by two considerations: (1) the limitations of the risk-based approach to diligence, which does not materially change the automatic distrust to which clients are subjected, and (2) the possibility of a feasible, morally better alternative which restricts automatic distrust to a domain in which it would be more legitimate.

DECLARATION

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I have followed the required conventions in referencing the thoughts and ideas of others.

I understand that the University of the Witwatersrand may take disciplinary action against me if there is a belief that this is not my own unaided work or that I have failed to acknowledge the source of the ideas or words in my writing.

Signature :



Date : 14 May 2021

I dedicate this research report to my late father, Werner Julius Zellmer.
He was a real *mensh*.

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My thanks go to my supervisor Professor Samantha Vice, for her wise insights, her deft guidance, and her patient encouragement during the time it took for this report to be completed.

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1. INTRODUCTION

The impetus for this report was the realisation, from the viewpoint of “common morality”, that in an increasing number of transactional settings I am routinely and by default, though not overtly, being perceived as a potential wrongdoer. For instance, when I request over-the-counter medicine, I am a potential drug dealer or addict; when I leave the DIY store with my purchase, I am a potential thief; when I want to set up a new investment, I am a potential money launderer; when I submit my tax return, I am a potential tax dodger, and so on. There seems to be a standard assumption that I could use the transaction to achieve some illicit purpose, and that I must be prevented from doing so. In each of these situations, the condition for completing the transaction is adherence to what I term integrity verification procedures, which supposedly help to prevent certain wrongs or harms, such as the non-fulfilment of obligations or the abuse of products or services. For example, when I want to self-medicate a cold, I am expected to provide personal and contact details for capturing into an information system; when I leave the DIY store, I am expected to present proof of payment for inspection; when I want to invest money, as a minimum, I must provide documents which confirm my identity, my place of residence and the source of my funds; when I submit a tax return, I must provide supporting documentation for auditing.

The situations described above are examples of an attitude which I shall term the presumption of wrongdoing.¹ The presumption of wrongdoing manifests as distrust, more specifically as automatic distrust, by which I mean distrust that is a pre-determined response to another party. Automatic distrust strikes me as uncivil, inappropriate and morally dubious. Automatic distrust acquires an additional twist when the distrust is not merely an informal practice or an unfortunate habit, but a legal obligation, since legal obligations remove most of the choice one might have had in the matter, and obeying the law is usually regarded as a morally good thing. Thus it occurred to me to explore the issue of automatic distrust in more depth, by reference to a transactional setting in which distrustful attitudes are more formalised and consistent than in other transactional settings, and in which automatic distrust is a legal obligation. This is the arena of financial services, which is heavily influenced by legislation to combat money laundering and the financing of terrorism. I will refer to this legislation as “AML legislation”,

¹ Hamish Stewart, “The Right to be Presumed Innocent,” *Criminal Law and Philosophy* 8, no. 2 (June 2014): 409, <https://doi.org/10.1007/s11572-013-9233-x>.

“AML” standing for “anti-money laundering”. For the sake of brevity, the terrorism financing aspect is not mentioned specifically, but is subsumed under the term “AML” (terminology is clarified further in section 3.2.1). South African AML legislation aligns with international standards for AML, and contains specific obligations which amount to an obligation to distrust, i.e. the obligation to exercise “customer due diligence” (essentially the verification of clients’ identity and the monitoring of their transactions), and the obligation to report certain types of transactions.² I will thus treat the legislation as an instance of automatic distrust.

Given my personal disapproval of automatic distrust, my question is whether the automatic distrust prescribed by the legislation is nevertheless morally defensible, and thus I will assess the legislation from a moral point of view. My assessment will be based on a specific approach to normative ethics, i.e. on Rosalind Hursthouse’s conception of neo-Aristotelian virtue ethics, in which the concepts of virtue, practical wisdom and the good life (i.e. the moral or virtuous life) play a key role.³ Given the legislation’s emphasis on customer due *diligence*, I consider it plausible to regard the legislation as promoting or enforcing the *virtue* of diligence. I think it worthwhile to take a critical look at whether this diligence qualifies as a virtue, if it leads to automatic distrust in a significant domain of everyday life. The concepts of virtue, practical wisdom and the good life will serve as the standards that must be met in order for the diligence demanded by the legislation to qualify as a virtue, and to be morally defensible.

² The legislation is complex, and in order for citations to be comprehensible, the basics of the legislation first need to be explained. This will be done in section 3.3, where I will also explain my specific method for citing the legislation.

³ Preliminary note regarding citations:

In cases where a citation is lengthy or intricate, or where multiple sources are placed in one footnote, I will deviate from the Chicago Manual of Style of 2017 (CMOS17) convention, and place citation elements or sources on multiple lines (URLs and DOIs in footnotes will not be split across lines, but placed on an additional line if necessary). The convention of separating each source from the next by means of a semi-colon will be retained, as will other conventions regarding punctuation, but some exceptions will be made for the sake of clarity. The margins of footnote text are justified, except when this would stretch text out too far, in which case margins are left-aligned. Microsoft Word’s superscript format for footnote numbers will be retained, since the superscript is sufficiently readable.

Source information for footnote 3:

Rosalind Hursthouse, *On Virtue Ethics* (Oxford: Oxford University Press, 1999), 8 – 13;

Rosalind Hursthouse, “Are Virtues the Proper Starting Point for Morality?”, ed. James Dreier, *Contemporary Debates in Moral Theory* (New Jersey: John Wiley and Sons, 2006), 101 - 105;

Rosalind Hursthouse and Glen Pettigrove, “Virtue Ethics,” *Stanford Encyclopedia of Philosophy* (Winter 2018), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/win2018/entries/ethics-virtue/>: 1 – 11 in the pdf version of the article (sections 1., 1.1 & 1.2 in the online version). Note: This citation is formatted as requested by *The Stanford Encyclopedia of Philosophy*.

My answer will be that the automatic distrust required by the legislation is not morally defensible. The legislation's aim of inhibiting wrongdoers is a moral one, but inhibiting wrongdoers is not justified by indiscriminately distrusting all transacting persons. The legislation expresses diligence inappropriately, as automatic distrust, and though automatic distrust may be practical, it impinges on the moral values of trust, respect and fairness, and this is not wise and not ethical. In addition, since automatic distrust morally "discredit[s] all for the sins of some"⁴ it is not compatible with living morally or virtuously. Therefore, I also think that my disapproval of being seen as and treated as a wrongdoer in common transactional situations is warranted.

My analysis of automatic distrust is set up as follows: Section 2 of this report specifies automatic distrust in more detail, suggests how automatic distrust seems to come about, and provides an initial indication of why automatic distrust may be of concern morally speaking. Section 3 provides an overview of the international initiative to combat money laundering and terrorism financing, in order to clarify the context for the specific instance of automatic distrust that of interest here; the section also summarises what the AML legislation that engenders automatic distrust actually entails, so that the moral issue that the legislation involves becomes clear. The purpose of section 4 on trust and distrust is to explain those aspects of trust and distrust that elucidate the nature of the trust-related moral problem within the legislation. Then, in section 5, I turn my attention to virtue ethics. I briefly distinguish it from other ethical approaches, and explain why I use this approach in order to assess the morality of AML legislation. I then provide a synopsis of the key concepts of virtue ethics, and indicate how they can be applied in a moral assessment of AML legislation. Section 6 contains the actual assessment. I first consider the argument *for* automatic distrust, and then I show how the diligence demanded by AML legislation, understood as a virtue, falls short when measured against appropriateness, practical wisdom and the idea of living a good or moral life. Lastly, in section 7, I consider how supporters of AML legislation might use the risk-managed approach to anti-money laundering to invalidate my assessment, and then show how the possibility of alternative approach to anti-money laundering allows me maintain my position that the automatic distrust required by the legislation is not morally defensible.

⁴ Trudy Govier, *Social Trust and Human Communities* (Montreal & Kingston: McGill-Queen's University Press), 178.

2. AUTOMATIC DISTRUST

2.1 Presumption of wrongdoing and presumption of integrity

Situations such as those described in the introduction have drawn my attention to an attitude that warrants further investigation, i.e. the presumption of wrongdoing.¹ This term is derived from the legal principle of the presumption of innocence, and is based on the idea that this legal principle has a moral analogue,² i.e. the presumption of integrity. The presumption of wrongdoing would then be the opposite of the presumption of integrity. “Integrity” in this context is an attribute of a person, and indicates that they³ possess a fundamental moral decency, and an understanding of what constitutes acceptable human conduct. I see integrity as having two shades of meaning. In a simple or ordinary sense, integrity can refer straightforwardly to moral decency, moral goodness or good moral character.⁴ In the full sense of the term, integrity, or more precisely moral integrity, has both a formal and a substantive aspect, and refers not only to the coherence and consistency of someone’s thoughts, beliefs, values and actions (the formal aspect), but also to the moral character and moral acceptability and sincerity of these thoughts, beliefs, values and actions (the substantive aspect). Strictly speaking, one cannot be morally decent or good or have a good moral character without also holding coherent, consistent and sincere moral thoughts, values and beliefs, and without one’s actions being congruent with these thoughts, values and beliefs. However, one need not always put too fine a point on the matter, and I will indicate where I use integrity in a simple sense.

A moral principle which is analogous to the legal principle can be understood as follows. The purpose of the legal presumption of innocence, simply put, is to ensure that a person who is on trial for a crime, but not yet proven guilty of it, is treated fairly and is shown the respect that is their due as a person⁵ (the assumption being that fairness and respect for persons are recognised

¹ Stewart, “The Right to be Presumed Innocent,” 409.

² Stewart, “The Right to be Presumed Innocent,” 409 – 410. Citing R.A. Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford: Hart Publishing, 2007), 197.

³ The pronoun “they” and its variants will be used as a gender-neutral singular (and plural) pronoun.

⁴ Cox, Damian, Marguerite La Caze, and Michael Levine, “Integrity”, *The Stanford Encyclopedia of Philosophy* (Spring 2017 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/spr2017/entries/integrity/>: 1 – 2 in the pdf version of the article (in online version, see Introduction to article, entitled “Integrity”). Note: This citation is formatted as requested by *The Stanford Encyclopedia of Philosophy*.

⁵ R.A. Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law*: Hart Publishing, 2007), 196 – 197; Stewart, “The Right to be Presumed Innocent,” 408 – 409.

as being important). A presumption of integrity in ordinary life would function in a similar way, and remind us to perform some *validation* of any unfavourable assumptions about others, especially before acting on them and treating others unfavourably. The principle would promote similar moral values, i.e. it would also remind us that fair and respectful attitudes toward one another, as demonstrated by a presumption of integrity for example, are an important aspect of acceptable human conduct, i.e. the type of conduct which makes it possible for us to live together in society.

One might argue that the presumption of innocence applies only in the setting of a criminal trial, or is necessary only in this context. However, if in a legal context suspicion alone does not justify treating a person as guilty,⁶ and if we are committed to moral conduct and to values like fairness and respect for persons, then the same standards should also apply in ordinary life, in the form of the presumption of integrity. A presumption of integrity means that that one has a reasonable expectation that, with some exceptions, one's fellow human beings are fundamentally decent; it does not mean that one naïvely believes everyone to be morally perfect. A presumption of integrity is a key component of trust, which will be discussed in more detail in section 4. I regard trust as a valuable social and moral good that is placed at risk when a presumption of wrongdoing is generalised and becomes an accepted approach to preserving social order. Note: I will use the term “fairness” rather than “justice” to refer to people's treatment of one another and to the idea that people deserve or do not deserve certain things; fairness is an aspect of justice, but I understand justice as a broader concept that refers to the equitable distribution of life's benefits and burdens.

2.2 Automatic distrust

As mentioned in the introduction, the presumption of wrongdoing manifests as distrust. For now, it will suffice to define distrust by equating it with the presumption of wrongdoing; a more detailed definition of distrust follows in section 4. Here I expand on my notion of *automatic* distrust. Automatic distrust refers to the type of distrust that is a pre-determined, standard or routine response to another party. I emphasise that I take issue with distrust when it is a “basic, standing attitude”⁷ towards others, since it is not deserved by people who are trustworthy, and

⁶ Duff, *Answering for Crime*, 197.

⁷ Govier, *Social Trust and Human Communities*, 129 (“standing attitude”) & 212 (“basic standing attitude”).

is likely to have some negative consequence for them. There may be some grounds for automatic distrust, but they are not sufficient to make automatic distrust reasonable, and therefore I regard it as morally dubious. I have no issue with a more judicious type of distrust, which I shall I term *situational* distrust. This type of distrust is shown for specific reasons based on specific circumstances. Situational distrust is thus better targeted and better grounded,⁸ and morally speaking it is likely to be more defensible. The immoral quality of automatic distrust will become clearer as the discussion proceeds.

In my scenarios, the distrust that is shown originates with a “higher authority”, which adopts an attitude of automatic distrust towards its transaction partners as policy, and instructs that everyone under its direction follows suit. In the case of the DIY store, it is the business owner who is directing employees to be distrustful of customers; in the other three scenarios, it is various organs of state, such as policymakers, legislators, regulators or various authorities who direct certain product providers or service providers to distrust their transaction partners. The employees who implement the policy or interact directly with transaction partners may or may not adopt the policy as a personal one, and they may or may not be distrustful themselves, but be that as it may, the fact is that distrust is shown, even though it may not be recognised as such by the party at whom it is directed, or be perceived as unacceptable. The advantage of automatic distrust as a transactional stance is that it solves or at least reduces an epistemic problem. “Successful” wrongdoing often involves deception, and in the transactional domain, in order to distinguish wrongdoing from honest dealing, the simplest thing to do is to assume that any person could be a wrongdoer, and then to verify who is transacting in good faith and who not. This basic rationale for automatic distrust will be taken up again in section 6, when I assess automatic distrust from a virtue ethical perspective.

I mentioned earlier that the presumption of wrongdoing which I perceive is not overt, and as such, one might object that we are dealing with a mild form of distrust, such as caution or wariness, and that I am overstating the issue. However, I will retain the stronger term distrust,

⁸ Carolyn McLeod, "Trust," *The Stanford Encyclopedia of Philosophy* (Fall 2015 Edition), Edward N. Zalta (ed.), URL = <<https://plato.stanford.edu/archives/fall2015/entries/trust/>>1 in the pdf version (introductory section entitled “Trust” in online version). Notes: (1) This citation is formatted as requested by *The Stanford Encyclopedia of Philosophy*. (2) After completing this report, I discovered an updated version of this article, dated Fall 2020. The updated version includes certain points about distrust that align with my own analysis of automatic distrust as uncivil, inappropriate and morally dubious, and in particular with my own analysis of trust as a form of respect and distrust as a form of disrespect (in this report, see section 6.2.3, subsection “Respect and fairness”).

especially since the wariness by product or service providers towards their transaction partners is acted upon and affects the manner in which the latter are treated: if they do not conform to the integrity verification procedures demanded by the product or service provider, they cannot transact. My initial assessment of this type of distrust is that it is inappropriate and uncivil. What is going on when, in the course of an ordinary transaction, the possibility that I might be up to mischief becomes a standard, formal, prominent consideration? Why are we so pre-occupied with wrongdoing? Do customers, clients or citizens commit so many wrongs that product or service providers (including public service providers) must be always on guard and effectively assume that customers, clients or citizens are “guilty until proven innocent”?⁹ One relatively straightforward explanation for this state of affairs might be that this distrust is a consequence of ever-increasing regulation or over-regulation of the transactional domain, and/or a concomitant of the complexity of the modern world. Thus, the distrust that I perceive is at most a minor annoyance, or perhaps a necessary evil, but it is not a cause for concern. However, I think that the automatic distrust which one increasingly encounters in everyday life contains a moral hazard; as indicated when the presumption of integrity was introduced, automatic distrust impinges on moral goods such as trust, respect and fairness. I will justify my concern about these moral goods in the virtue ethical assessment of automatic distrust in section 6.

2.3 The merit in evaluating automatic distrust

Questioning the morality of legislation to combat money laundering and the financing of terrorism may seem fanciful or eccentric, given the fundamental worthiness of preventing these harmful activities, and the support and promotion of the initiative by a wide range of transnational organisations and national jurisdictions. Over the last three or so decades that the initiative has gathered momentum, the morality of the enterprise seems to have been taken for granted, and my research indicates that potentially immoral aspects of the associated legislation have not attracted much attention, beyond some concern within the legal profession about the impact on rights such as privacy,¹⁰ or the odd critical voice within academia about the

⁹ Eric Uslaner, *The Moral Foundations of Trust*, Kindle edition (Cambridge: Cambridge University Press, 2002), 250.

¹⁰ Roberto Durrieu, *Rethinking Money Laundering & Financing of Terrorism in International Law: Towards a New Global Legal Order* (Leiden: Martinus Nijhoff Publishers, 2013), 169;

Itzikowitz, Angela, “South Africa,” in *International Guide to Money Laundering Law and Practice*, 4th ed., edited by Arun Srivastava, Mark Simpson and Nina Moffat (Haywards Heath: Bloomsbury Professional, 2013), 1200.

effectiveness of the legislation.¹¹ I see a number of reasons to investigate the morality of the legislation more closely: its wide-ranging scope, its resource-intensity, its significant coercive effects, the persistence of organised crime and terrorism, and last but not least, the very fact that the tide is against any doubters. It would be naïve to expect legislation to be morally perfect, but I do think that it is worthwhile considering the moral implications of accepting automatic distrust as a legitimate method to combat organised crime and terrorism. And if prevailing mindsets about how to deal with this type of wrongdoing were ever to change along the lines sketched in my virtue ethical assessment of the situation, so much the better.

Lastly, I stress that I am not questioning the concept of law as a mechanism for ensuring social order and preventing crime, nor the idea of eliminating the financial rewards and enablers of organised crime and terrorism, which is the focus of the initiative to combat money laundering and terrorism financing. It makes sense for society to constrain or even eliminate those elements which threaten its wellbeing, and to do so in a manner that is enforceable, as long as legal measures are not overused. My issue is with the current approach to preventing money laundering and terrorism financing, the automatic distrust that this approach entails, and the implications this type of distrust has for the morality of our attitudes and our conduct. A different approach to financially incapacitating criminals is not inconceivable, and might make it unnecessary to burden a large section of the transactional domain of society with increasingly elaborate counter-measures whose effectiveness is questionable, and to discredit all transacting persons by treating them as potential criminals.¹²

¹¹ Ronald F. Pol, “Anti-Money Laundering Effectiveness: Assessing Outcomes or Ticking Boxes?” *Journal of Money Laundering Control* 21, no. 2 (2018): 215-230, <https://doi.org/10.1108/JMLC-07-2017-0029>;
Jackie Harvey, “Just How Effective is Money Laundering Legislation?” *Security Journal* 21 (2008): 89 – 211, <https://doi.org/10.1057/palgrave.sj.8350054>.

¹² Govier, *Social Trust and Human Communities*, 178.

3. THE LEGAL OBLIGATION TO DISTRUST

The purpose of this section is to explain how money laundering and terrorism financing came to be a major concern, to outline what the initiative against these wrongful activities entails in practical terms, to summarise what the law that engenders automatic distrust actually stipulates, and thereby to get to the source of the moral problem that I perceive. In order for it to become clear, as the discussion proceeds, why the automatic distrust that is in focus here is morally problematic, I begin the section with a brief explanation of my understanding of morality. I follow with some generic aspects of the initiative, and then focus on how it is approached in South Africa, given the bounded scope of this discussion and my familiarity with the local transactional environment. The perspective I take is that of an ordinary moral agent, and not that of a person who is active in a legal, a compliance or a risk management role.

3.1 Morality

Morality can be understood as a guide for how we ought to conduct ourselves, both for our own sakes and for the sake of others. James and Stuart Rachels propose a “minimum conception” of morality, in which morality is seen as “the effort to guide one’s conduct by reason – that is, to do what there are the best reasons for doing – while giving [appropriate consideration] to the interests of [others] affected by one’s action.”¹ If one were to expand this definition a step further, and include two factors which often shape our actions, namely thinking and feeling, one can see morality as being concerned with the justification of our thoughts, feelings and actions, with the concurrent aim of balancing self-interest and common interests, and providing a basis for the wellbeing of both individuals and society. More concretely, morality can be understood as a system of informal² rules, principles, norms or standards, of varying degrees of specificity, which define what we regard as good, right or acceptable with regard to our thoughts, feelings and actions. As such, morality also defines what matters in human life, what is important, valuable or worthwhile. This broader understanding of morality (which I will adopt) aligns with Socrates’ conception, according to which morality is about “how we ought

¹ James Rachels and Stuart Rachels, “What is Morality?” Chap. 1 in *The Elements of Moral Philosophy*, 8th ed. (New York: McGraw Hill, 2012), 13.

² Regarding the informality of morality, an observation by Alasdair MacIntyre helps to clarify what I mean: “...’morality’ became the name for that particular sphere in which rules of conduct which are neither theological nor legal nor aesthetic are allowed a cultural space of their own.” Alasdair MacIntyre, *After Virtue*, 3rd ed. (Notre Dame, Indiana: University of Notre Dame Press, 2007), 39.

to live”.³ Lastly, guiding one’s conduct by reason implies that one conducts oneself in accordance with moral precepts or deviates from them out of one’s own rationally grounded conviction and volition. This means that one possesses integrity, not only in the sense that one is a fundamentally decent person, but also in the sense that one holds coherent and consistent moral values and beliefs, which would be congruent with one’s actions. Thus morality can bring about acceptable human conduct in those areas of life which are not or cannot (realistically) be regulated by law.

3.2 Combating money laundering & terrorism financing

3.2.1 Terminology

Measures to combat money laundering are commonly referred to as “anti-money laundering” and will be abbreviated to “AML”. Simply put, to “launder” or to “clean” money is to legitimise money that was obtained in an illegal manner. Practically this is achieved by performing a number of transactions within the financial system with illegally obtained funds, in order to make them appear to have been obtained legitimately, so that they can be used in a normal way to provide the full benefit that inheres in legitimate funds. It is standard to see money laundering as an action that is separate from the crime which gives rise to money laundering, and in so far as money laundering is a specific means of benefiting from crime, either by the perpetrators of the crime and/or their associates, it is comprehensible that it is treated as a crime in its own right. There is debate about the objective of criminalising money laundering and the justification for it, but this matter is beyond the scope of this discussion.⁴ “Combating/countering the financing of terrorism” is self-explanatory and will be abbreviated to “CFT”. Conversely to money laundering, the financing of terrorism entails the “dirtying” of money, since money is used to enable wrongdoing. However, since there are similarities in how criminal and terrorist organisations manage their finances (e.g. the use of deceptive techniques to conceal the criminal origin or destination of funds), measures to inhibit the financing of terrorism are coupled with those against money laundering.⁵

³ Rachels and Rachels, *The Elements of Moral Philosophy*, 1

⁴ Mariano-Florentino Cuéllar, “The Tenuous Relationship between the Fight against Money Laundering and the Disruption of Criminal Finance,” *The Journal of Criminal Law and Criminology* (1973-) 93, no. 2/3 (Winter -Spring, 2003): 380 – 403, <https://www.jstor.org/stable/1144319>;

Durrieu, *Rethinking Money Laundering*, 187 – 192.

⁵ Durrieu, *Rethinking Money Laundering*, 66 – 72.

3.2.2 The history

AML had its beginnings in the 1980s, in international initiatives to combat illegal drug-trafficking. The aim was to prevent drug-traffickers from being able to utilise the profits of their trade, and thus to deter them from their activities.⁶ Efforts to combat the financing of terrorism gained momentum in the early 2000s after the “9/11” terrorist attacks in the United States.⁷ The multi-national Financial Action Task Force (FATF), founded in 1989 at a “Group of 7” (G7) summit in Paris,⁸ functions as the global authority on AML and CFT.⁹ Thirty years on, it has global reach; its core membership consists of 37 countries (including South Africa) and two regional organisations, and it has a range of associate members and affiliations with a number of observer organisations, which include various multi-lateral or transnational bodies, such as the United Nations (UN), the International Monetary Fund or Interpol.¹⁰ Originally the FATF focused on defining measures to combat money laundering and overseeing their implementation, but over time its mandate expanded, first to include measures to combat the financing of terrorism, and then to include measures against the financing of the proliferation of weapons of mass destruction, and other related threats; as of April 2019 the FATF’s mandate is open-ended.¹¹ Therefore, to avoid complicating the discussion, I will from here onward drop the term CFT and refer to AML only, as the umbrella term for the entire range of issues that the FATF is mandated to address; this is safe to do, since the foundations of FATF’s approach to the issues remain the same.

3.2.3 Justifying anti-money laundering

The FATF describes organised crime as a threat to the integrity of the international financial system, and defines its specific task as protecting the international financial system from misuse by criminals.¹² I take “integrity” as used by the FATF to refer to the moral acceptability of the

⁶ Mark Simpson, “International Initiatives,” in *International Guide to Money Laundering Law and Practice*, 4th ed., eds. Arun Srivastava, Mark Simpson and Nina Moffat (Haywards Heath: Bloomsbury Professional, 2013), 237.

⁷ Durrieu, *Rethinking Money Laundering*, 2.

⁸ Financial Action Task Force, “What we do.” <http://www.fatf-gafi.org/about/whatwedo/>. Note: As in the main text, all further references to the Financial Action Task Force will be abbreviated to FATF.

⁹ FATF, “Who we are.” <http://www.fatf-gafi.org/about/whoweare/>.

¹⁰ FATF, “Members and Observers.” <http://www.fatf-gafi.org/about/membersandobservers/>.

¹¹ FATF, “What we do.” <http://www.fatf-gafi.org/about/whatwedo/>.

¹² FATF, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations* (Paris, FATF, 2012 – 2020, updated October 2020), 7. www.fatf-gafi.org/recommendations.html. Note: The document referenced here will be abbreviated to *Recommendations*.

financial system, but integrity in this case also incorporates the idea that the financial system as a whole, with all its various aspects and components, should be morally above board, without any part being immoral in character, as would be the case when transactions can be used for illicit purposes such as money laundering. Integrity in the sense of the safety, stability and proper functioning of the financial system is the remit of a different type of institution, such as the Basel Committee on Banking Supervision, national banking supervisors or national prudential authorities, such as the South African Reserve Bank.¹³ If one portrays the financial system as something which can possess moral integrity, then one seems to be attributing some kind of moral status to it. The plausibility of this idea will not be discussed here, but it is conceivable that the financial system is a valuable social resource, since it facilitates transactions and co-operation and contributes to the creation of further social goods that may flow from these activities. The use of the system by wrongdoers does not necessarily undermine its value, since wrongdoers rely on a functioning financial system as much as anyone else. The issue is that wrongdoers may use the system in order to enjoy the benefits of their wrongdoing, or to enable further wrongdoing. In this way the system might facilitate the creation of evils, as opposed to goods, and incentivise wrongdoing. Thus it makes sense to block wrongdoers' access to this resource and to punish them when they do use it for illicit purposes. In this sense, AML can be understood not only as a legal obligation, but also as a moral one.

3.2.4 Implementing anti-money laundering

The FATF plays a key role in the financial incapacitation of organised crime, i.e. the type of crime that is serious, large-scale and frequently also transnational or global, and which is regarded as particularly harmful to society.¹⁴ The FATF assists in curbing organised crime by devising methods and standards for removing those of its financial enablers and rewards that rely on use of the financial system, and by “[promoting] effective implementation of the necessary legal, regulatory and operational measures.”¹⁵ In addition, there is an ongoing review process which assesses countries' level of technical compliance with standards and their effectiveness in curbing money laundering, and which identifies any shortcomings that should

¹³ Basel Committee on Banking Supervision (of the Bank for International Settlements), *Customer Due Diligence for Banks* (Basel: Bank of International Settlements, October 2001), 2. <https://www.bis.org/publ/bcbs85.pdf>.

¹⁴ FATF, “Who we are.” www.fatf-gafi.org/about/.

¹⁵ FATF, *Recommendations*, 7.

be remedied.¹⁶ The FATF's standards come in the form of recommendations, but any country that wishes to participate fully in the global financial system is effectively obliged to follow the FATF's recommendations (though some customisation of the standard measures based on local circumstances is accepted). Importantly, the FATF recommends that AML-related duties of financial services organisations and certain non-financial service organisations be enforceable, either in law or through other means.¹⁷

3.3 South Africa's anti-money laundering legislation

In South Africa, the legislation which is most directly concerned with AML, since it provides the administrative or operational mechanism for combating money laundering, consists of a principal act ("act" as in "official law"), the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001), and two amendment acts, the Financial Intelligence Centre Amendment Act, 2008 (Act No. 11 of 2008) and the Financial Intelligence Centre Amendment Act, 2017 (Act No. 1 of 2017).¹⁸ These acts will be abbreviated as FICA 2001, FICA 2008 and FICA 2017 respectively; the term FICA on its own will be understood to refer to all three of these Acts.¹⁹ FICA is supplemented by regulations that prescribe in more detail how AML requirements must be fulfilled.²⁰ In accordance with FATF standards, FICA also establishes the Financial Intelligence Centre, which collects AML-related financial information from institutions, processes the data into intelligence, and shares it as appropriate with the relevant authorities; the Financial Intelligence Centre also monitors and guides institutions' performance with regard to AML.²¹ South Africa's AML approach aligns closely with FATF requirements, and

¹⁶ FATF, *Methodology for Assessing Compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems* (Paris: FATF, updated October 2019), 5 & 15 - 16.
<http://www.fatf-gafi.org/publications/mutualevaluations/documents/fatf-methodology.html>.

¹⁷ FATF, *Recommendations*, 115. Note: The automated table of contents in the FATF's document indicates that the relevant section of the document begins on page 108, but the page to which one is taken from within the table of contents is page 115.

¹⁸ Angela Itzikowitz, "South Africa," in *International Guide to Money Laundering Law and Practice*, 4th ed., edited by Arun Srivastava, Mark Simpson and Nina Moffat (Haywards Heath: Bloomsbury Professional, 2013), 1180. Note: Itzikowitz mentions certain other acts which also amend FICA, i.e. the Prevention of Organised Crime Act, 1998 (Act No. 121 of 1998), and the Protection of Constitutional Democracy Against Terrorist and Related Activities Act, 2004 (Act No. 33 of 2004), but it is not necessary to refer to these acts for the purposes of this discussion.

¹⁹ FICA 2001, FICA 2008 and FICA 2017 are listed under "F" in the bibliography, earliest date first, since this is how one would read the legislation. Note: My method for citing the legislation deliberately does not follow a specific convention, but is customised for the purpose of this discussion, and aims to provide the relevant details as succinctly as possible.

²⁰ The regulations pertaining to FICA were first referred to as "Regulations in terms of the Financial Intelligence Centre Act, 2001", but over time there has been some variation in the naming of the regulations. Therefore, the original description and its abbreviation "Regulations" will be used for citation purposes. The regulations are listed in under "R" in the bibliography.

²¹ FICA 2001, sections 3 & 4.

therefore my assessment of South African AML legislation is to an extent also an assessment of a generally accepted approach to dealing with a specific type of threat to law and order. As explained earlier, this approach entails a presumption of wrongdoing, and manifests as an attitude of automatic distrust, which I find morally problematic.

3.3.1 Obligation bearers

There are a number of role-players in the AML initiative, but the nexus is formed by two parties who are not usually involved in law enforcement in a formal way, i.e. the financial services industry and its clients. Given that AML is a financial incapacitation strategy, it makes some sense that the financial services sector should play a key role in this strategy (the propriety of compelling business enterprises to act as law enforcement or intelligence agents for the state is outside the scope of this essay). Thus a significant portion of the day-to-day responsibility for combating money laundering and applying AML measures is borne by organisations that provide some sort of financial service, or a service which could involve the processing of larger amounts of money, e.g. banks, insurance companies, stockbrokers, real estate agents, casinos, money remitters. These organisations, divided into nineteen categories, are most likely to be used for AML purposes and are classified as “accountable institutions”.²² In addition, there are two “reporting institutions” (car dealers and dealers in Kruger rands, a South African gold bullion coin with local and international appeal)²³ that may also be used to launder money, but whose AML responsibilities are less extensive, since it is seen as inappropriate to impose the full range of AML obligations on them (for reasons not mentioned in the legislation, but one might assume they have to do with financial services not being a primary offering nor a core competence of these businesses).²⁴

The parties who make use of the services provided by accountable and reporting institutions will be referred to as “clients” (in a business or transactional context, one tends to refer to buyers of products as “customers” and to buyers of services, especially of professional services, as “clients”). Clients can be natural persons such as individuals, or artificial persons such as companies, partnerships or trusts, but for the sake of clarity, this discussion will assume a natural person when it refers to a client. Clients who utilise the financial system acquire an

²² FICA 2001, Schedule 1.

²³ FICA 2001, Schedule 3; <https://www.investopedia.com/terms/k/krugerrand-gold-coin.asp>.

²⁴ FICA 2001, Chapter 5, section 76 (1)(a).

obligation to disclose and to provide access to certain personal and confidential information for use in AML (details in the section below on customer due diligence). This information is used to indicate whether or not the client is engaging in money laundering, and thus this obligation can be formulated more abstractly as the obligation to prove integrity. Clients are not specifically identified as obligation bearers in AML legislation, but it is important to note that they are the parties who are subjected to AML measures: morality entails showing appropriate consideration for the interests of others,²⁵ and in spite of the moral aim of AML, I question whether this particular criterion is met if clients are automatically distrusted.

3.3.2 Morally problematic obligations

Of the extensive AML measures that South African legislation prescribes, those that most prominently demonstrate the presumption of wrongdoing and automatic distrust are institutions' obligations regarding (1) customer due *diligence*, which includes the *monitoring* of transactions,²⁶ and (2) the *reporting* of *suspicious* and *unusual* transactions.²⁷ (FICA uses the term “customer” as part of the concept of customer due diligence, but otherwise follows the convention of referring to “client/s”.) I will condense the content of the obligations as far as possible, but it is necessary to go into some detail in order to indicate where the moral implications lie; more detailed discussion follows in the virtue ethical assessment of AML legislation.

Customer due diligence

Customer due diligence is financial industry terminology for what I refer to as integrity verification. Strictly speaking, the AML initiative is probably not interested in whether clients possess integrity in the full sense of the term; rather, AML is interested in a specific aspect of

²⁵ Rachels and Rachels, *The Elements of Moral Philosophy*, 13.

²⁶ FICA 2001, section 21;

FICA 2017, section 21 (amendment of FICA 2001 as per point 9.);

FICA 2017, sections 21 A & 21C (inserted into FICA 2001 as per point 10.).

²⁷ FICA 2001, section 29;

FICA 2017, section 29 (amended as per point 21.);

Regulations in terms of the Financial Intelligence Centre Act, 2001:

- Government Notice No. R. 1595 of 20 Dec 2002, regulation 23

- Government Notice No. R. 456 of 20 May 2005, substitution of regulation 23 (as per point 4.)

- Government Notice No. R. 1062 of 29 Sep 2017, substitution of regulation 23 (as per point 11.).

Note: References to regulations will henceforth be abbreviated in the format “Regulations 2002, regulation 3”.

integrity, i.e. clients' honesty about the legitimacy of their transactions. I will nevertheless use the expression "integrity verification", in order to be succinct. In a generic sense, the concept of "due diligence" refers to the exercise of a certain standard of care with regard to some significant matter, or to the type of care that a reasonable business or person would be expected to take before entering into an agreement with another party.²⁸ In the context of AML, customer due diligence is best understood as sustained care in ensuring that one is assessing the legitimacy of clients' transactions.

Institutions are required to perform both *initial* customer due diligence and *ongoing* customer due diligence. Initial customer due diligence is a process whereby (1) a new client's identity is established and verified,²⁹ and (2) information is obtained on the nature of the business relationship that is being entered into, the intended purpose of the relationship, and the source of the funds for transactions,³⁰ in order to establish the client's "profile" (this term remains relevant for my purposes, even though Chapter 3 of the regulations for FICA 2001, entitled "Client Profile", is repealed by the regulations for FICA 2017).³¹ The identity-related processes are meant to ensure that clients really are who they claim to be: *establishing* a client's identity usually entails obtaining particulars such as their full name, date of birth, identity number, income tax registration number, residential address; *verifying* the client's identity is usually done by comparing identity information to independent information sources which are expected to be reasonably reliable and accessible.³² Client *profiling* sets the parameters within which clients will be expected to transact in order to avoid particular suspicion.

Ongoing customer due diligence entails (1) the continuous monitoring of transactions throughout the business relationship to verify their legitimacy, which is done by confirming their consistency with the client's profile, and (2) ensuring that identity information remains

²⁸ https://en.wikipedia.org/wiki/Due_diligence.

²⁹ FICA 2001, section 21 (entire section); FICA 2017, section 21(1) (amendment of FICA 2001 as per point 9.).

³⁰ FICA 2017, section 21A.

³¹ Regulations 2017, point 6. regarding "Repeal of Chapter 3".

³² Regulations 2002, regulations 3 & 4.

Note: Strictly speaking, regulations 3 and 4 are repealed by the Regulations 2017 (point 4. regarding the repeal of Chapter 1 of the Regulations 2002, which contained regulations 3 and 4). FICA 2017 (sections 21(1) & 42) gives institutions more discretion in deciding how to establish and identify clients' identity, since identity-related processes become part of an institution's risk management and compliance programme and are no longer specified as before. However, the official guidance from the Financial Intelligence Centre, as well as the practice within institutions, has not changed substantially compared to the original requirements for establishing and verifying clients' identity (see the FIC's *Guidance Note 7* of 02 October 2017, paragraphs 74, 75, 85 – 94; full details in bibliography).

up-to-date.³³ Transactions may be specifically scrutinised to ensure that the source of funds matches the client profile, and special attention may be paid to transactions that are complex, large, unusual or show unusual patterns.³⁴ To summarise: client integrity in using the financial system is presumed to have been verified when identity information and the characteristics of the client's transactions conform to pre-defined expectations.

Reporting

FICA prescribes that institutions must report specific transaction-related information to the FIC, and stipulates the manner in which reports must be made (the FIC's format must be followed), the type of information that must be reported (e.g. cash transactions above a certain limit), and the timelines within which reports must be submitted (the timelines vary according to the type of information reported).³⁵ Reporting is based on extensive recordkeeping.³⁶ The reporting which is most pertinent to this discussion concerns the obligation to report a certain type of information, i.e. suspicious and unusual transactions.³⁷ This obligation essentially requires that anyone who owns, manages or is employed by a business and "who knows or ought reasonably to have known or suspected" that certain AML-related transactions are occurring or have occurred, must report this to the FIC.³⁸ The FIC would then evaluate this information and decide whether it needs to be actioned. Disclosure of reporting is prohibited³⁹ (to avoid alerting any wrongdoers), institutions or persons making reports in good faith are protected from being sued,⁴⁰ and certain established rules regarding confidentiality between transaction partners are overridden (e.g. attorney-client confidentiality is restricted to "the common law right to legal professional privilege ... in respect of communications made in confidence ... for the purposes of legal advice or litigation", which means that an attorney would have to report any potential AML-related dealings that are not covered by this provision).⁴¹

³³ FICA 2017, section 21C.

³⁴ FICA 2017, section 21C.

³⁵ This reference would be overly intricate if set out in full detail. Therefore, I summarise as follows:

FICA 2001, FICA 2008 & FICA 2017: Chapter 3, Part 3, sections 27 – 41A;

Regulations 2002, 2005, 01 Oct 2010 & 2017, regulations 22, 23 & 24. Note: The October date is given in full, because there were two amendments to the Regulations during 2010.

³⁶ FICA 2001, FICA 2008 and FICA 2017, sections 22 – 26C.

³⁷ FICA 2001 & FICA 2017, section 29.

³⁸ FICA 2001 & FICA 2017, section 29(1) & (2).

³⁹ FICA 2001 & FICA 2017, section 29(3) & (4).

⁴⁰ FICA 2001 & FICA 2008, section 38.

⁴¹ FICA 2001 & FICA 2008, section 37.

Though this discussion focuses on only two of the numerous AML obligations imposed on institutions, the consequences for not fulfilling an obligation are worth a mention, also in view of what might happen, simply put, if an institution were to presume integrity on the part of their clients. AML-related failures can result in punishment of varying severity, such as different types of penalties, restriction or suspension of business activity, fines from R1million to R100million, and imprisonment from three to fifteen years.⁴²

With regard to the moral implications of customer due diligence and reporting which this section is meant to point out, let me summarise the issues introduced at the beginning of the discussion. The bald reality is that on the current approach to AML, all clients are placed under general surveillance, which means that every client is distrusted, for as long as they are a client, for no other reason than the indeterminate possibility that they might be laundering money,⁴³ or, if one acknowledges the higher purpose of AML, that they might be engaging in organised crime. One would hardly keep constant watch if one did *not* distrust clients, the aim of constant observation being to find them out if they do wrong. AML's surveillance is comprehensible as a solution to the epistemic problem of identifying the deception which money laundering entails, but it leads to honest clients and wrongdoers being seen in the same unfavourable light and being treated in the same unfavourable manner. This situation strikes me as disrespectful of and unfair to honest clients. And it is not merely paradoxical that being treated as a potential criminal should offer protection from the harm real criminals cause, it is an unnecessary incongruity that can be mitigated. These matters will be explored further in the virtue ethical assessment.

⁴² FICA 2001, sections 46 – 71;

FICA 2008, sections 45C & 68(1) & (2);

FICA 2017, section 77(2)(c).

⁴³ Financial Intelligence Centre, *Guidance Note 7: On the Implementation of Various Aspects of the Financial Intelligence Centre Act, 2001 (Act 38 of 2001)*. In collaboration with the National Treasury, South African Reserve Bank and Financial Services Board (N.p.: Financial Intelligence Centre, Department National Treasury Republic of South Africa, South African Reserve Bank, Financial Services Board, 02 October 2017), paragraph 19.
<https://www.fic.gov.za/Compliance/Pages/Guidance-Notes.aspx>.

4. TRUST & DISTRUST

Trust is an intricate concept, and I will discuss only those aspects of trust and distrust which are most relevant to clarifying the trust-related moral problem that I perceive in the current approach to AML. The purpose of this section is to explain how trust and distrust will be understood, and to point out the role they play in managing information and the risk associated with the availability or lack of information.¹ The value of trust and distrust will be covered in the virtue ethical assessment, where I defend trust as a moral good that is worth preserving, contrary to the supposed advantage of automatic distrust in curbing organised crime.

In the context of AML, in so far as we have one group of people with certain characteristics distrusting another group with certain characteristics, one could say that we are dealing with a case of social distrust or role-based distrust, e.g. when policymakers and various policy implementers automatically distrust people who make use of financial services. The association between the transacting parties is likely to be impersonal in character, but ultimately the basic structure of an interpersonal trust relationship applies, whereby one person trusts or distrusts another person; in other words, interpersonal trust or distrust is the dominant model of trust or distrust,² and the discussion will proceed on the basis of this model.

I will assume that trust is “the original position of our relations to others”,³ and that trust is therefore prior to distrust. I will take trust as the basic concept, and understand distrust as a derivative of trust which “can be defined correlatively with trust”⁴ and which in some respects is the opposite of trust. Trust and distrust as defined here are similar in structure and function,⁵ but differ in two major respects, i.e. in their interpretation of information (or the lack thereof)

¹ Niklas Luhmann, “Trust: A Mechanism for the Reduction of Social Complexity,” Part One in *Trust and Power: Two Works by Niklas Luhmann*, trans. Howard Davis, John Raffan and Kathryn Rooney, eds. Tom Burns and Gianfranco Poggi (Chichester: John Wiley & Sons Ltd., 1979), 71 - 72. Note: Since Luhmann originally published his works on trust and power separately, and only the topic of trust is of interest here, the title in the abbreviated form of this reference will be given as *Trust* (and not as “Trust”);

Niklas Luhmann, “Familiarity, Confidence, Trust: Problems and Alternatives,” in *Trust: Making and Breaking Cooperative Relations*, ed. Diego Gambetta (New York: Basil Blackwell, 1988), 95 & 97.

² McLeod, “Trust,” 2 in the pdf version (introductory section entitled “Trust” in the online version).

³ J.M. Bernstein, “Trust: On the real but almost always unnoticed, ever-changing foundation of ethical life,” *Metaphilosophy* 42, No. 4 (Jul 2011): 402. <https://doi.org/10.1111/j.1467-9973.2011.01709.x>.

⁴ Trudy Govier, “Trust, Distrust and Feminist Theory,” *Hypatia* 7, no. 1 (1992): 17.

⁵ Luhmann, *Trust*, 71.

about people's character and conduct, and as the later discussion of the value of trust and distrust will show, in their implications for our sociality and morality.

4.1 Defining trust and distrust

I base my understanding of trust and the trust-related moral issues with AML primarily on Annette Baier's and Trudy Govier's accounts of trust, but I incorporate some insights from Niklas Luhmann on the function of trust (Baier and Govier too mention his work).⁶ For a definition of trust, I will follow Govier, who provides two definitions of trust that are of interest to this discussion. I will combine these definitions, and add an element from Baier's definition that I consider important (Baier's definition will not be discussed since it is not fundamentally different from Govier's). Govier's one definition states that "[t]rust is an attitude based on beliefs and expectations about what others are likely to do",⁷ and the other that "[t]rust is fundamentally an attitude, based on beliefs and feelings and implying expectations and dispositions."⁸ According to Baier, "to trust is neither quite to believe something about the trusted nor necessarily to feel any emotion towards them, but to have a belief-informed and action-influencing attitude".⁹ The element I borrow from this definition is the influence of trust on the trustor's actions (the trustor is the person doing the trusting, the trustee is the person who is trusted). Combining elements from Govier's and Baier's definitions, I define trust and distrust as an attitude that is based on one's beliefs, assumptions and expectations about the moral character and conduct of others, which is influenced by one's feelings and dispositions, and which is likely to influence one's actions in relation to others. For the purposes of this discussion, the feeling component will be omitted, since AML is primarily a political decision based on a specific understanding of organised crime, with intuitions or emotions about the matter probably playing a minor role, if any.

An **attitude** can be understood as a settled way of thinking and/or feeling about a matter.¹⁰ In line with my remark above about the irrelevance of feelings in the context of AML, I will understand attitude primarily as a way of thinking or as a mindset. The attitude of automatic

⁶ Annette C. Baier, *Moral Prejudices: Essays on Ethics* (Cambridge, Massachusetts & London, England: Harvard University Press, 1994); Govier, *Social Trust and Human Communities*; Luhmann, *Trust*; Luhmann, "Familiarity".

⁷ Govier, "Trust, Distrust and Feminist Theory," 17.

⁸ Govier, *Social Trust and Human Communities*, 4.

⁹ Baier, *Moral Prejudices*, 10.

¹⁰ Based on a Google definition and an entry at: [https://en.wikipedia.org/wiki/Attitude_\(psychology\)](https://en.wikipedia.org/wiki/Attitude_(psychology)).

distrust that characterises AML measures consists of clients being thought of in an unfavourable light by default, as potential money launderers (i.e. as potential criminals). This attitude then leads to certain **actions**, i.e. to institutions treating clients unfavourably, by subjecting them to ongoing integrity verification, by authenticating their identity, scrutinising their transactions, and reporting any transactions that the institution assesses as potentially constituting money laundering to the authorities for further investigation. I consider it important to acknowledge the potential of an attitude to shape our actions, and to recognise that what we think about one another can influence how we treat one another; this in turn influences the extent to which we can live the type of life that is appropriate for rational and social beings with an appreciation of morality (this is akin to “the good life” in virtue ethical terms, to be explained in section 5.2.3 on the virtue ethical perspective).

A **belief** can be understood as the acceptance that something is true or that something exists.¹¹ At some points in this discussion, particularly when the beliefs behind AML are in focus, the term “assumption” may be used instead of “belief”. I understand an **assumption** as a variant of belief which contains an element of conjecture: to assume something means that one takes it to be true, even though one does not know for certain that it is true,¹² whereas to believe something means that one takes it to be true with certainty. An **expectation** is another variant of belief, and can be understood as a strong belief that something specific will be the case in the future.¹³ For instance, AML supporters probably believe rather than assume that AML measures are an effective inhibitor of organised crime, and fully expect organised criminals to utilise the financial system to launder money unless they are prevented from doing so. In the context of AML, it is a matter of interpretation whether one is dealing with beliefs, assumptions or expectations (on the part of AML supporters), but this nuance does not affect the attitude of automatic distrust.

The **content of the belief**, assumption or expectation on which trust is based, generally stated, is that one’s fellow human beings possess moral integrity. More specifically, this means that one believes others to be benign or harmless,¹⁴ in the sense that their intentions and actions are characterised by goodwill towards their fellow human beings, or more realistically, by an

¹¹ Based on a Google definition of belief.

¹² Based on a Google definition of assumption.

¹³ This definition is adapted from a Google definition.

¹⁴ Govier, *Social Trust and Human Communities*, 6; Baier, *Moral Prejudices*, 99.

absence of ill will towards them.¹⁵ Thus the belief includes a belief that certain core moral values are held in common,¹⁶ and importantly, that others are likely also to act in a morally acceptable manner.¹⁷ Thus, trust requires integrity in the full sense of the concept: the trustor would believe not only that the trustee is fundamentally decent, but also that the trustee's moral values and beliefs are consistent and sincere, and that their actions will be in keeping with these values and beliefs. Conversely, distrust is based on the belief that other persons lack integrity, or that they are malign or harmful, or that they harbour some form of ill will toward or disregard for others, or that they lack goodwill toward others. Distrust includes the belief that others do not share one's moral values, and that they are likely to act badly or wrongly or in an otherwise unacceptable manner. Thus trust and distrust can be seen as moralised concepts. The belief regarding the actions of others has an important implication, which also constitutes a defining feature of trust: trust entails granting the trustee a certain amount of freedom or discretion in how to fulfil the trust that has been placed in them;¹⁸ not only are detailed specifications of how the trustee should act usually impracticable, they would also contradict trust. Thus, when one trusts, one also accepts risk,¹⁹ i.e. the risk that the trustee may, for reasons within or outside their control, not act appropriately.

As I see it, there are **three key beliefs** that inform AML's automatic distrust towards clients. **Firstly**, organised crime, be it the illicit trade in drugs, people or weapons, terrorism, corruption, or a similar activity, is an insidious and potentially all-pervasive evil that threatens to destroy civilised society, and this evil must be eliminated and prevented, or at least contained.²⁰ This belief is evident in the stance taken by the G7 countries and the UN, who can be regarded as the initiative's main sponsors (see the G7's Economic Declaration of 16 July 1989,²¹ and the three UN Conventions that pertain specifically to the problems of drug trafficking, terrorism

¹⁵ Baier, *Moral Prejudices*, 99.

¹⁶ Uslaner, *The Moral Foundations of Trust*, 2.

¹⁷ Govier, "Trust, Distrust and Feminist Theory," 17.

¹⁸ Baier, *Moral Prejudices*, 12; Govier, *Social Trust and Human Communities*, 4.

¹⁹ Baier, *Moral Prejudices*, 196. Citing Niklas Luhmann, "Familiarity," 94 – 107. Note: Baier gives the pages as 84 – 107, but my records indicate that page number 84 should read page number 94.

²⁰ United Nations Office on Drugs and Crime. *United Nations Convention against Transnational Organised Crime and the Protocols Thereto*, 2004, Foreword, iii – iv. <https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html>; Miles Johnson, "How the Mafia infiltrated Italy's hospitals and laundered the profits globally", *Financial Times*, July 9, 2020, <https://www.ft.com/content/8850581c-176e-4c5c-8b38-debb26b35c14>. Note: This reference to a recent press report provides some up-to-date insight into the nature and persistence of organised crime.

²¹ Group of Seven (G7), 15th summit from 14 – 16 July 1989 in Paris: *Economic Declaration*, dated 16 July 1989, paragraphs 52 & 53 on "Drug Issues". <http://www.g8.utoronto.ca/summit/1989paris/communique/index.html#drugs>.

and organised crime²²). **Secondly**, organised crime can be inhibited by removing its financial rewards, since money can be a strong motivator and organised crime can be highly profitable. The European Union Agency for Law Enforcement Cooperation (Europol) goes so far as to say that “[a]lmost all organised criminal groups ... carry out their activities for one reason: profit.”²³ **Thirdly**, organised criminals will use the financial system to launder their profits and thus to access the full benefit contained in legitimate funds, and if organised crime is to be financially incapacitated, this must be prevented (therefore the mandate given to the FATF).²⁴ Criminals’ participation in the financial system creates the possibility that clients’ financial dealings could be illegitimate, and this in turn leads to the morally problematic attitude of automatic distrust, via a move that I will explain together with the concept of disposition.

The term **disposition** has two shades of meaning. Disposition can refer to a character trait, which is relatively stable over time and across situations,²⁵ and which one deduces from a person’s expressed thoughts and feelings and from their actions. However, disposition can also refer to the tendency or propensity to think, feel or act in a specific way, so that it is likely but not certain that one will think, feel or act in that way. On Govier’s view, the disposition that underpins the attitude of trust is the tendency to interpret the actions of the trustee positively,²⁶

²² United Nations Office on Drugs and Crime. *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988*, in *The International Drug Control Conventions*, Part Three, Preamble to Articles, pages 123 – 124 (e-book format). New York: United Nations, 2003.
<https://www.unodc.org/unodc/en/commissions/CND/conventions.html>;

United Nations General Assembly. *International Convention for the Suppression of the Financing of Terrorism, A/RES/54/109, 25 February 2000 (adopted at the 76th plenary meeting, December 9, 1999)*. Preamble to Articles, pages 2 – 3 (pdf format). <https://digitallibrary.un.org/record/404084?ln=en#record-files-collapse-header>;

United Nations Office on Drugs and Crime. *United Nations Convention against Transnational Organised Crime and the Protocols Thereto*, Foreword, pages iii – iv, and Preamble to Articles, pages 1 – 4 (pdf format of full text of the convention and its protocols). New York: United Nations, 2004.
<https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html>.

²³ European Union Agency for Law Enforcement Cooperation (Europol), Financial Intelligence Group, *From Suspicion to Action: Converting financial intelligence into greater operational impact* (Luxembourg: Publications Office of the European Union, 2017), 7.
<https://www.europol.europa.eu/publications-documents/suspicion-to-action-converting-financial-intelligence-greater-operational-impact>.

Note: Not all of Europol’s reports are issued on an annual basis. This report is a once-off report, since Europol was not able to provide a later issue (as per their 15 July 2019 reply to my “public access request” of 11 July 2019). However, there are similar reports available that provide insight into organised crime and terrorism, e.g. Europol’s *Serious and Organised Crime Threat Assessment (SOCTA)* (latest issue dated 2017), or its annual *EU Terrorism Situation and Trend Report* (latest issue dated 2020).

²⁴ FATF. “Who we are.” Accessed May 15, 2020. <http://www.fatf-gafi.org/about/whoweare/>.

²⁵ https://en.wikipedia.org/wiki/Trait_theory.

²⁶ Govier, *Social Trust and Human Communities*, 6.

to take an optimistic view of others' conduct. Interpreting is a mental action and refers to the attribution of meaning, so in this case, a disposition will be understood as an aspect of the mind.

It is possible to identify a dispositional element in the current approach to AML, the dispositions in question being those of policymakers (e.g. the UN, G7 or national legislators) and policy implementers (e.g. the FATF, national supervisory bodies such as the FIC, financial institutions). It is also possible that individual members of these institutions might be personally disposed to have a pessimistic view of human conduct, and that such a view might contribute to the automatic distrust that is inherent in AML. However, I think it more likely that the dispositions that are necessary for success in certain political or social roles, such as tough-mindedness, are the ones that lead to the adoption of automatic distrust as a crime-fighting method. That is, the automatic distrust associated with AML does not originate in a distrusting disposition as such, but in other dispositions. In the case of policymakers, it is conceivable that they would be disposed to focus on goals, such as curbing organised crime or maintaining social stability. Policy implementers would probably be disposed to look for the most straightforward means to achieving the goals that have been set. Successful AML depends on detecting when money laundering is taking place, and it seems that the best way to do this is to interpret all financial dealings negatively and as potentially criminal, unless they are assessed as being legitimate. Whether this approach is regarded as practical or as expedient depends on whether one is in favour of automatic distrust or critical of it; practical considerations do not necessarily make automatic distrust morally acceptable; nor would they place policymakers beyond reproach, since they are ultimately accountable for how AML is implemented. "Expedient" as used here is contrasted with "practical", and refers the type of practicality that entails a certain impropriety or immorality.²⁷

4.2 Trustworthiness and untrustworthiness

An explanation of trust requires a mention of trustworthiness, which is a correlate of trust. Carolyn MacLeod observes that "[t]rust is an attitude that we have towards people whom we hope will be trustworthy, where trustworthiness is a property, not an attitude."²⁸ An attitude by definition has an object, in that it is a way of thinking about *something*. In the case of trust, the

²⁷ As per a Googled definition of "expedient".

²⁸ MacLeod, "Trust," 3 in the pdf version (section entitled "1. The Nature of Trust and Trustworthiness" in the online version).

object is another person (though “artificial persons” such as institutions can also be the objects of trust²⁹), and the characteristic which is assessed is that person’s or party’s trustworthiness. If one assesses others as possessing or lacking a basic moral decency or general integrity, then one is likely to regard them as also possessing the characteristic of trustworthiness or untrustworthiness, respectively. On my understanding of trust, in order for someone to be trustworthy, it is essential that they are seen to possess (or that they actually possess) moral integrity, in the full sense of the term, since it is the trustee’s moral integrity and a certain commonality in values with the trustor that makes the trustee trustworthy, rather than merely reliable or predictable.³⁰ Partners in crime who trust each other may be demonstrating a form of trust or trustworthiness, and some of the values they espouse may be moral ones. However, their criminal ethos disqualifies them from possessing true moral integrity, since they endorse wrongdoing, which is a disvalue.

In so far as one expects a trustee to do something specific, trustworthiness acquires some additional dimensions: the trustee must also be willing to do what is necessary to fulfil the trust placed in them, possess the competence to do it, and be reliable in doing it,³¹ or more strongly, be committed to doing it. And a trustee who is committed to doing what they are being trusted to do, is likely to value or to care about the relevant matter similarly to how the trustor values it or cares about it,³² would make appropriate use of the discretion they have been granted by the trustor, and would place the trustor’s interests before their own if necessary. An untrustworthy person would lack one or more of these further characteristics, and may therefore be distrusted. From an AML perspective, clients are regarded as untrustworthy because of the possibility that they might be laundering money.

4.3 Information and risk

Since trust is based on belief (and its variants), one is led to ask about the grounds for the belief, i.e. what **information** or evidence exists to indicate that the belief is warranted; hence my initial comment that automatic distrust is not well-grounded. Evidence would ideally consist of information about the trustee’s trustworthiness, and evidence for that, in turn, would ideally be

²⁹ Baier, *Moral Prejudices*, 105.

³⁰ Baier, *Moral Prejudices*, 98 - 99.

³¹ Govier, *Social Trust and Human Communities*, 4.

³² Baier, *Moral Prejudices*, 100 – 101, 138; Govier, *Social Trust and Human Communities*, 5.

based on the criteria for trustworthiness described above, i.e. general integrity, willingness, competence, reliability, commitment, shared values. If trust is based on such information, then it is sensible to trust; likewise with distrust, if it is based on information that indicates *lack* of integrity, willingness, competence, reliability, commitment or shared values. However, even though trust and distrust are ideally based on concrete evidence, it is just as likely, because one does not have sufficient information, that one trusts or distrusts without direct evidence of trustworthiness or untrustworthiness respectively, and instead extrapolates from what one knows to what one does not know. For example, if one can usually go about one's life without being intentionally harmed by other people, one might reasonably conclude that most people possess basic integrity, and have no qualms about trusting strangers. As Govier observes, "[t]he attitude of trust presupposes inductively grounded beliefs and confident expectations that go further than strict induction would warrant".³³

Generalisation is a rational way of dealing with a fact of human existence; it reflects the insight that it is impossible to know everything we might want to know or need to know about the reasons and actions of other people, and that instead we often have to make assumptions and take others' trustworthiness for granted in order to get on with the business of living. For example, as pointed out by Eric Uslaner, "when we trust other people, we don't have to face every opportunity to cooperate as a new decision."³⁴ However, in the case of distrust, taking untrustworthiness for granted does not simplify life in the way that assuming trustworthiness does; instead, life becomes more complicated and burdensome.³⁵ For instance, if one's objective is to detect money laundering, and if one knows that organised criminals are adept at deception, then it might make sense to subject all transactions (and all clients) to scrutiny, but this reduces the efficiency with which the parties can transact and requires significant additional resources.

One disadvantage of generalising is that the assumption/s it involves may turn out to be incorrect. To trust is also to take the **risk** that one's belief in the trustworthiness of the trustee will not be validated, or that the trustee might not make good use of the discretion they have been granted. Thus the trustor becomes vulnerable to some form of loss or harm, which can

³³ Govier, *Social Trust and Human Communities*, 6.

³⁴ Uslaner, *The Moral Foundations of Trust*, 2.

³⁵ Luhmann, *Trust*, 71 & 72.

range from an inconsequential disappointment to serious betrayal.³⁶ Trusting in circumstances in which one has insufficient information on trustworthiness may seem imprudent, even more so if there is a possibility of significant loss or harm. Instead distrust may seem to be the sensible response, as reflected in the current approach to AML. However, regardless of how informed or uninformed trust is, it involves some uncertainty and risk-taking, and tolerance of vulnerability on the part of the trustor, since both persons whose trustworthiness has been established, and persons without such credentials may for some unforeseen reason not perform as anticipated. Baier makes the following point: “Trusting is taking not-so-calculated risks, which are not the same as ill-judged ones. Part of what it is to trust is not to have too many thoughts about betrayals. They would turn the trust into [d]istrust.”³⁷ The possibility of being mistaken in trusting is not a sufficient reason for rejecting trust; error is compatible with rationality. Full knowledge of the world, which would be necessary for consistently correct reasoning, is impossible, and a reasoning process that results in a flawed outcome does not mean that no reasoning took place. Therefore, in spite of the risk and the vulnerability that trust entails, trust is sensible. Trust would be imprudent only when one knows or believes that a let-down is probable and costly, but one trusts nevertheless; likewise, trust would be outright foolish only when one knows or believes that a let-down is certain and costly, but one trusts nevertheless.

As with trust, distrust may be more or less informed, but in so far as distrust also generalises, it does so in the opposite direction to trust, not giving the benefit of the doubt, but playing it safe, so to speak. Distrust entails risk aversion (or higher sensitivity to risk), and aims to minimise or avoid risk and vulnerability. This does not disqualify distrust from being sensible, since by distrusting one may avoid unnecessary risks and be protected from loss or harm. The automatic distrust of AML also functions in this way, and could be morally justified in this way, as opposed to merely being a solution to the problem of detecting money laundering: automatic distrust minimises the risk that money laundering might go unnoticed and thereby curbs the harm caused by organised crime. It needs to be said, however, that even though generalisation may be necessary in many life situations, this does not release one from providing good reasons if one wishes to justify an attitude or an action that will affect others. In the case of AML, in so far as the indeterminate possibility that clients might be laundering money is not a

³⁶ Baier, *Moral Prejudices*, 99; Govier, *Social Trust and Human Communities*, 4 & 6.

³⁷ Baier, *Moral Prejudices*, 196. Citing (1) Luhmann, “Familiarity,” 97, and (2) Annette C. Baier, “Trusting Ex-Intimates,” in *Person to Person*, ed. H. LaFollette and G. Graham (Philadelphia, Pa.: Temple University Press, 1989), 269 – 281.

sufficiently good reason for automatically distrusting them, this attitude would be neither reasonable nor morally defensible. The virtue ethical assessment will examine this issue more closely.

To summarise, a short comparison of trust and distrust: If one trusts automatically, one may increase the risk of harm, but one reduces the complexity of life; if one distrusts automatically, one may reduce the risk of harm, but one increases the complexity of life. If one is more particular about when one trusts or distrusts, whom, on what matters and why,³⁸ i.e. when one's trust or distrust is situationally determined (see the beginning of section 2.3 on automatic distrust), one moderates the advantages and disadvantages: in the case of situational trust, when one does less trusting, one may risk less harm but life may be more complicated; in the case of situational distrust, when one does less distrusting, one may risk more harm but life may be less complicated. Speaking evaluatively, automatic distrust may be cynical or paranoid, whereas automatic trust may be imprudent or naïve. The situational variety of trust and distrust is more sensible, since it engages with the challenges of human life, rather than unrealistically disregarding them. With a view to determining the morality of automatic distrust in the context of AML, as opposed to its usefulness, I note for now that the number of people who are fundamentally decent probably meaningfully outnumber those who are not, otherwise society would probably not be functioning to the extent that it is. This is one reason why automatic distrust is less appropriate and morally less defensible than situational distrust, situational trust, or even automatic trust; the virtue ethical assessment will shed more light on the matter.

³⁸ Baier, *Moral Prejudices*, 14 & 96.

5. THE VIRTUE ETHICAL PERSPECTIVE

My virtue ethical assessment of AML legislation is based on Rosalind Hursthouse's particular conception of neo-Aristotelian virtue ethics. Her approach to virtue ethics lends itself well to application, since it prioritises concrete matters over conceptual issues.¹ Neo-Aristotelian virtue ethics is Aristotelian in so far as it aligns as far as possible with Aristotle's ethics, and it is new in so far as it does not limit itself to his list of virtues and omits ethically archaic elements (e.g. the subordinate status of women and slaves).² The purpose of this section is to position virtue ethics in relation to other moral theories, and to confirm its usefulness in assessing the morality of current approach to AML. Then, based on Hursthouse's interpretation and with the occasional input from another philosopher, I explain the basics of three key virtue ethical concepts that I will use to assess the morality of AML legislation (see section 6), i.e. virtue, practical wisdom and the good life. I will also point out which aspects of virtue, practical wisdom and the good life are relevant to my issue with AML.

5.1 Differentiating virtue ethics

Virtue ethics is one of three prominent approaches in normative ethics,³ normative ethics being a specific field of study within Anglo-American moral philosophy concerned with specifying criteria for morally good or right action. The other two prominent ethical theories are consequentialism and its relative utilitarianism, and deontology. Until the gradual revival of interest in virtue ethics from the late 1950s onward, these two theories represented the mainstream within Anglo-American moral philosophy. Broadly speaking, consequentialism defines right action as action which results in the best consequences, and utilitarianism focuses on maximising a specific consequence, namely people's "happiness" or wellbeing. Deontology defines right action as action which adheres to moral principles, rules or obligations, without denying that consequences too can determine the rightness of an action. Deontology is associated with a rights-based perspective on ethics, since the right of one party often creates an obligation for another party to respect or to fulfil the right in question. In contrast to consequentialism and deontology, virtue ethics sees virtue as the core of morality, rather than

¹ Hursthouse, *On Virtue Ethics*, 5.

² Hursthouse, *On Virtue Ethics*, 8.

³ Hursthouse and Pettigrove, "Virtue Ethics," 1 in the pdf version of the article (introductory section entitled 'Virtue Ethics' in the online version).

consequences or principles. The primary moral issue in virtue ethics is not good or right action, but the kind of person one should be and how one should live. Virtue ethics emphasises the significance of sound judgment or practical wisdom as a component of virtue, and sees one's ability to flourish in life as a key consideration in ethical thinking. Importantly, virtue ethics does not recast the concept of virtue in terms of other concepts that are seen as more central to morality, as tends to be the case in so-called virtue *theories*, or in forms of consequentialism or deontology that include virtue theoretical components.⁴ For example, a consequentialist might reframe virtue as a personal characteristic that will facilitate the achievement of good consequences; a deontologist might reframe virtue as a personal characteristic that inclines a person to fulfil their obligations.⁵ In the virtue ethics I am concerned with, virtue is a fundamental concept; as Hursthouse emphasises, virtue ethicists do not understand virtue by reference to concepts that other ethicists see as more fundamental, such as consequences or obligations, but understand virtue as a fundamental moral concept in its own right.⁶

On my interpretation, the moral justification of the AML initiative (and the automatic distrust it entails) is based on a combination of utilitarian and rights-based considerations: AML measures aim (1) to ensure the welfare of society, by countering the physical, psychological and socio-economic harms that organised crime and terrorism cause, and (2) to protect rights and freedoms that are undermined by organised crime and terrorism, such as the right to life, to safety, to property or to freedoms of various kinds.⁷ Since AML legislation requires financial services institutions to practise customer due diligence, I consider it plausible to regard the legislation as promoting or enforcing the virtue of diligence, out of a concern for protecting people's welfare and their rights. I also consider it worthwhile to take a critical look at whether this virtue does actually constitute virtue, if it leads to automatic distrust in a significant domain of everyday life.

⁴ Hursthouse and Pettigrove, "Virtue Ethics," 1 in the pdf version of the article (introductory section entitled 'Virtue Ethics' in the online version).

⁵ Hursthouse and Pettigrove, "Virtue Ethics," 1 in the pdf version of the article (introductory section entitled 'Virtue Ethics' in the online version).

⁶ Hursthouse and Pettigrove, "Virtue Ethics," 1 in the pdf version of the article (introductory section entitled 'Virtue Ethics' in the online version); Hursthouse, "Are Virtues the Proper Starting Point," 101.

⁷ *United Nations Convention against Transnational Organised Crime*, Foreword, page iii. Citing the *Millennium Declaration* adopted by the Heads of State meeting at the United Nations in September 2000 (the Millennium Summit of the United Nations was held in New York from 6-8 September 2000).

Sceptics might object that the virtue ethical focus on the moral agent (e.g. on what kind of person one should be) makes virtue ethics unsuitable for evaluating socio-political matters, such as policy or legislation. However, I think that the conception of virtue ethics that I utilise for the purposes of this discussion caters well for what Hursthouse terms “the complex particularity of concrete moral situations”,⁸ and is flexible enough to be applied more generally to human affairs. There are four further reasons why I consider a virtue ethical perspective on the AML initiative to be appropriate: Firstly, if the idea of the *morality* of the law is comprehensible and the subject of much discussion, then the idea of the *virtue* of legislation is equally comprehensible and worth discussing. Secondly, if one can attribute some kind of moral status to the financial system in the form of integrity, then one should be able to do likewise with the legislation that aims to protect its integrity. Thirdly, one can evaluate the products of moral agents similarly to how one would evaluate moral agents themselves, the product in question being AML legislation. Fourthly, my assessment of AML legislation can be read as an assessment of the policymakers and policy implementers who are responsible for its existence, though my assessment would apply to them not as individual moral agents, but as holders of important social roles.

5.2 A synopsis of virtue ethics

5.2.1 Virtue

A virtue is a morally praiseworthy character trait, which in common parlance might be called a strength of character. A virtue is also understood as “an excellence” of character, and incorporates the concept of an ideal.⁹ Virtues are the type of traits that make the person who possesses them a good person in the moral sense, and enable them to act morally or virtuously.¹⁰ Though a trait may to some extent be innate, it can also be acquired; either way, a virtue develops over time and as one’s mental faculties mature, it is rationally chosen,¹¹ practised and

⁸ Hursthouse, *On Virtue Ethics*, 40.

⁹ Hursthouse, *On Virtue Ethics*, 12; Hursthouse, “Are Virtues the Proper Starting Point,” 104.

¹⁰ Hursthouse, *On Virtue Ethics*, 13 & 125.

¹¹ Nafsika Athanassoulis, “Acquiring Aristotelian Virtue,” in *The Oxford Handbook of Virtue*, ed. Nancy E. Snow (New York: Oxford University Press, 2018), 416;

Hursthouse and Pettigrove, “Virtue Ethics,” 6 – 7 in the pdf version of the article (section 1.2 in the online version);

Aristotle, *The Nicomachean Ethics*, further revised edition, translated by J.A.K. Thomson, revised with notes and appendices by Hugh Tredennick, introduction and further reading by Jonathan Barnes (London: Penguin Books 2004;), 1106a4. Note: In this citation of Aristotle, the CMOS17 convention for abbreviations is specifically overridden, for the sake of clarity.

refined, out of an understanding of and commitment to what is morally good. A virtuous person is committed to acting virtuously whatever the situation, to “getting things right.”¹² Virtues indicate which values one holds, what one regards as worth doing, pursuing or preserving,¹³ and form part of one’s outlook on life. Aristotle defined a list of twelve virtues,¹⁴ and over time several taxonomies of virtues have been developed. However, none of these is definitive, though certain traits are widely regarded as virtues, for example the so-called cardinal virtues of courage, temperance, justice and wisdom. As mentioned earlier, the virtue that is of particular interest in the context of AML is diligence.

Virtue entails habitual ways of thinking, feeling and acting, though the Aristotelian concept of virtue specifically understands virtue as a deeply ingrained trait that is reflected in all facets of one’s being.¹⁵ Therefore, a tendency to act in established ways or for established reasons, even over time and across different situations,¹⁶ is not all there is to virtue. Virtue is also expressed in one’s thinking, perceptions, attitudes, interests, emotions, desires, expectations,¹⁷ and thus virtue emphasises that aspect of moral integrity whereby one’s thoughts, values and beliefs need to be consistent. The multi-dimensional quality of virtue means that virtue entails a complex mindset,¹⁸ and this mindset in turn entails a commitment to acting for the right reason,¹⁹ i.e. the most appropriate reason or the best reason. In virtue ethics, the right reason is determined by whichever virtue is called for in a specific situation, and would be one of the reasons for which a person with the virtue in question would perform the relevant virtuous action.²⁰ Essentially, acting for the right reason means that the virtuous person recognises which virtue is required, and expresses that virtue appropriately in action (a specification for expressing a virtue appropriately will be provided shortly, based on Aristotle’s concept of the mean²¹). Virtue’s concern with appropriateness highlights the other aspect of integrity, whereby one’s actions need to be consistent with one’s values and beliefs. From a virtue ethical

¹² Hursthouse, *On Virtue Ethics*, 13 & 129; Hursthouse and Pettigrove, “Virtue Ethics,” 8 of the pdf version of the article (section 1.2 of the online version).

¹³ Hursthouse, “Are Virtues the Proper Starting Point,” 101.

¹⁴ Aristotle, *The Nicomachean Ethics*, Appendix 1, 284 – 285.

¹⁵ Hursthouse and Pettigrove, “Virtue Ethics,” 4 of the pdf version of the article (section 1.1 of the online version).

¹⁶ https://en.wikipedia.org/wiki/Trait_theory (for the notions of “over time” and “across situations”).

¹⁷ Hursthouse, “Are Virtues the Proper Starting Point,” 101.

¹⁸ Hursthouse and Pettigrove, “Virtue Ethics,” 4 of the pdf version of the article (section 1.1 of the online version).

¹⁹ Hursthouse, *On Virtue Ethics*, 124 – 130.

²⁰ Hursthouse, *On Virtue Ethics*, 127 – 128.

²¹ Aristotle, *The Nicomachean Ethics*, 1106a25 – 1106b35.

perspective, the AML requirement to perform customer due diligence can be seen as containing two claims: (1) diligence is due in the sense that it is required in order to financially incapacitate organised crime, and (2) diligence is due in the sense that it is being exercised in an appropriate way. In the virtue ethical assessment of AML legislation, I will consider whether these claims are tenable.

One might ask how virtue as a multi-dimensional trait and a complex mindset is relevant to AML. Moral agents in the roles of policymaker or policy implementer are unlikely to manifest a trait in the same multi-dimensional way as an individual virtuous agent, since a formal political or governance role comes with certain pre-defined and role-specific spheres of action and reasons for action (which may or may not correspond to the character and personal reasons of the role-holder). However, it is not unreasonable to expect policymakers and implementers to approach policy formulation and execution with a similar mindset to that of a virtuous person, so that their decisions about what needs to be done are based on the right reasons, their goal-orientation (or whichever disposition is in play) is adjusted to suit the circumstances, and inconsistencies across the different spheres of political action are minimised – in this case, that the moral legitimacy of AML as a crime-control concept is maintained when AML is operationalised in legislation. At least, I believe that this is the standard which should apply to the type of political action that the AML initiative represents, in spite of the not uncommon cynical view that politics and morality are incompatible.

Since a character trait can be more or less pronounced, a virtue is also a matter of degree.²² Too strong a virtue escalates into excess, too weak a virtue degrades into deficiency. Both excess and deficiency in virtue are a distortion of virtue, and both excess and deficiency are vices, or defects in character. For instance, taking trust or being trusting as a virtue, an excess of trust may amount to naïveté, a deficiency to cynicism (in this sense, trust has two opposites). For Aristotle, the appropriate degree of virtue is situated at the mean between excess and deficiency. Proper virtue is always expressed at an intermediate degree, which is also the best degree.²³ Thus the exercise of an *appropriate* degree of virtue is an important aspect of acting for the *best* reason.

²² Hursthouse and Pettigrove, “Virtue Ethics,” 5 of the pdf version of the article (section 1.1. in the online version).

²³ Aristotle, *The Nicomachean Ethics*, 41, 1106b15 – 25.

A specification for expressing a virtue appropriately can be found in Aristotle's description of what it means to experience feelings at an intermediate degree. Such feelings are felt "at the right times, on the right grounds, towards the right people, for the right motive, and in the right way".²⁴ Since virtue is demonstrated both in feelings and in actions,²⁵ the same concepts apply to our actions, and can be used to assess whether the diligence that is required by AML legislation is appropriate, considering that diligence translates into actions that constitute automatic distrust. So, in addition to the questions (1) whether diligence is in fact the virtue that is required and (2) whether diligence is shown for the right reason, the virtue ethical assessment of AML legislation will consider whether diligence is shown (3) toward the right people, (4) at the right time, and (5) in the right way. Aristotle's "right grounds" is taken as synonymous with the right reason and will thus be set aside. As will the idea of the right motive, since it is understood to refer to the right personal motive, and in the context of AML, any personal motives for automatically distrusting clients are overridden by the political decision to use automatic distrust as a crime-fighting method. While it is possible to pinpoint particular facets of appropriateness such as those listed above, these facets are inter-dependent, and all requirements for appropriateness, as relevant to a particular situation, need to be fulfilled in order for virtue to obtain.

Paying attention to specific requirements for appropriateness also enables a virtuous person to demonstrate the situational awareness which is a distinctive feature of virtue, and which is key to expressing a virtue appropriately (I alluded to situational awareness when I explained that a virtuous person is committed to acting virtuously whatever the situation).²⁶ As Nafsika Athanassoulis explains, "[p]ossessing a virtue means having an awareness that certain situations require certain responses."²⁷ The notion of situational awareness has to do with the importance of circumstances in virtue ethics, and like the specification of appropriateness, is based on Aristotle's concept of the mean. Aristotle distinguishes between the "mean in relation to the *thing*" and the "mean in relation to *us*": he defines the mean of the thing as being akin to an arithmetic mean, which can be objectively determined and is "one and the same for everybody"; however, the "mean in relation to us [is] that which is neither excessive nor

²⁴ Aristotle, *The Nicomachean Ethics*, 1106b20 – 25 (commas inserted).

²⁵ Aristotle, *The Nicomachean Ethics*, 1106b15 – 20.

²⁶ Hursthouse and Pettigrove, "Virtue Ethics," 8 in the pdf version of the article (section 1.2 of the online version). Note: I include this reference since Hursthouse and Pettigrove refer to the idea of situational awareness as "situational appreciation".

²⁷ Athanassoulis, "Acquiring Aristotelian Virtue," 418.

deficient, and this is *not* one and the same for all.”²⁸ The implication is that when one is concerned with human affairs or human conduct, the mean or appropriateness is determined both by the virtue in question and by the circumstances. Identifying the mean requires sound judgment, or in virtue ethical terms, practical wisdom, which will be the subject of the next section.

5.2.2 Practical wisdom

The practical wisdom of virtue ethics is not fundamentally different from wisdom as it is generally understood, i.e. as a type of knowledge, understanding and experience that has both range and depth, which usually pertains to human affairs, and which specifically entails a capacity for good judgement. In a virtue ethical context, practical wisdom is “the ability to reason correctly about practical matters”.²⁹ Reason or rationality is the human capacity to think about and understand things in a systematic way,³⁰ and to have conscious or specifiable reasons for things such as actions, decisions or attitudes. Rationality is a necessary component of practical wisdom, but practical wisdom also requires exposure to many different concrete situations,³¹ so that one acquires life experience and develops genuine insight into the nature of human affairs.

This understanding and experience in turn brings the situational awareness³² that enables one to make correct moral judgments, i.e. to discern, in any given situation, which elements of the situation are important from a moral point of view, what their relative importance is, and then to identify which action would be morally appropriate under the circumstances.³³ Nafsika Athanassoulis explains practical wisdom as a “habit [...] of reason”, as a specific way of applying one’s mind that leads one “to judge rightly about human goods”.³⁴ Similarly to Hursthouse, she points out that practical wisdom requires perceptive ability, i.e. the ability to

²⁸ Aristotle, *The Nicomachean Ethics*, 1106a30 – 1106b5 (emphases as shown in the translated text). Note: The three quotations above regarding the mean correctly exclude the article “the”, which is placed before the quotation; this is not an oversight in quoting.

²⁹ Hursthouse, *On Virtue Ethics*, 12.

³⁰ <https://en.wikipedia.org/wiki/Reason>

³¹ Athanassoulis, “Acquiring Aristotelian Virtue,” 419 & 421.

³² Hursthouse and Pettigrove, “Virtue Ethics,” 8 in the pdf version of the article (section 1.2 of the online version); Athanassoulis, “Acquiring Aristotelian Virtue,” 418.

³³ Hursthouse and Pettigrove, “Virtue Ethics,” 8 in the pdf version of the article (section 1.2 of the online version).

³⁴ Athanassoulis, “Acquiring Aristotelian Virtue,” 419.

identify the morally salient features of a concrete situation, rather than the ability to reason abstractly or to apply moral principles or rules correctly.³⁵ Importantly, perceptiveness and situational awareness³⁶ also enable the virtuous person to justify their action based on the specifics of a situation,³⁷ for instance, according to the virtue ethical requirements for appropriateness outlined above (and not according to principles or rules).

In contrast to moral virtues such as courage or honesty, which are excellences of character, practical wisdom is an intellectual virtue, an excellence of the mind. As Hursthouse remarks, “the virtuous (excellent) person’s practical reasoning is itself excellent; she gets things right.”³⁸ Together with a commitment to moral excellence (acting for the right or the best reasons), it constitutes the distinctive mindset that underpins virtue. Practical wisdom can be regarded as the master virtue, since one cannot be properly virtuous without also being practically wise. Practical wisdom supports the commitment to acting for the right reason by enabling the virtuous person to identify correctly which virtue is called for, and needs to be exercised together with whichever (moral) virtue is in question, so that this virtue is expressed in an appropriate manner. Put slightly differently, a practically wise person understands not only *which* virtue is required, but also *how* to act in order to express the virtue in question appropriately.³⁹

Hursthouse makes some observations about practical wisdom that are particularly useful for this discussion. Since a person who possesses practical wisdom is morally astute, they have a well-developed understanding of what constitutes a benefit and what constitutes a harm.⁴⁰ The practically wise know what it takes “to secure real benefits effectively”⁴¹ and would be reproachable if they interpret benefit and harm incorrectly.⁴² Hursthouse suggests that practical wisdom could be the only virtue that is guaranteed to be a virtue, since it does not seem plausible

³⁵ Hursthouse and Pettigrove, “Virtue Ethics,” 8 in the pdf version of the article (section 1.2 of the online version); Athanassoulis, “Acquiring Aristotelian Virtue,” 419.

³⁶ Hursthouse and Pettigrove, “Virtue Ethics,” 8 in the pdf version of the article (section 1.2 of the online version); Athanassoulis, “Acquiring Aristotelian Virtue,” 418.

³⁷ Athanassoulis, “Acquiring Aristotelian Virtue,” 421.

³⁸ Hursthouse, “Are Virtues the Proper Starting Point,” 103.

³⁹ Athanassoulis, “Acquiring Aristotelian Virtue,” 420.

⁴⁰ Hursthouse and Pettigrove, “Virtue Ethics,” 7 in the pdf version of the article (section 1.2 of the online version).

⁴¹ Hursthouse and Pettigrove, “Virtue Ethics,” 8 in the pdf version of the article (section 1.2 of the online version).

⁴² Hursthouse and Pettigrove, “Virtue Ethics,” 7 - 8 in the pdf version of the article (section 1.2 of the online version).

that wisdom could be excessive.⁴³ However, while an excessive form of wisdom might be difficult to imagine, deficiencies in practical wisdom are a distinct possibility: not only can one fail to develop sufficient knowledge and understanding of life to qualify as practically wise, one can also, even if one is practically wise, fail to apply one's mind properly to a moral problem. So, when I evaluate to what extent AML's diligence meets certain criteria for appropriateness, I am also assessing the practical wisdom of the legislation, i.e. whether it "[secures] real benefits effectively,"⁴⁴ and/or qualifies as a case of "[judging] rightly about human goods."⁴⁵

Assessing AML legislation for its degree of practical wisdom is in line with the earlier comment that policymakers can be expected to apply their minds as a virtuous person would, since it is reasonable to expect that such a wide-ranging, resource-intensive and coercive initiative as AML has been thought through properly, so that it is likely to achieve the benefit it is meant to achieve in a morally acceptable manner. I also appeal to Aristotle in this matter, via Dorothea Frede's interpretation: legislators are supposed to possess practical wisdom to a higher degree than the ordinary citizen, so that they correctly identify what is required to ensure law and order, and to protect the common good.⁴⁶ Modern life is somewhat different from life in Aristotle's day, but the importance of wisdom in political leadership has remained constant, and is possibly greater today than it was in ancient Greece.

This section on practical wisdom contains four ideas or phrases that I will use a number of times in the remainder of the discussion: (1) "[reasoning] correctly about practical matters,"⁴⁷ (2) justifying actions in terms of the relevant specifics of the situation,⁴⁸ (3) "[judging] rightly about human goods"⁴⁹ and (4) "[securing] real benefits effectively."⁵⁰ In order to control the number of citations in the discussion, I will not explicitly cite further uses (or paraphrases) of these ideas or phrases, but proceed on the understanding that each further use also implies a clear

⁴³ Hursthouse, *On Virtue Ethics*, 13.

⁴⁴ Hursthouse and Pettigrove, "Virtue Ethics," 8 in the pdf version of the article (section 1.2 of the online version).

⁴⁵ Athanassoulis, "Acquiring Aristotelian Virtue," 419.

⁴⁶ Dorothea Frede, "The Historic Decline of Virtue Ethics," in *The Cambridge Companion to Virtue Ethics*, ed. D. C. Russell (Cambridge: Cambridge University Press, 2013), 127. Citing Aristotle, *The Nicomachean Ethics*, 1094a26-b11.

⁴⁷ Hursthouse, *On Virtue Ethics*, 12.

⁴⁸ Athanassoulis, "Acquiring Aristotelian Virtue," 421.

⁴⁹ Athanassoulis, "Acquiring Aristotelian Virtue," 419.

⁵⁰ Hursthouse and Pettigrove, "Virtue Ethics," 8 in the pdf version of the article (section 1.2 of the online version).

acknowledgement of their origin. The same principle will apply to further uses of the idea of situational awareness, which was introduced in the last paragraph of the previous section (5.2.1) on virtue.

5.2.3 The good life

The discernment of the practically wise extends beyond appropriate responses to concrete situations, to include a sound grasp of what is beneficial, valuable or worthwhile in life as a whole,⁵¹ and what it means to lead a good life. As mentioned earlier, the particular type of virtue ethics which is of interest for this discussion is neo-Aristotelian. Within this category, one can distinguish further distinct forms of virtue ethics, according to how they understand the relationship between those concepts which are common to the different forms of virtue ethics, i.e. virtue and practical wisdom, and other ethical concepts,⁵² such as the concept of how one should live, or the concept of motivation. My interest is in so-called “eudaimonist” virtue ethics, which understands virtue from the perspective of *eudaimonia*. The ancient Greek concept of *eudaimonia* can be taken to mean happiness, flourishing or wellbeing,⁵³ but these terms should not be understood in their ordinary sense, as referring to a psychological state of joy, contentment or pleasure, and/or a situation of material comfort or prosperity. Rather, *eudaimonia* refers to a type of happiness that is more substantial, and which is the property of a life⁵⁴ that is well-lived overall. Such a life is referred to as a good life. According to Aristotle, *eudaimonia* is the goal at which all our actions are ultimately aimed,⁵⁵ and thus *eudaimonia* is the highest good to which one can aspire.⁵⁶

Eudaimonia is based on the idea that living is something that we do, and therefore we can do it well or we can do it badly⁵⁷ (in the moral sense, and using just two ends of the spectrum for clarity’s sake). This then raises the question what it means to live well or badly, to flourish as opposed to merely living. The answer in eudaimonist virtue ethics is that living well or leading

⁵¹ Hursthouse and Pettigrove, “Virtue Ethics,” 9 of the pdf version of the article (section 2 of the online version).

⁵² Hursthouse and Pettigrove, “Virtue Ethics,” 9 of the pdf version of the article (section 2 of the online version).

⁵³ Hursthouse and Pettigrove, “Virtue Ethics,” 9 of the pdf version of the article (section 2.1 of the online version).

⁵⁴ Mark Lebar, “Eudaimonism,” in *The Oxford Handbook of Virtue*, ed. Nancy E. Snow (New York: Oxford University Press, 2018), 470 – 471.

⁵⁵ Mark Lebar, “Eudaimonism,” 470. Citing Aristotle, *Nicomachean Ethics*, 1102a4.

⁵⁶ Hursthouse and Pettigrove, “Virtue Ethics,” 10 of the pdf version of the article (section 2.1 of the online version).

⁵⁷ Mark Lebar, “Eudaimonism,” 471.

a good life consists of the exercise of virtue, or in more general terms, of living morally. The exercise of virtue is a necessary part of a good life, even if it is not *all* that there is to a good life, since goods such as a minimum level of material comfort, a variety of personal relationships or some leisure activity are plausibly also part of a good life. If living well entails the exercise of virtue, then a deficiency of virtue or an excess of virtue would detract from a good life, and if one's life is overall deficient or excessive in virtue, then one would be living badly. And since living well and flourishing is the highest good, the character traits that make the good life possible qualify as virtues.⁵⁸

On the particular eudaimonist understanding of virtue that I adopt in this discussion, virtue is not instrumentally valuable as a means to the end of a good life; the point of virtue is not to enable one to attain the goods that comprise a good life, although virtue may nevertheless have that effect. Rather, virtue is inherently valuable and is pursued for its own sake; it is an end and a good in itself, and constitutes a good life (with the proviso mentioned earlier that virtue is not the only constituent of a good life). So, the content of a good life is specified only to the extent that it includes the exercise of virtue. On the face of it, the good life seems irrelevant as a criterion for assessing the morality of AML legislation, since a virtuous person should be able to live a good life regardless of whether they are automatically distrusted or not. That is, if an individual is committed to moral excellence, this commitment should not be affected by how they are perceived or treated by others. However, I do not believe that matters are as simple as that, and my assessment will show in what way the automatic distrust associated with AML is not compatible with a good life.

⁵⁸ Hursthouse and Pettigrove, "Virtue Ethics," 11 of the pdf version of the article (end of section 2.1 of the online version).

6. A VIRTUE ETHICAL ASSESSMENT OF AML LEGISLATION

I will begin my assessment of AML legislation by summarising my interpretation of the thinking which underpins AML legislation. The second step will be to show how, from a virtue ethical perspective, one might take issue with the legislation: I will analyse the customer due diligence and reporting obligations according to the virtue ethical criteria for appropriateness, consider how well these obligations measure up to the practical wisdom requirement of judging rightly about human goods, and assess how well they support a moral way of living. This analysis will provide the basis for deciding whether the AML obligations in question are morally defensible or not. The third step will be to envisage how AML supporters might object to my appraisal, and the fourth and final step will be to respond to the objection and to show how my assessment can be upheld. I will mention minor objections during my assessment, and present the main objection separately. As mentioned when the objective of this discussion was explained (section 2.4), the virtue ethical assessment of AML legislation amounts to an assessment of automatic distrust.

6.1 The argument for automatic distrust

In this section, I set out how I envisage the argument for automatic distrust from the perspective of AML supporters, as a departure point for the assessment that follows. Certain statements re-iterate what was said previously about the background to AML and the beliefs that underpin it, therefore references to sources will not be provided again. The statements are numbered for the sake of clarity. The argument goes as follows:

(1) Organised crime is a potentially all-pervasive evil that threatens the existence of civilised society. (2) This evil should thus be eliminated and prevented, or at least minimised as far as possible. (3) One way of inhibiting organised crime is to cancel out the factor/s which usually function/s both as an incentive and as a reward for this type of crime, i.e. to remove the prospect of reward as well as any actual reward. (4) It is reasonable to assume that the high profits that are typically associated with organised crime constitute both a major incentive and a major reward for engaging in this type of crime. (5) Thus it makes sense to target criminal profits, by increasing the likelihood that they will be detected and confiscated, and thereby effectively rendering them useless, if not dangerous, to criminals. (6) The profit-destruction approach is not only a form of punishment for benefiting from organised crime that has been committed,

but also a deterrent against organised crime that might still be committed (and if detection of money laundering leads to the detection and punishment of the crime that generated the profit, there is a further advantage to this approach¹).

(7) One way in which organised criminals make their profits useful and obtain the full benefit that inheres in legitimate funds, is to utilise the financial system to launder or legitimise this profit. (8) Thus one must prevent organised criminals from using, or rather abusing, the financial system to benefit from their crime. (9) However, it is general practice among organised criminals to conceal the criminal origin of their money and to appear to be engaging in legitimate transactions. (10) Thus anyone who uses the financial system could be laundering money. (11) However, one has to identify who is actually laundering money. (12) The best way to achieve this is by diligently authenticating the identity of all clients on a regular basis, verifying the legitimacy of their transactions at all times, and reporting any transactions that might constitute money laundering to the relevant authorities (i.e. the initial and ongoing customer due diligence and reporting explained in section 3.3.2).

6.2 The virtue ethical issues with customer due diligence and reporting

As acknowledged in earlier sections of this discussion, the ultimate aim of the AML initiative is a moral one, and as a means to inhibiting organised crime, along with pre-emptive strategies to foil crime before it is even committed, a financial incapacitation strategy does make sense. From a virtue ethical standpoint, the blemish on the morality of the initiative is the assumption that the current approach to AML, i.e. automatic distrust, is the best way to financially incapacitate organised criminals (as per statements 11 and 12 above). Applying a virtue ethical lens to the matter will highlight where the moral flaws of the current approach lie, and how they could be rectified. Briefly, the initiative falls short on all three key aspects of the virtue ethical approach that serves as the assessment framework in this discussion: the virtue of diligence is not expressed appropriately when it is expressed as automatic distrust, the current approach demonstrates a lack of practical wisdom (on the part of policymakers and implementers), and diligence in the form of automatic distrust impinges on our ability to live a good or moral life.

¹ Cuéllar, “The Tenuous Relationship,” 388.

6.2.1 The need for diligence and the right reason for diligence

This discussion will give AML supporters the benefit of the doubt that organised crime has the potential to destroy society if it is not inhibited, and that this type of crime is serious enough to require specific counter-measures. However, one should consider the possibility that the seriousness of the danger could be overstated, and that ordinary citizens and private enterprise do not need to be conscripted into a war against evil that would otherwise overcome the world. The competition between good and evil, and perhaps even a sort of balance of power between them, seems to be a constant feature of human existence. Nevertheless, assuming that the danger as perceived is real, it stands to reason that diligence or sustained caution is one the elements that is required to contain or neutralise the danger. I would also grant that the AML initiative could be seen as diligence on the part of political leaders in fulfilling their duty of care towards society, i.e. in fulfilling their responsibility to ensure that measures are in place to protect its wellbeing. In this sense, the initiative demonstrates that aspect of virtue which entails an understanding of and commitment to what is morally good. And if the crime that is being tackled is organised and serious and entails significant harm, as opposed to being of the opportunistic and/or petty variety that entails minor harm, there is a good reason for insisting on diligence, and diligence would also be morally defensible.

6.2.2 Showing diligence toward the right people and at the right time

The purpose of this section and the next is to show how AML's customer due diligence fares when assessed against the three criteria for the appropriateness of a virtue, as selected earlier from those that Aristotle specifies. I will consider whether AML's diligence is shown towards the right people, whether diligence is shown at the right time (in this section), and whether diligence is shown in the right way (in section 6.2.3), all of which would be necessary in order for virtue to obtain (along with calling upon the right virtue and exercising it for the right reason). The assessment will find that AML's diligence does not meet the three criteria that are in focus here, and thus the virtue of diligence is not expressed appropriately.

Showing diligence towards the right people

AML's due diligence is directed at *all* the clients of accountable and reporting institutions, since it is possible for *any* of these clients to be laundering money when they transact. From a virtue ethical standpoint, being sensitive to situational specifics and mindful of avoiding excess, one might point out that it is unreasonable to assume that money laundering is a common pursuit of the general transacting population, even for an AML supporter who assumes potentially illicit transactions for practical reasons. Rather, it is possible that *some* clients may be transacting illicitly. Showing diligence towards all clients, and expressing this diligence by automatically distrusting all clients, contains an element of excess that a virtuous approach to detecting money laundering would try to avoid or at least minimise. Furthermore, if one looks more closely at the implications of distrusting for practical reasons, one would find that AML's due diligence measures are *not* directed at the right people when they are applied to trustworthy clients, since trustworthy clients are imposed upon, out of convenience rather than necessity, so that criminals who are getting the better of the experts in crime prevention and law enforcement can still be caught. If one takes a wider view of the organised crime situation, as a virtuous person with situational awareness and practical wisdom would, one might consider the following possibility: it may be that organised crime is particularly difficult to tackle, but it is also possible that AML measures are necessary not because organised criminals are particularly effective in what they do, but because crime prevention and law enforcement are not effective enough in what they do; if they were, diligence could be correctly focused on incapacitating criminals before they do harm and/or generate profit from it, and trustworthy clients would not have to be subjected to automatic distrust. This is one reason why diligence is not expressed appropriately, and why customer due diligence is morally dubious. AML supporters might argue that AML measures are meant to remove the crime prevention shortcomings that provide organised crime with an advantage, but the point is the following:

While there are good reasons to call on diligence in order to deal with organised crime, this diligence becomes inappropriate, and thereby also less well-grounded and morally less defensible, when clients who are not criminals are negatively affected by it. The negative effect in this case consists of an unmerited doubting of trustworthy clients' integrity, and their not being able to transact unless they submit to due diligence procedures to verify their integrity. AML supporters might object that most clients are unlikely even to perceive themselves as being negatively affected, and/or that they do not have to endure much more than some

additional “red tape”. A virtuous person who is committed to moral excellence (i.e. acting virtuously whatever the situation) might point out that a lack of concern about or acquiescence to being treated as a potential criminal is a warning that we are lowering our standards on what is regarded as morally acceptable conduct towards one another. Practical wisdom would recognise that practical solutions to practical problems are not automatically appropriate; pragmatism can also mean taking the easy way out, and turn into expediency or cynicism, which is less likely than a sensible morality to sustain social order and cohesion. Customer due diligence may be a convenient method to identify dissembling wrongdoers, but to create the impression that one must either distrust all clients or be overcome by organised crime, is to disregard the possibility of at least one alternative financial incapacitation approach that would be morally more acceptable (to be suggested when I deal with the main objection to my assessment).

The moral mistake in customer due diligence and automatic distrust is aptly illustrated by the following:

[C]onsider the following proposal from Detective Inspector Grim of *The Thin Blue Line*:

‘And, God, don’t we hate all that fannyng about [the criminal process and the presumption of innocence]. Why don’t they change it round? Presume everybody in the country is guilty of something, which most of them are, and lock ’em up ... the entire population ... and anyone who can, to the satisfaction of a senior judge, prove themselves to be wholly and fundamentally innocent will be released. There’d be a bit less fannyng about then, wouldn’t there?’²

² Stewart, “The Right to be Presumed Innocent,” 413. Citing: *The Thin Blue Line*, Season One, Episode Three, “Night Shift”.

Showing diligence at the right time

As to the question whether diligence is being shown at the right time: for as long as the danger posed by organised crime persists, it makes sense to maintain diligence, and in this sense the ongoing due diligence required by AML legislation is appropriate. However, there is something morally dubious about clients having the status of potential criminal attached to them on a permanent basis, that is, for the duration of their business relationship with an accountable or reporting institution. Under current AML legislation, the bona fides of all clients must be verified and monitored *all* the time, and this introduces another element of excess that is not appropriate from a virtue ethical standpoint. This level of diligence is not “due” in the sense of “advisable” or “appropriate”, but over-zealous. A person with practical wisdom, with sound judgment and insight into human affairs, might observe that even if it is the case that certain types of crime have become rampant and could ruin society if not checked, it is not the case that proportional, sensible counter-measures must include a level of diligence that leads to automatic distrust becoming established as a normal, ongoing state of affairs in a large part of the transactional domain and ordinary life.

As mentioned earlier in connection with the information and risk management aspect of trust, and above in connection with the people towards whom diligence is shown, it is plausible that the number of trustworthy people who do business legitimately significantly exceeds the number of untrustworthy people for whom committing major wrongs is a full-time occupation. If most transactions were illicit, it is unlikely that society would be functioning to the extent that it is. This is not to say that one unwisely believes organised crime to be unproblematic, but to acknowledge, based on situational awareness and insight into human affairs, that troublemakers tend to receive more attention than people who go about their business in an acceptable way. Thus the current approach to AML could represent a “social panic” approach³ to a problem that could be dealt with more moderately, so that diligence is expressed at an intermediate degree, as Aristotle would say.⁴ Against this background, the worry that I mentioned above is reinforced: the automatic distrust of AML is not simply practical or convenient, it becomes expedient, if not somewhat cynical. From a virtue ethical standpoint, expedience and cynicism are the result of excessive diligence, and strictly speaking one should see them as vices.

³ Harvey, “Just How Effective is Money Laundering Legislation,” 190.

⁴ Aristotle, *The Nicomachean Ethics*, 41, 1106b15 – 25.

The automatic distrust of AML ignores the legitimate interest of trustworthy people in having their trustworthiness acknowledged, simply by *not* being seen or treated as potential criminals for the duration of their business relationship with financial institutions. Customer due diligence undermines the due consideration for the interests of others that is a key ingredient of morality. Thus an excess in the virtue of diligence is associated with a deficit in the virtue of consideration, and this deficit is one of the reasons why I see the automatic distrust of AML as impinging on the values or virtues of respect and fairness (more about that in the next section, where I consider whether AML-type diligence is expressed in the right way). AML supporters might argue that the interest of trustworthy people in being acknowledged as such is trumped by the interest of society in inhibiting the crime that could destroy it, and that being automatically distrusted is the lesser of the two evils. The possibility of avoiding this trade-off, or rather, the possibility that such a trade-off is not necessary, will be covered when a morally better approach to financial incapacitation of criminals is suggested. Since virtue requires that one acts virtuously whatever the situation, a virtuous mindset would deal differently with such competing situational factors. A virtuous mindset would not use the need for the virtue of diligence and the fact that diligence is being shown for the right reason as justification to sacrifice the requirements to show diligence towards the right people and at the right time (and in the right way). A virtuous approach would look to reduce or eliminate these inconsistencies, so that diligence can be expressed appropriately, or at least more appropriately or as appropriately as possible.

6.2.3 Showing diligence in the right way

So, diligence is called for and the reasons for it are appropriate, but a significant proportion of the people whom it targets and the length of time over which it is exercised are not appropriate. This already indicates that AML's diligence is not being exercised in the right way, which would be a third reason why it is not appropriate from a virtue ethical standpoint, and why, more generally speaking, it is morally not defensible. The right way would be one which is not only practical, but also morally unproblematic (or less problematic), and I will present an alternative when I reply to the main objection to my assessment. It bears repeating that diligence is expressed in actions that constitute automatic distrust, i.e. in the actions that are required under the customer due diligence and reporting obligations. Customer due diligence

involves the authentication of clients' identity and keeping identity information up-to-date,⁵ and the ongoing monitoring of their transactions for signs of potential money laundering, for the duration of the business relationship (between clients and institution).⁶ Thus it is reasonable to say that the customer due diligence obligation amounts to general surveillance (general because all clients are monitored). I include the reporting obligation under general surveillance because reporting results in a closer examination of suspicious transactions by the relevant authorities.⁷ As I explained when I pointed out the moral implications of these obligations in section 3.3.2, they also amount to distrust because one would hardly place clients under constant observation if one did not distrust them; the immediate aim of AML's surveillance is not to protect clients, but to reveal the wrongdoers amongst them. (General surveillance might ultimately and indirectly offer some protection to clients and society in general, *if* AML achieves its aim of incapacitating organised crime and thereby contributes to preserving the wellbeing of society; however, the effectiveness of AML has not been established.⁸) Lastly, as per section 2.3 where I introduced the idea of automatic distrust, I describe AML's distrust as automatic because it is a pre-determined, standing attitude towards people who use or wish to use the financial system.

My reason for assessing automatic distrust as an inappropriate way of demonstrating diligence, and as morally problematic, is that the disvalue of automatic distrust is being underestimated. This is a third reason why AML's diligence is not appropriate, and why automatic distrust as a crime-fighting method is morally not defensible. As mentioned when the concept of virtue was introduced, virtue entails an understanding of and a commitment to what is morally good. A lack of concern about automatic distrust amongst AML policymakers and implementers, and possibly amongst clients as well, indicates that this understanding and commitment is limited, and that they are not judging rightly about human goods, as people with practical wisdom would. I would also say that the protective value of automatic distrust is being overestimated, since as mentioned above, it is not clear that AML is achieving its aim. However, this aspect is not in scope for this essay, and I will focus on pointing out the not-so-obvious implications or disadvantages of automatic distrust, given the prominence of automatic distrust as a crucial counter-measure against evil. AML's automatic distrust is a disvalue in so far as it (1)

⁵ FICA 2001 and FICA 2017, sections 21(1) & 21C(b).

⁶ FICA 2001 and FICA 2017, section 21C(a).

⁷ FICA 2001, FICA 2008 and FICA 2017, sections 29, 32 & 34.

⁸ Pol, "Anti-money laundering effectiveness," 89 – 211.

contributes to creating an undesirable ethos of distrust⁹ in society, (2) jeopardises the social and moral good of trust, and (3) undermines the moral values of respect and fairness.

Ethos of distrust

Automatic distrust helps to create an ethos of distrust by increasing the prevalence of distrust in common life situations, such as those described at the beginning of this discussion, and by legitimising unfavourable perceptions and unfavourable treatment of a significant section of society, for instance people in the role of customer, client or citizen in my initial scenarios. An ethos of distrust exists when standardly doubting others' moral integrity is regarded as acceptable or as sensible, and becomes common practice. Practical wisdom would recognise that while situational distrust can be appropriate in that it may serve to protect certain goods, an ethos of distrust is inappropriate, because it represents excess and is a distortion of the virtue of diligence. Excess is not compatible with a human good, and in the case of an ethos of distrust, which entails excess on a large scale, it is the opposite of a human good. The ease with which this ethos takes hold is brought home by one of Diego Gambetta's observations about trust: "Trust is a peculiar belief predicated not on evidence [of trustworthiness] but on the lack of contrary evidence [of untrustworthiness] – a feature that ... makes it vulnerable to deliberate destruction."¹⁰ This is what seems to have happened in the case of AML: prior to AML, clients tended at least to be treated as trustworthy (they were not placed under AML-style surveillance,) because it was not evident that they were untrustworthy (whether clients were also *seen* as trustworthy is another question); since AML was implemented, they are both regarded as untrustworthy and treated as such, since it is not evident that they are trustworthy. There has been a withdrawal of trust because of a lack of evidence of trustworthiness. AML supporters may assess the risk of harm from organised crime as serious enough to justify this change in "risk appetite", but the reason why an ethos of distrust is undesirable and should be resisted becomes clear when one considers the social and moral value of trust. We seem to be making an unfortunate habit of distrust, and are making it more pervasive than necessary, even in a world that is highly complex. In the context of AML, automatic distrust can be seen as the

⁹ Govier, *Social Trust and Human Communities*, 86. Citing E. Pellegrino, "Trust and Distrust in Professional Ethics," in *Ethics, Trust and the Professions: Philosophical and Cultural Aspects*, ed. E. Pellegrino, R. Veatch, and John P. Langan (Washington, DC: Georgetown University Press, 1001), 84.

¹⁰ Diego Gambetta, "Can we Trust Trust?" in *Trust: Making and Breaking Cooperative Relations*, ed. Diego Gambetta (New York: Basil Blackwell, 1988), 234.

result of a lack of diligence or care in how we express diligence. A lack of diligence in how we express diligence may also be a reason why an ethos of distrust takes hold with relative ease.

The social value of trust

At the most fundamental level, trust is one of the habits that enables human beings to live as is natural and appropriate for their species, as rational and social beings.¹¹ It is a fact of nature that we are social creatures and depend on one another in order to survive. As “the original position of our relations to others,”¹² trust is a means by which we establish and maintain relationships between ourselves, and therefore it also enables social co-operation and cohesion. Trust can also be a result of co-operation, and is strictly speaking not necessary for co-operation, since it is possible to co-operate without trust, for instance by managing our interactions via contracts.¹³ Nevertheless, trust certainly facilitates or optimises social co-operation and cohesion, and is probably more efficient than more formal co-operation mechanisms; as mentioned previously, “when we trust other people, we don’t have to face every opportunity to cooperate as a new decision.”¹⁴ Luhmann’s way of putting it is that trust prevents us from being overwhelmed by the complexity of life and simplifies life by risk-taking.¹⁵ An additional benefit of trust and the social co-operation and cohesion that it engenders, is that these social conditions lessen the likelihood of wrongdoing and thus provide a basic form of protection against organised crime, simply because a social environment which is characterised by co-operation and cohesion is not conducive to the pursuit of one’s own interests at the expense of others, which can be seen as one of the root causes of crime. Policymakers and implementers would probably not deny the social value of trust, but from a virtue ethical perspective, they are demonstrating insufficient insight into human affairs and a lack in practical wisdom if they somewhat carelessly impinge on the benefits of trust by promoting automatic distrust.

Practical wisdom in turn would not deny that there will probably always be some people who go about fulfilling their interests by immoral means, or that there will be occasions on which otherwise decent people succumb to the temptation, even if social conditions are such that they

¹¹ Hursthouse, *On Virtue Ethics*, 206.

¹² Bernstein, “Trust,” 402.

¹³ Baier, *Moral Prejudices*, 117.

¹⁴ Uslaner, *The Moral Foundations of Trust*, 2.

¹⁵ Luhmann, *Trust*, 4 & 71.

discourage wrongdoing. Thus distrust can serve as an important corrective to trust, as long as it is not overdone. However, practical wisdom which judges rightly about human goods would also be alert to the disvalue that distrust can represent, and would discern that distrust and its risk avoidance work against our sociality. Distrust creates distance between people, which makes relationships more difficult to establish, and existing ones more difficult to maintain. Thus co-operation may become more difficult, and social cohesion may be weakened. For reasons already mentioned, the automatic distrust built into AML is an over-correction, an excess, even if it is adopted out of convenience. Furthermore, as a means to improve detection of criminal activity, it increases any pre-existing levels of distrust among people, and contradicts the social co-operation and cohesion that provide a first line of defence against wrongdoing, even if indirectly. In this sense automatic distrust would also be counter-productive. The anti-social character of distrust can make distrust morally objectionable, especially if it is a standing attitude that involves a considerable misdirection of distrust: automatic distrust works against what morality aims to achieve, namely to optimise how we conduct ourselves in relation to others, and thereby to support the wellbeing of society. From a virtue ethical perspective, AML's neglect of the social value of trust and its promotion of automatic distrust constitutes a malfunctioning of the virtue of diligence: diligence is expressed in a way which is excessive and which carries moral hazards. Thus AML's diligence clearly misses virtue ethical standards of appropriateness. This in turn can be ascribed to a lack of the virtue of practical wisdom, or to an insufficient appreciation that this virtue is crucial to ensure that the virtue of diligence is expressed appropriately.

The moral value of trust

To some extent, the social value of trust overlaps with the moral value of trust, simply because trust contributes to the wellbeing of both the individual and society. To distinguish the moral value of trust from the social value of trust, one might consider what normative case can be made for trust, that is, why we *should* trust. If we consider why trusting is something that we do, “as a matter of routine and normal behaviour”¹⁶ that enables us to get on with the business of living, then we identify the function of trust in our lives. If we consider why trusting is something that we *should* do, because it is individually and socially beneficial, we identify the moral value of trust. Conversely, if we consider why trusting is something that we *should not*

¹⁶ Luhmann, “Familiarity”, 97.

do, because it may be individually or socially harmful, we identify the moral disvalue of trust. And to the extent that distrusting is something that we should or should not do, because it entails benefit or harm, it too has moral value or disvalue.

Trusting is something that we should do because trust produces valuable goods for both individuals and for society, such as relationships, co-operation and social cohesion. It makes sense to pursue what is morally valuable. Trust would also be worthwhile from a virtue ethical point of view, as one of the values or virtues that constitute of the good or moral life (briefly, if trust can be a moral value, it can also be a virtue; I expand on this in the next sub-section, “Respect and fairness”). Furthermore, if we adopt an attitude of trust, we also adopt a belief in the moral integrity of others. This belief includes the belief that trustors and trustees share common moral values,¹⁷ and this in turn may include a further belief, namely that trustees *should* possess integrity¹⁸ and be trustworthy, i.e. their moral values and beliefs should be consistent and sincere and be congruent with their actions. If trustor and trustee share this understanding of what trust entails, then trust could be seen as reinforcing morality and the good life, and vice versa. Even if trusts entails risks, and even if there are situations in which it is clearly foolish to trust, I would claim that in principle trust is preferable to distrust, since trust promotes morality and an adequate morality cannot “condemn the conditions needed for its own thriving.”¹⁹ This would be the case if one endorsed distrust to the same degree as trust, and it is also the reason why automatic trust, in spite of being as undiscerning as automatic distrust, is morally preferable to automatic distrust.

Respect and fairness

The case for trust is strengthened if one considers that trust not only possesses instrumental moral value because of the individual and social goods that it produces, but that it also possesses a certain inherent moral value.²⁰ Firstly, in so far as trust is an acknowledgement or appreciation

¹⁷ Uslander, *The Moral Foundations of Trust*, 2.

¹⁸ McLeod, "Trust," 13 in the pdf version (section entitled “1. The Nature of Trust and Trustworthiness ” in the online version). Citing Margaret Urban Walker, *Moral Repair: Reconstructing Moral Relations after Wrongdoing* (Cambridge: Cambridge University Press, 2006), 79.

¹⁹ Baier, *Moral Prejudices*, 96.

²⁰ McLeod, "Trust," 24 – 25 in the pdf version (section entitled “3. The Value of Trust” in the online version). Note: As mentioned in the first reference to this article, the updated 2020 version includes certain points about distrust that align with my own analysis of automatic distrust as uncivil, inappropriate and morally dubious, and in particular with my own analysis of trust as a form of respect and distrust as a form of disrespect.

of something worthy in another person, e.g. that person's moral integrity, one can regard trust as a form of respect. Secondly, in so far as the trustor gives the trustee the benefit of the doubt and provides them with an opportunity to demonstrate whether they are in fact worthy of trust, i.e. whether they deserve to be trusted, it is a form of fairness. Thirdly, when one trusts another person and gives them a degree of discretion in defining how they will honour the trust that has been placed in them,²¹ one believes in their judgment and acknowledges their moral competence. So, if trust is a form of respect, in that it affirms the trustee's moral integrity and moral competence, and if trust is also a form of fairness in that it does not unreasonably withhold what is more likely to be deserved than not, then trust is morally valuable. And since trust, respect, fairness and moral competence are morally valuable and are comprehensible as excellences of character, they can also be regarded as virtues. And as virtues, trust, respect and fairness would be among the constituents of the good or moral life in virtue ethical terms. The way in which AML's automatic distrust impinges the good or moral life, and therefore also on trust, respect and fairness, is not straightforward, and will be examined in more detail in section 6.2.5.

Conversely to trust, AML's automatic distrust implies a certain disrespect for clients, in that it does not credit them with moral integrity, but attributes some kind of moral insufficiency to them and thereby impinges on their moral status, based on the indeterminate possibility that they might launder money. As far as the fairness aspect of trust is concerned, one might argue that AML's automatic distrust does exactly the same as trust, in that it gives clients the opportunity to prove their integrity. However, AML is a case of verifying integrity and never really trusting, whereas in the case of trust, trusting is followed by the possibility of verification. The difference is that AML's automatic distrust obliges one continually to earn what is unreasonably withheld, whereas trust allows one to affirm (or deny) what is reasonably given. When, as is the case with AML, automatic distrust is concretised in surveillance and threat of punishment,²² one effectively gives up on moral competence as a source of moral conduct, and replaces it with incentives and coercion (in an attempt to avoid the risk of immoral conduct). AML's downgrading of moral competence does not prevent clients from nevertheless transacting legitimately, but routinely taking elaborate legal measures to ensure such conduct in everyday settings diminishes the role of morality as a vital standard for acceptable conduct.

²¹ Baier, *Moral Prejudices*, 12; Govier, *Social Trust and Human Communities*, 4.

²² Baier, *Moral Prejudices*, 133.

This cynical aspect of automatic distrust makes it a moral disvalue, and reduces its moral legitimacy as crime fighting method. Baier observes that morality does rely on coercion to some extent, at least under difficult conditions that make it difficult to maintain acceptable standards of conduct; however, coercion (in this case legal AML measures) should be a last resort in the event that basic integrity fails, since our lives would be greatly diminished if coercion were to become the favoured mechanism for managing our conduct.²³

6.2.4 Deficiency in practical wisdom

Thus far, I have indicated where the AML initiative demonstrates a lack of practical wisdom. This section is meant to explain in more detail wherein the deficit lies. When I explained the objective of this essay in section 2.4, I indicated that automatic distrust may be practical, but that it is not wise and not ethical. Another way of putting it is that automatic distrust may be *rational*, but not wise (and not ethical). I will use four points from the section on practical wisdom to show that the due diligence of AML, expressed as automatic distrust, does not meet the criteria for practical wisdom, i.e. (1) reasoning correctly about practical matters, (2) justifying actions in terms of the relevant specifics of the situation, (3) judging rightly about human goods and (4) securing real benefits effectively.

My view is that the reasoning that leads to AML's automatic distrust (as outlined in section 6.1) is only partially correct, because it focuses on detecting money laundering and disregards other morally relevant specifics of the project to curb organised crime. This amounts to judging inappropriately about human goods, since the elements that are disregarded represent significant moral values. One could grant that automatic distrust secures at least some of the moral benefit of curbing organised crime (even though AML's effectiveness is not established), but since this is done at the expense of other important moral values, I would say that this benefit is not secured effectively, but in a morally flawed manner. To avoid unnecessary repetition, I will elaborate only on the first criterion, reasoning correctly about moral matters, since this one effectively leads to the others not being fulfilled. To show how justifying diligence according to the situation, and judging rightly about goods go awry, I will recap some points made previously, regarding the (in)appropriateness of due diligence and the social value of trust. The matter of securing benefits effectively will be dealt with when I suggest an alternative approach to financially incapacitating organised crime.

²³ Baier, *Moral Prejudices*, 14.

On my interpretation, **the reasoning behind automatic distrust** is flawed because it is based on a narrow understanding of what rationality entails. In its most basic sense, the term “rational” means having a reason or reasons for something, such as an action, a decision, an attitude. A reason in turn is the idea that something is necessary for or conducive to the achievement of an objective.²⁴ Thus, rational should include the notion of “appropriate”, “suitable”, or “fit-for-purpose”, but this is not a given, since it is possible for something that is rational to be inappropriate in some way, when relevant factors other than the immediate objective are ignored or not properly considered. For instance, as deplorable as organised crime is, it can be regarded as rational, since it enables criminals to achieve their objectives (though we are dealing with a perverse rationality that achieves criminal objectives).

In the case of AML, the aim is to curb organised crime by preventing or deterring organised criminals from using the financial system. Thus it might be rational to place all transactions under constant surveillance and thereby to increase the possibility that illicit ones might be detected, so that criminals either avoid the financial system or face the prospect of being caught. However, what is overlooked or disregarded is that the method of automatic distrust also impinges on important components of morality, i.e. trust, respect and fairness, and that these values also provide a first line of defence against organised crime. Practical wisdom would recognise that a complex problem such as organised crime needs to combine a focus on objectives with a broad understanding of all the major factors that contribute to the problem, and thus there is an additional criterion for the rationality that should be applied to resolve the problem, namely appropriateness in the broader sense of the term.

In other words, I distinguish between instrumental or practical rationality, and proper or appropriate rationality. Instrumental or practical rationality focuses on achieving the immediate objective, and AML’s automatic distrust is an example of this type of rationality; proper or appropriate rationality considers the “bigger picture”, and is an important aspect of practical wisdom. Automatic distrust may be rational and practical, but it is not properly or appropriately rational, since it disregards important moral values. This is why automatic distrust is not wise and not ethical. Practical wisdom is more likely than (mere) practical rationality to enable one

²⁴ Lars Hertzberg, “On the Attitude of Trust,” *Inquiry* 31:3 (1988): 310, <https://doi.org/10.1080/00201748808602157>.

to identify the best reason for one's actions,²⁵ and to consider the possibility of another approach to financial incapacitation of organised crime.

With regard to **justifying one's actions according to the specifics of the situation**, one could say, in line with the "lesser of two evils" stance mentioned previously, that automatic distrust is well-justified in the face of the major threat that organised crime poses to society. To insist that the preservation of trust, respect and fairness are as important as tackling serious wrongdoing, and that they ought to co-determine the crime-fighting methods that are chosen, is overly fastidious, especially since the fight against organised crime requires a level of collective action that is difficult enough to achieve, without the additional complexity that the consideration of moral values such trust, respect and fairness would introduce. I would repeat that the disvalue of automatic distrust is being underestimated, especially since distrust seems to be increasingly prevalent in ordinary life situations. In addition to contradicting key moral values, automatic distrust is likely to be self-fulfilling²⁶ and thus it is easily entrenched, which is socially and morally undesirable, given its anti-social quality. Trust too can be self-fulfilling, but as mentioned under the ethos of distrust, it is susceptible to deliberate destruction, more so than distrust, which is not as easy to invalidate, since it either discourages people from engaging with one another, or encourages behaviour which reinforces its justifiability.²⁷ Trust and distrust tend to be self-fulfilling because we have a tendency to look only for that evidence which confirms our beliefs, assumptions and expectations, and to ignore evidence that contradicts them.²⁸ The priority which the AML initiative places on diligence as automatic distrust, out of convenience rather than necessity, and at the expense of other important values or virtues, means that AML supporters are **not judging rightly about human goods**. This view is further supported by the possibility that automatic distrust could be self-defeating, because it is the antithesis of the social conditions it would aim to protect (as pointed out under the social value of trust).

²⁵ Rachels, *The Elements of Moral Philosophy*, 13.

²⁶ Gambetta, "Can we Trust Trust," 234; Govier, *Social Trust and Human Communities*, 36 – 37.

²⁷ Gambetta, "Can we Trust Trust," 234.

²⁸ Govier, *Social Trust and Human Communities*, 36.

6.2.5 Incompatibility with the good life

At the end of my summary of the virtue ethical concept of the good life, I mentioned that a person who is committed to virtue should be able to practice virtue and to live a good life regardless of whether they are automatically distrusted or not. Strictly speaking, the morally dubious attitudes or actions of others should not prevent a virtuous person from thinking, feeling, acting and living virtuously, since anyone who is morally steadfast is unlikely to permit the immoral conduct of others to undermine the morality of their own conduct. Thus it seems that the automatic distrust to which trustworthy clients are subjected because of AML measures should be of no concern to any these clients who are committed to living a good life (but if automatic distrust achieves the intended results, it should help to prevent criminal clients from living an immoral life). One could add that the good life of the parties doing the distrusting is not diminished either, and that their distrusting does not interfere with any commitment they may have to living morally, since automatic distrust is merely a necessary means to a good end. And yet, this assessment seems inadequate.

I think it plausible that for most people, if they are rational and social beings, living well with others in society, and having various sorts of relationships based on mutual trust, will be an important component of a good life, something without which neither individuals nor society can flourish. When discussing the social value of trust, I referred to our sociality, our disposition to engage with others, to form relationships and to co-operate; in virtue ethical terms one might refer to this disposition as social virtue.²⁹ Social virtue would be one of the virtues that are practised as part of a good life, though it could also refer to any virtue that is inherently “other-directed” and entails the consideration for or appreciation of others, such as trust, respect and fairness.

Social virtue would recognise that our ability to live a good life is influenced by our attitudes towards one another and by how we treat one another, and that a certain reciprocity or mutuality is required in order for us to relate to one another in a way that is both healthy and morally decent: being trusted, being respected and being treated fairly by others is as important to virtue or morality as showing trust, respect and fairness towards others; i.e. the receiving of moral goods is as important as the giving of moral goods. As Govier observes, “We contribute to

²⁹ Govier, *Social Trust and Human Communities*, 33.

[one another's] flourishing by affirming [one another's] worth."³⁰ In so far as automatic distrust unreasonably withholds trust, respect and fairness, it contradicts the idea of living well with others in society, and thus denies or at least impinges on an important component of a good life. It is not plausible that one should be able to flourish properly in a social environment that is not supportive of one's commitment to virtue or morality, or that questions this commitment, which is why I claim that automatic distrust and the good life are incompatible.

Then there is the possibility that commitment to virtue or morality, or least to our social virtue, could falter if it is routinely doubted by others, and if seeing and treating others as untrustworthy is positioned as acceptable and sensible by parties who are in positions of authority. To quote Govier once more: "We can affect [one another's] social virtue by our expectations [of] and attitudes to [one another]." Thus automatic distrust may lead to the lowering of moral standards within wider society, and it is not unreasonable to worry that the lower the commitment within society to leading a morally good life, the more difficult it would become to protect society from the evils of organised crime, and the more attractive crime becomes as a method for obtaining resources. This is why an ever-increasing prevalence of automatic distrust could represent a threat to the institution of morality, and why I believe that its use as a method to detect wrongdoing should be contained (more about this when I suggest an alternative to the current AML approach). Lastly, I think that it is one of the requirements of social virtue to oppose that which would undermine social virtue, which is why my disapproval of being seen as and treated as a potential criminal is warranted, and why it might be useful to consider morally less problematic ways of curbing organised crime.

³⁰ Govier, *Social Trust and Human Communities*, 116.

7. JUSTIFYING AUTOMATIC DISTRUST

In this section, I first discuss an easily foreseeable and relatively straightforward objection to my disapproval of automatic distrust, i.e. an objection that readily comes to mind if one sees automatic distrust as an ordinary or normal attitude. This objection and my response to it will be presented together in sub-section 7.1 entitled “Automatic distrust as basic prudence”. Then I turn to a more technical or more informed objection, one which is likely be raised by AML supporters who are more familiar with the particulars of the AML initiative than the general public, i.e. the risk-based approach to due diligence. In this case, the objection and the response are each allocated their own sub-section, i.e. sub-section 7.2 entitled “The risk-based approach to AML” and sub-section 7.3. entitled “Limiting automatic distrust”.

7.1 Automatic distrust as basic prudence

A typical objection to my issue with automatic distrust might be as follows. Reasonable people would probably regard an attitude of automatic distrust in a variety of life situations as a matter of basic prudence or caution, for example, routinely locking one’s home when going out, or endorsing the security checks that are standard at airports. If I agree, which I do, that the distrust that is shown in situations such as these is automatic, and that this automatic distrust is warranted, then my stance on AML’s automatic distrust might seem untenable. However, I think that the situations are not sufficiently analogous to the AML situation to invalidate either my general claim that automatic distrust as a “basic, standing attitude”¹ is morally problematic, nor my specific claim that AML’s automatic distrust is morally not defensible.

In the case of locking one’s home, if circumstances are such that one needs to protect one’s belongings from being stolen, then prudence is called for and one is being prudent for the right reason. Also, nobody but intruders are targeted, the measure is taken on the right occasions, no innocents are imposed upon, and it would become clear as soon as one returns home whether the intended benefit has been achieved effectively or not. Since one’s actions are not likely to entail morally unacceptable disadvantages, no major demands are made on one’s practical wisdom, and acting on the understanding that some people conduct themselves immorally does not work against the virtue of living well with others. So, this is a case where automatic distrust

¹ Govier, *Social Trust and Human Communities*, 129 & 212.

is appropriate and morally unproblematic, because at root it is based on similar deliberations as those that characterise situational distrust, which is determined by and justified by the specific features of a situation. AML supporters would probably counter that the same could be said of AML's automatic distrust, a fair comment which I will address shortly when I consider the risk-based approach to due diligence.

In the case of security checks at airports, the aim is to protect ordinary travellers from harm that could be imminent, serious and personal, so as in the previous scenario, prudence is required and is exercised for the right reason. "Successful" terrorist or criminal action on a flight would cause direct and immediate harm to everyone on the flight, possibly to innocents and criminals alike, and therefore the security measures that aim to prevent such a situation are sensible and morally justifiable. The link between AML measures and the control of the harms caused by money laundering and organised crime is far more tenuous and uncertain. The flaw in security measures for air travel is that harmless travellers who do not deserve to be cast into the role of potential hijackers are subjected to distrust, but the distrust is of short duration and is shown in an appropriate way, since it is sensible to check travellers and their carry-on luggage for items that could be used to carry out a hijack. And arriving unharmed at one's destination within a relatively short period of time would show that the intended benefit has been achieved effectively. In this case it is a lot clearer than in the case of AML that being distrusted for a moment is a worthwhile sacrifice to make in order to avoid harm, and to prevent air travel from becoming an easy and effective method for criminals to get their way. A practically wise person would probably reason that a brief dose of distrust which prevents criminals or terrorists from being obviously successful (through public displays of violence), and which provides an immediate, concrete and certain benefit of personal safety, is better justified than the ongoing distrust of AML, where the benefit of society's wellbeing is longer-term, more intangible and uncertain. The distrust that is at work in the security check situation, like that in the previous scenario, seems to be based on a prior assessment of the situation, even though it is subsequently applied without further deliberation. Airport security checks are a case of reasoning correctly about practical matters and judging rightly about human goods, and support the virtue of living well with others.

7.2 The risk-based approach to AML

The adoption of a risk-based approach to customer due diligence would probably be the most significant challenge to my claim that AML's due diligence is morally not defensible. AML supporters are likely to argue that the risk-based approach prevents AML's diligence from being either excessive or deficient, that it is practical, wise and ethical, that it preserves the moral values of trust, respect and fairness, and that it supports our sociality. Initially, the approach to AML tended to be prescriptive or rule-based,² but it has been recognised that the diversity and the complexity of the matters that need to be regulated might not only make a rule-based approach impracticable, but also inefficient and ineffective. A rule-based approach also tends to produce a focus on complying with regulatory requirements, rather than a focus on preventing money laundering.³ The FATF's recommendations of 1990 and 1996 do not yet refer to a risk-based approach, but the 2003 version of the recommendations and its 2004 update introduce the idea of determining the extent of customer due diligence measures on a "risk sensitive basis".⁴ From 2012 onward, the risk-based approach becomes the first of the FATF's forty recommendations, and the interpretative note to this recommendation claims upfront that "[t]he risk-based approach ... is an effective way to combat money laundering and terrorist financing."⁵ In South African legislation, the original requirement to formulate and implement internal rules is replaced by the requirement to develop, document, maintain and implement a risk management and compliance programme.⁶ (As an aside on the purported effectiveness of a risk-based approach, it is possible to assess a risk incorrectly, which could result in the failure

² Financial Intelligence Centre, *Guidance Note 7*, 13, paragraph 31.

³ Jackie Harvey, "The Search for Crime Money – Debunking the Myth: Facts versus Imagery", *Journal of Money Laundering Control* 12, no.2 (2009): 98, <https://doi.org/10.1108/13685200910951875>;

FATF, *Guidance on the Risk-Based Approach to Combating Money Laundering and Terrorist Financing: High Level Principles and Procedures* (Paris: FATF/OECD, June 2007), 2.

[http://www.fatf-gafi.org/documents/riskbasedapproach/?hf=10&b=0&s=desc\(fatf_releasedate\)](http://www.fatf-gafi.org/documents/riskbasedapproach/?hf=10&b=0&s=desc(fatf_releasedate)).

⁴ The FATF's recommendations of 1990, 1996 and 2003 are no longer available on the FATF's website as at mid January 2021; however, the *FATF 40 Recommendations* of October 2003, incorporating all subsequent amendments until October 2004, are still accessible, at <http://www.fatf-gafi.org/publications>. Full details of the four documents mentioned here are provided in the bibliography. I noted the "risk-sensitive" approach as follows:

FATF, *The Forty Recommendations* (Paris: FATF, 20 June 2003), 3;

FATF, *FATF 40 Recommendations* (Paris: FATF, October 2003, incorporating all subsequent amendments until October 2004), 5.

⁵ FATF, *Recommendations*, 31.

⁶ FICA 2001, section 42;

FICA 2017, point 27. ("Substitution of section 42 of Act 28 of 2001" by "Risk Management and Compliance Programme").

of an AML measure, and this failure may be punished.⁷ And if it is possible for risk-taking to result in punishment, this might disincentivise even calculated risk-taking, and limit the extent to which a risk-based approach improves the efficiency and effectiveness of AML.)

The difference between a rule-based and a risk-based approach is best explained by means of an example. The regulations for FICA 2001 specified in detail which information an institution needed to obtain in order to establish and verify the identity of a client.⁸ This requirement is repealed in the regulations for FICA 2017.⁹ Also, in FICA 2017, the “Duty to identify clients” that FICA 2001 required is replaced by “Customer due diligence”, and by the requirement for institutions to establish and identify the identity of clients in accordance with their risk management and compliance programme.¹⁰ Also, the FIC’s guidance note on FICA 2017 and its regulations states that “accountable institutions now have the *flexibility* to choose the type of information by means of which [they] will establish clients’ identities and also the means of verification of clients’ identities, *instead of following the rigid steps* provided for in the MLTFC [money laundering and terrorism financing] Regulations.”¹¹

A risk-based approach (which one can also call a risk-managed approach) means that a financial institution identifies, assesses, monitors and mitigates the money laundering risks to which it is exposed, so that its AML measures are proportionate to the risks identified, and are better targeted at specific risks.¹² The general principle is that one should concentrate resources where there is most risk, and pay more attention to high risks than to low risks¹³. The intricacies of risk management cannot be covered here, but in simple terms, managing risk requires that one

⁷ FATF, *Guidance on the Risk-Based Approach*, 3;
FICA 2001, sections 46 – 71;
FICA 2008, sections 45C & 68(1) & (2);
FICA 2017, section 77(2)(c).

⁸ Regulations 2002, regulations 3 & 4.

⁹ Regulations 2017, point 4., “Repeal of Chapter 1 [of the Regulations 2002]”.

¹⁰ FICA 2017, point 7., substitution of heading of Part 1 in Chapter 3 of FICA 2001 “Duty to identify clients” by “Customer due diligence”;

FICA 2017, point 9., amendment of section 21(1) to include specific reference to an institution’s “Risk Management and Compliance Programme”;

FICA 2017, point 27., substitution of section 42 of FICA 2001 “Formulation and implementation of internal rules” by “Risk Management and Compliance Programme”;

FICA 2017, section 42 (i.e. the content of section 42).

¹¹ Financial Intelligence Centre, *Guidance Note 7*, paragraph 74 (my italics).

¹² FATF, *Recommendations*, 31.

¹³ FATF, *Guidance on the Risk-Based Approach*, 4.

identifies the factors that create the risk (e.g. client characteristics, product features, delivery channels, geographic location of the institution), that one assesses the risk factors against criteria such as relevance, probability of occurrence, size of negative impact and inter-relatedness, and that one then decides which actions to take in order to control, minimise or eliminate the risk.¹⁴ A risk-based approach is supposed to provide institutions with more flexibility in how they implement AML measures, and to enable them to use their AML resources more efficiently and effectively.¹⁵ However, the FATF does caution that this approach is more suited to institutions that have sufficient capacity for and experience in AML.¹⁶ Importantly, a 2007 FATF guidance paper on the risk-based approach points out that risk management requires not only specialist expertise, but the exercise of “sound and well-trained judgment”.¹⁷

AML supporters would probably argue that the adoption of a risk-based approach to customer due diligence resolves the problem of automatic distrust, as well as any further implications automatic distrust may have, since a risk-based approach corresponds to the situational distrust which I referred to at the beginning of this discussion and at the end of the section on trust. I stated that situational distrust is more discerning than automatic distrust, since it is shown for specific reasons based on specific circumstances, and thus it is also better targeted and better grounded, and morally more defensible than automatic distrust. The risk-based approach meets all these requirements, since it balances the imperative of preventing money laundering with a well-considered assessment of client-specific circumstances, as illustrated by the requirement to understand the key characteristics of the business relationship between client and institution, so that a client profile can be established.¹⁸ This enables the institution to set the parameters within which clients can transact without arousing particular suspicion of money laundering, and to adjust the intensity of diligence according to the level of money laundering risk that a client represents. Thus simplified due diligence measures could be applied in the case of low-risk clients, and enhanced due diligence measures in the case of high-risk clients.¹⁹

¹⁴ Financial Intelligence Centre, *Guidance Note 7*, 7 – 29.

¹⁵ FATF, *Recommendations*, 8, 10, 31.

¹⁶ FATF, *Recommendations*, 31.

¹⁷ FATF, *Guidance on the Risk-Based Approach*, 4.

¹⁸ FICA 2017, section 21A.

¹⁹ FATF, *Recommendations*, 33.

Furthermore, the proportionality principle of the risk-based approach means that an appropriate level of diligence is identified for each client, and that the virtue ethical idea of determining the mean in accordance with the circumstances is at work. The risk-based approach directs diligence at the right people, in that high-risk clients are subjected to higher levels of diligence. The problem of ongoing distrust is solved by making particular suspicion dependent on deviations from the client profile (distrust would thus be episodic rather than permanent). These arrangements enable one to exercise diligence in the right way, that is, respectfully and fairly, and without creating the moral hazards that I associate with automatic distrust. And in so far as diligence manifests as distrust, one is dealing not with inappropriate, automatic distrust, but with appropriate, situational distrust. Additionally, appropriate distrust is sensibly paired with appropriate, situational trust, since client profiling defines both the conditions under which clients will be trusted (i.e. when a client transacts in accordance with their profile), and the conditions under which they will be distrusted (i.e. when a client performs a transaction that deviates from their profile). This is not much different from the generalisation and the good judgment on which a practically wise person would rely in order to decide who to trust and who to distrust, why, when, how far or on which matters,²⁰ and shows that AML supporters do reason correctly about practical matters, and that they do judge rightly about human goods. So, rather than distrusting automatically and inappropriately, contributing to an ethos of distrust, and jeopardising respect, fairness and moral autonomy, AML legislation trusts and distrusts appropriately, affords clients the trust, respect and fairness that they deserve, and grants them sufficient freedom to (trans)act. And if these moral goods are preserved, then my concern about automatic distrust working against our sociality is also resolved. Therefore, AML's claim to *due* diligence is justified, and my assessment of the relevant AML obligations as morally indefensible cannot hold.

7.3 Limiting automatic distrust

The risk-based approach to customer due diligence does represent a refinement of the previous undifferentiated approach to determining clients' bona fides, in that clients are at least trusted to some extent. The recognition of the need for moderation (a virtue), as demonstrated by more selective diligence, is commendable. However, there are two issues that show that AML's claim to due diligence is limited, i.e. the reason that the risk-based approach was adopted, and

²⁰ Baier, *Moral Prejudices*, 14 & 96.

the limitations of the risk-based approach. The limitations of the risk-based approach are specifically addressed in the 2007 FATF guidance paper mentioned previously, but from an operational perspective, not from an evaluative perspective.²¹ I will first clarify these two issues, and then explain how it might be possible to limit automatic distrust, as an alternative to the current approach to AML.

Even though the risk-based approach may help to mitigate the impropriety of excessive diligence or automatic distrust, the approach was adopted not out of the realisation that diligence is problematic when it manifests as automatic distrust, but out of the realisation that this diligence is not efficient and therefore inhibits the effectiveness of AML measures (to the extent that these measures actually are effective). It is certainly desirable, also from a moral point of view, that the extensive resources that are required for AML should be used efficiently, and that the AML initiative is effective. And in so far as the original seemingly practical approach turned out to be impractical, it makes sense that other methods are then tried in order to achieve practicality. However, the flaw is that the risk-based approach was chosen for the same practical reasons as automatic distrust was originally chosen. From a virtue ethical perspective, the moderation that is shown is not shown for the right reason, or stated less exactly, for quite the right reason. The right reason would have been to find a morally less problematic approach to detecting money laundering, or would at least have included such an objective. Thus the risk-based approach demonstrates practical rationality, but I would disagree that it demonstrates practical wisdom. Practical wisdom would recognise that the risk-based approach does not eliminate the moral hazard of automatic distrust, since there are limits to what this approach achieves and automatic distrust remains the AML approach for other aspects of due diligence.²²

And while one could grant that the risk-based approach enables some appropriate trusting, one could also follow Baier and Luhmann, and object that this approach involves taking calculated risks (and still entails too many thoughts about betrayals),²³ so that the trust which the risk-based approach claims to accommodate is too limited to be regarded as proper trust. A last point regarding the reasons for the risk-based approach is this: the practical rather than moral reasons for this approach mean that one cannot rule out that previous levels of distrust could be

²¹ FATF, *Guidance on the Risk-Based Approach*, 9.

²² FATF, *Guidance on the Risk-Based Approach*, 9.

²³ Baier, *Moral Prejudices*, 196. Citing (1) Luhmann, "Familiarity," 97; and (2) Baier, "Trusting Ex-Intimates," 269 – 281.

re-instated if circumstances were to change, for example, should organised crime increase and new ways of benefitting from criminal proceeds be devised. So, even though a risk-based approach introduces an element of moderation into AML's automatic distrust, the trust that it does permit is restricted, and the reduction in automatic distrust that it achieves is not assured. Therefore, distrust remains prominent enough to impinge on our ability to live well with one another, in a way that includes showing one another mutual respect and treating one another fairly.

Now to the limitations of the risk-based approach. Under a risk-based approach, the requirement to establish and verify the identity of clients, which would include any requirement to keep identity-related information up-to-date, remains in place and is not adjusted according to the level of risk that the client represents.²⁴ And adopting simplified due diligence measures in low-risk situations is not quite as simple as it seems: not only do simplified measures not apply to all components of due diligence, one also has to ensure that any relaxations that one allows are appropriate, and that they cannot be abused (an example of abuse is the splitting of the total value of a transaction into several smaller value transactions in order to remain under the value threshold that exempts transactions from closer scrutiny).²⁵ The main advantage of a risk-based approach is increased accuracy in identifying suspicious transactions.²⁶ Fewer transactions may be classified as suspicious and fewer transactions may be reported to the authorities, and to this extent some clients might be seen as and treated as a potential criminals less often. However, legislation still requires ongoing monitoring of all transactions, otherwise it would not be possible to detect unusual or suspicious transactions, and to assess whether they need to be reported to the authorities or not. The FATF guidance makes clear that even in the case of low-risk clients, monitoring is required so that one can verify that transactions do match the client's low-risk profile.²⁷ The FATF guidance also makes clear that the reporting of suspicious transactions is another element of due diligence that is not risk-based.²⁸ This means that general surveillance remains in place under the risk-based approach, that clients are never quite free of suspicion, and that they are perceived to possess integrity only to the extent that they transact within the parameters of their client profile. And if one must constantly verify

²⁴ FATF, *Guidance on the Risk-Based Approach*, 9.

²⁵ FATF, *Guidance on the Risk-Based Approach*, 9.

²⁶ FATF, *Guidance on the Risk-Based Approach*, 9.

²⁷ FATF, *Guidance on the Risk-Based Approach*, 9.

²⁸ FATF, *Guidance on the Risk-Based Approach*, 9.

whether one can trust another person, then one is not truly trusting; therefore I stated earlier that AML is a case of verifying integrity and never really trusting. Similarly to my assessment of the *reasons* for the risk-based approach, my assessment of the *limits* of a risk-based approach is that the reduction in automatic distrust under this approach is not sufficient to avoid the moral hazards that come with automatic distrust. The subversion of trust, respect and fairness may be less overt, but the shortcomings of diligence or automatic distrust as seen from a virtue ethical perspective remain the much the same. Therefore I stand by my claim that the due diligence obligations of AML legislation are morally not defensible. My final point about an alternative approach to financially incapacitating organised crime should reinforce my position.

If one bears in mind that virtue involves a commitment not only to basic moral values but to moral excellence, and that virtue requires not only rationality but wisdom, and if one is faced with the need to curb the activities of criminals who fulfil their interests at the expense of others, then, instead of focusing on preventing money laundering and increasing the prevalence of automatic distrust, one might ask “So what do the wise person and the wise society do to guard against false pretenders, *without* giving up on trust?”²⁹ As I mentioned when I discussed the time at which diligence is shown, even if it is the case that organised crime could ruin society if not checked, this does not mean that proportional, sensible counter-measures must include a level of diligence that leads to a lack of moral integrity becoming a basic assumption that one makes about other people. While it may not be possible to do without some form of automatic distrust altogether, we could be more diligent about keeping the number of people who are required to distrust others to a minimum. This would reduce the likelihood that an ethos of distrust develops, that key moral values and society’s welfare are compromised, and that a basic protection against crime is undermined. The current approach to AML assumes that financial incapacitation of organised crime must be initiated within the financial system, where the misdeed of money laundering takes place and the evidence is generated, but this makes things more complicated than necessary.

Most societies have established specific institutions to prevent wrongdoing and to ensure certain contributions to the common good, such as law enforcement or crime prevention agencies (the police) and tax authorities. For these institutions, being distrustful is a legitimate responsibility and a core competence, in order that they can effectively combat major

²⁹ Baier, *Moral Prejudices*, 159 – 160 (my emphasis).

wrongdoing and tax evasion. It would make sense to allocate the responsibility for tackling money laundering to these bodies, instead of burdening private business organisations with responsibilities that are neither their real expertise nor part of their organisational purpose. This organisational or institutional design approach would also make it unnecessary to create additional institutions to deal specifically with money laundering, and avoid co-ordination problems that inevitably arise when a number of different institutions need to act as a collective. The tax authorities are well positioned to detect money laundering, since they have a keen interest in knowing every taxpayer's total income, and in ensuring that they make an appropriate financial contribution to the common good. It would not be unrealistic to expand this interest to include the source of income for every citizen or resident, and the legitimacy of this income, regardless of whether citizens and residents earn enough to have to pay tax. Tax authorities could be given the facilities with which to monitor transactions in the financial system for signs of money laundering, and if necessary they could also access the identity information which financial institutions would continue to obtain, primarily as a safety measure to protect clients from having their funds stolen. The tax authorities would pass on any suspicions of money laundering directly to the police, so that they in turn could take action either to prevent crime or to enforce the law, as applicable. I quote Baier once more: "Where judgment is tested and given scope is not in the recognition of failures [of trust], but in the redesign of the system."³⁰

One might say that AML identifies and attempts to resolve a certain failure of trust, which consists in wrongdoers abusing the financial system in order to launder the proceeds of crime, i.e. the assumption that clients will transact legitimately does not always hold. However, to remedy this failure by automatically distrusting all clients and burdening society with significant amounts of additional "bureaucracy" constitutes a certain mis-judgment, because the moral hazard inherent in this approach is disregarded. Automatic distrust and more "bureaucracy" may be an instance of practical rationality, but this approach is deficient in practical wisdom and is not ethical. The practically rational AML approach also increases the complexity of the existing crime prevention system, which might make it more difficult for this system to achieve its fundamentally moral goal. Practical wisdom would recognise that the moral aim of AML should also be achieved in a moral way, and that if one takes a broader view of the situation, it would be better, morally and practically, to implement a more fundamental re-design of the crime prevention system, i.e. to re-design that part of the crime prevention

³⁰ Baier, *Moral Prejudices*, 159 – 160.

system that will tackle money laundering, and not merely to add extra components to it. The alternative approach outlined above suggests how a re-design could be achieved.

The alternative that I propose should be feasible, at least as practical as the current approach, and possibly even more efficient and effective. Also, diligence would be exercised not only to prevent crime, but also to preserve important moral goods which might otherwise be jeopardised. Thus this approach could claim to demonstrate practical wisdom in addition to practical rationality, and to be more consistent with the idea of living morally. And if a morally better approach to AML is possible, one which achieves real moral benefits effectively, then I can sustain my claim that the current approach and its automatic distrust are morally not defensible.

8. CONCLUSION

The purpose of this report was to take a closer look at an attitude that seems to be increasingly prevalent in ordinary spheres of life, or at least, more prevalent than one might at first realise. This attitude is the presumption of wrongdoing,¹ and it manifests as automatic distrust. The reason for my interest is that indiscriminately distrusting others, without a specific reason based on specific circumstances, seems uncivil, inappropriate and morally questionable. I decided to get to the bottom of the matter by assessing automatic distrust from a moral point of view. My analysis of AML legislation, as an instance of automatic distrust, and more specifically as an instance of automatic distrust that is made obligatory by legislation, shows that my initial intuition about the impropriety of automatic distrust is not off the mark, even though AML legislation has a moral aim and demands diligence for a good reason. A virtue ethical perspective on the matter led to the finding that diligence is expressed inappropriately when it is expressed as automatic distrust, and that this impinges on certain valuable social and moral goods, namely trust, respect and fairness. Diligence as automatic distrust also displays a lack of practical wisdom and is not compatible with the idea of living well with others. AML measures have become more focused over time, through a risk-based approach to inhibiting illegal financial activity within the financial system. However, this does not materially change the automatic distrust to which clients are subjected. The possibility of a feasible alternative approach, which would at least limit the extent to which automatic distrust pervades daily life, supports my claim that the automatic distrust required by AML legislation is morally not defensible. I end this discussion by re-iterating that unnecessarily seeing one another as potential wrongdoers, and treating one another accordingly, is not how we should live.

¹ Stewart, "The Right to be Presumed Innocent", 409.

9. BIBLIOGRAPHY

Aristotle. *The Nicomachean Ethics*. Further revised edition. Translated by J. A. K. Thomson. Revised with Notes and Appendices by Hugh Tredennick. Introduction and Further Reading by Jonathan Barnes. London: Penguin Books, 2004.

Athanassoulis, Nafsika. "Acquiring Aristotelian Virtue." In *The Oxford Handbook of Virtue*, edited by Nancy E. Snow, 415 – 31. New York: Oxford University Press, 2018.

Baier, Annette C. *Moral Prejudices: Essays on Ethics*. Chapters 1 & 6 – 9. Cambridge, Massachusetts: Harvard University Press, 1994.

Baker, Judith. "Trust and Rationality." *Pacific Philosophical Quarterly* 68, no. 1 (1987): 1 - 13. <https://doi.org/10.1111/j.1468-0114.1987.tb00280.x>.

Basel Committee on Banking Supervision (of the Bank for International Settlements). *Customer Due Diligence for Banks*. Basel: Bank of International Settlements, October 2001. <https://www.bis.org/publ/bcbs85.pdf>.

Beekarry, Navin. "Introduction." In *Combating Money Laundering and Terrorism Finance: Past and Current Challenges*, edited by Navin Beekarry, xiii-lxiv. Cheltenham: Edward Elgar Publishing, 2013.

Bernstein, J.M. "Trust: On the Real but Almost Always Unnoticed, Ever-Changing Foundation of Ethical Life." *Metaphilosophy* 42, no. 4 (July 2011): 395 – 416. <https://doi.org/10.1111/j.1467-9973.2011.01709.x>.

Cox, Damian, Marguerite La Caze, and Michael Levine, "Integrity", *The Stanford Encyclopedia of Philosophy* (Spring 2017 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/spr2017/entries/integrity/>.

(This entry is formatted as requested by The Stanford Encyclopedia of Philosophy.)

Cuéllar, Mariano-Florentino. “The Tenuous Relationship between the Fight against Money Laundering and the Disruption of Criminal Finance.” *The Journal of Criminal Law and Criminology* (1973-) 93, no. 2/3 (Winter -Spring, 2003): 311-466.

<https://www.jstor.org/stable/1144319>

Duff, R.A. “Offences, Defences and the Presumption of Innocence.” Chap. 9 in *Answering for Crime: Responsibility and Liability in the Criminal Law*. Oxford: Hart Publishing, 2007.

Durrieu, Roberto. *Rethinking Money Laundering & Financing of Terrorism in International Law: Towards a New Global Legal Order*. Leiden: Martinus Nijhoff Publishers, 2013.

European Union Agency for Law Enforcement Cooperation (Europol), Financial Intelligence Group. *From Suspicion to Action: Converting Financial Intelligence into Greater Operational Impact*. Luxembourg: Publications Office of the European Union, 2017.

<https://www.europol.europa.eu/publications-documents/suspicion-to-action-converting-financial-intelligence-greater-operational-impact>.

Financial Action Task Force (FATF). *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations*. Paris, FATF, 2012 – 2020, updated October 2020. www.fatf-gafi.org/recommendations.html.

Note: In line with the appearance of title pages of most FATF documents, and its citing format, “Financial Action Task Force” is henceforth abbreviated to “FATF”. However, the FATF’s citing format is adapted to the 2017 version of the Chicago Manual of Style.

Historical versions of the FATF’s *International Standards* (only item number 4 is still accessible online as at January 2021):

1. FATF. *The Forty Recommendations of the Financial Action Task Force on Money Laundering*. Paris: FATF, **1990**.
2. FATF. *The Forty Recommendations*. Paris: FATF, **1996**. (The document is undated, but a footnote at the beginning of the section entitled “Introduction”, and two footnotes in the section entitled “Interpretative Notes”, indicate that amendments up to 02 July 1999 were included.)
3. FATF. *The Forty Recommendations*. Paris: FATF, **20 June 2003**.

4. FATF. *FATF 40 Recommendations*. Paris: FATF, **October 2003**, incorporating all subsequent amendments until **October 2004**. <http://www.fatf-gafi.org/publications>, still accessible in mid January 2021.

FATF. *Methodology for Assessing Compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems*. Paris: FATF, updated October 2019.

<http://www.fatf-gafi.org/publications/mutualevaluations/documents/fatf-methodology.html>,

FATF. *Guidance on the Risk-Based Approach to Combating Money Laundering and Terrorist Financing: High Level Principles and Procedures*. Paris: FATF/OECD, June 2007.

<http://www.fatf->

[gafi.org/documents/riskbasedapproach/?hf=10&b=0&s=desc\(fatf_releasedate\)](http://www.fatf-gafi.org/documents/riskbasedapproach/?hf=10&b=0&s=desc(fatf_releasedate)).

Financial Intelligence Centre. *Guidance Note 7: On the Implementation of Various Aspects of the Financial Intelligence Centre Act, 2001 (Act 38 of 2001)*. In collaboration with the National Treasury, South African Reserve Bank and Financial Services Board. N.p.:

Financial Intelligence Centre, Department National Treasury Republic of South Africa, South African Reserve Bank, Financial Services Board, 02 October 2017.

<https://www.fic.gov.za/Compliance/Pages/Guidance-Notes.aspx>.

Financial Intelligence Centre Act, 2001, Act No. 38 of 2001.

In the Government Gazette of the Republic of South Africa, No. 22886, 3 December 2001.

<https://www.gov.za/documents/financial-intelligence-centre-act>.

Financial Intelligence Centre Amendment Act, 2008, Act No. 11 of 2008.

In the Government Gazette of the Republic of South Africa, No. 31365, 27 August 2008.

<https://www.gov.za/documents/financial-intelligence-centre-amendment-act>.

Financial Intelligence Centre Amendment Act, 2017, Act No. 1 of 2017.

In the Government Gazette of the Republic of South Africa, No. 40821, 02 May 2017.

<https://www.gov.za/documents/financial-intelligence-centre-amendment-act-1-2017-english-afrikaans-2-may-2017-0000>.

Flores, Fernando L. and Robert C. Solomon. *Business & Professional Ethics Journal* 16, no. 1/3, Trust and Business: Barriers and Bridges (Spring-Summer-Fall 1997): 47-76.

<https://www.jstor.org/stable/27801025>.

Frede, Dorothea. "The Historic Decline of Virtue Ethics." In *The Cambridge Companion to Virtue Ethics*, edited by Daniel C. Russell, 124 – 148. Cambridge: Cambridge University Press, 2013.

Fukuyama, Francis. *Trust: The Social Virtues and the Creation of Prosperity*. First Free Press Paperback edition. New York: Simon & Schuster, 1996.

Gambetta, Diego. ed. *Trust: Making and Breaking Cooperative Relations*. Oxford: Basil Blackwell, 1988.

Gambetta, Diego. "Can We Trust Trust?" In *Trust: Making and Breaking Cooperative Relations*, edited by Diego Gambetta, 213 – 237. Oxford: Basil Blackwell, 1988.

Geiger, Hans, and Oliver Wuensch. "The Fight against Money Laundering: An Economic Analysis of a Cost-Benefit Paradoxon." *Journal of Money Laundering Control* 10, no. 1 (2007): 91 – 105. <https://doi.org/10.1108/13685200710721881>.

Govier, Trudy. *Social Trust and Human Communities*. Montreal & Kingston: McGill-Queen's University Press, 1997.

Govier, Trudy. "An Epistemology of Trust." *International Journal of Moral and Social Studies* 8, no. 2 (Summer 1993): 155 – 174.

Govier, Trudy. "Distrust as a Practical Problem." *Journal of Social Philosophy* 23, no. 1 (March 1992): 52 – 63. <https://doi.org/10.1111/j.1467-9833.1992.tb00484.x>.

Govier, Trudy. "Trust, Distrust, and Feminist Theory." *Hypatia* 7, no. 1 (Winter 1992): 16 – 33. <https://www.jstor.org/stable/3810131>.

Grabosky, P. N. “Counterproductive Regulation”. *International Journal for the Sociology of Law* 23, no. 4 (December 1995): 347 – 369. [https://doi.org/10.1016/S0194-6595\(05\)80003-6](https://doi.org/10.1016/S0194-6595(05)80003-6).

Group of Seven (G7). *Economic Declaration* (of 15th summit from 14 – 16 July 1989 in Paris). Dated 16 July 1989, section entitled “Drug Issues”, paragraphs 52 and 53. <http://www.g8.utoronto.ca/summit/1989paris/communique/index.html#drugs>.

Haines, Fiona. *The Paradox of Regulation: What Regulation Can Achieve and What it Cannot*. Cheltenham: Edward Elgar Publishing, 2011.

Harvey, Jackie. “The Search for Crime Money – Debunking the Myth: Facts versus Imagery”. *Journal of Money Laundering Control* 12, no. 2 (2009): 97 – 100. <https://doi.org/10.1108/13685200910951875>.

Harvey, Jackie. “Just How Effective is Money Laundering Legislation?”. *Security Journal* 21, no. 3 (2008): 89 – 211. <https://doi.org/10.1057/palgrave.sj.8350054>.

Hawley, Katherine. “Trust, Distrust and Commitment.” *Noûs* Vol. 48, No. 1 (March 2014): 1 – 20. <https://www.jstor.org/stable/43828859>.

Hertzberg, Lars. “On the Attitude of Trust.” *Inquiry* 31, no. 3 (1988): 307-322. <https://doi.org/10.1080/00201748808602157>.

Hollis, Martin. “The Paradox of Trust.” Chap. 1 in *Trust within Reason*. Cambridge: Cambridge University Press, 1988.

Horsburgh, H. J. N. “The Ethics of Trust.” *The Philosophical Quarterly* (1950-) 10, no. 41 (October 1960): 343-354. <https://doi.org/10.2307/2216409>.

Hursthouse, Rosalind and Glen Pettigrove, "Virtue Ethics", *The Stanford Encyclopedia of Philosophy* (Winter 2018 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/win2018/entries/ethics-virtue/>.

(This entry is formatted as requested by The Stanford Encyclopedia of Philosophy.)

Hursthouse, Rosalind. "Are Virtues the Proper Starting Point for Morality?" In *Contemporary Debates in Moral Theory*, edited by James Dreier, 99 – 112. New Jersey: John Wiley & Sons, 2006.

Hursthouse, Rosalind. *On Virtue Ethics*. Oxford: Oxford University Press, 1999.

Itzikowitz, Angela. "South Africa." In *International Guide to Money Laundering Law and Practice*, 4th ed., edited by Arun Srivastava, Mark Simpson and Nina Moffat, 1179 - 1200. Haywards Heath: Bloomsbury Professional, 2013.

Johnson, Miles. "How the Mafia infiltrated Italy's hospitals and laundered the profits globally." *Financial Times*, July 9, 2020.

<https://www.ft.com/content/8850581c-176e-4c5c-8b38-debb26b35c14>.

Jones, Karen. "Trust as an Affective Attitude." *Ethics* 107, no. 1 (1996): 4 – 25.

<https://www.jstor.org/stable/2382241>.

Lebar, Mark. "Eudaimonism." In *The Oxford Handbook of Virtue*, edited by Nancy E. Snow, 470 – 487. New York: Oxford University Press, 2018.

Luhmann, Niklas. "Familiarity, Confidence, Trust: Problems and Alternatives." In *Trust: Making and Breaking Cooperative Relations*, edited by Diego Gambetta, 94 – 107. Oxford: Basil Blackwell, 1988.

Luhmann, Niklas. "Trust: A Mechanism for the Reduction of Social Complexity." Part One in *Trust and Power: Two Works by Niklas Luhmann*. With Introduction by Gianfranco Poggi. Translated for the English edition by Howard Davis, John Raffan and Kathryn Rooney. Edited by Tom Burns and Gianfranco Poggi. Chichester: John Wiley & Sons, 1979.

MacIntyre, Alasdair. *After Virtue*, 3rd ed. Notre Dame, Indiana: University of Notre Dame Press, 2007.

Maloy, J. S. "Two Concepts of Trust." *The Journal of Politics* 71, no. 2 (April 2009): 492 – 505. <https://doi.org/10.1017/s0022381609090410>.

McLeod, Carolyn, "Trust", *The Stanford Encyclopedia of Philosophy* (Fall 2020 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/fall2020/entries/trust/>.
(This entry is formatted as requested by The Internet Encyclopedia of Philosophy.)

McLeod, Carolyn, "Trust", *The Stanford Encyclopedia of Philosophy* (Fall 2015 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/fall2015/entries/trust/>.
(This entry is formatted as requested by The Internet Encyclopedia of Philosophy.)

Pol, Ronald F. "Anti-Money Laundering Effectiveness: Assessing Outcomes or Ticking Boxes?" *Journal of Money Laundering Control* 21, no. 2 (2018): 215-230.
<https://doi.org/10.1108/JMLC-07-2017-0029>.

Preston-Roedder, R. "Civic Trust." In *Philosophers' Imprint* 17, No. 4 (2017): 1 – 23.
<https://quod.lib.umich.edu/p/phimp/3521354.0017?rgn=full+text>.

Rachels, James and Stuart Rachels. "What is Morality?" Chap. 1 in *The Elements of Moral Philosophy*, 8th ed. New York: McGraw Hill, 2012.

Regulations in terms of the Financial Intelligence Centre Act, 2001:

- Government Notice No. R. 1595, in the Regulation Gazette No. 7541 (within the Government Gazette of the Republic of South Africa, No. 24176, 20 December 2002).
<https://www.gov.za/documents/acts> (search by date).
- Government Notice No. R. 456, in Regulation Gazette No. 8234 (within the Government Gazette of the Republic of South Africa, No. 27580, 20 May 2005).
<https://www.gov.za/documents/acts> (search by date).
- Government Notice No. R. 867, in Regulation Gazette No. 9386 (within the Government Gazette of the Republic of South Africa, No. 33596, 01 October 2010).
<https://www.gov.za/documents/acts> (search by date).
- Government Notice No. R. 1107, Regulation Gazette No. not provided (within the Government Gazette of the Republic of South Africa, No. 33781, 26 November 2010).
<https://www.gov.za/documents/acts> (search by date).

(Regulations continue on next page.)

- Government Notice No. R. 1062, Regulation Gazette No. 10765 (within the Government Gazette of the Republic of South Africa, No. 41154, 29 September 2017).

<https://www.gov.za/documents/acts> (search by date).

Reuter, Peter, and Edwin M. Truman. “How much Money is Laundered?” In *Combating Money Laundering and Terrorism Finance: Past and Current Challenges*, edited by Navin Beekarry, 460 – 477 (chapter 22). Cheltenham: Edward Elgar Publishing, 2013. Originally in: Reuter, Peter, and Edwin M. Truman. “How much Money is Laundered?” Chap. 2 in *Chasing Dirty Money: The Fight Against Money Laundering*. Washington DC: Peterson Institute for International Economics, 2004.

Simpson, Mark. “International Initiatives.” In *International Guide to Money Laundering Law and Practice*, 4th ed., edited by Arun Srivastava, Mark Simpson and Nina Moffat, 237 - 284. Haywards Heath: Bloomsbury Professional, 2013.

Stewart, Hamish. “The Right to be Presumed Innocent”. *Criminal Law and Philosophy* 8, no.2 (June 2014): 407–420. <https://doi.org/10.1007/s11572-013-9233-x>.

Thomas, Laurence. “Trust and Survival: Securing a Vision of the Good Society.” *Journal of Social Philosophy* 20, no. 1-2 (March 1989): 34 – 41.

<https://doi.org/10.1111/j.1467-9833.1989.tb00005.x>.

United Nations Office on Drugs and Crime. *United Nations Convention against Transnational Organised Crime and the Protocols Thereto*, Foreword, pages iii – iv, and Preamble to Articles, pages 1 – 4 (pdf format of full text of the convention and its protocols). New York: United Nations, 2004.

<https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html>.

United Nations General Assembly. *International Convention for the Suppression of the Financing of Terrorism, A/RES/54/109, 25 February 2000 (adopted at the 76th plenary meeting, December 9, 1999)*. Preamble to Articles, pages 2 – 3 (pdf format).

<https://digitallibrary.un.org/record/404084?ln=en#record-files-collapse-header>.

United Nations Office on Drugs and Crime. *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988*, in *The International Drug Control Conventions*, Part Three, Preamble to Articles, pages 123 – 124 (e-book format). New York: United Nations, 2003.

<https://www.unodc.org/unodc/en/commissions/CND/conventions.html>.

Uslaner, Eric M. *The Moral Foundations of Trust*, Kindle edition. Cambridge: Cambridge University Press, 2002.

Wacks, Raymond. *Understanding Jurisprudence: An Introduction to Legal Theory*. 5th ed. Oxford: Oxford University Press, 2017.