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Money Finds a Way: Increasing AML Regulation Garners Diminishing Returns and Increases Demand for Dark Financing

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**Money Finds a Way:
Increasing AML Regulation
Garners Diminishing Returns and
Increases Demand for Dark
Financing**

ABSTRACT

The cost of anti-money laundering regulations has grown to many billions of dollars, and countries worldwide are increasingly complying with international standards for financial regulation. Yet, the interception rate for criminal proceeds remains under 1 percent. Banks in the United States, United Kingdom, and France continue to engage in unsafe practices, undeterred by legal penalties. Recent US legislation will narrow, but not eliminate, regulatory gaps. The cost of regulation has become so great that banks accept litigation as a cost of doing business or reduce legal exposure by ending relationships in areas of perceived high risk for money laundering; this excludes developing economies from the global financial system, reducing stability. Anti-money laundering should focus on transparency instead of punishment—particularly for clients that need more, not less, access to the financial system—and redirect funds to investment to stop predicate crimes rather than focus inefficiently on laundering.

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I. INTRODUCTION

“It’s the critics who are the true optimists.”—Jaron Lanier¹

For decades now, the international community has steadily increased its focus on fighting money laundering. However, global anti-money laundering (AML) proponents have lost sight of AML’s purpose. Money laundering is part and parcel to modern, large-scale crime, but it is a symptom, not a cause. So long as major predicate crimes (drug and human trafficking, for example) continue, money laundering will persist, flow through new channels, and create new service markets to exploit the global financial system. While domestic and transnational regulations and governance have an undeniable role to play, that role has become at once hazy and bloated, pushing the costs of AML regulation to regulators and regulated entities beyond present benefits and decreasing the deterrence value of AML enforcement.²

Financial institutions are already subject to many regulations and mechanisms for liability.³ They are also often directly related to

1. THE SOCIAL DILEMMA (Exposure Labs 2020).

2. See Mohammed Ahmad Naheem, *The Agency Dilemma in Anti-Money Laundering Regulation*, 23 J. MONEY LAUNDERING CONTROL 26, 28 (2020) [hereinafter *Agency Dilemma*] (asserting that once the costs of regulation outweigh the penalties incurred by non-compliance, then complying with the regulation would no longer be a priority).

3. At a national level, the FDIC, US Treasury, and State Department all take an active interest in financial institutions’ dealings. Abroad, the UN, the Financial Action Task Force, and the UK’s Financial Conduct Authority, to name just a few, all aim in part to curb money laundering through regulation and monitoring. See Anja P. Jakobi, *Governing Illicit Finance in Transnational Security Spaces: The FATF and Anti-Money Laundering*, 69 CRIME L. SOC. CHANGE 173, 175 (2018); see also Euphemia Godspower-Akpomiemie & Kalu Ojah, *Money Laundering, Tax Havens, Transparency and Board of Directors of Banks* 9 (MPRA, Working Paper No. 89550, 2018), <https://core.ac.uk/download/pdf/211629012.pdf> [https://perma.cc/KS3K-JDWF] (archived Mar. 11, 2022); see *Money Laundering and Terrorist Financing*, FCA (Nov. 15, 2021), <https://www.fca.org.uk/firms/financial-crime/money-laundering-terrorist-financing> [https://perma.cc/X2CH-5J59] (archived Mar. 11, 2022).

harmful behavior and criminal activity, financing known bad actors or colluding with corrupt officials, knowingly or unknowingly.⁴ Like supply chain links, financial institutions often escape commensurate liability, indicating that the global regulatory environment for financial institutions is an insufficient deterrent,⁵ and victims' attempts to find justice are often futile.⁶ Consumer demands do not have the same impact on banks as on retailers because, to a large extent, customers are at the mercy of banks, not the other way around.

This Note explores current domestic and transnational efforts to combat money laundering. Part II will discuss the history of money laundering and AML legislation and how the purpose of financial reporting regulations has drifted over the last half century. Part III discusses modern advances in AML and the result of this expensive regime. Part IV will discuss possible solutions and the current debate amongst scholars and policy experts over the direction that AML regulation can and should go to advance global law enforcement and economic goals while meeting modern AML challenges. This Part will also propose that AML funds be reinvested in development. Part V will conclude.

II. BACKGROUND

Money laundering is the mechanism of routing criminal earnings to disguise their illegitimate origin.⁷ Where a sudden, unaccounted-for influx of revenue may raise suspicion, money laundering gives illegal revenue the appearance of legal income. Laundered money thus becomes viable tender for all financial activities without raising

4. See, e.g., Reuters Staff, *HSBC Sued by Families of Victims in Drug Money Laundering Case*, REUTERS (Feb. 9, 2016), <https://www.reuters.com/article/us-hsbc-lawsuit-mexico/hsbc-sued-by-families-of-victims-in-drug-money-laundering-case-idUSKCN0VJ085> [<https://perma.cc/URD3-CMSQ>] (archived Jan. 8, 2022) (families of victims of Mexican drug cartels that used HSBC's relaxed reporting procedures to finance criminal activity attempted to bring a lawsuit in the United States which was ultimately dismissed in the Eastern District of New York in *Zapata v. HSBC Holdings PLC*, 414 F. Supp 3d 342 (2019)).

5. See, e.g., Adam Klasfeld, *Court Hides Monitor's Hand in HSBC Drug-Money Deal*, COURTHOUSE NEWS SERV. (July 12, 2017), <https://www.courthousenews.com/court-hides-monitors-hand-hsbc-drug-money-deal/> [<https://perma.cc/97KT-E6JM>] (archived Apr. 17, 2022) (discussing the HSBC settlement in a U.S. civil case and the banks use of a deferred prosecution agreement, a device formulated for individuals but now commonly used by financial institutions to escape criminal prosecution); Suzanne McGee, Opinion, *'Too Big to Jail': HSBC's Fine Didn't Fit the Crime*, THE FISCAL TIMES (Dec. 13, 2012), <https://www.thefiscaltimes.com/Columns/2012/12/13/Too-Big-to-Jail-HSBCs-Fine-Didnt-Fit-the-Crime> [<https://perma.cc/8HNG-P3U4>] (archived Jan. 8, 2022).

6. See Reuters Staff, *supra* note 4.

7. See Euphemia Godspower-Akpomemie & Kalu Ojah, *Money Laundering, Tax Havens and Transparency: Any Role for the Board of Directors of Banks?*, in *ENHANCING BOARD EFFECTIVENESS* (Franklin N. Ngwu, Onyeka Osuji, Chris Ogbechie, & David Williamson eds., 2019) (citing law enforcement estimates).

further suspicion.⁸ In 2015, laundered money likely accounted for between 3.5 and 5.7 percent of the global gross domestic product.⁹ Though any criminal organization is likely to utilize laundering, drug trafficking, terrorism, and human trafficking are most commonly associated with it; these crimes are also the primary target of most anti-money-laundering/countering-the-financing-of-terrorism-regimes, commonly now referred to as AML regimes or “AML/CFT.”¹⁰ According to Transnational Institute’s Tom Blickman, AML/CFT regimes have five goals:

- (1) removing profit out of crime through confiscation; (2) detecting crime by following the money trail; (3) targeting third-party or professional launderers, who through their services allow criminals to retain the proceeds of crime; (4) targeting the upper echelons of the criminal organization whose only ‘visible’ connection to the crime is the money trail; and (5) protecting the integrity of the financial system against abuse by criminals.¹¹

The international Financial Action Task Force (FATF) has listed corruption as the primary obstacle to effective AML regimes in certain countries.¹² In most areas, however, the obstacles are more difficult to name. The perceived strong connection between street criminals and money laundering is not fully accurate and belies the wealth, power, and sophistication of many beneficiaries of money laundering, which often include powerful government officials including judges, ministers, and, in the case of Nigeria, even presidents.¹³ This conception feeds into risk assessment burdens that disproportionately impact low-income areas, resulting in devastating financial exclusion.¹⁴ Conversely, it allows high-income areas to benefit from a presumption of legitimacy of which they are undeserving.

8. See *id.*

9. Mohammed Ahmad Naheem, *Trade Based Money Laundering: Towards a Working Definition for the Banking Sector*, 18 J. MONEY LAUNDERING CONTROL 513, 515 (2015).

10. *The Financial Action Task Force*, U.S. TREASURY FIN. CRIMES ENF’T NETWORK, <https://www.fincen.gov/resources/international/financial-action-task-force> (last visited Jan 8, 2021) [<https://perma.cc/3YQH-7RKS>] (archived Jan. 8, 2022).

11. Tom Blickman, *Countering Illicit and Unregulated Money Flows: Money Laundering, Tax Evasion and Financial Regulation*, in TRANSNATIONAL INSTITUTE BRIEFING SERIES: CRIME AND GLOBALIZATION 7 (Dec. 2009) (citing Ian Carrington & Heba Shams, Speech Delivered at the Plenary Meeting of the FATF in Paris: Money Laundering: the Importance of International Countermeasures (Feb. 10, 1998)).

12. Anna Markovska & Nya Adams, *Political Corruption and Money Laundering: Lessons from Nigeria*, 18 J. MONEY LAUNDERING CONTROL 169, 170 (2015).

13. Norman Mugarura, *The Jeopardy of the Bank In Enforcement of Normative Anti-Money Laundering and Countering Financing of Terrorism Regimes*, 18 J. MONEY LAUNDERING CONTROL 352, 352–53 (2015).

14. See Jimmy Yicheng Huang, *Effectiveness of US Anti-Money Laundering Regulations and HSBC Case Study*, 18 J. MONEY LAUNDERING CONTROL 525, 525 (2015).

A. Obfuscation

Criminal operations obscure the true nature of ownership and products or piggy back off of real transactions to sneak through illicit financial flows (IFFs) with numerous other legitimate transactions.¹⁵ Tracking IFFs is paramount to AML and requires identifying the true recipient of funds, also known as the beneficial owner, and differentiating transactions for legitimate goods and services from illegal transfers.

1. Ownership

Determining beneficial ownership is critical to combatting money laundering. Shell companies mask the beneficial owner of the company and therefore the true recipient of the proceeds.¹⁶ This mechanism is more difficult and sophisticated than trade-based money laundering and poses a serious problem for AML regulation and international law enforcement.¹⁷

2. Transactions

Trade-based money laundering (TBML) mimics legitimate commercial activity and, in some cases, coincides with legitimate transactions.¹⁸ TBML became a common money-laundering mechanism in the last decade, and works by falsifying commercial information to disguise the true nature or extent of a transaction.¹⁹ This may include misrepresenting pricing or quantity, misidentifying goods and services, invoicing for shipments never sent, or charging consultancy fees that actually represent an illegal transfer.²⁰ A cursory customer due diligence (CDD) check may not uncover underlying fraud.²¹ Enforcement officers must use enhanced due diligence (EDD) to uncover false transactions as well as forged, altered, or illegally obtained identification documentation.

15. See Naheem, *supra* note 9, at 516.

16. Graham Stack, *Shell Companies, Latvian-type Correspondent Banking, Money Laundering, and Illicit Financial Flows from Russia and the Former Soviet Union*, 18 J. MONEY LAUNDERING CONTROL 496, 499–504 (2015).

17. Naheem, *supra* note 9, at 516. Money laundering is but one concern for the use of false identification. *Id.*

18. *Id.*

19. *Id.* at 514.

20. *Id.* at 515–16.

21. See *id.* at 516–17.

3. Other Laundering

Another sophisticated method of laundering called “cuckoo smurfing” allows launderers to hijack legitimate transactions by substituting their “dirty money” for a third party’s clean money, of which they then take ownership.²² Thus, the dirty funds move via a legitimate transaction, shielding them from scrutiny.

“Straw men” are another common method for beneficial owners to avoid identification. As a sort of human shell company, a straw man will have no overt connection to a criminal organization and thus can pass a CDD check if they are not already established banking customers.²³ The list of laundering mechanisms goes on and is beyond the scope of this Note.

B. *Why it Matters: Transacting in Goods, Services, and Misery*

Richard Hobbs introduced the term “glocalization” to describe how the model of AML law exemplifies the intensely local nature of the effects of transnational crime and money laundering.²⁴ Money flowing through the illegal narcotics market fuels atrocities in communities where drug cartels operate, beyond the detrimental health effects of drugs on users. Funded inadvertently by recreational drug users in the United States and elsewhere, and facilitated by, at best, lackadaisical banks like HSBC, cartels maintain their dominance with bribes, violence, and torture.²⁵ In the early 2000s, over seventeen thousand people were killed in a four-year span in Mexico as cartels competed for a larger piece of the \$25–\$40 billion illicit drug industry.²⁶

C. *International History of AML*

Just as no one mechanism describes all money laundering, no one legal mechanism entirely captures illicit financial flows. AML began as a primarily domestic issue, and many nations have their own domestic FATF-type institutions. The United States, for instance, monitors money-laundering activity through the Financial Crimes Enforcement Network (FinCEN) in the Department of the Treasury.²⁷ Similarly,

22. *Id.* at 518.

23. *Id.* at 517.

24. Shannu Narayan, *Anti-Money Laundering Law in India: A ‘Glocalization’ Model*, 40 STATUTE L. REV. 3, 6 (2019).

25. See, e.g., Jason Lange, *From Spas to Banks, Mexico Economy Rides on Drugs*, REUTERS (Jan. 22, 2010), <https://www.reuters.com/article/us-drugs-mexico-economy/from-spas-to-banks-mexico-economy-rides-on-drugs-idUSTRE60LoX120100122> (last visited Jan. 8, 2021) [<https://perma.cc/HEW8-W99R>] (archived Jan. 8, 2022).

26. *Id.*

27. U.S. TREASURY FIN. CRIMES ENF’T NETWORK, *supra* note 10.

France has TracFin, and the United Kingdom has the Financial Conduct Authority (FCA), to name a few others.²⁸

The Banking Secrecy Act of 1970 (BSA) was an early form of US AML legislation aiming to trace illegal streams of money, rather than end them outright.²⁹ Then, after years of financial institutions ignoring the BSA's reporting requirements, the Reagan administration showed renewed interest in a "follow the money" approach as it intensified its focus on the rampant illicit drug trade of the 1980s.³⁰ Congress passed the resulting Money Laundering Control Act in 1986.³¹

The United Nations (UN) first included provisions against transnational money laundering in the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.³² As the international community observed the rise of powerful cartels in Colombia, Peru, and Bolivia, the G7 worried the prevalence of drug money threatened the collapse of national financial and judicial systems in South America.³³ Money laundering quickly became a high priority for international institutions.³⁴ The UN Office on Drugs and Crime (UNODC) also pursues money laundering, partnering with the International Monetary Fund (IMF), World Bank, and international law enforcement agencies.³⁵

Since its founding at the G7's Paris summit in 1989, the FATF sets AML policy and global standards for money laundering control.³⁶ Membership has expanded to thirty-two countries and territories and two regional organizations.³⁷ Rather than create international law, the

28. See *Money Laundering and Terrorist Financing*, FIN. CONDUCT AUTH., <https://www.fca.org.uk/firms/financial-crime/money-laundering-terrorist-financing> (last visited Jan. 8, 2021) [<https://perma.cc/S2U3-DXSU>] (archived Jan. 8, 2022); *TracFin*, MINISTÈRE DE L'ÉCONOMIE DES FINANCES ET DE LA RELANCE, <https://www.economie.gouv.fr/tracfin> (last visited Feb. 2, 2022) [<https://perma.cc/UF8A-ABH7>] (archived Feb. 18, 2022).

29. Blickman, *supra* note 11, at 4. The BSA was also known as the Currency and Foreign Transactions Reporting Act, enacted during President Nixon's "tough on crime" movement. *Id.*

30. *Id.*

31. *Id.* at 5.

32. INT'L DRUG POL'Y CONSORTIUM, *TAKING STOCK: A DECADE OF DRUG POLICY – A CIVIL SOCIETY SHADOW REPORT* 75 (Oct. 21, 2018) [hereinafter IDPC]. The Convention aptly uses the term "concealment" rather than "money laundering." United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *Official Records*, 75, E.94.XI.5 (1988), https://www.unodc.org/documents/commissions/CND/Int_Drug_Control_Conventions/Commentaries-OfficialRecords/1988Convention/1988_OFFICIAL_RECORDS_Volume_I_en.pdf (last visited Jan. 9, 2021) [<https://perma.cc/4W6F-2X2P>] (archived Jan. 9, 2022).

33. Blickman, *supra* note 11, at 4.

34. See Blickman, *supra* note 11, at 5 (the UN set up FATF in response to the rise of money laundering in drug trafficking).

35. IDPC, *supra* note 32, at 76.

36. *Id.* at 75–76.

37. See United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *supra* note 32, at 180; see also

FATF seeks to harmonize domestic legislative treatment of money laundering and make international AML more effective.

Additionally, eight FATF-style regional bodies (FSRBs) have developed and often include FATF members.³⁸ FSRBs have similar functions to the FATF: they promulgate a set of measures in support of an individual country's criminal justice and regulatory systems; set forth the functions and mechanisms for authorities and inter-agency cooperation; establish preventive measures for financial institutions and businesses, including measures to ensure transparency on ownership; and lay the groundwork for international cooperation.³⁹

The United States' dedication to AML took off after the investigation into the terrorist attacks of September 11, 2001, revealed that money laundering tactics were a key means of financing al-Qaeda and other international terrorist organizations and extremist groups.⁴⁰ Drug trafficking continues to remain a focus of AML efforts, but counterterrorism has become a central aim of AML policy.

The FATF adopted the "International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation" in 2012 and the "FATF Methodology for assessing compliance with the FATF Recommendations and the effectiveness of AML/CFT systems" in 2013.⁴¹ Currently, its "40 + 9" recommendations set the gold standard for AML/CFT regulation on AML and countering the financing of terrorism (CFT).⁴² Recommendations include fundamentals such as criminalizing money laundering per the Vienna and Palermo Conventions⁴³ and providing "the widest possible range of mutual legal assistance" to pursue money laundering.⁴⁴

Find a Country, FATF, <https://www.fatf-gafi.org/countries/> (last visited Jan. 9, 2021) [<https://perma.cc/C8JL-MVYF>] (archived Jan. 9, 2022).

38. *The Financial Action Task Force*, *supra* note 10. FSRBs include, for example, the Caribbean Financial Action Task Force, the Eurasian Group, and the Middle East and North Africa Financial Action Task Force. *Id.*

39. *Id.*

40. *See, e.g.*, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (Title III, § 302 finding that money laundering is critical to the "financing of global terrorism").

41. *See, e.g.*, *Mutual Evaluation*, FATF <https://www.fatf-gafi.org/publications/mutualevaluations/documents/fatf-methodology.html> (last visited Jan. 9, 2021) [<https://perma.cc/X3HC-5DQG>] (archived Jan. 9, 2022) (AML and CFT stand for anti-money laundering and Countering the Financing of Terrorism, respectively); *see also Money Laundering and Terror Financing Issues in the Middle East: Hearing Before the Comm. on Banking, Housing, and Urban Affs.*, 109th Cong. (2005) (statement of Richard C. Shelby, Chairman).

42. Blickman, *supra* note 11, at 6.

43. *See* United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances art. 3(1)(b)&(c), Dec. 20, 1988, 1988 U.S.T. LEXIS 194; United Nations Convention Against Transnational Organized Crime and the Protocols Thereto, art. 6(1), Nov. 15, 2000, 2000 U.S.T. LEXIS 210.

44. FINANCIAL ACTION TASK FORCE, INTERNATIONAL STANDARDS ON COMBATING MONEY LAUNDERING AND THE FINANCING OF TERRORISM & PROLIFERATION 12, 28 (2021).

Drug trafficking and terrorism financing are now just two of the FATF's many focuses, which reflects, in part, the fact that only about a quarter of criminal proceeds covered by money laundering statutes are attributed to drug distribution.⁴⁵

The current transnational AML regime requires FATF members to locally implement criminal and banking laws consistent with AML principles. In India, for example, the Prevention of Money Laundering Act of 2002 (PMLA) was passed to remain in compliance with FATF obligations and allows for the confiscation of property associated with money laundering.⁴⁶ This legislation, though similar to statutes around the world, was a novel development for a country where money laundering has occurred "since time immemorial" and where every day civilians acutely feel the local effects of extensive money laundering activity in India.⁴⁷

1. Identifying Beneficial Ownership

The Obama administration published the Customer Due Diligence rule in 2016. At that point it was clear that many shell companies in the United States were linked to former Soviet Union countries (FSUs).⁴⁸ FSUs used shell companies both to launder money to hide criminal activity and to reverse-launder money to remove income from official channels to avoid taxes and make illegal, off-book transactions.⁴⁹ FinCEN finally enacted this rule in 2018, requiring banks to identify and verify the identity of customers and beneficial owners, and track risk profiles and suspicious activity.⁵⁰

On June 19, 2018, the European Union (EU) issued its fifth AML directive, prescribing the creation of registries of beneficial owners for corporations, trusts, and other legal-financial relationships.⁵¹ The

45. IDPC, *supra* note 32, at 8.

46. Shannu Narayan, *Anti-Money Laundering Law in India: A 'Glocalization' Model*, 40 STATUTE L. REV. 3, 6 (2019).

47. *Id.*

48. See Yeganeh Torbati & Elizabeth Dilts, *U.S. Issues Rule Requiring Banks to Identify Shell Company Owners*, REUTERS (May 5, 2016), <https://www.reuters.com/article/us-usa-regulations-finance/u-s-issues-rule-requiring-banks-to-identify-shell-company-owners-idUSKCN0XX02O> [<https://perma.cc/VGD6-YQHM>] (archived Jan. 8, 2022).

49. See Yuliya G. Zabyelina, *Reverse Money Laundering in Russia: Clean Cash for Dirty Ends*, 18 J. MONEY LAUNDERING CONTROL 202, 203 (2015).

50. Neil Weinberg, *Hedge Funds Risk Biden-Era End to Money-Laundering Loophole*, BLOOMBERG L. NEWS (Feb. 5, 2021), <https://www.bloomberg.com/news/articles/2021-02-05/hedge-funds-risk-biden-era-closing-of-money-laundering-loophole> [<https://perma.cc/T3WG-8929>] (archived Jan. 8, 2022).

51. *Anti-Money Laundering and Counter Terrorist Financing*, EUR. COMM'N, https://ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-supervision-and-risk-management/anti-money-laundering-and-counter-terrorist-financing_en (last updated July 20, 2021) [<https://perma.cc/R2B5-WD4M>] (archived Jan. 8, 2022).

European Commission adopted a report on the success of the directive two years later, which reported progress in some countries but a failure in others to apply the directive to legal arrangements that function as trusts under other names.⁵² The difficulty of incorporating the widely varying financial instruments and obligations throughout the EU into the AML regime is illustrative of the uphill battle that international AML faces. Tracing beneficial ownership is now a top priority for curbing money laundering and international crime.⁵³

III. ANALYSIS

A. FATF Compliance

In 2013, the FATF published a methodology for evaluating AML regulatory systems that is used by the FATF, FSRBs, the IMF, and the World Bank to conduct mutual evaluation reports (MERs) on FATF members to grade them on their AML compliance.⁵⁴ The methodology defines eleven immediate outcomes against which to evaluate a country's AML effectiveness, such as whether supervisors adequately monitor financial institutions' compliance with AML/CFT regulations, and whether proceeds and instrumentalities of money laundering crimes are confiscated.⁵⁵ The methodology also provides factors to aid assessors in evaluating each immediate outcome.⁵⁶ A round of grading all members takes seven to eight years to complete.⁵⁷ Currently the fourth round is under way.⁵⁸ A MER for a single country can take over a year to complete, during which assessors meet with the country's government and law enforcement representatives, private sector representatives, and non-profit civil servants.⁵⁹

52. *Id.*; *Report From the Commission to the European Parliament and the Council Assessing Whether Member States have Duly Identified and Made Subject to the Obligations of Directive (EU) 2015/849 All Trusts and Similar Legal Arrangements Governed Under their Laws*, at 2 (Sept. 16, 2020), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0560> [https://perma.cc/72UC-UG7S] (archived Mar. 11, 2022).

53. See Umar Bello et al., *Strategies for Preventing Illicit Financial Flows in Developing Countries*, 23 J. MONEY LAUNDERING CONTROL 601, 605 (2020). For FATF's proposed amendments to target beneficial ownership, see FIN. ACTION TASK FORCE, REVISIONS TO RECOMMENDATION 24 – WHITE PAPER FOR PUBLIC CONSULTATION 1–3 (2020).

54. FIN. ACTION TASK FORCE, *METHODOLOGY FOR ASSESSING TECHNICAL COMPLIANCE WITH THE FATF RECOMMENDATIONS AND THE EFFECTIVENESS OF AML/CFT SYSTEMS* 5 (2020).

55. *Id.* at 16.

56. *Id.* at 19.

57. See *Mutual Evaluations FAQ*, FIN. ACTION TASK FORCE, <https://www.fatf-gafi.org/faq/mutualevaluations/> (last visited Dec. 15, 2021) [https://perma.cc/7KGW-J37M] (archived Mar. 13, 2021).

58. See *id.*

59. See *id.*

The most recently published MER data from March 2021 shows that, of those countries with complete fourth-round evaluations, the United States, Spain, and Israel are in the lead for “most effective” AML regulations.⁶⁰ Botswana earned the title of “most improved” with thirty-four upgrades in technical compliance between 2017 and 2021, yet it still received a “low level of effectiveness” in all but two of the eleven immediate outcome areas, indicating a need for “fundamental improvements.”⁶¹ Honduras and Israel are the only two countries outside the United States with a “high level of effectiveness” in confiscating illegal funding.⁶²

The most encouraging resultant statistic is that many upgrades and very few downgrades in compliance were found in the fourth round, indicating that overall, countries are making real advances in AML regulation.⁶³ However, as discussed below, there is little reason for celebration.

B. *AML Effect on International Crime*

Has the ever-improving AML regime curtailed illicit financing? According to data and anecdotal evidence, it seems not.⁶⁴ The quantity of illegal assets seized has grown, but the pool of criminal assets and the market to circumvent AML regulations has also grown in turn.⁶⁵ The focus in recent decades on drug trafficking enforcement brought with it many unintended consequences on a global and domestic scale. Large portions of domestic and international resources shifted away from public health and social intervention toward drug enforcement, while the drug trade shifted to new products and manufacturing areas and continued to largely elude law enforcement.⁶⁶

Despite about \$20 billion spent in the EU over the last decade promulgating a complex banking compliance regime, a mere 1 percent of laundered criminal proceeds are successfully seized annually.⁶⁷ Similarly, in West Africa, the number of court rulings addressing money laundering has been unexpectedly low despite the known high

60. FIN. ACTION TASK FORCE, 4TH ROUND RATINGS (2021).

61. *See id.*

62. *See id.* Technical compliance and effectiveness are measured separately for each company. MEs are not complete for all FATF members, so the data set for the fourth round remains incomplete.

63. *See id.*

64. *See, e.g., Global Banks Defy U.S. Crackdowns By Serving Oligarchs, Criminals And Terrorists*, INT’L CONSORTIUM INV. JOURNALISTS (Sept. 20, 2020) [hereinafter ICIJ], <https://www.icij.org/investigations/fincen-files/global-banks-defy-u-s-crackdowns-by-serving-oligarchs-criminals-and-terrorists/> [https://perma.cc/KUF5-ADAW] (archived Sept. 12, 2021).

65. *Id.*

66. *See* IDPC, *supra* note 32, at 75.

67. *Id.* at 33.

rate of drug trafficking and financing.⁶⁸ In the United Kingdom, an international finance powerhouse throughout recent decades, interdiction rates are an estimated 0.1 percent despite its application of AML/CFN controls not only to banks but also facilitators of financial transactions.⁶⁹ In New Zealand, of criminal asset forfeitures, 80 percent resulted from traditional policing methods, with only the remaining 20 percent attributed to financial institution reporting within the AML regime.⁷⁰ All in all, these results represent a dismal outlook for the efficacy of AML efforts. While regulatory costs increase and reduce access to financing in developing areas, “the proportion of criminal earnings seized by authorities does not even remotely approach tax rates commonly applied to legitimate businesses.”⁷¹ Though interdiction is not a perfect representation of AML-related crime prevention, nor is it highly accurate, the consistently low interdiction rates across the world are unencouraging.⁷²

The impotence of the current global AML regime may then be described as the confluence of fundamentally ineffective policy with nations and international institutions unwilling to pursue fully prosecution of violations of the AML regime. Why then expend so many resources, international and domestic, to establish and run a regulatory system when an estimated minimum of 98 percent of global criminal proceeds remains in the hands of perpetrators?⁷³ Even the United States, with top marks in MERs, seems not to make much progress.

1. FinCEN Files

The “FinCEN files,” a set of documents leaked from FinCEN to BuzzFeed and the International Consortium of Investigative Journalists in 2020, shows that HSBC, J.P. Morgan, Standard Chartered Bank, Deutsche Bank, and Bank of New York Mellon, all of whom previously paid “steep fines” in the United States for similar behavior,⁷⁴ continued business with bad actors between 1999 and 2017.⁷⁵ The files document transactions in the trillions of dollars, and show how common—and legally ambiguous—it is to deal in IFFs as

68. *Id.*

69. See Robert F. Pol, *Uncomfortable Truths? ML=BS and AML=BS2*, 25 J. FIN. CRIME 294, 299–300 (2018).

70. See *id.* at 301–02.

71. *Id.* at 296.

72. See *id.* at 296–97.

73. See *id.*

74. *Id.*

75. *Id.*

long as some modicum of report discloses the transaction to authorities.⁷⁶

Though international institutions claim a correlation between AML compliance and GDP, even the most well-funded AML regimes have not kept domestic banking operations from running afoul of AML laws and handling IFFs. Criminal organizations, banks, and even governments have not reformed in response to the global AML regime, and perhaps banks do not have the necessary incentives to play the role initially imagined by the FATF when creating the AML regimes.

2. Inadequate Incentive/Deterrence Structures

Prior to 2005, AML regulations were functionally more suggestive than mandatory, but since then civil and criminal litigation began in earnest for AML breaches.⁷⁷ However, financial giants view regulatory penalties as a cost of doing business, not a true deterrent. Large-scale fines hardly make a dent in their profit margins, and the threat of criminal litigation appears to diminish with each deferred prosecution agreement. Watchdogs within J.P. Morgan filed suspicious activity reports (SARs) in accordance with CDD requirements implicating \$514 billion, and Deutsche Bank reported \$1.3 trillion in suspicious activity according to the FinCEN files leak alone.⁷⁸ These are but two examples of suspicious financial flows that, though not dispositively criminal in nature, may indicate that banks do not hesitate to deal in, at best, gray areas. Meanwhile, the US government knows of substantial evidence of wrongdoing and harm, in direct violation of domestic and international law, yet often makes a calculated decision not to prosecute for fear of a US or global economic collapse.

3. Too Big to Fail: HSBC Case Study

Between 2005 and 2010, the Mexican Sinaloa drug cartel and Colombian Norte del Valle drug cartel transferred \$881 million through the global financial giant HSBC's Mexico branch,⁷⁹ known locally as "the place to launder money."⁸⁰ US court documents describe

76. See *Fincen Files: All You Need To Know About The Documents Leak*, BBC NEWS (Sept. 21, 2020), <https://www.bbc.com/news/uk-54226107> [<https://perma.cc/3MRF-VKK3>] (archived Sept. 12, 2021).

77. See Stack, *supra* note 16, at 8.

78. See ICIJ, *supra* note 64. The FinCEN files likely represent less than 0.02% of the SARs reported to FinCEN. *Id.*

79. See Robert Mazur, Opinion, *How to Halt the Terrorist Money Train*, N.Y. TIMES (Jan. 2, 2013), <https://www.nytimes.com/2013/01/03/opinion/how-bankers-help-drug-traffickers-and-terrorists.html> [<https://perma.cc/X99T-LR5D>].

80. Carrick Mollenkamp & Brett Wolf, *Insight: How Colombian Drug Traffickers used HSBC to Launder Money*, REUTERS (Jan. 1, 2013), <https://www.reuters.com/article/us-hsbc/insight-how-colombian-drug-traffickers-used-hsbc-to-launder-money-idUSBRE90002Q20130101> [<https://perma.cc/8UT7-8VHL>] (archived Jan. 9, 2022).

the cartels' process of selling illegal narcotics in the United States and smuggling cash back into Mexico to deposit at HSBC Mexico.⁸¹ HSBC Mexico was notoriously delinquent in policing suspicious deposits by "not conducting due diligence on customers, not adequately monitoring wire transfers or cash shipments and not having enough employees to run anti-money laundering systems."⁸² According to Assistant Attorney General Lanny Breuer, these transgressions amount to "stunning failures of oversight."⁸³

HSBC entered a deferred prosecution agreement for \$1.9 billion in fines and no criminal charges. It admitted to laundering at least \$881 million for drug cartels, yet no employees or officers of HSBC served any jail time. HSBC promised to aggressively fight IFFs for the five-year term of the agreement.⁸⁴

At the expiration of the deferred prosecution agreement, HSBC's Chief Executive Stuart Gulliver reported that HSBC was better able to fight financial crime "as the result of the significant reforms [HSBC] implemented over the last five years."⁸⁵ HSBC replaced top executives and "embarked on a worldwide programme of upgrading its compliance systems to US standards, raising its spending to more than \$1 billion a year."⁸⁶ The United States agreed that HSBC had learned its lesson, and declined to pursue a formal criminal indictment.⁸⁷

Meanwhile, SARs from the FinCEN files tell a different story about HSBC's supposed reformation from crime facilitator to crime fighter.⁸⁸ HSBC continued financial transactions with suspected Russian money launderers and facilitated a transnational Ponzi scheme during its five-year probation.⁸⁹ The US government withdrew

According to the Department of Justice, this was relayed to the head of HSBC's Mexican operations by Mexican regulators in 2008, during the time in question.

81. *See id.*

82. *Id.*

83. *Id.*

84. *Id.*; ASSOCIATED PRESS, *HSBC Says US Officials Will Dismiss Criminal Charges*, COURTHOUSE NEWS SERV. (Dec. 11, 2017), <https://www.courthousenews.com/hsbc-says-us-officials-will-dismiss-criminal-charges/> [https://perma.cc/334G-TELRL] (archived Jan. 3, 2022).

85. ASSOCIATED PRESS, *supra* note 84.

86. Lawrence White, *HSBC Draws Line Under Mexican Cartel Case After Five-Years on Probation*, REUTERS (Dec. 11, 2017, 5:31 AM), <https://www.reuters.com/article/us-hsbc-usa/hsbc-draws-line-under-mexican-cartel-case-after-five-years-on-probation-idUSKBN1E50YA> [https://perma.cc/UVK7-YF7G] (archived Jan. 3, 2022).

87. *Id.*

88. *See* ICIJ, *supra* note 64; *see also* FinCEN Files Reporting Team, *FinCEN Files: HSBC Moved Ponzi Scheme Millions Despite Warning*, BBC NEWS (Sept. 20, 2020), <https://www.bbc.com/news/uk-54225572> [https://perma.cc/APJ5-CX99] (archived Jan. 3, 2022) (reporting HSBC began moving funds for a Ponzi scheme soon after the bank was fined in the US despite warning signs).

89. FinCEN Files Reporting Team, *supra* note 88.

charges against HSBC due to its “good behavior” in spite of much evidence that HSBC remained unchastened.⁹⁰

Ultimately, the U.S. Department of Justice found the cost of HSBC’s possible demise too great and settled for promises to avoid further violations of the BSA, also waiving charges on felony violations of the International Emergency Economic Powers Act and Trading with the Enemy Act.⁹¹ However, just by filing SARs, HSBC has gone a long way toward protecting itself from legal sanction. Increased SAR disclosure may serve the original ideals of tracking suspicious money, but it flies in the face of the deterrent purposes of prosecution.

Though a \$1.9 billion penalty sounds steep, critics worry the deal weakened the deterrent effect of the BSA,⁹² as the fine only amounts to about 9.6 percent of HSBC’s annual profits.⁹³ It seems that not only are some banks “too big to fail” for bad business decisions,⁹⁴ some are also “too big to prosecute” for illegal ones.⁹⁵

4. Anti-Money Laundering Act of 2020

US Treasury Secretary Janet Yellen declared that determining companies’ beneficial ownership is a high priority.⁹⁶ Congress included

90. See ICIJ, *supra* note 64. Though the FinCEN files consist of suspicious activity reports (SARs) filed by banks and other financial institutions, these reports are not dispositive of wrongdoing.

91. *Id.*; *HSBC’s \$1.9B Money Laundering Settlement Approved by Judge*, CBC NEWS (Jul. 3, 2013, 3:34pm), <https://www.cbc.ca/news/business/hsbc-s-1-9b-money-laundering-settlement-approved-by-judge-1.1377272> [<https://perma.cc/4AYJ-FZ56>] (archived Jan. 3, 2022).

92. Ben Protess & Jessica Silver-Greenberg, *HSBC to Pay \$1.92 Billion to Settle Charges of Money Laundering*, N.Y. TIMES (Dec. 10, 2012), <https://dealbook.nytimes.com/2012/12/10/hsbc-said-to-near-1-9-billion-settlement-over-money-laundering/?ref=business> [<https://perma.cc/8LHK-ZQ4U>] (archived Jan. 3, 2022).

93. Based on reports that the bank makes 1.92 in about five weeks. See Tom Teodorczuck, *Netflix Documentary Re-examines HSBC’s \$881 Million Money-Laundering Scandal*, MARKETWATCH (Feb. 24, 2018, 3:21 pm), <https://www.marketwatch.com/story/netflix-documentary-re-examines-hsbc-s-881-million-money-laundering-scandal-2018-02-21> [<https://perma.cc/FYM8-U8MC>] (archived Jan. 3, 2022); see also Nils Pratley, *HSBC Fine: What Does it Take for a Bank to get Prosecuted?* GUARDIAN (Dec. 11, 2012), <https://www.theguardian.com/business/nils-pratley-on-finance/2012/dec/11/hsbc-money-laundering-fine> [<https://perma.cc/NC4K-7JTA>] (archived Jan. 3, 2022) (reporting the amount represented closer to only four weeks’ worth of profit).

94. See, e.g., Matt Phillips, *Too Big to Fail: The Entire Private Sector*, N.Y. TIMES (May 19, 2020), <https://www.nytimes.com/2020/05/19/business/too-big-to-fail-wall-street-businesses.html> [<https://perma.cc/E99Q-8MUN>] (archived Jan. 4, 2022) (discussing the “too big to fail” idea and its application to US banks and other large businesses).

95. See Klasfeld, *supra* note 5 (quoting US Circuit Judge Rosemary Pooler: “an indictment alone can deal a death blow to a corporation”).

96. Jacob Rund, *Shell Company Disclosure Exemptions Prompt Calls for Changes*, BLOOMBERG L. NEWS (Jan. 22, 2021), <https://news.bloomberglaw.com/banking-law/shell-company-disclosure-exemptions-prompt-calls-for-changes> [<https://perma.cc/5QPT-8Z5A>] (archived Jan. 6, 2022).

the Anti-Money Laundering Act of 2020 (AMLA) in that year's annual defense spending legislation, updating the Banking Secrecy Act in several important ways.⁹⁷ First, it increased the cap on whistleblower rewards from \$150,000 to thirty percent of the amount forfeited, increasing the likelihood of discovering money laundering.⁹⁸ Second, it explicitly includes cryptocurrency transactions under the purview of the BSA.⁹⁹ Third, and perhaps most importantly, the defense spending legislation also includes the Corporate Transparency Act (CTA), which provides for the creation of a beneficial owner registry that appears to target shell companies.¹⁰⁰ The CTA went into effect in January 2021, and beneficial ownership disclosure requirements became effective January 2022.¹⁰¹ Existing corporations will have two years to comply, with new companies reporting beneficial ownership immediately in 2024.¹⁰² Thus, it remains to be seen how effective the CTA will be. Certainly, businesses are now on notice that they risk criminal and financial sanction for previously unnoticed or underreported business activity.¹⁰³ However, while targeting beneficial owners was an important step in recognizing the real players in international money laundering, it is not sufficient.

As usual, regulated groups argue that the new rules will create a heavy burden for little benefit.¹⁰⁴ However, proponents say the CTA will not additionally burden entities that are compliant with existing AML law and primarily targets those business forms most likely to launder money.¹⁰⁵ One may well ask whether any exempted category of entity is more likely to launder money than any regulated one.

97. *Id.*; Rachel Maimin & H. Gregory Baker, *Anti-Money Laundering Act Requires Fresh Look at Compliance*, BLOOMBERG L. NEWS (Jan. 25, 2021), <https://news.bloomberglaw.com/banking-law/anti-money-laundering-act-requires-fresh-look-at-compliance> [https://perma.cc/8Z2K-62UD] (archived Jan. 6, 2022).

98. Maimin, *supra* note 97.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *See id.*

104. *See, e.g.,* Neil Weinberg, *Hedge Funds Risk Biden-Era End to Money-Laundering Loophole*, BLOOMBERG NEWS (Feb. 5, 2021), <https://www.bloomberg.com/news/articles/2021-02-05/hedge-funds-risk-biden-era-closing-of-money-laundering-loophole> [https://perma.cc/4VPJ-URFV] (archived Jan. 6, 2022).

105. *See* Tad Simons, *How Will the Corporate Transparency Act Affect AML Compliance?*, THOMSON REUTERS LEGAL INSIGHTS (July 30, 2021), <https://legal.thomsonreuters.com/en/insights/articles/how-will-the-corporate-transparency-act-affect-aml-bsa-compliance> [https://perma.cc/5LHU-K4BB] (archived Sept. 14, 2021).

a. Prognosis Unclear

The new legislation narrows an important loophole without closing it.¹⁰⁶ The many forms of business that the CTA excludes from disclosure requirements, such as investment funds, trusts, and certain charitable organizations, leave the door open for IFFs through the United States.¹⁰⁷

The impact of AMLA remains to be seen, particularly because the CTA requires financial institutions to request permission from a business before FinCEN will share its data.¹⁰⁸ If a business withholds permission, it is not clear what the repercussions will be, if any.¹⁰⁹ The legislation does not address de-risking by cutting services to underdeveloped areas head-on and will not likely improve financial inclusion critical to emerging markets.

5. Too Small to Save

Large transnational financial institutions may leverage too much power against governments to bear serious criminal liability, but the same cannot be said for smaller banks and certainly not for individual drug users and street sellers.¹¹⁰

Unlike HSBC and its colossal peers, some banks have been entirely cut off from markets for their breach of AML regulations. Banco Delta Asia, a small, family-owned bank, was prosecuted under the US Patriot Act for money laundering on behalf of North Korea.¹¹¹ The Bank of Credit and Commerce International (BCCI) was closed by the UK government in 1991 for corruption at its highest level, falsifying records for customers and serving terrorists, drug runners, and dictators.¹¹²

106. See Rund, *supra* note 96.

107. See *id.*

108. See Simons, *supra* note 105.

109. See *id.*

110. See, e.g., ANA PAULA HERNÁNDEZ, SYSTEMS OVERLOAD - DRUG LAWS AND PRISONS IN LATIN AMERICA 60, 70 (2010), https://www.wola.org/sites/default/files/downloadable/Drug%20Policy/2011/TNIWOLA-Systems_Overload-def.pdf

[<https://perma.cc/8QRV-ULDW>] (archived Jan. 6, 2022) (“a large number of those who do end up in prison are hardly dangerous and that their role in drug trafficking is relatively insignificant”); see also ADRIÀ COTS FERNANDEZ & MARIE NOUGIER, PUNITIVE DRUG LAWS: 10 YEARS UNDERMINING THE BANGKOK RULES 6 (IDPC Briefing Paper, Feb. 2021).

111. David Lague & Donald Greenless, *Squeeze on Banco Delta Asia Hit North Korea Where it Hurt - Asia - Pacific - International Herald Tribune*, N.Y. TIMES (Jan. 18, 2007), <https://www.nytimes.com/2007/01/18/world/asia/18iht-north.4255039.html> [<https://perma.cc/2UJU-Y22F>] (archived Jan. 6, 2022).

112. Steven Mufson & Jim McGee, *BCCI Scandal: Behind the 'Bank of Crooks and Criminals'*, WASH. POST (Jul. 28, 1991), <https://www.washingtonpost.com/archive/politics/1991/07/28/bcci-scandal-behind-the-bank-of-crooks-and-criminals/563f2216-1180-4094-a13d-fd4955d59435/> [<https://perma.cc/5654-CWQF>] (archived Jan. 6, 2022).

Though the United States had investigated BCCI for years, the bank entered a plea agreement with prosecutors after what some viewed as an inexplicably limited investigation.¹¹³ BCCI was distinct in its extensive and intentional criminal behavior,¹¹⁴ but the episode may indicate an important point: a bank with bad business practices, as judged by its contemporary market, will slowly bleed out so that the results of a subsequent crash or closure are limited to an acceptable amount of economic collateral damage. Prior to its forced closure, many other large banking institutions worldwide either sensed from the start that it was best to stay away from BCCI because of its alleged suspicious behavior and prevarication or eventually pulled their investments for the same reason.¹¹⁵

Though no global economic collapse ensued, Bangladesh suffered a huge loss in assets and jobs when BCCI collapsed. The institution handled a third of the country's foreign trade and "had deposits of \$171 million against assets of \$142 million when [its] operations were suspended."¹¹⁶ Certainly, BCCI's closure stung for Bangladesh.¹¹⁷ Apparently the Bangladeshi economy did not warrant protection from the costs of international law enforcement.

At an even smaller scale, deferred prosecution is rarely on the table. Penalties for drug trafficking in the United States average seventy-six months in prison for individual street-level sellers.¹¹⁸ In Bolivia, penalties include up to twenty-five years in prison, and Indonesia's drug trafficking laws include the death penalty.¹¹⁹ Users also receive surprisingly high criminal sanctions, though by many accounts they are among the "victims" of drug trafficking.¹²⁰ Though Mexican law punishes addicts, it acknowledges an important

113. *Id.* (quoting Jack Blum special counsel to Senator John Kerry's subcommittee of the Senate Foreign Relations Committee, the subcommittee on terrorism, narcotics, and international operations).

114. "BCCI made phony loans, concealed deposits, hid huge losses, and was the bank for a host of shady customers ranging from terrorists and spies to drug runners and dictators." *Id.* Then-Governor of the Bank of England, Robin Leigh-Pemberton, explained the decision to shutter BCCI because it was beyond reform: "The culture of the bank is criminal." *Id.*

115. *Id.*

116. Farid Hossain, *BCCI Closure Jolts Bangladesh, Where Founder Began Career*, AP NEWS (Aug. 6, 1991), <https://apnews.com/article/37f5c0112380eb21108533785a1e75de> [<https://perma.cc/T729-2TB6>] (archived Jan. 6, 2022).

117. Because of BCCI's fraudulence, many assets were mere mirage and the banks closure therefore had a smaller actual effect than anticipated. *See id.*

118. *Quick Facts – Drug Trafficking Sentences*, U.S. SENTENCING COMM. (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Drug_Trafficking_FY18.pdf [<https://perma.cc/C8XY-VJ68>] (archived Jan. 6, 2022).

119. FERNANDÉZ & NOUGIER, *supra* note 110.

120. *See* Dustin Jones, *From Marijuana to Mushrooms, Voters Want Drug Laws Eased*, NPR (Nov. 4, 2020), <https://www.npr.org/2020/11/04/931507602/from-marijuana-to-mushrooms-voters-want-drug-laws-eased> [<https://perma.cc/3UWT-ANSL>] (archived Mar. 15, 2021).

distinction between drug users and drug addicts.¹²¹ No looming widespread economic collapse saves these inconsequential individuals from life-ruining sentences.

6. Financial Exclusion

AML regulation is one of very few transnational legal regimes that face scant political opposition to check its growth. AML laws do not significantly curb money laundering, but they do curb financial inclusion.¹²² While sophisticated criminal organizations shift gears to maintain access to financial flows, banks in traditionally high-risk areas are disenfranchised, leaving a space where only big banks can operate, creating jobs in “financial logistics,” and adding layers between each transaction and the ultimate beneficiary.¹²³ Meanwhile, would-be banking clients are pushed out of the financial system and cut off from its many potential benefits.¹²⁴

However, as governments have begun thinking of AML as less of an internal bank management issue and more of a national security issue leading to increasingly serious punishments, banks *have* changed their behavior.¹²⁵ With growing enforcement costs attributed to the quantity and inconsistency of AML regulations, global banks seek to cut their losses and simplify compliance by cutting ties with risk-prone banks.¹²⁶

Global banks have also ended correspondent banking relationships (CBRs) in high-risk/emerging markets.¹²⁷ CBRs allow respondent banks in emerging markets to access financial services in foreign jurisdictions through correspondent banks which hold respondents’ deposits.¹²⁸ Through CBRs, respondent banks provide customers in emerging markets with wire transfers and foreign exchange services, cash management services, letters of credit, check clearing services, and more.¹²⁹ Since 2005, there has been a marked

121. See HERNÁNDEZ, *supra* note 110, at 61.

122. Ehi Eric Esoimeme, *Balancing Anti-money Laundering Measures and Financial Inclusion*, 23 J. MONEY LAUNDERING CONTROL 64, 64–65 (2020).

123. See, e.g., WORLD BANK GRP., *THE DECLINE IN ACCESS TO CORRESPONDENT BANKING SERVICES IN EMERGING MARKETS TRENDS IMPACTS AND SOLUTIONS: LESSONS LEARNED FROM EIGHT COUNTRY CASE STUDIES* 11 (2018).

124. Rebecca L. Stanley & Ross P. Buckley, *Protecting the West, Excluding the Rest: The Impact of the AML/CTF Regime on Financial Inclusion in the Pacific and Potential Responses*, 17 MELB. J. INT’L L. 83, 92 (2016).

125. INT’L FIN. CORP., *GOOD PRACTICE NOTE, ANTI-MONEY-LAUNDERING (AML) & COUNTERING FINANCING OF TERRORISM (CFT) RISK MANAGEMENT IN EMERGING MARKET BANKS* 8 (2019).

126. See *id.* at 3. *But see* WORLD BANK GRP., *supra* note 123, at vii (suggesting that because global banks have de-risked some but not all banks in certain jurisdictions, jurisdictional concerns were not dispositive).

127. INT’L FIN. CORP., *supra* note 125, at 2.

128. *Id.* at 2.

129. *Id.*

decrease in financial services offered in emerging markets and a subsequent decline in those areas' economies.¹³⁰

As banks assess risk and seek to reduce their exposure to liability, they fail to apply AML regulations narrowly enough to avoid the harms that financial exclusion causes.¹³¹ As banks close, so too do opportunities for credit, secure savings, insurance, and convenient payment systems.¹³² Two billion people, mostly in developing countries, have no access to formal financial services.¹³³ Money transfer operators (MTOs) allow clients without bank accounts of their own to send and receive money, but they too depend on the existence of local branches with CBRs.¹³⁴ As MTOs' geographic reach shrinks as CBRs end, critical international remittances between laborers and families face grave obstacles.¹³⁵

Pacific island countries (PICs) are among the hardest hit by de-risking.¹³⁶ The majority of PIC residents do not have bank accounts.¹³⁷ Nevertheless, the financial system provides important services to PIC residents in the form of remittances.¹³⁸ Seasonal workers regularly travel to wealthy nations to work and use remittances to transfer funds to their families who depend on them.¹³⁹ Because forgoing money transfers is not an option for Pacific Islanders—in Samoa, for example, they are the single most important source of external income—workers use underground channels of money transfer rather than above-board remittances, making transfers less transparent and less subject to quality assurance measures.¹⁴⁰ Further, the government of Australia does not want to stop remittances, and neither should any proponent of AML policy.¹⁴¹ Australia has deemed remittances vital to security in the region, and they have a more direct impact on local people than foreign development aid delivered through inefficient diplomatic bureaucracy.¹⁴²

Though the FATF warns against blanket evaluation in favor of case-by-case risk management, regulators often require enhanced identifying information for categories of transactions, even for small sums.¹⁴³ The FATF allows for reduced AML scrutiny for transactions

130. *See id.*; *see also* Stanley & Buckley, *supra* note 124.

131. *See* Stanley & Buckley, *supra* note 124.

132. *See id.*

133. Esoimeme, *supra* note 122, at 64 (2020).

134. *See* Stanley & Buckley, *supra* note 124.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *See id.* at 85, 90. This makes the transaction less safe for the sender and recipient.

141. *See id.* at 90.

142. *See id.*

143. *Id.* at 101.

up to \$1,000.¹⁴⁴ At an average remittance rate of \$200 per month per worker (in 2015), a low limit could be established to maintain legitimate remittances with little risk of large illegal funds simultaneously getting through. Scholars such as Rebecca Stanley and Ross Buckley have already proposed this approach, but broad de-risking continues.¹⁴⁵

Economic growth in de-risked areas poses serious concerns for the very same parties spearheading the AML crusade.¹⁴⁶ Beyond developed countries' interests, if the intent of AML regulation is to reduce harm sustained by frequent victims of profit-driven crime, de-risking represents a major failure. Healthy economic conditions promote health and safety, education, and political and social stability, increasing safety locally and reducing extremism, violence, and criminality.¹⁴⁷

The International Financing Corporation published a "Good Practice Note" in 2019 suggesting ways for commonly de-risked jurisdictions to reduce their exposure to financial exclusion, mainly by improving financial self-policing.¹⁴⁸ But it may be asking too much for these emerging markets to go to greater lengths to increase their own internal regulatory apparatuses while having fewer resources. The World Bank offers technical and financial support to nations at risk of exclusion in order to prevent de-risking, but it is not yet clear if such support is enough.¹⁴⁹ While not all banks have been affected equally by CBR terminations and other results of de-risking, one World Bank group study found that each of eight countries surveyed reported CBR terminations.¹⁵⁰ All banks were able to establish or maintain some CBRs, but those were often at terms less favorable to the respondent banks.¹⁵¹

International criminals are highly adaptable; therefore, the AML regime must continue to evolve. However, evolution does not

144. *Id.* at 102.

145. *See id.*

146. *See, e.g., id.* at 90.

147. *See, e.g.,* Cape Up with Jonathan Capehart, *How Your Data is Used by the Police and Where It Goes Wrong*, WASH. POST, at 36:27 (July 17, 2018), <https://www.washingtonpost.com/podcasts/cape-up/how-your-data-is-used-by-the-police-and-where-it-goes-wrong/> [<https://perma.cc/ZWY5-8X3E>] (archived Mar. 19, 2021) (discussing the current use of predictive policing technology, and arguing that the same technology could be used to further prevent crime by identifying opportunities for, and then funding holistic social and community programs that go beyond traditional policing remedies); *see generally* WORLD BANK GROUP, *PATHWAYS FOR PEACE: INCLUSIVE APPROACHES TO PREVENTING VIOLENT CONFLICT* (2018).

148. *See* INT'L FIN. CORP., *supra* note 125.

149. *See* WORLD BANK, *DE-RISKING IN THE FINANCIAL SECTOR 3* (2016), <https://www.worldbank.org/en/topic/financialsector/brief/de-risking-in-the-financial-sector> [<https://perma.cc/WM3U-CWSZ>] (archived on Mar. 19, 2021) [hereinafter *DE-RISKING IN THE FINANCIAL SECTOR*].

150. *See id.*

151. *See id.*

necessitate the AML regulatory body's unchecked growth. As researchers Lucia Pellegrina and Donato Masciandaro have noted, agency theory cautions against the rising cost of AML regulations past a tipping point where non-compliance and attendant litigation and fees pose a more efficient business model than compliance.¹⁵²

The current AML paradigm is systematically biased against low-income areas. Traditional CDD tends to overestimate the risk of customers in certain developing areas, while underestimating the risk of high-income finance clients.¹⁵³ An illustration of this is wealthy crime bosses who move out of their native, so-called "high-risk" areas to enjoy lives of luxury in areas of perceived low-criminality.¹⁵⁴ Ultimately, AML regimes were designed by and for developed countries primarily from the Northern Hemisphere and are inapposite to less developed financial systems.¹⁵⁵ This can lead to a feedback loop that puts less developed areas farther out to sea financially.

To avoid liability for IFFs, banks often opt to de-risk, cutting low-income, high-risk parties out of the international financial system.¹⁵⁶ Financial exclusion has two major consequences. First, it reduces the footprint of the global financial system; net transparency diminishes as transactions divert to financial markets where they cannot be easily monitored.¹⁵⁷ Second, those same areas of high risk, often emerging markets, suddenly lose access to an array of financial services that are critical for growth and economic stability.¹⁵⁸

IV. SOLUTIONS

A. *Dependency*

The dichotomy between addicts and users in Mexican law mentioned briefly above offers an attractive framework for money laundering risk assessment as well. Some risk-prone areas have few alternatives to IFFs and can be seen as dependent in a way.

Indiscriminate red flagging disproportionately affects low-income areas, though many financial transactions in these locations are common and entirely legal.¹⁵⁹ Meanwhile, illegal organizations are moving to the United States, United Kingdom, Australia, and New

152. *Agency Dilemma*, *supra* note 2, at 28–29.

153. See Naheem, *supra* note 9. New forms of money laundering constantly enter the financial and criminal sectors. This constant need to adapt underlines the futility of an AML regime and continuous race between law enforcement filling gaps and criminal organizations discovering or creating new gaps.

154. Anton Moiseienko, "No Safe Haven": Denying Entry to the Corrupt as a New Anti-Corruption Policy, 18 J. MONEY LAUNDERING CONTROL 400, 407 (2015).

155. See Stanley & Buckley, *supra* note 124.

156. See DE-RISKING IN THE FINANCIAL SECTOR, *supra* note 149, at 1.

157. *Id.* at 2.

158. See INT'L FIN. CORP., *supra* note 125.

159. *Id.*

Zealand, where they still establish thick veils of secrecy while maintaining the appearance of legitimacy based on the jurisdiction's reputation.¹⁶⁰ While traditional due diligence may be a first line of defense against money-laundering, EDD is necessary to counteract the swell of shell companies in traditionally low-risk areas with higher GDP. These wealthier areas have risen in popularity as locales of criminal activity over the traditionally targeted high-risk areas.¹⁶¹ Hence, EDD looks beyond the interfacing customer to discover less-obvious hidden beneficiaries.

An example of EDD appears in FinCEN's proposed regulatory amendments, which "intended to provide financial institutions greater flexibility in the allocation of resources and greater alignment of priorities across industry and government, resulting in the enhanced effectiveness and efficiency of [AML] programs."¹⁶² Included in these amendments are flexibility measures to treat clients differently according to the amount transacted, and to allow banks to decide how to promulgate effective regulations.¹⁶³ It is not clear if these amendments address the emerging issue pointed out by Paul Pelletier, former senior U.S. Justice Department official and financial crimes prosecutor: banks realize that "they operate in a system that is largely toothless."¹⁶⁴

1. Users

New markets continuously emerge and recede as launderers and criminal organizations attempt to stay ahead of AML risk assessment procedures.¹⁶⁵ Delaware, once Shangri-La for shell companies, hasn't been the destination of choice for illegal incorporation since the 1990s.¹⁶⁶ Similarly, Ireland was supplanted by the United Kingdom as a popular shell location.¹⁶⁷

Some scholars have equated compliance with FATF regulatory recommendations with effective AML action.¹⁶⁸ However, with rate of seizure below two percent by most measures, even the most compliant

160. *Id.*

161. *See* Stack, *supra* note 16, at 502-03.

162. *News Release*, FINCEN (Sept. 16, 2020), <https://www.fincen.gov/news/news-releases/fincen-seeks-comments-enhancing-effectiveness-anti-money-laundering-programs>, [<https://perma.cc/VL67-2N3J>] (archived January 3, 2021) (at the time of writing, the period for comment is still open).

163. *See id.*; *see also* Anti-Money Laundering Program Effectiveness, 85 Fed. Reg. 58023, (Sept. 17, 2020) (to be codified in 31 C.F.R.).

164. ICIJ, *supra* note 64.

165. *See* Stack, *supra* note 16.

166. *See id.* at 502.

167. *See id.*

168. Robert F. Pol, *Response to Money Laundering Scandal: Evidence-Informed or Perception-Driven?*, 23 J. MONEY LAUNDERING CONTROL 103, 108 (2020).

countries can hardly be called effective.¹⁶⁹ Recently, the European Parliament published a report drawing a positive correlation between national GDP per capita and AML enforcement.¹⁷⁰ The same report also noted a country's attitude towards money laundering as a critical factor in whether it accepts and integrates its banking sector into an effective AML regime.¹⁷¹ As of the fourth round of FATF MER grading, Denmark had the lowest score in Europe so far (with more evaluations of EU countries pending at the time of writing),¹⁷² which perhaps comes as little surprise given Denmark's recent involvement in money laundering scandals.¹⁷³

Overall, the AML and anti-drug trafficking regimes have not been as successful as hoped. The UNODC evaluation of nations' AML efforts found that, as of 2016, very little progress was made in international AML legislation and monitoring, particularly regarding countries with measures in place for banks to identify transactions relating to criminal activity.¹⁷⁴ As demand for narcotics has continued to rise over the last decade,¹⁷⁵ money laundering also continues to adversely affect the global economy, inflating property prices, exacerbating corruption and the wealth income gap, and hurting foreign investment in developing countries.¹⁷⁶ Though instances of discovery and seizure have increased, they have not accelerated enough to make a substantial dent in growing criminal profits.¹⁷⁷

Even countries with the most comprehensive AML regulations and resource-intensive AML enforcement mechanisms are unable to make a serious dent in money laundering or organized crime.¹⁷⁸

B. *Focus on Transparency*

The long-term detriments of financial exclusion offset the short-term gains in reducing potential money laundering achieved by de-risking. IFFs do not stop, they merely go further underground and ultimately become more difficult to trace and less likely to be caught.

169. IDPC, *supra* note 32, at 77.

170. HARRY HUIZINGA, THE SUPERVISORY APPROACH TO ANTI-MONEY LAUNDERING: AN ANALYSIS OF THE JOINT WORKING GROUP'S REFLECTION PAPER at 12–13, (Nov. 2018), [https://www.europarl.europa.eu/RegData/etudes/IDAN/2018/624424/IPOL_IDA\(2018\)624424_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2018/624424/IPOL_IDA(2018)624424_EN.pdf) [<https://perma.cc/9BD4-JKUB>] (archived Jan. 6, 2022).

171. *See id.* at 9.

172. *See id.* at 12–13.

173. *See* Nikolaj Skydsgaard, *Danish Authorities Struggling with Surge in Suspicious Money Flows*, REUTERS (Jan. 24, 2020), <https://www.reuters.com/article/us-denmark-money-laundering-idUSKBN1ZN1Q7> (last visited Mar. 4, 2022) [<https://perma.cc/NT8Y-GLDM>] (archived Mar. 11, 2022).

174. *See* IDPC, *supra* note 32, at 77.

175. *See* IDPC, *supra* note 32, at 29.

176. *Id.* at 77.

177. *See* Pol, *supra* note 68, at 297–98.

178. IDPC, *supra* note 32, at 29, 77.

Yet, the FATF and domestic AML agency policy continues to pursue the financial transaction, the facilitator of that transaction, the funds involved, and the perpetrators of the original crimes. The ideal AML policy would simultaneously stop all IFFs while tracing them in both directions, to source and to recipient. Therefore, it may be time to ask, does such a regulatory regime exist? And if not, which objectives are the most critical, and how can the FATF and those that follow it streamline the stated objectives into those that are most fundamental and realistic?

The international AML regime developed as an additional point of access and investigation to uncover and punish the predicate crimes of money laundering.¹⁷⁹ Over time the international AML regime has warped and bloated. No longer is money laundering merely the means to stop predicate crimes such as drug and human trafficking, terrorism, and black market sales; it has become the focus of an enforcement regime that puts the impetus on the financial system to do much of the regulatory and policing work.¹⁸⁰ Not only is such a regime ultimately doomed to fail, it disproportionately burdens those who tend to suffer the greatest harms from the predicate crimes. While beneficiary registries offer a new step forward in the evolution of transparency, other aspects of the AML regime actually inhibit transparency.¹⁸¹

As desirable as it seems for banks to act as the front line against money laundering and its predicate crimes, they are ill-equipped to do so, even when they are willing. The banking sector seems undeterred by past punishments. The connection between those profiting from dirty financing and those who interface with clients laundering money can be too tenuous for prosecution. Other times, the clients themselves are simply judgment proof—not for lack of money but rather because of their perceived importance in the global economy.

The lack of accountability in the international financial system does not stem from a lack of specifically adapted legislation, international norms, or resources. Large banks have successfully made themselves so integral to the fabric of the global economy that it may be considered inequitable to undermine them when many innocent parties will feel the effects of strict enforcement.¹⁸² The modern world is almost myopically focused on financial flows, illicit or otherwise; they are the measure of all things. Maybe this is the real reason that the AML regime has become more focused on money and banking than on predicate crimes.

179. See, e.g., Blickman *supra* note 11, at 4; Zeyu Huang, *Is It Money Laundering*, 18 J. MONEY LAUNDERING CONTROL 411 (2015) (discussing Macau's criminalization of money laundering).

180. See Stanley & Buckley, *supra* note 124.

181. See *Agency Dilemma*, *supra* note 2, at 28–29.

182. See Natalie R. Davidson, *Human Rights Realism*, 54 VAND. J. TRANS. L. 31, 62–63 (2021) (discussing punishment as antithetical to justice).

Mobile access could bring millions of people into the global financial system, thus increasing the scope of any AML regime and allowing developing communities to access financial tools to alleviate anxiety, inconvenience, and risk.¹⁸³ However, cryptocurrency transfers are not costless, and the fees associated with transacting may be highly variable.¹⁸⁴ Moreover, cryptocurrencies can be simultaneously more anonymous and more transparent than traditional banking.¹⁸⁵ There are undoubtedly risks with immutable ledgers, but they provide the safest and most verifiable records, perfect for regulatory review.¹⁸⁶

C. Capitalizing on Windows of Opportunity

Money laundering is estimated to be the third-largest business in the world.¹⁸⁷ It is not a new business, and it is not a diminishing business. Meanwhile, the impetus behind the original US and transnational AML regimes—drug trafficking—may make certain regulations moot as more states legalize cannabis and discuss legalizing other narcotics.¹⁸⁸ Even the UN's more conservative body, the International Narcotics Control Board, has changed its tune and taken a second look at narcotics decriminalization policies, declaring that international law does not require incarceration of drug users and speaking in support of the Portuguese model of complete decriminalization of drug use.¹⁸⁹

As the international community moves more and more toward decriminalizing drugs, it should also move toward decriminalizing certain aspects of money laundering. The ultimate concern for the AML regime should be to stem predicate crimes—such was its purpose at

183. See Stanley & Buckley, *supra* note 124, at 102-05.

184. KEVIN WERBACH, *THE BLOCKCHAIN AND THE NEW ARCHITECTURE OF TRUST* 56-57 (2018) (discussing the inherent wastefulness of Bitcoin's proof of work and noting that at one time each transaction cost about \$10).

185. Blockchain technology boasts immutability in a financial record that can be viewed by all members of the network. The access points from which members view and use the network provide varying degrees of anonymity.

186. *But see* Morgan Meaker, *Cryptocurrency ATM Surge Fuels Fears of Money Laundering Risks*, DAILY TELEGRAPH (Feb. 17, 2021, 5:35 PM) <https://www.telegraph.co.uk/technology/2021/02/17/bitcoin-atm-boom-fuels-money-laundering-fears/> (subscription required) (discussing that the lack of information about cryptocurrency ATM users makes meaningful reporting difficult). However, using ATMs for cryptocurrency is not the same as using distributed ledgers for financial record keeping.

187. See Stanley & Buckley, *supra* note 124; Mohammed Ahmad Naheem, *Money Laundering Using Investment Companies*, 18 J. MONEY LAUNDERING CONTROL 438, 438-46 (2015).

188. See, e.g., Jones, *supra* note 120; Isabella Kwai, *U.N. Reclassifies Cannabis as a Less Dangerous Drug*, N.Y. TIMES, (Dec. 2, 2020) <https://www.nytimes.com/2020/12/02/world/europe/cannabis-united-nations-drug-policy.html> [<https://perma.cc/4F8C-42DY>] (archived Jan. 5, 2022) (reclassification as cannabis likely clears the way for an expansion of the market).

189. See IDPC, *supra* note 32, at 21.

the outset. Yet, the available data indicates that neither money laundering itself nor its predicates have been significantly thwarted or deterred in thirty years of increasing AML policy.¹⁹⁰

It seems counterintuitive to move toward a less punitive response to banks participating in illicit flows of money and only natural to lean further into a regime aimed at removing the profits of crime from the hands of criminals.¹⁹¹ But the truth is that with an AML regime that costs countries billions of dollars, the overwhelming majority of proceeds of crime continue to remain in the hands of criminals. If the banks are not in charge of flagging suspicious behavior, perhaps agencies that do have the proper motivations can take responsibility for financial crime investigations once again.

This proposal does not mean that money laundering can go on totally unchecked or that banks ought to be relieved of all financial regulatory reporting. Those wealthier parties—the laundering “users”—should still be subject to the highest level of regulation and the greatest punitive measures practicable. Banks should also be encouraged to extend banking services to more, not fewer, clients. Thus, the “dependent” countries should be subject to less scrutiny and instead receive more investment and access to financial services.

Surely there is a better use for the \$10 billion spent globally on AML regulation.¹⁹² The G20 has announced repeatedly its intention to reduce the cost of remittances in recognition of the benefit to development and safety of the nearly \$500 billion in annual remittances flowing to developing regions.¹⁹³ More importantly, the World Bank and other international organizations have prioritized financial inclusion, which is inconsistent with the proliferation of indiscriminate AML regulations.¹⁹⁴ The past several decades have seen the release of numerous studies revealing community investment as the most effective way to stop crime.¹⁹⁵ If that is the goal of the AML regime, why not redirect international focus to a carrot rather than a stick approach to money laundering and financial services? With the many billions of dollars that governments and banks spend to screen suspect customers out with little to show for it, it is time to channel that funding into communities more directly.

One mechanism for funding dependent countries could be through a scheme similar to impact fees paid by developers. When a developer enters a community and profits off of real estate and business development, they often pay mandatory fees to make community improvements ranging from improved infrastructure to neighborhood

190. See, e.g., Pol, *supra* note 69.

191. See, e.g., Bello et. al., *supra* note 52, at 604–05.

192. Esoimeme, *supra* note 122, at 73. Data current as of 2014.

193. Stanley & Buckley, *supra* note 124, at 89.

194. See UNITED NATIONS & WORLD BANK, PATHWAYS FOR PEACE: INCLUSIVE APPROACHES TO PREVENTING VIOLENT CONFLICT, 89–91 (2018).

195. *Id.* at xviii.

greenspaces. If banks benefit from illegal financial activity, which reporting indicates they must, they should contribute to the communities where they operate. Though this may run up against domestic laws analogous to the US Constitution's Takings Clause, prohibiting the government from arbitrarily seizing assets, it is more sensible and more beneficial than the AML regime. It will also serve to cast those banks with the best records of developmental aid in a positive light.

Not only would requiring banks to pay into their communities promote a sense of fairness in international finance system that, to this point, has been intractably bound up with criminal activity, it would provide the most effective way to assist developing countries and promote security for neighboring countries.¹⁹⁶ According to the World Bank, current aid models are "too slow to seize windows of opportunity and too volatile to sustain prevention."¹⁹⁷ As national administrations change and political and cultural values shift, foreign aid often drops below the optimum level to ultimately promote benefactors' economic health and stability as well as international peace.¹⁹⁸ Studies show that for every one dollar of investment in international development, donors save two to seven dollars in the medium to long term.¹⁹⁹ Banks become part of the fabric of a community and therefore can have special insight into the financial needs and areas of underinvestment in the locale. They also stand to grow as local economies grow and use more financial services.

Investing in local communities will also create a positive feedback loop of stability, as greater opportunity will lead to greater stability, which will encourage more independent investment and growth. The phrase "community development" is not a panacea for all the world's ills. Misguided and obtuse attempts to invest without understanding and communication with local communities can be worse than no investment at all.

According to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, concealment is the crux of money laundering,²⁰⁰ and concealment should be the focus of any AML regime. Yet it is not the concealment itself that needs to, or even can, be penalized; rather, it is those illegalities which are being concealed that should be brought to light through a more nuanced and sensitive international law enforcement standard. AML laws target the downstream side of criminal financial pipelines, and they do so

196. *Id.* at 2.

197. *Id.* at 287.

198. *Id.* at 287–89.

199. *Id.* at 2.

200. See IDPC, *supra* note 32, at 105 (discussing the removal of the term "laundering" because concealment was comprehensive and specific enough to comprehend what is typically meant by money laundering, and there was no need to add an additional term to define).

poorly and in a manner insufficiently tailored to the problem. Politically, it may be easier to pour money into programs that fall under regulation and law enforcement, particularly the latter in the United States.

VI. CONCLUSION

It may be time to stop pretending that banks will ever be the crime-fighting partners that scholars and politicians wish them to be. They lack the motivation, and the governments sporting the most powerful AML regimes in the world opt out of holding banks sufficiently accountable to deter continual involvement in shady transactions. Instead, if the global law enforcement community can come to terms with the financial sectors' strengths and weaknesses, resources can be diverted from a regime that is not working to one that has a fighting chance of undermining organized crime in a fundamental way. In the United States, AMLA begins this process by shifting regulation away from banks to FinCEN. Focusing on transparency alone can help keep banks performing as the FATF wants. The savings from a reduced regulatory scheme in areas that cannot afford greater financial exclusion are better spent on investment that may actually deter predicate crimes—the root of money laundering.

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