BERKELEY JOURNAL OF INTERNATIONAL LAW

VOLUME 22 2004 NUMBER 1

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Articles

Berkeley Journal of International Law

Volume 22 | Issue 1 Article 1

2004

Remarks on the Awarding of the 2003 Stefan A. Riesenfeld Award: Louis Henkin and the Felicitous Expression of Reason

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Remarks on the Awarding of the 2003 Stefan A. Riesenfeld Award:

Louis Henkin and the Felicitous Expression of Reason*

By
David D. Caron**

On behalf of the School of Law at the University of California at Berkeley, it is my pleasure to welcome our distinguished guest, Professor Louis Henkin, his wife Alice, and their son David, who we are proud to claim as a member of Berkeley's History Department.

"John Donne prayed God to deliver men 'From needing danger.' Others have in other words deplored the inability of men and societies to do what was necessary for their own salvation before war or disaster had nearly overwhelmed them. And so in wars alone men have died in numberless numbers."[1]

Ladies and gentlemen: Lou Henkin wrote those words. They open his first book, *Arms Control and Inspection in International Law*, published by Columbia University Press in 1958. It cost a whopping $5.50, which is remarkable in itself.

It is a prescient work. But since I can hear Lou in his wry way remark that "prescient" is merely a euphemism for "not popularly appreciated," let me say more positively that the importance of that work was not fully grasped at that time. Indeed, *Foreign Affairs* then had a practice of giving a one sentence review to books. In reviewing Lou's book, the Journal simply wrote, "[A] potentially very important subject."[2]

Later, in the mid 1990s, the Chemical Weapons Convention was put before the Senate for its advice and consent. Some members of the public and the academy argued against ratification of the Convention and against the prospect of foreign inspectors conducting what they saw as unconstitutional searches in

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* These remarks were delivered on Feb. 28, 2003 as an introduction to the 2003 Riesenfeld Award honoree, Louis Henkin, University Professor Emeritus of Columbia University Law School.

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1. LOUIS HENKIN, ARMS CONTROL AND INSPECTION IN AMERICAN LAW 1 (1958).

2. Henry L. Roberts, *Recent Books on International Relations*, 37 FOREIGN AFF. 504, 508 (1959).

the United States.[3] In that vein of criticism—a consequence of what Lou has often seen as a tendency of the United States to hold itself apart from a world that it is ineluctably a part of—our ratification of that historic arms control agreement hinged. An important force in that debate, which ultimately, but closely, went in favor of ratification, was Lou's book and the scholarship it informed and shaped.[4]

With two articles in 1956, and the book just mentioned, Lou was bursting onto the American legal academic stage. But who is this Lou Henkin?

There are gaps in the record. Public sources have been studied, friends have been consulted, and it must be said that it is not easy to uncover the early part of Lou's life. But let's apply our detective powers for a moment, drawing on the Foreword to Lou's 1958 book written by his mentor and friend, Philip Jessup of Columbia University. Jessup writes:

> This study required an author with the combination of experiences and skills which Professor Henkin possesses. His years of service in the State Department's Bureau of United Nations Affairs and Office of European Regional Affairs gave him the close acquaintanceship with the practicalities of foreign policy, with the workings of the United Nations and NATO, and, from 1950 to 1954, when he was assigned to problems arising from the aggression in Korea, with the trials of patience required in seeking an agreement with a Communist power.[5]

Had I read nothing else, I might have concluded: "Lou Henkin was a State Department lawyer who recently retired and assumed an academic post. He's probably in his late 50s or early 60s; he has one book to get out of his system and here it is!" But Jessup goes on to say:

> To his understanding of the realities of foreign policy, Professor Henkin joins rare skills in his appreciation of the whole body of constitutional doctrine,[6] an appreciation developed in contact with two of the keenest American legal minds, those of Judge Learned Hand,[7] and Mr. Justice Felix Frankfurter, both of whom he served as Law Clerk. He is now Professor of Law at the University of Pennsylvania Law School.[8]

So this must change our initial estimation. This 1958 Lou Henkin is significantly younger than we thought, but he can't be that young. Moreover, his presence at Pennsylvania and his prestigious clerkships indicate he did ex-

3. *See, e.g.*, John C. Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 CONST. COMMENT. 87 (1998).

4. LOUIS HENKIN, *Arms Control and Inspection in American Law* is cited in the Prepared Testimony of Professor Barry Kellman, DePaul University College of Law, at the *Hearing on the Constitutional Implications of the Chemical Weapons Convention Before the Senate Judiciary Comm.*, 103rd Cong. 859 (1996). At Senator Biden's request, Henkin directly addressed the CWC by letter. For a discussion of the senate vote, see Ronald D. Rotunda, *The Chemical Weapons Convention: Political and Constitutional Issues*, 15 CONST. COMMENT. 131, 131 (1998); Helen Dewar, *Senate Approves Chemical Arms Pact After Clinton Pledge*, WASH. POST, April 25, 1997, at A1; Adam Clymer, *The Chemical Arms Treaty: The Overview; Senate Approves Pact on Chemical Weapons After Lott Opens Way*, N.Y. TIMES, April 25, 1997, at A1.

5. HENKIN, *supra* note 1, at ix.

6. You should recall that "doctrine" was not a derogatory term in 1958.

7. Professor Lori Damrosch, one of Lou's colleagues at Columbia, pointed out to me the curious matter of the initials—Learned Hand and Louis Henkin—and whether anything should be made of that!

8. HENKIN, *supra* note 1, at ix-x.

tremely well at one of the best law schools, and given the identity of the judges, we know it most certainly was Harvard Law School. He is someone who as a young man served his country, perhaps during the Second World War, and most certainly throughout the American efforts to build a lasting peace after the war.

Jessup then gives us in his Foreword one more vital clue. He writes, "Even the layman will find the felicity of the author's English style leading him through those sections of the book which of necessity deal with legal complexities."[9] From this we know Lou Henkin is most likely not American by birth, because few Americans possess a felicitous style of English. Rather, it is likely the case that he, like others, came to English as a second language and learned it with the precision and determination that yields felicity. From what can be found in the public record, our extrapolations from Jessup's few remarks are close to the mark.

As I said, it's not easy to find much of the early story.[10] The first fact is that Louis Henkin was born on November 11, 1917 in Smolyani, a village 100 miles east of Minsk. (Which Lou, standing beside me, indicates is "roughly" accurate.) I don't have time to linger on each circumstance of Lou's early life, but this fact strikes me as again proving that truth is stranger than fiction.

First, imagine the month of November, 100 miles east of Minsk. I have had the occasion to approach Minsk from the northeast by train in early September, and I can only imagine what the mortality rate was for children born in November near Minsk at the turn of the century. It is a dark and cold place.

Second, let me add at this point that Lou and his family are Jewish, and east of Minsk at the turn of the century could be a particularly dangerous location for people of the Jewish faith.

Third, it is not only November, it is November of 1917. Ivan Bloch—Jewish, Russian, self-made man—in the early 1890s wrote that future war would be fought in the trenches, and with great armies and with commensurate losses.[11] Greater Europe is a very dangerous place in 1917.

Fourth, it is not only 1917 in Europe, it is 1917 in Russia. Bloch also wrote that the war in the trenches would last as long as economies could be redirected to that end. But before the breaking point there would be famine and social

9. *Id.* at x.

10. The following remarks are cribbed primarily from a short description of Lou's early life by some of his former research assistants: Jonathan Charney, Donald Anton, and Mary Ellen O'Connell. Jonathan I. Charney, *Introduction* to POLITICS, VALUES AND FUNCTIONS: INTERNATIONAL LAW IN THE 21ST CENTURY—ESSAYS IN HONOR OF PROFESSOR LOUIS HENKIN at 1, 8 (Jonathan I. Charney, et al. eds., 1997) [hereinafter POLITICS]. I would point out, however, that they incorrectly name one of Lou's three sons. They name the three boys as Joshua, David, and Jacob, whereas they are in fact, Joshua, David, and Daniel. David Henkin wrote "I can assure you that the three sons raised in my parents' home are named Joshua, David, and Daniel (in birth order, and in Biblical order as well). If you meet Jacob Henkin, tell him to come home." Although this error argues for some slight caution in relying on their brief account, I would note that Lou did not correct any of the facts above as they were recited in his presence.

11. IVAN BLOCH, THE FUTURE OF WAR IN ITS TECHNICAL, ECONOMIC AND POLITICAL RELATIONS (1998) (6 vols.) I discuss Bloch's work in David D. Caron, *War and International Adjudication: Reflections on the 1899 Peace Conference*, 94 AM J. INT'L L. 4 (2000).

revolution. And this is precisely what came to pass in Russia. The Russian monarchy was overthrown in 1917, and as is often the case, there is a second revolution as to who takes place of that which has gone. This second revolution, the Bolshevik Revolution, is in November 1917.

Fifth, this boy who would later serve the United States, his family's adopted home, is born in the same year that the United States enters the war that has Europe and Minsk in its grip.

Sixth, and last, the boy who will later as a man champion individual rights and international law is born on November 11—the eleventh day of the eleventh month, precisely one year before the armistice to end the war to end all wars, a war that claimed 8.5 million lives.

The note by Lou's former research assistants states that his family immigrated to the United States before he turned five. This suggests they left the Soviet Union shortly before Lenin's sacrifice of the people in the countryside gained its full force.

And then our story is the American story, and as with Stefan Riesenfeld, we and the world are much richer for his family making this nation their home. Lou's former research assistants report that Lou once described (with great felicity of expression!) his home as characterized by "poverty, piety and probity."[12]

But beyond that phrase, I can share only the milestones that mark the ascendancy of a brilliant young man: Yeshiva College—majoring in mathematics and philosophy, graduating *summa cum laude* in 1937. Harvard Law School—book review editor, graduating *magna cum laude* in 1940. Clerk for Judge Learned Hand, Court of Appeals of the Second Circuit, 1940-41. And then Louis Henkin, like so many of his generation, was swept up in the events of World War II, in his case serving from 1941-45 with the United States Army and seeing combat in Europe and North Africa with the First Field Artillery Observation Battalion. Upon returning to the United States he clerked for Justice Felix Frankfurter of the U.S. Supreme Court. He thereupon joined the U.S. State Department where he served in the United Nations Affairs Bureau from 1948-54, and the Bureau of European Affairs from 1954-57. Among other things he served as an advisor to the U.S. delegations to the UN General Assembly, the UN Economic and Social Counsel, the Geneva Conference on Korea, and was the U.S. representative to the UN Committee on Refugees and Stateless Persons in 1950. It was at the State Department that he met Philip Jessup, who later having left for Columbia invited him to spend time at Columbia writing his first book. And thus, we come back to that book in 1958.

Lou was forty years old, with enough experiences for several lifetimes. But before we move forward from 1958, I must first mention a singularly important event in 1960—his marriage to Alice, his partner these past forty years. You should know that Alice has carved her own paths through the wilderness, particularly in the area of human rights. But also, from 1960 forward, I doubt that one could say that Lou did this or that without mentioning Alice also.

12. POLITICS, *supra* note 10, at 8.

For six decades—the 50s, the 60s, the 70s and so on, Lou has put pen to paper, showing that he had much more than one book in him. Indeed, he has at least fourteen books as author, nine as editor, and in the neighborhood of 250 articles or chapters in books.[13]

Of course, there was much more going on than his writings. Lou moved to Columbia in 1962—no doubt Jessup was conniving at this all along—and has been there ever since. He was the Hamilton Fish Professor of Law and Diplomacy and the Harlan Stone Professor of Constitutional Law until his designation as University Professor in 1981. He currently is University Professor Emeritus and Special Service Professor. During these forty years at Columbia, Lou served, among other things, as Co-Editor-in-Chief of the *American Journal in International Law*, Chief Reporter of the American Law Institute's *Restatement 3d of the Foreign Relations Law of the United States* (which was a daunting task!), President of the American Society of International Law, U.S. member of the Permanent Court of Arbitration, Member of the Board of Directors of the Lawyer's Committee on Human Rights, and Chair of the Human Rights Center at Columbia. He was a longtime member of the Secretary of State's Advisory Committee on Public International Law, and the first U.S. appointee of the Human Rights Committee under the International Covenant on Civil and Political Rights. He is a fellow of the American Academy of Arts and Sciences, and a member of the Institut du Droit International. He is a recipient of Columbia's Wolfgang Friedman Award, and last year he received the American Society of International Law's Manley Hudson Medal.

He did not write about everything, but close to it. A significant part of his work concerns the foreign affairs law of the United States. Stefan Riesenfeld described the self-executing treaty doctrine as "a product of international and domestic constitutional rules."[14] That difficult terrain was mapped first, and best, by Lou Henkin in his book, *Foreign Affairs and the U.S. Constitution*, now in its second edition.[15] The integrity and felicity with English that distinguish this work has shaped all later expeditions. His scholarship also has focused upon human rights—very broadly conceived. Here he travels alongside others, but there is a special quality to his work, which I will address shortly. In addition to these two areas, Lou has written on international law and politics generally (here one should consult and profit from his book *How Nations Behave*[16]), the use of force, the United Nations, the law of the sea, Judaism and the world, legal history and comparative constitutionalism.

I cannot speak to you of all Lou's writings, but I have read and sampled his body of work, and I am struck by something behind the words—not only intelligence, but also the imprint of a soul possessed of a deep respect for humanity

13. A list of his writings, approximately five years out of date, may be found in POLITICS, *supra* note 10, at 461.

14. Stefan A. Riesenfeld, *The Doctrine of Self-Executing Treaties and U.S. v. Postal: Win at Any Price?*, 74 AM. J. INT'L L. 892, 900 (1980).

15. LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION (2d ed. 1996).

16. LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY (2d ed. 1979).

and the necessity of reason in human affairs. I'd like to sample just two pages for you in this regard.

First, on the place of reason in foreign affairs, I refer to a monograph Lou wrote on the proposed law of the sea regime for deep seabed mineral resources.[17] (Incidentally, Lou mentioned this book fortuitously to Professor Harry Scheiber and me as we were standing outside just before this ceremony.) At the end of his analysis, Lou argues for the place of reason in politics:

> New law . . . is law for an indefinite future. It is important that it not be made prematurely or too fast, so that it will not prove to be a straitjacket, hampering healthy development of new human activity, or become unworkable and irrelevant. It is important, on the other hand, that bad law should not "happen," unwittingly or by default, that opportunities to make good law should not be lost.[18]

Now what's striking to me about this passage, beyond the words themselves, is that one colleague to whom I read this quotation remarked, "Ah, to have lived in a time when policymaking was so deliberate, that reason was such at the fore." But, I think to do that is to privilege the present too much, and to underestimate the world that Lou dealt with in those decades past. After all, let us recall that Lou knew the McCarthy Era from a rather close distance. Lou's mentor Jessup was one of those "damn internationalists."[19] Lou commented on numerous uses of force, including Vietnam, and grappled with the legal and moral aspects of the most egregious abuses of human rights. Lou has always advanced the case of reason and humanity—not when it is easy, but amidst the worst circumstances. Professor Frank Newman of this law school, now deceased, used to say of such matters that "the questions are too important for there to be room for despair." Lou Henkin's work and efforts remind us that reason is not given a place; rather it earns its place by the integrity, brilliance, and felicity of its expression. Reason in this form will demand its place. And for Lou's example, we are thankful.

As to the deep respect for humanity, I would just give you a brief quote from his 1990 book, *The Age of Rights*:

> Human Rights may have become the idea of our time in part because ours is the age of development, industrialization, urbanization, which in many parts of the world have helped undermine what religion and tradition long offered the individual. In this modern, modernizing world, the human rights idea may sometimes appear as an ideology competing with religion, as a threat to traditional societies, as an obstacle to totalitarian socialism or to development in a hurry. But the idea of rights is not a complete, all-embracing ideology, is not in fact in competition with other ideologies. Religion explains and comforts, tradition supports, socialism cares, development builds; the human rights idea does none of these. . . .[T]here is now a working consensus that every man and woman, between birth and death, counts, and has a claim to an irreducible core of integrity and dignity. In that consensus, in the world we have and are shaping, the idea of human rights is the essential idea.[20]

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17. LOUIS HENKIN, LAW FOR THE SEA'S MINERAL RESOURCES (1968).

18. *Id.* at 75.

19. "Next to General George Marshall, [Jessup] was the most prominent target of McCarthy." Oscar Schacter, *Philip Jessup's Life and Ideas*, 80 AM. J. INT'L L. 878, 885 (1986).

20. LOUIS HENKIN, THE AGE OF RIGHTS 193 (1990).

For me, no other person in human rights moves with that appreciation for the place in our world of religion and of tradition. It pervades the work of Lou, and again, for that we are thankful.

The world shifts, but I find the work of Louis Henkin remains—and it does so because of its integrity and humanity. Lou's efforts and examples are appreciated in groups large and small around the world. His efforts remind us of the force of reason and the compassion of the human spirit, and inspire us to strive for a more just world.

Berkeley's motto is *fiat lux*: let the brightest of minds illuminate that which is hidden. It is with great pleasure that Boalt Hall School of Law and the Berkeley Journal of International Law award the 2003 Stefen A. Riesenfeld Prize to Louis Henkin for doing precisely that.

Berkeley Journal of International Law

Volume 22 | Issue 1 Article 2

2004

Keynote Address at the Riesenfeld Symposium

Adolfo Aguilar-Zinser

Keynote Address at the Riesenfeld Symposium

By
Ambassador Adolfo Aguilar-Zinser*

February 28, 2003

This year's theme of the Stefan Riesenfeld Symposium is a theme that is very close to us in Mexico, and for which we have a special dedication because Mexico and the United States have, between them, the largest phenomenon of money laundering. The United States is critical to the nervous system of the circulation of money because of the nature of its financial system and the connection of the U.S. financial system to the rest of the world. The United States is perhaps where most of the money launderers of the world pass, one way or another, through the banking system and through the financial institutions. However, Mexico is also very intertwined with this process.

As a contribution to the symposium, I would like to share some of my thoughts and perspectives on the matter of money laundering and on the abuse that arises around the issue in the relationship between Mexico and the United States. I have been observing the question of organized crime from different perspectives for the past fifteen years. I have observed it as an academic studying U.S./Mexican relations. I have also observed it as a legislator. As a legislator I have had the opportunity to engage in the investigation of corruption in Mexico, where issues of money laundering have been very prominent. I have also served as National Security Advisor in coordinating Mexico's negotiations with the United States on a broad range of issues related to security, law enforcement, crime, and money laundering. More recently, as an ambassador of Mexico to the United States, I have been very involved with the work of the CTC, the Counter-Terrorism Committee, which was created in the United Nations after September 11, 2001. This committee oversees the compliance of states with a resolution that was passed by the United Nations. A landmark resolution, 1373, orders all of the states to comply with certain criteria and rules concerning terrorism and also concerning money laundering associated with organized crime and other factors related to it.

Mexico and the United States are beginning to build a very peculiar partnership, a community of interests. Slowly, and sometimes very painfully, the

* Former Mexican Ambassador to the Security Council of the United Nations. Ambassador Zinser was the recipient of the 2003 Board of Editors Award from the Berkeley Journal of International Law.

relationship is gradually moving into identifying very specific areas of partnership and a community of interests between our two countries. This construction of a community of interests is in opposition to institutional trends of bilateral relations. The bilateral relation between Mexico and the United States has been characterized by the interaction of two factors. One of these factors is constant tension between two countries with so many disparities with each other. The tension of a superpower next to a country in development and the disparities that arise from this peculiar relationship create constant, frequent, and recurrent tensions that relate to questions of power. Mexico has always been very defensive to the hegemonic views of the United States in Latin America, and the United States has always been very suspicious of Mexico's nationalistic attitudes. In some ways this has created a dynamic in the relationship.

The other factor that has very intensely influenced the relationship is pragmatism. The two countries have very strong historical views that collide, but at the same time, there is a great deal of pragmatism. The pragmatism has to do with the need to address concrete questions away from ideological or historical grievances; concrete questions of our vicinity with which we have to deal on a daily basis; questions that are not controlled by the governments; questions that have to do with the interactions of our two societies, with the fact that we have open borders. This pragmatism has made us capable of identifying very concrete areas of understanding and compromise. By identifying these areas of understanding and compromise, we have made the relationship more balanced and symmetrical.

It is in the concrete questions of solving problems where our relationship becomes more symmetrical. Why? Because sometimes the disparities of power do not resolve these questions. The United States cannot impose solutions that militate against realities. Those questions have to do with water, with migration, with the environment, with drugs, with trade, with a number of issues. In each one of these instances we have to gradually move away from a relationship based on disparities and defensive versus hegemonic tendencies. We have to compromise on specific ways of solving these problems. The balancing of the relationship has been translated into this community of interests. There is no other area where the community of interests is becoming more strong and evident than in the area of security. We are facing a number of security threats that are equally dangerous and important for both countries. Mexico and the United States are beginning to understand that in the same way we have NAFTA, the North American Free Trade Agreement, as a meeting of interests in trade and commerce; we have another NAFTA in the background of that. It is the NAFTA of organized crime. It is the NAFTA of money laundering.

The interests of organized crime are so peculiar in our region that they have taken full advantage of the opportunities provided by globalization. Sometimes the interests of organized crime have been able to take advantage of globalization even more than governments, with fewer constraints and restrictions. Our governments sometimes cannot do a number of things among themselves because we have laws that forbid us to do them. We cannot interact with ourselves

because we are prevented by political considerations, by differences of opinion, and by legal matters. But there are no barriers among criminals in the organized crime community. There are specific interests and there are environments that can be taken advantage of. The expansion of organized crime in our North American area, particularly between Mexico and the United States, is also a phenomenon of NAFTA. It is part of the phenomenon of globalization.

We have board rooms of criminals that interact with each other in a very peculiar way because organized crime has become increasingly intertwined. It has become a web of interests that connect. There are areas of organized crime that we identify between Mexico and the United States, which probably synthesize the phenomenon of organized crime anywhere in the world. We have organized crime in drugs. It is very large, and it is very important, and it is very diversified and complex. We have organized crime in the smuggling of people. We have gangs that smuggle people that involve not only Mexicans and Americans, but also Central Americans, South Americans, and Asians. We have areas of smuggling of all kinds of products. One of the largest markets for counterfeit products is between Mexico and the United States. We have a huge market for music discs. And there are more millions of discs sold in Mexico that are pirate editions than there are commercially legal editions. We have a very large market of weapons between Mexico and the United States. You cannot imagine how large the weapons market is and how many people profit from that. We also have one of the largest markets in the world for car thieves. There are many cars stolen in the United States and sold in Mexico, and vice versa.

There is one common element in all of this global business of the NAFTA of organized crime: money laundering. The product of all of these activities, one way or another, enters the financial system of both our countries in ways that are immensely difficult to detect. If there was a possibility for us to obtain, through restitution, the money that has been illegally obtained in Mexico and deposited in American banks we could pay at least a portion of our foreign debt. However, there are immense legal difficulties involved with this. First, to identify money in these accounts is very difficult. Second, even if we identify it, gaining control of it is also difficult. This machinery of crime has taken full advantage of our intense relationship in the global world in which we live today.

Our two countries are beginning to respond very swiftly and very effectively to this issue. We have had, first of all, to break some fundamental barriers of understanding and trust. We have gone a long way in establishing some basis of trust, especially in the area of crime. The most important characteristic that the Americans have attributed to the Mexican law enforcement system has been corruption. We had a very serious problem of corruption in Mexico. The problem also exists in the United States, but not in the quantity and dimension that we have in Mexico. In the past ten years we have been fighting corruption in Mexico by attempting to make government more transparent, by establishing mechanisms of control, and by regulating the banking system. We have gradually put in place remarkable pieces of legislation that are beginning to show their importance. We have also, in the government of President Fox, launched more

audacious campaigns of fighting corruption and recovering the sense of integrity and morality of public officials. However, the effort of fighting against corruption is not new in Mexico. It is old and it has very interesting legislative traditions.

Based on this experience of crime in Mexico, the United States developed a great deal of mistrust. It has been very difficult to work together when one of the partners does not trust the other. The distrusting partner does not share information. It fears this information is going to be misused. It also fears that the lack of integrity of officials will make fighting crime together an unreliable venture. There has also been, on the part of Mexico, a great deal of resentment of the way in which the United States wants to impose certain measures that are based on the notion that Mexico is not capable of handling security or legal affairs by itself. The United States wants to do it all in Mexico. This has gradually been resolved and we have come a long way in the past two years in closing the gap of mistrust that exists in the area of law enforcement. That does not mean that we have been able to clean up corruption in Mexico, especially in the police forces. It does mean that we have created areas in which information can be shared with more confidence and used effectively to fight crime. An example of that can be found in the effectiveness of Mexico in capturing a number of the most prominent drug lords, the Arellano Felix brothers, who were on the run for many years. The brothers were moving about their business, managing a huge operation of drugs with quite a bit of impunity. They were captured by putting together the information available in the United States and the information available in Mexico. When this information matched, and was finally able to be transmitted fluidly, the legendary Arellano Felix brothers were captured within a matter of months. A number of other very spectacular things have happened since this common understanding. However, there is still a very long way that we have to go.

We have developed mechanisms to deal with money laundering between Mexico and the United States, which include the gradual adaptation of our banking laws to detect suspicious accounts, to trace money, and sometimes to be able to identify large movements of money across the border. One of the very large banks, which got itself involved in money laundering schemes in Mexico while the bank was in the United States, Citibank, has begun to establish a number of regulations to control this process. Some of us have to suffer these regulations. The other day, Citibank officials called me. I have had a Citibank account for many years, since I was in Washington, working for the Carnegie Endowment. The bank account here did not have, at any given time, more than five, six thousand dollars. But they called me and said they were going to close my bank account. I said, "Why?" They said, "You are a public official. You are a public figure." I said, "Well, I am a very poor public figure." They said, "It doesn't matter. We distrust all public figures now." So, I said, "Well, you will have to look at a number of Mexican public figures whose bank accounts in the United States are considerably larger than mine and probably you are still not asking them to close their accounts." The matter was settled, but it indicates that there

is now a widespread fear in the banking system of the United States that has led to the creation of some mechanisms of defense and resistance. How can we create a community of legislation and information sharing if we do not reach out to a larger environment?

Perhaps we are in the process of creating a much larger community of interests in fighting crime in the world. This might have come about as a consequence of 9/11. Immediately after the attack on the Twin Towers, the United Nations reacted by passing a number of resolutions. There was a U.N. Security Resolution passed on September 12, Resolution 1368. This is a condemnation of terrorism. But there is one interesting feature of that Resolution. This Resolution was based on the notion that the attacks of 9/11 on New York, Pennsylvania, and Washington, D.C. were attacks on the entire world, not only on the United States. They were attacks that represented an aggression to all nations. That was the assumption of Resolution 1368. Immediately after that, the United Nations began to debate another resolution that became a landmark, Resolution 1373. This is the first and only resolution I know of that is obligatory for all states.

United Nations resolutions are specifically targeted to a situation where international peace and security is at stake. Resolutions are circumscribed to the actors who are in a specific dispute in the world. In the Middle East, there are a number of resolutions regarding the Palestinian/Israeli question that are obligatory to Palestinians and Israelis. There are resolutions in Africa, specifically targeting the conflict among states. The only resolution that sets obligations on all of the states, 1373, establishes a set of obligations regarding money laundering in the first place, and identifying the financial resources that could be deposited in the financial system of any country and used for terrorism. The resolution is very simple, three or four pages, but it establishes a number of obligations.

The most critical of these obligations has to do with the identification of money and the relationship between money and other forms of crime. The United Nations created the CTC, the Counter Terrorist Committee. The Counter Terrorist Committee has the task of making sure that all the states comply with Resolution 1373. There are three stages of the work for this committee. The first stage requires that every country of the world report to the Security Council concerning the state of their legislation in fighting organized crime, money laundering, and identifying assets in the banking system. The reports have been coming to the United Nations for over a year, and now we have a very clear picture of the status of crime fighting legislation in the world. In turn, the Security Council experts require that all of these countries that presented their reports modify their legislation and adhere to certain international conventions in the struggle against terrorism. For over a year, every country has had to provide information to the United Nations about the changes it is making in its legislation. There are about twenty countries that have not complied yet, Iraq being one. The rest of the world has begun to adapt to the existence of uniform criteria of legislation. This is the first process. The second stage is to establish

executive mechanisms in the countries in order to implement these pieces of legislation and these directives, and to create intelligence units in the police and establish mechanisms of coordination among agencies within a country. This is just beginning, and it is going to take time for the United Nations to verify that countries have the capabilities in police, intelligence, customs, immigration, border controls, and so on. The third stage is cooperation at the bilateral and multilateral regional levels. The United Nations requires that countries begin to interact with each other and cooperate at a regional level. This stage also establishes the obligations for international organizations to participate very actively in promoting the relationship between states in this process.

We have, by virtue of Resolution 1373, a unique opportunity to transfer all of these capacities beyond the fight against terrorism to the area of organized crime of various forms and fashions. I think we are gradually moving in that direction. Mexico and the United States are, by comparison, far advanced. Mexico and the United States have gradually created this web of capacities among each other. One characteristic of these capacities is that they have to be based on symmetry of the relationship. I remember distinctly when we were negotiating with the United States the exchange of information of bank accounts. The United States established criteria by which we had to share with them but they did not have to share the information of their accounts with us. It was a very unbalanced process and very asymmetrical. Gradually, we are coming to terms with the notion that everything has to be symmetrical and reciprocal so we play on a level playing field. Looking from the perspective of what I have seen at the United Nations, I realize how far advanced Mexico and the United States are in those areas.

I am going to close my remarks here and be ready to answer questions. I deliberately did not refer to the matters that are today in very intense debate as part of our work in the Security Council, about which you probably read every day. I just want to tell you what a peculiar institution the Security Council is. Probably a year ago, none of you had any idea what the Security Council was. I had never seen the words, United Nations Security Council, on the front page of the newspaper when I arrived at the United Nations over a year ago. Probably every now and then somebody would say, "The U.N. Security Council would meet," and this and that, but the question of Iraq has put the Security Council at the forefront of every paper in the world. Walking inside the room of the Security Council a year ago, it was a deserted area. The diplomats would go in and we would lock ourselves in the Security Council's room of consultations, which is a very small room where countries face each other, and very little attention was paid to us. Today we cannot go anywhere in the United Nations or in New York without a storm of reporters following us. I have reporters in front of my house when I come out in the morning. I have reporters in my office. And if I have a meeting, they find out that I have a meeting with somebody, and then they arrive at the meeting and they always want to know exactly what is happening and when we are going to agree or disagree on whether there is going to be war or not.

This is an opportunity for the United Nations. It is an opportunity for the United Nations to be identified in the world as a very relevant institution. By the work that I have seen at the United Nations in the area of counter-terrorism, the United Nations is an extremely relevant institution, no matter what happens in Iraq. No matter what happens with the Security Council in the decisions we are going to be making in the next two weeks. No matter if the Security Council endorses or not the resolution that the United States presents to us, the United Nations is going to be a very relevant institution. It is going to be in the center of international relations. And the United Nations is going to be a critical instrument for us to achieve larger goals of a collective nature. You probably will cease to hear a lot about the Security Council after this issue is resolved one way or another. However, bear in mind that the United Nations is a very strong institution. It is the creation of the states. It has all of the mistakes and all of the problems, and it is only as slow as the countries of the world are to solve problems. But it is the most precious institution we have to preserve world peace and to address collective interests and to create a sense of belonging in a world that we can manage by ourselves.

Thank you very much.

Berkeley Journal of International Law

Volume 22 | Issue 1 Article 3

2004

The Mismatch between State Power and State Capacity in Transnational Law Enforcement

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The Mismatch Between State Power and State Capacity in Transnational Law Enforcement

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If there were but one way to wage war against crime, and the only question how vigorously to do it, there would be no need to identify the different objectives in devising the campaign. But if this is a continual campaign to cope with

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some pretty definite evils, without any real expectation of total victory or unconditional surrender, resources have to be allocated and deployed in a way that maximizes the value of a compromise.[1]

INTRODUCTION

Imagine that the citizens of a nation-state fear an amorphous threat to their security. Maybe the threat emerges from a tide of corruption, fraud, or drug trafficking. Perhaps the citizens fear a growing threat of terrorist activity. In response to citizens' concerns, the government recognizes the threat and uses its legal powers to respond. If existing laws are not sufficient, the government promulgates new laws that increase its capacity to deal with the threat. When these threats spill across borders, states cooperate on investigations, craft international treaties, or assert extraterritorial legal authority to seize an offender. Over time, governments therefore reduce both domestic and transnational threats.

I take issue with this account. The power to impose coercive punishment through law and the capacity to reduce threats are different things. Power reflects a nation-state's authority to legitimately coerce individuals or organizations in an attempt to achieve some objective desired by policymakers. The hallmarks of power are expansively-worded criminal statutes that can be applied domestically or extraterritorially and extensive regulatory powers that can be imposed with minimal judicial intervention to detain people, effect forfeitures of bank accounts, freeze assets or impose civil penalties. Capacity, meanwhile, describes the nation-state's ability to detect the most serious offenders and to effectively focus its extraordinary legal powers specifically on them.[2] Capacity is not assured with the passage of any law. It depends on the interplay between the laws, the behavior of the targets of law enforcement, and the technical sophistication, political incentives, and organizational practices of law enforcement officials and their political superiors. Together these practices let the nation-state anticipate how offenders behave, and in particular, how they react to the law. The separation between capacity and power can cloud analysis of the law's role in reducing transnational threats, creating agency problems that sepa-

1. THOMAS SCHELLING, CHOICE AND CONSEQUENCE 169 (1984).

2. Obviously a lot here depends on how we define "serious," "important," or "egregious" offenders. For the purposes of this article, I assume that one can ordinally sort offenders into groups, where the most serious ones are those that fall into either of two categories: those most resembling the paradigmatic offenders used by supporters of a particular law enforcement program to justify that program, or those who have a combination of motivation and ability to carry out (or substantially facilitate) activities that laypeople might find particularly troubling. These might include, among others, detonating a dirty bomb, leading and expanding an organized criminal network involving narcotics trafficking or alien smuggling, or engaging in massive public corruption schemes involving the theft of large sums from the public fisc. Constructing such an ordinal ranking of offense severity is relatively straightforward using the public statements of policymakers or reactions from the public. Creating a *cardinal* ranking is more difficult. *See, e.g.*, Peter Rossi et al., *The Seriousness of Crimes: Normative Structure and Individual Differences*, 39 AM. SOC. REV. 224, 227 (1974).

DOI: https://doi.org/10.15779/Z38564P

rate the interests of the public at large (the "principal") from those of politicians running the government (the "agent").[3]

Why would policymakers not care about capacity? Even if some want to do their best to build capacity, nothing *guarantees* that legislators, executive branch officials, and law enforcement officials will care about capacity-building, particularly when it is so easy for the public to observe the use of government legal powers and so hard for the public to observe just how much capacity the nation-state has to reduce threats at the margin.[4] Suppose that some important segment of the national public wanted to force its government to develop capacity and they had some way to put pressure on the government. If all the laws addressing transnational threats then could be precisely, and publicly, probed with an uncontroversial metric of marginal costs and benefits, there would be little danger of a gap between power and capacity. The public or political intermediaries such as opposition politicians could then clearly assess government capacity. That metric is not available, and is unlikely to appear anytime soon.[5] Marginal reductions in atrocious transnational threats may be desirable if they can be achieved through expansions in the nation-state's legal power. However, such a trade-off still requires us to evaluate, rather than assume, the connection between power and capacity.

My purpose here is to analyze the forces that engender the separation of state capacity and state power in order to shed light on transnational criminal justice. I have chosen the global attack on criminal finance as a case study because it is the most ambitious legal response to transnational crime: the conduct targeted in this attack includes both willful and also merely negligent conduct, the tools used to wage the attack include criminal penalties as well as regulation, and the predicate offenses range from drug trafficking to public cor-

3. *Cf.* Jeffrey S. Banks & Barry R. Weingast, *The Political Control of Bureaucracies Under Asymmetric Information*, 36 AM. J. POLI. SCI. 509 (1992) (discussing agency problems arising from politicians attempting to control domestic regulatory bureaucracies, and how politicians can use a combination of administrative procedures and interest group monitoring to mitigate this).

4. Policymakers might care in principle about avoiding the dangers of building power without capacity, but these may be offset by the value of using power to convince (naïve) voters that the government *does* possess the capacity to deal with transnational threats. The dangers of using power without capacity may be perceived as longer-term threats (if they are perceived as threats at all), and politicians' discount functions may be different from those of voters. The use of power without capacity is a variation on traditional agency problems, since the decision to use power might convey the impression to the public that the nation-state faces imminent danger, which in turn might redound to the benefit of politicians. *See, e.g.*, John R. Oneal & Anna Lillian Bryan, *The Rally 'Round the Flag Effect in U.S. Foreign Policy Crises, 1950-1985*, 17 POL. BEHAVIOR 379, 394 (1995) (noting that increases in presidential support in a crisis are greatest when a president's response is reported); *see also* Matthew Purdy & Lowell Bergman, *Unclear Danger: Inside the Lackawanna Terror Case*, N.Y. TIMES, Oct. 12, 2003, at A1 (despite ambiguities in the extent of danger posed by the alleged terrorist cell in Lackawanna, New York, policymakers, including New York's governor, responded to the arrests by claiming that they sent "a very important message: Terrorism is real, and not just in major cities").

5. For a discussion of the difficulties involved in such analysis of costs and benefits, see Mariano-Florentino Cuéllar, *Choosing Anti-terror Targets by National Origin and Race*, 6 HARV. LATINO L. REV. 9 (2003) [hereinafter *Choosing Anti-terror Targets*].

ruption to terrorism.[6] I use the term "criminal finance" to refer to financial activity linked in some way to deriving profits from crime, or to funding crime. The global attack on such activity is grounded in the view that many perpetrators of transnational crime are motivated by financial gain—and still others need funds to achieve their illegal objectives.[7] So perhaps it is not surprising that much of the serious discussion about reducing transnational crime or even national security threats invariably turns to the importance of disentangling money from crime.[8]

Parallel to the rhetoric, many nation-states have instituted legal changes allegedly critical to the success of transnational law enforcement. Legislatures have established separate penalties to punish financial activity that furthers certain predicate crimes.[9] Law enforcement officials prosecute people who fund or profit from serious predicate crimes. Working with regulators, they freeze as-

6. The global attack on criminal finance is hailed constantly as an integral component of any serious effort against transnational crime. The provisions of the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, annex I, 55 U.N. GAOR Supp. (No. 49) at 44, U.N. Doc. A/45/49 (Vol. I) (2001) (entry into force Sept. 29, 2003), underscore the alleged centrality of the global attack on criminal finance to controlling transnational crime. Article 6 of the Convention provides that states parties shall establish "as criminal offences. . . concealment or disguise of the true nature, source, location, disposition, movement or. . . property, knowing that such property is the proceeds of crime," and Article 7 requires signatories to "institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions and. . . other bodies particularly susceptible to money laundering." Other ventures include—among others—airline hijackings, weapons trafficking, human trafficking, drug trafficking, proliferation of weapons of mass destruction, and cybercrime. None of these ventures reflects the explicit ambition and scope of the global attack on criminal finance—to use criminal penalties and regulation and to have an effect across areas of transnational crime.

7. *See, e.g.*, H. RICHARD FRIMAN & PETER ANDREAS, *International Relations and the Illicit Global Economy*, *in* THE ILLICIT GLOBAL ECONOMY AND STATE POWER 1, 1-2 (H. Richard Friman & Peter Andreas eds., 1999). Writing a half-decade ago, they described the extent of illicit financial flows in the following terms and collected a number of relevant sources:

> It is estimated that the trafficking in illegal drugs generates as much as $500 billion in annual retail sales, a dramatic jump from just a decade ago. The smuggling of illegal immigrants into advanced industrial countries has developed into a multibillion-dollar business with smugglers charging up to $50,000 per head. Dumping and illicit trafficking comprise a growing portion of the cross-border trade in toxic waste, a trade conservatively estimated at 30-45 million tons and $15 billion annually. The clandestine global trade in endangered species is estimated at $10 billion annually. Illicit arms sales are fueled by the potential for a "nuclear 'yard sale' in the former Soviet Union" and the black market component of the annual $40-$50 billion conventional arms trade. There is even a growing illicit transnational trade in human body parts, thanks to modern technologies that make it possible to store and ship high-demand organs such as kidneys, livers, and bone cartilage. Finally, the 'financial reflection' of these and other illicit transactions contribute to wide-scale money laundering, tax evasion, and capital flight.

Id. at 2.

8. In terms of the importance of the global attack, see, for example, *International Cooperation Needed to Combat Money Laundering, Third Committee Told as Debate on Crime, Drugs Continues*, Press Release GA/SHGC/3635, United Nations, Fifty-Sixth General Assembly, Third Committee, 11th Meeting (October 16, 2001), *available at* http://www.un.org/News/Press/docs/2001/gashc3635.doc.htm; GUY STESSENS, MONEY LAUNDERING: A NEW INTERNATIONAL LAW ENFORCEMENT MODEL (2000); Ronald K. Noble & Court E. Golumbic, *A New Anti-Crime Framework for the World: Merging the Objective and Subjective Models for Fighting Money Laundering*, 30 N.Y.U.J. INT'L L. & POL. 79 (1997-98).

9. *See infra* Part I.b.i.

sets. They regulate financial institutions that may come into contact with currency or bank balances gleaned from slave labor or from selling a kilogram of heroin at street price. Government officials support and invoke international treaties on the subject. Led by the United States and its allies among developed economies in Europe, these efforts generate tens of millions of currency transaction reports;[10] tens of thousands of suspicious activity reports;[11] thousands of prosecutions, forfeitures, and orders freezing assets; hundreds of regulatory actions; and dozens of international agreements. Advocates of this global attack on criminal finance envision a steady movement over time toward a world where states' legal power to attack criminal finance will meet the technological, organizational and practical demands of mounting the global attack.[12]

While there may be principled reasons to mount a global attack on criminal finance, the reality involves a bewildering array of disconnections between asserted objectives and real-world results. Despite persistent efforts of government officials to equate these laws with the capacity to disrupt criminal finance,[13] the alignment of power and capacity is likely to be evanescent. Interest groups may oppose regulatory policies that build capacity. Some of the offenses that are easiest to detect, like currency reporting violations, are not the most dangerous or problematic ones. International agreements—even when they are backed up by the threat of extraterritorial sanctions—can succeed in forcing some states to make superficial legal changes but not deeper reforms that

10. *See* 31 U.S.C. § 5313 (2003) (establishing main currency transaction reporting requirement for domestic financial transactions); 26 U.S.C. § 6050I(f) (2003) (requiring the filing of reports of commercial transactions involving $10,000 or more in currency); 31 U.S.C. § 5316 (2003) (establishing reporting requirement for the movement of currency or monetary instruments totaling $10,000 or more into or out of the U.S.); 31 C.F.R. pt. 103.22(a)(1) (2003) (implementing CTR requirement).

11. *See* FINANCIAL CRIMES ENFORCEMENT NETWORK, THE SAR ACTIVITY REV. TRENDS, TIPS AND ISSUES: ISSUE 5 5 (2003), *available at* http://fincen.gov/sarreviewsissue5.htm.

12. Throughout this article, I use the term "state" in the sense used in international law, to describe nation-states assumed to possess a measure of sovereignty and recognized as such under international law. I use the terms "transnational law enforcement" to refer to efforts to disrupt cross-border criminal activity using investigations, criminal prosecutions, and regulatory policy.

13. Government officials also insist that previously-existing and new legal authorities to attack criminal finance are building the United States' capacity to detect and disrupt the most troubling kinds of criminal financial activity. *See, e.g.*, Office of Public Affairs, U.S. Department of the Treasury, *Testimony of Juan C. Zarate, Deputy Assistant Secretary, Executive Office of Terrorist Financing and Financial Crime, U.S. Department of the Treasury, before the Senate Foreign Relations Committee* (March 18, 2003), *available at* http://www.ustreas.govpress /releases/js139.htm ("Since September 11th, we have led a global campaign to identify, disrupt, and dismantle the sources and means of funding for Al Qaida and other terrorist groups . . . . We therefore have attacked the financial infrastructure of terrorist groups and held accountable those who bankroll terror."); *see also* Office of Public Affairs, U.S. Department of the Treasury, *Statement of Jimmy Gurule, Under Secretary for Enforcement, U.S. Department of the Treasury, before the Subcommittee on Treasury, Postal Service, and General Government, Committee on Appropriations* (February 28, 2002), *available at* http://www.ustreas.gov/press/releases/po1057.htm ("Of particular importance to our counter-terrorist efforts is the USA PATRIOT Act that clarifies the law enforcement and intelligence communities' authority to share financial information regarding terrorist investigations. These provisions are already being utilized and are bearing fruit in disrupting financial networks"); *see also Anti-Money Laundering Efforts in Texas: Field Hearing Before the Committee on Banking, Finance, and Urban Affairs, House of Representatives*, 103rd Cong. 91-92 (Statement of Ronald K. Noble, Treasury Under Secretary for Enforcement).

could directly affect criminal financial activity but may offend domestic financial interests. In developed countries, executive branch officials with ample power but scarce capacity to pursue the attack on criminal finance may still end up using this "disequilibrated" power to send citizens a signal that in fact they have built the capacity to reduce dreaded threats. Since power is visible and capacity rarely is, law enforcement officials might even trade away capacity in exchange for more power.[14] Finally, both developed and less developed states may find it difficult to regulate some financial transactions because substitute systems of exchange can be used to achieve them. People who want to avoid heavily-regulated banks can transport currency across borders, or they can seek out a *Hawaladar* who can informally arrange the transfer, for a price.[15] All of these forces can help create—and maintain—a gap between a state's legal powers to address citizens' most pressing security concerns and a state's capacity to deploy its draconian legal powers to actually reduce these threats at the margin. While the gap can make some legal actions futile, or even wreak perverse consequences, scholars of transnational law have seldom, if ever, addressed the issue.[16]

The remainder of this article elaborates on the preceding arguments in three parts. Part I explains the global attack on criminal finance. There I discuss the doctrinal structure and justification for this new trend in transnational criminal law. I also explain the justifications for making the attack global rather than merely domestic, and I discuss the proliferation of different criminal and regulatory laws generated by the interest in disrupting criminal finance. Part II then discusses a central problem in the global attack on criminal finance and in transnational law enforcement more generally: the separation between state legal

14. *See infra* Part II.b.iii. *See also* Mariano-Florentino Cuéllar, *The Tenuous Relationship Between the Fight Against Money Laundering and the Disruption of Criminal Finance*, 93 J. CRIM. L. & CRIMINOLOGY 311, 447-48 (2003) [hereinafter *Tenuous Relationship*] ("Lawmakers might be less concerned about the details of regulatory implementation designed to target criminal finance, because few among the public are likely to understand the value of it.").

15. *See infra* Part II.b.iv.

16. What research there is on state power and capacity tends to question whether there has been a decline in state "power" given the rise of non-state actors such as organized criminal networks or multinational corporations. As best I can tell, this literature does not draw any significant distinctions between state legal powers and state capacity to use those powers to achieve desired goals. *See, e.g*, LOUISE I. SHELLEY, *Transnational Organized Crime: The New Authoritarianism, in* THE ILLICIT GLOBAL ECONOMY AND STATE POWER 25, 46 (H. Richard Friman & Peter Andreas eds., 1999) ("The authoritarianism of transnational organized crime is predicated on a weak state"). Some scholars also draw distinctions between "weak states" and "powerful" states without distinguishing coercive authority, whether or not legitimized by law, from broader capabilities to achieve state objectives. *See, e.g.*, Eric Posner, *Do States Have a Moral Obligation to Obey International Law?*, 55 STAN. L. REV. 1901, 1915 (2003) ("[M]y argument is confined to the existing international system, where powerful states have more influence than weak states and compliance is rare."); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 67 (2002) ("For weak states the import of regulation can be thought of as 'a price of admission' to the fullest range of benefits provided by the network."); Mortimer Sellers, *The Legitimacy of Humanitarian Intervention Under International Law*, 7 INT'L LEGAL THEORY 67, 76 (2001) ("Large powerful states that violate international law do not face the same levels of enforcement that smaller weaker states do. Small weak states can seldom act to prevent human rights violations from occurring elsewhere.").

DOI: https://doi.org/10.15779/Z38564P

power to severely punish offenses and state capacity to detect and target the most important offenders—and the pressing threats—that citizens fear. I develop the argument by surveying various dynamics that create agency problems and tend to separate the extent of legal power used in the global attack on criminal finance from state capacity. Part III considers possible consequences of that separation, which include dilution of political pressures on nation-states to adopt policies that are costly to policymakers but have a greater probability for building capacity, and the creation of pressures that may radicalize actors in a position to exacerbate transnational threats. Nation-states ignoring these risks incur yet another risk: namely, that the gap between power and capacity will render some transnational law enforcement efforts self-defeating.

I.
THE GLOBAL ATTACK ON CRIMINAL FINANCE AS A CASE STUDY IN TRANSNATIONAL LAW ENFORCEMENT

To understand the gap between power and capacity it is helpful to start with some background about the subject of this case study. During the last decades of the twentieth century the United States and some of its allies started assailing the fact that certain people were becoming fabulously wealthy from engaging in cross-border illegal activity, and that money from around the world could be used to fund illegal activity such as terrorism. In the United States, much of this focus on criminal finance arose from legislative and executive responses to political circumstances.[17] Attacking criminal finance made for compelling symbolic politics amidst growing public concern about drug trafficking, and the attack conveniently provided a means to demonstrate that policymakers were addressing amorphous but increasingly salient global threats. Nonetheless, as I explain below, there is also a principled case to be made for this global attack.

A. Legal Structure of the Attack on Criminal Finance

Doctrinally, one might envision the attack on criminal finance either of two ways. One approach is to think of a prohibition on "criminal finance" as an expansion in the scope of preexisting, proscribed offenses. Thus, financing terrorism becomes an instance of terrorism, and drug money laundering is just an example of conspiracy to commit a drug offense.[18] The other approach is to think of criminal finance as a separate offense altogether, where the gravamen of the offense is not its direct relationship to the predicate crime, but rather the act of using knowledge and technical capacity to manipulate the financial system in nefarious ways. Under this conception, criminal finance is more like fraud–involving someone who appears respectable but uses the financial system

17. Elsewhere, I develop a more detailed analysis of the political circumstances affecting the development of anti-money laundering laws, which constitute a major part of the global attack on criminal finance. *See* Cuéllar, *Tenuous Relationship*, *supra* note 14, at 444-50.

18. Indeed, some judicial decisions predating the modern anti-money laundering statutes explicitly recognize how someone who helps solve a drug trafficker's financial challenges should be viewed as a conspirator. *See, e.g.*, United States v. Barnes, 604 F.2d 121, 154-55 (2d Cir. 1979).

for illegal ends.[19] Obviously these two conceptions might play out differently in context, but the important lesson for now is that both are certainly compatible with the basic criminal justice framework in play throughout the world.

For example, under either of these conceptions, the state decides to criminalize activity having a presumed connection to inherently harmful conduct that is difficult to observe. Thus a person transacting with a criminal guilty of drug trafficking or corruption and hiding the money's origin is not just punished for the marginal additional harm that the transaction itself creates, but for the unobserved activities presumably connected to the money laundering crime. The implication is that for every suitcase of crumpled bills turned into a credit in a Bahamian bank account, there occurred various drug smuggling and distribution activities, attempts to entice fifteen year-olds into a drug habit, as well as the reinvestment of criminal proceeds in corruption and crime.[20] Far from being a unique feature of the attack on criminal finance, this sort of "administrative presumption" crime is increasingly common in criminal codes. Drug possession crimes might be understood this way—the punishment being a way of responding not just to the perceived harm of someone holding onto the drugs, but for presumed past and future crimes. Perhaps because many "criminal finance" offenses have this characteristic, the expansion of the global attack has been relatively easy to graft onto existing criminal codes.

The amended criminal codes then allow a turn toward investigating and prosecuting a sort of "indirect liability." Historically, transnational law enforcement concerned itself with willful offenses like piracy, hijackings, and drug trafficking. People were the subject of extradition warrants and international condemnation because they were willing offenders. In contrast, the intent requirement in laws and regulations targeting criminal finance is supposed to be quite low. Instead of only punishing transnational criminals involved in willful activities (i.e., giving money to a front-group for terrorists posing as a charity, where the donor harbors the purpose of funding terrorism), the global attack implies a concern even with those who are merely reckless or negligent.[21] All of this involves the ascription of responsibility to people who are not directly

19. For an example of this sort of framing, see U.S. DEP'T OF THE TREASURY, THE NATIONAL MONEY LAUNDERING STRATEGY FOR 2000 7 (2000) ("Money laundering taints our financial institutions, and, if left unchecked, can undermine public trust in their integrity.").

20. As an analogy, one could try to justify the severe mandatory minimums associated with the simple possession of five grams or more of a substance containing cocaine base as a substitute for proving that someone is involved in drug distribution. *See* 21 U.S.C. § 844 (2001) (establishing a five-year mandatory minimum sentence for possession of five or more grams of cocaine base). Of course, this leaves the question of evaluating the purported harm (for example, cocaine distribution), deciding on the sufficiency of the connection between the allegedly harmful activity and the proscribed activity (cocaine base possession), and determining which institution(s) should control the answers to the preceding questions.

21. This unusual trend in transnational criminal law is in full display in a coterie of model laws designed to combat money laundering. For example, the Commonwealth Model Law for the Prohibition of Money Laundering defines the offense in relevant part as follows:

> "money laundering" means –
>
> (a)(i) engaging, directly or indirectly, in a transaction that involves property that is proceeds of crime: or

committing the underlying predicate offense. Individuals must increasingly shoulder the burden of assuring that, say, a charity to whom they would like to contribute is not itself contributing to another organization that is engaged in terrorist activity. Indirect liability is then supplemented with regulation and civil penalties. The more dangerous a particular criminal offense is considered, the easier it is for legislators and executive branch officials to make a case for regulatory requirements to supplement the bare criminal statutes defining an offense. Regulation is powerful stuff: it allows the state to use numerous civil penalties against people who engage in prohibited conduct but who are not worth subjecting to criminal punishments.

This brings us to the role of the financial system. Supporters of the global attack imply that the financial system should be used as a lever to combat crime. Conversely, they believe the financial system should not itself be used to facilitate—even incidentally—the activities of criminals. Just as environmental or occupational safety regulation is meant to reduce the risk of some harms, so is regulation of the financial system used to reduce a compound risk: that financial institutions will be used to make it easier to finance and profit from crime, and that such financial activity will actually result in a marginal increase in offending rates.[22] Through regulatory requirements, officials can impose liability on banks and financial institutions even when it is neither possible nor desirable to resort to imposing criminal liability. The regulatory requirements may also generate information, which can be useful in at least three different interrelated ways. The most obvious payoff to using financial information against crime is in the prosecution or the final stages of an investigation of a suspect. A prosecutor anywhere from Baltimore to Basle to the Bahamas can use financial records to establish a defendant's motive. Wire transfer records also help establish the relationship between associates. Finally, financial records can impeach a witness or bolster her credibility. In short, financial records are evidence, and thus in a capable prosecutor's hands, they help achieve punishment in a legal system that requires proof.

(ii) receiving, possessing, concealing, disguising, transferring, converting, disposing of, removing from or bringing into the (territory) any property that is proceeds of crime; and

(b)(i) knowing, or having reasonable grounds for suspecting that the property is derived or realised, directly or indirectly, from some form of unlawful activity.

Commonwealth Model Law for the Prohibition of Money Laundering (2003), *available at* http://www.imolin.org/Comsecml.pdf. This means that a person who "indirectly" engages in a transaction involving property that is the proceeds of crime, and has "reasonable grounds for suspecting" that the property is derived from unlawful activity would be guilty. This negligence standard comports with that found in another model law, the Model Money-Laundering, Proceeds of Crime and Terrorist Financing Bill Part II, 17 (2003), *available at* http://www.imolin.org/ poctf03.htm. That document provides that: "A person commits the offence of money-laundering if the person . . . acquires, possesses or uses property, knowing or having reason to believe that it is derived directly or indirectly from acts or omissions."

22. As with environmental or occupational regulation, the use of regulation in this context raises questions about transnational enforcement. Regulated parties may substitute activities that take place in less-regulated jurisdictions. *See infra* Part II.b.iv.

Yet the turn to the financial system also represents a grander ambition still: to churn through information and sort transactions into more and less suspicious ones, thereby helping people in charge of enforcing the law decide how to allocate their scarce investigative resources. Virtually all law enforcement activity involves some sifting through information to decide on potential threats to target. Even a cop walking down the street uses his physical senses to carry out some version of this.[23] One may rightly question whether harvesting such information would dramatically expand states' ability to punish transnational crime. The only point to emphasize here is that the motivation behind attacking criminal finance is to exploit the possibility that financial information can have substantial law enforcement payoffs. The record of such activity may be mixed, particularly given the likely resistance from financial groups, but the ambition is still central to understanding the attack on criminal finance.

The regulations are supposed to work with the criminal laws to disrupt criminal finance. In other work, I elaborate on the justifications for targeting not only money laundering, but criminal finance more generally.[24] Two things are worth emphasizing here. First, it is certainly possible to make a plausible, utilitarian argument for targeting criminal finance. The argument does not imply that targeting criminal finance is the only or even the best way of reducing illicit activity. Instead, the point is that if we make a few plausible assumptions, it makes sense to disrupt criminal finance as part of a larger strategy to target illicit activity. Second, the plausible justification for attacking criminal finance can also justify an international or global attack.

With respect to the first point, money matters because people tend to respond to costs and benefits, and these are often easily measured in money.[25] For example, drug traffickers, human traffickers, and terrorists must all solve organizational problems. Many of those problems can be solved with money. But the irony is that money creates as well as solves organizational problems. If it is in cash, then it must be deposited and moved. Even if it is not in cash, money must still be managed, raised, and directed towards particular activities. It must be guarded from people who would rather convert it to personal use. Its origins (or in some cases even its existence) must be kept secret from governments. In principle, the lower the cost of solving the organizational problems

23. I have written at length about the prospects for sorting through such information. *See* Cuéllar, *Tenuous Relationship*, *supra* note 14, at 444-47.

24. *Id.* at 380.

25. For a thorough review of equilibrium models of crime consistent with this notion, see Isaac Ehrlich, *Crime, Punishment, and the Market for Offenses*, 10 J. ECON. PERSP. 43, 46 (1996). Thus:

> A person's decision to participate in illegal activity i can be viewed as motivated by the costs and gains from such activity. These include the expected illegitimate payoff (loot) per offense, w_i; the direct costs incurred by offenders in acquiring the loot (including the costs of self-protection to escape punishment), c_i; the wage rate in an alternative legitimate activity, w_i; the probability of apprehension and conviction, p_i; the prospective penalty if convicted, f_i, and finally one's taste (or distaste) for crime – a combination of moral values, proclivity for violence, and preference for risk.

Id. at 46. *See also* Peter Reuter, Robert MacCoun, & Patrick Murphy, *Money from Crime: A Study of the Economics of Drug Dealing in Washington, D.C.*, RAND Corporation Report (1990).

https://scholarship.law.berkeley.edu/bjil/vol22/iss1/3
DOI: https://doi.org/10.15779/Z38564P

associated with money, the easier it is to commit numerous offenses that require, generate, or benefit from money. This makes offenders have a sort of love-hate relationship with the legitimate financial system, which encompasses private and commercial banks, investment banks and broker dealers, commodities traders, and businesses selling legitimate goods and services. While cash combines the blessing of anonymity along with the complication of bulk, the legitimate financial system does exactly the opposite. On the one hand, the financial system can collect information and therefore establish a proverbial paper trail to trace transactions. On the other hand, the financial system has largely evolved from economic and political pressures that have forced it to be very good at solving organizational problems involving money—including how to store it, move it, guard it, and reinvest it at an adequate rate of return.[26]

To illustrate the potential payoffs of the global attack, suppose we are trying to understand the impact of financial anonymity on the extent of illegal activity. A large number of offenders should crave the cloak of anonymity: the greater the financial anonymity they have, the more they might be willing to participate in financing and supporting illegal activity.[27] The figure below illustrates the relationship between crime and financial anonymity posited by proponents of the global attack. One axis is financial anonymity. The other tracks the product of the quantity and severity of illegal activity demanded by some group or individual. The lines L1 and L2 represent two alternative government-imposed limits on anonymity (that is, achieved through criminal penalties and investigative strategies, regulations, or international agreements limiting bank secrecy). In the diagram, moving from L2 to L1 may be expensive for the government, but lowers the illegal activity demanded from I* to Iq. The precise impact of the reduction depends on the slope of the line connecting the extent of financial anonymity to the illegal activity demanded. Thus, curve S represents one function, while curve S' illustrates how reductions in financial anonymity may have a milder impact on illegal activity where offenders are less concerned about being caught.[28]

Of course, people whose interest in crime is partly driven by profit may not always react in ways that could be easily described as "rational."[29] However, one may care about anonymity without conforming to a more elaborate defini-

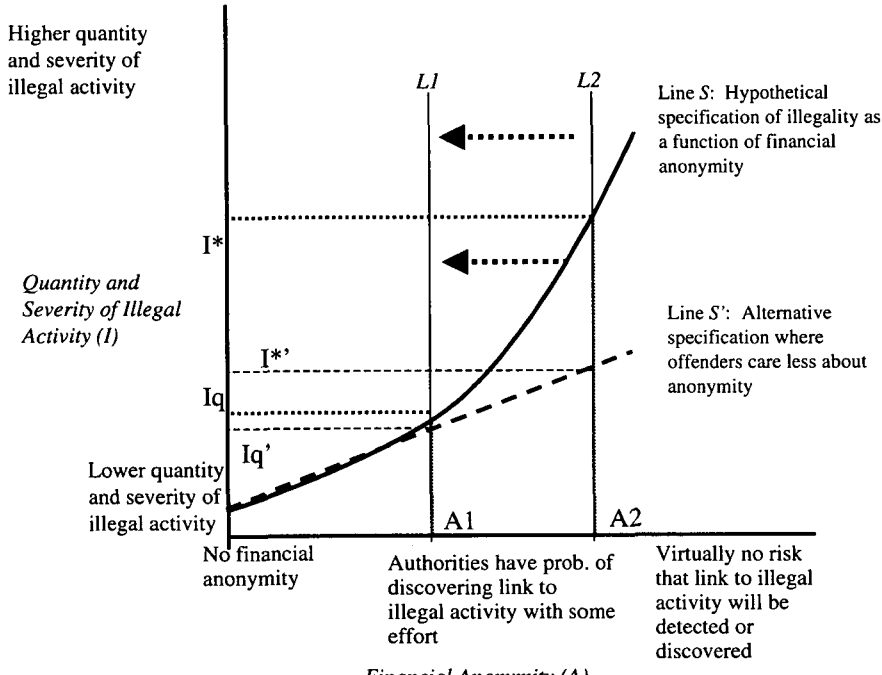
26. *See generally* Cuéllar, *Tenuous Relationship, supra* note 14, at 382.

27. Anonymity may entice potential offenders to think they will be able to spend their illicit gains without facing added risk of being punished. Some people who finance or profit from offenses are likely to value things that are endangered by the absence of anonymity, including (among other things) some combination of the following: freedom to lead a life that appears to be tied to legitimate economic pursuits, freedom from detection by law enforcement, flexibility to solve organizational and financial problems without incurring added risks of detection, or lack of attention from other people involved in illicit activities.

28. Curve S is concave to capture the possibility that certain offenders would only find it enticing to finance crime if there is virtually no possibility of being detected. Different assumptions would yield a different curve.

29. A particularly thoughtful account of some of the non-financial incentives enticing potential criminals is JACK KATZ, SEDUCTIONS OF CRIME: MORAL AND SENSUAL ATTRACTIONS IN DOING EVIL (1988). But note that this account, which emphasizes the non-financial attractions of crime, focuses on illicit activities with relatively low financial returns.

IMPACT OF FINANCIAL ANONYMITY ON ILLEGAL ACTIVITY
(OTHER THINGS BEING EQUAL)



tion of instrumental rationality: even terrorists who believe they have a date with destiny want to avoid being foiled before they execute their plan, and many other serious offenders, when given a choice, would rather avoid detection than attract attention.[30] This means that lines like S and S' should be expected to slope upward. The precise usefulness of targeting criminal finance then depends on the aggregate slope of line S, as well as a few other reasonable assumptions, like postulating that the government can move the limit on anonymity from L2 to L1 at a reasonable cost.[31]

Notice that some of the justification for the global attack would still apply even if there were imperfections in the detection system used to identify targeted accounts. Nowhere does the law ever claim (or perhaps even aspire to) perfection, even when a convicted felon's life is at stake. Sometimes it is hard to

30. *See* Cuéllar, *Tenuous Relationship*, *supra* note 14, at 386 (". . .even individuals whose desire to engage in terrorist activity could hardly be termed 'rational' might still make reasoned judgments meant to maximize the success of their activity and lower the risk of detection.").

31. Note that even if individual supply-of-offense functions were completely inelastic with respect to variations in financial anonymity above some critical threshold level, the whole population might still exhibit an elastic curve indicating the supply of offenses relative to financial anonymity. As long as changes in the degree of financial anonymity actually changed the return from offenses, then the return from criminal activity would change for marginal offenders, thus inducing them to engage in (or refrain from) illegal activity.

know if someone is genuinely guilty of an offense, and other times the underlying substantive offenses themselves are hardly more than prophylactic measures against people who may not ultimately be engaging in the most dreaded harm. When it comes to the global attack on criminal finance, we might imagine that if people knew some economic activities created the appearance of impropriety, then people could assiduously avoid these activities (such as, transactions with particular people, organizations, or countries). This would be fine if we believed that, among other things, there is sufficiently low social value in the suspect activity that we would not mind deterring it, and that firms taking steps to avoid impropriety will recognize they are being rewarded. Things start to get more problematic if the capacity to detect troubling financial transactions is extremely low, a point to which I return below.[32]

B. The Role of Treaties and Extraterritorial Power

Because crimes occur across the rivers and barbed wire fences that separate nation-states, one can also imagine some plausible reasons for policymakers in one country to be concerned about criminal finance around the globe. The United States and its allies have built a system of international agreements, multilateral conventions, and United Nations resolutions that call on countries (and in some cases establish mild requirements) to join the global attack on criminal finance. The threat or use of extraterritorial legal authority has also become a regular part of the global attack. Nonetheless, despite the noise made about these strategies, their impact is limited by problems involving the detection of offenses and the monitoring of countries implementing legal changes.

1. Justifications for Making the Attack Global

People easily can make cross-border financial transactions given a combination of financial technology and international agreements that have resulted from decades of efforts to facilitate cross-border financial transactions.[33] Transnational wire transfers are simple to execute.[34] Just as currency traders in the United States can purchase local currency in Brazil with little effort, so too can weapons brokers execute transactions to buy surplus Iranian machine guns and pay for them with money from a Swiss bank account. If authorities in one state

32. *See infra* Part III (explaining the political dynamic that might have a perverse effect on Islamic charities and others who are subject to power but may not be saved by a capacity focus).

33. Between the mid-1980s and mid-1990s, daily foreign exchange transactions increased by a factor of 6.5 to $1.3 trillion. THOMAS D. LAIRSON & DAVID SKIDMORE, INTERNATIONAL POLITICAL ECONOMY: THE STRUGGLE FOR POWER AND WEALTH 102 (1997). For a useful discussion of the mechanics of wire transfers, see Raj Bhala, *Paying for the Deal: An Analysis of Wire Transfer Law and International Market Interest Groups*, 42 U. KAN. L. REV. 667 (1994).

34. The combination of international migration and simple means of making transfers among financial accounts has fueled a massive volume of financial remittances flowing from developed economies to less-developed countries. *See* RICHARD H. ADAMS, INTERNATIONAL MIGRATION, REMITTANCES AND THE BRAIN DRAIN: A STUDY OF 24 LABOR-EXPORTING COUNTRIES (World Bank Policy Research, Working Paper No. 3069, 2003), *available at* http://econ.worldbank.org/files/27217_wps3069.pdf. Criminal financial transactions thus become needles in vast haystacks of remittance-related transactions.

decided to invest in a comprehensive regulatory and criminal enforcement program to disrupt criminal finance, offenders might try to evade its consequences by shifting their financial resources to a jurisdiction that either did not collaborate in the global attack on criminal finance or tried to collaborate but did not do so well. Indeed, some jurisdictions might be even more desirable to offenders because of strong laws protecting bank secrecy.[35] Part of this might be remedied in the United States by implementing controls on cross-border movements of financial resources. This already happens to some extent.[36] But given the competing interest of maintaining relative freedom of movement of capital across borders, money moves easily into and out of the United States, and most reporting requirements only focus on a tiny fraction of this flow.[37] Unless one believed (implausibly) that the legal regulation of financial flows into and out of the United States intercepted the bulk of transactions connected to criminal finance, it would seem necessary to think about extending the attack on criminal finance to other jurisdictions.

In many cases, the cross-border aspect of criminal activities also generates added enforcement costs. Law enforcement bureaucracies sometimes have a difficult time sharing information and coordinating their efforts.[38] Investigators and law enforcement officials from different countries may not trust each other.[39] They may not even have a clue that both are trying to nail the same narcotics smuggler. Countries tend to restrict foreign agents' rights to operate.[40] Countries differ in their success regulating corruption and the informal sector,

35. *See generally* MARK HAMPTON: THE OFFSHORE INTERFACE: TAX HAVENS IN THE GLOBAL ECONOMY (1996) (discussing different degrees of secrecy provided by various jurisdictions, and distinguishing between tax havens and bank secrecy havens).

36. *See, e.g.*, 31 U.S.C. § 5316 (2003) (establishing currency reporting requirement for movements of currency or monetary instruments in the amount of $10,000 or more across the border).

37. *See* Cuéllar, *Tenuous Relationship*, *supra* note 14, at 441.

38. *See* EGMONT GROUP, FIU'S IN ACTION (100 SANITIZED CASES FROM THE EGMONT GROUP) 100 (2000), *available at* http://www.fincen.gov/fiuinaction.pdf (October 24, 2003); *see, e.g.*, Lester M. Joseph, *Money Laundering Enforcement: Following the Money*, 6 ECON. PERSPECTIVES: AN ELECTRONIC JOURNAL OF THE U.S. DEPARTMENT OF STATE (May 2001), *available at* http://usinfo.state.gov/journals/ites/0501/ijee/justice.htm. Joseph, a Justice Department official, notes:

> [D]ue to the existence of offshore banks with representative offices in other foreign countries, U.S. law enforcement officials often encounter difficulty trying to determine the actual location of the funds and in which jurisdiction to focus forfeiture efforts. . . . One response to this is that states try to make such information sharing and joint investigations easier. But they have not reduced the cost enough to eliminate its impact on scarce enforcement resources. Even where U.S. law enforcement requests the assistance of the correct foreign jurisdiction, our ability to forfeit these funds depends upon the strength of forfeiture laws in that jurisdiction, which, if available, are frequently incompatible with U.S. law, and upon the cooperation of the foreign government.

39. For example, American law enforcement officials sometimes choose to assume the added complication of executing transnational law enforcement operations in foreign soil without obtaining approval from the foreign government instead of divulging the details of the operation. *See, e.g.*, Julia Preston, *Mexicans Belittle Drug-Money Sting*, N.Y. TIMES, May 20, 1998, at A6. For a description of one such operation, see U.S. v. Banco Internacional/Bital S.A., 110 F. Supp. 2d 1272 (C.D. Cal. 2000).

40. *See* Cuéllar, *Tenuous Relationship*, *supra* note 14, at 331 n.70 (discussing Mexican laws placing restrictions on foreign law enforcement agents operating in Mexico).

which allows criminals to leverage their manipulation of businesses or law enforcement in one country to engage in illicit activity in another.[41] This means that whenever offenders succeed in introducing a layer of international transactions, they effectively move the degree of "financial anonymity" along the horizontal dimension depicted in the figure above. It is hard to see how this added enforcement cost generated by cross-border transactions could ever be completely extinguished. Nonetheless, extending the global attack to other countries could have a marginal impact: two countries that both have anti-money laundering investigators and gather information about suspicious transactions may find it easier to detect and prosecute an offender than two countries where only one makes any effort to target criminal finance.

This is more than speculation. For example, some offenders use bank secrecy havens, such as those in Panama and the Cayman Islands, to scatter money to multiple accounts. Correspondent bank accounts involve a loosely regulated financial institution—such as an offshore shell bank—providing customers with banking services in a more highly regulated jurisdiction (like the United States).[42] The shell bank establishes an account at a full-service United States bank, which makes it easy for the shell bank's customer (or owner) to take advantage of the financial structure of the more highly-regulated bank.[43] Over the years, established banks have struck up correspondent relationships with large numbers of offshore banks, as chronicled by the staff report of one Senate Subcommittee:

> The industry norm today is for U.S. banks to have dozens, hundreds, or even thousands of correspondent relationships, including a number of relationships with high-risk foreign banks. Virtually every U.S. bank examined by the Minority Staff investigation had accounts with offshore banks, and some had relationships with shell banks with no physical presence in any jurisdiction. High-risk foreign banks have been able to open correspondent accounts at U.S. banks and conduct their operations through their U.S. accounts, because, in many cases, U.S. banks fail to adequately screen and monitor foreign banks as clients.[44]

41. Suppose a person is trying to move money away from the United States to hide its link to illicit activity. He may want to use sham companies, which may be easier to create and control in foreign jurisdictions. Then he can use the companies as a front to open foreign bank accounts that can send or receive wire transfers. *See, e.g.*, United States v. Hurley, 957 F.2d 1 (1st Cir. 1992) (lawyers involved in drug smuggling and money laundering set up "several Panamanian and Bahamian companies. . ." to facilitate laundering, but "[n]one of the public records reveal" their ownership).

42. The term "offshore bank" is often used to describe banks whose licenses do not allow them to engage in transactions with the citizens of their own licensing jurisdictions, or limit them from transacting business using the local currency. *See Role of U.S. Correspondent Banking in International Money Laundering: Hearing Before the Permanent Subcommittee on Investigations of the Senate Comm. on Governmental Affairs*, 107th Cong. 278 n.3 (2001) (Minority Staff Report on Correspondent Banking: A Gateway for Money Laundering) [hereinafter *Senate Correspondent Banking Report*].

43. The USA PATRIOT Act increased Treasury's regulatory authority to deal with correspondent bank accounts for "offshore shell banks." *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107- 56, § 312 (Oct. 26, 2001) [hereinafter USA PATRIOT Act]. Offshore banks complying with the rules can still take advantage of correspondent banking.

44. *See Senate Correspondent Banking Report*, *supra* note 42. The report continues:

Regardless of the extent of globalization in financial markets, the argument for mounting a global attack on criminal finance still depends to some extent on other things being equal. Policymakers have to trade off costs, benefits, and risks. The point of the global attack would be lost if it were too expensive, too threatening to other social values, or too cumbersome to administer. It would make little sense to shut down or heavily tax valuable cross-border financial flows to make the global attack succeed. Moreover, not every enforcement problem is exclusively (or even primarily) about criminal finance.

Yet nearly every transnational enforcement problem involves the movement of money, often across borders. Terrorists need funds to buy weapons and make bombs. Smugglers need money to pay off customs and immigration inspectors. Weapons traffickers need to raise interim financing. The financial system produces information useful in *ex ante* and *ex post* enforcement. And financial anonymity makes it possible for people to support offenses at arm's-length, insulating themselves (or trying to) from the consequences of what they do. Finally, many alternative enforcement strategies—such as hiring more undercover agents, paying off more informants, or detaining immigrants who seem to know something about terrorism—have their own drawbacks. All of this means it would be wrong to dismiss the justification for the global attack as either tunnel vision or unprincipled symbolic politics.[45] The question is how to implement the attack across borders.

2. *International Agreements*

At least in theory, the United States and its allies have put great stock in the global attack on criminal finance.[46] The result is a system of international agreements, multilateral conventions, and UN resolutions that call on countries (and in some cases establish mild requirements) to join the global attack on criminal finance. Broadly speaking, international law efforts against criminal finance fall into two categories: the use of formal treaties and the use of international organizations and informal agreements.

The most notable formal treaty dealing with money laundering is the Vienna Convention on Narcotics.[47] Opened for signature at the height of the

> The prevailing principle among U.S. banks has been that any bank holding a valid license issued by a foreign jurisdiction qualifies for a correspondent account, because U.S. banks should be able to rely on the foreign banking license as proof of the foreign bank's good standing. U.S. banks have too often failed to conduct careful due diligence reviews of their foreign bank clients, including obtaining information on the foreign bank's management, finances, reputation, regulatory environment, and anti-money laundering efforts. The frequency of U.S. correspondent relationships with high risk banks. . . belie banking industry assertions that existing policies and practices are sufficient to prevent money laundering in the correspondent banking field.

45. A lot of criminal justice and even national security policy is grounded in conjecture. The global attack on criminal finance is no different. Nonetheless, it is a separate question whether there is at least a plausible theory for why a particular approach to regulating illicit conduct might be fruitful.

46. *See supra* note 8.

47. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 19, 1988, U.N. Doc. E/CONF. 82/15.

DOI: https://doi.org/10.15779/Z38564P

American fixation with drug smuggling and crackdown in the 1980s, the Vienna Convention's main purpose was to prod countries to directly target narcotics trafficking through prosecution, extradition, and new criminal statutes. As such, the Convention was a vehicle to extend the scope of enforcement activity thought to be essential to combat drug trafficking. For example, states signing onto the Convention even committed to passing laws against the possession of equipment useful in drug cultivation.[48] In this vein, some of the Convention's provisions also commit signatories to criminalize the laundering of drug proceeds. The Convention also calls on countries to pass laws allowing authorities to forfeit property connected to drug trafficking.

Multilateral responses to terrorism evince the same approach of expanding the scope of offenses to include their nexus to financial activity. Shortly after September 11, 2001, the United Nations Security Council passed a resolution requesting that members cooperate in the fight against terrorist financing,[49] and urged them to ratify the Convention for the Suppression of Terrorist Financing. The Convention, in turn, requires countries to criminalize the financing of terrorism and to establish mechanisms allowing authorities to freeze the assets of charities, businesses, and individuals believed to be financing terrorism.[50] The focus on broad categories of offenses continues in the current efforts to negotiate regional and broader multilateral treaties on corruption,[51] and with efforts to establish international legal prohibitions on the sale of "conflict" diamonds gleaned from war zones.[52] If there is some legacy to these treaties, it does not appear to be in a direct, measurable impact on regulatory policy. Instead the treaties appear to advance a particular normative view of what conduct should be considered an integral component of the underlying offense, and what it takes to combat it.[53]

In contrast, the work of the Financial Action Task Force (FATF) does not depend on formal, binding multilateral agreements. Working under the auspices of the Organization for Economic Cooperation and Development, the FATF promulgates standards and engages in more detailed reviews of the laws and

48. *Id.* at Article 3(c)(ii).

49. *See Security Council Unanimously Adopts Wide-Ranging Anti-Terrorism Resolution; Calls for Suppressing Financing, Improving International Cooperation*, United Nations Security Council, Press Release SC/7158, Sept. 28, 2001, *available at* http://www.un.orgNews/Press /docs/2001/sc7158.doc.htm.

50. *See* International Convention for the Suppression of the Financing of Terrorism, December 9, 1999, 39 I.L.M. 270 (2000) (entered into force Apr. 10, 2002).

51. *See, e.g.*, Inter-American Convention Against Corruption, June 27, 1996, S. Treaty Doc. No. 105-39 (1998) (ratified by the Senate, July 27, 2000); Criminal Law Convention on Corruption, Europ. T.S. No. 173, (Jan. 27, 1999), *available at* http://www.conventions.coe.int/treaty/en/Treaties/Html/173.htm.

52. For a description of recent efforts to restrict trade in uncertified diamonds, *see* Tracey Michelle Price, *The Kimberley Process: Conflict Diamonds, WTO Obligations, and the Universality Debate*, 12 MINN. J. GLOB. TR. 1 (2003).

53. This sort of logic helps build the continuing case that vicarious offenders involved in financial activity that furthers transnational crime should be subject to liability for it. For example, if exploiting national resources during a military conflict is a war crime, then willfully profiting from such exploitation also may be.

policies that countries use to target criminal finance.[54] The FATF works on the basis of informal agreements and mutual evaluations of members. In the last few years, the FATF has developed a sort of blacklist of countries that are not considered to be cooperating in the attack on criminal finance. As a result, many smaller jurisdictions like the Bahamas and even the Cayman Islands are passing anti-money laundering laws and regulations. FATF members and non-members are trying to adopt its recommendations to combat terrorist financing. All of this is being achieved with minimal use of that traditional staple of public international law, the multilateral treaty. Instead, political pressure, perhaps coupled with the symbolic value of supporting the attack,[55] has led countries to adopt the FATF's recommendations.[56]

3. *Extraterritorial Power*

Countries seem to extol the expressive function of multilateral approaches, but in practice they rarely use multilateral treaties to advance specific investigations. Even agreements and resolutions with legal force (like the recent United Nations resolutions) leave countries with ample room for discretion.[57] Instead there is growing extraterritorial use or threat of use of domestic legal authority to achieve international enforcement objectives.[58] Policymakers in states with a substantial interest in targeting criminal finance have enough incentives to pursue this interest without agreements.[59] Those governments that *are* reluctant converts to the global attack have room to adopt legal agreements and pass laws while engaging in a strategy of diluted enforcement.[60] In the short run, international agreements are likely to have a greater impact if they are backed up by the threat that powerful nation-states will use extraterritorial regulatory authority to

54. *See generally* Sean D. Murphy, *Multilateral Listing of States as Money-Laundering Havens*, 94 AM. J. INT'L L. 695 (2000).

55. For a useful survey of the institutional sociology literature and a discussion of its application to transnational law, see Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 STAN. L. REV. 1749, 1758 (2003). *See generally* W. RICHARD SCOTT, INSTITUTIONS AND ORGANIZATIONS (2001).

56. *See* Cuéllar, *Tenuous Relationship*, *supra* note 14, at 374-76.

57. *Id.* at 438.

58. By "extraterritoriality" I mean simply that some legal action undertaken by the government has a direct and substantial effect outside the territory of the United States. This definition encompasses legal actions that have an effect outside U.S. territory through the regulation of some domestic activity. Thus, for example, imposing special measures against a nation-state under Title III of the USA PATRIOT Act may not be an "extraterritorial" action in technical legal terms, because the U.S. government is just prohibiting certain actions on *its own* territory. Nonetheless, the impact of the special measures have an effect beyond U.S. territory, where financial institutions in the targeted nation-state will be restricted in the scope of their access to the U.S. financial sector.

59. *See* Cuéllar, *Tenuous Relationship*, *supra* note 14, at 390, 440-44; *see also infra* Appendix. Moreover, domestic financial institutions facing administrative and regulatory costs from the domestic global attack may sometimes support the extension of such cost to competitors located beyond the territory of the state mounting the attack.

60. *See* Cuéllar, *Tenuous Relationship*, *supra* note 14, at 440 (noting that the costs of adopting laws advancing the attack on criminal finance are lower when countries can dilute implementation in accordance with domestic political pressures).

punish countries that do not comply.[61] The multilateral approach then helps justify coercion related to the pursuit of the global attack where powerful states already have an objective in mind, such as freezing the assets of a specific alleged perpetrator.[62]

The United States has aggressively pursued extraterritorial enforcement. While lawyers and judges accept that some international law crimes should be subject to universal jurisdiction,[63] American efforts to target transnational crime and promote national security have resulted in a parallel development: the expansion of extraterritorial jurisdiction. Perhaps some lawyers, judges, and policymakers have been persuaded by the idea that the world is increasingly interdependent, a view that strengthens both the move towards increased universal jurisdiction and greater extraterritorial jurisdiction.[64] Or it may be that countries with more traditional claims of jurisdiction linked to territory fail to please the rest of the world in how they handle their enforcement responsibilities. Whatever the precise cause, the effect is to make it easier for prosecutors and executive branch authorities to convince domestic courts that they should take jurisdiction over an offender whose conduct or person is somewhere else in the world. Although courts occasionally articulate balancing tests to establish whether laws should be given extraterritorial effect,[65] for the most part they go along with the executive branch's efforts to give extraterritorial effect to United

61. *Cf.* STEPHEN R. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 124 (1999) ("Between 1970 and 1990 the United States imposed sanctions against more than a dozen countries for human rights violations.").

62. International law norms can also have an effect on domestic practices without coercion, through various kinds of persuasion or long-term changes in domestic preferences. But these mechanisms would be unlikely to register substantial impact on intensely reluctant states in the short run.

63. *See* Peterson v. Islamic Republic of Iran, No. Civ.A.01-2094, 2003 WL 21251867, at *10 (D.D.C. May 30, 2003) (holding that 28 U.S.C. § 1605(a)(7) provides for personal jurisdiction over foreign state sponsors of terrorism); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 306 (S.D.N.Y. 2003) ("[S]tates may exercise universal jurisdiction over acts committed in violation of jus cogens norms. This universal jurisdiction extends not merely to criminal liability but may also extend to civil liability."); Flatow v. Islamic Republic of Iran, 999 F.Supp. 1, 14 (D.D.C. 1998) ("As international terrorism is subject to universal jurisdiction, Defendants had adequate notice that their actions were wrongful and susceptible to adjudication in the United States."). *But see* U.S. v. Yousef, 327 F.3d 56 (2d Cir. 2003) (holding that terrorism is not subject to universal jurisdiction).

64. *Cf.* United States v. Nippon Paper Industries, 109 F.3d 1, 12 (1st Cir. 1997) (Lynch, J., concurring) (extraterritorial application of criminal provisions in the Sherman Antitrust Act are "reasonable," because "raising the prices in the United States and Canada was not only *a* purpose of the alleged conspiracy, it was *the* purpose. . .").

65. *See, e.g.*, Steele v. Bulova Watch Co., 73 S.Ct. 252 (1952) ("[T]he legislation of Congress will not extend beyond the boundaries of the United States unless a contrary legislative intent appears.").

States laws.[66] The United States therefore has come to routinely apply extraterritorial jurisdiction.[67] Other countries may cautiously follow.

Some of this is understandable. From the start, some states were big supporters of the global attack but were also committed to a financial architecture built on the relatively free movement of capital. They were trying to have their cake and eat it, too. This pushed the global attack towards reliance on domestic law instead of macro-level controls on financial flows connected to illegal activity.[68] In recent years, some governments have moved away from this position and acknowledged that the global attack will sometimes disrupt legitimate financial flows. Yet much of the global attack is still carried out through domestic laws rather than elaborate international legal mechanisms used for trade or multilateral sovereign lending. Moreover, to the extent that states *do* rely on public international law, by itself it is not likely to deliver what the major sponsors of the global attack claim to want, which is to directly impact the amount of criminal financial activity. Even when international measures help establish a global norm (maybe even enough for some to argue that a new customary international law rule has developed), there are limits to what we can expect from international agreements.[69] For example, international agreements and FATF recommendations may create a dynamic where legal changes occur on the surface, but enough discretion remains to avoid strict enforcement.[70]

Extraterritorial application of domestic law, however, has the potential for more direct effects. The United States and other governments can thus rely on cross-border criminal prosecutions, the threat of special measures that could be

66. *See, e.g.*, 18 U.S.C.A. § 175 (2003) (granting extraterritorial jurisdiction to the federal government for certain crimes relating to biological weapons); 18 U.S.C.A. § 351, 1751 (2003) (granting extraterritorial jurisdiction for assassination of certain high level government officials); 18 U.S.C.A. §§ 1512-13 (2003) (granting extraterritorial jurisdiction for certain crimes against a witness, victim, or informant); 18 U.S.C.A. §§ 2339B(d) (2001) (granting extraterritorial federal jurisdiction to providing material support or resources to designated terrorist organizations).

67. *See, e.g.*, ANNE-MARIE SLAUGHTER & DAVID T. ZARING, EXTRATERRITORIALITY IN A GLOBALIZED WORLD 23 (Social Science Research Network, Working Paper, 1997), *available at* http://papers.ssrn.com/sol3/delivery.cfm /9706231.pdf?abstractid=39380 ("U.S. courts have applied U.S. criminal statutes abroad in a variety of contexts"); *see also* M. Sornarajah, *Extraterritorial Criminal Jurisdiction: British, American, and Commonwealth Perspectives*, 2 SING. J. INT'L & COMP. L. 1, 36-37 (1998) (reviewing cases and finding increasing movement in the United States, the United Kingdom, and the Commonwealth Countries towards the recognition of extraterritorial jurisdiction over drug trafficking and related offenses, and—to a somewhat lesser degree—over fraud offenses).

68. *See* Eric Helleiner, *State Power and the Regulation of Illicit Activity in Global Finance*, *in* THE ILLICIT GLOBAL ECONOMY AND STATE POWER 66 (H. Richard Friman & Peter Andreas eds., 1999) ("Instead of controlling money laundering at borders, the anti-money laundering regime seeks to bolster the ability of governments to crack down on money laundering domestically.").

69. *See, e.g.*, KRASNER, *supra* note 61, at 31-32 (noting that "enforcement and monitoring mechanisms for [international] conventions vary enormously," and that the question of whether . . . conventions alter policy can only be answered by examining behavior, not simply by looking at the terms of the agreement.")

70. *See* Cuéllar, *Tenuous Relationship*, *supra* note 14, at 438; *cf.* KRASNER, *supra* note 61, at 32 ("Where enforcement and monitoring provisions have been weak, as has generally been the case for human rights regimes, rulers might sign because, even though they are indifferent or antipathetic. . . they might believe that signing would make their regime appear more palatable to external or internal actors.").

used against countries that do not participate, and discretionary national security powers given by statutes like the International Emergency Economic Powers Act (IEEPA).[71] Credible threats to use measures under the PATRIOT Act and other extraterritorial regulatory measures can have a more direct impact on how laws are actually enforced.

No one should think of extraterritorial enforcement as a magic elixir. Even the use of coercive domestic legal authority can fail to affect patterns of enforcement in other countries. Most notably, U.S. authorities have to *know* about a deficiency—otherwise it would make no sense to impose drastic measures essentially at random. But if U.S. authorities decide that banks in the Cayman Islands or Austria engage in secret transactions that pose a threat to national security, they can take action using domestic law.[72] The question is not whether the U.S. government has the legal power to do this, but instead whether it has the capacity to detect offenses and respond dynamically to what it detects. This leads to the problematic question of the gap between state capacity and state power.

C. *A Proliferation of Laws Targeting Criminal Finance*

Upon reflection, the principled case for the global attack seems like a subtle one. Its merits depend on critical assumptions, on the precise nature of the laws at issue, and on the way those laws are applied. Moral intuitions provoke outrage for some, but even those intuitions become less stringent when it comes to imposing severe vicarious punishments on jewelry merchants who turn out to be helping alien smugglers wash their profits without direct knowledge that they were assisting a criminal network. Meanwhile, the utilitarian paradigm helps make the case for such an attack, though it is a case that depends on various assumptions and qualifications (for example, that some feasible version of the attack can impose a sufficiently high marginal cost on traffickers and terrorists). Despite all this, the reaction from the United States and a growing number of countries has been anything but subtle when it comes to expanding legal power. These nation-states have promulgated a hefty package of criminal laws, regulations and civil penalties that epitomize the ascendancy of indirect liability in the world of criminal finance.

For example, in the United States, prosecutors and investigators use criminal statutes for both domestic and extraterritorial enforcement connected to the global attack on criminal finance. The statutes criminalize uses of money derived from a long and growing list of specified unlawful activities.[73] A number

71. 50 U.S.C. § 1701 (2003). Cases interpreting IEEPA powers in relation to terrorist financing are not uncommon. *See, e.g.*, Holy Land Found. for Relief and Dev. v. Ashcroft, No. 02-5307, 2003 WL 21414301 (D.C. Cir., 2003) (using IEEPA in conjunction with terrorist financing); U.S. v. Reyes, 270 F.3d 1158 (7th Cir. 2001) (exporting military aircraft parts to Iran); U.S. v. Mechanic, 809 F.2d 1111 (5th Cir. 1987) (using IEEPA in conjunction with exporting microwave calibration devices).

72. *See, e.g., Austria Yields Over Accounts*, FIN. TIMES, Aug. 1, 1996.

73. *See* 18 U.S.C. §§ 1956, 1957 (2001).

of statutes also criminalize the financing of offenses.[74] These laws are not only used for domestic prosecutions, but also for prosecutions targeting extraterritorial conduct.[75] The point of extraterritorial enforcement is to reach people who affect a nation's interests even if they did not engage in actions that are within the territory of the nation-state.[76] Couple this with the expanding scope of what is considered to fall within the "interest" of a nation-state, and the result is that limits on criminal prosecutions against criminal finance arise from practical constraints on the use of legal power rather than prudential limits arising because politicians are uncertain about their capacity to target the most deserving offenders. Some of those practical constraints in carrying out investigations may be diminishing because of the growing presence of U.S. law enforcement agents around the world.[77]

There is no doubt that the threat of criminal investigation and prosecution can deter and incapacitate some offenders around the world.[78] But while U.S. prosecutors and investigators obtain convictions against hundreds of people involved in criminal finance every year, the larger question is whether the people investigated and prosecuted are the ones involved in the most dangerous kinds of criminal finance. This does not seem to be the case. Instead, the existing pattern of enforcement seems to be affected by the interaction of two important forces. First is the impact of low thresholds established by the elements of criminal offenses, which allow people to be convicted of money laundering or similar offenses even if they have not engaged in particularly complex or distinctive financial activity.[79] Second is the effect of the limited scope of detection strategies that investigators working on criminal cases have at their disposal to detect criminal financial activity, which include informants and intelligence reports, as well as undercover activity, and currency-intensive enforcement at ports of entry.[80] This raises the question of whether civil penalties and regulatory authority can help fill the gap in detection strategies.

74. *See, e.g.*, 18 U.S.C. § 1956(a) (2003) (establishing the offense of intending to promote the carrying on of a specified unlawful activity through the transnational transportation of money); 18 U.S.C. § 2339 (2000) (criminalizing material support of terrorism).

75. *See, e.g.*, 18 U.S.C. §§ 2339B(d) (2001)(providing extraterritorial jurisdiction over the offense of providing material support or resources to designated foreign terrorist organizations); 18 U.S.C. § 1956 (f) (2001) (providing extraterritorial jurisdiction over money laundering if the conduct is by a United States citizen, or occurs in part in the United States and involves transactions with a value over $10,000).

76. *See* MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 318-26 (4th ed. 2003) (naming the major accepted bases under international law for the assertion of jurisdiction by a domestic court: (1) territoriality—including both traditional subjective and the more open-ended objective or effects test; (2) nationality of the person in question; (3) the protective principle (or "national interest"); (4) passive personality (i.e., nationality of the victim); and (5) universality).

77. *See, e.g.*, PAUL R. PILLAR, TERRORISM AND U.S. FOREIGN POLICY 80 (2003) (noting that by 2000, the FBI had agents stationed in 44 countries).

78. *See, e.g.*, JAMES Q. WILSON, THINKING ABOUT CRIME 121 (Rev. ed. 1983) ("People are governed in their daily lives by rewards and penalties of every sort. . . . To assert that 'deterrence doesn't work' is tantamount to either denying the plainest facts of everyday life or claiming that would-be criminals are utterly different from the rest of us.").

79. *See* Cuéllar, *Tenuous Relationship*, *supra* note 14, at 404-10.

80. *Id.* at 410-20.

https://scholarship.law.berkeley.edu/bjil/vol22/iss1/3
DOI: https://doi.org/10.15779/Z38564P

Policymakers act as though the answer is yes. Through regulatory rules and civil penalties, they impose duties on business firms and the public. Rules can require the collection of information, the restriction of some kinds of financial transactions, or the reporting of suspicious activities. United States anti-laundering regulation, the model for such activity abroad, shows the breadth of this approach. Since about 1970, anti-money laundering regulations in the United States and later, in a number of other countries, have been developed with two purposes: (a) giving financial institutions a reason to cooperate; and (b) gathering information that can be used to detect and prosecute offenses. In the domestic context the regulatory approach generates (at least in theory) a lot of relevant information, especially on currency, and some legal pressure for banks and other financial institutions to report suspicious activity.[81] Along with the regulatory approach, prosecutors have made increasing use of civil (as well as criminal) forfeiture provisions to seize assets allegedly connected to criminal activity. This civil and regulatory agenda intersects with the substantial emergency economic powers held by some executive authorities to impose sanctions, issue regulatory rules, and block assets. In the United States, the result is that an ambitious set of goals embodied in the anti-laundering system has been amplified by regulatory powers originally designed to bolster presidential authority in the midst of a military conflict.

The American experience also shows how emergency powers can be used in the hopes of advancing the global attack. Since early in American history, presidents have been invested with substantial economic powers to use during national security emergencies.[82] President Jefferson asked for and received from the legislature the power to declare embargoes, and President Lincoln, to blockade ports. Executive branch officials in other countries are also endowed with considerable emergency powers.[83] The passage of time showcases two trends concerning these powers in the United States.[84] First is the growth of a bureaucratic and administrative system that helps translate legal decisions into regulatory mechanisms targeting assets. The Treasury Department's Office of Foreign Asset Control is the lynchpin of that system. As the U.S. financial system has become a more attractive conduit for cross-border financial transactions, the regulatory system has further developed the capacity to reach ever more financial activity. The second trend is a move away from defining national security exclusively in geo-strategic military terms. Instead American policymakers emphasize that national security is threatened by terrorism, transnational

81. *Id.* at 352-64.

82. *See, e.g.*, Harold Hongju Koh & John Choon Yoo, *Dollar Diplomacy/Dollar Defense: The Fabric of Economics and National Security Law*, 26 INT'L LAW. 715, 723-25 (1992).

83. *See, e.g.*, MICHAEL FREEMAN, FREEDOM OR SECURITY: THE CONSEQUENCES FOR DEMOCRACIES USING EMERGENCY POWERS TO FIGHT TERROR (2003); IMTIAZ OMAR, EMERGENCY POWERS AND THE COURTS IN INDIA AND PAKISTAN (2002); KURDISH HUMAN RIGHTS PROJECT, DUE PROCESS: STATE COURTS AND EMERGENCY POWERS IN SOUTH-EAST TURKEY (1997); Venelin I. Ganev, *Emergency Powers and the New East European Constitutions*, 45 AM. J. COMP. L. 585 (1997).

84. As I discuss in the next subsection, the trajectory of the law in the United States has also been reflected in the aspirations contained in international agreements and treaties.

criminal activity like drug trafficking, and even corruption.[85] Put these two trends together and the direction of regulatory policy in this area becomes clear: a system, transnational in scope, with the power to regulate assets for broadly-defined national security goals.[86]

That power continues to grow. In the United States, regulators can impose "special measures" on countries that do not cooperate in the global attack, restricting their access to financial institutions based in the United States.[87] This complements existing law by providing a mechanism for blocking the property of persons and organizations thought to pose national security threats to the United States. One recent executive order uses the President's authority under the International Emergency Economic Powers Act (IEEPA),[88] and other laws to establish a process to block the assets of persons and organizations connected to terrorism.[89] The executive order says little if anything about the process through which people or organizations should be evaluated for "connections" to terrorism. Even people or organizations that are merely "otherwise associated" with people or organizations believed to be controlled by those who are suspected of supporting terrorism can have their assets blocked.[90] The regulatory

85. *See, e.g.*, White House, *United States International Crime Control Strategy* (May 1998), *available at* http://www.usdoj.gov/criminal/press/iccs.htm. The document explicitly identifies an amorphous category of "financial crimes" (presumably including money laundering as well as fraud and the financing of crime) as a national security threat, stating that "[f]inancial crimes pose a national security threat because they threaten the integrity of the financial system while fueling numerous other types of criminal activity."

86. Similar trends exist in a few other countries with large economies. Indeed, in its influential "40-Recommendations," the OECD-supported Financial Action Task Force calls on all nations to ensure they have the legal power to "freeze, seize, and confiscate. . . proceeds from money laundering or predicate offenses, instrumentalities used in or intended for use in the commission of these offenses, or property of corresponding value." FINANCIAL ACTION TASK FORCE, FATF FORTY RECOMMENDATIONS (2003), *available at* www.fatf-gafi.org/40Recs_en.htm.

87. *See id.* at § 311.

88. 50 U.S.C. §§ 1701-17 (2003).

89. *See* Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism, Exec. Order No. 13,224, 66 FED. REG. 49079 (Sept. 23, 2001) (Pres.) [hereinafter Executive Order 13,224]. The order provides in relevant part that property or interests of specific individuals and organizations listed in the order are blocked:

> . . .(b) foreign persons determined by the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General, to have committed, or to pose a significant risk of committing acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States;
>
> (c) persons determined by the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, to be owned or controlled by, or to act for or on behalf of those persons listed in the Annex or those persons determined to be subject to subsection 1(b), 1(c), or 1(d)(i) of this order;
>
> (d) . . . . Persons determined by the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General. . . to assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of. . . . acts of terrorism. . . .

The USA PATRIOT Act also expanded the scope of authority to engage in asset freezes and forfeitures. *See, e.g.*, USA PATRIOT Act, § 323 (allowing the government to use a restraining order to freeze assets in the United States).

90. *See* Executive Order 13,224, *supra* note 89, at Section (d)(ii) (subjecting persons to blocking when they are "otherwise associated with those persons listed in the Annex to this order or those

side of the attack therefore serves two different objectives. One is the support of a generalized effort to raise costs for unknown offenders, for example, by requiring financial institutions to have anti-laundering programs and to report some suspicious financial activity as a supplement to other detection strategies. The other is to mete out some punishment against people whom the state has determined deserve it.

In the United States, laws targeting criminal finance are used aggressively to impose economic sanctions on individuals and organizations, or to target certain classes of common offenders like midlevel drug distributors and perpetrators of financial fraud.[91] In some ways this attention pays homage to the power of the imagery of the criminal financier—to the perceived moral reprehensibility of one who seems both entirely guilty and also respectable. The criminal financier may seem like the representative of nearly all that is wrong with the world: he is at once a terrorist, perhaps a drug trafficker, one who can lure developing countries back towards corruption. There may be some support for all of these images, though the most important part of the dynamic here is something else: the rhetorical devotion to the global attack may work to strengthen the perceptions of the domestic and international audiences that made the global attack politically attractive in the first place.[92] But if the global attack is going to get anywhere, its laws must allow nation-states to substantially alter the lucrative relationships greasing the wheels of the criminal economy.

II.
THE MISMATCH BETWEEN STATE POWER AND STATE CAPACITY

Most laws are described in principle as expressions of a public desire to solve a public problem. Whether it is a treaty or a domestic statute, the purpose

persons determined to be subject to subsection 1(b), 1(c), or 1(d)(i) of this order"). Even when executive branch officials discuss asset freezes, they describe the basis for an asset freeze as merely a "belief" (which is consistent with the broad discretion provided by the statute). *See, e.g.*, Letter to the Honorable F. James Sensenbrenner, Jr., Chairman, Committee on the Judiciary, U.S. House of Representatives, from the Office of Legislative Affairs, U.S. Department of Justice, regarding the USA PATRIOT Act 30 (May 13, 2003). The letter contains responses from the Department of Justice to the House Judiciary Committee regarding the USA PATRIOT Act and the legal aspects of the war on terrorism. The letter notes that ". . .the Seventh Circuit upheld Treasury's freeze on the assets of Global Relief Foundation, which *is believed to have supported* Osama bin Laden, al Qaida, and other known terrorist groups" [emphasis added]. The Justice Department also seemed to fudge the question of whether it had occasion to use new forfeiture powers provided by the USA PATRIOT Act, which the Department described as essential to the war on terrorism following September 11. *See id.* ("In most terrorism cases, it has not been necessary for the Justice Department to seek forfeiture of United States based terrorist assets under the USA PATRIOT Act's new authorities, because the assets had already been frozen by OFAC."). This underscores the value of asset freezes as a substitute for forfeitures, which (even before USA PATRIOT Act relaxed the standards) are essentially discretionary.

91. *See* Cuéllar, *Tenuous Relationship*, *supra* note 14, at 404-25 (discussing patterns of charging and conviction for money laundering offenses).

92. Whatever the attraction of rhetoric supporting the global attack, it is an altogether different question whether the global attack earns political support among interest groups, particularly financial services providers, who have to deal with its regulatory reach. In general such groups resist the global attack, at least its regulatory manifestation. *See* Cuéllar, *Tenuous Relationship*, *supra* note 14, at 448-49.

of a law is to create the capacity to address the threat of terrorism, the human cost of trafficking in persons, or some other dreaded activity. Few people would expect the capacity of the law to be anywhere near perfect. Yet beyond the sort of slippage in any human venture may lurk forces that systematically create and sustain gaps between power and capacity. Ignoring transnational threats may be risky, but so is ignoring the potential costs of just living indefinitely with the gap between power and capacity.

A. *Power and Capacity Distinguished*

The key to understanding the global attack on criminal finance is to distinguish between goals and actual enforcement practices, and particularly between the two major factors that drive those enforcement practices: power and capacity. I define state capacity as a state's ability to achieve its stated objectives. Capacity lets a nation-state materially reduce the most significant threats, stop the most dangerous terrorists, detect its most corrupt public officials, and punish the most important leaders of criminal networks. In contrast, power is the nation-state's authority to legitimately coerce individuals or organizations. Governments expand their legal power through expansively-worded criminal statutes that can easily lead to a conviction, and through regulatory provisions making it easy to freeze assets, forfeit property, and levy civil penalties.

Some countries experience direct problems with both power and capacity. These are the ones that run into problems running an electric power grid, keeping courts open, ensuring worker safety, and enforcing the law. It should not come as a surprise that these countries would also run into trouble attacking criminal finance. Thus, states such as Nigeria, Liberia, or Russia should not be expected to be effective in the global attack.[93] These countries are saddled by technical problems, exacerbated by pressure from kleptocrats eager to frustrate capacity-building. Because of their limited power and capacity, developing states are likely to remain attractive jurisdictions for engaging in financial transactions connected to crime. The reason is that those states' mix of limits on power and capacity turns them into breeding grounds for corruption, which results in opportunities to engage in large, anonymous financial transactions. These opportunities themselves create further opportunities for corruption, since it becomes easier to buy off government officials and law enforcement officials through secret financial transactions. In contrast, developed nation-states have little, if any, trouble asserting their legal power over people or organizations that violate the law. Constraints on power are not completely missing in developed countries; however, the constraints tend to come from interest groups that might be even more inclined to frustrate regulatory rules and information-gathering requirements that can build capacity.

What the preceding suggests is that the extent of any effort to equilibrate capacity and power depends on a constellation of circumstances that would

93. *See, e.g.*, *Russian Money Laundering*, Hearings Before the Committee on Banking and Financial Services, U.S. House of Representatives (106th Cong., 1st Sess.) (Sept. 21-22, 1999).

rarely arise in either developed countries or their developing counterparts. Interest groups and the public would have to *care* about the mismatch. They would also need information about whether there was a problem, or at least some basis to believe there was a problem in matching power and capacity. Otherwise the gap could continue unencumbered, producing a sort of prophylactic criminal and regulatory enforcement that targets people engaged in activity believed to be intimately tied to a deeper harm. This is not an unusual pattern in criminal and regulatory enforcement. However, this pattern is exacerbated when the indirectly harmful activity is defined as an integral part of that enforcement and when politicians and government officials believe they will benefit from showing progress on a popular enforcement priority (such as the "war on terrorism").

The mismatch between power and capacity can create some problematic scenarios. Statutes and regulations designed to serve a prophylactic purpose—like the prohibition against operating an unlicensed money transmitting business—can be coupled with severe criminal penalties that help a government send a message about their response to a threat.[94] Once these criminal and regulatory laws are justified as essential to an important purpose (such as fighting drug traffickers or stopping terrorism), they can be used against targets that may be only tangentially connected to the dreaded activity. Thus nation-states may build up power but neglect capacity because it is less visible, or because capacity-building would require regulations that impose costs on organized interest groups. All of which implies that the disequilibrium between power and capacity should not be ignored.

B. The Forces Creating a Power-Capacity Mismatch

I have demonstrated that power and capacity are different, but I have not yet explained why the laws attacking criminal finance might reflect such a dramatic disconnection between power and capacity. As I explain below, there are strong forces that would tend to keep power and capacity separated in the fight against transnational crime.

1. The Impact of Detection Difficulties

Detection difficulties can skew the allocation of penalties to offenders that are easier to find. If law enforcement officials have an interest in meting out punishment, but the marginal cost of detecting the more serious offenders outstrips the marginal additional benefit to the official of catching the most serious offender, then the result is that offenses that are routinely punished are likely those that are fairly easy to detect. The easily detected offenses are not necessarily likely to be the ones that merit the most attention in terms of either national security or some deep normative sense. There is no compelling reason to think that the difficulty of detecting an offense will vary inversely with the "serious-

94. The legislative history of the major laws targeting money laundering and criminal finance are filled with clear statements about *why* the enforcement efforts are being pursued, but these scenarios bear little connection to the routine uses of the criminal penalties. *See* Cuéllar, *Tenuous Relationship*, *supra* note 14, at 395-97.

ness" of the offense, measured in any number of ways. One might imagine the "seriousness" could simply refer to how severely an offense is sentenced, although the comparison may become less meaningful given the law's role in grouping different practices and defining them as "similar" enough to constitute the same offense (often with a similar range of sentences). An alternative approach to assessing how "serious" an offense is would be to ask whether the offense detected bears some resemblance to the paradigmatic ones that spurred legislators or other politicians to champion a particular enforcement program. Here the fight against one kind of criminal finance—money laundering—reveals a big disconnect between the "paradigm cases" and routine prosecutions. In the United States and many other countries, the fight against money laundering was most often justified in terms of three objectives: new methods for detecting crime, targeting third-party launderers who could use special skills (or professional cover as accountants, bankers, and lawyers) to launder money, and targeting leaders of criminal networks who could amass tremendous concentrations of wealth from illicit activities. Instead, conviction patterns show a focus on predicate offenders with no particular skill or ability at managing international financial flows, and who were often discovered using traditional law enforcement methods.

What about the rest of the attack on criminal finance? My primary objective is to establish that there is no reason to assume that the most serious or despised offenders would be the ones that are easiest to detect. On the contrary: most committed organizers of terrorist plots, corrupt central bankers, and leaders of narcotics smuggling networks are likely to have in common a strong desire to avoid being caught, combined with the skills and resources to make themselves harder to detect.[95] The greater the mismatch between offenders who are easy to detect and those who plausibly could be described as the most "serious" offenders, the more it is necessary to think about the unintended consequences of a particular enforcement scheme.

2. *Uncertain Impact of Legal Changes in Reluctant States*

Strategies using FATF and other transnational measures may force some states to make cosmetic changes in their laws. But new criminal statutes rarely achieve lasting differences in enforcement patterns. More profound changes seem to depend on more drastic transformations in political, economic and cul-

95. For a note on what I mean by "serious" offender, *see supra* note 2. Serious offenders might be especially difficult to detect for a few reasons. Presumably punishment is more severe for many offenders that might defensibly be termed "serious" (for example, the major financial backer of a terrorist scheme when contrasted to a person convicted of operating as an unlicensed money transmitter). Even mildly rational offenders would be more interested in avoiding punishment as the severity of the punishment drastically increases (though the extent of disutility that offenders face per unit of punishment likely diminishes with the extent of punishment). Leaders of criminal networks and corrupt offenders amassing substantial financial resources, moreover, would likely have a lot to lose if they are wealthy, and should be willing to spend their resources on remaining beyond the grasp of law enforcement. They could do so by investing in the technical capacity to hide money in offshore trusts and anonymous corporations, by purchasing services from government officials (including law enforcement officials), and by procuring the assistance of third-party launderers.

DOI: https://doi.org/10.15779/Z38564P

tural incentives for government officials and businesses. This is at least what the American experience implementing the fight against the related offense of money laundering seems to show.

It is worth saying a little about some of the forces that might be affecting that spread. As I suggested above, the United States and other developed countries have adopted the attack on criminal finance for reasons involving political symbolism as much as anything else. Executive branch officials and legislators respond to political pressures, so they are likely to promote a version of the attack on criminal finance acceptable to powerful interests, such as financial institutions. While these interests will not get everything they want, it is impossible for politicians and executive branch officials to completely ignore outside interest groups that are sufficiently organized to challenge executive policy through a combination of political pressure, economic pressure, and litigation. Thus politicians in developed countries should be expected to shape laws in response to the competitive environment in which they operate. Their personal views about the importance of attacking criminal finance would then develop within a particular set of constraints.

The situation in developing countries is not entirely different.[96] Some smaller jurisdictions obviously have a vested interest in bank secrecy because it allows them to compete for funds in the world market. Along with other developing countries, these jurisdictions might find it attractive to join the global attack on criminal finance only in principle. No doubt in some cases, policymakers in these countries could occasionally harbor a genuine interest in pursing the global attack,[97] but they might also be enticed to join the global attack in response to more coercive forces. The United States and its allies can exert pressure along the lines I describe below, yet ironically the cost of implementing legal measures against criminal finance may not be prohibitive, even for countries with a stake in bank secrecy. As I have explained elsewhere, the key is that legal changes do not necessarily determine the reality of how laws are enforced—that depends on factors that states still control, like budgets, prosecutorial discretion, and detection strategies used by investigators.[98] Add to this what may be a perception that in order to be considered a developed economy, states should develop the bureaucratic and legal structures that attest to their commitment to the fight.[99] Yet the substantive impact of these changes remains questionable.

96. *Cf.* JAMES RAYMOND VREELAND, THE IMF AND ECONOMIC DEVELOPMENT 53-54 (2003) (discussing the impact of the interest group environment on politicians and their economic policy choices in developing countries receiving IMF assistance).

97. For example, think of a situation where a newly-elected president of a developing country faces a government with persistent corruption problems. As a response to this problem, the president manages to impose new reporting requirements on major banks and financial disclosure requirements for senior government officials and their families. The president and her administration might therefore decide that it makes sense to pursue the global attack.

98. *See* Cuéllar, *Tenuous Relationship*, *supra* note 14, at 438.

99. *Cf.* Goodman & Jinks, *supra* note 55.

3. *Political Incentives to Use Power Without Capacity in Developed Countries*

Executive branch officials in more developed countries face their own constraints. They may find themselves under pressure to show results in the proverbial wars against those offenses alleged to benefit from criminal finance, such as terrorism and drug trafficking. The more power the laws allow the executive to exercise on a discretionary basis, the more tempting it may be for the executive to use such power regardless of whether there is the capacity to target the sanctions at the most deserving targets. Furthermore, interested parties may see costs associated with building capacity, which could spur them to act against capacity-building.

Let me expand on this argument. The executive branch of government can use many of its legal powers without interference from courts or legislators.[100] Suppose that something like a domestic terrorist attack happens, making voters feel threatened—what economists call an exogenous shock. For both affective and rational choice reasons, it makes sense to think voters will want to see their government use its legal authorities to punish those responsible for the attack and to respond to the perceived threat of future attacks. The affective motivation is driven by the desire of many voters to think about the world as being predictable and just in some sense—such that a harmful action against them (or their polity) is met with some corresponding government action.[101] Many voters would cringe if the government's major response to an attack consisted of a slow and uncertain search for evidence in a criminal case. The global attack on criminal finance, driven increasingly by executive powers rather than criminal statutes, may serve as a comforting sign that harmful actions are quickly met with guarding reactions. Making the attack focus on *finance* also captures moral intuitions about who should be blamed for harms. Financing undesirable activity or willfully enjoying the profits seems at least as bad as pulling the trigger, lighting the fuse, or physically imprisoning trafficked women.[102] The implication is, moreover, that the global attack on criminal finance targets people who would otherwise evade punishment under traditional criminal laws. Often this is technically true, because executive powers do not require legal and procedural formalisms that the criminal process does. It is precisely for this reason, though, that there are fewer guarantees about whether people or organizations targeted in the global attack deserve to be subjected to asset freezes or similar measures.

100. *Cf.* Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132 (1999).

101. *See generally* M. J. LERNER, THE BELIEF IN A JUST WORLD: A FUNDAMENTAL DELUSION (1980); M. J. Lerner & D. T. Miller, *Just World Research and the Attribution Process: Looking Back and Ahead*, 85 PSYCHOL. BULL. 1030 (1978); M. J. Lerner & C. H. Simmons, *Observer's Reaction to the Innocent Victim: Compassion or Rejection?*, 4 J. PERSONALITY & SOC. PSYCHOL. 203 (1966).

102. *Cf.* Robert Chesney, *Civil Liberties and the Terrorism Prevention Paradigm: The Guilt by Association Critique*, 110 MICH. L. REV. (forthcoming 2003) (defending statutes criminalizing material support of groups designated by the government as supporting terrorism, where material support includes providing money to the relevant groups).

The rational choice dynamic affecting the use of government power without capacity in the global attack is slightly different but leads in the same direction. Imagine that voters want to reward politicians not just for appearing to deal with a threat, but for actually reducing the threat. Unfortunately, changes in that threat are difficult to measure; indeed, changes in the threat attributable to specific legal or policy changes are even more difficult to assess. Given the existence of laws like IEEPA, politicians and the government officials that they oversee have access to executive powers that can be used regardless of whether their use has much of an impact on the threat. The use of the executive powers to pursue the global attack then becomes like a form of "cheap talk" for politicians—if politicians *did* have the means of using their powers to reduce the threat, then surely voters would be able to observe it because politicians would be using their legal authority.[103] This means that politicians and the government officials they oversee would have an incentive to use their substantial, existing legal authorities in the global attack. The incentive is there even if government officials question to what extent asset freezes under IEEPA or similar measures actually reduce national security risks.[104]

The problem of power-capacity gaps becomes worse because sometimes building capacity may require regulatory enforcement and programs that are costly to certain interest groups. Thus, banks and financial institutions have tended to fight expansions in regulations that yield information about when violations are occurring.[105] Thus developed countries may trumpet their twenty-first century banking supervision, but they may face some of the same constraints that developing countries do: their regulatory policy and implementation

103. *See, e.g.*, David Austen-Smith, *Information Transmission in Debate*, 34 AM. J. POL. SCI. 124, 125 (1990) (describing cheap talk as costless or near-costless communication).

104. What makes it difficult to draw conclusions here is that national security threats are hard to measure. Which means that a government official may not be genuinely dishonest when he says that something like an IEEPA designation contributes to national security. After all, the contribution to security might be understood in at least two different ways: either "it will make a measurable difference in security," or "I can imagine a scenario, of uncertain and perhaps even small probability, where IEEPA designations are part of a broad pattern that helps reduce the threat." For an example of the latter approach, see TERRORIST FINANCING: REPORT OF AN INDEPENDENT TASK FORCE SPONSORED BY THE COUNCIL ON FOREIGN RELATIONS 24-6 (2002), *available at* http://www.cfr.org/pdf/Terrorist_Financing_TF.pdf. The important point is this: given the availability of this latter justification (that is, the possibility that a scenario can be envisioned), then politicians can respond to the incentives favoring some kind of national security activity and still be "honest" in some sense of the term when they say that they believe they are making a contribution to national security. The question then becomes how to characterize facts that lend plausibility to the government's interpretation. *See, e.g.*, Eric Lichtblau, *Court Papers Show Charges That Group Aided Terrorists*, N.Y. TIMES, October 18, 2003 (describing a five-year federal law enforcement investigation of a network of charitable and educational institutions suspected of laundering hundreds of thousands of dollars to help finance terrorist attacks that has yielded few prosecutions).

105. *See Cuéllar, Tenuous Relationship, supra* note 14, at 449 n.469 (describing banks' efforts to stop currency reporting requirements designed to enhance law enforcement capacity to identify criminal financial activity). *See generally* Terry M. Moe, *The Politics of Structural Choice: Toward a Theory of Public Bureaucracy*, in ORGANIZATIONAL THEORY: FROM CHESTER BARNARD TO THE PRESENT AND BEYOND 328-29 (Oliver E. Williamson ed., 1995) ("A bureaucracy that is structurally unsuited for effective action is precisely the kind of bureaucracy that interest groups and politicians routinely and deliberately create. . .").

depends on what politicians have the will and opportunity to accomplish, which in turn depends a good deal on what interest groups will allow.

What if there was some way for the executive to "signal" that he is really developing capacity?[106] Imagine first a world in which an important segment of the mass public decides whether to support the executive using a simple rule of thumb: if the executive appears to be doing something constructive to reduce a threat, then he should be evaluated more positively than if he does not do so. Imagine further that the basis for using this rule of thumb is a simple effective response to a dreaded uncertainty. If people are facing an unknown threat, they obtain greater satisfaction knowing that they are not merely steeped in futility, but are instead part of a state whose government is responding to the threat. In a world like the one just described, it is not surprising that politicians would have an incentive to use their legal powers even in the absence of capacity to focus those powers on the most deserving targets. Members of the naïve public would take the mere decision to freeze assets or impose special measures on a country as a basis to reward the executive. In this scenario, the decision to use legal powers is itself taken as the signal, because (the naïve voter concludes) it would be silly for the executive not to use the expansive legal powers if the capacity really *was* there to target the important offenders. This dynamic might lead to asset freezes against some charity, for example, even if there is little basis for such an action. This state of affairs, in turn, may send the charity a message that its conduct does not matter much since it might face asset freezes regardless of what it does.[107]

106. In recent years, political scientists have studied the implications of signaling in strategic situations such as the escalation of international disputes. *See generally* JEFFREY S. BANKS, SIGNALING GAMES IN POLITICAL SCIENCE (1991). When the outcome of a game depends on some characteristic about one of the players that cannot be directly observed (for instance, how resolute a certain nation-state is to prevail in a conflict), that player can affect the outcome by sending a costly "signal" designed to credibly demonstrate that he is a certain kind of player. Depending on the characteristics of a game, a politician might be able to "signal" a sophisticated voter to indicate that he is willing to invest in capacity (which is not observable until the game ends and the payoffs are awarded). The players can send costly signals that help show voters whether they are the type who would (or have already) invest(ed) in capacity. The problem is, the costly signal is not always enough to sort the players in accordance with their "true" type or actions. Some equilibria are "separating" or "semi-separating" in the sense that the politicians do sort themselves into different categories that correspond to what the other player wants to find out. But "pooling" equilibria are also possible, where all the players adopt the same strategy of sending the costly signal. For a discussion of the impact of signaling among nation-states engaged in strategic interaction, see James Morrow, *Modeling the Forms of International Cooperation: Distribution Versus Information*, 48 INTL. ORG. 387 (1994).

107. The use of power would not work this way unless the executive could find some targets to punish that could be plausibly linked to the underlying threats that voters fear. Such links are rarely self-explanatory in transnational law enforcement, so the executive has to provide a compelling enough narrative to explain why catching an unlicensed money transmitter in Brooklyn or freezing the assets of a charity reduces the threat of terrorism. My analysis here assumes this is not that hard for the executive. The executive tends to have a lot of resources to articulate the desired narrative around visible actions that can be easily covered by the media, and the media coverage in turn shapes voters' perceptions of what issues matter. *Cf.* SHANTO IYENGAR & DONALD R. KINDER, NEWS THAT MATTERS 72 (1988) (using experimental evidence to establish that "by providing glimpses of some aspects of national life while neglecting others, television news helps define the standards that viewers apply to presidential performance"). Moreover, many voters use mental

DOI: https://doi.org/10.15779/Z38564P

The question is then what happens when we make different assumptions about the nature of the signal and voter sophistication. Suppose that some fraction of the electorate consists of sophisticated voters who are making rational decisions and that they care about rewarding an executive who develops capacity and uses power only when there is some degree of capacity. Suppose further there *is* some costly bundle of policies that, if adopted, allow the executive to send a credible signal to sophisticated voters about his interest in developing capacity. The policies could include appointing a technocrat to run a law enforcement bureaucracy, raising the threshold of proof necessary to use some legal powers, or making classified information public. As the appendix demonstrates, this state of affairs may encourage the executive to send signals that he is building capacity. But this happens only if the proportion of sophisticated voters that the executive needs to achieve some political objective (for example, reelection) is sufficient to offset the executive's cost of sending the signal.[108]

The scenarios described above all reflect an assumption that the major goal of the executive is pleasing voters. Yet sometimes executive branch officials may have other objectives besides pleasing voters. These objectives may be acceptable or problematic depending on where you stand ideologically, but the global attack suppresses much of the debate about them. For example, some executive branch officials might be interested in imposing punishments on people or organizations to advance prosecutorial agendas. Organizations targeted with asset freezes may then have an incentive to cooperate with government to help it make cases against other organizations and individuals in order to avoid asset freezes. Money transmitters targeted with severe penalties under new statutes prohibiting illegal money transmission may be eager to provide information on people and organizations considered to be suspicious, or even just to plead guilty to a lesser offense. Executive branch officials may be interested in using the global attack to advance prosecutions and punitive measures against suspected offenders, regardless of whether those offenders are the despised villains that justified the legal powers associated with the global attack. Government officials may also have a particular vision of national security that can be ad-

short-cuts to evaluate security policy. The short-cuts they use may only rarely lead them to copiously scrutinize the executive's arguments about how a particular action enhances security. *See, e.g.*, Milton Lodge, Kathleen M. McGraw & Matrick Stroh, *An Impression-Driven Model of Candidate Evaluation*, 83 AM. POL. SCI. REV. 399, 416 (1989) (using experimental evidence to establish that pleasing information about candidates and policy issues can affect subjects' support for candidates, even if the details of the information are not remembered subsequently). It would be helpful to have more empirical research on just how much leeway the government has in creating its narrative. Two factors are likely to shape the executive's flexibility to link small fish to big threats. One is the proportion of sophisticated voters that matter electorally, which the Appendix, *infra*, discusses. Another factor is the effect of racial, national origin, or similar characteristics. For example, if the public unconsciously links being Black or Arab to being threatening, it will be easier for the executive to construct its narrative when the target is Black or Arab. *Cf.* RUPERT BROWN, PREJUDICE, ITS SOCIAL PSYCHOLOGY 8 (1995) (noting that some people develop and sustain negative affect toward people with particular racial or other ascriptive characteristics); Henry E. Brady & Paul M. Sniderman, *Attitude Attribution: A Group Basis for Political Reasoning*, 79 AM. POL. SCI. REV. 1061, 1068 (1985) (suggesting that people's preexisting likes and dislikes of political groups drives some of their political attitudes when they use a "likeability heuristic" to interpret policies).

108. *See* Appendix, *infra*.

vanced by imposing sanctions on regimes, organizations, and individuals thought to pose a threat. Just as asset freezes might help government officials convince voters that they *know* whom they should blame for attacks or threats, the imposition of sanctions can help convince voters that the sanctioned regime is a threat.[109]

4. Substitution

Some transactions are intensely difficult to regulate because people can use substitute systems to achieve their objectives. Even when they make some headway, it is hard to imagine that authorities ever constrain offenders' ability to engage in financial transactions that further their offenses. As explained above, it is difficult to know exactly how costly it is for potential offenders to substitute harder-to-detect transactions for more easily detected ones. Though some kinds of transactions that are especially desirable for offenders might be made more costly (either through administrative burdens or reporting requirements that increase the perceived risk of detection), the more relevant point is that extremely motivated offenders (say, those with an ideological motive to engage in terrorism) may be exceedingly difficult to stop.

The possibility of substitution effects is perhaps not surprising, since laws can trigger such behavior in many if not most situations where people trade-off the possibility of reductions in desired activity against possibilities of continuing those activities but evading legal penalties. To begin with, the detection difficulties described above make it harder to identify offending transactions within the financial system. But even if this were not a problem, non-state actors would still have ways of moving money around. Jurisdictions complying with the FATF Forty Recommendations on money laundering enforcement and Eight Special Recommendations on terrorist financing retain substantial discretion to engage in lax enforcement. If all states strictly abided by these recommendations, offenders would still have the option of trying new approaches[110] or attempting to secede from the most heavily regulated components of the global financial system. These loopholes demonstrate how capacity also depends on the state's ability to enforce laws in the less-regulated nooks and crannies of the global financial system. One might question whether state capacity to regulate offshore and Internet financial transactions will expand indefinitely. For the criminal, substituting less regulated financial transactions probably entails some costs, including less convenience and perhaps lower return on investment. However, in many cases, those costs would still be less than the benefit of find-

109. The basic logic is the same: if the regime *were* a threat, politicians would impose the sanction. Failure to impose the sanction would make it harder for politicians to argue the regime is a threat.

110. *See, e.g.*, MARIA E. DE BOYRIE, SIMON J. PAK, & JOHN S. ZDANOWICZ, THE IMPACT OF SWITZERLAND'S MONEY LAUNDERING LAW ON CAPITAL FLOWS THROUGH ABNORMAL PRICING IN INTERNATIONAL TRADE (Center for International Business and Education Research, Fla. Int'l Univ. Working Paper 2002) (presenting tentative evidence of a shift toward the use of false international trade invoicing involving trade between the United States and Switzerland after the latter country adopted more stringent anti-money laundering controls).

https://scholarship.law.berkeley.edu/bjil/vol22/iss1/3
DOI: https://doi.org/10.15779/Z38564P

ing alternatives to the more highly regulated financial transactions. Shell banks are one option. Moreover, not every transaction must involve the financial system at all. Barter, as well as financial information exchanges, give people an alternative for moving money.[111]

The preceding logic implies that depending on the offense in question, a change in the marginal price of achieving the transaction may or may not discourage someone from going through with the transaction. Thus, the global attack on criminal finance may be expected to have a different effect on drug traffickers than on terrorists. For drug traffickers, the disposition of marginal dollars can make the difference between a cost-effective operation and a money-losing proposition. For terrorists, added expense may be problematic but not a deal breaker—at least as long as they can avoid detection before carrying out their objective.

III.
POTENTIAL CONSEQUENCES OF THE MISMATCH

Some would argue that the problems of capacity and power I have described are really not all that troubling. After all, as the argument goes, domestic and international laws targeting criminal finance are serving an expressive function, and every enforcement system harbors its own particular assemblage of faults. Such arguments for ignoring the gap between power and capacity are unconvincing without some elaboration. To judge law's impact one must understand how it is being enforced, and what consequences that enforcement might have. By the same token, altering the law's impact may call for changes not only in the content of a treaty or an extraterritorial statute, but in the incentives of the bureaucracies responsible for enforcing the law. The law's consequences are borne from its impact on the world, not just its aspirations. This section reviews the possible consequences of a persistent disequilibrium between power and capacity in transnational criminal enforcement, and the prospects for closing the gap.

A. Implications

While the mere existence of a gap between state power and capacity does not automatically undermine the principled argument for targeting criminal finance, under certain conditions the gap can have perverse effects once we consider the political context. Some might argue that this dynamic simply reflects the application of a principle akin to strict liability; that is, any allegation that a charity is participating in terrorist financing results in an asset freeze. But note that this argument implies that the worst consequence is futility. We might easily imagine another scenario where the worst that can happen is perversity. Suppose, for example, that some charities whose assets are frozen had made an effort to ensure their resources did not fund terrorists. If their assets are frozen

111. *Cf.* DAVID WOODRUFF, MONEY UNMADE: BARTER AND THE FATE OF RUSSIAN CAPITALISM (1999).

and other charities making a similar effort believe they will face the same prospect, then those other charities' resolve to police the destination of their funds may weaken.

This dire scenario is not the only possibility. One could make assumptions that would make these perverse effects seem extremely unlikely. One might suppose, for example, that charities would never be tempted to contribute their resources to foreign organizations that were involved both in violent and charitable activity. But those different assumptions would need at least some justification, and that stands in contrast to the justifications offered by government officials in the U.S. defending the global attack on terrorist financing. For example, one government official recently defended the existing approach as follows:

> We must remember that the problem underlying [our] concern is the abuse of charities by terrorist organizations. It is this abuse, not the consequential freezing actions taken by our government, which undermines donor confidence. In the absence of our designations, money intended for humanitarian assistance would not be frozen; rather, it would finance further destruction.[112]

The preceding statements assume that the designations are essentially correct, in the strongest sense of the term. The implication is that the asset freezes restrict the disposition of funds that would have otherwise financed destructive activity. This assumption is questionable given the incentives of the executive branch. Even if the assumption were plausible, the statement may not be convincing. There is an implicit presumption that if funds for humanitarian assistance and destructive activities are being commingled, the marginal additional dollar contributed would go to destruction. That is not obvious. Organizations commingling funds might have incentives to spend the marginal dollar on nondestructive activities. One might still come up with a theory of collective sanctions that would make it worthwhile to target an entire charity when any portion of its money appears to be going to destructive causes. At present, that kind of justification seems to be missing, or at least radically underdeveloped.

A defender of disequilibrated enforcement, like the official quoted above, might say that the global attack is just a reasonable step in the direction of strict liability. In such a world, letting even a crisp $5 bill be diverted to destructive activities should be subject to severe sanctions, which would force it to internalize the cost of stopping the misuse. I have already noted the problems that exist when it comes to gathering information confirming that, indeed, the $5 bill has been diverted. Beyond this, there is the question of whether strict liability makes sense in the many different battlefields where nation-states pursue the global attack on criminal finance. After all, there is nothing inherently wrong with strict liability. The problem is the potentially weak connection between what is supposed to trigger liability and what actually does trigger punishment. We cannot observe the extent of the disconnection directly, and we know from

112. U.S. Department of the Treasury, Office of Public Affairs, *Written Testimony of David D. Aufhauser, General Counsel, U.S. Department of the Treasury, Before the Senate Judiciary Committee, Subcommittee on Terrorism, Technology, and Homeland Security* (June 26, 2003).

the analysis above that the executive may have incentives to use power even in the absence of capacity to target the most egregious offenders. Moreover, even if there were an explicit move toward strict liability for anyone engaged in a particular kind of transaction—a bank discovered to have been laundering money, or a charity alleged to have facilitated terrorist financing—there would still be at least three important questions to address. First is the question of the marginal benefit of a strict liability regime on the reduction of undesired conduct. Second is the question of the marginal cost of a strict liability regime, especially in terms of reductions in desired activity, such as the provision of remittance services. Third is the question of the fairness and efficiency issues raised by how discretion is applied in punishing the range of possible offenders. The contemporary global attack on criminal finance does not seem to represent a strict liability system justified on the preceding grounds.[113]

Regardless of the extent of justification, law enforcement officials can pursue the global attack through criminal prosecutions of offenses with elements that are fairly easy to prove (illegal money transmission), yet are still closely identified with larger, more popular enforcement objectives (fighting terrorism). The same is true for actions freezing assets. To the extent that the use of the powers themselves will serve as a signal to voters about state capacity, and to the extent voters care about this, the politicians and the law enforcement officials they oversee will have a big incentive to use the powers. The incentive will persist even if it is possible *in principle* to undertake a painstaking, potentially useful investigation into international money laundering or terrorist financing of uncertain results. The major counterweight to this pressure will come from officials and politicians who consider accuracy, fairness, or genuine gains in national security to be personal goals, or from bureaucrats who might bear a substantial cost as a result of opposition from targeted groups. But since voters reward what they can see, political pressures will tend to push law enforcers in the opposite direction.[114]

In contrast, building a painstaking case against an offender takes time and effort. It is a sort of wager: investigators, prosecutors, and executive branch officials are not guaranteed that an exhaustive investigation will uncover Osama Bin Laden's personal investment banker or the Cali cartel's top Bahamian banker. All of these people may still care about anonymity, but they may have strategies of varying costs to purchase financial anonymity despite the uses of some of the legal measures that lay the foundation for the global attack.[115]

113. Note that when it comes to civil remedies against alleged financial contributions to terrorism, the United States legal system rejects the notion of strict liability. *See* Boim v. Quranic Literacy Institute and Holy Land Foundation, 291 F.3d 1000 (7th Cir. 2002) (giving money to a group which then sponsors a terrorist act, without knowledge of 'donees' intended criminal use of the funds, did not constitute an act of international terrorism).

114. *Cf.* Daryl J. Levinson, *Making Government Pay*, 67 U. CHI. L. REV. 345 (2000) (government tends to respond to votes, not dollars or anything else).

115. Moreover, although all of the preceding offenders may care about anonymity, the slope of the curve connecting anonymity to the demand for illegal acts may be different depending on whether the offender is, for example, a low level terrorist or the leader of a profitable drug smuggling business.

Not everyone will think that there is a problem if state power to attack alleged instances of criminal finance drastically exceeds the state's capacity to attack and constrain the most troubling instances of criminal finance. There are plenty of examples of legal authority that convey power but do not bestow on government the capacity to completely address a problem. Customs enforcement does not completely stop the flow of drugs. Laws against the sale of tobacco to minors do not prevent every enterprising fourteen year-old from getting his hands on some Lucky Strikes. Nonetheless, there is reason to be concerned about the mismatch between capacity and power in the global attack on criminal finance. Indeed, the disconnection between the most troubling threats and the actual targets of coercive power may eventually weaken the legitimacy of the global attack on criminal finance. Of course the meaning of legitimacy is contested. Its ebb and flow is admittedly hard to assess either conceptually or empirically. Still, some domestic or international constituencies may care about the connection between alleged threats justifying particular enforcement policies and the people actually targeted with those policies. Disequilibrated enforcement that works just fine in the short run may lead these constituencies to reduce their aggregate degree of trust in the state.[116]

Even on purely utilitarian terms, disequilibrated enforcement could be problematic because of its impact on opposition to the global attack, and the possible distrust from organizations, individuals, and groups targeted in the global attack.[117] Regulatory asset freezes and low-threshold criminal prosecutions may even help engender a perverse dynamic, where people and organizations decide it is not worth their while to forego illegal conduct because they may suffer punishment anyway or because seeing instances of punishment that they consider unjustified produces a radicalizing effect.[118] Defenders of disequlibrated enforcement would be quick to point out that draconian enforcement simply errs on the side of punishing those who have given the government rea-

116. Suppose, for example, a rational, sophisticated voter cares about making sure that legal powers are actually used to reduce the threats that justifies the existence of such powers. The voter observes the executive over several time periods. Assume further that the voter could observe both power and some signal that may or may not be related to capacity after each time period (for instance, the appointment of a trusted law enforcement official). After each time period, the voter could use Bayesian updating to react to the executive's repeated assertions of power without making an effort to develop the capacity to target the most egregious threats. *Cf.* DREW FUDENBERG AND JEAN TIROLE, GAME THEORY 211 (1993). If a sophisticated voter were judging the politician over more than one period, the voter could update her beliefs about the probability that the assertion of power was also coupled with an effort to build capacity. After a few rounds of play, the sophisticated voters might decide to withdraw their political support. The equilibrium would depend on the payoffs for the voter and the executive (including the cost of the capacity-related signal), and on the players' assessment of various probabilities. If the politician refuses to build capacity after a few time periods, then the voter could suddenly withdraw her support after deciding that given the preceding behavior, the politician cannot be trusted.

117. *See* Cuéllar, *Choosing Anti-terror*, *supra* note 5, at 23 n.44 (2003) ("[O]ne cannot state with certainty that racial profiling's benefits would dwarf the consequences of 'clamming up.' The only certain conclusion is that the 'clamming up' effect should not be ignored.").

118. *See, e.g.*, RUI J. P. DE FIGUEIREDO, JR. & BARRY R. WEINGAST, VICIOUS CYCLES: ENDOGENOUS POLITICAL EXTREMISM AND POLITICAL VIOLENCE (University of California, Berkeley Institute for Governmental Studies, Working Paper 2000) *available at* http://www.igs.berkeley.edu/publications/workingpapers/WP2001-9.pdf.

son to doubt that they are refraining from illicit activity. The problem is that it is hard to tell in advance what exactly will trigger a government reprisal. It is hardly the case that every affected charity is justified in complaining that its assets have been unfairly frozen. Still, it is also true that disequilibrated enforcement may have costs, skewing the incentives of charities that fear being targeted and potentially polarizing constituencies that are valuable in waging a war on criminal finance or terrorism.

Even if there were no risks of perverse radicalization, disequilibrated enforcement may provide a false sense of security when its most deserving targets elude capture.[119] A few things might make this possible. One is the executive's ability to show voters what looks like progress by using legal powers without building capacity. Another is the low level of power or capacity in developing countries. Either way, there is some risk involved in having the machinery of the law hum along, generating asset freezes and arrests for illegal money transmitting, but little if any change in the marginal threat. Depending on one's assumptions about the sophistication of the public, the bustle created by the exercise of legal power might create a cascading impression among the public that there is no capacity problem at all.[120]

Finally, though states are building their power to wage the global attack, the low capacity means that scarce resources for the attack—including money, bureaucratic priority, diplomatic pressure, and regulatory enforcement—may be misallocated. At worst, the gap can even create a sort of spiral where demands for power grow with little attention on their marginal impact on capacity. This may not be true for every law enforcement agency in every situation. The point is that, in the panoply of political circumstances shaping law enforcement agency budgets and legal powers, the lack of capacity may play a role in the still further expansion of legal power. Intelligence and law enforcement failures are often the preludes to still further expansions of legal powers and financial resources for security bureaucracies. Unless distinctive circumstances create pressures on law enforcement officials and politicians to repeatedly and publicly scrutinize the connection between requested legal powers and the impact on capacity, law enforcers will have little to lose when requesting new powers. Thus the gap between power and capacity can grow ever larger for an extended period, even if a growing group of citizens may eventually question the legitimacy of law enforcement as a result.[121]

119. By "deserving," I mean "serious." *See supra* note 2 (discussing what offenses are "serious").

120. *Cf.* Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999).

121. For a discussion of law enforcement officials' incentives to expand the scope of criminal laws in the domestic context, see generally William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001). Domestic criminal law may also involve a separation between criminal law powers and capacity to achieve criminal justice results. I leave for another day the questions of whether this dynamic is materially different, but some distinctions appear on the surface: domestic criminal prosecutors and police forces (especially local ones) operate subject to budget and political constraints driven by voters who can readily observe developments in regional criminal justice. Transnational threats can create intense fear and are more difficult to readily ob-

B. Prospects for Controlling the Mismatch

Suppose that, despite the forces I have described as contributing to the mismatch, the currents impelling the global attack on criminal finance continue to carry it forward. Policymakers continue to insist on the "indirect liability" model imposing responsibilities on financial institutions and people involved in economic activity linked in some way to crime. Developed countries grow more emboldened to threaten or use extraterritorial authority. Would it then be possible to transform all the interest in criminal finance into a concerted effort to raise state capacity in order to make sure that the draconian laws against this activity were focused on the most egregious offenders?

One approach to increasing state capacity is to attempt to drastically increase the extent to which criminal offenses (and similarly problematic national security risks) can be detected from patterns of financial activity.[122] This has far less to do with criminal penalties than with the need for dramatic increases in the government's capacity to collect and analyze domestic and international data on financial activity, as well as to isolate the activities that are most suspicious. Experts might disagree about the value of information such a system could provide and the different kinds of costs such a system would entail. But there would be little prospect of raising state capacity in this area without radically improving government's capacity to create audit trails, obtain data, and analyze patterns of transactions. Despite some improvements in this area at the margin, a revolutionary advance here is unlikely.[123] Even if the focus were only on the United States, there would be substantial political opposition from financial institutions and other interested constituencies. Banks, broker-dealers, and other financial services providers would quickly see the administrative costs. Such regulations would make it still easier for government to impose indirect liability on them. Civil libertarians would also oppose major expansions in the centralization of financial information, at least in the absence of elaborate safeguards against government abuse of such information. Capacity and power problems in less-developed countries would remain a further nettlesome obstacle, since largely anonymous foreign transactions can complicate even domestic enforce-

serve. Since the threats in question are taken to involve high-cost, low probability events, voters have difficulty making reasonable calculations about the benefits of different enforcement strategies. *See generally* Cuéllar, *Choosing Anti-terror Targets*, *supra* note 5, at 117. Moreover, in contrast with domestic regulatory policy, neither political superiors nor citizens can easily use interest groups to police law enforcement bureaucracies because of the paucity of information.

122. Even if capacity were possible to achieve, the executive may not make the effort to develop it. Whether the politician chose to develop capacity would still depend on the politician's motivations (which may change only slowly), the extent to which the electorate will reward capacity, and the cost of developing capacity.

123. The other option, of course, is to increase the effectiveness of existing detection strategies, which depend heavily on intelligence and undercover infiltration. The problem here is that using these techniques requires some prior knowledge of the groups or individuals involved. This makes the traditional tactics very path-dependent and prone to be reactive to threats that are already known. Moreover, these methods have their own costs. While revamping the global attack would not necessarily solve all these problems, at least it provides an alternative paradigm.

https://scholarship.law.berkeley.edu/bjil/vol22/iss1/3
DOI: https://doi.org/10.15779/Z38564P

ment.[124] So closing the gap by raising capacity remains, at best, an uncertain prospect.[125]

The same can be said for trying to close the gap by constraining the use of power without capacity. Leaders of nation-states have incentives to equate power with capacity, thereby making failures of capacity into failures to provide authorities with enough power and letting the use of legal power instill a sense of security. Unless such leaders believe that disequilibrated enforcement will directly damage their political prospects or something else they hold dear, then they will have reason to use power as an indirect way of showing desirable results. Unsophisticated citizens will buy this, but even with more sophisticated voters the dynamic may not change. The appendix provides a simple example. Supposing that a government could take certain actions to signal its commitment to use power only when it had the capacity to focus it on appropriate targets, the executive branch would only rarely have the incentive to take those actions. In general, the executive would have no reason to do so unless a few unusual political circumstances presented themselves, such as a large number of sophisticated swing-voters who cared about security and had a terribly dire view of what would happen if power and capacity were not in equipoise. Legal trends in the United States and abroad instead are consistent with the absence of political circumstances that would lead to constraints on power. Substantive criminal statutes provide for expansive and extraterritorial liability. Regulatory authority allows states to punish specific institutions or achieve the forfeiture of assets

124. An example: suppose a weapons smuggler wants to bribe inspectors of the U.S. Bureau of Customs and Border Protection to allow a shipment of explosives into the United States. Suppose further that the inspectors are somewhat risk averse, so they will demand a considerable amount (say, five times their yearly pay) to facilitate the illegal shipment. If the inspectors are paid in cash, each will have to either hoard or deposit approximately $300,000. Hoarding it may be risky, but so would depositing the money, since large cash transactions can give rise to currency reports (or even suspicious activity reports, which might be filed even if the amount of the cash deposit does not exceed the $10,000 reporting threshold). Conversely, the inspectors can open accounts in U.S. banks and receive a wire transfer. Although the transfer itself may be unlikely to attract suspicion, the account and its balance may trigger either a report to the IRS or a suspicious activity report. *See* Cuéllar, *Tenuous Relationship*, *supra* note 14, at 440. In contrast, if the inspectors can receive anonymous deposits in secure bank accounts abroad subject to bank secrecy, then they do not need to worry about unusual concentrations of currency. The only problem remaining for the inspector is to verify that the deposit has actually been made at a reliable institution, and to figure out a scheme to enjoy the financial largesse without attracting attention.

125. Even if it were possible to design a system to police potential government abuses in this area, there is still the problem of specifying the profile of a genuinely suspicious transaction. Government officials would have at least three resources. Analysts can obtain ex post and ex ante intelligence from U.S. intelligence agencies, other states, or law enforcement agencies. The intelligence sheds light on how offenders operate. In this vein, so-called "red teams" can let the government learn without waiting for intelligence data, by getting confederates to simulate the achievement of an unlawful objective (i.e., use a fake name to set up a straw bank account to move money to a simulated terrorist cell). All of this can be supplemented with theoretical models that make assumptions about offenders, their incentives, and financial architecture to derive implications about what sort of conduct would be exceedingly unlikely to observe in a pattern of lawful transactions. For a similar approach used to identify teachers cheating when administering standardized tests to their students, see generally BRIAN JACOB & STEVEN D. LEVITT, ROTTEN APPLES: AN INVESTIGATION OF THE PREVALENCE AND PREDICTORS OF TEACHER CHEATING (NBER WORKING PAPER NO. W 9413 2003); BRIAN JACOB & STEVEN D. LEVITT, CATCHING CHEATING TEACHERS: THE RESULTS OF AN UNUSUAL EXPERIMENT IN IMPLEMENTING THEORY (NBER WORKING PAPER NO. W9414 2003).

with minimal evidence of wrongdoing. National security and emergency powers fill any remaining gaps in state power, allowing executive branch officials to detain people or freeze assets with low thresholds of justification.

In the meantime, governments can take some limited and less radical steps in the direction of increasing capacity. For example, governments can improve the use of existing information, regulatory rules on cross-border transactions, and high-profile changes in reporting requirements. They can see which groups change their behavior in response to the new rules (presumably the ones who fear government scrutiny most are the ones that will change their behavior) and target enforcement. But a more comprehensive capacity-building effort is a ways off, if it ever comes. The different challenges to building the regulatory system discussed above make it highly unlikely. Nor are states likely to face the pressure to roll back the laws and policies that imbue law enforcers with the power to pursue the attack on criminal finance, regardless of whether the capacity to focus that authority on the most egregious offenders is itself missing.[126]

CONCLUSION

There are principled reasons to pursue transnational criminal enforcement in general and to pursue the global attack on criminal finance in particular. Yet the legal arrangements created for these purposes can fail to achieve their objectives, and may sometimes even create perverse results. The problem is that changes in a nation-state's legal powers may herald only meager if any change in its capacity to reduce transnational threats. As with other challenges in transnational law enforcement, the global attack on criminal finance evinces a trend toward growth in state legal power; a trend as clear as the extent of capacity is opaque. I have explained how the gap could be narrowed in specific and rare circumstances, such as when swing voters are disproportionately sophisticated, or when investigative methods and technologies improve dramatically. Without these developments, the seductive scenario where the nation-state actually augments its capacity by expanding its legal powers will remain on the horizon, tantalizingly close—but perhaps relentlessly out of reach.

126. A rollback of power in developed countries is unlikely because: (1) the rhetoric and political logic of the global attack tends to encourage an expansion, not a contraction of those powers; and (2) there is unlikely to be a judicial remedy allowing people to police government legal powers used in the global attack on criminal finance through something akin to judicial review of prosecutorial discretion. Perhaps regulatory policy is the only area where there is likely to be continued attack on the laws used to wage the attack on criminal finance. There, powerful interest groups representing financial services providers may much prefer to have less regulation rather than more. When political shocks like the September 11, 2001 attacks on the United States drastically raise the interest in financial enforcement, even these interest groups may step aside in the face of strong political interest in further grants of regulatory authority to administrative agencies—but then they can take up the fight again before the agency to dilute the scope of regulatory power actually used. *See* Cuéllar, *Tenuous Relationship*, *supra* note 14, at 446-48. Nonetheless, constraints on regulatory authority may have more of a limiting effect on capacity (since regulation is primarily aimed at producing information) than on raw legal power to punish offenders, even low-level offenders, if they happen to attract attention from government.

APPENDIX: SIGNALING CAPACITY WITH A DIVIDED ELECTORATE AND SOPHISTICATED VOTERS

This appendix briefly considers how the mismatch between power and capacity would evolve if the executive were able to send a costly signal that demonstrated the development of capacity. I assume in this model that voters make rational expected utility calculations when deciding to vote.[127] Imagine a situation where an executive, such as a president or prime minister, is trying to obtain political support. Popular support allows the executive to continue in office. It can also be translated into backing for the executive's broader legislative agenda.[128] Unfortunately for the executive, the electorate is divided over his performance.

More specifically, suppose that voters can choose between the executive or a rival political candidate in an election. About 10 million people are expected to vote, so 5 million voters plus one should be necessary to win. Because of a lingering recession, about 4.5 million voters oppose the executive and only 3 million support him. These voters have made up their minds on the basis of their concerns about the economy. That leaves 2.5 million undecided voters who instead care most about national security, of which the executive needs about 80% (2 million plus one) to win the election. Suppose further that, of the 2.5 million undecided voters, some fraction F are naïve voters. As far as the naïve voters are concerned, an executive who uses legal powers surely has developed the capacity to use those powers effectively,[129] which in turn justifies supporting the incumbent. The presence of these voters makes the executive inclined to use available legal powers.

The remaining swing voters (that is, $1 - F$) are discerning, sophisticated voters who are concerned about the possible adverse consequences of a power-capacity mismatch. To decide how to vote, the sophisticated voters consider the consequences of the package of security policies associated with the executive. These consequences are affected by the probability p_a that there will be an adverse result because of the mismatch, and thus the probability of no adverse result is $(1 - p_a)$.[130] Meanwhile, the probability that a mismatch exists is p_m, which makes $(1 - p_m)$ the probability that a mismatch does *not* exist. The sophisticated voter has the following payoffs: 2 (or u_e) if the executive uses power along with capacity, 1 (or $u_{\sim a}$) if the executive uses power without capacity but there is no adverse result from the mismatch, and –2 (or u_a) if the executive uses power without capacity and there is an adverse result from this (say, neglect of

127. *See, e.g.*, DAVID M. KREPS, A COURSE IN MICROECONOMIC THEORY 76 (1990) (discussing Von Neumann-Morgenstern expected utility).

128. *Cf.* Douglas Rivers & Nancy L. Rose, *Passing the President's Program: Public Opinion and Presidential Influence in Congress*, 29 AM. J. POL. SCI. 183, 194 (1985) ("The empirical analyses. . . indicate that, contrary to some earlier claims, public opinion is an important source of presidential influence in Congress.").

129. It is not naïve to think that naïve voters would reason this way. *See supra* note 102 (discussing why many voters would associate power with capacity).

130. I describe some of the adverse results of the mismatch, including perverse impacts on security and distrust of the executive, *supra* Part III.

legitimate threats because of false security, or increasing polarization leading more people to support terrorism). Then the sophisticated voter employs a simple heuristic: if a vote for the incumbent produces an expected utility above a certain critical threshold t (set this to 1), then she will support the incumbent. Otherwise she will vote for the challenger. Thus the sophisticated voter will support the executive if and only if:

$$\{ p_m [(p_a * u_a) + ((1-p_a) * u_{\sim a})] + [(1-p_m) * u_e] \} > t$$

Now we introduce the signaling dynamic. The executive can choose to send the electorate a signal to indicate that he is actually developing capacity. One might imagine that the signal includes some combination of (1) spending financial resources on capacity-building activities, (2) appointing competent technocrats to run law enforcement bureaucracies, (3) disclosing (i.e., declassifying) information about the extent of capacity, and (4) raising the threshold of proof necessary to use certain legal powers. Since it is costly to send the signal, the executive will not do so unless he feels like he needs to in order to achieve a victory in the election.

If the executive chooses to send the signal, this lowers p_m from .5 to .3. If we assume that the probability of an adverse result from the mismatch (or p_a) is .4, then the sophisticated voter's utility from voting for the executive is: [(.3) (.4) (−2) + (.3) (.6) (1)] + (.7) (2) = 1.34. Since $1.34 > t$, then the sophisticated voters will vote for the executive. As long as the preceding assumptions apply and $F < 2$ million plus one, then the executive will send the signal. If $F > 2$ million plus one, then the executive could win the election simply by using power, and it would not be necessary to incur the cost of sending the signal. Assuming that F were smaller than 2 million plus one, then the executive would have lost if he had not sent the signal, since then the sophisticated voter's utility would have been [(.5) (.4) (−2) + (.5) (.6) (1)] + (.5) (2) = .9, and $.9 < t$.

Notice that the preceding result depends on the sophisticated voter's conclusion about the probability of an adverse result. If p_a were only .1 and p_m were .5 (that is, if the probability of the adverse result were lower and there were no costly signal sent), then the sophisticated voter's utility would be as follows: [(.5) (.1) (−2) + (.5) (.9) (1)] + (.5) (2) = 1.35. The resulting utility is still higher than t, which means that the politician would not have to worry about sending the signal.

The upshot is that it may be possible for voters to force the executive into taking actions that might reduce the power-capacity mismatch, but only in limited circumstances. Voters can do so (1) *if* there is a costly signal the executive can send to show that he is strengthening capacity, (2) *if* the proportion of sophisticated voters is large enough so that the executive needs them to achieve a victory, (3) *if* the sophisticated voters think that the probability of a mismatch *without* the signal is quite high, and (4) *if* those sophisticated voters think the existence of a mismatch is sufficiently dire. That adds up to a lot of *ifs*.

https://scholarship.law.berkeley.edu/bjil/vol22/iss1/3
DOI: https://doi.org/10.15779/Z38564P

Berkeley Journal of International Law

Volume 22 | Issue 1 Article 4

2004

The Transnational and Sub-National in Global Crimes

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The Transnational and Sub-National in Global Crimes

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INTRODUCTION

Human trafficking and money laundering are international problems that have been fueled by globalization. "Fundamentally the Global Age involves the supplanting of modernity with globality. . . ."[1] At the heart of the globalization debate lies the market and its relationship to the nation state. Due to globalization, markets and other non-state entities are increasingly important actors in the political and economic orders.[2] Commerce has transcended territorial definitions and is now extra-territorial and global in orientation, as capital, technology, and investment routinely cross national boundaries.

This phenomenon, referred to interchangeably as globalization, transnationalization, postnationalization, or denationalization,[3] involves the process by

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1. MARTIN ALBROW, THE GLOBAL AGE 4 (1996); *see also* MALCOLM WATERS, GLOBALIZATION 1 (1995) ("globalization may be the concept of the 1990's, a key idea by which we understand the transition of human society into the third millennium."); ROLAND ROBERTSON, GLOBALIZATION: SOCIAL THEORY AND GLOBAL CULTURE 113 (1992). This discussion on globalization in the Introduction is drawn from Lan Cao, *Corporate and Product Identity in the Postnational Economy: Rethinking U.S. Trade Laws*, 90 CAL. L. REV. 401 (2002).

2. *See generally* LOWELL BRYAN & DIANA FARRELL, MARKET UNBOUND: UNLEASHING GLOBAL CAPITALISM (1996); SUSAN STRANGE, THE RETREAT OF THE STATE (1996); HENRY WENDT, GLOBAL EMBRACE: CORPORATE CHALLENGES IN A TRANSNATIONAL WORLD (1993).

3. Terms such as globalization, internationalization, transnationalization, postnationalization, and even denationalization have been used to describe the process by which activities, which were once taking place within national borders, are now taking place beyond national borders. *See* R.J. BARRY JONES, GLOBALISATION AND INTERDEPENDENCE IN THE INTERNATIONAL POLICY ECONOMY 3 (1995). Goods, financial instruments, capital, services, technology, even culture itself, are being exchanged across national borders. Each of the terms above describes something about that process, although each term may connote something specific about the character of and consequences to this phenomenon.

The term "globalization" is generally associated with various forms of linkages among businesses and markets across and without regard to national borders and usually connotes some erosion of the national state, provoking questions about the meaning of democracy, participation, sovereignty. *See* Gordon R. Walker & Mark A. Fox, *Globalization: An Analytical Framework*, 3 IND. J. GLOBAL LEGAL STUD. 375, 380 (1996) ("Internationalization" or "transnationalization" may simply mean "cooperative activities of *national* actors," bilaterally or multilaterally so that the national is not necessarily diminished); *see also* Anne Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFF. 183, 184 (1997) ("The state is not disappearing, it is desegregating into its separate, functionally distinct parts. These parts—courts, regulatory agencies, executives, and even legisla-

which activities that historically took place within national borders are now conducted across national borders through the intermediary of non-state actors. This process is most evident in the fields of trade and investment. The global economy has made it easier for multinational companies to engage in transnational economic activities such as "world-wide sourcing"[4] and foreign direct investment,[5] thus freeing companies from the restraints and "factor endowment of a single nation"[6] and allowing them access to resources and markets across

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tures—are networking with their counterparts abroad, creating a dense web of relations that constitutes a new, transgovernmental order."). "Postnationalization" implies a shift, conceptually and paradigmatically, from the national to something beyond the national, although the term does not necessarily implicate a shift in the relationship between the state and the market, as in "globalization," but rather a shift in the relationship between the state and other non-market, non-state entities, such as non-governmental organizations in the fields of human rights and the environment. *See, e.g.*, Richard Falk, *The Making of Global Citizenship*, *in* GLOBAL VISIONS: BEYOND THE NEW WORLD ORDER 47-48 (Jeremy Brecher et al. eds., 1993); Paul Wapner, *Politics Beyond the State: Environmental Activism and World Civic Politics*, 47 WORLD POL. 311, 312-13 (1995). "Denationalization" is less used, but refers to the phenomenon, primarily economic, in which the national is diminished. *See* SASKIA SASSEN, LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION 31 (1995) ("Economic globalization has contributed to a denationalizing of national territory."). "Transnationalization," "postnationalization," and "denationalization" have also been used to describe wholly non-economic developments, to capture the emergence of cross-national or sub-national identities to give rise to a new meaning of citizenship that is multiple and transterritorial. *See, e.g.*, Peter J. Spiro, *The Citizenship Dilemma*, 51 STAN. L. REV. 597 (1999) (book review); Yasemin Nuhoglu Soysal, *Changing Parameters of Citizenship and Claims-Making: Organized Islam in European Public Spheres*, *in* 26 THEORY & SOC'Y 509, 513 (1997) (post-national citizenship).

4. SUSAN STRANGE, STATES AND MARKETS 82 (2d ed. 1994). *See, e.g.*, J. Linn Allen, *Chicago Mecca for Real Estate Gurus*, CHI. TRIB., Sept. 8, 1996, § 3, at 1 (describing how a major telecommunications company outsources management of its real estate assets to another company); Leslie Helm, *The Fading Metropolis*, L.A. TIMES, June 3, 1996, at D1 (describing how a major accounting firm institutes "hoteling" for its auditors—auditors are to make reservations to use a limited number of office spaces when not conducting audits); *see also* Norman Jonas, *The Hollow Corporation*, BUS. WK., Mar. 3, 1986, at 57-58 ("Outsourcing breaks down manufacturers' traditional vertical structure, in which they make virtually all critical parts, and replaces it with networks of small suppliers . . . . In the short run, the new system may be amazingly flexible and efficient. In the long run, however, some experts fear that such fragmented manufacturing operations will merely hasten the hollowing [out of U.S. industry]."). Various industries are resorting increasingly to outsourcing.

5. In the United States, foreign direct investment is defined as "the ownership or control, directly or indirectly, by one foreign person of 10 per centum or more of the voting securities of an incorporated U.S. business enterprise or an equivalent interest in an unincorporated U.S. business enterprise, including a branch." 15 C.F.R. § 806.15(a) (1998). "A key element of the structural transformation into the global company town was the role played by the multinational corporation and foreign direct investment . . . . Technological advances have played a part in triggering the global revolution, but the multinational corporation has evolved to become an important vehicle for allocating resources." Bijit Bora, *The Implications of Globalisation for Australian Foreign Investment Policy*, *in* ECONOMIC PLANNING ADVISORY COMMISSION, GLOBALIZATION: ISSUES FOR AUSTRALIA 92 (1995), *quoted in* Walker & Fox, *supra* note 3, at 375. The flow of foreign direct investment into and out of a country is routinely used as a reliable indicator or gauge of corporate international expansion. *See* U.N. Center on Transnational Corporations, *The Process of Transnationalization in the 1980s*, *in* READINGS IN INTERNATIONAL BUSINESS: A DECISION APPROACH 23, 26, 33 (Robert Z. Aliber & Reid W. Click eds., 1993). The growth of foreign direct investment in 1995 exceeded that of export of goods and non-factor services by 18 percent and world output by 2.4 percent. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, WORLD INVESTMENT REPORT, at 3 (1996).

6. MICHAEL E. PORTER, THE COMPETITIVE ADVANTAGE OF NATIONS 14 (1990).

national boundaries.[7] Multinational companies routinely operate in many countries besides their home countries and the products they make are themselves global composites, with parts manufactured in multiple national jurisdictions.[8]

This shift has meant more than simply the internationalization of economic activities.[9] It has also resulted in a fundamental transformation of the relationship between market power and state authority, in which the state is increasingly unable or unwilling to regulate the activities of non-state actors.[10] This process has provoked a shift from public to private modes of regulation and a shift from territorially-based to non-territorially based centers of authority.[11]

This altered relationship between the state and the market has had a significant impact not just on conventional trade but also on the trade in "violence commodities."[12] The erosion of state sovereignty and the concomitant "compression of the world"[13] through developments in technology, transportation, communication, and information processes have created a "borderless global economy"[14] in which criminal activities too are increasingly transnational.

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7. Asea Brown Boveri, Inc., a Swiss-Swedish electrical engineering company, for example, considers itself "a company without any regard to national boundaries." *See* Charlene Marmer Solomon, *Transplanting Corporate Cultures Globally*, PERSONNEL J., Oct. 1993, at 78, 80 (statement by Richard P. Randazzo, ABB's Vice-President of Human Resources). ABB also planned to lay off a thousand Swiss workers and invest $1 billion in Asia. WILLIAM GREIDER, ONE WORLD, READY OR NOT: THE MANIC LOGIC OF GLOBAL CAPITALISM 62 (1997).

8. For a discussion of the effect globalization has on corporate nationality and products' rule of origin, see Cao, *supra* note 1.

9. Some of the transformations associated with globalization have been identified as early as 1944 by Karl Polanyi. *See generally* KARL POLANYI, THE GREAT TRANSFORMATION (1944). However, while the rise of the market and the retreat of the state might have occurred previously, they have not occurred with such speed nor breadth. "[T]oday's era of globalization is not only different in degree; in some very important ways it is also different in kind . . . .Today's era of globalization is built around falling telecommunications costs—thanks to microchips, satellites, fiber optics and the Internet. These new technologies are able to weave the world together even tighter." THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE xv (1999).

10. Multinational corporations, for example, are increasingly mobile and unconstrained by national or territorial restrictions. *See generally* U.N. Conference on Trade and Development, *Programme on Transnational Corporations, World Investment Report 1993: Transnational Corporations and Integrated International Production*, U.N. Sales No. E.93.II.A.14 at 161, U.N. Doc. ST/CYC/159 (1993) [hereinafter WIR 1993] (discussing the inability of states to regulate corporate multinational activities whether for tax and other revenue-raising purposes or to restrain unfair business practices).

11. In this way, free market globalization, like its antithesis from a prior era, communist internationalism, is obtuse to the pull of the particular and instead exhibits behavior that generally scorns the relevance of place. *See, e.g.* ROSA LUXEMBURG., THE NATIONAL QUESTION, SELECTED WRITINGS BY ROSA LUXEMBURG 135, 159, 161 (Horace B. Davis ed., 1976) (favoring internationalism over nationalism, which Luxemburg considered to be a mask for class division); *see also* JOHN GRAY, FALSE DAWN: THE DELUSIONS OF GLOBAL CAPITALISM 3 (1998) (equating the flaws of global capitalism with those of global communism).

12. Alex Y. Seita, *The Role of Market Forces in Transnational Violence*, 60 ALB. L. REV. 635, 637 (1997) ("Illegal or not, the demand for (and supply of) particular commodities can often be a contributing cause of violence, whether narrowly defined to mean death or serious physical injury to human beings, or broadly defined to include psychological harm to human beings and physical harm to other living organisms and the environment.").

13. ROBERTSON, *supra* note 1, at 8.

14. Mike Featherstone & Scott Lash, *Globalization, Modernity, and the Spatialization of Social Theory: An Introduction*, *in* GLOBAL MODERNITIES 2 (Mike Featherstone et al. eds., 1995).

Transnational organized crime has become "the new authoritarianism."[15] Governments are pitted against market forces, but in this case, the latter are not conventional markets but rather markets of violence. Trafficking in women is only one part of a global decentralized network of crime, in which the actors are highly mobile, stateless, and in a transnational market, unbound by geography.

In addition to such transnational forces, sub-national forces organized around common religious, ethnic, communal, and traditional ties have redefined the nature and dimensions of international criminal networks. There is a dialectical interplay of internal, centripetal forces pushing the nation state inward towards the realm of the sub-national with external, centrifugal forces pushing the nation-state outward towards the realm of the global in ways that have facilitated the agenda of the criminal network. In other words, the rise of a "global localism"[16] is intertwined with the workings of "global crime." As this article explains further below, criminal alliances are both transnational and sub-national; although they operate transnationally, many are organized around common ethnic ties. Furthermore, the proceeds from such illicit operations may be laundered through the use of transnational offshore banks but also through traditional modes of money transfers, also organized along sub-national ethnic lines, such as the "fei qian" or "flying coins" method, as the Chinese call it, or the "hawala" system, meaning "trust" or "exchange" in Hindi. To the extent that anti-money laundering efforts adopted by the United States and by the international financial system focus primarily on the activities of financial institutions, they are ignoring a vast, parallel mode of money transfers that have become increasingly intertwined with the illicit activities of global criminals. The current lack of information and understanding regarding these "ethnic banking systems"[17] and their underlying cultural norms has prevented the international community from developing an effective response to laundering activities. Indeed, although the legal regime instituted after September 11, 2001 may be a necessary response to the concern that underground ethnic systems are being used for criminal and terrorist objectives, it is highly unlikely, however, that such a regime—imposing formalization requirements on the informal ethnic banking system—will achieve the desired outcome. This may be an instance where law is necessary but wholly inadequate, and a more comprehensive ap-

15. Louise I. Shelley, *Transnational Organized Crime: The New Authoritarianism, in* THE ILLICIT GLOBAL ECONOMY & STATE POWER 25, 32 (H. Richard Friman & Peter Andreas eds., 1999). This new authoritarianism exploited the void left by the weakened states, such as the disintegrating former Soviet Union. TOM FARER, *Conclusion: Fighting Transnational Organized Crime: Measures Short of War, in* TRANSNATIONAL CRIME IN THE AMERICAS 245, 267-68 (Tom Farer ed., 1999); PETER B. MARTIN, *Confronting Transnational Crime, in* GLOBAL ORGANIZED CRIME AND INTERNATIONAL SECURITY 27 (Emilio C. Viano ed., 1999). It also took on some traditional state responsibilities. The Chinese Triads and the Japanese Yakuza, for example, perform social welfare functions. Shelley, *supra*.

16. Thomas M. Franck, *Clan and Superclan: Loyalty, Identity and Community in Law and Practice,* 90 AM. J. INT'L L. 359, 360 (1996).

17. Lisa C. Carroll, *Alternative Remittance Systems: Distinguishing Sub-Systems of Ethnic Money Laundering in Interpol Member Countries of the Asian Continent* (Jan. 31, 2003), *available at* http://www.interpol.com/public/FinancialCrime/MoneyLaundering/EthnicMoney/default.asp [hereinafter Carroll, *Interpol Report*].

proach would be required, one that emphasizes community norms and long-term economic development in developing countries that lack an effective legal and financial framework.

Part I of the article examines the burgeoning problem of global traffic in persons, particularly women, and places this problem within the continuum of global criminal activities that result from the altered relationship between the state and the market. Trafficking in women is viewed not as a phenomenon that exists in isolation but as one part of a global, decentralized trade in violence arising from the relationship between centripetal, sub-national forces on the one hand and centrifugal, transnational forces on the other. Part II studies the financial dimensions of global crimes and the ways in which criminal organizations launder illegal proceeds to make them appear legitimate. Part II also discusses the various anti-money laundering regimes designed to regulate financial institutions initiated at the national and international levels by the United States and various intergovernmental organizations, respectively. Part III explores the underground financial system that exists in the shadow of formal financial institutions and looks at how such sub-national, ethnically based alternative remittance systems are being used by criminal organization for money laundering purposes. Part III also examines state responses to such alternative systems and evaluates their effectiveness. Part IV, the conclusion, assesses the relationship between the market and the state, the rise of both transnationalism and sub-nationalism, and provides some observations about how the relationship between law and norms may facilitate or impede the effectiveness of anti-money laundering efforts.

I.
THE GLOBAL TRAFFIC IN WOMEN AND TRANSNATIONAL CRIME

According to the United Nations ("U.N."), millions of people are trafficked every year.[18] According to the U.N. Office for Drug Control and Crime Prevention, it is estimated that 200 million people worldwide may be subject to the control of traffickers.[19] Trafficking in persons is becoming the fastest growing

18. *See* REPORT OF THE SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN, ITS CAUSES AND CONSEQUENCES, U.N. ESCOR, COMMISSION ON HUMAN RIGHTS, 53rd Sess., Provisional Agenda Item 9(a), at IV, U.N. Doc. E/CN.4/1997/47 (1997). According to the U.S. Congressional Research Service, between seven thousand to two million people, most women and children, are trafficked across international borders. Francis T. Miko, *Trafficking in Women and Children: The U.S. and International Response*, Cong. Res. Service Report for Congress, Order Code 30545 (2002), *available at* http://fpc.state.gov/documents/organization/9107.pdf; *see also* Amy O'Neill Richard, U.S. Dep't of State, Center for the Study of Intelligence, *International Trafficking in Women to the United States: A Contemporary Manifestation of Slavery and Organized Crime* 1 (1999), *available at* http://www.odci.gov/csi/monograph/women/trafficking.pdf. A distinction is also drawn between human trafficking and human smuggling. In the latter case, voluntary migrants enlist smuggling rings to transport them illegally into another country. Interpol, *People Smuggling*, *available at* http://www.interpol.com/Public/THB/PeopleSmuggling/Default.asp (describing how migrants are at the mercy of people-smuggling criminal syndicates who require them to work for years to pay off debts incurred as a result of their transportation).

19. Barbara Crossette, *UN Warns that Trafficking in Human Beings is Growing*, N.Y. TIMES, June 25, 2000, at A10. Trafficking in children has also increased. The Center for Protection of

activity conducted by organized crime.[20] The U.N. General Assembly defines trafficking as:

> the illicit and clandestine movement of persons across national and international borders, largely from developing countries and some countries with economies in transition, with the end goal of forcing women and girl children into sexually or economically oppressive and exploitative situations for the profit of recruiters, traffickers, and crime syndicates, as well as other illegal activities related to trafficking, such as forced domestic labour, false marriages, clandestine employment, and false adoption.[21]

Annual profits are estimated to be up to U.S. $7 billion.[22] Traffickers have traditionally targeted women from Southeast Asia and Latin America. Since the fall of the Berlin Wall, however, they have increasingly relied on Eastern European countries to be a source of procurement.[23] Economic difficulties during the transitional period from a planned to a market economy have prompted impoverished Eastern European women to search for employment in Western Europe, making them susceptible to exploitation by criminal syndicates.[24] Indeed, sex traffickers target women from poor and unstable regions of the world because the combination of economic hardship and the temptations of a better life elsewhere render these women particularly vulnerable to traffickers' schemes.[25]

Children's Rights estimates that as many as 800,000 children worldwide are in prostitution. In India alone, UNICEF estimates that there are approximately 400,000 to 500,000 child prostitutes. MANUEL CASTELLS, END OF MILLENNIUM 155 (1998).

20. Crossette, *supra* note 19.

21. *Id. See also* Richard, U.S. Dep't of State, *supra* note 18, at v. The U.S. State Department defines trafficking as "all acts involved in the recruitment, abduction, transport, harboring, transfer, sale or receipt of person; within national or across international borders; through force, coercion, fraud, or deception; to place persons in situations of slavery or slavery-like conditions, forced labor or services, such as forced prostitution or sexual services, domestic servitude, bonded sweatshop labor or other debt bondage." *Id.*

22. Janie Chuang, *Redirecting the Debate Over Trafficking in Women: Definitions, Paradigms, and Contexts*, 11 HARV. HUM. RTS. J. 65, 68 (1998); Maya Raghu, *Sex Trafficking of Thai Women and the United States Asylum Law Response,* 12 GEO. IMMIGR. L.J. 145, 171 (1997); Penny Venetis, *Violence Against Women: International Solutions Symposium, International Sexual Slavery,* 18 WOMEN'S RTS. L. REP. 263, 279 (1997) (describing a multi-billion dollar business); Roger Cohen, *The Oldest Profession Seeks New Market in West Europe,* N.Y. TIMES, Sept. 19, 2000, at A1; Gillian Caldwell et al., *Global Survivor Network, Crime & Servitude: An Exposé of the Traffic in Women for Prostitution from the Newly Independent States* 3 (1997), *available at* www.globalsurvival.net/femaletrade/9711russia.html; Nat'l Sec. Council, *Alien Smuggling, International Crime Threat Assessment* (2002), *available at* http://clinton4.nara.gov/WH/EOP/NSC/html/documents/pub45270/ pub45270chap2.html.

23. Laurie Hauber, *The Trafficking of Women for Prostitution: A Growing Problem within the European Union,* 21 B.C. INT'L & COMP. L. REV. 183, 184-85 (1998); Joel Brinkley, *Vast Trade in Labor Portrayed in CIA Report,* N.Y. TIMES, Apr. 2, 2000, at 22; Cohen, *supra* note 22, at A1; Michael Specter, *Contraband Women,* N.Y. TIMES, Jan. 11, 1998, at 1 (deceptive advertisements promising lucrative jobs); *Trafficking in Women: In the Shadows*, ECONOMIST, Aug. 26, 2000, at 38; Richard, U.S. Dep't of State, *supra* note 18, at iii; *see also* Phil Williams, *Emerging Issues: Transnational Crime and Its Control, in* GLOBAL REPORT ON CRIME AND JUSTICE 225, 225 (Graeme Newman ed., 1999) (describing trafficking of women from Eastern Europe to Western Europe).

24. Hauber, *supra* note 23, at 184-85; ECONOMIST, *supra* note 23, at 39.

25. Raghu, *supra* note 22, at 145-46 (women in developing countries are targeted because of the imbalances in power); ECONOMIST, *supra* note 23, at 39; Human Rights Watch, Women's Rights Project, *The Human Rights Watch Global Report on Women's Human Rights* 196 (1999); Richard, U.S. Dep't of State, *supra* note 18, at 1; *see also* Williams, *supra* note 23, at 225 (describing methods of procurement targeted at women in Thailand, Brazil, and the Philippines).

Methods of procurement include outright abduction to false promises of jobs in other countries.[26] Criminal syndicates traffic women for numerous purposes, including pornography, sex tourism, mail order brides, and forced prostitution.[27] In order to control women's movement, traffickers routinely confiscate their passports[28] and keep them confined, in brothels, under surveillance, sometimes even chained to beds.[29] Until all debts incurred to the traffickers are repaid, the victims exist in a condition of debt bondage.[30]

Although this section focuses on the global traffic in women in particular, it is important to understand this problem within a broader context, as part of a spectrum of interconnected criminal activities with global and transnational as well as local or sub-national characteristics. International sex trafficking is generally undertaken by organized crime groups,[31] which are often engaged in other criminal activities,[32] each connected with the other, locally as well as globally.[33] Many of these groups are also ethnic-based such as "the Italian Mafia, the Russian mob, the Japanese Yakuza, the Chinese Triads, the Colombian cartels, and the Mexican criminal organizations."[34] Such global networks often leverage their pre-existing ethnic ties. For example, the mainland Chinese and the Chinese diaspora have consistently maintained these ties to the benefit of the Chinese triads.[35] These groups are moving beyond competitive inclinations to form

26. Chuang, *supra* note 22, at 69 (deceptive promises of employment); Becki Young, *Trafficking of Women Across United States Borders: How United States Laws Can Be Used to Punish Traffickers and Protect Victims*, 13 GEO. IMMGR. L.J. 73, 79 (1998) (kidnapping); Caldwell et al., *supra* note 22, at 3 (deceptive promises of employment); Specter, *supra* note 23, at 1.

27. Jennifer L. Ulrich, *Confronting Gender-Based Violence with International Instruments: Is a Solution to the Pandemic Within Reach?*, 7 IND. J. GLOBAL LEGAL STUD. 629, 634 (2000).

28. Specter, *supra* note 23, at 1; *Slave Trade Endures in the 21st Century*, S.F. CHRON., July 2, 2000, at 8.

29. Yasmine Rassam, *Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law*, 39 VA. J. INT'L L. 303, 324 (1999); Venetis, *supra* note 22, at 269; Richard, U.S. Dep't of State, *supra* note 18, at 5.

30. Lan Cao, *Illegal Traffic in Women: A Civil RICO Proposal*, 96 YALE L.J. 1297, 1306 (1987); Christopher M. Pilkerton, *Traffic Jam: Recommendations for Civil and Criminal Penalties to Curb the Recent Trafficking of Women from Post-Cold War Russia*, 6 MICH. J. GENDER & L. 221, 228-29 (1999) (describing debts incurred because the victims had to pay for the purchase of passports and other travel documents); Human Rights Watch, *supra* note 25, at 197; Richard, U.S. Dep't of State, *supra* note 18, at 5.

31. Cao, *Illegal Traffic in Women*, *supra* note 30, at 1299; Rassam, *supra* note 29, at 305; Cohen, *supra* note 22, at A1; Richard, U.S. Dep't of State, *supra* note 18, at vii-viii.

32. Edgardo Rotman, *The Globalization of Criminal Violence*, 10 CORNELL J.L. & PUB. POL'Y 1, 8-9 (2000) (including drug trafficking, illegal traffic in cultural property, automobiles, arms trafficking); Joyce M. Davis & Nomi Morris, *Growth of Slave Trade Sounds Alarm*, TIMES UNION, Jan. 7, 2001, at A10, 2001 WL 6285248 (including drug and arms smuggling and money laundering).

33. JOHN KERRY, THE NEW WAR: THE WEB CRIME THAT THREATENS AMERICA'S SECURITY 24 (1997) (noting that "vast poppy fields in eastern Turkey are linked to the heroin dealer in downtown Detroit" and that "the men of the Chinese triads who control gambling and extortion in San Francisco's Chinatown work the same network as the Singapore gang that turns out millions of fake credit cards."); Frank Pearce & Michael Woodiwiss, *Introduction*, *in* GLOBAL CRIME CONNECTIONS: DYNAMICS AND CONTROL xiii (Frank Pearce & Michael Woodiwiss eds., 1993).

34. Rotman, *supra* note 32, at 8; *see also* Carrie Lyn Donigan Guymon, *International Legal Mechanisms for Combating Transnational Organized Crime: The Need for a Multilateral Convention*, 18 BERKELEY J. INT'L L. 53, 57-61 (2000).

35. KERRY, *supra* note 33, at 68.

strategic and interactive alliances with each other, each attempting to move beyond their particular national boundaries to establish a global network,[36] a pax mafiosa.[37] The Chinese triad and the Russian mob, for example, have collaborated with each other to maximize their illegal human trafficking networks.[38] French intelligence observed that a 1994 gathering in Burgundy, France, of Russian, Chinese, Japanese, Italian, and Colombian "businessmen" was in fact a meeting of leaders of international criminal syndicates "to discuss carving up Western Europe for drugs, prostitution, smuggling and extortion rackets."[39] As one commentator observed regarding the emergence of a "global mafia capitalism,"[40] there is a "growing tendency of hierarchical criminal organizations [not only to] specialize in certain illicit markets (drugs, arms, sex trade, gambling, and so on) [but] to diversify and form international business links both among themselves and with more conventional business partners . . . [and to increase] their efficiency at raising and laundering huge amounts of capital for strategic investments in foreign or transnational markets."[41] Indeed, ethnically or culturally-based criminal organizations with deep, historical roots in national traditions, such as the Italian Mafia and the Chinese triads, have managed to exploit globalization for their own benefit.[42] Thus, although criminal syndicates may turn insular or inward, organizing themselves along pre-globalization ties of culture, religion, or ethnicity, they have also successfully manipulated globalization's advances in communications, transportation, technology, open borders and reduced state authority[43] to extend their power and reach.

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36. CASTELLS, *supra* note 19, at 169 (1998); Carol Hallett, *The International Black Market: Coping with Drugs, Thugs, and Fissile Materials, in* GLOBAL ORGANIZED CRIME: THE NEW EMPIRE OF EVIL 74, 76 (Linnea P. Raine & Frank J. Ciluffo eds., 1994); JAMES R. RICHARDS, TRANSNATIONAL CRIMINAL ORGANIZATIONS, CYBERCRIME, AND MONEY LAUNDERING 3 (1999).

37. Claire Sterling, *Containing the New Criminal Nomenklatura, in* GLOBAL ORGANIZED CRIME: THE NEW EMPIRE OF EVIL, *supra* note 36, at 107-111; *see also* CLAIRE STERLING, CRIME WITHOUT FRONTIERS: THE WORLDWIDE EXPANSION OF ORGANISED CRIME AND THE PAX MAFIOSA (1994).

38. KERRY, *supra* note 33, at 140l; *see also* Louis J. Freeh, *International Organized Crime and Terrorism: From Drug Trafficking to Nuclear Threats, in* GLOBAL ORGANIZED CRIME: THE NEW EMPIRE OF EVIL, *supra* note 36, at 2 (describing collaboration and coordination between organized crimes in Russia and Colombia and similar collaboration among Russian, Sicilian and American organized crimes); KERRY, *supra* note 33, at 29 (describing secret summits between the leaders of the Russian and Italian mobs in Prague, Warsaw, and Zurich in the summer of 1992); CLAIRE STERLING, THIEVES' WORLD 130-31 (1994) (describing how the Chinese Triads smuggle aliens through crime capitals in Russia, Eastern Europe, and Italy); Center for Strategic and International Studies, *Russian Organized Crime: Global Organized Crime Project* 42-43 (1997) (describing collaboration between the Italian Mafia and South American cartels).

39. Andrew Alderson & Carey Scott, *Crime Kings Meet to Carve Up Europe*, SUN. TIMES, Mar. 29, 1998, *available at* LEXIS, Home News.

40. Maria Los, *Beyond the Law: The Virtual Reality of Post-Communist Privatization, in* GOVERNABLE PLACES: READINGS IN GOVERNABLE GOVERNMENTALITY AND CRIME CONTROL 244-45 (Russell Smandych ed., 1999).

41. *Id.* at 244-45.

42. CASTELLS, *supra* note 19, at 170.

43. Dr. Sally Stoecker, *Introductory Remarks at the Trafficking Conference: The Exploitation of Women from Russia, Scale and Scope, available at* http://american.edu/transcrime/misc/ 5April99.htm (Mar. 11, 1999). Criminal organizations generally operate with the technology of many multinational corporations. KERRY, *supra* note 33, at 19 (1997). In many cases, the power of the state is reduced because governments are often complicit in trafficking schemes, with officials bribed either

In other words, the two recurring themes emphasized in this Article—transnationalism and sub-nationalism—are fully evident in the global activities of ethnically based criminal organizations. As I discuss in Part II below, in examining the related problem of international money laundering, it is equally important to understand the role transnationalism and sub-nationalism have played in facilitating this growing international crime.

II.
INTERNATIONAL MONEY LAUNDERING: THE TRANSNATIONAL AND THE SUBNATIONAL

Money laundering has become a global problem[44] arising from the need to reinvest proceeds of criminal activities. Money laundering is the financial component of transnational crimes. Given the enormous profits involved in trafficking of persons and other transnational criminal activities, there is a growing need to cleanse or launder such proceeds for use in conventional traditional channels. For example, millions of dollars derived from organized criminal activities in Russia have found their way into major banks in New York; millions from an investment fraud scheme in Japan were similarly invested in Las Vegas.[45] Approximately U.S. $500 billion dollars of illegally obtained funds are laundered throughout the world annually.[46]

Money laundering is "the process by which the proceeds of crime or fraud are made to appear as if they have emanated from a legitimate source."[47] Money laundering generally consists of three stages: the placement of money, the layering of money, and the integration of money.[48] Placement refers to the physical disposal of cash into a financial institution[49] and the conversion of this illicit cash into different negotiable instruments such as money orders or cash-

to turn a blind eye to the problem or to protect traffickers from arrest or even to engage themselves in the procurement and transportation of women. Human Rights Watch, *supra* note 25, at 199 (1995). There is collusion between governments and criminal non-state organizations not only in developing countries but also in the United States and European countries. Shelley, *supra* note 15, at 35, 45; *see also* R. James Woolsey, *Global Organized Crime: Threats to U.S. and International Security, in* GLOBAL ORGANIZED CRIME: THE NEW EMPIRE OF EVIL, *supra* note 36, at 138. For a discussion of corruption among Thai authorities who are bribed to protect brothels or who are themselves pimps, see SAUK PHONGPAICHIT ET. AL., GUNS, GIRLS, GAMBLING, GANJA: THAILAND'S ILLEGAL ECONOMY AND PUBLIC POLICY 210-211 (1998).

44. Stefan D. Cassella, *Money Laundering Has Gone Global: It's Time to Update the Federal Laws*, 49 FED. LAW. Jan. 2002, at 25.

45. *Id.*

46. Peter J. Quirk, *Money Laundering: Muddying the Macroeconomy,* FIN. & DEV. 7, Vol. 39, Issue 1, Mar. 1997, at 8. If the pool is expanded to include any funds that the owners wish to hide from governments, creditors, or business partners, the estimated amount increases to between $800 billion to $2 trillion a year. William F. Wechsler, *Follow the Money,* FOREIGN AFF., July-Aug. 2001, at 40, 45.

47. Duncan E. Alford, *Anti-Money Laundering Regulations: A Burden on Financial Institutions,* 19 N.C.J. INT'L & COM. REG. 437, 437 (1994); Nicholas Clark, *The Impact of Recent Money Laundering Legislation on Financial Intermediaries,* 14 DICK. J. INT'L L. 467, 469.

48. Clark, *supra* note 47, at 470.

49. *Id.*; *see also* Alford, *supra* note 47, at 439 (at the placement stage, money laundering is most susceptible to detection.); Peter E. Meltzer, *Keeping Drug Money from Reaching the Wash Cycle: A Guide to the Bank Secrecy Act,* 108 BANKING L.J. 230, 231 (1991).

ier's checks.[50] The placement stage may consist of several phases. First, cash received at the initial transaction is brought to safe houses—intermediary sites controlled by the criminal organization—and then to brokers for distribution to import/export businesses.[51] These businesses subsequently deposit the money into financial institutions as part of an apparently legitimate business transaction,[52] structuring the deposit to avoid threshold reporting requirements[53] and often converting such illicit proceeds to a more convenient or less suspicious medium for purposes of exchange, such as cashier's checks or money orders.[54]

Layering, the second stage of money laundering, refers to the movement of money through several accounts or several financial institutions in an attempt to distance the funds from its illegal source, thereby legitimizing them.[55] Techniques for layering include international wire transfers through offshore entities,[56] the establishment of boutique banks for the purpose of accepting illicit

50. Scott Sultzer, Note, *Money Laundering: The Scope of the Problem and Attempts to Combat It*, 63 TENN. L. REV. 143, 149 (1995). Transforming large amounts of cash into negotiable instruments makes such illicit proceeds easier to smuggle as well as easier to deposit into mainstream financial institutions. *Id.* It is in the placement stage that the money laundering process is most susceptible to detection by law enforcement because banks are required to report cash deposits in excess of a certain amount. Alford, *supra* note 47, at 439.

51. Timothy H. Ehrlich, Note, *To Regulate or Not? Managing the Risks of E-Money and its Potential Application in Money Laundering Schemes,* 11 HARV. J.L. & TECH. 833, 836 (1998).

52. *Id.*

53. *Id.* In the United States, financial institutions are required to file a Currency Transaction Report ("CTR") for transactions of US $10,000 or more. 31 C.F.R. § 103.22 (b)(1) (1998). Individuals must also file a Report of International Transportation of Currency or Monetary Instruments if they transport more than US $10,000 into or out of the United States. 31 U.S.C. § 5316(a)(1) (1994).

54. Lawrence L.C. Lee, Note, *Combating Illicit Narcotics Traffic in Taiwan: The Proposed Money Laundering Control Act*, 4 TUL. J. INT'L & COMP. L. 189, 210 (1996); *see also* Carroll, *Interpol Report*, *supra* note 17, at 6-7. In general, money laundering begins with the placement phase whereby criminal proceeds are placed into the formal, legitimate financial system. In order to minimize suspicion, large deposits are divided into smaller deposits—a process known as structuring or "smurfing." Where there are large amounts of cash, such amounts will be first brought physically (carried personally, by courier, or other means used by smugglers) to a place lacking in anti-money laundering regulations in order to make placement easier to achieve. Illegal proceeds may also be converted into other financial instruments or used to buy goods. This may be accomplished by using non-traditional venues, such as casinos, check cashing services, postal services, currency exchanges, metals brokers, etc. *Id.*

55. Clark, *supra* note 47, at 470. Alford, *supra* note 47, at 439-40; *see also* Barry A.K. Rider, *The Wages of Sin—Taking the Profit out of Corruption—A British Perspective,* 13 DICK. J. INT'L L. 391, 400 (1995). The most direct solution for money launderers is to deposit money into a financial institution and then transfer and reroute such funds through wire transfers. Sultzer, *supra* note 50, at 149.

56. *See generally* David D. Beazer, *The Mystique of "Going Offshore,"* 9 UTAH BAR J. 19 (1996) (describing various financial transactions conducted through off-shore banks to avoid tax and regulatory scrutiny). Off-shore banks conduct financial transactions in foreign jurisdictions with favorable tax and regulatory environments. *Id.* at 19; *see also* Alford, *supra* note 47, at 439-41. Placing funds in a country with stringent bank secrecy laws makes it difficult to trace the origin of the funds. Rider, *supra* note 55, at 400. Bank secrecy laws prevent banks from providing information on a customer's account to anyone, even law enforcement agencies, without the authorization of the client. Alford, *supra* note 47, at 441; *see also* H.R. REP. NO. 98-907 (1984) (describing the difficulty of obtaining records from banks in countries with unregulated banking, especially when more than one foreign jurisdiction is involved).

funds,[57] or the use of a variety of mechanisms designed to disguise the identity of the depositor.[58] Money launderers have also turned to the non-bank financial sector for layering purposes.[59] The techniques include the use of counterbalancing schemes, that is, placing illicit funds in off-shore banks and using the value of the account as collateral for bank loans in the United States or another country,[60] front companies,[61] and payable through account arrangements.[62]

The third step in the money laundering process, integration, refers simply to the re-insertion of funds into the legitimate economy.[63] Funds are transmitted to legitimate operations, through a variety of instruments, such as letters of credit, bank notes, debt and equity securities, without revealing any link to their illicit origin.[64]

Because financial institutions are generally considered to be an integral part of any money laundering scheme[65] and because the placement stage is the point at which money laundering is most vulnerable to detection as that is where illicit funds are most easily traced to their original source, legislation in the United States as well as internationally has centered for the most part on the regulation

57. Sultzer, *supra* note 50, at 150-51. Money launderers may establish small boutique banks that are then used to transact business with larger correspondent banks at the placement stage. *Id.*

58. Numbered accounts may also be used so that the only contact the depositor has with the bank is through the account manager. Alford, *supra* note 47, at 439-40. Other ways of concealing the depositor's identity include the use of a trust whereby only the bank is aware of the trustee's identity or the use of paper corporations. *Id.* at 440. Only the attorney who sets up the corporation knows the identity of the shareholders and the corporation issues only bearer shares that can be redeemed by any bearer without the need to proffer identification. *Id.* at 468 n.30.

59. *See generally Money Laundering Trends Highlight FATF Report*, 7 No. 7 MONEY LAUNDERING L. REP. 1, 7 (1997) (discussing the movement by money launderers into the non-banking financial sector, for example, into currency-exchange businesses because, although the latter provide financial services they are subject to less stringent regulatory controls) [hereinafter *Money Laundering Trends*].

60. Sultzer, *supra* note 50, at 150; *Money Laundering Trends*, *supra* note 59, at 7.

61. Sultzer, *supra* note 50, at 156. Money launderers set up fictitious companies, for example, import/export companies that use the services of United States banks to conduct their businesses.

62. Payable through accounts ("PTAs") are checking accounts marketed to foreign banks that otherwise would not be able to offer their customers' access to the U.S. banking system. PTAs, in other words, provide foreign bank customers with access to the U.S. banking system without being subject to many U.S. banking guidelines. *See generally Money Laundering Trends*, *supra* note 59. A PTA is usually an account in a U.S. bank established by a foreign bank, through which the foreign bank's customers may conduct banking transactions. Christine M. Taylor, *Finding Laundering Perils, Fed Cracks Down on "PTAs,"* 3/1/95 MONEY LAUNDERING ALERT, 1995 WL 8353434 (describing instructions issued by the Federal Reserve Board on how banks should deal with the "latent money laundering menace" posed by PTAs). Through this mechanism, the foreign bank's customers can engage in most banking activities as if they were direct customers of the U.S. bank. They could, for example, transfer funds by writing checks at their own bank that are payable through the U.S. bank. *See Swiss Style Banking in Montana?*, 6 No. 7 MONEY LAUNDERING L. REP. 3 (1996). See also FDIC Launches First Crackdown on Payable-Through Accounts, 1/1/96 MONEY LAUNDERING ALERT, 1996 WL 8687165. These accounts became especially popular with international banks when it became increasingly difficult for foreign banks to receive approval to operate in the United States in the wake of the Bank of Credit and Commerce International money laundering case. *See* United States v. Awan, 966 F.2d 1415, 1417 (11th Cir. 1992).

63. *Id.*

64. Sultzer, *supra* note 50, at 151.

65. Clark, *supra* note 47, at 470.

of financial institutions.[66] Whether it is the entry of cash into the financial system, the subsequent transnational flows of cash, or wire transfers within the financial system, the use of a bank or some other deposit-taking financial institution is often involved.[67] A comprehensive scheme is therefore in place aimed at regulating the activities of financial intermediaries to ensure that they are not involved, intentionally or unintentionally, in money laundering activities. Yet, as Part IV will demonstrate below, in addition to the formal financial system, there is also a parallel, informal, or underground system, a "mysterious global structure for facilitating the transfer of funds between countries without touching the recognized and regulated international financial systems. . . [and] without any meaningful records being kept."[68] This ancient underground system has in recent years been hijacked by criminal and money laundering organizations to transfer illicit funds as well as to finance illegal activities without relying on the formal financial system. Until recently, anti-money laundering efforts undertaken by law enforcement authorities have, for the most part, neglected this informal underground sector.

In the United States, anti-money laundering initiatives center around the formal financial system. One example includes the Currency and Foreign Transactions Reporting Act, commonly referred to as the Bank Secrecy Act,[69] ("BSA") which remains, despite various amendments and supplements throughout the years, the centerpiece of United States money laundering regulation.[70] The BSA imposes currency reporting requirements for domestic financial institutions.[71] The BSA also contains "know your customer" ("KYC") guidelines.[72] KYC guidelines require financial institutions to develop certain internal policies, procedures, and controls[73] and to designate compliance officers to ensure their effective implementation.[74] These guidelines are an important part of the anti-money laundering effort because they are designed to prevent the placement of

66. Meltzer, *supra* note 49, at 230.

67. Clark, *supra* note 47, at 470.

68. Alan Lambert, *Underground Banking and Financing of Terrorism*, 15 FLA. J. INT'L L. 9, 12 (2002).

69. Bank Secrecy Act, Pub. L. No. 91-508, 84 Stat. 114 (codified as amended at 31 U.S.C. § 5311-5314, 5316-5324). The purpose of the Bank Secrecy Act ("BSA") was to "require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." 31 U.S.C. § 5311.

70. John J. Byrne et al., *Examining the Increase in Federal Regulatory Requirements and Penalties: Is Banking Facing Another Troubled Decade?*, 24 CAP. U.L. REV. 1, 40-41 (1997).

71. The BSA requires financial institutions to file an IRS Form 4789, Currency Transaction Report ("CTR") whenever a person engages in one or more cash transactions exceeding in total US $10,000 in a single day. *See* BSA, *supra* note 69; Sultzer, *supra* note 50, at 152-67.

72. This guideline originated in a legislative report on the BSA. *See* H.R. REP. NO. 91-975, at 8 (1970) (requiring insured banks to keep records of the identities of customers authorized to sign checks, make withdrawals, or have control over the account).

73. 31 U.S.C. § 5318(h)(1)(a) (1994).

74. 31 U.S.C. § 5318(h)(1)(b) (1994). Although KYC guidelines are not codified, the Treasury Department has delegated authority, 31 U.S.C. 5318 (h)(1) (1994), to the federal banking agencies to require banks to comply with the reporting requirements of the BSA. 12 C.F.R. § 21.21 (1999). Law enforcement officials promote KYC guidelines as necessary for banks to prevent money laundering. Proposed Rules, Department of the Treasury, 31 C.F.R. pt. 103 (1998); Bank Secrecy Regulatory Applications to the Problem of Money Laundering Through International Pay-

illicit cash into the financial system[75] and to deter the use of financial institutions as laundering tools.[76] Additionally, by requiring banks to maintain certain records, the BSA aims at creating a paper trail that would aid law enforcement agencies in combating financial crimes.[77] Other anti-money laundering laws in the United States also center around financial institutions and the formal financial system. The Money Laundering Control Act ("MLCA"),[78] for example, imposes criminal liability on individuals who structure transactions[79] to avoid the filing requirement of the BSA and also requires financial institutions to report suspicious transactions to government officials.[80] Under the MLCA, financial institutions could also be liable for dealings with criminal entities if they fail to conduct investigations into their clients' histories.[81]

At the international level, there is a similar emphasis on regulating the financial system. A number of international money laundering regimes have been established to facilitate cooperation among signatory states.[82] Organizations such as the Basle Committee on Banking Regulations and Supervisory Practices ("Basle Committee") provide a guiding framework for adherence by financial institutions.[83] In 1988, the Basle Committee, consisting of officials from central banks of eleven major industrialized nations and Luxembourg,[84] adopted a statement of principles targeted specifically at money laundering.[85] It recom-

ments, 54 FED. REG. 45, 45, 769, 771 (1989) (requesting that banks impose KYC procedures for suspicious wire transfers).

75. H.R. REP. NO. 101-446, at 21-22 (1990) (discussing the importance of monitoring and reporting cash flows and of identifying illegal sources of funds as important to anti-money laundering efforts).

76. Meltzer, *supra* note 49, at 239 (noting that KYC principles might reveal that services required by a client are consistent with a money laundering operation—customer information transferred to a database would indicate when transactions are inconsistent with a customer's normal business pattern); *see also* 31 C.F.R. pt. 103, app. at 10 (1998) (stating that strict adherence to KYC guidelines may help financial institutions detect the illicit nature of a customer's business because it would appear as inconsistent with the customer's profile).

77. H.R. REP. NO. 91-975, at 2 (1970).

78. Money Laundering Control Act, Pub. L. No. 99-570, 100 Stat. 3207-18 (codified as amended at 18 U.S.C. § 1956-1957, 31 U.S.C. §§ 5324-26).

79. 31 C.F.R. § 103.22(c)(2) (1998) (defining structured transactions to include multiple transactions made by one person or on behalf of any individual person in excess of U.S. $10,000 on one day).

80. 31 U.S.C. § 5318(g) (1994). This section also exempts from liability directors, employees, officers, or agents of financial institutions for disclosure of such transactions. *Id.* § 5318(g)(3).

81. Alford, *supra* note 47, at 457 (noting that banks either have to investigate their customers' transactions or face liability under 18 U.S.C. § 1957).

82. *See generally* Bruce Zagaris & Sheila M. Castilla, *Constructing an International Financial Enforcement Subregime: the Implementation of Anti-Money Laundering Policy*, 19 BROOK. J. INT'L L. 871 (1993).

83. *See generally* CHARLES A. INTRIAGO, INTERNATIONAL MONEY LAUNDERING 29 (1991); Duncan E. Alford, *Basle Committee Minimum Standards: International Regulatory Response to the Failure of BCCI*, 26 GEO. WASH. J. INT'L L. & ECON. 241, 247 (1992).

84. Alford, *Basle Committee*, *supra* note 83, at 291 n.1 (The banking regulators are from Belgium, Canada, France, Germany, Italy, Japan, Luxembourg, the Netherlands, Sweden, Switzerland, the United Kingdom, and the United States.).

85. Basle Committee on Banking Regulations and Supervisory Practices December 1988 Statement on Prevention of Criminal Use of the Banking System, *reprinted in* INTERNATIONAL EFFORTS TO COMBAT MONEY LAUNDERING, 273-77 (Dr. W.C. Gilmore ed., 1992); *see also* INTRIAGO,

mended, for example, that banks make a concerted effort to know their customers' identities.[86] In accordance with the KYC rule, banks are supposed to take certain measures, such as severing relations with the client, and freezing or closing the account at issue, if they suspect that a deposit consists of proceeds from criminal activities.[87] Presumably these rules would make it difficult for money launderers to use banks because banks would require information as to the identity of their clients as well as the nature of the deposited funds.[88] The 1988 rules have been supplemented by additional rules in 1992—the Minimum Standards for the Supervision of International Banking Groups and Their Cross-border Establishment ("Minimum Standards").[89] Under these new Minimum Standards, international banks would be subject to consolidated supervision by a home country regulator[90] and must receive prior consent from both host and home regulators before opening an establishment in a foreign country.[91] Additionally, host country banking regulators have the right to collect information from international banks and may impose sanctions if a bank fails to meet minimum standards.[92]

The Financial Action Task Force on Money Laundering ("FATF"), an intergovernmental organization formed by the G-7 countries to develop and promote anti-money laundering policies,[93] also has a financial institution focus.[94] In 1990, the FATF issued its Forty Recommendations on Money Laundering with broad suggestions on improving national legal systems[95] as well as the reporting and monitoring capabilities of the financial system.[96] The Task Force also favored international implementation of the KYC policy and of the BSA

supra note 83, at 29 (discussing recommendations towards the prevention of the use of banks as "intermediaries for transfer or deposit of funds derived from criminal activity").

86. Alford, *supra* note 47, at 444-45 (stating that banks should refuse to conduct business with clients lacking adequate identification).

87. *Id.*

88. *Id.*

89. The Basle Committee Report on Minimum Standards for the Supervision of International Banking Groups and their Cross-border Establishment, *reprinted in* INTERNATIONAL ECONOMIC LAW DOCUMENTS, I.E.L. II-I (1992) [hereinafter Minimum Standards].

90. *Id.* at 3; *see also* Alford, *Basle Committee*, *supra* note 83, at 267. A home country regulator, for example, may prevent the establishment of banking operations in foreign jurisdictions if it is deemed that the host country's supervision of foreign banks is inadequate.

91. Minimum Standards, *supra* note 89, at 4; *see also* Alford, *Basle Committee*, *supra* note 83, at 270.

92. Minimum Standards, *supra* note 89, at 3.

93. Financial Action Task Force on Money Laundering (FATF): The Forty Recommendations of the Financial Task Force on Money Laundering, with Interpretive Notes, June 28, 1996, 35 I.L.M. 1291, at introduction [hereinafter FATF]. The twenty-six FATF member countries are: Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Hong Kong, Iceland, Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Singapore, Spain, Sweden, Switzerland, Turkey, United Kingdom, and United States, and the two organizations are the European Commission and Gulf Cooperation Council.

94. *Id.* at 1293.

95. *Id.* at 1291; *see also* WILLIAM C. GILMORE, DIRTY MONEY: THE EVOLUTION OF MONEY LAUNDERING COUNTER MEASURES 100 (1995).

96. FATF, *supra* note 93, at 1294-95.

reporting requirements already in place in the United States,[97] thus continuing the emphasis on regulating the formal financial system and essentially neglecting the informal, underground banking network.[98]

States have responded to the growth of global crimes by focusing on their transnational dimension, for example, and directing their anti-laundering effort on financial institutions and their cross-border transactions. Yet, as Part III below demonstrates, even as governmental scrutiny of the formal financial system intensifies in an effort to detect and prevent money laundering, money launderers increasingly turn their attention to the parallel, informal financial system as an alternative mechanism for remitting their criminally derived proceeds.

III.
THE INFORMAL BANKING SECTOR: AN ALTERNATIVE REMITTANCE SYSTEM

A. Ethnic Ties and the Methods and Norms of Alternative Remittance Systems

The alternative remittance system ("ARS"), rooted in Asia, particularly China, and the Middle East, is known by a variety of names, the most common of which is hawala or chiti.[99] Depending on the spelling, the term hawala may mean "to change or transform" in Arabic, or "trust" in Hindi, or may even refer to a non-Arabic Muslim saying that means "transfer of money between two persons through a third person."[100] This system is generally believed to have been

97. *Id.* at 1293. These Forty Recommendations were subject to subsequent revisions in 1996 because universal, blanket recommendations may not be appropriate for certain countries. *Id.* at 1294. The revisions thus permit flexible implementation so that countries may apply the suggested recommendations within their own financial framework. *Id.* The Forty Recommendations were again updated in 2003 following the events of September 11. *Id.*

98. Characterizing these modes of transmittance as "underground" is not wholly accurate, "as they often operate in the open with complete legitimacy, and these services are often heavily and effectively advertised." Patrick M. Jost & Harjit Singh Sandhu, *The Hawala Alternative Remittance System and Its Role in Money Laundering* 1 (Feb. 3, 2003), *available at* http://www.interpol.int/Public/FinancialCrime/MoneyLaundering/hawala/default.asp [hereinafter Jost and Sandhu].

99. "Chiti" comes from Hindi, the language used in India. The term was introduced into India by the English and is often used to describe the Chinese ARS. Hawala usually refers to the ARS of the Indian sub-continent. Both are founded on trust and on networks of immigrant and diaspora communities. The chiti system extends throughout China, Southeast Asia, and North America, and the larger hawala system extends through the Indian subcontinent, Southeast Asia, Europe, the Middle East, Africa, and North America. Interpol also identifies the Thai and Vietnamese sub-system of underground banking, with the latter being used extensively by the Vietnamese community in the United States for both legal and illegal remittances. Carroll, *Interpol Report*, *supra* note 17, at 10-11.

The Chinese chiti system and the Indian hawala system are virtually "identical in their adherence to trust, confidentiality, and efficiency," but there are some characteristic differences, which are important to drug dealers. The Chinese system, according to the Drug Enforcement Agency, is less prominent internationally and as a result, the hawala system, which prevails in North America, is preferred by Chinese heroin traffickers. Carroll, *Interpol Report*, *supra* note 17, at 11.

100. Lambert, *supra* note 68, at 13; *see also* Carroll, *Interpol Report*, *supra* note 17, at 1. According to this report, there is no one single system but rather two dominant systems, "the first encompassing the Asian-oriental countries and the second covering the Indian sub-continent," each with their own multiple regional sub-systems of ethnic banking; as a result, the literature on these alternative modes of money movement is filled with contradictions. Jammaz Al-Suhaimi, *Demysti-*

invented by the Chinese during the Teng Dynasty[101] and was subsequently adopted by others because of a distrust of banks on religious grounds[102] or because of a desire to avoid certain strictures imposed by the state, such as currency controls or taxes. The very informal and fluid nature of this system has made it especially equipped to serve as a conduit for currency transactions wholly outside of and unhampered by the current international anti-money laundering efforts. Indeed, the essential characteristic that defines an ARS is trust.[103] This trust is possible because the transaction is undertaken by members of a common ethnic community with a shared sense of identity, affiliation and obligation, thus reducing the transaction costs involved in screening, monitoring, and enforcement normally associated with conventional, mainstream, non-ethnically based economic activities.[104] "These cultural ties are the pillars of every transaction."[105]

As a result, transactions among these ethnic bankers—often established and respected members within their communities—are conducted through a system

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fying Hawala Business, THE BANKER, Apr. 1, 2002, *available at* 2002 WL 19007789 (explaining that "hawala" means "transfer," and in the context of hawala remittances, it means "transfer of value" rather than a "physical transfer").

101. The tea trade between the southern provinces of China and the Imperial Capitol during the Teng Dynasty made it necessary to introduce a more convenient mode of exchange, referred to by the Chinese as "flying money" or "fai chen." The system worked in the following way:

> Provincial governors maintained special courts in the capitol; southern merchants paid the money they made from the sale of goods in the capitol into these courts, which then used it to satisfy tax quotas due from the southern provinces to the central government. In return, the courts issued a certificate to the merchants. When the merchant returned home, he presented the certificate to the provincial government and was paid an equivalent sum of money. In this way, both the merchant and the government avoided the risk and inconvenience of carrying large quantities of money or other valuable commodities. Arabic traders used a similar system as a means of avoiding being robbed on the Silk Road and again by avoiding the need to physically carry large sums of money.

Lambert, *supra* note 68, at 13; *see also* Mohammed El-Qorchi, *How Does This Informal Funds Transfer System Work, and Should It Be Regulated?* Fin. & Dev., Vol. 39, Issue 4, Dec. 1, 2002, at 31, 2002 WL 19084823 (ARSs or informal funds transfer ("IFT") systems were used in earlier times to finance trade. "They were created because of the dangers of traveling with gold and other forms of payment on routes beset with bandits. Local systems were widely used in China and other parts of East Asia and continue to be in use there. They go under various names—Fei-Ch'ien (China), Padala (Philippines), Hundi (India), Hui Kuan (Hong Kong), and Phei Kwan (Thailand).").

102. Some have suggested that because under Islamic law it is considered sinful to receive interest from money, it is unlawful to use certain recognized banking systems. In such cases, alternative procedures, known as the "Thick al muwamalat" or "transactions amongst the people," are relied upon under sharia Islamic law. Lambert, *supra* note 68, at 13.

103. Carroll, *Interpol Report*, *supra* note 17, at 2; Jost and Sandhu, *supra* note 98, at 1. Al-Suhaimi explains the necessity of trust as follows:

> [t]his requires that the persons collecting the funds to be remitted from the expatriates must have credibility. They are likely to have the same nationality as the expatriate, speak the same language or dialect, hail from the same region, town or village and belong to a prominent family or a tribe. Such people often have strong roots and ties with their home country and may even have legitimate, well-known local businesses.

Al-Suhaim, *supra* note 100.

104. For a discussion and evaluation of the use of trust and ethnic ties in ethnic-based organizations, such as rotating credit associations, to lower transaction cost and produce economic capital, see Lan Cao, *Looking at Communities and Markets*, 74 NOTRE DAME L. REV. 841 (1999).

105. Carroll, *Interpol Report*, *supra* note 17, at 2.

of similarly situated bankers in corresponding diaspora communities around the world and make little, if any, use of formal contracts, written communications, or negotiable instruments.[106] Alternative remittances involve the delivery of money by one ethnic banker, at the request of a client, to another ethnic banker in another country, with orders to the latter to pay in accordance with the client's order—all with no money crossing a border and no involvement of the conventional banking system.[107] The debt between the two bankers would be settled by subsequent transactions, as described below.

A hypothetical transaction may be structured in the following way.[108] First, assume that X lives in New York and would like to send US $5000 to his brother in Karachi. X has the option of using the services of a major bank. However, the bank may prefer that he have an account with it before it does business with him. It will sell him Pakistani rupees at the official rate (assume this rate is 31 rupees to the dollar), and it will charge him U.S. $25 to issue him a bank draft. Delivery of the 154,225 rupees to X's brother in Karachi would involve an overnight courier service costing approximately U.S. $40 to Pakistan and possibly taking as much as a week to arrive.

By contrast, the same transaction handled by a hawala operator would involve the following terms: a 5% "commission," (or as offered by another hawala operator, a pricing scheme of 1 rupee for each dollar transferred), an exchange rate that is more favorable to X than the official exchange rate—assuming a rate of 35 rupees to the dollar, delivery of the 166,250 rupees to X's brother; or assuming a rate of 37 rupees for the dollar, delivery of 180,000 rupees. Delivery would be included in the transaction fee, and the delivery associated with a hawala transaction would also be faster (usually within a day of the initial payment) and more reliable than a bank transaction. The recipient, in this case, X's brother, could claim the money either by showing an ID or relaying a password.[109]

The hawala transaction would involve the following steps. X gives US $5000 to the New York hawala operator. The New York operator contacts her hawala counterpart in Karachi. The Karachi hawala operator arranges to have rupees delivered to X's brother. No money has left New York, and no money has entered Pakistan because what has been transferred is the value of money,

106. *Id.* at 2; Jost and Sandhu, *supra* note 98, at 1-2.

107. Carroll, *Interpol Report*, *supra* note 17, at 3.

108. Unless stated otherwise, this example and details of the transaction are drawn from Jost and Sandhu, *supra* note 98, at 2-4.

109. Ed Blanche, in *The Labyrinthian Money Trail of Osama bin Laden,* THE MIDDLE EAST, Jan. 2002, at 22, LEXIS, News Group File, describes the process between the customer and halawa operator as follows:

> [the customer and operator] agree on a one-time identity number or a password and the dealer contacts his colleague at the other end telling him to pay out the money to whoever approaches him with the number or password. No identification is required, no cash is traceable through electronic or legal channels and the dealer and his partner, often members of the same clan, settle up later. Records are kept only until the transaction has been completed, when they are destroyed.

See also Michelle Cottle, *Hawala v. the War on Terrorism,* THE NEW REPUBLIC, Oct. 15, 2001, at 24, available at LEXIS, Magazine Stories; Lambert, *supra* note 68, at 14.

not money itself.[110] Upon delivery of the cash to X's brother, the New York operator then owes the Karachi operator the equivalent of US $5000. The Karachi operator would recover that amount through subsequent arrangements with his New York counterpart. These arrangements are possible because the two hawala operators are part of a network of hawala operators based primarily on trust. Indeed, the New York operator trusts that the Karachi operator will deliver the money to X's brother in Pakistan. And the Karachi operator trusts that the New York operator will repay him for the money he delivered to X's brother. Between the two operators, there is no receipt or record keeping of individual remittances,[111] only an understanding of what is owed and how it will be paid. Indeed, "[t]he trust between the two bankers secures the debt and allows the debt to stand, with no legal means of reclamation. In some cases, the trust between client and banker allows the money to be delivered to its destination even before payment is requested of the sender."[112]

How the Karachi hawala operator will be repaid depends on the nature of the pre-existing ties existing between him and the New York operator. For example, in the first instance, both operators may be business partners or at least do business with each other regularly. Transferring money between them would simply be part of their routine business dealings. Or in the second instance, the Karachi operator might owe the New York operator money and because it might be difficult to transfer money out of the country, the Karachi operator is repaying his debt to the New York operator by paying the latter's hawala customers, that is, by delivering cash to them in Pakistan.

In the second scenario, the Karachi operator does not recover any money from the New York operator because he is simply repaying an existing debt to the New York operator, or handling money that for some reason the New York operator has entrusted to him, but is unable, perhaps because of exchange regulations, to move out of the country. In the first scenario, however, where the two operators conduct regular businesses with each other, some formal mechanism for balancing accounts between the two would be needed. If, for example, the two hawala operators also run an import/export business (which is a highly

110. Lambert, *supra* note 68, at 14.

111. To the contrary, records of the transaction are usually destroyed once the transaction is completed. *Id.* As noted, ARSs consist of several sub-systems. The Chinese remittance system maintains few records because most transactions are conducted by phone or fax. However, if records are kept, two sets may be used, one to keep track of legitimate transactions, and the other containing a "hidden 'parasitic' account documenting off-the-books transactions. . . . [L]aw enforcement attempts to decode these records are complicated by the need to distinguish traditional Chinese accounting practices from accounting entries recording illegal activities." Carroll, *Interpol Report*, *supra* note 17, at 14. In the hawala system, remittances that are recorded are often encrypted and in the operator's "personal shorthand," for example, consisting of mere initials and numbers. *Id.* In some cases, bank notes or pictures may be torn in two, with one part given to the client and the other sent or delivered to the recipient. The two parts must be ultimately matched. *Id.*

112. *Id.* at 3. Given the fact that ARSs are based on informality and trust, they also carry certain risks. For example, a family lost a lot of money when its trusted hawala operator was murdered before family members could receive the transferred funds. The family had no legal claims. *See* Gregg Jones, *Shadowy Hawala System Moves Cash Quickly; Anonymity of Transfers Appeals to Terrorists, Criminal Syndicates*, DALLAS MORNING NEWS, Oct. 18, 2001, at 15A.

likely scenario because many hawala transactions are conducted in the context of import/export businesses), the New York hawala might purchase and import goods from the Karachi operator and through this import context, manipulate invoices to conceal the actual movement of money. Thus, if she needs to repay the Karachi operator 180,000 rupees or the equivalent of US $5000, which was delivered to her client's brother in Karachi, she may do so by "under invoicing" a shipment to him, sending him US $20,000 worth of goods but invoicing him for only US $15,000. The additional US $5000 value of the goods sent represents the money owed.

ARSs are preferred over traditional banking by those in developing countries with fragile banking systems and by many members of ethnic communities throughout the world. Though it is an ancient practice and in many ways still retains its traditional basis founded on common ethnic ties and community norms of trust, it has also adopted modern techniques such as advertising, whether in ethnic newspapers or even on the Internet,[113] and other high-tech devices such as computers and cell phones.[114] Because of their informal, often secretive nature, there are no definitive figures regarding the amount of money that is transferred via the ARS.[115] Pakistani bankers estimated that the annual hawala inflow into Pakistan was between $2.5 billion and $3 billion, compared to only $1 billion through banks.[116] A 1999 investigation by Institutional Investor magazine revealed an estimated 1,100 hawala brokers operating in Pakistan, with individual deals running as high as $10 million.[117]

ARSs are especially popular in diaspora ethnic communities, especially in U.S. cities with a high concentration of South Asian or Middle Eastern immigrants.[118] For years, ARSs functioned as a legitimate mode of money transfer used to transmit the earnings of those in immigrant communities to relatives in the home country.[119] While there may be regulations in many countries that

113. Carroll, *Interpol Report*, *supra* note 17, at 12. Some researchers have found that hawala dealers advertise their services, and Interpol has documented cases of advertising in ethnic papers and on the Internet. Other researchers have found, however, that many hawala operators do not advertise. The Vietnamese and Chinese ARSs tend to restrict access to the system to those within the same ethnic network and do not advertise publicly.

114. Michael M. Phillips, *U.S. is Forced to Use Cash-Transfer System Utilized by Terrorists*, ASIAN WALL ST. J., Nov. 13, 2002, at A1 (describing how "Kabul's hawaladars work with their computers and cellphones from an antenna-studded building where money changers swap the national currency, afghanis, for foreign bills").

115. Carroll, *Interpol Report*, *supra* note 17, at 4; El-Qorchi, *supra* note 101 ("Hawala transactions cannot be reliably quantified because records are virtually inaccessible, especially for statistical or balance of payments purposes.").

116. Cottle, *supra* note 109. There are larger estimates also. *See* Jones, *supra* note 112 (putting the figure at $5 billion to $6 billion being transferred in Pakistan annually by hawala dealers); Richard Behar, *Kidnapped Nation*, FORTUNE, Apr. 29, 2002, at 84, *available at* LEXIS, Fortune (describing documents prepared for the finance ministry which reveal that nearly $8 billion was being remitted into Pakistan annually by overseas Pakistanis through the hawala system, an amount eight times what is transmitted into the country through banks).

117. Cottle, *supra* note 109.

118. *Id.*

119. Carroll, *Interpol Report*, *supra* note 17, at 4; *see* El-Qorchi, *supra* note 101 ("At present, its primary users are members of expatriate communities who migrated to Europe, the Persian Gulf region, and North America and send remittances to their relatives on the Indian subcontinent, East

make hawala transactions illegal,[120] it is by no means always the case that money transmitted via hawala operators derives from illicit earnings. For a variety of reasons, most associated with concerns about political stability, currency restrictions,[121] "repressive financial policies and inefficient banking institutions,"[122] many people opt to move their money to another country, and the use of ARSs "as a facilitator of 'capital flight' on both large and small scales is very common."[123] ARSs have therefore proliferated as a result of the global movement of workers across national borders. ARSs are a quick and convenient way of maintaining a financial link between the expatriate and the homeland communities.[124] This is especially so because it is frequently the case that expatriate workers come from the underprivileged areas of their home countries, such as distant rural villages not served by their countries' conventional banking system. As a result, hawala transactions are especially in demand among members of the expatriate community.[125]

Additionally, these communities are usually insular, tightly knit, and depend on trust and common understandings of community norms. "The

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Asia, Africa, Eastern Europe, and elsewhere. These emigrant workers have reinvigorated the system's role and importance.").

120. For example, to the extent that hawala operators engage in foreign exchange speculation or conduct transactions based on a parallel, unofficial rate of exchange, they would be engaged in an illegal activity in India. The Foreign Exchange Regulation Act of India, 8(2)(8) states that:

> [e]xcept with the previous general or special percussion of the Reserve Bank, no person, whether an authorized dealer or a moneychanger or otherwise, shall enter into any transaction which provides for the conversion of Indian currency into foreign currency or foreign currency into Indian currency at rates of exchange other than the rates for time being authorised by the Reserve Bank.

Jost & Sandhu, *supra* note 98, at 5.

121. El-Qorchi, *supra* note 101 (describing how hawala transactions from developing countries are driven "by a desire to circumvent exchange control regulations and the like, leaving no traceable records").

122. *Id.* The reason hawala is popular in developing countries is because of lack of confidence in the formal banking system. "Only a small percentage of people maintain bank accounts in Pakistan. Foreign currency transactions have only been legal since 1992, and bank-to-bank transfers even within the country are cumbersome and expensive." Jones, *supra* note 112. Mohsin Khalid, a Pakistani who was president of the Islamabad Chamber of Commerce and Industry, said of a recent bank-to-bank transfer from the United States that took one month to complete, "I would have had that money in 24 hours if I had gone through the [hawala] system . . . And they would have delivered it to my place." *Id.*

123. Jost & Sandhu, *supra* note 98, at 6 ("Many people in these countries [with capital outflow restrictions] have money that they would like to move to another country due to concerns about stability, to pay for education or medical treatment."); *see also* Al-Suhaimi, *supra* note 100 ("Hawala is prevalent in many countries that have or had restrictions on free flow of capital and where many people need foreign exchange for travel, education, business and so on. Dealers can take local currency and provide hard currency overseas to travelers [sic], businesspeople and students at competitive rates."); Behar, *supra* note 116 (describing the $100 billion in capital government leaders believe to have been taken out of Pakistan in recent years); El-Qorchi, *supra* note 101 ("In addition to overly restrictive economic policies, unstable political situations have offered fertile ground for the development of the hawala and other informal systems. Most IFT (informal funds transfer) systems have prospered in areas characterized by unsophisticated official systems and during times of instability. They continue to develop in regions where financial development has been slow or repressed.").

124. Al-Suhaimi, *supra* note 100.

125. *Id.* Carroll, *Interpol Report*, *supra* note 17, at 4 ("Ethnic banking systems are also popular because of their ability to serve remote Asian locations.").

hawaladar [hawala operator] in any given country or region is known only to members of the same family, village, clan, or ethnic group. Their existence is not publicized outside their respective communities. But they will know of, and be in regular contact with, hawaladar in other regions and other countries of the world."[126] They are also governed by a shared understanding of what is required of the parties involved in such transactions, and consequently, the system is highly efficient because of the minimal costs incurred in their performance. The need for enforcement therefore is unlikely because "[a]ny form of cheating within the system is said to be extremely rare. If cheating is discovered, it is usually punished by effective excommunication and loss of honor, which is in itself the equivalent of an economic death sentence."[127]

Consequently, ARSs offer a number of advantages over conventional banking services. First, ARSs are cost effective due to "low overhead, exchange rate speculation and integration with existing business activities. . . ."[128] ARSs are embedded within existing businesses such as import and export. They are conducted on an informal basis and thus do not incur expenses usually associated with businesses in the formal sector, such as insurance or employee retirement plans.[129] Hawala operators routinely skirt exchange regulation laws and are therefore able to offer their clients a more favorable rate of exchange than that offered by banks, which transact at the official, authorized rate.[130]

Second, ARSs are efficient and reliable. Clients prefer the international network of hawala operators, who operate on trust and connections and whose remittances typically take one or two days, as opposed to international wire transfers which usually take about a week and may be subject to delays due to holidays, weekends, and time differences.[131] Because of their efficiency and

126. Lambert, *supra* note 68, at 15; *see* Behar, *supra* note 116 (In Pakistan, it is alleged by central bank insiders that six men, all members of the Memon ethnic group, control the country's hawala "mafia" or "cartel." These six operate from their bases in Karachi and Dubai and rely on each other's networks for their remittances.).

127. Lambert, *supra* note 68, at 15.

128. Jost & Sandhu, *supra* note 98, at 4.

129. *Id.*

130. *Id.* at 4-5. Hawala operators may engage in foreign exchange speculation or black market currency transactions, which means their dealings may be illegal in the country where they operate. *Id; see also* Al-Suhaimi, *supra* note 100 ("As the cost of business for Hawala is very low, dealers can offer better exchange rates than those offered by licensed banks and money changers. Also, in many developing countries, there is normally a large difference in official and unofficial exchange rates."); El-Qorchi, *supra* note 101 ("The fees charged by hawaladars on the transfer of funds are lower than those charged by banks and other remitting companies, thanks mainly to minimal overhead expenses and the absence of regulatory costs to the hawaladars, who often operate other small businesses. To encourage foreign exchange transfers through their system, hawaladars sometimes exempt expatriates from paying fees.").

131. Jost & Sandhu, *supra* note 98, at 5-6; *see also* Lambert, *supra* note 68, at 15 (Hawala "is favored because it usually costs less than moving funds through the banking system, it operates 24 hours a day and every day of the year, it is virtually completely reliable, and there is minimal paperwork required."); Al-Suhaimi, *supra* note 100 ("This channel is much faster and more efficient, as it requires only a telephone call or an e-mail for a transfer. There are no delays due to documentation, processing, clearing and arranging delivery. Normally Hawala transfers are delivered within 24 to 48 hours."); El-Qorchi, *supra* note 101 ("The system is swifter than formal financial transfer systems partly because of the lack of bureaucracy and the simplicity of its operating system; instruc-

reliability, the use of ARSs has expanded from members of expatriate and ethnic communities to include organizations such as World Vision International, Care, and other aid agencies, which rely on hawala networks to move money from Pakistani banks to Kabul as well as to other isolated, often heavily-armed rural areas in Afghanistan where viable banking systems are non-existent.[132] The World Bank estimates that aid agencies have moved at least $200 million through hawalas since the fall of the Taliban.[133] The Bush administration has allowed such funds to pass through the system because it fears that without aid inflows required for the construction of roads, bridges, and other basic infrastructure projects to show Afghans that progress is being made, the interim Afghan government may not survive.[134]

Third, ARSs are specifically geared to the needs of the ethnic and expatriate communities. In deference to expatriate workers' work schedules, hawala operators may even travel to workers' homes or places of work.[135] Many expatriate workers may also lack formal education and have a distrust of financial institutions. The absence of paperwork involved in a hawala transaction makes it especially appealing to such workers.[136] Given the preference for cash among expatriate workers and their family members in home countries, the delivery of funds is normally made in cash, thus saving the beneficiary the trouble of going to banks.[137] Additionally, funds are often paid by the transmitter only once the money has arrived at the receiving end and receipt has been confirmed, resulting in a few days' extension of credit by the hawala operator.[138] Finally, because many expatriate workers are males with wives still in the home country where old-world traditions require women to have few external contacts, the hawala system is particularly appealing. The family would rely on a trusted hawala operator familiar with local etiquette to act as a financial intermediary, thus making it possible for wives to avoid direct dealings with banks and their agents.[139]

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tions are given to correspondents by phone, facsimile, or e-mail; and funds are often delivered door to door within 24 hours by a correspondent who has quick access to villages even in remote areas.").

132. Phillips, *supra* note 114.

133. *See id.* Graham Strong, operations director for western Afghanistan for World Vision International, said, "I don't think there's an agency in Afghanistan that doesn't use the hawala system." According to CARE, not once have its hawalas failed to deliver the money. Every few months, CARE conducts bids from rival hawaladars to ensure it is receiving the best rate. *Id.*

134. *Id.* Reconstruction efforts will require disbursement of millions of dollars to places far from the Afghan capital, but there are no nation-wide commercial banks. *Id.* The central bank is itself in disarray. Aid agencies are reluctant to transport large amounts of cash through the unstable countryside. "That leaves at least one way to move money safely and reliably: hawalas." *Id.* John Taylor, the U.S. Treasury Undersecretary for International Affairs, said, "'Eventually there will be other ways. But right now they're there, and they're very efficient.'" *Id.* Aid workers judge the hawala system solely on whether it delivers the money needed for aid reliably and efficiently. "U.S. officials see the risk but feel they have no choice but to take it." *Id.*

135. *See also* Al-Suhaimi, *supra* note 100; El-Qorchi, *supra* note 101 ("The flexible hours and proximity of hawaladars are appreciated by expatriate communities.").

136. Al-Suhaimi, *supra* note 100.

137. *Id.*

138. *Id.* El-Qorchi, *supra* note 101 ("To accommodate their clients, hawaladars may instruct their counterparts to deliver funds to beneficiaries before expatriate workers make payments.").

139. *Id.*

Fourth, ARSs are preferable to banks because bureaucratic hurdles are substantially reduced for those expatriate workers who deal exclusively in cash or are without social security numbers in the case of the United States.[140] Even for those who earn their money legally, the lack of a paper trail is an additional incentive to use ARSs and not banks.

Of course the informal nature of ARSs also facilitates tax evasion and other types of illegal ventures. Money transmitted through banking channels may attract attention from tax officials, whereas ARSs are essentially "a scrutiny-free remittance channel."[141] The very essence of ARSs, its informality, has made it relatively easy for the system to defy national and even international control. There have been notable instances, especially in times of political upheavals, in which the system flourishes, flouting state law and regulation. For example, when currency exchanges between Pakistan and India were banned because of the 1947 partition of India, the ban was easily bypassed because hawala was used instead.[142] Following the Asian financial crisis, in order to curtail capital flight, the Malaysian government imposed currency controls in 1998 by restricting people's ability to convert the local ringgit, a move also thwarted by hawala operators with ample access to hard currency.[143] In May 1998, because of a drop in domestic confidence in the Pakistani banking system as Pakistan weathered global condemnation for testing nuclear weapons, the amount transferred through official channels dropped from $150 million per month to $50 million. During this period, hawala became the preferred mode for remittances into Pakistan from overseas workers, essentially replacing banks for remittance purposes.[144] It has even been rumored that U.S. intelligence agents relied on hawala to incite unrest—using hawala operators to funnel money to anti-Soviet mujahedin guerillas fighting in Afghanistan.[145]

Even where ARSs are legal, they are not popular with the government. ARSs have significant economic implications because of their impact on the monetary accounts of countries at both ends of the transaction. Unlike funds transferred through the formal sector, hawala transactions are not recorded in official statistics, which means that fund transfers do not show up "as an increase in the recipient country's foreign assets or in the remitting country's liabilities. . . ."[146] At the same time, no direct or indirect tax is assessed on hawala transactions, resulting in "a negative impact on government revenue. . . ."[147]

140. Jost & Sandhu, *supra* note 98, at 6.

141. *Id.*

142. Cottle, *supra* note 109.

143. *Id.*

144. *Id*; *see also* Behar, *supra* note 116 (In this example, hawala helps Pakistan "defy" international sanctions. "Pakistan should have had hyperinflation in 1998 after its nuclear bomb tests caused capital flight . . . and it should have had plummeting foreign-exchange rates after Sept. 11. But neither of those things happened. The reason: Hundi [hawala] is both killing the economy and keeping it afloat.").

145. Cottle, *supra* note 109.

146. El-Qorchi, *supra* note 101.

147. *Id. See* Behar, *supra* note 116 (noting a report prepared for Pakistan's finance ministry describing the $8 billion being remitted into Pakistan each year by overseas Pakistanis through the hawala system, none taxed.).

Hawala transactions, whether for benign or malignant purposes, may also damage a country's economy because they undermine the official exchange rate and may, in certain cases, result in the siphoning off of foreign currency reserves.[148]

At this point, it is useful to make a distinction between "transactions where the source of the money is legitimate . . . and where the source, and intent, of the transaction is illegitimate."[149] According to Indian and Pakistani usage, "white hawala" refers to legitimate transactions; these include hawala remittances, which, although illegal under Indian and Pakistani law, may not be illegal in other jurisdictions.[150] "Black hawala" refers to illegitimate transactions and is associated with offenses such as money laundering, narcotics trafficking, and fraud, which are illegal in most jurisdictions.[151] As the following section explains, with traditional avenues for money laundering becoming increasingly restricted by national and international regulations, "black hawala" is becoming more common and ARSs are proving to be an effective, fast, and inexpensive mechanism to launder money.

B. The Criminal Economy, Alternative Remittance, and State Regulation

The lack of a paper trail and the emphasis on anonymity mean that ARSs are susceptible to multiple forms of misuse and abuse. In some instances, money, whether derived from legal or illegal sources, might be used for illegal purposes. India, for example, discovered that money transferred via hawala was being used to fund separatist movements in Punjab and to provide legal aid to gang members tried for the smuggling of arms from Pakistan across the Indian border.[152] Officials in the United States also determined that hawala money had been used to finance the smuggling of 200 aliens per month into the United States, at $20,000 per person, from South Asia.[153] A Vietnamese underground bank, used by the Vietnamese in the United States to send money to relatives in remote rural areas in Vietnam, was also used to transmit money to Vietnam to destabilize the Communist government.[154] The United States government is in-

148. Cottle, *supra* note 109. This is the case because in cases of transmittance of funds by a client from a hard currency country, for example, the United States, "dollars stay with U.S.-based hawaladar instead of being injected into the local banking system." *Id.* On the other hand, for countries such as Pakistan, hawala may be both a boost and a curse. The central bank of Pakistan itself has had to turn to hawala dealers. It purchased $4.4 billion in 1999 from dealers in Dubai to increase its dwindling dollar reserves. Behar, *supra* note 116.

149. Jost & Sandhu, *supra* note 98, at 8.

150. *Id.*

151. *Id.*

152. Cottle, *supra* note 109.

153. *Id*; Carroll, *Interpol Report*, *supra* note 17, at 16 (stating that illegal activities such as drug smuggling and traffic in humans produce cash surplus used by hawala operators to generate funds for their business); *see also* Barry Ryder, Interview with the BBC, *in* Fletcher N. Baldwin, Jr., *Organized Crime, Terrorism and Money Laundering in the Americas*, 15 FLA. J INT'L L. 3, 17-18 (2002) (describing the use of ARS orchestrated by one of the organizers of a human smuggling venture to transfer money from those smuggled back to their families in China. This underground banking system was so effective that it became a major competitor of the Bank of China located on East Broadway in New York City).

154. Cottle, *supra* note 109.

creasingly concerned that the hawala system is being used by not just criminal syndicates but also by terrorist organizations such as al-Qaeda.[155]

In other instances, the illegality lies not in the criminal use of the funds being remitted but in some other ancillary violations, for example, violation of exchange controls or of customs regulations.[156] In yet other instances, ARSs may be used to launder money that is itself illicitly gained,[157] and the illegality of ARSs lies additionally in the "act to conceal or disguise the identity of illegally obtained proceeds so that they appear to have originated from legitimate sources."[158] In this last instance, the funds are therefore illegally obtained, which would not necessarily be the case in the first two instances, and through ARSs, laundered to disguise their illegal origin.

Part III explained that money laundering consists of three phases: placement, layering, and integration. Hawala may be used in any of these phases. In the placement phase, hawala may provide an especially useful means for introducing cash into the financial system.[159] In some national jurisdictions, financial institutions are required to report cash transactions over a certain amount—US $10,000 in the United States. In the hypothetical discussed in Part III, Section A, X gave the New York hawala operator US $5000 in cash. Because the hawala operator not only performs remittance services but also operates a business, it is a routine matter for her to make periodic bank deposits consisting of cash and checks. Although she might prefer that no reports be filed by the banks for large cash transactions, her business provides her with more than sufficient justification for cash deposits. At the same time, she might also use the cash received from X and other hawala clients to reinvest in her business or meet business expenses, thus decreasing the need to make cash deposits in banks.

In the layering stage, the money launderer attempts to make illicit funds appear legitimate, often by transferring money from one account to another.

155. *See* Jones, *supra* note 112 (noting that post-September 11 investigations have brought the hawala system to the attention of U.S. investigators).

156. Carroll, *Interpol Report*, *supra* note 17, at 16. Invoice manipulation may be used to generate hard currency "by conjuring documentation for non-existent shipments in order to obtain foreign exchange releases." The invoice manipulation component in a hawala transaction violates customs regulations in India, for example, while the currency speculation or currency dealings at other than the official exchange rate violate India's Foreign Exchange Regulation Act. *Id.*

157. Carroll states that:

> [M]oney associated with the drug trade is laundered through ARSs in Hong Kong, China, India, Indonesia, Nepal, Pakistan, the People's Republic of China, the Republic of the Philippines, Sri Lanka, Thailand, Turkey, and Vietnam. Remittance systems in India, Sri Lanka, and Turkey encounter profits from smuggling. The Indian system also launders funds from smuggled gold and precious stones, terrorism, and corruption . . . . The ethnic banking systems of Hong Kong, China, Indonesia, Japan, and the Republic of the Philippines are used to launder illegal gambling profits, and the proceeds of human traffic, including alien smuggling and ransom, are washed through alternative remittances in India, Japan, the People's Republic of China, the Republic of the Philippines, Vietnam.

Carroll, *Interpol Report*, *supra* note 17, at 22-23.

158. *Id.* at 6.

159. The discussion on the use of hawala in the three phases of money laundering is drawn from Jost & Sandhu, *supra* note 98, at 7-8, unless otherwise indicated.

Layering via the formal banking system presents several problems for the money launderer. If deemed suspicious, the transaction would be reported as such to the relevant authorities. Conventional banking also leaves a paper trail and could lead investigators to the sources of the illicit proceeds. By contrast, "[h]awala transfers leave a sparse or confusing paper trail if any. Even when invoice manipulation is used, the mixture of legal goods and illegal money, confusion about 'valid' prices and a possibly complex international shipping network create a trail much more complicated than a simple wire transfer."[160] In fact, even basic, routine hawala transfers can be difficult to unravel and trace. If, on the other hand, they were used for layering purposes, for example, by structuring the transaction so that several hawala brokers in several countries are used, and by breaking up the transfers over a period of time, they would pose an additional challenge to law enforcement authorities.

In the last stage of money laundering, money is integrated by the launderer who uses the funds to invest in other assets or in other illegal activities. "[H]awala techniques are capable of transforming money into almost any form, offering many possibilities for establishing an appearance of legitimacy."[161] Because hawala transactions are routinely embedded in preexisting businesses, money can be easily reinvested in the business. In our hypothetical, the New York hawala operator could easily have money transferred from the United States to Pakistan, then back to the United States, as part of an investment in a business in New York. In other words, "integration is accomplished again through the business front; as investment or disguised in the invoicing of imports and exports."[162]

As previously noted in Part III, there are numerous efforts in the United States and internationally to combat money laundering. It is clear that such efforts are ineffectual in many countries where enforcement of existing laws is lax.[163] It is also clear that such efforts are aimed at regulating the formal financial sector and have, until recently, neglected the alternative or informal sector. In many countries, however, ARSs may already be criminal "where exchange controls exist to regulate the flow of currency across their borders."[164] Yet, even in those countries where ARSs are illegal, the cultural norms rooted in these age-old, traditional systems nonetheless prevail over the more recently enacted state restrictions and controls. As a result, ARSs become "accepted and

160. *Id.* at 9-10.

161. *Id.*

162. Carroll, *Interpol Report*, *supra* note 17, at 9.

163. *See* Behar, *supra* note 116 (describing how the government of Pakistan lacks the enforcement capability to address the problem. As of August 2001, Pakistan's provincial police did not have the authority to demand records from banks, much less from hawala operators. As one official said, "'We have laws on the books, but there is no practical enforcement in Pakistan. Where are the task forces on money laundering, organized crime, or terrorism? We don't have a criminal database like the FBI. People are afraid to do investigations.'").

164. Carroll, *Interpol Report*, *supra* note 17, at 22. Exchange controls are in place in countries such as Bahrain, India, Indonesia, Kuwait, Malaysia, Nepal, Oman, Pakistan, Thailand, Turkey, and Vietnam. *Id.*

embraced within society,"[165] and indeed, even used by government officials and business people.[166] In this high-tech, global age, it is increasingly clear that hawala, described as a "[c]enturies old . . . low-tech Western Union,"[167] represents a serious obstacle to national and international anti-money laundering efforts. Even as, and perhaps precisely because, national and international efforts to curb money laundering multiply, by increasing state oversight and regulation of the international banking system, ARSs have become an even more significant alternative for money launderers.[168]

There are a variety of approaches adopted by different countries faced with the widespread use of ARSs. Singapore, for example, attempts to regulate the system by requiring registration of all hawala brokers.[169] But given the internalization of hawala norms—trust, common ethnic ties, flexibility and informality—Singapore has also discovered that most brokers adopt a "don't-ask-don't-tell approach to business,"[170] thus making the job of law enforcement authorities exceedingly difficult.

Other countries such as Saudi Arabia have focused on creating a more appealing alternative to ARSs.[171] Since the 1970s oil boom, Saudi Arabia has attracted a large number of expatriate workers drawn from lesser developed, emerging market countries where ARSs have deep and ancient roots. These workers use hawala to transmit money from Saudi Arabia back to their home countries. But hawala has also been used as a conduit for transmitting illegally-derived funds, as discovered in recent years by the Saudi Arabian Monetary Agency ("SAMA").[172] To counteract the proliferation of hawala in ethnic and expatriate communities, SAMA has prodded Saudi banks to compete effectively with hawala operators for transmittance business by following the hawala model: speed, efficiency, and cost effectiveness.[173] Saudi banks have begun to open specialized centers that are aimed at specifically meeting the needs of expatriate workers.[174] The funds transmitted through these centers, like those transmitted via hawala, are delivered in cash or by check to the homes of benefi-

165. *Id.*

166. *Id.*

167. Cottle, *supra* note 109.

168. *Id.* A warning was sounded more than a decade ago that "law enforcement agencies believe the success of new Western laws enabling the confiscation of assets and prosecution for money-laundering have greatly accelerated hawala use by international organised crime. . . ." *Id.* As the United States has taken action to clamp down on Colombian drug cartels, the cartels have turned to the black-market peso exchange, a money transfer system similar to hawala. *Id.*

169. *Id.*

170. *Id.* As one Singapore-based hawaladar remarked, "'My company does not question the amount or the purpose of sending the money. They trust us, and I don't ask questions. Why should I, when I have a license to operate?'"

171. Al-Suhaimi, *supra* note 100.

172. *Id.*

173. *Id.*; *see also* Behar, *supra* note 116 (noting that Pakistan is also exploring the possibility of incorporating hundi [hawala] principles into the national banking system to encourage Pakistanis living abroad to send money through the formal banking system).

174. These centers are open at times convenient to expatriate workers, for example, and provide help desks for customers as well as high-speed transfer systems between Saudi Arabia and countries with large numbers of expatriate workers. Al-Suhaimi, *supra* note 100.

ciaries within 24 to 48 hours. The centers charge low fees and offer competitive exchange rates. For law enforcement authorities, the key factor is the fact that transmitters and beneficiaries are not anonymous but clearly identified.[175]

The United States' approach is similar to Singapore's, that is, formalization[176] of what has been a wholly informal, alternative system. In 1993, the U.S. Congress enacted a law that required United States-based hawala operators to be registered with the government and to file suspicious activity reports similar to those already required to be filed by banks.[177] Efforts to introduce this law, however, were delayed twice due to concerns about the amount of paperwork that would be involved.[178] Since September 11, 2001, however, ARSs have attracted the attention of top government officials such as the then Secretary of Treasury Paul O'Neill who traveled to Dubai, deemed, along with Pakistan and India, to be part of the hawala triangle, to see for himself the workings of hawala.[179] Lawmakers have responded to the post-September 11 world by amending existing statutes and enacting new anti-money laundering laws. On October 26, 2001, Congress passed the International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001 ("2001 Money Laundering Act") as Title III of the USA Patriot Act.[180] In enacting the 2001 Money Laun-

175. *Id.*

176. HERNANDO DE SOTO, THE OTHER PATH (1989) (generally proposing that the informal economy in developing countries, such as Peru, be formalized and informal property rights held by the poor in unrecorded, unlicensed form be subject to formal registration so wealth for the poor could be created).

177. Bruce Zagaris, *U.S. Congress Hearings Advance U.S. International Money Laundering Efforts*, 17 NO. 1 INT'L ENFORCEMENT LAW REP. 11 (2001) (stating that although the 1993 Annunzio Wiley Act required the United States to make money services business ("MSB"), which would include hawalas, register, the Executive branch has not implemented this requirement) (quoting Jonathan Winer, former deputy assistant Secretary of State for Law Enforcement in the Clinton Administration). The Annunzio-Wiley Act is codified at 31 U.S.C. § 5318 (2003). The law requires that financial institutions or non-financial trades or businesses maintain record keeping, verification, identification and reporting procedures. The Annunzio-Wiley Act is noted for providing a safe harbor provision for institutions that voluntarily report suspicious behavior. 31 U.S.C. § 5318(g)(3) (2003).

178. Ryder, *supra* note 153, at 18; Cottle, *supra* note 109 (The 1993 law, which was twice delayed because of concerns about the volume of paperwork, first by the Clinton, then the Bush administration, has been fast-tracked. At a September 26, 2001 Senate hearing, the Treasury Under Secretary for Enforcement, Jimmy Gurule, assured Senate members that the administration will require hawaladars to be registered and to file suspicious activity reports similar to those already required of banks.). The United States is pushing other countries towards this approach as well. *See* Phillips, *supra* note 114 (describing pressure exerted by the Bush Administration on the government of Afghan President Karzai to require hawalas to keep records and report suspicious transactions).

179. Baldwin, *supra* note 153, at 16.

180. Uniting and Strengthening America by Providing Appropriate Tools to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, tit. III, Pub. L. 107-56, 115 Stat. 272 (2001). Specifically, Title III of the 2001 Money Laundering Act deals with requirements and laws concerning money laundering and regulation of banking institutions. The new regulations relate to financial institutions such as domestic and foreign banks, broker-dealers, securities and commodities dealers as well as travel agencies, dealers in precious gems and currency exchanges. Under the PATRIOT Act, banks must engage in greater due diligence in their relationships with customers and other banks. The Act expands federal authority to obtain foreign bank records and broadens the list of entities required to file currency transaction reports. *Id.*; *see also* Nicole M. Healy, *The Impact of September 11th on Anti-Money Laundering Efforts, in the European Union and Commonwealth Gatekeeper Initiatives*, 36 INT'L LAW. 733 (2002). Essentially, the PATRIOT Act builds upon ex-

dering Act, Congress recognized the need to take additional measures to combat domestic and international money laundering.[181]

The 2001 Money Laundering Act remains focused on financial institutions and requires that they take "special measures" when dealing with foreign institutions and jurisdictions that are of "primary money laundering concern," and that they strictly monitor the relationships between United States financial institutions and foreign banks.[182] The Act increases civil and criminal penalties imposed on financial institutions involved in money laundering—up to twice the amount of the transaction or up to a maximum penalty of one million dollars.[183] It also provides the government with enhanced enforcement powers over financial institutions.[184]

For the first time, these amendments also systematically address certain activities connected to the informal financial sector.[185] The USA PATRIOT Act requires, as far as ARSs are concerned, that money remitters, including hawala operators, register as "money services businesses" or "MSBs."[186] A

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isting laws enacted through the Bank Secrecy Act (BSA). The Act grants authority to the US Secretary of Treasury to create regulations requiring financial institutions to keep records, create and file reports of transactions to the government and to implement counter-money laundering programs. These regulations are found as codified at 31 C.F.R. § 103. The reports filed by the financial institutions are reviewed by the U.S. Department of Treasury's Financial Crimes Enforcement Network (FINCEN). This agency assists in coordinating investigative efforts and provides Congress with analysis and statistics useful in the creation of new anti-money laundering legislation.

181. In its findings, for example, Congress noted that the International Monetary Fund ("IMF") had estimated that money laundering constitutes about two to five percent of the annual global gross domestic product, approximately $600 billion each year. Money Laundering Act, Pub. L. 107-56, § 302(a)(1), 115 Stat. 272 (2001). Congress was also concerned that lax regulatory regimes in foreign jurisdictions facilitated the movement of funds that are derived either from criminal activities or are being used to commit criminal activities such as narcotics and arms trafficking, terrorism, financial fraud, and trafficking in human beings. Pub. L. 107-56, § 302(a)(4), 115 Stat. 272 (2001); *see also* Financial Action Task Force on Money Laundering, *Combating the Abuse of Alternative Remittance Systems: International Best Practices*, at 2 (June 20, 2003), *available at* http://www1.oecd.org/fatf/pdf/SR6-BPP_en.pdf. [hereinafter FATF, *Abuses of ARSs*] (The FATF noted that "the principal criminal activities engaged in by those who utilise MVT services are the illicit trafficking in narcotic drugs and psychotropic substances, illicit arms trafficking, corruption, evasion of government taxes and duties, trafficking in human beings and migrant smuggling.").

182. 31 U.S.C. § 5318A (2001); John Gibeaut, *Show Them the Money: The Anti-Terrorism Laws Target Money Laundering, Forcing Banks to be More Vigilant and Compliance Officers to Take On More Tasks*, 88 A.B.A.J. 46, 47-48 (2002). The Act imposes on banks the duty to conduct enhanced due diligence for private banking and correspondent accounts, 31 U.S.C. § 5318(i) (2001), and prohibits U.S. banks from maintaining correspondent accounts with foreign "shell banks." 31 U.S.C. § 5318(j) (2001). Shell banks are possible due to the age of the internet; they have no physical presence and are not subject to any country's regulatory ambit.

183. 31 U.S.C. §§ 5321, 5322 (2001).

184. The Attorney General or the Secretary of the Treasury may issue a summons or subpoena to obtain foreign bank records even if maintained overseas, by serving the financial institution's representative in the United States. 31 U.S.C. § 5318(k) (2001). The government may seek the forfeiture of funds deposited in a foreign bank by filing a civil action against the equivalent amount deposited in a U.S. bank account. 18 U.S.C. § 981(k) (2001).

185. 18 U.S.C. § 1960 (2001) (dealing with the illicit transmission of funds).

186. USA PATRIOT Act, PL 107-56, § 373, 115 Stat. 272 (2001) (amending 18 U.S.C. § 1960 to encompass the prohibition of an unlicensed money transmitting business, which is defined to mean a "money transmitting business which affects interstate or foreign commerce in any manner or degree and (A) is operated without an appropriate money transmitting license. . ."; "(B) fails to comply with the money transmitting business registration requirements under section 5330 of Title

MSB must comply with BSA requirements already applicable to financial institutions[187] and must also meet MSB registration requirements—registration with the Department of the Treasury by December 31, 2001[188] and maintenance of a list of its agents.[189] This registration requirement subjects MSBs to existing money laundering and terrorist financing regulations, including the requirement to maintain certain records,[190] file Currency Transaction Reports ("CTRs") and

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31, United States Code, or regulations prescribed under such section."). The United States Code defines money transmitting business as any business other than the United States Postal Service which:

> provides check cashing, currency exchange, or money transmitting or remittance services, or issues or redeems money orders, travelers' checks, and other similar instruments or any other person who engages as a business in the transmission of funds, including any person who engages as a business in an informal money transfer system or any network of people who engage as a business in facilitating the transfer of money domestically or internationally outside of the conventional financial institutions system.

31 U.SC. § 5330(d)(1)(A) (2003); *see also* 31 C.F.R. § 103.11(uu)(1) through (uu)(6) (defining MSBs); *see* www.msb.gov for a definition of MSBs.

187. *See* http://www.msb.gov/msb/index.html. The following is a summary of BSA requirements for MSBs: MSBs must register and maintain a list of agents; if an MSB knows or suspects a transaction is suspicious and involves funds of $2000 or more ($5000 or more if identified by issuers from a review of clearance records), it must file a SAR; MSBs must develop an Anti-Money Laundering compliance program; if an MSB provides either a cash-in or cash-out transaction of more than $10000 with the same customer in a day, it must file a currency transaction report (CTR); if an MSB provides money orders or traveler's check for cash of $3000-$10,000 to the same customer in a day, it must maintain a record of the transaction; if an MSB provides money transfers of $3000 or more to the same customer in a day, regardless of the method of payment, it must keep a record; if an MSB provides currency exchanges of more than $1000 to the same customer in a day, it must keep a record.

The BSA requires financial institutions to create paper trails by keeping records and filing reports of certain transactions. The reports are submitted to the Department of Treasury's Financial Crimes Enforcement Network (FinCen), which analyzes information submitted and supports law enforcement investigative efforts. The BSA requirements applicable to conventional financial institutions are now applicable to MSBs. *See* http://www.msb.gov/pdf/bsa_quickrefguide.pdf.

188. *See* http://www.msb.gov/guidance/msb_registration.html. A copy of the filed registration and supporting documentation must be retained at a location in the United States (such as the address of the MSB reported on the form) for five years.

189. The registration rules also require that each registered MSB prepare a list of its agents. The agent list must be maintained at a location in the United States. The list must contain the name of every agent and certain information about the agent, such as name, address, telephone number, and a listing of the months in the twelve months preceding the date of the agent list whereby the gross transaction amount of the agent exceeded $100,000. The initial agent list must be prepared by January 1, 2002. The list and each revised list must be retained for a period of five years. Civil and criminal penalties may be imposed for violations of the registration rules. *See* http://www.msb.gov / guidance/msb_agent.html; *see also* 31 C.F.R. § 103.41.

190. MSBs are required to file a CTR within 15 days whenever a transaction or series of transactions involves more than $10,000 in either cash-in or cash-out and is conducted by or on behalf of the same person on the same business day. MSBs that sell money orders or traveler's checks must record cash purchases of $3000 to $10,000. MSBs that provide money transfer services must keep a record of each money transfer of $3000 or more, regardless of the method of payment (for example, verify customer's ID, record customer and transaction information; sender is also to provide certain information to the receiving MSB or financial institution); currency exchangers must keep a record of each exchange of more than $1000 in domestic or foreign currency. *See* http://www.msb.gov/pdf/ bsa_quickrefguide.pdf.

Suspicious Activity Reports ("SARs").[191] Failure to meet these requirements can result in civil and criminal sanctions.[192]

On the multilateral front, recognizing that money launderers may rely on the informal sector to escape the regulatory strictures of the formal financial sector,[193] the FATF, in 2003, published an updated version of its Forty Recommendations. Originally published in 1990, the set of Forty Recommendations was conceived as a framework that nations could adopt to stop money laundering. However, the 2003 version has a broad definition of what countries should consider a "financial institution." It defines "financial institution" as "any person that transfers money or value."[194] Additionally, the 2003 version specifies that informal banking systems may be considered financial institutions.[195] Classifying informal banking systems as financial institutions will allow countries to require such businesses to register and be held to the reporting standards required of banks.

The recommendations put forth by FATF are similar to those required under the USA Patriot Act, including those requirements dealing with registration, record keeping, and filing. Jurisdictions should have in place a system of civil, criminal, or administrative sanctions in cases of non-compliance.[196] However, because the FATF recognizes the value of these informal transfer systems, especially in providing services when access to the formal financial sector is

191. Zagaris, *supra* note 177; *see also* www.msb.gov. MSBs are required to report "suspicious activity involving any transaction or pattern of transactions at or above a certain amount: $2000 or more; $5000 or more for issuers reviewing clearance records." Bank Secrecy Act Requirements: A Quick Reference Guide for Money Services, Businesses, *available at* http://www.msb.gov/pdf/bsa_quickrefguide.pdf. Suspicious activity is defined in the Quick Reference Guide as:

> any conducted or attempted transaction or pattern of transactions that you know, suspect, or have reason to suspect meets any of the following conditions: involves money from criminal activity; is designed to evade Bank Secrecy Act requirements, whether through structuring or other means; appears to serve no business or other legal purpose and for which available facts provide no reasonable explanation; involves use of the money services business to facilitate criminal activity.

Id. Examples of suspicious activity include the following: when a customer uses fake ID or multiple IDs. Structuring is defined as "[d]esigning a transaction to evade triggering a reporting or record keeping requirement." *Id.* Structuring is itself a federal crime and must be reported by the filing of a SAR. Examples of structuring include the following: breaking up a large transaction (which itself would meet the threshold for reporting of the transaction by the MSB) into smaller transactions. *Id.*; *see also* USA PATRIOT Act, § 352, 31 U.S.C. § 5318 (2003); 31 C.F.R. § 103.125 (2002). The MSB has 30 days after becoming aware of a suspicious transaction to file a SAR. A copy of the form filed along with supporting documentation must be retained for five years from the date of filing. Violation of the SAR filing requirement results in civil and criminal penalties. *See* Bank Secrecy Act Requirements: A Quick Reference Guide for Money Services, Businesses, *available at* http://www.msb.gov/pdf/bsa_quickrefguide.pdf

192. Penalties that can be applied for the failure of these money transmitting services to register with the government or maintain appropriate records carry a civil penalty of $5000 for each violation. 31 U.S.C. § 5330(e). Criminal penalties are also provided under the law. 31 U.S.C. § 5321 (2003), as amended by USA PATRIOT Act § 353(a) (2001).

193. *See* FATF, *Abuses of ARSs*, *supra* note 181, at 4.

194. *The Forty Recommendations*, FATF 15 (2003), *available at* www.fatf-gafi.org/pdf/40Recs-2003_enpdf.

195. *Id.* at 15, n.8.

196. FATF, *Abuses of ARSs*, *supra* note 181, at 8.

expensive, difficult or nonexistent,[197] the FATF recommends that government oversight be "flexible, effective, and proportional to the risk of abuse."[198] This means that the burden of compliance should not be so great as to drive these businesses further underground and thus make abuses even more difficult to detect.[199]

With respect to registration or licensing, FATF Special Recommendation VI states that every country should take measures to ensure that persons engaged in the transmission of money or value through a money or value transfer service (MVT service),[200] whether or not through alternative remittance networks, be licensed or registered and subject to the existing recommendations already applicable to financial institutions.[201] Registration is "likely to be a relatively cost effective approach when compared with the significant resources required for licensing."[202] The FATF, like the USA PATRIOT Act, also recommends that registration or licensing apply to agents as well, which means that the business must maintain a list of agents to be provided to the relevant authorities.[203] There are also suggestions on identification strategies for law enforcement to uncover informal, unregistered MVT services, by reviewing, for example, community media outlets such as newspapers, radio, or internet for advertising of such services, monitoring neighborhoods where MVT services are suspected to thrive, and, because many MVT businesses maintain bank accounts connected with their other business operations, enlisting the help of banks to crosscheck certain accounts against a register of MVT operators.[204]

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197. *Id.* at 2.

198. *Id.* at 3.

199. *Id.*

200. According to the FATF:

> [An MVT service] refers to a financial service that accepts cash, cheques, other monetary instruments or other stores of value in one location and pays a corresponding sum in cash or other form to a beneficiary in another location by means of a communication, message, transfer or through a clearing network to which the MVT service belongs. Transactions performed by such services can involve one or more intermediaries and a third party final payment.

Id. at 1. The FATF further notes that MVT services are also referred to as ARSs with ties to certain geographic regions and may also go by various names, such as hawala, hundi, fei-chien, and the black market peso exchange. *Id.*

201. *Id.* Involved in both licensing and registration is the fact that law enforcement is aware of the existence of the MVT business. But licensing implies inspection and sanction by some authority whereas registration merely means the entry and recording of the MVT business into the regulator's list. *Id.* at 3.

202. *Id.*

203. *Id.* at 3.

204. *Id.* at 5; *see also* Jost & Sandhu, *supra* note 98, at 8 (noting that "[o]ne of the most consistent and valid indicators of hawala activity in investigations conducted in the United States is seen in bank accounts." A hawala bank account usually reveals significant cash and check deposits, usually from ethnic communities known to use the hawala system. Upon examination, these checks may have notations, such as the name of the person receiving the transmission, or something indicating what had been bought with the money. In one case, investigators noted that many checks, for even dollar amounts, had the word 'bangle' written on them, presumably to create the appearance that the checks had been written to purchase jewelry. Another indicator that a bank account is a hawala bank account is that it will show many outgoing transfers to financial centers known to be involved in hawala, such as Great Britain, Switzerland, and Dubai.).

In addition, KYC rules, considered the "backbone" of the anti-money laundering framework, would also be applicable to MVT systems. Recommendation 10 previously in place for financial institutions is now applied to MVT services, which means that the MVT operators must subject the client to an identification check, on the basis of official identifying documents such as identity cards, passports, driver's licenses, or social security cards.[205] Failure on the client's part to produce acceptable identification should result in the rejection of the client and if the circumstances are deemed to be suspicious, the filing of a suspicious transaction report.[206]

With respect to record keeping, the FATF recommends that national jurisdictions require MVT services to maintain accurate and complete records to enable investigative agencies to retrace transactions if necessary. FATF Recommendation 12, as applied to MVT services, would mean that such services would be required, for at least five years, to maintain records in a form that is "intelligible and retrievable."[207]

In general, these recommendations address a particular goal: the enhancement of the integrity and transparency of informal value transfer systems internationally by requiring that countries register or license informal value transfer businesses and subject them to all of the FATF Recommendations that apply to banks and non-bank financial institutions.[208] Commentators have noted the need for an even more comprehensive and stringent approach, particularly in the use of ARSs in criminal and terrorist cases. Suggestions include the adoption of a regime that is "globalized, harmonized, standardized, and . . . multisectoral,"[209] exerting international pressure, through the FATF and other agencies, on underregulated countries such as Pakistan, the United Arab Emirates,

205. FATF, *Abuses of ARSs*, *supra* note 181, at 7. Identification of the customer is required whether the relationship is short- or long-term. Thus, transactions conducted via fax or phone or internet should proceed only after customer identification has been made, for example, as a result of a previous business relationship.

206. *Id.* The FATF recommends that national jurisdictions impose requirements that are in line with their current reporting requirements for the formal financial sector. The FATF also notes that one of the factors to be considered in determining whether a transaction appears suspicious and thus to be reported to a competent authority is the lack of complete originator information. *Id.* at 8.

207. *Id.*

208. The European Union has followed the recommendations set by FATF and changed some of its money laundering legislation to include a more comprehensive definition of what is to be considered a financial institution. In December 2001, Directive 91/308/EEC(4), used to combat money laundering, was amended and the definition of what constituted a financial institution was defined as, "these [financial institutions] include the activities of currency exchange offices (bureaux de change) and of money transmission/remittance offices. . . ." European Parliament and Council Directive 2001/97/EC of 4 December 2001 Amending Council Directive 91/308/EEC on Prevention of the Use of the Financial System for the Purpose of Money Laundering, art. 1, 2001 O.J. (L 344). By classifying alternative remittance systems as financial institutions, the EU subjects alternative remittance systems to the same anti-money laundering regulations that govern banks and other more traditional financial institutions. For example, all financial institutions (including the alternative remittance systems) are required to identify their customers before entering into a transaction with them, *id.* at art. 3, § 1, inform authorities of any situations that may indicate money laundering is occurring, *id.* at art. 4, § 1(a), and refrain from processing transactions that are known to be related to money laundering until the authorities have been contacted. *Id.* at art. 7.

209. Zagaris, *supra* note 177 (quoting Jonathan Winer, former deputy assistant Secretary of State for Law Enforcement in the Clinton Administration).

and the Gulf States that still lack adequate financial regulatory and enforcement systems. This new, proposed regime would emphasize accountability and the tracing of assets, establish a terrorist finance database, support presidential use of emergency economic powers, begin on-site inspections of registered MSBs, with an emphasis on those that have Middle East connections, and vigorously prosecute unregistered MSBs for their failure to register.[210]

It remains to be seen whether this approach, treating ARSs as though they were formal financial institutions, subjecting them to similar laws and pushing for a system of increased international cooperation,[211] will produce the desired results. To the extent that ARSs are deeply embedded in certain ethnic communities, identified and accepted by their members as an ancient, cultural practice, and to the extent that ARSs are practiced routinely in countries with an overall inadequate regulatory regime, it will not be easy to subject them to state-imposed control, whether in the United States or elsewhere. In many ways, a registration requirement for ARSs is intrinsically different from state regulation of conventional businesses. To require ARSs to be registered or licensed and maintain records sufficiently transparent to allow regulators to follow an audit trail if needed is to require ARSs to be, from the point of view of their clients, what they are not: formal when they are in essence informal. ARSs would have to shed the very features, informality, flexibility, anonymity, that make them appealing to ethnic communities to begin with. In other words, formalization requirements are themselves at odds with and in opposition to the deeply embedded norms of ARSs.

It may very well be that ARSs are "too fluid to control with conventional banking laws, too insular and too diffuse to easily infiltrate, and too enmeshed in South Asian culture to abolish outright (other nations have tried)."[212] A study by Interpol on hawala concluded that there was "[n]o evidence . . . to support the conceptualization of alternative remittance systems as organized, hierarchical networks; indeed, each expert surveyed reiterated the foundation of trust and ethnic networking that underlies these systems."[213] ARSs are essentially flexible and non-hierarchical, with rules that are not imposed in a top-down fashion by a central ARS regulator but rather internalized as a customary norm embedded in the very social fabric of many societies. It will be difficult for law enforcement to decree changes in such diffuse and deeply internalized cultural norms. In this case, formal state law and social norms may exist in largely parallel and separate domains, so that the latter is maintained by community practice essentially in ignorance of the rules and requirements of the former.[214]

210. *Id.*

211. *See* Financial Action Task Force on Money Laundering, *Special Recommendations on Terrorist Financing*, Oct. 31, 2001. Recommendation V states that "[e]ach country should afford another country, on the basis of a treaty, arrangement or other mechanism for mutual legal assistance or information exchange, the greatest possible measure of assistance in connection with criminal, civil enforcement, and administrative investigations . . . ." *Id.*

212. Cottle, *supra* note 109.

213. Carroll, *Interpol Report*, *supra* note 17, at 25.

214. Robert Ellickson describes how the norms of Shasta County operate separately from the universe of state law. *See* ROBERT ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE

Where norms are different from or antithetical to state-enacted laws and regulations, it will be far more difficult for the latter to be accepted and obeyed.[215]

At the same time, ARSs are popular in many regions of the world that do not have in place a system that promotes transparency or accountability. Thus, to call, as the FATF does, for the adoption of laws that are designed to create a transparent remittance system in countries that are themselves characterized overall by non-transparency is unlikely to produce the transparency desired. Take Pakistan, as an example, where hawala is popular and efforts are underway to reform one sector of the economy, the securities market. The Securities and Exchange Commission, launched in 1999, is still struggling to introduce basic disclosure and governance rules for public companies.[216] Massive corruption and stock manipulation are commonplace.[217] As the Securities and Exchange Commission Chairman Khalid Mirza noted, "[N]obody is supporting it. It's like the Greek myth of Ajax battling the elements. Transparent? Accountability? Who wants it?"[218] Mirza's reform efforts have led to street protests by brokers who accuse him of being an "American agent."[219]

Although the Commission has issued rules and regulations to ensure transparency, due process, and accountability, Mirza recently acknowledged that the Commission is constrained in its enforcement efforts by an economic and cultural environment that does not value transparency. According to Mirza:

> [e]xcept for the legal framework, none of the essential elements are present in Pakistan in any substantial sense. Hence the ground is not fertile for corporate governance to develop firm and deep roots. Thus, so far, corporate governance is either confined to a few corporates or it is really superficial or it is not sustainable.[220]

DISPUTES 137-55 (1991) (discussing how formal rules that governed property regimes in Shasta county had minimal effect on the way neighboring ranchers resolved disputes because the ranchers were guided by prevailing norms rather than legal rules); Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1694-95 (1996) (describing a more synthetic relationship in which state law is not separate from but reflects social norms).

215. *See, e.g.*, Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 840 (1987) ("There is no doubt that the law possesses a specific efficacy . . . . Nevertheless, this efficacy, defined by its opposition both to pure and simple impotence and to effectiveness based only on naked force, is exercised only to the extent that the law is socially recognized and meets with agreement, even if only tacit and partial . . . .").

216. Behar, *supra* note 116.

217. At the time reform began, most of the trading was in just 30 stocks as the other 375 companies were listed primarily for tax advantages. The Karachi Stock Exchange was run by six brokers. It was commonplace for commercial banks to lend to crooked brokers, who then loaned the money at 20% interest rates to their client-investors whom the crooked brokers would subsequently ambush and devour in a practice called "cornering." Shareholder meetings were often not held. According to Pakistan's Securities and Exchange Commission Chairman, who took the job in March 2000, "[t]here are vested interests." Although newly enacted exchange regulations prevent brokers from managing the exchange, they still control 60% of the board. And only recently was the Commission authorized to regulate accountants. The penalty for manipulating the books, however, is only $30 per offense.

218. Behar, *supra* note 116.

219. *Id.*

220. *Conditions Not Suitable for Corporate Governance*, THE NATION (PAKISTAN), Nov. 29, 2002, *available at* LEXIS, News Library, Global Newswire.

In this respect, Pakistan is not much different from other countries in South and East Asia or the Middle East where ARSs are an economic, social, and cultural fact of life.

Furthermore, in a country like Pakistan where the "black-market economy, which includes everything from underground banking to narcotics to the smuggling of consumer goods, ranges up to 100% of the so-called formal sector,"[221] it will be difficult to reform the banking sector, especially the parallel informal one, given the country's overall predilection favoring the informal market, a cash economy and general resistance to centralized state control. A fraud expert hired by the United Nations to prepare a report on Pakistan's money-laundering problems observed the following: "The whole economy is predicated on avoiding taxes,"[222] with eighty-five percent of all transactions in cash (compared to 3% in North America).[223] In terms of roots, it is the informal sector, not the state regulated sector, which has taken hold. In such an environment, state laws would be subject to the contextual constraint posed by norms existing outside the legal regime.[224]

Of course, state law may, in some instances, be used as an instrument for the reshaping of social norms.[225] In this sense, although formal laws and social norms may exist as two separately constituted realms, they may also influence each other. Norms may influence, or in our case, impede the effectiveness of laws and laws may also influence norms. In other words, government actions carry certain expressive dimensions and impart "cultural consequences" as well as "instrumental consequences."[226] Overtime, everyday behavior may in fact be guided by formal rules and the interaction between such rules and preexisting social norms, thereby allowing for the successful modification of norms by state law. For example, rather than only requiring the informal ARS to comply with formal banking requirements, it may also make sense to encourage, as Saudi Arabia has, the formal banking system to adopt some informal ARS-type norms that make ARSs appealing to their clients. State attempt to regulate an area already infused with deeply ingrained norms is more likely to succeed if the state is aware rather than ignorant of the existence of such norms and how these norms shape the social, cultural, and economic order.

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221. Behar, *supra* note 116.

222. *Id.*

223. *Id.*

224. For a discussion of norms and their relationship to law, see Cao, *supra* note 104, at 867-68.

225. *See* Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1065-85 (1995) (describing how the passage of the Civil Rights Act of 1964 facilitated the erosion of the social norm that had kept white business owners from serving or hiring blacks for fear of social stigma); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2034-35 (1996) ("[L]aw might attempt to express a judgment about the underlying activity in such a way as to alter social norms . . . . Through time, place, and manner restrictions or flat bans, for example, the law might attempt to portray behavior like smoking, using drugs, or engaging in unsafe sex as a sign of individual weakness.").

226. Richard H. Pildes, *The Unintended Cultural Consequences of Public Policy: A Comment on the Symposium*, 89 MICH. L. REV. 936, 938 (1991).

Additionally, in developing countries such as Pakistan, the reform process will undoubtedly require more than the enactment of laws or procedures to fight money laundering, whether in the formal or informal financial sector. While some governments may be corrupt or may not take the problem seriously or invest sufficient resources, the stark fact is also that many other governments do not have the law-enforcement capability to address the problem. As the head of one of Pakistan's corporate investigative agencies explained, "[w]e have laws on the books, but there is no practical enforcement in Pakistan. Where are the task forces on money laundering, organized crime, or terrorism? We don't have a criminal database like the FBI. People are afraid to do investigations."[227]

Clearly, many laws have been enacted at the international as well as national levels. The problem, however, lies in many areas that are multi-varied and complex. Enforcement of the enacted laws might be sporadic, inadequate or wholly absent because of insufficient resources, lack of political commitment and lack of political or cultural norms needed to make laws work. To the extent that national and international attention remains essentially focused on the enactment of laws to the exclusion of other crucial and related issues—insufficient resources due to underdevelopment, the relationship between weak laws against ARSs and strong norms favoring ARSs, law per se is unlikely to be effective.

IV.
CONCLUSION

Scholars who span a host of academic disciplines have noted the erosion of state power, especially in the economic sphere.[228] Global capitalism—the mobility of capital and technology, the explosive growth of foreign direct and portfolio investment—transcends territorial demarcations, causing the state, that "coldest of cold monsters,"[229] to loosen its control over many of its traditional domains, i.e. capital flows, currencies, interest rates and foreign investment. In broad terms, markets are generally acknowledged—even by nominally Communist countries such as China and Vietnam—to be superior to state control.

But the rise of global markets has not only meant a parallel rise of conventional markets for the exchange of goods, technology, or ideas, but has also induced the rise in markets of violence or markets in crime. Criminal activities have always presented a challenge to state authority, but in the new world of globalization, fueled by new communications networks, the market in transnational crime has grown in an unprecedented and uncontrolled manner.

Alongside the move towards transnationalization, there is also a countermovement towards particularism and sub-nationalization, that is, "the widespread assertion of substate identities that challenge the central authority of the

227. *Id.*

228. *See* MATTHEW HORSMAN & ANDREW MARSHALL, AFTER THE NATION-STATE (1994); KENICHI OHMAE, THE END OF THE NATION STATE (1995); WALTER WRISTON, THE TWILIGHT OF SOVEREIGNTY (1992).

229. F.W. NIETZSCHE, THUS SPOKE ZARATHUSTRA 48 (W. Kauffmann, trans. 1978).

juridical state."[230] This form of particularist identification may be based on commonalities of language, culture, religion, ethnicity, or history. It may also be allied with transnational forces, such as the transnational market in crime or trafficking in persons, to concoct a hybrid of the transnational and the sub-national. Hence one can see the rise in transnational networks of affinity-based criminal activities that are forged on the basis of sub-national identities, such as the Russian mafia, the Chinese triads or the Japanese Yakuzas. "[A] growing part of humanity is seeking community with others based on commonalities that are neither genetic nor territorial,"[231] and this fact is equally applicable to criminal organizations.

The growth of transnational crime and the enormous profits it generates have also meant an increased need to disguise the illicit origin of such proceeds, hence the concomitant rise in international money laundering. The measurable shift in the decline of state power and the lack of coordinated multilateral responses have made it increasingly difficult for states to forge effective responses to this problem. The difficulty is compounded by a number of factors. First, as governments have directed their regulatory and enforcement efforts at preventing money laundering through financial institutions, by imposing strict requirements, such as record keeping and KYC rules, money launderers have turned elsewhere. They have carved out a niche within the informal economy by engaging in both transnational and sub-national alliances, that is relying on alternative, traditional remittance systems founded on sub-national ties of ethnicity that are, in the global age, also transnational. In other words, transnational migration has produced expatriate and ethnic communities all over the world, and money launderers have managed to leverage diaspora bonds for their own ends. In this parallel, informal sector, transactions are conducted on the basis of community norms, custom, and trust. There is little, if any, paper record to be unraveled by law enforcement. Laws enacted by the state, transposed into this cultural universe where the informal economy is governed by norms favoring anonymity and flexibility, are directly at odds with community norms and unlikely to be effective in the short term. In cases where community norms are self-sustaining, it will be difficult for state enacted laws to alter them where norms are self-enforcing and laws are not. Laws therefore will require third-party or judicial enforcement to take root and be effective. Enforcement of law, then, is a crucial next step. In the alternative, or as a supplement, norm change may also be necessary, that is, transforming cultural norms favoring ARSs into ones that favor the formal financial system. This is difficult to accomplish and is likely to be a slow and gradual process.

Second, only recently have governments recognized the existence of this form of ethnic underground banking. The United States in particular has responded by imposing a formalization framework on ARSs, such as subjecting them to registration, record-keeping and other similar requirements already ap-

230. Oscar Schachter, *The Decline of the Nation State and Its Implications for International Law*, 36 COLUM. J. TRANSNAT'L L. 7, 15 (1997).

231. Franck, *supra* note 16, at 382.

plicable to the formal financial sector. Yet, formalization requirements are, again, antithetical to ARSs, which are fluid, informal, and flexible by their very nature. Because such requirements are at odds with the cultural norms of ARSs, which are widely accepted by ARS operators, clients and those in the relevant ethnic communities, it is unlikely that they will be readily obeyed. Where resistance to state-enacted, top-down laws is likely to be strong, so that the level of compliance will probably be low, enforcement efforts will likely face additional difficulties that they would not be faced with were there no cultural clashes among the parties.[232]

Furthermore, although the formalization requirements may be a viable first and necessary step, it is also important to understand the realities faced by many countries, especially those where ARSs are popular and formal banking channels are weak or ineffective. Many of these countries may be plagued by endemic corruption, political strife, economic instability and violence. In these volatile environments, the rule of law and transparent governance have not taken hold.[233] ARSs are among the few things that do in fact work in such places.

In other words, the relationship between laws, which govern the formal financial regime, and norms, which guide the informal, alternative regime, needs to be more fully considered. The enactment of laws governing money laundering is important, of course, but laws must be considered against a contextual background of culture, understanding, and expectations. As Robert Cover observed, "[n]o set of legal institutions or prescriptions exist apart from the narratives that locate it and give it meaning."[234]

232. For example, law enforcement will likely face difficulty locating and identifying hawala operators if members of the community where they operate are unwilling to expose them. Cottle, *supra* note 109 (stating that although the new regulations will "provide additional leverage for prosecuting hawaladar suspected of shady deals, law enforcement will still need to know whom and what sorts of activity to investigate - a task for which they are sorely unprepared. If you can even find a hawala broker to interview, one former Clinton Treasury official joked . . . 'you'll be doing better than the FBI.'").

233. Behar, *supra* note 116 (discussing the sentiment in Pakistan that despite President Musharraf's efforts to institute an array of reforms, "Nothing's going to change here. Musharraf will go eventually, and it will be back to business as usual. Just an endless cycle of cancer.").

234. Robert M. Cover, *The Supreme Court, 1982 Term: Foreword: Nomos and Narrative*, 94 HARV. L.REV. 4, 4 (1983).

Berkeley Journal of International Law

Volume 22 | Issue 1 Article 5

2004

Bulk Cash Smuggling and the Globalization of Crime: Overcoming Constitutional Challenges to Forfeiture under 31 U.S.C. 5332

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Overcoming Constitutional Challenges to Forfeiture Under 31 U.S.C. § 5332

By
Stefan D. Cassella*

INTRODUCTION

To law enforcement professionals, the hallmark of the new millennium is the rapid increase in the globalization of crime. Criminals move as freely between countries as tourists do, leaving victims in one place, hiding criminal proceeds in another, and taking up residence in a third. A computer, a cell phone, an internet connection, and a bank account may be all the tools a person needs to perpetrate a transnational fraud scheme, to finance a terrorist attack in one country with money generated in another, or to launder the proceeds of multi-national organized crime. To the twenty-first century criminal, political borders mean nothing. Indeed, criminals revel in the limitations imposed on local law enforcement authorities by antiquated concepts of jurisdiction and national sovereignty.

To twenty-first century law enforcement authorities, of course, political borders still mean everything. There is no such thing as international jurisdiction over multinational crime. There are no transnational wiretap orders, or search warrants, or procedures for the confiscation of criminal proceeds. What is a crime in one place may not be a crime in another. What constitutes lawful law enforcement authority in one place may carry no weight in another, or may actually constitute a crime. Everything in law enforcement is based on the laws and legal traditions of individual nation-states, each with its own set of quaint anachronisms, rarely meshing with the laws and traditions of the neighboring state or the state across the globe.

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Granted, there are now treaties in place that attempt to ensure a modicum of cooperation between countries on matters of transnational crime, but the process is abysmally slow.[1] In the time it takes a prosecutor in Alabama to subpoena bank records in France, the criminal will have moved through several countries, opened and closed numerous bank accounts in the names of as many off-shore corporations, laundered his criminal proceeds in remote bank-secrecy jurisdictions, and retired to a life of leisure under an assumed name. To the criminal who resides in Europe or Asia, uses the internet to steal money from victims in the United States, and launders the proceeds through a Caribbean bank, the efforts of law enforcement authorities to hurdle the legal and political obstacles that current law places in their way must be oddly entertaining—like watching a lead-footed policeman pursuing a sprinting teenage delinquent down alleys and over fences in a revival of West Side Story.

With such advantages, it is no wonder that criminals will commit crimes that span international borders, showing no regard for the requirements of local law. Indeed, criminals are no more likely to allow artificial political boundaries to restrict their movements than are rocks in a landslide.

Of particular concern is the way that criminals have internationalized the process of laundering criminal proceeds. Any criminal, of course, wants to hide the proceeds of his crimes from law enforcement, to avoid paying taxes, and to use the money to finance future criminal acts or enjoy the "good life." For various reasons that this article explores, many criminals in the United States find it best to do that by sending the money abroad. Moreover, there is strong evidence that a number of criminals commit crimes in the United States in order to raise money to finance terrorism elsewhere. Sending criminal proceeds from one country to another simply to hide them from the authorities is one thing; sending them to a second country so that they can be used to murder innocent citizens is a problem of much greater magnitude.

Once money representing the proceeds of crime—or money intended to be used to finance new criminal activity—moves from one country to another, it is notoriously difficult to track down and recover.[2] Thus, curtailing international

1. The United States has bilateral Mutual Legal Assistance Treaties with approximately 40 countries. *See, e.g.*, Mutual Legal Assistance Treaties With Cyprus, Egypt, France, Greece, Nigeria, Romania, South Africa, Ukraine and The Inter-American Convention On Mutual Assistance In Criminal Matters With Related Protocol, 106th Congress Exec. Rept. Senate 2d Session 106-24 (2000).

2. For example, federal authorities in the United States have no power to subpoena records from a foreign bank. Instead, the requesting authority must ask the Office of International Affairs in the Department of Justice to initiate a treaty request pursuant to whatever Mutual Legal Assistance Treaty (MLAT) or other bilateral agreement may exist between the United States and the country in which the bank records are located. If, as is often the case, there is no bilateral agreement in place, the United States must invoke the ancient procedure of sending letters rogatory to the foreign government. It is the common experience of federal prosecutors that both the MLAT and letters rogatory options take months or even years to produce the requested records. Section 319 of the USA PATRIOT Act contains a provision, codified at 31 U.S.C. § 5318(k) (2003), that was designed to short-circuit this procedure by authorizing the Attorney General to serve a subpoena directly on a foreign bank if that bank does business in the United States through a correspondent bank account at a domestic bank. But the Department of Justice has been reluctant to use this approach, acceding to

money laundering is a high priority of law enforcement regardless of what the underlying crime that generated the laundered money might have been.

This article deals with one aspect of international money laundering—bulk cash smuggling.[3] As we will see, the success that the United States has experienced in enforcing the currency transaction reporting requirements at domestic financial institutions has forced criminals who want to move their money overseas without creating a paper trail to transport the money physically across the border in bulk form. Recognizing that the older customs reporting requirements were inadequate to deal with this problem, Congress enacted a new statute, 31 U.S.C. § 5332, making bulk cash smuggling a criminal offense, and providing for the forfeiture of all of the smuggled currency. This article focuses on the application and enforcement of the new statute.

I begin by discussing the reasons why criminals prefer to launder their money overseas and the reasons why they resort to bulk cash smuggling to do so. I then trace the history of the currency transaction reporting statutes and describe how the Supreme Court's decision in *United States v. Bajakajian*[4] effectively nullified the ability of law enforcement to use those statutes to deter money laundering by means of smuggling currency out of the country. Finally, I discuss the new bulk cash smuggling offense itself and set forth the arguments that the government might make to rebut the constitutional challenges that have been raised against it. My conclusion is that by making aggressive use of the new statute, federal law enforcement agencies will be able to reduce the role that bulk cash smuggling plays in international money laundering and the financing of terrorism.

I.
REASONS FOR SMUGGLING CURRENCY

Once upon a time, when Bonnie and Clyde robbed the local bank, they kept the money under a floorboard in the attic, or in the trunk of the car, and spent the cash as they needed it. Some still do that, but most criminals now have more sophisticated ways of handling the proceeds of their crimes: by making investments, acquiring assets, or taking advantage of the international banking system.

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the views of the Department of State that by-passing the MLAT process would be injurious to bilateral relations with its treaty partners.

3. I have discussed other aspects of the international laundering of criminal proceeds in other articles. *See, e.g.*, Stefan D. Cassella, *Reverse Money Laundering*, 7 J. OF MONEY LAUNDERING CONTROL 92 (2003) (paper presented at the twentieth Cambridge International Symposium on Economic Crime, Cambridge University, September 2002); Stefan D. Cassella, *Provisions of the USA PATRIOT Act Relating to Asset Forfeiture in Transnational Cases*, 10 J. OF FINANCIAL CRIME 303 (2003) (same); Stefan D. Cassella, *Restraint and Forfeiture of Proceeds of Crime in International Cases: Lessons Learned and Ways Forward*, Proceedings of The 2002 Commonwealth Secretariat Oxford Conference on the Changing Face of International Cooperation in Criminal Matters in the 21st Century, p. 183 (Commonwealth Secretariat, 2002); Stefan D. Cassella, *The Recovery of Criminal Proceeds Generated in One Nation and Found in Another*, 9 J. OF FIN. CRIME 268 (2002) (paper presented at the 19th Cambridge International Symposium on Economic Crime, Cambridge University, September 2001); Stefan D. Cassella, *Money Laundering Has Gone Global*, 49 THE FEDERAL LAWYER 1, 24 (January 2002).

4. 524 U.S. 321 (1998).

Indeed, given the obstacles that law enforcement faces in trying to follow the proceeds of crime around the world and in trying to recover them, anyone with a significant sum of illegally-derived money to hide would be foolish not to try to get the money out of the United States and into a foreign country.

The question is how to get it there. Criminals have an abiding desire to avoid creating a paper trail that law enforcement is able to follow. Thus, they prefer to deal exclusively in cash. Cash is bulky, however, and no criminal really wants to have to carry $20 million in currency out of the country in a suitcase if he can avoid it. Consequently, carrying the money physically across the border has never been the criminal's first choice of methods for moving his money to a foreign bank. A better alternative would be to place the money in a local bank, and then to wire it to a foreign bank account, send a check drawn on the local account to the foreign account by mail, or send an ATM card and PIN number corresponding to the local account to a confederate abroad who could then withdraw the money as cash and redeposit it into a foreign bank.

At first, putting money in a local bank entailed little risk that law enforcement would be apprised of the bank customer's sudden access to large sums of currency. One could always avoid leaving any fingerprints on his money by depositing it in a third party's name, commingling it with the proceeds of a legitimate business, or simply relying on the absence of records of most cash transactions. In the 1980s, however, the United States began to enforce aggressively the requirement that the identity of any person conducting a currency transaction involving more than $10,000 at a financial institution be recorded on a form filed with the Internal Revenue Service (IRS).[5] The notion, obviously, was to take advantage of the criminal's need to convert his cash to a more usable form by creating a paper record whenever he conducted a large cash transaction, and sending that record directly to a federal law enforcement agency. When criminals began to find ways to evade the $10,000 reporting requirement by breaking up their cash transactions into smaller amounts, Congress amended the law to make it an offense to structure any transaction involving more than $10,000 for the purpose of evading the reporting requirements.[6]

The success of law enforcement in enforcing the currency transaction reporting requirements at domestic financial institutions has forced criminals to resort to the more obvious but decidedly less convenient method of moving their money to a foreign country without creating a paper trail: bulk cash smuggling. Once money is physically transported out of the United States, it can be deposited into a foreign bank (that might not be subject to any currency reporting requirements), sold on the black market,[7] repatriated to the United States in the

5. *See* 31 U.S.C. § 5313 (2003) and related regulations requiring filing of Currency Transaction Report or "CTR." 31 CFR 103.11 *et seq.*

6. *See* 31 U.S.C. § 5324(a)(3) (2003).

7. The black market is the term used by federal law enforcement agencies in the United States to describe the informal system of selling U.S. dollars at a discount in exchange for foreign currency through money brokers or a change bureau abroad. The criminal is generally willing to accept the discount in exchange for transferring the risk of dealing with the tainted dollars to the money broker, and having the foreign currency to spend or invest as he sees fit. *See Money Laun-*

form of a check or wire transfer from a foreign corporation, or invested in property in a foreign country.

Federal law did not wholly lack tools for responding to this innovation, of course. Just as there is a requirement that any domestic currency transaction involving more than $10,000 be reported to the IRS, there has long been a requirement that any attempt to transport more than $10,000 in currency into or out of the United States—at the border, at an airport, or by mail or other common carrier—be reported to the Customs Service.[8] Failing to file that form, which is called a Currency and Monetary Instrument Report (CMIR), is a criminal offense, carrying a potential jail sentence and the risk that the unreported currency may be confiscated under the asset forfeiture laws.[9]

Problems existed, however, with this as a law enforcement tool. Unlike the report filed by the bank on a domestic currency transaction, the Customs report is filed not by a disinterested financial institution, but by the traveler himself—that is, the very person with the greatest interest in avoiding the creation of the paper trail that the form was designed to generate. Thus, compliance with the reporting requirement among the target group of travelers—criminals, tax evaders, and money launderers—is low.[10]

Accordingly, it is up to the courts and to federal law enforcement authorities to force compliance with the reporting requirements, or to discourage attempts to move unreported money out of the country in the first place, by imposing severe consequences for failure to comply. Unfortunately, a Supreme Court decision in the late 1990s, *United States v. Bajakajian*,[11] greatly reduced the government's ability to impose a significant economic penalty on the currency smuggler, and thus undermined law enforcement's effort to achieve an appreciable level of compliance with the currency reporting laws.

II.
THE SUPREME COURT'S DECISION IN *UNITED STATES V. BAJAKAJIAN*

In *United States v. Bajakajian*, Mr. Hosep Bajakajian, a traveler departing the United States from the Los Angeles airport, was stopped after a dog trained to detect the presence of currency by its smell signaled the presence of a large

dering Crisis: Hearing Before the Subcomm. on Crime of the House Comm. of the Judiciary, 106th Cong. 31-33, 43-44 (2000) (statements of James K. Robinson, Assistant Attorney General, Criminal Division, United States Dept. of Justice & Stefan D. Cassella, Assistant Chief, Asset Forfeiture and Money Laundering Section, United States Dept. of Justice).

8. *See* 31 U.S.C. § 5316 (2003) (requiring the filing of a Currency and Monetary Instrument Report or "CMIR").

9. *See* 31 U.S.C. § 5317(c) (2003) (providing for the civil or criminal forfeiture of the property involved in a CMIR offense).

10. There is no way of knowing how many travelers fail to file the CMIR, but the former U.S. Customs Service, now the Bureau of Immigration and Customs Enforcement (ICE), reports hundreds of instances of travelers who did not file the form only to have more than $10,000 discovered in their luggage during routine customs inspections.

11. 524 U.S. 321 (1998).

quantity of cash in Bajakajian's luggage.[12] Customs agents informed Bajakajian that he was required to declare whether he was transporting more than $10,000 in currency out of the country, but he denied that he was doing so.[13] When an inspection of the luggage revealed the presence of $357,144 in currency, however, Bajakajian was arrested.[14] Ultimately, he pled guilty to the criminal offense of failure to report the currency on the required customs form.[15]

As part of the criminal case, the government sought to forfeit the $357,144 as property "involved in" the currency reporting offense.[16] The statute provided that the forfeiture of the entire sum was mandatory, but the district court, as well as the Court of Appeals for the Ninth Circuit, held that such forfeiture would violate Bajakajian's rights under the Excessive Fines Clause of the Eighth Amendment.[17] The government appealed and the Supreme Court agreed to hear the case.

The government offered several reasons why the Excessive Fines Clause should not apply to this case at all, or if it did, why the Court should nevertheless allow the forfeiture of the entire $357,144. First, money that a traveler fails to declare on a customs form when taking the money out of the country, the government argued, is akin to goods on which a smuggler fails to pay a customs duty—it is the *corpus delicti* of the crime.[18] Since the earliest days of the Republic, the government noted, the forfeiture of such smuggled goods has always been upheld without any regard to the value of the goods being forfeited.

Similarly, the government argued that the instrumentalities of an offense have been considered subject to forfeiture, regardless of their value, because they represented the actual means by which the offense was committed.[19] Bajakajian's unreported currency, the government said, was the instrumentality of his offense, because without it there could have been no reporting violation at all.[20]

Finally, the government contended that forfeiture of the undeclared currency in Bajakajian's case served a remedial, non-punitive purpose, because the forfeiture would deter the illicit movement of cash and aid in providing the government with valuable information regarding the flow of money into and out of the United States.[21] Because only punitive forfeitures are considered "fines" subject to the Excessive Fines Clause of the Eighth Amendment,[22] the govern-

12. *Id.* at 324.
13. *Id.* at 324-25.
14. *Id.* at 325.
15. *Id.*
16. *Id.* at 326. Note that the forfeiture statute at issue in *Bajakajian*, 18 U.S.C. § 982(a)(1) (1998), has since been amended. The forfeiture provision for the currency reporting offense for which Bajakajian was convicted is now found at 31 U.S.C. § 5317(c) (2003).
17. *Bajakajian*, 524 U.S. at 326.
18. *See id.* at 340.
19. *Id.* at 333.
20. *Id.*
21. *Id.* at 322.
22. *See* Austin v. United States, 509 U.S. 602, 622 (1993).

ment said, a forfeiture that served such remedial purposes could not violate the constitutional proscription against the imposition of an excessive fine.[23]

The Court rejected each of the government's arguments, however. Even if the forfeiture of the actual means by which a crime is committed—that is the instrumentality of the crime—were permitted without regard to the value of the property, the Court said, the unreported currency in this case would not qualify.[24] Bajakajian's money was not the means by which the crime was committed, the Court said, but was "merely the subject of the crime of failure to report."[25]

With respect to the *corpus delicti* argument, the Court acknowledged that many early cases and statutes authorized the forfeiture of smuggled goods on which a duty was not paid without regard to their value.[26] However, Bajakajian was not charged with a smuggling offense, the Court noted; he was charged only with failing to file a report.[27] Moreover, the Court found that forfeitures in smuggling cases serve "the remedial purpose of reimbursing the government for the losses accruing from the evasion of customs duties" or taxes.[28] In contrast, the forfeiture of Bajakajian's money would not have any remedial purpose; it would do nothing to provide the government with information regarding the amount of currency leaving the country, nor would it compensate the government for any loss.[29]

Accordingly, the Court held that the forfeiture of the unreported currency in a case involving a currency reporting violation is subject to the Excessive Fines Clause of the Eighth Amendment.[30] "The touchstone of the constitutional inquiry under the Excessive Fines Clause," the Court said, "is the principle of proportionality."[31] The Court continued, "If the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional."[32] Given the relatively insignificant nature of Bajakajian's reporting vio-

23. *Bajakajian*, 524 U.S. at 322.
24. *Id.* at 334 n.9.
25. *Id.*
26. *Id.* at 340.
27. *Id.* at 338 n.13.
28. *Id.* at 342.
29. *Id.* at 329. The Supreme Court also repeatedly emphasized that the smuggling cases on which the Government relied were all civil *in rem* cases, and not cases where the forfeiture was imposed as part of the punishment in a criminal case. *Id.* at 331-32, 340, 344. In the years since *Bajakajian*, however, the lower courts have routinely rejected the notion that there is any distinction between civil and criminal forfeiture for Eighth Amendment purposes, and have held that the *Bajakajian* gross disproportionality test applies equally in civil and criminal cases. *See* United States v. $273,969.04 United States Currency, 164 F.3d 462 (9th Cir. 1999) (finding civil forfeiture for failure to report the exportation of currency is subject to same excessive fines analysis as the Supreme Court applied in *Bajakajian*); United States v. $359,500 in United States Currency, 25 F. Supp. 2d 140 (W.D.N.Y. 1998) (same); United States v. Ahmad, 213 F.3d 805 (4th Cir. 2000) (holding that *Bajakajian* applies equally to criminal forfeitures and to civil forfeitures of non-instrumentalities); United States v. 40 Clark Road, 52 F. Supp. 2d 254 (D. Mass. 1999) (finding that *Bajakajian* applies to civil forfeiture of facilitating property under the drug statutes).
30. *Bajakajian*, 524 U.S. at 334.
31. *Id.* at 334.
32. *Id.* at 337.

lation, the Court concluded, the forfeiture of the entire $357,144 in unreported funds would be unconstitutionally excessive.[33]

The Aftermath of Bajakajian

The impact of *Bajakajian* on the government's efforts to use forfeitures under the currency reporting statute to deter the smuggling of criminal proceeds into or out of the United States was immediate. The Customs Service had no choice but to lower its guidelines for the seizure of unreported currency,[34] and prosecutors became reluctant to bring any forfeiture cases based on the reporting violation to federal court. While such things cannot be proven with certainty, the circumstantial evidence certainly suggests that the recent upsurge in bulk cash smuggling activity may be tied to the ineffectual nature of the government's enforcement tools, with *Bajakajian* providing the principal obstacle.[35]

At the same time, however, there are ways in which the government can work around the constitutional problems that *Bajakajian* created. In *Bajakajian* itself, the Supreme Court suggested that its holding would not apply to reporting violation cases where the unreported currency was derived from a criminal offense or was intended to be used for an unlawful purpose. "Whatever his other vices," the Court said, "[Bajakajian] does not fit into the class of person for whom the statute was principally designed: He is not a money launderer, drug trafficker, or a tax evader."[36] To the contrary, his crime was "the willful failure to report the removal of currency from the United States . . . unrelated to any other illegal activities."[37] Accordingly, all courts addressing the Eighth Amendment issue in currency reporting cases have held that *Bajakajian* does not apply if the government is able to demonstrate some nexus between the unreported currency and another criminal offense.[38]

In addition, the lower courts have held that *Bajakajian* does not apply to traditional smuggling cases where the government is seeking the forfeiture of

33. The Court, however, did not venture any opinion as to what amount short of one hundred percent of the unreported money could be forfeited without violating the Eighth Amendment. *See id.* at 337, n.11.

34. *See* "CMIR Remission and Mitigation Guidelines" promulgated by the former U.S. Customs Service. Mitigation Guidelines: Fines, Penalties, Forfeitures and Liquidated Damages," U.S. Customs Service (April 2002), *at* http://www.cbp.gov/ImageCache/cgov/content/laws/informed_5fcompliance5fregs/icp069_2epdf/v1/icp069.pdf.

35. As discussed below, that belief is what motivated Congress to enact the new bulk cash smuggling statute as part of the USA PATRIOT Act.

36. *Bajakajian*, 524 U.S. at 338.

37. *Id.* at 337-38.

38. *See, e.g.,* Unied States v. U.S. Currency in the amount of $898,719.00, 2003 WL 21544283 (W.D. Mo. 2003) (*Bajkajian* does not bar full forfeiture under § 5317(c) of drug money transported into the United States without filing a CMIR); United States v. $97,253.00, 2000 WL 194683 (E.D.N.Y. 2000) (if the undeclared funds in a CMIR case are drug proceeds there is nothing disproportional about forfeiting the entire amount, either because *Bajakajian* does not apply to the nonpunitive forfeiture of proceeds, or if it does apply, because the court compares the forfeiture to the gravity of the drug offense, not to the gravity of the CMIR violation); *cf.* United States v. Beras, 183 F.3d 22 (1st Cir. 1999) (criminal forfeiture of entire $138,794 that defendant failed to declare on a CMIR form was unconstitutional under *Bajakajian*; on remand, district court must consider, *inter alia,* whether the money was derived from an illegal source).

the smuggled goods themselves. In other words, if the crime giving rise to the forfeiture is merely a reporting violation, then any punishment, including forfeiture, for that offense must satisfy the "gross disproportionality" test. However, if the crime is a smuggling offense, it remains entirely proper for the government to confiscate the smuggled goods, regardless of their value, because they represent the *corpus delicti* of the crime.[39]

Thus, in *United States v. An Antique Platter of Gold*,[40] the Second Circuit held that the forfeiture of illegally imported goods pursuant to 18 U.S.C. § 545 is traditionally viewed as nonpunitive, and that therefore *Bajakajian* does not apply. Similarly, in *United States v. $273,969.04 United States Currency*,[41] the Ninth Circuit held that traditional customs forfeitures of smuggled goods under 19 U.S.C. § 1497 lie outside the scope of *Bajakajian's* excessive fines analysis as well. As this article will demonstrate, this distinction between traditional smuggling offenses and the currency reporting offense at issue in *Bajakajian* is one of crucial importance.

III.
THE NEW BULK CASH SMUGGLING STATUTE

In 2001, Congress expressed its displeasure with the *Bajakajian* decision and created a new "bulk cash smuggling" offense, 31 U.S.C. § 5332, that is designed to permit forfeiture of one hundred percent of the smuggled currency in most circumstances, whether or not the government can establish a nexus between the smuggled money and another criminal offense. Enacted as part of the post-September 11 effort to address terrorist financing specifically, and international money laundering generally, in Title III of the USA PATRIOT Act,[42] the new law recognizes the central role that bulk cash smuggling plays in the globalization of crime. Most important, it seizes upon the Supreme Court's distinction between smuggling offenses and currency reporting violations to fill the void that *Bajakajian* created in the government's ability to deter international money laundering through the enforcement of the domestic money laundering laws.

In a set of "Findings" and "Purposes" that accompanied the enactment of the new statute, Congress found that smuggling currency in the form of "bulk cash" is a favored device of drug traffickers, money launderers, tax evaders and persons financing terrorist operations, and that it "is the equivalent of, and cre-

39. *See* United States v. An Antique Platter of Gold, 184 F.3d 131, 140 (2d Cir. 1999) (section 545 forfeiture of contraband—for example, illegally imported goods—is traditionally viewed as nonpunitive; therefore *Bajakajian* does not apply); United States v. $273,969.04 U.S. Currency, 164 F.3d 462, 466 (9th Cir. 1999) (section 1497 forfeitures lie outside scope of excessive fines analysis; *Bajakajian* does not apply).

40. 184 F.3d 131, 140 (2d Cir. 1999).

41. 164 F.3d 462, 466 (9th Cir. 1999).

42. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, § 371, 115 Stat. 272, 336-39 (2001) [hereinafter USA PATRIOT Act].

ates the same harm as, smuggling goods."[43] Moreover, Congress found that "only the confiscation of smuggled bulk cash can effectively break the cycle of criminal activity of which the laundering of bulk cash is a critical part."[44] Finally, picking up on the distinction between smuggling offenses and reporting violations in *Bajakajian*, Congress noted that as long as bulk cash smuggling was considered only a currency reporting offense, the penalties could not "adequately provide for the confiscation of smuggled currency."[45] In contrast, Congress concluded, "if the smuggling of bulk cash were itself an offense, the cash could be confiscated as the *corpus delicti* of the smuggling offense."[46]

Based on these findings, Congress set forth the purposes of the new statute as follows:

> (1) to make the act of smuggling bulk cash itself a criminal offense;
> (2) to authorize the forfeiture of any cash or instruments of the smuggling offense; and
> (3) to emphasize the seriousness of the act of bulk cash smuggling.[47]

The Findings and Purposes were summarized in the Committee Report accompanying the money laundering provisions of the PATRIOT Act:

> The Committee believes . . . that bulk cash smuggling is an inherently more serious offense than simply failing to file a Customs report. Because the constitutionality of a forfeiture is dependent on the 'gravity of the offense' under [*United States v. Bajakajian*], it is anticipated that the full forfeiture of smuggled money will withstand constitutional scrutiny in most cases. For the confiscation to be reduced at all, the smuggler will have to show that the money was derived from a legitimate source and not intended to be used for any unlawful purpose. Even then, the court's duty will be to reduce the amount of confiscation to the maximum that would be permitted in accordance with the Eighth Amendment and the aggravating and mitigating factors set forth in the statute.[48]

In short, Congress found that the clandestine movement of bulk cash across the border is really more like a smuggling offense than like the simple failure to file a currency transaction report. Smuggling currency, after all, does more than deprive the government of information that may be used to create a paper trail. It is an integral part of the recycling of drug proceeds, the financing of terrorism, the evasion of income taxes, and the commission of other crimes that rely on extracting currency from, or injecting foreign funds into, the U.S. economy without using the traditional banking or wire transfer systems. In fact, smuggling currency creates the same type of harm as other forms of smuggling, including the smuggling of firearms, counterfeit goods, adulterated foods and unapproved medicines.

Thus, Congress made it an offense to smuggle currency into or out of the United States with the intent to evade the currency reporting requirements, and expressly provided that all of the smuggled currency would be subject to civil

43. § 371, 115 Stat. at 337.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. H. R. REP. No. 107-250, at 53 (2001).

and criminal forfeiture whether the government is able to establish a nexus between the currency and another crime or not.[49] As in any smuggling offense, the essence of the crime is the concealment of property and the movement of that property across the international border.[50] It remains entirely legal to take any amount of currency out of the United States. The offense lies in concealing the money—on one's person, in luggage, in exported merchandise, or by other means[51]—to avoid detection by the customs agents who are charged with deterring the export of currency as part of a clandestine money laundering operation by enforcing the currency reporting laws.

Like goods involved in a traditional smuggling offense, currency involved in a bulk cash smuggling offense is subject to forfeiture as the *corpus delicti* of the crime. In other words, what Congress has done is to bring forfeiture under the new statute squarely within the scope and framework of the traditional statutes that the Supreme Court recognized and distinguished from the simple reporting offense at issue in *Bajakajian*.[52] Moreover, like traditional smuggling statutes and unlike the reporting violation in *Bajakajian*, section 5332 would serve a remedial purpose: to deter the ongoing practice of laundering criminal proceeds, evading taxes and financing terrorist activities by moving money out of the United States and into foreign markets and financial institutions without creating records that link the money to the person engaged in its movement abroad. Accordingly, if Mr. Bajakajian were to try to depart from LAX today with $357,000 in currency concealed in the false bottom of his suitcase, he could be prosecuted under section 5332 and one hundred percent of the currency could be forfeited as the *corpus delicti* of the smuggling offense.[53]

Constitutional Challenges to the Bulk Cash Smuggling Statute

Opponents of the new law have charged that the remedial purpose underlying the traditional customs laws that the Supreme Court recognized in *Bajakajian* was to reimburse the government "for losses accruing from the eva-

49. 31 U.S.C. §§ 5332(b)-(c) (2003). The statute contains no provision for a criminal fine because it was assumed that the forfeiture of the currency would serve that function. Thus, in the Eighth Amendment proportionality analysis, there is no "maximum fine" against which the forfeiture can be compared. The only cap on the "fine"—that is, on the forfeiture—is the amount of money being smuggled. *See* United States v. $100,348.00 in U.S. Currency, 2004 WL 67876 (9th Cir. 2004) (using the maximum fine available under the U.S. Sentencing Guidelines as a measure of the gravity of the offense for Eighth Amendment purposes).

50. § 5332(a)(1), provides in pertinent part as follows:

> Whoever, with the intent to evade a currency reporting requirement under section 5316, knowingly conceals more than $10,000 in currency . . . and transports or transfers or attempts to transport or transfer such currency . . . from a place within the United States to a place outside of the United States . . . shall be guilty of a currency smuggling offense.

51. § 5332(a)(2).

52. *Bajakajian*, 524 U.S. at 340.

53. Effective November 1, 2002, the United States Sentencing Commission has set the offense level for violations of section 5332 two levels above the offense level for CMIR offenses to reflect the greater seriousness of the offense. *See* U.S.S.G. § 2S1.3 (2002).

sion of customs duties,"[54] and that the new statute does nothing of the kind. That is true; however, a statute does not have to provide for the collection or recovery of lost revenue to be remedial. To the contrary, the Supreme Court has repeatedly recognized other remedial purposes inherent in the federal asset forfeiture laws. For example, forfeiture statutes may be used to discourage "unregulated commerce" in certain types of property, such as firearms; to abate a nuisance, such as an apartment building being used to sell crack cocaine; to prevent future use of property for illicit purposes; to remove certain types of forbidden property from "circulating in the United States;" to ensure that persons do not profit from their illegal acts; and to "encourage property owners to take care in managing their property and ensure that they will not permit that property to be used for illegal purposes."[55] Deterring bulk cash smuggling certainly serves many of the same remedial purposes. Indeed, if it is remedial for Congress to discourage "unregulated commerce" in lawful property like firearms to ensure that they will not be used for illegal purposes, it is remedial to discourage the exportation of concealed currency for the purpose of evading the efforts of law enforcement to determine who is engaged in a practice that has been clearly linked to drug trafficking, money laundering, terrorist financing, tax evasion and other serious crimes.[56]

The opponents of the new law might also contend, of course, that the Findings Congress included in the PATRIOT Act suggest that the bulk cash smuggling statute was only intended to apply to cases where there is a demonstrable connection between the currency smuggling offense and some other criminal activity. Why else, they argue, would Congress have specifically referred to currency smuggling as an activity in which "drug dealers and other criminals" are engaged, or suggested that the smuggling of cash is "one of the most reliable warning signs of drug trafficking, terrorism, money laundering, racketeering, tax evasion and similar crimes."[57]

This criticism misses the entire point of the new statute. Under *Bajakajian,* it was already possible to forfeit one hundred percent of unreported currency if the government was able to demonstrate a nexus between the currency and another criminal offense.[58] Consequently, there was no need to enact a new statute to accomplish that goal. Rather, the point was that bulk cash smuggling is itself an inherently serious offense precisely because it is the method that criminals use to conceal or disguise the connection between their money and other criminal activity. To prevent law enforcement authorities from establishing that connection, in other words, is the *raison d'être* of bulk cash smuggling. Requiring the government to prove the nexus between the smuggling offense and other criminal activity before it could fully enforce the smuggling statute

54. 524 U.S. at 342.

55. United States v. Ursery, 518 U.S. 267, 290-91 (1996).

56. *See* USA PATRIOT Act, Pub. L. No. 107-56, § 371, 115 Stat. at 336-37.

57. *Id.*, § 371, 115 Stat. at 336-37.

58. *See supra* note 38 and related text.

would nullify the intent of the statute and reward the criminal for his success in using bulk cash smuggling as a money laundering device.

By recognizing that bulk cash smuggling has become an essential step in the commission and concealment of drug trafficking, money laundering, tax evasion and other crimes, Congress stated the obvious: it is the *practice of bulk cash smuggling* that must be deterred, whether or not the government can establish the nexus to another offense. Indeed, if the government could establish the nexus to another offense—that is, if the smuggler has done his job poorly—law enforcement could simply arrest the perpetrator or confiscate the property involved in that offense without having to resort to the new statute at all. The concern is with the smuggler who does his job well! The powers of prosecution and confiscation under the new statute were directed at him.

Terrorist financing cases provide an excellent example. If it could be shown that a person was exporting money to Pakistan, for example, to finance terrorist attacks against U.S. citizens, the money could be forfeited under the money laundering statute, 18 U.S.C. §§ 1956(a)(2)(A), 981(a)(1)(A). There would be no need to resort to the bulk cash smuggling statute. However, proving motive and intent is notoriously hard in terrorism cases. If the person has smuggled the currency in violation of the bulk cash smuggling statute, however, the ability to confiscate the smuggled currency in connection with that violation gives law enforcement the opportunity both to cut off a source of terrorist funding and to gain access to witnesses who might be encouraged to reveal the identities of the people involved in the offense.[59] Without the ability to confiscate the money, however, the incentive to cooperate simply is not there.

IV.
APPLYING THE EXCESSIVE FINES CLAUSE TO BULK CASH SMUGGLING CASES

While it is evident from the legislative history of section 5332 that Congress intended that the full forfeiture of the smuggled money in a bulk cash smuggling case would "withstand constitutional scrutiny in most cases,"[60] there will be cases where the evidence affirmatively shows that the person engaged in a bulk cash smuggling offense was not engaged in any other criminal endeavor. In those cases, it may be necessary to mitigate the forfeiture to a level somewhat below one hundred percent to avoid any violation of the Excessive Fines Clause of the Eighth Amendment.

When it passed both the House and the Senate in separate bills, section 5332 contained a subsection (d)(1) that provided as follows:

> Upon a showing by the property owner by a preponderance of the evidence that the currency or monetary instruments involved in the offense giving rise to the forfeiture were derived from a legitimate source, and were intended for a lawful

59. *See* Stefan D. Cassella, *Terrorism and the Financial Sector: Are We Using the Right Prosecutorial Tools?*, J. OF FIN. CRIME (forthcoming 2004) (paper presented at the Twenty-first Cambridge International Symposium on Economic Crime, September 9, 2003).

60. H.R. REP. NO. 107-250, at 53.

purpose, the court shall reduce the forfeiture to the maximum amount that is not grossly disproportional to the gravity of the offense.[61]

In short, paragraph (d)(1) would have codified the case law holding that whenever a challenge to a forfeiture is made under the Eighth Amendment, the burden is on the defendant to show that the forfeiture of one hundred percent of the property would be grossly disproportional to the gravity of the offense.[62] It also would have made it clear that upon finding that full forfeiture of the property involved in the offense would constitute an excessive fine, the court's role is to avoid the constitutional violation by reducing "the forfeiture to the maximum amount that is not grossly disproportional to the gravity of the offense."[63]

Subsection (d)(1) was deleted from the final version of § 5332 without explanation, but the case law it would have codified still applies.[64] Thus, if the government succeeds in establishing a bulk cash smuggling violation, the property involved in the offense is subject to forfeiture in its entirety unless the person opposing the forfeiture establishes that the money came from a lawful source and was intended for a lawful purpose. Even if the person opposing the

61. H.R. REP. NO. 107-250, at 4.

62. *See* United States v. $21,510 in U.S. Currency, 292 F. Supp. 2d 318, 323 n.3 (D.P.R. 2003) (declining to address Eight Amendment issues because the claimant did not make even a threshold showing of gross disproportionality); United States v. Powell, 2001 WL 51010 (4th Cir. 2001) (following *Ahmad, infra* this note, regarding the burden of proof on proving excesiveness); United States v. Ahmad, 213 F.3d 805 (4th Cir. 2000) (holding that the party challenging the constitutionality of the forfeiture has the burden of demonstrating excessiveness); United States v. 6040 Wentworth Avenue, 123 F.3d 685 (8th Cir. 1997) (finding the same standard for criminal forfeiture); United States v. Alexander, 108 F.3d 853 (8th Cir. 1997) (finding that because defendant has burden of making *prima facie* showing, he also has burden of establishing the value of the property forfeited); United States v. 829 Calle de Madero, 100 F.3d 734 (10th Cir. 1996) (finding that after the Government establishes a nexus between the property and the offense, the burden shifts to claimant to demonstrate gross disproportionality); United States v. One 1970 36.9' Columbia Sailing Boat, 91 F.3d 1053 (8th Cir. 1996) (holding claimant's failure to make threshold showing of gross disproportionality between the value of the property and the value of the drugs ends the court's Eighth Amendment inquiry).

63. *See Bajakajian*, 524 U.S. at 349 (Kennedy, J. dissenting) ("The only ground for reducing the forfeiture, then, is that any higher amount would be unconstitutional"); United States v. U.S. Currency in the Amount of $119,984.00, 304 F.3d 165, 175 n.7 (2d Cir. 2002) (noting that *Bajakajian* does not bar forfeiture of some amount less than one hundred percent of the seized currency but greater than zero when there is no connection to other illegal activity); United States v. 6380 Little Canyon Rd., 59 F.3d 974, 986-87 (9th Cir. 1995) (the court must limit a civil forfeiture to an appropriate portion of the asset to avoid an Eighth Amendment violation); *see also* United States v. United States Coin and Currency, 401 U.S. 715, 731 (1971) (White, J., dissenting) ("Of course, we are not free to set aside convictions or forfeitures at will. The forfeiture judgment must stand unless the Constitution commands otherwise.").

64. Some have suggested that Congress's last minute deletion of subsection (d) from § 5332 meant that Congress disapproved of the proposed language, even though it had passed both houses of Congress in separate bills, because it placed too great a limitation on the courts' constitutional duty to mitigate a forefeiture under *Bajakajian*. Others have suggested that the opposite is true: that the mitigation language in subsection (d)(1) was inconsistent with the stated objective of the new statute, which was to authorize forfeiture of one hundred percent of the smuggled currency, even if the defendant or claimant proved that it came from a lawful source. Both notions underscore the wisdom of the Supreme Court's recent admonition that speculating on the reasons why Congress did not do something is a dangerous exercise that should be avoided. *See* United States v. Craft, 535 U.S. 274 (2002) (holding that Congress's failure to enact a legislative proposal is "dangerous ground" on which to rest the interpretation of a statute; congressional inaction may only mean that a proposal intended to clarify existing law was considered unnecessary).

forfeiture makes that showing, *Bajakajian* only requires that the forfeiture be mitigated to avoid the Eighth Amendment violation. It does not require that the forfeiture be reduced to zero, nor is the court free simply to set aside the forfeiture statute and impose any amount of forfeiture that it sees fit. In enacting the forfeiture statutes, Congress has provided that *all* of the property involved in the offense is subject to forfeiture—limited only by the constitutional proscriptions embodied in the Excessive Fines Clause. In other words, the congressional mandate that all of the property involved in an offense be forfeited to the United States remains in effect, up to the point where any additional forfeiture would be constitutionally excessive.

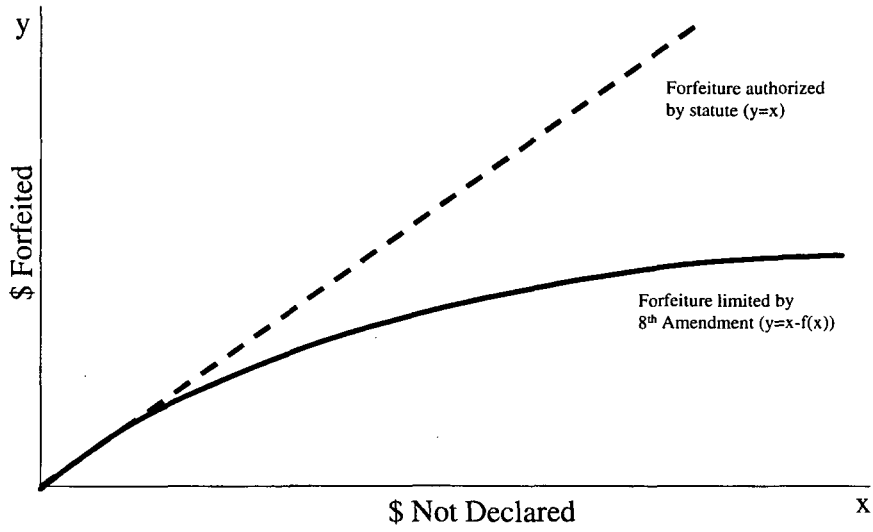
Forfeiture statutes are therefore entirely unlike statutes that set forth a maximum civil or criminal fine and give the court the unfettered discretion to impose any fine within the specified range. To the contrary, a forfeiture statute is like a statute imposing a *mandatory* fine which must be imposed unless doing so would violate the Excessive Fines Clause. [65] Stated differently, a statute such as 31 U.S.C. § 5332(b) or (c) embodies Congress's intent that *all* of the property involved in a criminal offense be forfeited to the United States, to the extent that it is constitutional to do so.

The best way to conceptualize the issue is to envision a line on a graph that begins to rise linearly but then begins to curve and flatten as mitigating and aggravating factors representing the limitations imposed by the Eighth Amendment are taken into account. Without these factors, the line would continue to rise linearly, because the amount to be forfeited would always be equal to the amount involved in the reporting offense, as section 5332 provides. But the Eighth Amendment factors—for example, the absence of a connection between the property and another crime and the maximum statutory fine—in effect weigh down the rising line so that it rises more slowly, regardless of how much money was involved in the currency reporting offense. That line represents the maximum amount of forfeiture permissible under the Excessive Fines Clause, and hence the forfeiture that the court is required to impose.

If the court were free to pick a level of forfeiture along the continuum between zero and some maximum level, as it would do when imposing a discretionary fine, it could pick any point *on or below* the line on the graph to represent the amount of forfeiture to impose. But it is the duty of a court in a forfeiture case to mitigate the forfeiture to the maximum level that would accord with the forfeiture statute without violating the Eighth Amendment, not to pick

65. *Cf.* United States v. Monsanto, 491 U.S. 600, 606 (1989) ("Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied"); United States v. Corrado, 227 F.3d 543 (6th Cir. 2000) (holding that criminal forfeiture is a mandatory aspect of the defendant's sentence); United States v. Hill, 167 F.3d 1055 (6th Cir. 1999) (holding that a court may not ignore mandatory language of forfeiture statute and give defendant option of substituting cash for forfeited items, unless section 853(p) applies). The foregoing cases involved criminal forfeiture. There is no reason to believe that civil forfeiture is any different, and there does not appear to be any case holding that a court has the discretion to mitigate a civil forfeiture other than on Eighth Amendment grounds. If the rule were otherwise, *Bajakajian* would apply differently in civil and criminal cases whereas, to the contrary, the courts uniformly hold that it applies equally in both contexts.

MITIGATION OF FORFEITURE UNDER THE EIGHTH AMENDMENT



any arbitrary point based on considerations not mandated by Eighth Amendment analysis. Thus a court must pick a point *on the line* corresponding to the maximum allowable forfeiture, just as it would do if the Eighth Amendment factors were negligible and the line rose linearly in relation to the amount of money involved in the offense.

Deferring to the Legislature

Finally, as the Supreme Court has recently emphasized, in responding to any challenge to a statute based on an alleged violation of the Eighth Amendment, a court must take into account, and defer to, the goals the legislature sought to achieve in authorizing the punishment in question.

In *Ewing v. California*,[66] the Court upheld California's "Three Strikes and You're Out" law, holding that sentencing a repeat offender to twenty-five years to life for a $1,200 grand theft offense does not constitute a violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment. The sentence, the Court held, was not grossly disproportionate to the gravity of the offense.

Writing for a three-justice plurality, Justice O'Connor said that a court undertaking an Eighth Amendment proportionality review must "accord proper deference to the policy judgments that find expression in the legislature's choice of sanctions."[67] Later in the opinion, Justice O'Connor underscored that proposition, holding that the legislature's judgment in fixing a punishment by statute is "entitled to deference."[68] Because the "Three Strikes" law reflected the

66. 538 U.S. 11, 35 (2003).
67. *Id.* at 34.
68. *Id.*

California legislature's considered policy judgment that a stiff sentence for repeat offenders was necessary to incapacitate certain criminals and to deter others, its application did not violate the Eighth Amendment.[69]

The policy judgments that Congress made in enacting the forfeiture provisions for the bulk cash smuggling statute could not be clearer. As already noted, Congress found that bulk cash smuggling is a serious law enforcement problem; that the existing penalties were insufficient in that they did not "adequately provide for the confiscation of smuggled currency;" and that the new statute made the smuggling of the currency an offense so that the currency itself "could be confiscated as the *corpus delicti* of the smuggling offense."[70] Congress included the provisions in section 5332 that authorize the forfeiture of the smuggled currency in order to accomplish those objectives. Accordingly, if a forfeiture order under section 5332 was challenged under the Eighth Amendment by a defendant or claimant arguing that the forfeiture violated the Excessive Fines Clause, a court would be required to find, based on the holding in *Ewing v. California,* that the clear intent of Congress to authorize forfeiture of the smuggled currency in order to achieve clearly identified policy goals is "entitled to deference."[71]

V.
CONCLUSION

International money laundering is a significant part of the growing globalization of crime. Once money that is derived from a criminal act, or that is intended to be used to commit such an act in the future, leaves the country where it was generated, it becomes extremely difficult to trace or recover. The best way to prevent criminal proceeds from being laundered in the international marketplace, or used to finance terrorism or other acts of wrongdoing abroad, is to make it as difficult as possible for the criminal or terrorist to remove the money from the jurisdiction in which it was generated in the first place.

By aggressively enforcing its domestic currency reporting laws, the United States has succeeded in cutting off the traditional means of injecting criminal proceeds into the global economy by forcing criminals to look for alternatives to placing their currency in the U.S. banking system. Currently, the alternative is to smuggle the criminal proceeds out of the United States in the form of bulk cash, so that it can be sold, deposited, or invested abroad.

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69. Interestingly, Justice Thomas, the author of the *Bajakajian* decision, concurred in the judgment but did not join in the plurality opinion. In his view, Justice Thomas said, "the Cruel and Unusual Punishment Clause of the Eighth Amendment contains no proportionality principle" at all. *Ewing*, 538 U.S. at 38 (Thomas, J., concurring). In *Bajakajian*, however, Justice Thomas derived the "grossly disproportional" test for forfeiture cases under the Excessive Fines Clause of the Eighth Amendment from the test the Court had used for criminal cases under the Cruel and Unusual Punishment Clause. *See Bajakajian*, 524 U.S. at 337 (citing Solem v. Helm, 463 U.S. 277, 288 (1983)) (a criminal sentence violates the Eighth Amendment if it is "grossly disproportionate" to the offense). It is thus no longer clear what the basis is for the application of the "gross disproportionality" test to forfeiture cases.

70. *See* USA PATRIOT Act, Pub. L. No. 156-70, § 371, 115 Stat. at 337.

71. *Ewing*, 538 U.S. at 34.

The Currency and Monetary Instrument Reports (CMIRs) that travelers are required to file with the Customs Service when taking more than $10,000 in currency out of the United States were intended to deter this form of international money laundering by generating a paper trail that law enforcement authorities could later follow. However, the Supreme Court's 1998 decision in *United States v. Bajakajian* left the government without an effective means of enforcing the reporting requirement. In response, Congress made bulk cash smuggling a crime, and provided that the sanctions for violating the statute would include the forfeiture of one hundred percent of the smuggled cash.

That statute is now being tested in the courts and is likely to be subjected to the same constitutional attacks, based on the Excessive Fines Clause of the Eighth Amendment, that were leveled against the CMIR provision. But in enacting the bulk cash smuggling statute, Congress was careful to articulate the policy judgments on which it based the forfeiture sanction, and it was careful to place the forfeiture provision squarely within the exception that *Bajakajian* created for property representing the *corpus delicti* of a smuggling offense. Those policy judgments are entitled to deference by the courts.

Consequently, the law enforcement agencies of the United States should aggressively enforce the bulk cash smuggling statute, and the courts should uphold those enforcement efforts against constitutional challenge. Only then will the government have a realistic opportunity to significantly diminish the role that bulk cash smuggling plays in international money laundering and the globalization of crime.

APPENDIX
REMARKS TO THE STEFAN A. RIESENFELD SYMPOSIUM

INTRODUCTION

International money laundering takes many forms, with each permutation presenting its own set of law enforcement problems. We deal, for example, with drug dealers who sell drugs in the United States and then smuggle their proceeds to Latin America so they can launder them on the black market, with foreign criminals who commit crimes in other countries and bring the proceeds here to hide or to invest, and with terrorists who raise money in the United States and use it to finance terrorist activity abroad, or raise money abroad and use it to finance terrorist acts here.

What I propose to do in the brief time allotted is to set out some examples of the various problems that arise in law enforcement with respect to each of these situations, and to discuss some of the tools we have—and that we lack—for dealing with them.

I.
LAUNDERING CRIMINAL PROCEEDS OVERSEAS

A. The Black Market Peso Exchange

Let me start with the way drug dealers launder their money in Latin America. As most people know, most drugs in this country are produced in Latin America, are smuggled into the United States from the South, and are then distributed north, east and west to the major cities. There, the money is collected—almost always in cash. The drug dealer's problem is what to do with all of the cash.[1]

Years ago, drug dealers would simply deposit their money in a bank account, sometimes using "smurfs" to deposit small sums in different banks on different days. But our success in enforcing the currency transaction reporting requirements (for example, by way of Currency Transaction Reports [CTRs], Form 8300's, and the identification requirements for purchasing money orders)[2] has, to a large extent, kept large sums of illicit currency out of the U.S. banking system. In short, the bad guys do not want to run the risk of creating a paper trail. So what do they do? Money launderers resort to a number of safeguards, but the most common is to transport and smuggle the money out of the country as currency and sell it on the black market in Latin American countries where there is a demand for United States dollars at prices below the official exchange rate.

In a typical case, the drug dealer does not handle the money himself. He turns it over to a money broker in New York, or Los Angeles or elsewhere and

1. I discussed this issue in more detail in *The Recovery of Criminal Proceeds Generated in One Nation and Found in Another*, 9 J. OF FIN. CRIME 268 (2002) (paper presented at the 19th Cambridge International Symposium on Economic Crime, Cambridge University, September 2001).

2. *See* 31 U.S.C. §§ 5313, 5324, 5325 and 5331.

the broker pays him in local currency in South America. The money then becomes the broker's problem. In order to gain a return, the broker hires couriers to transport it south via interstates, through airports, on buses, or in packages shipped via common carrier. Once the money is out of the United States he sells it to third parties—often legitimate businesspeople—who need dollars and are willing to pay enough to allow the broker to make a profit, while still paying less than the official exchange rate.

B. What Are the Problems for Law Enforcement?

Smuggling bulk cash evades the currency reporting system and it leaves no paper trail for law enforcement to follow. Under the USA PATRIOT Act[3] of 2001, it is now a crime to engage in bulk cash smuggling.[4] Still, this kind of smuggling is difficult to detect, and when it is detected, courts are still reluctant to impose the maximum penalty—forfeiture of the smuggled cash—unless the government can establish a nexus between the cash and another crime. That, of course, is often very hard to do. Also, there is no domestic version of the bulk cash smuggling statute. For example, driving down the highway with $60,000 in cash in a concealed compartment is not a crime, even if you know it was derived from a criminal offense or is intended to be used for an unlawful purpose.[5]

Moreover, just because we catch someone smuggling currency out of the country does not mean that we have probable cause to seize any other assets. For example, if law enforcement agents apprehend someone crossing into Canada with a large quantity of concealed cash, they can arrest him and seize the cash he is carrying,[6] but the arrest for smuggling cash might not, by itself, provide probable cause to seize other funds that the smuggler may have in bank accounts in the United States. If there is no such probable cause, the government would have no means of freezing those accounts before the smuggler moved the rest of his money out of the country.

The biggest problems occur, of course, once the money is out of the United States. If there is a criminal case against the drug dealer or against the money broker, a court can order him to repatriate the money.[7] This, however, presupposes that we have caught the offender and that he will obey the repatriation order. If we locate the money in a foreign bank account, it is likely to be the account of the third party who bought it on the black market. Not only is that

3. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, § 371, 115 Stat. 272, 336-39 (2001) [hereinafter USA PATRIOT Act].

4. *See* 31 U.S.C. § 5332.

5. I discussed the deficiencies in the current money laundering statutes, and proposals for rectifying those problems legislatively in *Money Laundering Has Gone Global*, THE FEDERAL LAWYER, 49:1 (Jan. 2002) at 24.

6. *See* 31 U.S.C. §§ 5316 and 5317(c).

7. 21 U.S.C. § 853(e)(4).

person entitled to assert an "innocent owner" defense under the forfeiture statutes,[8] but if he wins, the government will be required to pay his attorneys fees.[9]

Also, recovering the money from a foreign bank account requires the cooperation of the foreign bank and the foreign government. Some countries will freeze money at our request. Some will even enforce our forfeiture orders. Much more frequently, however, trying to persuade a foreign country to enforce a subpoena, to freeze assets for forfeiture under United States law, or to enforce our forfeiture judgments, is a very frustrating exercise.

This is not necessarily due to a lack of goodwill. Courts and law enforcement professionals in other countries are generally attuned to the harm caused by international money laundering, and are anxious to join forces to combat the problem whenever they are able to do so. The problem is the absence of legal tools and a statutory framework for cooperation in asset forfeiture matters between sovereign states. What is needed is a set of procedures to act as an interface between disparate law enforcement systems, so that the mutual good will among law enforcement professionals can be translated into effective international action against the proceeds of crime.[10]

Countries are not always imbued with good will and the spirit of cooperation, of course. In *United States v. Swiss American Bank*,[11] the Government convicted a money launderer in Boston, but the bank in Antigua where the money was sent refused to turn the money over to us, claiming the Antiguan government had confiscated it. The Antiguan government claimed to know nothing about it, and the bank represented that all records had been lost in a hurricane.[12] No money was ever recovered.

C. Correspondent Accounts

Our inability to reach money deposited into foreign bank accounts led to the enactment of an innovative provision in the USA PATRIOT Act. Title 18, Section 981(k) says that if criminal proceeds are deposited in an account in a foreign bank, and that bank has a correspondent United States based account at a U.S. bank, the U.S. Government can seize an amount of money equal to the criminal proceeds from the correspondent account.[13] The notion is that the foreign bank will then make itself whole by debiting the customer's foreign account, letting the customer take his objections to the court in the United States that authorized the seizure.

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8. 18 U.S.C. § 983(d).
9. 28 U.S.C. § 2465(b).
10. *See supra*, note 2.
11. 191 F.3d 30, 35 (1st Cir. 1999).
12. *Id.*
13. *See* Stefan D. Cassella, *Forfeiture of Terrorist Assets Under the USA PATRIOT Act of 2001*, 34 LAW AND POL. IN INT'L BUS. 7 (2003); Stefan D. Cassella, "Restraint and Forfeiture of Proceeds of Crime in International Cases: Lessons Learned and Ways Forward," Proceedings of The 2002 Commonwealth Secretariat Oxford Conference on the Changing Face of International Cooperation in Criminal Matters in the 21st Century (Commonwealth Secretariat, 2002), p. 183.

Obviously, there are comity problems with this. Some countries object to the notion of the United States exercising self-help in this fashion rather than going through the formal Mutual Legal Assistance Treaty, or "MLAT," process. Some banks also object that there is no guarantee that the courts in the foreign country will allow them to make themselves whole against the customer's account. Nevertheless, this new statute has been used several times, and so far it appears to be serving the purposes for which it was intended.

II.
FOREIGN CRIMES

Let me turn next to the cases where a foreign criminal commits an offense abroad and transfers the proceeds to the United States. This could involve, for example, a corrupt public official in Eastern Europe, a person engaged in the slave trade in Africa, or a person defrauding investors in Japan. The United States does not want to be the repository of the world's criminal proceeds. Until the passage of the PATRIOT Act, however, it was not a crime to launder the proceeds of most foreign crimes in the United States.

Money laundering, I should explain, is a crime only if the money being laundered is the proceeds of one of the 250 or so crimes listed in the money laundering statute.[14] Some crimes, in other words, are predicates for money laundering and some are not. Before 2001, only a handful of foreign crimes—basically drug trafficking and bank fraud—were on that list. So it was not a crime to launder, for example, the proceeds of a foreign bribery offense, or a foreign corruption offense.

The PATRIOT Act expanded the list of foreign crimes that are considered to be predicates for money laundering. The list now includes, in addition to drug trafficking, all crimes of violence, public corruption, and other crimes like arms trafficking. The list, however, still does not contain fraud (except for bank fraud) or tax evasion.

A. Tracing Issues

Another issue that arises with respect to both foreign and domestic crimes concerns tracing. Under most federal laws, our ability to recover laundered criminal proceeds—and to prosecute the money launderer—depends on whether we can trace the money to the original criminal offense. For example, if another country asserts that John Doe stole money from innocent victims, and sent the money to the United States, and we find money held by Doe in the United States, there is not much we can do unless we can trace the money to the crime that occurred abroad.

For us to prosecute Doe for money laundering, we have to show that the money he moved into the United States was actual criminal proceeds, or was

14. *See* Laundering of Monetary Instruments, 18 U.S.C. § 1956(c)(7), listing the "specified unlawful activities" for money laundering.

otherwise sent here in furtherance of the criminal offense.[15] Similarly, for us to move against the money itself in a civil forfeiture case, or to restrain it pre-trial in a criminal case, we would have to be able to trace it to the foreign offense. In neither case would it be sufficient to show that the money in the United States simply belonged to the person who committed the foreign crime. Strict tracing by a forensic accountant is required. The one case where strict tracing is not required is when a court imposes a money judgment on a defendant as part of his sentence in a criminal case.[16] But such post-conviction remedies are hollow if, as most courts hold, courts lack the pre-trial authority to restrain assets that are not directly traceable to the offense.

This situation improved to some extent in 2000 with the enactment of a statute allowing federal courts to enforce foreign judgments against assets in the United States without requiring strict tracing.[17] But to enforce our own statutes, strict tracing is still required. To make the money laundering and asset forfeiture tools effective against international money launderers, we need the ability to treat electronic funds as fungible property, and the ability to restrain money pre-trial to ensure that it is available to satisfy a forfeiture judgment whether it is directly traceable to the underlying offense or not.

B. Parallel Transactions

A related problem concerns parallel transactions such as those carried out by hawalas and other informal money exchange systems. A typical scenario might be described as follows: a person with the proceeds of slave trafficking in Sudan wants to transfer that money to the United States, so he goes to his local money exchanger and says, "Here's $100,000, send it to Mr. X in New York." The money exchanger then gives the $100,000 to someone in Egypt, who in turn directs his cousin in New Jersey to give another $100,000 to Mr. X in New York.

In this scenario, there is only one transaction over which we have jurisdiction: the New Jersey/New York transaction. But does that transaction involve any criminal proceeds? Or were the proceeds involved in, and only involved in, the Sudan/Egypt transaction? There is a recent case holding that outbound wire transfers cannot be broken up into their constituent parts but rather must be considered a unified transaction for purposes of the money laundering statutes.[18]

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15. *See* 18 U.S.C.§ 1956(a)(2)(A).

16. *See* United States v. Puche, 350 F.3d 1137 (11th Cir. 2003) (upholding forfeiture of substitute assets in a money laundering case)

17. 28 U.S.C. § 2467.

18. United States v. Dinero Express, 313 F.3d 803 (2nd Cir. 2002) (holding that the course of conduct—sending money through a money remitter—that begins with a sum of money in one country and ends with a related sum in another country, constitutes a transfer, even though the transaction was accomplished through offsetting debits and credits, so that no single step involved the movement of money across the border).

Whether that can be extended, without remedial legislation, to what I call the left-pocket/right-pocket problem, is not at all clear.[19]

III.
TERRORIST FINANCING

Let me conclude with a few words about terrorist financing. Obviously, terrorist financing presents all kinds of complicated and serious problems for law enforcement. These include all of the bulk-cash smuggling and tracing problems I have already mentioned. Another problem I want to mention here concerns what I call "reverse money laundering."[20]

Traditionally, all of our U.S. money laundering statutes and enforcement efforts have been backward looking. We have been concerned with the source of the money—did it come from drugs or corruption or fraud or trafficking in human misery?—and with what the offender is doing with the money to conceal or disguise his offense.

In terrorism cases, the bad guy is going through the same steps to conceal or disguise his money, but not because it is the proceeds of a crime. Indeed, money used to finance terrorism is often raised as charitable contributions, or is money from someone's personal wealth, and does not represent criminal proceeds at all. Rather, what the bad guy tries to conceal or disguise is the *future use* of that money to finance a terrorist act such as blowing up a train in New Jersey, launching a chemical attack on Chicago, or destroying the Golden Gate Bridge.

This kind of money laundering—or reverse money laundering—is forward-looking. The idea is not to hide dirty money to make it clean, but to hide clean money until it can be used to do something evil. It is at least as serious as ordinary money laundering. In fact, it is probably much more serious but it is not illegal under any statute that requires the prosecutor to prove that the money being laundered is the proceeds of a prior criminal act.

We have a few tools that deal with reverse money laundering. One statute makes it a crime to transport any money, clean or dirty, into or out of the United States for the purpose of facilitating another crime.[21] Others specifically make it an offense to raise money for terrorism.[22] But we have no domestic reverse money laundering statute. This is a problem Congress will have to address.

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19. The name reflects the fact that this problem arises anytime dirty money goes into someone's left pocket and clean money then comes out of his right pocket.

20. Stefan D. Cassella, *Reverse Money Laundering*, 7 J. OF MONEY LAUNDERING CONTROL 92 (2003) (paper presented at the twentieth Cambridge International Symposium on Economic Crime, Cambridge University, September 2002).

21. 18 U.S.C. §1956(a)(2)(A).

22. 18 U.S.C. §§ 2339A, 2339B and 2339C.

IV.
CONCLUSION

International money laundering is a growing problem with which law enforcement professionals are dealing on a daily basis. The tools enacted in recent legislation have proven useful in countering some money laundering methods, but the practice of laundering money without regard to political borders is evolving quickly and becoming more sophisticated and more complex. New tools are needed to address this threat to the ability of law enforcement to protect our institutions from corruption, from misuse at the hands of organized crime, and from being used as the conduit for financing terrorism. Those of us who deal with these problems day in and day out have identified the need for new legislation. It is up to Congress to enact it into law.

Berkeley Journal of International Law

Volume 22 | Issue 1 Article 6

2004

The Merging of the Anti-Money Laundering and Counter-Terrorism Financial Enforcement Regimes after September 11, 2001

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The Merging Of The Anti-Money Laundering And Counter-Terrorism Financial Enforcement Regimes After September 11, 2001

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INTRODUCTION

Globalization, technology, free trade, and consumerism have increasingly brought the world together. Today, individuals, organizations, and governments can move people, goods, services, and capital almost as if there were no international borders. Criminals, both petty and transnationally organized, can and do easily take advantage of the ability to do business anyplace, from anywhere, instantaneously.

Governments and law enforcement agencies have struggled to cope with the pressures of international crimes such as counterfeiting, illegal immigration, plane and vehicle theft, stolen art, and illicit trafficking of arms, nuclear materials, narcotics, aliens, and so on. Their failures empower mom-and-pop gangs, whether they are Latin American drug lords or Russian mafia, as well as more established groups, such as Italian organized crime, the Yakuza, and their U.S. counterparts, who are able to enter new markets and participate in new products and businesses, either alone or in joint ventures with other gangs. As politicians struggle to explain their inability to effectively control the growth of transnational crime, the rhetoric and efforts to develop an international money movement enforcement regime have increased.

Now law enforcement is fighting back. By designing and elaborating new enforcement and international cooperation regimes, agents hope to globalize and modernize laws and practices to the point where they can compete with criminals on an even playing field. One important area of cooperation has been the regulation of the international movement of money, for which national and international laws are relatively recent. These anti-money laundering (AML) laws reflect a steadfast commitment by world governments to combat illicit drug trafficking and other forms of criminal activity, especially as conducted by organized crime.

A major U.S. response to the terrorist attacks of September 11, 2001, was to pursue the money used by the perpetrators so that their supporters' ability to conduct future attacks would be diminished. The Bush administration initiated a series of agreements in international organizations, issued executive orders, and quickly passed sweeping legislation to curb the financing of terrorism. These counter-terrorism financial enforcement (CTFE) measures merged with the AML regime, with which they are closely linked by the similarity of their goals. This paper focuses on the new AML/CTFE regime, and how the United States and various intergovernmental organizations have extended existing AML laws and conventions to cover additional persons, products and situations, and to encompass new strategies and implementation mechanisms to cover CTFE concerns as well. As transnational crime and terrorism remain threats to national and personal security, the laundering of funds to support them will increase and the new AML/CTFE regime will expand accordingly, gathering a momentum of its own and interacting with other areas of law.

Part I of this article reviews some of the major U.S. government statutes and regulations in the AML realm, describing how they laid out and expanded

the due diligence requirements all financial institutions must meet. It goes on to detail how these AML measures were merged into a new AML/CTFE regime following the terrorist attacks of September 11, 2001. In particular, I examine the pertinent executive orders and infrastructural changes, as well as the enactment of the USA PATRIOT Act. Part II identifies the key international organizations whose work has catapulted this regime onto the worldwide stage, including global institutions (like the United Nations and the Financial Action Task Force on Money Laundering) and regional ones (such as those in Europe and the Americas). Part III analyzes some enforcement actions undertaken to combat money laundering and terrorist financing with a focus on the challenges and difficulties they present for law enforcement officials. In Part IV, I describe the ways in which the new AML/CTFE regime has affected my job as an international corporate lawyer and offer suggestions on how to improve the regime.

I.
THE U.S. ANTI-MONEY LAUNDERING REGIME

Since the initiation of international anti-money laundering (AML) efforts in the mid-1980's, various substantive mandates have been established.[1] Nations are now required to criminalize money laundering activities through the proactive tracing, freezing, and seizing of the instrumentalities and proceeds of serious crime, and the forfeiting of them to law enforcement personnel.[2] Financial institutions and their employees must practice what is known as due diligence. They are bound by law to help law enforcement officials by "knowing their customers"; identifying and reporting suspicious transactions to authorities; training employees; hiring compliance officers; and obtaining outside audits of their compliance with AML standards. Neither governments nor financial institutions may cite secrecy or privacy as a reason for refusing to follow any of these obligations.

The United States spurred the growth of the AML regime early on and has been a leader in its expansion, both to cover more entities and activities, as well as nations. Its main AML provisions are found in Titles 12, 18 and 31 of the U.S. Code.

The Bank Secrecy Act of 1970 (BSA),[3] a precursor to AML efforts, was intended to deter money laundering and the use of secret foreign bank accounts by improving the detection and investigation of criminal, tax, and regulatory

1. For background on some of the early AML law, see Bruce Zagaris & Sheila M. Castilla, *Constructing an International Financial Enforcement Subregime: The Implementation of Anti-Money-Laundering Policy*, 19 BROOK. J. INT'L L. 871, 872-78 (1993).

2. The purpose of forfeiture is to disable the criminal from continuing to perpetrate crimes and to distribute to law enforcement and/or victims the ill-gotten gains. Indeed, a good portion of the budgets of law enforcement agencies in the U.S. and other countries comes from forfeiture, and an enormous cottage industry dealing with the freezing and forfeiture of assets has arisen. For background on AML forfeiture laws, see DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES (1998).

3. Bank Secrecy Act of 1970, Pub. L. No. 91-508, 84 Stat. 1114 (1970) (codified as amended in scattered sections of 12 U.S.C., 15 U.S.C., 18 U.S.C., and 31 U.S.C.).

violations. It demanded an investigative "paper trail" for large currency transactions by establishing regulatory reporting standards and requirements, and imposed civil and criminal penalties for noncompliance.[4]

The Money Laundering Control Act of 1986,[5] part of the Anti-Drug Abuse Act of 1986,[6] created three new criminal offenses for money laundering activities by, through, or to a financial institution: knowingly helping launder money; knowingly engaging in (including by being willfully blind to) a transaction of more than $10,000 that involves property acquired through criminal activity; and structuring transactions to avoid the BSA reporting requirements.

The Anti-Drug Abuse Act strengthened the AML scheme by significantly increasing civil and criminal sanctions for laundering crimes and BSA violations, including forfeiture of "any property, real or personal, involved in a transaction or attempted transaction" in violation of the reporting laws;[7] requiring more precise identification and recording of cash purchases of certain monetary instruments; allowing the Department of the Treasury to obligate financial institutions to file additional, geographically targeted reports;[8] requiring Treasury to negotiate bilateral international agreements covering the recording of large U.S. currency transactions and the sharing of such information; and increasing the criminal sanctions for tax evasion when money from criminal activity is involved.

The Housing and Community Development Act of 1992[9] allows regulators to close or seize financial institutions that violate AML statutes by suspending or removing institution-affiliated parties who have violated the BSA, or been indicted for money laundering or criminal activity under it, and appointing a conservator or receiver, or by terminating the institution's charges. The Act further forbids any individual convicted of money laundering from unauthorized participation in any federally insured institution.

Additionally, the Act requires Treasury to issue regulations compelling national banks and other depository institutions to identify which of their account holders (other than other depository institutions or regulated broker dealers) are non-bank financial institutions such as money transmitters or check cashing services. Pursuant to the Act, Treasury, along with the Federal Reserve, promulgated regulations obligating financial institutions and other entities that cash checks, transmit money, or perform similar services to maintain records of domestic and international wire transfers so that these can be made available for law enforcement investigations. The Act also established a BSA Advisory

4. See, for example, I.R.S. CURRENCY TRANSACTION REPORT FORM 4789, which requires banks to report any transfer of funds in an amount greater than $10,000. In some instances, this monetary threshold can sink as low as $3,000. 31 C.F.R. § 103.29 (2003).

5. Money Laundering Control Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended at 18 U.S.C. §§ 1956-57).

6. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended in scattered sections of the U.S.C.).

7. 31 U.S.C. § 5317(c) (2003).

8. *See* 31 C.F.R. § 103.26 (2003).

9. Housing and Community Development Act of 1992, Pub. L. No. 102-550, 106 Stat. 3672 (codified as amended in scattered sections of the U.S.C.).

Group that includes representatives from the departments of Treasury and Justice and the Office of National Drug Control Policy and other interested persons and financial institutions. The group's main goal is to develop harmonious private-public cooperation to prevent money laundering.

The Act also gave Treasury the authority to require financial institutions to adopt AML programs that include internal policies, procedures, and controls; designation of a compliance officer; continuation of an ongoing employee training program; and an independent audit function to test the adequacy of the program. Financial institutions and their employees are also required to file suspicious activity reports on transactions relevant to possible violations of law or regulations. However, the Act protects institutions and their employees from civil suits arising from such reports. The American Bankers' Association and the banking industry had long sought such a safe harbor.[10] Yet a financial institution or employee may not disclose to the subject of a referral or grand jury subpoena that a criminal referral has been filed or a grand jury investigation has been started concerning a possible crime of money laundering or violation of the BSA. Employees who improperly disclose information concerning a grand jury subpoena for bank records are subject to prosecution.

Together, the above-mentioned requirements comprise the due diligence standards imposed on institutions covered by AML laws.[11] They represent far-reaching mandates of information-sharing between private entities and governmental law enforcement agencies. They override privacy statutes in the name of enhanced crime-fighting capabilities. They also erode the contractual and ethical principles of privacy and confidentiality that are important to banks, financial institutions and intermediaries, as well as professionals involved in the international transfer of wealth.[12]

Thus, when new regulations were proposed in 1998 that would have required banks and eventually other financial institutions to develop "Know Your Customer" programs,[13] the industry balked. Bankers knew what broad implications for private banking and offshore accounts the imposition of such requirements would have in forcing them to design, implement, and regularly update and adjust their "Know Your Customer" internal control systems. Due to enor-

10. For more information on the ABA's involvement in the U.S. AML scheme, see ANTONIO CALZADA ROVIROSA ET AL., ANTI-MONEY LAUNDERING AND ANTI-TERRORIST FINANCING POLICY IN THE POST-SEPTEMBER 11TH ERA: A PRELIMINARY ANALYSIS OF THE IMPACT ON FINANCIAL INSTITUTIONS IN THE UNITED STATES 4.2.1 (2002).

11. Other statutes also added to the standards of due diligence. *See, e.g.*, Money Laundering and Financial Crimes Strategy Act of 1998, Pub. L. 105-310, 112 Stat. 2941 (requiring the Treasury to work with state and local officials and to plan and implement a national AML strategy).

12. *See* Antony G.D. Duckworth, *The Trust Offshore*, 32 VAND. J. TRANSNAT'L L. 879, 927-29 (1999).

13. The Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, and the Office of Thrift Supervision simultaneously proposed substantially similar rules. *See, e.g.*, Know Your Customer, 63 Fed. Reg. 67536 (proposed Dec. 7, 1998).

mous opposition from an unusual coalition of private sector groups from both the far left and far right, the proposed regulations were withdrawn.[14]

But not for long. Just two and a half years later, the USA PATRIOT Act[15] amended section 352 of the BSA, requiring financial institutions to practice enhanced due diligence on high-risk products, including those aimed at servicing persons on certain lists of designated terrorists and Senior Foreign Political Figures (also known as Politically Exposed Persons); private banking clients; certain financial intermediaries; foreign shell banks; foreign correspondent accounts; as well as transactions with non-cooperative countries and territories.[16] Although not quite as stringent as the earlier proposed regulations would have been, the new requirements were similar in many respects and indeed are often referred to as "Know Your Customer" rules.[17]

American leadership on the international financial enforcement front peaked in 2001 with new withholding regulations that had a dramatic impact on foreign investment in the United States. They required foreign investors to reveal the ultimate beneficial ownership of complex structures that include multiple layers of businesses or else incur a 31% withholding tax on all receipts from their U.S. investments, including dividends, capital gains, royalties, and interest.[18] Fiduciaries and their counsel had to review over 200 pages of extremely complex rules that distinguish among complex, simple, and grantor trusts and repeatedly cross-reference various sections of the Internal Revenue Code and Internal Revenue Service regulations.[19] Understanding the dense and complicated language was all the more difficult for non-English speakers. Hence, there arose a proliferation of model "Know Your Customer" agreements with countries less than ninety days before the regulations took effect.[20]

Banks and fiduciaries also needed to enforce the Qualifying Intermediary Regulations by implementing a new bureaucracy, complete with regular audits

14. *See, e.g.*, Know Your Customer, 64 Fed. Reg. 14845 (withdrawn Mar. 29, 1999); Robert O'Harrow, Jr., *Disputed Bank Plan Dropped*, WASH. POST, Mar. 24, 1999, at E1.

15. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of the U.S.C.).

16. The FATF later incorporated the idea into its 2003 revision of its Recommendations. *See* Press Release, Organisation for Economic Co-operation and Development, New Anti-Money Laundering Standards Released (June 20, 2003), *available at* http://www.oecd.org/document/25/0,2340,en_2649_201185_2789401_1_1_1_1,00.html.

17. *See* BASEL COMMITTEE ON BANKING SUPERVISION, CUSTOMER DUE DILIGENCE FOR BANKS (2001); BASEL COMMITTEE ON BANKING SUPERVISION, CONSOLIDATED KYC RISK MANAGEMENT (2003) (a supplement to the former).

18. *See* PRICEWATERHOUSECOOPERS, THE NEW US TAX WITHHOLDING RULES (2001), *available at* http://www.pwcjp-tax.com/eg/library/gets/17/1707e.pdf.

19. To better comprehend how difficult it was for the industry to understand the new rules, see CITIBANK SWITZERLAND, NEW US REGULATIONS ON US WITHHOLDING TAX ON DIVIDENDS AND INTEREST AS OF 1 JANUARY 2001 (2000), *available at* http://www.citibank.com/ipb/europe/pdf/swiss/non_us_help.pdf.

20. *See, e.g.*, GUERNSEY FINANCIAL SERVICES COMMISSION, NEW U.S. WITHHOLDING TAX RULES (Aug. 1, 2000), *available at* http://www.gfsc.guernseyci.com/news/archive/uswitholdingtax.html.

by the IRS or another entity approved by the IRS.[21] Simultaneously, they had to review, with the aid of newly-purchased bureaucratic software, the latest changes to the U.S. unilateral extraterritorial export control laws such as the Foreign Narcotics Kingpin Designation Act.[22] They also had to buy separate software and hire separate compliance officers for the Office of Foreign Asset Control regulations. Indeed, due to the complex nature of the two sets of regulations, it would be foolhardy to try to implement both through one compliance officer.

II.
THE U.S. COUNTER-TERRORISM FINANCIAL ENFORCEMENT REGIME[23]

Shortly after the September 11, 2001, terrorist attacks, President Bush issued a series of executive orders extending CTFE laws, which are intended to dry up the funding of terrorists and terrorist organizations. These orders were followed by the establishment of new investigative teams in numerous law enforcement agencies and the passage of the USA PATRIOT Act, which criminalized various business and financial transactions, expanded law enforcement powers, and imposed new due diligence measures on the private sector that weakened privacy and confidentiality laws and increased penalties for non-compliance with regulatory efforts.

A. U.S. Sanctions Against Terrorists and Terrorist Organizations[24]

On September 24, 2001, President George W. Bush issued an executive order that immediately froze U.S. financial assets of, and prohibited U.S. transactions with, twenty-seven different entities.[25] The listed entities included terrorist organizations, individual terrorist leaders, a corporation that serves as a front for terrorism, and several nonprofit organizations.[26] The executive order was issued under the authority of the International Emergency Economic Powers Act[27], the National Emergencies Act,[28] section 5 of the United Nations Participation Act of 1945, as amended,[29] and Title 3, section 301 of the U.S. Code.

21. For a discussion of the QI regime, see TIM BENNETT, TOLLEY'S INTERNATIONAL INITIATIVES AFFECTING FINANCIAL HAVENS 124-25 (2001).

22. Foreign Narcotics Kingpin Designation Act, Pub. L. No. 106-20, 113 Stat. 1606, 1626-11636 (1999) (codified as amended at 21 U.S.C. §§ 1901-08).

23. This section is derived substantially from Bruce Zagaris, *The Merging of the Counter-Terrorism and Anti-Money-Laundering Regimes*, 34 L. & POL'Y INT'L BUS. 45, 48-73 (2002).

24. This section is derived substantially from Bruce Zagaris, *U.S. Initiates Sanctions Against bin Laden and Associates*, 17 INT'L ENFORCEMENT L. REP. 480 (2001).

25. Exec. Order No. 13,224, 3 C.F.R. 786, 790 (2001), *reprinted as amended in* 50 U.S.C.A § 1701 (2002).

26. Remarks on United States Financial Sanctions Against Foreign Terrorists and Their Supporters and an Exchange with Reporters, 37 WEEKLY COMP. PRES. DOC. 1364 (Sept. 24, 2001) [hereinafter Remarks].

27. 50 U.S.C. § 1701 *et seq.* (2001).

28. 50 U.S.C. § 1601 (2001).

29. 22 U.S.C. § 287(c) (2001).

President Bush also cited as legal bases United Nations Security Council Resolution 1214 of December 8, 1998, Resolution 1267 of October 15, 1999, Resolution 1333 of December 19, 2000, and Resolution 1363 of July 30, 2001.[30]

The Administration believed, as it still does, that many of the targeted terrorist individuals and groups, such as Osama bin Laden and Al Qaeda, operate primarily overseas and have little money in the United States.[31] As a result, it announced to foreign governments that elected not to block these terrorists' ability to access funds in foreign accounts, or to share information, that the United States has the authority to freeze a foreign bank's assets and transactions in the United States. Legally, the executive order authorizes this action by empowering the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, to take whatever action may be necessary or appropriate.[32]

The following persons are subject to the blocking order: (1) foreign persons determined by the Secretary of State to have committed, or to pose a significant risk of committing, acts of terrorism that threaten the security of the United States, its foreign policy, economy, or citizens; (2) persons determined by the Secretary of the Treasury to be owned or controlled by, or to act for or on behalf of any persons listed under the order or any other persons determined to be subject to it; (3) persons determined by the Secretary of the Treasury to assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, such acts of terrorism or those persons listed under the order or determined to be subject to it; (4) persons determined by the Secretary of the Treasury to be otherwise associated with those persons listed under the order or determined to be subject to it.[33]

The executive order's other principal prohibitions include: (1) transacting or dealing in blocked property either by U.S. entities (including overseas branches, but not foreign subsidiaries) or within the United States; (2) for American entities and those in the United States only, evading or avoiding, or attempting to evade or avoid, any of the order's prohibitions; (3) conspiring to violate any of the order's prohibitions; and (4) making donations intended to relieve human suffering to persons listed under the order or determined to be subject to it.[34]

Practically speaking, the terrorist sanctions introduced by Executive Order 13,224 largely overlap already existing U.S. terrorist sanctions administered by the Department of Treasury Office of Foreign Assets Control; those sanctions include the Terrorism Sanctions Regulations[35] and the Foreign Terrorist Organizations Sanctions Regulations.[36] Under the Terrorism Sanctions Regulations,

30. Exec. Order No. 13,224, *supra* note 25, at 786.
31. *Id.* at 790; Remarks, *supra* note 26.
32. Exec. Order No. 13,224, *supra* note 25, at 789.
33. *Id.* at 787.
34. *Id.* at 788. The last prohibition only applies to donations made by U.S. nationals. *Id.*
35. Exec. Order No. 12,947, 31 C.F.R. 595 (2001), *reprinted as amended in* 50 U.S.C.A § 1701 (2003).
36. 31 C.F.R. § 597 (2001), *reprinted as amended in* 50 U.S.C.A § 1701 (2003).

the office blocks the property of persons posing a significant risk of disrupting the Middle East peace process. Under the Foreign Terrorist Organizations Sanctions Regulations, U.S. financial institutions must block all funds in which foreign terrorist organizations have an interest. Most of the persons listed in the executive order were already listed as specially designated global terrorists under the Terrorism Sanctions Regulations or as foreign terrorist organizations under the Foreign Terrorist Organizations Sanctions Regulations.[37]

But the new sanctions also significantly expanded on existing ones. First, they are broader than the Terrorism Sanctions Regulations because their reach extends beyond terrorists that pose a significant risk of disrupting the Middle East peace process. Second, and most importantly, the sanctions are broader than the Foreign Terrorist Organizations Sanctions Regulations in that they require blocking actions by all U.S. entities, not just financial institutions. Third, the new sanctions make it easier to designate more individuals as terrorists because anyone "associated" with terrorists can be listed. Now, the U.S. government may block the U.S. assets of, and bar U.S. market access to, foreign banks that can be linked to terrorists in any way, unless they agree to freeze those terrorists' assets. While foreign subsidiaries appear to be beyond the scope of the executive order, any link between them and a terrorist could be treated as an "association" warranting sanction.

B. New U.S. Investigative Teams Targeting Terrorist Financial Networks[38]

Creating lists of terrorists is not enough to establish a working CTFE regime; the proper infrastructure is also necessary to undertake this work successfully. To that end, the United States has established new intra- and interagency groups, such as the Policy Coordinating Committee on Terrorist Financing and Operation Green Quest, to prioritize the identification of terrorists and the blocking of their finances.[39] To organize the high-level effort against terrorist financing, the National Security Council established the Policy Coordinating Committee on Terrorist Financing soon after the attacks of September 11. Its purpose is to vet, approve, and recommend proposed strategic policy relating to terrorist financing, and to coordinate U.S. efforts in that direction.[40]

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37. For a complete and current list of individuals and organizations subject to blocking orders promulgated under the authority of Executive Order 13,224, the Terrorism Sanctions Regulations, the Terrorism List Governments Sanctions Regulations, and the Foreign Terrorist Organizations Sanctions Regulations, see OFFICE OF FOREIGN ASSETS CONTROL, WHAT YOU NEED TO KNOW ABOUT U.S. SANCTIONS, *available at* http://www.treas.gov/offices/eotffc/ofac/sanctions/terrorism.html (n.d.) [hereinafter OFAC List].

38. This section is derived substantially from Bruce Zagaris, *U.S. Forms New Investigative Team to Target Terrorist Financial Networks*, 17 INT'L ENFORCEMENT L. REP. 519 (2001).

39. *See, e.g., Counterterror Initiatives in the Terror Finance Program: Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 108th Cong. 5 (2003) (statement of David D. Aufhauser, General Counsel, U.S. Department of the Treasury) [hereinafter Aufhauser]; *The Financial War on Terrorism: New Money Trails Present Fresh Challenges: Hearing Before the Senate Comm. on Finance*, 107th Cong. 10 (2002) (statement of Jimmy Gurulé, Under Secretary for Enforcement, U.S. Department of Treasury) [hereinafter Gurulé].

40. *See* Aufhauser, *supra* note 39, at 5.

In October 2001, the U.S. Treasury Department created a new investigative team to target terrorist organizations fronting as legitimate businesses and organizations. Operation Green Quest includes prosecutors from the Justice Department as well as investigators from the Internal Revenue Service, the Customs Service, the Federal Bureau of Investigation, and other agencies.[41] By taking a systems-oriented approach, the group tackles terrorist financing in a different manner from other similar agencies.[42] It is intended to be proactive, identifying future sources of terrorist financing and dismantling their activities before they can take root.[43] Thus, it has targeted activities that have been connected with terrorist financing, such as counterfeiting, credit card fraud, drug trafficking, and cash smuggling, as well as illicit charities and financial institutions, and *hawalas,* the undocumented asset transfers common in the Middle East and Asia.[44]

The FBI has also established its own CTFE agency: the Terrorist Financing Operations Section (TFOS) of the FBI's Counterterrorism Division. TFOS participates on the Policy Coordinating Committee on Terrorism Financing and serves as a mini-version of that body within the FBI.[45] It also provides intelligence and investigative support to field offices, other agencies, and foreign governments.[46] TFOS's work has led to many successful law enforcement actions. With the assistance of foreign authorities, TFOS disrupted Al Qaeda financing in the United Arab Emirates, Pakistan, Afghanistan, and Indonesia.[47] In the United States, TFOS efforts have resulted in the dismantling of a Hezbollah procurement and fund-raising network tied to cigarette smuggling and a charity that was sending money to Al Qaeda.[48]

The establishment of the task forces illustrates the depth of the U.S. commitment to CTFE and dedication to combining the many areas of expertise of various agencies to maximize success. The government is training investigators to think in new ways, developing international relationships, and cooperating with the private sector. But these efforts face a daunting infrastructural challenge in the enormous reorganization of the U.S. government made necessary by the establishment of the Department of Homeland Security, which has led to turf wars, funding and staffing problems, and demoralization.[49] It is hoped that the new Executive Office for Terrorist Financing and Financial Crimes within the

41. Peter Spiegel, *US Team Created to Target al-Qaeda Finances*, FIN. TIMES, Oct. 26, 2001, at 5.

42. Gurulé, *supra* note 39, at 10.

43. *See* Spiegel, *supra* note 41.

44. *Id.*

45. *Counterterror Initiatives in the Terror Finance Program: Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 108th Cong. 2-3 (2003) (statement of John S. Pistole, Assistant Director, Counterterrorism Division, Federal Bureau of Investigation).

46. *Id.* at 4-5.

47. *Id.*

48. *Id.* at 12.

49. *See* John Mintz, *Government's Hobbled Giant*, WASH. POST, Sept. 7, 2003, at A1.

Department of the Treasury can successfully lead U.S. AML/CTFE efforts during the transition period and beyond.[50]

C. *The USA PATRIOT Act*[51]

On October 26, 2001, President George W. Bush signed the USA PATRIOT Act into law.[52] Title III of the Act, concerning efforts designed to combat international money laundering and terrorism financing, greatly strengthened the CTFE regime and even more fully incorporated AML schemes into it, such as through enhanced due diligence requirements.

Section 311 of the Act added a new section, 5318A, to the Bank Secrecy Act. This section gives the Secretary of the Treasury discretionary authority to impose one or more of five special measures on foreign jurisdictions or their institutions, foreign financial institutions, or one or more types of accounts, if he determines that the entity poses a "primary money laundering concern" to the United States. The special measures include: (1) requiring additional record-keeping or reporting for particular transactions; (2) requiring identification of the foreign beneficial owners of certain accounts at a U.S. financial institution; (3) requiring identification of customers of a foreign bank who use an interbank payable-through account opened by a foreign bank at a U.S. bank; (4) requiring the identification of customers of a foreign bank who use certain correspondent accounts opened by that foreign bank at a U.S. bank; and (5) after consultation with the Secretary of State, the Attorney General, and the Chairman of the Federal Reserve Board, restricting or prohibiting the establishment or maintenance of certain interbank correspondent or payable-through accounts. Measures (1) through (4) cannot be imposed for more than 120 days except by regulation, and measure (5) may only be imposed by regulation.

Section 313 added subsection (j) to 31 U.S.C. § 5318 to prohibit depository institutions and securities brokers and dealers operating in the United States from establishing, maintaining, administering, or managing correspondent accounts for foreign shell banks, other than shell bank vehicles affiliated with recognized and regulated depository institutions. On December 14, 2002, final rules were issued on obtaining certain information with respect to correspondent accounts for foreign shell banks.[53] As evidence that terrorist supporters use shell banks and correspondent accounts to collect and move money, Treasury cited its November 7, 2001, listing of Bank al-Taqwa, a Bahamian-based shell bank, as a terrorist financing source.[54]

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50. *See* Press Release, U.S. Department of Treasury, U.S. Treasury Department Announces New Executive Office for Terrorist Financing and Financial Crimes (Mar. 3, 2003), *available at* http://www.ustreas.gov/press/releases/js77.htm.

51. This section is derived substantially from Bruce Zagaris, *U.S. Enacts Counterterrorism Act with Significant New International Provisions*, 17 INT'L ENFORCEMENT L. REP. 522 (2001).

52. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

53. 31 C.F.R. § 103 (2002).

54. *The PATRIOT Act Oversight: Investigating Patterns of Terrorist Financing: Hearing Before the House Financial Subcomm. on Oversight and Investigations*, 108th Cong. 10 (2002)

Pursuant to section 314, the Secretary of the Treasury issued regulations on September 26, 2002, to encourage cooperation among financial institutions, financial regulators, and law enforcement officials, and to permit the sharing of information by law enforcement and regulatory authorities with those institutions regarding persons reasonably suspected, on the basis of credible evidence, of engaging in terrorist acts or money laundering activities.[55] The section also allows—with notice to the Secretary of the Treasury—the sharing among banks of information regarding possible terrorist or money laundering activity and requires the Secretary of the Treasury to publish a semi-annual report containing a detailed analysis of patterns of suspicious activity and other appropriate investigative insights derived from suspicious activity reports and law enforcement investigations. These provisions give financial institutions and their employees a "qualified" safe harbor protection from liability when they provide information to another institution about a former employee's employment record.[56]

Thus, Treasury significantly expanded the role of the Financial Crimes Enforcement Network (FinCEN), an information conduit between law enforcement and financial institutions.[57] To obtain customer account information, federal law enforcement agencies had merely to submit a form to FinCEN that required them only to identify the agency and certify that the information pertained to a case concerning money laundering or terrorism.[58] After it received the form, FinCEN would ask financial institutions and businesses to supply information on the relevant accounts or transactions.[59]

However, the system proved problematic. Financial institutions received many information requests per day, often addressed to the wrong person, and had only a week to respond.[60] In response to complaints from the American Bankers Association,[61] FinCEN stopped all such information requests from U.S. law enforcement agencies for four months in order to retool the system to give financial institutions more time and to solve other problems.[62] Since then, the

(statement of Juan C. Zarate, Deputy Assistant Secretary, Terrorism and Violent Crime, U.S. Department of the Treasury).

55. 31 C.F.R. §§ 103.100, 103.110 (2002).

56. *See* Robert B. Serino, *Money Laundering, Terrorism, & Fraud*, ABA BANK COMPLIANCE 22 (Mar/April 2002).

57. *See* FINANCIAL CRIMES ENFORCEMENT NETWORK (FINCEN), 2003-2008 STRATEGIC PLAN (2003). Treasury has also promised to provide the financial sector with more information, such as typologies of money laundering or terrorist financing schemes and updates on the latest criminal trends. *See* Jimmy Gurulé, Under Secretary for Enforcement, Department of the Treasury, Speech Before the American Bankers' Association Money Laundering Conference (Oct. 22, 2001), *at* http://usembassy.state.gov/colombia/wwwsjg02.shtml.

58. *To Relief of Many, U.S. Treasury Halts Flood of '314(a)' Requests*, 14 MONEY LAUNDERING ALERT 1 (Dec. 2002).

59. *Id.*

60. *Progress Since 9/11: The Effectiveness of U.S. Anti-Terrorist Financing Efforts: Hearing Before the House Fin. Servs. Subcomm. on Oversight & Investigations*, 108th Cong. 5 (2003) (statement of John J. Byrne on behalf of the American Bankers Association).

61. *See* Letter from John J. Byrne, Senior Counsel and Compliance Manager, American Bankers Association, to Financial Crimes Enforcement Network, Special Information Sharing (Apr. 2, 2002), *available at* http://www.aba.com.

62. Press Release, Financial Crimes Enforcement Network, FinCEN to Reinstate USA PATRIOT Act Section 314(a) Information Requests (Feb. 6, 2003), *available at* http://www.fincen.gov.

system has been used to share the names of over 250 persons suspected of terrorist financing and has resulted in over 1,700 matches, 700 tips, and 500 case referrals that were passed on to law enforcement officials.[63] In addition, under its new CTFE powers, FinCEN has supported over 2,600 terrorism investigations and the expansion of the suspicious activity report regime has resulted in financial institutions filing over 2,600 such reports on possible terrorist financing.[64]

Several sections of the USA PATRIOT Act broadened the reach of law enforcement and the judiciary. Section 315 amended 18 U.S.C. § 1956 to add foreign criminal offenses and certain U.S. export control violations, customs, firearm, computer, and other offenses to the list of crimes that are "specified unlawful activities" for purposes of the criminal money laundering provisions. The broadening of predicate offenses for criminalizing money laundering enabled U.S. prosecutors to help foreign law enforcement agencies who might otherwise have difficulty prosecuting someone or seizing funds outside their country.[65]

Section 317 gave U.S. courts extraterritorial jurisdiction over foreign persons committing money laundering offenses in the United States, over foreign banks opening bank accounts, and over foreign persons who convert assets ordered forfeited by a U.S. court. It also permits a U.S. court dealing with such foreign persons to issue a pre-trial restraining order or take other action necessary to preserve property in the United States to satisfy an ultimate judgment. In addition, section 318 expands the definition of financial institution for purposes of 18 U.S.C. sections 1956 and 1957 to include those operating outside of the United States.

Section 319 amended U.S. asset forfeiture law[66] so that funds deposited by foreign banks in interbank accounts at U.S. banks are now treated as having been deposited in the United States for purposes of the forfeiture rules.[67] For example, if a terrorist has money in a foreign bank that has a correspondent account at a U.S. bank, a federal court can now order the U.S. bank to seize the foreign bank's money. The foreign bank is then expected to recover its money by debiting the terrorist's account.[68] The terrorist, but not the bank, can oppose

63. Aufhauser, *supra* note 39, at 8-9, 11.

64. *Id.* at 11.

65. *Dismantling the Financial Infrastructure of Terrorism: Hearing Before the House Comm. on Fin. Servs.*, 107th Cong. 7 (2001) (statement of Michael Chertoff, Assistant Attorney General, Criminal Division, U.S. Department of Justice).

66. 18 U.S.C. § 981 (2001).

67. *See* United States v. All Funds in Account Nos. 747.034/278, 747.009/278, & 747.714/278 in Banco Espanol de Credito, Spain, 295 F.3d 23 (D.C. Cir. 2002) (upholding jurisdiction of U.S. courts to order forfeiture of property located in foreign countries); *see also The Financial War on Terrorism & the Administration's Implementation of the Anti-Money Laundering Provisions of the USA PATRIOT Act: Hearing Before the Senate Comm. on Banking, Housing & Urban Affairs*, 107th Cong. 7 (2002) (statement of Michael Chertoff, Assistant Attorney General, Criminal Division, U.S. Department of Justice) (describing a case of Belizean money launderers whose assets were made recoverable by the Act).

68. *See* Stefan D. Cassella, *Forfeiture of Terrorist Assets Under the USA PATRIOT Act of 2001*, 34 L. & POL'Y INT'L BUS. 7, 14 (2002).

the forfeiture action. The Attorney General and Secretary of the Treasury are authorized to issue a summons or subpoena to any such foreign bank and to seek records, wherever located, that relate to such a correspondent account.[69]

Section 325 authorized the Secretary of the Treasury to issue regulations concerning the maintenance of concentration accounts by U.S. depository institutions to ensure such accounts are not used to prevent association of the identity of an individual customer with the movement of funds of which the customer is the direct or beneficial owner.[70] Similarly, pursuant to section 326, the Secretary of the Treasury promulgated final rules establishing minimum standards for financial institutions and their customers regarding the identity of customers who open new accounts.[71] The standards require financial institutions to verify customers' identities, consult with lists of known and suspected terrorists at account openings, and maintain records.

Finally, section 373 of the Act amended 18 U.S.C. § 1960 to prohibit unlicensed money services businesses. In addition, such businesses must file suspicious activity reports with law enforcement officials.[72] Pursuant to section 356, the Secretary of the Treasury promulgated final rules requiring broker-dealers to also file suspicious activity reports.[73] In the future, Treasury will issue similar regulations regarding futures commission merchants, commodity trading advisors, commodity pool operators, and investment companies.

III.
INTERNATIONAL ORGANIZATIONS

Intergovernmental organizations (IGOs) have played a key role in conceptualizing and creating the international AML and CTFE enforcement regimes through conventions, resolutions, and recommendations.[74] By establishing standards, mechanisms and institutions to deal with the transnational problems of money laundering and terrorist financing, they set the framework for the necessary international cooperation. Although these standards have traditionally been comprised of "soft law," in recent years IGOs have started to impose compliance regimes through evaluation mechanisms, "naming and shaming," and economic sanctions.

In particular, a major development in 2000 was the almost simultaneous issuance of blacklists against non-cooperative countries and territories. One after another, the Organisation for Economic Cooperation and Development is-

69. In relation to forfeiture, section 320 amended 18 U.S.C. § 981 to allow the United States to institute forfeiture proceedings against any proceeds of foreign predicate offenses located in the U.S., and section 323 allowed the government to seek a restraining order to preserve the availability of property subject to a foreign forfeiture confiscation judgment.

70. Treasury has not yet issued any such regulations.

71. 31 C.F.R. pt. 103 (2003).

72. *Id.*

73. *Id.*

74. For background on the work of international organizations in the AML realm, see WILLIAM C. GILMORE, DIRTY MONEY: THE EVOLUTION OF MONEY LAUNDERING COUNTERMEASURES (2d ed. 1999).

sued its harmful tax competition initiative with a list of tax havens that did not agree to make a public commitment to bring their practices into compliance;[75] the Financial Stability Forum issued its report on offshore financial centers, classifying them into three levels of compliance with international standards;[76] and the Financial Action Task Force on Money Laundering issued its list of fifteen non-complying countries.[77] The simultaneous issuance of blacklists was an attempt to jumpstart the merging of the AML and CTFE regimes, conferring on soft laws a greater status in international law and politics.

However, since AML and CTFE laws have developed at such a rapid rate, there are inconsistencies in legislation, implementation, and enforcement that present difficulties for international cooperation. Further, legal systems differ in their organization, procedures, substantive law, and cultural traditions. A nation with an Islamic legal system and another rooted in the common law may have difficulty bridging differences in their concepts of the proper procedures and ultimate goals. Reaching an understanding on these issues can also be extremely difficult because privacy and confidentiality laws, along with AML and asset forfeiture statutes, often encompass competing societal objectives.

As IGOs continue to strive for uniform legislation for the AML regime, many of the gaps and obstacles that arise from conflicts of laws will be resolved. This will take time, however, since the normal course for creating international legal norms has been to agree initially on narrow sets of legal principles and policies and then to broaden them. Already, cooperation has increased substantially, especially in the western hemisphere, among regional groups that share similar institutions and legal systems, and that interact within a common criminal justice organization. Indeed, the efforts of IGOs such as the United Nations, the European Union, and the Financial Action Task Force on Money Laundering have been largely responsible for the international acceptance of the AML/CTFE regime.

A. Global Organizations

1. The United Nations

a. Conventions

The United Nations pioneered international AML cooperation with the 1988 Vienna Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,[78] which requires signatories to criminalize money laundering and immobilize the assets of persons involved in illegal narcotics trafficking.

75. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, TOWARDS GLOBAL TAX CO-OPERATION, REPORT TO THE 2000 MINISTERIAL COUNCIL MEETING AND RECOMMENDATIONS BY THE COMMITTEE ON FISCAL AFFAIRS: PROGRESS IN IDENTIFYING AND ELIMINATING HARMFUL TAX PRACTICES (2000).

76. FINANCIAL STABILITY FORUM, REPORT OF THE WORKING GROUP ON OFFSHORE FINANCIAL CENTRES (Apr. 5, 2000); *see also* BENNETT, *supra* note 21, at 159-63.

77. FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, REVIEW TO IDENTIFY NON-COOPERATIVE COUNTRIES OR TERRITORIES (June 22, 2000).

78. Dec. 19, 1988, SEN. TREATY DOC. NO. 101-4, 28 I.L.M. 47 (1989) (entered into force Nov. 11, 1990).

Because the Convention was an initial effort and the participating governments so diverse, there are differences in each country's criminalization of money laundering, extent of scienter required, enforcement methods, number of convictions, and range of punishments.[79] Nevertheless, subsequent efforts have drawn from the Vienna Convention and utilize wherever possible the same terminology and systematic approach.

The 1999 International Convention for the Suppression of the Financing of Terrorism prohibits direct involvement or complicity in the international and unlawful provision or collection of funds, attempted or actual, with the intent or knowledge that any part of the funds may be used to carry out any of the offenses described in the Convention, such as those acts intended to cause death or serious bodily injury to any person not actively involved in armed conflict in order to intimidate a population, and any act intended to compel a government or an international organization to take action or abstain from taking action.[80] Offenses are deemed to be extraditable crimes, and signatories must establish their jurisdiction over them, make them punishable by appropriate penalties, take alleged offenders into custody, prosecute or extradite them, cooperate in preventive measures and countermeasures, and exchange information and evidence needed in related criminal proceedings.

The Convention also requires each signatory to take appropriate measures, in accordance with its domestic legal principles, for the detection, freezing, seizure, and forfeiture of any funds used or allocated for the purposes of committing the listed offenses.[81] Article 18(1) requires signatories to subject financial institutions and other professionals to "Know Your Customer" requirements and the filing of suspicious transaction reports. Additionally, article 18(2) requires signatories to cooperate in preventing the financing of terrorism insofar as the licensing of money service businesses and other measures to detect or monitor cross-border transactions are concerned.

Another treaty with important AML/CTFE provisions is the 2000 Palermo Convention Against Transnational Organized Crime,[82] which contains three supplementary protocols: one to prevent, suppress and punish trafficking in persons, especially women and children; another to stop the smuggling of migrants by land, sea and air; and a third to stop the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition.

This convention seeks to strengthen the power of governments to combat serious crimes by providing a basis for stronger common action against money laundering through synchronized national definitions of such crimes. Signatory countries pledge to: (1) criminalize offenses committed by organized crime

79. *See* UNITED NATIONS OFFICE ON DRUGS AND CRIME GLOBAL PROGRAMME AGAINST MONEY LAUNDERING, MODEL LEGISLATION ON LAUNDERING, CONFISCATION AND INTERNATIONAL COOPERATION IN RELATION TO THE PROCEEDS OF CRIME (1999).

80. International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 39 I.L.M. 270 (2000) (entered into force Apr. 10, 2002).

81. *Id.*

82. Convention Against Transnational Organized Crime, Dec. 12, 2000, U.N. Doc. A/55/383 (entered into force Sept. 29, 2003).

groups, including corruption and corporate or company offenses; (2) combat money laundering and seize the proceeds of crime; (3) accelerate and extend the scope of extradition; (4) protect witnesses testifying against criminal groups; (5) strengthen cooperation to locate and prosecute suspects; (6) enhance prevention of organized crime at the national and international levels; and (7) develop a series of protocols containing measures to combat specific acts of transnational organized crime. The signatories must establish regulatory regimes to deter and detect all forms of money laundering, including customer identification, record keeping, and reporting of suspicious transactions. In these respects, the Convention's provisions are similar to those found in the Forty Recommendations of the Financial Action Task Force on Money Laundering.[83]

In addition to conventions, the U.N. Office on Drugs and Crime has drafted model laws such as the Model Legislation on Laundering, Confiscation and International Cooperation in Relation to the Proceeds of Crime[84] and, in response to its expansion into the realm of CTFE, the Model Money-Laundering, Proceeds of Crime and Terrorist Financing Bill.[85] The Office on Drugs and Crime provides technical assistance on legislative drafting, financial intelligence, capacity building, and a range of services to help governments and law enforcement agencies implement their obligations under the Vienna Convention and related AML initiatives.[86]

b. Security Council Resolution 1373[87]

On September 12, 2001, the United Nations Security Council adopted Resolution 1368, condemning the attacks of the day before and calling on all states to work together to quickly bring to justice those who perpetrated them, as well as those "responsible for aiding, supporting or harbouring the perpetrators."[88] The resolution also called on the international community to increase efforts "to prevent and suppress terrorist acts including by increased cooperation and full implementation of the relevant international anti-terrorist conventions and Security Council resolutions."[89] Finally, the resolution expressed the Security

83. *See* Paul Allan Schott, REFERENCE GUIDE TO ANTI-MONEY LAUNDERING AND COMBATING THE FINANCING OF TERRORISM III-3, III-4 (2002).

84. U.N. OFFICE ON DRUGS AND CRIME, MODEL LEGISLATION ON LAUNDERING, CONFISCATION AND INTERNATIONAL COOPERATION IN RELATION TO THE PROCEEDS OF CRIME (1999).

85. U.N. OFFICE ON DRUGS AND CRIME, MODEL MONEY-LAUNDERING, PROCEEDS OF CRIME AND TERRORIST FINANCING BILL (2003).

86. U.N. OFFICE ON DRUGS AND CRIME, GLOBAL PROGRAMME AGAINST MONEY LAUNDERING, *available at* http://www.unodc.org/unodc/en/money_laundering.html (last visited Jan. 24, 2004).

87. This section is derived substantially from Bruce Zagaris, *The United Nations Acts to Combat Terrorism*, 17 INT'L ENFORCEMENT L. REP. 469 (2001) and Bruce Zagaris, *UN Security Council Hears Progress of Counter-Terrorism Committee*, 18 INT'L ENFORCEMENT L. REP. 113 (2002).

88. S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg. at § 3, U.N. Doc. S/RES/1368 (2001).

89. *Id.* at § 4. The resolutions especially to be adhered to included the specifically-mentioned Resolution 1269, S.C. Res. 1269, U.N. SCOR, 54th Sess., 4053rd mtg., U.N. Doc. S/RES/1269 (1999) (encouraging nations to fight terrorism), as well as Resolution 1267, S.C. Res. 1267, U.N. SCOR, 54th Sess., 4051st mtg., U.N. Doc. S/RES/1267 (1999) (demanding that the Taliban to deliver Osama bin Laden to international authorities), and Resolution 1333, S.C. Res. 1333, U.N.

Council's preparedness to take "all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism."[90]

On September 28, 2001, the Security Council adopted the United States sponsored Resolution 1373, which called on all member states to: (1) prevent and suppress the financing of terrorism; (2) freeze without delay the resources of terrorists and terror organizations; (3) prohibit anyone from making funds available to terrorist organizations; (4) suppress the recruitment of new members by terrorism organizations and eliminate their weapon supplies; (5) deny safe haven to those who finance, plan, support or commit terrorist acts, or provide safe haven to terrorists; (6) afford one another the greatest measure of assistance in criminal investigations involving terrorism; (7) prevent the movement of terrorists or terrorist groups by effective border controls and control over travel documentation; and (8) cooperate in any campaign against terrorists, including one involving the use of force.[91]

While it contains strong language, the resolution still has gray areas, such as its failure to define the term "terrorist." Invoking Chapter 7 of the U.N. Charter, which requires all members states to cooperate and gives the Security Council authority to take action, including the use of force, against those who refuse to do so, the resolution drew on several commitments that have already been made in treaties and past resolutions and made them immediately binding on all member states.[92] Many of its clauses require changes in national laws, such as those dealing with border controls and asylum.[93]

From an implementation perspective, an important aspect of Resolution 1373 is the establishment of the Counter-Terrorism Committee (CTC) of the Security Council, consisting of each member of the Council, to monitor member states' implementation of the resolution.[94] The CTC is divided into three five-member subcommittees, each of which oversees one-third of the U.N. member states. All member states must report to the CTC on the steps they have taken toward implementation, and it is the duty of the CTC to review these reports and advise the appropriate subcommittees on whether it should follow up with a particular member state to achieve compliance with the resolution, and whether the member state requires assistance in that regard.[95] Although the CTC will not define terrorism in a legal sense, its work will help develop minimum standards for an international CTFE regime.

SCOR, 55th Sess., 4251st mtg., U.N. Doc. S/RES/1333 (2000) (demanding that the Taliban to stop supporting terrorism).

90. S.C. Res. 1368, *supra* note 88, at § 5.

91. S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (2001). No terrorist organizations were specifically cited in the resolution. *Id.*

92. Serge Schmemann, *U.N. Requires Members to Act Against Terror*, N.Y. TIMES, Sept. 29, 2001, at A1.

93. Human Rights Watch has noted the possibility that these changes may involve new and overbroad statutes that will impinge on basic liberties. HUMAN RIGHTS WATCH, IN THE NAME OF COUNTER-TERRORISM: HUMAN RIGHTS ABUSES WORLDWIDE, 4-5 (2003).

94. S.C. Res. 1373, *supra* note 91, at § 6.

95. COUNTER-TERRORISM COMMITTEE, HOW DOES THE CTC WORK WITH STATES?, *at* http://www.un.org/Docs/sc/committees/1373/work.html (last visited Jan. 24, 2004).

2. *Financial Action Task Force on Money Laundering*[96]

In 1989, the G7[97] established the Financial Action Task Force on Money Laundering (FATF) to serve as an international clearinghouse for ideas and recommendations on how to curtail money laundering.[98] But in keeping with the post-September 11 international trend of merging AML and CTFE regimes, the FATF has since expanded its mission to include efforts to stem terrorist financing. Operationally, the FATF relies on a sophisticated network of FATF-style regional bodies throughout the world[99] to elaborate typologies charting money laundering trends and formulate appropriate responses and mutual evaluations.

The FATF's recently updated Forty Recommendations,[100] when combined with the eight Special Recommendations on Terrorist Financing,[101] create a comprehensive laundry list of every major step nations and institutions should take to combat money laundering and terrorist financing. They cover ratification of international agreements, criminalization of relevant activities, due diligence requirements and the kinds of financial institutions that are bound to meet them, assistance to foreign countries, implementation of terrorist list sanctions, and so on. Each FATF member must self-assess its compliance with the Recommendations and report to the FATF, which will then "name and shame" non-cooperating countries and territories (NCCTs).[102]

If an NCCT does not take effective measures to address and solve the problems the FATF views as non-compliance with the world AML/CTFE re-

96. This section is derived substantially from Bruce Zagaris, *FATF Adopts New Standards to Combat Terrorist Financing*, 17 INT'L ENFORCEMENT L. REP. 493 (2001).

97. The G7, now the G8 with the addition of Russia, was comprised of heads of state of the United States, Canada, Japan, France, Germany, Italy, Britain, and the European Community. G8 INFORMATION CENTER, WHAT IS THE G8?, *at* http://www.g7.utoronto.ca/what_is_g8.html (last modified Nov. 7, 2003).

98. FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, MORE ABOUT THE FATF AND ITS WORK, *at* http://www1.oecd.org/fatf/AboutFATF_en.htm (last modified Aug. 25, 2003). The FATF currently has 31 member countries and territories. *Id.*

99. These include the Caribbean FATF, the FATF in South America, the Asia/Pacific Group on Money Laundering, the Eastern and Southern Africa Anti-Money Laundering Group, and the MONEYVAL Committee. In addition to the organizations discussed herein, the G8, the G20, the International Monetary Fund, the World Bank, the World Customs Organization, the Commonwealth Secretariat, Europol, Interpol, the International Organization of Securities Commissions, the Financial Stability Forum, the Egmont Group of Financial Intelligence Units, the Basel Committee on Banking Supervision, the Offshore Group of Banking Supervisors, the European Central Bank, and various development banks play important roles in developing the international AML/CTFE regime through raising awareness, developing methodologies, building institutional capacity, and research and development. *Id.*

100. FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, THE FORTY RECOMMENDATIONS (2003), *at* http://www1.oecd.org/fatf/40Recs_en.htm.

101. FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, SPECIAL RECOMMENDATIONS ON TERRORIST FINANCING (2001), *at* http://www1.oecd.org/fatf/SRecsTF_en.htm.

102. For the current list of NCCTs, see FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, NON-COOPERATIVE COUNTRIES AND TERRITORIES, *at* http://www1.oecd.org/fatf/NCCT_en.htm#List (last visited Jan 26, 2004). In deciding whether or not to identify a country or territory as non-cooperative, the FATF considers twenty-five criteria; further criteria govern removal from the list of NCCTs. *See* FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, ANNUAL REVIEW OF NON-COOPERATIVE COUNTRIES OR TERRITORIES (2003), *at* http://www1.oecd.org/fatf/pdf/NCCT2003_en.pdf.

gime, the FATF can recommend that counter-measures be taken against the NCCT. These sanctions punish entities located within NCCTs by establishing enhanced due diligence requirements for financial institutions that deal with them and notification to their business partners that they may be money launderers.[103] These measures have been in effect against Nauru since December 2001,[104] and other nations, such as Ukraine and Myanmar, have been threatened with them.[105] In 2002, the FATF, in partnership with the World Bank and International Monetary Fund, created a new methodology to assess nations' compliance with AML/CTFE standards, drawing heavily from the FATF's Forty Recommendations and eight Special Recommendations on Terrorist Financing, as well as international conventions.[106] The FATF will utilize this methodology in future NCCT evaluations and the International Monetary Fund and World Bank have included it as part of their own assessments of their members in pursuance of a one-year pilot program ending November 2003.[107]

B. Regional Organizations

Regional organizations have been important actors in formulating and implementing AML and CTFE regimes. Organizations with universal membership can have difficulty designing and implementing policies and laws that are customized to the needs of various regions because each one has unique institutions, legal systems, and cultures. By working more closely with area states, a regional organization can gain the respect of governmental and non-governmental actors, increasing the level of its authority and effectiveness in accomplishing regional priorities. This cooperation is essential to the success of the new AML/CTFE regime.[108]

1. Europe

The Council of Europe's 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime obligates signatories to cooperate in the AML regime.[109] The European Union's Directive on the Prevention of the Use of the Financial System for the Purpose of Money Laundering, amended

103. *Id.* at 23.

104. *Id.* at 19-20.

105. *Id.* at 19; Press Release, Financial Action Task Force on Money Laundering, FATF Decides to Impose Counter-Measures on Myanmar (Nov. 3, 2003), *at* http://www1.oecd.org/fatf/pdf/PR-20031103_en.pdf.

106. FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, METHODOLOGY FOR ASSESSING COMPLIANCE WITH ANTI-MONEY LAUNDERING AND COMBATING THE FINANCING OF TERRORISM STANDARDS (2002).

107. Press Release, International Monetary Fund, IMF Executive Board Approves 12-Month Anti-Money Laundering Pilot Project (Nov. 22, 2002).

108. For additional discussion of the interplay between national governments, and inter- and non-governmental organizations, see Bruce Zagaris, *International Money Laundering*, *in* INTERNATIONAL ORGANIZATIONS: A COMPARATIVE APPROACH TO THE MANAGEMENT OF COOPERATION 138-42 (Robert S. Jordan ed., 2001).

109. Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Nov. 8, 1990, 30 I.L.M. 148 (1991) (entered into force Sept. 1, 1993).

in December 2001,[110] is significant in its breadth; it applies due diligence requirements to numerous actors in the private sector, including lawyers and accountants, whenever they conduct a financial transaction or engage in financial planning. Because European nations dominate the FATF[111] and many other international organizations, their policies play a critical political role in the design and implementation of the AML/CTFE regime.

Ten days after the September 11 attacks on the United States, officials from the European Union (EU) member states met to show their solidarity. At the meeting, the European Council called for the broadest possible global coalition against terrorism, to act under the auspices of the U.N., and approved over thirty measures to expand the AML/CTFE regime in Europe.[112] These included agreements to introduce a Europe-wide arrest warrant,[113] adopt a common definition of terrorism,[114] create a list of known and presumed terrorists, establish joint investigative teams and make combating terrorism and its financing a higher law enforcement priority,[115] implement all international AML/CTFE agreements as soon as possible,[116] and support the Indian proposal to draft a comprehensive U.N. convention on international terrorism.[117] The Council also called for each member state to establish a Financial Intelligence Unit, a central state agency serving as a clearinghouse for information related to money laundering.[118]

In 2002, the EU released its first list of terrorists, terrorist organizations, and their supporters, similar to the U.S. list.[119] The regulations governing the

110. Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001, amending Council Directive 91/308/EEC on Prevention of the Use of the Financial System for the Purpose of Money Laundering, 2001 O.J. (L 344/76).

111. *See* FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, MEMBERS AND OBSERVERS, *at* http://www1.oecd.org/fatf/members_en.htm (last modified Oct. 6, 2003).

112. *See* Conclusions and Plan of Action of the Extraordinary European Council Meeting on 21 September 2001, 2001 O.J. (SN 140/01) [hereinafter Council Meeting]; Peter Norman, *Stage Set for Leaders to Show Solidarity*, FIN. TIMES, Sept. 21, 2001, at 4; Peter Norman, *Stronger Ties Urged Between Police Forces*, FIN. TIMES, Sept. 21, 2001, at 4.

113. To enter into force on January 1, 2004. DIRECTORATE-GENERAL, JUSTICE AND HOME AFFAIRS, EUROPEAN COMMISSION, EUROPEAN ARREST WARRANT TO REPLACE EXTRADITION (2002).

114. *See* Common Position 2001/931/CFSP on the Application of Specific Measures to Combat Terrorism, 2001 O.J. (L 344/93), *amended by* Common Position 2003/651/CFsP, 2003 O.J. (L 229/42).

115. *See, e.g.*, Press Release, The United States Mission to the European Union, U.S., E.U. Sign Legal Assistance, Extradition Treaty (June 25, 2003).

116. The six EU members that had not yet signed the International Convention for the Suppression of the Financing of Terrorism by the time of the meeting did so within one month after it. *See* UNITED NATIONS, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY GENERAL, CHAPTER XVIII: PENAL MATTERS, 11, INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM, *at* http://untreaty.un.org/ENGLISH/Status/Chapter_xviii/treaty11.asp (listing signatories) (last modified Nov. 7, 2003).

117. The proposal is currently being considered by a working group of the United Nations, along with a draft international convention for the suppression of acts of nuclear terrorism. *Report of the Working Group on Measures to Eliminate International Terrorism*, U.N. GAOR 6th Comm., 57th Sess., Agenda Item 160, U.N. Doc. A/C.6/57/L.9 (2002).

118. *See* Council Meeting, *supra* note 112; EGMONT GROUP OF FINANCIAL INTELLIGENCE UNITS, STATEMENT OF PURPOSE (June 13, 2001).

119. *See* Council Regulation (EC) No 881/2002 of 27 May 2002 Imposing Certain Specific Restrictive Measures Directed Against Certain Persons and Entities Associated with Osama bin

EU list, however, also provide for greater safeguards against the mistaken listing of non-terrorists, including checks before listing, an appeals process, and sanctions for wrongly listing entities. They also except from freezing any funds related to everyday living as well as those used to cover legal costs.[120]

2. *The Americas*

In 1996, the Organization of American States (OAS), comprised of all 35 independent nations in the Americas,[121] established the Inter-American Drug Abuse Control Commission, to combat drug abuse, including through AML measures.[122] To that end, the Commission wrote model regulations that include provisions regarding the establishment of Financial Intelligence Units and, after 2002, CTFE measures as well.[123] Also in that year, another OAS body, the Inter-American Committee Against Terrorism,[124] created the Inter-American Convention Against Terrorism, which includes many AML/CTFE provisions such as due diligence and mutual assistance requirements.[125] Together, these bodies operate training seminars, providing technical assistance to OAS member states, and release reports on the current state of the AML/CTFE regime in the Americas. They have also worked with the Inter-American Development Bank to fund member states' efforts to eliminate money laundering and the financing of terrorism.[126]

The Caribbean Financial Action Task Force (CFATF), over a decade old, is one of the most active FATF-style regional bodies.[127] Often working together with the Caribbean Anti-Money Laundering Programme, it organizes symposia and training courses for regulators and private sector professionals to increase awareness and expertise within the region about AML and CTFE initiatives.[128] It has also created its own list of 19 Recommendations to mirror those of the

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Laden, the Al-Qaida Network and the Taliban, 2002 O.J. (L 139/9) app. I, as amended, *available at* http://europa.eu.int; *see also* Council Regulation (EC) No 2580/2001 of 27 December 2001 on Specific Restrictive Measures Directed Against Certain Persons and Entities with a View to Combating Terrorism, 2001 O.J. (L 344/70), as amended, *available at* http://europa.eu.int.

120. *See id.*

121. ORGANIZATION OF AMERICAN STATES, ABOUT THE OAS, MEMBER STATES AND PERMANENT MISSIONS, *at* http://www.oas.org/documents/eng/memberstates.asp (last visited Jan. 26, 2004).

122. AG Res. 813, OAS AG, 16th Sess., OAS Doc. XVI-O/86 (1986).

123. INTER-AMERICAN DRUG ABUSE CONTROL COMMISSION, MODEL REGULATIONS CONCERNING LAUNDERING OFFENSES CONNECTED TO ILLICIT DRUG TRAFFICKING AND OTHER SERIOUS OFFENSES (2002).

124. AG Res. 1650, OAS AG, 29th Sess., OAS Doc. XXIX-O/99 (1999).

125. Inter-American Convention Against Terrorism, June 3, 2002, AG Res. 1840, OAS AG, 32nd Sess., OAS Doc. XXXII-O/02 (entered into force July 10, 2003).

126. For instance, in May 2001, the bank's Multilateral Investment Fund approved a $1,230,000 grant to assist eight South American countries in their efforts to establish and improve their financial intelligence units. Press Release, Inter-American Development Bank, Multilateral Investment Fund Approves Financing to Fight Money Laundering in Latin America (June 26, 2002).

127. *See* CARIBBEAN FINANCIAL ACTION TASK FORCE, CFATF: AN OVERVIEW, *at* http://www.cfatf.org (last modified July 11, 2003).

128. *See, e.g.*, Press Release, CFATF Secretariat, IADB Project (Feb. 19, 2003), *at* http://www.cfatf.org/news/viewnews.asp?pk_news=12.

FATF, but tailored to meet the unique needs of the Caribbean region.[129] The prime focus of the CFATF, however, has been on drafting and testing typologies of money laundering in the fields of non-bank financial institutions, casinos and the gaming industry, international transactions, cyberspace, illegal trade in guns, free trade zones, and terrorist financing.[130] These typologies are then used to help craft the FATF's own typology reports.[131]

IV.
PROBLEMS OF ENFORCEMENT

A. International Concerns

Given the vast changes that occurred with the post-September 11 merging of the AML and CTFE regimes, it was clear that problems would arise. U.S. and international law enforcement agencies have experienced difficulties refocusing their efforts, keeping track of rapid and significant amendments to laws and new regulations, new partnerships and bureaucracies, as well as different perspectives in the international community. Governments, organizations, and institutions have been wary of moving too quickly with the new regime for fear of alienating allies, violating fundamental rights to due process and privacy, and incurring burdensome costs.

With regard to the international politics of the elaboration and implementation of the new AML/CTFE regime, some have claimed that the decision-making process was flawed. This criticism is especially strong in the case of the three simultaneously released blacklists, which arguably suffered from: (1) the exclusion from most of the decision-making process of the very countries that are the targets of the policies; (2) a lack of adequate participation in policymaking and implementation by the private sector; (3) a general lack of transparency in the decision-making process; (4) the apparent use of economic sanctions and coercion in the way of blacklists without binding hard law; (5) deferential and favorable treatment of decision-making members whose own inadequacies have not resulted in blacklisting; (6) the apparent efforts to usurp critical policymaking from democratically elected governments without adequate participation by such governments; and (7) questionable substantive policy design.[132]

In the United States, the Treasury Department, pursuant to the USA PATRIOT Act, has issued hundreds of pages of complex regulations that force

129. CARIBBEAN FINANCIAL ACTION TASK FORCE, REVISED CFATF 19 RECOMMENDATIONS (1999), *at* http://www.cfatf.org/documentation/docadmin.asp?mcat=15.

130. *See* CARIBBEAN FINANCIAL ACTION TASK FORCE, THE CFATF MONEY LAUNDERING TYPOLOGY PROGRAMME PLAN OF ACTION (1998), *at* http://www.cfatf.org/documentation/docadmin.asp?mcat=17; CARIBBEAN FINANCIAL ACTION TASK FORCE, SUMMARY REPORT (2002) (discussing the results of the terrorist financing typology exercise).

131. *See* FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, REPORT ON MONEY LAUNDERING TYPOLOGIES 2002-2003 (2003), *at* http://www1.oecd.org/fatf/pdf/TY2003_en.pdf.

132. *See* Bruce Zagaris, *Issues Low-Tax Regimes Should Raise When Negotiating with the OECD*, TAX NOTES INT'L 523 (2001); Press Release, CFATF Secretariat, Communiqué on the Conference on the International Financial Services Sector (Jan. 2, 2001).

banks and financial institutions, their counsel, and many other professionals to participate in law enforcement activities and regulatory processes. For instance, section 311, which allows Treasury to punish non-cooperative countries and territories, has the potential to alienate allies of the U.S. CTFE regime. It is highly subjective and thus susceptible to abuse for political purposes other than combating terrorism. Nations in the Americas claim that it is protectionist and aimed at scapegoating offshore financial centers.[133] Still, in April 2003, pursuant to section 311, Treasury issued a notice of proposed rulemaking requiring all U.S. financial institutions to terminate correspondent accounts with banks from the island of Nauru.[134]

Concerns have also been raised about the act's effect on remittances, $15 to $20 billion of which are sent annually from the U.S. to Latin America and the Caribbean, mostly by immigrants who return money to their families.[135] Latin American immigrants living in the United States transfer an average of $250 home to their native countries eight to ten times annually.[136] In fact, the present value of remittances to Latin America exceeds levels of official development assistance.[137] However, they are costly; transfer fees frequently amount to 20% of the sum being sent.[138] The act could make them even more expensive. Further, identification of U.S. immigrant customers can be difficult because many customers do not have reliable identification documents.[139] The Mexican Government has instituted a program to regularize identification issues, but U.S. states have not reacted uniformly.[140] Treasury must find the proper balance between achieving national security and law enforcement objectives, and leaving financial institutions free to serve their remittance customers at a reasonable price.[141]

As a result of the new laws, regulations, and lists of terrorists and persons assisting and associated with them, law enforcement agencies are investigating and prosecuting a host of individuals and entities. In assessing the success of AML/CTFE actions, the U.S. government cites the number of freezes, seizures,

133. *See* Associated Press, *New Scrutiny Weighs on Caribbean Offshore Business, but Critics Warn that Crimes Continue* (Feb. 14, 2003), *available at* http://www.acams.org/press/associated-press_021403.htm.

134. *U.S. Proposes Nauru Crackdown*, 14 MONEY LAUNDERING ALERT 8 (May 2003).

135. Sheila C. Bair, Assistant Secretary for Financial Institutions, U.S. Department of the Treasury, Remarks Before the Multilateral Investment/Inter-American Development Bank Second Regional Conference on Impact of Remittances as a Development Tool (Feb. 26, 2002).

136. *Id; see also* ROBERTO SURO, ET AL., BILLIONS IN MOTION: LATINO IMMIGRANTS, REMITTANCES AND BANKING (2002).

137. MULTILATERAL INVESTMENT FUND & INTER-AMERICAN DEVELOPMENT BANK, SENDING MONEY HOME: AN INTERNATIONAL COMPARISON OF REMITTANCE MARKETS 6 (2003); *see also* MULTILATERAL INVESTMENT FUND & INTER-AMERICAN DEVELOPMENT BANK, REMITTANCES TO LATIN AMERICA AND THE CARIBBEAN: COMPARATIVE STATISTICS 15 (2001).

138. Bair, *supra* note 135.

139. Robyn Lamb, *Montgomery County Officials Ask All Banks in County to Accept Hispanic Gov't ID's*, DAILY RECORD, May 28, 2003.

140. Kathryn Lee Holloman, *The New Identity Crises: USA PATRIOT Act Customer Identification Programs and the Matricula Consular as Primary Identification Documents for Mexican Nationals*, 7 N.C. BANKING INST. 125, 125-26, 128 n.37 (2003).

141. Bair, *supra* note 135.

and forfeitures, as well as the number of searches, prosecutions, and convictions they bring about.[142] Essentially, this is an attempt to justify their work, but the measures can be misleading, falsely providing a sense of accomplishment when perhaps little of significance has actually been achieved.[143] While the United States and the international community may be able to disrupt some terrorist cells through CTFE actions, by itself the strategy has enormous limitations. Unlike those who engage in crimes such as the trafficking of narcotics or persons, terrorists are not generally motivated by and do not need much money—just a handful of dedicated amateurs can perpetrate great terror.[144] The Unabomber phenomenon demonstrated the ease with which one person without any network or money can wreak havoc for years.

Another issue affecting the success of the U.S. CTFE regime is the degree to which the international community is willing to commit to and cooperate with it. Whereas U.S. export control rules are largely unilateral,[145] the United States will need to rely more on international organizations and foreign governments to design, administer, and enforce sustainable AML and CFTE mechanisms.[146] In this regard, the executive orders and the USA PATRIOT Act pose serious problems. To succeed, U.S. prosecutors will need to exercise much discretion and diplomacy.

B. Case Studies[147]

The United States has continued to add persons linked to Al Qaeda to its list of terrorists and terrorist supporters, including a number of charitable organizations, businesses, and individuals with close contacts to governments in the Middle East and Central Asia.[148] Early additions included three seemingly innocent businesses said to be Al Qaeda fronts: Al-Hamati Sweets Bakeries, Al-

142. *See, e.g.*, Aufhauser, *supra* note 39, at 3-4, 8-9, 11.

143. *See* Peter L. Fitzgerald, *Drug Kingpins and Blacklists: Compliance Issues with US Economic Sanctions*, 4 J. MONEY LAUNDERING CONTROL 360 (2001) (explaining that the proliferation of multiple blacklists and export control regimes for diverse activities from terrorism to narcotics trafficking makes for enormous difficulty, both for the private sector and regulatory agencies).

144. *See* REX A. HUDSON, THE SOCIOLOGY AND PSYCHOLOGY OF TERRORISM: WHO BECOMES A TERRORIST AND WHY? 14-19 (1999). For a post-September 11th review of what it means to be a terrorist, see RAPHAEL PERL, TERRORISM, THE FUTURE, AND U.S. FOREIGN POLICY 4 (2003). Indeed, searching for terrorists has been said to be more difficult than "searching for the proverbial needle in the haystack; it is, rather, akin to searching for an indistinguishable needle among a stack of needles." Lee Wolosky & Stephen Heifetz, *Regulating Terrorism*, 34 L. & POL'Y INT'L BUS. 1, 3 (2002).

145. This can create problems of its own. *See* LAW AND POLICY OF EXPORT CONTROLS: RECENT ESSAYS ON KEY EXPORT ISSUES 267-443 (Homer E. Moyer, Jr. et al. eds., 1993); BARRY E. CARTER, INTERNATIONAL ECONOMIC SANCTIONS: IMPROVING THE HAPHAZARD U.S. LEGAL REGIME 252-54 (1988).

146. *See* Aufhasuer, *supra* note 39, at 13-14.

147. This section is derived substantially from four articles by Bruce Zagaris: *U.S. and Other Countries Attack Against Additional List of Terrorist Supporters*, 17 INT'L ENFORCEMENT L. REP. 515 (2001); *Counterterrorism Financial Enforcement Produces Litigation and Controversy*, 18 INT'L ENFORCEMENT L. REP. 31 (2002); *U.S. and Allies Crack Down on 2 Money Transmitters*, 18 INT'L ENFORCEMENT L. REP. 32 (2002); and *Swedish Government Requests Review of 3 Somali Swedes on U.S. Terrorist List*, 18 INT'L ENFORCEMENT L. REP. 112 (2002).

148. *See* Joseph Kahn & Judith Miller, *U.S. Freezes More Accounts*, N.Y. TIMES, Oct. 13, 2001, at A1.

Nur Honey Press Shops, and Al-Shifa Honey Press. Mahmud Abu al-Fatuh Muhammad, the owner of Al-Shifa, has been linked to the Islamic Cultural Institute in Milan, which U.S. officials characterize as "the main Al Qaeda station house in Europe" and which is allegedly used to "facilitate the movement of weapons, men and money across the world."[149]

Another politically sensitive entity included on the list is the Rabita Trust, a Pakistani charity of which Pakistan's President General Pervez Musharraf was a board member.[150] The United States had warned Musharraf of the impending order and encouraged him to disassociate himself from the organization beforehand.[151] Top Pakistani officials helped to establish Rabita, which aids resettled refugees from Bangladesh. According to a Pakistani news account, the Rabita Trust is affiliated with a much larger and better-known charity, usually called Rabita Alam-e-Islami, or the Muslim World League, which is headquartered in the holy city of Mecca and operates a multi-billion dollar budget contributed to by many wealthy Saudis.[152] But Rabita is also headed by Wa'el Hamza Jalaidan, whom the U.S. Department of the Treasury characterized as the "logistics chief" and co-founder of Al Qaeda.[153]

Lebanon's Prime Minister, Rafik Hariri, refused U.S. requests to freeze assets belonging to Hezbollah, which his government claimed is a movement of national liberation and not a terrorist organization.[154] Syrian President Bashar al-Assad explained that his nation held the same view.[155] British officials said they would only freeze the assets of Hezbollah's external security organization, which they considered a terrorist arm, but would not act against its political and social activities.[156] Another controversial group, Hamas, gained notoriety for suicide bombings against Israel but is also recognized for its charitable work in education and health.[157] Abdel Aziz Bouteflika, the Algerian president, expressed approval of CTFE actions but qualified his support by excluding Arab groups fighting Israel from any definition of terrorists.[158]

The U.S. terrorist list also includes Saudi businessman Yasin al Qadi, also known as Yasin Kadi, a former director of the Muwafaq Foundation, or Blessed

149. John Willman & Richard Wolffe, *US Probe Takes Close Look at Trail of "Honey Money,"* FIN. TIMES, Oct. 13, 2001, at 3.

150. Charitable and other nonprofit organizations have increasingly come under the suspicion of law enforcement officials. *See* FATF, COMBATING THE ABUSE OF NON-PROFIT ORGANISATIONS: INTERNATIONAL BEST PRACTICES (2002).

151. Kahn & Miller, *supra* note 148.

152. David S. Hilzenrath & John Mintz, *More Assets on Hold in Anti-Terror Effort*, WASH. POST, Oct. 13, 2001, at A16.

153. *Id.*

154. *See Lebanon Refuses Plea by U.S. to Name Hezbollah as Terrorists*, N.Y. TIMES, Nov. 9, 2001, at B3 (mentioning separate statements by Lebanon President Emile Lahoud and the cabinet that Hezbollah is waging a legitimate campaign against Israeli occupation of Arab land).

155. Thor Valdmanis, *Militant Group: Israelis are Terrorists, Not Us*, USA TODAY, Nov. 5, 2001, at 6A.

156. Harvey Morris & Gareth Smyth, *Lebanon Set to Refuse to Freeze Terror Assets*, FIN. TIMES, Nov. 8, 2001, at 8.

157. *See id.*

158. James Drummond, *Algeria Backs U.S. on Anti-Terrorism Campaign*, FIN. TIMES, Nov. 7, 2001, at 12.

Relief, whose trustees have included some of Saudi Arabia's most prominent families. Al Qadi is part of a successful merchant family and his interests have extended to banking and diamonds, as well as charity: he endowed Pakistan's largest public hospital and a Saudi women's college.[159] But the U.S. Treasury Department alleged that Muwafaq sent millions of dollars from Saudi businesses to Osama bin Laden. Before including al Qadi's name, the Bush administration had consulted with European allies, but not with Saudi Arabia, which had informed the United States that it had searched for assets belonging to persons on the original terrorist list but had not been able to locate any. U.S. officials commented that Saudi Arabia had yet to formally instruct its banks to expeditiously seize such assets if they were found, and hence, they doubted the thoroughness of any purported search.[160] Nonetheless, although U.S. officials contemplated listing the Muwafaq Foundation itself, they compromised by only listing al Qadi.[161]

Al Qadi is now suing in the European Court of Justice to have his name removed from the list because there has been no independent review of the evidence against him.[162] Among other arguments, he alleges the British Government breached the Human Rights Act by depriving him of the use and enjoyment of his properties and interfering "in a most grave and serious" way with his private life. In a statement to the court, al Qadi said he had never financially or otherwise supported any terrorist activities or any terrorist group or individual. In addition, he claimed that his inclusion on the list has caused him serious personal and professional prejudice and damage.[163]

Two other organizations whose assets the U.S. government blocked were Al Taqwa and Al Barakaat.[164] The networks did business in over forty countries, including the United States, and, according to the White House, raised, managed, and distributed funds for Al Qaeda, arranged for the shipment of weapons, and provided terrorist supporters with Internet service, secure telephone communications, intelligence, and instructions.[165]

Al Taqwa was a worldwide investment company that owned a bank in the Bahamas, as well as factories and other industrial plants. It offered thousands of clients investments that did not offend Islamic law, which forbids charging interest or owning anything connected with alcohol, weapons, gambling, or adultery. Youssef Nada, Al Taqwa's owner and a naturalized Italian citizen, denied any

159. Jimmy Burns, *Court Fight Over Frozen Assets*, FIN. TIMES, Nov. 9, 2001, at 4.

160. Khan & Miller, *supra* note 148.

161. Jeff Gerth & Judith Miller, *Philanthropist, or Fount of Funds for Terrorists?*, N.Y. TIMES, Oct. 13, 2001, at B3. *See also* Hilzenrath & Mintz, *supra* note 152.

162. Constant Brand, *EU Court Hears Terror Blacklist Case*, GUARDIAN UNLIMITED, Oct. 14, 2003, *available at* http://www.guardian.co.uk/worldlatest/story/0,1280,-3263794,00.html. According to al Qadi's lawyer, one of the prime allegations against his client is his brother's link to a listed "terrorist" group, even though he has no brothers. *Id.*

163. Burns, *supra* note 159.

164. Press Release, Office of the Press Secretary, Executive Office of the President, Fact Sheet: Shutting Down the Terrorist Financial Network (Nov. 7, 2001).

165. *Id.*

association with or assistance to terrorists.[166] He pointed out that the Swiss Banking Commission had audited his firm and found no evidence of money laundering or allowing other entities to use the company as a front. Nonetheless, the United States worked with its international allies to detain Nada for questioning, raid his offices, and seize records and money.[167] He is still under investigation for links to Al Qaeda and Saddam Hussein, the former leader of Iraq.[168]

Al Barakaat became the largest remittance company in Somalia, a nation with no formal banking system and limited alternative sources of foreign exchange, by using an informal system to allow Somali expatriates to send money home to relatives.[169] The United States began scrutinizing Al Barakaat after it placed Al Itihaad, an Islamic Somali group, on a prior terrorist list. Despite rumors that Al Itihaad had connections with Al Qaeda and operating bases in Somalia, there was no concrete evidence.[170] Business partners found Al Barakaat a model corporation, perfectly honest and transparent in its accounts. The management of Al Barakaat claimed that its records proved their innocence.[171] Nonetheless, the United States pressured its allies, including the Bahamas, the United Arab Emirates, Liechtenstein, and other European nations, to disrupt Al Barakaat's operations. Its funds were frozen, its offices raided, and an employee arrested.[172] These actions forced the company to close, leaving behind a Somali remittance crisis and multi-million dollar debts to local Somalis and U.S. companies.[173]

Similarly, when the United States transmitted its list of terrorists to the United Nations, the Swedish government objected and insisted on reviewing the cases of three Swedish citizens whom the United States had included as associates of Al Barakaat.[174] Pursuant to Resolution 1373, the Swedish government froze the accounts of the three Somali-born men, but it also requested means to ascertain whether or not they were guilty and how to provide some rule of law for reviewing the possibility that the men had, as they claimed, merely trans-

166. Donald G. McNeil, Jr., *Italian Arab Is Perplexed by Swiss Raid*, N.Y. TIMES, Nov. 8, 2001, at B8. Nada said he was a victim of guilt by association because he sometimes did business with members of the bin Laden family and is a member of the Egyptian Muslim Brotherhood. The Brotherhood is, however, not a violent group. Indeed, it has been criticized for renouncing *jihad*, has members in the Egyptian parliament, and is not listed by the United States as a terrorist organization. *Id.*

167. *Id.*; Dana Milbank & Kathleen Day, *Businesses Linked to Terrorists Are Raided*, WASH. POST, Nov. 8, 2001, at A1.

168. Michael Isikoff & Mark Hosenball, *Jihad's Long Reach*, MSNBC, Sept. 17, 2003, *available at* http://www.msnbc.com/news/968210.asp?0sl=-21.

169. *See* William Hall, et al., *Cash Movers Branded as Financiers of Terrorism*, FIN. TIMES, Nov. 8, 2001, at 10.

170. Mark Turner, *Barakat Pleads Innocent to U.S. 'Terror' Claim*, FIN. TIMES, Nov. 12, 2001, at 6.

171. Hall, *supra* note 169.

172. David E. Sanger & Kurt Eichenwald, *U.S. Moves to Cut 2 Financial Links for Terror Group*, N.Y. TIMES, Nov. 8, 2001, at A1.

173. Turner, *supra* note 170.

174. *See* Serge Schmemann, *Swedes Take Up the Cause of 3 on U.S. Terror List*, N.Y. TIMES, Jan. 26, 2002, at A9.

ferred funds to their families in Somalia. The Swedish government also asked the sanctions committee of the U.N. Security Council to review their inclusion.[175]

The case attracted much attention in Sweden at a time when Europeans were criticizing the United States for what they saw as human rights and due process violations, especially in relation to U.S. treatment of prisoners of war. Prominent Swedes began to collect funds for the group's legal fees in defiance of the sanctions, which not only require the freezing of funds, but also prohibit business deals with, or the channeling of funds to, persons on the list. A prominent Swedish attorney rose to represent the men, all respected citizens free of criminal records, and the candidacy of one of them, Abdirisak Aden, in the 2000 Swedish elections, brought additional publicity to the case.[176]

Sweden's action focused attention on the lack of any judicial review of the inclusion of persons on the terrorist lists and any recourse to unfreeze assets.[177] The French government urged the Security Council to establish basic rules on CTFE efforts, including specific criteria for imposing sanctions, such as a direct link with Al Qaeda or the Taliban, and a mechanism for regularly reviewing the list. But the United States opposed both the Swedish review and the French initiative because it felt that explaining the basis for an entity's inclusion on the list would endanger its ability to gather further intelligence.[178]

Eventually, the United States gave in and removed Aden and four other persons from the list.[179] Additionally, the U.S. government agreed to alleviate some of the harsh effect of its sanctions, in part by considering the appeals of governments whose citizens found themselves on the U.N. terrorist list.[180] The U.N. then instituted evidentiary requirements for listing allegedly terrorist entities and an appeals procedure providing for the removal of contested names from the list.[181] Within the United States, the three-volume report of the Judicial Review Commission, established by Congress to review legal issues in U.S. export control laws, discussed in detail the due process concerns raised by the blacklisting of alleged terrorists without judicial review and recommending

175. *Id.*

176. *Id.*

177. Furthermore, countries in which terrorist funds may be frozen sometimes do not permit unfreezing without a court decision holding that the funds are not the instrumentalities and/or proceeds of crime. In Switzerland, funds are frozen and tied up for decades when governments allege them to be the proceeds of crime but then cannot ultimately show that they actually are. *See* Roger Thurow, *Frozen Terrorist Funds May Not Thaw Easily*, WALL ST. J., Nov. 14, 2001, at A1.

178. Schmemann, *supra* note 174.

179. Press Release, 1267 Committee Approves Deletion of Three Individuals and Three Entities From its List, U.N. Doc. SC/7490 (2002), *available at* http://www.un.org/News/Press/docs/2002/sc7490.doc.htm. Except for one other person, no other person or entity has been removed from the list. For the most current version of the list, see 1267 COMMITTEE, THE NEW CONSOLIDATED LIST OF INDIVIDUALS AND ENTITIES BELONGING TO OR ASSOCIATED WITH THE TALIBAN AND AL-QAIDA ORGANISATION AS ESTABLISHED AND MAINTAINED BY THE 1267 COMMITTEE, *available at* http://www.un.org/Docs/sc/committees/1267/1267ListEng.htm.

180. Carola Hoyos, *U.S. Backs Down Over 'Terror' Assets*, FIN. TIMES, Aug. 16, 2002, at 1.

181. SECURITY COUNCIL COMMISSION ESTABLISHED PURSUANT TO RESOLUTION 1267 (1999) *at* http://www.un.org/Docs/sc/committees/1267Template.htm; GUIDELINES OF THE COMMITTEE FOR THE CONDUCT OF ITS WORK (2003) *at* http://www.un.org/Docs/sc/committees/1267/1267_guidelines.pdf

changes in the law to allow for it.[182] Still, all three Swedish men have brought suit in the European Court of Justice, complaining they were listed without due process of law.[183]

Over 150 nations, including Saudi Arabia, have publicly supported the CTFE regime.[184] The public designation of terrorists and terrorist supporters, and the blocking of their abilities to transmit and receive funds through international financial institutions, have been critical elements in the CTFE regime.[185] So far, the U.S. list has been updated more than 39 times and it currently includes almost 330 persons and organizations. With it, the U.S. government has frozen over $136.8 million.[186] Still, the decision whether or not to include certain organizations on the lists reflects the fine line the U.S. government must walk between putting pressure on Muslim nations, such as Saudi Arabia and Pakistan, to work to drain terrorist finances, and not alienating those allies.

V.
CONCLUSION

During the last three or four years, governments and international organizations continued their active efforts to increase regulatory and criminal enforcement to stem the tide of transnational crime. These efforts were reflected in the criminalization of various business and financial transactions, the imposition of new due diligence measures on the private sector and the concomitant weakening of privacy and confidentiality laws, and strengthened penalties for non-compliance with regulatory efforts against the private sector and governments. These anti-money-laundering measures were brought into the fold of the counter-terrorism financial enforcement scheme following the September 11, 2001, terrorist attacks. Together, AML and CTFE regulations have coalesced into one regime constituting a new global financial architecture. How well this regime has fared, and how it can be improved, is the subject of the following discussion. I first relate my personal experiences as an international corporate lawyer and then offer my analysis on the current and future regimes.

A. The Role of an International Corporate Lawyer

The rapid pace of change in AML and CTFE law makes it difficult for international corporate lawyers to keep up with all the new regulations. For instance, two or three years ago the International Monetary Fund and World Bank had no money laundering departments or staff with an AML background. Now they both have both. New counsel must set new policies for the interna-

182. JUDICIAL REVIEW COMMISSION ON FOREIGN ASSET CONTROL, FINAL REPORT TO CONGRESS (2001). For a summary of the Commission's recommendations, see Bruce Zagaris, *U.S. Judicial Review Commission on Foreign Asset Control Recommends More Due Process*, 17 INT'L ENFORCEMENT L. REP. 69 (2001).

183. Brand, *supra* note 162.

184. *See* Spiegel, *supra* note 41.

185. Aufhauser, *supra* note 39, at 3.

186. *Id.* at 3-4; *see* OFAC List, *supra* note 37.

tional financial institutions, evaluate compliance by governments, and help provide technical assistance to governments in terms of drafting and critiquing AML laws, institutions, and overall AML regimes. Recently, the International Finance Corporation, an IMF/World Bank Group entity, hired its first counsel to specialize in AML law, who must practically start from scratch in achieving those objectives.

In my own practice, I spend much of my time evaluating national and international laws, advising on due diligence and voluntary disclosures for big transactions, conducting audits of companies, and checking whether a potential transaction with an entity may violate the prohibitions on doing business with one of the thousands of persons named on one of the many blacklists. And all of this in some fairly gray areas of the law. Increasingly, I work with foreign lawyers whose clients are about to receive a large inheritance or make a gift, or otherwise transfer money to family members. But they are uncertain as how to conduct a transaction within the confines of the myriad rules and often want advice on the AML and reporting rules before they or their clients do so. Working with multinational corporations can also present exciting challenges as they are accustomed to aggressive business and tax planning and yet cannot afford to violate AML and CTFE laws because the cost of a criminal conviction, or even defending a prosecution, is enormous.

Foreign governments that rely on offshore financial centers as a significant part of their economy are inherently tricky to work for now that they are reviled throughout the AML and CTFE spheres. On a few occasions I have represented criminal defendants accused of money laundering offenses due to their alleged abuse of offshore financial center vehicles. The U.S. government has also hired me a number of times to serve as a consultant and expert witness in cases involving abusive transactions at offshore financial centers. In one case, I consulted and served as an expert witness for a person who was fired for reporting too much wrongdoing while conducting an audit of a large broker-dealer's money laundering; he brought an arbitration action for wrongful dismissal.

In addition to the increased risk of liability, the vast number of gray areas in AML and CTFE law, especially at the nexus of U.S. and international and foreign law, also allow ample opportunity for corporations, their executives, and their inside and outside counsel and accountants, to conduct the same aggressive business and tax planning they engaged in before. For instance, corporate inversions to Bermuda with the use of tax treaty intermediaries in Luxembourg or Barbados and aggressive use of transfer pricing can still be accomplished. Indeed, despite the rapid growth of the new regime, the ease with which these transactions can be completed has increased due to inadequate regulatory oversight and insufficient leadership from the U.S. government.

B. *Improving the AML/CTFE Regime*[187]

Unilateral action can present difficulties for international cooperation. In the days before September 11, the Bush administration gained the ire of much of the international community by rejecting numerous international proposals, even those to which the United States was already a party. These included the proposed U.N. convention on trafficking in small arms, the treaties banning landmines and atomic/biological/chemical weapons, the 1972 Anti-Ballistic Missile Treaty with Russia, the nuclear test ban, the accord to establish the International Criminal Court, and the Kyoto accord on global warming.[188] Following the attacks, the administration's designation of its prisoners in the "war on terror" as "enemy combatants," as well as its invasion of Iraq, prompted further international consternation.[189]

What is necessary is a comprehensive approach to AML and CTFE efforts through a genuine and effective multilateral policy. The current mix of "hard law" conventions and statutes and "soft law" mutual evaluations provides a good framework for cooperation, so long as proceedings are open to all parties and countermeasures are fairly distributed. In this regard, the recent change at the FATF to allow for a comment period open to all persons prior to revising its Forty Recommendations[190] and the increased collaboration between it and the CFATF[191] have shown promise of an AML/CTFE regime increasingly interested in working with all nations. Further, the establishment of common national institutions along with an international organization composed of representatives of those institutions, such as the Egmont Group of Financial Intelligence Units, greatly fosters cooperation and enhances knowledge.

Thus, international organizations are establishing increasingly more mechanisms to ensure the implementation of their newly created AML and CTFE requirements and to sanction nations, institutions, and persons who do not meet them. In looking at the future we must focus on the basic principles governing international cooperation, global efforts to combat money laundering and terrorist financing, and the rights and interests of persons affected by the AML/CTFE regime. Multilateral conventions must be implemented by international organizations with universal membership and transparent and democratic procedures, and they must mandate and effectively enforce adherence by all nations. Only then can they result in true law enforcement success in combating money laun-

187. This discussion is derived substantially from Bruce Zagaris, *Money Laundering: New Challenges and Emerging Issues*, THE 2002 COMMONWEALTH SECRETARIAT OXFORD CONFERENCE ON THE CHANGING FACE OF INTERNATIONAL CO-OPERATION IN CRIMINALS MATTERS IN THE 21ST CENTURY 199, 219-20 (Aug. 27-30, 2002).

188. Colum Lynch, *U.S. Fights U.N. Accord to Control Small Arms*, WASH. POST, July 10, 2001, at A1.

189. Tony Allen-Mills, *Camp X-ray Rewrites the Law of War*, SUNDAY TIMES OF LONDON, Jan. 13, 2002; CNN, *Cities Jammed in Worldwide Protest of War in Iraq*, Feb. 16, 2003, *available at* http://www.cnn.com/2003/US/02/15/sprj.irq.protests.main.

190. FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, REVIEW OF THE FATF FORTY RECOMMENDATIONS CONSULTATION PAPER (2002).

191. Bruce Zagaris, *Caribbean FATF Dialogues with IMF/World Bank on Proposed Methodology*, 19 INT'L ENFORCEMENT L. REP. 77 (2003).

dering and terrorism. But even then they cannot alone root out the underlying causes behind these phenomena, and indeed they can lead to abuses in other areas.

One can see the danger the AML/CTFE regime poses by considering the so-called "war on drugs." One part of the U.S. strategy was the Clinton administration's Plan Colombia, through which the United States, amongst other actions, sold the Colombian military helicopters to spray and destroy crops of narcotics.[192] The plan, supposed to be international in nature and protective of human rights, proved lacking in both regards. President Clinton waived all but one of its human rights provisions in the name of national security. Then European leaders, concerned about the over-militarization of counter-narcotics efforts under the plan, agreed to fund only economic, peace, and human rights programs.[193] Following the attacks of September 11, the Bush administration expanded the plan to include counter-terrorism measures[194] and, in a break with long-standing tradition, allowed Colombia to use the U.S. aid not only for counter-narcotics purposes, but also to combat illegal armed forces.[195] Despite over thirty years of fighting, the U.S. Drug Enforcement Administration is still not winning its "war."[196]

In the AML/CTFE context, the danger is similar. By describing CTFE efforts within the rhetoric of a "war on terrorism" and freezing the funds of suspected terrorists and terrorist "associates" without due process, the United States risks alienating its allies and violating human rights such as the right to privacy. Already, many Arabs and Arab-Americans have pulled their money out of U.S. institutions for fear of it being frozen as terrorist funds.[197] Further, dismantling organizations that have both military and charitable wings, such as Hamas,[198] without simultaneously providing adequate substitutes for the humanitarian assistance they otherwise provide, erodes public confidence in the justice of the cause. A proper balance must be struck between fundamental human rights and national security. In the long run, unless wealthy nations increase basic living standards and democratic institutions in the developing world, it will remain a breeding ground for crime and terrorism, the AML/CTFE regimes there will remain mostly symbolic, and those elsewhere less effective.

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192. *Challenges for U.S. Policy Toward Colombia: Is Plan Colombia Working: Hearing Before the Senate Comm. on Foreign Relations*, 108th Cong. (2003) (statement of Robert B. Charles, Assistant Secretary for International Narcotics and Law Enforcement Affairs, U.S. Department of State) [hereinafter Charles].

193. HUMAN RIGHTS WATCH, WORLD REPORT 2001 (2001).

194. *See* Charles, *supra* note 192.

195. HUMAN RIGHTS WATCH, WORLD REPORT 2003 (2003).

196. Almost one of every four high school seniors smokes pot at least monthly and, in 2001, over seven times as many people died of drug-induced causes as from the September 11th terrorist attacks. *See* NATIONAL CENTER FOR HEALTH STATISTICS, ILLEGAL DRUG USE, *at* http://www.cdc.gov/nchs/fastats/druguse.htm (last modified Oct. 14, 2003); SEPTEMBER 11, 2001, VICTIMS, *at* http://www.september11victims.com/september11victims/victims_list.htm (last modified Oct. 11, 2003).

197. *See* Tony Karon, *Are Saudi Billions Leaving America?*, TIME, Aug. 23, 2002.

198. *See Counterterror Initiatives in the Terror Finance Program: Hearing Before the Senate Comm. on Banking, Housing & Urban Affairs*, 108th Cong. 5 (2003) (statement of E. Anthony Wayne, Assistant Secretary for Economic and Business Affairs, U.S. Department of State).

With regard to organized crime and terrorism, there are no silver bullets. The AML/CTFE regime is only one tool of many to respond to these deeply imbedded and powerful phenomena. Transnational terrorism reflects the reality of modern day discontents taking advantage of globalization and technology to employ maximum violence to achieve, as they hope, maximum social change. Organized crime extends from the old gangs of bandits roaming rural highways, through the days of Al Capone, to today's international traffickers in narcotics, people, firearms, etc.

It will thus take a great deal of time for the new regime to function. The sweeping transformations of law that have been adopted cannot be fully implemented overnight.[199] In the meantime, international legal systems must accommodate the diplomatic tensions that will inevitably arise due to competing national interests and priorities. Perhaps it was wrong to attempt to graft AML regulations onto the new CTFE regime. Since terrorist financing normally involves the disbursement and movement of small amounts of money often derived from legitimate or quasi-legitimate sources, the chances of financial institutions detecting such activities are negligible under a regulatory framework developed for far larger-scale transactions. Although financial institutions may be able to help reduce the funding available to terrorists to a limited extent, they must rely heavily on government terrorist lists to be of use.

Additionally, they must bear the burden of considerable new costs imposed by the ever expanding due diligence requirements, which constitute a quasi-privatization of law enforcement. Financial institutions and their employees, and ever more associated professionals, are on the front line of international efforts to stamp out money laundering, organized crime, and terrorism. To increase the confusion, most nations still have substantial unfinished AML work on all levels (legislative, executive, private, and so on), and now they must rapidly create a complicated CTFE regime out of thin air and attempt to make it comprehensible to the private sector, which is then subject to liability for misinterpreting any gray areas the law may contain. Thus the new AML/CTFE requirements are major resource burdens, both in terms of cost and administrative time and energy, and they come at a time of worldwide recession. Yet there are sanctions for those entities that cannot keep up with the fast pace of change. The degree of success with which governments will meet in their endeavors depends on the level of trust and credibility they can retain with financial institutions, as well as each other.

Thus, a United Nations convention on money laundering could give the AML regime an added boost of authority and quicken the pace of harmonization of national laws. In my view, an essential requirement of a successful AML/CTFE regime is the establishment of an institution with the authority and resources to help regulators and financial institutions on a daily basis to implement and administer rules. This could be the role of an Americas Committee on

199. One prospective solution is to require that future free trade and economic integration arrangements include up-front, as part of the document, more regulatory and enforcement mechanisms.

Crime Problems, which could operate under the auspices of the Organization of American States and be modeled after the Europe Committee on Crime Problems, which functions under the Council of Europe.[200] It could also facilitate networking among professionals from the private sector, think tanks and academia, as well as government and law enforcement officials, and other stakeholders, in order to start a global community of laws based on shared values and interests.[201] Interested citizens could use it as a sounding board for their concerns and ideas.

At any rate, a fresh vision is required, one that includes pragmatism and restraint, as well as idealism. This was the sort of leadership Irving Tragen gave as Executive Secretary of the Inter-American Drug Abuse Control Commission. Trained in the law, Irving conceptualized and materialized innovative and visionary mechanisms for policy-making and implementation. Yet he was a diplomat's diplomat. An American, he spoke impeccable Spanish and was culturally sensitive to foreign politicians and dignitaries, always treating them with patience and deference. He knew how to accomplish his objectives in an inclusive manner, earning the trust and respect of the international community. As Irving did, we must roll up our sleeves and work together to develop effective institutions and a civil society in which a comprehensive criminal justice policy, national security, freedom, and good governance are essential and equally valued elements.

ABBREVIATIONS

AML	Anti-Money-Laundering
BSA	Bank Secrecy Act of 1970
CFATF	Caribbean Financial Action Task Force
CTC	Counter-Terrorism Committee
CTFE	Counter-Terrorism Financial Enforcement
EU	European Union
FATF	Financial Action Task Force on Money Laundering
FinCEN	Financial Crimes Enforcement Network
IGO	Intergovernmental Organization
NCCT	Non-Cooperative Country or Territory
OAS	Organization of American States

200. For a discussion of the European Council's Committee on Crime Problems, see Scott Carlson & Bruce Zagaris, *International Cooperation in Criminal Matters: Western Europe's International Approach to International Crime*, 15 NOVA L. REV. 551 (1991). For a discussion of a more comprehensive anti-crime regime development applied to the Americas, see Bruce Zagaris, *Constructing a Hemispheric Initiative Against Transnational Crime*, 19 FORDHAM INT'L L.J. 1888 (1996); B. Zagaris & C. Papavizas, *Using the Organization of American States to Control International Narcotics Trafficking and Money Laundering*, 57 REV. INT'L DE DROIT PENAL 119 (1986).

201. For a discussion of integration within the intra-Caribbean system and transnational functional relations, for example, in anti-narcotics action, justice and human rights, currencies, finance and banks, see CHRISTOPH MÜLLERLEILE, CARICOM INTEGRATION: PROGRESS AND HURDLES, A EUROPEAN VIEW 84-135 (Fitzroy Fraser trans., 1996).

TFOS	Terrorist Financing Operations Section
U.N.	United Nations
U.S.	United States
USA PATRIOT Act	Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001

Berkeley Journal of International Law

Volume 22 | Issue 1 Article 7

2004

Speaker Biographies

2003 Riesenfeld Symposium International Money Laundering: From Latin America to Asia, Who Pays?

Speaker Biographies

THE HONORABLE ADOLFO AGUILAR-ZINSER is Mexico's former Ambassador to the United Nations. He is a member of the Inter-American Dialogue in Washington, D.C. and a syndicated columnist for *Reforma* and for other important newspapers such a *Frontera de Tijuana* and *Diario de Yucatán*. He is the author of several books and essays regarding international matters such as political and economic relations between Mexico and the United States; Central America; national security; Mexico's southern border and refugee policy; and national issues about the Mexican political system and corruption. In 2000 he was appointed by the President of Mexico, Vicente Fox, as the National Security Advisor and Commissioner of Law and Order. He was also elected to Congress as an external Partido de la Revolucion Democratica (PRD) candidate and was the founder of the Independent Citizens Congressmen Group. Ambassador Aguilar-Zinser is a member of various commissions including the Commission for the Investigation of CONASUPO (national supply company for basic consumption commodities) and its branches (this Commission was established to investigate corruption of high public officials); Foreign Affairs; Border Affairs; Radio, Television and Cinematography and Social Communication Special Commission. Ambassador Aguilar-Zinser gave the keynote address and was the inaugural recipient of the Board of Editors Award presented by the Berkeley Journal of International Law.

MADS ANDENAS has been the Director of the British Institute since April 2000. He is also a Senior Teaching Fellow in European Community Law of the Institute of European and Comparative Law, University of Oxford and a Fellow of Harris Manchester College, University of Oxford. He was the Director of the Centre of European Law, King's College, University of London from 1994-2000, and the Honorary Director of Studies. Later he was named Law Society Senior Research Fellow in Corporate Law, Institute of Advanced Legal Studies, University of London. He is General Editor of the *International and Comparative Law Quarterly* and of *European Business Law Review* and is on the editorial boards of some 12 other law journals and book series. He has published some

30 books. Mr. Andenas spoke as a member of the panel focused on banking and globalization.

DIANE AMANN is a Professor of Law at the University of California, Davis School of Law. Her specialties include International Criminal Law, Criminal Law, Procedure, Evidence, Constitutional Law and International Human Rights Law. She has written various articles and book chapters on each of those topics. In 2002 she was a Visiting Professor at the Irish Centre for Human Rights at the National University of Ireland, Galway and in 2001-02 she was a Professeur invitée, Faculté de droit, Université de Paris 1 (Panthéon-Sorbonne). Professor Amann spoke as a member of the panel concerning the worldwide effects of money laundering as it affected trafficking of women in Asia and Eastern Europe.

MARTHA BOERSH, a federal prosecutor, currently supervises five attorneys in the Organized Crime Strike Force of the U.S. Attorney's Office in San Francisco, which investigates and prosecutes Asian, Russian, and other organized crime groups for a variety of federal offenses. From September 2001 until September 2002, Ms. Boersch supervised seven attorneys in the Securities Fraud Section, which specializes in corporate fraud, insider trading, and investment fraud cases. She also served as the International and National Security Coordinator and Anti-Terrorism Coordinator. As an Assistant U.S. Attorney in the Criminal Division her case load included fraud and money laundering cases as well as violent crimes. Ms. Boersh spoke as the moderator of the panel focused on enforcement.

JACK A. BLUM is a partner at Lobel, Novins & Lamont, a Washington, D.C. law firm where he represents individuals, governments and corporations on international business transactions, corporate fraud, recovery of losses for victims of international fraud schemes, tax and antitrust matters. As a Senate Attorney he was involved in a number of well-known investigations, including BCCI, General Noriega's drug trafficking, and Lockheed Aircraft's overseas bribes. He is an expert on money laundering and offshore tax haven issues and has served as an expert witness in these areas. Mr. Blum spoke as a member of the panel focused on enforcement.

LAN CAO is the Cabell Professor of Law at William & Mary School of Law and was a visiting Professor of Law at University of Michigan Law School in the spring of 2003. She specializes in and has written several articles and books concerning International Business & Trade, International Law, and Law & Development. She clerked for Judge Constance Baker Motley of the United States District Court, District of New York, practiced with Paul, Weiss, Rifkind, Wharton & Garrison in New York City, and was a Ford Foundation Scholar in 1991. She is also the author of the acclaimed novel *Monkey Bridge*. Professor Cao has written an article as a member of the panel focused on the worldwide effects of money laundering as it influences trafficking of women in Asia and Eastern Europe.

DAVID D. CARON is a C. William Maxeiner Distinguished Professor of Law at the University of California, Berkeley School of Law (Boalt Hall). He presently serves as a member of the precedent panel of the U.N. Compensation Commission for claims arising out of the Gulf War and is also a member of the Department of State Advisory Committee on Public International Law. He has written extensively on international law including two of his most recent publications: "The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority" in the *American Journal of International Law* (2002); and "The United Nations Compensation Commission: Practical Justice, Not Retribution" in the *European Journal of International Law* (2002).

STEFAN D. CASSELLA became the Deputy Chief of the Asset Forfeiture and Money Laundering Section in 2002. He supervises the Legal Policy Unit which is responsible for giving legal advice on money laundering and forfeiture issues, training, legislation, policy and dissemination of information through publications, the media, and public appearances. He has litigated major domestic and international money laundering and forfeiture cases, including heading the trial team handling the forfeiture of $1.2 billion in assets of the Bank of Credit and Commerce International (BCCI) and coordinating the litigation of international forfeiture cases in Operation Casablanca. He has written nine law review articles and two monographs on money laundering and asset forfeiture that serve as key resource material for the Department of Justice and the U.S. Attorney's Office. Mr. Cassella spoke as a member of the panel focused on enforcement.

MARIANO-FLORENTINO CUÉLLAR received his J.D. from Yale in 1997 and a PhD in political science from Stanford in 2000. He was an undergraduate research fellow at the American Bar Foundation during the summer of 1992, a teaching and research assistant at Stanford in 1994-95 and part of the research staff to the Council of Economic Advisers during the summer of 1996. From 1997-1999, he was Senior Advisor to the Under Secretary of the Treasury (Enforcement). In 1999 he served as a law clerk to Chief Judge Mary M. Schroeder of the U.S. Court of Appeals for the Ninth Circuit. He has been a member of the Stanford Law School faculty since 2001. Professor Cuéllar spoke as a member of the panel concerning banking and globalization.

AMBASSADOR NANCY ELY-RAPHEL is currently Counselor on International Law in the Office of the Legal Adviser. Prior to that appointment she served as Senior Advisor to the Secretary of State and Director of the newly created Office to Monitor and Combat Trafficking in Persons. Secretary of State Colin Powell selected her for that position in October 2001. She established the office and led State Department efforts to develop and implement policy to combat trafficking in persons until January 2003. From 1998 until 2001 she served as the U.S. Ambassador to Slovenia. Prior to her service in Slovenia, she served as the Coordinator for Bosnia, the Principal Deputy Assistant Secretary of State for Democracy, Human Rights, and Labor, and the Assistant Legal Adviser for African Affairs and Nuclear Affairs. She is a graduate of Syracuse University and the University of San Diego School of Law, and has worked as an Assistant U.S.

Attorney, Deputy City Attorney in San Diego, Associate Dean of Boston University School of Law, and senior trail attorney with the Organized Crime Strike Force of the Department of Justice. In 2001 she received The University of San Diego's Author E. Hughes Award for lifetime career achievement. Ambassador Ely-Raphel spoke as a member of the panel concerning the worldwide effects of money laundering as it influences trafficking of women in Asia and Eastern Europe.

EDWARD LUIS "LUCHO" GARZON was the president of Colombia's largest labor federation, the CUT (*Confederación Unitaria de Trabajadores*), from 1996-2001. He was a presidential candidate in 2002 for the new party, *Polo Democrático*, and won the largest support for a third-party candidate in the history of Columbia. Currently, he is a key figure in the peace process, serving as a member of the Executive Committee of the National Peace Council. Recently, Mr. Garzon has been elected mayor of Bogota, the second highest political post in Columbia. Mr. Garzon spoke as a member of the panel concerning the status of affairs and policy reforms in Latin America.

ANDREW GUZMAN is an Acting Professor of Law and the Director of the International Legal Studies Program at the University of California, Berkeley School of Law (Boalt Hall). He works and writes in the fields of international trade, international regulation, international law (public and private), arbitration, foreign direct investment, and choice of law. Some of his forthcoming articles include "The Political Economy of Litigation and Settlement at the WTO," and "International Antitrust and the WTO: The Lesson from Intellectual Property." Prior to joining the Boalt Hall faculty he was a Visiting Assistant Professor at the University of Chicago Law School and served as a law clerk to the Honorable Juan R. Torrella, Chief Judge of the First Circuit Court of Appeals in San Juan, Puerto Rico. Professor Guzman spoke as the moderator of the panel concerning banking and globalization.

JOHN W. MOSCOW, a native New Yorker, is a Deputy Chief of the Investigations Division of the New York County District Attorney's Office, where he started prosecuting street crime in 1972. He has spent more than twenty-five years prosecuting thefts, tax fraud, money laundering, securities fraud and bank fraud. A graduate of the University of Chicago and Harvard, his best known case is the prosecution of the Bank of Credit and Commerce International (BCCI). Since 1996 he has prosecuted securities fraud cases, including those against A.R. Baron, Duke Securities and Meyers Pollak Robbins. He is currently prosecuting officers of Tyco International Ltd for theft, as well as cases involving international money laundering and related frauds. Mr. Moscow spoke as a member of the panel concerning enforcement.

KAL RAUSTIALA is an Acting Professor of Law at the University of California, Los Angeles School of Law. He teaches International Environmental Law and Public International Law. He is associated with UCLA's Institute of the Environment, a campus-wide multidisciplinary program. He is the co-editor of *The Implementation and Effectiveness of International Environmental Commit-*

ments: Theory and Practice (with Victor and Skolnikoff, 1998). His most recent publications focus on sovereignty and multilateralism, and international regulatory cooperation. He was a Peccei Scholar at the International Institute for Applied Systems in Vienna, Austria in 1995 where he spent part of three years studying environmental treaties and has frequently worked as a consultant to the United Nations Environment Programme. Professor Raustiala spoke as a member of the panel focused on banking and globalization.

HARLEY SHAIKEN is a Professor of Geography and Education and the Chair of the Center for Latin American Studies at the University of California, Berkeley. He specializes in issues of economic integration, technology, labor, and global production. He is the author of three books: *Work Transformed: Automation and Labor in the Computer Age*; *Automation and Global Production*; and *Mexico in the Global Economy*, as well as numerous articles and reports. Professor Shaiken introduced Ambassador Aguilar-Zinser and also spoke as the moderator of the panel focused on the status of affairs and policy reforms in Latin America.

JUAN SOLA is professor of Constitutional Law and the Chairman of the Public Law Department at the University of Buenos Aires. He served as a delegate for Argentina to the Law of the Sea Convention and is the author of a book on the Law of the Sea and Argentina. He was a career diplomat and served as Deputy Ambassador to Brazil, the third highest post in his country's diplomatic corps. For a few years he served as Consul General in Los Angeles. Professor Sola spoke as a member of the panel concerning the status of affairs and policy reforms in Latin America.

JUAN TOKATLIAN received a B.A. in sociology in 1978; he received a M.A. in 1981 and a Ph.D. in 1990 in International Relations from The Johns Hopkins University School of Advanced International Studies in Washington, D.C. Currently, he is a professor at Unversidad de San Andres in Victoria, Provincia de Buenos Aires, Argentina. Professor Tokatlian lived in Colombia for 17 years, from 1981-1998. He was an associate professor form 1995 to 1998 at the Universidad Nacional de Colombia, Bogotá, where he was senior researcher at the Instituto de Estudios Politicos y Relaciones Internacionales. He co-founded the Centro de Estudios Internacionales at the Universidad de los Andes in Bogotá in 1982 and served as director from 1987 to 1994. He has published extensively on Colombian foreign policy, U.S. Latin American Relations, drug trafficking in the Americas, and global politics. Professor Tokatlian spoke as a member of the panel focused on the status of affairs and policy reforms in Latin America.

BRUCE ZAGARIS has a B.A., J.D., and L.L.M. from George Washington University. His B.A. included a major in International Affairs with a specialty in Latin American Affairs. After serving as a law clerk for the U.S. District Court for the Southern District of West Virginia (1972-73), Mr. Zagaris became an Assistant Attorney General for the State of Idaho (1973-74). Mr. Zagaris received graduate legal diplomas from Stockholm University, Sweden (1975)

and from the Free University, Brussels (1976). During his two years in Europe, in 1974-76, Mr. Zagaris worked for the Nordic Law Consultants and served as a UN consultant to the Mano River Union, a customs union in West Africa. Mr. Zagaris is currently an Adjunct Professor at the Washington College of Law, American University in Washington and the Fordham University Law School, New York. Since November 1978, Mr. Zagaris has practiced law in Washington, D.C., where he is a partner with Berliner Corcoran & Rowe, LLP. He has served as a consultant, counsel and lobbyist for fourteen governments on various subjects. Mr. Zagaris spoke as a member of the panel concerning the worldwide effects of money laundering as it influences trafficking of women in Asia and Eastern Europe.