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Anti-Money Laundering: An Inquiry into a Disciplinary Transnational Legal Order

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This Article enquires into the case of one of the most comprehensive, far-reaching, most deeply penetrating, and most punitive of TLOs: anti-money laundering. Drawing on an intensive study at a moment when its governing norms and methodologies of implementation were undergoing revision and expansion, as well as on observation and participation in AML/CFT activities over three decades, the Article brings rich empirical evidence to bear on two theoretical issues. First, despite its seemingly successful institutionalization, the AML TLO exhibits many deficiencies and imposes extensive costs on the private and public sectors, and harms upon the public. Why doesn't it fail? Second, the pervasiveness and penetration of the AML TLO indicates it may constitute a particular species of "disciplinary" TLOs. To address these issues, the Article, first, briefly sketches the thirty-year development and workings of the AML TLO; second, considers its benefits, costs, deficiencies and harms; third, confronts the puzzle of its persistence; and, fourth, concludes by arguing that the AML TLO may be distinctive insofar as (1) it has a foundational assumption of recalcitrant actors who must be monitored to reduce social harms which (2) legitimates a pervasive surveillance apparatus that is (3) yoked to punitive criminal institutions and practices which (4) lead to an elaborate repertoire of discipline that (5) has been multiplied to include states, financial institutions (e.g. banks), non-state collective actors such as charities, organized crime families, and individuals such as lawyers, accountants, and everyday participants in their myriads of transactions in an integrated global financial system. Those singular properties may in fact be shared substantially by other TLOs directed at crime. The site of criminal justice thereby encourages a more differentiated understanding of TLOs in 21st century settings.

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INTRODUCTION

Transnational legal orders (TLOs) proliferate. They offer solutions to economic, social and political problems, ranging from business and financial regulation to climate change, from human rights to constitution-making. They come in many shapes and sizes, rising and falling at different rates, and cooperating or conflicting as they come into contact with each other.¹

This Article enquires into the case of one of the most comprehensive, far-reaching, most deeply penetrating, and most punitive of TLOs. It is so punitive that we suggest, there is value in considering whether it points to a species of legal order that warrants particular attention in its own right.

Since the 1980s an amalgam of clubs of nations, powerful states, international financial institutions, banking and financial institutions, and emergent “issue professionals” have created a worldwide regulatory order to stem tides of money laundering and thereby attempt to forestall the very many harms which Anti-Money Laundering (AML) entrepreneurs perceive follows from the flow of dirty money inside states and beyond.² Not only does this order rely on heavy punitive measures against citizens and institutions within states, it also has the capacity, often threatened and occasionally effected, to bring punitive action against states.

This Article draws on an intensive study of the AML and Combating the Financing of Terrorism (CFT) (hereafter cited in text as AML/CFT) order³ at a moment when its governing norms and methodologies of implementation were undergoing revision and expansion,⁴ as well as on observation and participation in AML/CFT activities over three decades. This enables us to bring rich empirical

*We are grateful for the cooperation of staff at the International Monetary Fund, the Financial Action Task Force, and other international and domestic regulators and non-profit organizations integral to the AML/CMT international regulatory order. Our views are entirely our own. We thank Gregory Shaffer, Ely Aaronson, and the participants in the 2018 conference for their valuable insights.

1. Terence C. Halliday & Gregory Shaffer, *Researching Transnational Legal Orders*, in TRANSNATIONAL LEGAL ORDERS 473–528 (Terence C. Halliday & Gregory Shaffer, eds., 2015); Tom Ginsburg, *Constitution Making as Transnational Legal Ordering*, in CONSTITUTION-MAKING AND TRANSNATIONAL LEGAL ORDER 74–76 (Gregory Shaffer, Tom Ginsburg & Terence C. Halliday, eds., 2019).

2. Michael Levi & Peter Reuter, *Money Laundering*, 34 CRIME & JUST. 289, 333–47 (2006) (discussing the enforcement of the AML regime); Mark T. Nance, *The Regime that FATF Built: An Introduction to the Financial Action Task Force*, 69 CRIME, LAW & SOC. CHANGE 109, 114–17 (2018) (discussing the history of the AML before and after the FATF).

3. Technically speaking, this regulatory regime or order now embraces AML, CFT, and counter-proliferation financing (CPF). The vast majority of criminal prosecutions and regulatory actions are focused on money laundering. Hereafter we shorten this to the AML TLO.

4. TERENCE C. HALLIDAY, MICHAEL LEVI & PETER REUTER, GLOBAL SURVEILLANCE OF DIRTY MONEY: ASSESSING ASSESSMENTS OF REGIMES TO CONTROL MONEY-LAUNDERING AND COMBAT THE FINANCING OF TERRORISM (2014).

evidence to bear on two theoretical questions.

First, despite its seemingly successful institutionalization, the AML TLO exhibits many deficiencies and imposes extensive costs on the private and public sectors, and harms upon the public. Why doesn't it fail? What explains its persistence? Here, we seek to contribute to the theory less on the rise of TLOs and more on their persistence and the conditions under which they are likely to fail.⁵

Second, the pervasiveness and penetration of this particular TLO suggests that it has qualities that distinguish it from other TLOs that have been observed in the domains of business, finance, rights, constitution-making and private legal ordering. The Article asks if the AML TLO, or indeed criminal TLOs more generally,⁶ are a particular species of a TLO which might be characterized as "disciplinary" TLOs.

First, we briefly sketch the thirty-year development of the AML TLO and describe how it works; second, consider its benefits, costs, deficiencies and harms, both intended and unintended; third, confront the puzzle of its persistence; and, fourth, conclude with considerations on its distinctiveness as a disciplinary TLO.

I. THE RISE OF THE AML TLO

Although the Council of Europe adopted in 1980 a weak measure for banks to develop some vigilance over who deposited or transferred cash (as part of its counter-terrorism efforts), a sharpening focus on money-laundering in the 1980s came principally as a response to the drug trade, organized crime, and domestic terrorism. Money laundering is defined (with some variation between nations) as actions that attempt to conceal the criminal origins of assets, and generally includes self-laundering by primary offenders as well as by third parties, some of whom are lawyers and accountants.

Initially responses by some states came in the form of domestic legislation to detect and deter money-laundering, almost entirely initially focused on the banking industry.⁷ The UK enacted legislation on police and criminal evidence (1984), drug trafficking offenses (1986), other crimes for gain excluding tax fraud (1988) and prevention of terrorism (1989), which strengthened law enforcement's capacity to reach dirty money in the banking sector with police powers. The Department of Trade and Industry gained financial regulatory powers in the Financial Services Act (1986) and the Companies Act (1989). The UK set up a Serious Fraud Office in 1987, though it never had any clear role in relation to money laundering prosecutions other than via its later transnational bribery mandate (from 2010). For

5. Terence C. Halliday & Gregory Shaffer, *Researching Transnational Legal Orders*, in *TRANSNATIONAL LEGAL ORDERS* 473, 500–11 (Terence C. Halliday & Gregory Shaffer, eds., 2015).

6. TLOs of international criminal justice might include legal orders concerned with trafficking, corporate foreign bribery, prison standards, sexual violence, the death penalty, crimes against humanity, and cannabis prohibition.

7. Michael Levi, *Pecunia non olet: Cleansing the Money-Launderers from the Temple*, 16 *CRIME L. & SOC. CHANGE* 217, 217–302 (1991) (discussion of the initial response from states to control money laundering through domestic legislation).

the UK, too, detecting dirty money was part of a strategy to suppress the financing of terrorism, then focused on the Provisional IRA and to a lesser extent, Protestant paramilitaries in Ireland.

Following a presidential commission on organized crime that reported in 1986, the US enacted its Money Laundering Control Act (1986) which criminalized money-laundering with sentences of up to ten years for individuals who knowingly laundered dirty money. Money laundering refers to efforts to use the financial system to make the fruits of specific crimes (“predicate crimes”) appear to be legitimate. In all these cases, government responses to money laundering were seen more broadly as a way of suppressing domestic crime (particularly drug dealing and financial crimes), national and international organized crime.

International legal responses to the financial proceeds of crime and laundering of dirty money⁸ gathered momentum in the later 1980s and early 1990s. The 1988 UN Vienna Convention, for the first time, named money-laundering as an offense in international law in an effort to deprive illicit drug dealers of their ill-gotten financial gains. For the financial sector, the 1988 Basel Committee on Banking Principles issued principles to increase vigilance over customers who might be engaged in criminal activity. The Council of Europe followed with a 1990 convention on laundering, search, seizure and confiscation of the proceeds of crime, a law mirrored by the 1991 European Community Directive on Money Laundering.⁹

The painstaking, time-consuming and exhausting effort to produce the multi-lateral Vienna Convention convinced the US and the G-7 that treaties were not the appropriate legal method to handle the fast-moving, sophisticated and shadowy world of dirty money.¹⁰ The US had no interest in lodging new surveillance and enforcement capacities in the UN. Instead, the US proposed a task force, subsequently accepted by the G-7, that would take one year to review and report on domestic AML laws across the world. Formed in 1989 to focus narrowly on moneys generated from the illicit drug trade, the Financial Action Task Force on Money Laundering (hereafter cited in text as FATF) began as a network with eleven members and no standing in international law.

Contrast this tentative moment of origin with the global enterprise described in the 2014 report to the IMF on *Global Surveillance of Dirty Money*:

10. The FATF has accomplished a remarkable feat of global standard-setting since its founding in 1989. From a world in which there were no global standards on anti-money laundering and few national standards, FATF has forged a single global standard for AML, then CFT,

8. NB: these are not identical. Although proportions are not empirically established, there is considerable evidence that at least for all but elite offenders, most proceeds from criminal activities are spent immediately on lifestyles and relatively less is laundered for future consumption.

9. Michael Levi, *Pecunia Non Olet? The Control of Money-laundering Revisited*, in THE ORGANISED CRIME COMMUNITY 161–82 (F. Bovenkerk & Michael Levi, eds., 2007).

10. Mark T. Nance, *The Regime that FATF Built: An Introduction to the Financial Action Task Force*, 69 CRIME L. & SOC. CHANGE 109, 114–17 (2018) (discussing the history of the AML before and after the FATF).

and now financing of proliferation of weapons of mass destruction. The Standard comprises a set of Recommendations which were first issued by the FATF in 1990 and revised in 1996, 2001 (where eight provisions were added on terrorism), 2003, 2004 (where a 9th recommendation was added on terrorism) and 2012. To guide assessments of countries, the FATF created an assessment Methodology in 2013 for all AML/CFT assessor bodies, namely the FATF, the eight FATF-Style Regional Bodies (FSRBs), the Fund and the World Bank.

11. Since its founding, the FATF has forged a global network of states and non-state bodies. It has created an amalgam of thirty-four member jurisdictions and two regional organizations, nine regional bodies, and 22 observer bodies, including the International Monetary Fund and World Bank. The FATF-led standard setting and assessment program has produced substantial convergence on core elements of a universal AML/CFT regime which in turn has facilitated international communication and cooperation in the efforts to prevent money laundering and terrorism, to freeze and recover proceeds of crime, and ease financial investigation and prosecution of offenders. This is a significant political achievement.¹¹

II. HOW DOES IT WORK?

The AML regime utilizes assessments of country compliance with the FATF standards as a mechanism of surveillance and control. They are conducted in two ways: by teams from other nations and international organizations (IOs), including the FATF, IMF and World Bank; and by peers from other countries who appraise one of their regional neighbors. In both instances the result is a Mutual Evaluation Report.

For the IO evaluations which occurred in the Third Round of evaluations between 2004 and 2012, certainly those involving the IMF's dedicated Financial Integrity Group, the process generally proceeded through the following steps. First, the IO would conduct a "desk analysis" of a country's financial and legal system to provide background. Second, the IO would then send an extensive questionnaire to national authorities asking about aspects of their financial and legal systems that relate to the FATF Standards. Third, after reviewing the responses in the questionnaire, the IO would send a team of about 4–6 specialists for a 2–3 week on-site visit with state and non-state stakeholders. Based on the accumulated documentary and interview materials, the IO would prepare a draft report, including recommendations and provisional ratings on a checklist of key factors. In draft form these were shared with state officials, invariably leading to several rounds of informal comments and responses as the assessors and country officials moved towards a final, agreed-upon text.

The final text would then be reviewed by the FATF Secretariat as a quality control and consistency check. If the country being assessed was a member of

11. HALLIDAY, LEVI & REUTER, *supra* note 4, at 10.

FATF the report would come to one of the periodic FATF plenaries, where all FATF members and IOs convened in a general assembly, for confirmation (or rejection) of recommendations and ratings. There might be some amendments made to the report at the plenary. After FATF approval, the Report would be made public. Sometimes countries with compliance problems would go through several rounds of reform and assessments, until the FATF considered the country was sufficiently compliant and could exit the reporting process.¹²

Since the implementation of a new 2013 Methodology in 2014, there have been some small changes in this process,¹³ reflecting modest rethinking about issues that were working better or less well and the integration of FATF and FSRB processes. For mutual evaluations conducted by regional FATFs there were some variations in the process, but these have now been harmonized, at least formally.

Compliance levers and mechanisms

The AML TLO is built upon an architecture of positive inducements and negative sanctions.

There are four principal inducements, although they may not be explicitly stated. Countries that perform well in the assessments are publicly praised, although there is no direct evidence that this provides tangible benefits. Countries which face challenges or criticism may be eligible for technical assistance by the IMF or other bodies in order to strengthen their institutions and governance capabilities. Countries may find that AML regulatory measures strengthen their capacity to control domestic and imported crime more generally, and help strengthen Financial Intelligence Units (FIU) in their bid to obtain inter-agency support for creating a more compliant AML system. And, as an unanticipated by-product of enhanced executive powers in AML regimes, authoritarian leaders obtain new tools to monitor and suppress opposition.

The inducements are complemented by three sets of negative sanctions.

(1) Diffuse diplomatic and social pressure, significantly through shaming for low ratings, comes from the influence of both “peer” states and powerful states to comply.

(2) Financial pressures can follow from low ratings; money center banks may charge more for providing correspondent banking services because their own regulators require enhanced due diligence for transactions involving that country, or they may even “de-risk” large sectors of the low-rated economy by refusing to

12. HALLIDAY, LEVI & REUTER, *supra* note 4, at 27.

13. The FATF made changes to its recommendations in February 2013 (aligning R.37 and R.40), October 2015 (Note to R.5), June 2016 (R.8 and Note to R.8), October 2016 (Note to R.5 and definition of “funds or other assets”), June 2017 (Note to R.7 and glossary definitions), November 2017 (R.18 and R.21), and February 2018 (R.2). Financial Action Task Force [FATF], *The FATF Recommendations*, Comment to *Information on Updates Made to the FATF Recommendations*, <http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html#UPDATES> (last visited Nov. 6, 2018).

process their dollar or other transactions.

(3) Much more serious in its consequences is blacklisting by the International Cooperation Review Group (ICRG). Whether they like blacklisting or not, numbers of AML/CFT regulators perceive that even the threat of blacklisting through ICRG was a very good driving engine to get countries to push for reforms. No country, except for the occasional microstate such as Nauru, has stayed on the list for long. But its effects on access to affordable international finance produce tangible impacts ranging from a reduction or withdrawal of correspondent banking privileges for a given country to increased difficulty and higher costs in raising capital on international financial markets. The combined risks of these two alone can galvanize governments to react vigorously, initially in efforts to upgrade the ratings they receive from assessors and subsequently in legal and institutional reforms. Even in a country such as Germany, which was at no real risk of being put on the ICRG list, our research found how seriously its senior officials reacted to the draft IMF report's criticisms, even to the extent of bringing a delegation to Washington to confer with IMF officials.¹⁴

The combination of inducements and sanctions has led to a remarkable degree of formal compliance in the adoption of laws and regulations, the creation and enhancement of state institutions, and at least a measure of conformity by domestic economic and civil society actors. However, one effort to assess the performance of rich countries (Organisation for Economic Co-operation and Development (OECD) members) at the end of the third round of evaluations¹⁵ showed that many countries were seriously deficient in their compliance. For example, not one out of 29 members fully complied with Recommendation 24 concerning Regulation of Designated Non-Financial Businesses and Professions; only 3 of the countries were Largely Compliant and 13 were judged as Non-Compliant.

When we apply conceptual criteria to empirical evidence it is evident that the AML/CFT governance regime constitutes a well-institutionalized TLO.¹⁶ First, its architects have created a certain kind of normative *order* that seeks to solve a “problem” in predictable ways through legal means. Second, it is *transnational* insofar as its norms are produced ultimately by social organizations that transcend the state. Third, it is *legal* not so much because its norms are expressed in recognizably legal forms, but insofar as those norms are directed to legal institutions and legal regulation within the state. And fourth, it can be said to be institutionalized on three inter-related criteria: (a) there is an alignment, even if partial and contested, between underlying issue-areas (e.g., illicit drug trade, organized crime, transnational

14. The sanctions regimes are often concatenated with AML but have their own processes. Thomas J. Biersteker, Sue E. Eckert & Marcos Tourinho, *Thinking about United Nations Targeted Sanctions*, in TARGETED SANCTIONS: THE IMPACTS AND EFFECTIVENESS OF UNITED NATIONS ACTION, 11, 13–15 (Thomas J. Biersteker, Sue E. Eckert & Marcos Tourinho, eds., 2016).

15. ORG. OF ECON. COOPERATION AND DEV. [OECD], ILLICIT FINANCIAL FLOWS FROM DEVELOPING COUNTRIES: MEASURING OECD RESPONSES 42–43 (2014).

16. Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders*, in TRANSNATIONAL LEGAL ORDERS 3, 42 (Terence C. Halliday & Gregory Shaffer, eds., 2015).

crime, financial instability, security) and the order created to govern them; (b) the norms are well settled in the governing transnational recommendations and their adoption in national laws, regulations and institutions, and somewhat settled in local norms that infuse the mentalities of police or bankers or professionals; and (c) there is recognizable concordance in the norms at global, regional, national and local levels of adoption and internalization.

III. DOES IT ACHIEVE ITS PURPOSE?

If one measure of success is the formalization of norms, the institutionalization of a global regulatory apparatus, and the construction of domestic monitoring and enforcement agencies, then the AML regime has been highly successful. Almost all states, and tiny jurisdictions ranging from powerful places (such as the Vatican and the Cayman Islands) to tiny powerless places (such as Nauru and Turks and Caicos Islands) are now either members of the FATF itself or one of the FATF-style regional bodies. Put another way, if we evaluate outcomes of this TLO by the GAO criteria of *formal compliance* and *program implementation*,¹⁷ then the outcomes can be counted as substantially achieved. They submit themselves to the Mutual Evaluation Reports (MER) scrutiny and have already put in place much of the legal and institutional structure that FATF requires, all this without FATF being either a treaty body or a UN agency.

If, however, we apply the stricter standards of *program effectiveness* and *outcome effectiveness*,¹⁸ then the verdict is very different. Our research concluded that the FATF efforts have almost entirely been focused on formal compliance and “[v]ery little emphasis, if any, was given to program effectiveness and outcome effectiveness.”¹⁹

17. See, e.g., HALLIDAY, LEVI & REUTER, *supra* note 4, at 13.

Formal compliance refers to legal authorizations for a country to comply with FATF standards by placing substantive and procedural laws on the books, issuing regulations, and passing enabling law that authorizes the setting up or reform of agencies. **Program implementation** refers to practices that put into effect the authorizations of formal compliance. There are two aspects of program implementation:

(a) the setting up, funding and staffing of agencies, creating educational and reporting obligations for state and non-state bodies, designing reporting protocols and procedures, among others;

(b) the operation of these agencies and programs in the public and private sectors through activities such as obtaining and analyzing STRs (Suspicious Transaction Reports) and/or SARs (Suspicious Activity Reports), investigating and prosecuting crimes, freezing and confiscating proceeds of crime/terrorist finance, sanctioning criminals, exchanging information between countries on money laundering and terrorist financing and predicate crimes, as well as instituting actions by the private sector.

18. HALLIDAY, LEVI & REUTER, *supra* note 4, at 14.

Program effectiveness refers to the extent of actual attainment of the goals and objectives of a particular AML/CFT regime as indicated by activities and behaviors that display a *net* effect of formal compliance and program implementation. That is, these are effects of formal and program compliance whose impact would not have occurred without the AML/CFT interventions. **Outcome effectiveness** refers to a country's attainment of ultimate AML/CFT objectives *whether or not* those objectives were met through the FATF AML/CFT tools and regime.

19. HALLIDAY, LEVI & REUTER, *supra* note 4, at 5.

Many of the grander claims made for the efficacy of the regime are not sustained by empirical evidence and are belied by media headlines the world over.²⁰ Major international banks in prominent financial centers, such as London, Frankfurt and New York, continue to shock with the scale of money laundering over extended periods that involve tens of billions of dollars. Levi's²¹ conclusion in 1997 remains largely true today: "there is little evidence that 'stripping offenders of their profits' has had much impact on levels or organisation of crime." It is doubtful that any AML monitoring would have picked up the \$500,000 or less that entered the US to fund the 9/11 terrorist attacks and certainly not the 1998 attacks on US embassies in East Africa.²² And the report on Global Surveillance of Dirty Money concluded that "[n]o credible scientific evidence has yet been presented that there is a direct relationship between installation of effective AML/CFT regimes and the IMF mandate to produce domestic and international financial stability."²³

Just as striking as the lack of evidence for effectiveness is the lack of sustained interest in that aspect of the system. Neither the individual nations driving the system (such as the US, UK and France) nor the International Financial Institutions have undertaken any substantial evaluation effort or put resources into developing a methodology for this very difficult evaluation task. Yet, the IMF, World Bank and major national Treasury Departments have substantial research units that contribute to many aspects of agency missions on other issues.

IV. COSTS, DEFICIENCIES, AND HARMS

Not only is there limited evidence that the return on investment in the AML regime has been effective in pursuing its many putative goals, but there is growing attention to what had previously been manifestly ignored by the states, IOs and entrepreneurs that drive the AML order. It has very considerable deficiencies and it cannot be taken for granted that it produces only public goods, and no public or private "bads." There is growing argument and evidence of internal fragilities which might render vulnerable this invasive and pervasive regulatory order.

First, its objectives are eclectic, unclear and potentially in conflict. In their report to the IMF, Halliday, Levi and Reuter (2014) judge that it remains "very difficult to articulate clear objectives" for this "regime,"²⁴ as they call it. The array of objectives has been astonishing in its expansiveness. A good AML regime, promised an IMF Guidance Note,²⁵ might be to prevent or act as a palliative for

20. See, e.g., Jane Bradley & Oliver Bullough, *The Ghost Companies Connected to Suspected Money Laundering, Corruption, and Paul Manafort*, BUZZFEED NEWS (Aug. 22, 2018), <https://www.buzzfeed.com/janebradley/shell-companies-money-laundering-uk-paul-manafort>.

21. Michael Levi, *Evaluating the 'New Policing': Attacking the Money Trail of Organized Crime*, 30 AUSTRALIAN NEW ZEALAND J. OF CRIMINOLOGY 1, 22 (1997).

22. It should be noted that one-off attacks may be low cost but maintaining terrorist organizations that sustain them over a long period can be costly.

23. HALLIDAY, LEVI & REUTER, *supra* note 4, at 5.

24. HALLIDAY, LEVI & REUTER, *supra* note 4, at 13–19.

25. IMF, *Anti-Money Laundering and Combating the Financing of Terrorism Inclusion in Surveillance and*

“threats to financial stability and macroeconomic performance,” “loss of access to global financial markets and destabilizing inflows and outflows,” undermining “the rule of law,” a “corrosive, corrupting effect on society,” “tax evasion” and “budget deficit shortfalls,” “bank fraud,” “Ponzi schemes,” as well as suppressing crime and denying criminals the fruits of their illegality or terrorists the fruits of their violence. It is true that while the FATF did not articulate clear objectives in its 2003 standards and methodology, it did make an attempt to produce a three-level more systematic hierarchy of objectives in its 2013 Methodology. Even here the objectives are diverse and reach to suppressing underlying predicate crimes, lessening money-laundering and financing of terrorism risks, detecting proceeds of crime, keeping proceeds of crime out of the financial system, depriving criminals and terrorists of illicit moneys, preventing terrorist acts, “thereby strengthening financial sector integrity and contributing to safety and security.”²⁶

Some of these concepts are not clearly defined. Relations among objectives are unspecified²⁷ and there is no “logic-model” or coherent causal theory which indicates what levers of public policy might be pulled that plausibly will reduce crime, money-laundering or terrorism. While this multiplicity of goals and definitional weaknesses are not uncommon in the global governance of crime, it is especially problematic when certain of the objectives conflict with others. For instance, if sanctions were to apply to a country that was not considered adequately compliant with global norms, then that in turn might destabilize a country’s financial system, precisely one of the goals that the AML TLO supposedly is designed to prevent. Indeed, the best interpretation of the few national crises that are usually identified as caused by money laundering (namely Latvia and Estonia in 2018, Nauru in 2000, and Dominican Republic and Serbian bank (1993) crises) are best viewed as crises triggered by concerns that a major financial fraud and country takeovers by criminal kleptocrats would lead to international AML sanctions as well as to a run on the bank(s) that (except for the European Union member states) might not be compensated by the government or by an industry collective body.

Second, even if objectives were clear, the quality of data on which the TLO rests is weak or even non-existent in critical respects. Measures of various objectives are neither agreed upon nor readily available in scientific circles.²⁸ For instance, it is exceedingly difficult to measure the scale of the underlying problem of predicate crime that yields dirty money, i.e., the proceeds of crime.²⁹ Thus, there is no adequate denominator that allows measurement of how much dirty money is in the illicit market for money laundering. Measurement of the efficacy of punishment—

Financial Stability Assessments, Guidance Note 5, 6, 11 (Dec. 2012).

26. Financial Action Task Force [FATF], *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems* 15 (Oct. 2018).

27. Terence Halliday, Michael Levi & Peter Reuter, *Can the AML System be Evaluated without Better Data?* 69 *CRIME L. & SOC. CHANGE* 307, 324 (2018).

28. *Id.* at 310, 321.

29. PETER REUTER & EDWIN M. TRUMAN, *CHASING DIRTY MONEY: THE FIGHT AGAINST MONEY LAUNDERING* 9 (2004).

arrests, sentences, asset confiscation—or of the destabilizing effects of cross-border flows of dirty money lag far behind the “measurement” of how many laws are enacted or rules are adopted. While this problem is not confined to the AML TLO, and may be true of criminal law at all levels, it nevertheless remains the case that the AML TLO rests on flimsy and often purely rhetorical foundations.³⁰

These deficiencies are paralleled in practice by defects in the assessments of how AML regimes are working in nation-states. Our close review of IMF Detailed Assessment Reports, if typical of FATF reports more generally, indicates that data collection and data analysis remained well behind the state of the art in the applied social sciences which specialize in behavioral observation and institutional analysis. Deficiencies included no systematic methodology for collecting data on country fundamentals; no sampling design for collecting information from non-state stakeholders; a degree of bias from primary reliance on government officials within the evaluated state to choose informants and sources on private compliance; no methodology for systematic analysis of media reports, including investigative journalist reports, on crime and laundering; no systematic methodology for qualitative analysis; and no systematic methods for gathering and appraising scientific and academic research on Money Laundering (ML)/FT, crime or regulation in a given country.³¹

Third, seldom does appraisal of the AML disciplinary order count the costs. These are of at least three kinds.

One set of costs are economic. There are substantial costs to states, especially for poor countries, of erecting an AML regime. In addition to the diversion of domestic lawmaking towards this externally-induced policy agenda, there are tangible costs in personnel, infrastructure, and expertise involved in the creation of FIU, the hiring and training of civil servants and regulators in commerce and revenue ministries, the training of police to handle financial crimes, and the recruitment and training of judges to comprehend what are often complex financial dealings. The proportion of AML government administrative costs to the total budget of a developing country will be substantial and entail policy costs for other goals that governments may consider more pressing. In Mauritius, a county of 1.3 million, there were a total of twenty-five positions in its FIU. For a middle-income country with such a small population, that is a significant component of its financial regulatory resources, especially for largely non-prudential regulation.

Even in an advanced economy, Amicelle and Iafolla report that Canada has some eleven federal departments and law enforcement agencies dedicated to law-enforcement and intelligence on money-laundering with a combined budget of \$C70 million.³² FinTrac, Canada’s financial intelligence unit has 350 staff.

There are enormous costs to businesses, such as banks, which have been co-

30. Halliday, Levi & Reuter, *supra* note 27, at 322.

31. *Id.* at 324.

32. See Anthony Amicelle & Vanessa Iafolla, *Suspicion-in-the-Making: Surveillance and Denunciation in Financial Policing*, 58 BRIT. J. CRIMINOLOGY 845, 848–63 (2017).

opted by the state to monitor customers on the state's behalf. While these costs are usually closely held, the director of a major international bank's compliance division recently guesstimated³³ that it cost his bank approximately \$2 billion annually to implement AML standards through its compliance division.

There are transaction costs to bank customers in time-consuming demands for more and more information when originating a home mortgage or loans for expensive items such as new cars, boats, or private planes.

Risk aversion by financial institutions, which seek to protect themselves from undue scrutiny or sanctions by financial regulators, can lead to denial of financial services to customers by "de-risking practices" in which banks decide to discontinue business relationships with customers who are deemed too risky.³⁴

Further potential adverse impacts can occur through false positives when individuals are mistakenly cut off from sources of credit or certain kinds of business activity because over-cautious bankers or faulty algorithms flag them as high risk.³⁵

Entire industries have grown around consulting and advising businesses and governments on AML/CFT compliance, an area stimulated by large fines and threats of prosecution to major international banks. HSBC Bank's \$1.9 billion fine in 2012 for violations both of AML and of the sanctions regimes against various nations was large enough to catch the attention of bank boards, though substantial violations have post-dated that and other fines. Even as this Article was being written the largest bank in Denmark was reporting (under severe media pressure) that it had probably laundered tens of billions of Euros through its Estonian branch, though the problem had been drawn to the attention of the bank board many years earlier by one of its managers.

There are also transaction costs for global regulatory institutions and the expense involved in national evaluations, both to the surveillance institutions and the nation-state. The IMF earlier reported that each of its national assessments cost the Fund more than \$300,000. A MER might cost a state \$1 million, a minimal amount for an advanced economy, but not inconsequential for a poor state. However, if we consider cumulative costs of the entire regime over the near thirty years of its existence, in a closed-door consultation with the authors, a senior researcher in an international financial institution guesstimated that the total costs of the AML regime since its inception to national and international institutions worldwide might approach or exceed \$US1 trillion. While this number must be treated with the same degree of skepticism as IMF Managing Director Camdessus's guesstimate that the volume of dirty money floating through the world's financial

33. Private communication with the authors.

34. Fin. Stability Board [FSB], *Stocktake of Remittance Service Providers' Access to Banking Services*, at 16 (Mar. 16, 2018), <http://www.fsb.org/wp-content/uploads/P160318-3.pdf>; Yasmin Almeida, Michaela Erbenová, Francisca Fernando, Giancarlo Gasha, Nadim Kyriakos-Saad, Yan Liu, Alejandro López-Mejía, Emmanuel Mathias & Mohamed Norat, *The Withdrawal of Correspondent Banking Relationships: A Case for Policy Action*, Staff Discussion Notes, INTERNATIONAL MONETARY FUND [IMF] (Jun. 2016).

35. Amicelle & Iafolla, *supra* note 32, at 851, 856–57.

systems might amount to 3% of world GDP, these speculations nonetheless point to very high cumulative costs indeed, and costs disproportionately (per GDP) borne by states with limited resources.

Furthermore, it is impossible to establish that economic benefits outweigh the economic costs since benefits are at present impossible to calculate.³⁶ We reported that as of 2014 there was:

[N]o significant effort by any of the standard-setting or assessor bodies to undertake a cost-benefit analysis despite positive but incomplete moves in some jurisdictions . . . National officials and private stake-holders state that discussion or information on benefits and costs of an AML/CFT regime are limited or non-existent. Little consideration has been given, they say, to the costs of implementing an AML/CFT regime, and little evidence has been adduced to demonstrate that the costs produce commensurate benefits in their own or indeed in any other jurisdiction.³⁷

Economic harms to poor countries can adversely affect the most vulnerable populations. Within countries, the AML transnational order has pressed countries to draw informal markets into the formal economy where they can be better monitored. This may have adverse economic effects on the poorest populations. Between countries an even more severe economic cost may be incurred when money-laundering and counter-terrorism measures reduce remittances that overseas workers can send back to their country of origin. The volume of remittances can be high. For instance, it is reported that “every year, Somali migrants around the world send approximately \$1.3 billion to friends and families at home, dwarfing humanitarian aid to Somalia. . . . A recent report by the UN Food and Agricultural Organisation shows that up to 40 percent of families receive some form of remittance, and that the money is integral to their survival.” The Report continues, “banks in the West are closing down the accounts of money transfer operators, thereby threatening to cut the lifeline to hundreds of thousands of Somali families.”³⁸

In the UK, the US and Australia, around 2012, banks came to perceive the transfer of funds to countries such as Somalia and Pakistan as exposing them to high risk of violation of Counter Terrorism Finance (CTF) regulations. Many of the transfers occurred through Money Service Businesses (MSBs) that knew little about their customers in the receiving countries; some of the money might be going to terrorist organizations such as Al Shabab. Rather than attempt to decide which MSBs could be trusted, an expensive undertaking, the banks terminated accounts for all MSBs transmitting money to Somalia. “Banks frequently characteri[z]e the

36. Fifteen years ago, Peter Reuter and Edward M. Truman produced a rough estimate of the cost of implementation of AML for the US economy (partitioned among government, corporations and the general public). See REUTER & TRUMAN, *supra* note 29, at 93–103. There does not seem to be any more recent or more refined estimate, despite the substantial growth of coverage of legislation and regulatory institutions nationally and internationally.

37. See HALLIDAY, LEVI & REUTER, *supra* note 4, at 47–48.

38. *Id.* at 51.

entire remittance sector as high risk.”³⁹

When formal means of transmitting moneys are suppressed, and when banking institutions clamp down on remittances as a way of “de-risking,” the poorest populations in the world may be forced to use unregulated and unmonitored enterprises for their only lifeline to wellbeing. Hawalas became more important for Somali remittances.⁴⁰ “[D]e-risking measures make it difficult to receive transactions through the formal banking system in a timely fashion. They also block money transfer operators as a viable channel for financial access and the transfer of remittances from the Somali diaspora.”⁴¹ In 2017, the World Bank commented for MSBs generally that “[t]he country authorities are worried about [the] shift to the informal market.”⁴²

Economic harms in practice can result from discriminatory behaviors by financial institutions when individuals are not excluded on manifest criteria such as race or gender but “*on the basis of a certain criteri[on] of risk*” which happens to be highly correlated with certain racial or gender attributes.⁴³

There are also harms to other institutions that have been seldom confronted, at least until recently. Arguably political harms may be caused by supplying new monitoring and surveillance tools to authoritarian leaders. Charges of tax evasion, fraud and money-laundering can provide convenient ways for authoritarians to marginalize their rivals and AML weapons enhance their armory for bringing such charges.

Harms to civil society can occur through increased registration and reporting demands on civil society organizations, not to mention the administrative burdens on small charities which already struggle to survive.⁴⁴ Reporting itself is not only a possible administrative and financial burden but it enables authoritarian states to penetrate more deeply into voluntary associations; and thereby to subject them to

39. Fin. Stability Board [FSB], *Stocktake of Remittance Service Providers’ Access to Banking Services*, at 7 (Mar. 16, 2018), <http://www.fsb.org/wp-content/uploads/P160318-3.pdf>.

40. *Hawalas* and other similar service providers arrange for transfer and receipt of funds or equivalent value and settle through trade, cash and net settlement over a long period of time. What makes them distinct from other money transmitters is their use of non-bank settlement methods. Financial Action Task Force [FATF], *The Role of Hawala and Other Similar Service Providers in Money Laundering and Terrorist Financing* (Oct. 2013), <http://www.fatf-gafi.org/publications/methodsandtrends/documents/role-hawalas-in-ml-tf.html>.

41. Sherine El Taraboulsi-McCarthy, *The Challenge of Informality: Counter-terrorism, Bank De-Risking and Financial Access for Humanitarian Organisations in Somalia*, HUMANITARIAN POLICY GROUP [HPG] iii (June 2018), <https://www.odi.org/sites/odi.org.uk/files/resource-documents/12258.pdf>.

42. World Bank Group [WBG], *Remittances and De-Risking: World Bank’s Role: Understanding the Effects and Facilitating Solutions* (2017), <http://pubdocs.worldbank.org/en/227971497448351308/WB-work-on-derisking-2017.pdf>.

43. Amicelle & Iafolla, *supra* note 32, at 859 (emphasis in original).

44. See DAVID ARTINGSTALL, NICK DOVE, JOHN HOWELL & MICHAEL LEVI, FIN. CONDUCT AUTHORITY, *DRIVERS & IMPACTS OF DE-RISKING* 58–60 (Feb. 2016), <https://www.fca.org.uk/publication/research/drivers-impacts-of-derisking.pdf>; Anna Tims, *Banks Accused of Putting Lives at Risk as Charity Accounts are Shut Without Notice*, GUARDIAN (May 8, 2017, 4:24 EDT), <https://www.theguardian.com/money/2017/may/08/banks-charity-accounts-shut-without-notice-money-laundering>.

surveillance and even control.

Not least, there are massive contradictions within the AML TLO which erode its legitimacy.⁴⁵ There is apparent inequity: those countries most heavily sanctioned are poor and weak. Despite the enormous problems of non-compliance in rich countries, such as the US and UK, they are rarely sanctioned, yet are prime drivers of the international order. A recent news story on British shell companies offered the unsubstantiated figure of an estimated £90 billion “that is laundered through the country each year.”⁴⁶ Certainly there is a great deal of evidence that stolen money from Russia and other nations with high levels of corruption are laundered through real estate in London, New York and other international cities in wealthy countries.⁴⁷

And then there is the allegation that the AML TLO is merely another arrow in the quiver of US foreign policy: Iran and North Korea are blacklisted. There is an undercurrent of geopolitical cherry-picking: China and India are not sanctioned whereas numbers of less powerful countries are. And then there is the resistance by business, which bears the heavy burden of cooptation by the state, and of professions, particularly the legal profession, which consider reporting and surveillance demands on them to be inconsistent with their hallowed values of privacy and client confidentiality. Though the US is the leading AML hawk, driving much of the FATF decision-making, it has been unable to meet FATF standards with respect to AML regulation of the legal profession.

Indeed, most of the critiques of the system registered by Levi and Reuter⁴⁸ a decade ago remain salient. The AML regime is “elaborate[] and intrusive[.]” It has demonstrated lack of success in suppressing predicate crime, “rooting out major criminals or recovering a large percentage of crime proceeds.”⁴⁹

V. CONFRONTING A PUZZLE

At once we are confronted with a two-sided question for TLO theory. From one side, how is it possible for a TLO with so many ambiguities and contradictions, costs and harms, brittleness and fragility, to continue to reproduce its seemingly well institutionalized order? Why is it so resilient? From the other side, under what conditions will a TLO fail, even a TLO as highly developed as the AML TLO?⁵⁰

At present, the empirical evidence indicates there is no immediate sign this TLO will fracture or collapse. How is this to be explained?

In the first place, it does work to some degree. It is likely that some generic

45. Levi, *supra* note 9.

46. Bradley & Bullough, *supra* note 20.

47. *See generally* J. C. SHARMAN, THE DESPOT’S GUIDE TO WEALTH MANAGEMENT: ON THE INTERNATIONAL CAMPAIGN AGAINST GRAND CORRUPTION (2017); J.C. SHARMAN, THE MONEY LAUNDRY: REGULATING CRIMINAL FINANCE IN THE GLOBAL ECONOMY (2011).

48. Michael Levi & Peter Reuter, *Money Laundering*, 34 CRIME & JUST. 289, 289–375 (2006).

49. *Id.* at 365 (citations omitted).

50. Halliday & Shaffer, *supra* note 5, at 473–528.

benefits of the regime identified by Levi and Reuter more than a decade ago still remains largely true.⁵¹ The AML regime makes it more difficult and expensive for offenders to carry out crime and enjoy its benefits. Its mechanisms generate more evidence about the occurrence of crime and link particular individuals to that crime, at least if those links are pursued. Convictions and news stories from time to time have the social appeal that criminals are not getting to enjoy the fruits of their criminality. The most prominent cases involving financial crimes in the United States in recent years, such as Enron, Bernie Madoff, and Paul Manafort have involved convictions for money laundering, even though fraud and/or corruption may have been the principal offences. Moneys confiscated contribute to the state treasury; indeed, there are occasional complaints that the New York state bank supervisor, who issues licenses for operation on Wall Street, funds the office's operations by putting pressure for settlements from banks who might be charged with money laundering. And it is possible the measures put in place to enforce money-laundering laws may increase the efficiency of law enforcement (not necessarily by reducing predicate crime).

Second, even if the AML regime imposes harms, it may be the case that those harmed are disproportionately weak as political actors, and thus, in no position to mount effective resistance to the regime. The senders or recipients of remittances, those injured financially by false positives, small civil society NGOs, the small-time money launderers occasionally convicted, all confront problems of collective action. Even if those hurdles were surmounted their probable impact on domestic politics would be slight and their ability to influence the transnational legal order would be minimal. Others, international NGOs or religious institutions might speak on their behalf, as has been the case with some positive effect with remittances, but even there, significant difficulties remain.⁵²

There are occasional vocal and potentially powerful sources of resistance, most notably legal professions in the US and elsewhere, but their impact has been at the margins since their principal focus has been on the effort to bring them into the set of AML regulated professions. Indeed, for advocacy groups in the world of economic development, the moral high ground is effective enforcement of AML. Given that they have succeeded in keeping themselves out of the AML net, these organizations are uninterested, or at least less interested, in the broad costs that AML imposes.

Third, even if there are certain financial harms and costs, these are hidden from a public that has only the vaguest sense of what additional costs this imposes

51. Levi & Reuter, *supra* note 48, at 289–375.

52. On the other hand, FATF and the system as a whole certainly saw de-risking as a serious challenge to the legitimacy of the AML regime. Roger Wilkins, the Australian who served as FATF president at the height of the de-risking crisis, made some strong statements to this effect. It appears that the AML regime did respond in a constructive fashion. *See* Roger Wilkins, President, Financial Action Task Force, Address at the 6th Annual International Conference on Financial Crime and Terrorism Financing (Oct. 8, 2004); *see also* Press Release, Financial Action Task Force, FATF clarifies risk-based approach: case-by-case, not wholesale de-risking (Oct. 23, 2014).

on their everyday banking. While they may observe that getting home loans has become more onerous, the borrowers will have little awareness of how much these burdens can be attributed to the AML regime. Banks, too, may treat the monitoring obligations upon them partly as a barrier to entry to new competition; in particular the costs of AML decline with scale, so that large banks will be advantaged compared to small new entrants. They will be indifferent to costs so long as all banks bear the same costs. One might even infer from the massive cheating of the previous decade (there seems to be less now) that some banks may have liked the regime because deviating from it gave them a competitive advantage, i.e., that being willing to evade the regime enabled them to expand business at the expense of more AML compliant competitors.

Fourth, the AML TLO may be resilient because it rests on a surface plausibility. Cocaine is dangerous and most people accept that it should be tightly controlled; that may not justify criminalization but it gives prohibition credibility. The notion that banks should keep out dirty money has a similar face plausibility. In fact, the promoters of the AML TLO have had considerable success in building a plausible folk theory to underwrite their enterprise.⁵³ A plausible folk theory is built not on robust empirical foundations but on parsimony, face validity, a compactness of rhetorical expression, sufficient ambiguity to accommodate potentially conflicting understandings of what it purports to explain, an affinity with extant beliefs about such things as crime and dirty money; and a failure or resistance to examining too closely the premises and logic of the theory itself. The most succinct version of the folk theory underlying the AML order can be expressed as: (1) billions of dollars of dirty money are generated by crime, (2) those moneys cause harms by destabilizing markets, governments or even the international financial system, and (3) the regulatory order constructed by the FATF will mitigate or eliminate both (1) and (2). Part of the appeal of a plausible folk theory to an international organization lies precisely in the fact that they induce optimism that solutions abound for challenging problems, their promise offers an umbrella under which actors with diverse interests can find common ground, and it relieves IOs or states from the very difficult and resource-intensive tasks of subjecting the practices of crime and money laundering to rigorous empirical research.

Fifth, the AML regime covers not just money laundering but also CTF. There is good reason to be skeptical that the system has contributed much to the control of terrorism incidents. As already noted, terrorism is not very expensive. The British government's independent monitor of counter terrorism has presented data to suggest that it is rare for the government to have financial information about detected terrorists. Yet there is an understandable reluctance to criticize anything that is plausibly a component of effective anti-terrorism policy.

Relatedly, the AML TLO satisfies certain symbolic and social needs of publics

53. Terence C. Halliday, *Plausible Folk Theories: Throwing Veils of Plausibility Over Zones of Ignorance in Global Governance*, BRIT. J. SOC. 69, 936–61 (2018).

and governance institutions. While the AML TLO may not rest on empirical foundations, it does offer a compelling narrative. Its real work is not to change behavior or stop rule-breakers but to “unite good consciences, to show purity in the face of danger, to do cultural work.”⁵⁴ It creates a persuasive account of a world in which there are dark, nefarious activities that must be stopped. It joins fear of the unknown and of the criminal with the opportunity for states and supra-state institutions to be styled as rescuers. It offers comfort that good is fighting evil. It assures publics that the fear of the unknown is being addressed, that leaders are acting to assuage fears and control dark forces.⁵⁵

Not least, the AML TLO is sustained by geopolitics. The AML regime, originally aimed at drug trafficking, has been extended to the international sanctions regime, which has been a central element of US foreign policy for twenty years. Some of the largest fines (e.g., Paribas \$9 billion in 2015[?] and \$80 million against ABN Amro in 2005) have been for violations of the financial sanctions regime that falls under FATF aimed at Iran, Libya, North Korea, and Russia. The AML TLO has been important for the US in forcing strategic opponents such as Iran and North Korea to enter into unpalatable bargains. Put in another idiom, this TLO is sustained, critical theories would say, because they are tools of US imperialism or hegemony.⁵⁶

These explanations of TLO resilience lead us back to the hypotheses generated in earlier studies of resistance to TLOs and the conditions under which they might falter or fail.⁵⁷

The AML TLO might be expected to confirm the hypothesis that resistance to TLOs will increase in inverse proportion to the legitimacy of its institutions or norms.⁵⁸ The master norms of the AML order are crafted principally by a few powerful states and international organizations. In theory, poorer and weaker states and non-state actors participate in the development of both AML Standards and its Methodology. In practice, their involvement is more *pro forma*. Yet this seems not to have detracted from the legitimacy of the AML TLO. Perhaps the fact that for so many of the poorer nations the leadership is seen as kleptocratic with a deep interest in weakening money laundering controls makes their governments weak opponents to FATF, with its visibly moral position. Each time a kleptocrat falls (e.g., Mubarak in Egypt or Suharto in Indonesia) and it is revealed that they have laundered large amounts overseas, the position of developing countries for reform of the FATF TLO is weakened.

More pointed is the hypothesis that poorer and weaker nation-states and other

54. Address at the University of California, Irvine School of Law Symposium: Transnational Legal Ordering of Criminal Justice (Sept. 21–22, 2018).

55. We are indebted to Sally Merry and David Nelken for these insights. Sally Merry, Address at the University of California, Irvine School of Law Symposium: Transnational Legal Ordering of Criminal Justice (Sept. 22, 2018).

56. We are indebted to Mariana Valverde for underlining this point.

57. Halliday & Shaffer, *supra* note 5, at 473–528.

58. *Id.* at 508.

actors are more likely to resist a TLO when norms are “perceived to be instruments of imposition, coercion, surveillance, or control by stronger actors on weaker states”⁵⁹ Since we have seen that AML norms emerged primarily from a few states at the center of the world economic and financial systems, and have been sustained by international governance bodies (e.g., IMF, World Bank) where those states wield disproportionate influence, resistance would seem probable from states in the periphery. While this is not overt in the last revision of either the Standards or Methodology, it is more probable that resistance takes the form of symbolic compliance where states adopt laws and create institutions but cannot or will not implement them in practice. Normative concordance, in other words, is accompanied by a discordance between the expression of those norms and changes in behavior.

We hypothesize that TLOs have a greater probability of failing the more that internal contradictions intensify.⁶⁰ If, for instance, retributive sanctions by AML governors are brought against a state or financial institution, then it may actually produce the very condition of financial instability the regime was erected to forestall. Yet there appears little evidence this has occurred or occurred sufficiently often to fracture the TLO. Another contradiction might follow from the very expansiveness and penetration of the TLO itself, thereby engendering a backlash from constituencies that are harmed. Here again, apart from occasional critiques from academics and some professional insiders, such a backlash has not eventuated.

It has been hypothesized that a change in the embedding contexts which facilitated emergence of the TLO might subsequently render a TLO irrelevant or sclerotic. Institutional rigidities might reduce adaptive flexibility. Yet the AML TLO has shown itself to be remarkably adaptive. From beginnings in the drug war it managed to pivot swiftly to encompass the war against terrorism and pivot again to embrace the financing of nuclear proliferation and be a panacea for tax evasion along the way. This might of course produce its own contradictions—a sheer overload of not always consistent goals. But it may also signify the agility of a soft law institutional foundation built on high-level principles⁶¹ and the minimal bureaucratic infrastructure that might inhibit change.

Moreover, while some TLOs have diminished or fallen when confronted with a more potent rival,⁶² no rival TLO can be observed on the horizon of AML/CFT/FNP. It is true that there is much passive resistance in the implementation of norms in practice. And there is a good deal of decoupling between states compliance with global norms which, intentionally or not, does not make it into national or local

59. Halliday & Shaffer, *supra* note 5, at 500.

60. Halliday & Shaffer, *supra* note 5, at 508.

61. Susan Block-Lieb, What is Soft International Law? Why Might it be Preferred in Commercial Law and other Contexts? (Oct. 26, 2018) (unpublished manuscript) (on file with the University of Michigan).

62. Philipp Genschel & Thomas Rixen, *Settling and Unsettling the Transnational Legal Order of International Taxation*, in *TRANSNATIONAL LEGAL ORDERS*, 154, 156–80 (Terence C. Halliday & Gregory Shaffer, eds., 2015).

practice. There is gamesmanship of various kinds as peers in the mutual evaluation of other states may favor each other in implicit reciprocities of disciplinary restraint.

Finally, there is the view that AML TLO has proven itself valuable to monitoring groups in international civil society that seek to constrain corruption and kleptocracy.⁶³ AML provisions enable investigative journalists and NGOs to follow trails of money and asset purchases across borders and thereby to hold accountable political leaders and others who siphon off state moneys and seek to transmit them to safe havens for private consumption elsewhere in the world.⁶⁴ That accountability effect may also be deployed in domestic politics when, for instance, a special prosecutor seeks evidence of malfeasance in financing of political campaigns by candidates for office or elected politicians. It has been said that local liberal elites in Iran appeal to FATF standards in their own domestic struggles to hold national leaders accountable.⁶⁵

In sum, on the one side, viewed from the vantage-point of its champions, the AML TLO persists because (1) it works in small respects; (2) it has surface plausibility insofar as it is underwritten by a plausible folk theory; (3) it offers a culturally satisfying, protective narrative of hope; (4) its minimalist bureaucracy and soft law properties have given it significant adaptive capacity; (5) it offers geopolitical benefits to the most powerful states, esp. the US; and (6) it demonstrates to the world and to regions that international governance institutions are effectively confronting the dark forces of globalization.

On the other side, viewed from the stance of its critics and opponents, it has survived assaults on its mission and practices because (1) most domestic actors harmed or hurt by it either do not realize the costs they bear (e.g., to privacy) or those costs are born by institutions such as banks which can bear them; (2) even if costs were widely recognized, collective action by such diverse economic and civil society actors presents an immense barrier; (3) even if collective action barriers were surmounted, those who are adversely harmed are weak actors; (4) attacks on its legitimacy and practices come from weak or discredited actors; (5) weak states disproportionately harmed by it do not have the ability to mobilize collectively against it, but they can mitigate its local unwanted effects through symbolic compliance; (6) its internal contradictions have not yet swelled to disruptive levels; (7) the institution has no looming rivals at the global level; and (8) it is immunized from much criticism because a TLO invoking protections from terrorism is rhetorically unassailable.

Indeed, more generically, we may hypothesize that when a TLO is deeply embedded within and supported by other normative institutions, and when its rules become an integral guide to the practices of hundreds or thousands of organizations beyond the state, within the state and across markets, the legal order becomes highly

63. Address at the University of California, Irvine School of Law Symposium: Transnational Legal Ordering of Criminal Justice (Sept. 21–22, 2018).

64. This is not to minimize the challenges posed by the fact that data collected by FIU are classified. It may be eased if beneficial ownership registers help expose or deter deviants.

65. IMF, *supra* note 25.

resilient when confronted by attacks or changed contexts. Moreover, if its technical features prove applicable to new problems, then it can move sideways to take on tasks that further widen its appeal to even broader constituencies. Insofar as the AML TLO has accomplished these feats of a legal order it should be presumed that the greater probability is that it will persist rather than fail despite its costs and harms.

VI. A DISCIPLINARY TLO?

Nevertheless, while the preceding factors go some distance towards an explanation of resilience, they may serve as elements in a more comprehensive theory. Ultimately, we propose, its persistence results not from demonstrable results in achieving its ostensible goals,⁶⁶ but from its disciplinary character. How does it serve as a disciplinary institution and whose interests are advanced by those facilities?

Much currency in contemporary sociology on the topic of discipline derives from the writings of Foucault. The recent revisionist work by Mariana Valverde⁶⁷ on Foucault and criminology, law, justice and penology asserts that conventional English understandings of the French verb *surveiller*, frequently translated as “discipline,” are too constrictive. Rather than a negatively inflected tone directed towards predominantly top-down control, in her view, “discipline” better connotes an amalgam of “keeping an eye on things,” watching over activities, monitoring and supervising.⁶⁸ Extrapolating from Foucault’s work on modern prisons, “whole populations would come to be controlled,” monitored and supervised. The panopticon is the paradigmatic exemplar, even the extreme. Silently, every inmate of the prison is constantly observed. In society this gaze proceeds thru “hierarchical observation” where “techniques for supervising or monitoring groups of people . . . allow and foster surveillance by authorities.” “[T]he few are employed to watch the many.” Great power is exercised “in a silent, impersonal, and almost automatic manner.”⁶⁹

In AML regimes, much of the surveillance is silent and unobserved, for instance, as backroom bank employees scan transactions for a whiff of suspicion, or computers run algorithms to identify patterns of abnormal or illegal transactions, or officers in financial systems create lists of both domestic and foreign Politically Exposed Persons (PEPs) who will be subject to heightened scrutiny. Recent research on Canada, for instance, indicates that any citizen can be watching a neighbor for out-of-the-ordinary financial activity or styles of life and submit a report to a government agency unbeknownst to the hapless neighbors.⁷⁰ Keeping

66. Or as Peter Andreas cleverly puts it, “a policy failure that is a political success.” Peter Andreas, *A Tale of Two Borders: the U.S.-Mexico and U.S.-Canada Lines After 9-11* (2003).

67. MARIANA VALVERDE, MICHEL FOUCAULT 34 (2017).

68. *See id.* at 33 n.1.

69. *Id.* at 47, 55, 61.

70. Amicelle & Iafolla, *supra* note 32.

an eye out, thereby, simultaneously occurs from below and above. In AML regimes, much of the monitoring is routinized and observable, though not intrusive, whether at the mundane level of bank deposits or the use of cash for payments or in annual reporting of NGOs and the activities of charities.

The tools that enable such monitoring and eyes on behavior at the bank or in leisure activities offer varieties of value for quite different actors.

For state officials, they may offer intelligence for law enforcement of a broad spectrum of crimes, especially Grand Corruption. Tax authorities obtain an added tool to lessen tax evasion. The security apparatus adds a window into potential threats of violence against the state.

For states who dominate this transnational order, they gain another weapon in the armory against “terrorism” or nuisance-some players in regional politics or a bloodless alternative to military action.

For authoritarian regimes, the imperative for control of their populations may be well served by comprehensive and largely unobserved means of tracking who opponents are, what they own, and what they do. Empirical research on use of AML tools for political purpose is in its infancy. Yet, for authoritarians currently in power, the most dangerous of opponents, whether the leader of an opposition party, a prior ruler, the media, or a civil society irritant, the payoff of keeping an eye on opponents’ affairs through the legitimate means of financial surveillance at once may keep current rulers abreast of the threat of insurgency and at most gives them weapons to quash and silence voices perceived to threaten them.⁷¹

For bankers, even if costly to implement, the actuality of monitoring and the threat of AML enforcement may contribute to an even playing field so that competitors do not get undue advantage through devices designed to attract dirty money.

Foucault spoke of the punitive city where “tiny theaters of punishment”⁷² were staged in parks and at intersections so passersby could observe the little dramas and heed their moral lessons. The AML regime scales up to the regional and global, to a punitive global order where monitoring and punishing and shaming take place on a global stage, whether in the form of international media exposes, such as the high drama of the Dansk Bank⁷³ scandal, or blacklisting threats for punitive actions taken by the entire international financial system.

It is reasonable to ask whether the TLO actually disciplines those it is intended to discipline. The fact that money laundering and underlying predicate crimes

71. Of course, authoritarian rulers have armories of weapons to wield against opponents and financial surveillance may be only one of these. To make this point is not to be construed as an argument that authoritarian states could or do exert influence in FATF for this specific purpose. However, they may concur with stronger measures that have collateral political benefits.

72. VALVERDE, *supra* note 67, at 50 (quoting Michel Foucault).

73. THE GUARDIAN, *Danske Bank Faces US Investigation into Money Laundering*, (Oct. 4, 2018), <https://www.theguardian.com/world/2018/oct/04/danske-bank-faces-us-investigation-into-money-laundering>.

continue is not sufficient in itself to belie the impact of disciplinary measures. While discipline might not achieve all or any of its intended effects, it might well impel financial institutions or criminal organizations to develop new techniques of bypassing the rules. The disciplinary apparatus shapes unforeseen ways of crime displacement, where the place, time or method of offending is changed to avoid detection. Thus, there may be a disciplinary effect even if the crime reduction effect is minimal or difficult to observe.⁷⁴

In sum, is it possible that the persistence of this disciplinary TLO can be attributed to the symbolic and tangible appeal of “discipline” itself? That is, a disciplinary TLO has multi-faceted appeal that gives it viability despite the manifest inadequacies or limitations we have noted. Like much lawmaking on crime, the AML TLO gestures towards taking seriously problems that trouble publics and rulers without necessarily doing much about it in practice. This disciplinary TLO gives powerful states, especially the United States, legitimate cover to leverage surveillance and control in pursuit of domestic policy priorities. And because it is exceedingly difficult to be publicly in favor of dirty money, the illicit drug trade, financing of terrorism, and nuclear proliferation by “rogue states,” those institutions that would prefer to escape the TLO cannot legitimately do so and will not thereby defect. Hence this TLO, even if erected on weak foundations to control problems for which it is ill-suited, may nonetheless persist because its collateral benefits give it enduring resilience.

VII. IS THE AML TLO SINGULAR?

The disciplinary properties of the AML TLO offer a capstone explanation for its resilience. Are those properties distinctive to an AML institution or are they indicative of a class of TLOs which share some of its properties?

In comparison to many other partially or wholly institutionalized TLOs previously studied in the scholarly literature, the AML TLO does appear to be distinctive. We can explore this putative distinctiveness more systematically by asking—what makes a TLO disciplinary?

First, there is a pervasive assumption that there are identifiable recalcitrant actors in society who must be monitored to reduce the harms they may cause society. On its face, a disciplinary order offers an attractive way of doing so. This is not an assumption underlying most commercial, finance and trade TLOs. Nor is it an assumption about actors in a climate change TLO or a value chain TLO, although one might get to recalcitrance in types of deviance for both. This assumption might be a secondary concern for a World Trade Organization or carriage of goods by sea regime, since deviance of some sort may factor in either TLO but these don’t seem quite in the same category as the AML order.

Second, we have seen that the AML TLO has erected a pervasive surveillance apparatus into many corners of society. Is this merely a difference in degree or is it

74. We are indebted to the editors of this symposium for this insight.

a difference in kind? Perhaps it is true that banking and taxation TLOs come close to this level of surveillance. And perhaps it is the case that the burgeoning reliance of states and international organizations on indicators begin to approach or aspire to such pervasive monitoring.⁷⁵ Human rights TLOs monitor broad swaths of social behavior, yet they tend to more be focused on one or another right and leave entire arenas in a society, e.g., its financial institutions or its leisure activities, outside their gaze.

Third, the pervasive AML surveillance apparatus is yoked to punitive criminal institutions and practices. This TLO is anchored in public law and the institutions of the state erected to control crime—the police, courts and prisons. The qualifier “punitive” is deliberately chosen because the model of crime control underlying the AML TLO is principally retributive and confiscatory, relying on punishment to deter both the criminals who generate financial proceeds of crime and the enablers that allow them to enjoy or use those proceeds for malign purposes.

Fourth, the AML TLO has constructed an elaborate repertoire of discipline. Socialization into disciplinary norms occurs for government officials through their participation in FATF global and regional bodies, for workers in the financial sector through their training, and for professionals in collegial education. Reports by the FATF and Reports on the Observance of Standards and Codes (ROSCs) from the global financial institutions calibrate degrees of deviance by ratings that concentrate the minds of state officials and incur the evaluative judgments of supra-state monitors. It is a short step from rating to naming and shaming, then to tangible threats of grey or blacklisting. How extensively can this repertoire of discipline be found in commercial or financial or environmental or private contracting or human rights TLOs?

Fifth, we have seen that the AML TLO has multiplied its subjects of discipline to include states, financial institutions (e.g., a bank), non-state collective actors such as charities, organized crime families, and individuals in their many guises of PEPs, lawyers or accountants, or everyday participants in their myriads of transactions in an integrated global financial system. Again, the geographical and legal scope of this disciplinary TLO appears unusually extensive, even qualitatively so.

The question of singularity properly points to a cognate issue: are criminal justice TLOs themselves⁷⁶ distinctive as a class? There are reasons to suggest they are. TLOs directed to control of crime involve (i) a particular moral sanction, viz., that of being labeled a “criminal;” (ii) the threat or deployment of coercion by the state; and (iii) the use of disciplinary powers beyond those deployed in governmentality more generally. Moreover, a criminal justice TLO targets a subset

75. KEVIN E. DAVIS, ANGELINA FISHER, BENEDICT KINGSBURY & SALLY ENGLE MERRY, *INDICATORS AS A TECHNOLOGY OF GLOBAL GOVERNANCE* 79 (Reprint ed. 2015).

76. See Stefanie Neumeier & Wayne Sandholtz, *The Transnational Legal Ordering of the Death Penalty*, 4 U.C. IRVINE JOURNAL INT'L, TRANSNAT'L, & COMP. LAW, 1 (2018) (Discussing how a transnational legal order (TLO) authoritatively shapes “the understanding and practice of law” in a specific area of social activity.).

of behavior, viz., that which is illegal, in contrast to TLOs that target legal behavior which may be deviant in its forms of action but is controlled by civil or regulatory measures.⁷⁷

Placing the AML TLO within a set of TLOs that is as expansive as law itself, public and private, domestic and international, thereby compels us to confront the possibility that the AML TLO is singular or, more probably, is one instance of a class of TLOs not hitherto explored or well understood. Those singular properties may in fact be shared substantially by other TLOs directed at crime. The site of criminal justice thereby encourages a more differentiated understanding of TLOs in 21st century settings and concomitantly TLO theory reveals aspects of international criminal justice that amplify understandings of crime control, markets and politics in the contemporary global order.

77. We appreciate these insights of the symposium editors on the distinctiveness of criminal TLOs.