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A Case for Reforming the Anti-Money Laundering Regulatory Regime: How Financial Institutions' Criminal Reporting Duties Have Created an Unfunded Private Police Force

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A Case for Reforming the Anti-Money Laundering Regulatory Regime: How Financial Institutions' Criminal Reporting Duties Have Created an Unfunded Private Police Force

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INTRODUCTION

Under the Bank Secrecy Act of 1970 and related anti-money laundering regulations promulgated by the Secretary of the Treasury and the Financial Crimes Enforcement Network (FinCEN), financial institutions, their employees, and many other business professionals are expected to report to authorities when they suspect that their customers have committed money laundering offenses or other financial crimes.[1] The criminal reporting duties conferred on financial institutions under the Bank Secrecy Act/Anti-Money Laundering (BSA/AML) regulatory regime expanded in July 2018, when the Customer Due Diligence Rule ("CDD Rule") came into effect.[2] The CDD Rule closed loopholes in the provisions already in place by requiring financial institutions to implement additional procedures for verifying the identities of their customers.[3] Prior to the CDD Rule, the verification requirements did not extend to "shell" companies, which criminals often organize to disguise their identities as the true underlying owners.[4] The anonymity that shell companies provide allows them to launder their illegally gained proceeds into apparently legitimate businesses without drawing the attention of law enforcement.[5] In addition, the CDD Rule requires financial institutions to monitor their customers for changes

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1. Currency and Foreign Transactions Reporting Act, Pub. L. No. 91-508, 84 Stat. 1114 (1970) (codified as amended in scattered sections of 12 U.S.C., 15 U.S.C., and 31 U.S.C.); *Financial Crimes Enforcement Network*, U.S. DEP'T TREASURY, https://www.treasury.gov/about/history/Pages/fincen.aspx (last updated Nov. 13, 2010) [https://perma.cc/6KJP-K3FC].

2. *FinCEN Reminds Financial Institutions that the CDD Rule Becomes Effective Today*, FIN. CRIMES ENFORCEMENT NETWORK (May 11, 2018), https://www.fincen.gov/news/news-releases/fincen-reminds-financial-institutions-cdd-rule-becomes-effective-today [https://perma.cc/5S2V-8NNG]. The CDD Rule was issued in May 2018. Customer Due Diligence Requirements for Financial Institutions, 81 Fed. Reg. 29,398 (May 11, 2016) (codified at 31 C.F.R. pts. 1010, 1020, 1023, 1024 & 1026).

3. 31 C.F.R. § 1020.220 (2019) (establishing the requirements of the Customer Identification Program).

4. *See* Louise Story, *U.S. Plans to Require Banks to Identify Owners of Shell Companies*, N.Y. TIMES (Apr. 6, 2016), https://www.nytimes.com/2016/04/07/world/americas/us-plans-to-require-banks-to-identify-owners-of-shell-companies.html [https://perma.cc/33VD-NMDU].

5. Ed Leefeldt, *How "Shell" Companies Launder Dirty Money*, CBS NEWS: MONEYWATCH (Sept. 8, 2016, 5:30 AM), https://www.cbsnews.com/news/how-shell-companies-launder-dirty-money/ [https://perma.cc/4QLA-4XCD].

in activity that should raise their suspicions of possible criminal activity and trigger their reporting duties.[6]

Although these developments in the law may be viewed as positive changes, federal regulators' increased reliance on banks to serve as the eyes and ears of law enforcement is unusual in that the law traditionally rejects imposing obligations to report crimes on private actors.[7] Surely, if a financial institution or its employees are complicit in a money laundering scheme or actively assist in its commission, they may be charged as participants in the offense itself, regardless of their lack of involvement in the underlying criminal activity from which the funds were derived.[8] But the reporting laws require more than merely not being part of the problem—financial institutions have a duty to stay abreast of the emerging methods and trends in laundering illegitimate proceeds.[9]

Federal regulators have ensured their strict compliance through harsh civil and criminal penalties.[10] For example, Banamex USA, a subsidiary bank of Citigroup, agreed to pay $140 million in 2015 for deficiencies in its BSA/AML compliance program.[11] Three of the bank's executives were also fined tens of thousands of dollars and effectively barred from the banking industry as a result of the same enforcement action.[12] The penalty amounted to one-sixth of the bank's total assets,

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6. *See infra* text accompanying notes 64–65.

7. *See* Joshua Dressler, *Some Brief Thoughts (Mostly Negative) About "Bad Samaritan" Laws*, 40 SANTA CLARA L. REV. 971, 975 (2000).

8. *See, e.g.*, Mathew Paulose Jr., United States v. McDougald: *The Anathema to 18 U.S.C. § 1956 and National Efforts Against Money Laundering*, 21 Fordham Int'l L.J. 253, 253 (1997) ("The investigation involves . . . an inquiry into whether [Citibank] knowingly accepted, deposited, and disseminated more than US$100 million in allegedly illegitimate income . . . . If the inquiry proves true, the Justice Department will charge Citibank for money laundering . . . ."). The consequences for such involvement are severe. For example, a bank convicted of money laundering may have its charter terminated, known as the "death penalty," and the government can seize and attach either the laundered money or substitute bank assets in forfeiture actions. Whitney Adams, Effective Strategies for Banks in Avoiding Criminal, Civil, and Forfeiture Liability in Money Laundering Cases, 44 Ala. L. Rev. 669, 685, 698 n.199 (1993).

9. Adams, *supra* note 8 at 693.

10. Treasury Order 180-01 lists FinCEN's duties to administer the BSA. Treas. Order 180-01(3)(a) (July 1, 2014). The BSA established the guidelines for how financial institutions are to detect and report money laundering. 31 U.S.C. §§ 5311–32 (2012).

11. Press Release, Citigroup, Inc., Citigroup Statement on Banamex USA (July 22, 2015), https://www.citigroup.com/citi/news/2015/150722a.htm [https://perma.cc/CVN3-6NNZ].

12. Michael Corkery & Ben Protess, *Citigroup Agrees to $97.4 Million Settlement in Money Laundering Inquiry*, N.Y. TIMES: DEALBOOK (May 22, 2017), https://www.nytimes.com/2017/05/22/business/dealbook/citigroup-settlement-banamex-usa-inquiry.html [https://perma.cc/7G3R-R5PS]. The Treasury Department, through the U.S. Attorney's Office, can bring actions against banking industry officials enjoining them "from participating, directly or indirectly, in the conduct of the affairs of any 'financial institution' . . . that is located in the United States or conducts business within the United States . . . ." Complaint at 2, 5, U.S. Dep't of Treasury v. Haider, No. 14 CV 9987 (S.D.N.Y. Dec. 18, 2014); *see also* 31 U.S.C. § 5320 (2012) (authorizing the Secretary of the Treasury to bring civil actions in district court to enjoin violations or enforce compliance).

so it was likely not a coincidence that Citigroup announced its plans to close Banamex USA on the same day it shared news of the settlement.[13]

Such large penalties are not the exception but the norm, as both the number of enforcement actions brought against financial institutions for inadequate BSA/AML compliance and the dollar value of the fines have both soared in the past decade.[14] As another example, in 2012, British bank HSBC agreed to a record $1.92 billion settlement with U.S. federal and state authorities to avoid a criminal indictment for inadequate BSA/AML compliance.[15] In light of the law's historical reluctance to criminalize the failure to report crimes, the strictly enforced and costly reporting obligations imposed on financial institutions under the BSA/AML regulatory regime appear anomalous.[16] In effect, the current scheme outsources law enforcement duties to private institutions, and it deputizes them as government agents responsible for preventing, monitoring, and investigating money laundering crimes.[17]

This policy decision raises not only normative questions about whether financial institutions *ought* to bear these duties, and to what extent, but also positive questions about the BSA/AML regime's effectiveness and efficiency in deterring money laundering. Industry leaders and lobbyists have increasingly criticized FinCEN for providing little guidance on how to comply with BSA/AML reporting requirements, and there is evidence suggesting that the benefits of criminal reporting do not outweigh the costs of compliance.[18] Accordingly, policymakers are under growing pressure to adopt reform measures that would shift the costs of the BSA/AML regulatory regime to the public sector.[19]

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13. Lanier Saperstein, Geoffrey Sant & Michelle Ng, *The Failure of Anti-Money Laundering Regulation: Where Is the Cost-Benefit Analysis?*, 91 NOTRE DAME L. REV. 1, 2 (2015); Press Release, Citigroup, Inc., *supra* note 11.

14. Robert Kim, *Feeding the Beasts: Anti-Money Laundering Enforcement in 2009-2016*, BLOOMBERG BNA: NEWS (July 3, 2017, 12:00 AM), https://news.bloomberglaw.com/banking-law/feeding-the-beasts-anti-money-laundering-enforcement-in-2009-2016?context=search&index=103 [https://perma.cc/Q475-CZD4].

15. Ben Protess & Jessica Silver-Greenberg, *HSBC to Pay $1.92 Billion to Settle Charges of Money Laundering*, N.Y. TIMES: DEALBOOK (Dec. 10, 2012, 4:10 PM), https://dealbook.nytimes.com/2012/12/10/hsbc-said-to-near-1-9-billion-settlement-over-money-laundering/ [https://perma.cc/6MTM-2XZA].

16. To further demonstrate the costs associated with BSA/AML compliance, U.S. firms collectively spend $25.3 billion per year on their compliance programs. Press Release, LexisNexis Risk Sols., Anti-Money Laundering Compliance Costs U.S. Financial Services Firms $25.3 Billion Per Year, According to LexisNexis Risk Solutions (Oct. 10, 2018), https://risk.lexisnexis.com/about-us/press-room/press-release/20181010-true-cost-aml [https://perma.cc/UWA7-QY7X].

17. *See Examining the BSA/AML Regulatory Compliance Regime: Hearing Before the Subcomm. on Fin. Insts. & Consumer Credit of the H. Comm. on Fin. Servs.*,115th Cong. 1 (2017) (statement of Rep. Blaine Luetkemeyer, Chairman, H. Subcomm. on Fin. Insts. & Consumer Credit) [hereinafter *Hearing*]; *A New Paradigm: Redesigning the U.S. AML/CFT Framework to Protect National Security and Aid Law Enforcement*, THE CLEARING HOUSE 3 (2017) [hereinafter *A New Paradigm*].

18. *See, e.g.*, *Hearing*, *supra* note 17, at 16 (statement of Lloyd DeVaux, President and Chief Executive Officer, Sunstate Bank).

19. *A New Paradigm, supra* note 17, at 10–18.

In spite of the financial sector's growing pushback, law enforcement officials continue to defend the importance of criminal reporting,[20] and as the implementation of the new CDD Rule shows, regulators are willing to expand the regime. This begs another question: if their claims about the value of the information in financial institutions' reports are true, then why are similar criminal reporting requirements not imposed on other private actors, such as Facebook, who might just as easily assist law enforcement in detecting possible criminal activity?

To analyze the case for reforming the BSA/AML regulatory regime, this Note follows two related lines of inquiry. First, it looks to other mandatory criminal reporting laws to derive a framework of normative principles that justify the imposition of criminal reporting requirements on private actors.[21] These principles are then applied to the BSA/AML criminal reporting requirements to argue that a policy that almost entirely shifts law enforcement duties to financial institutions is not only anomalous but excessive given the law's reluctance to criminalize failures to report crime.[22] To further illustrate this point, this Note suggests that the government's same crime-deterrence rationale for imposing strict criminal reporting duties under the BSA/AML regulatory regime could seemingly extend to numerous other private actors who are equally as likely to encounter criminal activity.[23] As part of its second line of inquiry, this Note conducts a cost-benefit analysis, weighing the major arguments for and against reform of the BSA/AML regulatory scheme, before considering how recent proposals to reform the regime could alleviate some of the burdens imposed on private institutions.[24]

Part I of this Note provides background information outlining the relevant BSA/AML laws that establish financial institutions' affirmative duties to report financial crimes. Part II analyzes the contours of other laws that create mandatory criminal reporting obligations, including their extent, their underlying justifications, and how stringently government agencies enforce them. Part III demonstrates how financial institutions' reporting duties are uniquely stringent and punitive compared to those imposed elsewhere in the law, and it questions the justifications of this policy. Lastly, Part IV of this Note argues that the BSA/AML regulatory regime could be reformed to reduce the costs and duties borne by financial institutions without sacrificing the government's interests in deterring money laundering and ensuring national security. To be clear, this Note does not advocate for the elimination of BSA/AML reporting duties. Rather, it argues that the current BSA/AML regulatory regime would be more consistent with its stated objectives if federal policymakers adopted measures that reduce the disproportionate costs and perverse incentives discussed in this Note.

I. THE ANTI-MONEY LAUNDERING REGULATORY SCHEME

Section I.A of this Note first explains how criminals launder illegally gained proceeds, and it describes the benefits that they derive from doing so. Next, Section

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20. *See infra* text accompanying notes 233–234.
21. *See infra* Section II.A.
22. *See infra* Part III.
23. *See infra* text accompanying notes 263–265
24. *See infra* Section IV.D.

I.B traces the historical development of the BSA/AML regulatory regime and examines how each major legislative act has expanded financial institutions' role in combating financial crime. Section I.C concludes by defining the several affirmative duties imposed on the financial institutions by the regulatory scheme.

A. Definition of Money Laundering

Money laundering is the process "by which one conceals the existence, illegal source, or illegal application of income, and then disguises that income to make it appear legitimate."[25] In other words, it is making illegally gained, or "dirty money," appear "clean."[26] Money laundering generally involves three steps: (1) placement, (2) layering, and (3) integration.[27] Placement is the most difficult step in which money launderers are most vulnerable, as they must find a way to enter large sums of cash into the legitimate financial system without drawing the attention of law enforcement.[28] This is typically accomplished by funneling the money through "front" operations (e.g., jewelry stores and check-cashing operations) or converting it into negotiable instruments that can be directly deposited into banks (e.g., cashier's checks).[29] In the next step, layering, the aim is to create confusion by transferring the funds through numerous accounts in a complex series of transactions that make it difficult for law enforcement agencies to trace the money's origins.[30] Often, the money is wired to accounts in offshore banking havens in countries with strict bank secrecy laws, where money launderers can create additional confusion by forming "shell" companies that conceal the identity of their beneficial owners.[31] The anonymity provided by these companies allows money launderers to funnel illegal proceeds into these accounts under the guise of a legitimate business.[32] Alternatively, they may use the value of the offshore accounts as security (or collateral) to take out loans in other countries.[33] In the final step, integration, the funds reenter the mainstream financial system and appear as legal proceeds.[34] The personal and commercial transactions involved at this stage can range from purchasing luxury

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25. PRESIDENT'S COMM'N ON ORGANIZED CRIME, INTERIM REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL, THE CASH CONNECTION: ORGANIZED CRIME, FINANCIAL INSTITUTIONS, AND MONEY LAUNDERING 7 (1984).

26. *History of Anti-Money Laundering Laws*, FIN. CRIMES ENFORCEMENT NETWORK, https://www.fincen.gov/history-anti-money-laundering-laws [https://perma.cc/W6KZ-SGCJ].

27. *Id.*

28. Scott Sultzer, *Money Laundering: The Scope of the Problem and Attempts to Combat It*, 63 TENN. L. REV. 143, 149 (1995).

29. *Id.*

30. Kathleen A. Lacey & Barbara Crutchfield George, *Crackdown on Money Laundering: A Comparative Analysis of the Feasibility and Effectiveness of Domestic and Multilateral Policy Reforms*, 23 NW. J. INT'L L. & BUS. 263, 268 (2003); *History of Anti-Money Laundering Laws*, *supra* note 24.

31. Sultzer, *supra* note 28, at 150; *see also* Lacey & George, *supra* note 30, at 268 ("The beneficial owners of the shell companies are hidden beneath layers of bank secrecy laws and the exercise of the attorney-client privilege.").

32. *See* Leefeldt, *supra* note 5.

33. Sultzer, *supra* note 28, at 150.

34. Lacey & George, *supra* note 30, at 268.

goods to investing in business ventures or various financial instruments.[35] Again, the end goal is to provide the criminal with access to the proceeds by giving them the appearance of legitimacy.[36]

B. The Role of Financial Institutions in the Fight Against Money Laundering

The Bank Secrecy Act of 1970 (BSA) established the U.S. Department of the Treasury's authority to require financial institutions to record and report their customer's transactions and to assist government agencies in detecting money laundering violations.[37] Although the BSA does not define the types of reports that financial institutions must file or criminalize the act of money laundering itself, it serves as an enabling statute that empowers the Secretary of the Treasury to issue regulations on the types of reports it expects to collect.[38] The goal of the BSA was to create a paper trail of financial transactions and records that could be used to prosecute the underlying crimes of money laundering (e.g., drug trafficking, tax evasion, terrorism).[39] For instance, pursuant to the powers conferred by the BSA, the Secretary of the Treasury requires Currency Transaction Reports (CTRs) to be filed when a domestic financial institution is involved in a payment, receipt, or transfer of currency greater than $10,000.[40]

In response to financial institutions' duty to file CTRs, money launderers began to divide their transactions into smaller amounts to avoid detection in a process called "smurfing" or "structuring."[41] Moreover, many banks, recognizing that the fines for not filing CTRs were relatively small and that investigations were rare, exploited loopholes in the BSA.[42] Federal lawmakers at the time noted the ineffectiveness of the BSA in deterring money laundering, and they passed the next major piece of AML legislation: The Money Laundering Control Act of 1986 (MCLA).[43] The

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35. Alison S. Bachus, *From Drugs to Terrorism: The Focus Shifts in the International Fight Against Money Laundering After September 11, 2001*, 21 ARIZ. J. INT'L & COMP. L. 835, 845 (2004); *see also* Sultzer, *supra* note 28, at 151 (listing some of the different financial instruments used by money launderers to integrate illicit funds).

36. *What Is Money Laundering?*, FIN. CRIMES ENFORCEMENT NETWORK, https://www.fincen.gov/what-money-laundering [https://perma.cc/F36K-PNBZ].

37. Currency and Foreign Transactions Reporting Act, Pub. L. No. 91-508, 84 Stat. 1114 (1970) (codified as amended in scattered sections of 12 U.S.C., 15 U.S.C., and 31 U.S.C.); *FinCEN's Mandate from Congress*, FIN. CRIMES ENFORCEMENT NETWORK, https://www.fincen.gov/resources/statutes-regulations/fincens-mandate-congress [https://perma.cc/J775-KKNW].

38. Paul Fagyal, *The Anti-Money Laundering Provisions of the Patriot Act: Should They Be Allowed to Sunset?*, 50 ST. LOUIS U. L.J. 1361, 1370 (2006).

39. *See* 31 U.S.C. § 5311 (2012) ("It is the purpose of this subchapter . . . to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism."); *see also* Fagyal, *supra* note 38, at 1370.

40. 31 U.S.C. § 5313 (2012); 31 C.F.R. § 1010.310–.311 (2019).

41. Fagyal, *supra* note 38, at 1374.

42. Sultzer, *supra* note 28, at 158–59.

43. Pub. L. No. 99-570, 100 Stat. 3207-18 (codified as amended at 18 U.S.C. §§ 1956–

MCLA made both money laundering and structuring crimes in and of themselves, and it provided for civil and criminal forfeitures of funds and property involved in money laundering.[44] An individual convicted of money laundering can face up to twenty years in prison and up to a $500,000 fine.[45]

The BSA/AML regulatory framework broadened again with the passage of the Annunzio-Wylie Anti-Money Laundering Act of 1992 ("Act").[46] The Act changed the role of financial institutions under the BSA/AML regime in two major ways: (1) it created the Suspicious Activity Report (SAR);[47] and (2) it set forth the minimum requirements for financial institutions' BSA/AML compliance programs.[48] The effect of the SAR requirement is that the responsibility for determining which reports should be filed shifted from the government to the banks,[49] as they ultimately decide whether or not to file an SAR with FinCEN in response to suspicious activity, and they must document the reasons underlying each one of their decisions.[50] FinCEN is a bureau administered by the U.S. Department of the Treasury that collects information about financial transactions to combat money laundering and terrorism.[51] FinCEN was created in 1990 as an intelligence network designed to support the detection, investigation, and prosecution of money laundering crimes.[52]

A financial institution is expected to file an SAR with FinCEN when the bank knows, suspects, or has reason to suspect that:

1957, 31 U.S.C. §§ 1353–1354, 31 U.S.C. §§ 5324–5326 (1988)); *see also* Sultzer, *supra* note 26, at 159 (recounting the shortcomings of the BSA that led to the passage of the MCLA).

44. Sultzer, *supra* note 28, at 159. See *infra* note 194 for a discussion about forfeiture actions under the BSA/AML regulatory regime.

45. 18 U.S.C. § 1956(a)(1) (2012).

46. Pub. L. 102-550, 106 Stat. 4044 (1992) (codified as amended in scattered sections of 12 U.S.C., 18 U.S.C., and 31 U.S.C.); *see also* Fagyal, *supra* note 38, at 1375–76 (discussing how the Act changed the BSA/AML regulatory regime).

47. The Act provided the statutory authority for the SAR by authorizing the Secretary of the Treasury to require financial institutions "to report any suspicious transaction relevant to a possible violation of law or regulation." 31 U.S.C. § 5318(g)(1) (2012). Financial institutions are expected to file SARs that report their customer's criminal activities, or their suspicions thereof, to FinCEN. *See* Matthew R. Hall*, An Emerging Duty to Report Criminal Conduct: Banks, Money Laundering, and the Suspicious Activity Report*, 84 KY. L.J. 643, 653–54 (1995).

48. *See* Fagyal, *supra* note 38, at 1376–77. See *infra* text accompanying notes 63 and 64 for the minimum requirements of financial institutions' BSA/AML compliance programs.

49. Fagyal, *supra* note 38, at 1376.

50. *Suspicious Activity Reporting—Overview*, FFIEC: BSA/AML MANUAL, https://bsaaml.ffiec.gov/manual/RegulatoryRequirements/04 [https://perma.cc/Y2EZ-JQ92].

51. 31 U.S.C. § 310 (2012). Although this Note focuses primarily on the role of the U.S. Department of the Treasury and FinCEN in the BSA/AML regulatory regime, there are at least six other major policymakers involved in the fight against money laundering: (1) the U.S. Department of Justice; (2) the Office of the U.S. Attorney General; (3) the Federal Bureau of Investigation (FBI); (4) the Drug Enforcement Agency (DEA); (5) the Federal Reserve Board; and (6) the Federal Deposit Insurance Corporation (FDIC). Sultzer, *supra* note 28, at 179–80.

52. Treas. Order 105-08 (Apr. 25, 1990); *Financial Crimes Enforcement Network*, *supra* note 1.

> (i) The transaction involves funds derived from illegal activities or is intended or conducted in order to hide or disguise funds or assets derived from illegal activities (including, without limitation, the ownership, nature, source, location, or control of such funds or assets) as part of a plan to violate or evade any law or regulation or to avoid any transaction reporting requirement under Federal law;
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> (ii) The transaction is designed to evade any regulations promulgated under the Bank Secrecy Act; or
>
> (iii) The transaction has no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage, and the institution knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction.[53]

The kind of customer conduct that should alert financial institutions of possible criminal activity largely depends on a customer's individual risk profile, which is created by a bank when a customer opens an account and is then used as a benchmark for identifying unusual transactions.[54]

Congress expanded FinCEN's role in 1994 to include responsibilities for administering the BSA.[55] Today, the agency's primary duties are concentrated on collecting the CTRs and SARs filed by financial institutions and sharing them with partners in the law enforcement community.[56] Congress gives FinCEN a broad range of other responsibilities as well: the agency analyzes data in support of investigations, it exchanges information with foreign financial intelligence unit counterparts, it manages data storage to ensure government-wide access, it issues and interprets regulations related to combating money laundering, and it enforces compliance with those regulations.[57]

Following the terrorist attacks of September 11, 2001, Title III of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("Patriot Act") included AML provisions that broadened the role of financial institutions in exposing terrorist networks.[58] First, the types of financial institutions required to submit SARs expanded to include casinos, insurance companies, brokers and dealers in securities, currency dealers and exchangers, jewelers, dealers in precious metals and stones, and mutual funds.[59] The

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53. 12 C.F.R. § 21.11(c)(4) (2019).

54. *See infra* text accompanying note 72.

55. FIN. CRIMES ENF'T NETWORK, ANNUAL REPORT: FISCAL YEAR 2010, at 3 (2010).

56. *Financial Crimes Enforcement Network*, U.S. DEP'T TREASURY, https://www.treasury.gov/about/history/Pages/fincen.aspx (last updated Nov. 13, 2010) [https://perma.cc/9A6B-B7FA].

57. 31 U.S.C. § 310(b)(2) (2012); Treas. Order 180-01(3)(a) (July 1, 2014); *see also What We Do*, FIN. CRIMES ENFORCEMENT NETWORK, https://www.fincen.gov/what-we-do [https://perma.cc/Z27M-SLFW].

58. Fagyal, *supra* note 38, at 1362.

59. *Id.* at 1378–79; *BSA Timeline*, FIN. CRIMES ENFORCEMENT NETWORK, https://www.fincen.gov/resources/statutes-and-regulations/bank-secrecy-act/bsa-timeline

Patriot Act also assigned the Secretary of the Treasury the authority to add to the list of covered institutions any business or agency that is similar to the others already included, as well as any others that are useful in criminal, tax, or regulatory matters.[60] In addition, the Patriot Act established the "Know Your Customer" (KYC) laws, which require financial institutions to verify the identity of their customers at account opening.[61] Still in effect today, KYC laws direct financial institutions to, at a minimum, implement procedures that are designed to meet the following objectives:

> (A) verifying the identity of any person seeking to open an account to the extent reasonable and practicable;
>
> (B) maintaining records of the information used to verify a person's identity, including name, address, and other identifying information; and
>
> (C) consulting lists of known or suspected terrorists or terrorist organizations provided to the financial institution by any government agency to determine whether a person seeking to open an account appears on any such list.[62]

C. The CDD Rule: "The Fifth Pillar" of Effective Compliance

Prior to the passage of the new CDD Rule, an effective BSA/AML compliance program had four essential "pillars":

> (A) the development of internal policies, procedures, and controls;
>
> (B) the designation of a compliance officer;
>
> (C) an ongoing employee training program; and
>
> (D) an independent audit function to test programs.[63]

The CDD Rule, which became effective in July 2018, created a fifth core pillar of effective BSA/AML compliance.[64]

The CDD Rule's fifth pillar expects financial institutions to implement risk-based procedures for customer due diligence as part of an ongoing duty to monitor their customers.[65] The duty begins when a customer opens a new account, at which point a financial institution must create a customer risk profile that is "used to develop a

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[https://perma.cc/B7FS-88K8] (providing the list of financial institutions required to file SARs has continuously expanded from 2002 until present).

60. *See* 31 U.S.C. § 5312(a)(2)(Y), (Z) (2012).

61. Fagyal, *supra* note 38, at 1378.

62. 31 U.S.C. § 5318(*l*)(l)–(2) (2012).

63. 31 U.S.C. § 5318(h)(1)(A)–(D) (2012).

64. *FinCEN Adds Fifth BSA Compliance "Pillar*,*"* NAT'L CREDIT UNION ADMIN., https://www.ncua.gov/newsroom/Pages/ncua-report/2017/second-quarter/fincen-adds-fifth-bsa-compliance-pillar.aspx [https://perma.cc/Z4PV-KFZR].

65. *Id.*

baseline against which customer activity is assessed for suspicious activity."[66] This baseline assists a financial institution in determining whether a customer's "transaction has no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage," which would trigger its duty to file an SAR report.[67]

In creating the customer risk profile, a financial institution may rely on the information supplied by customers, so long as "it has no knowledge of facts that would reasonably call into question the reliability of the information," although it is expected to continuously update that information based "on a risk basis."[68] This risk basis should be "event-driven and occur[] as a result of normal monitoring" for changes to a customer's personal information, including beneficial ownership information.[69]

The CDD Rule also added "legal entity customers" to the list of customers whose identities must be verified before a financial institution conducts business with them.[70] Prior to the CDD Rule, financial institutions were only required to address beneficial ownership for owners of private accounts and for accounts related to certain foreign financial institutions.[71] Financial institutions are now required to "identify the beneficial owners of legal entity customer accounts" at the time a new account is opened.[72] Legal entity customers include corporations, limited liability companies, partnerships, and similar domestic and foreign types of businesses.[73] Notably, the verification requirements now extend to "shell" companies,[74] which are often formed by money launderers for the sole purpose of concealing their identities as the account holders.[75]

The rule provides three categories of beneficial owners who are covered: (1) any persons who, directly or indirectly, have a twenty-five percent or greater stake in the legal entity customer; (2) any single person "with significant responsibility to control, manage, or direct a legal entity customer" (e.g., the CEO, CFO, General Partner, or any other person with similar functions); and (3) the trustee of a trust that has greater than a twenty-five percent equity interest in the legal entity customer.[76]

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66. Customer Due Diligence Requirements for Financial Institutions, 81 Fed. Reg. 29,398, 29,398 (May 11, 2016) (codified at 31 C.F.R. pts. 1010, 1020, 1023, 1024, 1026).

67. Suspicious Activity Report, 12 C.F.R. § 21.11(c)(4)(iii) (2019).

68. 81 Fed. Reg. at 29,398; *see also FinCEN Adds Fifth BSA Compliance "Pillar*,*" supra* note 64.

69. *Customer Due Diligence—Overview*, FFIEC: BSA/AML MANUAL, https://bsaaml.ffiec.gov/docs/manual/03_RegulatoryRequirements/02.pdf [https://perma.cc/FMX3-HZQB].

70. 31 C.F.R. § 1010.230 (2019); *see also* 81 Fed. Reg. at 29,398 (discussing how the rule functions and how it changes financial institutions' duties).

71. Adam S. Coto, *Customer Due Diligence: FinCEN and the Beneficial Ownership Requirement for Legal Entity Customers*, 20 N.C. BANKING INST. 145, 146–47 (2016).

72. *Id.* at 146.

73. *Beneficial Ownership Requirements for Legal Entity Customers—Overview*, FFIEC BSA/AML MANUAL, https://bsaaml.ffiec.gov/docs/manual/03_RegulatoryRequirements/03.pdf [https://perma.cc/9MC3-KT4C].

74. Story, *supra* note 4.

75. *See* Leefeldt, *supra* note 5; *see also supra* text accompanying note 31.

76. 31 C.F.R. § 1010.230(d)(1)–(3) (2019).

D. Financial Institutions' Affirmative Criminal Reporting Duties Under the BSA/AML Regulatory Regime

The overarching effect of the AML regulatory framework is that financial institutions must fulfill several affirmative duties to conform with FinCEN's expectations and avoid criminal and civil liability. First, by requiring financial institutions covered by the regulations to share their suspicions of money laundering through SARs and CTRs, Congress has created a duty to report crimes and suspicions thereof.[77] Secondly, financial institutions have a duty to investigate their customers, as the SAR requirement and KYC laws require them to maintain records and conduct inquiries into their customers' identities and businesses.[78] Lastly, as a result of the new CDD Rule, financial institutions have a third ongoing duty to monitor their customers for changes in activity that should be considered suspicious.[79]

II. JUSTIFICATIONS FOR IMPOSING MANDATORY DUTIES TO REPORT CRIMES: EXAMINING THE CONTOURS OF CRIMINAL REPORTING LAWS

Part II of this Note, after establishing that American criminal law generally resists imposing affirmative duties to report crimes, analyzes the contours of other laws that create mandatory criminal reporting obligations, including their extent, their underlying justifications, and their enforcement. From these other laws, Section II.D identifies some of the normative principles that justify imposing criminal reporting requirements on private actors. This discussion concludes that criminally punishing the failure to report crimes does not violate principles of proportionality and fairness if, on balance, the burden created by the reporting obligation is low, relative to the social good derived from reporting the crime.[80]

A. The Law Generally Imposes No Affirmative Duty to Report a Crime

American law traditionally resists imposing affirmative legal duties to act—a byproduct of the common law's deeply rooted principles of individual liberty and autonomy—and similarly resists punishing failures to act with civil or criminal punishments.[81] Instead, criminal laws generally prohibit the commission of socially

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77. *See supra* text accompanying note 53.
78. *See supra* text accompanying note 62.
79. *See supra* text accompanying note 65.
80. *See, e.g.*, Sungyong Kang, *In Defense of the "Duty to Report" Crimes*, 86 UMKC L. REV. 361, 369–70, 375 (2017) (establishing a framework for evaluating a "duty to report"); Saperstein et al., *supra* note 13, at 1 (questioning the effectiveness of the anti-money laundering scheme); *see also Hearing*, *supra* note 17, at 33 (statement of Heather A. Lowe, Legal Counsel and Director of Governmental Affairs, Global Financial Integrity) ("[I]t is critical that Congress understands and carefully weighs the potential benefits against the potential ramifications that may be negative before making decisions in this area.").
81. Matthew E. Dyson, *Always on Duty: Can I Order You to Report Crimes or to Intervene?*, 224 MIL. L. REV. 176, 181 (2016); Heather Benzmiller, Note, *The Cyber-Samaritans: Exploring Criminal Liability for the "Innocent" Bystanders of Cyberbullying*, 107 NW. U. L. REV. 927, 946 (2013).

harmful proscribed acts, creating negative duties not to intentionally make the world a worse place.[82] Laws creating positive duties, in contrast, tell actors what they *must* do.[83] The underlying rationale is that, although not reporting could be considered immoral, the proper role of criminal law is not to punish every moral wrongdoing irrespective of the harm it causes to society.[84] Thus, absent a recognizable duty to act at common law (e.g., parent-child relationship),[85] a person is not usually criminally responsible for what they fail to do.[86]

The law has generally extended this approach to criminal reporting requirements, imposing no affirmative duty to report a crime.[87] For their part, American courts have historically found that criminally punishing individuals for omitting to report a crime is overly harsh.[88] For example, the federal statute for the common law crime of "misprision of felony," 18 U.S.C. § 4, reads:

> Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.[89]

Facially, the statute is capable of punishing anyone with passive knowledge of a felony who fails to report it to authorities. However, the federal courts have held that the law punishes only those individuals who take positive or affirmative steps to

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82. *See* Dressler, *supra* note 7, at 979.

83. *Id.*

84. *See* Kang, *supra* note 80, at 362.

85. Dressler, *supra* note 7, at 975–76. Another category of omission liability for special duties created by statute—for example, the duty to pay taxes by a set date—also exists in American criminal law. *Id.* at 976–77; *see also* 26 U.S.C. § 7203 (2012). However, the justifications for these types of laws are typically unquestioned, and they do not implicate the same issues as BSA/AML criminal reporting laws, which this Note seeks to address. *See infra* Section II.D. To be sure, the crime of failing to file a tax return (established by 26 U.S.C. § 7203) makes the act of not filing the return a crime itself, but the duty to file the return arises regardless of whether an actual or suspected predicate crime has occurred. The information provided in the return could very well contain criminal information about its subject, but the government's interest in enforcing the obligation to file a tax return is much broader than learning of criminal activity. This aspect largely distinguishes this obligation from even the statutes discussed in Section II.C., which require the criminal reporting of oneself to authorities for social harms committed by that individual.

86. Dressler, *supra* note 7, at 975.

87. Hall, *supra* note 47, at 643.

88. Marbury v. Brooks, 20 U.S. (7 Wheat.) 556, 575–76 (1822) ("It may be the duty of a citizen to accuse every offender, and to proclaim every offense which comes to his knowledge; but the law which would punish him in every case for not performing this duty is too harsh for man.").

89. 18 U.S.C. § 4 (2012).

conceal a crime.[90] Similar state misprision statutes have either been repealed,[91] or courts have declined to extend their application to mere omissions to report a crime to authorities.[92] Conceptually, the effect of including an "active concealment" requirement in the misprision of felony statute is that it functions like most traditional criminal laws—individuals do not have an affirmative duty to come forward with their knowledge, but they are not allowed to intentionally act in a way designed to prevent authorities from discovering the commission of a crime.[93]

B. State and Federal Statutes Creating Individual Criminal Reporting Duties

Despite the law's general rejection of a duty to report crimes, various state and federal statutes carve out exceptions and create civil and criminal punishments for individuals who fail to do so under specific circumstances.[94] Indeed, there are circumstances in which moral duties to act outweigh the interest in maintaining individual liberty, especially when the burden of reporting is relatively low.[95] For example, a handful of states have enacted laws that require individuals to report the commission of specifically enumerated crimes to authorities, creating variants of "Bad Samaritan" statutes.[96] The crimes that trigger reporting duties under "Bad

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90. *E.g.*, United States v. Baumgartner, 581 F. App'x 522, 526 (6th Cir. 2014); Bratton v. United States, 73 F.2d 795, 797 (10th Cir. 1934); *see also* Craig Ehrlich, *When Minding Your Own Business Means Speaking Up: Criminally Punishing a Corporate Executive for Failing to Blow the Whistle on the Illegal Misconduct of a Colleague*, 32 J.L. & COM. 255, 268–69 (2014) (citing various federal and circuit court decisions requiring positive concealment to be found guilty under the federal misprision statute).

91. Gabriel D.M. Ciociola, *Misprision of Felony and Its Progeny*, 41 BRANDEIS L.J. 697, 723 (2003) (stating that Louisiana, Maine, and New Jersey have repealed their misprision of felony statutes).

92. For example, Colorado has a misprision statute in its criminal code, COLO. REV. STAT. ANN. § 18-8-115 (West 2013), but the Tenth Circuit held that the law imposed no general obligation to report a crime, United States v. Zimmerman, 943 F.2d 1204, 1214 (10th Cir. 1991). Similarly, South Dakota's and Ohio's misprision statutes have not been repealed, but the crimes are rarely, if ever, charged. OHIO REV. CODE ANN. § 2921.22(A) (LexisNexis 2014 & Supp. 2019); S.D. CODIFIED LAWS § 22-11-12 (2017); *see* Ciociola, *supra* note 91, at 726–30. Courts in a select few states recognize the common law crime of misprision of felony, but prosecutors rarely charge individuals with the crime except in extraordinary circumstances. *See generally* Ciociola, *supra* note 91, at 710–21 (discussing how different state courts have addressed the common law crime of misprision of felony). Most of the courts in the select states that recognize the crime at common law include a mens rea element or require positive acts of concealment. *Id.* In sum, it can be said that the common law crime of misprision is practically nonexistent in American law. Ehrlich, *supra* note 90, at 268.

93. *See* Ciociola, *supra* note 91, at 722–23.

94. *See* Hall, *supra* note 47, at 644.

95. Dressler, *supra* note 7, at 987.

96. For example, a Nebraska statute punishes "[a]ny person who has knowledge of the theft or loss of explosive materials," and who does not report it to authorities, with a misdemeanor. NEB. REV. STAT. ANN. § 28-1226 (LexisNexis 2015). Although the Nebraska statute creates an affirmative duty to take action, and it criminally punishes omissions thereof, the only circumstance in which the duty arises is when one knows of the theft or loss of explosives. *See id.*

Samaritan" laws are usually limited in their scope to specific acts of violence against other individuals.[97] Additionally, these laws typically carry light punishments[98] and require that an individual either witnessed the crime[99] or had actual knowledge of the offense.[100] The statutes' mens rea requirements help explain why, despite the fact that many states have specialized reporting provisions for particular offenses in their criminal codes, "Bad Samaritan" laws are not frequently enforced.[101] Stricter enforcement would be costly, and it would be difficult for a prosecutor to prove that a bystander possessed the necessary knowledge or other level of culpability required by the statute.[102]

Other state laws impose a narrower reporting duty on members of specific professions, such as medical care providers and owners of car repair shops, who are likely to encounter signs of certain types of harm in their line of work.[103] These variants of "Bad Samaritan" laws also tend to have minimal penalties for noncompliance,[104] as well as various mens rea requirements that limit culpability.[105]

Another unique quality of these "Bad Samaritan" laws is that punishments for violations appear directly related to the severity of the crime witnessed, rather than the harm caused by a violator's inaction. For example, the Michigan statute that applies to car garage owners who observe bullet damage to vehicles does not specify a punishment.[106] In contrast, violations of the Massachusetts reporting law that applies to any person who witnesses a sexual assault, murder, manslaughter, or

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97. *See, e.g.*, MASS. ANN. LAWS ch. 268, § 40 (LexisNexis 2010); WASH. REV. CODE ANN. § 9.69.100 (West 2019); WIS. STAT. ANN. § 940.34(2)(a) (West 2005); *see also* Ciociola, *supra* note 91, at 730–31; Ehrlich, *supra* note 90, at 268; Benzmiller, *supra* note 81, at 950–51.

98. Benzmiller, *supra* note 81, at 950–51; *see, e.g.*, HAW. REV. STAT. ANN. § 663-1.6(a) (West 2008).

99. *See, e.g.*, MASS. ANN. LAWS ch. 268, § 40 (LexisNexis 2010); WASH. REV. CODE ANN. § 9.69.100 (West 2019).

100. *See, e.g.*, NEB. REV. STAT. ANN. § 28-1226 (LexisNexis 2015); 3 R.I. GEN. LAWS § 11-1-5.1 (2002); *see also* Ciociola, *supra* note 91, at 731–34 (listing various statutes that require individuals to report certain crimes).

101. *See* Ehrlich, *supra* note 90, at 268; Benzmiller, *supra* note 91, at 950–51.

102. *See* Dressler, *supra* note 7, at 982, 985.

103. Ciociola, *supra* note 91, at 730–31 (describing this variant of criminal reporting statutes); Ehrlich, *supra* note 90, at 271–73.

104. *See, e.g.*, 25 HAW. REV. STAT. ANN. § 453-14(c) (West 2008 & Supp. 2019) (failure of medical professional to report an injury sustained in a suspicious or violent manner is punishable by a fifty dollar to five hundred dollar fine); IND. CODE ANN. § 9-26-5-1, -2 (West 2012) (those in charge of car repair shops who do not report evidence that a vehicle was struck by a bullet are guilty of a Class C infraction); MICH. COMP. LAWS ANN. § 750.411(c) (West 2004) (failure by physician or surgeon to report injuries inflicted by violence punishable as a misdemeanor).

105. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3009 (2018) (creating a duty for communications officers to report violations within their knowledge of crimes related to eavesdropping); OHIO REV. CODE ANN. § 2921.22(B), (F) (LexisNexis 2014 & Supp. 2019) (creating a negligence standard for caregivers who fail to report gunshot or stab wounds or injuries caused by suspected domestic violence).

106. *Id.*

armed robbery are potentially punishable by a $2500 fine.[107] The inaction that gives rise to liability under both crimes is ostensibly the same, so it seems that one's culpability is dependent not on a violator's conduct (or lack thereof), but the harmfulness of the crime not reported.

The most sweeping and stringently enforced statutes impose a duty to report crimes against helpless victims—namely, the abuse of children and the elderly.[108] Under federal law, all states must have statutes that designate individuals within certain professions as "mandatory reporters" of child abuse.[109] Some states also include "catch-all" provisions that extend the duty to anyone who develops a suspicion of abuse.[110] This type of criminal reporting statute requires more than the other variations discussed above because, by imposing a duty to report suspicions of abuse, the law requires individuals to make difficult, good faith judgments about the underlying cause of the harm observed.[111] State statutes that similarly require individuals to report instances of elder abuse have been modeled after those related to child abuse, and both types of reporting laws also extend civil immunity to the reporters.[112]

Whether or not a person has failed to fulfill his or her duty to report abuse resembles a negligence standard, asking if the objective, reasonable person would have had cause to believe that abuse occurred.[113] To further encourage mandatory reporters to share their suspicions, the statutes include good faith immunity clauses that protect them in the event that their suspicions are mistaken.[114] Thus, although mandatory reporters do not have a duty to further investigate their customers, clients,

107. MASS. ANN. LAWS ch. 268, § 40 (LexisNexis 2010).

108. Ciociola, *supra* note 91, at 731–34; Ehrlich, *supra* note 90, at 271–72; *see, e.g.*, 320 ILL. COMP. STAT. ANN. 20/4 (West 2018).

109. CHILD WELFARE INFO. GATEWAY, MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT (2019) (providing information about all states' mandatory reporting laws).

110. Sandra Guerra Thompson, *The White-Collar Police Force: "Duty to Report" Statutes in Criminal Law Theory*, 11 WM. & MARY BILL RTS. J. 3, 11, 15 (2002).

111. Suzanne M. Nicholls, *Responding to the Cries of the Innocent: Holding Non-Offending Parents Criminally Responsible for Failing to Protect the Abused Child*, 30 T. JEFFERSON L. REV. 309, 318 (2007); *See* Lisa Koverko, Note, *Piercing the Veil of Secrecy: The Impact of the Child Protection Law on the Prevention of Child Sexual Abuse*, 88 U. DET. MERCY L. REV. 51, 64 (2010).

112. Thompson, *supra* note 110, at 23.

113. *See, e.g.*, OR. ADMIN. R. 413-015-0115(50) (2018) (defining reasonable suspicion); *see also* CHILD WELFARE INFO. GATEWAY, *supra* note 109, at 3 ("Typically, a report must be made when the reporter . . . *suspects or has reason to believe* that a child has been abused or neglected. Another frequently used standard is the requirement to report in situations in which the reporter has knowledge of, or observes a child being subjected to, conditions that would reasonably result in harm to the child." (emphasis in original)); Nicholls, *supra* note 111, at 318 ("To determine whether there is reasonable cause to believe that child abuse is occurring, courts use the same standard as that used for permissive reporters—the objective reasonable person standing in the reporter's position.");.

114. Nicholls, *supra* note 111, at 318; Koverko, *supra* note 111, at 64.

or patients,[115] the expectation that mandatory reporters will not be negligent in observing signs of child abuse creates a duty to *discover* crime.[116]

C. Duties to Report Crimes that Commonly Arise in Specific Industries

Mandatory criminal reporting laws applicable to specific industries may be justified by a governmental interest in preventing systemic crimes within the industry.[117] Often, the effect of these statutes is to reduce liability or require reporting in instances where the actor itself is responsible for the harm.[118] Criminal self-reporting obligations that are imposed on certain industries prominently arise under securities laws and environmental laws.[119] For instance, under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), persons in charge of vessels are expected to report a release of hazardous materials for which they are responsible.[120] Liability under CERCLA for omitting to report a spill is limited to "persons in charge," and the statute's safe harbor provision extends immunity from criminal liability to self-reporters.[121]

Another industry-wide reporting requirement mandates that electronic communication service providers share the identity, location, and communications of individuals who are involved with child pornography to the National Center for Missing and Exploited Children.[122] Similar to the mens rea requirements found in several "Bad Samaritan" laws, violations of the law occur when actors with "actual knowledge" of the criminal activity omit to file the required reports.[123] To assist the electronic communication service providers in their efforts to identify offenders, the National Center for Missing and Exploited Children shares its own information, including web addresses already known to contain illicit material.[124]

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115. *See* Andrew Solomon, *Preventing Recurrences of the Cover-Ups at Penn State & Baylor (and Now Michigan State): Where Does It End?*, 28 MARQ. SPORTS L. REV. 379, 409–10 (2018).

116. Koverko, *supra* note 111, at 67; *see also* Solomon, *supra* note 115.

117. *See* Thompson, *supra* note 110, at 12.

118. Hall, *supra* note 47, at 646.

119. *Id.* at 647; *see, e.g.*, 42 U.S.C. § 9603 (2012). Unlike the other laws discussed in Section II.C., Sarbanes-Oxley requires *internal* reporting of financial misconduct to the chief legal counsel or the chief executive officer of a company. *See* Section 307 of Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 784 (codified as amended at 15 U.S.C. § 7245 (2012)). Similarly, the Dodd-Frank Act is different from the criminal reporting statutes for the reason that it encourages, but does not require, reporting. *See* Section 922 of the Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1841 (codified as amended at 15 U.S.C. § 78u-6 (2012 & Supp. V 2018)).

120. Pub. L. No. 96-510, 94 Stat. 2772 (codified as amended at 42 U.S.C. § 9603(a) (2012); *see also* Thompson, *supra* note 110, at 33 (describing the conditions under CERCLA that can create criminal liability for failing to report).

121. 42 U.S.C. § 9603(a).

122. 18 U.S.C. § 2258A (2012 & Supp. V 2018).

123. *Id.*

124. Kang, *supra* note 80, at 392.

D. A Framework for Understanding When Imposing Affirmative Duties to Report Crimes Is Justified

To address the normative question of when it is acceptable for the government to compel criminal reporting, a *qualitative* and *quantitative* cost-benefit analysis of criminal reporting laws can lend valuable insights into their relative levels of fairness and proportionality.[125] One commentator, Sungyong Kang, suggests that the proper framework for this analysis should consider the moral culpability of the reporter as determined by the reporter's relationship to the crime (i.e., victim, offender, or third party).[126] Kang also acknowledged that other factors—including the potential reporter's level of knowledge about the crime, the harm caused to the individual being reported, and the social good produced by the reporting—also bear on this analysis.[127] This Section will examine how these factors apply to the mandatory criminal reporting laws discussed earlier in Part II to create a benchmark from which burdens created by the BSA/AML reporting laws can be examined.

The affirmative duties that criminal reporting laws create may be justified by a societal belief that people in special circumstances should be expected to assist law enforcement in preventing crime.[128] In carving out exceptions to the law's general rejection of imposing affirmative duties to act, the reporting laws primarily benefit society in one of two ways: (1) protecting helpless victims, and (2) preventing widespread or systemic harms.[129] For example, mandatory reporting laws related to child abuse fall in the first category, and the duties are imposed on licensed individuals who have already accepted professional duties of care.[130] Any additional burden borne by reporters is minor relative to the obligations that they already owe and the magnitude of harm that can be prevented by the reporting of child abuse.[131] Moreover, due to the discreet nature of the crime, punishing many offenders would be much more difficult, if not impossible, but for mandated criminal reporting.[132]

The position of the reporter relative to the crime also bears on the potential reporter's level of knowledge about the commission of a crime. Reporters who are more certain that a crime occurred and fail to report it are more blameworthy than individuals who merely suspect one took place.[133] Thus, the mens rea requirements in reporting laws can help make the imposition of the affirmative duties more

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125. *See id.* at 370; *see also Hearing*, *supra* note 17, at 11 (statement of Heather A. Lowe, Legal Counsel and Director of Governmental Affairs, Global Financial Integrity) ("[I]t is critical that Congress understands and carefully weighs the potential benefits against the potential ramifications that may be negative before making decisions in this area."); Saperstein et al., *supra* note 13, at 1 ("The optimal level of banking regulation necessarily requires some sort of cost-benefit analysis.").

126. Kang, *supra* note 80, at 378–79.

127. *Id.* at 376–78.

128. Arthur Leavens, *A Causation Approach to Criminal Omissions*, 76 CALIF. L. REV. 547, 575 (1988).

129. Thompson, *supra* note 110, at 12.

130. *Id.*

131. *See* Hall, *supra* note 47, at 646.

132. *See* Kang, *supra* note 80, at 381.

133. *Id.* at 376.

justifiable by limiting who can be held criminally liable to those actors with the greatest culpability. For instance, most of the variations of "Bad Samaritan" laws discussed in Section II.B require that an individual either witnessed the crime or had knowledge of the offense.[134] Similarly, the criminal self-reporting statutes applicable to business associations are not only justified by the fact that the actors themselves are responsible for the harm, but the potential reporters will also have little doubt about their own responsibility for the crime committed.[135]

Under Kang's cost-benefit approach, a third factor, the social good created by criminal reporting, can be weighed against the burden imposed on the reporter.[136] The social good created by criminal reporting largely depends on the severity of the harm that the government seeks to deter,[137] which helps to distinguish the varying criminal penalties imposed by the "Bad Samaritan" statutes discussed above. The mandatory reporting duties related to serious, violent crimes include more stringent punishments for omissions, even though the other factors (such as the parties' relationships to the crime and the mens rea requirements) were generally the same.[138] Moreover, the burden created is relatively low under all the criminal reporting laws discussed in Part II, as they require no further action after alerting authorities.[139]

III. THE EXCEPTIONALLY STRINGENT DUTY TO REPORT CRIME UNDER ANTI-MONEY LAUNDERING LAWS

This Note recognizes that private financial institutions may be in a better position than government agencies to detect and report money laundering violations,[140] as they are simultaneously violators, victims, and interested third parties to the crime.[141] As potential violators who stand to profit, financial institutions are incentivized not to report financial crimes, which is a factor that supports stricter punishments and more stringent enforcement of their reporting duties.[142] The government, for its part, has an unquestioned interest in preventing the systemic harms created by money laundering and terrorist financing—further justifying the imposition of mandatory criminal reporting requirements on private actors—but to what extent should this

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134. *See supra* text accompanying notes 96–100.

135. *See* Thompson, *supra* note 110, at 50. For example, the costs for businesses that self-report their violations of environmental laws might ultimately be high, as violators are granted criminal, but not civil, immunity under CERCLA, but the fact that the reporter bears direct responsibility for causing the harm justifies these costs. *Id.* at 34. Still, even if a potential reporter was responsible for an environmental harm, their failure to report may not have caused the harm or necessarily even aggravated it. *Id.* at 6.

136. *See* Kang, *supra* note 80, at 377.

137. *See id.*

138. *See supra* text accompanying notes 105–106.

139. *See supra* Sections II.B, C.

140. *See* Kang, *supra* note 80, at 362.

141. *See id.* at 364.

142. *See* Fagyal, *supra* note 38, at 1371–74 (describing banks' lax BSA/AML compliance in the 1970s and 1980s—an era in which banks actively sought ways to avoid reporting requirements in order to continue conducting business with money launderers).

practice be allowed?[143] Today, federal regulators punish banks even when no money laundering violations were found to have occurred.[144]

This Note appreciates the severity of the threats that these crimes pose to the integrity of the financial system, but it questions the extent to which the government's interest in deterring money laundering can reasonably support creating mandatory criminal reporting duties that shift the government's own law enforcement responsibilities to private actors. To address this issue, Part III conducts a qualitative and quantitative cost-benefit analysis of the BSA/AML regulatory regime.[145] This Part focuses first on the *qualitative* aspects of BSA/AML reporting obligations, as well as FinCEN's stringent enforcement of the regulations and the disproportionate punishments for inadequate compliance, which distinguish AML criminal reporting duties from the reporting laws discussed in Part II. This Part then considers recent *quantitative* data and studies that suggest the economic costs and burdens of compliance incurred by financial institutions are disproportionate to the benefits that the law enforcement agencies derive from the current BSA/AML regulatory regime. Part III concludes that the burdens created by the reporting duties under the current regime have become excessive and are inconsistent with the principles discussed in Section II.D. In effect, the AML/BSA regulatory framework has turned the industry into an unfunded police force.[146]

A. A Qualitative Analysis of the Affirmative Duties Imposed on Financial Institutions by AML Laws and Regulations

As discussed in Section I.D of this Note, the overarching effect of the BSA/AML regulatory framework is that financial institutions must fulfill several affirmative duties to conform with FinCEN's expectations and avoid criminal and civil liability.[147] First, financial institutions have a duty to report crimes, as the BSA/AML regulatory regime mandates that they share their suspicions of financial crimes with FinCEN by filing SARs and CTRs.[148] Secondly, financial institutions have a further

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143. This Note maintains that, in some situations, failing to report a crime may be inherently wrong, mala in se, and that it is the failure to fulfill a moral duty and causation of social harm that justifies criminal, as opposed to just civil, punishment. *See* Kang, *supra* note 80, at 369. Administrative, or regulatory, laws that create civil penalties for violations are generally less concerned about the violator's culpability for the offense, often holding the violators strictly liable. *See id.* Often, such regulatory actions are justified if their benefits outweigh their costs. *See id.* at 369–70 (stating that regulations are often subject to cost-benefit analyses); *see also* Saperstein et al., *supra* note 13, at 2 (stating that scholars, Congress, and courts encourage policymakers to weigh the qualitative and quantitative benefits and costs of regulations). Because the AML/BSA regime is a hybrid of criminal and administrative law that includes both civil and criminal punishments for inadequate compliance, *see infra* Section III.B, this Section of my Note analyzes financial institutions' moral culpability for BSA/AML violations, as well as the economic costs and benefits of the regime.

144. Saperstein et al., *supra* note 13, at 1.

145. *See* Kang, *supra* note 80, at 369–70; Saperstein et al., *supra* note 13, at 1–2; *see also supra* text accompanying note 125.

146. *See, e.g.*, *Hearing*, *supra* note 17, at 1.

147. *See supra* Section I.D.

148. *See supra* Section I.D.

duty to investigate, as the KYC regulations require the affected institutions to maintain records and conduct inquiries into their customers' identities.[149] Third, financial institutions are expected to monitor their customers for changes in activity that indicate illegal activity.[150] Before discussing how well compliance is enforced and the severity of punishments for inadequate compliance, Section III.A analyzes how financial institutions' reporting duties are qualitatively distinct, as financial institutions are held criminally liable for failing to serve as effective law enforcement agents.

1. BSA/AML Criminal Reporting Duties Are Uniquely Broad, Ambiguous, and Burdensome Compared to Criminal Reporting Duties Found Elsewhere in the Law

The Patriot Act broadly delegated authority to the Secretary of the Treasury to add almost any business to the list of financial institutions expected to comply with BSA/AML reporting requirements.[151] The result has been that, under the current regulatory regime, car dealers, travel agencies, and jewelers may be subject to the same liability as major banks for failing to adequately file reports with FinCEN without regard for their financial ability to undertake the same compliance measures.[152] Even if the reporting duties can be justified in part by financial institutions' professional knowledge about the signs of money laundering—in the same way that physicians can reasonably be expected to report signs of gunshot wounds—the indiscriminate application of the reporting requirements still overlooks two other factors. It ignores the proportionality and fairness of this requirement, as surely the value of the information that the government hopes to gain from such a wide range of actors cannot be of equal value.[153]

Moreover, financial institutions' reporting duties are particularly burdensome in light of the fact that their SAR reporting obligations are triggered by a lesser evidentiary standard than the laws discussed in Part II.[154] For example, unlike mandatory reporters who are required to report their "reasonable suspicions" of child abuse to authorities,[155] financial institutions' reporting duties may be triggered by

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149. *See supra* Section I.D.

150. *See supra* Section I.D.

151. Thompson *supra* note 110, at 27–28.

152. *See* 31 U.S.C. § 5322 (2012); *see also* Thompson *supra* note 110, at 28–29 (noting that several of the institutions that are covered by BSA/AML reporting requirements are only financial in the sense that they earn revenue, but all are equally required to maintain records and file SARs). However, some types of businesses, like car dealerships, which are required to file transaction reports pursuant to BSA authority, are not expected to file other types of reports, like SARs. Car dealerships, for example, file a Form 8300 for cash payments exceeding $10,000. *See* 26 U.S.C. § 6050I (2012).

153. *See Hearing*, *supra* note 17, at 11 (statement of Heather A. Lowe, Legal Counsel and Director of Governmental Affairs, Global Financial Integrity) ("The second point I really wanted to stress here is that AML compliance and reporting is undertaken by a really wide range of entities and persons going far beyond the banking sector. . . . [A]ny proposed changes being considered should really be looked at in light of that wide range of actors, those types of entities and persons.").

154. *See supra* Sections II.B, C.

155. *See* Thompson, *supra* note 110, at 16.

any suspicion of *possible* criminal activity.[156] Both actors share a duty to "discover" crime to some extent,[157] and the standards, combined with the threat of criminal sanctions, create a strong incentive to report.[158] In the context of child abuse, it is very likely good public policy to require anyone, especially professionals like teachers or doctors, to report their reasonable suspicions, as the victims involved are among society's most vulnerable.[159]

The issue with applying a lesser evidentiary standard to financial institutions, however, can be explained by the differences in their relationship to the crimes that the government seeks to deter. Their reporting duties relate not to the third-party victims, but rather to the potential perpetrators who are actively concealing their criminal acts from the financial institutions that they hope to defraud.[160] The conduct that should alert financial institutions of when to file SARs is not often readily identifiable,[161] as money launderers intentionally structure their deposits in ways that are designed to avoid triggering their reporting duties.[162] Potential violators include not only their customers but also insiders within the financial institution, who all deliberately attempt to avoid committing acts that they know could create suspicion.[163] Compared to mandatory reporters, who are held to a negligence standard for failing to recognize and report reasonable suspicions of child abuse,[164] financial institutions' duty to "discover" crimes seems to be a much more arduous task that requires greater attentiveness to comply.[165] Moreover, FinCEN does not share its own relevant information with financial institutions to help ease this burden, as is the case with the National Center for Missing and Exploited Children and electronic communication service providers.[166]

In effect, the evidentiary standard that triggers the duty to file an SAR rule is a double-edged sword. Financial institutions may require less certainty about the validity of their suspicions before reporting, as all *possible* criminal conduct is reportable, but this standard also means that good compliance practices must catch a wider array of activity to avoid criminal and civil liability. To illustrate this point, the SAR requirement gives financial institutions the power to exercise "prosecutorial discretion" in deciding what conduct should be considered "suspicious" and reported to FinCEN.[167] Even FinCEN has acknowledged that, in certain situations, "a more

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156. *Id.* at 25; *see also* 12 C.F.R. § 21.11(c) (2018).

157. *See supra* text accompanying note 115–116.

158. *See* Thompson, *supra* note 110, at 18.

159. *See id.* at 11–13.

160. *See supra* Section I.A.

161. *See* Hall, *supra* note 47, at 651.

162. *See supra* text accompanying note 41.

163. *See* Thompson, *supra* note 110, at 24.

164. *See supra* text accompanying note 113.

165. For the standards that prosecutors must meet to punish financial institutions that fail to adopt adequate BSA/AML policies, *see infra* Section III.B.

166. Kang, *supra* note 80, at 392–93.

167. *See* Amendment to the Bank Secrecy Act Regulations; Requirement to Report Suspicious Transactions, 61 Fed. Reg. 4326, 4329 (Feb. 5, 1996) (codified at 31 C.F.R. pt. 103, transferred to 31 C.F.R. Ch. X, 75 Fed. Reg. 65,806 (Oct. 26, 2010)); Hall, *supra* note 47, at 651.

involved judgment may need to be made whether a transaction is suspicious within the meaning of the rule."[168] Given the ambiguity, complexity, and perhaps subjectivity in the criteria for what should be considered possibly "suspicious" in the context of money laundering and financial crimes, the SAR rule renders financial institutions liable for exercising poor judgment, at least according to federal regulators, about the type of customer conduct that is valuable to law enforcement agencies.[169]

2. SAR Reports and "Know Your Customer" Regulations Create an Additional Burden to Investigate for Crimes

Financial institutions' responsibility to file SARs also serves as a useful starting point for discussing their additional investigative duties. As noted above, banks are authorized to exercise a unique degree of discretion in selecting what kind of customer behavior is reportable.[170] When a bank is alerted of customer activity that deviates from its risk profile on that customer, the bank, not the government, bears the responsibility for the additional investigatory work needed to determine whether a SAR report should be filed.[171] To contrast this additional obligation from the criminal reporting requirements found elsewhere in the law, reporters of child abuse, for example, owe no additional duty to substantiate the underlying causes of their reasonable suspicions after reporting them to authorities.[172] Financial institutions' duty to investigate is resource intensive, and as Greg Baer, President of the Clearing House Association, has pointed out, it requires the institutions "to investigate [their suspicions] like a law enforcement agency."[173] Although this is a task that law enforcement is more qualified and better trained to perform, banks' compliance professionals, who often account for a greater portion of a bank's staff than their loan officers, can spend days conducting exhaustive research to process a single SAR report.[174]

In addition, the "Know Your Customer" laws, which obligate financial institutions to perform inquiries into their customers' records and affairs when they open an account, create other investigative duties for financial institutions.[175] The information gained in the course of performing these duties should ideally inform

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168. Amendment to the Bank Secrecy Act, 61 Fed. Reg. at 4329.

169. *See* Saperstein et al., *supra* note 13, at 1.

170. *See supra* text accompanying note 167.

171. *See Hearing*, *supra* note 17, at 14–15 (statement of Lloyd DeVaux, President and Chief Executive Officer, Sunstate Bank).

172. *See supra* text accompanying note 115.

173. *Hearing*, *supra* note 17, at 18 (statement of Greg Baer, President, The Clearing House Association). The Clearing House is a banking association owned by the largest commercial banks that conducts research on financial regulations and the banking system as a whole. *Our History*, CLEARING HOUSE, https://www.theclearinghouse.org/about/history [https://perma.cc/HM6D-G8KX].

174. *See Hearing*, *supra* note 17, at 6–7 (statement of Faith Lleva Anderson, Senior Vice President and General Counsel, American Airlines Federal Credit Union, on behalf of the Credit Union National Association (CUNA)).

175. Thompson, *supra* note 110, at 29; *see also supra* text accompanying note 66.

banks of when a customer's activities should be considered suspicious and when an SAR should be filed.[176] And federal regulators have, to a great extent, outsourced their own role in this process to the private sector. Compliance requires financial institutions to educate their entire staff on the KYC requirements, as the responsibility for gathering the necessary information to build customers' risk profiles often falls on the frontline employees who set up bank accounts.[177] The overall effect of financial institutions' investigative duties is that they bear conflicting responsibilities: they are simultaneously expected to serve as the gatekeepers who prevent money launderers from exploiting the financial system, as well as the reporters who assist federal agents in creating the paper trail that can be used to convict criminals.[178]

3. The CDD Rule Imposes Additional Duties to Monitor and Investigate Customers

Under the new CDD Rule, financial institutions now have an additional duty to monitor for criminal activity, as financial institutions' obligation to "identify and verify the identity of beneficial owners of legal entity customers" is ongoing.[179] Compliance with the new rule creates additional investigatory burdens for financial institutions since beneficial ownership information is not easily accessed, as no statute currently provides for this information to be shared with financial institutions by the states in which beneficial owners incorporate their business associations.[180] The ambiguities in the "fifth pillar" of effective BSA/AML compliance, which requires financial institutions to implement risk-based procedures for identifying changes in customer activity,[181] adds to the burden of compliance. For example, to update customers' information on a "risk basis," some financial institutions have taken extreme steps, including constant monitoring of media for adverse stories about their customers, to avoid potential liability.[182]

B. The Enforcement of Punishments for Failing to Fulfill Affirmative Duties Under the BSA/AML Regulatory Regime

Financial institutions are seemingly punished for their failure to comply with FinCEN's own subjective determinations of what proper compliance looks like, even in the instances where there have been no money laundering violations.[183] This perception of inconsistent enforcement may be due in part to financial institutions' uncertainty in how to fulfill their criminal reporting requirements. For example, as discussed earlier in this Note, the ultimate decision of when an SAR report should

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176. *See supra* text accompanying note 67.

177. *See Hearing*, *supra* note 17, at 24, (statement of Lloyd DeVaux, President and Chief Executive Officer, Sunstate Bank).

178. *A New Paradigm*, *supra* note 17, at 6.

179. Customer Due Diligence Requirements for Financial Institutions, 81 Fed. Reg. 29,398 (May 11, 2016) (codified at 31 C.F.R. pts. 1010, 1020, 1023, 1024, 1026).

180. *A New Paradigm*, *supra* note 17, at 12.

181. *See supra* text accompanying notes 67–69.

182. *A New Paradigm*, *supra* note 17, at 5.

183. Saperstein et al., *supra* note 13, at 1.

be filed rests with the financial institutions.[184] Unlike the bright-line duty to file CTRs, which is triggered by a set monetary threshold, the duty to file SARs is dependent on financial institutions' own judgments on the amount of suspicion that customers' transactions should generate.[185]

The bank examination manual, published by the Federal Financial Institutions Examination Council (FFIEC) to guide field examiners when assessing the quality of banks' SAR procedures, states that banks "should not be criticized . . . unless the failure is significant or accompanied by evidence of bad faith."[186] But these terms are undefined, and despite this stated policy, federal agencies may issue cease and desist orders, requiring financial institutions to take specific actions to eliminate deficiencies in their BSA/AML programs, if there is a significant *potential* for unreported money laundering offenses.[187] Financial institutions will consent to these cease and desist orders to avoid litigation costs, but if they fail to take the necessary corrective actions, the OCC may issue additional orders imposing multimillion dollar civil penalties.[188]

Moreover, if the U.S. Attorney's Office files criminal or civil enforcement actions against financial institutions, the mens rea standard that must be established requires far less than bad faith. Financial institutions and their individual employees can be held criminally liable for inadequate compliance,[189] but individual employees are only culpable for criminal punishments if they are found to have "willfully" violated the reporting requirements.[190] In contrast, financial institutions are ostensibly held to a strict liability standard for inadequate compliance under the criminal penalty statute.[191] After announcing charges, federal prosecutors usually opt for deferred

184. *See supra* text accompanying note 167.

185. *See supra* text accompanying notes 168–69.

186. *Suspicious Activity Reporting—Overview*, FFIEC BSA/AML MANUAL, https://bsaaml.ffiec.gov/docs/manual/03_RegulatoryRequirements/04.pdf [https://perma.cc/EYZ9-FDMS].

187. 12 U.S.C. § 1818(i), (s) (2012); *Appendix R: Enforcement Guidance*, FFIEC BSA/AML MANUAL, https://bsaaml.ffiec.gov/docs/manual/07_Appendices/18.pdf [https://perma.cc/GTD3-VJDB].

188. *See, e.g.*, Consent Order Between Capital One, N.A. and the Office of the Comptroller of the Currency, AA-EC-2018-62 (Oct. 23, 2018) (agreeing to a $100 million penalty).

189. Jeffrey R. Boles, *Financial Sector Executives as Targets for Money Laundering Liability*, 52 AM. BUS. L.J. 365, 394 (2015).

190. 31 U.S.C. § 5322(a) (2012), the statute establishing individual criminal liability, includes a "willfully" mens rea element, which has been interpreted by the Supreme Court to require that the defendant had knowledge of the requirement and a purpose to disobey the reporting requirement. *See* Ratzlaf v. United States, 510 U.S. 135, 141 (1994). *But see* 31 U.S.C. § 5324(a)(1) (2012) (excluding a "willfully" mens rea requirement in setting forth individual criminal liability for those who cause BSA/AML reports not to be filed).

191. 31 U.S.C. § 5322(d), the statute that holds financial institutions liable for violations of its reporting requirements, does not include a "willfully" mens rea requirement. *See also A New Paradigm*, *supra* note 17, at 23 ("Financial institutions currently operate under a strict liability, post-hoc regulatory standard that is both opaque and constantly changing.").

prosecution agreements,[192] which will also include large civil penalties[193] and forfeiture actions.[194] When financial institutions have implemented effective compliance programs, insofar that no *actual* money laundering offenses or other crimes were uncovered, they are not necessarily shielded from liability under BSA/AML regulations.[195]

The severity of the penalties for inadequate compliance is perhaps the factor that most distinguishes the BSA/AML regime from other criminal reporting requirements found elsewhere in the law. This Note provided a few examples of the draconian civil and criminal fines in its Introduction,[196] but to give yet another example of the harsh penalties for insufficient compliance, Citibank was forced to pay a $70 million penalty in January 2018 for failing to improve its AML program as mandated in a 2012 consent order.[197] The Office of the Comptroller of the Currency (OCC), a bureau within the U.S. Department of the Treasury tasked with supervising banks,[198] cited the bank's incomplete identification of high-risk customers, inadequate customer due diligence, and failure to file timely SARs.[199] Additionally, the maximum civil penalties for inadequate BSA/AML compliance increased following the passage of the Federal Civil Penalties Inflation Adjustment Improvements Act of 2015.[200] The government's rationale for this increase—that fines had not kept pace

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192. *E.g.*, Press Release, U.S. Attorney's Office for the S. Dist. of N.Y., Manhattan U.S. Attorney Announces Criminal Charges Against U.S. Bancorp for Violations of the Bank Secrecy Act (Feb. 15, 2018), https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-criminal-charges-against-us-bancorp-violations-bank [https://perma.cc/M8AQ-8L8D].

193. 31 U.S.C. § 5321 requires that one have "willfully" not implemented BSA/AML compliance measures to be liable for *civil* penalties, but "collective knowledge," "willful blindness," or "recklessness," have all been held to satisfy the mens rea element. *See, e.g.*, Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 57–58 (2007); *see also* Hall, *supra* note 47, at 670 ("By eliminating any mens rea defense, *Bank of New England* virtually imposes strict liability on banks for compliance with currency transaction reporting requirements."). This standard extends to both individuals and organizations. *See, e.g.*, Assessment of Civil Money Penalty, B.A.K Precious Metals, Inc., No. 2015-12 (Dec. 30, 2015).

194. In addition to civil penalties, financial institutions' assets that the government can trace to a "specified unlawful activity" are subject to criminal and civil forfeiture actions. *See, e.g.*, 18 U.S.C. §§ 981–82 (2012 & Supp. V. 2018). These actions often follow deferred prosecution agreements and can be particularly harsh. For instance, in 2017, Banamex USA, after agreeing to pay fines in 2015, was the subject of another enforcement action in 2017 that led to the forfeiture of $97 million. Corkery & Protess, *supra* note 12.

195. *See* Saperstein et al., *supra* note 13, at 4.

196. *See supra* text accompanying notes 11–15.

197. Laura Alix*, Citibank Fined $70M for Failing to Fix BSA Deficiencies*, AM. BANKER (Jan. 4, 2018, 2:45 PM), https://www.americanbanker.com/news/citibank-fined-70m-for-failing-to-fix-bsa-deficiencies [https://perma.cc/UE79-KGXG].

198. *About Us*, OFF. COMPTROLLER CURRENCY, https://www.occ.treas.gov/about/index-about.html [https://perma.cc/KS8D-ENJY].

199. Alix, *supra* note 197197.

200. Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 701, 129 Stat. 584, 599–601 (codified as amended at 28 U.S.C. §§ 1 note, 2461 note (2012 & Supp. 2016)); *see also* Inflation Adjustment of Civil Monetary Penalties, 83 Fed. Reg. 11,876, 11,877 (Mar. 19, 2018) (codified at 31 C.F.R. pt. 1010) (discussing the Department of the Treasury's "initial catch-up

with the rate of inflation—is ironic considering law enforcement's resistance to similar increases in the monetary thresholds that trigger banks' reporting requirements.[201] Based on the formula used in the regulations, the civil penalties for BSA/AML violations have doubled or nearly doubled.[202]

C. Data & Studies Suggest that the BSA/AML Regime Is Ineffective and Inefficient in Deterring Money Laundering

The benefits that the government derives from such strictly enforced criminal reporting requirements seem to be far out of proportion to the costs incurred by financial institutions. In 2017, over two million SARs were filed,[203] and eighty percent of CTRs filed were for monetary amounts below $30,000.[204] Due to the volume of reports received, federal law enforcement agencies are unable to read a vast majority of the CTRs and SARs filed, yet policymakers have not reduced the scope of financial institutions' reporting obligations in accordance with the diminishing utility of the high volume of reports that they receive.[205] Rather than reducing the number of reports that are filed, financial institutions can instead flag high-value SARs, called "super SARs," which require the additional step of taking the report into the offices of federal law enforcement agencies, thereby signaling that the customer conduct necessitating the report is unusually suspicious.[206]

Despite FinCEN's steadfast and continued insistence on maintaining the current BSA/AML regime,[207] financial institutions have spent a growing amount of money on regulatory compliance and have filed an increasing number of SARs only as defensive measures to avoid becoming subject to enforcement actions.[208] U.S. firms spend on average $25.3 billion per year on AML compliance efforts.[209] Financial institutions dedicate a significant portion of this amount toward fulfilling their duties to verify their customers and assess the risks that they pose—spending as much as

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adjustment" prior to a final rules being published).

201. *See infra* text accompanying note 241.

202. Ignacio A. Sandoval, *Bank Secrecy Act Violations Now Come with Significantly Higher Penalties*, MORGAN LEWIS: ALL THINGS FINREG (June 30, 2016), https://www.morganlewis.com/blogs/finreg/2016/06/bank-secrecy-act-violations-now-come-with-significantly-higher-penalties [https://perma.cc/962L-HYL5].

203. *See Hearing*, *supra* note 17, at 8 (statement of Greg Baer, President, The Clearing House Association).

204. Steven M. D'Antuono, *Combating Money Laundering and Other Forms of Illicit Finance: Regulator and Law Enforcement Perspectives on Reform*, FBI: NEWS (Nov. 29, 2018), https://www.fbi.gov/news/testimony/combating-money-laundering-and-other-forms-of-illicit-finance [https://perma.cc/U4SA-59AH].

205. *See Hearing*, *supra* note 17, at 14 (statement of Greg Baer, President, The Clearing House Association) ("Now that we have almost 2 million [SARs] filed per year, there is no one reading them in the first instance. Instead, what law enforcement does is word searches against that database.").

206. *Id.* at 17 (statement of Greg Baer, President, The Clearing House Association).

207. *See infra* Section IV.A.

208. *See Hearing*, *supra* note 17, at 61 (testimony of Greg Baer, President, The Clearing House Association).

209. Press Release, LexisNexis Risk Sols., *supra* note 16.

$500 million per year to comply with KYC provisions of the BSA/AML regime.[210] The addition of the new CDD Rule will compound this issue, as FinCEN has predicted that the additional CDD requirements will cost financial institutions between $1.15 billion and $2.15 billion to comply over a ten-year period.[211]

For some smaller financial institutions, BSA/AML compliance costs amount to ten percent of their total expenses, resulting in organizational structures in which more bank's staff members are dedicated to compliance efforts than its actual banking operations.[212] These costs will not be borne entirely by the financial institutions either, as the portions of their budgets dedicated to BSA/AML compliance will no longer be available for providing loans and other services, and the costs will be further passed on to customers through higher fees and rates.[213] To explain how high compliance costs directly hinder banks' ability to perform their primary business functions, Lloyd DeVaux, the President and Chief Executive Officer of Sunstate Bank, testified at a congressional hearing in 2017 that "[e]very $100,000 spent on compliance translates to a million dollars less that we can lend."[214]

Economically disadvantaged customers are particularly harmed as a consequence of the costs and perverse incentives produced by the current AML regime. Banks, in a practice known as "derisking," are reluctant to conduct business with customers with ties to countries that they perceive to be more risky out of their fear of enforcement actions.[215] For example, Banamex USA, the Citigroup subsidiary bank currently being dissolved following civil penalties for inadequate BSA/AML compliance, was originally acquired by Citigroup in 2001 to improve the bank's access to Mexico's market by connecting Mexican immigrants working in the United States who needed to send money to their relatives at home.[216] The issue is that many of these innocent cash transfers are large enough to trigger financial institutions' BSA/AML reporting duties, although they are obviously not of the kind that FinCEN hopes to uncover.[217] Customers from other countries, such as Somalia, who also hope to send money home, have been subject to the same disparate treatment due to the perverse incentives created by the regime.[218]

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210. John Callahan, *Know Your Customer (KYC) Will Be a Great Thing When It Works*, FORBES (July 10, 2018, 7:15 AM), https://www.forbes.com/sites/forbestechcouncil/2018/07/10/know-your-customer-kyc-will-be-a-great-thing-when-it-works/#203558d38dbb [https://perma.cc/2S42-K88D].

211. Customer Due Diligence Requirements for Financial Institutions, 81 Fed. Reg. 29,398, 29,432 (May 11, 2016) (codified at 31 C.F.R. pts. 1010, 1020, 1030, 1024, and 1026); *see also* Coto, *supra* note 71, at 161 (accounting for IT costs, some estimates put compliance costs as high $2 billion per firm, while FinCEN calculated an "'improbably large' upper boundary of $10 billion").

212. *Hearing*, *supra* note 17, at 10 (statement of Lloyd DeVaux, President and Chief Executive Officer, Sunstate Bank).

213. Saperstein et al., *supra* note 13, at 8.

214. *Hearing*, *supra* note 17, at 10 (statement of Lloyd DeVaux, President and Chief Executive Officer, Sunstate Bank).

215. Saperstein et al., *supra* note 13, at 5–6.

216. Corkery & Protess, *supra* note 12.

217. *See* Saperstein et al., *supra* note 13, at 6.

218. *Id.*

IV. THE CASE FOR REFORM: HOW RECENTLY PROPOSED LEGISLATIVE REFORM COULD BALANCE THE COSTS IMPOSED BY THE BSA/AML REGULATORY REGIME

Part IV builds upon Part III by analyzing the ways in which reforming the regulatory scheme could reduce the excessive burdens imposed on financial institutions without compromising the federal government's law enforcement and national security interests. Although the financial-service industry has consistently lobbied for less stringent reporting requirements, its public opposition to the expansion of AML reporting requirements was largely muted after the terrorist attacks of September 11, 2001, as many in the industry feared that opposition to the additional AML regulations would appear unpatriotic.[219] More recently though, members of Congress and other policymakers have appeared more sympathetic toward financial institutions' longstanding complaints, as proposed legislation that would reform the current BSA/AML regulatory regime has received bipartisan support.[220]

This Part first considers the financial industry's major criticisms of their reporting duties, as well as the responses of federal regulators who continue to express their unwavering belief in the value of the information that financial institutions are required to share.[221] Next, this Part examines viable options for reform—some of which are currently included in bills before Congress.[222]

A. Financial Institutions Seek Greater Efficiency, Clarity, and Feedback Under AML Regulations

Recent criticisms from leaders in the financial system suggest that the reporting requirements under the current AML regime fail to efficiently fulfill their intended purposes. The Clearing House Association ("The Clearing House") has been at the forefront of this criticism.[223] In February 2017, The Clearing House published a comprehensive report, *A New Paradigm*, that suggested areas in the BSA/AML framework in need of immediate reform.[224] One fundamental problem the association has identified is the lack of feedback made available to institutions about the utility and effectiveness of the information they provide.[225] Financial institutions have expressed their collective frustrations about this lack of transparency, as they have been forced to carefully reevaluate their AML compliance practices, at their own expense, in response to recent enforcement actions for inadequate compliance, which

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219. *See* Fagyal, *supra* note 38, at 1378 (discussing how many of the debates that surrounded the expansion of AML regulations in the Patriot Act dated back to the 1970s).

220. Ian McKendry, *With Dodd-Frank Relief Near, Banks Set Sights on AML*, AM. BANKER (Jan. 5, 2018, 5:36 PM), https://www.americanbanker.com/news/with-dodd-frank-relief-near-banks-set-sights-on-aml [https://perma.cc/NDY6-YHEM].

221. *See infra* Section IV.A.

222. *See infra* Section IV.B.

223. See *supra* note 173 for a description of the organizational mission of The Clearing House.

224. *A New Paradigm*, *supra* note 17.

225. *Id.* at 7.

are brought in a seemingly inconsistent and unpredictable fashion.[226] Given the lack of guidance on the kind of customer activity that should generate SAR reports,[227] leaders in the banking industry believe that greater feedback on the value of their reports will allow financial institutions to more efficiently identify and prioritize the activity that federal agents find the most helpful in catching criminals.[228]

In connection with the agency's efforts to provide more feedback and greater transparency to financial institutions, FinCEN provides case examples on its website that partially illuminate how federal agencies use the reports filed pursuant to AML regulations in enforcement actions.[229] But the agency still does not provide data on how many SARs sent by financial institutions are actually reviewed by government authorities or ultimately lead to arrests.[230] Although FinCEN committed to reviewing the efficiency of the BSA/AML regulatory scheme in 2007,[231] the penalties levied against banks for inadequate BSA/AML compliance soared during the Obama administration, and the trend of more enforcement actions and higher penalties appears to have survived the change in administrations.[232] Under the Trump administration, FinCEN has continued to maintain that the reports received from financial institutions are indispensable to combating money laundering and terrorist financing because they reveal personal information, previously unknown addresses, business associations, banking and travel habits, and communication methods of suspects.[233] At the National Anti-Money Laundering Conference & Expo in August 2018, FinCEN Director Kenneth Blanco reaffirmed the value of the information provided by financial institutions, emphasizing that 149 SAR review teams analyze BSA/AML data on behalf of 500 law enforcement agencies that regularly make queries into the database.[234]

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226. The Clearing House Association, Comment Letter on Proposed Rule – Customer Due Diligence Requirements for Financial Institutions 3 (Oct. 3, 2014), https://www.theclearinghouse.org/-/media/files/association-related-documents/20141003-tch-comments-to-fincen-on-cdd.pdf [https://perma.cc/XC4W-NJZ3].

227. *See, e.g.*, *Hearing*, *supra* note 17, at 16 (statement of Lloyd DeVaux, President and Chief Executive Officer, Sunstate Bank); *see also supra* text accompanying note 9.

228. *See Hearing*, *supra* note 17, at 33 (statement of Faith Lleva Anderson, Senior Vice President and General Counsel, American Airlines Federal Credit Union, on behalf of the Credit Union National Association (CUNA)).

229. *The Value of FinCEN Data*, FIN. CRIMES ENFORCEMENT NETWORK, https://www.fincen.gov/resources/law-enforcement/case-examples?field_tags_investigation_target_id=685 [https://perma.cc/FUF6-347W].

230. Richard K. Gordon, *Losing the War Against Dirty Money: Rethinking Global Standards on Preventing Money Laundering and Terrorism Financing*, 21 DUKE J. COMP. & INT'L L. 503, 522 (2011).

231. *Regulatory Efficiency and Effectiveness*, FIN. CRIMES ENFORCEMENT NETWORK, https://www.fincen.gov/regulatory-efficiency-and-effectiveness [https://perma.cc/H7MN-PEUZ].

232. Kim, *supra* note 14.

233. *The Value of FinCEN Data*, *supra* note 229.

234. Kenneth A. Blanco, *Prepared Remarks of FinCEN Director Kenneth A. Blanco, Delivered at the 11th Annual Las Vegas Anti-Money Laundering Conference and Expo*, FIN. CRIMES ENFORCEMENT NETWORK (Aug. 14, 2018), https://www.fincen.gov/news/speeches/prepared-remarks-fincen-director-kenneth-blanco-delivered-11th-annual-las-vegas-1

Still, leaders in the industry have increasingly complained that the reports filed pursuant to BSA/AML regulations, particularly SARs, are not an efficient mechanism for supporting law enforcement agencies' efforts to combat money laundering. The unpredictability of enforcement actions has incentivized covered institutions to overreport their customers' suspicious activities in order to minimize the risk of facing penalties for inadequate compliance.[235] Further, banking officials feel that their professional knowledge about money laundering offenses no longer justifies their performance of additional investigatory duties on behalf of law enforcement.[236] Instead, financial institutions are willing to turn over bulk data to federal agencies, which can use advanced data analytics to sift through the information just as efficiently.[237] This solution could reduce regulators' reliance on criminal reporting by shifting the responsibility for discovering bad actors back to the government.

B. Federal Policymakers Should Adopt BSA/AML Regulatory Reform Measures that Balance the Public and Private Sectors' Responsibilities for Combating Financial Crime

Introduced to Congress in June 2018, the Counter Terrorism and Illicit Finance Act ("CTIFA") aimed to increase the dollar thresholds that trigger reporting duties, allow greater information sharing between financial institutions, and give FinCEN the authority to issue "no-action letters" in response to a financial institution's inquiry about the applicability of BSA/AML regulations.[238] CTIFA died in the U.S. House of Representatives at the end of the 115th Congress's session,[239] but proponents of the bill hoped that updating the reporting thresholds would lessen the compliance burden imposed by the BSA/AML regulatory regime by reducing the volume of SARs and CTRs that must be filed.[240] Opponents, including some federal agents who rely on CTRs and SARs in their criminal investigations, resisted the proposed increased thresholds. For example, Steven D'Antuono, the Section Chief of the FBI's Criminal Investigation Unit, pointed to terrorists' frequent use of small-dollar transactions in his testimony before the Senate Banking, Housing, and Urban

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[https://perma.cc/ZS9X-8JLY].

235. *See supra* note 195 and accompanying text; *see also* Gordon, *supra* note 230, at 522 ("There is also a strong indication that many financial institutions do not believe that financial intelligence units or other governmental authorities make much use of suspicious activity reports, in part because the reports are too numerous to be helpful.").

236. *See A New Paradigm*, *supra* note 17, at 7.

237. *Id.*

238. H.R. 6068, 115th Cong. §§ 2, 5, 9 (2018).

239. *See H.R.6068 - Counter Terrorism and Illicit Finance Act*, CONGRESS.GOV, https://www.congress.gov/bill/115th-congress/house-bill/6068/ [https://perma.cc/G5GK-CW7Y] (indicating that no further action was taken on bill after being referred to the House Committee on Financial Services).

240. Blaine Luetkemeyer & Steve Pearce*, It's Time to Modernize the Bank Secrecy Act*, AM. BANKER: BANKTHINK (June 13, 2018, 10:28 AM), https://www.americanbanker.com /opinion/its-time-to-modernize-the-bank-secrecy-act [https://perma.cc/93R3-EST5].

Affairs Committee in November 2018.[241] Section Chief D'Antuono noted that eighty percent of the CTRs filed were for dollar amounts below $30,000 in 2017, but he provided at least some examples of CTRs filed in response to small-dollar transactions that resulted in important investigations and prosecutions for terrorism and other crimes.[242] However, as Congressmen Blaine Luetkemeyer and Steve Pearce pointed out, the current $10,000 threshold that triggers CTR reporting duties[243] was set in 1970 and is equal to more than $60,000 when measured in today's dollars.[244] The proponents of the CTIFA maintained that, by raising the dollar amount to $30,000, the government's law enforcement interests would be largely maintained, as federal regulators would no longer be forced to examine countless reports with no connection to money laundering offenses or other crimes.[245]

Further, the CTIFA, by extending the current safe harbor provisions to those who adopt new compliance technologies,[246] would have reduced future costs of effective compliance by encouraging innovative ways to catch money laundering offenses. The caveat to this provision is that it would have cut againsthe adoption of another proposed solution, which is for the government to rely on modern technology to develop resources of its own that mine financial data for evidence of money laundering offenses.[247] However, assuming that financial institutions' relationship to the crime of money laundering continues to justify the imposition of some reporting requirement, new technologies and software programs that use data analytics and other advanced metrics would allow institutions to meet their compliance objectives at lower costs.[248] These technologies, which would primarily rely on algorithms produced by big data and artificial intelligence, would still necessitate more detailed feedback from FinCEN on the effectiveness of SAR reports in order to effectively and more efficiently identify the transactions that are of the most value to federal law enforcement agents.[249]

But if federal policymakers are unwilling to expand the current safe harbors, as the CTIFA proposed, the laws can be amended in other ways that would incentivize the innovation of new methods for detecting money laundering offenses. One commentator, Cory Howard, has suggested that the BSA/AML regime could include a "broad affirmative defense that would shield financial institutions from regulatory

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241. *Combating Money Laundering and Other Forms of Illicit Finance: Opportunities to Reform and Strengthen Bank Secrecy Act Enforcement: Hearing Before the S. Comm. on Banking, Hous. & Urban Affairs*, 115th Cong. 10 (2018) (statement of Steven M. D'Antuono, Section Chief, Criminal Investigation Division, Federal Bureau of Investigation, Department of Justice), https://www.banking.senate.gov/imo/media/doc/D'Antuono%20Testimony%2011-29-18.pdf [https://perma.cc/NA5N-VXBV].

242. *Id.* at 10–11.

243. *See supra* text accompanying note 40.

244. Luetkemeyer & Parsons*, supra* note 240.

245. *Id.*

246. *See* Counter Terrorism and Illicit Finance Act, H.R. 6068, 115th Cong. §§ 2, 5, 9 (2018).

247. *See A New Paradigm*, *supra* note 17, at 7.

248. *Id.*

249. *See Hearing*, *supra* note 17, at 14 (statement of Greg Baer, President, The Clearing House Association).

enforcement actions in certain situations."[250] The "BSA/AML affirmative defense" would reduce the punitive nature of the regulatory regime's strict-liability standards and lessen the appearance of subjectivity in how FinCEN evaluates compliance programs.[251] But in order for it to apply, financial institutions would be required to establish that they conduct routine maintenance on their compliance programs and report shortcomings to the appropriate regulatory body when they are discovered.[252] Because the BSA/AML affirmative defense would be unavailable to financial institutions that fail to undertake these measures, the law would likely encourage greater investment in compliance systems and personnel.[253] Thus, the additional requirements might not reduce compliance costs, but they would encourage greater cooperation and transparency between financial institutions and law enforcement agencies.[254]

One notable shortcoming in the CTIFA was the absence of a beneficial ownership provision that would decrease the additional costs and burdens imposed on financial institutions by the CDD Rule. For instance, The Clearing House has expressed support for a statute that would require states to record the beneficial ownership of the legal entities that incorporate under their laws and that would be available to financial institutions.[255] The Corporate Transparency Act of 2017[256] would have responded to this request by requiring "an entity that forms a corporation or limited liability company to disclose information about its beneficial owners."[257] If the state of incorporation did not require this information by law, then the entity must have

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250. Cory Howard, *Financial Crimes Compliance Self-Governance: Applying the* Faragher *Defense to Bank Secrecy Act/Anti-Money Laundering Violations*, 48 MEMPHIS L. REV. 45, 67 (2017). Howard's proposed affirmative-defense statute would excuse a financial institution's civil or criminal liability for failing to comply with BSA/AML regulations if:

> (a) The financial institution used reasonable care to prevent and correct BSA/AML/OF AC failures, provided that such failures were reported to the appropriate regulatory body, after
>
> > (i) Such financial institution undertakes, with appropriate frequency, a reasonably detailed review and/or audit of its BSA/AML compliance program, which evaluates the institution's current program, the risk of its operations, the existence and strength of current controls, and the resulting residual risk of its business activities; and
>
> (b) The financial institution did not unreasonably fail to take any preventive or corrective actions after discovering the alleged defects in its compliance program or fail to report such defects to the appropriate regulatory body within a reasonable time of discovery.

Id.

251. *See supra* text accompanying notes 183–188.

252. *See* Howard, *supra* note 250, at 68–70.

253. *See id.* at 70–71.

254. *See id.* at 68.

255. THE *A New Paradigm*, *supra* note 17, at 12.

256. H.R. 3089, 115th Cong. (2017).

257. *Summary: H.R.3089—115th Congress (2017-2018)*, CONGRESS.GOV, https://www.congress.gov/bill/115th-congress/house-bill/3089?q=%7B%22search%22%3A%5B%22hr3089%22%5D%7D&r=1 [https://perma.cc/74MQ-U5GE].

directly filed the information with FinCEN.[258] This provision, although originally included as part of the CTIFA, was later stripped from the revised version of the bill that appeared before Congress.[259]

The Corporate Transparency Act of 2017's successor, the Corporate Transparency Act of 2019 (CTA), reintroduced the beneficial ownership requirement to Congress, but the bill died in the Senate after it was passed in the House of Representatives.[260] Had it been enacted, the CTA would have made it more difficult for underlying bad actors to hide behind a veil of corporate secrecy by requiring companies to annually file with FinCEN a list of its current beneficial owners and any changes in beneficial ownership that occurred during the previous year.[261] The CTA allocates the responsibility for collecting and maintaining this data to FinCEN, which will provide the information to financial institutions complying with their "know your customer" obligations.[262]

CONCLUSION

The normative questions this Note seeks to address, whether financial institutions *should* be subject to criminal reporting requirements, and to what extent, demand a closer examination of financial institutions' relationship to the crime of money laundering. Although the government's interest in deterring money laundering deserves fair consideration, and financial institutions undoubtedly should bear some responsibility for ensuring that they do not profit from criminals who exploit the nation's financial system, this Note argues that financial institutions' duties under the BSA/AML regulatory regime should be reformed to limit the extent that federal agencies can outsource their own law enforcement duties to private actors.

One can point to other actors who, like financial institutions, have unique relationships to certain crimes in that they can be considered violators, victims, or interested third parties to the crimes. For example, criminals often use social media platforms like Twitter and Facebook to plan and organize serious criminal acts, yet the actors who own and operate these platforms currently have no affirmative duties to investigate their customers for criminal activity or to report their knowledge thereof to authorities.[263] Indeed, under the current trend of expanding criminal

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258. *Id.*

259. Brad Gershel, *Beneficial Ownership Provision Stripped from Latest Draft of Counter Terrorism and Illicit Finance Act*, NAT'L L. REV. (June 20, 2018), https://www.natlawreview.com/article/beneficial-ownership-provision-stripped-latest-draft-counter-terrorism-and-illicit [https://perma.cc/2VND-2JYQ].

260. Corporate Transparency Act of 2019, H.R. 2513, 116th Cong. (2019).

261. Press Release, Carolyn B. Maloney, Representative, House of Representatives, Reps. Maloney, King, and Malinowski Introduce Bipartisan Corporate Transparency Act (May 3, 2019), https://maloney.house.gov/media-center/press-releases/reps-maloney-king-and-malinowski-introduce-bipartisan-corporate [https://perma.cc/6ANY-BLJ5].

262. *Id.*

263. The most comparable statutorily imposed criminal reporting duty is imposed on internet service providers to report their knowledge of violations of child pornography laws under 18 U.S.C. § 2258A (2012). However, the law is not as expansive, does not carry as strict of punishments, and is not as consistently enforced as the BSA/AML reporting requirements

reporting duties,[264] it would seem logical to continue to broaden the scope of both the actors legally required to report crimes and the types of crimes that they are required to report. Under the same crime-deterrence rationale used to justify the BSA/AML regulatory scheme, cell phone companies and internet service providers could also be mandated to perform the same affirmative duties.[265] The information that these private actors could share would surely be highly valuable to law enforcement agencies, but the question, of course, becomes: to what extent can private actors be deputized to serve as the eyes and ears of law enforcement before such policies should be rejected for their inconsistency with accepted principles of American law?

This Note concludes that such policies violate notions of fairness and proportionality when the burdens imposed on private actors outweigh their overall benefits to society. Although financial institutions should bear some burden, the proper extent of their criminal reporting duties could be resolved in part by conducting a qualitative and quantitative cost-benefit analysis. By implementing some of the reform measures discussed in this Note,[266] the burdens would be more equally shared by the public and private sectors.

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imposed on financial institutions. *See* Kang, *supra* note 80, at 370.

264. *See, e.g.*, Thompson, *supra* note 110, at 24.

265. The possible Fourth Amendment challenges to these proposed criminal reporting laws are beyond the scope of the Note, but such challenges would seem to implicate the third-party doctrine. *See, e.g.*, United States v. Miller, 425 U.S. 435 (1976).

266. *See supra* Section IV.B.