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Chasing the Fruits of Misery: Confronting the Historical Relationships Between Opioid Revenues, Offshore Financial Centers, and International Regulatory Networks

Stephen C. Wilks
University of Detroit Mercy School of Law, wilkssc@udmercy.edu

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Cover Page Footnote

Associate Professor, University of Detroit Mercy School of Law, B.A., J.D., Queen's University at Kingston (Canada); M.S.W., University of Toronto; and LL.M., Ph.D., York University, Osgoode Hall Law School (Canada). The author wishes to thank Nathalie Martin, Shuba Ghosh, D. A. Jeremy Telman, Joan MacLeod-Heminway, Troy Harris, and Jelani Jefferson-Exum for commenting on earlier versions of this Article. He also wishes to thank 2L J.D. Candidate Briget Kuhns for her outstanding research assistance.

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Stephen Wilks[*]

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[*] Associate Professor, University of Detroit Mercy School of Law, B.A., J.D., Queen's University at Kingston (Canada); M.S.W., University of Toronto; and LL.M., Ph.D., York University, Osgoode Hall Law School (Canada). The author wishes to thank Nathalie Martin, Shuba Ghosh, D. A. Jeremy Telman, Joan MacLeod-Heminway, Troy Harris, and Jelani Jefferson-Exum for commenting on earlier versions of this Article. He also wishes to thank 2L J.D. Candidate Briget Kuhns for her outstanding research assistance.

Abstract

As the opioid crisis continues to claim lives throughout the U.S., tort litigants have faced challenges pursuing Purdue Pharma – one of the drug makers responsible for aggressively promoting OxyContin while downplaying the drug's addictive effects. Much of this litigation posture sought to recover billions in public health costs incurred responding to the crisis at federal, state and local levels. As the plaintiff class grew, Purdue Pharma petitioned for bankruptcy protection, at which point auditors discovered the entity's beneficial owners had caused it to wire billions in opioid profits into offshore accounts – placing them beyond the reach of litigants. These transactions reveal the limits of domestic financial reporting regulations and international regulatory bodies, like the Financial Action Task Force (FATF), whose frameworks narrowly focus on intercepting proceeds of terrorism and money laundering.

Existing scholarship has not considered why the offshoring of opioid revenues remains legal in a regulatory landscape conceived to protect the common good. The soft-law system of norm-building responsible for building these frameworks would best fulfill its purpose by broadening its reach to include a wider sweep of capital mobility. The opioid crisis offers a useful context for exploring this claim. By devising a class of activity – described below as the Public Interest Transaction (PIT) – modified FATF rules would offer a principles-based alternative to the existing system's language and provide a pathway for intercepting a wider variety of capital mobility with an emphasis on profits derived from "high casualty" crises such as the opioid crises. By precluding language that targets other forms of publicly harmful transactions, existing norms will continue to undermine the public good in a transnational banking environment lacking more principles-based approaches to financial regulation. The timing and context of Purdue Pharma's wire transfers offer a useful laboratory for making these arguments.

TABLE OF CONTENTS

I. INTRODUCTION AND OVERVIEW

Opioid addictions have cost thousands of American lives, billions in public health expenditures, as well as destruction to both families and communities across the United States. As this crisis unfolded, Purdue Pharma (Purdue)—the drug maker responsible for aggressively promoting and selling OxyContin—and its beneficial owners, the Sackler family, found themselves facing a rising tide of tort claims from across the country seeking to recoup public health costs associated with responding to the opioid epidemic.[1] The resulting mass tort claims were ultimately consolidated into multi-district proceedings, prompting Purdue and the Sacklers to begin settlement negotiations.[2] During these negotiations, outside auditors discovered the Sacklers caused Purdue to wire billions out of the country and into offshore financial centers, accelerating the pace of these transactions, which represented a far greater sum than amounts offered to plaintiffs during settlement talks.[3]

This Article uses these wire transfers to question the efficacy of existing international financial regulatory bodies such as the Financial Action Task Force (FATF). It argues that the soft law norms used to promulgate FATF standards are insufficient to protect the public interest; that American regulations demonstrate how existing laws in FATF member countries sustain a regulatory climate that continues to support problematic forms of capital flight; and that creating a new regulatory class of Public Interest Transactions (PIT) targeting a wider species of wire transfers is in keeping with the FATF's purpose. Absent an aspirational regime that confronts gaps in our international financial regulatory systems, domestic and transnational norms will undermine efforts to seek redress on behalf of those harmed by actors such as Purdue and the Sacklers.

Had the Sacklers been street-level drug pushers or terrorists responsible for tens of thousands of deaths, there is little doubt they would have been prosecuted, jailed, and subject to asset seizure. Ironically, over the same period of time that banking institutions were being asked to refine reporting rules that would help governments seize proceeds of crime, at least a dozen worked with Purdue's beneficial owners' offshore capital under circumstances substantively adjacent to the FATF's work.

Given their timing and context, the Purdue–Sackler wire transfers are a prototypical example of a globalized problem that awaits a globalized solution. With modest changes, the FATF is best suited to regulate such capital flows, given its mandate and infrastructure. This Article explains how to institute such changes.

This Article uses the opioid crisis and the history of the FATF to explore ways to improve international financial regulatory networks and

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1 *See infra* Part IV.
2 *See infra* Part IV.
3 *See infra* Part IV.

widen their surveillance standards to include transactions in which the public has a significant interest. While these two subject areas may seem unrelated, early phases of the opioid crisis generated enormous profits for the healthcare industry at a time when the United States and other countries were working through international financial regulatory networks to target the proceeds of crime and, eventually, terrorist-related finance. Purdue and its beneficial owners—the Sackler family—were among those whose fortunes grew before widespread use of their products played a role in a substance abuse epidemic that continues to cost lives.[4] Over decades, key members of the family used American financial institutions to wire Purdue's profits to offshore entities under their control.[5] During this same period, U.S. representatives were actively working through the FATF to globalize financial surveillance norms.[6] The offshoring of opioid proceeds illustrates how informal rulemaking paradigms did not sufficiently account for the classes of transactions and parties warranting enhanced scrutiny at critical times.

Early in the FATF's history, its member states used the "talking shop" model of engagement and rulemaking because it was thought to be well-suited to the exigencies of international regulatory networks.[7] This Article looks to the work of David Zaring, whose writings have explored the merits of states working through a network of global institutions to steer the behavior of financial intermediaries without purporting to act with the force of law.[8] Zaring advances the claim that the "talking shop" model would bring flexibility to transnational financial networks and help stabilize country economies.[9] Recognizing the absence of a global financial regulatory authority with the jurisdiction to promulgate and enforce binding rules, "talking shop" cedes responsibility for governance and rulemaking functions to venues where behavioral norms emerge out of a shared body of informal understandings.[10]

There is no commonly shared definition of soft law or of the features linking its connection to "talking shop" as a form of lawmaking.[11] In

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4 *See infra* Part IV.

5 *See infra* Part IV. "Offshore financial centers" are also referred to as "tax havens" and "secrecy jurisdictions." This Article uses these terms interchangeably.

6 *See infra* Parts III & IV.

7 David Zaring, *Finding Legal Principle in Global Financial Regulation,* 52 VA. J. INT'L L. 683 (2012) [hereinafter Zaring, *Finding Legal Principle*].

8 *Id.*

9 *Id.*

10 *Id. See also* Timothy Meyer, *Soft Law as Delegation*, 32 FORDHAM INT'L L.J. 888–89 (2008) [hereinafter Meyer].

11 *See, e.g.,* Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171, 174 (2010) [hereinafter Guzman & Meyer] (". . . we opt to define soft law in a way that is closer to the doctrinal approach, both because it is the more common definition, focusing on differences in legality rather than all the design features that affect compliance, and because it turns out to be more useful for the analysis we undertake.").

governance and regulatory spheres, it refers to informal discourses among parties who have chosen to develop shared customs through informality rather than through formal processes.[12] Scholarly views of soft law's practical merits vary. While some authors generally favor the concept,[13] others have expressed faith in its capacity to constrain behavior just as effectively as formal obligations.[14] These arguments contrast with commentary questioning whether soft law should be called "law" at all.[15] Taken together, much of this discourse is commonly positioned in relation to hard law's more formal features.[16]

There is sound logic in marrying domestic and international forms of rulemaking in financial sectors. These exercises unfold under the aegis of international organizations formed to serve as networked gathering points where participants recognize a pragmatic need to produce effective norms through cooperation.[17] Globalization has produced important concerns for

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12 Roberta S. Karmel & Claire R. Kelly, *The Hardening of Soft Law in Securities Regulation*, 34 BROOK. J. INT'L L. 883, 884 (2009) [hereinafter Karmel & Kelly] (discussing expressions of soft law within self-regulatory organizations).

13 ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 196 (1st ed. 2004) (arguing that the fear of lost reputational standing through "social and professional opprobrium" moves national regulators to support trans-governmental networks); Meyer, *supra* note 10, at 889 (generally lauding Basel Accords (or Basel I and Basel II) and the Basel Committee on Banking Supervision as important non-binding legal agreements).

14 Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 575 (2008) (arguing that soft law arrangements "can ultimately have real effect by working their way into customary international law or by providing the framework for information interstate cooperation"); Jack L. Goldsmith & Eric A. Posner, *International Agreements: A Rational Choice Approach*, 44 VA. J. INT'L L. 113, 116 (2003) [hereinafter Goldsmith & Posner] (identifying important examples of informal rulemaking, such as quota agreements generated by the Organization of Petroleum Exporting Countries (OPEC), the Strategic Arms Limitation Treaty (SALT 1)); Karmel & Kelly, *supra* note 12, at 884 (generally discussing how soft law within the framework of self-regulatory organizations can harden law when it is incorporated into statutes, regulations, and even treaties).

15 Goldsmith & Posner, *supra* note 14, at 114 n.2 (arguing there is no sense calling "nonlegal" or non-binding instruments "law"); Brian Sheppard, *Norm Supercompliance and the Status of Soft Law*, 62 BUFF. L. REV. 787, 789 (2014) ("The strangeness of soft law has led many to question whether it makes sense at all.").

16 Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 422 (2000) ("We use the shorthand term soft law to distinguish this broad class of deviations from hard law and, at the other extreme, from purely political arrangements in which legalization is largely absent."); Waliul Hasanat, *Soft-Law Cooperation in International Law: The Arctic Council's Efforts to Address Climate Change*, 23 FINNISH Y.B. INT'L L. 519-20 (2012–2013) (arguing "there is a need to keep studying these new cooperation structures even if they do not clearly fit within the traditional confines of international law").

17 Meyer, supra note 10, at 889; Matthew C. Turk, Reframing International Financial Regulation after the Global Financial Crisis: Regional States and Interdependence, Not Regulatory Networks and Soft Law, 36 MICH. J. INT'L L. 59, 77 (2014) [hereinafter Turk] (arguing that "Interdependence problems . . . present opportunities for states to develop

domestic financial regulators who cannot give full effect to enforcement goals beyond their borders and into an international landscape fraught with systemic risk.[18] This limitation makes the globalizing of financial regulation both pragmatic and difficult.[19] Working through non-binding international organizations to engender cooperation among a network of regulators offers the hope of harmonizing norms that give rogue actors nowhere to hide their capital.[20]

This Article asserts that the FATF's networked participants and their transnational spaces have left important work unfinished to the extent that private actors continue placing their assets offshore and beyond the reach of public interest litigants in times of crisis. The following discussion also argues that the most relevant transnational networks have fallen short in addressing particular classes of public interest concerns and that the design and function of these multilateral entities fall short of their goals by failing to capture a sufficiently broad range of regulatory targets.

Parts of this Article bring elements of Zaring's work into contemporary payment spaces and make the claim that particular expressions of public interest considerations have yet to find a much-needed place within the same transnational networks used by participating states to pollinate domestic policy. Zaring's framework envisions how state agents form financial regulatory networks, and how the core features of these networks offer no more uncertainty than more formalized, treaty-based rulemaking.[21] These principles include: (i) a principle for national treatment; (ii) a most favored nation principle; (iii) an inclination toward rulemaking instead of adjudication; (iv) a subsidiary principle of enforcement; (v) enforcement through peer-review; and (vi) a network model of institutionalization.[22] Aided by an interdisciplinary body of scholarship, this Article applies Zaring's framework to the strategic outflow of opioid proceeds from the United States over a twenty-year period ending in 2018.

Payment systems are not amoral insofar as they serve as the connective tissue mediating relationships between the state and its subjects while revealing the condition of our modern political economy.[23] The

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cooperative arrangements that discourage negative spillovers or encourage positive spillovers in ways that can benefit all parties involved.").

18 Zaring, *Finding Legal Principle*, *supra* note 7, at 689.

19 *Id.*; Turk, *supra* note 17, at 63 (arguing that soft law developments after the 2008 financial crisis may streamline cross-border finance while still struggling to reduce financial instability).

20 Zaring, *Finding Legal Principle*, *supra* note 7, at 689.

21 *Id.* at 686.

22 *Id.* at 685.

23 *See generally* JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET?: ILLUSIONS OF A BORDERLESS WORLD (Oxford Univ. Press 2006) (generally discussing how payment systems were shaped by laws, regulations, pressure, and notions of corporate

present discussion considers two aspects of payment infrastructure. The first services modern commerce, usually inside financial institutions facilitating the transfer of funds in connection with every conceivable transaction. The second function is tethered to the governmental exercise of determining individual participants' financial contribution to the common good, capturing revenues and deploying public resources in accordance with established priorities. The state finds important expressions of power through making decisions about how to distribute social costs among its various constituents who, in turn, fashion a range of behaviors in response to demands that their contributions be commensurate with their wealth.[24]

State and private actors position themselves in relation to choices about resource allocation through their selective support of institutions, individuals, operating rules, industry standards, and technologies that support the transfer of monetary value.[25] Fields such as taxation[26] and securities regulation[27] are the prototypical contexts in which actors' interests within modern payment spaces diverge—with governments preferring norms that require traceable movements of money[28] and private actors favoring financial secrecy to the extent covert transactions advance

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responsibility as part of an effort to regulate illegal behavior).

[24] *See, e.g.*, Herbert Hovenkamp, *Limits of Preference-Based Legal Policy* 89 NW. U. L. REV. 4 (1994) (generally discussing how governments can account for well-being when making decisions about resource allocation); Sanford M. Jacoby, *Finance and Labor: Perspectives on Risk, Inequality, and Democracy*, 30 COMP. LAB. L. & POL'Y J. 17-18 (2008) (arguing that coalitions of "middle-class consumers, farmers, small business, and organized labor" have the power to influence wealth distribution when they succeed in challenging "the economic and political significance of finance"); William A. Lovett, *Transnational Finance Regulation and the Global Economy*, 20 TUL. J. INT'L & COMP. L. 43, 59 (2011). ("Sovereign states have primary roles in framing government tax revenues, budget allocations, and the use of deficits (or surplus) as a part of national finance.").

[25] *See generally* Mark Edwin Burge, *Apple Pay, Bitcoin, and Consumers: The ABCs of Future Public Payments Law*, 67 HASTINGS L.J. 1493 (2016); Gary W. Lorenz, *Electronic Stored Value Payment Systems, Market Position, and Regulatory Issues*, 46 AM. U. L. REV. 1177 (1997).

[26] *See generally* U.S. General Accounting Office, GAO/AFMD-85-56 1 (1985-09-30) Federal Accounting and Auditing Standards Affecting the Private Sector.

[27] Daniel L. Goelzer & Anne Sullivan, *Obtaining Evidence for the International Enforcement of the United States Securities Laws*, 16 BROOK. J. INT'L L. 145-47 (1990) (describing how U.S. securities regulators must supplement various treaties and international agreements by relying on memoranda of understanding to obtain help from foreign governments).

[28] Peter P. Swire, *Financial Privacy and the Theory of High-Tech Government Surveillance*, 77 WASH. U. L.Q. 461, 485 (1999) [hereinafter Swire] ("The government has a strong interest in receiving data relevant to its own financial affairs, such as collection of taxes and distribution of benefits. It also has a strong interest in receiving data to deter, detect, and punish violations of law. These two interests combine in enforcement against tax evasion and benefits fraud. Along with this criminal and civil enforcement, money laundering laws, with their emphasis on 'following the money trail,' turn out to be at the heart of modem government demands to greater access to financial records.").

commercial interests and limit wider social scrutiny.[29] Predictably, these competing interests account for some of the disagreement as to the proper scope of public law's presence within modern financial regulation within and across borders.[30]

Amidst these arguments, financial institutions remain vital actors in our modern payment ecologies. They quietly do the work of transferring value in ostensibly amoral processes that nonetheless allocate resources in profound and consequential ways. Commentary in the popular press and scholarly writings is replete with narratives catering to perceptions that political and economic elites enjoy seemingly limitless power to commandeer control over state institutions and public resource allocation while reducing the scope of their commitment to the social contract.[31] Published stories about the continued and controversial use of offshore financial services catering to wealthy clients coexist with conversations about barriers to socioeconomic mobility,[32] the sustainability of social welfare commitments,[33] and a hardening of attitudes towards

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[29] Arthur J. Cockfield, *How Countries Should Share Tax Information*, 50 VAND. J. TRANSNAT'L L. 1091, 1097 (2017) [hereinafter Cockfield, *How Countries Should Share*] (discussing how "[t]axpayers engaged in offshore tax evasion and international money laundering clearly prefer the status quo, which makes it difficult or impossible for authorities to investigate and track their criminal activities"); Antoine P. Martin, *Coordinating Modern Cross-Border Financial Services: No Global Policy, No Global Legal Framework, but Some Regional Opportunities*, 50 INT'L LAW. 467, 470 (2017) (arguing countries have pursued heavy regulation of financial services at the cost of missing opportunities to streamline them).

[30] Cockfield, *How Countries Should Share*, *supra* note 29. *See also* Mariano-Florentino Cuellar, *The Tenuous Relationship between the Fight against Money Laundering and the Disruption of Criminal Finance*, 93 J. CRIM. L. & CRIMINOLOGY 311, 312 (2003) (arguing that "major players involved in running the system—including legislators, prosecutors, investigators, and regulators—face a tangle of incentives" that leave our financial and law enforcement systems ill-suited to disrupting the "larger universe of criminal financial activity").

[31] Arthur J. Cockfield, *Shaping International Tax Law and Policy in Challenging Times*, 54 STAN. J. INT'L L. 223, 224, 226 (2018) [hereinafter Cockfield, *Shaping*] (discussing how media revelations about the Panama Papers and the Paradise Papers reinforce the popular perception that the "'system is rigged' in favor of wealthy and powerful individuals, and against average citizens"); International Consortium of Investigative Journalists, *Panama Papers: Explore the Panama Papers Key Figures*, ICIJ, (Jan. 31, 2017) https://www.icij.org/investigations/panama-papers/explore-panama-papers-key-figures/ [https://perma.cc/8ETD-X8R6].

[32] Cockfield, *Shaping*, *supra* note 31; Michael Forsythe, *Paradise Papers Shine Light on Where the Elite Keep Their Money*, N.Y. TIMES (Nov. 5, 2017), https://www.nytimes.com/2017/11/05/world/paradise-papers.html [perma.cc/TC52-N3G5]; Karl M. F. Lockhart, *Investment Treaties, Offshore Finance, and the Resource Curse*, 59 B.C. L. REV. 2663 (2018).

[33] Sara Dillon, *Tax Avoidance, Revenue Starvation and the Age of the Multinational Corporation*, 50 INT'L LAW. 275, 276 (2017) (exploring the degree to which any mandatory obligation for corporations to contribute to the common good no longer exists and corresponding demand for offshoring taxable revenue).

internationalism.[34]

Modern statehood depends on the surveillance of capital mobility and, by extension, a set of relationships with financial institutions.[35] These arrangements have grown out of hard and soft law norms,[36] multilateral processes such as economic sanctions, currency controls, and other forms of economic statecraft coexisting with soft power emerging from the "talking shop" paradigm.[37] As discussed below, financial institutions participate in the project of networked regulation while serving their clients' interests, which means they exist in legal environments where they must serve two masters.[38]

Part II of this Article uses a selection of literature to explain network theory's relevance to existing conversations about transnational regulation. This scholarship illustrates the domestic regulatory appetite for working through networks to develop consensus-based, nonbinding norms within spaces that also obscure points of contact between hard and soft law. It also recognizes the complexities inherent in locating similar points of contact in modern payment spaces by virtue of their structure and function, which serve to support capital mobility and modern commerce more broadly. Part II nonetheless treats transnational regulatory networks, their processes, and outcomes as generating particular expressions of soft law that merely reflect dominant participants' priorities. It also asserts that the "talking shop" model will always struggle to represent the fullest expressions of public interest.

Part III applies the foregoing themes to the FATF, a prototypical transnational regulatory network that has played a role in globalizing financial reporting standards. It also discusses how American regulators

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[34] Cockfield, *Shaping*, *supra* note 31, at 224, 226; James F. Hollifield, *Migration, Trade, and the Nation-State: The Myth of Globalization*, 3 UCLA J. INT'L L. & FOR. AFF. 595, 597, 623 (1998) (discussing links between Free Trade and increased migration, the reversal of which would stoke racism and xenophobia). *See also* Jennifer Fitzgerald, David Leblang & Jessica C. Teets, *Defying the Law of Gravity: The Political Economy of International Migration*, 66 WORLD POL. 406 (2014).

[35] Swire, *supra* note 28, at 485. For a more restrained approach to governments deputizing private institutions based on a "make or buy" calculation, *see* Cristie Ford, *Macro- and Micro-Level Effects on Responsive Financial Regulation*, 44 U. BRIT. COLUM. L. REV. 589, 592 (2011) (". . . [E]nforced self-regulation and other process-based regulatory approaches would benefit from building in, at a structural level, greater attention to both 'macro' forces, such as the background influence of power, and 'micro' forces, such as the form, nature, and drivers of incremental change within the interstices of any flexible regulatory process"); Sidney A. Shapiro, *Outsourcing Governmental Regulation*, 53 DUKE L.J. 389, 400 (2003).

[36] Guzman & Meyer, *supra* note 11, at 174.

[37] *Id.* This Article adopts two complementary treatments of soft law. One evinces a set of promises or statements that fall short of hard law despite being "law-like." The other is a principles-based concept that considers the extent to which devised rules will likely restrain or compel participant conduct.

[38] *See infra* Parts III & IV.

worked through these bodies to globalize domestic priorities, especially in response to the terrorist attacks on September 11, 2001 (9/11). In each instance, these efforts purported to demonstrate public interest concerns, only to stop short of fulfilling the broadest commitment to such principles where they competed with hegemonic behavior or expressions of self-interest. This Part of the Article exposes some of the inherent limits of a "talking shop" system of transnational regulation—particularly those that conceal the precise moments when subjugation of public interest occurs.

Part IV offers an example of this subordinated public interest by summarizing precursors to the opioid crisis and by placing this history alongside contemporary phases of the FATF's institutional evolution. It describes an overview of opioids, their capacity to treat pain, and the growing demand for pain management solutions that began in the 1990s. Part IV of the Article goes on to describe how Purdue engaged in deceptive marketing practices to further stoke demand for OxyContin, which, in turn, prompted a sharp increase in both sales and revenues. During these years, several banking institutions helped the Sacklers execute over 800 wire transfers into family-controlled entities that were either offshore or routed through Swiss bank accounts. The wire transfers continued for decades—overlapping with a period of time when the FATF was aggressively pressuring countries to harmonize financial surveillance norms. The banks that participated in these transactions were themselves adhering to increasingly stringent reporting obligations over a twenty-year period. Part IV concludes by arguing that U.S. regulators, working through international financial regulatory networks, underutilized their "talking shop" powers at critical times and in ways that would undermine their domestic, state-level counterparts seeking compensation for the amounts spent responding to the opioid crisis. This failure of FATF member countries to use networked power and soft law effectively gave cover to the smaller networks of private actors, banks, and offshore financial centers that sheltered assets in places where opioid litigants—who were mostly government plaintiffs—could not reach them.

Part V imagines what FATF standards might look like had the FATF been more purposive in their design and application. It explores the options of creating a new class of "public interest transactions" or "politically exposed persons" whose transactions warrant closer scrutiny once certain triggering events occur. It contemplates how American regulation might have responded to the wire transfers from Purdue to its beneficial owners had different FATF standards been reflected in U.S. law at any time in the past twenty years. The Article concludes with a note of pessimism about the prospect of new standards, particularly in light of America's recent track record of disengagement from multilateral institutions and a general preference for financial deregulation.

II. NETWORKS AS A VEHICLE FOR GOVERNANCE AND REGULATION

A. *Network Theory as an Organizing Paradigm for Governance and Regulation*

Much of the scholarship in global financial regulation uses network theory as an analytical device because its lexicon captures the essence of modern governance and regulation deployed through transnational spaces.[39] Network theory is a framework used to describe "informal institutions linking actors across national boundaries and carrying on various aspects of global governance in new and informal ways."[40] On a spectrum of laws, regulations, and rules, it is the opposite of statutory law, if it is law at all. It is custom devised to fill the void where there are no binding international laws, but where banking practices require efficient and predicable transfers of capital. A networked world functions above, below, and through states—it allows for strategic expressions of statehood to operate in more atomized and organic ways that are in keeping with networked dialogue.[41] Even as they separate insiders from outsiders, networks also respond to internal and external pressures that do not easily fit within Westphalian frameworks of statehood.[42]

While they may evolve differently, international networks now function in almost every sector of public and private life. For example, national securities regulators work to harmonize global regulatory standards through The International Organization of Securities Commissions (IOSCO) instead of solely relying on their heads of state.[43] Central banks internationally coordinate their norms through the Basel Committee on Banking Supervision.[44] In the private sector, the International Organization for Standardization (ISO) figures prominently in the setting of industry norms across thousands of fields.[45]

"Networked governance" is not a new concept. Discussions about the necessity (and impact) of trans-governmental and transnational relations

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39 *See* MANUEL CASTELLS, THE RISE OF THE NETWORK SOCIETY: THE INFORMATION AGE, ECONOMY, SOCIETY AND CULTURE (2d. ed. 2000); Mark Bevir & R. A. W. Rhodes, *Searching for Civil Society: Changing Patterns of Governance in Britain*, 81 PUB. ADMIN. 41 (2003); and Mark Bevir, R. A. W. Rhodes & Patrick Weller, *Traditions of Governance: Interpreting the Changing Role of the Public Sector*, 81 PUB. ADMIN. 1 (2003); Scott C. Burris, Peter Drahos & Clifford D. Shearing, *Nodal Governance*, 30 AUSTL. J. LEG. PHIL. 30 (2005).

40 Anne-Marie Slaughter & David Zaring, *Networking Goes International: An Update*, 2 ANN. REV. L. & SOC. SCI., 211, 215 (2006) [hereinafter Slaughter & Zaring].

41 *Id.*

42 *Id.*

43 Zaring, *Finding Legal Principles*, *supra,* note 7, at 691.

44 *Id.*

45 ISO, *ISO Today*, https://www.iso.org/about-us.html (last visited Sept. 13, 2020).

started in the 1970s when scholars argued that asymmetric distribution of state powers could not eclipse the growing importance of interdependence.[46] However, this early commentary challenged theorists to consider the possibility of international cooperation without the hegemonic influence of American power, which was declining despite its significance.[47] How would this revised model of cooperation continue functioning alongside a range of pre-existing international norms and institutions?[48]

The ensuing theoretical discourse begat *regime theory*—the study of how actors in a specific policy arena develop their own set of expectations based on norms, rules of engagement, and procedures.[49] Non-state actors—corporations and civil society groups—were also acknowledged as important constituents within these arenas.[50] "Epistemic communities" would eventually populate these venues as "a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue area."[51] These communities share four elements: (i) a "shared set of normative and principled beliefs" that provides them with a "value-base rationale" for undertaking socially-relevant action; (ii) "shared causal beliefs" illuminating the underlying relationship between the available policies and the preferred outcomes; (iii) "shared notions of validity" that are employed to identify admissible knowledge in the subject area of concern; and (iv) "a common policy enterprise" that comprises particular sets of social issues and the policy instruments ordinarily used to manage them within the domain at issue.[52]

Networked governance is attractive for several reasons. Expert communities and government officials can interact with international peers with minimal executive or cabinet-level supervision, and these relationships

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[46] *See generally* ROBERT KEOHANE & JOSEPH NYE, TRANSNATIONAL RELATIONS AND WORLD POLITICS (Harvard Univ. Press 1972). *See also* ROBERT KEOHANE & JOSEPH NYE, POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION (Little, Brown 1977); Robert Keohane & Joseph Nye, *Transgovernmental Relations and International Organizations*, 1 WORLD POLITICS 39, 39–42 (1974).

[47] *See generally* ROBERT KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY (Princeton Univ. Press 1984).

[48] *Id.*

[49] *See generally* STEPHEN D. KRASNER, INTERNATIONAL REGIMES (Cornell Univ. Press 1983).

[50] *See generally* MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS (Cornell Univ. Press 1998); Oran R. Young, *Rights, Rules, and Resources in World Affairs*, *in* GLOBAL GOVERNANCE: DRAWING INSIGHTS FROM THE ENVIRONMENTAL EXPERIENCE 1:1–23 (MIT Press 1997).

[51] *See generally* Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1 (1992) [hereinafter Haas].

[52] *Id. See also* Slaughter & Zaring, *supra* note 40, at 215.

are loosely structured without requiring formal negotiation.[53] Peer pressure and other membership incentives operate to produce compliance and policy convergence.[54] Networks also carry the potential to morph into more institutional structures with considerable influence.[55] This understanding of institutions can include a range of informal relationships "consisting of norms and rules connecting and constituting recognized roles."[56]

While it is legitimate to acknowledge the de-centering of government as a byproduct of globalization, this shift should not be overstated or taken to mean state power has been completely neutered. Networks can obscure the origins of power while expanding the reach of state influence in positive or negative ways, sometimes with a considerable degree of coercion.[57] Put another way, locating accountability in lightly institutionalized, networked spaces is difficult, which may also make them attractive rulemaking venues. In his 1997 critique of networked governance, Philip Alston captured this complexity in what he saw as a mismatch between networked approaches to governance and lingering, Westphalian models of international law:

> State sovereignty is not what it used to be. International lawyers, in particular, are acutely aware of the extent to which many of its characteristics have changed. But sovereignty is largely an abstraction and the developments that have made such an impact upon it are both multi-faceted and complex. For all its shortcomings, the term "globalization" is now the one most commonly used to describe some of them. But despite its ubiquity in other disciplines such as economics and political science, it is a term, which, at least until very recently, has been accorded little prominence in the literature of international law. . . . [This] relative neglect is highly problematic in two respects. It reflects a failure to address adequately the implications for international law of both the changing internal role of the state and the changing nature and structure of the global economy.[58]

Alston's primary complaint about governance networks was that

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53 Haas, *supra* note 51, at 2.

54 *See* Thomas Risse-Kappen, *Introduction* to BRINGING TRANSNATIONAL RELATIONS BACK IN: NON-STATE ACTORS, DOMESTIC STRUCTURES AND INTERNATIONAL INSTITUTIONS (Thomas Risse-Kappen ed., Cambridge Univ. Press 1995). *See generally* Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*. 43 VA. J. INT'L L. 1 (2002).

55 *See generally* David Zaring, *Informal Procedure, Hard and Soft, in International Administration*, 5 CHI. J. INT'L L. 547 (2005).

56 *See generally* William Coleman & Tony Porter, *International Institutions, Globalisation and Democracy: Assessing the Challenges,* 14 GLOBAL SOC'Y 377, 385 (2000).

57 Clifford Shearing, *Reflections on the Refusal to Acknowledge Private Governments*, in JENNIFER WOOD & BENOÎT DUPONT DEMOCRACY, SOCIETY AND THE GOVERNANCE OF SECURITY 11, 20–23 (Cambridge Univ. Press 2006).

58 Philip Alston, *The Myopia of the Handmaidens: International Lawyers and Globalization*, 8 EUR. J. OF INT'L L. 435, 435 (1997).

"those with power consolidate it and make the decisions which will continue to determine the fate of the excluded."[59]

Turning to *regulation* as something distinct from governance entails considering functions aimed at engineering desired behaviors among regulatory subjects. It represents the granular detail that emerges from governance structures seeking to animate policy choices through rulemaking regimes. Its configurations can vary from well-established customs enforced under threat of ostracism to more comprehensive and formal systems. Regulatory frameworks typically consist of setting standards, prescribing conditions of entry and maintaining good standing, and designing remedies for non-compliance. Government's status as the ultimate rule-maker allows it to deploy the full machinery of public law in aid of state goals or at the behest of influential lobbyists seeking to assert their interests. But state presence is not a definitional requirement. Indeed, some of society's most powerful forms of non-governmental regulation exist in the form of "soft law" structures, such as payment and messaging protocols.[60]

B. *Finding Expressions of Public Interest Inside the "Talking Shop's" Relationships with Hard and Soft Law*

In the context of financial regulatory networks, the "talking shop" model of rulemaking sits at the intersection of governance, regulation, and network theory in action.[61] In theory, this produces networked institutions with the capacity to support the process of informal rulemaking and non-binding mandates, but without the resources or legal authority to mimic the full power of domestic regulators.[62]

While there is nothing to guarantee an equitable movement of influence between international financial regulatory bodies and their members' countries—or between member countries—participants have the freedom to engineer cooperation through their network of relationships to produce desired outcomes.[63] These features of international financial regulation reflect tensions between the respective proponents of hard and soft law in a landscape where states can only control domestic portions of

59 *Id.* at 441.

60 *See, e.g.*, SWIFT, *SWIFT History*, https://www.swift.com/about-us/history (last visited Sept. 8, 2020) [hereinafter SWIFT]. (The Society for Worldwide Interbank Financial Telecommunication (SWIFT), supplies institutions around the world with encrypted networks that enable the transmission of information linked to financial transactions. SWIFT also sells software products and services primarily for use on its network. SWIFT has burnished its standing among the global banking community by developing standard messaging syntax, which uses a format recognized by a wide range of payment processing platforms.).

61 Zaring, *Finding Legal Principle*, *supra* note 7, at 694.

62 *Id.*

63 Goldsmith & Posner, *supra* note 14, at 116.

an interconnected monetary system where controlling risk demands cooperation.[64] Soft law's skeptics question its wider legal value and its status as law altogether.[65] Yet there are examples of careful adherence to powerful soft law arrangements, which arise out of strong mutual interests that transcend national borders.[66]

International financial regulation's value as a flexible, permissive rulemaking culture also represents its potential limitation. Aspects of hortatory institutional signaling and voluntary compliance that work well in cooperative climates do not necessarily create alignments between vital domestic need and the rulemaking ethos presiding over gatherings of international delegates.[67] Ideally, public sentiment and the specter of reprisals from angry voters might operate to influence this alignment. This was certainly the case in the immediate aftermath of 9/11 when a fearful American public clamored for political and legislative responses to the largely unfamiliar experience of a terrorist attack.[68] But international norms often come into and out of existence without much opposition from an ill-informed, unconcerned public lacking the wherewithal to hold their leaders accountable.[69] Part IV of this Article explores this problem in the context of the opioid crisis by casting a light on poorly-scrutinized relationships between domestic health conditions, the corporate actors who helped create them, and the financial institutions that—amorally or otherwise—supported their attempts to escape regulatory accountability. The conversation

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64 Zaring, *Finding Legal Principle*, *supra* note 7, at 689.

65 Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1229–33 (2004) (suggesting that the underlying spirit of international law influences compliance with non-binding rules); Prosper Weil, *Towards Relative Normativity in International Law*?, 77 AM. J. INT'L L. 413, 414 n.7, 414–17 (1983) (arguing informal obligations "are neither soft law nor hard law: they are simply not law at all").

66 Goldsmith & Posner, *supra* note 14, at 116.

67 *See, e.g.*, Jason Hoffman & Maegan Vazquez, *Trump Announces End of U.S. Relationship with the World Health Organization*, CNN.COM (May 29, 2020), https://www.cnn.com/2020/05/29/politics/donald-trump-world-health-organization/index.html (describing the Trump administration's decision to end its relationship with the World Health Organization as the organization worked with countries to find a vaccine for the coronavirus, the outbreak of which caused a global pandemic).

68 *See generally* Kern Alexander, *Extraterritorial US Banking Regulation and International Terrorism: The Patriot Act and The International Response,* 3 J. INT'L BANKING REG. 307 (2002) [hereinafter Alexander]. *Contra* Cass R. Sunstein, *Terrorism and Probability Neglect*, 26 J. RISK & UNCERTAINTY 121, 121–22 (2003) [hereinafter Sunstein] ("As a result of probability neglect, people often are far more concerned about the risks of terrorism than about statistically larger risks that they confront in ordinary life. In the context of terrorism and analogous risks, the legal system frequently responds to probability neglect, resulting in regulation that might be unjustified or even counterproductive."). *See also* Nina J. Crimm, *The Moral Hazard of Anti-terrorism Financing Measures: A Potential to Compromise Civil Societies and National Interests*, 43 WAKE FOREST L. REV. 577 (2008) [hereinafter Crimm].

69 Goldsmith & Posner, *supra* note 14, at 142.

considers how the current design of international financial networks makes it possible for regulatory defendants responsible for these crippling problems to continue relocating their assets to jurisdictions where depository institutions play a role in supporting capital flight. The cross-border nature of this behavior necessarily implies that any public interest considerations in sending and receiving jurisdictions are too narrowly defined. This deficiency calls for attention to the places within payment landscapes where hard and soft law meet.

C. Locating Payment Systems Within Financial Regulatory Networks

Modern commerce relies on payment systems that are reliable. This principle is reflected in the premium placed on certainty within payment chains, which are primarily concerned with making, supporting, and facilitating the transfer of money.[70] Financial institutions and transacting parties make such transfers possible through adherence to a combination of rules, procedures, standards, and payment-processing technologies. Several of these rules exist within a comprehensive set of American statutes and regulations. These include: uniform commercial law statutes governing negotiable instruments, bank deposits, collections, and funds transfers—all of which are standard reading for American law students;[71] licensing and registration requirements for financial institutions in the business of transmitting or converting money;[72] federal requirements for reporting suspicious transactions or currency transactions exceeding prescribed amounts;[73] federal rules for debit and credit card usage;[74] and strict reporting obligations for parties importing or exporting currency or payment instruments across the U.S. border.[75] The foregoing regulations co-exist with federal and state banking regulations, which have evolved over a century.[76]

These laws leave room for powerful soft law systems and other forms of private ordering; most of these customs operate within private banking networks rather than public ones. For example, the Society for Worldwide

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70 LYNN LOPUCKI, ELIZABETH WARREN, DANIEL KEATING, RONALD J. MANN & ROBERT M. LAWLESS, COMMERCIAL TRANSACTIONS: A SYSTEMS APPROACH 335 (5th ed. 2012).

71 U.C.C. Art. 3, 4, and 4A (AM. LAW INST. & UNIF. LAW COMM'N 2005).

72 18 U.S.C. § 1960 (2006); UNIF. MONEY SERV. ACT (UNIF. LAW COMM'N 2001).

73 Bank Secrecy Act of 1970 (alternately called the Currency and Foreign Transactions Reporting Act), 84 STAT. 1114-24 (1970).

74 Consumer Credit Protection Act, Pub. L. 90–321, 82 STAT. 146 (1968) (Title I (15 U.S.C. § 1601 et seq.) is the Truth in Lending Act. Title IX (15 U.S.C. § 1693 et seq.) is the Electronic Fund Transfer Act); 12 C.F.R. § 205 (2019); 12 C.F.R. § 226 (2019).

75 31 U.S.C. § 5316.

76 *See generally* Gary Gorton, *The Development of Opacity in U.S. Banking*, 31 YALE J. ON REG. 825 (2014) (providing a useful history of American banking); Jerry W. Markham, *Banking Regulation: Its History and Futur*e, 4 N. C. BANKING INST. 221 (2000) (providing another useful history of American banking).

Interbank Financial Telecommunication (SWIFT) network's Business Identifier Codes (BICs) use a financial messaging syntax for use over SWIFTNet and other payment processing networks.[77] Similarly, the credit card industry uses contracts to coordinate cardholder-to-merchant payments and to allocate overall network operating costs.[78] Both of these arrangements operate through banks where private and public iterations of hard and soft law comingle. For example, private contract terms govern elements of consumer credit card processing pursuant to issuer and acquirer side agreements.[79] But the federal Truth in Lending Act (TILA) regulates particular payment disputes between cardholders and merchants arising from the same transaction.[80]

Information sharing is an essential element of most payment chains. The manner of payment—be it a check, debit card, or wire transfer—uses these transactional details to establish the pathway for the money's movement from payor to payee and to determine the terms of settlement finality. These requirements also satisfy the broad sweep of reporting obligations—particularly where international payments are involved—and satisfy underlying policy concerns, such as tax evasion, money laundering, and the financing of terrorism.[81] For example, a $1,000,000 international wire transfer originating from the United States requires compliance with Article 4A of the Uniform Commercial Code (UCC), a BIC to transmit payment messaging information across the SWIFT platform, and the filing of a Currency Transaction Report with the Financial Crimes Enforcement Network (FinCEN) under rules refined in the wake of 9/11.[82] As is discussed in Part III of this Article, U.S. regulators have used surveillance programs to monitor these transactions in the name of national security while pressuring other FATF member countries to do the same.

The operation of U.S. payment laws shows how states use "informational power" to engage in financial surveillance and to assert authority over individuals and organizations seeking to conceal their payment practices.[83] The data-dependent nature of international banking simultaneously suits the needs of globalized governance and regulation.[84]

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77 SWIFT, *supra* note 60; SWIFT, *SWIFTNet Link, Ensuring Technical Interoperability for All Users of SWIFT*, https://www.swift.com/our-solutions/interfaces-and-Jintegration/swiftnet-link (last visited Sept. 8, 2020).

78 Stephen Wilks, *Private Interests, Public Law, and Reconfigured Inequality in Modern Payment Card Networks*, 123 DICK. L. REV. 307, 316–18 (2019).

79 *Id.* at 318–19.

80 TILA § 170(a) (allows consumers to withhold payments to credit card issuers on the basis of defenses they can assert to original merchants.).

81 *See* Barry A. K. Rider, *Financial Regulation and Supervision After 11th September, 2001*, 10 J. FIN. CRIME 336 (2003).

82 31 C.F.R. § 1010.311 (2011).

83 Swire, *supra* note 28, at 485.

84 *Id.*

Both rely on the capacity to quickly gather, secure, assess, and otherwise manage large volumes of information.[85] The contest between regulators and their subjects over disclosure of financial information has emerged as one of the most important challenges to power and authority. Systemically important banking institutions must reconcile expansive interpretations of their regulatory obligations with the interests of serving lucrative and systemically problematic clients.[86]

To what extent has "talking shop" resolved this conflict of interest or made it worse by leaving latitude for placing self-interest ahead of the public interests underlying applicable regulations? Part III of this Article uses Zaring's six principles to explore the FATF's structure and effectiveness.

III. THE FINANCIAL ACTION TASK FORCE AS A CASE STUDY IN NETWORKED FINANCIAL REGULATION

Formed in 1989 under the aegis of the Organization for Economic Development and Cooperation, the FATF developed as a gathering point for member countries' delegates to globalize and implement financial reporting norms. Its initial mandate was to develop financial reporting standards to combat money laundering.[87] The FATF's creation signaled a response to the combined challenges of capital mobility and modern technologies.[88] These challenges had implications beyond concerns about money laundering or tax evasion and raised the spectre of economic competition from "more lax" jurisdictions—or offshore financial centers—offering the commodity of financial secrecy.[89] Applying the language of network theory, these jurisdictions create nodes of assemblage by attracting opportunistic actors seeking jurisdictions where they can operate in ways considered illegal elsewhere.[90]

Exploring the FATF's history through Zaring's six principles reveals nuances in the way states use networks to globalize their influence. First, in less than a decade, sixteen countries managed to build a networked coalition of participants now representing more than 200 jurisdictions.[91] Second, this institutional trajectory demonstrates how the FATF, along with its members and constituents, have formed a blend of consensual and

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[85] *Id.*

[86] Alexander, *supra* note 68; Crimm, *supra* note 68; Sunstein, *supra* note 68.

[87] FATF, Membership, https://www.fatf-gafi.org/about/historyofthefatf/ (last visited Sept. 8, 2020).

[88] Kenneth S. Blazejewski, *The FATF and Its Institutional Partners: Improving the Effectiveness and Accountability of Transgovernmental Networks*, 22 TEMP. INT'L & COMP. L.J. 1, 7 n.15 (2008) [hereinafter Blazejewski].

[89] *Id.* at 7.

[90] *Id.*

[91] FATF, *Who We* Are, https://www.fatf-gafi.org/about/whoweare/ (last visited Sept. 8, 2020).

hierarchical relationships to disseminate a normative range of financial supervision. Within this structure, networked power is manifest in determining which countries participate in setting standards and in the coordinated ways it compels targeted jurisdictions to establish hard law regimes in keeping with FATF priorities. Third, this transmission of power leaves little room for arguments about the basis for asserting authority over subject countries, except where they encroach upon interests of other transnational bodies like the International Monetary Fund (IMF) or the World Bank—entities underwritten and led by the same countries that established the FATF.

A. National Treatment Effectuates Non-Discrimination and Harmonization but Not Necessarily Equality

National treatment is a principle of non-discrimination. It aims to ensure equal treatment among domestic and foreign financial institutions and to act as a vehicle for promoting fairness and standard practices across various segments of the financial sector.[92] National treatment prioritizes harmonization over deregulation, preferring that a network's weaker members work to improve their standards as a bulwark against transnational risks beyond the control of any single domestic regulator.[93] While the national treatment framework defined the initial phases of the FATF's existence, it grew out of a primary focus on harmonization and working through members to articulate globalized reporting obligations.[94] The recommendations also focused on prospective regulatory subjects adjacent to banking institutions, including lawyers, accountants, financial advisers, and casinos.[95] Such an outlook necessarily implied identifying jurisdictions were considered subpar against metrics in a process that inevitably drew skepticism once expressed in more coercive terms.

B. Most Favored Nation Principle

Borrowed from trade law, the Most Favored Nation Principle (MFN) requires states to treat all trading partners equally.[96] Acknowledging the absence of any formalized MFN norm within international financial regulation, Zaring advances the claim that its "consensus format"

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[92] Zaring, *Finding Legal Principle*, *supra* note 7, at 704 (describing national treatment within areas such as capital adequacy requirements, international accounting principles, and disclosures to taxing authorities.).

[93] *Id.*

[94] William Vlcek, *Surveillance to Combat Terrorist Financing in Europe: Whose Liberty, Whose Security?*, 16 EUR. SECURITY 99 (2007).

[95] *Id.* These previously excluded actors resisted being subject to reporting rules until 9/11, when the FATF's mandate was expanded to include combating the financiers of terrorism.

[96] WTO, *Principles of the Trading System*, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited Sept. 8, 2020).

effectively discourages any one country from exempting another state from existing rules or from crafting special rules for one nation to the exclusion of others.[97] The FATF frowns on side deals among member nations, which is likely rooted in its homogeneous membership of like-minded constituents who can quickly respond to policy issues without ratification requirements.[98] But this composition came at the cost of resentment from non-member states excluded from FATF activities during those critical periods when recommendations were being developed.[99] The only option available for non-member states was to participate in FATF activities, but this was only possible after the organization was transformed from an informal, *ad hoc* entity to a fully-formed international institution.[100] The FATF's pattern of disparate treatment extended into its assessment systems, which distinguished member states from non-member states—the latter being grouped into nine regional bodies modelled in its image. More recently, the FATF has created the status of "associate members," allowing specific regional bodies a greater role in FATF policymaking.[101]

C. Rulemaking Instead of Adjudication

Rulemaking within transnational networks is "talking shop's" ultimate product. As a refined expression of equal treatment and an aversion to side deals, member countries devised a framework of desired rule regimes designed for domestic implementation on a voluntary basis.[102] The preference for rules over adjudication is ostensibly consistent with the setting of voluntary standards, preserving flexibility for domestic implementation, and recognizing the lack of any centralized global regulator to adjudicate compliance problems.[103] In the FATF context, this process produced a broad sweep of provisions, consisting of forty-nine recommendations[104] and a set of best practices.[105] The FATF's forty-nine recommendations cover nine subtopics, the most substantive focusing on preventative measures, banking supervision, and law enforcement.[106] The

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97 Zaring, *Finding Legal Principle*, *supra* note 7, at 706-07.

98 Blazejewski, *supra* note 88, at 11.

99 *See also* Intergovernmental Group of Twenty-Four, *Intergovernmental Group Of Twenty-Four On International Monetary Affairs And Development Communiqué* ¶ 20 (April 19, 2002).

100 Blazejewski, *supra* note 88, at 48–50.

101 *Id.*

102 Zaring, *Finding Legal Principle*, *supra* note 7, at 707-09.

103 *Id.*

104 FATF, *The FATF Recommendations*, http://www.fatf-gafi.org/publications/fatf recommendations/documents/fatf-recommendations.html (last visited Sept. 8, 2020) [hereinafter *The FATF Recommendations*].

105 FATF, *Guidance*, http://www.fatf-gafi.org/documents/guidance/ (last visited Sept. 8, 2020).

106 *The FATF Recommendations*, *supra* note 104, at 12, 21.

recommendations ostensibly comport with the principle of voluntary norm setting by seeking to establish "an international standard which countries should implement through measures adapted to their particular circumstances."[107] This work complemented rulemaking exercises emerging from other international bodies, such as model civil and common law statutes prescribing provisions for mutual legal assistance, extradition provisions, and targeting the financing of terrorism and money laundering.[108]

FATF recommendations are organized around themes of transparency, reporting, and enforcement. They create standards for due diligence in record keeping (particularly with respect to transactions exceeding $15,000),[109] politically-exposed parties,[110] cross-border correspondent banking,[111] enhanced scrutiny of high-risk jurisdictions,[112] reporting of suspicious transactions,[113] and whistle-blower protections for financial institutions' directors, officers, and employees.[114] While the language also includes proposals to prohibit the misuse of "legal persons"—such as corporations or limited liability companies—the prohibitions are confined to proscriptions against money laundering and the financing of terrorism rather than more generalized, strategic forms of transactional secrecy.[115] The discussion below juxtaposes the FATF's success at implementing these standards with the methods for securing compliance. The latter exposed complex hierarchical arrangements and coercive strategies at odds with the notion of voluntary adherence to rulemaking, as the "talking shop" approach to network regulation contemplates.

D. Subsidiary Principle of Enforcement

The Subsidiary Principle of Enforcement promotes the idea that a network's member states administer and enforce internationally developed norms within their respective jurisdictions.[116] The FATF's structure reflects this ethos, consisting of a small administrative operation that relies on member states to carry out its work.[117] American law predates the FATF,

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[107] *Id.* at 6.

[108] IMF, *Anti-Money Laundering/Combating the Financing of Terrorism (Aml/Cft, Reference Materials*, https://www.imf.org/external/np/leg/amlcft/eng/aml4.htm#law (last visited Sept. 8, 2020).

[109] *The FATF Recommendations*, *supra* note 104, at 12 (Recommendation 10, Customer Due Diligence).

[110] *Id.* at 14 (Recommendation 12, Politically Exposed Persons).

[111] *Id.* (Recommendation 13, Correspondent Banking).

[112] *Id.* at 17 (Recommendation 19, Higher-Risk Countries).

[113] *Id.* (Recommendation 20, Reporting of Suspicious Transactions).

[114] *Id.* (Recommendation 21, Tipping-Off and Confidentiality).

[115] *Id.* at 21.

[116] Zaring, *Finding Legal Principle*, *supra* note 7, at 709.

[117] Blazejewski, *supra* note 88, at 9.

which supports the inference that U.S. statutory norms were the source of its recommendations. The fundamental principles in the FATF's first forty recommendations align with core features of the U.S. Bank Secrecy Act (BSA) that was passed in 1970. The BSA required banks and other financial institutions to keep certain records,[118] authorized the Secretary of the Treasury to requisition financial transactions reports from subject institutions and people involved in transactions for such institutions,[119] and required the filing of Currency Transactions Reports (CTRs) on currency transactions exceeding $10,000.[120] The BSA also imposed a "suspicious"-transaction-reporting (STR) requirement for aggregate sums.[121]

The next wave of FATF harmonization unfolded amidst the counter-terrorism zeitgeist that followed 9/11. In October 2001, the FATF issued another eight additional recommendations aimed at disrupting terrorist financing. (A ninth was issued in October 2005.) As with the first group of recommendations, these also mirrored pre-existing U.S. regulations. Additionally, Congress quickly passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act, 2001)[122] which, among other things, expanded financial reporting requirements (under Title III). This paralleled the hasty passage of UN Resolution 1373, which obligated countries to "freeze and seize" assets of people and organizations accused of having links to terrorists or terrorist activities.[123] These changes sought to expand reporting requirements across the global financial system.[124]

E. *Enforcement Through Peer Review Does Not Necessarily Promote Equality*

Enforcement through peer review contemplates supervising network and non-network members as they implement standards at national and subnational levels, sometimes with the technical assistance of outside entities.[125] While the FATF has formulated a system of review reflecting similar values, the outcome produced a less "voluntary" system of recommendations than Zaring's network-based rulemaking envisions. In

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118 31 C.F.R. § 5312(a)(2) (2003) (*Financial institutions* include, but are not limited to, banks and depository institutions, broker-dealers and investment companies.).

119 31 C.F.R. § 5313(a) (2003).

120 31 C.F.R. § 1010.311–14 (2011).

121 31 C.F.R § 1020.320 (2011).

122 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, H.R. 3162 (107th Cong. 2001–2002).

123 S.C. Res. 1373, (Sept. 28, 2001).

124 Mark Pieth, *The Harmonization of Law Against Economic Crime*, 1 EUR. J.L. REFORM 527 (1999) [hereinafter Pieth].

125 Zaring, *Finding Legal Principle*, *supra* note 7, at 711.

1998, the FATF began working through its member states to assess each other in light of best practices set out in its forty-nine recommendations.[126] Member countries started "blacklisting" Non-Cooperative Countries and Territories (NCCTs) for failing to comply with the FATF's recommendations.[127] If these designations failed to induce compliance, the FATF could consider other measures, such as banning certain financial transactions with business entities resident in the non-compliant jurisdictions.[128]

FATF assessors use a comprehensive review protocol to: (i) determine compliance with recommendations; and (ii) review the effectiveness of domestic statutory regimes.[129] The assessment methodology consists of two elements. The first "addresses the specific requirements of the FATF Recommendations, principally as they relate to the relevant legal and institutional framework of the country, and the powers and procedures of the competent authorities."[130] The second emphasizes outcomes and considers "the adequacy of the implementation of the FATF Recommendations, and identifies the extent to which a country achieves a defined set of outcomes that are central to a robust Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT) system."[131]

At the national level, the FATF's technical guidance looks for structural hallmarks of good governance, such as "political stability; a high-level commitment to address AML/CFT issues; stable institutions with accountability, integrity, and transparency; the rule of law; and a capable, independent and efficient judicial system."[132] Assessors are also encouraged to use a contextualized approach to understanding the level of compliance with its standards.[133] This approach accounts for variables such as the state of a particular country's financial sector in relation to its overall economy, the kinds of financial institutions or products common in that sector, the ratio of domestic to cross-border business, and the extent of interaction with "high risk" jurisdictions where compliance with FATF standards is

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[126] FATF, *FATF Members and Observers,* http://www.fatf-gafi.org/about/membersandobservers/#d.en.3147 (last visited Sept. 8, 2020).

[127] Sanaa Ahmed, *The Politics of Financial Regulation*, 11 SOCIO-LEGAL REV. 61, 66 (2015) [hereinafter Ahmed] (explaining how countries on the FATF's black list find it hard to pay trading partners, thereby limiting the capacity to import goods); Blazejewski, *supra* note 88, at 18.

[128] Blazejewski, *supra* note 88, at 18.

[129] FATF, *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of Aml/Cft Systems* at 5, http://www.fatf-gafi.org/media/fatf/documents/methodology/FATF%20Methodology%2022%20Feb%202013.pdf.

[130] *Id.*

[131] *Id.*

[132] *Id.* at 7.

[133] *Id.*

relatively low.[134]

Three themes emerge from the FATF's structure and function. The first recognizes a separation of insiders and outsiders during the FATF's standard-setting phase, followed by a belated inclusion of "secondary" actors once most of the formative work was complete.[135] The second acknowledges the specter of hegemony growing out of relationships between the assessors and those countries under scrutiny.[136] The third inference traces an uneven allocation of power and authority inside these networks as is evident in member states' capacity to secure compliance under threat of blacklisting or more serious sanctions. The practice of "talking shop" passes through all of these sorting arrangements. Parties with more power are constantly finding ways to exert their influence over those with less, demonstrating how rulemaking does not instinctively prescribe egalitarianism or reveal internal allocations of power to outsiders.

F. Network Governance

As discussed in Part II of this Article, networked governance entails private and governmental units working with their counterparts in other countries across national boundaries.[137]

> . . . Two implications of the fit between networks and globalization are particularly worth noting. First, thinking about globalization from a disaggregated, networked perspective challenges claims about homogenization and centralization of power and allows for at least the possibility of continuing diversity in implementing common standards. But second, where traditional power relations continue to operate, as they surely must, they must now operate in a networked rather than a centralized context.[138]

Another scholar has captured the effects of this process as it applies to the FATF's development into an institution whose country evaluation procedures evolved into instruments of peer pressure:

> Originally an *ad hoc* structure that collected the pre-existing rules on the prevention and repression of money laundering from the Basle Statement of Principles (on due diligence in the financial sector) and the 1988 Vienna Convention (on criminalization of money laundering and forfeiture), the FATF rapidly developed into an institution, for the first time

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[134] *Id.*

[135] FATF, *History of the FATF,* https://www.fatf-gafi.org/about/historyofthefatf/ (last visited Sept. 8, 2020) (There were sixteen countries in the FATF structure. This number grew to twenty-eight by 1992 and reached thirty-one in 2000. There are currently thirty-nine member countries.).

[136] Chris Brummer, *How International Financial Law Works (And How It Doesn't)*, 99 GEO. L.J. 257, 304 (2011) [hereinafter Brummer] (discussing the "democratic deficits" existing within the design of international standard-setting bodies).

[137] Zaring, *Finding Legal Principle*, *supra,* note 7, at 713.

[138] Slaughter & Zaring, *supra* note 40, at 218.

managing to regulate and to push implementation of an entire area of law on a world-wide basis in less than ten years.[139]

By their very nature, governance exercises require participants to form hierarchical relationships. But such relationships do not form easily, often taking shape where sovereignty assertions collide with coercive expressions of power expressed through the fear of ostracism.[140] Locating sources of authority and challenging power is no easy task for the targets of networked regulation—a particularly sensitive topic for jurisdictions with colonial histories.[141] The various scholarly treatments of authority vary from something that implies a public "surrender of private judgment"[142] to the subject's willingness to acknowledge that its supervising entity is somehow "entitled to obedience."[143] These understandings of authority imply a way to publicly identify sources of authority as well as the rules determining their application to subjects.[144]

Although the FATF has convinced 200 countries and jurisdictions to adopt its standards,[145] the organization itself has also faced governance challenges.[146] As the FATF sought to establish more formal partnerships with the IMF, the latter entity was critical of the NCCT model because it held non-member countries to a higher assessment standard than countries within the FATF membership.[147] The IMF was especially concerned about the disparate treatment of developing economies.[148] These particular jurisdictions were already subject to pre-existing oversights through the

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[139] Pieth, *supra* note 124, at 531.

[140] SLAUGHTER, *supra* note 13, at 196.

[141] Ahmed, *supra* note 127, at 82 ("The norms of transparency and accountability essential to good governance are severely lacking in the global financial regulation project. Recent scholarship has stripped economic regulation of its apolitical, technical pretensions and discovered a disturbing proclivity towards colonial domination through economic means. How different is financial regulation?"). *See also* Brummer, *supra* note 136.

[142] *See generally* PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS (A. Claire Cutler et al. eds., 1999).

[143] R.B. Friedman, *On the Concept of Authority in Political Philosophy*, *in* AUTHORITY 64, 56–91 (Joseph Raz ed., 1990). *See also* BRUCE LINCOLN, AUTHORITY: CONSTRUCTION AND CORROSION (1st ed. 1994); Joseph Raz, *Introduction*, *in* AUTHORITY 1–19 (Joseph Raz ed., 1990).

[144] Friedman, *supra* note 143, at 69.

[145] FATF, *Who We Are,* https://www.fatf-gafi.org/about/whoweare/ (last visited Sept. 11, 2020).

[146] Blazejewski, *supra* note 88, at 44.

[147] *Id.* at 54-55.

[148] *Id*. at 46 n.249 (quoting Ruth W. Grant & Robert O. Keohane, Accountability and Abuses of Power in World Politics, 99 AM. POL. SCI. REV. 29, 29 (2005) "Accountability presupposes a relationship between power-wielders and those holding them accountable where there is a general recognition of the legitimacy of (1) the operative standards for accountability and (2) the authority of the parties to the relationship (one to exercise particular powers and the other to hold them to account).").

Report on the Observance of Standards and Codes (ROSC).[149] Developed by the IMF's Financial Sector Assessment Program (FSAP) and the World Bank, ROSC was designed to assess countries against twelve benchmarks with a view towards improving their financial systems.[150] NCCT protocols conflicted with ROSC models in three respects. The ROSC procedures: (i) provided a right of reply whereas NCCT protocols did not; (ii) considered the various stages of economic development across subject countries; and (iii) took into account the progress of subject countries toward becoming fully compliant with desired norms.[151] The FATF eventually modified its NCCT process by taking on more adjudicative features.[152]

The IMF, along with the World Bank, eventually worked to resolve conflicts between the FATF and developing countries. These efforts led to the creation of the Caribbean Financial Action Task Force (CFATF), the oldest regional body.[153] Formed in 1990, the CFATF opposed FATF recommendations targeting offshore financial centers in the Caribbean.[154] The CFATF adopted its own nineteen recommendations, known as the Aruba Recommendations, which it felt better reflected the region's needs.[155] Although it submitted to FATF assessment processes, the CFATF demanded that its own nineteen recommendations be used in the exercise.[156] By 2003, the FATF—with IMF support—invited the CFATF to participate in the review of its recommendations. Only after this process was complete did the CFATF express its willingness to unconditionally accept revised recommendations.[157] The CFATF is now an associate member of the FATF.

G. Leveraging Existing Networks as Instruments of Transnational Power

Through the FATF, the United States and its allies have successfully used disaggregated soft power to globalize financial reporting standards. Despite this power's varying degrees of coercion, its harmonizing effects have brought a measure of consistency to our international financial networks, contributing to the effort to reduce systemic risk. Even with its

[149] *Id*. at 31 n.149 (These areas include accounting, auditing, banking supervision, corporate governance, data dissemination, fiscal transparency, insolvency and creditor rights, insurance supervision, monetary and financial policy transparency, payments systems, securities regulation, and money laundering and the financing of terrorism.). *See* IMF, *Standards and Codes*, http://www.imf.org/external/standards/index.htm (accessed October 23, 2009).

[150] Blazejewski, *supra* note 88, at 46.

[151] *Id.*

[152] *Id*. at 30.

[153] *Id.* at 52.

[154] *Id.*

[155] *Id*.

[156] *Id.*

[157] *Id.*

imperfections, the FATF may be the space where transnational financial networks might devise new rules that target regulatory subjects outside the spheres of terrorist finance or money laundering; yet, it may nonetheless attract limits on the free movement of its assets, owing to disputes in which there is a compelling public interest. Part IV uses recent opioid litigation as the basis for exploring this argument.

IV. OPIOID LITIGATION DEFENDANTS AND THEIR TRAIL OF INTERNATIONAL WIRE TRANSFERS

This Part describes the Opioid crisis in detail in order to demonstrate the magnitude of the harm, as well as the incredible and continuing harm, caused by a failure to properly regulate untraceable offshore wire transfers that, as a result, may be unreachable by plaintiffs.

A. Locating Profiteers (and Their Profits) Amidst a Complex Crisis

As the opioid crisis continues to take its human and financial toll on Americans, relationships between its profiteers and their banking institutions have passed without much comment. This oversight is all the more striking given the size and complexity of the litigation as well as the scale of profit-making that was inured to the benefit of drug manufacturers and their beneficial owners.[158] Naturally, the plaintiffs seek to recover billions in opioid-related public health expenditures from the companies that made these drugs. More specifically, the plaintiffs allege these drug makers were aggressive and deceptive in marketing these drugs to healthcare-provider consumers while downplaying or denying their addictive qualities. Disagreement exists regarding how to interpret "vector-based" arguments, which revolve around the idea that prescribing opioids to treat legitimate pain management is a kind of "gateway" for patients who would become addicted and eventually seek out alternative drugs once denied access to originally-prescribed medications.[159] Recent scholarship questions the merits of pursuing civil or criminal proceedings against

[158] A "beneficial owner" refers to any natural person who ultimately owns or controls a legal entity or arrangement, such as a corporation or a trust.

[159] Nicolas P. Terry, *The Opioid Litigation Unicorn*, 70 S. C. L. REV. 637, 652 (2019) [hereinafter Terry] (arguing that the vector model is a "simple cause and effect model to explain a far more complex problem" that should center on social determinants of health, such as "overlapping social structures and economic systems that are responsible for most health inequities."). *See* Patricia Zettler, Margaret Foster Riley & Aaron S. Kesselheim, *Implementing a Public Health Perspective in FDA Drug Regulation*, 73 FOOD & DRUG L.J. 221, 235 (2018) [hereinafter Zettler, et al.] (This view supports the inference of the vector theory.) ("In 2016, forty percent of all opioid related deaths in the U.S., roughly 16,000 people, were due to prescription opioids. An estimated two million people misuse or are dependent on prescription opioids. Many of the individuals who have moved on to stronger illicit drugs like heroin and fentanyl began by misusing prescription opioids.").

manufacturers instead of prioritizing systemic reform.[160] It further suggests that blaming manufacturers supports a narrative that eclipses responsibility borne by other participants in the drug supply chain.[161] Another line of discussion contrasts historical claims against tobacco companies (that operated in unregulated markets) with more contemporary opioid litigation posture in an industry where extensive regulatory approvals could afford important tort defenses.[162] Commentary has also focused on changes to federal drug approval mechanisms that might impact supply-side behavior.[163]

The foregoing arguments continue against the backdrop of a staggering death toll and enormous public costs incurred in responding to this crisis. About 450,000 Americans died from opioid overdoses between 1999 and 2018.[164] In the five-year period between 2013 and 2018, the federal government spent $129 billion on law enforcement and treatment initiatives.[165] This amount does not include state and local expenditures, which account for most of the plaintiffs participating in opioid litigation across the country.[166] Nor does it account for derivative economic impacts, such as diminished labor participation, increased child welfare costs, and lost tax revenues, which some estimate would bring the total cost closer to $504 billion.[167]

B. Opioids and the Evolution of Markets for Pain Management Medications

Derived from the opium poppy, opioids bind receptors in the body that

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[160] Terry, *supra* note 159, at 651 (arguing that tort litigation promotes blame rather than systemic reform). *See also* Abbe R. Gluck, Ashley Hall & Gregory Curfman, *Civil Litigation & the Opioid Epidemic: The Role of Courts in a National Health Crisis*, 46 J. L. MED. & ETHICS 351, 351 (2018).

[161] Terry, *supra* note 159, at 649–51 (suggesting that the current litigation posture detracts attention from the opioid epidemic's contemporary features insofar as they have changed since the period bracketed as the drug manufacturer's misconduct).

[162] *See* Micah L. Berman, *Using Opioid Settlement Proceeds for Public Health: Lessons from the Tobacco Experience,* 67 U. KAN. L. REV. 1029, 1034 (2019).

[163] Zettler, et al., *supra* note 159, at 235 (suggesting population data, such as provider and patient behavior, figure more prominently in the Food & Drug Administration's approval and withdrawal decisions).

[164] *Three Waves of Opioid Deaths*, CENTERS FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/drugoverdose/epidemic/index.html.

[165] *Economic Aspects of the Opioid Crisis: Hearing Before the J. Econ. Comm.*, 115th Cong., 6 (2017) (statement of Lisa N. Sacco, Crime Policy Analyst, Congressional Research Service, Library of Congress), https://crsreports.congress.gov/product/pdf/TE/TE10017 [hereinafter Sacco Statement].

[166] *Id.*

[167] Darlene Superville, *White House Says Opioid Crisis Cost $504 Billion in 2015, Much Higher Than Once Thought*, PBS NEWS HOUR (Nov. 20, 2017), https://www.pbs.org/newshour/nation/white-house-says-opioid-crisis-cost-504-billion-in-2015- much-higher-than-once-thought.

help regulate pain and emotions. A wide range of medications use opioid analgesics to relieve acute pain by "action on the μ opioid receptor—the major analgesic opioid receptor expressed throughout the nervous system."[168] Since Friedrich Sertürner successfully isolated morphine from crude opium in 1803, there has been a steady increase in the varieties of opioid analgesics, chemical composition, means of administration, and abilities to bind to opioid receptors.[169] The duration of effects vary within this class of drugs—either because of "intrinsic properties of the opioid molecule" or "pharmaceutical formulation."[170]

Although opioids have been available in the United States since the nineteenth century, the 1990s marked a turning point in demand for the pain management solutions in the healthcare marketplace.[171] Much of this demand was rooted in the challenges of treating pain. One group of authors described the problem succinctly:

Pain is the perception manifest from nociceptive stimuli in internal tissues and external insults detected by peripheral sensors in the body. It is a complex physiologic process, involving many different forms of pain encoded by a number of neural circuits. Pain may be expressed in numerous forms, for example, stabbing, pricking, burning or aching, and may also produce diverse emotions and sensations. Pain also arises in multiple clinical contexts, and each context, and sometimes each individual patient, raises specific issues that need to be addressed in distinct ways.[172]

Pain's emergence as an important clinical concern centered on problems with it being largely under-assessed, under-treated, and unnoticed.[173] As patient advocates increased pressure on healthcare systems to treat pain symptoms with opioids, they relied on a small and frequently cited body of contemporary literature suggesting the risk of addiction is low.[174] These arguments gained considerable support in 1995 when Dr. James Campbell famously outlined arguments for treating pain as a fifth "vital sign" during his Presidential Address to the American Pain Society

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[168] NATIONAL ACADEMIES OF SCIENCES, ENGINEERING AND MEDICINE, PAIN MANAGEMENT AND THE OPIOID EPIDEMIC: BALANCING SOCIETAL AND INDIVIDUAL BENEFITS AND RISKS OF PRESCRIPTION OPIOID USE 53 (Richard J. Bonnie, Morgan A. Ford & Jonathan K. Phillips eds., 2017), https://www.ncbi.nlm.nih.gov/books/NBK458660/pdf/Bookshelf_NBK458660.pdf [hereinafter NAS REPORT].

[169] *Id.*

[170] *Id.*

[171] Sacco Statement, *supra* note 165.

[172] Zettler et al., *supra* note 159, at 225.

[173] *Id.* at 225–26.

[174] Russell K. Portenoy & Kathleen M. Foley, *Chronic Use of Opioid Analgesics in Non-malignant Pain: Report of 38 Cases*, 25 PAIN 171 (1986) (arguing prescribing opioids to treat non-cancer related pain could be safe); Jane Porter & Hershel Jick, *Addiction Rare in Patients Treated with Narcotics,* 302 NEW ENG. J. MED. 123 (1980) (arguing that evidence of addiction was rare in a review of hospitalized patients with no prior history of addiction).

(APS).[175] Campbell's concept of devising pain management metrics quickly gained traction, prompting the APS to develop pain evaluation systems for use in assessing vital signs.[176] Within the next decade, expectations surrounding pain management crystalized into obligations that could implicate licensure of institutions and physicians alike. Such obligations required healthcare organizations to improve their pain management practices,[177] and the Federation of State Medical Boards recommended that state boards consider sanctioning health professionals who did not adequately treat pain.[178]

But pressures from outside and within the medical community did not immediately translate into better clinical outcomes—owing to pain's varied origins and impacts on individual patients.[179] Nonetheless, prescription rates continued to climb, as did the potency of analgesics prescribed.[180] The number of Americans experiencing some form of pain—and expectations that the medical community tend to their discomfort—became so widespread that the growing demand for pain care was eventually reflected in the number of prescriptions being filled.[181] By 2012, primary care physicians, who commonly had a basic understanding of pain management, produced nearly 49% of all opioid prescriptions.[182] During this period, specialists were also using opioids across a variety of clinical contexts, ranging from surgical and post-operative care to treat "acute injuries, such as those due to household, sporting, or motor vehicle accidents."[183]

C. Purdue Pharma's Marketing Practices and the Gateway Theory of Liability

Recognizing a lucrative market for pain treatment medications, drug makers pursued a multi-faceted strategy designed to steer demand toward

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175 James N. Campbell, *APS 1995 Presidential Address,* 5 PAIN F. 85 (1996); Natalie E. Morone & Debra K. Weiner, *Pain as the Fifth Vital Sign: Exposing the Vital Need for Pain Education,* 35 CLINICAL THERAPEUTICS 1728 (2013).

176 Andrew E. Lelling, *Corporate Accountability for the Opioid Epidemic*, 66 DOJ J. FED. L. & PRAC., Oct. 2018, at 159, 161 (2018); Zettler et al., *supra* note 159, at 226.

177 David W. Baker, *The Joint Commission's Pain Standards: Origins and Evolution*, THE JOINT COMM'N 3 (May 5, 2017), https://www.jointcommission.org/assets/1/6/Pain_Std_History_Web_Version_05122017.pdf.

178 Zettler et al., *supra* note 159, at 226.

179 *See id.* (explaining that in spite of changes in the medical profession, pain has remained "notoriously difficult to treat," and discovering appropriate therapies requires an understanding of "various complex neural circuits involved in different types of pain" that has so far eluded the medical community).

180 NAS REPORT, *supra* note 168, at 57. ("From 1999–2002 to 2011–2012, however, the percentage of users of opioid analgesics who were prescribed an opioid analgesic stronger than morphine increased from 17 to 37 percent.").

181 *Id.* at 57.

182 *Id.*

183 *Id.* at 58.

their products. Common practices included sending sales representatives to meet with healthcare providers, issuing samples to patients and their doctors, funding professional development programs, paying "thought leaders" to promote drugs, and coordinating with patient advocacy groups.[184] These tactics coincided with myriad institutional pressures on physicians and healthcare to address their patients' pain management demands.

Soon after its 1995 release of an oxycodone product known as OxyContin, drug maker Purdue emerged to become one of the more infamous actors in the marketing of analgesics. OxyContin was novel in that it was an "extended-release" product, which indicated a twelve-hour dosing schedule at a time when most other products were administered every four to six hours.[185] Between 1996 and 2000, Purdue promoted the drug in several ways, some of which were hosting more than forty conferences for a total of 5000 healthcare professionals—including doctors, nurses and pharmacists—and doubling its sales force.[186] Purdue worked through these marketing strategies to enlist the medical community's support for its products while offering assurances that OxyContin could relieve pain with minimal risk to patients. OxyContin sales subsequently skyrocketed, growing from $44 million and 316,000 prescriptions in 1996 to more than $1 billion by the year 2000.[187] Sales reached $3 billion in 2001–2002 with 14 million issued prescriptions.[188] Additionally, OxyContin prescriptions unrelated to cancer treatments grew from 670,000 to 6.2 million between 1996 and 2002.[189] Throughout these time frames, Purdue's promotional material maintained the position that OxyContin posed little to no risk of addiction.[190]

Increased prescription rates combined with insufficient regard for the risk of addiction produced tragic effects. Between 1999 and 2018, more than 232,000 Americans died from prescription opioid overdoses.[191] The oxycodone family of drugs (including OxyContin), along with methadone and hydrocodone, have been the prescribed opioids mostly commonly connected to overdose deaths.[192] According to the Centers for Disease Control and Prevention (CDC), deaths from prescription opioids

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[184] Zettler et al., *supra* note 159, at 227.
[185] *Id*. at 228.
[186] *Id.*
[187] *Id.*
[188] *Id.*
[189] *Id.*
[190] *Id.*
[191] *Overview*, CENTERS FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/drugoverdose/data/prescribing/overview.html [hereinafter CENTERS FOR DISEASE CONTROL & PREVENTION]
[192] *Prescription Opioids*, CENTERS FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/drugoverdose/opioids/prescribed.html.

quadrupled during this same period.[193] Despite a steady decline in overall prescribing rates since 2012, prescription opioids were linked to 32% of overdose deaths in 2018.[194] One possible explanation for this linkage may be the potency of prescriptions—expressed in morphine milligram equivalents (MME)—which has increased threefold since 1999.[195] In the face of mounting death tolls and concern from public health experts, Purdue ceased its marketing practices—by which time it had generated $2.8 billion in revenue from the sale of OxyContin (between January 1996 and June 2001).[196] As early as 2004, lawsuits against Purdue and other defendants began springing up all over the United States and in Canada.[197] The most notable litigation involved three of Purdue's senior officers who reached plea agreements with the Department of Justice. On May 10, 2007, Purdue's President and CEO (Michael Fridman), its Chief Legal Officer (Howard R. Udell), and its Chief Scientific Officer (Dr. Paul Goldenheim) pled guilty to the introduction of a misbranded drug into interstate commerce contrary to 21 U.S.C. §§ 331(a), 352(a), and 333(a)(2). According to the agreed statement of facts:

The Purdue Frederick Company, Inc., and the three executives have admitted that Purdue fraudulently marketed OxyContin by falsely claiming that OxyContin was less addictive, less subject to abuse, and less likely to cause withdrawal symptoms than other pain medications when there was no medical research to support these claims and without Food and Drug Administration approval of these claims.[198]

In addition to paying a $600 million fine to the federal government, Purdue also entered into a civil settlement, which imposed exclusion from taking part in federal healthcare programs for twenty-five years.[199]

As already discussed, tort claims against opioid drug makers are premised on the "gateway" theory of liability, which is organized around the idea that opioid prescriptions—regardless of their underlying legitimate purpose—function as a pathway to other forms of addiction. It presupposes that opioid prescriptions administered without regard for their addictive qualities will induce dependency and misuse among patients, who, in turn, seek other kinds of drugs after being cut off from their original, physician-

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193 CENTERS FOR DISEASE CONTROL & PREVENTION, *supra* note 191.

194 *Overdose Death Maps*, CENTERS FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/drugoverdose/data/prescribing/overdose-death-maps.html

195 *Id.*

196 *See* Exhibit B to Information, Agreed Statement of Facts, United States v. The Purdue Frederick Co., Inc. et al., No. 07-00029-JPJ, ECF No. 5-2 (W.D. Va. May 10, 2007).

197 Rebecca L. Haffajee & Michelle M. Mello, *Drug Companies' Liability for the Opioid Epidemic,* 377 NEW ENG. J. MED. 2301, 2302-03 (2017).

198 News Release, U.S. Attorney's Office, W.D. of Va., The Purdue Frederick Company, Inc. and Top Executives Plead Guilty to Misbranding OxyContin; Will Pay Over $600 Million (May 10, 2007).

199 *United States v. Purdue Frederick Co.*, 495 F. Supp. 2d 569, 572 (W.D. Va. 2007).

supervised opioid doses. This, combined with evidence of deceptive marketing practices, undoubtedly prompted a great deal of litigation. While these untested arguments remain the subject of some debate, the CDC's three-phase historical narrative of the crisis offers some support to gateway theorists: the first phase began with a rise in opioid prescriptions in the 1990s; a second was defined by increases in heroin-related overdose deaths, which began in 2010; and a third was marked by a climb in overdose deaths involving synthetic opioids—such as fentanyl—beginning in 2013.[200] Taken together, these arguments have been central to the legal theory underlying opioid litigation claims against drug manufacturers.

D. *Offshoring OxyContin Revenues and the Rising Tide of Opioid Litigation*

Local governments' experience with the 1998 Master Settlement Agreement (MSA) between major tobacco companies and forty-six states have also shaped current opioid litigation strategy.[201] The MSA's terms provided that states would receive more than $206 billion over twenty-five years in what remains the largest civil litigation settlement in history.[202] While part of the agreement's central purpose was to fund programs related to smoking cessation, litigation proceeds often found their way into general spending.[203] In many states, these proceeds failed to reach local government agencies on the front lines of public health.[204] Anxious to ensure history would not repeat itself with opioid-related claims, local governments began filing their own claims against drug makers, producing a large and diverse plaintiff class.[205] While varied among states, counties, cities, and tribal nations, their claims mimicked a dozen settled state and federal suits that focused on "overpromotion and diversion."[206] More specifically, they argued that (i) drug makers downplayed the addictive effects of opioids while exaggerating their benefits, and (ii) distributors did not have sufficient controls in place to identify suspicious orders made on behalf of

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[200] *Id.*

[201] Berman, *supra* note 162.

[202] *Id.* at 1036.

[203] *Id.*

[204] *Id.* at 1039–44.

[205] *Id.* at 1035; Brief of Amici Curiae of Michigan, Alaska, Arizona, Connecticut, Hawaii, Indiana, Kansas, Montana, Nebraska, North Dakota, South Dakota, Tennessee, Texas, and the District of Columbia in Support of the State of Ohio's Petition for Writ of Mandamus (Dkt. No. 7), *In re* State of Ohio, at 13, No. 19-3827 (6th Cir. Sept. 6, 2019) (several states have challenged this strategy on the basis that political subdivisions lack the legal authority to represent the people of their state). *See* Petition for Writ of Mandamus of State of Ohio (Dkt. No. 1), *In re* State of Ohio, No. 19-3827 (6th Cir. Aug. 30, 2019) (thirteen states and the District of Colombia filed a brief of *amici curiae* supporting the Ohio Attorney General, taking the position that "smaller political subdivisions lack the broad powers and duties that are necessary to effectively protect the States' citizenry as a whole").

[206] Terry, *supra* note 159, at 640.

so-called "pill mills" and other heavy subscribers.[207]

In December of 2017, the United States Judicial Panel on Multidistrict Litigation (USJPM) determined all claims involved shared questions of fact, and that it would consolidate and transfer hundreds of federal claims to the Northern District of Ohio before U.S. District Judge Daniel Polster.[208] Additional plaintiffs joined the proceedings and Purdue alone was named in more than 2600 suits.[209] Multidistrict Litigation (MDL) processes aim to reserve litigants' resources by preventing duplicative discovery procedures and conflicting pretrial rulings.[210] "Transferred actions not terminated in the transferee district are remanded to their originating transferor districts by the Panel at or before the conclusion of centralized pretrial proceedings."[211] These proceedings will often hear representative trials to refine some of the justiciable issues of interest to all parties.[212]

After a year of settlement negotiations, Purdue reached a tentative agreement in September of 2019 "with critical and important constituents" that would resolve outstanding claims through bankruptcy proceedings.[213] In tandem with these proceedings, Purdue proposed a three-part resolution structure, which it claimed would provide "unprecedented transfer of value to the American people."[214] These terms provided that:

(1) Purdue's existing shareholders will relinquish all of their equity interests in the Debtors and consent to the transfer of all of the Debtors' assets to a trust or similar post-emergence structure for the benefit of claimants and the U.S. public, "free and clear" of Purdue's liabilities to the fullest extent permitted by law;

(2) Purdue's existing shareholders will engage in a sale process for their ex-U.S. pharmaceutical companies; and

(3) Purdue's existing shareholders will contribute an additional $3 billion over seven years. . .with the hope of substantial further contemplated contributions from the sales of their ex-U.S. pharmaceutical businesses.[215]

Purdue's terms were met with criticism—New York Attorney General Letitia James called them "insulting" and several states refused to participate in the settlement.[216] Attempting to properly contextualize

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[207] *Id.* at 619.

[208] *In re* Nat'l Prescription Opiate Litig., 290 F. Supp. 3d 1375, 1378-79 (J.P.M.L. 2017).

[209] Debtor's Informational Brief at 36, *In re* Purdue Pharma, No. 19-23649 (Bankr. S.D.N.Y. Sept. 16, 2019). [hereinafter Debtors' Informational Brief].

[210] U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, OVERVIEW OF PANEL, https://www.jpml.uscourts.gov/overview-panel-0.

[211] *Id.*

[212] Terry, *supra* note 159, at 642.

[213] Debtors' Informational Brief, *supra* note 209, at 44.

[214] *Id.*

[215] *Id.*

[216] Richard Gonzalez, *New York AG Says Sacklers Transferred $1B From Pharma Accounts to Themselves*, NPR (Sept. 13, 2019, 6:10 PM), https://www.npr.org/2019/09/13/

proposed settlement amounts, she sought discovery of documents that would help determine the extent of assets under the control of Purdue and its beneficial owners—the Sackler family. In September of 2019, court filings revealed that members of the Sackler family had executed more than 800 wire transfers—representing an aggregate of nearly $1 billion—into entities in the Channel Islands using Swiss bank accounts and that these transactions took place as recently as 2018.[217] Financial institutions involved in these transactions included: "Bank of America, N.A., Charles Schwab & Co., Inc., Citibank, N.A., Goldman Sachs & Co. LLC, HSBC Bank USA, N.A., J.P. Morgan Chase Bank, N.A., Morgan Stanley & Co. LLC, UBS Financial Services, Inc., and Wells Fargo."[218] None of the entities described in these wire transfers appear in Purdue's organizational chart attached to the Debtor's Informational Brief as "Exhibit A."[219] At the very least, these records suggest Purdue and the Sacklers were trying to "lowball" plaintiffs to the extent that they were not entirely forthcoming about the extent of their assets during the course of settlement negotiations. In a revealing statement to National Public Radio (NPR), a Sackler family spokesperson insisted, "There is nothing newsworthy about these decade-old transfers, which were perfectly legal and appropriate in every respect . . . ."[220] A clearer picture of these wire transfers subsequently emerged when auditors discovered the Sackler family had withdrawn more than $10.7 billion from Purdue since 2008.[221] Their timing suggests the Sacklers accelerated the pace of these transactions in an attempt to protect most of their wealth at a point in time when there was good reason to anticipate large-scale litigation.

E. The Failures of "Talking Shop" During the Arc of Time Spanning Wire Transfers Between Purdue and Its Beneficial Owners

Information surrounding the 2019 release of transactional details between Purdue and entities controlled by the Sackler family point to a

760688886/new-york-ag-says-sacklers-transferred-millions-from-pharma-accounts-to-themselve [hereinafter Gonzales]; Deanna Paul, *N.Y. Attorney General Exposes $1 Billion in Wire Transfers by Sackler Family*, WASH. POST (Sept. 14, 2019, 12:33 PM), https://www.washingtonpost.com/business/2019/09/14/ny-attorney-general-exposes-billion-wire-transfers-by-sackler-family/.

[217] Opposition by the Consortium of Some Massachusetts and Other Municipalities to the Motion for a Preliminary Injunction in Favor of the Sackler Family Non-Debtors Exhibit 2 Affidavit at 7, Purdue Pharma v. Massachusetts (*In re* Purdue Pharma), No. 19-23649 (Bankr. S.D.N.Y. Oct. 2, 2019) [hereinafter Exhibit 2]. *See also* Colin Dwyer, *Sacklers Withdrew Nearly $11 Billion From Purdue as Opioid Crisis Mounted*, NPR (Dec. 17, 2019, 11:43 AM), https://www.npr.org/2019/12/17/788783876/sacklers-withdrew-nearly-11-billion-from-purdue-as-opioid-crisis-mounted [hereinafter Dwyer].

[218] Exhibit 2, *supra* note 217, at 10.

[219] Debtor's Informational Brief, *supra* note 209, at app. A.

[220] Gonzalez, *supra* note 216.

[221] Dwyer, *supra* note 217.

pattern of wire transfers that began in 1989, if not sooner.[222] Financial institutions readily offered up their services in helping to decapitalize Purdue during important points in the respective trajectories of private wealth accumulation, efforts at targeting particular kinds of financial secrecy, and the FATF's evolution. The wire transfers at issue in the opioid story were legal and thus outside the FATF's remit. This remained the case after 2007, when Purdue paid a $600 million fine in connection with its deceptive marketing practices. Whether one accepts the "gateway" theory of liability or gives more weight to socioeconomics and other determinants of vulnerability to opioid-induced dependency, Purdue and its beneficial owners continued profiting from OxyContin sales past the point where primary and derivative forms of dependency were costing lives.

There is much irony in the profits of this misery passing through American banking institutions while U.S. regulators worked through the FATF to develop and enforce recommendations aimed at limiting financial secrecy out of concern for the common good. There was also a compelling public interest in the "Purdue-Sackler" wire transfers. Representing more than just the fruits of misery-making on a large scale, these transactions reveal a particular set of networked institutional arrangements existing within a globalizing regulatory landscape where targeting proceeds of crime and the financing of terrorism became top priorities. Had they been street-level drug pushers or terrorists responsible for tens of thousands of deaths, there is little doubt members of the Sackler family would have been prosecuted, jailed, and subject to asset seizure. But such moral and legal calculations change when the "overpromotion and distribution" of highly addictive drugs operates through skillfully arranged business entities and a federally regulated drug supply chain. Over the same period of time that banking institutions were being asked to refine reporting rules that would help governments seize proceeds of crime, at least a dozen worked with Purdue's beneficial owners' offshore capital under circumstances substantively adjacent to the FATF's work.

"Talking shop's" failures inside the FATF ecosystem extend into the relationships between America's national and subnational public actors. The delegates purporting to represent the country's interests within international settings devised regulatory structures to promote financial transparency in ways that undermined the interests of their state and local counterparts—counterparts who accounted for most of the plaintiffs suing Purdue and the Sackler family.[223] Put another way, those capable of leveraging soft law power underperformed at critical moments when they might have used networked regulation to put restrictions around more diverse forms of capital flight. Part V reimagines contents of the FATF's

[222] *Id.*

[223] Debtors' Informational Brief, *supra* note 209, at 5 (indicating that governmental plaintiffs accounted for 85% of all claimants).

recommendations and technical guidance documents with these arguments in mind.

V. PUBLIC INTEREST TRANSACTIONS AND THE BUILDING OF TRANSNATIONAL REGULATORY STRUCTURES FOR NETWORKS WITHIN NETWORKS

This Part explains why wire transfers originating from Purdue to its beneficial owners fall outside the FATF and thus explains the need for either additional standards or new interpretive guidelines that meaningfully give effect to the FATF's mandate.

A. The FATF's Evolution

There is nothing new or radical in the proposal to refine the interpretive scope and direction of FATF recommendations. The FATF first reviewed its mandate in 2004,[224] adopted a new surveillance process in 2006,[225] and revised its mandate a second time in 2008.[226] The FATF also produced a series of responses following the 2009 meeting of G-20 countries in Pittsburgh, where countries "called on the FATF to improve transparency and exchange of information" and to issue a list of "high risk jurisdictions."[227] The following year, the FATF developed guidelines for insurance companies, cross-border transport of cash and bearer bonds, tax amnesty laws, and asset repatriation.[228] In the same year, it published reports on free trade zones and their potential vulnerability to misuse for money laundering or the financing of terrorism.[229] The November 2010 G-20 Summit in Seoul produced a similar "call and response," with member states urging the FATF to "update and implement" FATF standards pertaining to "transparency of cross-border wire transfers, beneficial ownership, customer due diligence, and due diligence for 'politically exposed persons.'"[230] At the G-20 summit in 2016 in Hangzhou, China, leaders similarly stated their continued support for "protecting the integrity of the international financial system," calling on the FATF to "improve the implementation of the international standards on transparency, including on the availability of beneficial ownership information of legal persons and legal arrangements, and its international exchange."[231] The G-20 finance

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[224] JAMES K. JACKSON, CONG. RSCH. SERV., RS21904, THE FINANCIAL ACTION TASK FORCE: AN OVERVIEW 2 (2017), available at https://crsreports.congress.gov/product/pdf/RS/RS21904.

[225] *Id.*

[226] *Id.*

[227] *Id* at 3.

[228] *Id.*

[229] *Id.*

[230] *Id.*

[231] G20 Research Group, *G-20 Leader's Communique: Hangzhou Summit* (Sept. 5, 2016) para. 20, http://www.g20.utoronto.ca/2016/160905-communique.html, (last visited Sept. 11,

ministers and central bank governors, who met in July 2013 and November 2015, echoed prior sentiments and refrains, with both events producing some form of commentary about tackling "the risks raised by opacity of legal persons and legal arrangements."[232]

B. The Ambiguity of the "Purdue-Sackler" Wire Transfers

Properly contextualized, the wire transfers between Purdue and its beneficial owners (the "Purdue-Sackler" wire transfers) fall outside FATF scrutiny for reasons that are logical yet problematic. FATF standards that target the financing of terrorism, for example, recognize the costs associated with planning, training, travel, and buying any materials used to carry out attacks.[233] Accounting for debates about their efficacy, these standards seek to disrupt the financing of such activity in the name of public safety. But these provisions are qualitatively mismatched with features of the Purdue-Sackler wire transfers. Despite their relationship to opioid deaths and other forms of large-scale social disruption, their particular features bear no substantive relationship to "terrorism," whatever disagreements persist about how to define the term.[234]

More complex problems exist within the FATF's definition of money laundering: "the processing of . . . criminal proceeds to disguise their illegal origin."[235] This definition requires that targeted funds have some cognizable relationship to the commission of a known crime. This framework precludes a wider conceptualization of money laundering—one that involves payments routed through offshore jurisdictions and bank accounts to obscure their provenance or ultimate payee. Whether the Purdue-Sackler wire transfers constitute proceeds of crime remains unclear. On July 23, 2007, Purdue pled guilty to "misbranding OxyContin, a prescription opioid pain medication, with the intent to defraud or mislead, a felony under the federal Food, Drug, and Cosmetic Act."[236] But the order accepting the guilty plea is silent on the legal treatment of future Purdue proceeds arising

2020).

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233 FATF, *The Importance of Combating Terrorist Financing,* https://www.fatf-gafi.org/publications/fatfgeneral/documents/terroristfinancing.html (last visited Sept. 11, 2020).

234 *See*, *e.g*., Geoffrey Levitt, *Is "Terrorism" Worth Defining?*, 13 OHIO N. U. L. REV. 97, 109 (1986); Sameera Singh, *Will Acceptance of a Universally Approved Definition of Terrorism Make Article 1 F of the 1951 Refugee Convention More Effective in Excluding Terrorists*, 2 J. MIGRATION & REFUGEE ISSUES 91 (2006); Sami Zeidan, *Desperately Seeking Definition: The International Community's Quest for Identifying the Specter of Terrorism*, 36 CORNELL INT'L L.J. 491 (2004).

235 FATF, *What Is Money Laundering?*, https://www.fatf-gafi.org/faq/moneylaundering/ (last visited Sept. 11, 2020).

236 *United States v. Purdue Frederick Co*., 495 F. Supp. 2d 569 (W.D. Va. 2007) [hereinafter *United States of Am. v. The Purdue Frederick Company, Inc.*]; 21 U.S.C.A. §§ 331(a), 333(a)(2) (2018).

from opioid sales and limits its chronological focus to the period running from "December 12, 1995 . . . to on or about June 30, 2001."[237] This language supports the inference that the $600 million in fines was imposed for conduct carried out during the same period without expressly capturing a corresponding time frame for revenues derived from the underlying crime.

In plea agreements executed in connection with the May 2007 proceedings, the federal prosecutors agreed "there will be no further criminal prosecution or forfeiture action by the United States for any violations of law, occurring before May 10, 2007, pertaining to OxyContin that was the subject matter of the investigation . . . ."[238] The benefits of this undertaking applied to Purdue's beneficial owners and related entities.[239] More recently, the media has reported that Purdue was in talks with the federal government to resolve ongoing civil and criminal probes as recently as September 2019.[240]

C. Confronting the Discordant Interests Among Three Networked Constituencies

To the extent that the "talking shop" approach to transnational rulemaking has been underutilized, it also represents an unexplored opportunity to envision further interpretive changes to FATF standards. The FATF also expresses its institutional priorities in what it chooses *not* to do as a network that places a premium on particular forms of financial surveillance that accord with its mandate. It has yet to set its sights on how

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[237] *United States of Am. v. The Purdue Frederick Company, Inc.* at 571.

[238] Completion of Prosecution, Plea Agreement Between the Purdue Frederick Company, Inc. and the United States, at paragraph 11, *United States of Am. v. The Purdue Frederick Company, Inc.*, 495 F. Supp. 2d 569 (2007): ". . . there will be no further criminal prosecution or forfeiture action by the United States for any violations of law, occurring before May 10, 2007, pertaining to OxyContin that was the subject matter of the investigation by the United States Attorney's Office for the Western District of Virginia and the United States Department of Justice Office of Consumer Litigation that led to this agreement, against the following, or any property owned by any of the following: PURDUE, its current and former directors, officers, employees, co-promoters, Owners (including trustees and trust beneficiaries of such owners), successors and assigns; any of PURDUE'S related and associated entities (as listed on Attachment A); and such related and associated entities' current and former directors, officers, employees, owners (including trustees and trust beneficiaries of such owners), successors and assigns, and trusts for the benefit of the families of the current and former directors of PURDUE, including the trustees and trust beneficiaries of such trusts."

[239] *Id.*

[240] Sara Randazzo, *Purdue Pharma in Talks With Justice Department to Resolve Criminal, Civil Probes*, WSJ.COM (Sept. 6, 2019, 1:50 PM), https://www.wsj.com/articles/purdue-pharma-in-talks-with-justice-department-to-resolve-criminal-civil-probes-11567792243. The scale of these cash transfers is such that they would have required compliance with federal reporting requirements discussed in Part II, making it likely that federal regulators also had notice of these transactions.

certain unexamined features of other networked relationships fetter the fulfillment of its fundamental purpose. The Purdue-Sackler transfers are problematic because of their ties to the opioid crisis and their ostensibly legal nature in relation to U.S. law and FATF standards. Moreover, sub-state actors—such as the governmental opioid plaintiffs—cannot easily lobby for changes to existing FATF practices or their domestic iterations under national law without coordinated support from a federal government whose vague posture vis-a-vis these wire transfers sits uneasily alongside its antipathy toward multilateral engagement. State and local plaintiffs must also contend with powerful defendants—mostly members of the influential pharmaceutical industry whose banking institutions stand ready to provide the kinds of asset protection strategies at issue in this Article. The Purdue-Sackler wire transfers are a consequence of these relationships, which remain outside the reach of the FATF's purview by virtue of the interface between existing rules and the asset-protection strategies currently beyond their reach.

D. Refinements Towards Developing a Public Interest Transaction

Much has been written about the social contract in relation to financial regulation.[241] However construed, its constituent elements must include regulations that facilitate access to accountability from those who contribute to social harms on a large scale. In a globalized context, these elements must also use transnational networks to extend their reach beyond borders in order to keep pace with the modern realities of capital mobility. Given their timing and context, the Purdue-Sackler wire transfers offer a prototypical example of a globalized problem that awaits a globalized solution. With modest changes, the FATF is best suited to regulate such capital flows, given its mandate and infrastructure. As a threshold matter, the FATF should establish a new class of "Public Interest Transaction," (PIT) defined as "any transnational movement of capital that represents earnings directly or indirectly derived from crimes or other practices that cause substantial harm to the public good and in which there is a

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[241] *See, e.g.*, Mehrsa Baradaran, *Banking and the Social Contract*, 89 NOTRE DAME L. REV. 1283, 1342 (2014). *See also* Lev E. Breydo, *Structural Foundations of Financial Stability: What Canada Can Teach America about Building a Better Regulatory System*, 17 U. PA. J. BUS. L. 973, 1002 (2015) ("Because of banks' central importance and unique risks, they 'have long functioned within the terms of an established social contract with the Authorities.' This contract grants 'certain privileges that are unavailable to other firms,' but also imposes uniquely wide-ranging oversight."); Adam J. Levitin, *Safe Banking: Finance and Democracy*, 83 U. CHI. L. REV. 357, 447 (2016) ("The safety and liquidity of deposits are fundamental parts of the modern state's social contract. A state that cannot ensure the safekeeping of its citizens' assets is a failed state, no less than if it allowed barbarian hordes to pillage its citizens' assets."). *But see, e.g.,* ANTHONY DE JASAY, SOCIAL CONTRACT, FREE RIDE: A STUDY OF THE PUBLIC GOODS PROBLEM (1990); DAVID SCHMIDTZ, THE LIMITS OF GOVERNMENT: AN ESSAY ON THE PUBLIC GOODS ARGUMENT (1991); ROBERT SUGDEN, THE ECONOMICS OF RIGHTS, COOPERATION & WELFARE (1986).

governmental plaintiff." This definition consists of five core elements, which can interface with the existing complex of FATF recommendations and underlying technical manuals to produce outcomes that give fuller meaning to the institution's purpose.

1. A Cross-Border Dimension

The PIT framework recognizes a causal relationship between various public harms, its profiteers, and the financial institutions that help move resulting profits offshore. This approach complements the language in FATF Recommendations 24 and 25, which calls for measures to prevent misuses of "legal persons" and "legal arrangements", respectively.[242] The outcomes tied to these recommendations envision degrees of access to information about legal entities and their beneficial owners such that new types of triggering events will mandate important disclosures regulators consider useful in tracking PIT-related capital flows.[243]

2. Standing for Subnational Government

Legislation defining the PIT's construction of "government" should expressly contemplate a role for subnational regulators to institute legal action and enjoy the benefit of coordination with federal regulators such as FinCEN. Such an outlook is in keeping with classical expressions of network theory, as expressed in Part II of this Article.[244] It also reflects the notion that transnational networks need not presumptively exclude state actors at the local or regional levels.[245] This iteration of government also recognizes a particular class of plaintiffs with the standing to advocate for the public interest in the wake of socially-harmful events occurring at more localized levels, such as oil spills, collapsed mines, or chemical spills resulting from derailments.

3. The Perpetual Discoverability and Attachment of Proceeds

FATF member states should legislatively recognize a PIT doctrine that preserves plaintiffs' rights to pursue profits of socially-harmful practices without regard to the timing of regulatory proceedings, be they civil, criminal, or some hybrid of the two. For example, impugned conduct may

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[242] FATF, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation* at 20 (2019) www.fatf-gafi.org/recommendations.html [hereinafter *International Standards on Combating Money Laundering*] (discussing Transparency and Beneficial Ownership of Legal Persons and Arrangements).

[243] FATF, *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of Aml/Cft Systems* at 110, http://www.fatf-gafi.org/media/fatf/documents/methodology/FATF%20Methodology%2022%20Feb%202013.pdf (discussing Immediate Outcome 5).

[244] Slaughter & Zaring, *supra* note 40.

[245] *Id.*

generate proceeds that come to light long after any court proceedings have concluded. The completion of proceedings should not bar plaintiffs from pursuing targeted funds so long as they can establish those moneys were earned from the underlying conduct or otherwise traceable to it—especially if there is evidence of non-compliance with statutory provisions promulgated in compliance with FATF Recommendations 24 and 25.

4. An Emphasis on Principles-Based Approaches to Transactional Scrutiny

Rather than define an exhaustive list of triggering events, legislating a framework around PITs should be rooted in principles-based regulation. This approach to financial regulation is well-established and reinforces the merits of accounting for the limitless scenarios that may warrant government action while still building a sustainable and effective compliance culture among regulees.[246] It is a form of "flexible regulation" that favors a context-dependent paradigm rather than a prescriptive model of rulemaking.[247] One scholar aptly described it as integrating "community norms, individual morality, market forces, market or media pressure, and any other forces that can help strengthen the arm of regulation."[248] In the PIT context, this principle sidesteps complications that arise where otherwise problematic transactions fall outside a fixed set of prohibited activities despite engaging concerns that warrant regulatory intervention.

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[246] *See*, *e.g*., Rachelle Y. Holmes, *Deconstructing the Rules of Corporate Tax*, 25 AKRON TAX J. 1, 2 (2010) (arguing that "a systemic focus and commitment by lawmakers to a more principles-based approach to regulation would significantly mitigate many of the challenges currently encumbering the U.S. tax regime"); Ruth O. Kuras, *Harmonization of Securities Regulation Standards between Canada and the United States*, 81 U. DET. MERCY L. REV. 465 (2004) (comparing the American and Canadian approaches to principles-based regulation); John T. Lynch, *Credit Derivatives: Industry Initiative Supplants Need for Direct Regulatory Intervention—A Model for the Future of U.S. Regulation,* 55 BUFF. L. REV. 1371, 1420 (2008) (describing how the U.K.'s Committee on Capital Markets Regulation (CCMR) called for "domestic coordination and the recognition of the need for greater international regulatory cooperation can best be achieved by the shift to a more harmonized principles-based form of regulation rather than trying to synchronize numerous extensive sets of prescriptive rules"); Harvey L. Pitt, *Bringing Financial Services Regulation into the Twenty-First Century*, 25 YALE J. ON REG. 315 (2008) (arguing in favor of principles-based regulation generally). *See also* Paul D. Paton, *Rethinking the Role of the Auditor: Resolving the Audit/Tax Services Debate*, 32 QUEEN'S L.J. 135 (2006).

[247] Cristie Ford, *Financial Innovation and Flexible Regulation: Destabilizing the Regulatory State*, 18 N.C. BANKING INST. 27 (2013) [hereinafter Ford, *Financial Innovation*].

[248] *Id*. at 29.

E. Reimagining a Different Approach to the Purdue-Sackler Wire Transfers

The Purdue-Sackler wire transfers occurred over a period of time when the rising prospect of litigation stemming from Purdue's role in the opioid crisis created a strong incentive to place assets offshore as a protective strategy. Once the PIT model is embedded into the FATF's existing body of recommendations and member countries' laws, it is worth contemplating their corresponding impact on the regulatory calculus surrounding these transactions. The goal is to imagine a different course of events in how financial institutions behave both in relation to Purdue's assets and reimagined laws in FATF member countries.

Once public health experts began sounding the alarm about opioid deaths from different parts of the United States, local authorities would have started investigating the source of the problem. These efforts would have uncovered information about actors within the drug supply chain, including their legal structures and beneficial owners. The five federal[249] and four state agencies[250] engaged in the investigations preceding Purdue's 2007 guilty plea are evidence that sufficient statutory authority for interagency cooperation exists to support the language in FATF Recommendation 31.[251] The fruits of this cooperation should generate, at a minimum, information outlining the nature of the underlying public interest problem, the actors involved, the structure of their business entities, and a notice of intent to commence legal proceedings. Parties named in these investigations should receive notice of any submissions and be afforded the opportunity to comment.

Pending any further decisions as to the disposition of seized funds, federal regulators should ask entities named in any investigation to disclose beneficial owners, all domestic and offshore entities under their control, and information confirming the names of their respective financial institutions. These disclosures should be reviewed against information from the Internal Revenue Service. The named financial institutions should provide all records generated in the ordinary course of compliance with existing FATF requirements and comparator provisions under American law. The most relevant provisions govern customer due diligence,[252] record keeping,[253]

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[249] These included the Food and Drug Administration, Office of Criminal Investigations; Internal Revenue Service Criminal Investigation; Department of Health and Human Services Office of Inspector General; Department of Labor, Office of Inspector General; and Defense Criminal Investigative Service.

[250] These included the Virginia Attorney General's Medicaid Fraud Control Unit, Virginia State Police, and West Virginia State Police.

[251] *International Standards on Combating Money Laundering*, *supra* note 242, at 23 (discussing Recommendation 31, Powers of Law Enforcement and Investigative Authorities).

[252] *Id.* at 12 (discussing Recommendation 10, Customer Due Diligence); 31 CFR Parts 1010, 1020, 1023, 1024, and 1026; 81 FR 29397.

correspondent banking,[254] and wire transfers.[255] The targeted entity's assets should be subject to a form of asset seizure once originating jurisdictions can establish their connection to a cognizable and sufficiently described harm. Any subsequent filings generated in connection with the cross-border movement of funds deemed to be proceeds of the PIT should require banks to freeze any further outbound capital flows consistent with the U.S. statutory equivalent of FATF Recommendation 4, pending resolution of any outstanding legal claims to such funds.[256] Existing mutual legal assistance commitments with relevant foreign jurisdictions (in accordance with FATF Recommendations 37 and 38) should complement these asset freezes.[257]

The foregoing framework offers two important benefits. First, it prevents beneficial owners from strategically decapitalizing defendant businesses at points in time when their conduct has produced the kinds of harms that engage public interest. Linking this restraint to a principles-based framework that considers "community norms, individual morality, market forces, market or media pressure, and any other forces" engenders a compliance culture that need not be at odds with regulatory certainty.[258] The second advantage revolves around the contours of litigation settlement negotiations, which would shift once a clearer picture of the defendant's assets was known and was within the plaintiff's reach. This would have undoubtedly had an impact on Purdue's fall 2019 offer to pay a $3 billion settlement and relinquish control of its entities, which assumed a qualitatively different meaning once the extent to which their

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[253] *Id*. at 13 (discussing Recommendation 11, Record Keeping).

[254] *Id*. at 14 (discussing Recommendation 13, Correspondent Banking).

[255] *Id*. at 15 (discussing Recommendation 16, Wire Transfers).

[256] *Id*. at 10. (Recommendation 4, Confiscation and Provisional Measures reads: "Countries should adopt measures similar to those set forth in the Vienna Convention, the Palermo Convention, and the Terrorist Financing Convention, including legislative measures, to enable their competent authorities to freeze or seize and confiscate the following, without prejudicing the rights of *bona fide* third parties: (a) property laundered, (b) proceeds from, or instrumentalities used in or intended for use in money laundering or predicate offences, (c) property that is the proceeds of, or used in, or intended or allocated for use in, the financing of terrorism, terrorist acts or terrorist organisations, or (d) property of corresponding value. Confiscation and provisional measures * Such measures should include the authority to: (a) identify, trace and evaluate property that is subject to confiscation; (b) carry out provisional measures, such as freezing and seizing, to prevent any dealing, transfer or disposal of such property; (c) take steps that will prevent or void actions that prejudice the country's ability to freeze or seize or recover property that is subject to confiscation; and (d) take any appropriate investigative measures. Countries should consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction (non-conviction based confiscation), or which require an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law.")

[257] *Id*. at 25-26, Recommendation 37, Mutual Legal Assistance, and Recommendation 38, Mutual Legal Assistance: Freezing and Confiscation.

[258] Ford, *Financial Innovation*, *supra* note 247.

decapitalization strategy came into clearer focus.[259] Both of these advantages reinforce what should be an important element of the social contract—one that gives communities meaningful access to redress mechanisms while encouraging better practices among regulees.

VI. CONCLUSION

The FATF's historical trajectory demonstrates how the "talking shop" framework has the capacity to produce transnational frameworks whose outcomes can find their way into expressions of hard law. Despite pressures to broaden its mandate, the fettering of its power and leaving certain problematic forms of asset mobility unaddressed continues to undermine its mission. Admittedly, PITs are unlike terrorism and entail different formulations of risk and psychological impact that prompt rapid institutional responses.

But there is a vital role for soft law in helping to connect this new concept to existing recommendations and standards to produce an outcome that better represents the FATF's original purpose. Regulators should address demands for covert movements of capital mobility that represent profits traceable to a limitless range of events, including environmental or air disasters, financial crises, the politicized depletion of national treasuries, and general corruption.

As long as governments fail to take action on this front, they will preserve the opportunism that continues to make secrecy jurisdictions attractive options for those who profit from catastrophic events in ways that destroy our social fabric. Properly deployed, "talking shop" can generate the soft law that emerges from transnational networks to generate consensus and offer concrete, domestic solutions in the hope of preventing such destruction.

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[259] Dwyer, *supra* note 217.