REPUTATIONAL REGULATION

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Universities cover up sexual assault. Energy companies pollute rivers. Hospitals commit fraud. All these examples illustrate how the actions of organizations harm society. When these organizations act in ways that offend the public interest, parties seeking to change that behavior traditionally turned to litigation (civil and criminal) to force large organizations to reform, whether by command or consent. For example, following Brown v. Board of Education, *"structural reform litigation" forced large-scale organizations, from school boards to prisons, to change their practices. Similarly, in the wake of recent financial scandals, federal prosecutors have relied on the threat of indictment to pressure large corporations to agree to significant structural reforms. The problem is that these avenues for organizational change are under threat due to concerns about expertise, supervision and enforcement, separation of powers, and procedural barriers.*

This Article addresses this problem by identifying an alternative strategy for organizational reform that relies on the indirect reputational effects of litigation. Under this approach, organizational change does not result from court order or parties' settlement but from the information effects of litigation. Litigation disseminates information about an organization into the public space. This information has reputational consequences for the affected organizations. Voluntary organizational change is a response to that reputational shaming. Critically, these reputational sanctions can accompany all types of litigation and not just those specifically seeking "structural reform" remedies; as a result, "reputational regulation" of organizations can thrive even if structural reform litigation does not.

This Article identifies and explains the operation of four reputational sanctions: financial, policy, regulatory spill-over, *and* barriers to entry. *We are most familiar with the financial sanction where consumers adopt "naming and shaming" boycotts to punish corporations for their behavior, thereby encouraging the latter to change their practices. But reputational sanctions also take the other three forms and can also encourage large organizations to change their practices even when financial sanctions are weak or inoperative. Collectively, these reputational sanctions – operating outside the boundaries of traditional legal and regulatory processes – are employed by both public and private actors and play an increasing role in the decisions that organizations make.*

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INTRODUCTION

Our daily lives are influenced by the conduct of organizations: political committees, professional associations, labor unions, multinational corporations, religious entities, financial institutions, and health-care providers, to name a few. Some of these organizations behave badly and thereby pose unique risks to society: Whole Foods profits from slave labor.[1] Google sells users' data.[2] The NFL hides the effects of head trauma.[3] Wells Fargo creates "fake accounts."[4]

Our traditional recourse against problematic organizations is litigation.[5] Since *Brown v. Board of Education*, litigants used "structural reform" lawsuits to force school boards,[6] prisons,[7] police departments[8] and other organizations to conform their practices to the United States Constitution. But these lawsuits grow increasingly unpopular[9] because of concerns regarding expertise, supervision and enforcement, separation of powers, and procedural barriers.[10]

This Article identifies an alternative strategy that relies on the indirect reputational effects of civil and criminal litigation to encourage organizations to change.[11] Under this approach, organizational change does not result from court order or parties' settlement. Instead, it results from the information effects of litigation: Litigation releases information about organizational conduct into the

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[1] Adam Chandler, *Walmart, Whole Foods, and Slave-Labor Shrimp*, THE ATLANTIC (Dec. 6, 2015).

[2] Mark Hachman, *The price of free: how Apple, Facebook, Microsoft and Google sell you to advertisers*, PCWORLD (Oct. 1, 2015).

[3] Jim Avila et al., *Former NFL Players File Lawsuit Against League on Concussions*, ABC NEWS (June 7, 2012), http://abcnews.go.com/US/nfl-players-file-lawsuit-league-concussions/story?id=16514359.

[4] Matt Egan, *5,300 Wells Fargo Employees Fired over 2 Million Phony Accounts*, CNN MONEY (Sept. 9, 2016), http://money.cnn.com/2016/09/08/investing/wells-fargo-created-phony-accounts-bank-fees/.

[5] Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281,1282–83 (1979); Owen Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

[6] Brandon Garrett, *Structural Reform Prosecution*, 93 VA. LAW REV. 869-70 (2007).

[7] Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805, 848-60 (1990).

[8] Stephen Rushin et al., *Structural Reform Litigation in American Police Departments*, 1343 MINN. L. REV. 1378 - 1396 (2015).

[9] *See* Susan Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 642 (1993(discussing the changes in the "political and judicial climate" reducing prevalence of structural reform litigation); Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477, 484 (2004)("The legitimacy of the court's role in restructuring institutions has come under persistent attack."); Emily Chiang, *Institutional Reform Shaming*, 120 PENN STATE L. REV. 53, 62 (2015) ("Although structural reform is in no danger of disappearing, there is no question that it is more difficult to procure and more dependent upon the discretion and disposition of the judge than in its (short-lived) prime.").

[10] John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121, 1138-40 (1996); David Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability,* 72 MD. L. REV. 1295, 1326 (2013).

[11] *See also* Chiang, *supra* note ___ at 56 (advocating for "institutional reform shaming" which "is the public revelation of a failure to comply with social norms with the intent of generating change").

public domain. This information has reputational consequences for the affected organizations. Voluntary organizational change is a response to that reputational shaming. Reputational sanctions potentially accompany *all* types of litigation and not only those specifically seeking "structural reform" remedies. Consequently, "reputational regulation" can thrive even if structural reform litigation does not.[12]

Consider an example of reputational regulation at work: Over the past few years, the National Football League (NFL) faced a series of lawsuits from injured players who claimed that the NFL knew about the dangers of head injuries but hid those risks to players and failed to mitigate those risks.[13] These lawsuits served an important informational function because many players, fans and parents of future football players claimed that they did not know about the risks of "hard hits" until the lawsuits disseminated that information to the public through pleadings and expert reports.[14] The plaintiffs claimed that the NFL knew about the health risks but lacked incentives to disclose that information to the public. As media, player, and fan attention to head injuries grew, the NFL introduced a series of new protocols on head injuries, culminating in 2016's new $100 million initiative "Play Smart, Play Safe."[15] Under this initiative, the NFL commits to additional medical research *and* dissemination of that research,[16] as well as changes to officiating rules, practice guidelines and training methods, among other improvements.[17]

Reputational effects are not unique to litigation only but also apply to other adjudicative processes, such as agency proceedings, and can similarly lead to organizational change.[18] For example, Wells Fargo angered many of its banking

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[12] *See* J. Lobel, *supra* note___ at 489-90 (explaining the publicity effects of litigation); Chiang, *supra* note __ at 56 (describing potential for litigation to shame organizations into reforming).

[13] *See In re National Football Players' Concussion Injury Litigation*, PLAINTIFFS' MASTER ADMINISTRATIVE LONG-FORM COMPLAINT, MDL No. 2323 (June 7, 2012), ¶ 2 ("The NFL, . . . was aware of the evidence and the risks associated with repetitive traumatic brain injuries virtually at the inception, but deliberately ignored and actively concealed the information from the Plaintiffs and all others who participated in organized football at all levels.").

[14] *See* Avila, *supra* note ___; Josh Kosman, *Youth Football May Never Be the Same Again After This*, N.Y. POST (Mar. 8, 2016), http://nypost.com/2016/03/08/pop-warner-football-settles-concussion-lawsuit/ ("Growing awareness of head injuries prompted some parents to pull their kids from the sport, while participation in team sports is down across the board in general.").

[15] Letter from Commissioner Roger Goodell, *NFL Commitment to Player Health and Safety* (Sept. 14, 2016) [hereinafter "Goodell Letter"], available at https://www.playsmartplaysafe.com/commitment-letter/; *see also* National Football League, Press Release, NFL, NFLPA Announce Policy to Enforce Concussion Protocol (July 25, 2016) ("Furthering their commitment to protecting the health and safety of NFL players, the NFL and NFLPA today announced an agreement to enforce the NFL Game Day Concussion Protocol and discipline clubs that violate it.").

[16] Goodell Letter, *supra* note __,(quoting Roger Goodell: "Our primary interest is in keeping our players and the public informed about these important health issues. As we gain new insights or discover new challenges, we will share them, so you will know them as well.").

[17] *Id.*

[18] *See* Ernest Gellhorn, *Adverse Publicity by Administrative Agencies*, 86 HARV. L. REV. 1380, 1381 (1973)(examining the risks of "adverse agency publicity," which are "affirmative measures taken by an agency which,

customers when they learned in September 2016 that Wells Fargo's employees had "secretly created millions of unauthorized bank and credit card accounts -- without their customers knowing it -- since 2011."[19] The Consumer Financial Protection Board (CFPB) fined Wells Fargo $100 million plus penalties for its sales practices but that figure is only a fraction of the bank's financial loss resulting from its tainted reputation. One study found that Wells Fargo could lose almost $100 billion in deposits and another $4 billion in revenue over the next two years because of the scandal as consumers switch to other banks.[20] This scandal not only affects Wells Fargo's reputation but also the reputation of the broader banking industry that has been attempting to regain public confidence since the financial crisis of 2008.[21] In order to appease consumers and policymakers, other banks are considering changing their practices on recovery of executive compensation in order to satisfy the public demand for accountability.[22]

In these examples, the engine for change is reputation and the fuel for that engine is information. For a number of reasons, organizational actors possess information about their practices that are unknown to anyone else but it is often not in their interest to share it. As in the NFL example, both internal stakeholders (NFL players) and external stakeholders (fans, parents) may be unaware of

by calling public attention to agency action, may adversely affect persons identified in the publicity."); Nathan Cortez, *Adverse Publicity By Administrative Agencies in the Internet Era*, BRIGH. YOUNG UNIV. L. REV. 1371, 1379 (2011)(discussing agency use of adverse publicity to compensate for limited statutory enforcement authority, among other reasons); Tim Wu, *Agency Threats*, 80 DUKE L. J. 1841, 1851 (2011)(defending the use of informational threats by agencies in dynamic industries); *see also* Section V, *infra* (discussing the information effects of complaints filed under the Organization for Economic Cooperation & Development (OECD)).

19 Egan, *supra* note ___.

20 CG42, WELLS FARGO MINI-STUDY 3 (Oct. 2016), http://cg42.com/pdf/cg42-Wells-Fargo-Mini-Study.pdf.

21 Evan Ramstad, *U.S. Bancorp's Richard Davis Says Banks Are Still Fighting for Their Reputation*, STAR TRIB. (Oct. 19, 2016), http://www.startribune.com/u-s-bancorp-profit-continues-steady-march/397576481/.

22 The compensation changes concern the recovery of executive compensation through "clawback" policies that allow issuers to recover compensation from executives under certain conditions. Many companies had already adopted some form of clawback policy prior to the Wells Fargo scandal. Section 304 of the Sarbanes-Oxley Act and Item 402 of Regulation S-K require reporting and clawback provisions for certain executives. *Listing Standards for Recovery of Erroneously Awarded Compensation*, 17 CFR Parts 229, 240, 249 and 274 (proposed July 1, 2015). Additionally, as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, the Securities & Exchange Commission proposed Rule 10D-1 in July, 2015. U.S. Securities and Exchange Commission, PRESS RELEASE, *SEC Proposes Rules Requiring Companies to Adopt Clawback Policies on Executive Compensation* (July 1, 2015). This proposed rule would require national securities exchanges to adopt listing standards that would require issuers to adopt, disclose and comply with clawback policies that must meet certain specified criteria. *Listing Standards for Recovery of Erroneously Awarded Compensation*, *supra* note ___ at 8. Against this backdrop, "Bankers fear not only that the new rules on pay will be tightened as a result of the furor at Wells Fargo but also that boards will go beyond them to avoid a political backlash." Olivia Oran and Ross Kerber, *Wells Fargo's CEO Pay Clawback Puts Wall Street Executives on Notice*, REUTERS (Sept. 28, 2016), http://www.reuters.com/article/us-wells-fargo-accounts-clawbacks-idUSKCN11Y358.

information in an organization's possession. Litigation forces that information into the public.

My analysis incorporates the insight of two rich bodies of scholarship: information analyses of civil litigation and social movements theory. First, as recognized by a growing body of scholarship, the litigation process possesses unique information-forcing functions that benefit litigants,[23] judges,[24] and the broader public.[25] My reputational analysis extends this research by connecting the information flow from litigation to the forms of reputational sanctions it produces and, in turn, the effects of these sanctions on voluntary organizational change. This analysis is relevant even for lawyers who already incorporate reputational effects into their litigation strategies because it is not enough to know that litigation creates reputational sanctions. We need to understand *how* litigation creates reputational sanctions and the mechanics by which these sanctions drive change.[26] In this Article, I explain four distinct reputational sanctions produced by litigation or government investigation: *financial*, *policy, regulatory spill-over*, and *barriers to entry*.

Financial sanctions are the most familiar as we often associate them with "naming and shaming" campaigns and consumer boycotts of companies exposed as polluters, human-rights abusers, cheaters, or liars. Financial sanctions convert information of misdeeds into financial consequences for an organization. *Policy sanctions* result from the lack of legitimacy an organization possesses to offer policy solutions because of its reputation, such as the outcry over tobacco companies participating in health policymaking following revelations of their public relations tactics.[27] The *regulatory spill-over* sanction occurs when one bad

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[23] Andrew Bradt & Theodore Rave, *The Information-Forcing Role of the Judge on Multidistrict Litigation*, 104 CAL. L. REV. ___ (forthcoming 2017) (manuscript at 6) (proposing that judges in multi-district litigation cases (MDL) use their role to force information disclosure enabling parties in MDL cases to reach informed decisions on whether or not to accept proposed settlements); Gillian Hadfield & Dan Ryan, *Democracy, Courts and the Information Order*, 54 EUROPEAN J. OF SOCIOLOGY 67 (2013) ("The power that parties wield when they become the abstract persons 'Plaintiff' and 'Defendant' in civil court, then, is a rather extraordinary capacity to call on the power of the state to enforce obligations to disclose information. Outside of the courtroom and the relationship of Plaintiff and Defendant there is no such power: one who has a grievance against another has only the tools that fall to his or her individual status to obtain information.").

[24] Samuel Issacharoff & Geoffrey Miller, *An Information-Forcing Approach to the Motion to Dismiss*, 5 J. LEGAL ANALYSIS 437, 450 (2013) (proposing limited discovery at motion to dismiss stage).

[25] Roy Shapira, *Reputation Through Litigation: How the Legal System Shapes Behavior By Producing Information*, 91 WASH. L. REV. 1193, 1213 (2016)(discussing second-opinion effects of the courts); Alexandra D. Lahav, *The Role of Litigation in American Democracy*, 65 EMORY L.J. 1657, 1683-90 (2016)(discussing transparency benefits for the public).

[26] Chiang, *supra* note __ at 87 (arguing for improved understanding of how litigation shames organizations even when litigators already employ these strategies in their "playbook").

[27] Thomas Bollyky, *Has a Global Tobacco Treaty Made a Difference?* THE ATLANTIC (Feb. 28, 2015)(explaining how revelations about the tobacco industry's "systematic industry deception" about health effects led to its ostracism as "a global pariah," increased support for an international treaty on tobacco control, and "undermin[ed] the industry's attempts to kill it.").

industry actor compromises the reputation of its industry peers through the former's misdeeds. Consider the example of Volkswagen (VW) and the effects of its cheating scandal for auto manufacturers around the world as other national regulators initiated investigations into the emissions performance of VW *and* its competitors.[28] Finally, reputational sanctions can serve as a *barrier to entry* for new businesses in a market. Incumbent businesses use reputational sanctions strategically to de-legitimize a potential competitor in the public's mind,[29] such as the allegations raised by the taxi industry against Uber[30] or the hotel chains against Airbnb.[31]

Second, reputational regulation is not the first strategy to capitalize on the indirect effects of litigation. The extensive scholarship on social movements illuminates the benefits of litigation for public education, political mobilization, identity formation, resource allocation (primarily from elites), and values validation, among other benefits.[32] All these benefits foster conditions conducive for organizational change.

In contrast, reputational regulation focuses less on the substance and soldiers of the social movements involved and more on the particular institutional vulnerabilities of the organizations at issue. Specifically, reputational sanctions encourage organizational change by bringing an organization to a crisis point where it is denied access to a resource it values (capital, market entry, policy-making role, etc) unless it demonstrates change to those withholding those resources. Reputational regulation can foster organizational change without attaining any of the intermediate benefits that social movements use litigation to achieve; as such, reputational regulation and social movements practice pursue similar organizational reform outcomes but take different routes to that outcome.

My central thesis is intuitive. We expect demonstrations of good behavior by organizations that have lost public favor: change follows scandal. What this

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[28] *See* William Boston, *Volkswagen Emissions Investigations Should Widen to Entire Auto Industry, Officials Say*, WALL ST. J. (Sept. 22, 2015)(reporting that French, British, German, and Italian regulators considering investigating broader auto industry for similar emissions fraud).

[29] Alex Bitektine, *Legitimacy-Based Entry Deterrence in Inter-Population Competition*, 11 CORP. REPUTATION REV. 73, 76 (2008).

[30] Serena Saitto, *Inside Big Taxi's Dirty War With Uber*, BLOOMBERG (Mar. 11, 2015)(explaining how the taxi trade association hired a publicity expert to gather and disseminate unfavorable information about Uber).

[31] Christopher Elliott, *Big Hotels' Plan to Win Customers from Airbnb*, FORTUNE (Jan. 27, 2016)(explaining that the hotel industry is funding research suggesting that "some Airbnb operators are running illegal hotels").

[32] *See, e.g.*, Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 959-62 (2007)(discussing effects of litigation on social mobilization); Joel Handler, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: THEORY OF LAW REFORM AND SOCIAL CHANGE 214 (1978)(explaining how social reform groups used legal proceedings to create unfavorable publicity that will force parties into a settlement); Chiang, *supra* note __ at 59-61 (describing similar strategies); J. Lobel, *supra* note __ at 489 (describing social mobilization effects of publicity); *see generally* Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2011)(discussing the benefits to social movements from losing litigation battles).

Article adds to our collective intuition is a deeper analysis of the mechanisms through which the latter leads to the former, including differentiating between different types of reputational sanctions, understanding the role of litigants and prosecutors, and identifying the information functions of the courts and the media.

Better understanding of these reputational dynamics leads to a number of normative implications for civil and criminal litigation strategy. This analysis reveals the importance of process over outcomes because the release of information through the adjudicative process potentially results in organizational change – change that may be more significant than any remedy or punishment a court could order, if a case even survives that long. This is consistent with beliefs among judges and lawyers that "litigation itself can be a valuable player in the marketplace of ideas and that the publicity gained for causes via litigation may benefit the cause regardless of whether the litigators actually prevail in the courts."[33] The analysis offered here supports this view and reveals additional benefits of process over outcomes. It also reveals that the costs of court secrecy and arbitration to the public interest may be higher than many suspect because these impediments not only obstruct the public notice function but also the effect of reputational incentives and, consequently, the likelihood of responsive organizational change. This Article also explains how shamed organizations may use adjudicative processes for reputation repair by using the litigation stage for public relations purposes. Finally, it also reveals the information effects of other types of legal processes and the potential for reputational regulation of non-governmental organizations (NGOs).

This Article proceeds as follows. Section I discusses three approaches that litigators, courts, and prosecutors have used to encourage organizational change using direct incentives. Section II explains the origins of organizational reputations and emphasizes the importance of information availability to stakeholders. It also explains the various advantages of the courts and the media, individually and collectively, in producing information that stakeholders use to evaluate organizations. Section III discusses four types of reputational sanctions (financial, regulatory spill-over, policy and entry) and provides a case illustration of each. The case illustrations are taken from recent organizational scandals playing out in the headlines and before courts, congressional hearings, and government investigations: Fédération Internationale de Football Association ("FIFA") investigation (*financial*), Wells Fargo fine (*regulatory spill-over*), Uber vs.

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33 Chiang, *supra* note __at 69; *see also* J. Lobel, *supra* note __ at 479 (" [C]ourts not only function as adjudicators of private disputes, or institutions that implement social reforms, but as arenas where political and social movements agitate for, and communicate, their legal and political agenda.").

taxi civil suits (*barrier to entry*), and the responses of the oil and gas industry to climate change policymaking (*policy*).

Section IV discusses potential risks of "reputational regulation," including crowding out public regulation, rise of frivolous litigation (such as in "strike suits"),[34] and unintended consequences of reputational sanctions. Finally, Section V concludes by identifying the implications of "reputational regulation" for litigation objectives, court secrecy measures and alternative dispute resolution and explaining the information effects of agency proceedings and international dispute resolution processes on the behavior of political organizations and international advocacy groups.

I. DIRECT INCENTIVES FOR ORGANIZATIONAL CHANGE: COMMAND AND CONSENT

Following *Brown v. Board of Education*,[35] litigants requested injunctive remedies to change the practices of public organizations; these changes were a product of commands from the courts. In "structural reform litigation," judges became architects of change within large organizations in order to bring these organizations into alignment with Constitutional requirements.[36] Structural reform litigation departed from traditional dispute resolution in significant ways.[37] The focus of structural reform was not upon "particular incidents or transactions" but instead on "a social condition that threatens important constitutional values and the organizational dynamic that creates and perpetuates that condition."[38] The victim in a structural suit is usually a group, not an individual, and the beneficiaries of the structural remedies may include individuals outside the victim group.[39] Finally, the hallmark of structural reform litigation is its remedial focus that aims at institutional change.[40] The primary instrument of this change is the decree, which "seeks to adjust future behavior, not to compensate for past wrong."[41]

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34 James Bohn & Stephen Choi, *Fraud in the New-Issues Market : Empirical Evidence on Securities Class Actions*, 144 U. PA. L. REV. 903, 916 (1996); Janet Alexander, *Do the Merits Matter ? A Study of Settlements in Securities Class Actions*, 43 STANFORD L. REV. 497, 532 (1991).

35 347 U.S. 483 (1954).

36 Paul Gerwitz, *Remedies and Resistance*, 92 YALE L.J. 587, 588 (1983).

37 Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282–83 (1979) (describing traditional litigation as bipolar, retrospective, right-remedy interdependent, self-contained, and party-initiated/party-controlled).

38 Fiss, *supra* note __, at 18.

39 *Id.* at 19–22.

40 *Id.* at 27.

41 Chayes, *supra* note __, at 1298.

In the years following *Brown*, structural reform litigation expanded from desegregation cases to include reform of other organizations of public concern such as mental asylums and prisons.[42] Today, however, structural reform litigation faces a number of criticisms and obstacles, including concerns with procedural barriers,[43] functional competence,[44] supervision and enforcement of structural decrees,[45] separation of powers,[46] and high costs of implementation (especially for poorer municipalities).[47] For these reasons, a number of scholars have claimed we are in the waning years of structural reform litigation.[48]

In recent decades, prosecutors similarly seek to achieve organizational change within business organizations but they use written agreements with the corporation's representatives to induce these changes.[49] In the corporate context, prosecutors enter into deferred prosecution agreements (DPAs) or non-prosecution agreements (NPAs) to obtain organizational cooperation in significant structural reform of corporate entities implicated in wrongdoing from tax violation to money laundering to environmental harm.[50] In a deferral arrangement, prosecutors file charges but agree not to prosecute in exchange for cooperation from the corporation's leadership – cooperation that is outlined in the terms of a DPA.[51] These terms usually relate to internal reform of the organization, cooperation regarding investigations into individual employees, restitution payments, and external monitoring.[52] If prosecutors are satisfied that the corporation abided by the terms of the DPA at the end of the deferral period, they will dismiss the case; otherwise, the prosecutor is able to continue its prosecution of the organization.

For example, in 2005, accounting firm KPMG came under investigation by different government bodies for engaging in tax fraud.[53] After the Department of Justice (DOJ) filed a tax criminal complaint against KPMG, the parties reached

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42 Garrett, *supra* note __, at 857.

43 Myriam Gilles, *An Autopsy of the Structural Reform Injunction: Oops ... It's Still Moving!*, 58 U. MIAMI L. REV. 143, 161 (2003).

44 Yoo, *supra* note 10, at 1138.

45 *Id.* at 1138.

46 *Id.* at 1140.

47 Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1408–16 (2015).

48 Gilles, *supra* note __, at 144–45; Weaver, *supra* note 9.

49 These agreements reflect the Organizational Sentencing Guidelines that created significant incentives for internal structures that monitor for wrongdoing. Garrett, *supra* note __, at 860.

50 Garrett, *supra* note __, at 887.

51 *Id.* at 888–89.

52 Cindy R. Alexander & Mark A. Cohen, *The Evolution of Corporate Criminal Settlements: an Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements*, 52 AM. CRIM. L. REV. 537, 588–90 (2015) (comparing the increased use of governance provisions in DPAs and NPAs compared to plea agreements).

53 Garrett, *supra* note ___, at 862.

an agreement setting forth significant structural change at KPMG: restrictions on its tax practice, implementation of compliance and ethics program, training programs, protection for whistleblowers, among others.[54] In exchange, the DOJ and the IRS ended the criminal prosecution of KPMG as an organization.[55] Similarly, the United States Attorney's Office entered into a deferred prosecution agreement with Bristol-Myers Squibb Company following the former's investigation into the latter's earnings fraud.[56] The agreement between the parties avoided any fines or penalties in favor of significant structural reform including mandating particular disclosures in Bristol-Myers' public filings[57] and governance changes such as splitting the role of chairman of the board of directors and chief executive officer.[58]

Strategically, DPAs offer prosecutors the ability to change corporate culture prospectively "rather than to indict, to prosecute, and to punish."[59] Like structural reform litigation, organizational reform through DPAs also attracted criticism regarding functional competence. Critics argue that structural reform prosecution involves prosecutors in management, compliance, and other organizational decisions that may extend beyond their expertise.[60] Other criticisms include selectivity issues,[61] use of corporate monitors,[62] the inclusion of unrelated provisions,[63] lack of judicial oversight of DPAs and NPAs,[64] broad scope of prosecutorial discretion,[65] and the requirement of privilege waivers until the practice was later discouraged.[66]

II. THE INFORMATION EFFECTS OF THE COURTS

In the examples discussed above, there is a direct and close causal connection between the legal institution and the organizational reform: a judge ordered a

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54 *Id.* at 863–65. According to Brandon Garrett, DOJ was not only able to influence structural reform at KPMG but potentially the broader accounting industry: "Given KPMG's prominence in the industry, any reforms adopted by the Independent Monitor may become established 'best practices' in the industry." *Id.* at 867.

55 *Id.* at 862.

56 Christopher J. Christie & Robert M. Hanna, *A Push Down the Road of Good Corporate Citizenship: The Deferred Prosecution Agreement Between the Good Corporate Citizenship: The Deferred Prosecution Agreement Between the U.S. Attorney for the District of New Jersey and Bristol-Myers Squibb Co.*, 43 AM. CRIM. L. REV. 1043, 1043 (2006).

57 Christie & Hanna, *supra* note __, at 1050.

58 *Id.* at 1052.

59 Spivack & Raman, *supra* note __, at 161.

60 Uhlmann, *supra* note __, at 1324.

61 Uhlmann, *supra* note __, at 1327.

62 Veronica Root, *The Monitor-Client Relationship*, 100 VA. L. REV. 523, 533, 541–43 (2014) (providing examples from Statoil, Total, and InVision, among others).

63 Garrett, *supra* note __, at 917–18; Spivack & Raman, *supra* note __, at 174.

64 Uhlmann, *supra* note __, at 1328–29.

65 Garrett, *supra* note __, at 918–31.

66 Spivack and Raman, *supra* note __, at 180.

particular remedy or a prosecutor threatened to continue its investigation unless corporate management agreed to organizational changes. The continued effectiveness of these approaches is unclear for many of the reasons discussed in Section I, *supra*. Fortunately, these are not the only strategies for encouraging organizational reform. Public and civil actors can encourage similar organizational reform by relying on the reputational sanctions produced by litigation and other adjudicative processes.[67]

Critically, reputational sanctions have an important advantage over structural reform litigation or prosecution because reputational sanctions can accompany *all* types of litigation or adjudicative action and not only those specifically seeking organizational change. As a result, reputational sanctions survive even if structural reform litigation does not.

Here's why: In the structural reform context, the incentives for change are direct. Change results because of lawsuits or prosecutions specifically seeking organizational reform. The organization's leaders undertake specific structural changes because they were ordered to do so by a court or agreed to the changes in order to avoid prosecutorial action, for example. If litigants or prosecutors disfavor these types of structural reform actions (for the reasons listed above), then these types of direct incentives for organizational change decrease.

In contrast, reputational sanctions are indirect effects that can accompany all types of litigation or investigation and not just those seeking organizational change. Reputational sanctions are not mandated by the courts, agreed to by prosecutors, or even requested by the plaintiffs. Instead, reputational sanctions are a by-product of the normal operation of our adjudicative processes. These sanctions can accompany even garden-variety civil suits because they do not rest upon the remedy sought but the reputational impact of the suit.

This section explains the creation and operation of reputational sanctions on organizational behavior. Part A outlines the concept of reputation and how it is produced. Parts B and C describe the role of the courts and the media in correcting information asymmetries so that stakeholders can judge organizational conduct. Finally, Part D explains how reputational sanctions under "reputational regulation" operate differently than those studied by social movements theorists.

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67 *See* Section II (D)(explaining similar reputational strategies examined by social movements theorists and contrasting those strategies with "reputational regulation").

A. Organizational Reputation & the Information Problem

Although definitions of organizational reputation are plentiful and diverse,[68] many scholars studying one type of organization, corporations, agree that corporate reputations result from what many different actors think about it).[69] For example, leading reputational analyst Charles Fombrun defines corporate reputation "as the overall estimation in which a company is held by its constituents. . . . represent[ing] the 'net' affective or emotional reaction – good or bad, weak or strong – of customers, investors, employees, and the general public to the company's name."[70] The "good" or "bad" reputation that a corporation winds up with is "the aggregate of many personal judgments about the company's credibility, reliability, responsibility, and trustworthiness."[71]

Corporate reputation matters to different stakeholders because it helps them "gauge the probable outcomes of interacting with a particular organization."[72] As such, a corporate reputation influences stakeholder decisions on whether that actor will want to associate or exchange with a particular corporation. A corporation's reputation has significant consequences for it including its ability to charge premium prices, recruit and retain employees, enjoy consumer loyalty, lower operating costs, and benefit from a "halo effect" that can help mitigate the risks to a corporation if and when a crisis strikes.[73]

Although a corporate reputation is a product of what various people – employees, investors, consumers, communities – think about that corporation,

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68 Violina P. Rindova *et. al.*, *Being Good or Being Known: An Empirical Examination of the Dimensions, Antecedents, and Consequences of Organizational Reputation*, 48 ACADEMY OF MANAGEMENT J. 1033, 1036 (2005)(collecting definitions of reputation from marketing, sociology, economics and other disciplines).

69 *See, e.g.,* Charles Fombrun, *The Building Blocks of Corporate Reputation in* THE OXFORD HANDBOOK OF CORPORATE REPUTATION 100 (Barnett & Pollock (eds) 2012)("A corporate reputation is a collective assessment of a company's attractiveness to a specific group of stakeholders relative to a reference group of companies with which the company competes for resources."); David L. Deephouse, *Media Reputation as a Strategic Resource: An Integration of Mass Communication and Resource-Based Theories*, 26 J. OF MANAGEMENT 1091, 1093 (2000)(defining reputation as "the evaluation of a firm by its stakeholders in terms of their affect, esteem, and knowledge . . . . A firm's reputation is produced by the interactions of the firm with its stakeholders and by information about the firm and its actions circulated among stakeholders, including specialized information intermediaries."); Yuri Mishina, Emily S. Block, and Michael J. Mannor, *The Path Dependence of Organizational Reputation: How Social Judgment Influences Assessments of Capability & Character*, 33 STRAT. MGMT. J. 459, 459 (2012)("Organizational reputation is defined as the collective, stakeholder group-specific assessment regarding an organization's capability to create value based on its characteristics and qualities."); E. Geoffrey Love & Matthew Kraatz, *Character, conformity, or the bottom line? How and why downsizing affected corporate reputation*, 52 ACAD. MANAG. J. 314, 314 (2009)("Corporate reputation is an important asset (or liability) bestowed upon a firm by external audiences.").

70 Charles J. Fombrun, REPUTATION: REALIZING VALUE FROM THE CORPORATE IMAGE 37 (1996).

71 *Id.* at 72.

72 Mishina et al., *supra* note __ at 460

73 Fombrun, *supra* note __ at 72-80; Deephouse, *supra* note ___ at 1098; Fombrun & Shanley, *supra* note __ at 233; Ronald Sims, T*oward a Better Understanding of Organizational Efforts to Rebuild Reputation following an Ethical Scandal*, 90 J. BUS. ETHICS 453, 455 (2009); Sims, *supra* note __ at 454-455.

these stakeholders often face an information problem that make it difficult to evaluate its behavior or its products. These information problems are not unique to interactions with corporations only but also extend to our dealings with other types of organizations.

The first hurdle we confront is the problem of information asymmetries between an organization and external stakeholders. Recall the example of the NFL. The heart of the class litigation against it was that the NFL knew salient facts concerning the impact of football on player health but withheld, dismissed or misrepresented this information to its players and the public.[74] As an organization, it was in a better position to collect, aggregate, and interpret information regarding brain trauma but it did not have the incentives to share it.[75] The NFL example is not an isolated one. Other organizations similarly possess superior capabilities to acquire information about their operations and similar incentives not to share it.

Even if stakeholders can get access to that information, they confront other issues that impede their ability to use that information in productive ways. One issue is expertise and the capacity to make sense of the information that an individual obtains about an organization. A second issue relates to too much information that can overwhelm a consumer or other stakeholder. These issues do not concern the lack of access to information but, rather, unwillingness or inability to understand it.[76] For example, a variety of consumer protection laws increasingly require companies to disclose information to consumers about their products and services but how often do buyers eager for a home read the fine print on their financing documents before signing? How about a patient in pain who is waiting for medical treatment? These issues do not only concern stakeholder evaluations of a company's products or services but also limit their ability to evaluate its conduct. How many Americans can explain the role of the banking industry in the 2008 financial crisis or the mechanics of a collateralized debt obligation (CDO)? The information is out there but for a variety of reasons – time, inclination, and capability – we do not make use of it.[77]

That is why we often rely on a variety of *information intermediaries* to reveal, disseminate, explain, and analyze information about an organization that we find relevant.[78] Voters rely on their favorite news channels to recommend political

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[74] *See* notes __-___, *supra*, and accompanying text.

[75] *See* notes __-___, *supra*, and accompanying text.

[76] *See, e.g.*, Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 UNIV. PA. LAW REV. 647, 687-705 (2011)(providing an overview of the problems with mandated disclosure in influencing individual behavior, especially in credit and health care contexts).

[77] Paula J. Dalley, *The Use and Misuse of Disclosure as a Regulatory System*, 34 FLORIDA STATE UNIV. LAW REV. 1089, 1114 (2007)(discussing the limitations on the effectiveness of information-based regulation).

[78] *See* Roy Shapira, *A Reputational Theory of Corporate Law*, 26 STANFORD L. & POL'Y REV. 1, 9 (2015)("[R]eputational sanctions in mass markets are largely determined by the interpretations and diffusion of information through intermediaries.").

parties; couples rely on financial advisors to recommend investment companies; consumers rely on professional athletes to recommend automobile brands; and we even rely on celebrities to tell us what social causes are worth caring about. These are all information intermediaries who sift through the universe of available information out there and provide signals to us about the information that is relevant and even the decision that is correct.

The same is true when it comes to information regarding corporations, including their performance, value, and character. Information intermediaries such as government agencies, financial ratings agencies, public interest groups, and consumer agencies "enjoy lots of analytic resources and often have access to better information than ordinary constituents . . . . Their opinions significantly affect the way a company is regarded by its less-informed observers."[79] The following sections discuss the information enhancing effects of two important intermediaries: the media and the courts. Each of these intermediaries supplies stakeholders with both facts and narratives with which stakeholders can evaluate organizational conduct and construct organizational reputation.[80]

B. The Courts as Information Intermediaries

We are accustomed to relying on courts for one type of information – legal norms – that tell us what to do and what happens when we don't.[81] But the information produced from litigation also has significant *factual* value, informing the public what happened, why it happened, and, critically, if it can happen again.[82] At times, we pay more attention to the courts' abilities to determine facts about the world we live in – facts unknown to us or contested by ourselves and others – than the legal outcomes reached. Courts develop a factual record that is relevant to others besides the litigants.

Of course, not all the facts released by the courts are a result of judicial scrutiny. Instead, courts produce factual information for public consumption in the form of pleadings, expert testimony, filed discovery, as well as judicial decisions.[83] Not all these products result from a judge's hand yet the public tends

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[79] Fombrun, *supra* note __ at 60.

[80] Timothy G. Pollock & Violina P. Rindova, *Media legitimation effects in the market for initial public offerings*, 46 ACAD. MANAG. J. 631, 631 (2003).

[81] John O. McGinnis & Steven Wasick, *Law's Algorithm*, 66 FLA. L. REV. 991, 998-1000 (2014)(discussing top-down versus distributed forms of legal ordering).

[82] Shapira, *Reputation Through Litigation, supra* note __ at 1201.

[83] Andrew Goldstein, *Sealing and Revealing: Rethinking the Rules Governing Public Access to Information Generated Through Litigation*, 81 CHI.-KENT L. REV. 375, 402 (2006).

to aggregate all these products under the common sacrosanct umbrella of "the court." That label is important because it accords information associated with that label a special kind of authority. We place special weight on facts shared through a court process because of unique features of the court system that render it a more credible information intermediary compared to alternative sources of the same information.[84] This begs the following question: when courts are one among many types of information intermediaries that can inform us of facts about the world we occupy, what is special about the information produced by the courts that make us more willing to believe it?

First, the courts can inform us of facts that we do not know and may not have any way of knowing but for the courts' information disclosure.[85] The rules of procedure, for example, empower private parties to obtain information they might not otherwise access but through the aid of the judicial power to command information disclosure.[86] As such, courts and the information process generally are credible sources of information because they may be the *exclusive* source of that information.

Second, even when litigation information is also available from other sources, the public often views litigation related information as more credible because of the filtering function of the courts that they believe weed out "fake news." For example, most people believe that legal and ethical rules (and their associated sanctions) reduce the likelihood that parties would lie to a court or that counsel would raise unmeritorious arguments.[87]

Similarly, the information revealed through litigation is evaluated by a trusted class of opinion-givers: judges.[88] When parties file public pleadings designed to persuade, how is a layperson supposed to decide which version of events is more credible? We rely on the adversarial process to test the strength of each side's arguments and the judges to parse the truth from competing sets of compelling narratives. Even if the media broke the story prior to a lawsuit, the release of information incidental to litigation allows stakeholders to re-evaluate their initial assessment based on the check provided by judicial opinions and thereby calibrate their reputational judgments of organizational behavior.[89]

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[84] HANDLER, *supra* note __ at 217.

[85] Lahav, *supra* note __ at 1683-90.

[86] Goldstein, *supra* note __ at 402.

[87] *See,. e.g.*, FED. R. CIV. P. 11 (outlining "good faith" requirements of counsel).

[88] Roy Shapira, *A Reputational Theory of Corporate Law*, 26 STANFORD L. & POL'Y REV. 1, 8-12 (2015).; Bradt & Rave, *supra* note __ at 7 (discussing the unique capabilities of MDL judges that qualify them to act as information intermediaries, including coordinating exchange of information, deciding information-intensive motions, and access to experts).

[89] Shapira, *Reputational Theory of Corporate Law, supra* note __ at 8.

Additionally, stakeholders are more likely to incorporate litigation-related information into reputational judgments because of the type of information litigation conveys. Specifically, stakeholders seem to pay particular attention to information that conveys insight about an organization's character, especially its trustworthiness and reliability;[90] this may be because we fear opportunistic behavior by organizations and look out for information regarding past conduct that can serve as clues to how we may be treated by the same organization. Lawsuits convey that kind of information and reveal corporate misconduct or other negative cues that are more likely to gain notice by stakeholders.[91]

C. The Media as Information Intermediary

Information from the courts does not make its way directly to individual awareness. We are all strapped for time and mental energy and there is a lot of information that comes our way during the course of a day. Most people neglect to read the daily newspaper (or its televised or online version). They are certainly not going to wade through dense, lengthy legal pleadings or judicial opinions. Instead, we learn about legal news as we learn about most other news: someone tells us.

We rely on another class of information intermediaries to inform us of legal developments and explain their significance. The most prevalent information intermediary of legal information is the media because it is free or, at least, significantly less costly than legal counsel, another information intermediary of legal news. Specialized media sources communicate, explain, and frame legal proceedings for audiences who are reluctant to read a pleading or judicial opinion for themselves.[92] As such, litigation related information passes through two levels of intermediaries (litigation intermediary and media intermediary) before it reaches the stakeholder.

Like the courts, the media also possess unique qualities that influence how individuals perceive the information it shares and, consequently, stakeholders'

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90 Love & Kraatz, *supra* note ___ at 316, 330.

91 *Id.* at 962-966.

92 For example, national newspapers, such as the *Wall Street Journal* and *Washington Post* devote sections of their publications to legal developments. Certain journalists devote their careers to only covering the courts, especially the United States Supreme Court. See Linda Greenhouse, N.Y. Times Op-Ed pages, https://www.nytimes.com/column/linda-greenhouse. Television personalities also explain legal developments for their audiences. Even lawyers obtain legal news through trade publication, professional newsletters, and firm bulletins.

views on organizations. Specifically, the media serves an important agenda-setting function whereby "[t]he day to day selection and display of news by journalists focuses the public's attention and influences its perceptions. The specific ability to influence the salience of both topics and their images among the public has come to be called the agenda-setting role of the news media."[93] The media's coverage of an organization and its activities contributes to the public agenda because the "prominence of elements in the news influences the prominence of those elements among the public."[94]

The process of agenda-setting begins with the attention that the media accords a particular organization and its activities or products.[95] Through cues, such as the length of a story or its frequency, the public will decide which organizations' behavior most warrants their attention.[96] But the media does not stop there. It also provides a filter through which the public associates the organization with a set of attributes.[97] This is the affective component of media coverage that relates to tone and feeling about various organizations and influences the perception of organizations: "By calling attention to some matters while ignoring others, the news media influences the criteria by which presidents, government policies, political candidates and corporations are judged."[98]

The agenda-setting function interacts with litigation information disclosure in interesting ways. Although litigation may release initial facts into the public space, those facts may be ignored unless a media intermediary picks up those facts and amplifies it to an audience.[99] Even if we hear the facts, we are not usually very good at processing those facts without a narrative. Legal pleadings create factual narratives but not necessarily the types of narratives that are salient to a lay audience. For example, court documents may reveal that Corporations X and Y have been conspiring to restrain trade in Industry Z in violation of the Sherman Act but such disclosures do not necessarily explain: (a) what is the Sherman Act?, (b) what policy goals does it serve? and (c) how do violations of the Sherman Act, in Industry Z or another, affect me?

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93 Craig E Carroll & Maxwell McCombs, *Agenda-setting Effects of Business News on the Public's Images and Opinions about Major Corporations*, 6 CORP. REPUT. REV. 36, 36 (2003).

94 *Id.* at 37; Pollock & Rindova, *supra* note __ at 632 ("Therefore, in performing its functions of informing, highlighting, and framing, the media presents market participants with information that affects impression formation and the legitimation of firms.").

95 Carroll & McCombs, *supra* note __ at 37.

96 *Id.*

97 *See* Timur Kuran and Cass Sunstein, *Availability Cascades and Risk Regulation*, 51 STANFORD L. REV. 683, 733-736 (1999)(discussing the ways that interest groups feed information to media outlets in order to increase the salience of an issue); Carroll & McCombs, *supra* note __ at 37.

98 Carroll & McCombs, *supra* note __ at 37.

99 J. Lobel, *supra* note __ at 487.

The media actively contributes to the reputation of an organization not just by answering these questions but also through forum-hosting: the media serves as a forum through which different stakeholders exchange and even debate conflicting views of an organization.[100] The media expressly cultivates this forum function by soliciting opinions of an organization's behavior from diverse constituencies, including legal experts who can explain the legal significance of different court developments.[101] In this way, "the media provide a forum where firms and stakeholders debate what constitutes a good firm and which firms have good reputations."[102] The litigation process is also a type of forum that hosts comparable debates but the effect of the exchange is often lost unless a media intermediary shares and explains that exchange to the public.

D. The Process of Influencing Organization Change: From Social Movements to Priming, Pivoting, and Positioning

In contrast to the organizational reform strategies explained in Section I, *supra*, reputational regulation relies on reputational sanctions to incentivize organizations to change.

This is not new. Social movement theorists shared the benefits of litigation publicity for encouraging organizational change by driving the defendant organization to the negotiating table,[103] educating the public on a cause,[104] securing funding and other resources,[105] constructing a social movement's organizational identity (and motivating its members),[106] and challenging the legitimacy of the courts.[107] Both social movements theory and reputational regulation are less "court-centered" than traditional litigation because both approaches use legal processes to achieve extra-legal objectives rather than rely

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100 *Id.*

101 Deephouse, *supra* note __ at 1098 ("They will ask a firm to respond to a stakeholder evaluation or ask a stakeholder to respond to a firm action or statement. One evaluation may lead to a competing or even a supporting evaluation by another source.").

102 *Id.*

103 Chiang, *supra* note __ at 79 ("[S]haming can be used to close gaps between existing doctrine and the desired reform by serving as an added source of pressure for defendants to come to the bargaining table when plaintiffs' purely legal entitlements may not otherwise be sufficient.");.

104 J. Lobel, *supra* note __ at 481-82 (providing examples of how "political movements have used courts to further public debate on important constitutional issues.").

105 HANDLER, *supra* note __ at 216.

106 NeJaime, *supra* note __ at 972-86.

107 NeJaime, *supra* note __ at 1002-11.

on legal processes to achieve the social objectives desired.[108] Both analyses also reveal the productive social benefits of legal processes that, upon initial evaluation, "fail" to produce legal solution to organizational misconduct.[109]

But reputational regulation diverges from social movements theory in the method by which it encourages organizational change. Under reputational regulation, organizational change relies less on the characteristics of the social cause or its proponents and instead focuses on the particular institutional vulnerabilities of the organizations at issue. Specifically, reputational sanctions bring an organization to a crisis point where it is denied access to a resource it values (capital, market entry, policy-making role, etc) unless it demonstrates change to those withholding those resources. The denial of resources and the proof of change are attenuated; the total parties involved may never occupy the same room or even meet. They signal each other through media fora as one set of parties communicates the consequences of poor organizational behavior and another set of parties responds with proof of their redemption.

The contrast between social movements theory and reputational regulation is most clear when we examine how these approaches influence the reforms an organization undertakes. Publicity increases pressure on organizations to change but, by itself, does not determine the types of reforms that the organization adopts; those desiring reform must not only incentivize organizations to change but to change for the better. For example, social movements theorists explained that one advantage of litigation publicity is that it brings the organization to the negotiation table to settle upon organizational reform strategies with other stakeholders.[110] Others explain that litigation publicity mobilizes distinct opposition groups who employ both legal and non-legal strategies to influence the types of organizational reform adopted.

In contrast, reputational regulation influences the way that organizations change by *priming*, *pivoting*, and *positioning*. *Priming* refers to creating conditions for an organization's willingness to undertake institutional change. *Pivoting* occurs when an organization fosters closer ties to one organization while simultaneously cutting its ties to another. *Positioning* describes the institutional constraints an organization confronts when it tries to change its identity to appear more legitimate in public perceptions.

Priming incentivizes an organization to change. For example, litigation discloses information about an organization's attributes and fosters legitimacy crises for the affected organization. These processes serve a priming function by rendering that organization more willing to change. By its very function, priming

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108 HANDLER, *supra* note __ at 192 (describing the use of legal system for "nontraditional" purposes).

109 NeJaime, *supra* note __ at 1002-11.

110 HANDLER, *supra* note __ at 214-15; Chiang, *supra* note ___ at 106-07.

necessitates a subsequent action: we prime in anticipation of some future act. When litigation primes organizations, they are setting up that organization to take some further act by reducing its resistance to change. Priming only affects the susceptibility or willingness of an organization to change; it does not guarantee that the change will be a socially desired one. That is why it is also important to *pivot*.

Pivoting occurs when an organization tries to copy one organization while simultaneously attempting to distinguish itself from another. Although pivoting is voluntary, litigation creates conditions for pivoting. Industry actors often pivot when they confront a legitimacy crisis created or exacerbated by litigation. They distance themselves from organizations further jeopardizing their legitimacy while pivoting towards organizations that could enhance their legitimacy.

Pivoting is a product of isomorphism, which explains why organizations tend to resemble each other in their policies, practices and other operational features.[111] Paul DiMaggio and Walter Powell's classic study of isomorphism explained that organizations adopt particular policies, programs, and techniques of other organizations in order to improve their legitimacy, deal with uncertainty, or satisfy societal expectations.[112] These are all examples of "isomorphic attraction" because their analysis generally describes situations when organizations change to resemble each other.

In contrast, I also identify "isomorphic repulsion," which describes situations when organizations change their practices to differentiate or distance themselves from another organization. This distancing can include creating new identities, adopting new practices, and forging alliances with other actors. The key point is that organizations not only change their practices to look more like some organizations but also to look *less like* others. At times, an isomorphic repulsive force may be stronger than an organization's isomorphic attraction to another organization; therefore, isomorphic repulsion may better predict and explain organizational change in those circumstances. Isomorphic attraction and repulsion can explain the forms of organization change by illustrating why and when an organization will copy another.

Pivoting is important because the organizations towards which a scrutinized organization pivots may have limited ability to influence the organization otherwise. A pivoting organization may borrow institutional practices from the organization it is pivoting towards but may not do so without a legitimacy crisis

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[111] Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, *in* THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 66 (1991); *see also* Meyer & Rowan, *supra* note __, at 340–41.

[112] *Id.*

motivating it. No outside actor could command that organization to incorporate and enforce the non-binding institutional rules of multi-stakeholder initiatives, NGO guidelines, etc. All these organizations lack coercive capability; but what they do possess is legitimacy. When, for instance, an organization's legitimacy is tainted by the reputational effects of litigation, the organization is more likely to pivot towards these non-coercive organizations in order to enhance its own legitimacy.[113]

Positioning is the last step and refers to the institutional constraints created by an identity struggle when an organization tries to distance itself from its old identity and solidify its new one. This is distinguishable from pivoting, which directs organizations to the actors it will borrow institutional practices from. The information produced by media-litigation intermediaries can trigger an identity struggle for an organization if the revealed information presents an image of the organization that differs from the organization's desired public image. This identity struggle plants a firm on a spectrum between two poles representing the identity they desire and the identity they fear; positioning is therefore about the institutional constraints created by this identity struggle. This identity struggle has two consequences for organizational behavior. First, organizations will adopt practices that lead them to resemble the desired identity and less like the feared one. Second, organizations often pursue their desired identity by distinguishing themselves from other organizations that they cast as "the enemy." By labeling other actors as the enemy, organizations change their practices to differentiate themselves from those others so that the public can distinguish between the two.

III. REPUTATIONAL SANCTIONS IN PRACTICE

The information conveyed by both media and legal intermediaries are processed by different stakeholder groups: consumers, investors, communities, employees, etc. It is these stakeholders who translate the information from media and legal intermediaries into reputational consequences for an organization – consequences that incentivize these organizations to change.

This section analyzes four distinct but related reputational incentives for organizational change: *financial*, *regulatory spill-over*, *barriers to entry*, and *policy*. These incentives do not necessarily operate in isolation but often work in combination to encourage organizations to reform. Consequently, the case illustrations below demonstrate multiple, overlapping incentives at work but I organized these illustrations to draw the reader's attention to the operation of one incentive per

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113 *See* Bitektine, *supra* note __ ("[W]hen two organizations are linked through a transaction, partnership or public endorsement, the legitimacy ' flows ' through such a link from the more legitimate to a less legitimate organization..").

case illustration. My reason for highlighting incentives independently is to identify and explain the unique mechanisms of each incentive in order to understand its particular contribution to organizational change.

The case illustrations selected are as follows: Fédération Internationale de Football Association ("FIFA") investigation (financial), Wells Fargo fine (regulatory spill-over), Uber vs. taxi civil suits (barrier to entry), and climate change treaty (policy). I selected the case illustrations based on the following factors: (a) immediacy of events, (b) extent of media coverage for depth of background information, (c) diversity of media sources for comprehensiveness of information, and (d) litigation or governmental investigation or inquiry. Two of the case illustrations concern events that qualified for *Fortune*'s annual list of "Top Five Corporate Scandals" for 2015 and 2016.[114] The other case illustrations may not have commanded significant media attention by themselves but occurred in the shadow of significant political and industry developments over the past two years

In drafting the case illustrations, I consulted a variety of sources including legal complaints and judicial opinions, national and foreign news media reports, government press releases, DOJ filings, industry association press releases, intergovernmental guidelines, company websites, independent study reports, financial studies, and academic articles.

A. Financial Sanctions: "Naming and Shaming"

The most well known reputational consequence for an organization facing bad publicity is a financial penalty, often produced through "naming and shaming" campaigns. Revealed misconduct about an organization translates into a degraded evaluation of that organization by stakeholders who wield financial leverage over it, such as consumers and investors. In consumer markets, reputational consequences harm an organization's bottom line when consumers boycott products. In order to regain consumers, organizations will change their behavior. Investors also communicate their values into capital markets through shareholder proposals advocating organizational changes to address non-

[114] Chris Matthews & Matthew Heimer, *The 5 Biggest Corporate Scandals of 2016*, FORTUNE (Dec. 28, 2016)(listing Wells Fargo scandal at top of list); Chris Matthews & Stephen Gandel, *The 5 Biggest Corporate Scandals of 2015*, FORTUNE (Dec. 27, 2015)(listing FIFA scandal).

financial risks, such as those relating to the environment or human rights.[115] Therefore, financial consequences can compromise access to capital and revenue depending on the stakeholder exercising the leverage. The financial pressure leads organizations to adopt changes in order to appease the concerns of these stakeholders and to keep them as exchange partners.

In the case study below, I explain how financial pressure from corporate sponsors incentivized Fédération Internationale de Football Association ("FIFA") to adopt internal reforms in 2016. I focus on the financial incentives in encouraging this organizational change because FIFA is not new to scandal: the public has been aware of FIFA's problems for a long time but FIFA had not adopted broad internal reform in response to this public exposure – until April 2016. Although it is challenging to draw lines of direct causation, two factors stand out as distinguishing FIFA's most recent corruption scandal from the rest of its tainted history. First, a number of former FIFA officials are under government investigation by US and Swiss authorities.[116] Second, and related, FIFA suffered its worst financial crisis in over 15 years as corporate sponsors threatened to withdraw because of FIFA's tarnished reputation.[117] FIFA's leadership saw internal reform as a way to win sponsors back and attract new ones.[118] As such, I use this case illustration to describe financial incentives in practice but the regulatory incentive (through DOJ investigation) also played a significant role.

1. Fédération Internationale de Football Association ("FIFA")

The multi-billion dollar industry of global soccer is managed by Fédération Internationale de Football Association ("FIFA"), the international governing body for organized soccer, which makes billions of dollars from media and marketing rights and ticket sales to World Cup championships, as well as corporate sponsorships.[119]

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[115] *See, e.g.,* Victoria Harper Ho, *Risk-Related Activism: The Business Case for Monitoring Nonfinancial Risk*, 41 J. CORP. L. 647, 690 (2016) ("During the 2014 proxy season, investors filed 148 climate-related resolutions, a 50% increase over 2013." (citing Andra Vittorio, *Investors Push Energy Companies on Climate Change*, BLOOMBERG BNA (July 10, 2014))); INST'L S'HOLDER SERVS., 2015 UNITED STATES PROXY SEASON REVIEW 2 (2015) ("The number of governance-related shareholder proposals that appeared on ballots in the first half of each respective year has skyrocketed, from 172 in 2014 to 238 in 2015, reflecting a breakout year for proxy access proposals.").

[116] *See* notes __-__, *supra*, and accompanying text.

[117] *See* notes __-__, *supra*, and accompanying text.

[118] *See* notes __-__, *supra*, and accompanying text.

[119] Virginia Harrison, *How FIFA makes its billions*, CNN MONEY (May 27, 2015), http://money.cnn.com/2015/05/27/news/fifa-corruption-profit/.

In May 2015, the United States Attorney's Office for the Eastern District of New York announced charges against several high-ranking officials of FIFA and other soccer organizations, among others, for "racketeering, wire fraud and money laundering conspiracies, among other offenses, in connection with the defendants' participation in a 24-year scheme to enrich themselves through the corruption of international soccer."[120] By December 2015, the United States Department of Justice (DOJ) had charged a total of 41 individuals and organizations as part of its FIFA investigation.[121] According to DOJ's Superseding Indictment, the defendants "conspired with one another to use their positions within the enterprise to engage in schemes involving the solicitation, offer, acceptance, payment, and receipt of undisclosed and illegal payments, bribes, and kickbacks."[122] Through their actions, the DOJ alleged, the "defendants and their co-conspirators corrupted the enterprise by engaging in various criminal activities, including fraud, bribery, and money laundering, in pursuit of personal and commercial gain."[123]

DOJ's criminal investigation created an environment conducive for internal reform within FIFA by fostering a legitimacy crisis for FIFA that grew into a financial crisis.[124] The legitimacy crisis began with information revealed from the investigations about FIFA's misconduct. These revelations were not particularly startling given FIFA's checkered history.[125] However, now this information was being supplied by trusted intermediaries — government agencies — and signaled that those intermediaries were going to do something about that misconduct. As a result, "[t]he governing body's lawyers hope the reforms will show U.S. prosecutors that it is serious about changing its

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[120] Press Release, U.S. Dep't of Justice, Nine FIFA Officials and Five Corporate Executives Indicted for Racketeering Conspiracy and Corruption (May 27, 2015), https://www.justice.gov/opa/pr/nine-fifa-officials-and-five-corporate-executives-indicted-racketeering-conspiracy-and.

[121] Press Release, U.S. Dep't of Justice, Sixteen Additional FIFA Officials Indicted For Racketeering, Conspiracy And Corruption (Dec. 3, 2015)("FIFA and its six continental confederations – including CONCACAF, headquartered in the United States, and CONMEBOL, the confederation headquartered in South America – together with affiliated regional federations, national member associations and sports marketing companies, constitute an enterprise of legal entities associated in fact for purposes of violating the federal racketeering laws."), https://www.justice.gov/usao-edny/pr/sixteen-additional-fifa-officials-indicted-racketeering-conspiracy-and-corruption.

[122] Superseding Indictment ¶ 95, *United States v. Hawit, et al.*, 15-cr-252 (E.D.N.Y. Nov. 25, 2015), Dkt. No. 102, [hereinafter, Superseding Indictment].

[123] *Id.*

[124] FIFA, 2016 FIFA REFORM COMMITTEE REPORT, at 1 (Dec. 2, 2015) ("FIFA is currently going through the worst crisis of its history.").

[125] Much of its recent controversy surrounds FIFA's decisions to award the 2018 and 2022 World Cup tournaments to Russia and Qatar respectively. Rod Norland, *Corruption Claims Cast Cloud on Qatar's World Cup Bid*, N.Y. TIMES (June 9, 2014).

culture."[126] The British newspaper, the Guardian, reported that "Fifa insiders are desperate for the reforms to pass, fearing that US prosecutors could reconsider the governing body's 'victim' status in the continuing prosecutions if they do not."[127]

This public image fueled a financial crisis that compounded the pressure for organizational reform. Corporate sponsors had shamed FIFA in the past for other corruption issues,[128] but this time FIFA suffered a financial deficit exceeding $100 million in 2015 due to withdrawn corporate sponsorships and legal costs associated with the various national investigations.[129] This was the first time that FIFA had run a deficit in 15 years when it was projected to fall short of its four-year revenue target by $550 million.[130]

These revelations regarding financial losses increased the pressure on FIFA's leadership to adopt reforms in order to attract new sponsors after multiple sponsor withdrawals in 2015.[131] In January 2015, Castrol, Continental, and Johnson & Johnson joined Sony and Emirates in withdrawing their support from FIFA, raising concerns that FIFA had become "toxic."[132] Sponsorship further declined following the United States Attorney General's May 2015 announcement of criminal charges against FIFA officials. Visa threatened to withdraw altogether, with Coca-Cola and Adidas also adding pressure for FIFA to address its internal issues.[133] British comedian Jon Oliver added his own

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[126] ESPN, *FIFA members vote to back reforms package at Extraordinary Congress* (Feb. 26, 2016), http://www.espnfc.us/blog/fifa/243/post/2815643/fifa-members-vote-to-back-reforms-package.

[127] Owen Gibson, *Fifa's existence at risk if reforms are rejected, warns Issa Hayatou*, THE GUARDIAN (Feb. 25, 2016).

[128] Barabbi, *FIFA Corruption Reform*, *supra* note __.

[129] Brian Homewood, *FIFA faces $108 million deficit for 2015 -finance overseer*, REUTERS (Feb,. 25, 2016); Press Assoc'n, *Fifa suffers £67m loss after crisis takes its toll on governing body*, THE GUARDIAN (Dec. 2, 2015); Rebecca R. Ruiz, *FIFA's Financial Disclosures Show That Scandal Has Affected Its Bottom Line*, N.Y. TIMES (March 17, 2016)(reporting $62 million in legal fees).

[130] Martyn Ziegler, *Sponsorship exodus leaves Fifa $550m short of revenue target*, THE TIMES (Feb. 26, 2016)(reporting that FIFA has been paying legal fees as high as $10 million a month to prepare itself for the criminal investigations launched by Swiss and US authorities). However, critics argue that these revelations of financial vulnerability only support the victim narrative that FIFA is now constructing around itself in its attempt to recover legitimacy amidst the scandal. Ruiz, *supra* note __.

[131] Ruiz, *supra* note __.

[132] Ben Rumsby, *Fifa loses three key sponsors as Castrol, Continental and Johnson & Johnson sever ties with world governing body*, THE TELEGRAPH (Jan. 22, 2015).

[133] Adam Withnall, *Fifa key sponsors Visa, adidas and Coca-Cola pile on pressure in wake of corruption scandal*, THE INDEPENDENT (May 27, 2015). Coca-Cola took an even more active role months later when it called upon FIFA President Sepp Blatter to resign immediately. Coca-Cola and other corporate sponsors issued their demand the week after Blatter was placed under criminal investigation by Swiss authorities. Malcolm Moore, *Fifa sponsors forced to act with call for Blatter to go*, THE FINANCIAL TIMES (Oct. 4, 2015).

incentive for corporate withdrawal, offering to endorse products of FIFA corporate sponsors that withdrew their support of Blatter.[134]

By the end of 2015, 27 of FIFA's 34 corporate sponsorship slots were unfulfilled: "The corruption scandal has proved so toxic that no new sponsors have joined since the 2014 World Cup."[135] The year ended with Coca-Cola, Adidas, McDonald's, Visa, and AB Inbev sending an open letter to the FIFA Executive Committee demanding significant cultural change to reflect values of "[t]ransparency, accountability, respect for human rights, integrity, leadership and gender equality."[136]

These conditions created an environment where FIFA experienced "the worst crisis of its history" and suffered significant damage to its reputation as a result.[137] FIFA's leadership delivered dire warnings regarding what might occur if the FIFA Congress rejected reform. Acting President of FIFA, Issa Hayatou, warned that FIFA's existence "may be at risk."[138] FIFA's new president, Gianni Infantino, stated that "'[i]t is now or never for Fifa to embrace change and to bring football back to the heart of Fifa.'"[139] FIFA recognized that "in order to restore confidence in FIFA, significant modifications to its institutional structure and operational processes are necessary to prevent corruption, fraud, self-dealing and to make the organization more transparent and accountable."[140]

The financial pressure exerted by the corporate sponsors helped prime FIFA for reform but it was not the only significant factor. The criminal investigations by DOJ and Swiss authorities not only provided information to the public, which resulted in reputational sanctions, but also created a background enforcement threat, which added to their effectiveness.[141] This threat was not only relevant for FIFA officials but also for corporate sponsors who feared that the reputational contamination and risk of investigation might spread to them as

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[134] On May 31, 2015, Jon Oliver, host of HBO's "Last Week Tonight", made the following plea to FIFA's corporate sponsors: "Please make Sepp Blatter go away. I will do anything. Adidas, I will wear one of your ugly shoes. . . . McDonald's, I'll take a bite out of every item on your dollar menu. . . . Budweiser, if you pull your support and help get rid of Blatter, I will put my mouth where my mouth is . . . and I will even drink a Bud Light Lime." *Last Week Tonight* (HBO television broadcast May 31, 2015), https://www.youtube.com/watch?v=qr6ar3xJL_Q. On June 7, following Blatter's resignation announcement, Oliver kept his promises to the sponsors on air. *Last Week Tonight* (HBO television broadcast June 7, 2015), https://www.youtube.com/watch?v=_Csi_BEgL_U.

[135] Press Ass'n, *New sponsors are not committing to Fifa until new president is elected*, THE GUARDIAN (Dec. 4, 2015).

[136] Coca-Cola, Company Statement, *Open Letter to the FIFA Executive Committee* (Dec. 1, 2015), http://www.coca-colacompany.com/open-letter-to-the-fifa-executive-committee.

[137] FIFA, 2016 FIFA REFORM COMMITTEE REPORT, at 1

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *See supra* notes __-__ and accompanying text.

well.[142] As a result, the criminal investigations provided necessary pressure for both organizational reform and stakeholder (sponsor) pressure for reform.

In February 2016, 179 of the 209 members of FIFA's legislative body approved a historic reform package.[143] The reforms included (a) clear separation between "political" and management functions, (b) term limits for the FIFA President, FIFA Council (previously FIFA Executive Committee) members and members of the Audit and Compliance Committee and of the judicial bodies, (c) greater scrutiny and supervision over the election of FIFA Council members, and (d) disclosure of individual compensation by high-ranking FIFA officials.[144] FIFA also amended its governing statute to reflect these reforms.[145]

FIFA portrayed its 2016 reform package as a response to corporate sponsors' concerns regarding its recent reputational crisis and internal organizational issues. In its report, the Reform Committee explicitly stated that it "engaged with the commercial partners of FIFA, in particular, FIFA's primary sponsors, and has carefully listened to their views on the subject of FIFA reform."[146] Originally, Coca-Cola and other sponsors had demanded independent oversight of FIFA, beginning with the reform process.[147] They were promised seats on the Reform Committee but were later relegated to an "advisory board."[148] It was therefore important that FIFA "sell" the reforms as a reflection of sponsors' views, especially when sponsors were denied the participation they initially sought.[149]

Priming FIFA for change is not enough. This was not FIFA's first scandal or promise of change. But the legitimacy and financial crises also created the conditions for FIFA to borrow practices from other organizations that could introduce meaningful structural reform in at least certain operational areas. For example, FIFA pivoted towards the United Nations following the corruption

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142 Ben McLanahan, *Sponsors step up pressure on Fifa over corruption probe*, FIN. TIMES (May 28, 2015)("'Adidas must be careful that its Fifa sponsorship does not become a reputational risk and damage its brand'"); *id.* (explaining that Sony had permitted its long-term $305 million contract to expire in December 2015 and that "Sony officials had previously expressed concerns about the widening allegations and the group's association with Fifa"); Joe Leahy & Mark Odell, *Fifa corruption scandal threatens to engulf Nike as sponsors raise pressure*, FIN. TIMES (MAY 29, 2015); Christopher M. Matthews, Aruna Viswanatha & Joe Flint, *U.S. Considers Role of Banks, Sponsors in Soccer Bribery Probe*, WALL ST. J. (Apr. 17, 2016)(" U.S. authorities' focus now has shifted to the relationships between sports-marketing firms and the companies to whom they sold media and sponsorship rights").

143 FIFA, *FIFA Congress approves landmark reforms* (Feb. 26, 2016), http://www.fifa.com/about-fifa/news/y=2016/m=2/news=fifa-congress-approves-landmark-reforms-2767108.html.

144 *Id.*

145 *Id.*

146 FIFA, 2016 FIFA REFORM COMMITTEE REPORT, at 1.

147 Coca-Cola, *Open Letter*, *supra* note ___.

148 Rob Harris, *FIFA Sponsors Demand 'Independent Oversight' Of Reform Process*, HUFF. POST (Dec. 2, 2015).

149 The Reform Committee consisted of 11 members, 10 of whom were appointed by the FIFA Executive Committee and came from the soccer confederations under the FIFA umbrella. FIFA, 2016 FIFA REFORM COMMITTEE REPORT, at 1.

scandals of 2015.[150] It requested that the former United Nations Special Representative on Business & Human Rights, John Ruggie, recommend strategies for how FIFA could embed better human rights norms throughout its operation.[151] It also requested technical assistance from the United Nations Office of the High Commissioner for Human Rights.[152] FIFA may not have pivoted towards the United Nations on its own; instead, the criminal investigations primed FIFA to pivot by creating a legitimacy crisis where FIFA would want to foster ties to organizations with greater legitimacy (United Nations) and cut ties with actors further jeopardizing its legitimacy (defendants in DOJ investigation).

By pivoting toward the United Nations to enhance its own legitimacy, FIFA set itself up to borrow practices from that organization.[153] Outside actors have limited ability to command FIFA to abide by United Nations' human rights practices; however, the reputational consequences following the DOJ investigation created the conditions for pivoting that led FIFA to a similar outcome.

B. Regulatory Sanctions vis-a-vis the Spill-Over Effect: The Tragedy of the Reputational Commons

Information disclosure from media, courts, and prosecutors do not only impact the organization making headlines or the one named in the complaint. Instead, this information can also have significant negative consequences for the broader industry because of spill-over effects. Consider the examples (and your reactions) to the following: BP, Volkswagen, Enron, etc. Our instinctual reaction to these names and the industries they represent illustrate how an organization's reputation is interconnected with the reputation of its industry peers. As a result, "[r]eputations are 'intangible commons' because organizations share both the penalties and rewards associated with the reputation of their industry."[154]

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150 *See* notes ___-___ and accompanying text.

151 Press Release, FIFA, Report by Harvard Expert Professor Ruggie to Support Development of FIFA's Human Rights Policies (Apr. 14, 2016), http://www.fifa.com/governance/news/y=2016/m=4/news=report-by-harvard-expert-professor-ruggie-to-support-development-of-fi-2781111.html.

152 *Id.*

153 *Id.*

154 Lori Qingyuan Yue & Paul Ingram, *Industry Self-Regulation as a Solution to the Reputation Commons Problem*, *in* THE OXFORD HANDBOOK OF CORPORATE REPUTATION 279 (Barnett & Pollock (eds.) 2012); Michael L Barnett & Andrew J Hoffman, *Beyond Corporate Reputation: Managing Reputational Interdependence*, 11 CORP. REPUT. REV. 1, 2 (2008).

The risk of reputational spillover is most acute when organizations are homogenous because their similarities inhibit the ability of stakeholders to differentiate one actor from the rest of the industry.[155] The act of any individual firm is more likely to be judged characteristic of the potential of all such firms."[156] As a consequence, revelations of misconduct by one industry actor can place the entire industry under scrutiny by stakeholders because these stakeholders are now on notice of particular risks.[157] Organizational scholars have observed reputational spillover effects in industries as diverse as oil and gas, diamonds, apparel, chemicals, and cinema.[158]

Spill-over effects can cause both financial and regulatory consequences for industry peers – and not all these consequences are bad. The spill-over effect can have positive consequences on industry peers because the homogeneity between the shamed firm and its industry peers increases substitution possibilities between the two for consumers or investors: one firm's loss is another firm's gain.[159] For example, consumers angered by Apple's human rights practices can purchase a Samsung phone instead. Here, perceived homogeneity between firms is a financial advantage for other peers in the same industry, although that same perception is a disadvantage for the shamed firm that loses out to substitution.

Spill-over effects can also give rise to regulatory consequences for industry peers. The same perceived homogeneity that increases the likelihood of positive financial spillover effects (substitution) also increases the likelihood of regulatory spillover effects as government actors, usually in response to public outrage, broaden the scope of their inquiry to encompass the entire industry as opposed to just focusing on the conduct of an individual organization. In this climate, organizations may use new institutional initiatives or organizational changes to manage their public perception and regulatory risk.[160]

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155 Michael L. Barnett, *Finding a working balance between competitive and communal strategies*, 43 J. MANAG. STUD. 1753, 1763 (2006)("[T]he more numerous, distant, and heterogeneous are the members of an organizational field, the less intense is any reputation commons problem likely to be.").

156 *Id.*; Michael L Barnett & Andrew King, *Good fences make good neighbours: A longitudinal analysis of an industry self-regulatory institutions*, 51 ACAD. MANAG. J. 1150, 1152 (2008) ("If observers can judge the actions of a firm independently of the actions of its rivals, no commons exists, but when one firm's actions influence the judgments observers make of another firm or an industry as a whole, a commons arises. This reputation commons intertwines the fates of firms in an industry because all firms suffer when any firm engages in actions that damage the industry's shared reputation."); Sheila Goins & Thomas S Gruca, *Understanding Competitive and Contagion Effects of Layoff Announcements*, 11 CORP. REPUT. REV. 12, 30 (2007); Yue & Ingram, *supra* note __, at 280.; Barnett & King, *supra* note __, at 1152.

157 Yue & Ingram, *supra* note __, at 280.

158 *Id.* at 281.

159 *See* Sheila Goins & Thomas S Gruca, *Understanding Competitive and Contagion Effects of Layoff Announcements*, 11 CORP. REPUT. REV. 16-17, 29 (2007)(explaining the competitive effects of information on rival firms).

160 *See, e.g.*, John W. Maxwell et al., *Self-Regulation and Social Welfare: The Political Economy of Corporate Environmentalism*, 43 J.L. & ECON. 583, 613 (2000) (concluding that corporations are more likely to engage in voluntary self-regulation as political pressure and the threat of formal regulation increases).

In the following case illustration, I discuss the consumer fraud scandal of Wells Fargo. This case illustration demonstrates the interaction of two incentives: financial and regulatory. Although the story begins by demonstrating the financial consequences of reputational sanctions, I use the case illustration to discuss the reputational spill-over effect of the Wells Fargo scandal on its banking peers and effect of regulatory risk. I focus on the regulatory spill-over effects instead of the financial spill-over effects because I believe the former better explains the organizational changes witnessed within the banking sector. Below, I highlight how (a) the scandal and spill-over effects contributed to a heightened regulatory climate for the banking sector regarding executive compensation, and (b) certain actors within this sector considered pro-active organizational changes regarding executive compensation in order to address this regulatory risk.

1. The Wells Fargo Sham Account Scandal

Wells Fargo emerged from the 2008 financial crisis with its reputation relatively intact compared to other major banks.[161] That status changed rapidly in September 2016 when the Consumer Financial Protection Board (CFPB) fined Wells Fargo $100 million (plus $85 million in additional penalties) for engaging in aggressive sales tactics where employees created up to 2 million fake accounts in order to meet internal sales quotas.[162]

At first glance, the Wells Fargo's fate looks like a perfect example of the financial harm than can result from reputational consequences, similar to the examples discussed above in Section III(A), *supra.*: government enforcement action causes reputational harm to organization that changes the terms with which stakeholders, such as investors and consumers, are willing to exchange with the affected organization.

The September fine against Wells Fargo was the largest fine that the CFPB had ever imposed.[163] But despite its size, the fine represents a small fraction of the financial fallout that Wells Fargo suffered as a result of the scandal, which is consistent with empirical research indicating that "reputational losses for

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[161] Emily Glazer, *Wells Fargo CEO John Stumpf Steps Down*, WALL ST. J. (Oct. 12, 2016).

[162] Press Release, Consumer Financial Protection Bureau, CONSUMER FINANCIAL PROTECTION BUREAU FINES WELLS FARGO $100 MILLION FOR WIDESPREAD ILLEGAL PRACTICE OF SECRETLY OPENING UNAUTHORIZED ACCOUNTS (Sept. 8, 2016)(" Spurred by sales targets and compensation incentives, employees boosted sales figures by covertly opening accounts and funding them by transferring funds from consumers' authorized accounts without their knowledge or consent, often racking up fees or other charges").

[163] *Id.*

financial misconduct exceed the explicit penalties imposed by either public or private enforcement agents."[164]

The fine created secondary reputational consequences that levied another wave of financial consequences for Wells Fargo.[165] For example, within a month after the fine was imposed, Wells Fargo's stock price plummeted to a 2.5 year low, declining 10% since it was fined by the CFPB.[166] A study conducted in October 2016 by management consulting firm cg42 predicted, "Wells Fargo will lose $99 [billion] in deposits and $4 [billion] in revenue over the next 12-18 months as a direct result of the scandal."[167] The study's authors attributed this financial loss to consumers' desire to switch banks with the study finding that 30% of those surveyed reported they are considering alternatives and another 14% already resolved to switch because of the scandal.[168] Some states, such as California, Illinois, and Ohio, also pulled their business from Wells Fargo because, as Governor John Kasich of Ohio explained on Twitter, "Wells Fargo has lost the right to do business with the State of Ohio because its actions have cost it the public's confidence."[169] As expected, we also see the financial spill-over effects for the industry with consumers switching business from Wells Fargo to its peers.[170]

But the Wells Fargo scandal not only exemplifies the financial repercussions for the shamed firm or the financial spill-over effects for its peers. It also

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[164] Jonathan Karpoff, *Does Reputation Work to Discipline Corporate Misconduct?* i*n* THE OXFORD HANDBOOK OF CORPORATE REPUTATION 362 (Barnett & Pollock (eds) 2012). Companies often experience market sanctions that exceed government penalties when the conduct concerns consumer fraud. *See* Karpoff, J, M,, and J, R, Lott, Jr, '*The Reputational Penalty Firms Bear from Committing Criminal Fraud*, 36 JOURNAL OF LAW AND ECONOMICS, 757, 758 (1993)("[W]e present evidence that the reputational cost of corporate fraud is large and constitutes most of the cost incurred by firms accused or convicted of fraud."); *see also* Jonathan M, Karpoff, D, Scott Lee, and Gerald S, Martin, *The Cost to Firms of Cooking the Books*, 43 J. FIN. & QUANTITATIVE ANALYSIS 581, 582 (2008)(in cases involving financial misrepresentation, "[t]he reputation loss exceeds the legal penalty by over 7.5 times, and it exceeds the amount by which firm value was artificially inflated by more than 2.5 times.").

[165] In another example, proxy advisory firm Institutional Shareholder Services recommended in April 2017 that shareholders of Wells Fargo vote against 12 of the 15 members of Wells Fargo's board. Emily Glazer, *Proxy Advisory Firm ISS Suggests Wells Fargo Shareholders Vote Against 12 of 15 Directors*, WALL ST. J. (Apr. 7, 2017).

[166] Matt Egan, *Wells Fargo stock sinks to 2-1/2 year low*, CNN Money (Sept. 26, 2016) ("Wall Street is worried that the scandal is causing reputational and financial harm to Wells Fargo.")

[167] Cg42, WELLS FARGO MINI-STUDY 3 (October 2016), *available at* http://cg42.com/pdf/cg42-Wells-Fargo-Mini-Study.pdf.

[168] *Id.*; *see also* Michael Corkery, *Wells Fargo Says Customers Shied Away After Scandal*, N.Y. TIMES (Oct. 14, 2016).

[169] Governor John Kasich Press Release, *available at* https://twitter.com/JohnKasich/status/786990903198093312/photo/1?ref_src=twsrc%5Etfw.

[170] Cg42, WELLS FARGO MINI-STUDY 8 (October 2016), *available at* http://cg42.com/pdf/cg42-Wells-Fargo-Mini-Study.pdf. Although Chase and Bank of America stand to gain the most from switching, other national banks, such as US Bank, TD Bank, and SunTrust, among others, will also gain deposits and revenue from switching. *Id.* These findings are also consistent with a JD Power study that found that when consumers switch banks, they usually switch to another large bank. Christina Rexrode & Emily Glazer, *Wall Street's Campaign Season: Dodging a Bullet, Running into Wells Fargo*, WALL ST. J. (Nov. 3, 2016).

illustrates regulatory spill-over effects for the broader financial industry. For example, the Office of the Comptroller of the Currency (OCC) sent formal letters to large and regional banks, such as Citigroup, Bank of America and JP Morgan Chase, requiring information about sales practices and incentive-compensation structures.[171] The scandal and banking regulation emerged as a campaign issue in the 2016 presidential election.[172]

The scandal also shone a spotlight on those regulating the banks.[173] For example, the House Financial Services Committee questioned Janet Yellen, Chairwoman of the Federal Reserve, about potential systemic risk.[174] One theme that emerged from the hearing was the need for accountability from actors at the very top of these banks.[175] In response, Chairwoman Yellen explained that banking agencies were responding by analyzing one aspect of banking culture: executive compensation.[176]

In the wake of the 2008 financial crisis, large US banks introduced or strengthened clawback policies in order to increase the accountability of executives for risk-taking.[177] The rules differ among banks but they usually authorize banks to re-take stock awards or compensation for misconduct, such as taking improper risks or poor performance, or to punish executives if a bank needs to significantly restate results.[178] For example, Wells Fargo's specific clawback provision allows the bank to recover compensation when "misconduct" by an executive officer "'contributes to the company having to restate all or a significant portion of its financial statements"' or "'incentive compensation was based on materially inaccurate financial information, whether

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171 Emily Glazer & Christina Rexrode, *Big U.S. Retail Bank Operations Under Scrutiny After Wells Scandal*, WALL ST. J. (Oct. 25, 2016).

172 *Id.*

173 Yuka Hayashi, *Wells Fargo Isn't the Only Bank That Draws Cross-Selling Complaints*, WALL ST. J. (Sept. 28, 2016)("Analysts say the problems at Wells Fargo put pressure on government agencies to more closely regulate the cross-selling of products and incentive compensation tied to tough sales goals."); *see also* Sharon Gilad & Tamar Yogev, *How Reputation Regulates Regulators: Illustrations from the Regulation of Retail Finance*, i*n* THE OXFORD HANDBOOK OF CORPORATE REPUTATION 321 (Barnett & Pollock (eds) 2012)(discussing the reputations of regulators); Shu-yi Oei & Diane Ring, *The Law of the Leak* (unpublished manuscript), at 37-40 (describing the risk of sub-optimal tax policymaking when leaked tax information increases pressure on tax authorities to respond).

174 Victoria Finkle, *House Panel Questions Fed Chief on Wells Fargo Scandal*, N.Y. TIMES (Sept. 28, 2016).

175 *Id.* (quoting Representative Keith Ellison, D-Minn.: """How can line-level workers be held accountable to the degree that they clearly have been, and yet nobody in the upper level of management seems to be taking responsibility for it?"').

176 *Id.*

177 Olivia Oran and Ross Kerber, *Wells Fargo's CEO pay clawback puts Wall Street executives on notice*, REUTERS (Sept. 28, 2016).

178 *Id.*

or not the executive was responsible.'"[179] Wells Fargo's board utilized the clawback provision and Stumpf gave back $41 million, making him the "the first CEO of a major U.S. bank to actually have to give back significant pay or benefits as the result of a scandal."[180]

The use of claw-back policies may not stop with Stumpf and Wells Fargo. The Wells Fargo crisis potentially primed other banks to use their own clawback policies in order to proactively distinguish their consumer practices from those of Wells Fargo, thereby illustrating isomorphic repulsion as they try to pivot away from Wells Fargo.[181] One commentator explained that Wells Fargo made a misstep by only taking action on the clawback provision after the scandal was out of control and that the boards of other banks may "learn from this mistake."[182] Consequently, the Wells Fargo scandal not only poses risk of regulatory reaction but also *pre-emptive* self-regulatory action.[183]

These organizational changes are responsive to at least two factors: industry mistrust and regulatory risk. First, a Gallup poll in August 2016 showed that only 38% of Americans view the banking industry positively – and that was before news of the Wells Fargo scandal broke.[184] According to Bancorp Chief Executive Richard Davis, the banking industry is still attempting to rebuild its reputation

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[179] Kevin Wack, *Wells Fargo Scandal Will Rewrite the Book on Clawing Back Pay*, AMERICAN BANKER (Sep. 19, 2016)(quoting Wells Fargo's 2016 proxy statement), www.americanbanker.com/news/consumer-finance/wells-fargo-scandal-will-rewrite-the-book-on-clawing-back-pay-1091373-1

[180] INDEPENDENT DIRECTORS OF THE BOARD OF WELLS FARGO & COMPANY SALES PRACTICE INVESTIGATION REPORT 10 (April 10, 2017)(explaining that the Wells Fargo Board determined in April 2017 to clawback an additional $28 million of Stumpf's incentive compensation), https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/presentations/2017/board-report.pdf?https://www.wellsfargo.com/assets/pdf/about/investor-relations/presentations/2017/board-report.pdf. The board "has imposed forfeitures, clawbacks and compensation adjustments on senior leaders totaling more than $180 million." *Id.* A few years earlier, JP Morgan Chase imposed pay clawbacks on traders and executives involved in the London Whale trading scandal. Otherwise, clawbacks have been sporadic on Wall Street in recent history but that may change in light of the recent scandal. *Id.*

[181] Ramstad, *supra* note __ (quoting US Banncorp CEO Richard Davis: "'I don't even know what the cross-sell is at this bank. Honest to God, I've never ever looked at that number,'"); Emily Glazer & Christina Rexrode, *Big U.S. Retail Bank Operations Under Scrutiny After Wells Scandal*, WALL ST. J. (Oct. 25, 2016) (describing media explanations provided by senior executives at JP Morgan Chase and Citigroup regarding their own sales practices and how these practices differed from Wells Fargo). *But see* Hayashi, *supra* note __ (" Problematic sales practices at banks may extend beyond the abuses revealed in this month's $185 million enforcement action against Wells Fargo & Co., according to a new analysis of customer complaints maintained by the U.S. government."); Rachel Louise Ensign, *What the Wells Fargo Cross-Selling Mess Means for Banks*, WALL ST. J. (Sept. 15, 2016).

[182] Oran & Kerber, *supra* note __; *see also* Emily Glazer, *Wells Fargo Claws Back $75 Million More From John Stumpf and Former Retail Bank Head*, WALL ST. J. (Apr. 10, 2017)(explaining how the investigation by the board of Wells Fargo into its sales practices "not only rocked the country's third-largest bank by assets but also the broader banking industry, with dozens of firms examining their own sales practices at the behest of regulators").

[183] Oran & Kerber, *supra* note __. However, several months later, the regulatory risk may have abated because of the de-regulatory stance advanced under the Trump Administration. Jen Wieczner, *Why Yahoo CEO Marissa Mayer's $141 Million Payday Is Safe From the Hack Cover-Up*, FORTUNE (Jan, 24, 2017).

[184] Christina Rexrode & Emily Glazer, *Wall Street's Campaign Season: Dodging a Bullet, Running into Wells Fargo*, WALL ST. J. (Nov. 3, 2016).

following the financial crisis.[185] The Wells Fargo scandal jeopardizes this redemption because customers can better understand what the banks did wrong.[186] The average layperson may not understand how a collateralized debt obligation (CDO) works or its role in the 2008 financial crisis but they do understand the simple act of lying.[187] In the words of an executive at Citigroup, "'Any event that causes people to question the motives of any bank is bad for every bank."[188] Recovery of executive compensation could signal to a mistrustful public that the banking industry is willing to accept accountability.

Second, the Wells Fargo scandal unfolded at a time when the Securities & Exchange Commission (SEC) had proposed a new rule on clawback practices.[189] The Sarbanes-Oxley Act (SOA) had already required CEOs and CFOs to return compensation under certain conditions.[190] However, as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, the SEC proposed Rule 10D-1 in July 2015 that goes further than the requirements of SOA because it requires specific action, applies to a broader swath of actors, affects a greater amount of compensation, and does not require misconduct to trigger the policy.[191] When the scandal broke, industry actors feared that the Wells Fargo scandal may lead to stricter rules and concrete requirements along with a faster timeline to complete the regulations.[192] Additionally, the reputational harm caused by the Wells Fargo scandal also potentially jeopardized the industry's lobbying efforts because the scandal affected the credibility of the industry's position in the prelude to new regulation.

C. Sanctions Based on Barriers to Entry

In Section III.B, *supra*, organizational change resulted from enhanced regulatory risk as a result of the spill-over effect, where information regarding one bad actor taints the collective reputation of an industry. However, regulatory risk can also arise from heterogeneity as opposed to homogeneity. In this

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185 Evan Ramstad, *U.S. Bancorp's Richard Davis says banks are still fighting for their reputation*, STAR TRIB. (Oct. 19, 2016).

186 *Id.*

187 *Id.*

188 Rexrode & Glazer, *supra* note __.

189 U.S. Securities and Exchange Commission, PRESS RELEASE, *SEC Proposes Rules Requiring Companies to Adopt Clawback Policies on Executive Compensation* (July 1, 2015).

190 *Listing Standards for Recovery of Erroneously Awarded Compensation*, 17 CFR Parts 229, 240, 249 and 274 (proposed July 1, 2015), at 7.

191 Covington & Burling LLP, Legal Advisory, *SEC Proposes Rules on Clawback Policies* 7 (July 6, 2015).

192 Oran & Kerber, *supra* note __.

situation, incumbent organizations intentionally manipulate social norms to discourage the entry or subsequent performance of new entrants.[193] For this strategy to succeed, the incumbent attackers need to be sufficiently different from their targets, however, or the de-legitimizing strategies can backfire and cast a shadow over both the incumbent and the new entrant.[194] Heterogeneity is therefore a precondition for these forms of intentional deterrent strategies.

Incumbent organizations manipulate social norms to de-legitimize their competitors and legitimize their own organizations in the eyes of stakeholders, such as consumers. These maneuvers characterize the strategic use of legitimacy. In these battles between incumbent firms and new entrants, the battle over legitimacy concerns the organizational form of the different market players. Incumbent organizations in a market seek to discourage entry by new competitors who are organizationally distinct from themselves by delegitimizing these organizations' alternative organizational forms. These de-legitimizing strategies can have serious consequences for the new entrant, creating enhanced regulatory risk, increased financial costs, and changing consumer preferences.[195]

In the case illustration below, I explain how incumbent actors in an industry (taxi companies) use information from lawsuits and government action to de-legitimize the way that Uber does business, thereby challenging the latter's ability to compete. Legal institutions can create barriers to entry in two ways. First, laws can simply ban certain actors from operating unless these actors meet certain regulatory requirements. However, Uber entered new markets and operated illegally, amassing public support to resist attempts to shut down its operations.[196] But even if regulations change, rivals can use information disclosure from litigation to erect barriers to entry based on legitimacy by discrediting an entrant's (Uber) operations. Specifically, rivals can use the fact of lawsuits and government proceedings to ruin the reputation of an entrant's organizational form and scare customers away. The following case illustration demonstrates how legal institutions create reputational sanctions that can serve as barriers to entry. Unlike the other case illustrations, it does not demonstrate organizational change and therefore does not include the analysis of priming, pivoting, and positioning present in the other case illustrations.

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193 Bitektine, *supra* note __ at 84.

194 *Id.* at 84, 87.

195 *Id.* at 80 (strategic deterrence "may provoke regulatory action against the new entrant or put the targeted organization into a situation of legitimacy crisis, which may lead to organization's isolation from important social networks and constrain its access to critical resources.").

196 Marcus Wohlsen, *Uber's Brilliant Strategy to Make Itself Too Big to Ban*, WIRED (July 8, 2014).

1. The Information Wars between Uber and the Taxicab, Limousine & Paratransit Association

Uber is a ride-sharing company that challenged the traditional model of commercial transportation offered by taxi companies in the United States and abroad. Riders request an Uber ride through a phone app that provides the rider with information about available drivers nearby, pricing, wait time, and vehicle details.[197]

Although riders embraced the Uber model of transportation, the incumbent transportation service providers challenged the entry of these new market players. The thrust of this challenge was led by an industry association representing these incumbent firms: the Taxicab, Limousine & Paratransit Association (TLPA). Uber's business model is different from ordinary taxi companies so the members of the TLPA sought to de-legitimize some of those differences using legal institutions.

Uber's industry opponents used two strategies to re-shape norms in a way that de-legitimized Uber in the eyes of stakeholders, especially potential customers. The first strategy consisted of shaping legal norms to restrict or eliminate Uber's business.[198] This usually took the form of opposing local regulations that would authorize Uber's operations in new markets.[199] Uber's competitors also lobbied for increased regulatory requirements for Uber and other ride-sharing services.[200]

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[197] *How Uber Works*, UBER, *https://www.uber.com/ride/how-uber-works/* (last visited Jan. 24, 2017).

[198] Marlize van Romburgh, *Meet the International Player Powering Big Taxi's Fight against Uber*, BIZJOURNAL (Mar. 16, 2015), http://www.bizjournals.com/sanfrancisco/blog/techflash/2015/03/uber-regulations-taxi-industry-veolia-war-transdev.html (quoting Corey Owens, Uber's head of global public policy: ""The way that they protect their business is by trying to use laws to keep out competitors, rather than improving the rider and driver experiences."').

[199] Larry Downes, *Lessons From Uber: Why Innovation And Regulation Don't Mix*, FORBES (Feb. 6, 2013).

[200] Serena Saitto, *Inside Big Taxi's Dirty War With Uber*, BLOOMBERG (Mar. 11, 2015), https://www.bloomberg.com/news/articles/2015-03-11/inside-big-taxi-s-dirty-war-with-uber (reporting that according to TLPA leader, Mark Joseph, one of Uber's major competitors "prompted investigations into Uber by sending letters to regulators in core markets like Colorado, Maryland, and Pennsylvania."); Luz Lazo, *Cab Companies Unite against Uber and Other Ride-Share Services*, WASH. POST (Aug. 10, 2014), https://www.washingtonpost.com/local/trafficandcommuting/cab-companies-unite-against-uber-and-other-ride-share-services/2014/08/10/11b23d52-1e3f-11e4-82f9-2cd6fa8da5c4_story.html?utm_term=.78efd2670bb4 (explaining how Washington, DC area taxi companies increased coordination efforts to fight for regulation of ride-sharing: "Cabdrivers are joining labor unions, labor organizers and cab companies are lobbying jointly, and rival taxi executives are sharing notes and filing complaints and lawsuits. Collectively they are resisting an industry that they say threatens their livelihoods and the well-being of consumers.").

The taxi industry also embraced a second strategy: using lawsuits to shape social norms and public opinion regarding Uber.[201] As stated in the Washington Post, "[t]he battle over the future of the taxi industry is in many ways an information war."[202] In this battle for public opinion, both the TLPA and Uber launched rivalling websites to create narratives protecting themselves and harming the other. Critically, through this process, they became important information intermediaries regarding the other's behavior. Each of their websites collect and disseminate any unfavorable media reports, court rulings, or regulatory action against the other.

TLPA's website is called "Who's Driving You?" and its homepage features a Twitter feed that collects and disseminates information about Uber and its drivers that potential customers would find most upsetting. For example, between October 27 and November 4, 2016, the vast majority of the Twitter posts dealt with reports of sexual assault by Uber drivers against women and children. The Twitter feed also updates viewers on any regulatory or judicial decisions against Uber. It is no secret that Uber faces a barrage of lawsuits against it. Some of these lawsuits are facilitated by representatives of the taxi industry and, if successful, could increase Uber's financial costs of operation.[203] But these lawsuits also produce reputational consequences for Uber – consequences that the rivaling taxi companies were eager to amplify.

Information shared in the lawsuits provided the ammunition for a reputational battle between taxi companies and Uber. These websites became information intermediaries for legal information from regulatory action and litigation against Uber. After all, it is one thing for taxi companies as competitors to sling allegations at Uber – the public may be understandably skeptical considering the

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[201] On the heels of President Trump's Executive Order of January 27, 2017 restricting immigration, the New York Taxi Workers Alliance announced a one-hour work stoppage at JFK International Airport as a sign of solidarity with those protesting the order. When Uber drivers did not cease service during that period, they were accused of "strike-breaking" and many customers deleted the Uber app on their phones in reaction. Ashley Lutz, *Furious customers are deleting the Uber app after drivers went to JFK airport during a protest and strike*, BUS. INSIDER (Jan. 28, 2017).

[202] Nancy Scola, *Uber, Allies Kick Off Campaign to Brand 'Big Taxi',* WASH. POST (Sept, 12, 2014), https://www.washingtonpost.com/news/the-switch/wp/2014/09/12/uber-allies-kick-off-campaign-to-brand-big-taxi/?utm_term=.39160de24d39.

[203] O'Connor v. Uber Techs., Inc., No. 13-cv-03826-EMC, 2016 U.S. Dist. LEXIS 110281 (denying a motion for preliminary approval of a settlement in a class action brought by Uber drivers claiming that Uber had misclassified drivers as independent contractors rather than as employees); Mike Isaac, *Judge Overturns Uber's Settlement with Drivers*, N.Y. TIMES (Aug. 18, 2016), http://nyti.ms/2b0ypwT (noting that, in the California case, the National Taxi Workers Alliance, a union of drivers with chapters in New York and California, had helped a faction of the Uber drivers within the California class object to the settlement); Daniel Wiessner, *New York Drivers Group Sues Uber, Claims Labor Laws Violations*, REUTERS (June 2, 2016), http://www.reuters.com/article/us-uber-lawsuit-idUSKCN0YO221 (noting that the class action in New York had been filed by the New York chapter of the same national taxi drivers union that was also involved in the California case).

source of the information. But lawsuits elevate the normative effect of these allegations, providing an alternative source for the narrative. The lawsuits provide "second-opinion effects" in which "the process of determining whether to impose legal sanctions produces information on how the company behaved. . . . In that sense, litigation or regulatory investigations often create another 'third-party assessment' of the company's behavior."[204] This effect is further compounded if and when judicial opinions confirm those allegations, which sends a different reputational signal regarding Uber. The TLPA and its members are then quick to amplify that signal to the public.

There are a number of reasons why potential customers would find information mediated by the courts more persuasive than information supplied by Uber's competitors. Specifically, judges possess fact-finding abilities that can produce credible information regarding Uber's practices, thereby creating a persuasive factual narrative.[205] Critically, this narrative is not directly produced by the competitors but enjoys the credibility of the court that issued the decision. Here, the taxi industry disseminates the information from the courts to the public but is not the direct source of that information. For example, on the Who's Driving You? website provides the reader with direct links to court filings so that potential riders can read the allegations for themselves. The difference between the two is the perceived authority of the source of that information. By providing website users with direct access to legal documents, the taxi industry provides a legal narrative supporting what it has been alleging all along. It also draws the public's attention to the concern that Uber's behavior is not only undesirable but that it also potentially breaks the law, which also comes with its own set of normative consequences.[206] These reputational consequences, amplified by TLPA's website, help delegitimize Uber in the eyes of stakeholders.

D. Policy Sanctions

Revelations regarding corporate misconduct not only render us more likely to mistrust misbehaving organizations in their role as market actors (how they act in the marketplace for goods and services) but also as societal actors (concerning how they interact in society at large). A legitimacy crisis can paint an industry as untrustworthy, possibly generating an existential crisis for the industry

204 Shapira, *Reputation Through Litigation*, *supra* note __, at 1213.

205 *Id.*

206 For example, see the "shaming" scholarship that examines the expressive function of legal institutions and punishment. *See generally* Dan Kahan, *What Do Alternative Sanctions Mean?* 63 U. CHI. L. REV. 591, 593 (1996).

as a whole or undermining its credibility in policy debates concerning its future. Diminished public trust in an industry, especially concerning it past behavior in a particular issue area, reduce the likelihood that policymakers and the public will believe anything that industry's actors have to say. As a consequence of this exclusion, organizations are more likely to adopt organizational innovations that communicate their trustworthiness to observers, such as through new voluntary industry initiatives or multi-stakeholder partnerships.[207]

The following case illustration explains the challenges encountered by the oil and gas industry when its members want to participate in climate policy discussions. Government investigations, as well as the industry's own actions, gave the industry a reputation as an opponent to climate change policy. This reputational branding strengthened state and NGO demands to exclude oil and gas companies from international climate policy discussions. In this environment, the oil and gas industry devised a series of voluntary initiatives to change public perceptions of the industry. It also led to organizational shifts within the fossil fuels industry and new alignments among industry actors.

1. The Paris Climate Accord and the Oil & Gas Industry

In December 2015, representatives of 195 countries met in Paris, France, for the Paris Climate Summit and reached a landmark international agreement on climate change: the Paris Climate Accord.[208] These countries agreed to report their progress on cutting emissions, with reporting duties commencing in 2023.[209] The global strategy is to limit global warming to 2 degrees Celsius, with the hope of further reducing that limit in the future.[210]

Just weeks before the Paris Summit, the New York Attorney General's office launched an investigation into Exxon Mobil's climate change disclosures.[211] Specifically, the investigation examines whether the company suppressed climate

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[207] *See* Michael L. Barnett, *Finding a Working Balance Between Competitive and Communal Strategies*, 43 J. MGMT. STUD. 1753, 1760 (2006) ("Industries commonly intensify their collective efforts when threatened by government regulation or loss of public approval.").

[208] Coral Davenport, *Nations Approve Landmark Climate Accord in Paris*, N.Y. TIMES (Dec. 12, 2015), https://nyti.ms/2k9vJgw (describing the historic deal intended to address the risk of climate change).

[209] Vivienne Walt, *Energy Companies Face Big Risks from Paris Climate Deal*, FORTUNE (Dec. 17, 2015), http://fortune.com/2015/12/17/energy-companies-feel-the-burn-from-paris-climate-deal/.

[210] *Id.*

[211] Lynn Cook, *Exxon Mobil Gets Subpoena from N.Y. Regarding Climate-Change Research*, WALL ST. J. (Nov. 5, 2015), http://www.wsj.com/articles/exxon-mobil-gets-subpoena-from-n-y-regarding-climate-change-research-1446760684.

change research and committed consumer and securities fraud by lying to the public about the environmental effects of its products.[212] Three other attorneys general—from California, Massachusetts, and the U.S. Virgin Islands—launched similar probes into ExxonMobil regarding the company's disclosure of climate change information.[213] The federal government also got involved, as the SEC launched its own similar investigation into whether ExxonMobil fraudulently failed to account for the impact of climate change and increasing environmental regulation when valuing its fossil-fuel assets.[214] Shortly thereafter, a class action lawsuit was filed on behalf of ExxonMobil's shareholders alleging securities fraud based on the same climate change allegations.[215] These investigations were likely prompted by a major investigative journalism series published in the *Scientific American*, which reported that ExxonMobil had known about the risks of man-made climate change for more than forty years but had not disclosed that information to its shareholders or the public.[216]

It is possible that these investigations have not created unique reputational consequences for ExxonMobil since the fossil-fuel industry has weathered a lot of bad press over the years. But, for ExxonMobil, the initial story could not have broken at a worse moment, considering that the New York Attorney General announced his investigation into whether ExxonMobil had lied about climate change right as world leaders were convening a historic gathering in Paris to

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[212] Justin Gillis & Clifford Krauss, *Exxon Mobil Investigated for Possible Climate Change Lies by New York Attorney General*, N.Y. TIMES (Nov. 5, 2015), https://nyti.ms/2jL53WA ("The investigation focuses on whether statements the company made to investors about climate risks as recently as this year were consistent with the company's own long-running scientific research."). In March 2017, the New York attorney general accused Exxon Mobil of withholding documents from the investigation that related to correspondence from Secretary of State Rex Tillerson when he was chairman and chief executive of Exxon Mobil. Christopher M. Matthews & Erin Ailworth, *Rex Tillerson Used Email Alias at Exxon to Discuss Climate Change, New York Says*, WALL ST. J. (March 13, 2017)(describing allegations that "Exxon hadn't disclosed that Rex Tillerson, the former chairman and chief executive, used an alias email address to discuss risk-management issues related to climate change.").

[213] *See* Kiah Collier & Jim Malewitz, *Everything You Need to Know about Exxon Mobil Climate Change Probes*, TEXAS TRIB. (Dec. 11, 2016), https://www.texastribune.org/2016/12/11/everything-you-need-know-about-exxonmobil-climate-/ (explaining that the investigations by the attorneys general from New York, Massachusetts, and California were still ongoing, but that the attorney general for the U.S. Virgin Islands had closed its investigation citing a lack of resources).

[214] *See* Bradley Olson & Aruna Viswanatha, *SEC Probes Exxon over Accounting for Climate Change*, WALL ST. J (Sept. 20, 2016), http://www.wsj.com/articles/sec-investigating-exxon-on-valuing-of-assets-accounting-practices-1474393593 (noting that the SEC had already been receiving documents related to the N.Y. Attorney General's ongoing investigation and then began its own efforts to request information and documents from Exxon and its auditor in August 2016).

[215] Press Release, Ryan & Maniskas, LLP, Ryan & Maniskas, LLP Announces Class Action Lawsuit against Exxon Mobil Corporation (Nov. 16, 2016), http://www.prnewswire.com/news-releases/ryan--maniskas-llp-announces-class-action-lawsuit-against-exxon-mobil-corporation-300364532.html.

[216] Shannon Hall, *Exxon Knew about Climate Change Almost 40 Years Ago*, SCI. AM. (Oct. 26, 2015), https://www.scientificamerican.com/article/exxon-knew-about-climate-change-almost-40-years-ago/.

discuss that very topic. Regardless, the investigation was another mark against an industry perceived as hostile to climate change policymaking.[217]

The background of the climate change talks primed the oil and gas industry for change on energy policy. These talks increased the stakes of the industry's image problem because it compromised the legitimacy of this industry's public views on international regulatory efforts on climate change. Two years earlier, dozens of NGOs had specifically requested that the United Nations and the United Nations Framework Convention on Climate Change (UNFCC) implement new rules to protect global climate discussions from the influence of actors within the fossil fuel industry.[218]

They recommended that the UNFCC follow the approach of the World Health Organization and Article 5.3 of the Framework Convention on Tobacco Control (FCTC) that restricts industry participation and requires that states protect their policymaking from "commercial and other vested interests of the tobacco industry."[219] Civil society actors also petitioned to exclude members of the fossil fuels industry from participating in the Marrakech climate talks in November 2016, where representatives from over 200 countries met to discuss ways to implement the Paris Agreement.[220] The petition supported earlier recommendations by developing countries for a conflict of interest policy that would screen out non-state participants based on a conflict of interest.[221] The desire for exclusion was partially based on an inventory of the role of fossil fuel companies in funding climate change denial; front and center of this inventory was the N.Y. Attorney General's investigation into Exxon Mobil.[222]

This background of mistrust and desire for exclusion explains why the fossil fuels industry resorted to a legitimacy-enhancing device in an attempt to remain relevant in climate policy discussions that affect them. In September 2014, a

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217 *See* Benjamin J. Richardson, *Climate Finance and Its Governance: Moving to a Low Carbon Economy Through Socially Responsible Financing?* 58 INT'L & COMP. Q. 597, 603-04 (2009)(explaining how fossil fuel companies and their associated financial institutions suffer reputational risks because of climate change concerns).

218 *Open Letter Calling for Rules to Protect the Integrity of Climate Policy-making from Vested Corporate Interests*, CORP. EUROPE (Nov. 21, 2013), http://corporateeurope.org/blog/open-letter-calling-rules-protect-integrity-climate-policy-making-vested-corporate-interests {https://perma.cc/URU7-K8SZ] (showing that more than seventy-five civil society organizations had signed on to the open letter calling on the U.N. to protect environmental policy negotiations from the fossil fuel industry's influence).

219 *Id.*

220 Michael Slezak, *Marrakech Climate Talks: US Accepts Petition Calling for Fossil Fuel Lobbyists to Be Excluded*, GUARDIAN (Nov. 16, 2016), https://www.theguardian.com/environment/2016/nov/16/marrakech-climate-talks-us-accepts-petition-calling-for-fossil-fuel-lobbyists-to-be-excluded.

221 *Id.*

222 Michael Slezak, *Marrakech Climate Talks: Giving the Fossil Fuel Lobby a Seat at the Table*, GUARDIAN (Nov. 6, 2016), https://www.theguardian.com/environment/2016/nov/07/marrakech-climate-talks-giving-the-fossil-fuel-lobby-a-seat-at-the-table.

group of oil and gas companies launched the Oil and Gas Climate Initiative (OGCI) at the UN Climate Summit in New York.[223] The OGCI is a "voluntary, industry-driven initiative which aims to catalyze meaningful action on climate change through best practice sharing and collaboration within the industry."[224] The OGCI includes energy giants BG Group, BP, Shell, Statoil, and Total.[225] The ten OGCI member-companies provide almost one-fifth of all oil and gas production in the world and supply nearly ten percent of the world's energy.[226] OGCI's mission is to "enable[] the oil and gas industry to work together to deliver practical solutions to climate risks."[227]

On October 16, 2015, just weeks before the Paris Summit, OGCI released its Joint Collaborative Declaration (the "Declaration"). Much of the Declaration was devoted to communicating the cooperative attitudes of the OGCI on climate change.[228] The legitimacy-enhancing functions of the Declaration are confirmed by statements made by both industry representatives and their opponents. In October 2015, the CEO of Total stated that the oil and gas industry "needed to be on the offensive ... We need to be serious to bring answers and solutions to the table and not leave policy makers raising their fingers that they (oil companies) are the devils."[229] This image-function was exactly what the environmental groups feared, labelling the Declaration as nothing more than "greenwashing."[230] In the words of a Greenpeace activist, "Each and every one of them has a business plan that would lead to dangerous global temperature rises, yet suddenly they expect us all to see them as the solution, not the problem . . . Arsonists don't make good firefighters."[231]

Oil and gas industry actors realized that no one would trust their statements on climate policy so long as they were perceived as the enemy of climate policy.

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223 Press Release, Oil & Gas Climate Initiative, Climate Summit 2014: Oil & Gas Climate Initiative Action Summit (Sept. 23, 2014), http://www.oilandgasclimateinitiative.com/news/oil-gas-climate-initiative-action-statement/.

224 *Id.*

225 *About the Oil and Gas Initiative*, OIL & GAS CLIMATE INITIATIVE, http://www.oilandgasclimateinitiative.com/about (last visited July 22, 2016).

226 *Id.*

227 *Our Mission*, OIL & GAS CLIMATE INITIATIVE, http://www.oilandgasclimateinitiative.com/about/ (last visited July 22, 2016).

228 OIL & GAS CLIMATE INITIATIVE, JOINT COLLABORATIVE DECLARATION (2015), http://www.oilandgasclimateinitiative.com/~/media/Files/O/Ogci/documents/ogci-ceo-Declaration-2015.pdf.

229 Jeff Reed, *UN Climate Conference Gets Underway. Here's What Oilpros Need to Know*, OILPRO, http://oilpro.com/post/20399/un-climate-conference-starts-monday-here-oilpros-need-to-know.

230 Michael Stothard & Pilita Clark, *Energy Groups Pledge to Tackle Climate Change*, FIN. TIMES (Oct. 16, 2015), https://www.ft.com/content/ed42bad4-73e0-11e5-bdb1-e6e4767162cc ("Environmental groups accused the energy companies of trying to soften their image by supporting the Paris conference but failing to offer concrete change.").

231 *Id.*

This context not only primed the industry for change but also led to interesting divisions within the energy industry. These organizational shifts demonstrate both isomorphic attraction and repulsion as oil and gas actors attempted to align themselves with the United Nations, on the one hand, while distancing themselves from other industry actors that could only compromise their "clean" image.

First, the oil and gas industry pivoted towards the United Nations with public statements supporting the Paris Accord.[232] Critically, in a press release following the Accord, OGCI identified similarities between the Declaration and the Accord.[233] By connecting these two institutions, OGCI demonstrated institutional convergence between the industry's solutions and what the public wants, reinforcing the message that the industry is receptive and progressive on climate policy.

The oil and gas industry simultaneously pivoted away from an energy peer: coal. In order to absolve itself from "enemy status," the oil and gas industry passed that label on to coal companies in order to deflect public blame away from themselves. Chief Executive Officer of Total, Patrick Pouyanne, went so far as to announce in mid-2015 that "'the enemy is coal,'" while "'Total is gas, and gas is good.'"[234] Why blame coal? Isomorphic repulsion can partially account for these industry alignments. The oil and gas industry is in need of legitimacy so they chose to isolate the energy actor (coal) that draws the most public ire, making it into a strategic sacrifice in order to preserve the image and credibility of the remaining energy companies. Hence, they abandoned the umbrella of the fossil fuels industry in favor of coal on the one side versus oil and gas companies on the other; these are the "positioning" tactics where organizations cultivate new

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[232] *See* Darren Woods, Chairman and CEO of Exxon Mobil, Energy Factor Blog Post (Feb. 23, 2017)("I believe, and my company believes, that climate risks warrant action and it's going to take all of us – business, governments and consumers – to make meaningful progress. At ExxonMobil, we're encouraged that the pledges made at last year's Paris Accord create an effective framework for all countries to address rising emissions; in fact, our company forecasts carbon reductions consistent with the results of the Paris accord commitments."), https://energyfactor.exxonmobil.com/perspectives/the-future-of-energy-opportunities-and-challenges/. A year after the Paris Accord was reached, Exxon Mobil wrote a letter to the Trump Administration advocating in favor of the international climate agreement. Aric Jenkins, *Even ExxonMobil Wants President Trump to Stick With the Paris Climate Deal*, FORTUNE (Mar. 29, 2017); Matt Egan, *Exxon to Trump: Don't ditch Paris climate change deal*, CNN MONEY (March 29, 2017)("ExxonMobil doesn't want President Trump to abandon the global climate agreement reached in Paris"); Timothy Cama, *Oil exec: Trump should keep US in Paris climate pact*, THE HILL (March 7, 2017)("The head of oil giant ConocoPhillips said President Trump should keep the United States in the landmark Paris climate change agreement.").

[233] Press Release, Oil and Gas Climate Initiative, OGCI Welcomes the Paris Agreement (Dec. 20, 2015).

[234] Rakteem Katakey and Tara Patel, *Big Oil's Plan to Become Big Gas*, BLOOMBERG (June 1, 2015), http://www.bloomberg.com/news/articles/2015-06-01/big-oil-becomes-big-gas-as-climate-threat-spurs-tussle-with-coal. ("Oil companies that have pumped trillions of barrels of crude from the ground are now saying the future is in their other main product: natural gas, a fuel they're promoting as the logical successor to coal.").

identities. For its part, the World Coal Association objected to this industry division, explaining that the entire fossil fuel industry should work collaboratively.[235] The quest for legitimacy not only shaped institutional choices, such as the Declaration, but also organizational alignments and industry divisions.

Pivoting also influenced the types of organizational changes introduced. The oil and gas companies adopted policies and practices that demonstrated their pivot and distinguished them from coal companies. In early June 2015, a group of six European oil and gas titans (BP, Total, Shell, Emi, Statoil, and BG Group) released an open letter to Christiana Figueres, Executive Secretary of the UN Framework Convention on Climate Change, announcing their desire for carbon pricing through taxes or a cap-and-trade system.[236] The letter explains that carbon pricing "discourages high carbon options and encourages the most efficient ways of reducing emissions widely, including reduced demand for the most carbon intensive fossil fuels, greater energy efficiency, the use of natural gas in place of coal," among other effects.[237] Carbon pricing has very different consequences for coal companies compared to natural gas companies because gas produces about half the carbon emissions as coal.[238]

IV. OBJECTIONS & CONCERNS: THE DARK SIDE OF REPUTATION

The Section below discusses risks of reputational sanctions, including the possibility of "crowding-out" public regulation, ineffective deterrence, and unintended consequences of reputational harm.

A. Whither Public Regulation?

Is "reputational regulation" offered as a substitute for public regulation? No. The intent behind uncovering the mechanics of reputational regulation is to

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235 Stothard & Clark, *supra* note 230.

236 Open Letter to UN and Governments from Mr. Helge Lund (BG Group), Mr. Bob Dudley (BP), Mr. Claudio Descalzi (Eni), Mr. Ben van Beurden (Shell), Mr. Eldar Saetre (Statoil), and Mr. Patrick Pouyanné (Total) (June 1, 2015), http://newsroom.unfccc.int/unfccc-newsroom/major-oil-companies-letter-to-un/.

237 *Id.*

238 Ben Ratner, *The Good, The Bad and The Ugly When Oil Giants Shift to Natural Gas*, ENVTL. DEF. FUND (June 8, 2015), https://www.edf.org/blog/2015/06/08/good-bad-and-ugly-when-oil-giants-shift-natural-gas ("American companies . . . . [possess] a large stake in natural gas, [and] share an interest with European corporate peers when it comes to promoting a carbon price that displaces coal"); Watson, *supra* note 224 ("The European oil and gas companies' basic position is that more effective carbon-pricing can help re-position natural gas as a more competitive long-term strategic fuel during the transition to clean energy."); Geman, *supra* note ___; OGCI, JOINT COLLABORATIVE DECLARATION, *supra* note __; Bob Dudley, *Why Are Oil and Gas Companies Calling For More Action on Climate Change?*, REUTERS (Nov. 11, 2015), http://www.reuters.com/article/us-climatechange-summit-dudley-idUSKCN0T103T20151112.

reveal the additional potential of public processes to incentivize organizations to change. But reputational regulation does not get off the ground without public action in the first instance. Each of the case studies examined in Section III, *supra*, began with an act by a public institution – a court filing, government investigation, or multilateral treaty process – that released information into the public space and created the conditions for reputational regulation. As a descriptive matter, reputational regulation shares the same root as public regulation because both strategies depend on predicate action by public institutions; reputational regulation is therefore dependent upon public action.

Where the two diverge is in the mechanics of their operation and, potentially, their scope. The two are compatible but not identical because reputational regulation's effects can be broader and more attenuated, inviting change even when traditional public regulation (or litigation) apparently "failed" to achieve its outcome.[239]

As a normative matter, analysis of reputational regulation invites litigants seeking public policy objectives to broaden their litigation objectives to amplify the information effects of their suit. Information objectives may lead to different strategic choices in litigation when the objective is not to prevail or settle but to inform, thereby equipping other stakeholders to exercise their own unique sources of leverage over an organization and encouraging it to reform.

B. Problem of Short Attention Span: The Risk of Under-deterrence

We live in a 24-hour news cycle. Once the media moves on, so do we and thereby subsides any hope of sustained pressure for reform. If isolated events (media stories, court filings) cannot keep our attention for long, what we need are a series of events that catch our attention and keep our focus. No one information intermediary may be able to accomplish that task but the interaction of multiple information intermediaries could address that need. The following discussion explains the ways that interactions between (a) media-court intermediaries, and (b) market-court intermediaries provide a continuous stream of reminders to a public with limited attention. Critically, the interaction between these intermediaries can partially offset the deficiencies of each to keep our attention.

First, media-court interactions amplify the audience for litigation information. The problem is that the light the media shines is bright but brief. In contrast, litigation provides a long time horizon, unlike a media story, but no

[239] For discussion of similar effects produced by international treaty processes, see Kishanthi Parella, *Treaty Penumbras,* ___ U. PA. J. INT'L L. ___ (forthcoming Spring 2017).

one may pay attention. The solution then is for litigation to keep the media's attention so that it keeps ours. This is easier said than done.

Media attention to lawsuits is not often faithful, generally focusing on particular slices of a lawsuit and not the whole thing. Journalists may be more attracted to the initial complaint, alleging juicy facts and noteworthy allegations, but their attention can decline as the case progresses through procedural matters.[240] Although litigation can supply a continuous stream of legal developments that draw our attention back to the organizational conduct at issue, those developments may not have much of an audience because of media reluctance to deem those developments "news worthy." The challenge then is how to keep media attention on litigation.[241] Better understanding of factors that attract media attention to legal developments[242] may aid this task but may also open the door to risk of abuse when litigants craft pleadings and litigation strategy to chase media attention.[243]

C. The Dangers of Shame: The Risk of Over-deterrence

Not all reputational incentives lead to desirable results. The case illustrations in Section III, *supra*, demonstrated the positive benefits of reputational incentives. The discussion below highlights how these same types of incentives can lead to undesirable outcomes. It may be hard to ensure that our use of reputational incentives lead to the former and not the latter. After all, reputational incentives are clumsy instruments. They are often unpredictable, contingent, and can give rise to a number of unintended consequences. That does not mean we should abandon reputational incentives but only that we must be cautious about how we use them. The discussion below highlights three particular concerns with reputational incentives: (1) excessive harm, (2) collateral consequences, and (3) incentivizing frivolous litigation.

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240 Interview with Professor Toni Locy, Dept. of Journalism and Mass Communication, Washington & Law University (Feb. 9, 2017).

241 J. Lobel, *supra* note __ at 548-51.

242 Shapira, *Reputational Theory of Corporate Law*, *supra* note __ at 22 (listing factors that attract media attention to judicial opinions).

243 Samuel Terilli, *Lowering the Bar: Privileged Court Filings as Substitutes for Press Releases in the Court of Public Opinion*, 12 COMMUN. L. POLICY 144, 146 (2007)("The tell-tale signs of the public relations ploys include the lawsuit or complaint filed to generate publicity for a cause through the selection of an obviously attractive target (a competitor or newsworthy defendant, for example) coupled with plainly written and very quotable allegations, often including outrageous damage claims and other allegations that far exceed what the law requires in the pleading. Such pleadings invite public attention as well as a response from the opposing side.")(internal citations omitted).

First, we are accustomed to punishing by reputation. For example, shaming sanctions are forms of punishment designed to penalize an offender through embarrassment, isolation, and public condemnation.[244] Examples of shaming sanctions include issuing public apologies, displaying labels or stickers singling out offenders, or wearing clothing announcing an offender's crime.[245] What makes shaming sanctions unique is that embarrassment and other social consequences are the desired outcome: "Embarrassment and consequent social isolation may result from any punishment; but with most other sanctions shame and shunning are incidental . . . . With shaming penalties, in contrast, embarrassment is the principal purpose of the punishment."[246]

The use of shame led some scholars to reject these sanctions from a concern of lasting effects: "When it works, it redefines a person in a negative, often irreversible, way. Effective shame sanctions strike at an offender's psychological core. To allow government officials to search for and manipulate this vulnerable core is worrisome." [247] Additionally, even if judges may be skilled at creating shame, they may be less skilled at "reconstructing that core" after the offender has paid the penalty.[248]

Second, as explained in Section III, *supra*, criminal investigations, indictment and convictions carry significant reputational consequences for the affected organization. The positive effect of those reputational consequences is that it can force organizations to change. The negative effect is that it can lead to collateral consequences that harm innocent parties. It is this risk of collateral consequences that encouraged prosecutors to focus on reaching cooperative arrangements with corporate leadership through DPAs and NPAs.[249] What they fear is a repetition of an Arthur Andersen-type scandal. Arthur Andersen was an accounting firm convicted of obstruction of justice following the Enron debacle.[250] This conviction, although later overturned,[251] led to a range of collateral consequences that resulted in the eventual collapse of the firm, harming a variety of innocent parties in the process.[252] This episode illustrated the

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244 *See* David A. Skeel, Jr., *Shaming in Corporate Law*, U. PA. L. REV. 1811, 1820 (2000).

245 *Id.* at 1823.

246 Toni Massaro, *Shame , Culture , and American Criminal Law*, MICH. L. REV. 1880, 1884 (1990).

247 *Id.*

248 *Id.*

249 Garrett, *supra* note __ at 880 ("The overdeterrent effect of an indictment provided great impetus for the DOJ to resolve prosecutions pre-indictment at the charging stage."); C. E. Devers et al., *A General Theory of Organizational Stigma*, 20 ORGAN. SCI. 154, 165 (2009).

250 Jonathan Weil & Alexei Barrionuevo, *Arthur Andersen Is Convicted On Obstruction-of-Justice Count*, WALL. ST. J. (June 16, 2002).

251 Jess Bravin, *Justices Overturn Criminal Verdict in Andersen Case*, WALL ST. J. (June 1, 2005).

252 Garrett, *supra* note __ at 880.

reputational risks that accompany investigation and prosecution of organizations and the need for prosecutors to balance "aggressively root[ing] out corporate fraud while remaining sensitive to the considerable collateral consequences of moving criminally against an entire entity."[253]

Finally, the very effectiveness of reputational sanctions may make organizations, especially corporations, easy targets for frivolous lawsuits.[254] In the securities class action context, those involved in a public offering (such as issuer and its directors and officers, underwriter, accountants, and counsel) may contend with "strike suits" brought by plaintiff's firms following a steep and sudden drop in stock price.[255] The reputational consequences of the suit lead the defendants to settle even when they believe the suit is unmeritorious; the stigma is so strong that it encourages settlement where it might not otherwise occur.[256] Plaintiff's firms recognize the power of reputational sanctions and its effect on defendants' willingness to settle and, therefore, continue to initiate future frivolous suits.

Some of the risks outlined above are more likely to accompany shaming of individual actors rather than organizational entities. Organizations do not suffer psychological harm nor waste away because of social ostracism; after all, they "have no soul to damn or body to kick."[257] But organizations are comprised of flesh and blood actors who often sustain the brunt of reputational sanctions targeting the organizational host. The employees of Arthur Andersen paid a heavy price for the reputational sanction levied against the firm while the firm's name lives on today; in fact, parties are even fighting over who gets to call themselves by that name.[258]

Other risks outlined above pertain to both individual and organizational actors. The analysis of information effects of litigation may encourage more litigation and not all these lawsuits will serve the public policy functions I outline in this Article. Ultimately, reputational sanctions can be used for good or ill and the outcomes reached will depend on who wields those sanctions.

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253 Spivack & Raman, *supra* note __, at 166.

254 *See* J. Lobel, *supra* note __ at 517-20 (discussing imposition of Rule 11 sanctions for use of litigation for publicity).

255 Bohn & Choi, *supra* note __ at 816.

256 Alexander, *supra* note __ at 532.

257 This expression describes problems of penalizing one type of organization in particular, corporations, but these difficulties accompany organizations more generally.

258 Despite sustaining severe reputational damage following the Enron scandal, the "Arthur Andersen" brand is now valuable. In 2014, a tax-consulting firm operated by former Andersen partners bought the rights to the Andersen name and renamed the firm Andersen Tax. Michael Rapoport, *Tax Firm to Revive Arthur Andersen Name*, WALL ST. J. (Sept. 2, 2014). The redemption of the name was so successful that a French-based firm wants to call itself the new Arthur Andersen but its use of the name is challenged by Andersen Tax. Andrew Hill, *Arthur Andersen rises from the Enron ashes — twice*, FIN. TIMES (Sept. 9, 2015).

V. IMPLICATIONS OF REPUTATIONAL SANCTIONS

This Section discusses the implications of reputational regulation, including shaping litigation strategy, increasing the risks of confidentiality, opportunism in pleadings, and information effects produced by other adjudicative institutions.

A. Reconsidering Functions of Activist Litigation: Aggregation & Elevation

Reputational analysis may offer litigants more reasons for filing lawsuits against corporations. Through "aggregation" and "elevation", lawsuits fulfil important information functions. They add value to information from other sources by collecting it one place (aggregation) and providing that information with the normative significance of a court document (elevation).

These functions are important in themselves, aside from their ability to incentivize organizational change. Through these information functions, lawsuits amplify the audiences for factual and normative sources – sources that may go unnoticed otherwise. Important findings by domestic and international agencies may be ignored unless a legal or media intermediary picks up that information; moreover, the media may be more likely to do so after a lawsuit is filed because of the newsworthiness of a lawsuit alleging human rights abuses, for example, versus a government or NGO report alleging the same.[259] As a result, the "educational value of litigation is often substantial even where the case does not result in a legal victory."[260]

For example, in *Hodson v. Mars*, plaintiffs allege that Mars uses child labor in its cocoa supply chain but fails to disclose that risk to consumers at the point of purchase.[261] In *Sud v. Costco*, plaintiffs brought a lawsuit similarly alleging that the food giant failed to disclose to consumers that its products could have been produced with slave labor.[262] These lawsuits are similar to structural reform litigation efforts because they also seek organizational changes through injunctive remedies, especially regarding disclosure practices. In *Hodson*, plaintiffs wanted Mars to disclose on its labels of chocolate products that the chocolate may be

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[259] J. Lobel, *supra* note __ at 487 ("Public interest litigators and organizations have come to view litigation as a vehicle for attracting the media. . . . Often, litigation attracts the media's attention in a way that nothing else does.").

[260] J. Lobel, *supra* note __ at 488.

[261] Class Action Complaint, Hodson v. Mars, No. 15-cv-04450 (N.D. Cal. Sept. 28, 2015).

[262] Class Action Complaint, *Sud v. Costco Wholesale Corp.*, No. 3:15-cv-03783 (N.D. Cal. Aug. 19, 2015).

made with child labor so that consumers are aware of this risk at the point of sale.[263] Unfortunately, *Hodson*, like many of these lawsuits, died at the motion to dismiss stage and the court denied the plaintiffs the disclosure changes they sought.[264] As such, these lawsuits are unlikely to offer direct incentives for organizational change to the defendant corporations.

However, lawsuits can create indirect incentives for these corporations to change. First, lawsuits aggregate sources of both facts and norms to public audiences. Obscure industry codes of conduct, multi-stakeholder initiatives, government reports, and company initiatives are brought into the light of day through the spotlight provided by a legal complaint. In *Hodson*, for example, the class action complaint aggregated facts on child labor in cocoa supply chains from reports prepared by international organizations (International Labor Organization), domestic agencies (Department of Labor), media agencies (CNN), universities (Tulane University), and NGOs (Fair Labor Association).[265] It also aggregated norms that bind Mars but may be unknown to the average consumer, such as Mars's commitments under its own code of conduct and human rights policy, the Harkins-Engel Protocol or the United Nations Guiding Principles on Business and Human Rights.[266] These embedded sources of norms provide additional measuring sticks with which stakeholders can evaluate both Mars's behavior and the behavior of other actors in the industry who may similarly be bound to these norms.

Lawsuits not only aggregate information, but also elevate it. Information is packaged within a particular source: a news article, Twitter post, law review article, judicial opinion, government press release, international convention, as examples. Each of these sources has particular normative significance, which may vary with the stakeholder receiving that information.

Legal materials also have their own normative significance. Judicial opinions may be especially normatively significant but complaints also communicate normative gravity because (a) some segment of the public cared enough about the organization's conduct to file a complaint, and (b) the conduct at issue may violate one category of socially significant norms: legal norms. By including

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[263] Order Granting Mars Inc.'s Motion to Dismiss at 1, Hodson v. Mars, No. 15-cv-04450, at 1 (N.D. Cal. Feb. 17, 2016). Plaintiffs also request similar disclosure requirements in *Sud v. Costco*. *See* Class Action Complaint at 45, Sud v. Costco, *supra* note 262.

[264] Order at 16, *supra* note 263,; *see also* Dana v. Hershey Co., 2016 U.S. Dist. LEXIS 41594 (N.D. Cal. Mar. 29, 2016); McCoy v. Nestle, United States, Inc., 2016 U.S. Dist. LEXIS 41601 (N.D. Cal. Mar. 29, 2016); Wirth v. Mars Inc., 2016 U.S. Dist. LEXIS 14552 (C.D. Cal. Feb. 5, 2016).

[265] Class Action Complaint at 2–3, Hodson v. Mars, *supra* note ___.

[266] *Id.* at 8.

information from other sources, lawsuits do not only aggregate information but also elevate the normative significance of that information.[267]

For example, in *Hodson*, stakeholders learned that Mars's commitment to eradicate human rights originate from multiple sources, including United Nations guidelines, industry association commitments, and its own corporate policies.[268] The average consumer may attach little normative significance to the U.N.'s guidelines but these were incorporated into another source that consumers may find more normatively significant: Mars's voluntary corporate policies.[269] Finally, these normative obligations were disseminated within the *Hodson* complaint – a court document – that may garner more normative significance among stakeholders.[270] In this way, international norms from a distant international organization are elevated through corporate policies and industry commitments and into domestic legal materials that consumers may take more seriously.[271]

B. Transparency Costs of Arbitration

Arbitration is a form of alternative dispute resolution whereby parties contractually agree to resolve their dispute confidentially through a third-party decision-maker.[272] Scholars and consumer groups, among others, have criticized consumer arbitration for its lack of transparency because it deprives the public of learning of risks to its well-being and incentivizing corporations to address those risks.[273]

The analysis provided in this Article provides another reason for concern regarding the transparency costs of arbitration. By shuttling disputes into arbitration, the public is denied access to information regarding corporate wrongdoing. But stakeholders need this information in order to trigger the

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267 HANDLER, *supra* note __ at 217 (explaining how framing a political struggle in terms of legal entitlements accords greater legitimacy and validates the values championed).

268 Class Action Complaint at 8, Hodson v. Mars, *supra* note ___.

269 *Id.*

270 *Id.*

271 *Id.* The normative significance of different classes of information may vary by cultural context. A domestic legal court document, especially a judicial opinion, may garner more normative significance for an American consumer than United Nations guidelines, the opposite may be true in other countries. Even within the United States, different consumers may disagree about the normative significance of different sources of information.

272 AM. ARBITRATION ASS'N, AAA ARBITRATION GLOSSARY OF TERMS, https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004198 (last visited Jan. 24, 2017).

273 Ramona L. Lampley, *Underdog Arbitration: A Plan for Transparency*, 90 WASH. L. REV. 1727, 1746–55 (2015); Laurie Kratky Dore, *Public Courts Versus Private Justice: It's Time to Let Some Sun Shine in on Alternative Dispute Resolution*, 81 CHI.-KENT L. REV. 463, 486–89 (2006).

reputational mechanics explained above. As discussed in Sections II and III, stakeholders receive, interpret, and translate information produced by the courts into a variety of reputational sanctions.[274] In order to fulfil this function, stakeholders need to have access to this information in the first place.[275] Reputational sanctions cannot incentivize organizational change without access to information; therefore, private arbitration poses a problem for the creation of those reputational sanctions.

For example, most people learned of Well Fargo's sales tactics when it was fined by the CFPB in early September, 2016.[276] However, a number of consumers filed lawsuits against Wells Fargo between 2011-2016 based on those same sales tactics.[277] A Wells Fargo consumer could have been on notice of the risk years earlier, possibly protecting themselves from financial harm, except that these consumer lawsuits were shuttled into mandatory arbitration because of a clause in the consumer contracts.[278] The public warning function of the lawsuits was negated because of the resort to arbitration and the confidentiality that arbitration affords.[279] As a result, most of us did not learn of the risks posed by Wells Fargo until years later. This is the very charge levied against Wells Fargo by Senator Elizabeth Warren and other Democratic senators in a letter to the former CEO of Wells Fargo.[280]

C. Litigation Transparency: Protective Orders & Confidential Settlements

It is not just arbitration that poses a risk for the operation of reputational sanctions. The confidentiality provisions of the litigation process can also

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274 *See* notes ___-___ and accompanying text.

275 *See* notes ___-___ and accompanying text.

276 Paul Blake, *Timeline of the Wells Fargo Accounts Scandal*, ABC NEWS (Nov. 3, 2016), http://abcnews.go.com/Business/timeline-wells-fargo-accounts-scandal/story?id=42231128.

277 *See, e.g.*, Class Action Complaint, Jabbari v. Wells Fargo & Co., No. 3:15-cv-02159 (N.D. Cal. Sept. 23, 2015) (alleging violations of state unfair competition laws, among others); Order Granting Defendant's Motion to Compel Arbitration, *Jabbari*, No. 3:15-cv-02159 (dismissing complaint and compelling arbitration).

278 James Rufus Koren, *Even in Fraud Cases, Wells Fargo Customers Are Locked Into Arbitration*, L.A. TIMES (Dec. 5, 2015), http://www.latimes.com/business/la-fi-wells-fargo-arbitration-20151205-story.html ("Judges in California and federal courts have ruled arbitration clauses signed by customers when they opened legitimate accounts prevent them from suing even over allegedly fraudulent accounts created without their knowledge.").

279 *See* Judith Resnik, *Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes Are at Risk*, 81 CHI.-KENT L. REV. 521, 528 (2006) ("[O]pen conflict may serve to expose wrongdoers continuing to place others in harm's way."); Karpoff & Lott, *supra* note __, at 761–62 (describing the detection benefits of fraud for consumers of peer firms).

280 Press Release, Senator Patrick Leahy, Leahy, Brown & Leading Democratic Senators Call On Wells Fargo to End Use Of Forced Arbitration On Consumers (Sept. 23, 2016) (internal citations omitted).

impede the information flow from the courts to the public, thereby compromising the ability of stakeholders to levy reputational sanctions against organizations.

One reason that courts are information intermediaries is because they possess unique features that encourage information flow between parties who are otherwise powerless to access that information.[281] The classic device of this information balancing is discovery under Rule 26 of the Federal Rules of Civil Procedure (F.R.C.P.) and provides parties access to "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case."[282]

But while discovery educates the plaintiff, it leaves the public ignorant. There are two types of discovery at issue: filed and unfiled.[283] Parties routinely use information gained through discovery as evidence at trial or attachments to motions; these are filed discovery to which the public has access because it is now part of the adjudicatory process.[284] But most of the information gained through discovery remains unfiled discovery that is not included in the adjudicatory process and, according to critics, therefore not subject to public access because it is not as relevant to the public monitoring of the courts.[285]

But public monitoring is not the only justification for public access to the courts; instead, information obtained through litigation also serves important notice functions offering the only way that consumers, employees, or other public constituents learn of corporate practices that pose a risk to them. For example, legislators and consumer groups blame court secrecy for the lack of public awareness regarding the faulty ignition switches in GM vehicles.[286] According to Public Citizen, a nonprofit watchdog, "The information about GM's defective ignition switches and air bag failures, along with the injuries and deaths associated with them, was hidden from the public in confidential

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281 Hadfield & Ryan, *supra* note __ at 15-16; Howard M. Erichson, *Court-Ordered Confidentiality in Discovery*, 81 CHI.--KENT L. REV. 357, 363 (2006).

282 FED. R. CIV. P. 26(b).

283 Dore, *supra* note __, at 474.

284 Erichson, *supra* note __, at 360–61.

285 Sedona Conf. Working Grp. on Protective Orders, Confidentiality & Pub. Access, *The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases*, 6 SEDONA CONF. J. 183 (2005) (Principle 1: "There is no presumed right of the public to participate in the discovery process or to have access to the fruits of discovery that are not submitted to the court."); Erichson, *supra* note __, at 360–61.

286 Press Release, Statement of Christine Hines, Consumer and Civil Justice Counsel, Public Citizen, Sunshine in Litigation Act Would Improve Public Access to Information About Dangerous Products (May 20, 2014); *see also* Press Release, Congressman Jerrold Nadler, Congressman Nadler Statement on Protecting Public Health and Safety with Sunshine in Litigation Act (June 2, 2015).

settlements."[287] Although potentially relevant, there are a number of reasons why information revealed through discovery do not reach the public.[288]

Aside from these notice functions, we should also be wary of confidentiality obtained through settlement and protective orders because it restricts the operation of reputational sanctions – the very reason that many corporate defendants desire confidentiality. Reputational sanctions invite the possibility of organizational change within defendant corporations because of the risk of public outcry and heightened regulatory oversight or consumer backlash. These reactions not only protect the public by informing it of risks but they also encourage corporations to change so that they pose less of a risk of harm to consumers or other stakeholders.

D. Pleadings as Press Releases: "Info-washing" & Branding Through Litigation

Litigation not only discloses facts – it is also a soapbox. When a scandal breaks, organizations associated with the one "in the hot seat" may turn to litigation as a public forum to voice their side of the story or tiptoe away from their discredited associates. These actors are using the litigation stage for reputation repair as opposed to reputational sanctioning.

For example, following the FIFA scandal, FIFA filed a claim for restitution arguing that it was the victim of corruption and not its perpetrator.[289] It used its pleadings – framed to garner media attention – to explain to the public that the FIFA of 2016 is different from the FIFA corrupted by the officials under DOJ investigation.[290] Of course, it could have made the same case through a press release or another traditional public relations venue. But a legal complaint allows an organization to frame themselves as the victim and their participation in the scandal as minor, innocent, or non-existent.[291]

We see similar dynamics at work regarding the recent scandal surrounding Theranos, the blood-testing company founded by Elizabeth Holmes. Theranos

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[287] Hines Statement, *supra* note __.

[288] Minna J. Kotkin, *Secrecy in Context: The Shadowy Life of Civil Rights Litigation*, 81 CHI.-KENT L. REV. 571, 583-84 (2006) (discussing the declining rate of cases proceeding to trial); Laurie Kratky Dore, *Settlement, Secrecy, and Judicial Discretion: South Carolina's New Rules Governing the Sealing of Settlements*, 55 S.C.L. REV. 791, 798–99 (2004) (discussing confidentiality requirements in settlements).

[289] *See* notes __-__ and accompanying text.

[290] *See* notes __-__ and accompanying text.

[291] *See* Terilli, *supra* note __ at 145 (discussing the use of court filings as "substitute press releases" in the Kobe Bryant civil case).

and Holmes rose to fame on promises of revolutionizing the health industry by providing inexpensive, direct-to-consumer (DTC) blood testing kits that could provide results with a "few drops of blood."[292] No need for doctors, expensive lab tests or large blood samples.[293]

Unfortunately, the *Wall Street Journal* exposed Theranos as a fraud and the latter faces government investigations and a series of lawsuits by investors, as well as patients who claim that the inaccurate blood tests contributed to heart attacks and other issues.[294] This blood-testing scandal not only threatens Theranos but also its associated partner, Walgreens. As part of its direct-to-consumer business plan, Theranos needed distributors of its blood-testing kits and that is where Walgreens came in. Walgreens had contracted with Theranos to sell the latter's blood-testing kits at 40 Walgreens wellness centers in Arizona and California.[295]

Now that Theranos is imploding, it risks bringing down Walgreens too. Like FIFA, Walgreens recently filed a claim against Theranos to distinguish it from its disreputable partner.[296] It requested damages from Theranos for dragging Walgreens's name through the mud: (a) reputational damages, and (b) "damages it has suffered from being named as a defendant in the Consumer Class Action Litigation."[297] As with FIFA, the lawsuit seems particularly valuable to Walgreens because it allows Walgreens to point the finger at Theranos and to frame the public narrative in a way that minimizes the reputational (and potentially legal) risk to Walgreens.

As lawyers, we know that litigation, on some level, is an exercise in storytelling.[298] Law professors impress upon their first year students the importance of developing facts into persuasive narratives. The difference here with Walgreens's storytelling is that the primary audience for these litigation narratives is not a judge but the media and, by extension, consumers, regulators,

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[292] Roger Parloff, *Theranos Jump-Starts Consumer Lab Testing*, FORTUNE (May 7, 2015), http://fortune.com/2015/05/07/theranos-jump-starts-consumer-lab-testing/.

[293] *Id.* (explaining that Theranos's involvement in the 2015 Arizona law that "gives consumers [] the most robust and explicit rights in the country to order any lab tests they want, without having to go through a doctor.").

[294] *See, e.g.*, Sheelah Kolhatkar & Caroline Chen, *Theranos Under Investigation by SEC, U.S. Attorney's Office*, BLOOMBERG (Apr. 19, 2016), https://www.bloomberg.com/news/articles/2016-04-18/theranos-is-under-investigation-by-sec-u-s-attorney-s-office (describing investigations by the SEC, U.S. Attorney's Office of Northern District California, FDA, Centers for Medicare and Medicaid Services (CMS), and state health departments in Pennsylvania and California); Jef Feeley & Caroline Chen, *Theranos Faces Growing Number of Lawsuits Over Blood Tests*, BLOOMBERG (Oct. 14, 2016), https://www.bloomberg.com/news/articles/2016-10-14/theranos-faces-growing-number-of-lawsuits-over-blood-tests (reporting multiple lawsuits by investors and patients).

[295] Sy Mukherjee, *Walgreens Trashes Theranos in Their Fiery $140 Million Lawsuit Battle*, FORTUNE (Nov. 16, 2016), http://fortune.com/2016/11/15/walgreens-theranos-lawsuit-court-documents/.

[296] *See generally* Complaint (Public Version), Walgreen v. Theranos, No. 1:16-cv-01040, (D. Del. Nov. 8, 2016).

[297] *Id.* at 43.

[298] Chiang, *supra* note __ at 104.

shareholders, and other stakeholders. This itself may not be startling[299] but the risks of this practice could be greater when employed by corporations that use the litigation stage to pursue public relations strategies that had previously played out in press releases and other fora.

Litigation is an attractive forum for these "information wars" because of the way it attracts media coverage. News media prioritize litigation documents because, as public documents, journalists accord them greater significance for verification purposes.[300] Second, news stories spread quickly through magnification dynamics that corporate actors only need to set in motion.[301] If the complaint attracts the attention by one media outlet, competition among news organizations will increase the odds that multiple news sites will soon report on that same complaint.[302] Finally, news services like the Associated Press (AP) further facilitate dissemination because it, as a cooperative news entity, distributes stories to its member news outlets, each of which will publish the identical AP story.[303] By catching the attention of the AP, therefore, a corporate actor can disseminate its complaint through AP's subscriber network to newspapers, TV stations, and websites around the world.

E. Reputational Regulation by Other Legal Institutions

The reputational analysis offered in this article also invites further research regarding other kinds of legal institutions that also exhibit similar information effects and reputational sanctions. First, what other types of legal processes create the types of information effects that can serve as the basis of reputational regulation as described above?[304] One area of further research concerns suits before administrative agencies and their potential to create comparable reputational sanctions for business organizations and other types of actors.[305] The potential for responsive change may be particularly significant in the political sphere where complaints by public interest organizations before the Federal

[299] *Id.*

[300] Locy, *supra* note __.

[301] *Id.*

[302] *Id.*

[303] *Id.*

[304] *See* Parella, *Treaty Penumbras, supra* note __ (describing the reputational effects of treaty-making processes and resulting incentives for voluntary self-regulation).

[305] *See* Gellhorn, *supra* note __ at 1420 (discussing the risks of adverse agency publicity); Cortez, *supra* note __ at 1371 (explaining the use of publicity as a sanction); Wu, *supra* note __ (discussing the informal regulatory function of public threats).

Election Commission (FEC) can incentivize political organizations to reform themselves quickly before the complaints are public.[306]

For example, in 2015, the Hollywood Reporter claimed that President Donald Trump's campaign had hired professional actors to attend his political rallies.[307] The American Democracy Legal Fund filed a complaint before the FEC claiming that the Trump Campaign violated federal election laws by "fail[ing] to disclose payments to those actors or to the companies that hired them."[308] Although the FEC ultimately dismissed the complaint, the media attention and FEC complaint dissuaded other political actors from similar strategies.[309]

In future research, it is worth the (a) types of reputational incentives created by administrative agencies, (b) similarities and differences between information flows from litigation versus administrative agencies (c) factors that facilitate or impede the information flow from these institutions, and (d) what types of intermediaries are most suitable for aggregating, interpreting, and disseminating the information produced by administrative agencies.

F. Shaming the Angels: Reputational Regulation of Non-Governmental Organizations

It is one thing to shame Exxon Mobil or Walmart because these actors routinely confront criticism and bad press. It is a different matter when reputational sanctions attach to one of the "good guys," such as a non-governmental organization (NGO) whose mission and identity is dependent upon a reputation for positive social impact.

This is the situation currently facing the largest conservation NGO in the world: the World Wide Fund for Nature (WWF). Another NGO, Survival International, filed a complaint against WWF for the latter's action in Cameroon that involves financially and logistically supporting the (a) creation of conservation areas without the free prior and informed consent of the Baka, a local indigenous population, in violation of their human rights, and (b) "violent abuse to which Baka have been subjected by the ecoguards and other law

[306] Telephone Interview with Professor Sarah Haan, Associate Professor, University of Idaho School of Law (January 22, 2017).

[307] Aaron Couch, *Donald Trump Campaign Offered Actors $50 to Cheer for Him at Presidential Announcement*, HOLLYWOOD REPORTER (June 17, 2015).

[308] American Democracy Legal Fund v. Donald J. Trump et. al., First General Counsel's Report 1 (FEC March 7, 2016).

[309] Haan, *supra* note ___.

enforcement officials who patrol" the conservation areas.[310] Survival International requested a number of organizational changes to WWF's practices, including capacity-building, independent consultants, and greater participation by the Baka.[311]

Survival International did not bring these claims to a court or agency but to the Organization for Economic Cooperation & Development (OECD), an inter-governmental organization that serves as a forum for economic development issues. The OECD created non-binding principles and standards known as the OECD Guidelines on Multinational Enterprises (MNEs) that apply to MNEs associated with an adhering country.[312] Survival International claimed that WWF breached these Guidelines through its actions and therefore instigated the investigation and dispute resolution process available under the OECD framework.[313]

The complaint and ensuing investigation into WWF gained international attention because this is a rare occasion where an NGO is under investigation for violating the OECD Guidelines; traditionally, the "bad actors" under investigation were multinational businesses.[314] It is also the first time in OECD history that one NGO brought a case against another NGO.[315]

The complaint brings WWF practices – and their human rights impact – to light. It informs the public about the potential consequences of pursuing one social good (conservation) to the neglect of another (respect for local indigenous rights). The reputational consequences for WWF are both familiar and unique. WWF obtains a significant portion of its operational revenue from donors, who may withhold financial support if they believe that WWF is not a good steward of those funds; this is a variant of the financial sanction explored in Section III (A), *supra*.

This case may also demonstrate competitive dynamics that we are more accustomed to witnessing in the marketplace. By discrediting WWF, Survival

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[310] *Survival International Charitable Trust vv. World Wide Fund for Nature*, SPECIFIC INSTANCE (Feb. 10, 2016), ¶¶ 9-12, http://assets.survivalinternational.org/documents/1527/survival-internation-v-wwf-oecd-specific-instance.pdf.

[311] SPECIFIC INSTANCE, __ ¶¶ 114-20.

[312] Organization for Economic Cooperation & Development, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2011), http://www.oecd.org/daf/inv/mne/48004323.pdf.

[313] Under the OECD framework, complainants raise their claims with the relevant National Contact Point (NCP), which is the Swiss NCP in this case because Cameroon does not have an NCP and WWF's headquarters are in Switzerland. SPECIFIC INSTANCE, __ ¶ 5. Under the Guidelines, adhering countries create an NCP to help implement the Guidelines and resolve any disputes regarding an organization's failure to abide by the Guidelines. OECD, *About the National Contact Points*, http://mneguidelines.oecd.org/ncps/

[314] Associated Press, *Swiss wade into complaint against WWF over tribe's rights*, FOX NEWS (Jan. 5, 2017).

[315] OECD Watch, *Survival International v. WWF*, http://www.oecdwatch.org/cases/Case_457.

International raises its own profile and may even benefit from disgruntled donors who abandon WWF in favor of Survival International (switching NGOs).[316] The complaint also raises the profile of issues concerning indigenous populations and land rights, which may not receive the same attention as conservation efforts.[317] Therefore, the complaint could also encourage more stakeholders to switch support from conservation groups to indigenous rights advocacy, whether through Survival International or another NGO, depending on the elasticity of their social preferences (switching causes).

But reputational sanctions may have greater impact on an NGO compared to the (often disrepute) business organizations examined in Section III, *supra*. Reputational sanctions may be too strong when we are dealing in "the realm of the angels" because reputational sanctions have different consequences for these actors. In addition to reduced funds, a discredited NGO may suffer damage to its key strategic resource: its moral authority. It is this resource that enables it to pursue its mission through partnership with other organizations, advocate for causes or groups, disseminate information, coordinate action, and highlight poor behavior by other organizations – functions that could be jeopardized by too much damage to its moral authority. These consequences distinguish the unique vulnerabilities of NGOs to reputational effects. Instead of catalyzing change, these sanctions could threaten the future viability of the organization, which is an undesirable outcome if these organizations, on balance, create a positive social impact. We want them to change, not to disappear. It is therefore worth exploring the types and *strength* of reputational sanctions that are appropriate for NGOs as opposed to business organizations.

G. Facilitating Pivoting: How Litigation Enhances the Bonds of Non-Binding Law

Lawsuits can drive corporations to bind themselves to non-binding law. There are a variety of non-binding multi-stakeholder initiatives, international organization recommendations and guidelines, NGO certifications, and other "soft law" instruments that seek to regulate the behavior of businesses.[318] What

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316 *See* HANDLER, *supra* note __ at 216 ("Through the drama and newsworthiness of the litigation, the groups and the law-reformers publicize their cause and demonstrate their worth, and thereby hope to stimulate conscience beneficiaries (foundations, unions, and liberals) to support their cause.").

317 *See* HANDLER, *supra* note __ at 218 (explaining that reform groups legitimate their goals and causes through framing their objectives in the discourse of rights, which can also aid groups in securing resources from donors).

318 *See, e.g.*, John Ruggie, Special Representative for Bus. & Hum. Rts., *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework*, U.N. HUM. RTS. COUNCIL, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011); OECD, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2011), http://www.oecd.org/daf/inv/mne/48004323.pdf.

these instruments lack is enforcement: they are non-binding and corporations are not under an obligation to adopt these instruments. What they do possess is legitimacy because these instruments are usually formulated under the auspices of reputable organizations. Here, reputable may be relative. Many non-binding guidelines are developed by various units of the United Nations. Even if the American public has reservations concerning the United Nations, this actor's reputation is usually superior to that of large corporations routinely criticized for a range of violations. It is that reputational, or legitimacy, differential that matters for organizational change. Corporate actors will gravitate towards legitimacy-enhancing organizations when their own legitimacy is at stake. They pivot towards the United Nations or the Rainforest Alliance or other similar bodies when they might not otherwise. They seek to publicly associate themselves with these more legitimate organizations by forging some form of institutional relationship with them and these relationships can foster change.

For example, DOJ's criminal investigation caused a legitimacy crisis for FIFA that encouraged the latter to adopt a victim narrative through which it presented itself as the victim of its own corruption.[319] In order to retain this image – particularly to a doubtful global audience – FIFA had to take action consistent with its image as the victim and not the culprit.[320] Specifically, FIFA's legitimacy crisis meant that it had to distance itself from actors and practices compromising its fragile legitimacy and toward actors and practices that would enhance its legitimacy. This led FIFA to pivot towards the United Nations and begin the process of internalizing the latter's human rights standards into its practices.[321] FIFA may not have pivoted towards the United Nations on its own; instead, the criminal investigations primed FIFA to pivot by creating a legitimacy crisis where FIFA would want to foster ties to organizations with greater legitimacy (United Nations) and cut ties with actors further jeopardizing its legitimacy (defendants in DOJ investigation).

From the case illustrations examined, organizations are more likely to pivot under two conditions: (a) the stakes for legitimacy are high, and (b) they are in need of legitimacy. The first condition is satisfied, for example, in situations of

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[319] *See* Letter from William Buruck et al. to Lisa Foster, U.S. Attorney's Office, Eastern District of New York, at 1 (Mar. 15, 2016), http://resources.fifa.com/mm/document/affederation/footballgovernance/02/77/05/70/fifarestitutioncoverletter_neutral.pdf ("[FIFA] is a victim of the wrongful acts of multiple defendants in the above referenced matter").

[320] According to the FIFA Reform Committee, "in order to restore confidence in FIFA, significant modifications to its institutional structure and operational processes are necessary to prevent corruption, fraud, self-dealing and to make the organization more transparent and accountable. Recent events in particular have damaged FIFA and essential changes to its culture are needed to effect lasting reform and to restore its reputation . . . ". FIFA, 2016 FIFA REFORM COMMITTEE REPORT 1 (2015).

[321] *See* notes ___-___ and accompanying text.

heightened regulatory risk. Organizational legitimacy is particularly important when there is some nascent regulatory threat on the horizon. This regulatory threat could be prosecutorial, like FIFA, or legislative, such as the Paris Climate Accord.[322] Additionally, the banking sector was also more willing to re-examine executive compensation against the background of government inquiries and impending rules.[323]

Second, lawsuits can take away legitimacy when organizations need it most. The legitimacy consequences of litigation compromise the public image of a defendant corporation at a time when it desires to appear without fault. Additionally, lawsuits in this environment keep the public's attention on industry actors because of the media attention on legal proceedings. The legitimacy depriving consequences of litigation drive defendant corporations to seek the association of organizations with greater legitimacy than itself. It also encourages the corporation to borrow institutional practices from those organizations in order to appear more legitimate.[324]

CONCLUSION

This Article explores how our adjudicative institutions – litigation, government investigation, administrative action – creates information effects that have reputational consequences for organizations. These consequences provide four types of incentives for organizations to alter their behavior. *Financial incentives* convert information of organizational misconduct into financial consequences for that organization. *Policy incentives* concern the lack of credibility an organization possesses to participate in policy solutions. The *regulatory spill-over* incentive occurs when one organization compromises the reputation of its peers. Finally, incumbent organizations use reputational sanctions to de-legitimize a potential competitor in the market, thereby using reputation and social norms as *barriers to entry* for new business organizations in a market.

These incentives are important because they can encourage organizations to change when traditional "structural reform" strategies fail. Understanding these reputational incentives has implications for the objectives that litigants pursue in litigation because the process may be more important that the outcome. Litigation's value is in its dissemination of information about organizational behavior to the public, often with the aid of the news media. This analysis similarly reveals how the information effects of government investigation can also precipitate organizational reform. These adjudicative institutions create

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322 *See* notes ___-___ and accompanying text.
323 *See* notes ___-___ and accompanying text.
324 DiMaggio & Powell, *The Iron Cage Revisited*, *supra* note __.

different types of reputational sanctions that vary by the organization and the stakeholder evaluating its reputation. Collectively, these reputational sanctions reinforce each other and incentivize organizations to reform.