

Duke Law Journal

VOLUME 67

FEBRUARY 2018

NUMBER 5

REPUTATIONAL REGULATION

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ABSTRACT

*When organizations act in ways that offend the public interest, parties seeking to change that behavior traditionally turned to litigation to force these 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, federal prosecutors have used agreements with large corporations to introduce significant structural reforms.*

This Article identifies an alternative strategy for organizational change 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 informational effects of litigation: litigation transmits information about an organization into the public space; this information has reputational consequences for the affected

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Selected for the 2017 Stanford/Harvard/Yale Junior Faculty Forum.

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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.

This Article identifies and explains the operation of four reputational sanctions: financial, policy, regulatory spillover, 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 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 healthcare providers, to name a few. When these organizations behave badly, our traditional recourse is litigation.¹ Since *Brown v. Board of Education*,² litigants have used “structural reform” lawsuits to force school boards,³ prisons,⁴ police departments,⁵ and other public organizations to change for the better.

But it is not only public organizations that can pose a threat to society. Media headlines are filled with stories of misconduct by private organizations: Whole Foods profits from slave labor;⁶ Google sells

1. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282–83 (1979); Owen M. Fiss, *The Supreme Court, 1978 Term – Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2–3 (1979).

2. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

3. Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 869–70 (2007).

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

5. Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1378–96 (2015).

6. Adam Chandler, *Walmart, Whole Foods, and Slave-Labor Shrimp*, ATLANTIC (Dec. 16,

users' data;⁷ the National Football League (NFL) hides the effects of head trauma;⁸ Wells Fargo creates "fake accounts."⁹ While "structural reform prosecution" has been used to change private organizations, this Article identifies an alternative strategy that relies on the informational effects of litigation. As this Article explains, litigation releases information about organizational conduct into the public domain. This information has reputational consequences for the affected organizations. Organizational change is a response to that reputational shaming.¹⁰

Under this approach, organizational change does not result from a court order or parties' settlement. The engine for change is reputation, and the fuel for that engine is information. Over the past few years, for example, the NFL has faced a series of lawsuits from injured players who claimed that the NFL knew about the dangers of head injuries but hid those risks and failed to mitigate those risks.¹¹ As attention to head injuries from the media, athletes, and fans grew, the NFL introduced a series of new protocols to prevent and better understand head injuries, culminating in 2016's \$100 million initiative "Play Smart, Play Safe."¹² Under this initiative, the NFL has committed

2015), <https://www.theatlantic.com/international/archive/2015/12/slave-labor-shrimp-thailand-walmart-whole-foods/420837/> [https://perma.cc/QL33-MHT7].

7. Mark Hachman, *The Price of Free: How Apple, Facebook, Microsoft and Google Sell You to Advertisers*, PCWORLD (Oct. 1, 2015, 3:00 AM), <https://www.pcworld.com/article/2986988/privacy/the-price-of-free-how-apple-facebook-microsoft-and-google-sell-you-to-advertisers.html> [https://perma.cc/P43B-YV5H].

8. Jim Avila, Enjoli Francis & Lauren Pearle, *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> [https://perma.cc/7ZWM-PT36].

9. Matt Egan, *5,300 Wells Fargo Employees Fired over 2 Million Phony Accounts*, CNN MONEY (Sept. 9, 2016, 8:08 AM), <http://money.cnn.com/2016/09/08/investing/wells-fargo-created-phony-accounts-bank-fees> [https://perma.cc/5V94-TH9Y].

10. Reputational shaming through litigation can also be used against public organizations. See, e.g., Emily Chiang, *Institutional Reform Shaming*, 120 PENN ST. L. REV. 53, 76 (2015) ("[R]eform shaming seeks to induce those who operate institutions like schools and prisons to comply with the law for fear of being shamed if they do not."). However, the focus of this Article is the use of reputational sanctions against private organizations.

11. See Plaintiff's Amended Master Administrative Long-Form Complaint at 4, *In re Nat'l Football Players Concussion Injury Litig.*, 821 F.3d 410 (3d Cir. 2016) (No. 2:12-md-02323-AB) ("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.").

12. Roger Goodell, *NFL Commitment to Player Health and Safety: A Letter from Commissioner Roger Goodell* (Sept. 14, 2016), <https://www.playsmartplaysafe.com/commitment-letter> [https://perma.cc/8JW3-3JYR] [hereinafter Goodell Letter]; see also Press Release, National Football League, NFL, NFLPA Announce Policy to Enforce Concussion Protocol (July

to additional medical research and dissemination of that research¹³ and has changed officiating rules, practice guidelines, and training methods, among other commitments and improvements.¹⁴

Reputational effects are not unique to litigation, but also apply to other adjudicative processes, such as agency proceedings; organizational change can follow from the reputational effects of all these adjudicative processes.¹⁵ For example, Wells Fargo angered many of its banking customers when it was revealed 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."¹⁶ 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 loss that Wells Fargo suffered because of its tainted reputation.¹⁷ One study found that, as consumers switch to other banks in the wake of the scandal, Wells Fargo could lose almost \$100 billion in deposits plus another \$4 billion in revenue over the next two years.¹⁸ Additionally, this scandal affects more than just Wells Fargo's reputation; it also affects the reputation of the broader banking industry, which has been attempting to regain

25, 2016), <http://www.nfl.com/news/story/0ap3000000676669/article/nfl-nflpa-announce-policy-to-enforce-concussion-protocol> [<https://perma.cc/7YAS-98WS>] ("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.").

13. Goodell Letter, *supra* note 12 ("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.").

14. *Id.*

15. See Nathan Cortez, *Adverse Publicity by Administrative Agencies in the Internet Era*, *BYU L. REV.* 1371, 1379 (2011) (discussing agency use of adverse publicity to compensate for limited statutory enforcement authority); 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, by calling public attention to agency action, may adversely affect persons identified in the publicity."); Tim Wu, *Agency Threats*, 60 *DUKE L.J.* 1841, 1851 (2011) (defending the use of informational threats by agencies in dynamic industries). For further discussion on the informational effects of complaints filed under the Organization for Economic Cooperation & Development (OECD), see *infra* Part V.D.

16. Egan, *supra* note 9.

17. Press Release, Consumer Fin. Prot. Bureau, Consumer Financial Protection Bureau Fines Wells Fargo \$100 Million for Widespread Illegal Practice of Secretly Opening Unauthorized Accounts (Sept. 8, 2016), <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-fines-wells-fargo-100-million-widespread-illegal-practice-secretly-opening-unauthorized-accounts> [<https://perma.cc/UFJ9-KX2B>].

18. CG42, WELLS FARGO MINI-STUDY 3 (2016), <http://cg42.com/wp-content/uploads/2016/12/cg42-Wells-Fargo-Mini-Study-102016vF.pdf> [<https://perma.cc/2CH9-85LJ>].

public confidence since the financial crisis of 2008.¹⁹ To satisfy the public demand for accountability and appease consumers and policymakers, other banks are now considering changing their practices on recovery of executive compensation.²⁰

A number of scholars have explored the unique information-forcing effects of litigation for litigants,²¹ judges,²² and the broader public.²³ For a number of reasons, organizational actors possess

19. Evan Ramstad, *U.S. Bancorp's Richard Davis Says Banks Are Still Fighting for Their Reputation*, STAR TRIB. (Oct. 19, 2016, 9:09 PM), <http://www.startribune.com/u-s-bancorp-profit-continues-steady-march/397576481/> [<https://perma.cc/3HWS-6MUK>].

20. 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 a 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, 80 Fed. Reg. 41,144, 41,145–46 (proposed July 14, 2015) (to be codified at 17 C.F.R. pts. 229, 240, 249, 274). Additionally, as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, the Securities & Exchange Commission (SEC) proposed Rule 10D-1 in July 2015. Press Release, U.S. SEC, SEC Proposes Rules Requiring Companies to Adopt Clawback Policies on Executive Compensation (July 1, 2015), <https://www.sec.gov/news/pressrelease/2015-136.html> [<https://perma.cc/3QT7-6KSK>]. The proposed rule would require national securities exchanges to adopt listing standards that would require issuers to adopt, disclose, and comply with clawback policies, which must meet certain specified criteria. Listing Standards for Recovery of Erroneously Awarded Compensation, *supra*, at 41,146. Against this backdrop, “[b]ankers 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 & Ross Kerber, *Wells Fargo's CEO Pay Clawback Puts Wall Street Executives on Notice*, REUTERS (Sept. 28, 2016, 6:59 PM), <http://www.reuters.com/article/us-wells-fargo-accounts-clawbacks-idUSKCN11Y358> [<https://perma.cc/D74H-EZ3N>].

21. Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CALIF. L. REV. 1259, 1264 (2017) (proposing that judges in multidistrict litigation (MDL) cases use their role to force information disclosure, enabling parties in MDL cases to reach informed decisions on whether or not to accept proposed settlements). Hadfield and Ryan explain:

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: a person who has a grievance against another has only the tools that fall to his or her individual status to obtain information.

Gillian K. Hadfield & Dan Ryan, *Democracy, Courts and the Information Order*, 54 EUR. J. SOC. 67, 81 (2013).

22. 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).

23. Alexandra D. Lahav, *The Roles of Litigation in American Democracy*, 65 EMORY L.J. 1657, 1683–90 (2016) (discussing transparency benefits for the public); 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).

information about their practices that are unknown to anyone else, but it is often not in their interest to share it. Litigation forces that information into the public.

This Article explores the related but distinct information-transmission function of litigation: litigation as a mechanism to disseminate information in society at large. While the two functions—information forcing and information transmission—often overlap and operate in tandem, the information-transmission function is distinct in a few ways. First, it does not concern the revelation of new information, but the dissemination and amplification of information that may already be publicly available. The information-transmission function is significant because availability does not equal attention: we often ignore or otherwise miss information to which we have access. Litigation brings it to our attention, often with the aid of the media, which frames it within compelling narratives and elevates its profile, thereby expanding the audience for it.²⁴

Second, because the information-transmission function is not as concerned with new information, it operates even if the parties do not reach the discovery stage, where information-forcing functions are exercised. The information-transmission function takes effect earlier, even at the filing of the initial complaint.²⁵ Measures that restrict information-forcing functions of litigation may therefore not similarly impede the information-transmission functions. However, measures that restrict the flow of information from the courts to the public, such as confidentiality measures or alternative dispute resolution, would impede the transmission function.²⁶

Finally, the information-transmission function helps to produce a range of reputational sanctions. This Article describes four distinct reputational sanctions produced by litigation or government

24. See Katerina Linos & Kimberly Twist, *The Supreme Court, the Media, and Public Opinion: Comparing Experimental and Observational Methods*, 45 J. LEGAL STUD. 223, 227–28 (2016) (discussing the features of Supreme Court cases that increase the likelihood of media coverage).

25. See Chiang, *supra* note 10, at 104 (“The complaint in today’s institutional reform litigation is a powerful shame-generating tool. The idea of the complaint as an opportunity for story telling is not a new one, and litigators know that the most compelling cases rest upon the most compelling stories.”).

26. Laurie Kratky Doré, *Settlement, Secrecy, and Judicial Discretion: South Carolina’s New Rules Governing the Sealing of Settlements*, 55 S.C. L. REV. 791, 798–99 (2004); Andrew D. Goldstein, *Sealing and Revealing: Rethinking the Rules Governing Public Access to Information Generated Through Litigation*, 81 CHI.-KENT L. REV. 375, 379 (2006); Minna J. Kotkin, *Secrecy in Context: The Shadowy Life of Civil Rights Litigation*, 81 CHI.-KENT L. REV. 571, 583–84 (2006).

investigation: financial, policy, regulatory spillover, and barriers to entry. This analysis is important—even to lawyers who already incorporate reputational effects into their litigation strategies—because we need to understand how litigation creates reputational sanctions and the mechanics by which these sanctions drive change.²⁷

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. These types of financial sanctions are wielded by consumers who convert information of misdeeds into financial consequences for an organization, as opposed to financial penalties imposed directly by adjudicatory processes. *Policy sanctions* result when an organization’s reputation undermines or leaves it without any legitimacy to offer policy solutions, as when tobacco companies tried to help make health policy after their public relations tactics were revealed.²⁸ The *regulatory spillover sanction* occurs when the misdeeds of one bad industry actor compromise the reputation of its industry peers. Consider Volkswagen (VW) and the effects of its cheating scandal for auto manufacturers around the world, as other national regulators initiated investigations into the emissions performances of VW and of its competitors.²⁹ Finally, reputational sanctions can serve as a *barrier to entry* for new businesses in a market. Incumbent businesses use reputational sanctions strategically to delegitimize a potential competitor in the public’s mind,³⁰ as when the taxi industry raised

27. Chiang, *supra* note 10, at 87 (arguing for improved understanding of how litigation shames organizations, even when litigators already employ these strategies in their “playbook”).

28. Thomas Bollyky & David Fidler, *Has a Global Tobacco Treaty Made a Difference?* ATLANTIC (Feb. 28, 2015), <https://www.theatlantic.com/health/archive/2015/02/has-a-global-tobacco-treaty-made-a-difference/386399/> [<https://perma.cc/A7KX-M92J>] (describing how revelations about the tobacco industry’s “systematic industry deception” about health effects led to its ostracism as “a global pariah,” and simultaneously increased support for an international treaty on tobacco control and “undermin[ed] the industry’s attempts to kill it”).

29. See William Boston, *Volkswagen Emissions Investigations Should Widen to Entire Auto Industry, Officials Say*, WALL STREET J. (Sept. 22, 2015, 7:51 AM) <https://www.wsj.com/articles/volkswagen-emissions-investigations-should-widen-to-entire-auto-industry-officials-say-1442915079> [<https://perma.cc/NEG3-CSHJ>] (reporting that French, British, German, and Italian regulators were considering investigating the broader auto industry for similar emissions fraud).

30. Alex Bitiktine, *Legitimacy-Based Entry Deterrence in Inter-Population Competition*, 11 CORP. REPUTATION REV. 73, 76 (2008).

allegations against Uber³¹ or the hotel chains against Airbnb.³²

As previously mentioned, reputational sanctions are not unique products of litigation. But one attribute that makes litigation special is the way it attracts media attention;³³ the media may not be as likely to follow allegations unsupported by litigation.³⁴ Because litigation draws in the media, which can then act as an information intermediary, it can expand the audience for the information shared within the judicial process.³⁵

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.³⁶ All these benefits foster conditions conducive for organizational

31. Serena Saitto, *Inside Big Taxi's Dirty War with Uber*, BLOOMBERG (Mar. 11, 2015, 8:00 AM), <https://www.bloomberg.com/news/articles/2015-03-11/inside-big-taxi-s-dirty-war-with-uber> [<https://perma.cc/9R28-Q72R>] (explaining how the taxi trade association hired a publicity expert to gather and disseminate unfavorable information about Uber).

32. Christopher Elliott, *Big Hotels' Plan To Win Customers from Airbnb*, FORTUNE (Jan. 27, 2016, 7:00 AM), <http://fortune.com/2016/01/27/big-hotels-airbnb/> [<https://perma.cc/2QG2-8HVL>] (explaining that the hotel industry is funding research suggesting that “some Airbnb operators are running ‘illegal’ hotels”).

33. Perry Parks, *Summer for the Scientists? The Scopes Trial and the Pedagogy of Journalism*, 92 JOURNALISM & MASS COMM. Q. 444, 445 (2015) (“The trial was a major news event that attracted up to two hundred reporters and included the first live radio broadcast from a courtroom.”).

34. RICHARD MCADAMS, THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS 194 (2015) (“[T]he media is more likely to cover the press release about a lawsuit than a press release about legal claims not backed by a lawsuit. In the latter case, the absence of action creates doubt whether the [attorney general] actually believes the claim he is making.”).

35. See Linos & Twist, *supra* note 24, at 225, 232 (“[T]he media’s role is distinctly important to the [Supreme] Court’s influence on public opinion.” (citing RICHARD DAVIS, DECISIONS AND IMAGES THE SUPREME COURT AND THE PRESS 16 (1994))); *id.* at 232 (“[M]edia coverage of both health care and immigration issues spiked after the Supreme Court decisions to levels not seen before or since; no other actor or event, including the presidential debates, placed as much media attention on these issues as the Supreme Court.”).

36. See, e.g., 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 forced parties into a settlement); Chiang, *supra* note 10 at 59–61 (describing similar strategies); Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477, 489 (2004) (describing social-mobilization effects of publicity) [hereinafter Lobel, *Courts as Forums for Protest*]; 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). See generally Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2011) (discussing the benefits to social movements from losing litigation battles).

change. For example, in the discrimination context, “law reformers do not expect to achieve results through a court or administrative order Rather, they use legal proceedings to generate harmful publicity that will force the discriminator into a settlement.”³⁷ Along these lines, the Environmental Defense Fund used litigation concerning the use of DDT to “dramatize the dangers of environmental degradation and to launch a massive, and successful, fund-raising drive.”³⁸

Reputational regulation similarly focuses 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, policymaking role, autonomy—unless it demonstrates change to those withholding those resources.

This Article’s central thesis is intuitive. We expect demonstrations of good behavior by organizations that have lost public favor: change follows scandal. What this Article adds to our collective intuition is a deeper analysis of the mechanisms through which the latter leads to the former. This Article differentiates between different types of reputational sanctions, begins to understand the roles of litigants and prosecutors, and identifies the information-transmission functions of litigation.

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—the release of information through the adjudicative process potentially results in organizational 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 the view 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.”³⁹ The analysis offered here reveals additional benefits of prioritizing process over outcome. It also reveals that the costs to the public interest of

37. HANDLER, *supra* note 36, at 214.

38. *Id.* at 216.

39. Chiang, *supra* note 10, at 69–70; *see also* Lobel, *Courts as Forums for Protest*, *supra* note 36, 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.”).

court secrecy and arbitration may be higher than many suspect; these impediments obstruct not only the public-notice function but also the effect of reputational incentives and, consequently, the likelihood of responsive organizational change. Finally, it reveals a more comprehensive picture of the impact of litigation, whether desirable or not.

Though the focus of this analysis is on organizational change, not all organizational change will be desirable. Reputational sanctions are difficult to calibrate and their effects are difficult to predict or control. These sanctions may impose costs far exceeding any wrong committed, or may even impose costs when there was no wrong. Reputational sanctioning through the courts reduces the risk of abuse because of the gatekeeping function performed by pleading standards, professional rules, the adversarial process of truth finding, and review by judge and jury, among other checks. These checks distinguish the production of reputational sanctions via courts from the production of reputational sanctions through other channels.

This Article proceeds as follows. Part I discusses two ways that direct incentives have been used by litigators, courts, and prosecutors to encourage organizational change. It also explains the origins of organizational reputations and emphasizes the importance of information availability to stakeholders. Part I concludes by explaining the various advantages of the courts and the media, individually and collectively, in producing information that stakeholders use to evaluate organizations. Part III discusses four types of reputational sanctions—financial, regulatory spillover, 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: the Fédération Internationale de Football Association (FIFA) investigation (financial), the Wells Fargo fine (regulatory spillover), the civil suits against Uber (barrier to entry), and the responses of the oil and gas industry to climate change policymaking (policy).

Part III discusses the potential risks of reputational regulation, including the risk of frivolous litigation (such as in “strike suits”),⁴⁰ and concerns about litigation transparency and arbitration for reputational sanctions. Finally, Part IV concludes by identifying the implications of

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

reputational regulation for evaluating the success of legal institutions, identifying litigation objectives, and the reputational regulatory potential of other legal institutions.

I. ENCOURAGING ORGANIZATIONAL CHANGE THROUGH REPUTATION

There are a number of ways that legal institutions can encourage organizations to change. Organizational change can result from court order or non-prosecution or deferred prosecution agreements. However, the reputational effects of litigation and prosecution can also indirectly encourage organizations to change their practices. Section A describes how structural reform litigation and prosecution illustrate a direct means by which legal institutions compel defendant organizations into organizational change. It also explains the informational effects produced by those legal institutions and the role that the media plays in heightening those effects. Section B explains how those informational effects make organizations more willing to change and to borrow practices from other organizations. Legal institutions can thus be used to indirectly encourage organizational change.

A. *Understanding the Information Effects of the Courts*

Following *Brown v. Board of Education*, litigants requested injunctive remedies to change the practices of public organizations. In structural reform litigation, judges became architects of change within large public organizations in order to bring these organizations into alignment with Constitutional requirements.⁴¹ Structural reform litigation departed from traditional dispute resolution in significant ways.⁴² 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.”⁴³ 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.⁴⁴ Finally, the hallmark of structural reform litigation

41. Paul Gewitz, *Remedies and Resistance*, 92 YALE L.J. 585, 588 (1983).

42. Chayes, *supra* note 1, at 1282–83 (describing traditional litigation as bipolar, retrospective, right-remedy interdependent, self-contained, and party-initiated/party-controlled).

43. Fiss, *supra* note 1, at 18.

44. *Id.* at 19–22.

is its remedial focus that aims at institutional change.⁴⁵

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.⁴⁶ Today, however, structural reform litigation faces a number of criticisms and obstacles, including concerns with procedural barriers;⁴⁷ functional competence;⁴⁸ supervision and enforcement of structural decrees;⁴⁹ separation of powers;⁵⁰ and high costs of implementation, especially for poorer municipalities.⁵¹

Prosecutors similarly seek organizational change within business organizations through deferred prosecution agreements (DPAs) or non-prosecution agreements (NPAs) to obtain organizational cooperation in significant structural reform of corporate entities implicated in wrongdoing.⁵² The terms that organizations must agree to usually relate to internal reform of the organization, cooperation with investigations into individual employees, restitution payments, and external monitoring.⁵³

Like structural reform litigation, organizational reform through DPAs and NPAs has attracted criticism. Critics have raised concerns

45. *See id.* at 27 (noting that such litigation focuses on shaping remedies in the context of the ongoing relationship between judges and institutions).

46. Garrett, *supra* note 3, at 857.

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

48. John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CALIF. L. REV. 1121, 1138 (1996).

49. *Id.*

50. *Id.* at 1140.

51. Rushin, *supra* note 5, at 1408–09.

52. Garrett, *supra* note 3, at 888 (“DOJ avoids trial by entering into pre-trial diversion agreements, permitting organizations to commit to a rehabilitative program, and agreeing to defer prosecution should they comply.”). These agreements reflect the Organizational Sentencing Guidelines that created significant incentives for internal structures that monitor for wrongdoing. *Id.* at 860.

53. *See* 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). For example, in 2005, accounting firm KPMG came under investigation by different government bodies for engaging in tax fraud. Garrett, *supra* note 3, at 861. After the Department of Justice (DOJ) filed a criminal tax complaint against KPMG, the parties reached an agreement setting forth significant structural change at KPMG: restrictions on its tax practice, implementation of compliance and ethics programs, training programs, and protection for whistleblowers, among others. *Id.* at 863–65. In exchange, the DOJ and the IRS ended the criminal prosecution of KPMG. *Id.* at 862.

regarding expertise,⁵⁴ selectivity issues,⁵⁵ use of corporate monitors,⁵⁶ the inclusion of unrelated provisions,⁵⁷ lack of judicial oversight of DPAs and NPAs,⁵⁸ broad scope of prosecutorial discretion,⁵⁹ and the requirement of privilege waivers until the practice was later discouraged.⁶⁰

In structural reform litigation or prosecution, there is a direct and close causal connection between the legal institution and the organizational change: a judge orders a particular remedy or a prosecutor and organization enter into an agreement addressing organizational reform. Reputational regulation is an alternative approach wherein public and civil actors rely on the reputational sanctions produced by litigation and other legal processes to encourage private organizations to change.⁶¹ 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 upon the reputational impact of the suit. They can accompany all types of litigation or investigation, not just those seeking organizational change. The mechanism for organizational change is not court or contract but reputation.

Definitions of organizational reputation are plentiful, particularly depending on the organization being discussed,⁶² but many scholars who specifically study corporations agree that corporate reputations

54. David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1326 (2013) (noting concern that the focus of NPAs and DPAs on corporate compliance programs “involve[s] the Department in management controls and structural reform that may go beyond its core area of litigation expertise”).

55. *Id.* at 1327 (discussing selectivity issues based on firm size and nationality).

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

57. Garrett, *supra* note 3, at 917–18; Peter Spivack & Sujit Raman, *Regulating the New Regulators: Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 174 (2008).

58. Uhlmann, *supra* note 54, at 1328–29.

59. *See* Garrett, *supra* note 3, at 918–31 (exploring the implications of and counterweights to such broad discretion).

60. Spivack & Raman, *supra* note 57, at 180.

61. *See supra* Part I.B (explaining similar reputational strategies examined by social movements theorists and contrasting those strategies with “reputational regulation”).

62. Violina P. Rindova, Ian O. Williamson, Antoaneta P. Petkova & Joy Marie Sever, *Being Good or Being Known: An Empirical Examination of the Dimensions, Antecedents, and Consequences of Organizational Reputation*, 48 ACAD. MGMT. J. 1033, 1036 tbl.1 (2005) (collecting definitions of reputation from marketing, sociology, economics, and other disciplines).

result from what many different actors think about it.⁶³ 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.”⁶⁴ 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.”⁶⁵

Corporate reputation matters to different stakeholders because it helps them “gauge the probable outcomes of interacting with a particular organization.”⁶⁶ 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 its operations, including its ability to charge premium prices, recruit and retain employees, enjoy consumer loyalty, lower operating costs, and use its reputational capital to mitigate the risks to itself if and when a crisis strikes.⁶⁷

A corporate reputation is a product of what various stakeholders think about that corporation, but before stakeholders can form an

63. See, e.g., David L. Deephouse, *Media Reputation as a Strategic Resource: An Integration of Mass Communication and Resource-Based Theories*, 26 J. MGMT. 1091, 1093 (2000) (defining reputation as “the evaluation of a firm by its stakeholders in terms of their affect, esteem, and knowledge” and noting “[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”); Charles J. Fombrun, *The Building Blocks of Corporate Reputation*, in THE OXFORD HANDBOOK OF CORPORATE REPUTATION 94, 100 (Michael L. Barnett & Timothy G. 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.”); E. Geoffrey Love & Matthew Kraatz, *Character, Conformity, or the Bottom Line? How and Why Downsizing Affected Corporate Reputation*, 52 ACAD. MGMT. J. 314, 314 (2009) (“Corporate reputation is an important asset (or liability) bestowed upon a firm by external audiences.”); Yuri Mishina, Emily S. Block & Michael J. Mannor, *The Path Dependence of Organizational Reputation: How Social Judgment Influences Assessments of Capability & Character*, 33 STRATEGIC MGMT. J. 459, 460 (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.”).

64. CHARLES J. FOMBRUN, REPUTATION: REALIZING VALUE FROM THE CORPORATE IMAGE 37 (1996).

65. *Id.* at 72.

66. Mishina et al., *supra* note 63, at 460.

67. FOMBRUN, *supra* note 64, at 72–73; Deephouse, *supra* note 63, at 1098; Charles Fombrun & Mark Shanley, *What’s in a Name? Reputation Building and Corporate Strategy*, 33 ACAD. MGMT. J. 233, 233 (1990); Ronald Sims, *Toward a Better Understanding of Organizational Efforts to Rebuild Reputation following an Ethical Scandal*, 90 J. BUS. ETHICS 453, 454–55 (2009).

impression of a corporation, they need information about it. Unfortunately, these stakeholders often face information problems that make it difficult to evaluate a corporation's behavior or its products. These information problems are not unique to interactions with corporations, but also extend to our dealings with other types of organizations.

The first hurdle stakeholders confront is the problem of information asymmetry between themselves and an organization. Organizations are often in a better position to collect, aggregate, and interpret information about themselves, but lack the incentives to share it, particularly if it is not in their interest to do so.⁶⁸

Even if stakeholders can get access to that information, they confront other issues that impede their ability to use that information productively. One issue is expertise and the capability to make sense of the information that an individual obtains about an organization. A second issue relates to the availability of too much information, which 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.⁶⁹ The information is out there but for a variety of reasons—time, inclination, and capability—we do not make use of it.⁷⁰

That is why we often rely on a variety of *information intermediaries* to reveal, disseminate, explain, and analyze information about organizations.⁷¹ Voters rely on their favorite news channels to recommend political parties, individuals 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 and provide signals to us about the information

68. The NFL's handling of information regarding brain injuries serves as an example. See *supra* note 11–13 and accompanying text.

69. See, e.g., Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 687–90 (2011) (outlining the failure of mandated disclosure to influence stakeholders' behavior due to the informational overload effect, especially in the credit and healthcare contexts).

70. See Paula J. Dalley, *The Use and Misuse of Disclosure as a Regulatory System*, 34 FLA. ST. U. L. REV. 1089, 1114–19 (2007) (discussing the limitations on the effectiveness of information-based regulation).

71. See Roy Shapira, *A Reputational Theory of Corporate Law*, 26 STAN. 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.”).

that is relevant and even the decisions that are correct.

The same is true when it comes to information regarding corporations, including their performance, value, and character. Information intermediaries “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.”⁷² The remainder of this Section discusses the information-enhancing effects of two important intermediaries: the courts and the media. Each of these intermediaries supplies stakeholders with both facts and narratives with which stakeholders can evaluate organizational conduct and construct organizational reputation.⁷³

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 do not.⁷⁴ 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.⁷⁵ 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. Courts produce factual information for public consumption in the form of pleadings, expert testimony, filed discovery, and judicial decisions.⁷⁶ Not all these products result from a judge’s hand, yet the public tends to aggregate all these products under the common, sacrosanct umbrella of “the court.” That label is important because it accords information associated with it a special kind of authority, which 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 makes 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

72. FOMBRUN, *supra* note 64, at 60.

73. See Timothy G. Pollock & Violina P. Rindova, *Media Legitimation Effects in the Market for Initial Public Offerings*, 46 ACAD. MGMT. J. 631, 631 (2003) (examining the impact of media on stakeholders’ evaluation of corporate reputations).

74. 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).

75. Shapira, *supra* note 23, at 1201.

76. Goldstein, *supra* note 26, at 402.

disclosure; this is the information-forcing function of the courts.⁷⁷ 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.⁷⁸ 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; this is the information-transmission function of the courts. The information revealed through litigation is evaluated by a trusted class of opinion givers: judges.⁷⁹ 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 courts 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 reevaluate their initial assessment based on the checks provided by the litigation process and thereby to calibrate their reputational judgments of organizational behavior.⁸⁰

However reliable of an information intermediary the courts are, 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 are 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 other information intermediaries to inform us of legal developments and explain their significance. One prominent information intermediary of legal information is the media, at least in part because it is free or significantly less costly than legal counsel, itself

77. Lahav, *supra* note 23, at 1683.

78. See Goldstein, *supra* note 26, at 402 (noting the public reliance on the courts to expose wrongdoing).

79. Bradt & Rave, *supra* note 21, at 1264–65 (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); Shapira, *supra* note 71, at 12 (describing judges as providing a “second-opinion” on information produced during litigation).

80. See Shapira, *supra* note 71, at 13.

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.⁸¹ As such, litigation-related information passes through two levels of intermediaries—court intermediary and media intermediary—before it reaches the stakeholder.

Like the courts, the media also possesses unique qualities that influence how individuals perceive the information it shares and, consequently, stakeholders' 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.”⁸² 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.”⁸³

The process of agenda setting begins with the attention that the media accords a particular organization and its activities or products.⁸⁴ Through cues such as the length of a story or its frequency, the public will decide which organizations’ behavior most warrants their attention.⁸⁵ But the media does not stop there. It also provides a filter through which the public associates the organization with a set of attributes.⁸⁶ 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

81. 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 U.S. Supreme Court. Television personalities also explain legal developments for their audiences. Even lawyers obtain legal news through trade publications, professional newsletters, and firm bulletins.

82. Craig E. Carroll & Maxwell McCombs, *Agenda-Setting Effects of Business News on the Public’s Images and Opinions About Major Corporations*, 6 CORP. REPUTATION REV. 36, 36 (2003).

83. *Id.* at 36–37; Pollock & Rindova, *supra* note 73, 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 legitimization of firms.”).

84. See Carroll & McCombs, *supra* note 82, at 37 (noting the effect of media attention on the perceived salience of the subject to stakeholders).

85. *Id.*

86. See *id.*; Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 733–36 (1999) (discussing the ways that interest groups feed information to media outlets in order to increase the salience of an issue).

while ignoring others, the news media influences the criteria by which presidents, government policies, political candidates and corporations are judged.”⁸⁷

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.⁸⁸ 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. The media helps the general public learn and digest information elicited by the legal process. The public can then use that information to encourage organizational change, the process of which will be described in the next Section.

B. The Process of Influencing Organizational Change: Priming, Pivoting, and Positioning

In contrast to the organizational reform strategies explained in Part I.A, 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 in order to reach a settlement,⁸⁹ educate the public on a cause,⁹⁰ secure funding and other resources for the plaintiff organizations,⁹¹ and construct a social movement’s organizational identity, including motivating its members.⁹² Both social movements theory and reputational regulation are less court-centered than traditional litigation because both approaches use legal processes to achieve extralegal objectives rather

87. See Carroll & McCombs, *supra* note 82, at 37.

88. See Lobel, *Courts as Forums for Protest*, *supra* note 36, at 487.

89. See Chiang, *supra* note 10, 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.”).

90. See Lobel, *Courts as Forums for Protest*, *supra* note 36, at 481–82 (providing examples of how “political movements have used courts to further public debate on important constitutional issues”).

91. HANDLER, *supra* note 36, at 216.

92. NeJaime, *supra* note 36, at 972–86.

than relying on legal remedies to achieve the social objectives desired.⁹³ Both analyses also reveal the productive social benefits of legal processes that, upon initial evaluation, “fail” to produce legal solutions to organizational misconduct.⁹⁴

Under reputational regulation, organizational change depends on the particular institutional vulnerabilities of the organizations at issue. Specifically, reputational sanctions can be used to influence organizational change: stakeholders wield those sanctions to deny an organization access to a resource that it values unless that organization demonstrates change to those withholding the relevant resources.⁹⁵ The denial of resources and the proof of change are attenuated; the 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.

Publicity increases pressure on organizations to change but does not by itself determine the types of changes that the organization adopts; those desiring change 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 on organizational change strategies with other stakeholders.⁹⁶

In contrast, reputational regulation influences the way that organizations change by *priming*, *pivoting*, and *positioning*.⁹⁷ *Priming* refers to the creation of conditions that make an organization willing 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 that an organization confronts when it tries to change its identity to appear more legitimate to the public’s perception.

93. See HANDLER, *supra* note 36, at 192 (describing the use of the legal system for “nontraditional” purposes).

94. NeJaime, *supra* note 36, at 1002–11.

95. Craig Deegan, *Introduction: The Legitimising Effect of Social and Environmental Disclosures; a Theoretical Foundation*, 15 ACCT., AUDITING & ACCOUNTABILITY J. 282, 293 (2002) (“[L]egitimacy theory would suggest that whenever managers consider that the supply of the particular resource is vital to organizational survival, then they will pursue strategies to ensure the continued supply of that resource.”).

96. HANDLER, *supra* note 36, at 214; Chiang, *supra* note 36, at 106–07.

97. Kishanthi Parella, *The Information Regulation of Business Actors*, 111 AJIL UNBOUND 130, 130 (2017).

This stage of organizational change is called positioning because it involves an identity struggle that plants an organization on a spectrum between two poles, representing the identity it desires and the identity it fears; positioning is about the institutional constraints created by this identity struggle.⁹⁸

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 necessitates a subsequent action: we prime in anticipation of some future act. When litigation primes organizations, it is 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 that further jeopardize their legitimacy while pivoting toward organizations that could enhance their legitimacy.⁹⁹

Pivoting is a product of isomorphism, which explains why organizations tend to resemble each other in their policies, practices, and other operational features.¹⁰⁰ 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.¹⁰¹ These are all examples of isomorphic attraction because their analysis generally describes situations when organizations change to resemble each other.

98. *Id.* at 132.

99. Deegan, *supra* note 95, at 293.

100. 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* 63, 65–66 (Paul J. DiMaggio & Walter W. Powell eds., 1991); see John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 *AM. J. SOC.* 340, 340–41 (1977).

101. DiMaggio & Powell, *supra* note 100, at 67–77.

In contrast is 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 organizational change by illustrating why and when an organization will copy or distance itself from another.

Pivoting is important because the organizations toward 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 toward but may not do so without a legitimacy crisis motivating it. Outside actors are limited in their ability to command an organization to incorporate and enforce the nonbinding institutional rules of multistakeholder initiatives, nongovernmental organization (NGO) guidelines, or other unenforceable institutional rules.¹⁰² But while these organizations lack coercive capability they do possess an important resource: legitimacy.¹⁰³ When, therefore, an organization's legitimacy is tainted by the reputational effects of litigation, the organization is more likely to pivot toward these noncoercive organizations in order to enhance its own legitimacy.¹⁰⁴ For example, following a public crisis, a transnational corporation may willingly adopt the nonbinding rules of a respected international organization, such as the United Nations (UN), even though it is not legally obligated to do so.¹⁰⁵ The corporation adopts these nonbinding rules because the crisis has damaged its reputation, and it seeks to repair its image by forging

102. Parella, *supra* note 97 at 131–32.

103. *Id.*

104. See Bitektine, *supra* note 30, at 86 (“[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.”); Parella, *supra* note 97 at 131–32 (arguing that noncoercive organizations’ legitimacy induces business actors to turn to them when confronted with a legitimacy crisis).

105. Parella, *supra* note 97, at 132.

closer ties to another organization that is better respected.¹⁰⁶

Positioning is the last step, and it 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 from whom it will borrow institutional practices. The information produced by media-litigation intermediaries can trigger an identity struggle for an organization if the information revealed presents an image of the organization that differs from the organization's desired public image. This identity struggle has two consequences for organizational behavior. First, organizations will adopt practices that lead them to resemble the desired identity and appear less like the feared one. Second, organizations often pursue their desired identity by distinguishing themselves from other organizations they cast as "the enemy." By labeling other actors as the enemy, organizations change their practices to differentiate themselves from those others so the public can distinguish between the two.

Our legal institutions can encourage organizations to change in a number of ways. While court orders and DPAs can directly contribute to change, the reputational effects of litigation and prosecution can indirectly encourage organizations to change. These processes create informational effects that are amplified by media coverage.

The combination of priming, pivoting, and positioning through identity struggles illustrates how the information effects produced by legal institutions can provide indirect mechanisms for encouraging organizational change.

II. REPUTATIONAL SANCTIONS IN PRACTICE

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

This Part analyzes four distinct but related reputational incentives for organizational change: financial, regulatory spillover, barriers to entry, and policy. These incentives do not necessarily operate in isolation but often work in combination to encourage organizations to

106. *Id.*

change. Consequently, the case illustrations below demonstrate multiple, overlapping incentives at work, but they have been organized to draw the reader's attention to the operation of one incentive per case illustration. This Article highlights incentives independently in order to identify and explain the unique mechanisms of each incentive and thus understand its particular contribution to organizational change.

The case illustrations selected are as follows: the FIFA investigation illustrates the financial incentive, the Wells Fargo fine describes regulatory spillover, the civil suits against Uber demonstrate barrier to entry, and the climate change treaty is exemplar of the policy-based incentive. The case illustrations were selected 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 2016.¹⁰⁷ The other case illustrations may not have commanded significant media attention by themselves, but they occurred in the shadow of significant political and industry developments over the past two years.

A. *Financial Sanctions: "Naming and Shaming"*

The most well-known reputational consequence for an organization facing bad publicity is a financial penalty levied by consumers or 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 use shareholder proposals advocating organizational changes to address nonfinancial risks, such as those relating to the environment or human rights.¹⁰⁸ Therefore,

107. Chris Matthews & Stephen Gandel, *The 5 Biggest Corporate Scandals of 2015*, FORTUNE (Dec. 27, 2015, 10:47 AM), <http://fortune.com/2015/12/27/biggest-corporate-scandals-2015/> [<https://perma.cc/Q962-DNK5>] (listing the FIFA scandal); Chris Matthews & Matthew Heimer, *The 5 Biggest Corporate Scandals of 2016*, FORTUNE (Dec. 28, 2016, 10:00 AM), <http://fortune.com/2016/12/28/biggest-corporate-scandals-2016/> [<https://perma.cc/8TTG-XCKZ>] (listing the Wells Fargo scandal at the top of the list).

108. See, e.g., BIMAL PATEL, ROBERT KALB, ANDREW BOREK & RYAN PHILLIPS, INSTITUTIONAL S'HOLDER SERVS., 2015 UNITED STATES PROXY SEASON REVIEW – GOVERNANCE PROPOSALS 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."); Victoria Harper Ho, *Risk-*

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.

The case study below explains how financial pressure from corporate sponsors incentivized FIFA to adopt internal reforms in 2016. It focuses on the financial incentives that encouraged this organizational change because, though FIFA is not new to scandal, the reforms are new. Although it is challenging to draw lines of direct causation, two factors distinguish 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 U.S. authorities.¹⁰⁹ Second, and relatedly, FIFA experienced a significant financial crisis as corporate sponsors threatened to withdraw because of FIFA's tarnished reputation.¹¹⁰ FIFA's leadership saw internal reform as a way to win sponsors back and attract new ones.¹¹¹ As such, this case illustration is used to describe *financial* incentives in practice, but in reality, the regulatory incentive through Department of Justice (DOJ) investigation also played a significant role.

1. *Fédération Internationale de Football Association (FIFA)*. FIFA is the international governing body for organized soccer, which makes billions of dollars from media, marketing rights, ticket sales to World Cup championships, and corporate sponsorships.¹¹² FIFA is organized under Swiss association law and currently has 209 member associations globally.¹¹³ Each of these associations represents the football federation of a particular nation or territory.¹¹⁴ These associations comprise the legislative body of FIFA, the FIFA Congress.¹¹⁵ Additionally, each of these associations is a member of one of the six

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 percent increase over 2013.”).

109. See *infra* notes 117–19 and accompanying text.

110. See *infra* notes 122–30 and accompanying text.

111. See *infra* notes 128–37 and accompanying text.

112. Virginia Harrison, *How FIFA Makes Its Billions*, CNN MONEY (May 27, 2015, 12:17 PM) <http://money.cnn.com/2015/05/27/news/fifa-corruption-profit/> [https://perma.cc/NQM4-6W5E].

113. Victim Statement & Request for Restitution at 4, *United States v. Hawit*, No. 15-cr-252 (E.D.N.Y. Nov. 25, 2015), ECF No. 102.

114. *Id.*

115. *Id.*

continental confederations.¹¹⁶

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 of "other soccer governing bodies that operate under the FIFA umbrella."¹¹⁷ The officials were charged with "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."¹¹⁸ By December 2015, the DOJ had charged a total of forty-one individuals and organizations as part of its FIFA investigation.¹¹⁹

The U.S. investigation fostered a legitimacy crisis for FIFA that grew into a financial crisis, which created an environment conducive for internal reform within FIFA.¹²⁰ While FIFA's checkered history may have been public knowledge, DOJ's announcement of its investigations into FIFA created a unique legitimacy crisis because the information about FIFA's misconduct was revealed by trusted intermediaries—government actors—who signaled that they were going to do something about the misconduct. The investigations into FIFA tarnished its public image, which then fueled a financial crisis that compounded the pressure for organizational reform. In 2015, FIFA's deficit exceeded \$100 million, due to withdrawn corporate sponsorships and legal costs associated with the various national investigations.¹²¹

116. *Id.*

117. Press Release, U.S. DOJ, 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> [<https://perma.cc/6R5E-Z9UK>].

118. *Id.*

119. Press Release, U.S. DOJ, Sixteen Additional FIFA Officials Indicted For Racketeering, Conspiracy And Corruption (Dec. 3, 2015), <https://www.justice.gov/usao-edny/pr/sixteen-additional-fifa-officials-indicted-racketeering-conspiracy-and-corruption> [<https://perma.cc/Q747-879A>] ("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.").

120. FIFA, 2016 FIFA REFORM COMMITTEE REPORT 1 (2015), https://resources.fifa.com/mm/document/affederation/footballgovernance/02/74/17/54/2015.11.27finalreport_forpublication_neutral.pdf [<https://perma.cc/KW2U-DZDC>] ("FIFA is currently going through the worst crisis of its history.").

121. Brian Homewood, *FIFA Faces \$108 Million Deficit for 2015 -Finance Overseer*, REUTERS (Feb. 25, 2016) <https://www.reuters.com/article/us-soccer-fifa-finance/fifa-faces-108->

Throughout 2015, FIFA's corporate sponsors withdrew en masse. As early as January of that year, Castrol, Continental, Johnson & Johnson, Sony, and Emirates had already announced the end of their sponsorships, raising concerns that FIFA had become "toxic."¹²² Sponsorship further declined following the United States attorney general's May 2015 announcement of criminal charges against FIFA officials. Visa threatened to withdraw altogether, and Coca-Cola and Adidas also called for FIFA to address its internal issues.¹²³ Comedian John Oliver added his own incentive for corporate withdrawal, offering to endorse products of FIFA corporate sponsors that withdrew their support of then-FIFA President Sepp Blatter.¹²⁴

By the end of 2015, twenty-seven of FIFA's thirty-four corporate sponsorship slots were unfilled, with media reporting that "[t]he

million-deficit-for-2015-finance-overseer-idUSKCN0VY2UK [https://perma.cc/CGE5-8VAQ]; Rebecca R. Ruiz, *FIFA's Financial Disclosures Show That Scandal Has Affected Its Bottom Line*, N.Y. TIMES (Mar. 17, 2016), <https://www.nytimes.com/2016/03/18/sports/soccer/fifas-financial-disclosures-show-that-scandal-has-affected-its-bottom-line.html> [https://perma.cc/KT65-7YKG] (reporting FIFA had spent \$62 million in legal fees); Press Ass'n, *Fifa Suffers £67m Loss After Crisis Takes Its Toll on Governing Body*, GUARDIAN (Dec. 2, 2015), <https://www.theguardian.com/football/2015/dec/02/fifa-67m-loss-crisis-governing-body> [https://perma.cc/52HN-JR3Q].

122. Ben Rumsby, *Fifa Loses Three Key Sponsors as Castrol, Continental and Johnson & Johnson Sever Ties with World Governing Body*, TELEGRAPH (Jan. 22, 2015, 10:30 PM), <http://www.telegraph.co.uk/sport/football/world-cup/11364195/Fifa-loses-three-key-sponsors-as-Castrol-Continental-and-Johnson-sever-ties-with-world-governing-body.html> [https://perma.cc/5EWE-22CU].

123. Adam Withnall, *Fifa Key Sponsors Visa, Adidas and Coca-Cola Pile on Pressure in Wake of Corruption Scandal*, INDEPENDENT (May 27, 2015), <http://www.independent.co.uk/news/world/europe/fifa-key-sponsors-visa-adidas-and-coca-cola-pile-on-pressure-in-wake-of-corruption-scandal-10280496.html> [https://perma.cc/4QB4-9TKF]. 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*, FIN. TIMES (Oct. 4, 2015), <https://www.ft.com/content/7be415ca-6aaf-11e5-8171-ba1968cf791a> [https://perma.cc//GA6H-G2C4].

124. On May 31, 2015, John Oliver, host of HBO's *Last Week Tonight with John Oliver*, 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 with John Oliver (HBO television broadcast May 31, 2015); *LastWeekTonight*, FIFA II: Last Week Tonight with John Oliver (HBO) (June 1, 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); Inacho566, *John Oliver Keeps His Promise After Blatter's Resignation* (June 8, 2015), https://www.youtube.com/watch?v=_Csi_BEgLU.

corruption scandal has proved so toxic that no new sponsors have joined since the 2014 World Cup.”¹²⁵ 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 “[t]ransparency, accountability, respect for human rights, integrity, leadership and gender equality.”¹²⁶

The criminal investigations and the resulting financial sanctions caused FIFA to experience “the worst crisis of its history” and suffer significant damage to its reputation.¹²⁷ FIFA’s leadership delivered dire warnings about what might occur if the FIFA Congress rejected reform. Acting President of FIFA Issa Hayatou warned that FIFA’s existence “[may be] at risk.”¹²⁸ 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].”¹²⁹ 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 organisation more transparent and accountable.”¹³⁰

The financial pressure exerted by the corporate sponsors helped prime FIFA for reform, but so did the information revealed by the criminal investigations into FIFA’s officials. The investigations by the DOJ not only provided information to the public that resulted in reputational sanctions but also created a background enforcement threat.¹³¹ For example, 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

125. Press Ass’n, *New Sponsors Are not Committing to Fifa Until New President Is Elected*, GUARDIAN (Dec. 4, 2015), <https://www.theguardian.com/football/2015/dec/04/fifa-sponsors-https://perma.cc/E6S4-ASEB>].

126. *Open Letter to the FIFA Executive Committee*, COCA-COLA COMPANY (Dec. 1, 2015), <http://www.coca-colacompany.com/press-center/company-statements/open-letter-to-the-fifa-executive-committee> [https://perma.cc/KDZ3-HT7Y].

127. FIFA, *supra* note 120, at 1.

128. Owen Gibson, *Fifa’s Existence at Risk if Reforms Are Rejected, Warns Issa Hayatou*, GUARDIAN (Feb. 25, 2016) <https://www.theguardian.com/football/2016/feb/25/fifa-reforms-issa-hayatou> [https://perma.cc/23LZ-V5B6].

129. *Id.*

130. *Open Letter to the FIFA Executive Committee*, *supra* note 126.

131. Pa Sport, *FIFA Members Vote To Back Reforms Package at Extraordinary Congress*, ESPN (Feb. 26, 2016), <http://www.espnfc.us/blog/fifa/243/post/2815643/fifa-members-vote-to-back-reforms-package> [https://perma.cc/9CXK-LPSW] (“The governing body’s lawyers hope the reforms will show U.S. prosecutors that it is serious about changing its culture.”).

in the continuing prosecutions if they do not.”¹³²

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 well.¹³³ 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.¹³⁴ The reforms included clear separation between officials’ “political” and management functions; term limits for the FIFA President, FIFA Council (previously FIFA Executive Committee) members, members of the Audit and Compliance Committee, and members of the judicial bodies; greater scrutiny and supervision over the election of FIFA Council members; and disclosure of high-ranking FIFA officials’ compensation.¹³⁵ FIFA also amended its governing statute to reflect these reforms.¹³⁶

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.”¹³⁷

The investigations and ensuing financial crisis did not merely

132. Gibson, *supra* note 128.

133. Joe Leahy & Mark Odell, *Fifa Corruption Scandal Threatens to Engulf Nike as Sponsors Raise Pressure*, FIN. TIMES (May 29, 2015), <https://www.ft.com/content/06d28cd0-055b-11e5-bb7d-00144feabdc0> [https://perma.cc/2SHR-BTUW]; Christopher M. Matthews, Aruna Viswanatha & Joe Flint, *U.S. Considers Role of Banks, Sponsors in Soccer Bribery Probe*, WALL STREET J. (Apr. 17, 2016), <https://www.wsj.com/articles/u-s-considers-role-of-banks-sponsors-in-soccer-bribery-probe-1460937132> [https://perma.cc/5U94-WVTD] (“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”); Ben McLanahan, *Sponsors Step up Pressure on FIFA over Corruption Probe*, FIN. TIMES (May 28, 2015), <https://www.ft.com/content/16f465ac-04bb-11e5-adaf-00144feabdc0> [https://perma.cc/2DXX-U9T2] (“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”).

134. Press Release, 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> [https://perma.cc/EQ5H-6CJU].

135. *The Reform Process*, FIFA, <http://www.fifa.com/governance/how-fifa-works/the-reform-process.html> [https://perma.cc/KUA4-6M4J].

136. *Id.*

137. FIFA, *supra* note 120, at 1.

prime FIFA for organizational change. The crises also created the conditions for FIFA to borrow practices from other organizations that could introduce meaningful structural reform in certain operational areas. For example, FIFA pivoted toward the UN by requesting that the former UN Special Representative on Business and Human Rights, John Ruggie, recommend strategies for how it could embed better human rights norms throughout its operation.¹³⁸ It also requested technical assistance from the UN Office of the High Commissioner for Human Rights.¹³⁹ FIFA may not have pivoted toward the UN 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, such as the UN, and cut ties with actors who further jeopardize its legitimacy, like the defendants in the DOJ investigation.

By pivoting toward the UN to enhance its own legitimacy, FIFA set itself up to borrow practices from that organization.¹⁴⁰ Outside actors would have limited ability to command FIFA to abide by UN human rights practices; the reputational consequences following the DOJ investigation created the conditions for pivoting that led FIFA to a similar path.

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

Information disclosure from media, courts, and prosecutors does not only affect 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 spillover effects. Consider the examples of—and your reaction to—BP, VW, and Enron. Our instinctual reaction to these names and the industries they represent illustrates how an organization's reputation is interconnected with the reputation of its industry peers. As a result, “reputations are ‘intangible commons’ because organizations share both the penalties and rewards associated with the reputations of their industries.”¹⁴¹

138. 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> [<https://perma.cc/9Z98-C78H>]; Parella, *supra* note 97, at 132.

139. FIFA, *supra* note 138.

140. *See id.*

141. Lori Qingyuan Yue & Paul Ingram, *Industry Self-Regulation as a Solution to the*

The risk of reputational spillover is most acute when organizations in the same industry are homogenous; their similarities inhibit the ability of stakeholders to differentiate one actor from the rest of the industry.¹⁴² “[T]he act of any individual firm is more likely to be judged characteristic of the potential of all such firms.”¹⁴³ As a consequence, revelations of misconduct by one industry actor can place the entire industry under scrutiny by stakeholders, who are now on notice of particular risks.¹⁴⁴ Organizational scholars have observed reputational spillover effects in industries as diverse as oil and gas, diamonds, apparel, chemicals, and cinema.¹⁴⁵

Spillover effects can cause both financial and regulatory consequences for industry peers—and not all these consequences are bad. The spillover 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.¹⁴⁶ 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 peers in the same industry, although that same perception is a disadvantage for the shamed firm that loses out to substitution.

Reputation Commons Problem, in THE OXFORD HANDBOOK OF CORPORATE REPUTATION, *supra* note 63, at 278, 279; see also Michael L. Barnett & Andrew J. Hoffman, *Beyond Corporate Reputation: Managing Reputational Interdependence*, 11 CORP. REPUTATION REV. 1, 2 (2008) (stating that firms can both profit and be hurt by the reputation of their industry).

142. See Michael L. Barnett, *Finding a Working Balance Between Competitive and Communal Strategies*, 43 J. MGMT. 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.” (citing Andrew A. King, Michael J. Lenox & Michael L. Barnett, *Strategic Responses to the Reputation Commons Problem*, in ORGANIZATIONS, POLICY AND THE NATURAL ENVIRONMENT: INSTITUTIONAL AND STRATEGIC PERSPECTIVES 393 (Andrew J. Hoffman & Marc J. Ventresca eds., 2002))).

143. *Id.*; see also Michael L. Barnett & Andrew A. King, *Good Fences Make Good Neighbors: A Longitudinal Analysis of an Industry Self-Regulatory Institutions*, 51 ACAD. MGMT. J. 1150, 1152 (2008) (“[W]hen 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. REPUTATION REV. 12, 30 (2008); Yue & Ingram, *supra* note 141, at 280 (stating that reputations of organizations are interdependent).

144. Yue & Ingram, *supra* note 141, at 280.

145. *Id.* at 281.

146. See Goins & Gruca, *supra* note 143, at 16–17 (explaining the competitive effects of information on rival firms).

Spillover effects can also give rise to regulatory consequences for industry peers. The same perceived homogeneity that increases the likelihood of positive financial spillover effects via 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 instead of 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.¹⁴⁷

The following case illustration discusses 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, the case illustration then discusses the reputational spillover effect of the Wells Fargo scandal on its banking peers and the effect of regulatory risk. The example focuses on the regulatory spillover effects instead of the financial spillover effects because the former better explains the organizational changes witnessed within the banking sector. The example highlights how scandal and spillover effects contributed to a heightened regulatory climate for executive compensation in the banking sector, and how certain actors within this sector considered proactive 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.¹⁴⁸ That status changed rapidly in September 2016 when the CFPB fined Wells Fargo \$100 million plus \$85 million in additional penalties for engaging in aggressive sales tactics through which employees created up to two million fake accounts in order to meet internal sales quotas.¹⁴⁹

147. See, e.g., John W. Maxwell, Thomas P. Lyon & Steven C. Hackett, *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).

148. Emily Glazer, *Wells Fargo CEO John Stumpf Steps Down*, WALL STREET J. (Oct. 12, 2016), <https://www.wsj.com/articles/wells-fargo-ceo-stumpf-to-ire-1476306019> [https://perma.cc/8YFL-TH3G].

149. Consumer Fin. Prot. Bureau, *supra* note 17 (“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,

The fine against Wells Fargo was the largest fine the CFPB had ever imposed.¹⁵⁰ But despite its size, the fine represents a small fraction of the financial fallout Wells Fargo suffered as a result of the scandal, which is consistent with empirical research indicating that “reputational losses for financial misconduct exceed the explicit penalties imposed by either public or private enforcement agents.”¹⁵¹ The fine created secondary reputational consequences that levied another wave of financial consequences for Wells Fargo.¹⁵² For example, a study conducted in October 2016 by management consulting firm cg42 predicted that “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.”¹⁵³ The study’s authors attributed this financial loss to consumers’ desire to switch banks, with the study finding that 30 percent of those surveyed reported they are considering alternatives and another 14 percent already resolved to switch because of the scandal.¹⁵⁴ Some states, such as Illinois and Ohio, also pulled

often racking up fees or other charges.”).

150. *Id.*

151. Jonathan M. Karpoff, *Does Reputation Work To Discipline Corporate Misconduct?*, in THE OXFORD HANDBOOK OF CORPORATE REPUTATION, *supra* note 63, at 361, 376. Companies often experience market sanctions that exceed government penalties when the conduct concerns corporate fraud. See Jonathan M. Karpoff & John R. Lott, Jr., *The Reputational Penalty Firms Bear from Committing Criminal Fraud*, 36 J.L. & ECON., 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 & Gerald S. Martin, *The Cost to Firms of Cooking the Books*, 43 J. FIN. & QUANTITATIVE ANALYSIS 581, 582 (2008) (stating that 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”).

152. 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 STREET J. (Apr. 7, 2017), <https://www.wsj.com/articles/proxy-advisory-firm-iss-suggests-wells-fargo-shareholders-vote-against-12-of-15-directors-1491579277> [<https://perma.cc/6UEG-WLEH>].

153. CG42, *supra* note 18, at 3.

154. *Id.*; see also Lucinda Shen, *Wells Fargo’s Scandal Could End up Costing Bank \$8 Billion*, FORTUNE (Oct. 24, 2016), <http://fortune.com/2016/10/24/wells-fargos-scandal-could-end-up-costing-bank-8-billion> [<https://perma.cc/AE5R-8YN3>] (“[W]hile just 3% of Wells Fargo’s customers were actually affected by the scandal, public opinion regarding the bank has fallen dramatically, leading some 14% of customers to say they have already decided to bank elsewhere.”); Michael Corkery, *Wells Fargo Says Customers Shied Away After Scandal*, N.Y. TIMES (Oct. 14, 2016), <https://www.nytimes.com/2016/10/15/business/dealbook/wells-fargo-says-customers-shied-away-after-scandal.html?mcubz=3> [<https://perma.cc/392E-QAGF>] (stating that, by October 2016, Wells Fargo customers had opened 25 percent fewer checking accounts and applied for 20 percent fewer credit cards than in September 2015).

their business from Wells Fargo because, as Ohio 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.”¹⁵⁵ As expected, we also see the financial spillover effects for the industry with consumers switching business from Wells Fargo to its peers.¹⁵⁶

At first glance, Wells Fargo’s fate looks like a perfect example of the financial harm that can result from reputational consequences, similar to the example discussed in Part II.A: government enforcement action causes reputational harm to an organization, which changes the terms with which stakeholders such as investors and consumers are willing to exchange with the affected organization. But the scandal not only exemplifies the financial consequences of reputational harm for Wells Fargo. It also illustrates the ways that reputational harm can have regulatory spillover effects for the broader industry.¹⁵⁷ One theme

155. John Kasich (@JohnKasich), TWITTER (Oct. 14, 2016, 11:03 AM), https://twitter.com/JohnKasich/status/786990903198093312/photo/1?ref_src=twsrc%5Etfw [<https://perma.cc/2K6J-G57C>]; Alistair Gray, *Illinois Suspends \$30bn of Business with Wells Fargo*, FIN. TIMES (Oct. 3, 2016) (reporting that “Illinois is to stop using Wells as a broker dealer for about \$30bn worth of annual short-term investments, such as repurchase agreements and commercial paper”); *Ohio Extends Ban on Wells Fargo Business by Six Months*, REUTERS (Oct. 12, 2017) (reporting that in October 2016 Governor John Kasich stated that he “would avoid working with the bank on debt offerings or financial services for one year” and that the governor extended the ban through April 2018).

156. CG42, *supra* note 18, at 8. 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 STREET J. (Nov. 3, 2016, 8:58 PM), <https://www.wsj.com/articles/wall-streets-campaign-season-dodging-a-bullet-running-into-wells-fargo-1478181423> [<https://perma.cc/W9YV-9PH6>].

157. 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. Emily Glazer & Christina Rexrode, *Big U.S. Retail Bank Operations Under Scrutiny After Wells Scandal*, WALL STREET J. (Oct. 25, 2016, 9:11 AM), <https://www.wsj.com/articles/big-u-s-retail-bank-operations-under-scrutiny-follow-wells-scandal-1477400747> [<https://perma.cc/3N6Y-KBW9>]. The scandal also shone a spotlight on those regulating the banks. Yuka Hayashi, *Wells Fargo Isn’t the Only Bank That Draws Cross-Selling Complaints*, WALL STREET J. (Sept. 28, 2016), <https://www.wsj.com/articles/wells-fargo-isnt-the-only-bank-that-draws-cross-selling-complaints-1475058602> [<https://perma.cc/U6U6-MK4L>] (“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*, in THE OXFORD HANDBOOK OF CORPORATE REPUTATION, *supra* note 63, at 320, 320–21 (discussing the reputations of regulators); Shu-yi Oei & Diane Ring, *Leak-Driven Law*, 65 UCLA L. REV.

that emerged in the wake of Wells Fargo scandal was the need for accountability from actors at the very top of these banks, including how executive compensation might be used to encourage accountability.¹⁵⁸ Following the 2008 financial crisis, large U.S. banks introduced or strengthened clawback policies in order to increase executives' accountability for taking risks.¹⁵⁹ The rules differ among banks, but they usually authorize banks to take back stock awards or compensation if an executive misbehaves, such as by taking improper risks or underperforming, or if a bank needs to significantly restate results.¹⁶⁰ 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 or not the executive was responsible."¹⁶¹ In the wake of the Wells Fargo scandal, Wells Fargo's board utilized the clawback provision and former CEO John 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."¹⁶²

(forthcoming 2018) (manuscript at 37–40) (describing the risk of sub-optimal tax policymaking when leaked tax information increases pressure on tax authorities to respond).

158. Victoria Finkle, *House Panel Questions Fed Chief on Wells Fargo Scandal*, N.Y. TIMES (Sept. 28, 2016), <https://www.nytimes.com/2016/09/29/business/dealbook/house-panel-questions-fed-chief-on-wells-fargo-scandal.html?mcubz=3> [<https://perma.cc/6ZX6-2KY3>] ("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?" (quoting Representative Keith Ellison)).

159. Hillary A. Sale, *The New "Public" Corporation*, 74 L. & CONTEMP. PROBS. 137, 144–45 (2011); Oran & Kerber, *supra* note 20.

160. Oran & Kerber, *supra* note 20.

161. Kevin Wack, *Wells Fargo Scandal Will Rewrite the Book on Clawing Back Pay*, AMERICAN BANKER (Sept. 16, 2016) (quoting Wells Fargo's 2016 proxy statement), <https://www.americanbanker.com/news/wells-fargo-scandal-will-rewrite-the-book-on-clawing-back-pay> [<http://perma.cc/D6Q3-BJKV>] (quoting Wells Fargo's 2016 proxy statement).

162. Oran & Kerber, *supra* note 20; see INDEPENDENT DIRECTORS OF THE BOARD OF WELLS FARGO & COMPANY SALES PRACTICE INVESTIGATION REPORT 10 (2017), <https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/presentations/2017/board-report.pdf> [<https://perma.cc/X77J-7A2K>] (explaining that the Wells Fargo Board determined in April 2017 to clawback an additional \$28 million of Stumpf's incentive compensation). The board "has imposed forfeitures, clawbacks and compensation adjustments on senior leaders totaling more than \$180 million." *Id.* at i. A few years earlier, J.P. Morgan Chase imposed pay clawbacks on traders and executives involved in the London Whale trading scandal. Dan Fitzpatrick, *J.P. Morgan: 'Whale' Clawbacks About Two Years of Compensation*, WALL STREET J. (July 13, 2012, 2:06 PM), <https://www.wsj.com/articles/SB10001424052702303740704577524730994899406>

But the reputational harm of the scandal also affects the broader industry; many of Wells Fargo's industry peers took steps to differentiate their practices from Wells Fargo's.¹⁶³ The use of clawback policies may therefore not stop with Stumpf and Wells Fargo, and may potentially prime other banks to use their own clawback policies as another means of proactively distinguishing their consumer practices from those of Wells Fargo.¹⁶⁴ One commentator explained that Wells Fargo misstepped 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."¹⁶⁵ Consequently, the Wells Fargo scandal not only poses risk of regulatory reaction but also of *preemptive* self-regulatory action.¹⁶⁶ The example of Wells Fargo reveals the importance of two factors for converting reputational spillover effects experienced by industry peers into organizational change by these same actors: industry mistrust and regulatory risk. First, while the Wells Fargo scandal did not improve the public image of large banks, the banking industry had already struggled with loss of public faith. A Gallup poll in August 2016 showed that only thirty-eight percent of Americans view the banking industry positively—and that was before

[<https://perma.cc/8RPB-DBAG>].

163. See, e.g., Glazer & Rexrode, *supra* note 157 (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's); Ramstad, *supra* note 19 ("I don't even know what the cross-sell is at this bank. Honest to God, I've never ever looked at that number." (quoting U.S. Bancorp CEO Richard Davis)). *But see* Rachel Louise Ensign, *What the Wells Fargo Cross-Selling Mess Means for Banks*, WALL STREET J. (Sept. 15, 2016), <https://www.wsj.com/articles/what-the-wells-fargo-cross-selling-mess-means-for-banks-1473965166> [<https://perma.cc/8VDH-26FJ>] (describing the use of cross-selling in the financial services industry); Hayashi, *supra* note 157 ("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.").

164. *Id.*

165. Oran & Kerber, *supra* note 20; *see also* Emily Glazer, *Wells Fargo Slams Former Bosses' High-Pressure Sales Tactics*, WALL STREET J. (Apr. 10, 2017, 8:43 PM), <https://www.wsj.com/articles/wells-fargo-claws-back-75-million-more-from-john-stumpf-and-former-retail-bank-head-1491823808> [<https://perma.cc/M7PB-GMQF>] (explaining how the investigation by the board of Wells Fargo into its sales practices "not only has rocked Wells Fargo but the broader banking industry, with dozens of firms examining their own sales practices at the behest of regulators").

166. Oran & Kerber, *supra* note 20. The regulatory risk may have abated because of the deregulatory stance advanced under the Trump Administration. Jen Wiczner, *Why Yahoo CEO Marissa Mayer's \$141 Million Payday Is Safe from the Hack Cover-Up*, FORTUNE (Jan. 24, 2017, 6:00 AM), <http://fortune.com/2017/01/24/yahoo-marissa-mayer-investigation> [<https://perma.cc/YW8F-UKQM>].

news of the Wells Fargo scandal broke.¹⁶⁷ According to Bancorp Chief Executive Richard Davis, the banking industry is still attempting to rebuild its reputation following the financial crisis.¹⁶⁸ The industry spillover effects of the Wells Fargo scandal jeopardizes this redemption because customers can better understand what the banks did wrong.¹⁶⁹ The average layperson may not understand how a collateralized debt obligation works or its role in the 2008 financial crisis, but they do understand the simple act of lying.¹⁷⁰ 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.”¹⁷¹ Therefore, 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.¹⁷² The Sarbanes-Oxley Act (SOA) had already required CEOs and CFOs to return compensation under certain conditions.¹⁷³ However, in July 2015, as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, the SEC proposed Rule 10D-1, which requires more than did the SOA.¹⁷⁴ When the scandal broke, industry actors feared that the Wells Fargo scandal may lead to stricter rules, more concrete requirements, and a faster timeline to complete the regulations.¹⁷⁵ The reputational harm caused by the Wells Fargo scandal also potentially jeopardized the industry’s position in the prelude to new regulation.¹⁷⁶

167. Rexrode & Glazer, *supra* note 156.

168. Ramstad, *supra* note 19.

169. *Id.*

170. *Id.*

171. Rexrode & Glazer, *supra* note 156.

172. Press Release, U.S. SEC, SEC Proposes Rules Requiring Companies to Adopt Clawback Policies on Executive Compensation (July 1, 2015), <https://www.sec.gov/news/pressrelease/2015-136.html> [<https://perma.cc/2E8Y-L9U9>].

173. Sale, *supra* note 159, at 145.

174. See *SEC Proposes Rules on Clawback Policies*, COVINGTON & BURLING LLP 7 (July 6, 2015), https://www.cov.com/-/media/files/corporate/publications/2015/07/sec_proposes_rules_on_clawback_policies.pdf [<https://perma.cc/WXH3-PC8E>] (comparing the broader scope of Rule 10D-1 to the more narrow provisions of SOA).

175. Oran & Kerber, *supra* note 20.

176. See Hillary A. Sale, *Public Governance*, 81 GEO. WASH. L. REV. 1012, 1013 (2013) (“When corporate actors lose sight of the fact that the companies they run and decisions they make impact society more generally, and not just shareholders, they are subjected to publicness. Outside actors . . . become involved in the debate. *Decisions about governance move from Wall Street to Main Street.*” (emphasis added)). “Congress passed Sarbanes-Oxley in the wake of Enron

C. Sanctions Based on Barriers to Entry

Part II.B described how organizational change resulted from enhanced regulatory risk as a result of the spillover effect, whereby information regarding one bad actor taints an industry's collective reputation. However, regulatory risk can also arise from heterogeneity as opposed to homogeneity. Incumbent organizations can intentionally manipulate social norms to discourage the entry or subsequent performance of new entrants.¹⁷⁷ For this strategy to succeed, the incumbent attackers need to be sufficiently different from their targets, or the de-legitimizing strategies can backfire and cast a shadow over both the incumbent and the new entrant.¹⁷⁸ Heterogeneity is therefore a precondition for these forms of intentional deterrent strategies.

Incumbent organizations manipulate social norms to delegitimize their competitors and legitimate their own organizations in the eyes of stakeholders such as consumers. These maneuvers strategically use legitimacy to achieve some form of competitive advantage. While this strategy can be used against mature industry competitors already present in the market, the analysis in this section focuses on the use of legitimacy as a barrier to entry for new entrants. In these battles between incumbent firms and new entrants, incumbent firms used organizational form as the means of delegitimizing entrants. Incumbents seek to discourage entry by new competitors organizationally distinct from themselves by delegitimizing these organizations' alternative organizational forms. These delegitimizing strategies can have serious consequences for the new entrant, creating enhanced regulatory risk, increasing financial costs, and changing consumer preferences.¹⁷⁹

The case illustration below explains how taxi companies, who are incumbent actors in an industry, use information from lawsuits and government action to delegitimize the way that Uber does business,

and WorldCom and those scandals were instrumental to its passage. The failures of private corporate actors to prevent or adequately respond to those scandals—to self-regulate—were also extremely important. Those failures resulted in more public scrutiny of corporations and corporate decision making, which, in turn, created pressure for Congress to do something. Sarbanes-Oxley was the result.” *Id.* at 1022 (footnotes omitted).

177. Bitektine, *supra* note 30, at 84.

178. *Id.* at 84, 87.

179. *Id.* at 80 (stating that 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.”).

thereby challenging the latter's ability to compete. Incumbent actors can use legal institutions to create barriers to entry in two ways. First, they can advocate for laws that ban actors, such as new entrants, from operating unless those actors meet specific regulatory requirements.¹⁸⁰ In Uber's case, however, it entered new markets and operated illegally, amassing public support to resist attempts to shut down its operations.¹⁸¹ Second, incumbents can use information disclosure from litigation to erect barriers to entry based on legitimacy by discrediting an entrant's operations. Specifically, incumbents can use the existence 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 these types of 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.

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.¹⁸²

While riders embraced Uber's model of transportation, incumbent transportation service providers challenged the entry of this new market player. The thrust of this challenge was led by an industry association representing the incumbent transportation service providers: the Taxicab, Limousine & Paratransit Association (TLPA). Uber's business model is different from ordinary taxi companies, so the members of the TLPA sought to use legal institutions to attack those differences and delegitimize Uber.

Uber's industry opponents used two strategies to reshape norms

180. See Boris Bindman, *Keep on Truckin', Uber: Using the Dormant Commerce Clause to Challenge Regulatory Roadblocks to TNCs*, 72 WASH. & LEE L. REV. ONLINE 136, 172 n.190 (2015); *infra* notes 183–85 and accompanying text.

181. Marcus Wohlsen, *Uber's Brilliant Strategy To Make Itself Too Big To Ban*, WIRED (July 8, 2014, 6:30 AM), <https://www.wired.com/2014/07/ubers-brilliant-strategy-to-make-itself-too-big-to-ban/> [<https://perma.cc/55AY-P5NL>].

182. *How Uber Works*, UBER, <https://www.uber.com/ride/how-uber-works/> [<https://perma.cc/KN29-D7NX>].

in a way that was intended to delegitimize Uber in the eyes of stakeholders, especially potential customers. Under the first strategy, the TLPA tried to shape legal norms to restrict or eliminate Uber's business,¹⁸³ usually by opposing local regulations that would authorize Uber's operations in new markets.¹⁸⁴ Uber's competitors also lobbied for increased regulatory requirements for Uber and other ride-sharing services.¹⁸⁵

The taxi industry also embraced a second strategy: using lawsuits to shape social norms and public opinion regarding Uber.¹⁸⁶ As stated in the *Washington Post*, “[t]he battle over the future of the taxi industry is in many ways an information war.”¹⁸⁷ It is no secret that Uber faces a barrage of lawsuits against it. Information shared in the lawsuits provided the ammunition for a reputational battle between taxi companies and 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 source of the information.

183. See Marlize van Romburgh, *Meet the International Player Powering Big Taxi's Fight Against Uber*, S.F. BUS. TIMES (Mar. 16, 2015, 10:43 AM), <http://www.bizjournals.com/sanfrancisco/blog/techflash/2015/03/uber-regulations-taxi-industry-veolia-war-transdev.html> [<https://perma.cc/2DSD-F2Y4>] (“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.” (quoting Corey Owens, Uber's head of global public policy)).

184. Larry Downes, *Lessons From Uber: Why Innovation and Regulation Don't Mix*, FORBES (Feb. 6, 2013, 5:00 AM) <https://www.forbes.com/sites/larrydownes/2013/02/06/lessons-from-uber-why-innovation-and-regulation-dont-mix/#69596084de94> [<https://perma.cc/JLC2-95ZG>].

185. See 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 [<https://perma.cc/2EZY-EZMG>] (explaining how Washington, D.C.-area taxi companies increased coordination efforts to fight for regulation of ride sharing, including “joining labor unions, labor organizers and . . . lobbying jointly,” and “sharing notes and filing complaints and lawsuits”); Saitto, *supra* note 31 (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”).

186. 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. 29, 2017, 11:38 AM) <http://www.businessinsider.com/delete-uber-hashtag-jfk-airport-taxi-strikes-2017-1> [<https://perma.cc/4H5F-TUQF>].

187. 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 [<https://perma.cc/TBB7-QJL5>].

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.”¹⁸⁸

In this battle for public opinion, both the TLPA and Uber launched rivalling websites to serve as important information intermediaries regarding the other’s behavior. The websites especially reported legal developments in court rulings or regulatory action concerning 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.¹⁸⁹ For example, between October 27, 2016 and November 4, 2016, a significant number of the Twitter posts dealt with reports of sexual assault by Uber drivers against women and children.¹⁹⁰ The Twitter feed also updates viewers on any regulatory or judicial decisions against Uber.

The taxi industry disseminates the information from the courts to the public but is not the direct source of that information. For example, 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 comes with its own set of normative consequences.¹⁹¹ These reputational consequences, amplified by TLPA’s website, help delegitimize Uber in the eyes of stakeholders.

188. Shapira, *supra* note 23, at 1213.

189. Who’s Driving You, <http://www.whosdrivingyou.org> [https://perma.cc/Q9JW-K9CX]; see @WhosDrivingYou, TWITTER, <https://twitter.com/WhosDrivingYou>.

190. @WhosDrivingYou, TWITTER, <https://twitter.com/search?l=&q=from%3AWhosDrivingYou%20since%3A2016-10-27%20until%3A2016-11-04&src=typd> [https://perma.cc/5HTK-TH66].

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

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 (how they interact in society at large). A legitimacy crisis can paint an industry as untrustworthy, possibly generating an existential crisis for the industry as a whole or undermining its credibility in policy debates concerning its future.¹⁹² Diminished public trust in an industry, especially concerning its past behavior in a particular area, reduces the likelihood that policymakers and the public will believe anything that an industry's actors have to say. The consequence of this mistrust is that industry actors may have a diminished role in policymaking, either through direct exclusionary measures or reduced opportunities for consultation. When faced with these consequences, organizations are more likely to adopt organizational innovations that communicate their trustworthiness to observers, such as new voluntary industry initiatives or multistakeholder partnerships.¹⁹³

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 and Gas Industry*. In 2013, dozens of NGOs specifically requested that the UN and the UN

192. See Deegan, *supra* note 95, at 293 (“Legitimacy is considered to be a resource on which an organization is dependent for survival.”).

193. 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.”); David Hess & Thomas W. Dunfee, *The Kasky-Nike Threat to Corporate Social Reporting: Implementing a Standard of Optimal Truthful Disclosure as a Solution*, 17 BUS. ETHICS Q. 5, 8 (2007) (“If a firm fails to meet society's expectations, then it must act to re-establish its legitimacy to fend off social sanctions.”).

Framework Convention on Climate Change (UNFCCC) implement new rules to protect global climate discussions from the influence of actors within the fossil fuel industry.¹⁹⁴ The NGOs recommended that the UNFCCC follow the approach of the World Health Organization and Article 5.3 of the Framework Convention on Tobacco Control (FCTC), which restricts industry participation and requires that states protect their policymaking from “commercial and other vested interests of the tobacco industry.”¹⁹⁵

This concern about the role of the fossil fuels industry in climate change policy resurfaced in 2015 with the New York attorney general’s investigation into Exxon Mobil’s climate change disclosures.¹⁹⁶ The investigation examined whether the company suppressed climate change research and committed consumer and securities fraud by lying to the public about the environmental effects of its products.¹⁹⁷ Three

194. *Open Letter Calling for Rules To Protect the Integrity of Climate Policy-Making from Vested Corporate Interests*, CORP. EUR. OBSERVATORY (Nov. 21, 2013), <http://corporateurope.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 UN to protect environmental policy negotiations from the fossil fuel industry’s influence).

195. *Id.* (quoting WHO, FRAMEWORK CONVENTION ON TOBACCO CONTROL, at art. 5.3 (2003), <http://apps.who.int/iris/bitstream/10665/42811/1/9241591013.pdf?ua=1> [<https://perma.cc/XXR3-VFYU>]). 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 two hundred countries met to discuss ways to implement the Paris Agreement. Michael Slezak, *Marrakech Climate Talks: US Accepts Petition Calling for Fossil Fuel Lobbyists To Be Excluded*, GUARDIAN (Nov. 15, 2016), <https://www.theguardian.com/environment/2016/nov/16/marrakech-climate-talks-us-accepts-petition-calling-for-fossil-fuel-lobbyists-to-be-excluded> [<https://perma.cc/5GQE-UTP6>]. The petition supported earlier recommendations by developing countries for a conflict of interest policy that would screen out nonstate participants based on conflicts of interest. *Id.*

196. Lynn Cook, *Exxon Mobil Gets Subpoena from N.Y. Regarding Climate-Change Research*, WALL STREET J. (Nov. 5, 2015, 6:59 PM), <http://www.wsj.com/articles/exxon-mobil-gets-subpoena-from-n-y-regarding-climate-change-research-1446760684> [<https://perma.cc/SGP3-LYZL>].

197. See 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> [<https://perma.cc/6AH5-7PNG>] (“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 ExxonMobil of withholding documents from the investigation that related to correspondence from Secretary of State Rex Tillerson when he was chairman and chief executive of ExxonMobil. Christopher M. Matthews & Erin Ailworth, *Rex Tillerson Used Email Alias at Exxon To Discuss Climate Change, New York Says*, WALL STREET J. (Mar. 13, 2017, 8:20 PM), <https://www.wsj.com/articles/rex-tillerson-used-alias-email-at-exxon-to-discuss-climate-change-new-york-says-1489450814> [<https://perma.cc/EMY5-2KGT>] (describing allegations that “Exxon hadn’t disclosed that Rex Tillerson, the former chairman and chief executive, used an alias email address to discuss

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.¹⁹⁸ 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.¹⁹⁹ Shortly thereafter, a class action lawsuit was filed on behalf of ExxonMobil’s shareholders, alleging securities fraud based on the same climate change allegations.²⁰⁰

Given that the fossil fuel industry has weathered a lot of bad press over the years, it is possible that these investigations did not create unique reputational consequences for ExxonMobil. But the initial story could not have broken at a worse moment for ExxonMobil; 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 discuss climate change. 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.²⁰¹ These countries agreed to report their progress on cutting emissions, with

risk-management issues related to climate change”).

198. See Kiah Collier & Jim Malewitz, *Rex Tillerson, Exxon Mobil, and Climate Change Probes – and How Texas Is Involved*, TEX. TRIB. (Dec. 11, 2016, 12:00 PM), [https://www.texastribune.org/2016/12/11/everything-you-need-know-about-exxonmobil-climate-/
\[https://perma.cc/LNZ9-Z2PY\]](https://www.texastribune.org/2016/12/11/everything-you-need-know-about-exxonmobil-climate-/) (describing the investigations by the attorneys general of New York, Massachusetts, California, and the U.S. Virgin Islands). *Scientific American* 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. 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/
\[https://perma.cc/LC3Y-C2VE\]](https://www.scientificamerican.com/article/exxon-knew-about-climate-change-almost-40-years-ago/).

199. See Bradley Olson & Aruna Viswanatha, *SEC Probes Exxon over Accounting for Climate Change*, WALL STREET J. (Sept. 20, 2016, 7:55 AM), <http://www.wsj.com/articles/sec-investigating-exxon-on-valuing-of-assets-accounting-practices-1474393593> [https://perma.cc/N5FN-YZBS] (noting that the SEC had already been receiving documents related to the New York attorney general’s ongoing investigation and then began its own efforts to request information and documents from Exxon and its auditor in August 2016).

200. Press Release, Ryan & Maniskas, LLP, Ryan & Maniskas, LLP Announces Class Action Lawsuit Against Exxon Mobil Corporation (Nov. 16, 2016, 6:45 PM), <http://www.prnewswire.com/news-releases/ryan-maniskas-llp-announces-class-action-lawsuit-against-exxon-mobil-corporation-300364532.html> [https://perma.cc/N2YA-8ZT5].

201. Coral Davenport, *Nations Approve Landmark Climate Accord in Paris*, N.Y. TIMES (Dec. 12, 2015), <https://nyti.ms/2k9vJgw> [https://perma.cc/B2SF-PPWX] (describing the historic deal intended to address the risk of climate change).

reporting duties commencing in 2023.²⁰² The global strategy is to limit global warming to two degrees Celsius, with the hope of further reducing that limit in the future.²⁰³ The background of the climate change talks increased the stakes of the industry's image problem, while the investigations were another mark against an industry perceived as hostile to climate change policymaking.²⁰⁴

This background of mistrust and desire for exclusion helps to explain 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 group of oil and gas companies launched the Oil and Gas Climate Initiative (OGCI) at the UN Climate Summit in New York.²⁰⁵ The OGCI is a “voluntary, industry-driven initiative, which will enable the Oil & Gas industry to . . . share industry best practices, advance technological solutions, and to catalyse meaningful action and coordination on climate change.”²⁰⁶ The OGCI includes energy giants BP, Shell, Statoil, and Total.²⁰⁷ 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.²⁰⁸ OGCI's mission is to “use our collective resources to accelerate actions that mitigate the greenhouse gas emissions from the oil and gas industry's operations and the use of its products, while still meeting the world's energy needs.”²⁰⁹

On October 16, 2015, just weeks before the Paris Summit, OGCI released its Joint Collaborative Declaration (the Declaration).²¹⁰ Much

202. 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> [https://perma.cc/8UUZ-ZE53].

203. *Id.*

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

205. Press Release, Oil & Gas Climate Initiative, Climate Summit 2014: Oil & Gas Climate Initiative Action Summit (Sept. 23, 2014), <http://www.oilandgasclimateinitiative.com/news/climate-summit-2014.html> [https://perma.cc/7XRA-T7VF].

206. *Id.*

207. *About the Oil and Gas Initiative*, OIL & GAS CLIMATE INITIATIVE, <http://www.oilandgasclimateinitiative.com/about.html> [https://perma.cc/L8K8-WKG8] (last visited Sept. 16, 2017).

208. *Id.*

209. *Id.*

210. *Joint Collaborative Declaration*, OIL & GAS CLIMATE INITIATIVE (2015), <http://www.oilandgasclimateinitiative.com/~media/Files/O/Ogci/documents/ogci-ceo-Declaration->

of the Declaration was devoted to communicating the cooperative attitudes of the OGCI on climate change.²¹¹ 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 “need[s] 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.”²¹² This legitimacy-enhancing function of the Declaration was exactly what the environmental groups feared, labelling the Declaration as nothing more than “greenwashing.”²¹³ 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.”²¹⁴

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. 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 UN, 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 toward the UN, releasing public statements supporting the Paris Accord.²¹⁵ Critically, in a press

2015.pdf [<https://perma.cc/69MT-4HUG>].

211. See *id.* (enumerating the collaborative initiatives planned by OGCI member companies and pledging to regularly report on their progress).

212. Jeff Reed, *UN Climate Conference Gets Underway. Here’s What Oilpros Need To Know*, OILPRO (May 14, 2016), <http://oilpro.com/post/20399/un-climate-conference-starts-monday-here-oilpros-need-to-know> [<https://perma.cc/V8PC-GLXZ>].

213. See Michael Stothard & Pilita Clark, *Energy Groups Pledges To Tackle Climate Change*, FIN. TIMES (Oct. 16, 2015, 10:51 AM), <https://www.ft.com/content/ed42bad4-73e0-11e5-bdb1-e6e4767162cc> [<https://perma.cc/6HVS-Z6LJ>] (“Environmental groups accused the energy companies of trying to soften their image by supporting the Paris conference but failing to offer concrete change.”).

214. *Id.*

215. See Darren Woods, *The Future of Energy – Opportunities and Challenges*, EXXONMOBIL: ENERGY FACTOR BLOG (Feb. 23, 2017), <https://energyfactor.exxonmobil.com/perspectives/the-future-of-energy-opportunities-and-challenges/> [<https://perma.cc/RGJ9-ZR68>] (quoting ExxonMobil Chairman and CEO as saying “I believe, and my company believes, that climate risks warrant action 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.”). A year after the Paris Accord was reached, ExxonMobil wrote a letter to the

release following the Paris Accord, OGCI identified similarities between the Declaration and the Paris Accord.²¹⁶ 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."²¹⁷ Why blame coal? Isomorphic repulsion can partially account for these industry alignments. The oil and gas industry is in need of legitimacy, so it chose to isolate coal as the energy actor that draws the most public ire, making coal a strategic sacrifice in order to preserve the image and credibility of the remaining energy companies. The oil and gas industry 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 identities. For its part, the World Coal Association objected to this industry division, explaining that the entire fossil fuel industry should work

Trump Administration advocating in favor of the international climate agreement. Matt Egan, *Exxon to Trump: Don't Ditch Paris Climate Change Deal*, CNN MONEY (Mar. 29, 2017, 1:50 PM), <http://money.cnn.com/2017/03/29/investing/exxon-trump-paris-climate-change/index.html> [<https://perma.cc/X4R7-Q7W4>] ("ExxonMobil doesn't want President Trump to abandon the global climate agreement reached in Paris."); Aric Jenkins, *Even ExxonMobil Wants President Trump To Stick With the Paris Climate Deal*, FORTUNE (Mar. 29, 2017), <http://fortune.com/2017/03/29/exxon-mobil-donald-trump-paris-agreement-climate-change/> [<https://perma.cc/NY42-EQ4V>]. Cf. Timothy Cama, *Oil Exec: Trump Should Keep US in Paris Climate Pact*, THE HILL (Mar. 7, 2017, 4:20 PM), <http://thehill.com/policy/energy-environment/322796-conocophillips-head-trump-should-keep-us-in-paris-climate-pact> [<https://perma.cc/RH3V-ZLM7>] ("The head of oil giant ConocoPhillips said President Trump should keep the United States in the landmark Paris climate change agreement.").

216. See Press Release, Oil & Gas Climate Initiative, OGCI Welcomes the Paris Agreement (Dec. 20, 2015), <http://www.oilandgasclimateinitiative.com/news/ogci-welcomes-the-paris-agreement.html> [<https://perma.cc/LVC5-H396>] ("In alignment with the Paris Agreement, the OGCI's Joint Declaration issued October 2015 recognized the general ambition to limit global average temperature rise . . .").

217. Rakteem Katakey & Tara Patel, *Big Oil's Plan To Become Big Gas*, BLOOMBERG (June 2, 2015, 6:04 AM), <http://www.bloomberg.com/news/articles/2015-06-01/big-oil-becomes-big-gas-as-climate-threat-spurs-tussle-with-coal> [<https://perma.cc/Z3TA-ZL36>] ("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.").

collaboratively.²¹⁸ The quest for legitimacy thus not only shaped institutional choices, such as the Declaration, but also organizational alignments and industry divisions.

III. OBJECTIONS AND CONCERNS

Below, this Part discusses two factors that potentially compromise the use of reputational regulation to encourage companies to change their organizational practices. The first relates to whether reputational regulation can continue in the face of procedures and mechanisms that impede the flow of information from the courts. The second is whether, even if reputational regulation *can* continue in practice, it *should* do so. This Article has explained the advantages that reputational regulation can offer for incentivizing organizational change. However, reputational regulation may also lead to other effects—potentially unintended and unpredictable ones—that may caution against the use of reputational sanctions.

A. *Challenges to Reputational Regulation: Barriers to Information Flow from the Courts*

Reputational regulation is dependent upon information from the courts. Procedures and mechanisms that impede this information flow therefore inhibit the creation of reputational sanctions. This Section discusses two challenges to information flow that may impede the operation of reputational regulation.

1. *Transparency Costs of Arbitration.* Arbitration is a form of alternative dispute resolution wherein parties contractually agree to resolve their dispute confidentially through a third-party decisionmaker.²¹⁹ Scholars and consumer groups, among others, have criticized consumer arbitration for its lack of transparency, for depriving the public of the opportunity to learn about risks to its well-being.²²⁰

218. Stothard & Clark, *supra* note 213.

219. AM. ARB. ASS'N, AAA CONSUMER ARBITRATION GLOSSARY OF TERMS 1 (Sept. 21, 2017), https://www.adr.org/sites/default/files/document_repository/AAA%20Arbitration%20Glossary%20of%20Terms.pdf [https://perma.cc/G6AY-2ZAJ].

220. See Laurie Kratky Doré, *Public Courts Versus Private Justice: It's Time To Let Some Sun Shine in on Alternative Dispute Resolution*, 81 CHI.-KENT L. REV. 463, 487 (2006) (“[A]rbitration confidentiality perpetuates public ignorance of continuing hazards, systemic problems, [and] public needs.”); Ramona L. Lampley, *Underdog Arbitration: A Plan for Transparency*, 90 WASH. L. REV. 1727, 1734 (2015) (“[W]ithout open access to the complaint, or decision, it does not flag

This Article's analysis reveals that the transparency costs of arbitration are even greater: lack of information not only impedes the public-notice function but also the potential for reputational regulation. Shutting disputes into arbitration denies the public access to information regarding corporate wrongdoing. But stakeholders need this information in order to trigger the reputational mechanics explained above. As discussed in Part II, stakeholders receive, interpret, and translate information produced by the courts into a variety of reputational sanctions.²²¹ In order to fulfill this function, though, stakeholders need to have access to this information in the first place. 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, 2016.²²² But a number of consumers had filed lawsuits against Wells Fargo between 2011–2016 because of its fraudulent sales tactics.²²³ 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.²²⁴ The public warning function of the lawsuits was negated by the resort to arbitration and the confidentiality that arbitration affords.²²⁵ As a result, most consumers did not learn of

for other consumers a potential claim or a warning that there may be a problem with the manufacturer. This reduces the deterrent effect our court-based tort system has on manufacturers, retailers, and service providers. Similarly, in the employment context, the lack of publicity or transparency fails to advertise what may be widespread discriminatory practices.”).

221. For a discussion of the financial consequences due to the legitimacy crisis faced by FIFA in the wake of the criminal investigations, see *supra* notes 120–33 and accompanying text.

222. Paul Blake, *Timeline of the Wells Fargo Accounts Scandal*, ABC NEWS (Nov. 3, 2016, 4:15 PM), <http://abcnews.go.com/Business/timeline-wells-fargo-accounts-scandal/story?id=42231128> [<https://perma.cc/YR5J-P4MQ>] (observing that the fraud allegations came to light when the CFPB handed down the fines).

223. See, e.g., Class Action Complaint at 16–24, *Jabbari v. Wells Fargo & Co.*, No. 3:15-cv-02159 (N.D. Cal. May 13, 2015) (alleging violations of state unfair competition laws, among others); Order Granting Defendant's Motion to Compel Arbitration at 1, *Jabbari*, No. 3:15-cv-02159 (dismissing complaint and compelling arbitration).

224. James Rufus Koren, *Even in Fraud Cases, Wells Fargo Customers Are Locked into Arbitration*, L.A. TIMES (Dec. 5, 2015, 3:00 AM), <http://www.latimes.com/business/la-fi-wells-fargo-arbitration-20151205-story.html> [<https://perma.cc/48JN-2MRQ>] (“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.”).

225. See Karpoff & Lott, *supra* note 151, at 761–62 (describing how fraud detection reveals

the risks posed by Wells Fargo until years later.²²⁶

2. *Litigation Transparency: Protective Orders and Confidential Settlements.* Arbitration is not the only risk to the operation of reputational sanctions. The confidentiality provisions of the litigation or settlement processes can also impede the informational flow from the courts to the public, compromising stakeholders' ability 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.²²⁷ The classic information-forcing mechanism is discovery under Rule 26 of the Federal Rules of Civil Procedure (FRCP), which 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”²²⁸ Discovery provides parties with broad tools to wrest information from the other side, including interrogatories, written and oral depositions, and production of documents.²²⁹

But while discovery educates the plaintiff, it leaves the public ignorant. While we tend to recognize the importance of discovery for the parties, there is greater controversy relating to the public’s access to the information revealed through discovery but not filed. The public has access to filed discovery because it becomes part of the public

risks to consumers); 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.”).

226. Senator Elizabeth Warren and other Democratic senators alleged this very charge against Wells Fargo. As their letter notes:

A major reason that these outrageous practices continued for at least five years is that Wells Fargo’s customer account agreement includes a forced arbitration clause. These clauses eliminate consumers’ ability to bring a claim in open court or to band together in a class action, before any dispute has arisen. . . . Even more troubling is the fact that arbitration proceedings are kept secret, so that other customers are deprived of the knowledge that their experiences might be part of a more widespread problem. This forced arbitration system helps hide fraudulent schemes such as the sham accounts at Wells Fargo from the justice system, from the news media, and from the public eye. This is unacceptable.

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), <https://www.leahy.senate.gov/press/leahy-brown-and-leading-democratic-senators-call-on-wells-fargo-to-end-use-of-forced-arbitration-on-consumers> [<https://perma.cc/GGK5-K7VY>].

227. Howard M. Erichson, *Court-Ordered Confidentiality in Discovery*, 81 CHI.-KENT L. REV. 357, 363 (2006); Hadfield & Ryan, *supra* note 21, at 81–82.

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

229. FED. R. CIV. P. 30–34.

adjudicatory process.²³⁰ But much of the information gained through discovery remains unfiled and is not included in the adjudicatory process; it “does not give rise to a presumption of public access” because “[p]ublic monitoring of the judicial system does not require access to materials that are exchanged during discovery but not submitted for use in adjudication.”²³¹

Contrary to this justification, though, public monitoring is not the only justification for public access to the courts. 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, consumer groups blame court secrecy for the lack of public awareness regarding the faulty ignition switches in General Motors (GM) vehicles.²³² According to civil-society advocate Public Citizen, “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 settlements.”²³³ Although potentially relevant, there are a number of reasons why information revealed through discovery does not reach the public.²³⁴

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 sanctions²³⁵ — which is 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, heightened regulatory oversight, or consumer backlash. These reactions not only protect the public by informing it of risks but also

230. Erichson, *supra* note 227, at 360–61.

231. *Id.* at 362. One classic justification for this difference in public access to filed and unfiled discovery is that public access to discovery is allowed in order to improve public monitoring of the operation of our courts. Laurie Kratky Doré, *Public Courts Versus Private Justice: It’s Time To Let Some Sun Shine in on Alternative Dispute Resolution*, 81 CHI.-KENT L. REV. 463, 474, 475–76 (2006). Public access to filed discovery is therefore imperative because it is part of the adjudicatory process, but it is not for unfiled discovery that is never used in court. *Id.* at 473; Erichson, *supra* note 227, at 362.

232. Press Release, 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), <https://www.citizen.org/media/press-releases/sunshine-litigation-act-would-improve-public-access-information-about-0> [<https://perma.cc/UG9P-VXN6>].

233. *Id.*

234. See Doré, *supra* note 26, 798–99 (discussing confidentiality requirements in settlements); Kotkin, *supra* note 26, 583–84 (discussing the declining rate of cases proceeding to trial).

235. Shapira, *supra* note 23, at 1239–41.

encourage corporations to change so that they pose less of a risk of harm to consumers or other stakeholders.

B. The Risks of Reputational Regulation: Too Little or Too Much?

A separate concern with reputational regulation is that it is difficult to calibrate. Its effects are unpredictable and attenuated, raising the risk that the reputational sanctions may be too weak to incentivize organizational change. Alternately, the sanctions may prove too strong, causing unintended consequences, disproportionately sanctioning actors, and creating the conditions for abusive use of reputational sanctions.

1. Problem of Short Attention Span: The Risk of Underdeterrence.

We live in a twenty-four-hour news cycle. Once the media moves on, so do we, and thereby subsides any hope of sustained pressure for change. If isolated events like media stories or court filings cannot keep our attention for long, what we need are a series of events that catch our attention and keep our focus.²³⁶ No one information intermediary may be able to accomplish that task alone, but the interaction of multiple information intermediaries could address that need. This Section explains the ways that interactions between media-court intermediaries and 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.

Media-court interactions amplify the audience for litigation information.²³⁷ The problem is that the light the media shines is bright but brief. In contrast, litigation provides a long time horizon, but the public may not 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.

First, not all lawsuits are equally newsworthy and may not attract media attention for very long.²³⁸ Better understanding of factors that attract media attention to legal developments²³⁹ may aid this task but

236. Shapira, *supra* note 71, at 29 & n.97 (noting that litigation can add details that keep a story in the news cycle).

237. Parks, *supra* note 33, at 445; Linos & Twist, *supra* note 24, at 228–29.

238. Interview with Professor Toni Locy, Dept. of Journalism and Mass Comm'n, Washington & Lee University (Dec. 11, 2017).

239. See Linos & Twist, *supra* note 24, at 228 (“[M]any cases taken on by the Supreme Court receive extensive coverage at the time of the Court ruling. Cases on politically salient topics, especially those involving individual rights, tend to receive disproportionately more media

may also open the door to risk of abuse when litigants craft pleadings and litigation strategy to chase media attention.²⁴⁰ Second, even when journalists are interested in a story, it is becoming increasingly difficult for them to cover a lawsuit from start to finish because of litigants' use of protective orders and sealed settlements.²⁴¹

Another risk is that business organizations will respond to reputational sanctions by investing in shallow changes that address public pressure for change but change very little in fact. These public relations tactics may focus more on altering public perceptions of an organization than on ensuring meaningful organizational change. The challenge is twofold: first, how to ensure that stakeholders are not satisfied by public relations reforms and instead sustain the pressure for meaningful change, and second, how to ensure that stakeholders can differentiate between the two. The information asymmetries that prevent stakeholders from learning of harms committed by organizations can similarly limit their ability to distinguish between meaningful organizational change and a public relations strategy designed to manage a reputational crisis.

2. *Dangers of Shame: The Risk of Overdeterrence.* Not all reputational incentives lead to desirable results. The case illustrations in Part II demonstrated the positive benefits of reputational incentives. The discussion in this subsection highlights how these same types of incentives can lead to undesirable outcomes. It may be hard to ensure

coverage relative to their share of the Court docket. . . . In addition, cases that attract many amicus briefs and cases involving multiple dissents garner more coverage, as journalists often consider these important and controversial, and thus newsworthy.”); Shapira, *supra* note 71, at 22 (“Judicial opinions add saliency by recalling the attention of the media to a certain issue, providing media reporters with readymade quotes, and reducing journalists’ risk of defamation liability. Opinions also add credibility by certifying existing information.” (footnotes omitted) (citing JOHN D. LYTTON, HOLDING BISHOPS ACCOUNTABLE 95 (2008)).

240. Samuel Terilli, *Lowering the Bar: Privileged Court Filings as Substitutes for Press Releases in the Court of Public Opinion*, 12 COMM. L. & POL’Y 143, 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.” (footnotes omitted)); *see infra* Section III.B.3. I will be exploring this topic further in a future work, tentatively titled *Public Relations Litigation. Professor Parella Presents at Yale Law Workshop on Informal-Formal Governance*, WASH. & LEE L. FAC. SCHOLARSHIP BLOG (Oct. 4, 2017), <https://wluulawfaculty.wordpress.com/2017/10/04/professor-parella-presents-at-yale-law-workshop-on-informal-formal-governance/> [<https://perma.cc/D9PD-K8GZ>].

241. Interview with Professor Toni Locy, *supra* note 238; *see* Part III.A.

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, attenuated, 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: excessive harm, collateral consequences, and risk of abuse.

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.²⁴² Examples of shaming sanctions include forcing an offender to issue a public apology, displaying labels or stickers singling out offenders, or wearing clothing announcing an offender's crime.²⁴³ 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."²⁴⁴

The use of shame led some scholars to reject these sanctions out of a concern for 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" ²⁴⁵ Additionally, even if judges may be skilled at creating shame, they may be less skilled at "reconstruct[ing] that core" after the offender has paid the penalty.²⁴⁶

Second, as explained in Part II, 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 encourages

242. See David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811, 1820–21 (2001).

243. *Id.* at 1823.

244. Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1886 (1991).

245. *Id.* at 1920.

246. *Id.* at 1921.

prosecutors to focus on reaching cooperative arrangements with corporate leadership through DPAs and NPAs.²⁴⁷ What prosecutors fear is a repetition of the Arthur Andersen scandal: Arthur Andersen was an accounting firm convicted of obstruction of justice following the Enron debacle.²⁴⁸ This conviction led to a range of collateral consequences and eventually resulted in the firm's collapse.²⁴⁹ This episode illustrated 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."²⁵⁰

Finally, reputational sanctions may be abused and levied without justification. One reason for abuse is that reputational sanctions can be cheap to produce. This Article examined reputational sanctions that originated from litigation action, but courts are not necessary to produce reputational sanctions; news media, social media, NGOs, government officials, and market analysts, among others, can all produce reputational sanctions of some variety. Social media in particular lowers the production cost of reputational sanctions by making it easier to detect conduct deemed "shameful," and by enabling rapid transmission of information. Social media dynamics increase the scale of participation in shaming and, consequently, the magnitude of the resulting sanction.

But not all the sanctions imposed across social media or other informal media are appropriate; they are levied without a gatekeeper. It is the presence of a gatekeeping function performed by the courts that distinguish the "reputational regulation" discussed in this Article from reputational sanctions generally. By involving the courts in this process, those seeking to produce reputational sanctions must pass through several "gates," including pleading standards, professional rules, adversarial process of truth finding, and review by judge and jury. These gates introduce checks in the production of reputational

247. Cynthia E. Devers, Todd Dewett, Yuri Mishina & Carrie A. Belsito, *A General Theory of Organizational Stigma*, 20 *ORG. SCI.* 154, 165 (2009); Garrett, *supra* note 3, at 880 ("The overdeterrent effect of an indictment provided great impetus for the DOJ to resolve prosecutions pre-indictment at the charging stage.").

248. Jonathan Weil & Alexei Barrionuevo, *Arthur Andersen Is Convicted on Obstruction-of-Justice Count*, *WALL STREET J.* (June 16, 2002, 11:28 AM), <https://www.wsj.com/articles/SB1023469305374958120> [<https://perma.cc/6DEX-2E9S>].

249. See Garrett, *supra* note 3, at 880 ("The DOJ suffered great criticism following Andersen's collapse and has since moderated its approach to explicitly take into account collateral consequences in organizational cases.").

250. Spivack & Raman, *supra* note 57, at 166.

sanctions—checks that are lacking in the more informal production of reputational sanctions.

Even where reputational sanctions are appropriate, the sanctions may lead to disproportionate impact because these sanctions are difficult to calibrate and their effects are challenging to predict or control. One consequence of such impact is that it can lead an organization to exit the market instead of improving its conduct. This is especially a problem when an exiting organization proves less susceptible to reputational sanctions, but still does things at exit that are undesirable. The need for change is still present but the toolkit for incentivizing that change no longer includes reputational sanctions.

3. *The Risk of Public Relations Litigation.* The very effectiveness of reputational sanctions may make organizations, especially corporations, easy targets for frivolous lawsuits.²⁵¹ In the securities class action context, those involved in a public offering may contend with “strike suits” brought by plaintiff’s firms following a steep and sudden drop in stock price.²⁵² 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.²⁵³ The concern is that 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.

Frivolous suits may not only be brought *against organizations* but also *by organizations*. 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.²⁵⁴

For example, following the FIFA scandal, FIFA filed a claim for restitution arguing that it was the victim of corruption and not its perpetrator.²⁵⁵ It used its pleadings—framed to garner media

251. See Lobel, *Courts as Forums for Protest*, *supra* note 36, at 517–20 (discussing imposition of Rule 11 sanctions for use of litigation for publicity).

252. Bohn & Choi, *supra* note 40, at 916.

253. Alexander, *supra* note 40, at 532.

254. This point will be developed further in my future work, *Public Relations Litigation*.

255. See Victim Statement & Request for Restitution at 4, *United States v. Hawit*, No. 15-cr-252 (E.D.N.Y. Nov. 25, 2015), ECF No. 102 (“As a victim of the Defendants’ crimes, FIFA is entitled to recover restitution under the Mandatory Restitution to Victims Act.” (citing 18 U.S.C.

attention—to explain to the public that the FIFA of 2016 is different from the FIFA corrupted by the officials under DOJ investigation.²⁵⁶ 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 use a legitimized and trusted system—the courts—to frame themselves as the victim and their participation in the scandal as minor, innocent, or nonexistent. Framing this narrative in the courts may garner greater salience with the public than other public relations methods.²⁵⁷

As lawyers, we know that litigation, on some level, is an exercise in storytelling.²⁵⁸ Law professors impress upon their first-year students the importance of developing facts into persuasive narratives. The difference with the storytelling by FIFA or other actors who use litigation as a stage is that the primary audience for these litigation narratives is not a judge but the media and, by extension, consumers, regulators, shareholders, and other stakeholders. This itself may not be startling²⁵⁹ 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.

IV. IMPLICATIONS OF REPUTATIONAL SANCTIONS

The analysis provided in this Article helps to illuminate the reputational consequences of different types of litigation or regulatory action. The analysis in this Article explores the ways that reputational sanctions are produced, which also provides deeper insight into the operation of features of our legal system, including reassessing failure, effects of litigation on nonbinding law, and information effects produced by other institutions. This Part will consider those insights.

§ 3663A (2012))).

256. *Id.* at 17 (“The Defendants are responsible for harming FIFA’s brand and bringing FIFA and the game itself into disrepute.”).

257. *See* Terilli, *supra* note 240, at 145 (discussing the use of court filings as “substitute press releases” in the Kobe Bryant civil case).

258. *See, e.g.*, Chiang, *supra* note 10, at 104 (“[L]itigators know that the most compelling cases rest upon the most compelling stories.”).

259. *See id.* at 105.

A. *Reconsidering the Functions of Activist Litigation: Aggregation and Elevation*

Analyzing the reputational effects of litigation may offer litigants more reasons for filing lawsuits against organizations because lawsuits serve important informational functions by collecting information in 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 informational functions, lawsuits amplify the audiences for factual and normative information—which may otherwise go unnoticed. 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 disseminate information after a lawsuit is filed—a lawsuit alleging human rights abuses, for example, is often more newsworthy than a government or NGO report alleging the same.²⁶⁰ As a result, the “educational value of litigation is often substantial even where the case does not result in a legal victory.”²⁶¹

For example, in *Hodsdon v. Mars*,²⁶² the plaintiffs alleged that Mars uses child labor in its cocoa supply chain and that the company fails to disclose that abuse to consumers at the point of purchase.²⁶³ Unfortunately, like many similar lawsuits, *Hodsdon* died at the motion to dismiss stage.²⁶⁴

Despite these litigation losses, lawsuits can still create indirect

260. Lobel, *Courts as Forums for Protest*, *supra* note 36, 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.”) (internal citation omitted); *see also* MCADAMS, *supra* note 34, at 194 (noting that the media is more likely to cover a press release if a lawsuit has been filed because lawsuits are more costly than regular press releases).

261. Lobel, *Courts as Forums for Protest*, *supra* note 36, at 488.

262. *Hodsdon v. Mars, Inc.*, 162 F. Supp. 3d 1016 (N.D. Cal. 2016).

263. Class Action Complaint at 1, *Hodsdon*, 162 F. Supp. 3d 1016 (No. 4:15-cv-04450-RS).

264. Order Granting Mars Inc.’s Motion to Dismiss, *Hodsdon*, 162 F. Supp. 3d 1016 (No. 4:15-cv-04450-RS) at 16; *see also* Dana v. Hershey Co., 180 F. Supp. 3d 652, 654 (N.D. Cal. 2016) (dismissing claims alleging that Hershey failed to disclose on the packaging of its chocolate products that their production involved the use of slave labor and the worst forms of child labor); McCoy v. Nestle USA, Inc., 173 F. Supp. 3d 954, 972 (N.D. Cal. 2016) (dismissing claims alleging that Nestle failed to disclose on the packaging of its chocolate products that their production involved the use of slave labor and the worst forms of child labor); Wirth v. Mars Inc., No. 8:15-cv-01470 (KESx), 2016 WL 471234, at *6 (C.D. Cal. Feb. 5, 2016) (dismissing claims alleging that Mars failed to disclose the likely use of forced labor in the supply chain of its pet food products on their packaging).

incentives for these corporations to change. First, lawsuits aggregate sources of facts and norms for public audiences. Obscure industry codes of conduct, multistakeholder initiatives, government reports, and company initiatives are brought into view when put under the spotlight provided by a legal complaint. In *Hodsdon*, 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 which 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 UN Guiding Principles on Business and Human Rights.²⁶⁶ These embedded sources of norms provide additional measuring sticks with which stakeholders can evaluate 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, or international convention. Each of these sources has particular normative significance, which may vary depending on which stakeholder is 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 they signal that some segment of the public cared enough about the organization's conduct to file a complaint and that the conduct at issue may violate legal norms, which are a socially significant set of norms. By including information from other sources, lawsuits do not only aggregate information but also elevate the normative significance of that information.²⁶⁷

For example, in *Hodsdon*, stakeholders learned that Mars's commitment to eradicate human rights originates from multiple sources, including UN guidelines, industry association commitments,

265. Class Action Complaint, *supra* note 263, at 2–3, 11–13.

266. *Id.* at 8.

267. HANDLER, *supra* note 36, at 217 (explaining how framing a political struggle in terms of legal entitlements accords greater legitimacy and validates the values championed).

and its own corporate policies.²⁶⁸ The average consumer may attach little normative significance to the UN's guidelines, but these were incorporated into another source that consumers may find more significant: Mars's voluntary corporate policies.²⁶⁹ Additionally, these normative obligations were disseminated within the *Hodsdon* complaint—a court document—which 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. *Reassessing Failure: Process vs. Outcomes*

The analysis of reputational dynamics in this Article illustrates how the information produced by litigation can encourage recalcitrant organizations to change their practices. These functions are still important even if the plaintiff loses the litigation.²⁷² As such, the litigation process can matter as much as litigation outcomes for achieving socially desirable goals.

One reason that process matters is that resistance to change also incurs reputational costs—costs that matter even if the target organization “wins” the litigation. For example, in 2000, a group of animal advocacy groups brought a lawsuit against Feld Entertainment (Feld), parent company of Ringling Brothers and Barnum and Baileys, regarding the treatment of its elephants. Nine years later the case was dismissed, but Feld brought RICO charges against the animal welfare groups regarding their conduct in the litigation.²⁷³ In 2012, Feld settled with one animal rights group when it agreed to pay approximately \$9 million to Feld; two years later, the remaining animal advocacy groups

268. Class Action Complaint, *supra* note 263, at 8.

269. *Id.* at 17.

270. *Id.*

271. 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 the UN guidelines, and 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. NeJaime, *supra* note 36, at 983–88.

273. Press Release, Feld Entm't, Feld Entertainment, Inc. Victorious in Case Brought by ASPCA and Other Animal Special Interest Groups (Dec. 30, 2009), <https://www.feldentertainment.com/PressRoom/DisplayPressRelease/39470/> [<https://perma.cc/S9QW-LWPZ>].

agreed to pay another \$16 million to settle with Feld.²⁷⁴ One year later, however, Feld announced that it would no longer include elephants in its circus shows.²⁷⁵ This decision soon made the circus financially unsustainable, leading to Feld's decision to close it down.²⁷⁶

Examples of the reputational costs of resistance are not limited to the litigation context. Consider the fate of shareholder proposals and the information effects produced through that process. Corporate scholars argue that not only does the information on the vote and voting outcomes attract media coverage, but that "negative votes attract *even more* media coverage and raise questions about the choices of the corporate decisionmakers."²⁷⁷

Finally, we see similar dynamics at work in public law-making processes when private actors publicly resist change. For example, in 2003, the Sub-Commission on the Protection and Promotion of Human Rights adopted the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises (Norms). These Norms proposed a global template outlining the obligations that private industries have to protect human rights. Several industry associations, such as the International Chamber of Commerce (ICC) and International Organization of Employers (IOE), expended considerable resources in opposing the Norms and ensuring that it did not become binding.²⁷⁸ Although the Norms were effectively tabled, the resistance to the Norms exerted reputational costs on those industry actors who opposed them.²⁷⁹ According to former Shell VP

274. See Press Release, Feld Entm't, ASPCA Pays \$9.3 Million in Landmark Ringling Bros. and Barnum & Bailey Circus Settlement (Dec. 28, 2012), <https://www.feldentertainment.com/PressRoom/DisplayPressRelease/62237/> [<https://perma.cc/H5W9-9WLR>]; Richard Pollock, *Animal Rights Groups That Paid Circus \$15.7 Million File Suit Against Insurers Who Cancelled Them in 2010*, WASH. EXAM'R (July 7, 2014, 6:00 AM), <http://www.washingtonexaminer.com/animal-rights-groups-that-paid-circus-157-million-file-suit-against-insurers-who-cancelled-them-in-2010/article/2550518> [<https://perma.cc/7G3Y-3XRF>].

275. Richard Pérez-Peña, *Elephants to Retire from Ringling Brothers Stage*, N.Y. TIMES (Mar. 5, 2015), <https://www.nytimes.com/2015/03/06/us/ringling-brothers-circus-dropping-elephants-from-act.html?mcubz=0> [<https://perma.cc/ZSR2-XEVR>] (reporting factors such as increased legislation protecting animals, frequent litigation, and constant protests at circus sites).

276. Press Release, Feld Ent., Feld Entertainment Announces Final Performances of Ringling Bros. and Barnum & Bailey Circus in May 2017 (Jan. 14, 2017), <https://www.feldentertainment.com/PressRoom/DisplayPressRelease/85085/> [<https://perma.cc/564D-GZZS>].

277. Sale, *supra* note 176, at 1031 (emphasis added).

278. UN Observer & International Report, *Shell Leads International Business Campaign*, GLOBAL POL'Y F. (Mar. 15, 2004), <https://www.globalpolicy.org/component/content/article/225/32247.html> [<https://perma.cc/S6RM-EJSB>].

279. Parella, *supra* note 97, at 132.

Robin Aram, “This episode . . . has not been without damage to business. It has linked business with a perception of hostility to human rights.”²⁸⁰

In each of these examples, the legal process “failed” those seeking organizational change—the case was dismissed, the vote failed, and the transnational instrument was suspended. But the legal process itself forced the organizational actors to react, and they did so by resisting. That resistance attracted attention to the cause, its champions, and its opponents. It is this attention, and its subsequent information effects, that make process and its associated information effects productive independent of the fate of the litigation, investigation, or other legal process.

This begs the question: what does it mean to fail? These reputational dynamics suggest that those evaluating litigation strategies, government investigations, or even treaty-making should consider the spillover information effects of these processes when deciding whether these institutions succeeded or failed.²⁸¹ These spillover effects can be unpredictable, distant, and even hard to identify, but they also form part of the picture and should be included in analyses of the effects and overall merits of different governance strategies.²⁸²

C. *Facilitating Pivoting: How Litigation Enhances the Bonds of Nonbinding Law*

Reputational dynamics also demonstrate how lawsuits can drive organizations to bind themselves to nonbinding law when they might otherwise not. There are a variety of nonbinding-multistakeholder initiatives, international organization recommendations and guidelines, NGO certifications, and other “soft law” instruments that seek to regulate businesses’ behavior.²⁸³ What these instruments lack is

280. Emily Rabin, *In the Hot Seat: Shell VP Robin Aram*, GREEN BIZ (June 21, 2004, 5:00 PM), <https://www.greenbiz.com/news/2004/06/21/hot-seat-shell-vp-robin-aram> [<https://perma.cc/M5HR-RTQ5>].

281. Kishanthi Parella, *Treaty Penumbra*, 38 U. PA. J. INT’L L. 275, 317–22 (2017) (discussing the spillover effects of international law-making on voluntary industry cooperation with nonbinding norms).

282. *Id.*

283. See, e.g., OECD, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES *passim* (2011), <http://www.oecd.org/daf/inv/mne/48004323.pdf> [<https://perma.cc/4KAU-355N>]; JOHN RUGGIE, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS “PROTECT, RESPECT, AND REMEDY” FRAMEWORK *passim* (2011).

enforcement: they are nonbinding, so corporations are under no obligation to adopt them. But because they are formulated under the auspices of reputable organizations, they do possess perceived legitimacy.

Here, “reputable” may be relative. Many nonbinding guidelines are developed by various divisions of the UN. The UN’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 toward legitimacy-enhancing organizations when their own legitimacy is at stake.²⁸⁴ They pivot toward the UN or NGO actors 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; these relationships can then 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.²⁸⁵ 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.²⁸⁶ Specifically, FIFA’s legitimacy crisis meant that it had to distance itself from actors and practices that compromised its fragile legitimacy, and instead had to move toward actors and practices that would enhance its legitimacy. This led FIFA to pivot toward the UN and begin the process of internalizing the UN’s human rights standards.²⁸⁷ FIFA may not have pivoted toward the UN on its own, but its legitimacy crisis made association with a more legitimate organizational partner attractive.

284. Deegan, *supra* note 95, at 293.

285. See Letter from William A. Burck, Jenny A. Durkan, Thomas Werlen & Stephen M. Hauss, Quinn Emanuel Urquhart & Sullivan, LLP, to Lisa Foster, Victim-Witness Coordinator, U.S. Attorney’s Office, E. Dist. N.Y. (Mar. 15, 2016), http://resources.fifa.com/mm/document/affederation/footballgovernance/02/77/05/70/fifarestitutioncoverletter_neutral.pdf [https://perma.cc/UR4A-84WK] (“[FIFA] is a victim of the wrongful acts of multiple defendants in the above referenced matter . . .”).

286. According to the FIFA Reform Committee:

[I]n 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 organisation 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, *supra* note 120, at 1; see Parella, *supra* note 97, at 133.

287. See notes 138–40 and accompanying text.

From the case illustrations examined, organizations are more likely to pivot under two conditions: first, when the stakes for legitimacy are high, and second, when they are in need of legitimacy. The first condition is satisfied, for example, in situations of heightened regulatory risk. Organizational legitimacy is particularly important when there is some nascent regulatory threat on the horizon. This regulatory threat could be prosecutorial, as in the FIFA example, or governance, like the Paris Climate Accord.²⁸⁸

The second condition can be satisfied by lawsuits, for example, that can compromise organizations' public image, removing their legitimacy just when they need it most. And because of the media attention given to legal proceedings, lawsuits also help keep public attention on organizations who are parties to the litigation. These legitimacy-depriving consequences of litigation further drive defendant organizations to seek the association of organizations with greater legitimacy than themselves and borrow institutional practices from those organizations in order to appear more legitimate.²⁸⁹

D. Shaming the Angels: The Reputational Regulation of Nongovernmental and Governmental Actors

For a number of reasons, it is important to consider how reputational sanctions influence the behavior of actors besides business organizations. First, other types of organizations may take actions that we do not like, and we may therefore want to encourage them to change their practices through reputational sanctions. Second, by sanctioning these actors, we increase the likelihood that they will sanction another type of organization. For example, reputational sanctions levelled at public actors like regulators can influence their willingness to adopt measures against business organizations—measures that may then trigger a sequence of reputational sanctions discussed above.²⁹⁰ Finally, reputational sanctions may impact

288. See notes 120–21, 201–04 and accompanying text.

289. DiMaggio & Powell, *supra* note 100, at 68–70; see Kenneth W. Abbott, *Orchestration: Strategic Ordering in Polycentric Climate Governance* 9–11 (Working Paper) (describing “orchestration” as a process by which intergovernmental organizations work with intermediaries to exercise governance functions). These dynamics are particularly significant in the transnational sphere, where legal institutions are routinely criticized for lack of enforcement capacity. However, these lessons are not limited to the transnational context and are also relevant for other situations characterized by an “enforcement gap.”

290. It is worth noting that reputational regulation does not get off the ground without public action in the first instance. Each of the case studies examined in Part II began with an act by a public institution—a court filing, government investigation, or multilateral treaty process—that

regulators or NGOs differently than business organizations. It is one thing to shame Exxon Mobil or Walmart—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 an NGO whose mission and identity is dependent upon its reputation for positive social impact. We need to assess the nature and extent of the effects of reputational sanctions on these actors so that their use still leads to socially desirable outcomes.

For example, Survival International, an NGO, filed a complaint against World Wildlife Fund (WWF), the largest conservation NGO in the world. Survival International complained about WWF’s financial and logistical support for the creation of conservation areas in Cameroon, which were created without the free prior and informed consent of the Baka, a local indigenous population, in violation of their human rights, and for the subsequent “violent abuse to which Baka have been subjected by the ecoguards and other law enforcement officials who patrol” the conservation areas.²⁹¹ Survival International requested a number of organizational changes to WWF’s practices, including capacity-building, independent consultants, and greater participation by the Baka.²⁹²

Survival International did not bring these claims to a court or agency but to the Organization for Economic Cooperation & Development (OECD), an intergovernmental organization that serves as a forum for economic development issues. The OECD created nonbinding principles and standards known as the OECD Guidelines on Multinational Enterprises (MNEs) that apply to MNEs associated with an adhering country.²⁹³ Survival International claimed that WWF breached these Guidelines through its actions; Survival International therefore instigated the investigation and dispute resolution process available under the OECD framework.²⁹⁴

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.

291. SURVIVAL INT’L CHARITABLE TR., COMPLAINT AGAINST WORLD WIDE FUND FOR NATURE 5 (2016), <http://assets.survivalinternational.org/documents/1527/survival-international-v-wwf-oecd-specific-instance.pdf> [<https://perma.cc/DM7R-CGN5>] [hereinafter SPECIFIC INSTANCE].

292. *Id.* at 32–34.

293. OECD, *supra* note 283, at 3.

294. Under the OECD framework, complainants raise their claims with the relevant National Contact Point (NCP), which in this case is the Swiss NCP because WWF’s headquarters are in

The complaint and ensuing investigation into WWF gained international attention because it is a rare occasion in which an NGO is under investigation for violating the OECD Guidelines. Traditionally, the “bad actors” under investigation are multinational businesses.²⁹⁵ It is also the first time in OECD history that one NGO brought a case against another NGO.²⁹⁶

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 detriment of another (respect for local indigenous rights). The reputational consequences for WWF are both familiar and unique. As explored in Part II.A, WWF may experience financial ramifications for its practices: 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 case may also demonstrate competitive dynamics that we are more accustomed to witnessing in the marketplace. By discrediting WWF, Survival International raises its own profile and may even benefit from disgruntled donors who abandon WWF, perhaps in favor of Survival International (switching NGOs).²⁹⁷ The complaint also raises the profile of indigenous populations and land rights issues, which may not receive the same attention as conservation efforts.²⁹⁸ The complaint could thus encourage stakeholders to switch their 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).

Switzerland and Cameroon does not have an NCP. SPECIFIC INSTANCE, *supra* note 291, at 2. 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. *About National Contact Points*, OECD, <http://mneguidelines.oecd.org/ncps/> [<https://perma.cc/E39A-MRCA>].

295. Associated Press, *Swiss Wade into Complaint Against WWF over Tribe’s Rights*, FOX NEWS (Jan. 5, 2017), <http://www.foxnews.com/world/2017/01/05/swiss-wade-into-complaint-against-wwf-over-tribe-rights.html> [<https://perma.cc/F88G-PHTT>].

296. *Survival International vs. WWF*, OECD WATCH, http://www.oecdwatch.org/cases/Case_457 [<https://perma.cc/P45V-HCWU>].

297. See HANDLER, *supra* note 36, 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.”).

298. See *id.* at 217–18 (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).

But reputational sanctions may have greater impact on an NGO compared to the business organizations examined in Part II. In addition to reduced funds, a discredited NGO may suffer damage to its key strategic resource: its moral authority. This is the resource that enables it to pursue its mission through partnerships with other organizations, advocate for causes or groups, disseminate information, coordinate action, and highlight poor behavior by other organizations. All of these functions 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 the strength of reputational sanctions that are appropriate for NGOs as opposed to business organizations.²⁹⁹

In addition to considering how reputational regulation works on NGOs, it is also worth exploring the reputational regulation of other actors. The reputational dynamics explained in this Article depend on a number of legal institutions, such as government investigations and civil lawsuits that, in turn, depend on the actions of public actors, such as prosecutors and regulators. These actors are not immune to reputational consequences; instead, reputational considerations may influence their own actions as well.

As demonstrated by the case illustrations in Part II, “[r]egulators are among the key mediators of industries’ and individual firms’ reputations.”³⁰⁰ But regulators also have their own reputations to manage. A regulator’s reputation is based on “externally held beliefs regarding an agency’s efficacy in pursuing its formal and informal mandate, its technical expertise, and the legitimacy of its aims and the means it employs.”³⁰¹ Like the corporations they regulate, regulators are also vulnerable to reputation risk; the way they respond to these reputational risks impacts, in turn, the reputational sanctions they create for corporate actors.³⁰²

299. This Article does not explore this issue but merely posits the possibility that reputational sanctions must be calibrated differently when levied against NGOs.

300. Sharon Gilad & Tamar Yogev, *How Reputation Regulates Regulators: Illustrations from the Regulation of Retail Finance*, in *THE OXFORD HANDBOOK OF CORPORATE REPUTATION*, *supra* note 63, at 320, 321.

301. *Id.* at 322.

302. *Id.* at 321.

For example, institutional factors not only constrained FIFA's choices but also influenced the choices made by the government authorities pursuing FIFA. Specifically, jurisdictional competition between different criminal enforcement bodies kept the pressure on FIFA,³⁰³ but that external institutional pressure on FIFA was itself a product of interaction between different organizations, each vying for status and recognition.³⁰⁴ Their desire to do so is itself a product of where they stand in relation to each other and in relation to other government bodies on their home turf.³⁰⁵

E. Toward Information Environments: Extending Reputational Regulation to Other Legal Institutions

It is not only litigation that produces reputational consequences for organizational actors. International law-making processes also have reputational effects for industry actors by raising the profile of policy

303. According to ESPN, the U.S. Attorney's office for the Eastern District of New York's (EDNY) head of the organized crime unit, John Buretta, was eager to raise the profile of EDNY, and the FIFA investigation offered an opportunity for EDNY to come out from under the shadow of the high-profile Southern District of New York. Shaun Assael, Brett Forrest & Vivek Chaudhary, *The FBI vs. FIFA*, ESPN MAG. (Feb. 16, 2016), http://www.espn.com/espn/feature/story/_id/14767250/the-exclusive-story-how-feds-took-fifa [https://perma.cc/UN4H-PT73]. Additionally, Swiss authorities aided the U.S. criminal investigation into FIFA by arresting and extraditing individuals charged by U.S. authorities. Press Ass'n, *Swiss Authorities Agree To Extradite Venezuelan Fifa Official to USA*, GUARDIAN (Sept. 23, 2015, 10:36 AM), <https://www.theguardian.com/football/2015/sep/23/swiss-authorities-approve-extradition-usa-fifa-official-rafael-esquivel-football> [https://perma.cc/93XC-7PU6]. However, "Swiss authorities have been wary of appearing as puppets of the United States . . ." Rebecca R. Ruiz, *In FIFA Inquiry, Switzerland Aids U.S. but Is Wary of Being Eclipsed*, N.Y. TIMES (Dec. 5, 2015), <https://www.nytimes.com/2015/12/06/sports/soccer/in-fifa-inquiry-switzerland-aids-us-but-is-wary-of-being-eclipsed.html> [https://perma.cc/CP4C-UEDF]. It is therefore no surprise that Swiss authorities conducted their own investigation of FIFA: "Switzerland's privacy laws have stoked a behind-the-scenes competition, keeping potential key evidence out of the immediate reach of American prosecutors at the same time that Swiss prosecutors have trumpeted their own independent criminal inquiry into global soccer's top leadership." *Id.* (explaining that Switzerland's attorney-general, Michael Lauber, observed the reputation-enhancing benefits of the investigation for Loretta Lynch and pursued similar benefits).

304. See Sarah C. Kaczmarek & Abraham L. Newman, *The Long Arm of the Law: Extraterritoriality and the National Implementation of Foreign Bribery Legislation*, 65 INT'L ORG. 745, 748 (2011) ("[L]ead regulators from large markets may alter domestic enforcement decision making in other jurisdictions . . .").

305. See Steven Brint & Jerome Karabel, *Institutional Origins and Transformations: The Case of American Community Colleges*, in THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 63, 348–49 (Paul J. DiMaggio & Walter W. Powell eds., 1991) (explaining the evolution of community colleges with reference to the prominence of other players in post-secondary education).

issues and informing the public of organizational conduct.³⁰⁶ Critically, even law-making initiatives that “fail” place certain issues and policy tools on the table in a way that organizational actors cannot ignore when developing alternative, often private, governance strategies.³⁰⁷

The information produced by legal institutions also incentivizes organizational responses in ways other than through reputational sanctioning. For example, Richard McAdams explains how legal institutions serve coordination functions because “legal pronouncement can make the prescribed outcome salient or ‘focal,’ thereby creating self-fulfilling expectations that this outcome will occur.”³⁰⁸ As a consequence, these pronouncements are “likely to prompt some compliance independent of the threat of legal sanctions, merely because the common knowledge that everyone heard this particular message makes the named behavior focal.”³⁰⁹ According to McAdams, information supplied by legal institutions can be particularly effective at creating focal points for coordination because of the publicity accorded legal information, its unique abilities to be pronounced by public officials and backed by sanctions, and the reputation of judges and legislators for predicting behavioral change.³¹⁰ These features of information disclosure by legal institutions suggest that actors will often respond to that information even if they do not fear sanctions and are agnostic on the legal institution’s moral authority.

Additionally, information from legal institutions can encourage organizational change by altering expectations of the status quo.³¹¹ According to behavioral research, “[l]aw can create status quos: when people are given two options and told that one is the default preferred by a (domestic) legal regime, participants treat the default rule as the status quo.”³¹² Legal institutions create a perception of the status quo

306. Parella, *supra* note 281, at 317–22.

307. *Id.* at 301–02 (discussing prospective treaties as “penalty defaults” because “the draft text already place[s] certain categories of terms on the table [and] [t]his influences the mandate of topics and issues addressed by voluntary regulation”).

308. Richard H. McAdams & Janice Nadler, *Testing the Focal Point Theory of Legal Compliance: The Effect of Third-Party Expression in an Experimental Hawk/Dove Game*, 2 J. EMPIRICAL LEGAL STUD. 87, 88 (2005).

309. *Id.*

310. Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1669–72 (2000).

311. Arden Rowell & Josephine van Zeben, *A New Status Quo? The Psychological Impact of the Paris Agreement on Climate Change*, 1 EUR. J. OF RISK REG. 49, 49 (2016).

312. *Id.* at 50.

that “identifies an endowment baseline against which subsequent losses (or gains) will be measured.”³¹³ Critically, this baseline is used to judge future action, so that failure to achieve the status quo is perceived as a loss.³¹⁴ Fidelity to that baseline (and the psychological impact of failing to achieve it) offers an alternative mechanism for encouraging organizations to change their behavior even in the absence of traditional enforcement mechanisms.³¹⁵

Reputational sanctions, coordination functions, and baseline shifting are some of the ways that information from legal institutions encourage organizational change independent of these institutions’ coercive powers. As such, these functions reveal a broader spectrum of capabilities possessed by legal institutions to alter organizational behavior.

These capabilities expand further if we do not view their informational effects in isolation but as part of a broader institutional “information environment” in which an organization or a population of organizations resides.³¹⁶ The discussion above explains how information effects are not limited to one type of legal institution. Instead, a broad range of legal institutions exhibit information-dissemination features, including civil and criminal litigation, agency action³¹⁷ and international treaty making. The result is that there are a range of information-producing institutions that surround an organizational actor.³¹⁸

For example, in the business and human rights context, consider the following institutions that can constitute a transnational corporation’s immediate information environment: activist litigation in its home state, criminal investigation in host state, mandatory social reporting requirements at local and regional levels, international treaty-making processes, and shareholder proposals regarding human rights due diligence. Each of these institutions helps to correct the

313. *Id.* at 51.

314. *Id.* at 52.

315. *Id.*

316. See Kenneth W. Abbott, Jessica F. Green & Robert O. Keohane, *Organizational Ecology and Institutional Change in Global Governance*, 70 INT’L ORG. 247, *passim* (2016) (explaining the concept of “organizational ecology” and the ways that the institutional environment influences the processes of growth and change for organizational populations).

317. See Cortez, *supra* note 15, at 1371 (explaining the use of publicity as a sanction); Gellhorn, *supra* note 15, at 1420 (discussing the risks of adverse agency publicity); Wu, *supra* note 15, at 1851 (discussing the informal regulatory function of public threats).

318. Abbott et al., *supra* note 316, *passim*; DiMaggio & Powell, *supra* note 100, at 66–67.

information asymmetries between the public and organizational actors regarding the latter's conduct.

But *informational environments*, made up of more than one information-producing legal institution, have the following advantages over individual *informational institutions* for encouraging organizational change: magnitude, variety, and temporal effects. First, the more institutions, the more information released to the public, which results in greater attention and higher levels of awareness regarding organizational conduct, all of which increases pressure for organizations to respond.

Second, having a larger number of institutions not only increases the overall pressure for changes but also offers different incentives for change. The information released by each type of institution has its own characteristics and therefore could vary in the types of reputational sanctions or other informational effects produced. For example, governmental investigation may produce regulatory spillover effects but other institutions may not. Alternatively, legislative institutions may encourage coordination effects that investigations do not normally produce. An expanding range of institutions broadens the spectrum of incentives offered by an organization's informational environment.

Finally, the staggered release of information by institutions can help address the temporal limitations associated with reputational shaming. Our memories are short and so is the time horizon for many media stories. Public condemnation that follows media coverage of litigation may be swift but also brief. If institutions release information sequentially, however, media coverage may be more likely to remain with the story and keep the public's attention on the organization at issue. For these reasons, the willingness of organizations to change may vary based on what its immediate information environment looks like.

CONCLUSION

This Article explores how our adjudicative institutions—litigation, government investigation, administrative action—create informational effects that have reputational consequences for organizations. These consequences provide four types of incentives for organizations to alter their behavior. *Financial incentives* convert information about organizational misconduct into financial consequences for the misbehaving organization. *Spillover incentives* occur when the conduct of one organization compromises the reputation of its peers. *Policy*

incentives encourage organizations to change in order to appear more legitimate during significant policy debates concerning them. Finally, incumbent organizations use reputational sanctions to delegitimize a potential competitor in the market, thereby using reputation and social norms as *barriers to entry* for new business organizations in a market.

Understanding these reputational incentives has implications for the objectives that litigants pursue in litigation because the process may be more important than the outcome. Part of the value of litigation is its dissemination of information about organizational behavior to the public, often with the aid of the news media. This analysis reveals how the informational effects of government investigation can also precipitate organizational change. These adjudicative institutions create 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 change.