

# PUBLIC RELATIONS LITIGATION

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### INTRODUCTION

In *Colorado River Ecosystem v. State of Colorado*, Plaintiff River requested that a federal court recognize and declare that it “is capable of possessing rights similar to a ‘person,’” and therefore has rights “to exist, flourish, regenerate, naturally evolve, and be restored.”<sup>1</sup> A few months later, the River withdrew its lawsuit.<sup>2</sup> The River’s case prompts the three questions explored in this Article: (a) Why do parties like the River bring cases they do not intend to litigate all the way? (b) Are these cases a problem? and (c) If so, how should we discourage it?

None of these questions are new. Those analyzing the economics of litigation have analyzed motivations behind litigation variously called nuisance suits,<sup>3</sup> negative expected value suits,<sup>4</sup> and frivolous suits.<sup>5</sup> According to this analysis, “parties make litigation choices that maximize their expected value” where expected value “is a function of the likelihood of success on the merits (P), the expected trial award conditional on success (W), and the expected cost to the party of litigating the case through trial (C).”<sup>6</sup> It is therefore puzzling

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<sup>1</sup> AM. COMPL. DECL. & INJUNCTIVE RELIEF at 4, *Colorado River Ecosystem v. State of Colorado*, No.1:17-cv-02316 (Nov. 3, 2017) [hereinafter, “*Colorado River v. State of Colorado*, AM. COMPLAINT”].

<sup>2</sup> Amanda Pampuro, *Group Ends Quest Seeking Personhood for Colorado River*, COURTHOUSE NEWS (Dec. 5, 2017). According to media reports, the attorney for the plaintiff withdrew the case after multiple requests from the Colorado assistant attorney general’s office to voluntarily request dismissal with prejudice or face sanctions under Rule 11 of the Federal Rules of Civil Procedure. Victoria Prieskop, *Attorney Rebuffs Colorado’s Threat of Sanctions in River Case*, COURTHOUSE NEWS (Nov. 29, 2017).

<sup>3</sup> William H. J. Hubbard, *Nuisance Suits* (Coase-Sandor Institute for Law & Economics Working Papers No. 691, 2014) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2458685](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2458685).

<sup>4</sup> Lucian A. Bebchuk & Alon Klement, *Negative-Expected-Value Suits in PROCEDURAL LAW AND ECONOMICS* (Chris Sanchirico (ed.) 2011).

<sup>5</sup> Albert Choi & Kathryn E. Spier, *Taking a Financial Position in Your Opponent in Litigation* (September 19, 2017). Virginia Law and Economics Research Paper No. 3. Available at SSRN: <https://ssrn.com/abstract=2733710> or <http://dx.doi.org/10.2139/ssrn.2733710>

<sup>6</sup> Robert G. Bone, *Economics of Civil Procedure*, in OXFORD HANDBOOK OF LAW AND ECONOMICS 148 (Francesco Parisi (ed.) 2017).

why a plaintiff would file a “negative-value suit” where “the plaintiff’s expected total litigation costs would exceed the expected judgment.”<sup>7</sup>

One explanation is that plaintiffs bring these suits because they can still gain financially through settlement.<sup>8</sup> Of course, this leads to yet another question: why would defendants settle with plaintiffs who do not intend to go to trial? Several explanations are offered, including: A defendant may settle in order to avoid higher costs associated with defense or default judgments.<sup>9</sup> Information asymmetries between plaintiff and defendant may create uncertainty for the defendant regarding the likelihood that plaintiff will go to trial.<sup>10</sup> Plaintiff can create a credible threat to sue by increasing its upfront costs through pre-complaint investigation and detailed pleadings.<sup>11</sup> This explanation of incentives of nuisance suits leads to both normative and practical implications, including proposals to discourage these cases by taking away the prospect of financial gain through settlement.<sup>12</sup>

However, this framework does not address plaintiffs like the River or others who use litigation as a stage. The reason why harks back to Jeremy Bentham, who explained that “[u]nder the auspices of publicity, the cause in the court of law, and the appeal to the court of public opinion, are going on at the same time.”<sup>13</sup> Bentham’s key insight is that litigation involves *both* of these distinct but intertwined courts, and his insight leads to different answers than the ones provided by the economics of litigation.

Plaintiffs bring these suits because victory in either court – court of law or court of public opinion – may motivate the plaintiff. Moreover, victory need not

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<sup>7</sup> Lucian Bebchuk and Alon Klement, *Negative-Expected-Value Suits* (December 2009). PROCEDURAL LAW AND ECONOMICS, Chris Sanchirico, ed., 2011; Harvard Law School John M. Olin Center Discussion Paper No. 656. Available at SSRN: <https://ssrn.com/abstract=1534703n> at 1.

<sup>8</sup> Rosenberg & Shavell, *A model in which suits are brought for their nuisance value*, *supra* note \_\_ at 4-5.

<sup>9</sup> *Id.*

<sup>10</sup> Bebchuk & Klement, *supra* note \_\_ at 1 (also identifying the following factors that can also increase the probability of positive settlement for a negative expected value suit: divisibility of litigation costs, new information at intermediate points, litigants’ reputation and repeat playing, and contingent fees and retainer arrangements); Choi & Spier, *supra* note \_\_ at 18 (“[W]hen the lawsuit itself has a negative expected value, taking a short position against the defendant allows the plaintiff to turn the lawsuit into a positive expected value one.”).

<sup>11</sup> Hubbard, *supra* note \_\_ at 8; Lucian A. Bebchuk, *On the Credibility and Success of Threats to Sue*, 25 J. LEGAL STUD. 1, 3 (1996) (“There may arrive a stage at which a threat to continue all the way to judgment becomes credible by virtue of the small fraction of the litigation costs that remains to be incurred.”).

<sup>12</sup> Rosenberg & Shavell, *A solution to the problem of nuisance suits*, *supra* note \_\_ at 45-46 (describing the ways that a “settlement bar” can discourage nuisance suits).

<sup>13</sup> Jeremy Bentham, “Publicity in Courts of Justice,” in BETHAMIANA: OR SELECT EXTRACTS FROM THE WORKS OF JEREMY BENTHAM 115 (John Hill Burton (ed.) 1844).

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be financial. From torts<sup>14</sup> to property,<sup>15</sup> plaintiffs do not only exercise their legal rights to help themselves; they also do so to harm others.<sup>16</sup> Therefore, taking away the prospect of financial reward in law courts is ineffective if gains (financial or nonfinancial) in the court of public opinion motivate plaintiff's suit.

Plaintiffs may also use one court to influence outcomes in the other.<sup>17</sup> We are more familiar with the use of the court of public opinion to influence the court of law where strategic litigants employ public relations strategies to facilitate legal objectives. For example, Samsung enjoys a special status in Texas: it is the most sued firm in the United States District Court for the Eastern District of Texas.<sup>18</sup> The cases against it are almost always jury trials.<sup>19</sup> Recent empirical research reveals that Samsung responds with significant philanthropic giving to the community in which it is sued, including building the only outdoor skating rink in all of Texas – right in front of the federal courthouse so that it is “visible to all jurors who enter.”<sup>20</sup>

This story of how the court of public opinion influences courts of law is a fascinating one; the opposite story even more so. This Article explores how courts of law are not ends in themselves but channels through which plaintiffs affect the court of public opinion, often through lawsuits that attract news

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<sup>14</sup> Scott Hershovitz, *Tort as a Substitute for Revenge* in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS (John Oberdiek (ed.) 2014) (“[T]ort offered Mitchell the same thing that revenge did. It offered him a way of countering the message that Alcorn’s spit sent, a way of correcting the historical significance of Alcorn’s wrong.”).

<sup>15</sup> Larissa Katz, *Spite and extortion: A jurisdictional principle of abuse of property right*, 122 YALE LAW J. 1444, 1456-59 (2013); see also Daniel B. Kelly, *Strategic Spillovers*, 111 COLUMBIA L. REV. 1641, 1644 (2011) (describing “strategic spillovers” as situations where “parties employ externalities opportunistically as a type of extortion”).

<sup>16</sup> Brishti Guha, *Malicious litigation*, 47 INT. REV. LAW ECON. 24, 24 (2016).

<sup>17</sup> Each court can serve as a check on the other. Courts of law check the court of public opinion regarding information that is already in the public but may be incorrect. See, e.g., Roy Shapira, *Reputation Through Litigation: How the Legal System Shapes Behavior By Producing Information*, 91 WASH. L. REV. 1194, 1196 (2016). However, our legal tradition has a long-rooted faith in the role and importance of the court of public opinion serving as a disciplining mechanism regarding conduct by participants in the courts of the law. According to Jeremy Bentham, publicity encourages witnesses to be truthful in their courtroom testimony. BENTHAM, *supra* note \_\_ at 115 (“Environed as he sees himself by a thousand eyes, contradiction, should he hazard a false tale, will seem ready to rise up in opposition to it from a thousand mouths.”); Adriaan Lanni, *Publicity and the courts of Classical Athens*, 24 YALE J. LAW HUMANIT. 119, 127-29 (2012) (describing the disciplining effect of publicity on jurors). Publicity also disciplines those holding high judicial office and serves as society’s primary form of security against abuses of government power. BENTHAM, *supra* note \_\_ at 115 (Publicity “keeps the judge himself, while trying, under trial.”); see also Judith Resnik, *Bring Back Bentham: “Open Courts,” “Terror Trials,” and Public Sphere(s)*, 5 LAW & ETHICS OF HUMAN RIGHTS 226, 239-241 (2011); Gerald J. Postema, “The Soul of Law” in BENTHAM’S THEORY OF LAW AND PUBLIC OPINION 46-48 (Xiaobo Zhai & Michael Quinn (eds.) 2014) (discussing the ways that publicity ensures public oversight over government actors). In Bentham’s view, the “primary leverage” used by the public to ensure accountability of government actors was “manipulation of reputation or esteem. Public condemnation threatened an official’s reputation.” POSTEMA, *supra* note \_\_ at 52.

<sup>18</sup> Lauren Cohen and Umit G. Gurun, *Buying the Verdict*, 2-3 (unpublished manuscript) (October 30, 2017), available at SSRN: <https://ssrn.com/abstract=2994572>.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

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media.<sup>21</sup> For example, upon withdrawal, the River’s attorney explained: “‘It was such a challenge to the current status quo, I figured it would be a real uphill battle to get it in the court, but we can use this to launch a movement of the people in the streets.’”<sup>22</sup>

This is “public relations litigation”: the use of courts of law to influence the court of public opinion, often regarding the reputation of plaintiff or defendant. It is no secret that litigation can harm a defendant’s reputation; that is why so many of them spend considerable amounts of money to limit the reputational damage.<sup>23</sup> Less understood is that litigation can help a plaintiff’s reputation in the eyes of key stakeholders, such as employees, investors, or consumers.<sup>24</sup> Both effects illustrate the ways that courts of law influence courts of public opinion.

The River is not the only party using litigation as a stage. Tech companies use patent litigation to enhance their reputation among *employees* and discourage them from defecting to a rival.<sup>25</sup> Similarly, corporations use litigation to affect

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<sup>21</sup> 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*] (“[L]itigation is one of the most effective ways to win publicity for a cause.’ 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.”)(citations omitted).

<sup>22</sup> Pampuro, *supra* note \_\_ (“In his brief withdrawal, [Plaintiff’s attorney] Flores-Williams alludes to the 1972 Supreme Court Case *Sierra Club v. Morton*, in which Justice William Douglas famously dissented that nature should have standing in environmental lawsuits. . . . While Flores-Williams acknowledges his case had little impact on the legal system, he believes it brought Douglas’ doctrine back to national attention.”).

<sup>23</sup> Cohen & Gurun, *supra* note \_\_ at 2 (“Upon being sued in a given location, firms significantly increase advertising in that location.”)

<sup>24</sup> Erik Hovenkamp, *How Patent Assertion Entities Use Reputation to Monetize Bad Patents* (August 5, 2013), available at SSRN: <https://ssrn.com/abstract=2308115> ([explaining how companies use patent litigation to force other companies to accept licensing terms for broad, likely invalid low-value patents](#)); Litigation can achieve reputational objectives even when the lawsuit has a low prospect for success because litigation is a costly signal. For example, when founders sue venture capitalists (VCs), the former takes the risk of legal costs, emotional stress, and likelihood of not obtaining VC funding for another venture. The costliness of this signal helps to explain why defendant VCs suffer reputational losses even when the lawsuit against them fails. Vladimir Atanasov, *The Impact of Litigation on Venture Capitalist Reputation*, NBER WORKING PAPER No. 13641 at 13, 32 (Nov. 2007). The identity of the plaintiff may also matter for reputational losses. *Id.* at 14 (“Litigation by other parties does not send as clear a signal.”); Bhagat et al., *supra* note \_\_ at 6 (reporting that while all defendants experience a wealth loss at the filing of a lawsuit, the extent of the loss depends on the plaintiff so that defendants involved in suits against government entities “suffer larger declines in shareholder wealth [] than defendants involved in lawsuits with other firms [] or private parties.”).

<sup>25</sup> Martin Ganco et. al., *More Stars Stay, But The Brightest Ones Still Leave: Job Hopping in the Shadow of Patent Enforcement*, 36 STRAT. MGMT. J. 659, 660 (2015)(explaining how patent enforcement is a reputation-building strategy for plaintiff corporations because it is costly and observable, signaling to current employees that the corporation will litigate to defend its intellectual property and thereby discouraging employees to leave the corporation in order to join or form a competitor); see also R. Agarwal et al., *Reputations for toughness in patent enforcement: implications for knowledge spillovers via inventor mobility*, 30 STRAT. MGMT. J. 1349, 1367 (2009)(“[A] firm’s patent litigiousness significantly curtails the outward dissemination of technological knowledge that otherwise would be expected from employee departures.”); *id.* at 1350 (“Intel’s CEO reportedly issued a blanket order to his general counsel to file two IP lawsuits per quarter to dissuade engineers from ‘walking out the door’ with proprietary technologies.”); Leonid Bershidsky, *What Google Hopes to Gain by Suing Uber*, BLOOMBERG (Feb. 24, 2017) (arguing that the litigation battle is not just

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the opinion of *consumers* concerning a rival<sup>26</sup> or to signal the value of an asset.<sup>27</sup> Finally, *investors* also care about the signal that a lawsuit sends.<sup>28</sup> While defendants experience negative wealth effects in the stock market following the filing of a lawsuit,<sup>29</sup> plaintiff corporations may benefit from the filing of a lawsuit and the litigation “milestones” that occur, short of judgment.<sup>30</sup>

This Article examines yet another arena illustrating the public relations function of litigation: post-crisis litigation. A crisis, such as a financial scandal or product accident, can impose severe reputational consequences on multiple actors because people do not know which party to blame for the underlying events. Litigation often follows in the wake of such a crisis. But the litigation

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about trade secrets and patents but fundamentally an issue concerning employee loyalty because the core of the fight is about a former Google employee, Anthony Levandowski, removal of sensitive data from his employer to set up his own company that he subsequently sold to Uber).

<sup>26</sup> *Blue Buffalo v. Purina*, No. 4:14-cv-00920 (E.D. MO May 14, 2014), ¶56 (“Defendants’ smear campaign is calculated to destroy the reputation and goodwill of the Blue Buffalo brand. By spreading false claims about product ingredients and maligning the credibility of the brand, Defendants seek to curtail the rapid growth of Blue Buffalo’s business in the hope that this will stem the exodus of Nestle Purina customers to Blue Buffalo, and divert sales toward Nestle Purina’s products.”). In its countersuit, Blue Buffalo claims that the lynchpin of Purina’s “smear campaign” is a website launched the same day Purina filed its lawsuit against Blue Buffalo. *Id.* at ¶31. According to Blue Buffalo, Purina used the fact of the lawsuit to bolster its allegations concerning the quality of Blue Buffalo’s products. For example, the day after filing the lawsuit, Purina sent an email to consumers and pet food retailers where it repeated its allegations against Blue Buffalo and repeatedly drew attention to the fact it launched a lawsuit based on those allegations, even including a link to its complaint. *Id.*, Ex. M. These tactics suggest that Purina was potentially using the lawsuit as a signaling device aimed at consumers and intended to elevate the credibility of its allegations against Blue Buffalo. Blue Buffalo later conceded that some of its pet food products may have contained poultry by-product meal (as alleged by Purina), but it pointed the finger at its suppliers and brought a lawsuit against them. Lisa Brown, *Blue Buffalo says supplier mislabeled some ingredients*, ST. LOUIS DISPATCH (Oct. 15, 2014).

<sup>27</sup> Erik Hovenkamp, *How Patent Assertion Entities Use Reputation to Monetize Bad Patents* (August 5, 2013), available at SSRN: <https://ssrn.com/abstract=2308115> (explaining that tech companies use patent litigation to increase the financial value of low-quality patents by filing expensive lawsuits – even ones they expect to lose – in order to force defendants to accept their licensing terms). Patent litigation not only encourages defendants to accept licensing terms but also “other potential defendants who subsequently view the [patent assertion entities’] threats as more credible than they had previously thought, making them more amenable to the PAE’s licensing terms.” *Id.* at 3.

<sup>28</sup> See, e.g., Mark Klock, *Do Class Action Filings Affect Stock Prices? The Stock Market Reaction to Securities Class Actions Post PSLRA*, 15 J. BUS. & SEC. L. 109, 133 (2016); Rob Bauer & Robin Braun, *Misdeeds Matter: Long-Term Stock Price Performance after the Filing of Class-Action Lawsuits*, 66 FIN. ANALYSTS. J. 74, 88 (2010).

<sup>29</sup> See, e.g., Sanjai Bhagat, John Bizjak, and Jeffrey L. Coles, *The Shareholder Wealth Implications of Corporate Lawsuits*, 27 FIN. MANAGEMENT 5, 6 (1998) (“We find that no matter who brings a lawsuit against a firm . . . defendants experience economically meaningful and statistically significant wealth losses upon the filing of a suit.”); J.M. Bizjak, J.M. and J.L. Coles, *The Effect of Private Antitrust Litigation on the Stock-Market Valuation of the Firm*, AMERICAN ECONOMIC REVIEW 436, 437 (1995) (finding that defendant firms suffer

<sup>30</sup> J.M. Bizjak, J.M. and J.L. Coles, *The Effect of Private Antitrust Litigation on the Stock-Market Valuation of the Firm*, AMERICAN ECONOMIC REVIEW 436, 437 (1995) (finding that plaintiff firms obtain positive effect on shareholder wealth in interfirm antitrust litigation); Sanjun Nam *et al.* *The impact of patent litigation on shareholder value in the smartphone industry*, 95 TECH. FORECASTING & SOCIAL CHANGE 182, 187 (2015); Matthew P. Larson, *Litigation Trading: An Introduction to Wall Street’s Interest in Patent Cases*, 8 LANDSLIDE 1 (American Bar Association Section on Intellectual Property Law 2015); *But see* Bhagat, *supra* note \_\_ at 6-7 (finding no significant wealth effects for plaintiffs upon filing of a lawsuit).

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not only responds to the types of actual injuries that such an incident may cause but also to the information vacuum these incidents create and the reputational consequences that result if the vacuum is allowed to grow. Therefore, post-crisis litigation also involves public relations effects because it allows the plaintiff corporation to communicate its side of the story to the public and ameliorate potential reputational harm.<sup>31</sup>

For example, Elizabeth Holmes and her company, Theranos, enjoyed a meteoric rise with Silicon Valley dubbing her the “next Steve Jobs”<sup>32</sup> and *Fortune* heralding Theranos as a “potentially highly disruptive upstart in America’s \$73 billion diagnostic-lab industry.”<sup>33</sup> Unfortunately, the *Wall Street Journal* later exposed Theranos’s technology as flawed<sup>34</sup> and the company and Holmes faced government investigations and lawsuits.<sup>35</sup> This blood-testing scandal also implicated the reputation of Walgreens because it had sold Theranos’s blood-testing kits at over 40 of its “wellness centers.”<sup>36</sup> Following the scandal, Walgreens faced lawsuits alongside Theranos as consumers, investors, regulators and the public ask: *who is to blame?* Walgreens pointed the finger at Theranos in a 2016 lawsuit it filed against Theranos.<sup>37</sup> Unsurprisingly, Theranos pointed the finger right back in its countersuit, even proclaiming that Theranos had considered suing Walgreens *first* but Walgreens beat them to the punch.<sup>38</sup>

All these examples illustrate public relations effects of litigation where information from the lawsuit changes the way that key stakeholders of plaintiff –

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<sup>31</sup> See Craig Deegan, *The legitimising effect of social and environmental disclosures: a theoretical foundation*, 15 ACCOUNTING, AUDIT. ACCOUNT. J. 282, 296 (2002) (discussing the strategic use of information disclosure by corporations in the wake of crises to re-establish legitimacy); 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) (“[R]esearchers using legitimacy theory hypothesize that firms report information only when needed to maintain or repair their legitimacy within the community. Greater stakeholder awareness of any particular firm’s negative social performance leads to the need for that firm to engage in legitimacy maintenance activities, which include disclosure.”).

<sup>32</sup> Bilton, *supra* note \_\_\_\_.

<sup>33</sup> Roger Parloff, *This CEO is out for blood*, FORTUNE (June 12, 2014).

<sup>34</sup> See, e.g., John Carreyrou, *Hot Startup Theranos Struggled With Its Blood-Test Technology*, WALL ST. J. (Oct. 16, 2015) (reporting that by the end of 2014, “the lab instrument developed as the linchpin of its strategy handled just a small fraction of the tests then sold to consumers”).

<sup>35</sup> See, e.g., Sheelah Kolhatkar & Caroline Chen, *Theranos Under Investigation by SEC, U.S. Attorney’s Office*, BLOOMBERG (Apr. 19, 2016), <https://www.bloomberg.com/news/articles/2016-04-18/theranos-is-under-investigation-by-sec-u-s-attorney-s-office> (describing investigations by the SEC, U.S. Attorney’s Office of Northern District California, FDA, Centers for Medicare and Medicaid Services (CMS), and state health departments in Pennsylvania and California); Jef Feeley & Caroline Chen, *Theranos Faces Growing Number of Lawsuits Over Blood Tests*, BLOOMBERG (Oct. 14, 2016), <https://www.bloomberg.com/news/articles/2016-10-14/theranos-faces-growing-number-of-lawsuits-over-blood-tests> (reporting multiple lawsuits by investors and patients).

<sup>36</sup> Sy Mukherjee, *Walgreens Trashes Theranos in Their Fiery \$140 Million Lawsuit Battle*, FORTUNE (Nov. 16, 2016), <http://fortune.com/2016/11/15/walgreens-theranos-lawsuit-court-documents/>.

<sup>37</sup> See generally Complaint (Public Version), *Walgreen v. Theranos*, No. 1:16-cv-01040, (D. Del. Nov. 8, 2016), at 43.

<sup>38</sup> Theranos, PRESS RELEASE, *Theranos Statement on Walgreens Suit* (Nov. 8, 2016).

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employees, consumers, investors – perceive the plaintiff or defendant, often to the former’s advantage. These cases are not outliers; public relations litigation is not the exception but the rule. These examples may appear idiosyncratic but only because they are exemplars of public relations effects at work. Other cases are more commonplace and familiar because under Bentham’s analysis, *every* suit is a public relations suit, albeit to varying degrees. Here’s why: Suits filed publicly are accessible so information from courts of law flow into the court of public opinion, creating a potential public relations effect.<sup>39</sup> Suits not public offer even stronger proof of the public relations quality of litigation because many parties opt for alternative dispute resolution or litigation confidentiality measures in order to prevent information reaching the court of public opinion.<sup>40</sup> These are all examples of Bentham’s insight regarding the fundamental connection between the two courts.

Ignoring the court of public opinion means that we risk ignoring positive societal effects of litigation that occur outside the courtroom. Bentham’s insight strikes at the very heart of the entire enterprise: what is the purpose of adjudication? A common answer today is dispute resolution. An increasingly popular answer is information revelation.<sup>41</sup> But Bentham’s analysis points to a more unfamiliar, even startling, function: *information transmission*. This Article explains how our courts of law possess unique characteristics that distinguish their information transmission capabilities from those of other information mechanisms in our society: (a) characteristics of the broader information environment (magnet for media and the “age of fake news”), (b) characteristics of the courts (salience, classification, and democratic messaging), and (c) characteristics of the documents (aggregation and elevation). As a result, litigation offers parties a stage from which to tell their stories.<sup>42</sup>

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<sup>39</sup> Even in ancient Athens, “news of allegations made during a court case would likely find its way back to a litigant’s local village community, resulting in informal sanctions. Litigants clearly feared the effect that allegations of wrongdoing might have on their reputation.” Lanni, *supra* note \_\_\_ at 131-32.

<sup>40</sup> Thomas J. Stipanowich, *In Quest of the Arbitration Trijuncta, or Closed Door Litigation?: The Delaware Arbitration Program*, 6 J. BUS. ENTREPRENEURSHIP & L. 349, 354-55 (2013) (discussing the Delaware Arbitration Program that offered various levels of confidentiality to arbitration services performed by judges, including exclusion from public court dockets, private hearings, and restrictions on information shared about final awards); Judith Resnik, *The Contingency of Openness in Courts: Changing the Experiences & Logics of the Public’s Role in Court-Based ADR*, 15 NEV. L.J. 1631, 1674-81 (2015).

<sup>41</sup> Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CALIF. L. REV. 1259, 1264 (2017); Gillian K. Hadfield & Dan Ryan, *Democracy, Courts and the Information Order*, 54 EUR. J. SOC. 67, 81 (2013); Samuel Issacharoff & Geoffrey Miller, *An Information-Forcing Approach to the Motion to Dismiss*, 5 J. LEGAL ANALYSIS 437, 450 (2013); Alexandra D. Lahav, *The Roles of Litigation in American Democracy*, 65 EMORY L.J. 1657, 1683-90 (2016); 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).

<sup>42</sup> See e.g., Mark A. Drumbl, *The Expressive Value of Prosecuting and Punishing Terrorists: Hamdan, the Geneva Conventions, and International Criminal Law*, 75 GEO. WASH. L. REV. 1165, 1195 (2006) (“Trials can educate the public through the spectacle of theater. Adversarial legal process conveys considerable performativity, which is made all the more weighty by the reality that coincident with the closing act of the reading of the verdict comes the imposition on the antagonists of shame, sanction, and stigma through the issuance of sentence.”).



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Section I explains the information asymmetry problem following a corporate scandal and discusses the functions of crisis communication for addressing those information problems. It also explains how litigation can serve crisis communication functions and provides illustrative examples of public relations litigation in practice, highlighting the crisis communication functions of early stage litigation documents. Section II answers the puzzle of why litigation allows plaintiff corporations to achieve reputational objectives by examining the comparative advantages of civil litigation as an information mechanism. Section III explores the normative question of whether public relations litigation presents a problem that courts should actively discourage. Finally, Section IV explores the possibilities and limitations of constructing rules to discourage public relations litigation deemed socially undesirable.

I. THE EDUCATIONAL FUNCTION OF THE LITIGATION STAGE

Litigation creates public relations effects in the court of public opinion because of its educational function. For example, the 1920s Scopes Trial – basis for the play *Inherit the Wind* – is known for putting the merits of two competing theories on trial: creationism and evolution. The trial presented an opportunity for parties to educate the public masses on scientific knowledge and thereby change current thinking.<sup>43</sup> More recently, the Colorado River took the litigation stage to educate the public on the value it brings and the risks it confronts.<sup>44</sup>

But scientists and conservationists are not the only ones benefiting from the litigation stage. This Section explores another type of plaintiff with another kind of educational mission: businesses and other organizations that use litigation following a crisis to control reputational damage from that crisis. This case study is important for two reasons. First, many scholars exploring the publicity benefits of contemporary litigation have focused on lawsuits brought by social movements and public interest groups, like the environment groups behind Colorado River’s lawsuit.<sup>45</sup> This exposition of public relations litigation leads to

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<sup>43</sup> Perry Parks, *Summer for the Scientists? The Scopes Trial and the Pedagogy of Journalism*, 92 JOURNAL. MASS COMMUN. Q. 444, 444-45 (2015). The trial was also important because of the way it attracted “up to two hundred reporters and included the first live radio broadcast from a courtroom.” *Id.* at 445. The media framed the trial within narratives that were sure to get people’s attention, such as portraying it “as a clash of multiple values—religion versus science, urban enlightenment versus rural ignorance, Northern freethinking versus Southern fundamentalism.” *Id.*

<sup>44</sup> “*Colorado River v. State of Colorado*, AM. COMPLAINT, *supra* note \_\_\_ at ¶¶ 1-19.

<sup>45</sup> 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); Emily Chiang, *Institutional Reform Shaming*, 120 PENN ST. L. REV. 53, 59-61 (2015)(describing similar strategies); Lobel, *Courts as Forums for Protest*, *supra* note \_\_\_ at 489; 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); Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2011) (discussing the benefits to social movements from losing litigation battles).

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an incomplete picture of the phenomena because it generally focuses on *non-profit* plaintiffs litigating for primarily *public* benefit; we are therefore more likely to perceive public relations litigation as socially beneficial. But in order to understand and evaluate public relations litigation fully, we also need to pay attention to the other end of the spectrum: *for-profit* plaintiffs using the litigation stage for primarily *private* benefits. They are two sides of the same coin; both types of plaintiffs use the litigation stage for information transmission and to court public opinion. Critically, research in management and communication studies allows us to understand better the mechanisms of information transmission with regard to for-profit plaintiffs, which can also be instructive in understanding how other types of plaintiffs also employ public relations litigation.

### *A. Understanding the Problem: The Need for Information Following a Crisis*

In order to understand the public relations functions of post-crisis litigation, it is important to appreciate the problem that gives rise to it. It is a familiar one: information asymmetries in the marketplace. George Akerlof famously explained that information asymmetries between buyers and sellers in the market mean that the latter know significantly more about the qualities of the products they sell than the buyers, creating the risk of opportunism.<sup>46</sup> These information asymmetries have two consequences. First, buyers are aware that there is some risk of purchasing a “lemon” in the marketplace and will be less willing to pay higher prices; this price discount is borne not only by the sellers of “lemons” but also by the sellers of quality products because the buyer cannot differentiate between the two before she engages in the purchase. Therefore, the reputational harm caused by “lemons” does not only stick to the sellers of “lemons” but also sellers of better products as well. Second, sellers of high-quality products face challenges with credibly distinguishing their own goods from the lemons in the market and therefore enlist the aid of reputational intermediaries to help verify their information to potential consumers.<sup>47</sup>

Similar information asymmetries arise following a corporate crisis concerning attributions of blame for the conduct at issue. We the public want someone to blame. The problem is that we do not always know who that party is. We are not privy to the internal records, confidential communications, high-level meetings, or other sources of information that could reveal the identity of the

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<sup>46</sup> George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488, 489 (1979).

<sup>47</sup> Frank Easterbrook & Daniel R. Fischel, *Mandatory Disclosures & the Protection of Investors*, 70 VA. L. REV. 669, 676-77 (1984)(discussing information asymmetries in the securities markets).

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blameworthy party to us. Therefore, we tend to blame everyone involved. Consider the famous example of Ford and Firestone when consumers faced an information problem following hundreds of deaths resulting from crashes of Ford's Explorer vehicles.<sup>48</sup> Ford blamed the deaths on faulty tires manufactured by its supplier, Firestone.<sup>49</sup> Firestone claimed the deaths resulted from Ford's defective design for the Explorer.<sup>50</sup> The confusion over causation was so acute that *Bloomberg Businessweek* aptly dubbed the mystery a "Corporate Whodunit."<sup>51</sup> The crisis took its toll. After trading accusations in the public arena, the two companies ended their famous 100-year relationship – dating back to the Model T – because even a century old bond is not immune to the damage wrought by a reputational crisis.<sup>52</sup>

Information asymmetries following a crisis also give rise to the types of consequences that Akerlof identified in lemons markets. Consumers, regulators, suppliers, investors, and other stakeholders cannot differentiate the "bad actor" from the rest of the actors implicated in the crisis. This leads to two distinct problems discussed below. Part 1 describes how the crisis may threaten the reputation of all actors involved because the public does not possess sufficient information to distinguish between them. Part 2 explains why affected actors cannot communicate information concerning their innocence solely through their own narratives, such as a press release.<sup>53</sup> This limitation arises for the same reasons that self-disclosure has limited effect in the market for lemons: it's cheap, easy to replicate, and originates from actors mistrusted by the public.<sup>54</sup>

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<sup>48</sup> Dan Ackman, *Tire Trouble: The Ford-Firestone Blowout*, FORBES (June 20, 2001).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Joann Muller, *Ford v. Firestone: A Corporate Whodunit*, BLOOMBERG BUSINESSWEEK (June 11, 2001).

<sup>52</sup> Ackman, *supra* note \_\_; James O'Rourke, *Bridgestone / Firestone, Inc. and Ford Motor Company: How a Product Safety Crisis Ended a Hundred-Year Relationship*, 4 CORP. REPUT. REV. 255 (2001).

<sup>53</sup> Following negative publicity, firms increase information disclosure concerning the underlying events. Craig Deegan, Michaela Rankin, and Peter Voght, *Firms' disclosure reactions to major social incidents: Australian evidence*, 24 ACCOUNTING FORUM 101, 103-104 (2000) (summarizing research on how industries experiencing a "legitimacy crisis" following a crisis increase corporate disclosures). However, empirical studies show that many individuals distrust corporate communications, even preferring to receive corporate information from the news media. David Hess & Thomas W. Dunfee, *The Kasky-Nike Threat to Corporate Social Reporting*, 17 BUS. ETHICS Q. 5, 19 (2007) (citing 2002 Cone Corporate Citizenship survey); Geert Jacobs, *Self-reference in press releases*, 31 J. PRAGMAT. 219, 232 (1999) (discussing how journalists are wary of self-originating information and the lengths that organizations will go to in order to disguise their authorship of press releases).

<sup>54</sup> These reasons also explain why socially responsible corporations encounter difficulties in distinguishing themselves in the marketplace from socially irresponsible firms and run the risk that the public will discount social disclosures from all firms. David Hess & Thomas W. Dunfee, *The Kasky-Nike Threat to Corporate Social Reporting*, 17 BUS. ETHICS Q. 5, 19-21 (2007).

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### 1. The Risk of Reputational Contagion Post-Crisis

Reputations are important to corporations because they can influence consumer decisions on whether they want to exchange with that corporation; corporate reputations are important to consumers because it might be the only information we have about corporations.<sup>55</sup> Prospective employees also care about corporate reputations because they want to know whether a corporate employer will treat them well and reward good work.<sup>56</sup> Prospective suppliers care about whether a firm will fulfill its contractual obligations in good faith.<sup>57</sup> And communities are increasingly diligent about which firms are operating in their backyard.<sup>58</sup>

But a good reputation is not permanent. Reputations change as consumers and other stakeholders revise their opinions of a corporation based on new information.<sup>59</sup> Unsurprisingly, reputations can plummet following a corporate scandal.<sup>60</sup> For example, VW's sales plummeted after "Dieselgate" when it was caught cheating emissions tests.<sup>61</sup> Similarly, Wells Fargo can expect significant

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<sup>55</sup> Michael L Barnett & Andrew J Hoffman Ross, *Beyond Corporate Reputation: Managing Reputational Interdependence*, 11 CORP. REPUT. REV. 1, 4 (2008); Morten Thanning Vendelo, *Narrating Corporate Reputation: Becoming Legitimate through Storytelling* *Narrating Corporate Reputation*, 28 INT. STUD. MANAG. ORG. 120, 120 (1998); see also Hess & Dunfee, *supra* note \_\_ at 17 (explaining information asymmetries between firms and stakeholders).

<sup>56</sup> See John Dodge, *The war for tech talent escalates*, BOSTON GLOBE (Feb. 19, 2016)(describing the fierce competition for software engineers and other employees in Massachusetts's tech industry) .

<sup>57</sup> Lisa Bernstein, *Beyond relational contracts: Social capital and network governance in procurement contracts*, 7 J. LEG. ANAL. 561, 606 (2015)( "[E]ven firms as powerful as Apple are deeply concerned about their reputation for treating suppliers fairly.").

<sup>58</sup> See, e.g., Nicholas Bariyo & Jacquie McNish, *Tanzania's Tougher Mining Laws Rattle Companies*, WALL ST. J. (Aug. 2, 2017)(reporting that mining companies in Tanzania confront increasing pressure from the government in President Magufuli's "economic war," including export bans, restrictions on foreign travel, and demands for billions of dollars in back taxes, penalties, and interest); Tsvetana Paraskova, *Nigerian Protesters Storm Shell Crude Oil Flow Station*, OILPRICE.COM (Aug. 11, 2017)(describing how hundreds of protesters attacked a Shell-owned crude flow station "protesting against lack of jobs," "demanding infrastructure development," asking for "an end to oil pollution in the Niger Delta[.] [claim]ing that they were not benefiting from the oil-rich resources in the restive area.").

<sup>59</sup> Fombrun, *supra* note \_\_ at 59-61.

<sup>60</sup> Tieying Yu & Richard H Lester, *Moving Beyond Firm Boundaries: A Social Network Perspective on Reputation Spillover* 11 CORP. REPUT. REV. 94, 95 (2008)(explaining that reputational crises emerge as a result of accidents, scandals, or financial problems).

<sup>61</sup> See, e.g., Alex Davies, *Volkswagen's US Sales Plummet 25 Percent as Dieselgate Rolls On*, WIRED (Dec. 1, 2015)(reporting that Volkswagen of America sales dropped almost 25% in November 2015 compared to the same month in 2014 even while the broader auto industry "is on pace for record sales in November"); Julia Kollewe, *VW profits down 20% after diesel emissions scandal*, THE GUARDIAN (May 31, 2016)( " Volkswagen's profit tumbled nearly 20% at the start of this year as car sales continued to fall in the wake of the diesel emissions scandal. . . . In April, VW recorded its first annual loss in more than 20 years for 2015, after more than doubling the amount set aside to pay for costs related to the scandal to €16.2bn." ). *But see* William Boston, *Volkswagen sales rise in 2016 despite scandal*, MARKET WATCH (Jan. 9, 2017)( "Volkswagen AG's emissions-cheating scandal took a hefty dent out of sales of its VW brand in 2016, but strong growth in China and Eastern Europe helped offset declines in other major markets." ).

lost profits in the wake of revelations that its employees created 2 million fake accounts.<sup>62</sup>

The reputational damage from a corporate scandal can spread to industry peers, creating the risk that one actor's misdeeds can have consequences for another, whether the latter was involved in the misdeed or not.<sup>63</sup> For example, Volkswagen's Dieseltgate has implications for the credibility of other automakers.<sup>64</sup> United Airlines's publicized mistreatment of a passenger was met with warnings by regulators to all airlines concerning customer service.<sup>65</sup> And we are all scrutinizing our bank accounts more carefully in the wake of Wells Fargo's cheating scandal.<sup>66</sup> Industry peers potentially suffer reputational harm as various stakeholders wonder whether the problem is an isolated incident or reveals problems with the broader industry.<sup>67</sup>

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<sup>62</sup> See, e.g., CG42, WELLS FARGO MINI-STUDY 3 (Oct. 2016), <http://cg42.com/pdf/cg42-Wells-Fargo-Mini-Study.pdf>. (finding that Wells Fargo could lose almost \$100 billion in deposits and another \$4 billion in revenue over the next two years as consumers switch to other banks following the scandal).

<sup>63</sup> One group particularly vulnerable to "reputational contagion" are industry peers of the bad actor. Michael L. Barnett & Andrew a King, *Good fences make good neighbours: A longitudinal analysis of an industry self-regulatory institutions*, 51 ACAD. MANAG. J. 1150, 1152 (2008); see also Lori Qingyuan Yue & Paul Ingram, *Industry Self-Regulation as a Solution to the Reputation Commons Problem*, in THE OXFORD HANDBOOK OF CORPORATE REPUTATION 279 (Barnett & Pollock (eds) 2012) ("Reputations are 'intangible commons' because organizations share both the penalties and rewards associated with the reputation of their industry."); Michael L. Barnett, *Finding a working balance between competitive and communal strategies*, 43 J. MANAG. STUD. 1753, 1763 (2006); Sheila Goins & Thomas S Gruca, *Understanding Competitive and Contagion Effects of Layoff Announcements*, 11 CORP. REPUT. REV. 12, 30 (2007) ("[I]nformation from the actions of one firm sends signals that shareholders incorporate into their valuations of other companies."); Yue & Ingram, *supra* note \_\_ at 280; Tieying Yu & Richard H Lester, *Moving Beyond Firm Boundaries: A Social Network Perspective on Reputation Spillover* 11 CORP. REPUT. REV. 94 (2008) (using "reputational spillover").

<sup>64</sup> Amy Harder & Jason Chow, *EPA, Foreign Regulators Crack Down on Emissions Over Cheating Revelation*, WALL ST. J. (Sept. 25, 2015) ("U.S. regulators on Friday joined with governments in Europe and South America in pledging more emissions testing of diesel cars in real-world driving conditions, in the wake of revelations Volkswagen . . . manipulated pollution checks."). The emissions scandal also has consequences for public actors who criticized for failing to regulate the industry appropriately, thereby threatening the reputation of the entire national auto industry. Gernot Heller, *Merkel rival Schulz says executives endangering German car industry*, REUTERS (Aug. 13, 2017) ("The future of the auto sector, Germany's biggest exporter and provider of some 800,000 jobs, has become a hot election issue as politicians pile blame on executives and each other for the sector's battered reputation after an emissions scandal.").

<sup>65</sup> Susan Carey & Doug Cameron, *United, Other Airlines Warned by Lawmakers to Fix Customer Service*, WALL ST. J. (May 2, 2017) ("Airlines threatened with more regulation at House hearing after United passenger incident.").

<sup>66</sup> Matt Egan, *5,300 Wells Fargo employees fired over 2 million phony accounts*, CNN MONEY (Sept. 9, 2016) ("[F]ederal regulators said Wells Fargo (WFC) employees secretly created millions of unauthorized bank and credit card accounts -- without their customers knowing it -- since 2011.").

<sup>67</sup> Michael L. Barnett & Andrew J Hoffman Ross, *Beyond Corporate Reputation: Managing Reputational Interdependence*, 11 CORP. REPUT. REV. 1, 4 (2008); Yu & Lester, *supra* note \_\_ at 98 ("Since determining the impact of a reputational crisis requires accurate information, in situations of ambiguity stakeholders might find it difficult to differentiate between individual organizations, thereby penalizing all organizations that are either proximate or equivalent to the focal organization equally."). For example, the public did not whether Ford or Firestone were largely responsible for the multiple deaths that resulted from rollover accidents involving Ford explorers in 2001. Ford blamed the deaths on the tires that Firestone manufactured, whereas Firestone blamed the design of the Ford explorer. Joann Muller, *Ford vs. Firestone: A Corporate Whodunit*, BLOOMBERG BUSINESSWEEK (June 11, 2001); James O Rourke, *Bridgestone / Firestone , Inc . and Ford Motor Company : How a Product Safety Crisis Ended a Hundred-Year*

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Similarly, reputational damage can also spread to companies that are contractually associated with the identified bad actor. Both Firestone and Ford's reputations were affected by the Explorer crashes because the public didn't know whether the problem was the vehicle or the tire. Walgreens is similarly implicated in Theranos's crisis because we do not know whether the former knew they were exposing their customers to faulty tests.<sup>68</sup>

### 2. The Role of Crisis Communication in Managing Reputational Contagion: Addressing the Information Problem

Not all crises are equal. Some levy greater levels of reputational harm depending on the blameworthiness of the corporation in the opinion of stakeholders.<sup>69</sup> Crisis management scholarship identifies three types of crises with corresponding levels of blame attribution and reputational harm: *victim*, *accidental*, and *preventable*.<sup>70</sup> In the first type of crisis, the organization is also perceived as a victim of the crisis; this crisis type is associated with the lowest attribution of responsibility and the mildest reputational threat.<sup>71</sup> The reputational threat increases with the other two types of crises, culminating with the preventable crisis in which stakeholders believe that "organization knowingly placed people at risk, took inappropriate actions or violated a law/regulation"; this type of crisis is associated with strong attributions of responsibility and severe

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*Relationship*, 4 CORP. REPUT. REV. 255, 255 (2001) ("The accusations hurled by rival CEOs were among the nastiest that crisis communications experts could recall, with each calling the other's product unsafe.").

<sup>68</sup> According to communication scholars, one of the most important factors influencing reputational contagion is proximity to the focal organization. Yu & Lester, *supra* note \_\_\_ at 95 (explaining that reputational contagion is also affected by the high network centrality, composition of the industry network, and reputation of the recipient organization). Proximity is based on direct contacts between two organizations so that "[t]he closer the relational contact, the more likely that the change in one organization's disposition will affect the other." Yu & Lester, *supra* note \_\_\_ at 99 ("[D]irect contacts drive organizations to closely resemble one another, which in turn evokes a similar schema for stakeholders to interpret their true characteristics after a reputational crisis occurs. Therefore a reputational crisis is more likely to spread to an industry participant which has direct contacts with the focal organization."). But stakeholders can still bundle two firms together even if they do not share direct contacts but share "structural equivalence" or "perceived similarity in their core attributes," such as mission, similar organizational structure, core technology. *Id.* at 100.

<sup>69</sup> W. Timothy Coombs, *Protecting Organization Reputations During a Crisis: The Development and Application of Situational Crisis Communication Theory*, 10 CORP. REPUT. REV. 163, 166 – 68. (2007) (listing the other two factors as crisis history and prior relational reputation); W. Timothy Coombs, *An Analytic Framework for Crisis Situations: Better Responses From a Better Understanding of the Situation*, 10 J. PUB. REL. RES. 177, 182 (1998) ("Two dimensions seem to explain basic crisis attributions: external control and personal control/locus of causality. External control is the degree to which external agents could control the crisis event. Personal control/locus of causality is the degree to which the organization itself could control the crisis event."); *id.* at 187 (finding that "[c]risis types near to the high endpoint of greater personal control elicit stronger perceptions of crisis responsibility than those crisis types near the low end.").

<sup>70</sup> Coombs, *Protecting Organization Reputations*, *supra* note \_\_\_ at 168.

<sup>71</sup> Coombs, *Protecting Organization Reputations*, *supra* note \_\_\_ at 168.

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reputational threat.<sup>72</sup> All things being equal, a corporation can minimize the reputational harm sustained from a crisis if stakeholders perceive it as a victim crisis and not as a preventable one.<sup>73</sup>

The type of crisis is not a given – it is constructed. Crisis managers use information to control reputational damage. Specifically, they employ “frames” to make the underlying crisis appear more like one type (such as a victim crisis) and less like another type (preventable crisis).<sup>74</sup> Framing is part of a crisis response strategy and the frame promoted depends on which crisis response strategy an organization adopts.<sup>75</sup> Organizations may try to deny their involvement through scapegoating (“blam[ing] some person or group outside of the organization for the crisis”) or diminishing their responsibility through excuse (“denying intent to do harm and/or claiming inability to control the events that triggered the crisis”).<sup>76</sup> Finally, crisis managers may also use “bolstering” strategies such as reminder and ingratiation (“[t]ell stakeholders about the past good works of the organization”) and victimage (“remind stakeholders that the organization is a victim of the crisis too”) in order to minimize reputational damage.<sup>77</sup> These crisis response strategies are listed in Table 1 below.<sup>78</sup>

**Table 1: Crisis Response Strategies**

Strategy	Technique
Denial	Scapegoating
Diminish	Excuse
Bolstering	Ingratiation/Reminder
Bolstering	Victimage

Most stakeholders make judgments on what type of crisis occurred by using the frames provided by the media.<sup>79</sup> Therefore, a crisis manager’s goal is for the

<sup>72</sup> Coombs, *Protecting Organization Reputations*, *supra* note \_\_ at 168.

<sup>73</sup> *Id.*

<sup>74</sup> Coombs, *Protecting Organization Reputations*, *supra* note \_\_ at 167 (“A crisis manager tries to establish or shape the crisis frame by emphasizing certain cues. The cues include whether or not some external agent or force caused the crisis, whether the crisis was a result of accidental or intentional actions by members of the organization and whether the cause of the crisis was technical or human error.”).

<sup>75</sup> Coombs, *Protecting Organization Reputations*, *supra* note \_\_ at 171.

<sup>76</sup> Coombs, *Protecting Organization Reputations*, *supra* note \_\_ at 170.

<sup>77</sup> Coombs, *Protecting Organization Reputations*, *supra* note \_\_ at 170; Benoit, *supra* note \_\_ at 180.

<sup>78</sup> The chart does not provide an exhaustive list of the crisis response strategies identified by Situational Crisis Communication Theory that also includes: attacking the accuser, justification, compensation, and apology. Coombs, *Protecting Organization Reputations*, *supra* note \_\_ at 170; Coombs, *An Analytic Framework*, *supra* note \_\_ at 189; Benoit, *supra* note \_\_ at 180.

<sup>79</sup> Coombs, *Protecting Organization Reputations*, *supra* note \_\_ at 171.

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media to adopt the frame the manager wants.<sup>80</sup> That's where press releases come in. A press release is a type of communication "in which writers provide information to journalists in the hope that it will be passed on to the general public."<sup>81</sup>

The odds that a press release will be picked up increase when crisis managers craft their releases to meet the formal requirements of news reporting.<sup>82</sup> For example, authors of press releases avoid self-reference through the first person and adopt the third-person in order to distance themselves from the information they provide.<sup>83</sup> By using the third-person voice, "writers of press releases seem to anticipate the typical reference forms of news reporting and that, in doing so, they allow journalists to simply copy the press releases."<sup>84</sup> Additionally, the third-party voice disguises the source of the information and makes the information more credible and objective because it appears less self-promotional.<sup>85</sup> This disguising is complete if and when a journalist picks up the press release because "news reports based on press releases avoid mentioning their primary source."<sup>86</sup> Despite the appearance of objectivity, "organizations can be seen to smuggle in positive characterizations of their activities in seemingly innocuous third-person references."<sup>87</sup> Employing these strategies not only improves the chances that a journalist will pick up the press release but that she will minimize the editing of it; as a result, the crisis manager remains master of the narrative, communicating the crisis frame that he prefers.<sup>88</sup>

It is not only press releases that frame crises for stakeholder audiences. Instead, litigation documents, especially pleadings, share many of the characteristics of press releases that recommend them for appropriation by journalists. Lawyers draft litigation documents in the third person, usually adopting the formal name of the organization concerned. This convention aligns with the norms of formal news reporting and provides the legal documents with a greater level of objectivity and authority. This perception of objectivity is enhanced by legal norms that present advocacy arguments in a clear, objective,

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<sup>80</sup> Coombs, *Protecting Organization Reputations*, *supra* note \_\_ at 171.

<sup>81</sup> Henk Pander Maat, *How Promotional Language in Press Releases Is Dealt With by Journalists: Genre Mixing or Genre Conflict?*, 44 J. BUS. COMMUN. 59, 60 (2007).

<sup>82</sup> Geert Jacobs, *Self-reference in press releases*, 31 J. PRAGMAT. 219 (1999); Maat, *supra* note \_\_ at 61 ("To maximize the chance of a press release being journalistically appropriated and to exert the utmost control on how they are used, press release writers try to meet the formal requirements of news reporting.").

<sup>83</sup> Jacob, *supra* note \_\_ at 232.

<sup>84</sup> Jacob, *supra* note \_\_ at 229-230.

<sup>85</sup> Jacob, *supra* note \_\_ at 233 ("[W]riters of press releases indeed want to 'hide their relationship to the information they provide'").

<sup>86</sup> Maat, *supra* note \_\_ at 61.

<sup>87</sup> Maat, *supra* note \_\_ at 61.

<sup>88</sup> Jacob, *supra* note \_\_ at 228 (discussing preformulation).



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and largely impersonal manner that disguises self-promotion. These traits of legal pleadings accord with the “preformulation” techniques used by crisis managers when they craft press releases to improve the chances that a journalist will pick up the release and copy it verbatim.<sup>89</sup> Here, lawyers do not need to change their style of writing to increase traction with journalists; instead, the way we write *already* improves the odds of traction.

By already sharing traits of press releases – traits that improve media attention – legal pleadings become ideal channels for organizational actors (and their lawyers) to frame a crisis in a way that minimizes reputational damage to the organization.

B. *Litigation as Public Relations: Illustrative Examples*

In the examples below, litigation documents used by plaintiff organizations share many of the post-crisis framing techniques discussed above in Part A, *supra*. With many of its former leaders under DOJ investigation, Fédération Internationale de Football Association (FIFA) used bolstering strategies to repair its tarnished image, including reminder, ingratiation, and victimage. In contrast, the other two case examples illustrate denial and diminish strategies where the parties attempt to shift the blame to another organization, often claiming that they did not have access to the relevant information through no fault of their own. In *Walgreens v. Theranos*,<sup>90</sup> Walgreens argued that Theranos hid the truth about its defective technology from Walgreens despite the latter’s best efforts. Similarly, the automakers in *In re: Takata Airbag Products Liability Litigation* also argued that Takata hid vital information and deceived the automakers about the quality of the airbags installed in their vehicles.<sup>91</sup> Both these latter examples also illustrate victimage as the parties tried to minimize reputational damage by presenting themselves as victims of the crisis.<sup>92</sup>

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<sup>89</sup> Jacob, *supra* note \_\_\_ at 228.

<sup>90</sup> See notes \_\_\_ - \_\_\_, *supra*, and accompanying text.

<sup>91</sup> See notes \_\_\_ - \_\_\_, *supra*, and accompanying text.

<sup>92</sup> See notes \_\_\_ - \_\_\_, *supra*, and accompanying text.

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### 1. *Intra-Organizational Contagion: Victim Statement & Request for Restitution by Fédération Internationale de Football Association (FIFA)*

Fédération Internationale de Football Association (“FIFA”) is the international governing body for organized soccer.<sup>93</sup> In May 2015, the United States Attorney’s Office for the Eastern District of New York announced charges against several high-ranking officials of FIFA and other soccer organizations, among others, for “racketeering, wire fraud and money laundering conspiracies, among other offenses, in connection with the defendants’ participation in a 24-year scheme to enrich themselves through the corruption of international soccer.”<sup>94</sup> By December 2015, the United States Department of Justice (DOJ) had charged a total of 41 individuals and organizations as part of its FIFA investigation.<sup>95</sup>

The government investigations were triggering events that set off a reputational crisis for FIFA. According to FIFA, the investigation and charges contributed to “the worst crisis of [FIFA’s] history” and it suffered significant reputational damage and financial harm as a result.<sup>96</sup>

The reputational and financial crises increased pressure on FIFA to pass internal reforms, which it did in February 2016.<sup>97</sup> But FIFA’s attempt to redeem its image did not stop there. In March 2016, FIFA filed a Victim Statement and Request for Restitution (Statement) under the Mandatory Restitution to Victims Act before the United States District Court for the Eastern District of New York.<sup>98</sup> Government actors had ensured the forfeiture of millions of dollars in assets and identified, recovered, or frozen millions more as part of their

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<sup>93</sup> Virginia Harrison, *How FIFA makes its billions*, CNN MONEY (May 27, 2015), <http://money.cnn.com/2015/05/27/news/fifa-corruption-profit/>.

<sup>94</sup> Press Release, U.S. Dep’t of Justice, *Nine FIFA Officials and Five Corporate Executives Indicted for Racketeering Conspiracy and Corruption* (May 27, 2015), <https://www.justice.gov/opa/pr/nine-fifa-officials-and-five-corporate-executives-indicted-racketeering-conspiracy-and>.

<sup>95</sup> Press Release, U.S. Dep’t of Justice, *Sixteen Additional FIFA Officials Indicted For Racketeering, Conspiracy And Corruption* (Dec. 3, 2015) (“FIFA and its six continental confederations – including CONCACAF, headquartered in the United States, and CONMEBOL, the confederation headquartered in South America – together with affiliated regional federations, national member associations and sports marketing companies, constitute an enterprise of legal entities associated in fact for purposes of violating the federal racketeering laws.”), <https://www.justice.gov/usao-edny/pr/sixteen-additional-fifa-officials-indicted-racketeering-conspiracy-and-corruption>.

<sup>96</sup> FIFA, *2016 FIFA REFORM COMMITTEE REPORT*, at 1; Brian Homewood, *FIFA faces \$108 million deficit for 2015 -finance overseer*, REUTERS (Feb. 25, 2016); Press Assoc’n, *Fifa suffers £67m loss after crisis takes its toll on governing body*, THE GUARDIAN (Dec. 2, 2015); Rebecca R. Ruiz, *FIFA’s Financial Disclosures Show That Scandal Has Affected Its Bottom Line*, N.Y. TIMES (March 17, 2016) (reporting \$62 million in legal fees).

<sup>97</sup> 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>.

<sup>98</sup> Fédération Internationale de Football Association, *Victim Statement and Request for Restitution, United States v. Hawit et al.*, No. 15-cr-252 (E.D.N.Y. Mar. 15, 2016).

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investigation into specific FIFA actors.<sup>99</sup> In its Statement, FIFA requested that these funds be used to compensate it because it is a victim of those actors under government investigation: “The Defendants are responsible for harming FIFA’s brand and bringing FIFA and the game itself into disrepute. . . . FIFA is entitled to restitution for this harm to its business relationships, reputation and intangible property.”<sup>100</sup>

The government investigation had created a reputational risk that corporate sponsors, fans, and regulators would view the allegations against specific defendants as indicative of the character of the entire organization. The information problem concerned the question of organizational identity: *who is FIFA?* FIFA used the Statement to communicate a schism within FIFA between those it presented as blameworthy actors (the parties under government investigation) and the rest of the organization, thereby opening the black box of FIFA so that stakeholders did not perceive it as one unitary actor but could get a sense of the various actors involved.

Specifically, FIFA tried to reduce the reputational threat by portraying itself as the victim of the corruption perpetuated by the actors already identified by the government investigations.<sup>101</sup> For example, FIFA argued that the “damage done by the Defendants’ greed cannot be overstated. Their actions have deeply tarnished the FIFA brand and impaired FIFA’s ability to use its resources for positive actions throughout the world, and to meet its global mission of supporting and enhancing the game of football.”<sup>102</sup> In its Statement, FIFA also employs scapegoating by pointing the finger at those actors already under DOJ investigation and arguing that the “brazen corruption of the Defendants has co-opted the FIFA brand and obscured its role as a positive global organization.”<sup>103</sup> While condemning those under government investigation, FIFA attempted to elevate its own actions and organizational character through reminder and ingratiation strategies: “Everything FIFA does—including the many international tournaments it organizes, the youth development programs it supports, and all

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<sup>99</sup> *Id.* at 4.

<sup>100</sup> *FIFA’s Victim Statement and Request for Restitution*, *supra* note \_\_\_\_ at 17 (“The amount appropriate for this damage to reputation is subject to further investigation and analysis, but on information and belief is thought to be at least in the tens of millions of dollars.”); *id.* at 10 (“As a victim of the Defendants’ crimes, FIFA is entitled to recover restitution under the Mandatory Restitution to Victims Act”).

<sup>101</sup> *Id.*; *see also* Letter from William Buruck et al. to Lisa Foster, U.S. Attorney’s Office, Eastern District of New York, at 1 (Mar. 15, 2016) (“[FIFA] is a victim of the wrongful acts of multiple defendants in the above referenced matter”), [http://resources.fifa.com/mm/document/affederation/footballgovernance/02/77/05/70/fifarestitutioncoverletter\\_neutral.pdf](http://resources.fifa.com/mm/document/affederation/footballgovernance/02/77/05/70/fifarestitutioncoverletter_neutral.pdf); Rebecca R. Ruiz, *FIFA’s Financial Disclosures Show That Scandal Has Affected Its Bottom Line*, N.Y. TIMES (March 17, 2016).

<sup>102</sup> *Id.* at 3.

<sup>103</sup> *Id.* at 4.

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of its marketing efforts—is designed to promote football throughout the world. By doing so, it has been a tremendous force for good across far reaches of the globe.”<sup>104</sup> The Statement provides examples of FIFA’s financial and social programs intended to improve the lives of children in impoverished regions.<sup>105</sup> These crisis response strategies are listed in Table 2.

**Table 2: Crisis Response Strategies in FIFA's Victim Statement**

Strategy	Technique	Argument/Claim
Denial	Scapegoating	Responsible actors under investigation
Bolstering	Victimhood	FIFA suffered reputational and financial harm as a result of Defendants’ actions
Bolstering	Ingratiation/Reminder	Core mission Previous good acts

### 2. *Inter-Organizational Contagion (Retail Partner): Walgreens v. Theranos*

Theranos and its CEO, Elizabeth Holmes, captured the national stage with claims that they could revolutionize the multi-billion dollar blood testing industry by providing inexpensive, direct-to-consumer (DTC) blood testing kits that could provide results with a “few drops of blood.”<sup>106</sup> No need for doctors, expensive lab tests or large blood samples.<sup>107</sup>

Unfortunately, both were a little too good to be true. Relying on information from former employees, the *Wall Street Journal* revealed that “[a]t the end of 2014, the lab instrument developed as the linchpin of its strategy handled just a small fraction of the tests then sold to consumers.”<sup>108</sup> It also referenced concerns from physicians and former employees regarding the technology’s accuracy and its

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<sup>104</sup> *Id.* at 6; *see also id.* at 7 (“But FIFA and its members recognize that football is more than just a game. It has positive transformative powers, both through its ability to bring people together for a positive purpose and through the re-investment of financial proceeds generated by its commercial success.”).

<sup>105</sup> *Id.* at 7-8.

<sup>106</sup> Roger Parloff, *Theranos Jump-Starts Consumer Lab Testing*, FORTUNE (May 7, 2015), <http://fortune.com/2015/05/07/theranos-jump-starts-consumer-lab-testing/>.

<sup>107</sup> *Id.* (explaining that Theranos’s involvement in the 2015 Arizona law that “gives consumers [] the most robust and explicit rights in the country to order any lab tests they want, without having to go through a doctor.”).

<sup>108</sup> John Carreyrou, *Hot Startup Theranos Struggled With Its Blood-Test Technology*, WALL ST. J. (Oct. 16, 2015).

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compliance with federal regulations.<sup>109</sup> From there, it went from bad to worse for Theranos as it faced investigations, lawsuits, and regulatory sanctions.<sup>110</sup>

Theranos did not set out to revolutionize the blood-testing industry by itself. It needed Walgreens to offer the forum where Theranos’s technology was introduced to consumers.<sup>111</sup> Theranos offered its tests to the public through 41 “wellness centers” that were predominately located in Walgreens drugstores.<sup>112</sup> It is its role as a conduit for Theranos’s technology that created trouble for Walgreens when Theranos’s technology was exposed.<sup>113</sup>

While Theranos’s reputation was compromised because of its defective technology (and lying about it), Walgreens was criticized for something different. The scandal raised doubts about whether Walgreens—a trusted household name, increasingly associated with consumer health—had acted as a proper steward of its consumers’ trust. Specifically, it raised concerns about Walgreens’s due diligence regarding Theranos’s technology: Did Walgreens know about the risks and, if so, why did it expose its consumers? If it didn’t know, why not?<sup>114</sup> These questions raised concerns about whether Walgreens had endangered its own consumers’ health in the pursuit of profits.

These doubts were reinforced by the wave of lawsuits that piled up against Theranos and Walgreens in the wake of media reports and regulatory sanctions. For example, in *R.C. v. Theranos et. al.*, plaintiff blamed Walgreens for Theranos’s ability to perpetuate its fraud because Walgreens’s national footprint and

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<sup>109</sup> Carreyrou, *Hot Startup Theranos*, *supra* note \_\_\_\_.

<sup>110</sup> Christopher Weaver, John Carreyrou and Michael Siconolfi, *Theranos Is Subject of Criminal Probe by U.S.*, WALL ST. J. (Apr. 18, 2016); Kia Kokalitcheva, *Theranos CEO Elizabeth Holmes Banned From Operating a Lab*, FORTUNE (July 7, 2016).

<sup>111</sup> Theranos, Press Release, *Theranos Selects Walgreens as a Long-Term Partner Through Which to Offer Its New Clinical Laboratory Service* (Sept. 9, 2013) (“Theranos, Inc. and Walgreens . . . today announced a long-term partnership to bring access to Theranos’ new lab testing service through Walgreens pharmacies nationwide.”).

<sup>112</sup> Carreyrou, *Hot Startup Theranos*, *supra* note \_\_\_\_.

<sup>113</sup> When federal prosecutors began investigating Theranos in January 2016, Walgreens received subpoenas because it was “Theranos’s main conduit to consumers.” Weaver, *supra* note \_\_\_\_ (explaining that these subpoenas sought “broad information about how Theranos described its technologies and the progress it was making developing those technologies.”).

Walgreens started to withdraw from Theranos once the *Wall Street Journal* (*WSJ*) began exposing Theranos’s practices. It suspended plans to expand the number of wellness centers at its pharmacies following the October 2015 *WSJ* article. It also temporarily suspended the wellness center in Palo Alto and directed Theranos to send lab tests from the other wellness centers to the Theranos lab in Phoenix or an accredited third party lab. Michael Siconolfi et al., *Walgreens Pulls Back From Theranos*, WALL ST. J. (Jan. 28, 2016). Walgreens finally terminated its relationship with Theranos in June 2016.

<sup>114</sup> In May 2016, *Fortune* published a story titled *Walgreens Reportedly Struck Theranos Deal Without Verifying the Tech*, accusing Walgreens of failing to verify the technology before entering into the contract and exposing its customers to unverified technology. Sy Mukherjee, *Walgreens Reportedly Struck Theranos Deal Without Verifying the Tech*, FORTUNE (May 26, 2016).

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reputation “bolstered the validity of Theranos”<sup>115</sup> and “[d]espite all the red flags, Walgreens moved forward with its partnership with Theranos, provided Theranos with \$50 million in financing and opening numerous Theranos Wellness Centers inside of Walgreens stores.”<sup>116</sup> A separate lawsuit filed shortly thereafter, *L.T. v. Theranos et. al.*, accused Walgreens of putting profits over patient safety when it failed to perform adequate due diligence on Theranos’s technology because it feared that Theranos would give its business to a competitor.<sup>117</sup>

In November 2016, Walgreens brought its own lawsuit against Theranos. While seeking damages from Theranos, the lawsuit allowed Walgreens to re-frame its role in the scandal and address the reputation damaging allegations raised in the lawsuits against it. The Complaint filed by Walgreens uses scapegoating to shift the blame to Theranos and excuse to explain that Walgreens did not have access to vital information concerning the technology’s problems despite its best efforts.

The Complaint confirms that Walgreens performed adequate due diligence before entering into a contract that exposed its consumers to Theranos’s new technology.<sup>118</sup> It also repeatedly referenced assurances made to it by representatives of Theranos – assurances that later turned out to be false.<sup>119</sup> It then explains how little Walgreens knew of Theranos’s practices and blames Theranos for its own ignorance. According to Walgreens, Theranos went to great lengths to keep information about its technology’s inadequacies from Walgreens.<sup>120</sup> Specifically, Theranos repeatedly refused Walgreens’s request for a report from a regulatory body.<sup>121</sup> According to Walgreens, it was as much in

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<sup>115</sup> *R.C. v. Theranos*, Complaint, ¶¶ 37, 98-99; *id.* at ¶ 75 (“[Plaintiff] knew of Walgreens’ reputation as a longstanding provider of safe and reliable pharmacy care and knew that Theranos’ blood testing facility was located within a local Walgreen’s store. He trusted Theranos and Walgreens to provide reliable test results.”). It also drew attention to affirmative steps Walgreens took to endorse and market Theranos’s technology, such as through a joint press release in 2013. *Id.* at ¶ 38.

<sup>116</sup> *R.C. v. Theranos*, Complaint, ¶ 46.

<sup>117</sup> *L.T. v. Theranos*, Complaint, ¶¶ 35-36, 39 (“The failure of a proposed deal between Theranos and a Walgreens competitor, the grocery chain Safeway, also illustrates Walgreens’ pursuit of profits over patient safety. As Walgreens was courting Theranos, Theranos simultaneously was in talks with Safeway to provide lab testing services in Theranos-dedicated clinics embedded within Safeway stores. Safeway invested \$10 million in Theranos and sank \$350 million into constructing the clinics. According to public reports, however, Safeway pulled out of its deal with Theranos after its due diligence raised questions about the accuracy of the testing Theranos sought to offer. . . . Walgreens, exposed to nearly identical warning signs, instead invested \$50 million into Theranos and joined Theranos in its plan to seize an outsized portion of the lucrative nationwide lab testing industry and capture a nationwide market of patient”); *see also B.P. & D.L. v. Theranos*, Complaint, ¶ 22 (“According to published reports, throughout the process, Walgreens executives did not press for further verification because they were afraid Theranos would respond to questions by choosing another retail chain to work with as a partner.”).

<sup>118</sup> *Walgreen v. Theranos*, No. 1:16-cv-01040, (D. Del. Nov. 8, 2016), Complaint, ¶ 29-31 (describing review performed by individuals at Johns Hopkins University).

<sup>119</sup> *See, e.g.*, Complaint, ¶¶ 22, 24, 26, 37, and 65; Walgreens Opp. Br. Mot. To Dismiss, at 3.

<sup>120</sup> Complaint, ¶¶ 61-62.

<sup>121</sup> Complaint, ¶¶ 71-73, 79.

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the dark as the public and learned about Theranos’s misdeeds the same way as everyone else: press reports.<sup>122</sup> Media coverage, especially by the *Wall Street Journal*, filled the information gap that had grown between the parties because of Theranos’s unwillingness to answer Walgreens’s questions.<sup>123</sup> These statements emphasize the excuse or defeasibility strategy where organizational actors attempt to minimize their responsibility for a crisis by asserting “lack of information about or control over important elements of the situation.”<sup>124</sup>

While relying on the primary crisis management strategies of denial and diminishing responsibility, the Walgreens Complaint also drew upon secondary strategies of bolstering. The Complaint incorporates reminder and ingratiation techniques by communicating Walgreens’s vigilance in finding out the truth despite Theranos’s efforts at obfuscation.<sup>125</sup> While drawing attention to Theranos’s misdeeds, the Complaint emphasizes that Walgreens never abandoned its role as a steward of its consumers’ trust in it.<sup>126</sup> It also addresses the profit motive allegation (raised in consumer litigation against it) by clarifying that its core mission “is to help people in [the] communities [it serves to] lead healthier and happier lives.”<sup>127</sup> According to the Complaint, Walgreens entered into the contract with Theranos to advance that mission because the “fundamental premise of the parties’ contract – like any endeavor involving human health – was to help people, and not to harm them,” but that Theranos broke its promises to Walgreens.<sup>128</sup> These crisis response strategies are listed in Table 3.

**Table 3: Crisis Response Strategies in *Walgreens v. Theranos***

<b>Strategy</b>	<b>Technique</b>	<b>Argument/Claim</b>
<b>Denial</b>	Scapegoating	Withholding information
<b>Diminish</b>	Excuse	Lack of information
<b>Bolstering</b>	Ingratiation/Reminder	Core Mission Contract Objective

<sup>122</sup> Complaint, ¶¶ 98 (“Theranos hid the CMS letter from Walgreens for almost a month. In fact, it is likely that Theranos would have hidden the CMS letter for longer. Walgreens learned of the letter for the first time on April 13, 2016, when it was reported by the press.”); Walgreens Opp. Br. Mot. To Dismiss, at 6.

<sup>123</sup> Complaint, ¶¶ 71-73.

<sup>124</sup> Benoit, *supra* note \_\_ at 180.

<sup>125</sup> Complaint, ¶ 58 (“Walgreens promptly sought answers from Theranos.”); *id.* at ¶¶ 113-114 (explaining how Walgreens terminated its agreement with Theranos the day after it was finally able to obtain answers to key questions from Theranos representatives).

<sup>126</sup> Complaint, ¶¶ 74, 105, 113-114. *See also* Walgreens Opp. Br. Mot. To Dismiss, at 4 (“The Agreement included important provisions to safeguard the health of Walgreens’ customers and protect Walgreens’ reputation as a trusted provider in the communities it serves.”).

<sup>127</sup> Complaint, ¶ 2.

<sup>128</sup> Complaint, ¶ 4.

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In response to the lawsuit brought by Walgreens, Theranos claimed that it was Walgreens who had compromised the success of the partnership and that it was Theranos who had been considered *suing Walgreens* “for some time.”<sup>129</sup> The ensuing litigation battle in *Walgreens v. Theranos* was therefore an information battle between the two parties concerning who had compromised the partnership and placed consumers at risk. The parties finally settled their lawsuit for an undisclosed amount in August 2017, resulting in the dismissal of Walgreens’s lawsuit against Theranos “with no finding or implication of liability.”<sup>130</sup>

### 3. Inter-Organizational Contagion (Supplier): *Automobile Original Equipment Manufacturers (OEMs) v. Takata*

Takata is one of the world’s leading suppliers of airbags, outfitting Automobile Original Equipment Manufacturers (OEMs) like BMW, Chrysler, Ford, GM, Honda, Mazda, Mitsubishi, Nissan, Subaru, and Toyota that would purchase the Takata airbag systems and install them in their vehicles. However, its front-end airbags – designed to save passenger lives – started posing a danger to them. The airbags had a defect that caused the airbag’s steel canister “to crack and explode into pieces when the device deploys in a crash.”<sup>131</sup> The resulting airbag recall was the “largest and most complex safety recall in U.S. history.”<sup>132</sup> The resulting reputational damage may not have risked Takata as much as the OEMs because many people may assume that a car manufacturer, such as Toyota, makes all of its component parts. However, the scale of the recall and the number of automakers implicated revealed the significance of a common supplier.

The parallel criminal and civil litigation actions against the parties painted varying – even contradictory – images of the OEMs and their role in the harm caused by the Takata airbags. The Department of Justice’s (DOJ) criminal investigation into Takata had portrayed the OEMs, such as Ford and Honda, as unwitting victims in Takata’s misdeeds.<sup>133</sup> This victim status was further

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<sup>129</sup> Theranos, Press Release, *Theranos Statement on Walgreens Suit* (Nov. 8, 2016).

<sup>130</sup> Theranos, Press Release, *Theranos Reaches Settlement With Walgreens* (Aug. 1, 2017).

<sup>131</sup> Hiroko Tabuchi, *Takata Saw and Hid Risk in Airbags in 2004, Former Workers Say*, N.Y. TIMES (Nov. 6, 2014).

<sup>132</sup> National Highway Traffic Safety Administration, Press Release, *U.S. Department of Transportation expands and accelerates Takata air bag inflator recall to protect American drivers and passengers* (May 4, 2016).

<sup>133</sup> According to the Indictment, “OEMs mandated that the airbag systems purchased from Takata had to meet strict safety and performance requirements that were expressly communicated to Takata.” Indictment, ¶ 7 *United States v. Tanaka et. al.*, No. 2:16-cra20810 (Dec. 7, 2016), ¶ 21.



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emphasized in January 2017 when Takata Corporation entered into a plea agreement with DOJ.<sup>134</sup> As part of the agreement, the parties included a Statement of Facts that also reinforced the image of the OEMs as a victim of Takata's actions.<sup>135</sup>

This victim image was not lost on the OEMs. Following the plea agreement, the OEMs filed documents in a separate multidistrict litigation against them arguing that the statement of facts included in Takata's plea agreement undermines plaintiffs' case in the class action suits against the OEMs: "The plea agreement confirms, among other things, that Takata engaged in a fraudulent scheme to keep the Automotive Defendants from knowing what Takata knew about the inflators and their potential to rupture."<sup>136</sup> Through the victim narrative, the OEMs wanted to frame the crisis as one where they are also victims.<sup>137</sup>

However, the media and the plaintiffs challenged this characterization of the crisis when the *New York Times* ran an article challenging the view that the OEMs did not know the risks associated with the Takata airbags.<sup>138</sup> Additionally, the OEMs' claim of innocent ignorance in the multidistrict litigation prompted the plaintiffs to discredit that victim image: "Documents produced so far in discovery show that the Automotive Defendants were well aware of the risks inherent in filling a metal canister with ammonium nitrate . . . and placing it in a steering wheel or dashboard."<sup>139</sup>

These competing narratives placed the OEMs' identity in doubt: were they victims or perpetrators of the airbag defects? In order to clarify this identity, the OEMs began filing cross-claims against Takata in the multidistrict litigation in which they are all defendants. Honda, for example, brought claims for indemnity, fraudulent concealment and misrepresentation against Takata and established its allegations on the statement of facts included in Takata's plea agreement with

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<sup>134</sup> Dep't of Justice, Press Release, *Takata Corporation Agrees to Plead Guilty and Pay \$1 Billion in Criminal Penalties for Airbag Scheme* (Jan. 13, 2017).

<sup>135</sup> See, e.g., *United States v. Takata Corporation*, No. 16-20810, Plea Agreement, Exhibit B ¶ 19. ("Takata, . . . knowingly devised and participated in a scheme to obtain money and enrich Takata by, among other things, inducing the victim OEMs to purchase airbag systems from Takata that contained faulty, inferior, nonperforming, non-conforming, or dangerous PSAN inflators by deceiving the OEM through the submission of false and fraudulent reports and other information that concealed the true and accurate test results for the inflators which the OEMs would not have otherwise purchased as they were.")

<sup>136</sup> *In re: Takata Airbag Products Liability Litigation*, MDL No. 2599, AUTOMOTIVE DEFENDANTS' STATUS REPORT at 2 (Feb. 23, 2017).

<sup>137</sup> Coombs, *Protecting Organization Reputations*, *supra* note \_\_\_ at 168.

<sup>138</sup> Hiroko Tabuchi, *A Cheaper Airbag, and Takata's Road to a Deadly Crisis*, N.Y. TIMES (Aug. 26, 2016).

<sup>139</sup> *In re: Takata Airbag Products Liability Litigation*, MDL No. 2599, PLAINTIFFS' STATUS REPORT PRECEDING FEBRUARY 28, 2017 HEARING at 2 (Feb. 23, 2017).

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DOJ.<sup>140</sup> Through its cross-claim, it developed a narrative – begun with the DOJ investigation – that Takata induced Honda to purchase defective airbags by deceiving Honda through false reports and other information regarding the airbag’s quality.<sup>141</sup> And Honda was not alone. Similar cross-claims were also filed by Ford,<sup>142</sup> BMW,<sup>143</sup> and Toyota,<sup>144</sup> among others. Table 4 lists the crisis response strategies used in the criminal and civil litigations described.

**Table 4: Crisis Response Strategies in *In re Takata Airbag Products Liability Litigation & United States v. Takata***

Litigation	Source	Strategy/Crisis	Argument/Claim
<b>Criminal</b>	DOJ Indictment Plea Agreement	Victimage	Concealment of Information
<b>Criminal</b>	DOJ Indictment Plea Agreement	Excuse	Concealment of Information
<b>Civil</b>	Plaintiffs’ Pleadings	Preventable Crisis	OEMs Knew of Defects
<b>Civil</b>	OEM cross-claims	Victimage	Concealment of Information
<b>Civil</b>	OEM cross-claims	Excuse	Concealment of Information
<b>Civil</b>	OEM cross-claims	Scapegoating	Concealment of Information; Deceit

These cross-claims were picked up by the news media who, by reporting that the OEMs were suing Takata, helped to distinguish the two sets of actors in the public’s mind.<sup>145</sup> Many news reports also excerpted the most sensational portion of the cross-claims in which Ford (or Honda or another OEM) pointed the finger squarely at Takata, thereby exonerating itself:

Ford (and other vehicle manufacturers) would not have purchased these airbag systems from Takata as they were had the true and accurate test data and information been communicated to Ford, . . . If Ford had known of the true and accurate information and data, it would have insisted that the problems be

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<sup>140</sup> *In re: Takata Airbag Products Liability Litigation*, MDL No. 2599, AMERICAN HONDA MOTOR ET AL. CROSS CLAIM AGAINST TAKATA CORPORATION AND TK HOLDINGS, INC at ¶ 53 (Mar. 10, 2017).

<sup>141</sup> *Id.* at ¶ 30.

<sup>142</sup> *In re: Takata Airbag Products Liability Litigation*, MDL No. 2599, FORD MOTOR COMPANY CROSS CLAIM AGAINST TAKATA CORPORATION AND TK HOLDINGS, INC (Mar. 10, 2017).

<sup>143</sup> *In re: Takata Airbag Products Liability Litigation*, MDL No. 2599, DEFENDANT BMW OF NORTH AMERICA, LLC’S CROSS CLAIM AGAINST TAKATA CORPORATION AND TK HOLDINGS, INC (Mar. 10, 2017).

<sup>144</sup> *In re: Takata Airbag Products Liability Litigation*, MDL No. 2599, TOYOTA ET AL. CROSS CLAIM AGAINST TAKATA CORPORATION AND TK HOLDINGS, INC (Mar. 10, 2017).

<sup>145</sup> Susannah Nesmith, *Nissan, Ford, BMW Sue Takata Over Faulty Airbag Losses*, BLOOMBERG (Mar. 10, 2017)

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resolved prior to installation of the airbags in Ford vehicles or would have refused to purchase them for installation into those vehicles.<sup>146</sup>

C. *Summary*

This Section described the educational function of publicity associated with litigation. This function is particularly attractive for litigants who have a message to send – to consumers, investors, local community, or the public at large. The need for information transmission is particularly acute for organizations following a crisis when their reputations are on the line. Reputations result from information. Even the absence of information has reputational consequences for an organization following a crisis. Due to lack of information, the public may blame all organizations implicated in a scandal, whether that blame is justified or not. Left unchecked, such blame can erode an organization’s reputational capital that it relies on for various advantages in the marketplace for labor, capital, and consumers.

One traditional method for supplying favorable information post-crisis is through crisis communication, especially those designed to attract media attention. Litigation can also serve similar communication functions because litigation documents share many of the pre-formulation attributes of crisis communication that makes the latter attractive for appropriation and dissemination. Depending on the lawsuit, even early stage litigation can attract the media that shares facts and allegations asserted by the parties. As such, events unfolding in the court of law are shared in the court of public opinion where ordinary individuals can make reputational judgments of the parties concerned based on the information shared.

II. WHY EDUCATE THROUGH LITIGATION: THE COMPARATIVE ADVANTAGES OF COURTS AS INFORMATION TRANSMISSION MECHANISMS

The previous section explained why an organization in need of reputational repair may gain public relations benefits from post-crisis litigation. But identifying the potential public relations benefits does not explain why courts of law should influence courts of public opinion. This is especially puzzling if the information revealed in litigation is not new but knowledge already revealed by other sources. But by holding the *information-forcing* function of litigation constant, we can examine the unique *information transmission* function of litigation that serves as a mechanism for sharing information that is simultaneously available elsewhere. There are other information transmission mechanisms available to

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<sup>146</sup> Nesmith, *supra* note \_\_ (quoting *In re: Takata Airbag Products Liability Litigation*, MDL No. 2599, FORD MOTOR COMPANY CROSS CLAIM AGAINST TAKATA CORPORATION AND TK HOLDINGS, INC (Mar. 10, 2017), ¶ 41).

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organizations, such as press releases, press conferences, trade journals, internet websites, etc. The need for information transmission does not explain why that transmission needs to occur through litigation. What is special about litigation for information transmission, both in the context of post-crisis litigation and, more broadly, as a means for litigants to reach particular audiences?

The following section offers three distinct but overlapping reasons why litigation may be superior to other types of information transmission mechanisms: (a) *characteristics of the broader information environment* (magnet for media and the “age of fake news”), (b) *characteristics of the courts* (salience, classification, and democratic messaging), and (c) *characteristics of the documents* (aggregation and elevation).<sup>147</sup>

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<sup>147</sup> One characteristic not developed in this Article concerns the network effects of courts. Information frequently spreads through networks. See, e.g., Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1750-54 (2001); Avner Greif, *Reputation and Coalitions in Medieval Trade: Evidence on the Maghribi Traders*, 49 J. ECON. HIST. 857, 868-69, 878-880 (1989). Even the information from news media is filtered through personal contacts. Winter A Mason, Frederica R Conrey & Eliot R Smith, *Situating Social Influence Processes: Dynamic, Multidirectional Flows of Influence Within Social Networks*, 11 PERSONAL. SOC. PSYCHOL. REV. 279, 281 (2007). This means that not all the information available in the world will reach us; instead, information does not reach us unless it first reaches one of these network contacts. Companies have recognized the limitations of directly marketing to consumers and have adopted network strategies to promote their products and services. P. Domingos and M. Richardson. *Mining the network value of customers*. In Proceedings of the Seventh ACM SIGKDD International Conference on Knowledge Discovery and Data Mining, 57, 57, San Francisco, CA, 2001. ACM Press (discussing “viral marketing” where companies use word-of-mouth recommendations of social networks to market their goods as compared to direct to consumer marketing); Jacqueline Johnson, Peter H Reingen & Peter H Reingen, *Social Ties and Word-of-mouth Referral Behavior*, 14 J. CONSUM. RES. 350, 350 (1987); Itamar Simonson & Emanuel Rosen, *Three Long-Held Concepts Every Marketer Should Rethink*, HARV. BUS. REV. (Jan. 22, 2014) (“[B]rands are less needed when consumers can assess product quality using better sources of information such as reviews from other users, expert opinion, or information from people they know on social media.”). But getting information into a particular network does not guarantee it will spread to the audience the sender intends to reach. Therefore, companies must also pay attention to information pathways within networks. An information pathway sets out conduits of information flow between actors and explains how information reaches different people. Gueorgi Kossinets, Jon Kleinberg, & Duncan Watts, *The Structure of Information Pathways in a Social Communication Network*, Proceedings of the 14th ACM SIGKDD International Conference on Knowledge Discovery and Data Mining (KDD’08), August 24-27, 2008, Las Vegas, Nevada, USA, p. 434; See Stanley Milgram, *The Small World Problem*, 1 PSYCHOLOGY TODAY 61, 62 (1967)(discussing intermediate acquaintances in networks); Mark Granovetter, *The Strength of Weak Ties: A Network Theory Revisited*, 1 SOCIOLOGICAL THEORY 201, 202 (1983)(discussing the ways that “weak ties” between distant acquaintances are valuable because they connect information flow between two sets of close friends). The limits of “direct marketing” are not limited to products only; companies may similarly realize that information they want to share will be mistrusted if they are the source. Therefore, they may want to “seed” the information within litigation because of the network value of the courts. The information pathways of courts may also recommend the litigation stage. Courts may have pathways that reach a more diverse audience than other nodes. Lisa Bernstein, *Beyond relational contracts: Social capital and network governance in procurement contracts*, 7 J. LEG. ANAL. 561, 600 (2015)(explaining that the centrality of a node can result from its own direct contacts as well as its connection to contacts with high numbers of contacts, features allowing it to transmit information more quickly). Courts may even serve as exclusive or “gatekeeping” nodes so that information is unlikely to reach a particular audience without first passing through a court node.

A. *Characteristics of the Broader Information Environment*

1. Magnet for Media

Litigation is also an effective information transmission mechanism because of the way it attracts the media, another information transmission mechanism.<sup>148</sup> Litigation attracts media coverage for two reasons: (a) journalist norms concerning the types of stories they cover, and (b) journalist norms concerning verification preferences.

First, not all stories are equally compelling or “news-worthy.” According to the American Press Institute, journalists should choose stories that satisfy the following criteria: important, interesting, relevant, involve strong central characters, detailed, connect to deeper themes, involve emotion, explore tensions, provide context, and surprise and empower the reader.<sup>149</sup> It is not difficult to see how litigation satisfies many of these criteria. Both civil and criminal cases center around lead characters. In the criminal context, it is the accused; in the civil context, it is often the plaintiff but may also include the defendant. Even class actions have named plaintiffs who can capture the reader’s imagination.

The adversarial system also aids the newsworthiness of litigation stories because litigation unfolds as a conflict between parties and journalist norms may gravitate towards stories featuring conflict or the “preference for highlighting warring factions”.<sup>150</sup> Conflict satisfies the need for an easy to understand narrative (Plaintiff versus Defendant) and the stakes of the conflict (Plaintiff or Defendant wins).

Second, the media is not only attracted to litigation but also to litigation *documents*. According to Bill Kovach and Tom Rosentiel, the “essence of journalism is a discipline of verification.”<sup>151</sup> Journalist verification methods tend to differentiate between different classes of information sources relating to the courts: (a) information from primary “targets,” such as lawyers, police, suspects, etc., (b) information from witnesses, (c) primary sources documents, such as trial documents, and (d) secondary sources, such as press accounts.<sup>152</sup> While

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<sup>148</sup> See Katerina Linos and Kimberly Twist, *The Supreme Court, the Media, and Public Opinion: Comparing Experimental and Observational Methods*, 45 J. Leg. Stud. 223 (2016), at 7-8 (discussing the features of Supreme Court cases that increase the likelihood of media coverage); Perry, *supra* note \_\_ at 445.

<sup>149</sup> American Press Institute, *What makes a good story?*, <https://www.americanpressinstitute.org/journalism-essentials/makes-good-story/good-stories-explore-tensions/> (last visited July 21, 2017).

<sup>150</sup> Perry Parks, *Summer for the Scientists? The Scopes Trial and the Pedagogy of Journalism*, 92 J. MASS COMMUN. Q. 444, 461 (2015).

<sup>151</sup> Bill Kovach & Tom Rosentiel, *THE ELEMENTS OF JOURNALISM* 71 (2001).

<sup>152</sup> *Id.* at 89 (describing the Protess method of verification).

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journalists may prefer to get most of the information from the first two classes of sources, their access to individuals is may be limited in the court context.<sup>153</sup>

News media prioritize litigation documents because, as public documents, journalists accord them greater significance for verification purposes.<sup>154</sup> Second, news stories spread quickly through magnification dynamics that corporate actors only need to set in motion.<sup>155</sup> If the complaint attracts the attention by one media outlet, competition among news organizations will increase the odds that multiple news sites will soon report on that same complaint.<sup>156</sup> Finally, news services like the Associated Press (AP) further facilitate dissemination because it, as a cooperative news entity, distributes stories to its member news outlets, each of which will publish the identical AP story.<sup>157</sup> By catching the attention of the AP, therefore, a corporate actor can disseminate its complaint through AP's subscriber network to newspapers, TV stations, and websites around the world. These practices raise questions regarding the desirability of courts serving as fora for these information functions.

### 2. The Age of “Fake News”: Information Asymmetries in the Market for Information

Litigation is only one information mechanism among many in our society and not even the most popular. Most of us get our information from various media sources (print or online, mainstream or social) rather than the courts. But the information transmission capabilities of the courts and the media cannot be examined in isolation. Instead, they are components of a broader information environment in which we are situated. The fate of one influences our choice to turn to the latter. We may therefore turn to the courts as an information mechanism following the institutional damage suffered by news organizations in the age of “fake news.”

In 2017, the term “fake news” is ubiquitous. It refers to the dismissal or negation of news media and other sources of information because it is false,

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<sup>153</sup> By Jeremy & Harris Lipschultz, *A Comparison of Trial Lawyer and News Reporter Attitudes about Courthouse Communication*, 68 JOURNALISM QUARTERLY 750, 751 (1991).

<sup>154</sup> Locy, *supra* note \_\_\_\_.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

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deceptive, illegitimate or otherwise “fake.”<sup>158</sup> The term is simultaneously an accusation, defense mechanism, and subversive tool. As an accusation, we use it to dismiss information we do not like (and perhaps wish were not true). It is hurled by both sides of the political divide at the other as a way to discredit any information the other proffers to support its position; these accusations are not only limited to information supplied directly by political actors but also news agencies and other organizations viewed as partisan or whose views are not congruent with that of the recipient of the news.<sup>159</sup>

As a defense mechanism, it justifies our choices to insulate ourselves amongst news outlets and other information sources that tell us things we want to hear (whether those things are factually true or not). It prevents us from having to grapple with the possibility that the information provided may actually be true; moreover, it saves us from contending with the implications of that realization. Finally, it is subversive because it not only compromises the credibility and influence of particular news outlets but has also dealt a blow to the credibility and influence of news organizations as information institutions in our society.

The result of the “fake news” label is that we may turn to the courts as alternative information mechanisms. One of the advantages of the courts is its filtering capabilities. Consider the problem of “fake news” as another iteration of the lemons problem: We are consumers of information and, as consumers, we make choices as to who we go to obtain information. The problem is that there is an awful lot of choice for consumers. If we are aware that there is some level of “fake news” out there, how do we sort it out and differentiate it from the “real news”? The problem is that technology has enabled many producers of information to adopt the trappings of legitimacy through professional designs and appearances, sophisticated dissemination techniques, and celebrity or expert endorsements.<sup>160</sup> As a consequence, merchants of low-quality products (“fake news”) appear very similar to merchants of high-quality products (“real news”) because the former are able to imitate the latter (in form, not content) and the latter is unable to credibly signal their quality to consumers of information.<sup>161</sup>

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<sup>158</sup> See Mark Verstraete, Derek E Bambauer & Jane R Bambauer, IDENTIFYING AND COUNTERING FAKE NEWS 8 (2017) (distinguishing between four different types of “fake news”: hoax, satire, propaganda, and trolling).

<sup>159</sup> Elihu Katz, *And Deliver Us from Segmentation*, 546 ANN. AM. POLIT. SCI. SOC. 22, 26 (1996) (discussing the fragmentation of television news media and its contribution to insular information flow within politically affiliated groups); See Granovetter, *supra* note \_\_ at 205, 209 (discussing the insularity of information received by individuals with few weak ties and therefore their reduced access to information beyond that provided by their immediate friends).

<sup>160</sup> Verstraete, *supra* note \_\_ at 10 (explaining how Paul Horner “runs a website that publishes news stories that are untrue and uses a mark that closely resembles that of CNN” and that the “close similarity between the real CNN and Horner’s version often fools people into viewing the site as disseminating true information.”).

<sup>161</sup> Verstraete, *supra* note \_\_ at 11 (“Disclaimers about a site publishing false news stories are often buried in fine print at the bottom of the page, and some fake news stories reveal themselves to be fake in the article itself,

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Now some readers may dismiss this concern confident that they can spot a “lemon” in the market for information. Perhaps. But if we control for partisan bias and remove the usual suspects, how easy is it to spot the “real” news when it comes from unfamiliar sources? Or when two trusted sources report conflicting stories? One study of “fake news” raises concerns about the ability or willingness of readers to sort out lemons because “[r]eaders operate in digital media ecosystems that incentivize low-level engagement with news stories”<sup>162</sup> and “[c]onsumers of fake news have limited incentives to invest in challenging or verifying its content, particularly when the material reinforces their existing beliefs and perspectives.”<sup>163</sup>

Litigation has two features that address this information problem. First, there is a barrier to entry that requires access to legal expertise and other resources before a producer of information (a litigant) can put the information “out there” for consumption in the litigation process. It is not a perfect system. It is both under-inclusive, denying access to justice for meritorious plaintiffs who do not have these resources, and over inclusive by providing access for those who do even if they lack a meritorious claim. However, it increases the imitation costs and imposes a variety of sanctions on abuse. Second, litigation has a process for sorting out truth. When parties present conflicting narratives, the courts have mechanisms for parsing the truth from these narratives.

### B. *Characteristics of the Court*

#### 1. Saliency: Creating Focal Points through Adjudication

In our lives, we encounter a variety of situations where it is in our interest to coordinate with others but we cannot do so for a number of reasons. The classic example involves traffic where we all want to avoid an accident but coordination between drivers is difficult because of their sheer number (communication) and there are multiple outcomes around which we can

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which can be a problem in a media culture where many people do not read past the headlines”); *see also* Easterbrook and Fischel, *supra* note \_\_\_ at 674, 676-77 (discussing the problem of imitation by sellers of low-quality products and the need for additional signaling strategies by sellers of high-quality products).

<sup>162</sup> Verstraete, *supra* note \_\_\_ at 12; *see also id.* at 12-13 (discussing the problem of distinguishing fake news when “true and false information coexist in fake news narratives and on news platforms” with the result that “narratives [] have staying power because some of the narrative elements are true, yet the story is presented in a way that is misleading and not true.”).

<sup>163</sup> Verstraete, *supra* note \_\_\_ at 32.



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coordinate (“multiple equilibria”): we can drive on the right side or the left side of the road.<sup>164</sup>

When parties cannot communicate or agree on a coordination strategy, they can still coordinate through “focal points” that establish a coordination strategy: “An equilibrium is focal if it has some feature that, for reasons of psychology, history, or culture, draws attention to itself, making it ‘stand out’ among all equilibria. If the players are aware that one equilibrium draws special mental attention from all the players is ‘salient’ to all—that fact alone can cause everyone to play their strategy associated with that equilibrium.”<sup>165</sup> The important insight is that “expectations are self-fulfilling; once a player believes the other players are ‘aiming for’ a particular equilibrium, the player’s best response is to play the strategy associated with that equilibrium.”<sup>166</sup>

Third parties – those independent of the coordinating parties – can create focal points around which the other parties coordinate through expression: “By publicly endorsing a particular outcome in view of the players, the third party makes that equilibrium ‘stand out’ from the rest, which may then create self-fulfilling expectations that others will play the strategy associated with that equilibrium.”<sup>167</sup> Law, through legislation and adjudication, are forms of third-party expression that create focal points around which parties can coordinate. “By publicly endorsing a particular behavior, law tends to make that behavior salient, thereby producing self-fulfilling expectations that it will occur . . . . Any legal expression can have this effect – a constitution, statute, judicial opinion, executive order, or administrative agency decision.”<sup>168</sup> By electing one coordination outcome, legal institutions make one of these outcomes “salient” so that it sticks out among other competing outcomes, increasing the likelihood that drivers will make that choice.<sup>169</sup>

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<sup>164</sup> Richard H McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1652 (2000); 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. EMPIR. LEG. STUD. 87, 90 (2005) (“Coordination theories of expressive law apply only in situations of multiple equilibria.”).

<sup>165</sup> Richard McAdams, *The Expressive Power of Adjudication*, 1 UNIV. ILLINOIS LAW REV. 1043, 1060 (2005) (citing Thomas C. Schelling, *THE STRATEGY OF CONFLICT* 89 (1960)); McAdams & Nadler, *supra* note \_\_ at 90 (describing Thomas Schelling’s research indicating that “any feature of a coordination equilibrium that draws attention to itself, making it ‘stand out’ among the equilibria, will tend to produce self-fulfilling expectations that this salient equilibrium will result”).

<sup>166</sup> *Id.* at 1061.

<sup>167</sup> *Id.* at 1061.

<sup>168</sup> McAdams, *THE EXPRESSIVE POWERS OF LAW*, *supra* note \_\_ at 62; *see also* Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585, 586 (1998) (“Creating focal points is the first expressive use of law”).

<sup>169</sup> According to the expressive theory, law can help coordinate action not only when parties cannot communicate but also when they have “mixed motives” so that each prefers a different coordination outcome but mutually seek to avoid a non-coordinated outcome. McAdams, *EXPRESSIVE POWERS OF LAW*, *supra* note \_\_ 43-44. In these situations, law, as a form of “third-party” expression, can encourage party’s to conform their behavior to the outcome the law elects. McAdams, *Focal Point Theory*, *supra* note \_\_ at 1652.

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The result is that the law picks a side of the road and we all obey it. We comply not because of moral obligation or fear of legal sanction but because we share a common coordination objective with all the other strangers on the road: avoiding collision.<sup>170</sup> We drive on the right side because our laws, as third-party expression, have created expectations regarding how other drivers will act:<sup>171</sup> If I expect everyone else to drive on the right side of the road, I will also drive on the right side.<sup>172</sup> What is special about law is that it tells us how we can expect *other* people to behave and these expectations, in turn, shape our own behavior.<sup>173</sup>

Adjudication can serve as a powerful mechanism for creating focal points for coordinated behavior. Focal points work only if there is a shared belief that a particular coordination strategy “stands out” to everyone with whom an actor wants to coordinate.<sup>174</sup> If a British driver is unaware of American driving laws, a collision will ensue. Adjudication makes particular coordination strategies focal because the disputants are going to hear the message from the judge or arbiter who is deciding their case.<sup>175</sup> The process of litigation also creates a shared expectation of common knowledge through joint attendance and shared documents.<sup>176</sup>

The value of the focal point is not only limited to the parties to the dispute. When the court’s message is publicized adequately, it also creates expectations for future disputants who may confront similar coordination issues.<sup>177</sup> Their best prospect of coordination depends on what they expect others to do and a good predictor of how those parties will act is common knowledge of how the court has ruled previously concerning a similar coordination situation; judicial pronouncements that are common knowledge create a basis of shared expectations of how others will act.<sup>178</sup>

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<sup>170</sup> McAdams, *Focal Point Theory*, *supra* note \_\_ at 1652.

<sup>171</sup> *Id.*

<sup>172</sup> McAdams, *Focal Point Theory*, *supra* note \_\_ at 1651.

<sup>173</sup> McAdams, *Expressive Theory of Adjudication*, *supra* note \_\_ at 1063 (“A mediator’s message tends to make salient the outcome he endorses, rather than the opposite outcome, and thus tends to generate self-fulfilling expectations that the endorsed outcome will occur, rather than the opposite one.”).

<sup>174</sup> *Id.* at 1064.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 1091.

<sup>178</sup> *Id.*

## 2. Classification: Priming Audiences for Coordinated Sanctioning

Legal institutions are also mechanisms for coordinating collective, decentralized enforcement of society’s normative rules of behavior – rules that “depend on the willingness of individuals to voluntarily participate in the effort of punishment” and the “efficacy of the punishment depends on the participation of multiple individuals acting together.”<sup>179</sup> This problem is incentivizing ordinary individuals to participate in collective enforcement when such enforcement is costly. Enforcement presents a coordination problem because an individual’s willingness to take on the cost of participating in collective punishment depends on his belief that his fellow citizens will do the same.<sup>180</sup>

This coordination problem is overcome because of unique features of legal orders. Legal institutions are special types of classification institutions in our society, telling us whether a particular act is permitted or wrongful.<sup>181</sup> What is special about legal institutions is that their classifications are not static but can adapt to address new situations or update previous classifications.<sup>182</sup> But informing individuals what is right or wrong is insufficient to achieve a legal order; instead, these classifications must be enforced. Where a centralized enforcement authority is absent, these classifications are enforced by ordinary individuals when certain conditions are met: (a) people understand what is punishable and what is not (*common knowledge*), (b) individuals know where to look for guidance on classification when there is ambiguity (*authoritative stewardship*), (c) classifications “address the interests of diverse individuals” (*universality*), (d) the “classification institution operate[s] in an impersonal, neutral, and independent way”, and (e) individual enforcers have access to the process of classifications (*openness*).<sup>183</sup> These are features we often associate with our legal institutions and explain why we *respond* to the classifications they set out.<sup>184</sup>

It is these unique coordination effects that make litigation an attractive venue for public relations. We are accustomed to looking to the courts to provide

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<sup>179</sup> Frederica Carugati, Gillian K. Hadfield & Barry Weingast, *Building Legal Order in Ancient Athens*, 7 J. LEGAL ANALYSIS 291, 308 (2015); Gillian K. Hadfield & Barry Weingast, *What is Law? A Coordination Model of the Characteristics of a Legal Order*, 4 J. LEGAL ANALYSIS 471, 474 (2012).

<sup>180</sup> Carugati et. al., *supra* note \_\_ at 310.

<sup>181</sup> Hadfield & Weingast, *supra* note \_\_ at 474.

<sup>182</sup> Carugati et. al., *supra* note \_\_ at 309.

<sup>183</sup> Carugati et. al., *supra* note \_\_ at 310-12.

<sup>184</sup> See McAdams, EXPRESSIVE POWERS OF LAW, *supra* note \_\_ at 61 (“[E]veryone comes to expect that everyone else (or enough to make it matter) will obey the executive’s decree, the judge’s order, or the legislature’s mandate, including directives to sanction individuals for violating law. The legal actors have the power, by expression, to create self-fulfilling expectations that their demanded behavior will occur.”).

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signals regarding what is right or wrong in our society.<sup>185</sup> It is true that we also look to courts to sanction violations of these classifications but this is subject to two qualifications. First, legal sanctions are not necessarily exclusive sanctions. We also add our own sanctions to those that the courts impose.<sup>186</sup> Second, not all litigation reaches the legal sanctioning stage: cases are dismissed, parties settle their differences. Therefore, decentralized collective enforcement is still relevant even in the presence of robust courts; courts classify individual or organizational action as right or wrong and we all, to varying degrees, participate in the collective enforcement of those classifications.<sup>187</sup>

Legal institutions possess two institutional advantages over other alternative outlets for corporate narratives: (a) authoritative capacity to classify actors and actions as punishable or not, and (b) ability to incentivize individuals to enforce those classifications.<sup>188</sup> Therefore, corporations may choose the litigation stage because they expect us to respond with one or more of the following sanctions following a court's classification of their counterparty's activity as wrongful: organized boycotts or individual purchasing decisions, contracting choices, investment decisions, or employment choices, among others.<sup>189</sup> All these sanctions can hurt a business organization and we take our cue from the courts on when we should impose them. If a corporation is interested in the imposition of *these* informal sanctions on its counterparty,<sup>190</sup> it makes sense to tell its story before the institution that can trigger them – not by direct judicial action but through our *reaction* to that judicial action.

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<sup>185</sup> See McAdams, EXPRESSIVE POWERS OF LAW, *supra* note \_\_ at 178-79 (discussing signaling effects of judicial or executive enforcement actions).

<sup>186</sup> See Parella, *supra* note \_\_ at \_\_ (describing a variety of reputational drivers produced by litigation).

<sup>187</sup> Hadfield and Weingast examine situations where the institution providing classifications is itself incapable of punishing those whose behavior is classified as wrongful. In these situations, the only prospect for enforcement is if ordinary individuals engage in the simultaneous but independent provision of penalties. Gillian Hadfield & Barry Weingast, *Law without the State: legal attributes and the coordination of decentralized collective punishment*, 1 J. LAW & COURT 3, 8 (2013).

<sup>188</sup> Carugati et. al., *supra* note \_\_ at 309-310.

<sup>189</sup> Gillian Hadfield & Barry Weingast, *Law without the State: legal attributes and the coordination of decentralized collective punishment*, 1 J. LAW & COURT 3, 5 (2013) (describing informal sanctions such as “criticism, social ostracism, commercial boycott, reputational degradation, and physical retaliation.”).

<sup>190</sup> The cost of informal sanctions can exceed the cost of the formal sanctions that triggered them. Jonathan Karpoff, *Does Reputation Work to Discipline Corporate Misconduct?* in THE OXFORD HANDBOOK OF CORPORATE REPUTATION 362 (Barnett & Pollock (eds) 2012). Companies often experience market sanctions that exceed government penalties when the conduct concerns consumer fraud. See Karpoff, J. M., and J. R. Lott, Jr, “*The Reputational Penalty Firms Bear from Committing Criminal Fraud*,” 36 JOURNAL OF LAW AND ECONOMICS, 757, 758 (1993) (“[W]e present evidence that the reputational cost of corporate fraud is large and constitutes most of the cost incurred by firms accused or convicted of fraud.”); see also Jonathan M. Karpoff, D. Scott Lee, and Gerald S. Martin, *The Cost to Firms of Cooking the Books*, 43 J. FIN. & QUANTITATIVE ANALYSIS 581, 582 (2008) (in cases involving financial misrepresentation, “[t]he reputation loss exceeds the legal penalty by over 7.5 times, and it exceeds the amount by which firm value was artificially inflated by more than 2.5 times.”).

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Of course, sometimes cases disappear before they make it to the classification stage. It is possible that the traits of courts not only empower them to classify and coordinate enforcement but also produce spillover effects that attach to the broader institution of litigation. Once a classification institution meets the threshold discussed above, its signaling effects may extend beyond itself to closely associated actors or processes. Additionally, even if pleadings do not classify they announce imminent classification of the activity at issue. The result is that we can expect an announcement from the court on the wrongfulness of a particular actor or activity. This period of anticipation involves its own sanctions because it can lead to behavioral changes before a court rules as individuals attempt to reduce the risk of harm to themselves.

3. Democratic Messaging: Information Orders and Political Equality

*“If our fellow citizens are under no normative pressure to account to us – if our institutions are indifferent to their withholding of information relevant to our legal claims – can we continue to conceive of them truly as fellow citizens?”<sup>191</sup>*

Perhaps the most sacrosanct principle of any democracy is that its members are political equals. The trouble is that our daily lives do not always reflect this principle. One area of our lives that frequently defies it relates to the sharing of information. We share information based on social rules:

We keep secrets, maintain confidences, warn, notify, pass along tips, bring things to the attention of, inform, give and get scoops, . . . as *occupants of social positions and members of social relations*. . . . Brothers must be notified, co-workers expect to be told, employers must be given notice, spouses do not expect to ‘hear about it from friends,’ adversaries expect fair warning, patients must be informed, and legal notices must be published.<sup>192</sup>

The result of these social rules is that information sharing conveys *relational content* between the notifier of the news and the recipient of that news.<sup>193</sup> The recipient

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<sup>191</sup> Gillian K Hadfield & Dan Ryan, *Democracy, Courts and the Information Order*, LIV EUR. J. SOCIOLOGY 67, 93 (2013).

<sup>192</sup> D. Ryan, *Getting the Word Out: Notes on the Social Organization of Notification*, 24 SOCIOLOGY THEORY 228, 233 (1983)(emph. added).

<sup>193</sup> *Id.* at 240 (“Membership in couples, families, organizations, communities, states, professions, and contracts implies obligations to notify and expectations of being notified.”); Gillian K Hadfield & Dan Ryan, *Democracy, Courts and the Information Order*, LIV EUR. J. SOCIOLOGY 67, 72 (2013)(“The manner and sequence of

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of the information not only learns the substance of the news but also gleans information about her status in the relationship with the notifier and the wider society based on what she was told, when she was told, who was told before her, and how she was told.<sup>194</sup>

It is a reality of our society that some actors must disclose information while others may demand it and are under no obligation to share information of their own. The direction of information flow reflects power within the relationship between those disclosing information and those demanding it: those without power must share information while those with power may remain silent.<sup>195</sup>

The courts challenge that information relationship. Through the litigation process, courts alter the flow of information that would otherwise obtain in a society of abstract equality but practical inequality: “Courts provide an arena in which democratic citizens’ relationships as civic equals are enacted, in part through its enforcement of the information norms that characterize equal relationships.”<sup>196</sup> The result of this information sharing is that the “symmetric and abstract obligation to account – to provide information in the context of a legal claim filed in a public court – is an important means by which the principle of abstract equality among citizens is made manifest.”<sup>197</sup>

Consider what would happen in the absence of judicial intervention in information relationships. A retiree who lost her life savings in a fraudulent scheme may not learn how she lost the money. A spouse whose husband died unexpectedly during a routine medical procedure may never learn the cause of that loss. Certain types of trauma require that we get answers before we can heal and move on.<sup>198</sup> The court is where we go to get those answers from those who may not provide them otherwise. And in getting those answers, the court confirms the moral equality between the retiree and the investment fund, the surgeon and the patient’s spouse, and all the other participants of asymmetric information relationships within our society.<sup>199</sup>

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information acquisition conveys much about the state of our relationships. . . . Who tells what to whom and how and when they do so has a relational impact that is often independent of the instrumental value of the information.”).

<sup>194</sup> Ryan, *supra* note \_\_ at 245.

<sup>195</sup> Hadfield & Ryan, *supra* note \_\_ at 73 (“Hierarchical relationships are characterized by distinctive norms governing who must tell what to whom and, in particular, by specifically asymmetric or non-reciprocal obligations of disclosure.”).

<sup>196</sup> Hadfield & Ryan, *supra* note \_\_ at 70.

<sup>197</sup> *Id.*

<sup>198</sup> Hadfield & Ryan, *supra* note \_\_ at 76 (describing the need for answers described by individuals who lost family members in the September 11, 2001 attacks and their desire to litigate in order to obtain those answers).

<sup>199</sup> Hadfield & Ryan, *supra* note \_\_ at 83 (“The individual frustrated by the empirical inequality she experiences vis-a-vis a community member outside the courtroom has available an arena where she can insist on and experience at least some measure of equality with that other.”); see also Judith Resnik, *The Contingency of Openness in Courts: Changing the Experiences & Logics of the Public’s Role in Court-Based ADR*, 15 NEV. L. J. 1631, 1643 (2015).

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This information-equalizing function of litigation gives it a special status when we consider where to get our information. A plaintiff knows that the court will enable her to obtain information from those who enjoy more power than she does;<sup>200</sup> as such, she is personally invested in the court's information authority because of the answers that it provides. By forcing information, the courts send a clear and strong democratic message that will resonate with the plaintiff and render her more likely to heed other information, from other people's cases, that is also shared by the court.<sup>201</sup>

But this democratic message does not only fall on the ears of plaintiffs who have personally experienced the information sharing functions of the courts. The media that covers these litigation stories converts an otherwise personal experience of democratic information sharing into a public message about democratic values. A third party citizen reading about the case also witnesses the democratization of information and the role of the courts in this process. Therefore, he also becomes invested in the information qualities of courts and the litigation process as compared to other information mechanisms.

C. *Characteristics of the Documents*

1. Aggregation: Broadening the Audience for Knowledge

Legal documents serve important information functions aside from persuading readers of the merits of the party's position. Instead, legal documents are good aggregators of information available from other sources in society.<sup>202</sup> As lawyers, we cite things to support our factual and legal statements.<sup>203</sup> The effect of this citations practice is that our legal pleadings inform our readers of

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<sup>200</sup> Hadfield & Ryan, *supra* note \_\_ at 77 (explaining that one reason that parties choose to file claims is because they view the "courtroom as the place where the otherwise substantial differences in status between the powerful and the injured are leveled, at least in the information order, where they get to ask the questions and the powerful must answer.?).

<sup>201</sup> Hadfield & Ryan, *supra* note \_\_ at 84 (explaining that even the dismissal of a complaint is information forcing because it requires the defendant to respond and provide information explaining why the complaint is insufficient, which is more information than the plaintiff may otherwise obtain in his relations with the defendant outside the court).

<sup>202</sup> Kishanthi Parella, *Reputational Regulation*, DUKE LAW JOURNAL, V. 67, Issue 5 (2018).

<sup>203</sup> Frederick Schauer & Virginia Wise, *Legal Positivism as Legal Information*, 82 CORNELL LAW REV. 1080, 1103 (1997) ("[L]egal decisionmaking differs from other forms of decisionmaking in that legal decisionmakers are often expected not only to justify their decisions with formal written opinions, but also to include within those opinions reference to the authorities on which the decisionmakers have relied."); John O. McGinnis & Steven Wasick, *Law's Algorithm*, 66 FLA. L. REV. 991, 1011 (2014)(explaining how advances in legal search technologies led to substantial increases in the number of citations per judicial opinion).

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sources of information other than the primary legal document (or “third-party sources”): relevant judicial opinions, regulations, government reports, NGO investigations, scientific reports, statistical analyses, legal commentaries, economic studies, academic commentaries, press statements, investor reports, media stories, among others.<sup>204</sup> This citations practice has two important information consequences (but we usually only recognize the former). First, pleadings improve the credibility of their own statements by drawing upon these other sources; a skeptical reader may become more persuaded by the pleadings arguments after taking note of the supporting materials.

Second, pleadings also serve as advertisements for these other sources by expanding the audience for discrete sources of knowledge. The medical science community may heed developments shared in *Nature* and *The New England Journal of Medicine* but no one else may. A pleading broadens the audience for this information by channeling it to a different audience. Critically, it also “markets” this information by implicitly demonstrating the relevance of this information to individuals not primarily concerned with scientific discoveries.

For example, in the Walgreens Complaint, Walgreens points the reader to articles published in the *Wall Street Journal*, *Washington Post*, and the *New York Times*,<sup>205</sup> public statements made by Theranos representatives,<sup>206</sup> audit results performed by state regulatory bodies,<sup>207</sup> certification reports from federal agencies,<sup>208</sup> a study from the peer-reviewed *Journal of Clinical Investigation*,<sup>209</sup> scientific information from the *Cleveland Clinic Journal of Medicine*,<sup>210</sup> statements from U.S. congressional committees,<sup>211</sup> and statements from medical academics,<sup>212</sup> among others.

Similarly, in *Colorado River v. State of Colorado*, the plaintiffs relied on a variety of foreign sources of law to make their case.<sup>213</sup> For example, they pointed to New Zealand legislation that recognizes Te Urewera, an 821-square mile area, as a legal entity, entitling it to “bring causes of action on its own behalf without

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<sup>204</sup> McGinnis & Wasick, *supra* note \_\_ at 1012 (noting that legal search technology increased the availability of secondary and non-legal sources with the result that a “study of U.S. Supreme Court cases from 1950 to 1995 showed a large spike of nonlegal sources starting in 1991”); Schauer & Wise, *supra* note \_\_ at 1105 (hypothesizing a change in the information sets relied upon by lawyers and judges to now include greater diversity of sources).

<sup>205</sup> Complaint, ¶¶ 51, 55-56.

<sup>206</sup> Complaint, ¶¶ 55-56.

<sup>207</sup> Complaint, ¶ 63.

<sup>208</sup> Complaint, ¶ 68.

<sup>209</sup> Complaint, ¶¶ 85-87.

<sup>210</sup> Complaint, ¶¶ 92.

<sup>211</sup> Complaint, ¶¶ 120-22.

<sup>212</sup> Complaint, ¶ 132.

<sup>213</sup> *Colorado River v. State of Colorado*, AM. COMPLAINT at 22-23.



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having to prove direct injury to human beings.”<sup>214</sup> The plaintiffs also shared news of recent rulings of Colombia’s Constitutional Court and the High Court of Uttarakhand at Nainital, India, recognizing the legal status of rivers within those countries.<sup>215</sup> These foreign legal developments may have escaped the notice of many Americans except that the River’s case publicized them through citations and, in turn, the news media covering the River’s story disseminated news of the legal developments.<sup>216</sup>

## 2. Elevation: The Cognitive Authority of Legal Documents

*“All I know of the world beyond the narrow range of my own personal experience is what others have told me. It is all hearsay. But I do not count all hearsay equally reliable. Some people know what they are talking about, others do not. Those who do are my cognitive authorities.”*<sup>217</sup>

Elevation relates to the re-packaging of information from one source into another. The information contained in a legal pleading may be available from other sources, such as the media, government press releases, NGO reports, and academic journals. Not all of these sources carry the same weight with us. We may take media sources more seriously than Twitter feeds, government statements more seriously than media sources, and academic articles more seriously than government statements. And that order of authorities may vary with the particular reader. Why do we rank some sources of authority higher than others?

One possible explanation is “cognitive authority” that refers to “influence on one’s thoughts that one would consciously recognize as proper.”<sup>218</sup> People can have cognitive authority: we trust things that Shannon tells us but doubt what Dale says. The difference in cognitive authority between Shannon and Dale is based on factors such as experience, education and training, peer reputation,

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<sup>214</sup> *Id.* at 22.

<sup>215</sup> *Id.* at 22-23.

<sup>216</sup> See, e.g., Turkewitz, *supra* note \_\_\_\_ (describing the same foreign legal developments relied upon in *Colorado River v. State of Colorado*).

<sup>217</sup> Patrick Wilson, SECOND HAND KNOWLEDGE: AN INQUIRY INTO COGNITIVE AUTHORITY 13 (1983).

<sup>218</sup> Wilson, *supra* note \_\_ at 15; see also Robert C. Berring, *Legal Information and the Search for Cognitive Authority*, 54 CALIF. L. REV. 1675, 1676 (2000)(defining “cognitive authority” as the “act by which one confers trust upon a source.”).

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successful accomplishments, consensus, personal trust (“belief in a person”), and the “intrinsic plausibility” of the statements made.<sup>219</sup>

It’s not just people who have cognitive authority; texts and other sources of information also have cognitive authority. We take some texts more seriously than others. I value information from the *New York Times* but not the *Wall Street Journal*. Alternatively, I watch Fox News but not MSNBC. Like people, I take some sources of information more seriously than others based on their cognitive authority. The authority of these sources is usually based on the cognitive authority of the author (based on the factors for authority of persons), publications history (reputation of publishing house or journal), institutional endorsements, and published reviews.<sup>220</sup>

Litigation documents also have their own cognitive authority.<sup>221</sup> Litigation documents “elevate” information when the cognitive authority of the litigation document is higher than the cognitive authority of the third-party source. By re-incorporating that information from the third-party source into the litigation document, the substantive information enjoys the greater cognitive authority of the latter and is better able to influence the thinking of the reader. In other words, lawsuits not only aggregate information from third-party sources but also elevate the cognitive authority (and therefore influence) of that information.<sup>222</sup>

For example, in the Walgreens Complaint, factual statements made by academics and other experts were incorporated, first, into a media story published by the *New York Times* (NYT) or the *Wall Street Journal* (WSJ) and these media stories were then incorporated into the Complaint.<sup>223</sup> The

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<sup>219</sup> Wilson, *supra* note \_\_ at 21-25; Berring, *supra* note \_\_ at 1704-5 (“Early nominative judicial reports lived and died the individuals who reported. . . . The status of Lord Coke gave luster to his Reports. The West Publishing era replaced such individual authority with an institutional authority. Legal researchers believed in the National Reporter System as an institution. This system extended beyond judicial decisions.”).

<sup>220</sup> Wilson, *supra* note \_\_ at 167-68; *see also* Berring, *supra* note \_\_ at 1686-87 (noting the differences in materials cited by the United States Supreme Court at the turn of the twentieth century); John O. McGinnis & Steven Wasick, *Law’s Algorithm*, 66 Fla. L. Rev. 991, 1003 (2014) (“The difference in the use and reliance of precedent between the early Supreme Court and the present-day Supreme Court is partially a story of information technology.”).

<sup>221</sup> Robert Berring, *Chaos, Cyberspace, and Tradition: Legal Information Transmogrified*, 12 BERKELEY TECHNOL. LAW J. 189, 193 (1997) (“The information could exist in other formats, but the ‘real’ incarnation, the one that counted, was its appearance in the West bound volumes. Only if the decision could be found in a bound case reporter, which meant it could be found in the West system, could it be deemed real.”); *see also* Schauer & Wise, *supra* note \_\_ at 1099 (discussing the differences among legal theories as a debate about the cognitive authority of different types of sources for legal decision-making and explaining positivism as a view that “legal decisionmakers, especially judges and the lawyers who argue before them, draw on an information set in making their decisions that is different from the information set upon which other policymakers or public decisionmakers draw”).

<sup>222</sup> *See* McGinnis, *supra* note \_\_ at 999 (discussing the ways that new cases create additional data points in addition to the cases they cite);

<sup>223</sup> Walgreens Complaint, ¶ 90.

Complaint elevates the factual statements to the extent that the cognitive authority of the Complaint is higher than that of the NYT or WSJ.

Similarly, plaintiffs in *Colorado River v. State of Colorado* relied on a number of foreign legal developments to argue that the Colorado River should be recognized as a legal entity.<sup>224</sup> An average reader may place limited weight on the decisions of the New Zealand or Ecuadorian legislatures or the pronouncements of Colombian or Indian courts.<sup>225</sup> However, through citation, those sources are incorporated into an American legal document that may garner a higher level of cognitive authority among readers; the “source” of the assertion that rivers have rights has changed from a foreign voice to a local one. Additionally, the complaint was reported by news media, including the *New York Times*. For those who value the *Times*, the cognitive authority of these legal developments increased. In this way, legal developments concerning the status of ecosystems were progressively re-packaged in different sources, each one commanding greater cognitive authority than the one before according to the audience.

### III. IS PUBLIC RELATIONS LITIGATION A PROBLEM?

The previous sections described one type of litigation where we may expect to see public relations effects at work. But it is one thing to describe a phenomena. The question remains: is this a problem that we want the courts to discourage? This section explores four reasons why we may instinctually label public relations litigation a problem: *motivation* (lawsuits motivated by public relations effects and not desire for dispute resolution), *beneficiary* (actor who benefits from public relations effects), *reputational washing* (institutional effects of reputational intermediation on courts), and *audience* (effect of information on public stakeholders). The objective of this Section is to explain how each of these reasons is inadequate for categorically prohibiting public relations litigation. Not all public relations litigation is equal. Some lawsuits may enhance social welfare while others do not. Therefore, all public relations litigation is not a problem – only some. This Section explores the welfare effects of different types of litigation to provide guidance on what types of public relations litigation we want to encourage and the types we do not.

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<sup>224</sup> *Colorado River v. State of Colorado*, AM. COMPLAINT at 22-23.

<sup>225</sup> See, e.g., Turkewitz, *supra* note \_\_\_\_.

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### A. *Motivation: Intentional v. Incidental Public Relations*

One objection to public relations litigation is that litigants will flock to the courts to garner media attention for their case and cause, using the lawsuit to make their interests “newsworthy” and their views sympathetic. What specifically offends us is the motivation of the parties: we may tolerate cases brought for dispute resolution but that have public relations effects (incidental public relations) so long as those effects were not the primary motivation for the lawsuit (intentional public relations).<sup>226</sup>

Intentional public relations offend us because such lawsuits impose a variety of institutional costs on our courts. The first cost is reputational: while public relations litigation improves the reputation of the parties, it can compromise the reputation of the courts. Our concern is with the division of labor between courts of law and court of public opinion: in which court is most of the litigant’s battle waged? We may want to protect our legal courts as ends in themselves and limit this forum to only those battles that can be resolved primarily within the courts of law. Otherwise, we may fear that the law courts will be transformed into soapboxes and spectacles, potentially undermining their authority and legitimacy. There are alternative fora for influencing the court of public opinion and parties should be encouraged to take their battles there. The second institutional cost of public relations is economic: we already face a situation where we are concerned about the case-load of many courts. We do not want to compound this burden by including lawsuits primarily concerned with resolution in the court of public opinion rather than in a court of law.

However, barring intentional public relations lawsuits may exclude cases that we deem socially desirable. After all, Walgreens, FIFA, Ford, and Honda are not the only plaintiffs who may use the litigation stage for public relations objectives. So does the Colorado River. And so did early American revolutionaries, abolitionists, suffragettes, civil rights lawyers, Haitian refugees, anti-war activists, Guantanamo detainees, and education advocates, among many others.<sup>227</sup> Plaintiff River follows a much older tradition in which lawsuits are brought as a “means [to] draw public attention to particular issues” that litigants confront, “spark[ing] national and international outcry,” encouraging “societal discussion” of painful histories, “influencing the legislative agenda,” and keeping “issues alive politically.”<sup>228</sup> Eliminating intentional public relations lawsuits also eliminates these types of cases and their potential for social reform.

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<sup>226</sup> Katz, *supra* note \_\_ at 1469 (citing John Finnis to distinguish between the reasons for a decision versus the side-effects of a decision).

<sup>227</sup> Lobel, *supra* note \_\_ at 481-482, 488, 493-509.

<sup>228</sup> Lobel, *supra* note \_\_ at 481-482, 488.

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Additionally, parties may have mixed motivations for their lawsuits, where they are partially incentivized by legal remedy and partially motivated by the desire to change the way that various stakeholders view the parties. At which point does the admixture of motivations cross the line into public relations litigation?

B. *Beneficiary: Public Interest v. Private Interest*

If motivation is not what offends us, perhaps we object to the distributional benefits of public relations effects from litigation. We may tolerate litigation motivated by a public relations objectives when the benefits of the public relations effect accrues to the public (such as in the River’s situation) but sanction it when the benefits are primarily gained by private actors, such as in the business litigation examples discussed in Section II, *supra*.

The problem is that the distribution of benefits is rarely clear-cut and instead raise mixed-benefits concerns. First, while litigants assert public interest objectives, they also gain private benefits from the publicity provided by high-profile cases, such as increased funds from donors and greater status among public interest peers.<sup>229</sup> These benefits remain private benefits even if these benefits can, in turn, be used to advance the public interest through increased activities by the litigant.

The trouble with mixed-benefits also arise in the opposite situation where advancing the private interest through litigation publicity also aids the public interest. For example, if Company A sues its competitor, Company B, for creating false online reviews of the latter’s products on Yelp, Company A certainly stands to gain from clearing its name and re-gaining lost consumers (and new consumers who may switch from Company B because of its deceptive practices). However, consumers also gain from learning about these practices because they learn that the information they are using for purchasing decisions is inaccurate. In order to switch, consumers must first learn about the deceptive practices, which can aid them in making better-informed decisions. Therefore, Company A gains a private benefit (from customers who switch from Company B to Company A) but only after consumers gain the public benefit of increased information.

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<sup>229</sup> NeJaime, *supra* note \_\_\_ at 954-55 (describing internal and external benefits of litigation for social movements, such as “raising consciousness, mobilizing constituents,” increasing bargaining power with external actors, and shaping opinions of elites); HANDLER, *supra* note \_\_\_, at 216 (explaining how publicity from litigation can help plaintiff organizations secure funding and other resources).

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For these reasons, we cannot distinguish between permissible and impermissible public relations litigation based on beneficiary because, in many cases, the public relations effects benefit public and private interests.

### *C. Accomplice: Reputational Laundering v. Redemption*

Another reason for discarding the public/private benefit distinction is that we may not want to disqualify even those lawsuits where the public relations benefits only advance primarily private interests: Litigation may offer actors unfairly wronged in the court of public opinion the best stage on which to clear their name. Our courts of law allow us to correct deficiencies in the court of public opinion.

The court of public opinion is plagued by two significant information problems. First, there is a low barrier to entry for information seeking to enter this court: gossip, tabloids, tweets, television commercials, endorsements, privately-funded reports, documentaries, advertisements, books (fiction and non-fiction) and cinema can powerfully influence public opinion but face few filtering devices except for personal preferences. This means that there is a lot of information out there with which a party seeking to communicate must compete. The extent of competition could vary with “information density.” While there is a lot of information publicly available, it does not all concern the same subject; the number of information sources (density) relating to a particular subject – and thereby influencing public opinion on it – may be few or plenty. The greater the density, the more difficult it is for a particular message to stand out. Second, while it is easy for information to enter the court of public opinion, it is more difficult for it to stand out. The result is that there can be a lot of information that produces more confusion and distraction than clarity.

Enter the courts. Information from adjudication can stand out in a way that other competing sources of information cannot.<sup>230</sup> Therefore, by accessing litigation, a party wronged in the court of public opinion can transmit salient information into it through the channel of the court of law.

The problem is that both wronged and wrongful parties can use the litigation stage alike. If the reputation restoration function is only exercised by “good actors” unfairly wronged in the court of public opinion, then by helping that actor’s information stand out the court is used for the socially-beneficial function of reputational redemption. However, the same strategy could also be used by a “bad actor” appropriately blamed in the court of public opinion who uses the

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<sup>230</sup> See notes \_\_-\_\_ and accompanying text.

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salience of the litigation stage to obfuscate and cast doubt on well-founded criticisms of it. In this scenario, the law courts only contribute to the information problem in the court of public opinion by introducing yet more dubious but salient information; here, the court is an accomplice in a socially-costly phenomena of “reputational washing.”

Reputational washing has two unfortunate consequences. First, it aids bad actors in perpetuating false images of themselves and allows them to garner the reputational benefits of good actors, with the court’s help. In such a case, the courts disrupt reputational markets by helping bad actors attract too much good will. This not only has consequences on the operation of reputational markets (“what is the point of reputational management if good and bad actors internalize same rewards”) but also poses a risk to the credibility of the courts as an institution because they serve as accomplices in these processes. Courts also have their own collective reputation to consider. They may serve as information intermediaries for plaintiffs but they also have their own reputations to maintain. Aiding in the reputational washing of a bad actor will compromise the courts’ reputation as normative and informational authorities.

To protect the reputation of the courts and of wronged parties, we may permit reputation redemption and forbid reputation washing. But the distinction between the two depends on our ability to differentiate between good and bad actors *ex ante*: when a plaintiff knocks on the court’s door, how are we to know whether she is a wronged actor seeking redemption or a wrongful actor seeking obfuscation? Most of the information we have at that point to make the assessment is based on the court of public opinion – the very court whose deficiencies the law courts are meant to correct under this analysis.

D. *Audience: Courts as Information Intermediaries v. Reputational Intermediaries*

The risk to the court’s reputation in “reputational-washing” only arises if the audience (public) realizes that it was fooled; absent discernment, there is no risk to the court’s reputation except in the knowledge that it is helping bad actors to appear good. It all depends on the capabilities of the public audience to weigh information transmitted from the courts.

Specifically, it depends on whether courts are serving as information intermediaries or reputational intermediaries. The former only passes along information regarding the plaintiff; the latter vouches for it. An information intermediary is a conduit for information passing from one speaker (the plaintiff) to an audience (the public) but does not speak itself, explicitly or implicitly. The courts satisfy this information intermediary role because of the salience of information emanating from the litigation process. In contrast, a reputational

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intermediary is an actor that binds its own reputation (usually high) to that of another actor.<sup>231</sup> In the securities context, for example, reputational intermediaries “signal the value of disclosures to investors” by “lend[ing] their reputations to issuers that want additional credibility for their disclosures.”<sup>232</sup> Courts act as reputational intermediaries when the audience perceives the information in a more credible light *because* it was transmitted by a court. In this capacity, courts do not only transmit information but also elevate it; the information transmitted by the court is elevated because of the court’s own reputational capital.

If the public treats the courts as information intermediaries and not as reputational intermediaries, then we may worry less. But this depends on the capability of the public to scrutinize the value of information from the courts; in other words, are they rational listeners (high-scrutiny) or irrational listeners (low-scrutiny). This is an empirical question and its answer helps to identify the courts’ role as information or reputational intermediaries. If listeners are rational, then courts do not need to be as cautious about supplying more information because listeners will evaluate its quality on their own and will not elevate it just because it emanated from a court. In contrast, if listeners are irrational, then the court will need to serve more of a gatekeeper role concerning the information that flows through it and into the court of public opinion.

### E. SUMMARY

The above discussion explains the reasons why a categorical prohibition against all public relations litigation is not socially undesirable. There are some cases that produce more socially desirable public relations effects than others. To illustrate this point, imagine the universe of public relations litigation as a series of concentric circles (Diagram 1).

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<sup>231</sup> Frank Easterbrook & Daniel R. Fischel, *Mandatory Disclosures & the Protection of Investors*, 70 VA. L. REV. 669, 673-74 (1984).

<sup>232</sup> Peter B. Oh, *Gatekeeping*, 29 J. CORP. LAW 735, 746 (2004); Ronald Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE LAW J. 239, 290 (1984) (“The intermediary is paid only because its reputation renders it trustworthy in circumstances when a party to the transaction could not be trusted.”). Ronald Gilson & Reiner Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. LAW REV. 549, 620 (1984) (describing the role of investment bankers as reputational intermediaries who “represents to the market (to whom it, and not the issuer, sells the security) that it has evaluated the issuer’s product and good faith and that it is prepared to stake its reputation on the value of the innovation”). Trade associations, guilds, and other types of business associations can also serve as intermediaries providing reputational information in situations of information asymmetry. Clayton P. Gillette, *Reputation & Intermediaries in Electronic Commerce*, 62 LA. LAW REV. 1165, 1171 (2002) (explaining that potential creditors will “attribute high reputational quality to firms that are willing to present the information to third parties (the rating agencies) that presumably have the expertise to evaluate debt and that have the capacity to transmit the information to a broader population, some members of which will be able to evaluate quality.”). For example, Avner Greif explained that a merchant of the Maghribi coalition knew certain things about a member agent simply by virtue of the latter’s membership in the coalition: (a) the agent had a good past record of transactions (or else he would have been kicked out), and (b) the agent would enter a transaction with the knowledge that dishonesty would lead to his future ostracism from the coalition. Greif, *supra* note \_\_ at 868.



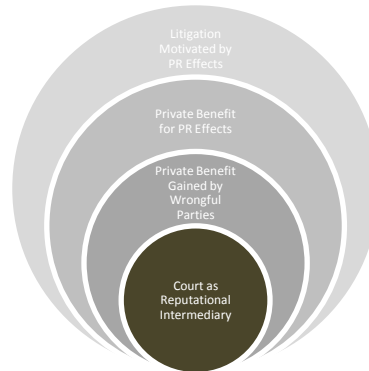


Diagram 1

The outermost circle represents the entire range of “public relations litigation” – cases brought by plaintiffs primarily for public relations effects (*motivation objection*). As discussed in Section A, some of these cases bring positive societal effects so it would be undesirable to discourage all cases contained in this zone (all public relations litigation). The next circle represents those cases brought for public relations effects where the primary benefits of the effects are enjoyed by private parties as opposed to the public (*beneficiary objection*). But as discussed in Section B, there are also positive societal effects associated with permitting private parties wronged in the court of public opinion to clear their names on the litigation stage; therefore, we would not want to eliminate all cases within this zone but only a subset within it. The third circle represents those cases brought for public relations effects by wrongful parties who want to use the litigation stage to obfuscate the information about themselves available in the court of public opinion (*reputational laundering objection*). We may want to draw the line at this point and declare that these are not welfare-enhancing cases and therefore should not be allowed. However, as discussed in Section C, it is very difficult to identify wrongful parties *ex ante*; too much gatekeeping could deny access to both wrongful and wronged actors. In order to reduce the risk of excluding wronged parties, it is therefore preferable not to eliminate cases in the third circle but instead concentrate the gatekeeping function for the fourth and innermost circle where wronged/wrongful parties use a court as a reputational intermediary as opposed to an information intermediary; in this situations, plaintiffs do not use courts only to pass along information but also to vouch for it (*audience objection*).

This analysis reveals that it is only the innermost circle that, on balance, is unlikely to enhance welfare. This means that it is only a subset of public relations litigation that we would want to categorically exclude. Prior to this analysis, we may have been tempted to exclude the entire universe of cases where the plaintiff is motivated by public relations effects. This analysis shows, however, that the

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subset of categorically impermissible cases is a much smaller subset (Diagram 2 below).

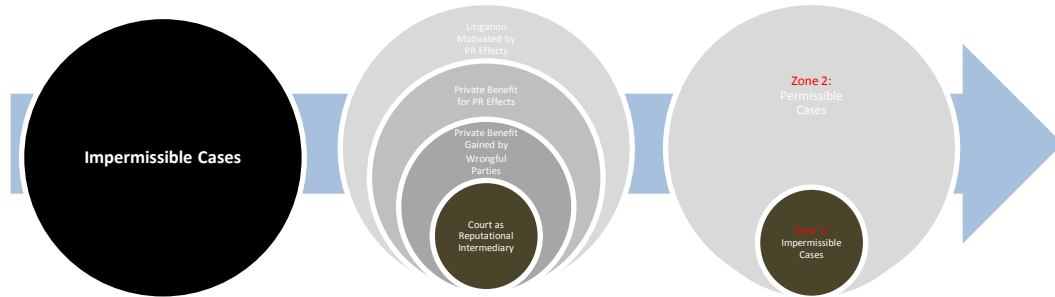


Diagram 2

### IV. GRANTING ACCESS TO THE LITIGATION STAGE: THE PROBLEM OF BENTHAM'S TWO COURTS

Section III explored the reasons why we may want to encourage some forms of public relations litigation while discouraging the rest. The question is: what rules or procedures would allow courts to sort public relations litigation in a socially optimal way so that, on balance, cases in Zone 1 are discouraged and cases in Zone 2 permitted (Diagram 2)?

This challenge is not new. Scholars studying the economics of litigation have analyzed litigation known as nuisance suits,<sup>233</sup> negative expected value suits,<sup>234</sup> frivolous suits,<sup>235</sup> and strike suits.<sup>236</sup> What these suits share in common is that “the plaintiff’s expected total litigation costs would exceed the expected

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<sup>233</sup> William H. J. Hubbard, *Nuisance Suits* (Coase-Sandor Institute for Law & Economics Working Papers No. 691, 2014) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2458685](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2458685).

<sup>234</sup> Lucian A. Bebchuk & Alon Klement, *Negative-Expected-Value Suits* (December 2009). PROCEDURAL LAW AND ECONOMICS, Chris Sanchirico, ed., 2011; Harvard Law School John M. Olin Center Discussion Paper No. 656. available at SSRN: <https://ssrn.com/abstract=1534703>

<sup>235</sup> Albert Choi & Kathryn E. Spier, *Taking a Financial Position in Your Opponent in Litigation* (September 19, 2017). Virginia Law and Economics Research Paper No. 3. Available at SSRN: <https://ssrn.com/abstract=2733710> or <http://dx.doi.org/10.2139/ssrn.2733710>

<sup>236</sup> 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).

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judgment.”<sup>237</sup> This is puzzling based on an economic analysis that assumes that “parties make litigation choices that maximize their expected value” where expected value “is a function of the likelihood of success on the merits (P), the expected trial award conditional on success (W), and the expected cost to the party of litigating the case through trial (C).”<sup>238</sup> Therefore, it is difficult to explain plaintiff motivations for a lawsuit where expected costs exceed expected benefits.

Scholars examining the economics of litigation answered this puzzle by revealing that such plaintiffs can still extract a settlement from defendants; it is the prospect of financial gain from settlement, rather than victory at trial, that incentivizes “nuisance plaintiffs” to file.<sup>239</sup> However, this explanation leads to a second puzzle: Why would a defendant settle knowing that the plaintiff does not intend to go to trial? Several explanations are offered, including: A defendant may settle in order to avoid higher costs associated with defense or default judgments.<sup>240</sup> Information asymmetries between plaintiff and defendant may create uncertainty for the defendant regarding the likelihood that plaintiff will go to trial.<sup>241</sup> Plaintiff can create a credible threat to sue by increasing its upfront costs through pre-complaint investigation and detailed pleadings.<sup>242</sup>

As discussed below, this explanation of plaintiff and defendant incentives leads to normative judgments about the social desirability of “nuisance suits,” as well as practical recommendations for deterring them. Unfortunately, neither applies to public relations litigation because this economic analysis of nuisance suits examines litigants’ incentives only with reference to one court (court of law) and neglects the court of public opinion. This compromises both the normative claims and practical strategies associated with this analysis when applied to public relations litigation.

The first problem is definitional: what makes a suit a nuisance? The standard explanation labels a suit a nuisance where plaintiff’s litigation costs exceed

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<sup>237</sup> Lucian Bebchuk and Alon Klement, *Negative-Expected-Value Suits* (December 2009). PROCEDURAL LAW AND ECONOMICS, Chris Sanchirico, ed., 2011; Harvard Law School John M. Olin Center Discussion Paper No. 656. Available at SSRN: <https://ssrn.com/abstract=1534703n> at 1.

<sup>238</sup> Robert G. Bone, *Economics of Civil Procedure*, in OXFORD HANDBOOK OF LAW AND ECONOMICS 148 (Francesco Parisi (ed.) 2017).

<sup>239</sup> Rosenberg & Shavell, *A model in which suits are brought for their nuisance value*, *supra* note \_\_ at 4-5.

<sup>240</sup> *Id.*

<sup>241</sup> Bebchuk & Klement, *supra* note \_\_ at 1 (also identifying the following factors that can also increase the probability of positive settlement for a negative expected value suit: divisibility of litigation costs, new information at intermediate points, litigants’ reputation and repeat playing, and contingent fees and retainer arrangements); Choi & Spier, *supra* note \_\_ at 18 (“[W]hen the lawsuit itself has a negative expected value, taking a short position against the defendant allows the plaintiff to turn the lawsuit into a positive expected value one.”).

<sup>242</sup> Hubbard, *supra* note \_\_ at 8; Lucian A. Bebchuk, *On the Credibility and Success of Threats to Sue*, 25 J. LEGAL STUD. 1, 3 (1996) (“There may arrive a stage at which a threat to continue all the way to judgment becomes credible by virtue of the small fraction of the litigation costs that remains to be incurred.”).

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plaintiff's litigation benefits: cost of litigation is higher than judgment.<sup>243</sup> As correctly pointed out, these are not necessarily weak or “frivolous” suits because plaintiff may have a strong chance of prevailing at trial – it is just unlikely that plaintiff will make it to trial because of the high costs of litigation and relatively low amount at stake.<sup>244</sup>

But while pointing out that *nuisance* suits are not necessarily *frivolous* suits, the literature suggests that we should still have a problem with frivolous suits that have low probability of succeeding at trial; frivolous suits are not normatively desirable.<sup>245</sup> Part of the reason for their undesirability seems to be their low probability of success at trial. But low probability does not equal low value.<sup>246</sup> Assessments of value cannot be based solely on value creation within the court of law; the court of public opinion matters too. Nuisance suits where plaintiffs are unlikely to prevail at trial (or “frivolous suits”) can also be normatively valuable if we just broaden the lens to include the suit's effects in the court of public opinion.<sup>247</sup>

Not every socially valuable suit is a slam-dunk; many are a long shot. This is especially true if the case is novel, provocative, and challenges contemporary legal and social frames. Its prospect for success in a court of law may be slim but it can succeed out of court by attracting media attention, raising public awareness, changing public discourse, and creating civil pressure for reform by institutions other than the courts. Many of the cases populating Zone 2 from Section III, *supra*, share these characteristics: Cases brought for public relations effects that have positive social welfare effects for the public at large. For example, the River's lawsuit may have a range of social welfare enhancing effects even if it loses its day in court, including raising public awareness of ecosystem vulnerability and increasing public pressure for private and public conservation efforts.

Equating success in a court of law with normative value undermines the contributions made by litigants whose legacies are felt outside the court.

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<sup>243</sup> See, e.g., Bebchuk & Klement, *supra* note \_\_ at 1; Hubbard, *supra* note \_\_ at 1.

<sup>244</sup> Bone, *supra* note \_\_ at 530, 531-532; Bebchuk, *supra* note \_\_ at 1; Warren F. Schwartz, *Can Suits With Negative Expected Value Really Be Profitable?*, 9 LEG. THEORY 83, 85-86(2003); Ted Sichelman, *Why Barring Settlement Bars Legitimate Suits: a Reply To Rosenberg and Shavell*, 18 CORNELL J. LAW PUBLIC POLICY 57, 68-74 (2008).

<sup>245</sup> See Warren F. Schwartz & Abraham L. Wickelgren, *Advantage Defendant: Why Sinking Litigation Costs Makes Negative-Expected-Value Defenses but Not Negative-Expected-Value Suits Credible*, 38 J. LEGAL STUD. 235, 236 (2009) (“Although [frivolous] has never been defined, the clear implication of the pejorative term is that it is socially undesirable that plaintiffs are able to earn a profit by bringing and settling such cases.”); see also Bone, *supra* note \_\_ at 530-31 (explaining how even suits with a high probability of success can be “frivolous”).

<sup>246</sup> Sichelman, *supra* note \_\_ at 69-70.

<sup>247</sup> See generally Kishanthi Parella, *Reputational Regulation*, DUKE LAW JOURNAL, V. 67, Issue 5 (2018)(describing the welfare-enhancing extra-legal effects of litigation of early-stage litigation).

Conversely, a plaintiff could bring a quintessentially Zone 1 public relations case that is more normatively desirable because it has a greater chance of success. Why should we prefer the latter and discourage the former? Ignoring a suit's effects in the court of public opinion – and the subsequent welfare benefits – is both under-inclusive and over-inclusive and does not provide a way to sort public relations litigation into the socially optimal categories (*Zone 1 v. Zone 2*) discussed in Section III, *supra*.

The second problem with ignoring the court of public opinion is a practical one: it limits strategies intended to deter nuisance suits. For example, one proposal to limit nuisance suits is through the introduction of a “settlement bar” that would allow a defendant – facing a plaintiff unwilling to proceed to trial – to exercise an option to have the courts refuse to enforce a settlement between the parties.<sup>248</sup> Denied the option to settle, plaintiffs must either withdraw or proceed to trial. Since “nuisance plaintiffs” by definition refuse to litigate to trial, they will withdraw and not extract a settlement offer from defendants.<sup>249</sup> If they can no longer extract a settlement offer, it is not rational for them to incur the costs of filing a nuisance suit and they will not do so.<sup>250</sup>

The problem with applying this solution to public relations litigation is that it identifies plaintiff and defendant's incentives for litigation and settlement based on costs and benefits endogenous to the courts of law. It is given that litigation offers one party an opportunity to impose costs on another. The economic analysis focuses on the costs incurred associated with the court of law: defense costs, default judgment or settlement amount. It is also given that litigation allows plaintiff to reap the value of many of these costs as plaintiff's benefits. For example, if defendant pays plaintiff \$100 to settle a nuisance suit, then the \$100 is a cost that defendant undertakes but is also a benefit that plaintiff reaps. A settlement bar would take away the plaintiff's ability to acquire a financial benefit through settlement and therefore discourage plaintiffs from filing nuisance suits.

The problem with this solution is that it neglects the second court: Litigation not only enables plaintiffs to impose costs on defendants arising from the courts of law (endogenous) but also allows a plaintiff to impose costs on defendant in the court of public opinion, forcing the latter to sustain monetary or non-monetary damage that it must incur expense to address.<sup>251</sup> Courts of law offer *one* forum for multi-fora battles between various types of adversaries. The shot

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<sup>248</sup> Rosenberg & Shavell, *A solution to the problem of nuisance suits*, *supra* note \_\_ at 45-46.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *See, e.g.*, Cohen & Gurun, *supra* note \_\_ at 2-3 (describing increased advertising and philanthropy by defendant companies following the filing of a lawsuit).

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is fired within a legal court but the wound is felt elsewhere: Plaintiff sues its competitor and tarnishes the reputation of the latter in the eyes of consumers.<sup>252</sup> Plaintiff sues its former venture capitalist firm and reduces the likelihood that the latter will raise capital or find new deals.<sup>253</sup>

If costs are exogenous, so are benefits.<sup>254</sup> Plaintiffs can incur benefits from filing a suit that are not directly derived from the courts of law but the court of public opinion.<sup>255</sup> Plaintiffs may redeem their reputation in the wake of a scandal.<sup>256</sup> Plaintiffs may gain a financial benefit by taking a financial position in the defendant.<sup>257</sup> Plaintiffs may discourage employee flight to a competitor<sup>258</sup> or signal quality of assets to future contractual partners.<sup>259</sup> These are benefits enabled by the court of law but found outside it. And so long as these benefits are on the table, plaintiffs will still bring suits they do not intend to take to trial. The settlement bar does not deter this type of litigation because it principally removes the prospect of gains associated with a court of law (through settlement); it does not remove the prospect of gains available in the court of public opinion.

The court of public opinion does not only promise rewards; it also offers ammunition with which to injure an opponent. There is a species of lawsuits known as “malicious lawsuits” where plaintiff “obtains some utility whenever the defendant is forced to undergo a monetary or non-monetary – e.g. reputational – loss.”<sup>260</sup> Settlement bars are less effective at deterring malicious litigation compared to nuisance suits because, in the former, the plaintiff “may benefit from filing even if reaching a settlement is not an option; he obtains utility from malice if he files and withdraws after having forced the defendant to incur expenses or defense.”<sup>261</sup> From torts<sup>262</sup> to property,<sup>263</sup> plaintiffs also litigate out of revenge and spite towards neighbors, family, and rivals, among others.<sup>264</sup> Therefore, removing the prospect of financial reward in law courts is ineffective if consequences (financial or nonfinancial) in the court of public opinion motivate plaintiff’s suit.

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<sup>252</sup> *Blue Buffalo v. Purina*, No. 4:14-cv-00920 (E.D. Mo. May 14, 2014), ¶56.

<sup>253</sup> *Atanasov*, *supra* note \_\_ at 32.

<sup>254</sup> *See Choi & Spier*, *supra* note \_\_ at 18 (explaining the effects of plaintiff’s financial position in defendant firm for litigation incentives).

<sup>255</sup> *See* notes \_\_ - \_\_ and accompanying text.

<sup>256</sup> *See* Section III, *supra*.

<sup>257</sup> *Choi & Spier*, *supra* note \_\_ at 1 (explaining how plaintiff can make its litigation threat more credible by taking a short position in defendant, thereby extracting a more favorable settlement).

<sup>258</sup> *Ganco et. al*, *supra* note \_\_ at 660; *Agarwal*, *supra* note \_\_ at 1367.

<sup>259</sup> *Hovenkamp*, *supra* note \_\_.

<sup>260</sup> *Brishti Guha*, *Malicious litigation*, 47 INT. REV. LAW ECON. 24, 24 (2016).

<sup>261</sup> *Id.* at 25. *Guha* recommends adding a “commitment requirement” to an optional settlement bar that “commit[s] the plaintiff to go to trial if the defendant refuses to cede or settle and puts up a defense.” *Id.* at 30.

<sup>262</sup> *Hershovitz*, *supra* note \_\_ at 21.

<sup>263</sup> *Katz*, *supra* note \_\_ at 1456-59.

<sup>264</sup> *Guha*, *supra* note \_\_ at 26.

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In summary, we need to account for effects in the court of public opinion for normative and practical reasons: First, to identify public benefits achieved in the court of public opinion (and downstream effects of those benefits) in order to make sound normative judgments about the social desirability of a suit. Second, to identify private benefits offered by the court of public opinion in order to craft practical solutions for deterring socially undesirable suits.

CONCLUSION

This Article explores the information transmission function of the courts by examining why information conveyed through litigation may spread through society differently than the same information that does not pass through a court. This Article identified three types of advantages that the litigation process offers: (a) *characteristics of the broader information environment* (age of “fake news,” and magnet for media), (b) *characteristics of the courts* (priming for collective sanctioning, network value and information pathways, and democratic messaging), and (c) *characteristics of the documents* (aggregation and elevation). These advantages, individually and collectively, help to explain why information transmitted through courts get particular types of attention in our society.

These information transmission advantages also help to reveal the ways that litigation is used. Specifically, this Article illustrates how organizations may use litigation for reputational repair functions because of the information transmission functions this Article identifies. Whether by design or coincidence, the information advantages of litigation allow organizations to achieve reputational repair functions traditionally associated with public relations.

The exploration of post-crisis litigation reveals the broader swath of public relations litigation, exposing the full spectrum of litigants and interests served. This analysis allows us to make better judgments about the social desirability of litigation and examine strategies meant to encourage those we like and discourage those we do not. It also highlights the second court that functions in the shadows of our legal ones, illustrating the connection – even dependence, at times – between the two and the ways that this connection attracts parties to the litigation stage.