

Public Relations Litigation

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Conventional wisdom holds that lawsuits harm a corporation's reputation. So why do corporations and other businesses litigate even when they will likely lose in the court of law and the court of public opinion? One explanation is settlement: some parties file lawsuits not to win but to force the defendant to pay out. But some business litigants defy even this explanation; they do not expect to win the lawsuit or to benefit financially from settlement. What explains their behavior?

The answer is reputation. This Article explains that certain types of litigation can improve a business litigant's reputation in the eyes of its key constituents—constituents that help it succeed in the marketplace. It is their changed views of the litigant—and subsequent actions taken based on those changed views—that provide the financial benefit from a lawsuit that the court may not deliver. For example, technology companies use patent litigation to discourage employee flight, consumer products companies may use litigation to affect consumers' opinions about competitors, and some corporate plaintiffs may even use litigation to address reputational harm following a crisis. In all these examples, business litigants may benefit from the reputational effects of the litigation even if they lose in court.

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This Article makes two contributions. Descriptively, it challenges the conventional wisdom that lawsuits are always bad for business by revealing hidden incentives found outside the courthouse that are neglected in the standard explanation for litigant behavior. Specifically, it explains how litigation can contribute to reputation-building through signaling or framing strategies. It also describes how this reputation-building can result in different types of distributed gains: interparty, intertemporal, and interinstitutional. Practically, it highlights that the legal rules that could address this reputation-building may lack utility due to the timing of reputational effects in litigation.

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INTRODUCTION

It is no secret that lawsuits often harm a party's reputation. As this Article explains, however, litigation can also offer reputational benefits for business litigants even if they do not prevail in court. This is because businesses depend on resources from a variety of actors, including suppliers, investors, employees, consumers, and even local communities.¹ The publicity around litigation can affect these actors' perceptions of the corporate parties and influence their decisions about whether to provide or withhold their particular resource.² It is these actors' changed views of the business litigant—and the subsequent actions those changed views prompt—that provide the financial benefit that the court may not directly deliver.

For example, some companies use patent litigation to gain a reputation for litigiousness that discourages employees from defecting to a rival.³ One CEO of such a company “reportedly issued a blanket order to his general counsel to file two IP lawsuits per quarter to

1. See, e.g., JEFFREY PFEFFER & GERALD R. SALANCIK, *THE EXTERNAL CONTROL OF ORGANIZATIONS: A RESOURCE DEPENDENCE PERSPECTIVE* 2 (1978):

[N]o organization is completely self-contained. Organizations are embedded in an environment comprised of other organizations. They depend on those other organizations for the many resources they themselves require. Organizations are linked to environments by federations, associations, customer-supplier relationships, competitive relationships, and a social-legal apparatus defining and controlling the nature and limits of these relationships. Organizations must transact with other elements in their environment to acquire needed resources

2. See, e.g., Edward M. Iacobacci, *On the Interaction Between Legal and Reputational Sanctions*, 43 J. LEG. STUD. 189, 190–91 (2014).

3. Martin Ganco et al., *More Stars Stay, but the Brightest Ones Still Leave: Job Hopping in the Shadow of Patent Enforcement*, 36 STRATEGIC MGMT. J. 659, 660 (2015) (explaining that 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 from leaving the corporation to join or form a competitor).

dissuade engineers from ‘walking out the door’ with proprietary technologies.”⁴ Patent Assertion Entities (“PAEs”) also engage in litigation even if they expect to lose money on the lawsuit in order to develop a similar reputation for litigiousness.⁵ For them, victory is not offered by a court but by the court’s audience; by demonstrating that they will litigate, plaintiffs persuade other companies to license even those patents that are very broad and likely invalid.⁶ In the defamation context, corporations file lawsuits in response to unfavorable online reviews in order to send a message to the public, refuting the allegations, and to investors, assuring them that the corporation is stable.⁷ What all these examples have in common is that victory, and its associated financial rewards, does not come from a court but from outside it.⁸ Reputational benefits may provide the missing value in an otherwise negative expected value lawsuit.⁹ And these reputational benefits may grow further because of social media and online access, which have expanded the public audience for litigation. In addition to reading excerpts from filings in news stories, the public can also read full court filings made available online by news media or, sometimes, the parties themselves.¹⁰ The link between the courts of law and public

4. Rajshree Agarwal et al., *Reputations for Toughness in Patent Enforcement: Implications for Knowledge Spillovers Via Inventor Mobility*, 30 STRATEGIC MGMT. J. 1349, 1350 (2009).

5. Erik Hovenkamp, *Predatory Patent Litigation: How Patent Assertion Entities Use Reputation to Monetize Bad Patents* 1, 3 (Aug. 5, 2013) (unpublished manuscript), <https://ssrn.com/abstract=2308115> [<https://perma.cc/2ZUH-JLKU>] (explaining that patent litigation may persuade potential targets to accept licensing terms by establishing a credible threat of future litigation).

6. *Id.* (manuscript at 2).

7. Lyrisa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 877 (2000). In libel litigation,

[p]laintiffs do not have to sue to win; they can win by suing. Ultimate judicial victory would be desirable, but not necessary. The suit is a symbolic means of vindicating the claim of falsehood, and it is the act of suit that largely accomplishes this. While very few plaintiffs win, and the incidence of judicial victory is smallest with public officials, the vast majority of plaintiffs who lost indicate that they would sue again, *knowing what happened . . .*

Randall P. Bezanson, *Libel Law and the Realities of Litigation: Setting the Record Straight*, 71 IOWA L. REV. 226, 228–29 (1985).

8. *See, e.g.*, Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477, 487 (2004) (“The lawyers’ and plaintiffs’ interest in the lawsuit is not solely winning or losing in court, but in getting their message out to the broader public or a particular group.”).

9. Hovenkamp, *supra* note 5 (manuscript at 1–5) (explaining how reputational benefits of patent litigation compensate for lawsuits that are unlikely to succeed).

10. The relationship between social media and litigation is not unilateral. While litigation can fuel social media activity, social media activity can also increase the possibility and affect the outcomes of litigation by increasing the information available to attorneys. Andy Radhakant & Matthew Diskin, *How Social Media Are Transforming Litigation*, LITIG. J. (Spring 2013), https://www.americanbar.org/groups/litigation/publications/litigation_journal/2012_13/spring/social-media-transformation [<https://perma.cc/PT3L-BEJJ>]:

opinion are becoming even tighter so that acts undertaken in the former are more likely to resonate in the latter.¹¹

All these examples illustrate the different ways that litigation functions as a reputation-building activity for a corporation or other business party, influencing how its constituents and rivals view it and subsequently interact with it. This Article addresses two questions that stem from this understanding: first, how does litigation help build a business's reputation, and second, how do businesses benefit from this reputation building?

First, litigation can build a party's reputation through *signaling* or *framing*. Each of these mechanisms communicate information concerning the litigant to a broader audience than the court; this information can influence the way that third-party actors perceive the litigant. However, these mechanisms differ on the types of information revealed. Each mechanism, then, provides a different answer to the question, "A reputation for what?"

Reputation building through signaling occurs when the act of filing a lawsuit is the salient information that builds a litigant's reputation. This information often helps to build a plaintiff's reputation as litigious or willing and able to file a lawsuit. This reputation makes the plaintiff's future threat to sue more credible, thereby increasing the odds that a future party will acquiesce to the plaintiff's demands rather than go to court.¹² In contrast, reputation building through framing occurs when the content of the legal narrative is the relevant information that influences how stakeholders view plaintiffs (and possibly defendants). Here, the salient information is not the fact that the plaintiff filed the lawsuit but the information that the lawsuit

[O]nline profiles often provide treasure troves of information about parties, lawyers, witnesses, experts, and even judges. The openness of social media—and users' willingness to tweet and post things they would never dream of saying in a letter or an email—means that social networks offer rich repositories of potential pre-litigation intelligence and fodder for cross-examination.;

id. ("Clients can jeopardize privilege and, in some cases, have been held to have waived it by tweeting, blogging, or posting information about their cases.")

11. However, the resort to private arbitration and other forms of litigation confidentiality may compromise the flow of information from courts of law to the court of public opinion. See Laurie Kratky Doré, *Settlement, Secrecy, and Judicial Discretion: South Carolina's New Rules Governing the Sealing of Settlements*, 55 S.C. L. REV. 791, 798–99 (2004); Minna J. Kotkin, *Secrecy in Context: The Shadowy Life of Civil Rights Litigation*, 81 CHI.-KENT L. REV. 571, 583–84 (2006); Judith Resnik, *Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes Are at Risk*, 81 CHI.-KENT L. REV. 521, 528 (2006).

12. See, e.g., Hovenkamp, *supra* note 5 (manuscript at 3) (explaining that "many of the most litigious PAEs are in fact engaging in a profitable strategy of predatory patent litigation, and that this is actually the most effective way to monetize bad patents.")

reveals about the parties.¹³ Certainly, discovery may influence parties' reputations, but early-stage litigation documents may also attract media attention and thereby communicate differing narratives concerning the parties' acts.

Through either mechanism, litigation can help a business litigant influence its reputation. This prompts the second question: How does this reputation building benefit the party, especially if it loses in court? This Article argues that reputational gains can come in three varieties: *intertemporal*, *interparty*, and *interinstitutional*. Intertemporal gains are benefits separated in time. A business or other actor may receive only a fraction of the benefit of its action at a moment in time; it enjoys the rest of the benefit once that benefit "matures" in the future. In the litigation context, Party A may lose a lawsuit against Party B, but that is not the end of the story; Party A may win in the long term if the reputational effect of the lawsuit influences its interactions with Party B in the future, whether in the courtroom or outside of it. Its willingness to litigate may make its future threat to sue more credible, which can benefit it in its future interactions with Party B or, more likely, Party C.¹⁴ Reputational gains are often interparty, so that the reputational gains are produced in an interaction with one party but enjoyed against another. Party A may lose a particular lawsuit against Party B concerning a low-stakes issue, but the reputational gain from that lawsuit (through signaling or framing) is the real benefit that Party A gains, assuming its reputational change allows it to extract something of value from Party C in the future. Finally, interinstitutional gains occur when the benefits are created on one playing field but enjoyed on another. For example, the parties may battle it out in a lawsuit but feel the real consequences in public opinion or at the negotiating table. While distinct, these gains often overlap.

This insight is both familiar and new. Approximately two hundred years ago, Jeremy Bentham explained, "Under 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."¹⁵ Bentham defined

13. Kishanthi Parella, *Reputational Regulation*, 67 DUKE L.J. 907, 910 (2018) ("[L]itigation releases information about organizational conduct into the public domain.").

14. See Ganco et al., *supra* note 3, at 660 ("[P]atent enforcement [is] a reputation-building strategy rather than a particular tactic launched against a particular target: by engaging in costly and observable litigious action, firms build reputations for being tough in safeguarding their intellectual property (IP)."); Paul Milgrom & John Roberts, *Predation, Reputation, and Entry Deterrence*, 27 J. ECON. THEORY 280, 281 (1982) (explaining how predation against the first new entrant by the incumbent firm builds its reputation as a predator that may discourage other new entrants in the future); Hovenkamp, *supra* note 5 (manuscript at 3).

15. JEREMY BENTHAM, *Publicity in Courts of Justice*, in BETHAMIANA: OR SELECT EXTRACTS FROM THE WORKS OF JEREMY BENTHAM 139 (John Hill Burton ed., 1844).

public opinion as a “system of law, emanating from the body of the people.”¹⁶ Like its judicial counterpart, the court of public opinion also judges individuals and organizations for their acts and provides penalties or awards based on those judgments.¹⁷ Unlike law courts, however, its enforcement is purely reputational: it levies reputational losses on those judged harshly and bestows reputational gains on those judged well.¹⁸ While separate, activities in one court can still influence outcomes in the other.¹⁹

16. *Id.* at 48; see also Robert C. Post, *Data Privacy and Dignitary Privacy: Google Spain, the Right to Be Forgotten, and the Construction of the Public Sphere*, 67 DUKE L.J. 981, 1018–19 (2018):

A “public” is a specific kind of social organization that arises within the “public sphere” by uniting strangers through common exposure to common texts. . . . [T]he people who comprise publics do not meet in the public street or in the public square, but instead “are all sitting in their own homes scattered over a vast territory, reading the same newspaper.”

(quoting JOHN B. THOMPSON, *THE MEDIA AND MODERNITY: A SOCIAL THEORY OF THE MEDIA* 126–27 (1995)); *id.* at 1023 (“Reading newspapers brought the masses into the circle of conversation that produced public opinion . . .”).

17. Fred Cutler, *Jeremy Bentham and the Public Opinion Tribunal*, 63 PUB. OPINION Q. 321, 328 (1999).

18. See *id.* Much of Bentham’s discussion of public opinion is devoted to its role in checking abuses of political power. *Id.* at 322. However, the “Public Opinion Tribunal” has broader jurisdiction and this Article examines its effects on reputational judgments of private as opposed to public actors.

19. See Tamar Frankel, *Court of Law and Court of Public Opinion: Symbiotic Regulation of the Corporate Management Duty of Care*, 3 N.Y.U. J.L. & BUS. 353, 361 (2007) (“[T]his restatement of the law is addressed to the media and the public as well. It influences, if not guides them, to the final judgment. It points to the Court of Public Opinion.”). 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) (“Contrary to the common assumption, law and reputation are not independent of each other, but rather complement each other. The legal system’s reaction to misbehavior affects the market reaction.” (footnote omitted)). 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 for the conduct of participants in the courts of the law. According to Jeremy Bentham, publicity encourages witnesses to be truthful in their courtroom testimony. BENTHAM, *supra* note 15, at 115 (“Envionred 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.”); see also Adriaan Lanni, *Publicity and the Courts of Classical Athens*, 24 YALE J.L. & HUMAN. 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. See BENTHAM, *supra* note 15, at 115 (“[Publicity] keeps the judge himself, while trying, under trial.”); see also 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); Judith Resnik, *Bring Back Bentham: “Open Courts,” “Terror Trials,” and Public Sphere(s)*, 5 LAW & ETHICS HUM. RTS. 1, 15–24 (2011) (explaining how Bentham thought publicity facilitated accountability). 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*, at 52; see also Lobel, *supra* note 8, at 487–89 (“[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

For decades, public interest lawyers heeded Bentham's insight by harnessing the publicity effects of litigation to pressure powerful social actors to change.²⁰ But this exposition of public relations litigation leads to an incomplete picture of the phenomena because it generally focuses on plaintiffs litigating for primarily public benefit. Society is therefore more likely to perceive public relations litigation as socially beneficial. What is missing—and what this Article offers—is a better understanding of how these strategies are employed at the other

the media. . . . Often, litigation attracts the media's attention in a way that nothing else does." (footnote omitted) (quoting MICHAEL McCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 58 (1994)). Bentham acknowledges that exercise of the Public Opinion Tribunal's functions is dependent on news media:

They are the real force by which information—including reports of government activities, proceedings of the legislature, and opinions ("suffrages") of the people—is collected, sifted through, and publicized in an accessible form. . . . The claimant and accused provide statements, correspondents to the editor provide evidence as witnesses, and then the editor essentially writes an editorial on the subject. After this debate-trial has run its course, the judgment of public opinion is converted into action, but only indirectly

Cutler, *supra* note 17, at 330–31.

20. See, e.g., JOEL F. 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 settlement); Emily Chiang, *Institutional Reform Shaming*, 120 PENN. ST. L. REV. 53, 59–61 (2015) (describing similar strategies); Lobel, *supra* note 8, 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).

One notable historical example is the Scopes Trial. See Perry Parks, *Summer for the Scientists? The Scopes Trial and the Pedagogy of Journalism*, 92 JOURNALISM MASS COMM. Q. 444, 444–45 (2015) (examining how the press contributed to educating the public about evolution during the Scopes Trial). The trial was also important because 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 using 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.*

For contemporary examples, consider *Colorado River Ecosystem v. Colorado*, in which the plaintiff, the Colorado River Ecosystem, 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." Amended Complaint For Declaratory & Injunctive Relief at 3, *Colo. River Ecosystem v. Colorado*, No.1:17-cv-02316 (D. Colo. dismissed Dec. 4, 2017), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2017/201711106_docket-117-cv-02316_complaint.pdf [<https://perma.cc/U8RP-BGTD>].

Similarly, *Naruto v. Slater* (the "Monkey Selfie" case), concerned whether nonhumans (such as monkeys) could have intellectual property rights under the law. 888 F.3d 418 (9th Cir. 2018). According to People for the Ethical Treatment of Animals ("PETA"), this case was important because it "sparked a massive international discussion about the need to extend fundamental rights to animals for their own sake—not in relation to the ways in which they can be exploited by humans." Zachary Toliver, *Settlement Reached: 'Monkey Selfie' Case Broke New Ground for Animal Rights*, PETA (Sept. 11, 2017), <https://www.peta.org/blog/settlement-reached-monkey-selfie-case-broke-new-ground-animal-rights> [<https://perma.cc/8W52-BU9C>].

end of the spectrum: for-profit parties using the litigation stage for primarily private benefits. These parties are two sides of the same coin; both types use litigation as a stage to reach particular audiences, albeit different ones.

This Article offers a framework for understanding how litigation can help manage reputation in yet another arena for public relations: *post-crisis situations* that occur in the wake of a financial scandal, data breach, product accident, or other reputational crisis. Litigation often occurs in such situations, but it responds not only to the actual injuries that such incidents may cause but also to the information vacuum these incidents create and the reputational consequences that result if the vacuum is allowed to grow.²¹ This Article offers a framework for understanding when we might expect to witness the reputational effects of post-crisis litigation. It explains that reputational effects depend on both proximity and organizational similarity between the parties. Depending on these factors, post-crisis litigation can help businesses “in the hot seat” achieve both economic *and* reputational objectives.

The framework that this Article offers has descriptive, practical, and normative implications. Descriptively, it helps to better understand litigant benefits that flow from lawsuits. The public generally assumes that parties initiate litigation to receive rewards—usually financial—from a court in response to a legal harm incurred.²² Litigant conduct becomes more difficult to explain in cases when parties are unlikely to win.²³ This Article explains how the court of public opinion matters for understanding litigant behavior and how ignoring it results in an incomplete picture of litigation.

Practically, this analysis illustrates the disparity in timing between the filing of reputational lawsuits and the law’s tools for

21. See Craig Deegan, *The Legitimising Effect of Social and Environmental Disclosures—A Theoretical Foundation*, 15 ACCT., AUDITING & ACCOUNTABILITY J. 282, 296 (2002) (discussing the strategic use of information disclosure by corporations in the wake of crises to reestablish 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.”).

22. See Robert G. Bone, *Economics of Civil Procedure*, in 3 OXFORD HANDBOOK OF LAW AND ECONOMICS 148 (Francesco Parisi ed., 2017) (“In this model, parties make litigation choices that maximize their expected value.”).

23. See, e.g., Lucian A. Bebchuk & Alon Klement, *Negative-Expected-Value Suits*, in PROCEDURAL LAW AND ECONOMICS 341 (Chris Sanchirico ed., 2d ed. 2012) (outlining potential theories as to why litigants pursue suits that they will likely lose); D. Rosenberg & S. Shavell, *A Model in Which Suits Are Brought for Their Nuisance Value*, 5 INT’L REV. L. & ECON. 3 (1985).

dismissing them (or otherwise discouraging them). Many business litigants hit their reputational mark upon filing the lawsuit; dismissals do not undermine that reputational victory. While a dismissal can protect a defendant from a frivolous lawsuit in a court of law, it does not similarly protect the defendant from harm in the court of public opinion. This insight is important because strategies designed to reduce unwanted lawsuits will fail if they do not account for litigant incentives that originate from public opinion. Normatively, this Article challenges us to consider the relationship between the “two courts” of law and public opinion and encourages us to identify the reputational dimensions of everyday litigation.

Part I explains how reputation provides the value in a lawsuit and illustrates this explanation with various examples where corporate plaintiffs benefit from the reputational effects of litigation. Part II builds on these examples with an in-depth study of how post-crisis litigation can address reputational damage for business litigants. This Part first provides a theoretical framework for understanding when reputational effects should be expected and then introduces two illustrative examples that demonstrate this framework. Part III investigates three reasons why litigation creates reputational effects: relationship to media, information environments, and aggregation. Finally, Part IV explores the types of reputational gains that litigation can produce and the limitations of current legal rules for discouraging public relations litigation deemed socially undesirable.

I. REPUTATION BUILDING THROUGH LITIGATION: SIGNALING

Assuming that businesses act rationally, we can expect them to engage in litigation when they obtain, or expect to obtain, positive value from a lawsuit.²⁴ Because this discussion focuses on business parties, this value is understood as financial gain—although individual plaintiffs do file lawsuits for a variety of nonfinancial reasons.²⁵ If this

24. Bone, *supra* note 22, at 148. One explanation for where this value originates is settlements. *See, e.g.*, Bebhuk & Klement, *supra* note 23; William H.J. Hubbard, *Sinking Costs to Force or Deter Settlement*, 32 J.L. ECON. & ORG. 545, 548–53 (2016); Rosenberg & Shavell, *supra* note 23.

25. *See, e.g.*, Scott Hershovitz, *Tort as a Substitute for Revenge*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 98 (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.”); Larissa Katz, *Spite and Extortion: A Jurisdictional Principle of Abuse of Property Right*, 122 YALE L.J. 1444, 1456–59 (2013) (surveying cases that were motivated by animus); *see also* Daniel B. Kelly, *Strategic Spillovers*, 111 COLUM. L. REV. 1641, 1644 (2011) (describing “strategic spillovers” as situations where “parties . . . employ externalities opportunistically as a type of extortion”).

financial gain does not come from the courtroom, then it must come from outside of it.

This Part explains how reputational effects may provide the missing value in a lawsuit that otherwise appears to lack it.²⁶ When business litigants do not obtain financial benefits from a judicial remedy or settlement, they may still obtain important reputational gains through the publicity around a lawsuit. These reputational gains can lead to indirect financial benefits for a business litigant by affecting its competitiveness in the marketplace. Specifically, information from litigation can reach particular audiences that are important to a corporation's success: employees, competitors, consumers, civil society, investors, and future contracting partners. These lawsuits have the potential to influence the reputation of the business litigant in the eyes of these actors, thereby affecting their decisions to interact with the business. It is these reputational effects—and the financial benefits that may result—that supply the otherwise absent positive value to some puzzling lawsuits. This Part begins with a brief introduction to corporate reputation and then provides examples of how different types of lawsuits can help business litigants, particularly plaintiffs, achieve reputational gains even if they lose in court.

A. Reputation as a Strategic Asset

According to reputation expert Charles Fombrun, a “corporate reputation is a perceptual representation of a company’s past actions and future prospects that describe the firm’s overall appeal to all of its key constituents when compared with leading rivals.”²⁷ A corporation’s key constituents include not only consumers but also investors, employees, and communities.²⁸ A corporation can rise or fall based on

26. See Hovenkamp, *supra* note 5 (manuscript at 1–5) (describing how the reputational effects of predatory patent litigation compensate for an otherwise unprofitable lawsuit).

27. CHARLES J. FOMBRUN, REPUTATION: REALIZING VALUE FROM THE CORPORATE IMAGE 72 (1996); see also David L. Deephouse, *Media Reputation as a Strategic Resource: An Integration of Mass Communication and Resource-Based Theories*, 26 J. MGMT. 1091, 1093 (2000) (“A firm’s reputation is produced by the interactions of the firm with its stakeholders and by information about the firm and its actions circulated among stakeholders, including specialized information intermediaries.”); Yuri Mishina, Emily S. Block & Michael J. Mannor, *The Path Dependence of Organizational Reputation: How Social Judgment Influences Assessments of Capability & Character*, 33 STRAT. MGMT. J. 459, 460 (2012) (“Organizational reputation is defined as the collective, stakeholder group-specific assessment regarding an organization’s capability to create value based on its characteristics and qualities.” (citations omitted)); Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691, 693–95 (1986) (discussing reputation as property).

28. FOMBRUN, *supra* note 27, at 61.

what these different actors think of it.²⁹ This is because these actors provide a corporation with something it needs in order to succeed: consumers provide revenue, investors provide capital, employees provide talent, and communities provide the social license to operate. A corporate reputation influences these actors' decisions to provide or withhold their resources; therefore, reputation has important competitive consequences.

Corporate reputations are important to consumers because a reputation might be the only information a consumer has about a corporation before the consumer purchases a good or service from it.³⁰ Prospective employees also care about corporate reputations because they want to know whether a corporate employer will treat them well and reward their work.³¹ Prospective suppliers care about whether a corporation will fulfill its contractual obligations in good faith.³² And corporations depend on relationships with local communities and government actors.³³

While reputations are important, they are not self-created; a reputation is a product of what *others* think.³⁴ A person or corporation

29. *Id.* at 81 (“Corporate reputations have bottom-line effects. A good reputation enhances profitability because it attracts customers to the company’s products, investors to its securities, and employees to its jobs. In turn, esteem inflates the price at which a public company’s securities trade.”).

30. Michael L. Barnett & Andrew J. Hoffman, *Beyond Corporate Reputation: Managing Reputational Interdependence*, 11 CORP. REPUTATION REV. 1, 4 (2008); Morten Thanning Vendelø, *Narrating Corporate Reputation: Becoming Legitimate Through Storytelling*, 28 INT’L STUD. MGMT. & ORG. 120, 120 (1998); *see also* Hess & Dunfee, *supra* note 21, at 17 (explaining information asymmetries between firms and stakeholders).

31. *See* John Dodge, *The War for Tech Talent Escalates*, BOS. GLOBE (Feb. 19, 2016), <https://www.bostonglobe.com/business/2016/02/19/the-war-for-tech-talent-escalates/ejUSbuPCjPLCMRYRZIKoJ/story.html> [<https://perma.cc/2U5A-88P2>] (describing the fierce competition for software engineers and other employees in Massachusetts’s tech industry).

32. Lisa Bernstein, *Beyond Relational Contracts: Social Capital and Network Governance in Procurement Contracts*, 7 J. LEGAL ANALYSIS 561, 606 (2015) (“[E]ven firms as powerful as Apple are deeply concerned about their reputation for treating suppliers fairly.”).

33. *See, e.g.*, Nicholas Bariyo & Jacquie McNish, *Tanzania’s Tougher Mining Laws Rattle Companies*, WALL ST. J. (Aug. 2, 2017), <https://www.wsj.com/articles/tanzanias-tougher-mining-laws-rattles-companies-1501666200> [<https://perma.cc/C2YV-KSEA>] (reporting that mining companies in Tanzania confront increasing pressure from the government, 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), <https://oilprice.com/Latest-Energy-News/World-News/Nigerian-Protesters-Storm-Shell-Crude-Oil-Flow-Station.html> [<https://perma.cc/Q9KS-XBJ8>] (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[,] and claim[ing] that they were not benefiting from the oil-rich resources in the restive area”).

34. FOMBRUN, *supra* note 27, at 59; E. Geoffrey Love & Matthew Kraatz, *Character, Conformity, or the Bottom Line? How and Why Downsizing Affected Corporate Reputation*, 52 ACAD. MGMT. J. 314, 314 (2009) (“Corporate reputation is an important asset (or liability) bestowed

can influence its own reputation but cannot author it.³⁵ Instead, a corporation shapes its reputation by affecting the views of others concerning itself.

B. Discouraging Rivals: Signals to New Entrants

Paul Milgrom and John Roberts investigated the threat of predation by incumbent firms against new entrants and explained that predation is profitable even if it does not result in immediate exit by a rival because acts of predation provide an incumbent with a reputation for predation that can discourage entry into the market by new firms.³⁶ It is this reputation that is valuable because it “leads potential entrants to anticipate that the incumbent firm will behave similarly if they should enter, and, thus, entry appears less attractive to them.”³⁷ Potential entrants rely on an incumbent’s reputation for predation when evaluating entry because they suffer from information asymmetries and are “unsure about one another’s options or motivation.”³⁸ Therefore, new entrants predict future behavior on the basis of past conduct;³⁹ an observable record of predation by the market incumbent against previous entrants suggests to new entrants that they would encounter a similar response.

Milgrom and Roberts’s explanation of reputation building through signaling is useful for understanding certain litigation strategies that similarly depend on reputational effects. For example, a plaintiff corporation may use a lawsuit to discourage competition from a market rival. In 2015, Gillette brought a lawsuit against four former employees who Gillette claimed had misappropriated its trade secrets to develop products for ShaveLogic (also a defendant).⁴⁰ In response,

upon a firm by external audiences.” (citation omitted)); Stelios Zyglidopoulos & Nelson Phillips, *Responding to Reputational Crises: A Stakeholder Perspective*, 2 CORP. REPUTATION REV. 333, 335 (1999) (“Reputation is, therefore, fundamentally a stakeholder-based concept; it grows out of a stakeholder relationship and it is shaped, if not determined, by that relationship.”); see also Post, *supra* note 27, at 692 (“The dictionary describes [reputation] as the ‘common or general estimate of a person with respect to character or other qualities.’ Reputation thus inheres in the social apprehension that we have of each other.” (footnote omitted)).

35. See, e.g., Parella, *supra* note 13, at 930–55 (discussing reputational sanctions for organizational defendants).

36. Milgrom & Roberts, *supra* note 14, at 281, 284.

37. *Id.* at 281 (“[P]redation will emerge in our model even if . . . predation against a particular rival involves losses that cannot be directly recouped in the given market, even were exit to be induced. Moreover, viability of this predatory strategy does not depend on being able to induce exit.”).

38. *Id.* at 304.

39. *Id.* at 302.

40. Complaint at 1, *Gillette Co. v. Provost*, No. 15-0149 B, 2015 WL 9911345 (Mass. Super. Ct. Jan. 16, 2015), 2015 WL 216997.

ShaveLogic counterclaimed for intentional interference with prospective business relations, alleging that Gillette had threatened to file a lawsuit against ShaveLogic and did so knowing that the latter would have to disclose the fact of the lawsuit to its investors and future business partners.⁴¹ The counterclaim alleged that the fact of a lawsuit would affect these actors' perceptions of ShaveLogic and influence their decision to collaborate with it.⁴² And ShaveLogic is not alone. The *Wall Street Journal* reported that "[t]he case is one of several Gillette has brought against rival razor companies as the brand cedes market share to upstarts offering cheaper blades and online delivery," such as Dollar Shave Club and Edgewell (Schick-brand razors).⁴³ Gillette asserted patent infringement claims against both competitors, who denied the allegations but later settled.⁴⁴

As the foregoing illustrates, businesses may engage in reputation building through signaling to reach audiences other than rivals. Litigation can serve reputation-building functions when the act of litigating allows a litigant to influence third-party views of itself or of a rival. These changed views provide reputational benefits when they influence the ways that the litigant or rival interacts with key stakeholders.

C. Employees: Discouraging Flight by Employees

Corporations also use litigation, frequently patent enforcement, to influence their reputations in a way that discourages employees from fleeing to competitors or starting their own businesses. A major component of a corporation's competitive advantage is its employees, who bring valued skills and expertise to the corporation's operations.⁴⁵ The problem is that such employees may leave. Exit is a double loss to a corporation: a departing employee reduces the skill and knowledge

41. *Gillette Co.*, 2015 WL 9911345, at *1.

42. In its counterclaim against Gillette, ShaveLogic alleged that Gillette sent letters threatening litigation when it "knew that ShaveLogic was in discussion with marketing and distribution partners and with potential investors, and would have to disclose those threats as part of their discussions." *Id.* ShaveLogic alleged that one marketing and distribution company "cut off discussions in November 2014 as soon as it learned of these litigation threats" and that "[a]t least one investor broke off discussions with ShaveLogic when these threats became known." *Id.* at *3-4.

43. Sharon Terlep, *Gillette's Lawsuit Against Razor Startup ShaveLogic Dismissed*, WALL ST. J. (Apr. 21, 2017), <https://www.wsj.com/articles/gillettes-lawsuit-against-razor-startup-shavelogic-dismissed-1492803768> [<https://perma.cc/DJ2F-G9UC>].

44. *Id.*; Barrett J. Brunsman, *P&G Settles Lawsuit with Unilever's Dollar Shave Club*, CINN. BUS. COURIER (Mar. 29, 2019), <https://www.bizjournals.com/cincinnati/news/2019/03/29/p-g-settles-lawsuit-with-unilever-s-dollar-shave.html> [<https://perma.cc/2YET-FYGG>].

45. Ganco et al., *supra* note 3, at 659.

available to the business and the employee may bring it to a rival, thereby augmenting a competitor's capacities. For example, as mentioned above, four former Gillette employees joined a competitor, ShaveLogic.

In this context, management research suggests that some corporations cultivate a strong reputation for patent enforcement in order to retain high-value employees: “[B]y engaging in costly and observable litigious action, firms build reputations for being tough in safeguarding their intellectual property,” thereby reducing the value that employees expect to gain upon departure.⁴⁶ As such, the patent enforcement concerns more than the parties to the case.⁴⁷ This is especially true when the media, attracted to patent litigation, expands the audience for the litigation and the implicit messaging contained therein.⁴⁸ The expense of patent litigation and the accompanying media coverage make it a costly and observable action that differentiates aggressive and passive employers.⁴⁹ As a consequence, when “firms develop stronger reputations for litigiousness, employee-inventors become less likely to join or form rival companies.”⁵⁰

D. Investors and Civil Society: Responding to Online Defamation

In the age of social media, we are all subject to the risk of unflattering views. Corporations are no different. Yelp, TripAdvisor, Amazon, and other platforms allow users to provide public but often anonymous reviews of a business's performance; social media outlets, such as Facebook and Twitter, augment that power. With a few clicks (or taps, on a smartphone), an irate customer can publish negative comments, and the increasingly expansive social networks disseminate those comments to an increasingly expanding audience. Through these dynamics, a few clicks or taps can potentially threaten a business's closely cultivated reputation.

46. See *id.* at 660, 679 (observing that “an employer's aggressiveness in patent enforcement alters the antecedent proclivity of employees to exit”); see also Agarwal et al., *supra* note 4, at 1367 (“[A] firm's patent litigiousness significantly curtails the outward dissemination of technological knowledge that otherwise would be expected from employee departures.”).

47. Ganco et al., *supra* note 3, at 660 (“[W]e view patent enforcement as a reputation-building strategy rather than a particular tactic launched against a particular target.”).

48. *Id.* at 662.

49. *Id.*

50. *Id.* This strategy does not succeed with all employees. This same study found that “tough reputations are particularly influential in retaining employees whose ideas are valuable internally to the firm although those with the most lucrative prospects for outside advancement are relatively unaffected.” *Id.*

Litigation offers businesses one tool to manage their reputations in the wake of such public criticism.⁵¹ As part of a multifaceted public relations campaign, defamation lawsuits can aid corporate plaintiffs since “[c]orporations often issue press releases announcing their decision to sue those who post on financial bulletin boards, even though doing so gives more widespread publicity to the defendants’ remarks than they received at the time they were posted.”⁵² The “tendency to publicize the decision to file suit” is important for explaining why some defamation plaintiffs—who may never expect to win their cases—file suits nonetheless:

The plaintiffs do not appear to see the *result* of their lawsuit, alone, as providing relief to their reputation. They know that victory is unlikely, and that the final decision is likely in any event to be ambiguous and distant. Instead, plaintiffs see the act of initiating suit, independent of its result, as an effective and public form of reply or response. By invoking the formal judicial system, the plaintiffs legitimize their claim of falsity. Reputational repair follows without the assistance of—indeed in spite of—the judicial system.⁵³

While this insight may be true for a broader range of defamation plaintiffs, the symbolic value of filing a defamation lawsuit is especially important to corporate plaintiffs who are sensitive to negative publicity that may affect their stock prices.⁵⁴ As a result, “corporations must act quickly to offset the potentially negative effects of defamatory messages by offering an alternative version of events. Indeed, failure to respond may itself be deemed an admission that the negative statements are true.”⁵⁵ As such, the existence of the lawsuit sends a message to a variety of audiences: investors (suggesting that the corporation is strong and stable, despite the reputational backlash), the public (refuting the defamatory comments), and even potential future critics (sending a warning by filing the lawsuit).⁵⁶ The scholarship on

51. See Jessica Bartlett, *Craft Beer Cellar Parent Sues Glassdoor over Negative Reviews*, BOS. BUS. J. (May 22, 2018), <https://www.bizjournals.com/boston/news/2018/05/22/craft-beer-cellar-parent-sues-glassdoor-over.html> [<https://perma.cc/GLV5-52KZ>] (“A craft beer retail chain is suing the employment website Glassdoor over negative comments and ratings on the site that the retail chain claims are defamatory.”); Beth Landman & Julia Marsh, *Woman Hit with Defamation Lawsuit by Doctor over Negative Yelp Review*, FOX NEWS (May 29, 2018), <https://www.foxnews.com/health/woman-hit-with-defamation-lawsuit-by-doctor-over-negative-yelp-review> [<https://perma.cc/J67Q-HTR5>] (“A Manhattan woman who gave one-star reviews on Yelp and ZocDoc to a Kips Bay gynecologist has spent nearly \$20,000 defending herself against a defamation suit filed by the physician . . .”).

52. Lidsky, *supra* note 7, at 876–77 (footnote omitted).

53. Bezanson, *supra* note 7, at 228.

54. See Lidsky, *supra* note 7, at 877 (“Corporate plaintiffs are at least partly motivated by the fear that negative statements on financial bulletin boards will drive down their stock price.”); Norman Redlich, *The Publicly Held Corporation as Defamation Plaintiff*, 39 ST. LOUIS U. L.J. 1167, 1168–69 (1995) (identifying various costs to corporations as a result of defamation).

55. Lidsky, *supra* note 7, at 877 (footnote omitted).

56. See *id.* at 880–81:

defamation suggests that these messages are still salient even if the prospects for litigation success are slim.⁵⁷

E. Future Licensees: Sending a Message

Finally, litigation can affect a business's reputation with future licensees. In the patent context, PAEs file patent infringement lawsuits even over "bad patents" that "are likely invalid and ought not to have been granted in the first place."⁵⁸ These plaintiffs sue, despite the very low likelihood that they will profit from the lawsuit, in order to develop a reputation for litigiousness.⁵⁹ This reputation matters because the targeted company's decision to acquiesce to the PAE's demands is influenced by the latter's reputation to make good on its litigation threats, which the targeted company could observe from the PAE's past litigation history.⁶⁰ Therefore, developing a reputation for litigiousness is important to PAEs because it allows them to financially benefit from patents that may otherwise have been difficult or impossible to license.⁶¹ This strategy also alters the incentives a lawsuit offers a PAE; what is at stake in the lawsuit is not necessarily the merits of the dispute but the PAE's reputation for litigiousness, because other

Bringing suit sends a message to shareholders and potential investors that they should not believe all the negative information they hear about the company; it quells rumors and takes the focus away from the negative press the company has been receiving—whether true or untrue. Even if the company ultimately decides not to pursue its action past filing a complaint, it may have won a symbolic victory simply by suing John Doe.

57. See Bezanson, *supra* note 7, at 228–29 (explaining that "the act of suit" sends out messages, regardless of the result of a lawsuit).

58. Hovenkamp, *supra* note 5 (manuscript at 2).

59. See *id.* (manuscript at 2–3) ("Despite being very experienced in patent litigation, many of the most litigious PAEs perform relatively poorly in court."); *id.* (manuscript at 4) ("[S]ome of the most litigious PAEs are not dissuaded by the likelihood of losing or the possibility that their patents will be held invalid."); *id.* (manuscript at 5) ("The PAE gains a strong reputation for aggressive litigation by following through on a litigation threat despite expecting to lose money on the suit.").

60. See *id.* (manuscript at 3):

They can give credibility to their threats by referencing previous situations in which they have litigated, and their targets can search through public records to discern how aggressively the PAE has litigated in the past. If the infringement claim is strong, then the PAE's threat would be inherently credible. But if its patents are weak, it relies on evidence of aggressive litigation to give credibility to its threats. Once such credibility is established, the PAE can persuade its targets to accept demands they would otherwise reject.

61. *Id.* (manuscript at 2) ("Despite their legal expertise and substantial resources, some of the most active and litigious PAEs make their way by asserting bad patents, i.e. patents that are likely invalid and ought not to have been granted in the first place.").

potential defendants observe this reputation of a propensity to litigate and react by acquiescing to the PAE's licensing terms.⁶²

* * *

The discussion above highlights three distinct lessons for understanding how business litigants, especially plaintiffs, derive value from litigation that may not succeed in court. First, the publicity around litigation can have reputation-enhancing effects for business litigants. Second, the audience for these reputational effects is not necessarily the opposing party in the lawsuit; instead, it can be a third-party actor, such as an investor, employee, or future contracting partner. The fact of the lawsuit and a business's litigiousness are the messages that are directed at these audiences. Finally, these reputational effects can have real consequences for a business's competitiveness in the marketplace by affecting its ability to retain employees, discourage competition, and assuage investors. It is these effects—and the financial benefits that may result from these effects—that help to explain the positive value of lawsuits that may otherwise fail in court. These effects and their reputational consequences are summarized in Table 1.

TABLE 1: THE REPUTATIONAL EFFECTS OF BUSINESS LITIGATION

Causes of Action	Defendant	Third-Party Audience	Reputational Effect	Competitive Effect
Unfair Trade Practices	New entrant	New entrant's potential business partners	Discourages partnership with new entrant	Impedes ability of new entrant to compete
Patent litigation	Former employees	Current employees	Reduces employees' expected value upon departure	Discourages employee flight
Defamation	"John Doe"	Investors and future critics	Legitimizes claim of falsity	Assuages investors and warns future critics
Patent infringement	Alleged infringers	Future licensees	PAE will litigate	Monetizes "bad patents"

62. *Id.* (manuscript at 2–3).

II. REPUTATION BUILDING THROUGH LITIGATION: FRAMING

The previous Part described how reputational gains provide value to business litigants even when those parties lose in court. This Part builds on this framework by explaining how litigation supplies reputational benefits in post-crisis situations. It is not surprising that litigation often follows in the wake of a corporate scandal; in some situations, however, lawsuits respond not only to economic harms but also to reputational problems. Section II.A provides a brief discussion of reputational harm following a crisis and the role of information in addressing it. Section II.B proposes a framework for understanding when we can expect particular reputational effects in post-crisis litigation. Section II.C then presents examples illustrating this framework.

A. Information: Cause and Cure for Reputational Harm

A good reputation is valuable but not permanent. Reputations change as consumers and other actors revise their opinions of a corporation based on new information.⁶³ Unsurprisingly, reputations can plummet following a corporate scandal.⁶⁴

A crisis not only threatens the reputation of the corporation in crisis but can also threaten the reputation of its associates and peers because of a fundamental information problem: Following a corporate crisis, the public wants someone to blame. The problem is that it is not always clear who that party is. The public is not privy to the internal records, confidential communications, high-level meetings, or other sources of information that could reveal the identity of the blameworthy party. Therefore, the public tends to blame all parties involved.⁶⁵

63. See FOMBRUN, *supra* note 27, at 59–61 (noting the difficulty that companies have in creating “enuring and resilient” reputations); Laura A. Heymann, *The Law of Reputation and the Interest of the Audience*, 52 B.C. L. REV. 1341, 1424 (2011) (“Reputational harm occurs when dissemination of information about an individual or entity causes others to form a collective judgment that has the potential to result in a change in relationship or attitude.”).

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

65. See Michael L. Barnett, *Finding a Working Balance Between Competitive and Communal Strategies*, 43 J. MGMT. STUD. 1753, 1763 (2006) (“A single act by a single firm can spark a constituent mobilization that destabilizes the taken-for-granted status of an entire industry.”); Michael L. Barnett & Andrew A. King, *Good Fences Make Good Neighbors: A Longitudinal Analysis of an Industry Self-Regulatory Institution*, 51 ACAD. MGMT. J. 1150, 1152 (2008) (“[W]hen new information is revealed about the characteristics of one firm, it reflects to some degree on all firms within its industry.”); Sheila Goins & Thomas S. Gruca, *Understanding Competitive and Contagion Effects of Layoff Announcements*, 11 CORP. REPUTATION REV. 12, 30 (2008) (“[I]nformation from the actions of one firm sends signals that shareholders incorporate into their

Consider the recent example of Facebook and Cambridge Analytica. In 2018, the public learned that Cambridge Analytica obtained access to private information for more than fifty million Facebook users.⁶⁶ Uproar ensued as users, regulators, and citizens demanded to know what had happened and who was responsible.⁶⁷ But placing blame was not simple given that three actors were involved: the data was accessed by Cambridge Analytica; the application was developed by a Cambridge University professor, Aleksandr Kogan; and the information was collected from Facebook.⁶⁸ Each denied wrongdoing and blamed the others. However, this scandal engulfed all three actors and levied significant reputational consequences against each.⁶⁹

Reputational harm can also spread to industry peers. In these instances, reputational harm does not spread based on proximity or contacts but on perceived organizational similarity. Industry peers may potentially suffer reputational harm as the public wonders whether the behavior underlying the crisis is an isolated incident or reveals broader

valuations of other companies.”); Roy Shapira, *A Reputational Theory of Corporate Law*, 26 STAN. L. & POL’Y REV. 1, 8 (2015) (“[S]takeholders are asymmetrically informed about the inner workings of the company.”); Yu & Lester, *supra* note 64, at 94–95 (explaining “reputational spill-over”); Lori Qingyuan Yue & Paul Ingram, *Industry Self-Regulation as a Solution to the Reputation Commons Problem*, in THE OXFORD HANDBOOK OF CORPORATE REPUTATION 279 (Michael L. Barnett & Timothy G. Pollock eds., 2012) (“[R]eputations are ‘intangible commons’ because organizations share both the penalties and rewards associated with the reputation of their industries.”).

66. Issie Lapowsky, *Facebook Exposed 87 Million Users to Cambridge Analytica*, WIRED (Apr. 4, 2018), <https://www.wired.com/story/facebook-exposed-87-million-users-to-cambridge-analytica> [<https://perma.cc/P4EM-SG8B>].

67. Tony Romm & Elizabeth Dwoskin, *U.S. Regulators Have Met To Discuss Imposing a Record-setting Fine Against Facebook for Privacy Violations*, WASH. POST (Jan. 18, 2019), <https://www.washingtonpost.com/technology/2019/01/18/us-regulators-have-met-discuss-imposing-record-setting-fine-against-facebook-some-its-privacy-violations> [<https://perma.cc/3MBR-TGXP>].

68. Lesley Stahl, *Aleksandr Kogan: The Link Between Cambridge Analytic and Facebook*, 60 MINUTES (Sept. 2, 2018), <https://www.cbsnews.com/news/aleksandr-kogan-the-link-between-cambridge-analytica-and-facebook-60-minutes/> [<https://perma.cc/AQ9L-TZFC>].

69. For example, Cambridge Analytica filed for bankruptcy following the crisis. Abinaya Vijayaraghavan & Supantha Mukherjee, *Cambridge Analytica Files for Bankruptcy in U.S. Following Facebook Debacle*, REUTERS (May 18, 2018), <https://www.reuters.com/article/us-cambridge-analytica-bankruptcy/cambridge-analytica-files-for-bankruptcy-in-u-s-following-facebook-debacle-idUSKCN1IJ0IS> [<https://perma.cc/6AB7-5XUJ>]. Mark Zuckerberg faced government hearings on both sides of the Atlantic, and Facebook is the subject of multiple lawsuits brought by investors, users, and state regulators. See Jeff John Roberts, *Facebook Has Been Hit By Dozens of Data Lawsuits. And This Could Be Just the Beginning*, FORTUNE (Apr. 30, 2018), <http://fortune.com/2018/04/30/facebook-data-lawsuits> [<https://perma.cc/5UJP-SBED>] (“Facebook is facing more than three dozen class action lawsuits over Cambridge Analytica.”); Vijayaraghavan & Mukherjee, *supra* (stating that both United States congressional committees and the European Parliament have requested that Mark Zuckerberg testify). Finally, Aleksandr Kogan claims that all these actors are using him as a scapegoat in the public eye. Matthew Weaver, *Facebook Scandal: I Am Being Used as Scapegoat*, GUARDIAN (Mar. 21, 2018), <https://www.theguardian.com/uk-news/2018/mar/21/facebook-row-i-am-being-used-as-scapegoat-says-academic-aleksandr-kogan-cambridge-analytica> [<https://perma.cc/PPP2-6UXY>].

problems within the industry.⁷⁰ In other words, is the company under scrutiny “the one bad apple in the basket,” or “is the whole basket rotten”?⁷¹

But information is not only a source of reputational harm, it is also a potential cure. Reputational harm spreads to multiple actors when the public lacks information concerning the facts of the crisis, such as what happened, why it happened, who was responsible, and whether it can happen again. Therefore, one way to contain reputational harm is to supply information concerning these questions, often through a press release.

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.”⁷² It is more likely that a journalist will pick up a press release when crisis managers draft their releases to meet the formal requirements of news reporting.⁷³ For example, authors of press

70. See Barnett & Hoffman, *supra* note 30, at 4 (emphasizing that a firm’s reputation depends on the actions and reputations of other firms); Yu & Lester, *supra* note 64, 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.”).

71. The Cambridge-Facebook scandal also illustrates the risk of reputational harm between industry peers, especially regulatory reputational risk. For example, the Senate Judiciary Committee not only invited Facebook CEO Mark Zuckerberg to testify, it also extended invitations to the CEOs of Twitter and Google. See Press Release, Office of Senator Chuck Grassley, Chairman Grassley Announces Hearing on the Future of Data Privacy in Social Media (Mar. 26, 2018), <https://www.grassley.senate.gov/news/news-releases/chairman-grassley-announces-hearing-future-data-privacy-social-media> [<https://perma.cc/5B8E-6689>]. Not only were industry peers dragged into the spotlight concerning their own practices but they also share the risk that this crisis could spark future regulation on data privacy. Christopher Mims, *Apple, Amazon and Google Also Are Bracing for Privacy Regulations*, WALL ST. J. (Apr. 8, 2018), <https://www.wsj.com/articles/apple-amazon-and-google-also-are-bracing-for-privacy-regulations-1523188801> [<https://perma.cc/W7YX-VGLV>] (“U.S. technology companies have stayed largely exempt from significant government regulation and self-policing of privacy, but that is about to change.”). Not all reputational damage is negative for peers. For example, Tim Cook used the crisis to distinguish Apple (its purpose, structure, and products) from Facebook and similar organizations: “The truth is we could make a ton of money if we monetized our customer, if our customer was our product. We’ve elected not to do that.” Ariana Brockington, *Apple’s Tim Cook Slams Facebook: Privacy Is a Human Right, ‘A Civil Liberty,’* VARIETY (Mar. 28, 2018), <https://variety.com/2018/digital/news/tim-cook-slams-facebook-privacy-1202738726> [<https://perma.cc/7FG4-PFA>]. By drawing attention to organizational differences between the two companies, Cook takes aim at Zuckerberg, Facebook, and other companies that “monetize” customers. See *id.*

72. Henk Pander Maat, *How Promotional Language in Press Releases Is Dealt with by Journalists: Genre Mixing or Genre Conflict?*, 44 J. BUS. COMM. 59, 60 (2007).

73. See GEERT JACOBS, *PREFORMULATING THE NEWS: AN ANALYSIS OF THE METAPRAGMATICS OF PRESS RELEASES* 122 (1999) (stating that press releases that meet the formal requirements of news reporting have a greater chance of being publicized by the media); Maat, *supra* note 72, 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.”).

releases avoid self-reference through the first person and adopt the third person in order to distance themselves from the information they provide.⁷⁴ This strategy is complete if and when a journalist picks up the press release because “news reports based on press releases avoid mentioning their primary source.”⁷⁵ Despite the appearance of objectivity, “organizations can be seen to smuggle in positive characterizations of their activities in seemingly innocuous third-person references.”⁷⁶ Employing strategies such as these improves not only the chances that a journalist will pick up the press release but also that the journalist will edit it only minimally. As a result, the crisis manager remains master of the narrative, supplying the information the manager prefers.⁷⁷

B. Framing Through Litigation

It is not only press releases that supply information to the public following a crisis. Post-crisis litigation addresses the economic harms that the parties suffered from the crisis and additionally helps address the information vacuum surrounding it—a vacuum that can threaten the reputation of the parties involved if it is allowed to grow. Litigation documents supply information that can help control reputational harm. Lawyers do not need to change their style of writing to increase traction with journalists; instead, the way lawyers write already improves the odds of traction. 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, and largely impersonal manner that disguises self-promotion. These characteristics accord with the “preformulation” techniques used by crisis managers when they draft press releases to improve the chances that a journalist will

74. See JACOBS, *supra* note 73, at 123 (claiming that authors of press releases use third-person to make the press releases “look disinterested and neutral rather than self-interested, promotional”). By using the third-person voice, “writers of press releases seem to anticipate the typical reference forms of news reporting and . . . in doing so, they allow journalists to simply copy the press releases.” *Id.* at 113. Additionally, the third-party voice disguises the source of the information and makes the information appear more credible and objective because it seems less self-promotional. *Id.* at 124 (“[W]riters of press releases indeed want to ‘hide their relationship to the information they provide’ . . .”).

75. Maat, *supra* note 72, at 61.

76. *Id.*

77. See JACOBS, *supra* note 73, at 113–14 (discussing preformulation).

pick up the release and copy it verbatim.⁷⁸ Additionally, litigation attracts media attention because litigation documents are more credible, provide context for events, and may provide sources that journalists may not otherwise obtain.⁷⁹

But just because litigation documents can create reputational benefits does not mean they always will. When might we expect to witness reputational framing in post-crisis litigation? One way to understand these effects is with reference to *proximity* and *organizational similarity*.

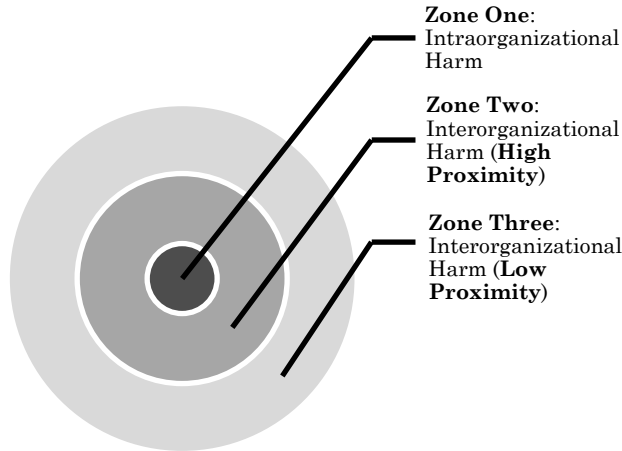
Figure 1 and the discussion that follows illustrate the effect these factors have on expected reputational benefits. The innermost zone presented in Figure 1 represents the focal corporation; here, the reputational harm is most acute. The outer zones represent possible patterns of reputational harm that can spread from the focal corporation to its associates or peers. Reputational harm dissipates with proximity, so lower levels of reputational harm would be expected in Zone Three (low proximity) compared to Zone Two (high proximity).⁸⁰

78. *Id.*

79. *See infra* notes 147–154 and accompanying text.

80. According to communications scholars, one of the most important factors influencing reputational harm is proximity to the focal organization. *See* Yu & Lester, *supra* note 64, at 95 (explaining that reputational harm is also affected by 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.” *Id.* 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.”). Stakeholders can still bundle two firms together even if those firms do not share direct contacts but instead share “structural equivalence” or “perceived similarity in their core attributes,” such as mission, similar organizational structure, or core technology. *Id.*

FIGURE 1: POST-CRISIS REPUTATIONAL EFFECTS



Zone One (Intraorganizational Harm). The corporation most at risk from a crisis is the focal corporation, or the “one in the hot seat.” Consider, for example, Acme Corporation, a company that makes high-tech widgets. Investigative journalism reveals that Acme Plant, a subsidiary of Acme Corporation, polluted local waterways with extreme levels of deadly toxins, leading to the deaths of dozens. The resulting reputational crisis is not limited to Acme Plant but attaches to the Acme name generally and in turn affects other units that also share the Acme name.

If Acme Corporation brings a lawsuit against one of its subsidiaries, it runs the risk of “reputational backfiring”: Acme Corporation and the Acme Plant in Missouri are not organizationally distinct enough to prevent the risk that any finger pointing at Acme Plant through litigation may cause reputational damage to Acme Corporation because the public cannot sufficiently distinguish between the two. This is the risk of organizational confusion. Therefore, while reputational risk is highest for the focal corporation, we may be less likely to witness public relations benefits of litigation in situations of intraorganizational reputational harm when the reputational harm of litigation can attach to both parties.

There is one exception: if a third-party actor has already initiated action (for example, investigation or litigation) against Acme Plant, then Acme Corporation may be more likely to benefit from the public relations effects of litigation because that third party has already publicly differentiated between the two. By instigating action against Acme Plant, the third party has opened the “black box” of Acme and

focused attention (including negative publicity) on the Acme subsidiary. Once this distinction has been made in the public mind, Acme Corporation may face less of a risk of organizational confusion if it engages in public relations litigation against Acme Plant.

Zone Two (Interorganizational Harm, High Proximity). A business located in Zone Two is one that is in high proximity to the focal corporation. Reputational risk to this business may not be as great as to the focal corporation, but the business may nonetheless suffer damaging reputational harm because of the focal corporation's crisis. Unlike the focal corporation, however, the proximate business may benefit from the public relations effects of litigation that poses a lower risk of organizational confusion because this business is organizationally distinct from the focal one. For example, suppose that Acme Plant makes widgets for a new line of self-driving cars manufactured by Auto Corporation. If the public learns of the connection, then the reputational fallout from the crisis involving Acme Plant can spread to Auto Corporation. However, Acme and Auto are organizationally distinct: they are separate companies, they do not share the same name, they make different products and compete in different markets, and they only have a buyer-supplier relationship. These organizational differences create space between the two corporations. While the supply relationship increases the risk of reputational harm spreading from one corporation to the other, the organizational differences between the two reduces the risk that reputational damage resulting from the lawsuit that is suffered by Acme will attach to Auto Corporation.

Zone Three (Interorganizational Harm, Low Proximity). Corporations in Zone Three are also organizationally distinct from the focal corporation, but with low proximity to the latter. As a result, the risk of reputational harm from the crisis is also low, so there is less likelihood that a corporation in this zone may benefit from reputational effects of public relations litigation.

In summary, we are more likely to witness reputational benefits for plaintiffs in post-crisis public relations litigation in Zone Two where the plaintiff corporation is at high risk for reputational harm but at low risk of organizational confusion. We may also expect similar reputational benefits for public relations litigation in Zone One when a third party has already initiated an investigation or litigation into one or more actors within the focal corporation.

C. Illustrative Examples

The previous Section provided a framework for understanding when we might expect to witness reputational benefits of post-crisis litigation for business litigants. This Section illustrates this framework with two recent examples. First, we may expect reputational benefits in litigation that occurs contemporaneously with a proxy fight.⁸¹ Here, litigation between management and shareholders supplies information to the media concerning each side, and this information, in turn, may influence shareholder perceptions and votes.⁸² Second, we may expect to see public relations effects in post-crisis litigation where two associated businesses are embroiled in a public relations crisis. Here, one side may use litigation to disseminate information to the media (and the public) regarding what happened, why it happened, and who was ultimately responsible. This information is significant in a crisis situation because it affects the extent of reputational damage a business may suffer in the wake of the crisis.

1. Zone One—Intraorganizational Reputational Harm: Public Relations in Proxy Fights

While reputations are important during proxy fights,⁸³ they are not given. Instead, reputations are constructed from the information available to a shareholder concerning each side. Consequently, each

81. See Steven Haas & Charles Brewer, *Dissident's Disclosure Lawsuit Leads to ISS Recommendation Change*, DEAL LAWYERS, Sept.-Oct. 2017, at 7, 7–8 (explaining how in a recent proxy fight, “dissident’s offensive disclosure litigation caused ISS to reevaluate—and ultimately withdraw—its support for the executive chairman,” thereby demonstrating “how a dissident can use offensive litigation strategically to bolster the dissident’s arguments and influence stockholders and proxy advisors”); T. Ray Guy, *The Trial of the Hidden Agenda: Part I*, A.B.A. CORP. COUNSEL (Feb. 8, 2012), https://www.weil.com/~media/files/pdfs/trial_hidden_agenda.pdf [<https://perma.cc/C555-PUX3>] (explaining the public relations effects of a lawsuit filed by a hedge fund in the Delaware Court of Chancery under Section 220, including (a) a lengthy demand letter replete with “lurid allegations” against the company that was publicized and filed as an attachment with the SEC, “where [it] could easily and immediately be accessed online and read by other voting stockholders,” and (b) the hedge fund’s attachment of its complaint to a press release it issued after filing the lawsuit).

82. See Guy, *supra* note 81 (“[A]llegations of corporate misconduct that were superfluous to a legitimate request for information were undeniably germane to an indirect communication to shareholders . . .”).

83. See *Proxy Contest*, BLACK’S LAW DICTIONARY 1241 (10th ed. 2014) (“A struggle between two corporate factions to obtain the votes of uncommitted shareholders.”); *Proxy Fight*, BARRON’S DICTIONARY OF FINANCE AND INVESTMENT TERMS 585 (9th ed. 2014) (“[A] technique used by an acquiring company to attempt to gain control of a takeover target. The acquirer tries to persuade shareholders of the target company that the present management of the firm should be ousted in favor of a slate of directors favorable to the acquirer.”).

side in a proxy fight will invest significant resources in influencing the information that shareholders receive about it and its opponent.⁸⁴

But not all information wars in proxy battles occur directly. Each side also influences its reputation (and the reputation of its opponent) through information it disseminates to intermediaries, such as the financial media, which in turn disseminate information to shareholders.⁸⁵ Lawsuits during a proxy fight between a company and activist investors also provide information that the financial and news media disseminate to the public in general and shareholders in particular.

For example, consider the litigation between Dov Charney and American Apparel's board of directors following the latter's termination of the former. In June 2014, the board suspended Charney from his positions as President and CEO, notifying him (and the public) that they intended to terminate him "for cause."⁸⁶ The lawsuits that followed the termination are important because the litigation documents provided information to the media that it used to develop and disseminate competing narratives explaining Charney's termination.⁸⁷

84. For example, in the largest proxy fight in U.S. history, Procter & Gamble and activist investor Nelson Peltz spent an estimated \$100 million collectively on "mailings, phone calls and advertisements to woo investors." Siddharth Cavale, *P&G Appoints Peltz to Board Despite Losing Proxy Battle*, REUTERS (Dec. 15, 2017), <https://www.reuters.com/article/us-procter-gamble-trian/pg-appoints-peltz-to-board-despite-losing-proxy-battle-idUSKBN1E92ZA> [<https://perma.cc/Q79D-NNE4>].

85. See Matthew W. Ragas, *Agenda Building During Activist Shareholder Campaigns*, 39 PUB. REL. REV. 219, 219 (2013) ("Investors turn to information intermediaries such as the financial news media to assist them in making investment decisions. Therefore, companies and their stakeholders, particularly activist shareholders, devote significant resources to trying to shape financial media coverage to their advantage." (citations omitted)); Kate Sylvester, *Trying to Reach Retail Holders in a Proxy Fight? Go Digital*, PROSEK (Nov. 6, 2017), <https://www.prosek.com/unboxed-thoughts/trying-to-reach-retail-holders-in-a-proxy-fight-go-digital> [<https://perma.cc/2FBX-8RLM>].

Just like in today's political campaigns, voters are not just being influenced by what they read in the papers and see on TV, but they're also influenced by what their friends share, tweet and like across social media channels. . . . Across the most high-profile proxy fights this past year, we've seen activists and targets both upping their game with integrated communications programs that combine traditional, digital and social tactics to reach individual holders across the country.

86. Press Release, American Apparel, American Apparel Board Suspends Dov Charney as CEO and Declares Intent to Terminate Him for Cause; Names John Luttrell as Interim CEO (June 18, 2014), <https://www.businesswire.com/news/home/20140618006665/en/American-Apparel-Board-Suspends-Dov-Charney-CEO> [<https://perma.cc/5379-L3BB>].

87. See, e.g., Samantha Masunaga, *In Lawsuit, Dov Charney Claims Conspiracy Between American Apparel, Standard General*, L.A. TIMES (June 25, 2015), <https://www.latimes.com/business/la-fi-charney-lawsuit-20150625-story.html> [<https://perma.cc/6EMN-AUG5>] (reporting on a lawsuit filed by Charney against American Apparel company officials and an investor and explaining that "[a]lthough Charney's lawsuit echoes many of the allegations he has made in previous legal documents, it presents new details of the ousted CEO's version of how events unfolded").

Charney had been the subject of multiple lawsuits alleging sexual misconduct,⁸⁸ and according to the board, it suspended Charney based on its perceived risk of intraorganizational reputational harm, whereby the public scrutiny of Charney could create reputational damage to the broader organization.⁸⁹

The termination itself, though, created the risk of a separate reputational crisis for Charney. This reputational risk potentially intensified when an anonymous source leaked the termination letter to a media source, which published the letter in full.⁹⁰ This reputational risk was significant following Charney's termination because shareholders would likely care about the reasons for his termination if they were going to support his efforts to regain control of the company.⁹¹ The media, aided by information from lawsuits between Charney and the board, helped to fill this information vacuum. Specifically, Charney

88. See, e.g., Laura M. Holson, *Chief of American Apparel Faces 2nd Harassment Suit*, N.Y. TIMES (Mar. 23, 2011), <https://www.nytimes.com/2011/03/24/business/24bias.html> [<https://perma.cc/JDB5-TX7V>] ("A former American Apparel sales associate filed a lawsuit on Wednesday alleging she was sexually harassed by Dov Charney Her claim is part of a lawsuit filed in Los Angeles Superior Court that also named three other women"); Jonathan Stempel, *American Apparel CEO Seeks End to Sex Slave Case*, REUTERS (Mar. 25, 2011), <https://www.reuters.com/article/us-americanapparel-sex-lawsuit/american-apparel-ceo-seeks-end-to-sex-slave-case-idUSTRE72O5PY20110325> [<https://perma.cc/KY73-9PU4>] (describing the sexual harassment lawsuit filed by Irene Morales against Charney).

89. In their notice letter to Charney, the board highlighted the financial and reputational costs to American Apparel that they claimed resulted from Charney's conduct. Complaint at ex. B, *Charney v. Am. Apparel, Inc.*, No. BC581602 (Cal. Super. Ct. May 12, 2015), 2015 WL 2254829. The financial costs "included expenses associated with litigation and defense costs, significant settlement payments, [and] substantial severance packages." *Id.* In terms of reputational costs, the board claimed:

Your misconduct has also harmed the business reputation of the Company. This is illustrated by voluminous press reports describing your behavior and the fact that the Company has had a very difficult time raising capital and securing debt financing at reasonable rates because of your actions. Indeed, many financing sources have refused to become involved with American Apparel as long as you remain involved with the Company. When the Company has been able to secure financing, it has been required to pay a significant premium for that financing in significant part because of your conduct.

Id.

90. Sapna Maheshwari, *Exclusive: Read Ousted American Apparel CEO Dov Charney's Termination Letter*, BUZZFEED (June 22, 2014), <https://www.buzzfeednews.com/article/sapna/exclusive-read-ousted-american-apparel-ceo-dov-charneys-term> [<https://perma.cc/7THV-ZH7>].

91. See *Am. Apparel, LLC*, Schedule 13D (June 25, 2014); Susan Berfield, *American Apparel: Charney's Bad Behavior Was Very, Very Expensive*, BLOOMBERG (June 23, 2014), <https://www.bloomberg.com/news/articles/2014-06-23/american-apparel-charney-fired-for-misconduct-financing-problems> [<https://perma.cc/7ZPM-HFDW>] (discussing reversal of support by shareholder: "At this point, I don't think that we will support Dov."); Matt Townsend, *American Apparel Investor Expects CEO to Fight Termination*, BLOOMBERG (June 19, 2014), <https://www.bloomberg.com/news/articles/2014-06-19/american-apparel-backer-expects-ceo-to-fight-company-over-firing> [<https://perma.cc/7HQD-PJMX>] (discussing support for Charney by American Apparel's second largest shareholder).

had brought a number of lawsuits against American Apparel and individual board members.⁹² Some of these lawsuits raised claims for defamation based on the board's communications with investors, with one lawsuit alleging that the board's actions "derailed Charney's efforts to regain control of the company"⁹³ and "has and will continue to cause prospective investors, business leaders and businesses to shun and avoid doing business with Charney."⁹⁴

While Charney did not fare well in the courts,⁹⁵ his defamation lawsuits allowed him to introduce a competing narrative in the court of public opinion.⁹⁶ The lawsuits provided even more material with which the media could tell the story of the termination, including links to court documents, which has reputational consequences for Charney or the board during the fight for control of the company.⁹⁷

2. Zone Two—Interorganizational Reputational Harm: Crisis Communications and Post-Crisis Litigation

While a crisis can hurt a corporation's reputation, not all crises are equal. Some crises levy greater levels of reputational harm depending on the blameworthiness of the corporation in the opinions of stakeholders.⁹⁸ Crisis management scholarship identifies three types of

92. See, e.g., Complaint, *supra* note 89; Complaint, Charney v. Am. Apparel, Inc., No. BC585664 (Cal. Super. Ct. June 19, 2015).

93. Complaint, *supra* note 92, at 7.

94. *Id.*

95. See Peg Brickley, *Dov Charney Faces Setback in Defamation Suits Against American Apparel*, WALL ST. J.: BANKR. BEAT (Oct. 8, 2015), <https://blogs.wsj.com/bankruptcy/2015/10/08/dov-charney-faces-setback-in-defamation-suits-against-american-apparel> [<https://perma.cc/PC2B-PBFW>].

96. Charney's termination letter and his lawyer's letter in response were made available in full by media sources. This publicity was important because each of these letters offered competing narratives explaining Charney's termination. See *supra* notes 89–93 and accompanying text.

97. In 2015, American Apparel filed for bankruptcy; Charney subsequently started a new clothing company, Los Angeles Apparel. Jessica DiNapoli, *American Apparel Files for Second Bankruptcy in Just over a Year*, REUTERS (Nov. 14, 2016), <https://www.reuters.com/article/us-bankruptcy-americanapparel-idUSKBN1390GX> [<https://perma.cc/S69Y-83XK>]; Matthew Townsend, *Dov Charney Couldn't Keep American Apparel, So He Restarted It*, BLOOMBERG BUSINESSWEEK (July 12, 2017), <https://www.bloomberg.com/news/features/2017-07-12/dov-charney-couldn-t-keep-american-apparel-so-he-restarted-it> [<https://perma.cc/YKDS-AZMR>].

98. See W. Timothy Coombs, *Protecting Organization Reputations During a Crisis: The Development and Application of Situational Crisis Communication Theory*, 10 CORP. REPUTATION 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, 181–82 (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

crises, with corresponding levels of blame attribution and reputational harm: *victim*, *accidental*, and *preventable*.⁹⁹ In the first type of crisis, the organization is perceived as a victim of the crisis; this crisis type is associated with the lowest attribution of responsibility and the mildest reputational threat.¹⁰⁰ The reputational threat increases with each of the other two types of crises, culminating with the preventable crisis, in which stakeholders believe that the “organization knowingly placed people at risk, took inappropriate actions[,] or violated a law/regulation.”¹⁰¹ This type of crisis is associated with strong attributions of responsibility and severe reputational threat.¹⁰² 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.¹⁰³

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 (such as a preventable crisis).¹⁰⁴ Framing is part of a crisis response strategy and the frame promoted depends on which crisis response strategy the organization adopts.¹⁰⁵ 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”).¹⁰⁶ Finally, crisis managers may also use “bolstering” strategies such as reminder and ingratiation (“[t]ell[ing] stakeholders about the past good works of the organization”) and victimage (“remind[ing] stakeholders that the organization is a victim of the crisis too”) in order to minimize reputational damage.¹⁰⁷

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”).

99. Coombs, *Protecting Organization Reputations*, *supra* note 98, at 168.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* 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.

105. *Id.* at 171.

106. *Id.* at 170.

107. *Id.*; see William L. Benoit, *Image Repair Discourse and Crisis Communication*, 23 PUB. REL. REV. 177, 180 (1997) (“[A] corporation may use bolstering to strengthen the audience’s

These types of framing techniques can also arise in post-crisis litigation. For example, litigation documents filed by Walgreens against Theranos in the wake of the latter's blood-testing scandal not only addressed the economic harms that Walgreens suffered but also the reputational costs associated with the crisis.

Theranos and its CEO, Elizabeth Holmes, captured the national stage with claims that they could revolutionize the multibillion-dollar blood-testing industry by providing inexpensive, direct-to-consumer ("DTC") blood-testing kits that could provide results with a "few drops of blood."¹⁰⁸ The *Wall Street Journal* later 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."¹⁰⁹ It also referenced concerns from physicians and former employees regarding the technology's accuracy and Theranos's compliance with federal regulations.¹¹⁰ The situation grew from bad to worse for Theranos as it faced investigations, lawsuits, and regulatory sanctions.¹¹¹

Theranos offered tests to the public through "Wellness Centers" that were located in Walgreens drugstores.¹¹² While Theranos's reputation was impacted due to its technology, Walgreens was criticized for a different reason. The scandal raised doubts about whether

positive feelings toward the [sic] itself, in order to offset the negative feelings connected with the wrongful act.").

108. Roger Parloff, *Theranos Jump-Starts Consumer Lab Testing*, FORTUNE (May 7, 2015), <http://fortune.com/2015/05/07/theranos-jump-starts-consumer-lab-testing> [<https://perma.cc/P3D4-EPKQ>].

109. John Carreyrou, *Hot Startup Theranos Has Struggled with Its Blood-Test Technology*, WALL ST. J. (Oct. 16, 2015), <https://www.wsj.com/articles/theranos-has-struggled-with-blood-tests-1444881901> [<https://perma.cc/7PX2-K9EF>].

110. *Id.*

111. See Kia Kokalitcheva, *Theranos CEO Elizabeth Holmes Banned from Operating a Lab*, FORTUNE (July 8, 2016), <http://fortune.com/2016/07/08/theranos-holmes-banned/> [<https://perma.cc/74TZ-CQ8K>] (detailing regulatory sanctions imposed on Theranos and its CEO by the Centers for Medicare and Medicaid Services); Christopher Weaver, John Carreyrou & Michael Siconolfi, *Theranos Is Subject of Criminal Probe by U.S.*, WALL ST. J. (Apr. 18, 2016), <https://www.wsj.com/articles/theranos-is-subject-of-criminal-probe-by-u-s-1461019055> [<https://perma.cc/AZ7Z-UYQD>] (describing probes by federal criminal prosecutors, the Securities and Exchange Commission, and the U.S. Postal Inspection Service).

112. Carreyrou, *supra* note 109; *Theranos Selects Walgreens as a Long-Term Partner Through Which To Offer Its New Clinical Laboratory Service*, BUS. WIRE (Sept. 9, 2013), <https://www.businesswire.com/news/home/20130909005578/en/Theranos-Selects-Walgreens-Long-Term-Partner-Offer-New> [<https://perma.cc/2J74-FERD>] ("Theranos, Inc. and Walgreens . . . today announced a long-term partnership to bring access to Theranos' new lab testing service through Walgreens pharmacies nationwide.").

Walgreens—a trusted household name, increasingly associated with consumer health—had acted as a proper steward of consumer trust.¹¹³

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*, the plaintiff blamed Walgreens for Theranos’s ability to perpetuate its fraud because the plaintiff alleged that Walgreens’s national footprint and reputation “bolstered the validity of Theranos,”¹¹⁴ and “[d]espite all the red flags, Walgreens moved forward with its partnership with Theranos, provided Theranos with \$50 million in financing and open[ed] numerous Theranos Wellness Centers inside of Walgreens stores.”¹¹⁵ A separate lawsuit filed shortly thereafter, *L.T. v. Theranos*, alleged that Walgreens prioritized profits over patient safety when it failed to perform adequate due diligence on Theranos’s technology.¹¹⁶

In 2016, Walgreens brought its own lawsuit against Theranos. More than just seeking damages from Theranos, the lawsuit offered a means for Walgreens to address the reputation-damaging allegations raised in the lawsuits against it. The complaint asserted that Walgreens performed adequate due diligence before entering into a contract that exposed its consumers to Theranos’s new technology.¹¹⁷ It

113. In May 2016, *Fortune* published a story that accused 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), <http://fortune.com/2016/05/26/walgreens-didnt-verify-theranos/> [<https://perma.cc/UE6C-3CZF>].

114. Class Action Complaint and Jury Trial Demanded at 13, *R.C. v. Theranos, Inc.*, No. 2:16-cv-02373 (D. Ariz. July 15, 2016), 2016 WL 3900728; see also *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 issuing a joint press release in 2013. *Id.* at 13.

115. *Id.* at 15.

116. See Class Action Complaint at 9–10, *L.T. v. Theranos, Inc.*, No. 2:16-cv-02660 (D. Ariz. Aug. 5, 2016) (“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.”) The complaint alleged that “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 patients.” *Cf.* Class Action Complaint at 5, *B.P. v. Theranos, Inc.*, No. 2:16-cv-02775 (D. Ariz. Aug. 17, 2016) (“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.”).

117. Complaint at 7, *Walgreen Co. v. Theranos, Inc.*, No. 1:16-cv-01040 (D. Del. Nov. 15, 2017) [hereinafter *Walgreens Complaint*] (describing review performed by individuals at Johns Hopkins University).

also repeatedly referenced assurances made to Walgreens by representatives of Theranos.¹¹⁸

The crisis management strategies of denial and diminishing responsibility appear in Walgreens's litigation narratives when it explains how little it knew of Theranos's practices. In its complaint, Walgreens alleged that Theranos went to great lengths to keep information about its technology's inadequacies from Walgreens.¹¹⁹ Specifically, Walgreens alleged that Theranos repeatedly refused Walgreens's request for a report from a regulatory body.¹²⁰ Walgreens also claimed that it was as much in the dark as the public and learned about Theranos's misdeeds the same way the public did: press reports.¹²¹ According to Walgreens, 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.¹²² These statements emphasize the crisis management strategy of excuse, 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."¹²³

The complaint also illustrates secondary strategies of bolstering. It incorporates reminder and ingratiation techniques by communicating Walgreens's vigilance in seeking the truth despite Walgreens's claims that Theranos did not share information.¹²⁴ While drawing attention to Theranos's conduct, the complaint emphasized that Walgreens never abandoned its role as a steward of its consumers' trust.¹²⁵ The complaint also addressed the profit motive allegation (raised in litigation against Walgreens and Theranos) by clarifying that

118. See, e.g., *id.* at 5, 6, 9, 16 (providing Walgreens's description of assurances by Theranos executives and attorney); Plaintiff Walgreen Co.'s Response in Opposition to Defendant Theranos, Inc.'s Motion to Dismiss at 3, *Walgreen Co. v. Theranos, Inc.*, No. 1:16-cv-01040 (D. Del. Feb. 6, 2017) [hereinafter *Walgreens Opposition Brief*] ("Of paramount importance, Theranos assured Walgreens that its innovative blood-testing technology would be safe and its operations would be of high quality.").

119. Walgreens Complaint, *supra* note 117, at 15.

120. See *id.* at 18, 20–21.

121. *Id.* at 25 ("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 Opposition Brief, *supra* note 118, at 6.

122. Walgreens Complaint, *supra* note 117, at 18.

123. Benoit, *supra* note 107, at 180.

124. See Walgreens Complaint, *supra* note 117, at 14 ("Walgreens promptly sought answers from Theranos."); *id.* 28–29 (describing Walgreens's reasons for terminating its agreement with Theranos).

125. See *id.* at 18–19, 27–29; see also Walgreens Opposition Brief, *supra* note 118, 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.").

Walgreens's "core mission is to help people in those communities" that it serves to "lead healthier and happier lives."¹²⁶

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."¹²⁷

III. EXPLAINING PUBLIC RELATIONS EFFECTS: THE COMPARATIVE ADVANTAGES OF COURTS AS INFORMATION TRANSMISSION MECHANISMS

The previous Part explained why an organization in need of reputational repair may gain public relations benefits from post-crisis litigation. But identifying these benefits does not explain why courts of law influence public opinion to begin with. This may not be surprising if the information courts reveal is new, extracted from the parties through rules allowing for discovery. But when the information from litigation has already been revealed by other sources, why is it salient? The following Part offers three distinct but overlapping reasons why litigation may be superior to other types of information transmission mechanisms in society: relationship with media, market for information, and aggregation.

A. Relationship with Media

A reputation-building activity is only beneficial for the reputation-building firm if knowledge of that activity influences the conduct of the business's target audience. But the activity can only exert such an influence if the target audience learns of it. In other words, there must be some mechanism by which information regarding one party (such as a rival) is communicated to another party (such as a potential entrant).

One of the most important information intermediaries is the media. The media fulfills a variety of functions that impact the reputation of a business. First, the media addresses information asymmetries between firms and the public by consolidating evaluations of the business made by information intermediaries, such as the

126. Walgreens Complaint, *supra* note 117, at 1; Lydia Ramsey, *Theranos Just Settled Its Lawsuit with Walgreens*, BUS. INSIDER (Aug. 1, 2017), <https://www.timesunion.com/technology/businessinsider/article/Theranos-just-settled-its-lawsuit-with-Walgreens-11723781.php> [<https://perma.cc/3PXB-PM2A>].

127. Press Release, Theranos, Theranos Reaches Settlement with Walgreens (Aug. 1, 2017), <https://www.businesswire.com/news/home/20170801006383/en> [<https://perma.cc/2NDA-XJWG>].

government or ratings agencies.¹²⁸ Through this process, the media influences what issues are discussed and how they are discussed. Second, the media can actively contribute to the reputation of a firm through forum hosting. The media serves as a forum through which different stakeholders exchange and even debate conflicting views of a business.¹²⁹ The media expressly cultivates this function by soliciting opinions of business behavior from diverse constituencies.¹³⁰ In this way, “the media provide[s] a forum where firms and stakeholders debate what constitutes a good firm and which firms have good reputations.”¹³¹ Accordingly, the media helps to shape a business’s reputation, influencing how it is perceived by its stakeholders.

The media also helps to shape the public agenda on issues concerning a business or even an entire industry; this is known as the “agenda-setting” function of the media. According to analysts of this function, “the day-to-day selection and display of news by journalists focuses the public’s attention and influences its perceptions.”¹³² The media’s coverage of a business and its activities contributes to the public agenda because the “prominence of elements in the news influences the prominence of those elements among the public.”¹³³

The process of agenda setting begins with the attention that a media organization accords a particular business and its activities or products.¹³⁴ Through cues, such as the length of a story or its frequency, the public will decide which business’s behavior most warrants their attention.¹³⁵ But the media does not stop there. It also provides a filter through which the public associates the business with a set of attributes:

By calling attention to some matters while ignoring others, the news media influence the criteria by which presidents, government policies, political candidates, and corporations are judged. Most recently, major media attention to issues of financial reporting and

128. Deephouse, *supra* note 27, at 1098.

129. *Id.* at 1097–98.

130. *Id.* at 1097 (“They will ask a firm to respond to a stakeholder evaluation or ask a stakeholder to respond to a firm action or statement. One evaluation may lead to a competing or even a supporting evaluation by another source.”).

131. *Id.*

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

133. *Id.* at 36–37; see Timothy G. Pollock & Violina P. Rindova, *Media Legitimation Effects in the Market for Initial Public Offerings*, 46 ACAD. MGMT. J. 631, 632 (2003) (“Therefore, in performing its functions of informing, highlighting, and framing, the media presents market participants with information that affects impression formation and the legitimation of firms.”).

134. Carroll & McCombs, *supra* note 132, at 37.

135. *Id.*

corporate governance suggest significant criteria for the evaluation of all companies and their executives, not just the companies explicitly mentioned in these news reports.¹³⁶

Thus, negative media coverage of a particular issue shines a light on a broad swath of firms, not just the particular firm that is under scrutiny.¹³⁷ Given the stakes of agenda setting, businesses may choose not to act passively concerning how the media portrays them and may instead offer “information subsidies” to media sources. These subsidies consist of “source-provided news releases, advertisements, speeches, and related materials, which attempt ‘to intentionally shape the news agenda by reducing journalists’ costs of gathering information.’”¹³⁸ Through information subsidies, businesses attempt to influence “construction of the media agenda.”¹³⁹

One area where businesses employ information subsidies is in proxy fights. A number of investors obtain their information from financial media. The information that financial media communicates is therefore important to how these investors view the parties to a proxy fight and, in turn, may influence how the investors vote on an issue. In the proxy context, information subsidies include shareholder letters, news releases, presentation slides, memos, and even advertisements.¹⁴⁰ Critically, “these subsidies are made accessible to the media through the candidate’s campaign websites, paid newswire services, and required filings with the U.S. S.E.C.’s Electronic Data-Gathering, Analysis, and Retrieval (EDGAR) system. Filings are monitored by financial journalists and investors, and serve as a principal source of information.”¹⁴¹

One case study of agenda building in the 2008 proxy contest between Carl Icahn and Yahoo examined party-controlled information subsidies and financial media coverage of the contest.¹⁴² The case study concluded that “[t]he issue agendas articulated in the information subsidies disseminated by both candidates were generally linked with financial media coverage of the contest. These linkages were found with both business newswires and newspapers”¹⁴³ The research found

136. *Id.* at 41.

137. Vinit M. Desai, *The Impact of Media Information on Issue Salience Following Other Organizations’ Failures*, 40 J. MGMT. 893, 899 (2014); *see also id.* at 913 (noting the relationship between “issue salience within organizations” and “media communication . . . following other organizations’ failures”).

138. Matthew W. Ragas et al., *Agenda-Building in the Corporate Sphere: Analyzing Influence in the 2008 Yahoo!-Icahn Proxy Contest*, 37 PUB. REL. REV. 257, 258 (2011) (citation omitted).

139. Ragas, *supra* note 85, at 219.

140. Ragas, *supra* note 138, at 259.

141. *Id.*

142. *Id.* at 261.

143. *Id.*

that information subsidies did not generally increase the level of attention that the media devoted to a proxy contest; that seemed to relate more to the size of the firm at the center of the fight.¹⁴⁴ However, information subsidies, controlled by the parties, seemed far more likely to relate to the media's coverage of specific issues in the proxy contest.¹⁴⁵ In fact, according to the research, the media-party link goes in both directions so that "campaigns generally responded to – rather than influenced – the importance accorded specific stakeholders by journalists in coverage."¹⁴⁶

Litigation can similarly offer important information subsidies to the media. First, litigation may provide journalists with access to sources that they could not otherwise have obtained.¹⁴⁷ For example, in one of their motions, a board member of American Apparel provided a "sampling of 'illicit email and text messages' Charney allegedly sent to employees while still with American Apparel."¹⁴⁸ Media sources subsequently excerpted from this "sampling" in their stories about the battles between Charney and American Apparel.¹⁴⁹ Litigation sources help journalists provide facts that the public may not get otherwise and by using "components" that help to tell that story, such as "good quotes, identifiable victims . . . , detail, and color."¹⁵⁰ Second, these sources are special not only because they may reveal unknown facts but because they may protect journalists from libel as well.¹⁵¹ Further, legal sources are more credible than many alternatives because "[i]nformation produced during litigation or investigation is given under oath, with the threat of legal sanction for perjury assuring more credibility than the journalist can find when tapping non-legal sources."¹⁵²

Even when litigation does not produce new information, journalists value legal sources because these sources can corroborate previous knowledge, which can help a journalist convince an editor to

144. Matthew W. Ragas, *Agenda-Building and Agenda-Setting in Corporate Proxy Contests: Exploring Influence Among Public Relations Efforts, Financial Media Coverage and Investor Opinion* 241 (2010), http://ufdcimages.uflib.ufl.edu/UF/E0/04/15/54/00001/ragas_m.pdf [<https://perma.cc/AXK4-MFMD>] (unpublished Ph.D. dissertation, University of Florida).

145. *Id.* at 241–42.

146. *Id.* at 242.

147. Roy Shapira, *Law as Source: How the Legal System Facilitates Investigative Journalism*, 37 *YALE L. & POL'Y REV.* 153, 174 (2018).

148. See Hilary Hanson, *Read the SEXTS Ex-American Apparel CEO Dov Charney Allegedly Sent Employees*, *HUFFINGTONPOST* (June 24, 2015), https://www.huffingtonpost.com/2015/06/24/dov-charney-american-apparel-sexes_n_7655522.html [<https://perma.cc/2MSM-R6Q6>].

149. *Id.*

150. Shapira, *supra* note 147, at 180 (footnotes omitted); see also Frankel, *supra* note 147, at 365.

151. Shapira, *supra* note 147, at 174.

152. *Id.* at 174–75.

invest time in investigating the story.¹⁵³ Additionally, legal sources can help contextualize and “process[] existing information” because “[j]udicial opinions or regulatory investigative reports, for example, are good at fleshing out patterns of misbehavior, organizing large chunks of information, and making it all less complex for the journalist.”¹⁵⁴

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

The information transmission capabilities of courts of law and the media cannot be examined in isolation. Instead, they are components of the broader information environment in which we are situated. The fate of one influences our choice to turn to the latter. In this environment, media stories supported by legal documents may have particular salience in the age of “fake news.”

The term “fake news” is ubiquitous. It refers to “fabricated information that mimics news media content in form but not in organizational process or intent.”¹⁵⁵ Consider the problem of “fake news” as another version of George Akerlof’s lemons problem: We are consumers of information and, as consumers, we make choices as to who we go to for information. But consumers are faced with a plethora of options. If they are aware that there is some level of “fake news” circulating in the media, how do they sort through their options and differentiate “fake news” from “real news”? This task is made more difficult by technology, which has enabled many producers of information to adopt the semblance of legitimacy through professional designs and appearances, and sophisticated dissemination techniques.¹⁵⁶ As a consequence, merchants of low-quality products (“fake news”) may 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 are unable to signal their quality

153. *Id.* at 179.

154. *Id.* at 176.

155. David M. J. Lazer et al., *The Science of Fake News: Addressing Fake News Requires a Multidisciplinary Effort*, SCIENCE 1094 (Mar. 9, 2018), <http://science.sciencemag.org/content/sci/359/6380/1094.full.pdf> [<https://perma.cc/8W6K-N4E7>]; see also Mark Verstraete, Derek E. Bambauer & Jane R. Bambauer, *Identifying and Countering Fake News* 8 (Ariz. Legal Studies, Discussion Paper No. 17-15, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3007971 [<https://perma.cc/GDR4-GZHA>] (distinguishing among five different types of “fake news”: hoax, satire, propaganda, trolling, and humor).

156. See Lazer et al., *supra* note 155, at 1094 (explaining how “the internet has lowered the cost of entry to new competitors”); Verstraete, *supra* note 155, at 10 (describing a “website that publishes news stories that are untrue and uses a mark that closely resembles that of CNN” and explaining that the “close similarity” between the two “often fools people into viewing the site as disseminating true information”).

to consumers of information.¹⁵⁷ One study of “fake news” raises concerns about the ability or willingness of readers to engage in the requisite sorting exercise, arguing that “[r]eaders operate in digital media ecosystems that incentivize low-level engagement with news stories”¹⁵⁸ 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.”¹⁵⁹

In this environment, media stories supported by litigation documents may be particularly salient because litigation has two features that address the information problem. First, there is a barrier to entry that usually requires access to legal expertise before a producer of information (a litigant) can introduce information for consumption in the litigation process. It is not a perfect system. It is both underinclusive, denying access to justice for parties with potentially meritorious claims who do not have access to resources, and overinclusive, providing access to justice for those who can access the resources even if they lack a meritorious claim. 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. As such, the media, on the one hand, and the litigants and courts of law, on the other, benefit from this symbiotic relationship: the media helps to share information from litigation (as discussed in Section III.A) and litigation documents help distinguish media stories in the market for information.

C. Aggregation: Broadening the Audience for Knowledge

Legal documents serve important information functions aside from persuading readers of the merits of the parties’ positions. Instead,

157. See Verstraete, *supra* note 155, 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, which can be a problem in a media culture where many people do not read past the headlines.;

see also Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669, 674, 676–77 (1984) (discussing the problem of imitation by sellers of low-quality products and the need for additional signaling strategies by sellers of high-quality products).

158. Verstraete, *supra* note 155, at 11; 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”).

159. *Id.* at 32; see also Lazer et al., *supra* note 155, at 1095 (“Individuals tend not to question the credibility of information unless it violates their preconceptions or they are incentivized to do so.”).

legal documents are good aggregators of information available from other sources in society.¹⁶⁰ Lawyers support their factual and legal statements by citing sources that support those statements.¹⁶¹ The effect of this practice is that legal pleadings can point readers to sources of information other than the primary legal document (that is, to “third-party sources”): relevant judicial opinions, regulations, government reports, nongovernmental organization investigations, scientific reports, statistical analyses, legal commentaries, economic studies, academic commentaries, press statements, investor reports, and media stories, among others.¹⁶²

Citation practice has two important information consequences. First, litigation documents improve the credibility of the litigant’s own statements by drawing on other sources; a skeptical reader may become more persuaded by the arguments after taking note of the supporting materials. Second, pleadings 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 noncommunity members generally may not. A pleading broadens the audience for this information by channeling it toward a different audience. Critically, a pleading also markets this information to new audiences 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*,¹⁶³ public statements made by Theranos representatives,¹⁶⁴ audit results performed by state regulatory agencies,¹⁶⁵ certification reports from federal agencies,¹⁶⁶ a study from

160. See, e.g., Parella, *supra* note 13, at 965–67.

161. See 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); Frederick Schauer & Virginia J. Wise, *Legal Positivism as Legal Information*, 82 CORNELL L. 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.”).

162. See McGinnis & Wasick, *supra* note 161, at 1012 (noting that legal search technology increased the availability of secondary and nonlegal sources, which resulted in “U.S. Supreme Court cases from 1950 to 1995 show[ing] a large spike of nonlegal sources starting in 1991”); Schauer & Wise, *supra* note 161, at 1105 (hypothesizing a change in the information sets relied on by lawyers and judges to now include greater diversity of sources).

163. Walgreens Complaint, *supra* note 117, at 13, 18, 23, 25, 26–27.

164. *Id.* at 14.

165. *Id.* at 15.

166. *Id.* at 16–17.

the peer-reviewed *Journal of Clinical Investigation*,¹⁶⁷ scientific information from the *Cleveland Clinic Journal of Medicine*,¹⁶⁸ and statements from medical academics,¹⁶⁹ among others. Thus, the Walgreens complaint aggregated information from a variety of sources, strengthening its claims and pointing the public audience to third-party sources it may not otherwise consult.

IV. IMPLICATIONS: DISTRIBUTED GAINS

The foregoing discussion provide illustrative examples of how litigation allows parties to build their reputations through signaling, framing, or both. These examples reveal how reputational benefits can supply the missing value in a lawsuit that otherwise appears unsuccessful. But not all reputational benefits are the same. This Part revisits many of the examples discussed previously to introduce three distinct types of reputational benefits: gains distributed across time (intertemporal), across parties (interparty), and even across institutions (interinstitutional). While these gains are produced from the model of reputation building explained by Milgrom and Roberts, it is important to recognize that these distributed gains can accompany reputation building through litigation as well. Section IV.A expands on these different types of reputational gains and explains how both signaling and framing techniques can lead to these gains in litigation. Section IV.B explains the significance of this descriptive insight for understanding litigant incentives. Finally, Section IV.C discusses procedural tools that exist currently or may be adopted in order to discourage distributed gains from reputation-building litigation; this is especially significant when those gains come at the cost of a third-party actor, including one who may not be in court.

A. Reputation Building and Distributed Gains

Milgrom and Roberts's analysis shows us that gains are interparty, intertemporal, and interinstitutional.¹⁷⁰ First, costs incurred against one party may translate into gains against another. Second, gains can also be intertemporal in that losses in one moment in time against one party may translate into gains against another party, contemporaneously or in the future, through the reputation gained by

167. *Id.* at 21–22.

168. *Id.* at 24.

169. *Id.* at 32.

170. See Milgrom & Robert, *supra* note 14, at 302.

the litigant. Finally, gains can be interinstitutional when they are created in one institution but enjoyed in another. For example, a party may build its reputation through litigation but enjoy those benefits in the marketplace rather than the courtroom.

Whether by signaling or framing, reputation building through litigation can help supply the three types of distributed gains discussed above. Litigants may benefit from these gains even if they lose in the short term. For example, reputation building through signaling in litigation can help produce these three different types of distributed gains. Intellectual property litigation serves reputation-building functions because it signals to employees who might leave that exit is costly. Potentially departing employees confront information asymmetries regarding the capacity and willingness of their employers to file a lawsuit upon the employee's departure. An employee must base exit decisions on the employer's history of filing lawsuits, a practice that provides that employer with a reputation for litigiousness. Even if the employer plaintiff loses a case against one employee, its reputation for litigiousness may discourage other employees from leaving in the future. Therefore, the reputation gained in the initial lawsuit (or subsequent ones) provides the employer with retention benefits in the future (intertemporal) against a different set of employees (interparty). These effects are also interinstitutional because the reputational-building exercise occurs in one institution (the courts) while the fruits of those efforts are enjoyed in another (employment relationship).

Similarly, reputation building through litigation is important to PAEs because it increases the revenue that they can earn on their patents, even otherwise "bad patents."¹⁷¹ Therefore, patent infringement lawsuits brought by PAEs also offer the types of distributed gains discussed above. While a PAE may lose its patent infringement lawsuit, it gains a reputation for litigiousness that makes its threat to sue future companies credible, thereby making it more likely that those companies will agree to licensing terms that are beneficial to the PAE; these are both intertemporal and interparty gains. Additionally, these gains are interinstitutional because the reputation is built within the institution of the legal system but enjoyed as market gains through private contracting.

Distributed gains from reputation building through framing can also be witnessed in litigation. In a proxy fight or other corporate battle, litigation narratives can help frame events in a way that is more beneficial for one side than the other; this framing is important when

171. *Id.*

each side is vying for support from a specific party, such as from investors. Similarly, following the crisis, framing techniques can help litigants manage how third-party stakeholders perceive the crisis and their role in it.

B. Distributed Gains and Litigant Incentives

The most familiar rationale for litigation is dispute resolution: parties file lawsuits to receive redress from the courts for harms suffered. But distributed gains offer another explanation for why parties may litigate even when they do not expect to gain from either winning or settling the dispute. As this Article has illustrated, parties obtain benefits from litigation that do not come from the courtroom. A lawsuit can help cement a party's reputation as litigious—a reputation that helps that party later reach desired results in its interaction with third parties not involved in the lawsuit. Some of these third parties may fear becoming future targets of similar lawsuits and may therefore be more willing to acquiesce to the litigious party's demands. Or the lawsuit may help a party frame a crisis in a particular way and attract media attention so that the party can disseminate that narrative. For example, litigation documents may adopt crisis management strategies that can frame a crisis in a way that minimizes the reputational risk to the business litigant who is implicated in the crisis.

But not all distributed gains are about helping the litigant. There is a species of lawsuits known as “malicious lawsuits” where the plaintiff “obtains some utility whenever the defendant is forced to undergo a monetary or non-monetary – e.g. reputational – loss.”¹⁷² Here, 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 on defense.”¹⁷³ In this situation, the plaintiff “gains” when he or she can impose some reputational loss on the defendant; the latter's pain is the former's gain even if the former does not obtain anything else. From torts¹⁷⁴ to

172. Brishti Guha, *Malicious Litigation*, 47 INT'L REV. L. & ECON. 24, 24 (2016).

173. *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.

174. See Hershovitz, *supra* note 25, at 86–102.

property,¹⁷⁵ plaintiffs litigate out of revenge and spite toward neighbors, family, and rivals, among others.¹⁷⁶

Society may dislike these types of lawsuits for many reasons, including because the plaintiff uses the courtroom to injure the reputation of the defendant. But the use of the courtroom to impose reputational costs is not limited to malicious lawsuits; instead, this practice is implicit whenever we witness distributed gains. When a party uses litigation to build its reputation, that reputation usually comes at the cost of another.¹⁷⁷ In framing techniques, a litigant redeems its reputation during a crisis usually by blaming another party. In signaling techniques, a litigant builds its reputation by exercising its litigation prowess against one party in order to influence how third parties view it. In these examples, the objects of the reputation-building activities often incur some kind of reputational cost, even if those costs fall short of the malicious action described above.

C. Constraining Distributed Gains: Dismissal, Settlement Bars, and the Litigation Privilege

The previous Sections explained how distributed gains operate. We may want to limit these gains either because we do not want litigants to profit in this manner or because we do not want them to impose reputational costs on others. While publicity around litigation has always had the capacity to wound a party's reputation, social media and online access to information potentially deepens those wounds. This Section discusses different tools that may limit these unwanted reputational effects.

1. Dismissals and the Timing of the Reputational Effect

We may wonder why the timing of reputational effects matters so long as baseless claims are exposed and dismissed. The problem is the difference in timing between when the reputational effect of the lawsuit is achieved and when dismissal occurs. While courts may be very good at screening out baseless claims, this screening often occurs too late in the process, either when plaintiffs have already gained reputational advantages upon filing a lawsuit or shortly thereafter. For

175. See Katz, *supra* note 25, at 1456–58 (analyzing various cases in which people sued their neighbors to be “petty or spiteful” or to “punish the defendant”).

176. See Guha, *supra* note 172, at 26 (explaining that plaintiffs in malicious litigation cases bring lawsuits for the benefits they receive from imposing costs on their “rival[s]”).

177. Hovenkamp, *supra* note 5 (manuscript at 1–4).

example, the Massachusetts Superior Court granted ShaveLogic's motion for summary judgment on Gillette's claims,¹⁷⁸ but according to ShaveLogic, Gillette had already attained its desired effect upon filing: the lawsuit drove away potential business partners that ShaveLogic would need to compete in the market.¹⁷⁹

The timing issue challenges a fundamental assumption we have concerning the salience of different types of information from courts. We may view litigation information as significant in at least two different ways. First, information is significant when a court has made some kind of ruling in the dispute, especially concerning the liability of the parties involved. In this case, courts provide normative guidance on society's rules and determine whether the parties have violated those rules. Second, courts are also unique sites for information revelation through the various tools available in discovery. These tools allow parties to learn information possessed by another. This information may also make its way to the public through court filings and media coverage of those filings. But as the ShaveLogic example illustrates, business litigants may achieve their reputational objectives before they even file suit.¹⁸⁰ If so, the tools for identifying baseless claims become available too late in the process to prevent some parties from obtaining reputational rewards from their actions and their opponents from suffering the consequences. This indicates that the threat of dismissal may not serve as a sufficient deterrent against reputation-building litigation by strategic parties.¹⁸¹

2. Motivations of Litigants and Settlement Bars

Whether through framing or signaling, information from litigation can influence public opinion. Even early-stage litigation that may have a low signaling effect can influence public opinion by attracting media attention and communicating to the public frames and narratives that shape the reputation of the parties.¹⁸²

178. *Gillette Co. v. Provost*, No. 136751, 2017 BL 173926, at *1 (Mass. Super. Ct. Apr. 19, 2017).

179. *Gillette Co. v. Provost*, No. 15-0149 B, 2015 WL 9911345, at *3–4 (Mass. Super. Ct. Jan. 16, 2015), 2015 WL 216997.

180. See *supra* notes 40–44 and accompanying text.

181. See also Nina Golden, *SLAPP Down: The Use (and Abuse) of Anti-SLAPP Motions to Strike*, 12 RUTGERS J.L. & PUB. POL'Y 426, 431 (2015) (discussing the reputational risk and litigation costs associated with SLAPP suits that are meritless).

182. See Lidsky, *supra* note 7, at 881 (explaining that in the defamation context, “[e]ven if the company ultimately decides not to pursue its action past filing a complaint, it may have won a symbolic victory simply by suing John Doe”); see also Scott Baker & Albert Choi, *Contract's Role in Relational Contract*, 101 VA. L. REV. 559, 573–75 (2015) (explaining the publicity effects of litigation).

The effect of public opinion is important to consider when creating solutions to deter socially undesirable lawsuits. To see why, consider nuisance suits. One proposal seeks to limit nuisance suits 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.¹⁸³ Denied the option to settle, plaintiffs must either withdraw or proceed to trial.¹⁸⁴ Since “nuisance plaintiffs” refuse to litigate to trial, they will withdraw and not extract a settlement offer from defendants.¹⁸⁵ 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.¹⁸⁶

The problem with applying this solution to public relations litigation is that it identifies a party’s incentives for litigation and settlement based on costs and benefits endogenous to the courts of law. It is assumed that litigation offers one party an opportunity to impose costs on another. It is also assumed that litigation allows a plaintiff to reap the value of many of these costs as benefits. For example, if a defendant pays a plaintiff a sum to settle a nuisance suit, then that sum is a cost that the defendant undertakes but also a benefit that the plaintiff reaps. But some benefits are provided neither by settlement nor by judicial remedy.

Publicity associated with litigation enables plaintiffs to impose costs on defendants that arise from the courts of law as well as costs that arise from negative publicity, forcing the latter to sustain monetary or nonmonetary damage that it must then incur expenses to address.¹⁸⁷ As an example, consider the lawsuit that Gillette filed against ShaveLogic at an important point in the latter’s business development. That lawsuit illustrates how courts of law offer one forum for multi-fora battles between various types of adversaries. The shot is fired within a legal court but the wound is felt elsewhere.

If costs are exogenous, so are benefits.¹⁸⁸ By filing suits, parties can incur benefits that are derived not directly from the courts of law

183. David Rosenberg & Steven Shavell, *A Solution to the Problem of Nuisance Suits: The Option to Have the Court Bar Settlement*, 26 INT’L REV. L. & ECON. 42, 45–46 (2006).

184. *Id.*

185. *Id.*

186. *Id.*

187. See, e.g., Lauren H. Cohen & Umit G. Gurun, *Buying the Verdict* 2–3 (Nat’l Bureau of Econ. Research, Working Paper No. 24542, 2018) (describing increased advertising and philanthropy by defendant companies following the filing of a lawsuit).

188. See Albert H. Choi & Kathryn E. Spier, *Taking a Financial Position in Your Opponent in Litigation*, 108 AM. ECON. REV. 3626 (explaining the effects of plaintiff’s financial position in defendant firm for litigation incentives).

but instead from public opinion.¹⁸⁹ Parties may redeem their reputations in the wake of a scandal.¹⁹⁰ Parties may discourage employee flight to a competitor¹⁹¹ or convince companies to acquiesce to licensing demands.¹⁹² These are benefits enabled by courts of law but found outside it. And so long as these benefits are available, parties may still litigate even if courts of law offer limited benefits.

3. The Litigation Privilege

The litigation privilege protects lawyers from “civil liability for statements related to litigation which may injure or offend an opposing party during the litigation process.”¹⁹³ Historically, the privilege protected lawyers from suits for defamation or libel, but courts have applied it to a number of other claims as well.¹⁹⁴ The privilege is justified on a belief that it “preserv[es] the integrity of the advocacy system”¹⁹⁵ by “barring claims that would disrupt the litigation process or deter persons engaged in that process from performing their respective functions.”¹⁹⁶

While the litigation privilege may reduce the risk of disrupting the litigation process, it could simultaneously exacerbate the risk that parties may use litigation—and litigation documents specifically—for public relations effects. This is the fear that Blue Buffalo, a pet food company, alleged in a lawsuit it filed against Purina in response to a separate lawsuit that Purina filed against Blue Buffalo, which alleged that Blue Buffalo engaged in false advertising concerning the quality of its products.¹⁹⁷ In its complaint, Blue Buffalo alleged that the litigation privilege facilitated Purina’s tactics:

189. See *supra* notes 15–19 and accompanying text.

190. See *supra* Part III.

191. See Agarwal, *supra* note 4, at 1367 (studying the effects that employer litigation in the semiconductor industry might have on the mobility of employees within the industry); Ganco et al., *supra* note 3, at 660 (examining how litigation by an employer might affect “employee mobility decisions”).

192. See Hovenkamp, *supra* note 5 (manuscript at 1–4).

193. Louise Lark Hill, *The Litigation Privilege: Its Place in Contemporary Jurisprudence*, 44 HOFSTRA L. REV. 401, 401 (2015).

194. T. Leigh Anenson, *Absolute Immunity from Civil Liability: Lessons for Litigation Lawyers*, 31 PEPP. L. REV. 915, 927–28 (2004).

195. *Id.* at 921.

196. *Id.*; see also *id.* at 923 (“It is recognized that the mere threat of a lawsuit may impair an attorney’s ability to put the interests of his or her client first, especially when the attorney’s actions may be simultaneously strengthening a cause of action for the client’s adversary.”).

197. Complaint at 1, *Blue Buffalo Co. v. Nestlé Purina Petcare Co.*, No. 4:14-cv-00920 (E.D. Mo. May 14, 2014).

Apparently conscious of the legal risks inherent in its smear campaign, Nestlé Purina has contemporaneously filed in this Court a spurious lawsuit in which it makes many of the same false accusations. Nestlé Purina apparently hopes that its lawsuit will protect it from legal action by Blue Buffalo, since statements in court papers themselves typically enjoy a “litigation privilege.”¹⁹⁸

Blue Buffalo’s complaint alleged that the centerpiece of the Purina public relations campaign against it is a website—the “Honesty Website”—that Purina launched on the very same day that it filed its lawsuit against Blue Buffalo.¹⁹⁹ Blue Buffalo alleged that Purina then issued a press release announcing the lawsuit and promoted the website via its various social media channels.²⁰⁰ According to Blue Buffalo’s complaint, the website to which consumers were directed provided links to the complaint and exhibits that Purina filed in the lawsuit.²⁰¹ The two parties eventually reached a confidential settlement, with each side agreeing to pay its own litigation costs and attorney’s fees.²⁰² Additionally, Gillette tried to assert the privilege against ShaveLogic’s counterclaims but was unsuccessful because the counterclaims sought “to hold Gillette liable not for speech, but for conduct.”²⁰³

These recent cases involving the litigation privilege in lawsuits between market incumbents and new entrants suggest two things for analyzing public relations litigation. First, it illustrates the concern that the availability of the privilege may therefore affect plaintiff incentives regarding public relations litigation. Second, the response of the Massachusetts courts in the ShaveLogic litigation suggests that this fear may be misplaced. At least some courts are on guard against the possibility that plaintiff businesses may use the litigation privilege as a shield to advance strategic objectives in litigation. But as discussed above, the denial of the privilege does not prevent a plaintiff from achieving its reputational goal; that carrot is still available.

CONCLUSION

This Article examines the reputational benefits of litigation for business litigants. Contrary to the view that litigation is usually bad for a business’s image, this Article discussed the many ways that litigation

198. *Id.* at 4.

199. *Id.* at 13–14.

200. *Id.* at 5–6.

201. *Id.* at ex. H (Pet Food Honesty Website).

202. See Steven Trader, *Purina, Blue Buffalo False Ad Fight Ends with Settlement*, LAW360 (Nov. 3, 2016), <https://www.law360.com/articles/859360/purina-blue-buffalo-false-ad-fight-ends-with-settlement> [https://perma.cc/DJ4W-LYRT].

203. *Gillette Co. v. Provost*, 74 N.E.3d 275, 278 (Mass. App. Ct. 2017).

can help a corporation or other business actor by affecting its reputation in the eyes of its key constituents. These reputational effects have real consequences for these actors' abilities to compete and succeed.

Litigation can bring reputational benefits even when a business is in a crisis. While we usually view litigation *as the crisis* to which public relations strategies respond, litigation itself can have public relations effects that may be valuable in crises. The framework provided here assists in understanding when we might expect to witness these reputational benefits of post-crisis litigation. It explains that these benefits depend on both proximity and organizational similarity between the parties. Depending on these factors, litigation can help a plaintiff with reputational repair following a crisis. In these situations, post-crisis litigation serves both economic and informational objectives.

It is important to understand these reputational benefits for descriptive, normative, and policy reasons. Descriptively, reputation helps us to understand the benefits that litigants may receive from lawsuits that they do not win or expect to win. The value that a court fails to provide is found outside of the court in the altered reputational judgments of the corporate litigant's constituents. These reputational judgments have financial consequences for the party that can compensate for the financial benefits that the party does not obtain from a court.

Finally, this analysis reveals some shortcomings of the legal rules we rely on to eliminate frivolous lawsuits. Specifically, it highlights the disparity in the timing between the filing of reputational lawsuits and our tools for dismissing them (or otherwise discouraging them). In a number of situations, the reputational benefit for the plaintiff (and corresponding injury to defendant) occurs upon filing of the lawsuit or shortly thereafter. Even if a court dismisses a lawsuit, a plaintiff may have achieved its reputational objective. Therefore, strategic plaintiffs may not be deterred by these rules when they are not primarily concerned with the fate of the lawsuit in a court; the loss in the court of law may not matter so long as the court of public opinion offers a "win."