SHAMING IN CORPORATE LAW

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INTRODUCTION

Shaming is in. Many of the same legal scholars who have recently turned their attention to social norms and questions of social meaning have taken a similar interest in shaming sanctions. The connections are obvious. Shaming sanctions range from requiring drunk drivers to wear T-shirts announcing their crimes to forcing polluters to place advertisements confessing and apologizing for their offenses. One of the common threads that tie these disparate punishments together is that each is designed to elicit moral disapproval from the offenders’ fellow citizens. Far more than with penalties such as fines or imprisonment, this moral disapproval is the beginning and end of the punishment. Shaming thus draws on shared social meaning and on norms about permissible and impermissible behavior. Given these links, it is hardly surprising that norms scholars would take a fervent interest in shaming.

From another perspective, however, the recent interest in shaming is somewhat odd. Shaming sanctions work best in close-knit communities in which citizens interact frequently and share common values. Because reputation is so important in this context, citizens will avoid behavior that may lead to shaming and will view shaming as a serious punishment. While American society may once have been characterized by close-knit communities, this seems far less true now. Moreover, a casual glance at the television or a visit to the movies suggests that behavior we once might have viewed as shameful has lost its opprobrium. If we no longer live in communities with shared

1 Professor of Law, University of Pennsylvania Law School. I am grateful to Bill Allen, Lichi Anji, Jennifer Arneson, Jeff Ayers, Susan BlockLieb, Jill Fisch, Steve Hether, Vic Khanna, Seth Kremer, Geoff Miles, Nell Minow, Eoin O’Hara, Bob Ramussen, Svea Thel, Mark West, Michael Whiting, Todd Zywicki, and participants at a faculty workshop at Fordham University School of Law, at the Corporate Law Seminar at Vanderbilt University School of Law, and at the Corporate Law and Norms Conference at the University of Pennsylvania Law School for helpful comments; to Bill Beper of the Biddle Law Library for comments and research help; to Donna Mancall for help with interviews and to Mark Taub for help with research; and to the University of Pennsylvania Law School for generous summer funding.

(811)
values and do not recognize shame, what explains the sudden interest in shaming? One explanation is simply that academics are out of touch with real-world conditions, of course, but I will put that possibility to one side. A more likely rationale may be nostalgia. Although the close-knit communities of earlier generations have disappeared, the fascination with shaming, and with norms generally, may reflect a dream that this lost sense of community could be restored. A more optimistic explanation is that community still figures prominently in our national life, but the nature of the relevant communities has changed. This view, that community is alive and well but has simply taken different shapes, has been the most frequent rebuttal to the much-discussed new book *Bowling Alone.* *Bowling Alone* documents the decline of community interaction—people bowl alone now, rather than with friends or bowling leagues. Its critics, on the other hand, argue that old-style community organizations like bowling leagues or the Rotary Club have simply given way to more contemporary organizations, such as professional associations.

While I do not purport to offer any final view on these issues in this article, my analysis will assume throughout, and at least anecdotally demonstrate, that corporations and corporate directors are immersed in communities in which reputation does indeed matter. The directors of large U.S. corporations are, in the words of one shareholder activist, "the most reputationally sensitive people in the world." Not only are shaming sanctions a potentially effective penalty for corporations and their directors, they already play a prominent and, in many respects, underappreciated role.

This Article is not the first to explore shaming in the corporate context. Other commentators have discussed, either explicitly or implicitly, the possibility of shaming corporate offenders. Despite this evidence of existing interest, there is much work to be done, and my aim is to extend the literature in at least two respects. First, the Article provides the most detailed examination to date of what we might call the "anatomy" of corporate shaming. I explore the role and limitations of the enforcers—that is, the person who invokes the

3 Interview with Neil Munro, Editor, The Corporate Library, in Washington, D.C., Oct. 25, 2000 (transcript on file with author) [hereinafter Munro Interview].
4 See supra note 2 (citing community interest in corporate shaming).
shaming sanction—the offender, and the enforcement community
(or communities). The area in which corporate shaming differs most
from shaming in other contexts is in the nature of the offender. With
a corporation, the corporation itself, its individual managers or
directors, or both, can be viewed as the relevant offender. The Article
therefore considers at length the question of who or what should be
the target of a shaming sanction. I also examine the relationship
between shaming and forms of criticism or disclosure, such as media
coverage of a firm’s misbehavior, that can have an analogous effect.

Second, and perhaps more important, the Article significantly
expands the focus of the shaming inquiry. The existing literature,
both in the corporate context and elsewhere, has focused almost
entirely on the use of shaming sanctions as a penalty for violating
criminal or certain kinds of civil laws, such as noncriminal
environmental provisions. From this perspective, the enforcer is
always a court. Yet private parties also shame wayward directors and
firms. In the corporate law context, shareholder activists and the
financial press have made frequent use of shaming techniques. Each
time CalPERS, the California state employees’ pension fund, publishes
a list of underperforming firms, for instance, one of its central goals is
to shame the offending firms. To understand corporate shaming
more fully, the Article therefore considers the activities of private
enforcers rather than just judicial ones.

The Article proceeds as follows. Part I briefly describes the
current literature on shaming, focusing in particular on the debate
between shaming advocates who argue that shaming sanctions are a
promising alternative to traditional punishments and shaming
detractors who worry about unintended effects of judicial shaming. The
Part concludes by briefly considering the mechanism by which
shaming works and the relationship between shaming sanctions and
social norms. Part II shifts from shaming in general to corporate
shaming in particular and considers each of the relevant parties to a
shaming sanction: the enforcer, the audience or enforcement
community, and the offender.

3 I have borrowed my terminology from Robert Ellickson’s helpful overview of the
norms literature. See Robert C. Ellickson, The Evolution of Social Norms: A
Perspective from the Legal Academy (Program for Studies in Law, Econ., and Pub.
Policy, Yale Law Sch., Working Papers No. 220, July 1, 1999) (unpublished manuscript,

4 See, e.g., Dan M. Kahan & Eric A. Posner, Shaming White-Collar Criminals: A
In Part III, the Article shifts from theory to reality and considers three different specific case studies of shaming in action: the use by CalPERS and the financial press of "torturers of shame"; shareholder activism Robert Mnookin’s and Neil Minow’s; more aggressive shaming campaigns, which included a full-page Wall Street Journal advertisement shaming the directors of Sears by name; and the decision of the Delaware Court of Chancery in a case stemming from alleged Medicaid and Medicare violations by Carenthik Industries.

Part IV concludes the Article by considering some of the implications of the analysis, both for the norms literature in general and for the future of corporate shaming. For private enforcers like CalPERS and other shareholder activists, I suggest that the Securities and Exchange Commission (S.E.C.) could facilitate shaming by forcing offending firms to bear some of the costs of shaming effects. I also briefly consider the potential effect of low-cost, high-tech, shaming-like activity on the Internet. For judicial shaming, I consider how shaming could fit into the kinds of multifaceted liability schemes that have been proposed in the literature on corporate criminal and tort liability.

I. THE CURRENT DEBATE ABOUT SHAMING

Shaming sanctions take forms that are as endlessly varied as the human imagination. In the past, we had pillories and branding; now, we have offenders wearing T-shirts that say "drunk driver." To make sense of all this shaming, it is useful to begin by defining "shaming" in general terms. "Shaming," as defined by its leading advocate in the legal literature, "is the process by which citizens publicly and self-conscious affect attention to the bad dispositions or actions of an offender, as a way of punishing him for having those dispositions or engaging in those actions."® Whereas imprisonment purifies the offender by taking away her physical freedom, shaming takes aim at the offender’s reputation or dignity. The enforcer expresses moral outrage at the offender, expecting that the intended audience will respond with similar moral disapproval. Not only does this moral disapproval have a chastening effect on future offenders, since the

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8 Kahan & Poushert, supra note 6, at 368.
effect on their reputation can be devastating and costly, but the possibility of shaming can also discourage potential offenders from misbehaving in the first instance.

The most famous literary depiction of shaming, Nathaniel Hawthorne's *The Scarlet Letter*, illustrates the conditions under which shaming sanctions prove most effective. In the New England Puritan community Hawthorne imagined, the town's citizens were closely knit and shared a common set of moral assumptions. The judge who ordered Hester Prynne, the offender, to wear a scarlet letter "A" could be confident that the relevant audience, the town's citizens, would share his moral outrage at her adultery, and of course they did.

Although the sense of community we associate with the Puritans has long since disappeared in the United States, citizens hold common views about many issues, such as outrage at drunk driving, and nearly all of us participate in one or more communities that share many of the same qualities that once characterized citizens' general civic lives. In our families or our professions, for instance, relationships often are closely intertwined and our reputations matter a great deal. In these contexts, shaming can be a powerful corrective when individuals violate the shared values of the community.

Given our fascination with norms and the interaction between norms and law, it was perhaps inevitable that legal scholars would rediscover the possibilities of shaming sanctions. And they have. Scholars have sharply diverged as to whether shaming is a promising new approach to punishing offenders or, as my reference to *The Scarlet Letter* might suggest, a dangerous and often pernicious practice. The discussion that follows provides a brief overview of the current debate.

I then consider the connections between shaming and norms and briefly address how shaming works.

A. The Shaming Literature

The most prominent advocate of shaming in the legal literature has been Professor Dan Kahan. Kahan defends shaming as part of a more general theory about the expressive dimension of criminal law. In his view, the social meaning of a criminal punishment—what it expresses—is crucial to its effectiveness. In addition to, or as part of, deterrence or attribution, Kahan argues, well-designed criminal

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* Kahan, supra note 7, at 197.
penalties must also give voice to society's disapproval of the behavior in question. Fines are a good illustration of a sanction that has proven problematic for expressive reasons. At least in theory, fines could have a significant deterrent effect on white-collar crime; yet they are deeply controversial, in Kahan's view, because "fines are insufficiently expressive of condemnation." Kahan explains that "when fines are used as a substitute for imprisonment, the message is likely to be that the offender's conduct is being priced rather than sanctioned." Imprisonment sends a very different message and is therefore more acceptable in expressive terms.

From this perspective, an obvious benefit of shaming sanctions is that they clearly signal a community's moral disapproval of the offender's conduct. Because shaming sanctions undermine the offender's reputation, they often serve the traditional functions of criminal law.Wouldbe offenders will be deterred by the threat of being shamed for their offenses, and the retributive goals of the criminal law are satisfied by the reputational penalties suffered by actual offenders as a result of their shaming. In short, shaming can both deter and punish, and it does so in a way that expresses clear social condemnation of the offender's actions.

Added to the expressive virtues of shaming is its low cost. Unlike imprisonment, which requires an elaborate administrative apparatus, shaming relies largely on private enforcement. Once a judge administers a shaming sanction, the sanction is, in effect, carried out by the offender's community. Community members gossip among themselves and withhold approval, all of which takes place outside of the formal criminal justice system and does not require the expenditure of public funds.

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11 See id. at 601.
12 Id. at 620.
13 Id. at 621.

In the literature on expressive textual law, commentators have debated whether a sanction can have independent expressive value entirely apart from any impact or consequences that the sanction has. For a survey and rejection of this possibility, see Matthew D. Adler, Expressive Theories of Law: A Skeptical Overview, 148 U. Chi. L. Rev. 1383 (2001). The sanctions we will see in this Article lead us to obvious, often tangible reactions in and responses by the relevant community. I do not take a position on whether or not these sanctions have independent expressive value.

17 See Kahan, supra note 7, at 699-99 (discussing the punishment and deterrent values of shaming penalties).
18 See, e.g., Kahan & Posner, supra note 6, at 371 (suggesting that shaming may often be "cheaper for the government than imprisonment"). Kahan and Posner note, however, that the private costs incurred by people who shun the offender may make
A final benefit of shaming is that its expressive qualities and relatively low cost can be combined with more traditional punishments to expand lawmakers' enforcement options. Once again, the best illustration is criminal fines. Although fines alone seem inadequate as a punishment for white-collar crime, lawmakers could achieve much more effective results by coupling fines with a shaming sanction. Requiring white-collar criminals to pay a steep fine and also make a formal apology for their crime could harness the deterrent potential of fines and, at the same time, express unequivocal social disapproval.17

Like the shaming theorists themselves, I have focused my attention on criminal liability. But shaming offers very similar benefits in the civil law context as well, as we will see, for private enforcers as well. If an offender has violated the standards of a relevant community, but the act does not implicate any criminal law, enforcers often have precisely the same shaming techniques at their disposal. A court that forces a polluter to issue a public apology, for instance, is engaging in shaming even if the environmental law is civil rather than criminal in nature.

For enthusiasts, then, shaming offers a low-cost way to promote shared values in all kinds of contexts. Skeptics, by contrast, see a darker, more corrosive side of shaming. Many skeptics, and even some enthusiasts, worry most about the effect of shaming on offenders—those who are forced to endure the shame.18 Perhaps the most vivid danger is the risk that shaming sanctions will prove too effective. If the relevant community shuns an offender enough, the offender may form a "deviant subcommunity" that flouts the morals of the relevant community. The Scarlet Letter once again bears elegant witness to this problem. Forced to wear the scarlet "A," Hester Prynne embroils is husband, as if to embrace her very ignorance.19 She and her daughter, Pearl, establish their own, defiant mini-community on the margins of the town that had shamed them.20 The same problem gives rise to our own era when inner-city youths who are convicted of crimes treat their criminal record as a badge of honor and seek the

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17 See, e.g., id. at 386-87 (advocating a "special hybrid penalty" consisting of a fixed shaming component and available fine component).
18 See, e.g., id., supra note 7, at 1920-21 (noting the negative psychological effects of shaming on the offender).
19 See, id. at 388-89, at 81.
20 See id. at 78-87.
approval of gangs rather than return to law-abiding society.\textsuperscript{11} The risk of inspiring or reinforcing deviant subcommunities is, in a sense, a specific instance of a more general problem: the difficulty of achieving the optimal amount of deterrence or rehabilitation. Shaming sanctions can have dramatically different consequences for different offenders. An offender whose skills are extremely valuable, for instance, may be largely immune from the effects of shaming.\textsuperscript{12} A stockbroker who has the Mark of Jot may face few long-term consequences if she is shamed for insider trading, whereas a more humble trader may find her life in shambles.\textsuperscript{13} Skeptics of shaming find this variability in the effect of shaming sanctions deeply problematic and at odds with the assumption that offenders who commit the same offense should receive the same penalties.\textsuperscript{14}

Skepticism also questions whether the costs of shaming are as low as enthusiasts insist.\textsuperscript{15} The most interesting variation of this criticism focuses on the social value of reputation. Unlike losing a face, which involves a transfer of the benefit of reputation to the offender or the victim or the state, an effective shaming sanction destroys the offender’s reputation without providing an offsetting benefit to someone else.\textsuperscript{16}

Reputations are costly to establish and maintain and thus have significant social value. This social value goes up in smoke when an

\textsuperscript{11} Australian criminologist John Braithwaite discusses the risk that shaming will create or reinforce deviant subcultures in detail in his book, \textit{John Braithwaite, Crime, SHAM, SHAME, AND RECONCILIATION} (1995). The author, Braithwaite believes, is “retrogressive shaming,” shaming that punishes offenders but then welcomes them back into the relevant community. Id. at 54-45.

\textsuperscript{12} This notion does not mean that there are no effects for the offender. If she has internalized the notion that she violated, the offender may be affected by a shaming sanction, but the overall consequences will be much weaker than for other offenders.

\textsuperscript{13} Kahan and Poister use the gifted stockbroker illustration. Kahan & Poister, supra note 6, at 372. The defendant in a well-known insider trading case, United States v. Chiarella, 715 F.2d 222 (9th Cir. 1983), is a particularly vivid example of the consequences of a ruined reputation to a top-ranked offender. Although Chiarella was acquitted of insider trading charges, the stigma of the case proved devastating. “[Alt]er [we]r years as a printer,” wrote the Wall Street Journal, “he was forced to drift from job to job... always taking new the pennyt line... [Every mention of his past life press paragraphe the end of each job].” Bryan Burrough, Apor the fall, \textit{Wall St. J.}, Nov. 18, 1987, at 1.


\textsuperscript{15} See, e.g., Kahan & Poister, supra note 6, at 372-73 (noting this skepticism).

\textsuperscript{16} See generally V.S. Klaassen, \textit{Criminal Capital Punishment: What Purpose Does It Serve?}, 109 Harv. L. Rev. 1747, 1763 (1996) (arguing that retributinal penalties have social costs). Manji rebuts a somewhat weaker point, arguing that the United States no longer has the kind of community structure that might help to reengineer offenders into society after they have been shamed. Manji, supra note 7, at 1973-28.
The offender is shamed. Another cost of shaming is the time and expense incurred by the relevant audience—the community members who carry out the sanction by refusing to transact with, or otherwise expressing disapproval of, the offender. Although the cost to each individual community member may be small, the collective cost could, at least in theory, prove quite large.57

In a fascinating account of the closely analogous issue of informational privacy, Seth Kreimer suggests several additional concerns.58 Kreimer notes that shaming sanctions are sometimes too easy to apply, which could lead to their indiscriminate use, especially by private enforcers.59 A similar concern is lack of process: offenders may have little opportunity to defend themselves.60

James Whitman raises yet another objection. Whitman insists that harassing community enforcement—which shaming enthusiasts tout as a benefit of shaming—really may not be such a good thing. "Once the state stirs up public opposition against an offender, Whitman argues, it cannot really control the way the public treats that offender." In some cases, such as the publication of the names of sexual offenders under Megan's Law statutes, shaming raises a genuine risk of retribution. Even in less volatile circumstances, Whitman worries, shaming gives too much "enforcement power to a fickle and uncontrolled general populace."61

What are we to make of these starkly opposed perspectives on the desirability of shaming sanctions? When we turn to corporate shaming in the next Part, I will argue that we need to focus more carefully on the particular context—that is, who the target, enforcer,
and relevant audience are—before we can make any final judgment.\textsuperscript{19}
We can, however, make at least one very general point: the objections to shaming do not make out a compelling case for rejecting this approach altogether. Both the risk of decentre subcommunities and the dangers of a “fickle populace” seem more serious in some contexts than in others. Offenders who are shamed for drug offenses or property crime, for instance, are more likely to form small communities than drunk drivers or polluters. The cost objections are plausible, but debatable. Although the aggregate costs to a community of enforcing a shaming sanction may be large, it certainly is not intuitively obvious that they swamp the costs of imprisonment and other alternatives. Similarly, traditional enforcement techniques raise many of the same calibration difficulties as shaming; in each case, the effect of the penalty may vary from individual to individual.

To assess the promise of shaming we must take a closer look at the kind of shaming we have in mind. In the next Part, we will do just that when we turn to the corporation. First, however, a brief note on the relationship between shaming and norms.

\textbf{B. A Note on the Relationship between Shaming and Norms}

Shaming sanctions are so integrally connected to social norms that it is not entirely clear where one leaves off and the other begins. A norm cannot survive unless it is enforced and, loosely speaking, norms are enforced in one or more of three different ways: guilt, shaming, and shaming. If the would-be offender feels guilt, she may enforce the norm unilaterally even in the absence of intervention by others. If community members see her violate the norm or learn about a violation, an enforcer may shame her by drawing attention to the violation. Other community members may then respond by shaming the offender. When we talk about norm enforcement, we therefore are often talking about shaming.

The shaming sanctions we will be considering in the Article are, in a sense, a subset of shaming activity generally. By shaming sanction, I mean, as noted earlier, a public statement made or ordered by an enforcer, directed at the offender, and addressed to the relevant community as a whole.\textsuperscript{20} When Robert Munks and Neil

\textsuperscript{19} For a similar definition, see Rabin & Ponter, supra note 6, at 568-69.
\textsuperscript{20} Shaming is a matter of revealing information about a person’s disgrace or actions. (The revelation ... must be done in a way that is known to the target of
Minow publish a full-page advertisement calling the directors of Sears as "Non-Performing Assets,"* when a judge orders a firm to publish a letter apologizing for polluting," these are shaming sanctions. My definition does not include a purely private confrontation, as when a neighbor confronts an offender, who is walking his dog on a trail where dogs are not permitted, at a time when no one else is around. Public criticism alone—absent any moral condemnation or "blaming"—also does not constitute shaming, although it can have a similar effect."

Although I have narrowed my focus to a particular kind of shaming, the fact remains that shaming sanctions, like shaming generally, are a device for enforcing norms. Much of the legal literature on norms therefore applies to shaming sanctions. Perhaps the most widely debated issue in norms literature is the most basic question of all: just how do norms work—what is the "mechanism" that drives, sustains, or changes a social norm? Thus far, legal scholars have developed two somewhat similar explanations. Richard McAdams emphasizes esteem and the effect that community members' withholding or conferring esteem can have on a would-be offender. Eric Posner characterizes norms as a signaling game in

the shaming . . . .

* See infra Part III.B (giving a detailed discussion of the Sears article).
** See infra note 46 and accompanying text (discussing remedies for the behavior of corporate polluters and other lawbreakers).

This is a variation of the "case of the devoted dog locust" illustration first shown in his analysis of the existing norm literature. See Robert E. Scott, The Limits of Behavioral Theories of Law and Social Norms, 80 VA. L. REV. 1605, 1608 (2000).

As we will see infra in Part III, these distinctions become quite subtle in the private enforcement context. For instance, a Wall Street Journal story might disclose the inappropriate behavior of a firm's managers without explicitly shaming them. In m. definition, shaming requires an instance by the related to publicly condemn the offender.

The puzzle for legal scholars is why community members are willing to enforce a norm given that enforcement is a public good. The set theories described below specialize that enforcement may usually be costless (McAdams) or has community members may anticipate benefits that offset the costs (Posner). For an excellent overview of the existing literature, written by the pioneer of legal scholarship on norms, see Eli Chvar, supra note 5. See also Peter H. Huang & Hsi-Ming Wu, More Order: Without More Law: A Theory of Social Norms and Organizational Capabilities, 19 J.L. ECON. & ORG. 396 (1994).

** See, e.g., Richard H. McAdams, A Full-Point Theory of Offensive Law, 96 VA. L. REV. 1649, 1691 (2000) (discussing the theory of "labeling" and suggesting that "[d]istributive game theory shows that law can influence behavior by its labeling power"); Richard H. McAdams, The Origins, Development, and Implications of Norms, 96 MICH. L. REV. 333 (1997) (proposing a model based on the theory that the initial force behind norm creation is the desire individuals have for the relative esteem of others).
which community members try to signal that they are cooperative—
"good types" rather than "bad types," the latter of which community
norms punish by refusing to interact with them.

A closely related issue is what makes norms change. Here, too,
the legal scholarship is very much in its infancy. Norms scholars have
focused on the role that "asymptotic entrepreneurs," such as black
churches in the civil rights movement, play in altering norms.14 Norm
entrepreneurs are most likely to be effective if the costs or benefits
of an existing norm, or the membership of the relevant community, have
changed—that is, when exogenous factors have undermined an
existing norm.15 Endogenous factors, such as changes in a community's
preferences, also seem to play a role, but we do not yet have
a plausible theory of how this works.

We will see many of these factors in action as we explore the role
of shaming sanctions in corporate law. Norm entrepreneurs such as
Monsk and Minnow have figured prominently as U.S. corporate
governance norms are increasingly fortified. Robert
Cooper has developed the most elaborate theory of endogenous
preferences and their role in creating and altering norms. See, e.g.,

In an interesting new article, Burt Kabam focuses on the relationship
between influence, of citizens' preferences to conform to the views of those around them, and
changes in norms. See Burt Kabam, Contesting the Vote: Moving the Norms Problem, 67 U. C. B. J. 267, 267 (2009); suggesting that the
makers of law are more successful in changing norms when they use institutional adjustments
rather than "hard coercion."

So, Michael A. Finerberg, Corporations Law and Social Norms, 59 COLO. L. REV. 1235
(1999) (providing a valuable analysis of corporate norms, with particular emphasis on the
change in directorial behavior in the past two decades). A variety of related norm
will figure in our discussion of corporate shaming. For instance, directors are expected to provide meaningful oversight, although obvious obstacles to their
accountability to shareholders, and assure that the firm behaves environmentally and
sustainably.
to determine just how much credit the pari-passus deserve for the shift to more active directorial oversight; at the least, shareholder activists have served as norm setters, highlighting directors who have not yet adjusted their governance standards to the current, more hands-on approach.) Corporate law also offers unusually clear evidence of the effect of shaming sanctions. In addition to losing esteem, directors and firms that violate a norm are punished in very tangible ways—investors refuse to buy their stock, for instance, and consumers may avoid their products.

II. A THEORETICAL OVERVIEW OF CORPORATE SHAMING

Corporations already have made their mark on the shaming literature. The standard list of illustrations of shaming includes drunk drivers forced to wear T-shirts proclaiming their crime, a landlord who was required to spend time in his repulsive apartments, and a cluster of cases that have instructed corporate politicians to issue public apologies for their "misbehavior." Interestingly, the Federal Sentencing Guidelines explicitly authorize sharing penalties of this sort, and shaming enthusiasts have treated these provisions as a model that should be used in other contexts.⁸

This is not to say, however, that shaming theories have meaningfully integrated corporate offenders into their analysis. Reading the existing literature often gives one the impression that corporate offenders can be lumped indiscriminately with individual offenders—that is, that no meaningful differences divide the two. But this obviously is not the case. Shifting from individual to corporate offenders introduces an entirely new dimension. Because corporations are run by agents—the managers—there are two

⁸ Kahn, supra note 7, at 682–84; see also Kahn & Pomer, supra note 6, at 585–87 (describing corporate apologies for illegal dumping of hazardous waste and arguing for similar shaming of white-collar criminals).


¹⁰ One aspect that does distinguish between the corporation and its individual managers is the Federal Sentencing Guidelines, which permit a court to require that a firm's chief executive appear at an sentencing under some circumstances, should be expanded. See id. at 586–87 (suggesting that CEOs should participate more extensively in "woodshed" proceedings). Quattlebaum, supra note 18, has written two books that address forms of corporate shaming in elegant detail. MAISTRAHAUT, supra note 21; REENT FREY & JOHN BRAGGHAUT, THE IMPACT OF PUBLICITY ON CORPORATE OFFENDERS (1989).
possible offenders rather than one. Shaming the corporation may have very different effects than shaming the managers or other employees individually. Only by considering both the corporate entity and its individual agents can we understand corporate shaming.

The discussion that follows will sketch out a simple anatomy of corporate shaming. The best way to do this is to analyze each of the three parties who take part in a shaming sanction: I will start by considering the enforcer, who is often a court, but who may also be a shareholder activist or other interested party. Next, I will examine the relevant enforcement community, or "audience." Finally, I will look at the target or offender. I save the offender for last because the decision whether to shame the corporate entity or particular individuals raises the most difficult and intriguing issues we will encounter.

Throughout this Part, we will remain in the realm of theory. With each of the participants in the shaming process, I will speculate about the conditions under which shaming might or might not make sense. The Part that follows will explore these predictions in a much more detailed way by considering actual shaming cases.

A. The Enforcer: Courts and Shareholder Activists

In the instances of corporate shaming that come most quickly to mind—the corporate polluter or corporate price fixer—courts play the role of enforcer. Shaming, however, need not be traced to the litigation process. When a prominent shareholder such as CAL/IFERS publishes a list of underperforming corporations, for instance, the principal purpose of the list is to shame the offending firms. As first glance, CAL/IFERS's focus list and the other examples of nonjudicial shaming may seem to lack one crucial thing: the moral component. When a corporate polluter is shamed by a court, we can easily see how the firm has offended a community standard. Can we make the same claim about the firms that are held up for

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46 I have borrowed my terms from the sociology literature used in assessing norms generally. Seelitigation, supra note 3.

47 CAL/IFERS's focus list of underperforming firms is discussed in detail infra in Part III.A.

48 By referring to the moral component and to community standards, I do not mean to suggest that the morality of the community is necessarily justifiable. As discussed below, community norms can be quite pernicious. See infra Part III.B. My point is simply that peer shaming is based on community standards of right and wrong and thus has a moral dimension.
condemnation by shareholder activist or the business press? The answer is yes. Although in times past the directors of large firms were not expected to do much at all, an increasingly powerful norm condemns directorial sloth and requires the board to exercise meaningful oversight. Directors who shirk these responsibilities, and firms that exact "accountability repellent," do so in violation of this norm. Private enforcers who call attention to these violations are therefore shaming the offenders in much the same way as a judge who orders a corporate polluter or price fixer to make a public confession of guilt.

With both judicia and private enforcers we need to keep our eyes on the same two issues: the enforcer's information and her incentives or motives. The information problem is quite simple: it is often extremely difficult to assess blame after the fact. The manager of a firm whose midlevel officers have engaged in rampant price-fixing may have genuinely sought to prevent such misbehavior, or they may have deliberately looked the other way. The managers are sometimes blameworthy when a firm performs badly, but underperformance can also stem from forces beyond their control. Even if the enforcer's aim is true - the wishes to shame only the blameworthy, not the unfortunate - these information effects seriously complicate the decision whether, and how, to shame a corporate offender.

Given the limitations of twenty-twenty hindsight, an obvious solution is for enforcers to rely on simple, objective yardsticks; that is precisely what we will see. For instance, courts focus on whether a firm that was caught price-fixing had an internal compliance system in place. Similarly, shareholder activists place significant weight on readily verifiable factors, such as the number of independent directors on the board of directors.

Even when we have no reservations about the enforcer's motives, information problems complicate the use of shaming sanctions, just as they complicate judicial intervention in corporate law generally. It is a bit unrealistic to assume that enforcers' motives are always pristine, which leads to a second issue: the possibility that an enforcer's motives are suspect. Although we like to think of judges as neutral

9 For a discussion of this transition in corporate terms, see Eisenberg, supra note 45, at 1295-97. The term "accountability repellent" comes from Neil Mino. Minor Idem., supra note 5.

10 Other corporate governance yardsticks include whether the board of directors has nominating and audit committees controlled by disinterested directors and whether all of the directors are stock in the corporation.
and detached, some judges may treat the shaming of a large corporation as a way to enhance their own reputation, even if the corporation’s actions do not really deserve this treatment. An activist shareholder may have a similarly disinterested perspective if she has a personal stake in the outcome. With private enforcers who do not have a significant ownership interest, the risk of ulterior motives may be particularly high and, in general, private enforcers seem more likely to have problematic motives than judicial enforcers.

With both limited information and pernicious motives, the seriousness of the problem depends on the behavior of other participants in the shaming process. Enforcers’ limited information and need to rely on readily verifiable factors is most troublesome if the enforcement community has similarly poor information. Similarly, enforcers’ motives are one problem if the relevant community will carry out, even an inappropriate shaming action.

A final consideration regarding private enforcers is cost. Cost is a crucial variable in the corporate context because the relevant community—say, all shareholders of a large corporation—will frequently be far flung. Placing an advertisement in the Wall Street Journal to shame the directors of Sears, for instance, cost Robert Marks well over $109,000. Because of the high cost of placing such advertisements, enforcers’ ability to attract national media attention, and thus free publicity of the shaming effort, dramatically enhances the likelihood that shaming will have an effect. Judicial enforcers do not face the same cost constraints since they can require the offending firm to bear the cost of the public shaming.

B. The Audience or Enforcement Community

Because shaming sanctions succeed only if the relevant community enforces them, the community can serve as a check onward enforcers. Shaming skeptics worry that the community will

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play this role effectively, not only may it carry out sanctions it should ignore, but the community's enforcement efforts may spiral out of control. As we saw earlier, according to James Whitman, shaming is "a form of lynch justice," and the enforcement community has a dangerous "tendency...to become either a mob or a collection of petty private prison guards." These images of riots and lynch mobs may seem a bit far-fetched in corporate law, but overzealous enforcement is a real concern. We can generalize the issue, and indulge our lurid imagery still further, by asking two simple questions in any given context: can the relevant audience distinguish desirable shaming efforts from undesirable ones, and will it respond appropriately?

To answer these questions, we must first determine what constitutes the relevant community. For shareholder activists and other private enforcers, the relevant audience is generally the firm's shareholders and, on occasion, the peers and friends of the firm's managers. In contrast, judicial shaming efforts often have a more diffuse target, such as the customers of products made by the offending firm.

The other two factors we should consider are the same two variables we explored in our discussion of enforcers: limited information and the likely motives of the audience. Very often, it is the interaction of these factors, rather than either information or motive alone, that determines whether we can have confidence in the audience. The reason is that even in a close-knit community, the audience usually has less information than either the enforcer or the offender. If community members have reason to blame only the shamesworths, they will take both their own limited information and the reliability of the enforcer into account as they respond to the shaming sanction. It is only in communities with less desirable incentives that problems arise.

Where do these undesirable incentives come from? A key variable is whether, and to what extent, the community internalizes or externalizes the effects of its enforcement activities. If the benefits and costs of shaming remain within the community, the community is

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footnotes:

* Whitman, supra note 37, at 1999; see the Kermit, supra note 28, at 9456 (describing the danger of private party responses to governmental disclosures).

* One of the reasons that Robert Manning's and Neil Morgan's shaming advertisements have been effective, in their view, is that they are seen by family, friends, and peers of the directors, rather than just by shareholders. See infra Part III.B (discussing the Sears battle).
less likely to shame inappropriately. For example, the ranchers in Robert Ellickson’s pioneering study of Shasta County rely in part on shaming to enforce community norms and the effects of the shaming are largely internalized.19 The shaming of Southern merchants who served blacks in the Jim Crow era is an illustration of shaming that had external effects, since blacks were excluded from the relevant community yet bore most of the costs of the shaming.20

Although much of the corporate shaming we will consider is internalized by the relevant community, corporate shaming can also have external effects. Perhaps the best example of this was Wall Street’s initial response to the onset of the takeover era of the late 1970s and 1980s. Prior to the takeover boom, a strong norm prohibited Wall Street banks from financing or advising hostile takeover ‘bidders.’21 In the small, close-knit community of Wall Street financiers, a bank that violated that norm would be shamed by its peers.22 This norm had obvious effects on outside parties, at least on the shareholders of target firms who lost the chance of receiving a takeover premium. The speed with which the norm collapsed once Morgan Stanley broke ranks by agreeing to participate in a hostile bid for First is a tribute both to the efficiency of the norm and the coercive power of market forces when the costs of an inefficient norm come to substantially outweigh its benefits.

Another illustration of corporate shaming that may have had external effects came in the Delaware Supreme Court’s important decision in Paramount Communications v. QVC Network.23 In this case, the court added an extraordinary appendix to the end of the case expressing shaming the well-known Texas trial lawyer Joe Jamail.24 Taking angry exception to Jamail’s representation of a Paramount director during a deposition in the case, the court complained that he “abused the privilege of representing a witness in a Delaware proceeding, in that he: (a) improperly directed the witness not to

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21 Eisenberg, supra note 45, at 1298.
22 For a discussion of this norm and its demise, see id. at 1287-94 (detailing Morgan Stanley’s involvement in the hostile takeover bid for First). 057 A.2d 34 (Del. 1993).
23 Id. at 51:37.
answer certain questions; (b) was extraordinarily rude, uncivil, and rude; and (c) obstructed the ability of the questioner to elicit testimony to assist the Court in this matter. The appendix is remarkable in that Janss’s behavior was not even at issue in the case. And because Janss was neither a Delaware lawyer nor admitted pro hac vice, the Delaware Supreme Court had no authority over him. We can view the glass here as either half empty or half full. It is half full in that the court’s insistence on high ethical standards reinforces the moral dimension to Delaware’s oversight of corporate law. At the same time, however, the rebuke can also be seen as highlighting the elite status of Delaware lawyers and the Delaware corporate bar, as well as underscored the importance of using Delaware lawyers in Delaware cases. Rather than investment bankers or the corporate bar, the offenders in the case studies we will explore in Part III are the firm and its directors, and the audience will generally be the firm’s shareholders or consumers. The shaming principles, however, are very much the same.

C. The Target: Corporate and Individual Offenders

Much of our discussion of enforcers and enforcement communities could be applied to any shaming discussion, corporate or otherwise. As we turn to our final player, the target of a shaming penalty, we take up the issues that make corporate shaming unique. When corporate offenders are shamed, the target may be either the corporation, an individual offender, or both.

1. Shaming the Corporation

While the “corporation” is simply an intangible entity which cannot itself misbehave or commit a crime, corporations can be held liable for a wide variety of offenses. By imposing liability on the corporation, lawmakers hope to induce corporate managers to keep a watchful eye on the behavior of the corporation’s employees. As a general matter, this strategy—vicarious liability—enjoys widespread approval. It is less clear, and there is more disagreement about, how

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68 Id. at 55-56.
69 Id. at 56-57.
to implement the liability. Determining whether to hold corporate offenders strictly liable, or, alternatively, to impose a duty-based regime, turns out to be quite tricky. If a duty-based regime is in place, the corporation is only liable when it violates a duty. As a result, corporate defendants may comply with the literal requirements of the duty but eschew preventive steps that are too ill-defined to be detected by a court. A strict liability regime seems to eliminate this problem since it gives firms and managers an incentive to take preventive steps so that the firm avoids paying a fine. But a strict liability regime also gives managers a subtle and perverse incentive not to uncover misbehavior once it has actually taken place; this is because the corporation is actually worse off when it dredges up and is fined for misbehavior that the government would not have detected. Thus, "strict liability only encourages policymakers measures insofar as they reduce the incidence of misconduct, but it perversely discourages them insofar as they increase the firm's expected liability for undetected misconduct."

Although the scholarly debate has focused on corporate fines, the same reasoning also applies to corporate shaming. If courts impose shaming sanctions on the firm without reference to fault, firms will face the same mixed incentives. How might the incentive problem be controlled? Corporate liability theorists have proposed, among other things, a composite liability regime consisting of two different levels of liability. In this


7 Arlen & Knake, supra note 6, at 707.

8 Although it seems counterintuitive to speak of shaming an inanimate entity like a firm, the reputational consequences to the firm when its managers engage in illegal behavior and the behavior is discovered can be enormous. For a detailed assessment, see Jonathan M. Karpoff & John R. Lott, Jr., The Reputational Penalty from Crime: A Case Study of Coca-Cola, 96 J.L. & ECON. 725, 726 (1999). See also Sarah Reagen & Roberto Toninato, Event Studies with the Nasdaq-22-22 (Nov. 2006) (unpublished manuscript, on file with author) summarizing the scholarly literature and concluding that governmental recall may have a greater impact than private produce liability litigation. This suggests that shaming penalties can have a dramatic effect on the reputation of a firm and indirectly on the employees associated with it, at least if they publicize misbehavior that has not been fully publicized already.

9 Arlen & Knake, supra note 6, at 720-29.
A hybrid regime, courts would impose a standard penalty on every corporate offender, without regard to fault. Only if the firm failed to police itself effectively would it bear the additional, second-level sanction. This is where shaming might come in. By including shaming in their arsenal of second-level sanctions, courts could reinforce the message that corporations are expected to monitor themselves for misbehavior while adding an alternative means of punishing firms that fail to do so.

I do not mean to suggest that composite liability is a perfect solution. Like all dual-based approaches, the second step of composite liability can be subverted if courts cannot easily determine whether the firm has monitored itself adequately. Even with this limitation, however, composite liability offers obvious benefits over a more traditional strict liability regime, and shaming fits neatly into this approach.

Before we move from corporate to individual offenders, we should briefly consider an issue I glossed over at the outset of this discussion: should corporations ever face criminal liability or should corporate liability be exclusively civil in nature? Although corporate criminal liability is popular in the statute books, it does not have nearly so prestigious a following in the scholarly community. Critics point out that corporate entities cannot have the mens rea traditionally required for criminal liability and question whether the procedural expectations of criminal law make sense when the defendant is a corporation. Despite these concerns, criminal liability might still make sense if shaming has a greater impact than shaming under a civil statute. This seems doubtful, however, when the offender is a corporation. For example, when Dewey's, and later Texas, were sued for alleged discrimination, the fact that the lawsuits were civil other than criminal in nature seems unlikely to have diminished the damage to the firms' reputations. The key issue in these cases was
whether the relevant audience believed that the behavior in question truly was shaneworthy.

Our analysis of corporate shaming thus suggests that we should cast at least a tepid vote for the scholars who wish to get rid of corporate criminal liability. But our insights should apply both in a world with corporate criminal liability and one in which corporate offenders face only civil sanctions.

2. Shaming Individual Managers

Shifting from corporate to individual offenders complicates the analysis in intriguing ways. In the discussion that follows, I start with several issues that arise even under the most straightforward of cases, where there is no risk of an excessive community response and we assume that all managers are equally responsive to shaming sanctions. I then turn to questions such as the risk of an excessive response and conclude by asking what kinds of managers are most (or least) likely to respond to shaming.

The most serious concern with imposing individual liability of any sort—whether a monetary penalty or shaming—is the risk that liability will have too great an effect on managers’ behavior. Unlike an ordinary investor, who can diversify her investments, managers have an enormous stake in the fortunes of the firm they manage. Having so many eggs in the same basket makes managers risk averse to start with; if a significant risk of liability were added to this, the reasoning goes, managers might be unwilling to take even the smallest and most ordinary of risks.

Firms have long countered the chilling effect of potential liability by providing insurance and indemnification for their

2006, at C4 (describing the Texas settlement of a lawsuit by black employees for racial discrimination); David M. Fernbach, Punitive Actions Are Advised in Discrimination at Denny’s, N.Y. TIMES, Aug. 15, 1997, at B1 (referring to prior class action lawsuits against Denny’s in the context of continued racial discrimination at the restaurant chain).

The best reason to retain corporate criminal liability may be a purely practical one: the corporate case can be coordinated with any criminal litigation involving individual offenders. See, e.g., Khanna, supra note 20, at 1529–30 (arguing that although the “enforcement framework of corporate criminal liability is sometimes desirable,” civil liability using such enforcement features is a better option).

7 This is more true with managers who are both directors and high-level officers of the firm, such as the CEO. As noted below, outside directors may be risk averse for other reasons, such as the fact that the risk of liability may dwarf the benefits to them of their interest in the firm.
managers. But notice how shaming sanctions complicate this strategy, at least for cases that are litigated to judgment. If a court holds that a manager breached her fiduciary duties, insurance may cover the financial liability, but it is not much help against a shaming sanction. A shaming sanction may have serious consequences for a manager’s reputation and firms cannot easily insulate their managers against the threat. For outside directors, shaming may loom even larger since they generally have much less of a financial stake in the firm to offset the reputational consequences of being shamed.

Although the chilling effect should make us wary about individual liability, there are good reasons not to set the buck stop at the corporate level. If the corporation has limited assets or substantial debt, for instance, its inability to pay a potential fine may diminish the deterrent value of the fine. Individual liability is thus an important supplement to corporate liability. Rather than abandoning individual liability, a better solution is to attempt to limit it to clear misbehavior. Indeed, we see this impulse both in corporate law

77 For an extensive recent discussion of responisibility and indemnification patterns, see Eshel Baras, Shareholder Litigation Under Indemnification Corporate Laws, 66 U. Chi. L. Rev. 887, 901-05 (1999). In those cases where managers’ indemnifiable, the managers face the double-whammy of reputational and monetary penalties, even without explicit shaming. See, e.g., Michael J. Whiting, Redenying Release of Officer Liability under Indemnification Corporate Laws, 85 Minn. L. Rev. 19, 22-23 (2001) (describing the reputational effects of violating corporate norms).

78 It is more difficult to shame individual offenders where the parties were in the case, as they very frequently do in the context of private shareholder litigation. If the case settles, the court’s only real opportunity to shame an individual offender may be in a written opinion deciding a preliminary motion or reviewing the proposed settlement. The Corleone-case, In re Corleone Inc. Exec. Officers Litig., 968 A.2d 99 (Del. Ch. 2006), which I consider in detail supra in Part IX.C, was a review of a proposed settlement.

79 Outside directors’ susceptibility to shaming suggests that both the benefit and the risk of shaming may be greatest with these directors. Shaming is more likely to influence their behavior, but the prospect of inappropriate shaming may discourage unwieldy directors from serving.

80 Theoretically, if examiners viewed the best way to achieve optimal deterrence, they would need to increase a firm’s liability to reflect the fact that the likelihood of detecting misbehavior is much less than 100%. That is, the liability should be based on the harm, multiplied by the probability of detection. This would require exorbitant fines in many cases—more that most firms could pay. See Coffee, supra note 67, at 589-90 (discussing the “feasibility of setting adequate punishment costs which does not exceed the corporation’s resources”).

81 Even Bruce Chapman, who makes a powerful case for imposing liability only on the firm, the corporate form, concludes that individual liability is appropriate if the individual offender lacked good faith and benefitted from the misbehavior. Bruce Chapman, Corporate Tax Liability and the Problem of Overcompliance, 69 U. Chi. L. Rev. 1679, 1704-02 (1996).
doctrine and in actual insurance policies, which tend to exclude intentional wrong from their coverage. This same strategy can be used with shaming sanctions.

A third issue, the "mob psychology" concern that Weitman and others have raised, moves us beyond the most straightforward cases and into the distinct features of corporate shaming. Suppose two or three managers of a corporate polluter are singled out for blame and subject to a shaming sanction—say, a court-ordered apology in several national newspapers that identifies them by name and position. Although the sanction is unlikely to lead to riots, the offenders could be subject to excessive punishment by one or more relevant communities. Other firms might be reluctant to hire them for fear that government regulators will closely scrutinize any firm that associates itself with the offending managers. The managers' reputations also could be seriously tarnished within their local community.

It is hard to know how likely a community is to overreact to a shaming sanction, but the risk does not seem trivial. Though runaway enforcement seems somewhat unlikely for the managers of a corporate polluter, one can easily imagine overreaction to cases involving politically charged issues such as sex or race discrimination. In these contexts, the risk of an excessive reaction might counsel in favor of limiting any shaming sanction to the corporation rather than pinpointing individual managers.

Up to now, I have assumed that all managers are essentially the same and will be equally responsive to shaming sanctions. This is not true, however. A final question, then, is what kinds of managers will be the most (or least) susceptible to shaming sanctions?

Because shaming undermines an offender's reputation, one would expect to find a direct correlation between responsiveness and the importance of reputation. This suggests that managers who have less need to establish a reputation for cooperation will be more difficult to shame. If a manager's skills are so valuable that people will transact with her regardless of her reputation, or if she actually

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8. See supra notes 35-32 and accompanying text.
9. Kremer discusses these kinds of concerns in some detail. See, e.g., Kremer, supra note 28, at 35-50 (describing retaliation by private parties after disclosure); id. at 144-45 (describing cases in which publicity is particularly likely to have a chilling effect).
10. We might also have concerns about shaming the corporation in this context, especially when it is done by private rather than judicial enforcers. Private enforcers can use the threat of shaming to exact value from a firm, as may sometimes be the case when acting through boycotts.
benefits from a reputation as a "bad" type, shaming sanctions are less likely to prove effective." High-tech managers may be an illustration of the first of these factors (at least before the recent downturn in Silicon Valley), and corporate raiders have sometimes personified the second.24 It is conceivable that companies engaged in morally tenuous businesses could use these kinds of considerations strategically by hiring managers who are unusually sensitive to shaming sanctions. The tobacco companies, for example, are sometimes accused of this and liquor manufacturers may have fit this description in an earlier age. For such a company, shaming sanctions would obviously be less effective than in other contexts.

D. Concluding Thoughts

In taking on all of corporate shaming, I have brought a wide variety of different practices under a single umbrella. Everything from the criminal penalties handed down by a court under the Federal Sentencing Guidelines to campaigns by shareholder activists seeking to rale their fellow shareholders can involve shaming. Despite the diversity, we can make sense of the pitfalls and promises of shaming by focusing on a small number of factors. For both the enforcer and the relevant audience, two factors loom especially large: limited information and the parties' incentives of motives. With the final party, the offender, the most important issue is who to shame and how to shame them.

Throughout the discussion, I have assumed that shaming sanctions have a meaningful, independent effect. This is a plausible assumption in most contexts, as we shall see. In some instances, however, as with misbehavior that has already received wide publicity, the additional impact of shaming may not be so clear. Duplicative shaming obviously has much less to offer as a sanction, and we will need to take into account the possibility that shaming may be

24 See supra note 22. An additional consideration is whether an offender has internalized the community's norm. If not, the will respond to a shaming sanction only if failing to do so will have tangible, external consequences.

25 The managers of Silicon Valley firms are widely perceived to be much less reputationally sensitive than managers of more traditional firms. As an illustration, a leading shareholder activist described to me a story involving a Silicon Valley manager who, after receiving a letter from a group of minions asking that the firm consider adding a female director, wrote a scathing response pointing out that the firm had used a signature stamp, rather than signing their letter by hand. Minow Interview, supra note 1.
III. CORPORATE SHAMING: THREE CASE STUDIES

Having looked at some of the theoretical issues raised by corporate shaming, it is time to go down into the trenches. The three case studies that follow cover the entire range of corporate shaming. We will begin with several prominent illustrations of shaming by private enforcers, including the various of shame published by CalPERS and the financial press and the ad campaigns waged by Robert Monks and Nell Minow against the directors of Sears and several other boards of directors. Turning to judicial enforcers, we then will focus at length on a prize-fighting case involving Citicorp Industries. The Citicorp case raises all of the corporate and individual liability issues we explored earlier, and we will consider how shaming sanctions might be used in such a case.

A. Review of Shame: CalPERS and the Business Press

1. CalPERS’s “Focus List” of Underperforming Firms

Americans are obsessed with lists. Many are designed to exact—the “all-twentieth-century” baseball team, for instance—and others are designed to rebuke. Shareholder activism and the business press use a similar technique to bring pressure on U.S. firms. The most sustained and dramatic example of this is the annual “focus list” published by CalPERS, California’s state pension fund for public employees. Because CalPERS, like other public and private pension funds, invests a substantial portion of the assets it manages in stock, it has been one of the nation’s largest stockholders for many years. As institutional

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[1] See infra Part III.C (discussing this possibility with corporate scandals).
[2] See supra Part III.C (comparing the effects on behavior of shaming individuals with the effect of shaming corporations).
[3] The Council of Institutional Investors (“CII”)—an organization comprised of representatives from public pension funds, private funds, and other institutions—publishes an analogous “watch list.” As with the CalPERS list, at least one study suggests that the CII focus list has had a significant, positive effect on the value of firms that make the list. Tim C. Opler & Janoshik Solnik, Does Coordinated Stockholder Activism Work? An Analysis of the Council of Institutional Investors (May 1999) (unpublished manuscript, on file with authors), available at http://finance.un.org/finance.orgi الأمرетs.
shareholders have taken an increasingly active role in monitoring the firms whose stock they hold, public pension funds have led the way, and CalPERS has embraced the new activism with more relish than any other.

Even CalPERS cannot actively oversee every firm in its portfolio, so it has developed an elaborate system for determining the firms in which to invest its energies for any given year. To narrow down its list to a chosen few, CalPERS considers three different factors: (1) shareholder returns for the last three years, (2) the economic value added, as determined by a test conducted by Stern Stewart & Co.; and (3) a "corporate governance" screen, which looks for red flags such as a majority of inside directors on the board or a class of stock with disproportionate voting power. The goal of the process is to identify firms that "are both poor economic performers and have corporate governance structures that do not ensure full accountability to company owners."

Once it has assembled a list—the so-called "long list"—of firms that scored lowest on both its economic and corporate governance tests, CalPERS's next step is to sit down for a chat with directors of the firms "to discuss performance and governance issues." CalPERS generally has no trouble arranging these private chats for a simple and obvious reason: both CalPERS and the directors know that CalPERS is likely to take action, such as launching a proxy contest, if the fund gets no response.

Nothing I have described thus far sounds much like shaming, indeed, if CalPERS held its conversations with underperforming directors and then aimed its proxy contest weapons at the boards that refused to listen, we could just jump to the next illustration. But that is not all that CalPERS does. After its chats, CalPERS assembles another, shorter list of the firms that "continue to merit public and market attention." These nine or ten firms are CalPERS's "focus list." CalPERS trumpets its focus list with a press release naming the firms and explaining the inadequacies that landed each firm on the list. One obvious benefit of the list is informational—it alarms

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94 Id.
95 Id.
96 Id.
97 The 1996 press release announced, for instance, that "Tycon Foods, Inc. and Girco Group Enterprises Inc. (CalPERS) sue of Corporate America's poorest
shareholders and the marks about the firms' problems and generates support for CalPERS's subsequent efforts. But there is a moral component as well. CalPERS clearly intends to blame the offending firms.

The list of changes CalPERS has induced is quite remarkable. Regarding the firms in its 2000 focus list, for instance, CalPERS persuaded one to separate the Chief Executive and Chair of the Board positions (Bob Evans Farms), three to require a majority of independent directors (Crown Cork and Seal, A.G. Edwards, and Paycor), and two to designate a lead independent director (First Union Corp. and Intergraph Corp.). When CalPERS picks corporate America's latest; there is no question about that.

Just how shaming—the "blame" component—fits into this picture is less clear, however. The list of underperforming firms is the most visible manifestation of CalPERS's monitoring efforts, but it is only a small piece of the overall strategy. Director's listen to CalPERS because they know that CalPERS will spring into action if the directors do not adequately respond. Indeed, CalPERS limits its focus list to firms in which it holds at least $2 million worth of stock for precisely this reason: to make sure it "has a large enough holding to justify the resource commitment necessary to elicit change."12

Why, with all the artillery in place, does CalPERS even bother to publish its roster of shame? One benefit, to be sure, is that the publicity paves the way for a groovy contest if each action becomes necessary. CalPERS also believes, however, that publishing the names and shortcomings of the firms has an independent reputational effect. The shame of association with a focus list firm is sufficiently embarrassing that it makes directors more willing to accede to governance change. As CalPERS's former general counsel explains, "[t]he shaming aspect is very important. Firms hate to be on the

12 Performance released today." Press Release, CALPERS Releases List of Nine Corporate America's Poorest Postural and Economic Performers (Apr. 7, 1999), available at http://www.calpers.ca.gov/whatsnew/peers/1999/9421.htm. The release that explained why these two firms were singled out for particular attention: "Tosco Foods... landed on the corporate laggards list because of its poor stock performance and use of a dual-class stock structure." Id. The firm of Citron Group now nothing to do with gambling and everything to do with "stock performance that is lower than in peers... and... a board that is insufficiently independent of management." Id.

13 See CALPERS, supra note 9 (setting forth the number of shares owned by CalPERS and the changes to all companies proposed by CalPERS).
So shaming works, or at least it seems to work. Whether we should be encouraged or troubled by CalPERS’s use of shaming is, of course, a different question. Our answer to this question depends in no small part on CalPERS itself—that is, the fund’s motives or incentives. When courts engage in shaming, they serve as ostensibly disinterested enforcers of permissible behavior. CalPERS, by contrast, has a direct stake in the outcome of its activities. The goal of CalPERS’s efforts is to increase the value of its holdings for the benefit of retired California employees. Because the managers of CalPERS are public officials, political factors may influence their decisionmaking, which suggests that their motives are not entirely objective. The need to justify their results in terms of shareholder value, however, is likely to have a restraining effect on pure political activism, particularly with actions such as a proxy revolt that will ultimately require a shareholder vote. 88

Although CalPERS’s stated aim seems laudable on the whole, the selection process for its focus list illustrates some of the information problems we considered in the last Part. 89 CalPERS’s corporate governance screen is designed to isolate firms that are dominated by insiders, and CalPERS devotes much of its energies to achieving simple structural changes such as establishing an independent board. 90 As obvious reason for this is that even a sophisticated investor like CalPERS often cannot know exactly why a firm is underperforming, and, therefore, must rely on broad yardsticks. In effect, CalPERS assumes that if a fund has performed badly and does

88 Telephone interview with Richard Koppe, former General Counsel. CalPERS (Oct. 8, 2000) [hereafter Koppe interview]. CalPERS does not publish its annual focus list until February, at the onset of the proxy season, to minimize this effect. Id.
89 Ed Rock and Roberta Romano have both emphasized that the activism of public pension funds may reflect the personal and political agendas of the fund leaders rather than solely an interest in maximizing the value of the fund’s stock. See Edward B. Rock, The Logic and (Un)Conscious Significance of Institutional Shareholder Activism, 79 Geo. L.J. 445 (1991) (delineating the significance of episodic shareholder action by pension funds); Roberta Romano, Public Pension Fund Activism in Corporate Governance Reconsidered, 93 Colum. L. Rev. 705 (1993) (noting that public pension funds are faced with investment conflicts that limit shareholder success). CalPERS itself is a large mixed investor in its own muniaction, which refers not just to the goal of increasing stock value, but also to CalPERS’s commitment to the public interest. See CalPERS, supra note 9.
90 See supra note 55 and accompanying text (describing the need to use objective yardsticks).
not have an independent board, the board’s lack of independence is one reason for the bad performance.

The problem with this strategy is that it is not clear that firms honoring the disinterestedness norm perform better than firms whose directors are interested. As Bernard Black, the leading commentator on shareholder activism, concludes, “there is no compelling evidence that greater board independence improves overall firm performance, and some evidence that inside and affiliated directors play useful roles.” Black’s conclusions about other priorities of CalPERS and its peers are equally defining. Although “[a]dvocating institutions generally support [independent] . . . nominating and compensation committees,” for instance, the leading study “finds no evidence that the existence of these committees or their staffing affects firm performance.”

On the other hand, in keeping with CalPERS’s generally benign motives and the stakes of its shareholder audience, there is no evidence that these activities are affirmatively harmful, and at least some evidence that a beneficial “CalPERS effect” exists when institutional shareholders such as CalPERS prod firms to alter their governance structure without waging a formal proxy fight. Moreover, CalPERS’s effectiveness depends in no small part on its incentive to increase the value of the firms it monitors. If an entity with no financial interest used the same kind of shaming techniques, shareholders and the firms’ managers would respond quite differently. To some extent, at least, the enforcement community—here, the firms’ other shareholders—acts as a check.

Is there anything further we can say about the nature of the firms on which CalPERS’s focus has its greatest effect? I suggested in the last Part that the boards of traditional firms may be more susceptible

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185 Black, supra note 103, at 469.

to shaming than newer, high-tech firms. CalPERS's former general counsel agrees that its efforts have been most effective with traditional firms, but offers a different explanation for the correlation: size and prominence. CalPERS's focus list works best when the national press takes an interest in its selections. CalPERS is far more likely to get extensive media coverage when it shames a firm whose name we all know than when it shames a medium-sized ("midcap") corporation.

One thing we almost never see on CalPERS's focus list is a reference to individual managers. The focus list shames underperforming firms, but rarely targets managers individually. CalPERS's failure to name names is at least mildly puzzling since we might expect shaming that singles out particular individuals to have a greater effect than more generalized shaming. This, too, is a manifestation of CalPERS's overall governance strategy. CalPERS relies heavily on private negotiations that might be undermined if CalPERS singled out the director by name. When we examine two shareholder activists, Robert Monks and Nell Minow, in Part III.B, we will see a much greater willingness to name names.

2. Shaming by the Financial Press  

Shareholder activists are not the only nonjudicial enforcers who use shaming techniques to punish wayward firms and their managers. The financial press—Fortune, Business Week, and their competitors—make regular use of the same kinds of techniques.

Now, nearly every issue of these magazines includes at least one story that looks somewhat like shaming. Investigative reports such as the articles that appear daily on the side columns of the Wall Street Journal's front page, cast a cold light on particular firms and individuals and have enormous reputational effects. I will return to journalistic of this sort, which does not overly blame the individuals and firms in question, at the end of this Part. In the discussion that follows, we will focus on journalism that looks much more like explicit shaming. Fortune's and Business Week's reports on the "best and worst boards" are

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106 See supra Part II.C (discussing various targets of corporate shaming).
107 Krupin Interview, supra note 99.
108 Id.
109 CalPERS's unwillingness to name names may also reflect the fund's own bureaucratic structure and its sensitivity as a state agency to political considerations. See, e.g., Minow Interview, supra note 9.
the most familiar illustration, and these lists will occupy our attention in the paragraphs that follow.

One of the first recent efforts to systematically identify the nation's worst corporate boards was a 1996 article in Business Week entitled, appropriately enough, "The Best and Worst Boards." The article followed up on several recent publications on board performance, each of which uses interviews and a set of qualitative criteria to identify the nation's twenty-five best and twenty-five worst boards of directors. Although its methodology is somewhat less elaborate, Fortune, too, has published several articles listing and criticizing the worst boards of the year.

The selection strategy used by the financial press is broadly similar to the strategy used by CalPERS on its annual focus list. In its initial article, Business Week emphasized the virtues of a vigorous board, "Perhaps the most important quality," the article suggests, "is directors who are active, critical participants in determining a company's strategies." Another crucial component of top-ranked boards is director independence. Governance experts believe that a majority of directors should be free of all ties to either the CEO or the company. The lists that made both magazines' lists of laggards almost invariably failed to meet these standards of vigor and independence. Business Week (charted II), for example, "[l]isted [MCI's board] at 112," Archer Daniels Midland because of its "lack of independence," and Rollins Environmental because its board is "probably the least independent board of any public company." Fortune listed Pacific Corporation as a "textbook of governance worst practices" because its board has just five members: (Pacific's CEO), (its COO, its outside lawyer, another lawyer, and a former accountant.

Each of these statements could easily have come from CalPERS or individual activists like Robert Morris and Nell Minow. Despite the striking similarities between the approaches of Business Week and Fortune

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4. Byrne et al., supra note 111, at 81.
5. Id. at 92.
6. Id. at 93.
and those of other enforcers, however, these journals bring very different credentials. The most important distinction is the journals’ lack of a direct stake in the firms they shame. Although disinterestedness is prized in most contexts, the fact that CalPERS and other shareholder activist enforcers put their money where their mouths are gives these credibility; if a shareholder activist’s shaming effort is misguided, the enforcer itself loses too. The credibility of Business Week, Fortune, and their peers must come from somewhere else, since they do not hold stock (we hope) in the firms they shame. That somewhere else is reputation, which we will consider in more detail in a moment.

Another difference between shareholder enforcers and the financial press is that the financial press can publish a roster of shame at a much lower cost. Because Business Week and Fortune have already committed to filling their pages, the marginal cost to them of publishing an article on the nation’s “worst boards” is very low. For private shareholder activists, by contrast, the cost of publicizing the sins of offending managers and firms can be quite high. (The additional costs to CalPERS are less dramatic, since CalPERS’s press releases often are covered by the national media.) Because financial journals, unlike shareholder activists, never engage in press solicitations, they also are spared the cost of complying with SEC disclosure requirements when they criticize managers in print.

In addition to the distinctions I have noted, the financial journal articles may seem to lack the blame component of true shaming. In some respects, the “worst boards” articles can be seen as mere criticism of poor performance. Yet they also have aspects of true shaming. When Business Week complains that Disney’s “muck, hardpicked” board “won the dubious distinction of being named the worst” in America, it is making a moral statement as well as a business one.13

An obvious concern with media enforcers is that their attacks will be sensationalized in order to sell magazines. This brings us back to why reputation is so important to the financial press. In many countries—think of Russia, for example—media shaming might have little effect because the principal audience of investors would not trust the accuracy of the attacks. In the United States, investors might respond similarly if the National Enquirer or World published its own roster of corporate shame. The shameless generally do not make

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13 Byrne et al., supra note 111, at 29.
successful shaming.

Business Week and its peers, by contrast, have a huge reputational stake in the accuracy—or at the least, the objectivity—of their reports.111 Readers buy the magazines because they offer sophisticated, inside looks at the business world. Under these circumstances, a roster of shame can have a powerful effect and there is some evidence that it does. A year after its 1996 “Worst Boards” article, Business Week reported that the featured firms were “hounded by investor criticism,” and that “many of the... boards...are trying to shake up”: AT&T, Dow Jones, and Waste Management brought on, new, more respected directors; Apple Computer overhauled its much-criticized board; ADM, Champion International, and Fleming embraced more liberal governance guidelines.112 Other observers are more skeptical as to how effective the Business Week and Fortune articles have been.113 Business journals face many of the same informational limitations as shareholder activists, and they too tend to focus on objective yardsticks, such as the number of outside directors on a board. As we have seen, these yardsticks can be misinterpreted even by bad firms. Skeptics believe that the Business Week columns, in attempting to assess the rank order of hundreds of firms, put too much weight on these simple yardsticks.114 Although each of the yardsticks alone may have some value, each is a very rough proxy and the errors multiply when the measures are combined. As a result, as Neil Milow complains, a firm often turns up at the bottom of the list one year and at the top a year later.115

B. Naming and Shaming: The Sears Battle and Beyond

The six-hundred-pound gorillas of shareholder activism are public and quasi-public pensions such as CalPERS and TIAA-CREF, but a small group of individual activists have also made waves in corporate governance. Indeed, shareholder activists Robert Monks and Nell

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111 See a similar point, see Hugh Zingales, In Search of New Foundations, 55 J. Fin. 963 (2000) (discussing Robert Monks’s Sears ad, which prompted Sears to implement his proposed changes). Zingales notes that “[i]n the United States, newsprint and newspapers have a tradition of being accurate and reliable. Readers rely on them to form their opinions.” Id.

112 Byrne et al., supra note 111, at 95.

113 Id.

114 Id. Milow is more impressed with the results of shame that are being published by two insider-journals CEO Magazine and Corporate Board. Id.
Minow can lay claim to having helped spur the previously dormant pensions into action in the late 1980s—as the dawn of the new age of shareholder activism. Often working with sympathetic institutional investors, Monks and Minow have challenged numerous recalcitrant boards, from American Express to Eastman Kodak. In the course of a prolonged battle with the directors of Sears in the early 1990s, Monks introduced as intriguing new shaming strategy: rather than shaming only the corporation, at tit most its CEO, Monks shamed all of the board members by name.

Until the 1980s, Sears's rise was one of the great mom-and-apple pie stories of American business. The famous Sears catalogue brought an ever-expanding variety of goods to consumers who lived outside of major urban markets. By the 1970s, as Monks himself has noted, "Sears accounted for a whole one percent of the gross national product. Two in three Americans shopped at Sears within any three months of 1972."

By the late 1980s, Sears's fortunes began to change. Fleet-footed competitors like Wal-Mart and K-Mart had cut into its retail base and Sears's CEO, Ed Brennan, responded with a plan to offer competitive prices and brand name merchandise. Sears's stock continued to languish, however, and institutional investors started calling for radical surgery, such as spinning off Sears's money-making financial

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123 Monks's and Minow's efforts go back to the mid 1980s, when Monks formed Institutional Shareholder Services. Id. A turning point in their efforts, and in shareholder activism generally, came on February 23, 1988, when the Department of Labor sent a letter to Amos suggesting the pension fund managers had an obligation to act as informed fiduciaries when they voted on corporate issues. Amos Prod., Inc., Dep't of Labor Letter Opinion, 15 Peru. Rep. (BNA) 391 (Feb. 23, 1988). Within a few months, the Institutional Shareholder Services's clients base mushroomed, and institutional shareholders abandoned their practice of always voting in favor of the proposal taken by the managers of the firms in which the institutions held stock. Monks (private interview, supra note 1, see also Black. Shareholder Initiatives Must Be Reexamined, 89 MINN. L. REV. 520, 527 (1975) (noting the effect of the Amos letter on shareholder voting, but suggesting that it did not prompt more sweeping activism). Each of these battles is chronicled in YORBART A.G. MONKS & YELL. MINOW, CORPORATE GOVERNANCE (1995); id. at 372-85 (American Express); id. at 440-44 (Eastman Kodak). I draw on their account of the Sears struggle in the discussion that follows.

124 Id. at 408-09.
125 Id. at 399.
126 Id. at 440.
127 Id. at 408-09.
Concluding that Sears, whose board showed no inclination to put pressure on the CEO, might be an ideal vehicle for shareholder activism, Monks launched a proxy contest to secure a seat for himself on the Sears board in 1981. The managers of Sears responded by taking aggressive steps to stymy the Monks bid. In addition to reducing the size of the board, which increased the number of votes Monks would need to capture a seat, Sears refused to let Monks have the list of Sears shareholders. To the end, Monks failed, but this would not be the last that Sears heard from him. The following year, Monks waged an active campaign to promote five proposals that had been submitted by other shareholders.

It was at this point that Monks introduced his shaming strategy. To promote the shareholder proposals, Monks purchased a full-page advertisement in the Wall Street Journal. At the top of the advertisement was a large, attention grabbing, silhouette-like outline of the nine Sears directors and a caption listing each by name and position. In enormous black letters, a headline beneath the picture referred to the directors as Sears's "Non-Performing Assets," and the text urged Sears's shareholders to support the five shareholder

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118 Id. at 401.
119 Id. at 404.
120 Id. at 409, 407.
121 Because Sears had cumulative voting in place, Monks initially needed only sixteen percent of the votes to win one of the five available seats. Id. at 404. Reducing the number of seats to three made it necessary for him to attract nineteen percent. Id. For a discussion of the mechanics of cumulative voting, see Arthur C. Grant et al., Cumulative Voting in Corporate Elections: Introducing Strategy into the Equation, 35 S.C. L. REV. 295 (1984).
122 To deny Monks access to a shareholder list, Sears contended in court that Monks did not have a "proper purpose." MONKS & MINNOW, supra note 118, at 405 (internal quotation omitted); see also Randall S. Thomas, Improving Shareholder Access to Corporate Information: Reversing Statutory Access to Information, 38 AM. L. REV. 331 (1996) (analyzing shareholders' use of state corporate law inspection statutes to get information from corporations).
123 MONKS & MINNOW, supra note 118, at 407-10.
124 The proposals called for making shareholder voting confidential, separating the jobs of CEO and Chair of the Board, investigating the spin-off proposal, eliminating staggered board terms, and requiring directors to invest in Sears stock. Id. at 409.
125 Id.
126 The advertisement is reprinted on the next page. Monks used this image taken from a photo of the Sears directors, rather than the photo itself, for a simple reason: Sears owned the copyright to the photo and obviously would not have agreed to let Monks use it. Minnow interview, supra note 3.
The Directors of Sears, Roebuck and Co.

NON-PERFORMING ASSETS

To the Shareholders:

As you may know, the financial performance of some of our non-performing assets has been significantly affected by the current economic conditions. However, we believe that through the aggressive pursuit of collection efforts, we can substantially improve the return on these assets. Therefore, we propose to sell these non-performing assets, and subsequently sell off the proceeds, if any, to investors who are interested in the potential for future gains.

If you agree with this proposal, please vote for it at the upcoming shareholders meeting. Your support is necessary for the success of this venture.

Sincerely,

[Signature]

[Name]

Chairman of the Board

Vote For Nonperforming Proposal

We urge all Sears shareholders to support the sale of our non-performing assets as outlined in this proposal. The proposed sale will not only help us reduce our losses but also provide an opportunity for potential gains. Please be sure to vote for this proposal at the upcoming shareholders meeting.

[Signature]

[Name]

Vice President of Finance

[Note: The page contains a diagram of the directors of Sears, Roebuck and Co.]

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376 MONK & MINOW, supra note 524, at 468.
None of the proposals passed, but several received more than forty percent of the shareholders’ votes. Monks and Minow are convinced that the advertisement played a crucial role in both the votes and the subsequent action of the Sears board.10 Before Monks published the ad, he and Minow promised to “go away” if the Sears board hired any investment bank other than Goldman, Sachs. Sears’s long-term advisor, to assess whether splitting off the firm’s financial services would enhance shareholder value.11 Prior to the ad, the directors did nothing.12 Yet, within five months of the ad, the board had done more than simple consider a divestiture. In September, the directors announced that the financial services businesses would be spun off.13

How could a single ad have had so much influence on a board that had usually resisted Monks’s more traditional efforts? Monks and Minow believe that the picture forced Sears’s outside directors to internalize, or “take ownership” of, their responsibility for Sears’s fortunes.14 Crucial to this effect was a shift in the relevant enforcement community. “We were speaking beyond the board members [and Sears shareholders],” Monks has written: “We were speaking to their friends, their families, their professional associates. Anyone seeing the ad would read it. Anyone reading it would understand it. Anyone understanding it would feel free to ask questions of any board member they encountered.”15 The outside directors had long simply followed the lead of CEO Ed Breman and his predecessors. Seeing their picture associated with the phrase “Non-Performing Assets” prodded the directors out of their lethargy and induced them to push for substantial change.

In the excerpts section, we briefly considered CallPERS’s motives when it shames underperforming firms.16 If anything, this issue is even more pressing with activists like Monks and Minow who target the directors individually, as they did with Sears. If shaming strikes fear into the hearts of reputationally sensitive directors, we may have

10 Id. at 419.
11 Minow Interview, supra note 3.
12 Id.
13 Id.
14 Id.; MONKS & MINOW, supra note 12, at 419.
15 Monks Interview, supra note 3.
good reason to worry that it will be misused. This concern is magnified, moreover, when the enforcement community includes not just shareholders, but also friends, peers, and others.

Monks and Minow seem to have a variety of different motives, including desires to play a visible role in corporate governance, to effect change, and to establish a marketable niche. Even more important than the precise mix of motives, however, is their need to establish a reputation for credibility. Unless they target genuine problems, other shareholders will not follow their lead, and shareholders are their primary audience. This does not mean that Monks and Minow invariably focus on shareholder value, of course, but it has a crucial shaping effect on their efforts.\textsuperscript{41}

Despite the apparent effectiveness of sharing advertisements, this strategy has not become a standardized weapon when shareholder activists challenge an underperforming board. One possible explanation for this is defamation law. Because the ads name names, an overzealous attack on a firm’s directors might prompt a costly defamation suit. Yet, suit, is a defense to a libel suit and the circumspect characterization of the Sears ad—which called the directors “Non-Performing Assets”—made a successful suit unlikely.\textsuperscript{42}

Monks himself offers a much more quotidian explanation: the cost of the ad.\textsuperscript{43} A full page ad in the Wall Street Journal costs well over $100,000.\textsuperscript{44} “It is virtually impossible to be reimbursed for these costs,” Monks notes, “so small wonder that the mode is so little employed.”\textsuperscript{45}

Given these obstacles, Monks and Minow save the shaming

\textsuperscript{41} This point can be extended to shaming generally. Shaming efforts will not succeed unless the enforcer is visible and in some way shared by the enforcement community. These factors limit the effectiveness of numerous shaming campaigns, such as animal rights activism. On the other hand, a relatively credible enforcer can sometimes be the thrust of shaming to extract concessions from a target, such as a corporation that has a valuable brand name at stake.

\textsuperscript{42} Nevertheless, the possibility of a defamation suit may well discourage other would-be shareholder enforcers from waged a shaming campaign, given the cost of defending any subsequent litigation. For a discussion of defamation laws as it applies to public discussion of corporate misdeeds and an argument that it is both too pro-plaintiff, because of the enormous damage awards in successful cases, and too pro-defendant, because it is too difficult to bring a successful suit, see FISCH & BROWN, supra note 48, at 25-55.

\textsuperscript{43} Email from Robert A.G. Monks, Chairman, Lenz Investment Management, to David A. Sked, Jr., Professor of Law, University of Pennsylvania Law School (Oct. 8, 2000, 06:36:55 EDT) (on file with author) (hereinafter Monks’ email).

\textsuperscript{44} Minow Interview, supra note 3.

\textsuperscript{45} Monks E-mail, supra note 43.
strategy for cases in which there is a threat that the firms obviously should take, yet the outside directors remain passive. So far this has occurred in two more instances: a challenge to Temple-Inland earlier this year and an ad in which two firms and Minows got ready for Waste Management but never ran. With Temple-Inland, the ad purported that "Nests Don't Grow on Trees" and offered "a lesson for Temple-Inland's directors" in support of a proposal to separate the firm's unrelated banking and forest product businesses. The Waste Management ad revisited the Sears approach, including silhouettes of the firm's twelve directors over the large black headline "Long-Term Liabilities." An obvious silver lining to the cost of a national advertisement is that it limits this strategy to the most serious of shareholder activated forces who are willing to put real money into the shamming effort. But it can also be seen as having too great a constraining effect. A question we wish to consider in Part IV is whether the costs can be reduced without inviting an excess of shamming.

C. Illegible References and Other Cases: The Case of the Case of

When shamming scholars speak of corporations and shamming in the same breath, they invariably have in mind corporate price fixers, polluters, or thieves. The principal enforcer is a public official rather than a private actor—a judge who has the coercive force of the law at her disposal.

In a very real sense, these offenders are subject to significant shamming sanctions outside of the judicial process when they price fix.

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111 Mono and Minow held off on the ad when Waste Management's board agreed to make several changes in response to shareholders' concerns. Minow interviews supra note 3.

112 The Temple-Inland ad is reprinted in Appendix B, infra p. 1667.

113 The Waste Management ad appeared in Appendix II, infra p. 1686. Another successful case of the Sears shamming strategy came out from Minows and Minows themselves, and not in the United States, but in an Italian newspaper article by Chicago's Business School Professor Luigi Zingales. See Luigi Zingales, Professor: Inglie e Imprese congiurate con Seri Sor (Professione, Scritto, and the Seri Case), CORRISPON DELLA SETA (Milan), Jan. 3, 1999, at 16. In 1999, Zingales wrote a column declaring Minows's Sears ad and held the directors of the Italian firm Seri up for similar disapproval for failing to name Seri's discredited CEO. Id. Zingales concluded the article by listing the outside director's name and calling them Seri's "true performing assets." Id. Less than a year later, the CEO and the Italian media attributed the naming to Zingales's article. Corrispondenza via stampa. Zingales, I professor che ho sempre citato Gela Seri (Resignation in Press: Zingales, the Professor Who Ousted the Head of Seri), FONORAMA, Mar. 25, 1999, at 149.
pollute, bribe, or otherwise misbehave. Just think of the recent firestorm surrounding Firestone tires. Firestone faces serious legal liability from the accidents that may have been caused by defective tires. These liabilities, however, pale in comparison to the costs of the fadness—or relentlessly scandalizing—media coverage. 80

For present purposes, the important question is whether these reputational effects can be harnessed through formal shaming sanctions. (A related question is whether the publicity in cases such as the Firestone controversy will have a confounding effect on shaming.) Although the Federal Sentencing Guidelines took the lead on this issue by authorizing shaming sanctions, 81 as we have seen, the strategy is still very much in its infancy. The novelty is reflected in the illustration we explore below. While the case is very real, I will speculate about the role that shaming penalties might play.

The firm in question is Caremark. 82 I use a byth because it raises all of the relevant shaming issues and because it prompted an important disgussion on corporate compliance programs. Caremark provides a variety of "alternative" services, including growth-hormone treatment and HIV/AIDS-related treatments, at hospitals and managed-care facilities. 83 For years, Caremark engaged in consulting contracts with many of the same doctors who later referred

80 See, e.g., Sus R. Rouse, Avoiding a Day in Court: Ford's Back to Stiff, U.S. NEWS & WORLD REP., Jan. 22, 2000, at 49 ("As for Firestone, the suits alone could bankrupt the company").

81 See, e.g., Stan Crock & Nicole S. Pierre, The Two Ships: Behind the Feeling Frayed, BUS. WK., Oct. 16, 2000, at 126 (noting the deaths linked to Firestone tires and describing the public reactions generated by those deaths); Mike France, The Litigation Machine, BUS. WK., Jan. 29, 2001, at 114 (discussing the efforts by plaintiffs' attorneys to file suits against Firestone); Mike Szeveini, Ford Will Try to Stop All Pending Edmonton Suits, WALLST. J., Jan. 4, 2001, at AS (detailing Ford's desire to settle the Firestone-related lawsuit quickly); Joan Miller et al., A Crisis of Confidence: CEO Says Smouldere To Embrace the PR Problem, BUS. WK., Sept. 16, 2000, at 40 ("For Ford... the mounting problems go well beyond the recall of vehicles equipped with Firestone tires").


83 Caremark was originally part of a better known firm, Baxter International, but it was spun off in 1999. In re Caremark Int'l, Inc., Derivative Litig., 608 A.2d 959, 960 (Del.Ch. 1996).

82 Id. at 96.
patients to Caremark. In 1991, the Department of Health and Human Services ("DHS") concluded that these practices may have violated Medicare and Medicaid provisions that prohibit firms from paying for referrals; in 1994, Caremark, several middle-level officers and a salesman were indicted. Caremark subsequently settled the allegations by pleading guilty to one count of mail fraud and paying a criminal fine.

In Caremark, like nearly all of the cases of this ilk (the foreign bribery scandals involving CFI and other firms in the 1970s are a good example), there are three possible offenders: the corporation itself, the (usually) middle-level managers who allegedly did the dirty deed, and the higher-level managers who allegedly failed to detect or prevent the misbehavior.

Under the Federal Sentencing Guidelines, the court, if it had wished, could have subjected Caremark, as a shamming sanction, such as requiring a public apology, maintain though corporations may be, they are far from immune from reputational penalties. Yet there is also reason to suspect that a corporate apology often will have only a limited effect. By the time a firm is convicted, as trials may already have generated ongoing media attention and much of the reputational penalty may already have been incurred. This does not mean, of course, that we should ignore the option of shaming the firm, but it does suggest that many of the most dramatic possibilities for shaming will be those involving the individual offenders.

How about the middle-level officers who actually negated Caremark's contracts, thus committing the sins in question? With direct offenders who satisfy the relevant liability standard, courts could use shaming as an alternative to incarceration or fines. In Caremark,
the fines were paid by the firm, not the individual officers. Indemnification does not mean that the individual officers get off scot-free, of course. They may be punished in a variety of indirect ways, such as through diminished salary and reduced promotion opportunities within the firm. Yet we cannot be certain that the firm will indeed punish the officers. After all, their misbehavior—paying for doctor referrals—actually helped Caremark’s profits. The firm’s somewhat complicated incentives suggest that this may be a particularly good context for shaming. The court could require that Caremark issue a public apology, for instance, and explicitly name the misbehaving officers. Unlike with fines, Caremark could not insulate the middle-level officers from the effects of this sanction even if it wanted to. Not only does shaming show clear disapproval, but it may be especially valuable in contexts in which an offender’s firm might otherwise offer too great an umbrella of protection.

What about the higher-level officers and directors of Caremark? The managers’ misbehavior, if any, is more subtle, since they participated only in an oversight role. A few criminal statutes provide for individual liability for managers when the managers’ employees violate a criminal law. In the absence of such liability the managers may still be sued for violating their fiduciary duties under state corporate law. Although the penalties are criminal in the first case and civil in the second, the basis for holding individual managers liable is similar in both contexts.

In Caremark itself a group of shareholder plaintiffs filed a state law derivative suit against Caremark’s directors, based on the allegations

106 Caremark, 698 A.2d at 965-46.
107 Chapman, supra note 82, at 1698-99.
108 John Coffee has suggested a somewhat analogous method of shaming: courts could use the “generating report” as a tool for shaming the firm and the responsible employees. Coffee, supra note 67, at 429-31. As Coffee notes, this strategy would require that generating reports be made public, which is not currently the case. Id. at 97.
109 Caremark, 698 A.2d at 971.
110 For a discussion of the more prominent cases finding criminal liability for supervisory failures, see William L. Capo & Melvin Aron Eisenberg, CASES AND MATERIALS ON CORPORATIONS 560-43 (7th ed. 1995).
111 See, e.g., Miller v. AT&T Co., 507 F.2d 756, 761 (7th Cir. 1974) (holding that the violation of a criminal statute through illegal political contributions "seems a particularly appropriate basis for finding breach of the defendant’s duties fiduciary duty to the corporation. Under such circumstances, the directors cannot be insulated from liability on the ground that the contribution was made in the exercise of sound business judgment.")
that surfaced in the HHS investigation and settlement.114 Under prior state (Delaware) law, managers had very little fiduciary duty exposure for failing to supervise employees who violated a criminal or civil law.115 Chancellor Allen's opinion envisioned a higher supervisory standard for corporate directors.

Can it be said today, as under the prior state law, that, absent some ground, giving rise to suspicion of violation of law, that corporate directors have no duty to ensure that a corporate information gathering and reporting system [sic] exists which represents a good faith attempt to . . . [assure compliance]? I certainly do not believe so.116

Quite to the contrary, Allen concludes, corporate directors' fiduciary duties include the responsibility to implement an effective compliance system.

How might shamming fit in here? A particularly nettlesome issue in cases in which directorial misbehavior does not benefit the directors directly is how to calibrate their liability. The difficulty is especially acute when the directors' misbehavior not actually have provided benefit, at least until discovered, for the firm.117 In a case such as Caremark, both problems are very much in evidence. The directors did not benefit in any immediate way and the victims of any harm were patients rather than the firm. If a court concluded that Caremark's directors breached their fiduciary duties, the most obvious damages measure would be the amount of referral fees paid. That being said, any connection between this figure and either the directors' personal benefit or any harm to Caremark would, of course, be entirely accidental.

This is where shamming comes in. Although shamming is hardly an exact science, shaming sanctions can be more easily tailored to the nature of the directors' misbehavior—their failure to oversee—than can an ordinary damages provision. Even if she does not impose monetary liability, for instance, a judge can shame an offending director by explicitly criticizing her in the published opinion for the

114 Caremark, 698 A.2d at 954.
116 Caremark, 698 A.2d at 969.
117 Id at 970.
118 This issue arose most prominently in the foreign bribery scandals of the late 1970s. For an attempt to develop a fiduciary duty and damages analogy for cases of this sort, see Patricia J. Ryan, Strange Bedfellows: Corporate Fiduciaries and the General Law Compliance Obligation in Section 201(a) of the AIF's Principles of Corporate Governance, 66 Wash. U. L. Rev. 413 (1991).
case.177 If you are curious as to how this might be done, take a look at the Delaware takeover cases.178

I have painted a rosy picture of shaming thus far, so I should stop for a moment to consider an important limitation on shaming in the judicial context: timing. Litigation may not arise until years after the behavior in question. If the offending firm can credibly claim that the managers who committed the wrong have left or merited their ways and that the offense does not reflect the firm in its current incarnation, shaming may have little impact. Shaming is most effective when it reveals information about how the firms and its managers are likely to act in the future.

An additional limitation in the Delaware case law is the fact that, far more than with actions brought by governmental officials, the parties have an enormous incentive to settle fiduciary duty litigation without insisting that the offending directors acknowledge their responsibility, since the directors may lose their insurance protection if they are found liable.179 Delaware's takeover jurisprudence attests to its ability to use moral suasion in opinions on preemption motions,180 but Delaware has fewer opportunities to invoke postjudgment sanctions, such as a formal, publicized apology.

To summarize, then, Corman reveals both the promise and

177 A more difficult question, in many respects, is how to determine whether or not the directors have in fact breached their outright obligations. The difficulty of making this determination is another reason to rely on moral suasion. Chancellor Allen's Corman opinion illustrates each of these impasses. See Corman, 888 A.2d at 570 (suggesting this course will find liability only in egregious cases).


180 See, e.g., Paramount Communications, 687 A.2d at 34; Resh, Inc., 506 A.2d at 173.
limitations of future shaming sanctions. A strategy in which the Federal Sentencing Guidelines are adjusted to further facilitate corporate and individual shaming offers real promise, which I will explore in more detail in the next Part. Delaware’s recent interest in imposing more meaningful compliance obligations in connection with private directorial litigation may offer analogous advantages, although this project is complicated by the traditional limitations of courts’ ability to police managers’ oversight obligations.

D. From Publicity or Disclosure to Shaming: A Concluding Note

In each of the case studies we have considered, shaming and publicity or disclosure have gone hand-in-hand. Absent publicity, CalPERS’s and Moira’s shaming activities would have little effect. The importance of publicity also holds true for most political shaming efforts. To conclude, we should consider the link between publicity, shaming, and points in between slightly more detail. Where does publicity, or the general disclosure of information, leave off and shaming begin, and how does publicity differ from shaming?

Recall that this Article has defined shaming as “drawing attention to the bad dispositions or actions of an offender” in order to “punish hint for having those dispositions or engaging in those actions.” Central to shaming, as I have defined it, is the posture of the enforcer. Only if the enforcer intentionally and publicly singles out the target, where the intent is to punish, has the enforcer engaged in shaming. If the Wall Street Journal publishes a “shady” article describing, for example, the dangerous risks posed by Firestone tires and the actions of Firestone’s managers, the authors have not shamed Firestone and its executives. The purpose of the Wall Street Journal’s news coverage is to provide information, not to case explicit moral opprobrium on the firms and managers whose travails the Journal chronicles. Media coverage can be seen as a continuum, from description or publicity alone, to criticism with little or no moral component, to shaming.30

30 supra text accompanying note 14 (quoting Salant & Potter, supra note 6, at 386).

31 When a newspaper article does take an explicitly judgmental stance, by contrast, it may cross the line into the realm of shaming. Thus, a newspaper’s “shady” piece generally is not shaming, whereas its “skeptical” piece sometimes is.

32 An article in today’s commentary that questions the propriety of a firm or its managers is an example of “criticism” (not often having a moral component).
To make sense of the relationship between shaming and publicity, we must add two important clarifications. First, as noted above, even if publication is not itself shaming, it may nevertheless figure prominently in the shaming process. If my hypothetical Wall Street Journal article reported on a shareholder or consumer activist’s efforts to shame Firestone or its managers, the article itself would not constitute shaming. But the article, and others like it, might well be the principal mechanism for communicating a shaming sanction. The shareholder or consumer activist is the one doing the shaming, but media coverage is essential to the effectiveness of the sanction.

Second, newspaper coverage that reveals unfavorable information about a firm or its managers obviously can have a dramatic reputational effect. True shaming, as is particular the act of expressly causing judgment, seems to punish an offender more than publicity or disclosure alone does under otherwise similar circumstances. But this is small comfort to the managers of firms that have been subject to widespread, ostensibly nonjudgmental, but unlaundering, newspaper coverage. Given that this coverage can, and does, have shaming-like reputational effects, it offers many of the same benefits and risks as shaming.

One interesting implication of the reputational effect of publicity is that it suggests that lawmakers can use disclosure obligations proactively, as an ex ante alternative to ex post shaming. "Sunlight is...the bane of disinfectants," as Louis Brandeis famously said, and the securities laws that were enacted on this principle in 1933 and 1934 are widely viewed as having diminished fraud in the securities markets.105 Similarly, recent evidence suggests that firms tend to make greater efforts to prevent environmental harm if they are required to disclose their environmental practices.106 In short, a firm that is required to disclose misbehavior may not engage in it in the first instance.

IV. CONCLUSIONS AND IMPLICATIONS

Shaming is everywhere in corporate law. This much should be clear by now. This Part briefly considers some of the implications of our previous discussion, both for the legal regulation of shaming sanctions and for our understanding of norms and shaming generally. I start with shaming by shareholder activists and other private enforcers, then turn to the use of shaming sanctions by judges.

A. Shaming by Shareholder Activists and Other Private Enforcers

With shaming by private enforcers, the most interesting insights of the analysis are descriptive in nature. Not least of the discoveries is the sheer prevalence of shaming activities. We have seen CalPERS use its "focus list" to shame wayward firms, Monks and Minnow compose stinging advertisements shaming offending directors by name, and more.165 This evidence of shaming in action has several useful implications for our understanding of shaming in general.

One that I did not especially emphasize in the case studies, but that should be evident nonetheless, is the role of legal rules and governmental actors in shaping social norms. A crucial moment in the shift to more active involvement by institutional shareholders was the Department of Labor's no-action letter to Ivan in 1989.166 Prior to this, institutional shareholders showed no inclination to throw their weight around and corporate directors had little reason to pay much attention to the complaints of dissatisfied shareholders. The rise of the takeover market in the 1980s and managers' resistance to takeovers increased the cost to shareholders of institutional investors' willingness to side blindly with management. The Labor Department's no-action letter seems to have forced institutional investors to start taking those costs into account. These were the conditions that made a shift in corporate governance norms, and effective shaming, possible.

Another discovery is the prominent role of the media in corporate shaming. Because the principal enforcement community—current and would-be shareholders—is so far flung, it is quite costly to make community members aware of the shaming effort. To reach a national audience, Monks and Minnow take out full-page ads in the Wall Street Journal, which quickly lifts the expense of a serious shaming effort.

165 See supra Part IV.
166 See supra note 129 and accompanying text.
SHAMING IN CORPORATE LAW

[page number]

... effort into the six figures. Both CalPERS and individual shareholder activists take the likelihood of media attention, and thus free publicity, into account when they decide which firms to target. The pervasive role of the financial press highlights the importance of a reputable publication to the effectiveness of corporate shaming. It also highlights an important limitation of current shaming activities: they invariably target large, prominent corporations and leave smaller, public corporations largely unaffected.

Norms scholars, trying to explain how norms arise and change, have emphasized the role of "norm entrepreneurs," who derive particular benefits and are willing to incur significant costs in order to help alter an existing norm. We have seen vivid evidence of norm entrepreneurs in our survey of private shaming. Robert Monks is a "traitor to his class," a former bank president who embarked on a crusade to reform corporate governance in the 1980s. Although he and Nell Minow hoped to profit from their governance adventures, profits have been only a secondary motive. Each new venture, from Institutional Shareholder Services to The Corporate Library, has been funded by Monks's own private fortune. The combination of credibility—both Monks and Minow are comfortable in and familiar with the elite world of corporate directors—and missionary zeal has enabled them to play an important role in the shift in governance norms.

The shaming effort is buttressed by the fact that corporate directors are the "most reputationally sensitive people in the world." The boards of prominent corporations are places where reputations matter, which makes them particularly fertile ground for shaming when the directors have violated a norm. This does not mean that a director's reputation will be destroyed if she is shamed, as simple...
signaling theories of shaming sometimes suggest. In fact, corporate shaming offers obvious avenues for quickly restoring a director's reputation, such as subsequently responding to the enactors' demands (think of the Sears battle). Even recalcitrant directors do not suddenly lose all stature. Shaming sanctions are unusually effective, however, because a director's reputation is her single most important asset.

If shaming is effective, at least in some contexts, an obvious question is whether the existing regulatory framework could be adjusted to expand its reach. As we have seen, the biggest obstacle to current shaming efforts is the cost. The best way to encourage private shaming would be to reduce the expense. The SEC has already taken a few steps in this direction. In 1992, the SEC reformed the proxy requirements promulgated under the Securities Exchange Act of 1934 to give shareholders greater flexibility to criticize firms and their directors outside of the formal proxy solicitation process. The 1992 reforms make it possible to publish a newspaper ad criticizing a firm's director without engaging in a full-blown proxy campaign, for example. But a shareholder enforcer still faces significant costs if she wishes to shame an underperforming board of directors. What else might the SEC do to encourage private shaming sanctions?

The most obvious way to further reduce costs would be to subsidize shaming directly. The SEC, or the lawmakers who regulate state corporate law, could spread the cost of shaming over all of the firm's shareholders by requiring the firm to pay for a shareholder enforcer's expenses. If the firm subsidized the cost of an ad in the

18 Kahan and Persky, for instance, suggest that "shaming typically destroys a person's reputation." Kahan & Persky, supra note 6, at 570. For a similar critique, see Scott, supra note 37, at 1034 (arguing that reputation does not simply reflect a binary division between those who are "good" and those who are "bad").

19 See supra note 56 and accompanying text.

20 Prior to 1992, a shareholder who made a statement or published an ad criticizing the firm's directors might be deemed to have engaged in a proxy solicitation, even if the shareholder had no intention of soliciting votes from other shareholders. As a result, the shareholder would be forced to incur the time and expense of filing formal proxy materials with the SEC, as required by Rule 14a-8. 17 C.F.R. § 240.14a-8(a) (1999) (requiring filing with the SEC prior to conducting a solicitation). The 1992 reforms amended Rule 14a-2, 17 C.F.R. § 240.14a-2(b), to exempt shareholders from this requirement so long as they seek only to benefit themselves in their activities on the same pro rata basis as other shareholders. 17 C.F.R. § 240.14a-2(b)(1)(iv).

Wall Street Journal for a limited proxy campaign, we can be sure that shaming strategies would become much more widespread. The obvious problem is that subsidizing shaming could make it too widespread. If shareholders could engage in shaming tactics at no cost, every shareholder with a bit of time on her hands might engage in shaming campaigns even in the absence of any serious evidence of corporate misbehavior. One benefit of the current framework, which forces shareholder enforcers to bear their own costs, is that it gives the enforcers a powerful incentive to employ shaming techniques only where the corporate offenders' behavior is genuinely shameworthy. This does not mean that the current approach is ideal, however, since it denies costs even to the most desirable of shaming efforts. In the closely related, indeed, overlapping context of proxy contests, several commentators have argued for a rule that would reimburse shareholder activists whose proposals received a substantial percentage—e.g., thirty-five or forty percent—of other shareholders' votes. So long as the costs of shaming were treated as reimbursable, such a rule would subsidize the efforts of shareholder activists who used the proxy process and whose campaigns drew substantial shareholder support.

I have focused throughout the Article on shaming by large shareholder activists who use the proxy process, together with shaming by the financial press. If this is shaming at the "wholesale" level, it is also important to recognize the prospect of shaming at the lower, retail level as well. The Internet has sharply reduced the cost of communicating with other investors, as we have seen with the recent use of the Internet for grassroots shareholder activism. This

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142 See Lucian Arye Bebchuk & Hartmut Kahle, A Framework for Analyzing Legal Rules Touched Proxy Contests, 78 CAL. L. REV. 1017, 1085 (1990) ("[T]he compensation to success" influences proxy contests by benefiting the contestants likely to receive the most votes to make them "more successful.").

143 A more complete reform of the proxy process would also consider the possibility that, in other respects, the proxy rules still provide too much of a subsidy to shareholder proposals. Under Rule 14a-8, 17 C.F.R. § 240.14a-8 (1996), the firm is required to include a wide variety of proposals in its own proxy materials. For an expansive review of current shareholder activism and several proposals for limiting a firm's responsibility for bearing the cost of including shareholder proposals, see Meineke, infra note 105.

144 See, e.g., Jack Steinbock, A Place at the Table, CHRISTIAN SC. MONITOR, Nov. 20, 2000 (describing activism at United Companies Financial). Similar efforts have sprung up elsewhere. Thomas Friedman has argued that activism should "compel companies...
development has intriguing implications for shareholder suffrage, but it also raises the risk of indiscriminate shaming. To give just a single, hypothetical example, one can easily imagine efforts to manipulate stock prices by disclosing damaging information about a manager that has serious consequences for the manager but little long-term significance for the firm. The SEC can police some of this behavior under the antifraud provisions of the securities laws, but the Commission faces a variety of enforcement obstacles—not least of which is its limited enforcement budget. One obvious moral is that, as the cost of shaming decreases, the downside risks of shaming sanctions may increasingly come to the fore.

B. Shaming by Judicial or Governmental Enforcers

1. Expanding the Role of Shaming Sanctions

As we have seen, the Federal Sentencing Guidelines already contemplate the use of shaming sanctions against corporate offenders and several scholars have called for still broader use of shaming. My analysis has closed these conclusions, and suggested a more nuanced approach to the shaming of corporate and individual offenders. For corporate criminal liability, the most effective liability scheme would include a fixed, strict liability component, together with a higher, second-stage penalty for firms that failed to adequately monitor their employees. Shaming sanctions would come into play at the second stage rather than the first, as an alternative or supplemental penalty for firms that violated their compliance obligations.

As we saw earlier, shaming can be a useful alternative sanction against an offending firm and is an even more powerful sanction for individual offenders. A firm that has been charged with polluting or...
violating antitrust laws can limit the extent of a criminal fine on the middlelevel employees who actually did the polluting or price-fixing, or the managers who oversaw them, by indemnifying the individual offenders. Negotiating a settlement that calls for the firm, but not the individuals, to pay a fine obviously has the same effect. By contrast, the firm cannot easily take the sting out of a shaming penalty.

The general implications for the Federal Sentencing Guidelines are thus two-fold; first, the guidelines could facilitate shaming by authorizing the shaming at the second stage of a two-stage liability framework for corporate offenders;99 second, the guidelines should also permit courts to shame individual offenders.

One concern with inviting courts to step up their use of shaming sanctions is that courts might use them inconsistently. That is, we might encounter the same kinds of disparities in shaming practices that commentators criticized in sentencing generally and that led to the Guidelines in the first instance.100 As with sentencing generally, an obvious solution is to standardize the shaming options.101 Let me suggest a simple framework that would provide a series of standardized options for any given case. The obvious starting point might be a standardized text that courts could impose as part of the higher, second-level sanction imposed on firms that fail to adequately monitor their employees.102 The sanction could also be standardized in other ways, such as the size or cost of the advertisement used.

Even when courts did not explicitly shame individual offenders—because they acted with negligence rather than scienter, for instance, or because it was unclear who was responsible—they could require that the firm's CEO or other prominent officers appear in court for

99 As noted earlier, the federal Sentencing Guidelines already permit the shaming element of the approach. See supra note 100 and accompanying text (discussing the imposition of a forced apology by the court).
100 See Mattaro, supra note 7, at 1940-42. Mattaro worries that criminal shaming sanctions often seem to arise from "episodic, almost whimiscal bursts of judicial, legislatu or prosecutorial inspiration." Id. at 1940.
101 Kahn and Pionte emphasize the importance of standardizing the shaming sanction in their proposal for shaming white-collar criminals. See Kahn & Pionte, supra note 6, at 385-97; see also Finus & Blankenau, supra note 48, at 311 ("It is possible to quantify formal publicity orders in terms of media time or space, and cost.").
102 Kahn and Pionte, quide, as an example, a court-ordered advertisement by General Vocal Processing Company announcing that the firm "recently pleaded guilty in federal court to illegally disposing of hazardous waste. We are sorry for what we did, and we hope that our experience will be a lesson to others that environmental laws must be respected." Kahn & Pionte, supra note 6, at 385.
the sentencing in significant cases, both to give a face to the misbehavior and to implicitly shame the officers. For cases in which explicit shaming is appropriate, the standardized sanction could be adjusted to include individual officers. The simplest way to target individual offenders directly would be to include them in the sanction. The court-ordered advertisement could state that a particular midlevel officer was found liable for illegally disposing of hazardous waste, for instance, or name the directors who failed to establish an adequate compliance program.

As with shaming by shareholders activism, the presence or absence of publicity complicates the efficacy of the sanction. If the firm’s misbehavior is widely publicized, shaming may add little to the reputational penalty the firm has already incurred. With lower profile firms, on the other hand, neither the misbehavior nor the court-ordered advertisement may create much of a media stir. In both contexts, however, formal shaming sanctions can play a valuable role. Shaming may add details omitted from the coverage of widely reported scandals, for instance, and it may draw attention to misbehavior that would otherwise receive no publicity at all.202

Another concern is the risk that the routine use of shaming sanctions would diminish their effectiveness. As Toni Massaro noted in the context of criminal shaming, “if the penalty were to become a convenient sanction, it may produce a shaming overload, which could reduce public interest in these displays and thereby lessen the deterrent impact.”203 The risk of shaming overload seems less pronounced in the corporate law context than with crimes such as drunk driving, but it underscores the importance of limiting judicial shaming sanctions to serious misbehavior.

As evidenced by the Cann case itself, private litigation sometimes serves as an alternative, parallel device for holding the firm’s directors accountable for their oversight responsibilities.204 Because of the awkward fit between many corporate misbehavior cases and the traditional concerns of corporate law, and because Delaware

202 Jayne Barnard makes this proposal in a recent article and argues that the Federal Sentencing Guidelines should be adjusted to permit broader use of this approach. See Barnard, supra note 48.
203 See BIEB & BRENCHLEY, supra note 48, at 299 (noting that the media coverage often omits the names of particular firms when more than one firm is involved in a scandal and it often neglects to point out that criminal offenses are involved).
204 Massaro, supra note 7, at 1990.
205 See supra Part III.G.
judges have only limited control over settlements by the parties, I am somewhat less optimistic about the effectiveness of judicial enforcement in this context. Yet Delaware's judges are the moral arbiters of U.S. corporate law, and even settled cases generally offer an opportunity to blame firms and directors who have failed to provide adequate oversight.

2. Limiting the Liability of Individual Offenders by Contract

A final issue is whether firms should be permitted to limit the liability of individual offenders. Some commentators have argued that individual employees should not be held liable for polluting and other corporate acts because the 'prospect' of liability may cause employees to take excessive precautions and the firm is in a better position than a court to determine whether and how an individual offender should be punished. In Garwood, Chancellor Allen raised the very similar issue of whether firms should be permitted to adopt a charter provision that waives liability for directors who fail to adequately monitor the firm's compliance with antitrust or environmental laws. The problem with limiting liability in each of these contexts is that firms' incentives are less trustworthy than might initially seem to be the case. Because the firm's liability is limited by the value of its assets, it will not internalize the effects of liability that could exceed the firm's total value. Assuming that individual offenders are also on the hook if they commit a corporate tort is an important means of making sure that the costs of violations are fully internalized.

Permitting firms to waive directors' liability for compliance raises an analogous and equally intriguing externality problem. Delaware adopted a provision inviting firms to waive their directors' due care liability in 1986, in order to address concerns that the prospect of liability would have a chilling effect on directors' willingness to serve on boards. In most contexts, market forces already pressure

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128 Bruce Chapman takes this position, although he would permit individual liability for individual offenders who benefited from their misbehavior. See Chapman, supra note 72.
129 Garwood, 68 A.2d at 970 n.27.
130 See Caldec, supra note 67, at 389-90.
131 See Del. Code Ann. tit. 8, § 102(b)(7) (Supp. 2000). Delaware adopted section 102(b)(7) in order to overrule the Delaware Supreme Court decision in Smith v. Van Gorden, 486 A.2d 856 (Del. 1985), which held the directors of Texas Union liable for violating their duty of care.
directors to perform well and penalize firms whose directors are ineffective, so eliminating liability will often have little or no adverse effect. But the market is less dependable with pollution or antitrust violations because these violations can actually benefit shareholders monetarily if the firm’s expected sanction is less than its profits from misbehavior.\textsuperscript{20} As a result, firms might have too great an incentive to waive directors’ compliance liability.

Although the debate on these issues has focused on liability in general, rather than shaming in particular, it has obvious implications for shaming. Eliminating the liability of individual offenders in each of these contexts would also limit judicial enforcers’ ability to invoke shaming sanctions. In both contexts, it makes more sense to preclude firms from limiting liability by contract.

\textbf{Conclusion}

I do not mean to oversell the virtues of shaming sanctions in corporate law. As we have seen, shaming by shareholder activists is based on simple yardsticks, such as the number of independent directors, and it is not entirely clear how useful these yardsticks are. With judicial enforcers, shaming sanctions sometimes do not add much to more traditional approaches to liability. Within these parameters, however, shaming can play a valuable role. Shareholder activists are convinced that shaming dramatically increases the effectiveness of their reform efforts. Shaming can fill in the gaps of civil and criminal liability, ensuring that individual and corporate offenders are fully punished for their misbehavior. This Article has attempted to highlight the existing uses of shaming in corporate law, pointing out both the risks of shaming and the places where there is room for more.

\textsuperscript{20} For a useful analysis of the reasons why fines often do not cause firms to fully internalize the costs of their misbehavior, see Cooter, supra note 67, at 388–93.
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APPENDIX II